JUDGMENT : Mr. Justice Teare : Commercial Court. 10th July 2008.

1. This is an application by the Defendant to set aside the order made by Walker J. on 14 March 2008 in which he granted permission for the Claim Form to be served out of the jurisdiction in the Isle of Man. The application notice relies upon two grounds, failure by the Claimant to make full and frank disclosure when seeking permission from Walker J. and the absence of reasonable prospects of success for the claim.

2. The Claim Form claims damages for breach of contract and an indemnity or contribution under the Civil Liability (Contribution) Act 1978. The particulars of the claim are set out in a separate document.

3. The claim in contract may be summarised as follows. The Claimant is or was a firm of solicitors acting on behalf of a large number of persons, formerly coal miners, who were seeking a Group Litigation Order against several firms of solicitors. The miners' claims against the firms of solicitors arose out of the solicitors' conduct of applications for claims for compensation under schemes established by the Department of Trade and Industry to compensate miners who had contracted vibration white finger or chronic obstructive pulmonary disease in consequence of their employment by the British Coal Corporation. In order to enable it to enter into conditional fee agreements ("CFAs") with the miners so that the miners would be at no risk of having to pay costs the Claimant sought "after the event litigation insurance" ("ATE insurance") from the Defendant for the benefit of the miners in about June 2005. Such insurance was obtained but it is alleged by the Claimant that there was also an agreement between the Claimant and the Defendant that in consideration of the Claimant agreeing to act on behalf of the miners under CFAs and "writing" (by which is meant arranging) ATE insurance with the miners on the Defendant's behalf pursuant to which the Defendant would be entitled to be paid premiums, the Defendant would honour its obligations under the policy issued by the Defendant to the miners.

4. On 18 May 2006 the miners were ordered by the High Court to pay costs to the firms of solicitors, the application for a Group Litigation Order having failed. The Defendant has failed or refused to indemnify the miners in respect of those costs. The Claimant says that it was therefore in breach of the guarantees it had given to the miners in the CFAs that they would not be liable to pay costs. The Claimant has since agreed to pay those costs thereby discharging the liabilities of the miners under the costs order. The Claimant now claims those costs from the Defendant pursuant to the alleged agreement between the Claimant and the Defendant.

5. The further or alternative claim under the Civil Liability (Contribution) Act 1978 is based upon the premise that the Claimant and the Defendant were liable to the miners in respect of the same damage and therefore the Claimant is entitled to a contribution or an indemnity from the Defendant in respect of the sums which it has paid to the miners in discharge of its liability.

The claim in contract

6. It is convenient to deal first with the question whether the claim in contract has any reasonable prospects of success. It is common ground that the merits threshold is the same as if the claimant were resisting an application by the defendant for summary judgment; see ***MRG (Japan) Limited v Engelhard Metals Japan Limited*** [2003] EWHC 3418 Comm., [2004] 1 Lloyds Rep.731 per Toulson J. at paragraph 10. In essence the question is whether there is a serious issue to be tried as to the claim in contract.

7. The facts which are said to give rise to the alleged contract are pleaded in paragraphs 5-8 of the Particulars of Claim. They are as follows:

> *"5. At a meeting in Douglas, Isle of Man, in late June Mr. Edwards [a partner in the Claimant] asked Mr. Brunswick [the managing director of the Defendant] if the Defendant would be interested in providing ATE insurance for the coal mining cases (the miners' claims). Mr. Brunswick said that he had read about the cases and would insure them and he instructed Mr. Maule [the underwriting manager of the Defendant] to arrange the insurance.*
>
> *6. Acting on the basis of that agreement Mr. Edwards proceeded to prepare documentation to be used for the miners to enter into CFAs with the Claimant.*
>
> *7. This documentation included a document headed "Mineworkers' Group Action….the GWM Guarantee to Clients". The Claimant will refer to this document for its full terms and effect. In its final form it included the following:*
>
> *(1) The GWM Guarantee to clients;*
>
> *(2) No win, no fee, no risk, no cost!;*
>
> *(3) We, Greene Wood & McLean LLP confirm to our clients that we will handle their claims in relation to the above matter on the basis that …….*
>
> *2) We have obtained a policy of After The Event Litigation Expense Insurance for our clients underwritten by Templeton Insurance Limited a regulated insurer of Douglas Isle of Man;*
>
> *3) The policy will cover adverse costs, own disbursements and the insurance premium….Below I set out what the costs implications are – win or lose ……..*
>
> *b) Lose….ii) Disbursements – these are recoverable from the insurance policy …iv) Adverse costs – this is recoverable from the insurance policy.*
>
> *8. The above document was submitted in draft to Mr. Maule who approved it subject to an amendment suggested by him (which was at paragraph 3(a)(iii) of the document). Having approved the documentation, Mr. Maule authorised the Claimant, on behalf of the Defendant, to enter into agreements with the miners whereby they became parties to the policy to be issued by the Defendant ("the Policy"). "*

8. It has been submitted that these pleaded facts are sufficient to give rise to the suggested agreement between the Claimant and the Defendant. Counsel put the matter in this way in his skeleton argument:

"Applying either or both of the business efficacy test and the officious bystander test, in agreeing with the Claimant that the latter would (a) be authorised to bind its clients to contracts of ATE insurance with the Defendant, and (b) give its clients the GWM Guarantee the Defendant must be taken to have agreed that it would meet valid claims under the Policy. This was an obligation owed to GWM, not merely to the individual insureds."

9. In his oral submissions counsel explained that it was an implied term of the agreement pleaded in paragraph 8 (whereby the Defendant authorised the Claimant, on behalf of the Defendant, to enter into agreements with the miners so that they became parties to the policy to be issued by the Defendant) that the Defendant owed a contractual duty to the Claimant to meet valid claims made under the policy.

10. This term was said to be implied either on grounds of business efficacy (ie that it is necessary to imply the term in order or make the contract work) or on the grounds that if an "*officious bystander"* had suggested to the parties that express provision be made for the Defendant to owe a contractual duty to the Claimant that it would meet valid claims under the policy by the miners they would both have replied *"of course, that is obvious*".

11. I should add that it was also said that the term was to be implied in the agreement pleaded in paragraph 5. However, paragraph 5 is hardly expressed in the language of a binding and enforceable contract. All that Mr. Brunswick is alleged to have said is that "*he had read about the [miners'] cases and would insure them and he instructed Mr. Maule to arrange the insurance."* As pleaded this is no more than the expression of a willingness to provide ATE insurance to the miners coupled with an instruction to his underwriting manager to arrange the insurance. It is not alleged that the terms of the ATE insurance to be issued had been discussed, let alone agreed. Such matters would be for Mr. Maule, the underwriting manager, to agree.

12. I accept however that paragraph 8 raises a serious issue to be tried that Mr. Maule, acting on behalf of the Defendant, entered into a binding and enforceable contract to authorise the Claimant to enter into agreements with the miners whereby they became parties to the policy to be issued by the Defendant.

13. However, I consider it unarguable that it was necessary, in order to make the contract work, to imply a term in the contract pleaded in paragraph 8 that the Defendant owed a contractual duty to the Claimant to meet valid claims made by the miners under the policy.

14. By authorising the Claimant to bind the miners to the ATE insurance the Defendant agreed to be brought into contractual relations with the miners upon the terms of the ATE policy so that the miners had a right to sue the Defendant upon its terms. By approving the terms of the guarantee of "no win, no fee, no risk" the Defendant agreed that the guarantee may be issued. It is not necessary, in order to make the contract pleaded in paragraph 8 work, to imply in it a term enforceable by the Claimant that the Defendant would honour its obligations under the policy to the miners. That is because the Claimant was enabled to give its guarantee to the miners by the Defendant's agreement that *the miners* would have an enforceable claim against the Defendant to be indemnified in respect of adverse costs on the terms of the ATE policy to be issued to them. It is not necessary to imply a term enforceable by *the Claimant* that the Defendant would honour its obligations under the policy to the miners, although the Claimant might now think that it would have been desirable had there been such a term.

15. Had an officious bystander suggested to the Claimant and the Defendant that express provision be made for the Defendant to owe a contractual duty to the Claimant that it would meet valid claims under the policy by the miners I do not consider it arguable that both parties would have replied *"oh, of course*". The Claimant might well have replied that such a duty might have its advantages but the Defendant would surely have replied that such a term was unnecessary because the miners would have a right exercisable against the Defendant to be indemnified in respect of costs. For that reason the miners would not have to bear adverse costs and the Claimant could be confident that, as stated in the *"guarantee*", adverse costs would be "*recoverable from the insurance policy"*.

16. If the Claimant wished to have a right to sue the Defendant which, as it were, sat in parallel with the right of the miners to sue the Defendant, the Claimant ought to have made express provision for such a term. Such a term cannot be said to be a necessary or obvious incident of the contract pleaded in paragraph 8 of the Points of Claim.

17. I have therefore reached the conclusion that there is no serious issue to be tried as to the Claimant's alleged claim in contract against the Defendant. Such claim has no real or reasonable prospect of success.

The claim for a contribution

18. Counsel for the Claimant submitted that the claim for a contribution or indemnity pursuant to the Civil Liability (Contribution) Act fell within CPR 6.20(5) because it was "a claim in respect of a contract" governed by English law. That contract was the policy of ATE insurance between the Defendant and the miners, the governing law of which was English.

19. I was not referred to any authority which examined the nature of the connection between the claim and the contract which was required in order to justify describing the claim as "*in respect of*" that contract. However, the notes to the White Book Vol.1 at 6.21.33 and 34 describe the provision as "wide", suggest that there must be a good arguable case that there is a contract between the claimant and the defendant and mention the case of *Albon v Naza Motor Trading* [2007] 1 Lloyds. Rep. 297. In that case, at paragraphs 25-27, Lightman J. held that

"in respect of" does not require that the claim arises "under" a contract; "it requires only that the claim relates to or is connected with the contract." The judge held that a claim for restitution in respect of overpayments made on account under and pursuant to a contract established the necessary relationship and connection even though claims for restitution are covered by CPR 6.20 (15). It is to be noted that the claimant in that case was party to the contract in question.

20. In the present case the claim under the Civil Liability (Contribution) Act 1978 has a connection with the ATE policy of insurance because in order to establish that the Defendant is also liable in respect of the same damage as the Claimant reference must be made to the ATE policy. But the claim is not under that contract and the Claimant is not party to it.

21. A claim under the Civil Liability (Contribution) Act 1978 need not have a connection with a contract. That is because the defendant to the claim may be liable in respect of the same damage "whatever the legal basis of his liability whether tort, breach of contract, breach of trust or otherwise"; see section 6 of the Act. Thus a connection with a contract is not a necessary element of a claim under the Act. But similarly, a connection with a contract is not a necessary element of a claim in restitution; yet the claim in ***Albon v Naza Motor Trading*** was held to be in respect of a contract. However, the claimant in that case was a party to the contract and the claim might have been put on the basis of an implied term; see paragraph 28.

22. I respectfully agree with Lightman J. in ***Albon v Naza Motor Trading*** that the ordinary and natural meaning of the words "*a claim ….in respect of a contract*" is a claim which relates to or is connected with a contract. Some connections will be more remote than others. But the fact that a connection is remote will not, in my judgment, prevent the claim from being "in respect of a contract" though the remoteness of the connection will no doubt be a factor to bear in mind when the court considers whether England and Wales is the "proper place" in which to bring the claim; see CPR 6.21 (2A).

23. I do not consider that the connection must be with a contract between the claimant and the defendant. The rule does not state that. It could easily have done so.

24. I have therefore concluded that the claim under the Civil Liability (Contribution) Act 1978 which the Claimant wishes to bring against the Defendant falls within CPR 6.20 (5) notwithstanding that the Claimant is not party to the contract in question and that the claim is not brought under that contract.

25. The next question is whether there is a serious issue to be tried as to the Claimant's right to a contribution under the Act. The Claimant says there is. The miners have suffered the financial loss of having been ordered to pay adverse costs. The Claimant says

    i) that it is liable in respect of that damage because it is in breach of its guarantee that the miners will not have to bear costs; and

    ii) that the Defendant is also liable in respect of that same damage because it failed or refused to indemnify the miners in respect of their costs liability.

26. The Defendant does not accept this analysis. It says that in truth the liability of the Claimant arises from its negligent conduct of the application for a Group Litigation Order. The damage which such negligence causes, and therefore the damage in respect of which the Claimant is liable, is not the same damage in respect of which the Defendant is liable pursuant to the policy of ATE insurance. In this regard reliance is placed on the decision of the House of Lords in ***Royal Brompton NHS Trust v Hammond*** [2002] 1 WLR 1397 and upon the decision of David Steel J. in ***Bovis Consruction v Commercial Union*** [2001] 1 Lloyds.Rep.416.

27. In ***Royal Brompton NHS Trust v Hammond*** Lord Bingham said this, at paragraph 6:

    "When any claim for contribution falls to be decided the following questions in my opinion arise:"

    (1) What damage has A suffered?

    (2) Is B liable to A in respect of that damage?

    (3) Is C also liable to A in respect of that damage or some of it?

    *At the striking-out stage the questions must be recast to reflect the rule that it is arguability and not liability which then falls for decision, but their essential thrust is the same. I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of "damage" or of "loss" or "harm", provided it is borne in mind that "damage" does not mean "damages" (as pointed out by Roch LJ in **Birse Construction Ltd v Haiste Ltd** [1996] 1WLR 675, at p 682) and that B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not."*

28. Lord Steyn said this at paragraph 27:

    *"But this purposive and enlarged view of the reach of the statute does not assist on the central issue of construction before the House. The critical words are "liable in respect of the same damage." Section 1(1) refers to "damage" and not to "damages": see **Birse Construction Ltd v Haiste Ltd** [1996] 1 WLR 675, 682 per Roch LJ. It was common ground that the closest synonym of damage is harm. The focus is, however, on the composite expression "the same damage". As my noble and learned friend Lord Bingham of Cornhill has convincingly shown by an historical examination the notion of a common liability, and of sharing that common liability, lies at the root of the principle of*

contribution: see also Current Law Statutes Annotated (1978), "Background to the Act" at p 47. The legislative technique of limiting the contribution principle under the 1978 Act to the same damage was a considered policy decision. The context does not therefore justify an expansive interpretation of the words "the same damage" so as to mean substantially or materially similar damage. Such solutions could have been adopted but considerations of unfairness to parties who did not in truth cause or contribute to the same damage would have militated against them. Moreover, the adoption of such solutions would have led to uncertainty in the application of the law. That is the context of section 1(1) and the phrase "the same damage". It must be interpreted and applied on a correct evaluation and comparison of claims alleged to qualify for contribution under section 1(1). No glosses, extensive or restrictive, are warranted. The natural and ordinary meaning of "the same damage" is controlling."

29. In ***Bovis Construction v Commercial Union*** David Steel J. held that it was a misconception to describe the liability of an insurer to indemnify a builder in respect of injury or damage to property as the same damage as that for which the builder was liable. The damage inflicted by the builder was a defective building susceptible to flooding damage whereas the insurer had inflicted financial loss by refusing to pay on the policy. That decision was approved by Lord Steyn at para.34 of *Royal Brompton NHS Trust v Hammond*.

30. It seems to me, when one seeks to answer Lord Bingham's three questions, the position is, or is at least arguably, as follows. (i) The miners have suffered financial loss, namely, they have been ordered to pay costs. (ii) The Claimant accepts that it is liable in respect of that damage because it is in breach of its guarantee to the miners that they would not have to bear such costs. (iii) The Defendant is liable in respect of that same damage because it has refused to indemnify the miners in respect of their costs liability. The Defendant disputes the second proposition because it maintains that the only guarantee was that adverse costs would be recoverable from the ATE policy and they were. The Defendant also disputes the third proposition because it says it had good reason to refuse to indemnify. However, the Claimant's case on the three questions is at least arguable. That being so there must be a serious issue to be tried as to the Claimant's right to a contribution under the Act.

31. I do not consider it beyond reasonable argument that the facts of ***Bovis Consruction v Commercial Union*** are distinguishable from the present case (or that the facts of the Canadian case discussed in *Royal Brompton NHS Trust v Hammond* by Lord Steyn at paragraph 29 (on which the Defendant also relied) are distinguishable from the present case).

32. There remains to be considered the question whether England is a proper place in which to bring the claim. The Defendant did not submit that it was not such a place. It seems to me that it is a proper place. The costs liability of the miners results from proceedings in England. The Defendant is being sued by the miners in arbitration in England pursuant to the terms of the ATE policy which is governed by English law. There is thus a real connection between the claim and this jurisdiction. There is no suggestion that litigating in England creates any form of prejudice to the Defendant.

33. So far as concerns the connection between the claim and the ATE policy (which provides the ground for jurisdiction under CPR 6.20) it is not so remote as to make England not a proper place in which to bring this claim.

34. Subject then to the allegations of a failure to give full and frank disclosure I would not set aside permission to serve out but would restrict that permission to the claim being brought under the Civil Liability (Contribution) Act 1978.

Disclosure

35. The relevant principles are set out in ***MRG (Japan) Limited v Engelhard Metals Japan Limited*** [2003] EWHC 3418 Comm., [2004] 1 Lloyds Rep.731 per Toulson J. at paragraphs 23-26 and 36. There must be full and frank disclosure of all facts known to the applicant which might reasonably be taken into account by the judge in deciding whether to grant the application for permission to serve out. He is not obliged to disclose matters which show that the defendant has or might have arguable grounds for defending the claim.

36. I have read the 9 matters which it is said ought to have been disclosed to the court. Only two caused me concern and they were the only ones pursued with any vigour at the hearing. The first may be called the assignment point and the second may be called the arbitration point.

The assignment point

37. The Claimant settled the miners' claim against it and took an assignment of the miners' right of action against the Defendant. The Claimant then sought to claim against the Defendant in arbitration under the ATE policy relying upon that assignment. However, that claim failed because the policy did not permit assignment save with the Defendant's agreement and there was no such agreement. It was only after that claim failed that the Claimant alleged that it had its own contractual claim against the Defendant. No mention was made of the assignment or of the failed attempt to sue the Defendant under the policy.

38. I confess to being surprised that these matters were not mentioned. A more cautious litigant, anxious to put the full history before the Court on an *ex parte* application, would have done so. He would have appreciated that his conduct might be taken as suggesting that the implied term which he now says is necessary and obvious did not occur to him until his attempt to claim against the Defendant under the ATE policy by way of assignment had failed. He would have been anxious either to say that was not so or, if it was, to explain why the thought had only occurred so late. However, strictly speaking, actions taken by the Claimant in 2006 cannot have a legitimate bearing upon the question whether, as a matter of law, a term is to be implied in an agreement made in 2005.

For that reason the assignment and failed attempt to claim in arbitration under the ATE policy were, strictly speaking, not material.

The arbitration point

39. Following the objection to the Claimant pursuing the Defendant in arbitration the claim was continued in the name of certain of the miners. In that arbitration it has been held that the miners' claim is limited to disbursements. That is because the miners' liability to pay costs has been discharged by the Claimant paying those costs. Since the Claimant's claim against the Defendant is premised upon the basis that the Defendant is liable to the miners in respect of their liability for costs, it seems to me that the cautious litigant might well have considered that these are matters which should be disclosed to the Court. For if the Defendant is not liable to the miners in respect of costs there may be serious difficulty in saying that the Defendant is nevertheless in breach of its alleged duty to the Claimant to indemnify the miners in respect of their costs liability. However, strictly speaking, the relevant question is whether the Defendant was liable to indemnify the miners in respect of their costs liability before the Claimant paid those costs, not whether the Defendant is liable to indemnify the miners in respect of those costs after the Claimant has paid them. It would be odd if the fact of payment, which highlights the need for a contribution from a person who is also liable to make that payment, at the same time extinguishes the right to call for such a contribution.

40. I therefore conclude that, taking a strict view of what matters are material for the Court to know on an application of this nature, there was no failure to give full and frank disclosure.

41. It was submitted on behalf of the Claimant that the arbitration award was confidential and could not be disclosed. In the light of my decision on materiality it is unnecessary to consider this point any further. I would simply say that if the consent of the parties to the arbitration to disclose decisions made in the arbitration is not forthcoming then the Claimant could seek permission from the Court to do so. The grant of such permission would protect the Claimant against complaint that the confidential nature of the arbitration had been broken. The alternative course of action, apparently favoured by the Claimant, is that the Court is left in ignorance of a fact which is (it is assumed for this purpose) material to the application before it. That cannot be right, for it would mean that the court might be led to grant an order for service out of the jurisdiction when such order ought not to have been made. However, since the decision in the arbitration was strictly not material this matter did not arise for decision.

Conclusion

42. There having been no failure to give full and frank disclosure I dismiss the application to set aside the grant of permission to serve out of the jurisdiction but restrict that permission to the claim under the Civil Liability (Contribution) Act 1978.

43. I shall ask Counsel to draw up an order giving effect to my decision on this application.

Ronald Walker QC (instructed by CMS Cameron McKenna LLP) for the Claimant
Derek Sweeting QC(instructed by Manches LLP) for the Defendant