John F Hunt Demolition Ltd v ASME Engineering Ltd [2007] ABC.L.R. 06/27

JUDGMENT : His Honour Judge Peter Coulson QC: TCC. 27th June 2007

A. INTRODUCTION

1. This case raises, by way of preliminary issue, two unrelated topics, both much-loved by practitioners in this area of law. They are, first, the interplay between the insurance provisions in the JCT Forms of Contract and the existence of duties of care at common law and, second, the proper interpretation and application of the Court of Appeal decision in ***Biggin & Co Ltd v Permanite Ltd*** [1951] 2 KB 314. I set out in **Section B** below the factual background. At **Section C** below, I then identify and answer the preliminary issues concerned with the insurance provisions and the duty of care. At **Section D** below, I identify and address, insofar as I am able to do so, the arguments of principle that arise in this case in respect of the proper application of ***Biggin v Permanite***.

2. As noted above, the parties have endeavoured to deal with the disputes of principle that have arisen between them by way of preliminary issue, without calling any evidence at all. The parties agreed that the factual background to which I should have regard (for the purposes of the preliminary issues only) was either that which they had expressly agreed, or which could be discerned from the Claimant's pleaded case. I should say at the outset that I am extremely grateful to both Counsel for their comprehensive and thoughtful submissions.

B. FACTUAL BACKGROUND

3. By a main contract, dated 30 June 2002, and incorporating the JCT Standard Form of Building Contract, With Contractor's Design, 1998 Edition, Kier (Whitehall Place) Ltd ("Whitehall"), engaged Kier Build Ltd ("Build") to carry out the design and construction of commercial office premises at 3-8A Whitehall Place, London, SW1 ("the property"). The standard form was the subject of a number of bespoke amendments, to which reference is made below. The main contract works required the demolition of much of the existing buildings on the site, but necessitated the retention of certain facades of the existing property.

4. By a sub-contract dated 27 March 2003, Build retained the Claimant, John F Hunt Demolition Limited ("Hunt") to carry out the demolition of the existing buildings. The demolition sub-contract incorporated the JCT Domestic Sub-Contract DOM/2 1981 Edition (reprinted in 1998) with Amendments 1 to 8, and there were again some further bespoke amendments.

5. By a sub-sub-contract made on or about 2 or 3 December 2002, Hunt engaged the Defendant, ASME Engineering Limited ("ASME"), to construct a temporary steel structure to support the existing facades of the property during the course of the demolition works. The sub-sub-contract was evidenced in an exchange of correspondence dealing with the temporary steel works package. There was no reference in that correspondence to the JCT contracts that had been agreed up the contractual chain.

6. On the afternoon of Tuesday, 22 April 2003, ASME were carrying out a part of that temporary steel work construction. The work involved the use of arc welding equipment. It appears that sparks from the welding work set light to the bitumen felt weather-proofing on the retained facades. The facades caught fire and it took in excess of 45 minutes for the fire to be extinguished. For the purposes of these preliminary issues only, I am asked to assume that the fire was due to ASME's culpable default.

7. The two separate Kier companies, Whitehall and Build, indicated a joint claim against the sub-contractor, Hunt. It appears that this claim focussed entirely on the consequences of the damage to the existing facades and the repair work that had to be carried out to those facades. The total amount claimed was £248,145.04. Hunt notified ASME of the claim. In about August 2005, Hunt and ASME jointly instructed quantity surveyors, Haleys Ltd, to assess the value of the claim. Following the provision of further information by the Kier companies, Haleys advised that the claim was worth about £151,545 exclusive of interest. This was, on its face, a quantum-only assessment; in other words, assuming a full liability to the Kier companies, Haleys were advising that such a claim was worth about £151,545, plus interest.

8. In the summer of 2006, Hunt offered to settle the claims that had been made for £152,500. This offer was accepted by the Kier companies. That is the sum which Hunt now seeks against ASME in these proceedings, together with other legal costs and fees. Following the identification (and my order for the hearing) of these preliminary issues, a certain amount of further detail relating to this claim was agreed by the parties.

9. Accordingly, the position now is as follows:

   a) Of the settlement figure of £152,500, it is agreed by the parties that £108,987.12 constituted the losses suffered by Whitehall. This figure represented the cost of reinstating the retained facades. Hunt accept that, pursuant to the terms of the main contract, Whitehall could not have recovered that sum against Build and that, therefore, Build could not have recovered that sum against them under the terms of the sub-contract. However, Hunt maintain that they would have been liable to Whitehall for this sum in tort, a proposition which ASME deny. That dispute gives rise to preliminary issues 1 and 2, addressed in **Section C** below.

   b) It is also agreed that the remaining part of the settlement, namely the sum of £43,512.88, constituted Build's own losses as a result of the fire and its consequences. It is not suggested that this sum could not have been recovered by Build under the terms of their sub-contract with Hunt. However, ASME contend that because, on their case, this figure of £43,512.88 represented Hunt's maximum liability to the Kier companies, the settlement at £152,500 was plainly unreasonable, and thus not the true measure of loss. That in turn gives rise to preliminary issues 3 and 4, dealt with in **Section D** below.

C. THE CONTRACT PROVISIONS AND THE DUTY OF CARE

C1. Preliminary Issues 1 and 2

10. The Preliminary Issues that arise in respect of the insurance and the duty of care disputes are as follows:

(1) Insurance Issue

(a) Were Build liable to Whitehall for any claims under the terms of the main contract?

(b) If not, were Hunt liable in principle under their sub-contract with Build solely for Build's own losses, and are those losses now claimed as against ASME at a maximum of £43,512.88?

(2) Duty of Care Issue

Assuming the answer to (1)(a) is No, and the answer to (1)(b) is Yes, did Hunt owe a duty of care at common law to Whitehall, thereby allowing Whitehall to recover the entirety of its claim against Hunt as damages for breach of that duty?

11. For the reasons noted above, Hunt now concede that Build had no liability to Whitehall under the terms of the main contract. The answer to preliminary issue (1)(a) is therefore No. As we shall see, this concession is the result of the operation of the relevant indemnity and insurance provisions and, in my judgment, it is entirely in accordance with the authorities. In those circumstances, the maximum that Build could recover pursuant to their sub-contract with Hunt was in respect of Build's own losses, claimed at a maximum of £43,512.88. The answer to preliminary issue (1)(b) is therefore Yes. Thus preliminary issue 2 is now what matters: whether, in all the circumstances, including in particular the terms of the main contract and the sub-contract, Hunt owed a duty of care to Whitehall in respect of the fire damage to the existing facades, so as to enable Hunt to say that the joint claim made against them by the Kier companies was not limited in law to Build's losses alone.

C2. The Contract Terms

The Main Contract

12. Clause 2.1 of the main contract provided: *"The Contractor shall upon and subject to the Conditions carry out and complete the Works referred to in the Employer's Requirements, the Contractor's Proposals …, the Articles of Agreement, these Conditions and the Appendices in accordance with the aforementioned documents and for that purpose shall complete the design for the Works including the selection of any specifications for any kinds and standards of the materials and goods and workmanship to be used in the construction of the Works so far as not described or stated in the Employer's Requirements or Contractor's Proposals …"*

13. Clause 18.2.1 of the main contract, as amended, provided: *"Subject to Clause 18.2.4.1 and to Clause 18.2.4.4 the Employer hereby consents to the sub-letting by the Contractor of the Works and to the sub-letting of the design of all or any part of the Works to the Contractor's Design Consultants and to sub-contractors carrying out substantial design works."*

14. Clause 20 of the contract, as amended, provided:

"20.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the carrying out of the Works (including performance by the Contractor of his obligations under Clause 16) or out of the presence on Site of any persons for any other reasons, except to the extent that the same is due to any act or neglect of the Employer or of any person for whom the Employer is responsible including the persons employed or otherwise engaged by the Employer to whom Clause 29 refers.

20.2 Subject to Article 15, the Contractor shall be liable for and shall indemnify the Employer against any expense, liability, loss, claim or proceedings in respect of any loss injury or damage whatsoever to or in respect of any property, real or personal (including any expense, liability, loss or claim arising from but not limited to obstruction, trespass, nuisance or interference with any rights of way, light, air or water) in so far as such loss injury or damage arises out of or by reason of the carrying out of the Works and to the extent the same is due to any negligence, breach of statutory duty, omission, breach of contract or default of the Contractor his servants or agents or out of the presence on Site of any person or persons for any reason whatsoever apart from the Employer or any person employed, engaged or authorised by him to be on the Site or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights or obligations. The liability and indemnity hereunder is subject to Clause 20.3 and where Clause 22C.1 is applicable excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

20.3.1 Subject to Clause 20.3.2 the reference in Clause 20.3 to 'property real or personal' does not include the Works, work executed and/or site Materials up to and including the date of issue of the statement by the Employer setting out the date of Practical Completion or up to and including the date of determination of the employment of the Contractor (whether or not the validity of that determination is disputed) under Clause 27 or Clause 28 or Clause 28A or, where Clause 22C applies, under Clause 27 or Clause 28 or Clause 28A or Clause 22C.4.3 whichever is the earlier….

20.4.1 Subject to Article 15 without prejudice to the generality of Clause 20.2 the Contractor shall at all times take reasonable precautions to prevent any public or private nuisance …"

15. *'Specified Perils'* were defined at Clause 1.3 of the main contract. They included: *"fire, lightning, explosion, storm, tempest, flood…"* and related perils. The contract had been amended to indicate that these were the specified perils *"howsoever caused"*.

16. Clause 22 was concerned with the Insurance of the Works. Clause 22A and Clause 22B had both been deleted. Clause 22.2 provided this amended definition of a Joint Names Policy: *"A policy of insurance which includes the employer and the Contractor and such other persons as the employer may reasonably require including (but without limitation) the Commissioners and DEFRA and the Fund as the insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to Clause 22.3, recognised as an insured thereunder."*

17. Clause 22.3 provided:

"The Contractor where Clause 22A applies, and the Employer where either Clause 22B or 22C applies, shall ensure that the Joint Names Policy referred to in Clause 22A.1 or Clause 22A.3 or the Joint Names Policy referred to in Clause 22B.1 or in Clause 22C.2 shall in respect of each sub-contractor to whom Clause 18.2.1 refers

either provide for the recognition of each sub-contractor as an insured under the Joint Names Policy

or include a waiver by the relevant insurers of any rights of subrogation which they may have against any such sub-contractor

in respect of loss or damage by the Specified Perils to the Works and Site Materials; and that this recognition or waiver shall continue up to and including the date of issue of any certificate or other document which states that the sub-contract works are practically complete or the date of determination of the employment of the Contractor …"

18. The relevant parts of Clause 22C were as follows:

"22C.1 The Employer shall take out and maintain a Joint Names Policy in respect of the existing structures … together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils …

22C.2 The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in Clause 22.2 for the full reinstatement value of the Works …"

The Sub-Contract

19. The relevant terms of the DOM/2 sub-contract between Build and Hunt included a number of Recitals. The second Recital refers in detail to the main contract and the third Recital stated that: *"The sub-contractor [Hunt] has had reasonable opportunity of inspecting all of the provisions of the main contract, or a copy thereof, except any detailed prices of the Contractor …"*

20. Article 1 provided:

"1.1 The Sub-Contractor shall be deemed to have notice of all the provisions of the Main Contract except any detailed prices …

1.2 The Sub-Contractor shall upon and subject to the Sub-Contract documents and the provisions of the Main Contract carry out and complete the Sub-Contract works shown upon and described by or referred to in those Documents.

The Sub-Contract Conditions set out in … DOM/2, including Amendments 1 to 8 thereof … shall be deemed amended mutatis mutandis to correspond with the Schedule of Amendments to the Articles and Conditions of the Main Contract as further amended by the document 'KIER GROUP AMENDMENTS dated 17.8.01' shall be deemed to be incorporated in sub-contract DOM/2 as executed by the parties hereto. …"

21. Part 1 Section A of the Appendix to DOM/2 identified that Clause 22C of the main contract applied.

22. Clauses 6.3 and 6.4 of the DOM/2 conditions provided:

"6.3 The Sub-Contractor shall be liable for, and shall indemnify the Contractor against any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal insofar as such loss, injury or damage arises out of or in the course or by reason of the carrying out of the Sub-Contract Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Sub-Contractor or any person for whom the Sub-Contractor is responsible. This liability and indemnity is subject to Clause 6.4.

6.4 The liability and indemnity to the Contractor referred to in 6.3 shall not include any liability or indemnity in respect of injury or damage to the Works and/or Site Materials by one or more of the Specified Perils, whether or not caused by the negligence, breach of statutory duty, omission or default of the Sub-Contractor or any person for whom the Sub-Contractor is responsible, for the period up to and including whichever is the earlier of the Terminal Dates."

23. Clause 7.1 of the DOM/2 conditions provided: *"Without prejudice to his obligations to indemnify the Contractor under Clause 6, the Sub-Contractor shall take out and maintain insurance which will comply with Clause 7.2 in respect of claims arising out of his liability referred to in Clauses 6.2 and 6.3 as modified by Clause 6.4 …"*

24. The insurance provisions were set out in Clause 8. Clause 8.1 provided that Clause 8C would apply where Clause 22C applied under the Main Contract. Clause 8C provided: *"The Contractor shall, prior to the commencement of the Sub-Contract Works, ensure that the Employer arranges that the Joint Names Policy referred to in Clause 22C.2 of the Main Contract Conditions shall be so issued or so endorsed that in respect of loss or damage by the Specified Perils to the Works and Site Materials insured thereunder, the Sub-Contractor is either recognised as an insured under the Joint Names Policy or the insurers waive any rights of subrogation they may have against the Sub-Contractor, and that this recognition or waiver shall continue up to and including whichever is the earlier of the Terminal Dates."*

C3. The Authorities

(a) The Relationship between Contract Terms and Common Law Duties of Care

25. I was referred to a number of authorities dealing with the relationship between contractual terms and the existence (or otherwise) of duties of care at common law. I take those cases in chronological order. The first was the decision of the Court of Appeal in ***Pacific Associates Inc & Anor v Baxter & Ors*** [1990] 1 QB 993. In that case, a contractor unsuccessfully asserted that the engineer owed him a duty of care. There was a term of the main contract, Condition 86, which provided a general disclaimer to the effect that the engineers were not themselves to be held liable to the contractor. Purchas LJ said at page 1010: *"…Where the parties have come together against a contractual structure which provides for compensation in the event of a failure of one of the parties involved the court will be slow to superimpose an added duty of care beyond that which was in the contemplation of the parties at the time that they came together. I acknowledge at once the distinction, namely, where obligations are founded in contract they depend on the agreement made and the objective intention demonstrated by that agreement whereas the existence of a duty in tort may not have such a definitive datum point. However, I believe that in order to determine whether a duty arises in tort it is necessary to consider the circumstances in which the parties came together in the initial stages at which time it should be considered what obligations, if any, were assumed by the one in favour of the other and what reliance was placed by the other on the first."*

He went on to say at page 1022: *"… The absence of a direct contractual nexus between A and B does not necessarily exclude the recognition of a clause limiting liability to be imposed on A in a contract between B and C, when the existence of that contract is the basis of the creation of a duty of care asserted to be owed by A to B. The presence of such an exclusion clause whilst not being directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against which the contractor demonstrates reliance on, and the engineer accepts responsibility for, a duty in tort, if any, arising out of the proximity established between them by the existence of that very contract."*

26. In the same case, Russell LJ said of the exclusion clause Condition 86: *"I would hold that, the parties having sought to regulate their relationships the one with the other by a contractual process, the law should be very cautious indeed before grafting onto the contractual relationships what might be termed a parasitic duty, unnecessary for the protection of the interests of the parties and, as will appear when reference is made to PC86, contrary to the express declarations of the engineer."*

It was doubtless this passage which Tuckey J (as he then was) had in mind *in* ***Saipem SpA and Conoco (UK) Ltd v Dredging VO2 BV and Geosite Surveys Ltd*** *[*1993] 2 Lloyds Rep 315 when he said, at page 322, by reference to a number of cases, including ***Pacific Associates****,* that: *"…In comparable situations the Courts have set their face against imposing obligations in tort where the parties have chosen to regulate their relationships by contract."*

27. In the well-known passage of his speech in ***Henderson & Ors v Merrett Syndicates Ltd*** [1995] 2 AC 145, Lord Goff referred to the particular nature of the claim against the managing agents in that case, and said at page 195: *"I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort. Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the* ***Hedley Byrne*** *principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his function. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility."*

28. Mr Althaus also referred me to ***Marc Rich & Co & Ors v Bishop Rock Marine Co Ltd*** [1996] 1 AC 211, a decision in which the House of Lords emphasised that, in cases of physical damage to property in which the claimant had a proprietary or posssessory interest, the only requirement was proof of reasonable foreseeability; and the similar comment by Lord Hoffman in ***Customs & Excise Commissioners v Barclays Bank Plc*** [2007] 1 AC 181 at page 198, where he said that in the case of personal or physical injury, reasonable foreseeability of harm was usually enough to generate a duty of care whilst, in the case of economic loss, "something more is needed". Finally, for completeness, I should also note that I was also taken to ***Riyad Bank v Ahli United Bank PLC*** [2006] 2 Lloyd's Law Reports 292, [2006] EWCA Civ 780, a decision of the Court of Appeal in which they upheld the approach, in a case like this, of considering, first, whether there was a duty, and, second, whether such a duty was excluded or negatived by operation of the contract(s), although they stressed that, in that case, had the judge asked himself one composite question rather than two, he would still have answered it in the same way.

(b) The Fire Cases: Main Contractors

29. There have been a number of cases in which, following a fire during the course of building works, an employer has sought to make a claim against the main contractor, only to be met with the assertion that, as a result of the insurance provisions, the main contractor had no liability under the terms of that contract. It is unnecessary to set out all of the authorities in which this point has been considered, particularly as they arise under a plethora of different JCT standard forms. However, the decisions of the Court of Appeal in ***Surrey Heath BC v Lovell Construction Ltd*** (1990) 24 Con LR 1, and the judgment of His Honour Judge Fox-Andrews QC in ***Ossory Road (Skelmersdale Ltd) v Balfour Beatty Ltd*** (15 June 1993, unreported), both identified the employer's difficulties in pursing such a claim against the main contractor in the light of the insurance provisions. In ***Kruger Tissue (Industrial) Ltd v Frank Galliers Ltd & Ors***, (1998) 57 Con LR 1, HHJ Hicks QC held that the employer had been right to accept that the insurance provisions of the JCT 1980 Form had the effect of excluding from the contractor's liability any loss or damage against which the employer was bound to insure. He went on to find that, on the terms of that particular standard form, the employer was not obliged to insure against consequential loss, and that therefore the insurance provisions did not provide any bar to recovery by the employer of such heads of damage as loss of profit and increased working costs.

(c) The Fire Cases: Sub-Contractors

30. In ***Norwich City Council v Harvey*** [1989] 1 WLR 828, the employer failed in front of Garland J, and subsequently the Court of Appeal, to establish that the sub-contractor whose carelessness had caused a fire owed the employer a duty of care. It was held that, although there was no direct contractual relationship between the employer and the sub-contractor, because they had each contracted with the main contractor on the basis that the employer had assumed the risk of damage by fire (by operation of the insurance provisions), there was no sufficiently close direct relation between them to impose on the sub-contractor any duty of care to the employer in respect of such damage. May LJ said at page 836: *"In the instant case it is clear that as between the plaintiff and the main contractor the former accepted the risk of damage by fire to its premises arising out of and in the course of the building works. Further, although there was no privity between the plaintiff and the sub-contractor, it is equally clear from the documents passing between the main contractor and the sub-contractor to which I have already referred that the sub-contractor contracted on a like basis … Approaching the question on the basis of what is just and reasonable I do not think that the mere fact that there is no strict privity between the employer and the sub-contractor should prevent the latter from relying upon the clear basis upon which all the parties contracted in relation to damage to the employer's building caused by fire, even when due to the negligence of the contractors or sub-contractors."*

31. In the later case of ***British Telecommunications Plc v James Thomson & Sons (Engineers) Ltd*** [1999] 1 WLR 9, another fire case, it was found that the relevant sub-contractor did owe a duty of care to the employer. Under the particular JCT form of main contract utilised there, the terms governing the insurance policy which the employer was bound to take out and maintain made clear that both the contractor and "all nominated sub-contractors" were to be protected by the policy, whilst domestic sub-contractors were excluded from it. Lord MacKay of Clasfern said at page 16: *"In my opinion it is of crucial significance in the present case that a distinction is made between nominated sub-contractors on the one hand and domestic sub-contractors on the other in the terms of the insurance policy to be provided by BT under the contract. In my view the contractual provisions reinforce rather than negative the existence of a duty of care towards BT by Thompson in the circumstances of the present case."*

32. There are no authorities dealing with the position under the JCT 1998 form. At paragraph 19-315 of **Keating on Construction Contracts**, 8th Edition, 2007, the editors conclude that the position is not clear, although they point out that the clear intention of the JCT forms as a whole was that the risk of damage due to a specified peril should fall upon the insurers, rather than the parties to the relevant contracts.

(d) Summary

33. On the basis of the cases noted above, and adopting the two-stage approach referred to in ***Riyad***, I derive the following principles:

    a) Where, as here, the damage consists of physical damage to property, then the starting point is that, subject to questions of foreseeability, a duty of care will usually be owed (see, for example, ***Marc Rich*** and ***Customs & Excise v Barclays***).

    b) If, however, the contractual provisions negative the existence of a duty of care, then no such duty will be found: see, generally, ***Pacific Associates*** and ***Henderson v Merrett*** and, more specifically, ***Norwich City Council*** and ***Thompson***. It is important to note that, even though a duty was found to exist in ***Thompson***, the decision turned on the precise terms of the contract. If, in that case, the sub-contractors in question had been nominated and not domestic then, under the terms of the contract, they would have been covered by the insurance provisions, and no duty of care would have been found.

    c) Accordingly I conclude that whether or not, in this case, the sub-contractor, Hunt, owed the employer, Whitehall, a duty of care at common law must turn on the precise terms of both the main contract and the sub-contract.

C4. Analysis

34. It is important to note that the starting point in my analysis of the contractual provisions must be Hunt's proper concession that Build were not liable to Whitehall under the terms of the main contract. Clause 20.2 of the main contract provided a wide-ranging indemnity by Build to Whitehall. But that indemnity expressly excluded loss or damage to any property required to be insured under Clause 22C.1 where the damage was caused by fire. Under Clause 22C.1, Whitehall were obliged to insure the existing structures, namely the retained facades,

against damage by fire. In my judgment, therefore, it could not be clearer that Build would have had no liability to Whitehall under the terms of the main contract, because the express exclusion in Clause 20.2 operated to exempt them from liability, and to ensure that responsibility for the financial consequences of making good the damage to the retained facades remained with the insurers.

35. What then is different about the terms of the sub-contract which, on Hunt's case, does not operate to prevent them, as the sub-contractors, from being liable to Whitehall in tort for damage to the existing structures, even though the main contractor, Build, had no such liability? Mr Althaus submits that, whatever the position under the main contract, the position under the sub-contract does not exclude Hunt's liability in respect of the existing structures; as an alternative submission, he maintains that the position is so unclear that the duty of care which would prima facie arise is not negatived by the terms of the sub-contract. It is to that critical argument that I now turn.

36. Mr Althaus accepted that Clause 22.3 and 22C.2 of the main contract required Whitehall to ensure that the Joint Names Policy either recognised Hunt as an insured, or included a waiver of the insurers' subrogation rights against Hunt. He accepts that this would be sufficient to negative a duty of care owed by Hunt in respect of the Works and the Site Materials. However, this case is concerned with damage to the existing structures, and he submits that there was no corresponding obligation on the part of Whitehall to include Hunt under the Joint Names Policy against Specified Perils in respect of existing structures under Clause 22C.1 or, indeed, anywhere else. Thus, he submits that, whilst Build were protected as against damage to both the Works/ Site Materials, and the existing structures, Hunt were only protected in respect of the former, and not the latter. To use his words, Hunt were "out in the cold" in relation to damage to the existing structures. Furthermore, he submits that this was reinforced by Clause 8C.1 of the Build/Hunt sub-contract, which referred to loss and damage caused by the specified perils to the Works and Site Materials, but contained no equivalent provision in respect of the existing structures.

37. Although this argument was advanced by Mr Althaus with considerable skill, I have concluded that, for two separate reasons (one general and one specific), it is erroneous, and should be rejected.

38. The general reason for rejecting this submission is based on a consideration of the JCT contractual provisions as a whole, both main contract and sub-contract, which adopts the same approach as that taken by the Court of Appeal in ***Norwich City Council***. In this case, I consider that the key provision was Clause 20.2 of the main contract. That provided an extensive indemnity to the employer, Whitehall, in respect of negligence on the part of Build and any sub-contractor (Hunt) or sub-sub-contractor (ASME) who happened to be on site. But that wide indemnity went on, in the proviso, expressly to exclude loss and damage to the existing structures caused by fire. In other words, the parties to the main contract and any sub-contract would have known that, if there was fire which caused damage to the retained facades, that damage would be insured under the Joint Names Policy, and that Whitehall, as employer, would look to the insurers to pay for the cost of reinstatement of those existing structures. It would be inconsistent with that overall regime for any party to seek to sidestep the allocation of risk and responsibility set out in these lengthy forms of contract, by trying to investigate possible causes of action against the sub-contractor in negligence.

39. Secondly, I consider that, although the main contract and the sub-contract conditions appear to treat the existing structures in a slightly different way to the Works and Site Materials, there is in fact a very good reason for that. In respect of the Works and/or Site Materials, the indemnity under Clause 20.2 does not apply, not because of the operation of Clause 22C.1, but because of the operation of Clause 20.3.1. Thus, if the ongoing Works and/or Site Materials were damaged by fire prior to practical completion, then, pursuant to Build's general obligations under Clause 2.1 of the main contract, Build would have to carry out all necessary works of repair and reinstatement. In carrying out such work, Build may be paid for it, either under Clause 22A.4 (out of the insurance monies) or, if Clause 22C.2 applied, by way of a change instruction under Clause 12. However, the fact remains that, if the Works and/or Site Materials were damaged by fire before practical completion, Build were contractually obliged to carry out all necessary works of repair and reinstatement. Hunt would owe no duty of care to Whitehall in respect of the Works and/or Site Materials because of the operation of Clause 22.3.

40. In respect of the existing structures, which in this case mean the retained facades which were damaged, a different contractual regime applies. The existing structures were present on site at the outset of the Works. Build, the main contractor, had no obligation in respect of the construction of those facades, because they already existed, but they had a general duty to take reasonable care when carrying out the Works in and around those structures. It is for that reason that, unlike in respect of the Works/Site Materials, the indemnity provided by Build at Clause 20.2 covered damage to the existing structures. Thus, the main contractor and the sub-contractors had generally to take care in respect of the existing structures, and if they did not (because, say, they knocked down part of the existing façade through the negligent operation of their tower crane), then prima facie under Clause 20.2 they would be liable for all damage thereby caused. In such circumstances, if they were instructed to carry out the consequential remedial work, they would have had to have done so at their own expense. But, as we have seen, this liability on the part of the main contractor and his sub-contractors was expressly excluded by operation of the proviso at the end of Clause 20.2, and Clause 22C.1, if (but only if) the damage was caused by a specified peril, for which the employer had taken out Joint Names Insurance. Here, the damage was caused by such a peril, so their liability was excluded.

41. For these reasons, I do not consider that the JCT main contract and sub-contract can or should be read in such a way as would lead to the absence of any duty of care upon Hunt in respect of fire damage to the Works/Site

Materials, but would lead to the imposition of a duty of care in respect of fire damage to the existing structures. There could be no logical basis for such a distinction; as far as I can see, it would not be capable of justification on any practical grounds, and none were identified by Mr Althaus during argument. The differences in the contract provisions, set out above, arise solely out of the way that repair/reinstatement to the Works/Site Materials, on the one hand, and to the existing structures, on the other, would be carried out and paid for. The provisions of the sub-contract relied on by Hunt are, on this analysis, entirely consistent with the proposition that the employer's insurers will pay out for damage to existing structures due to specified perils, but that other damage to the facades (such as, to use the example noted above, damage caused by the sub-contractor's negligent use of a tower crane) would not be so exempt and would therefore be covered by the indemnity provided by Hunt at Clause 6.3 of the sub-contract, and the (separate) insurance provisions at Clause 7.1.

42. Accordingly, I conclude that, as a result of the provisions of the main contract and the sub-contract, Hunt owed no duty of care to the employer, Whitehall, in respect of the repair/reinstatement necessitated by damage to the existing structures caused by fire. In such circumstances, given the concession that Hunt were not liable under the terms of the sub-contract in respect of any losses suffered by Whitehall, Hunt had no liability in law whatsoever to Whitehall. I find that the maximum for which Hunt were liable to the Kier companies was £43,512.88, which the parties are agreed represented Build's own losses. With that finding in mind, I then turn to a consideration of whether, in those circumstances, the settlement was reasonable.

D. THE REASONABLENESS OF THE SETTLEMENT

D1. Preliminary Issues 3 and 4

43. There are two preliminary issues that arise in respect of the alleged reasonableness of the settlement achieved by Hunt. They are:

(3)On the basis that Hunt had no liability for any losses suffered by Whitehall, so that their liability was limited to the £43,512.88 claimed by Build, was that sufficient on its own to render the settlement at £152,500 unreasonable?

(4)If the settlement was unreasonable (either because of the answer to the preceding issue or for other reasons on the facts) then:

a) Can Hunt claim a hypothetical amount, representing what a reasonable settlement would have been? or

b) Does the settlement become irrelevant, thereby limiting Hunt to just the £43,512.88?

44. Because I have found that Whitehall had no claim against Hunt at all, preliminary issue (3) above raises the wider question of whether, if A settles with B, even if A has no liability to B in law, A can still seek to recover against C the sum paid pursuant to that settlement. Issue (4) above assumes that the settlement was unreasonable and considers whether or not, if it was unreasonable, the settlement can play any legitimate role in subsequent proceedings, or whether the claim must be limited to that which could be demonstrated to have been due in law and on the facts, irrespective of the terms and circumstances surrounding the settlement.

D2. The Authorities

45. Again, a large number of authorities were cited by Counsel in support of their respective submissions. I deal below briefly with those authorities, again endeavouring to take them in chronological order.

46. ***Biggin & Co Ltd v Permanite Ltd*** [1951] 2 KB 314 was a case in which Biggin accepted liability to the Dutch Government in the sum of £43,000 as a result of defects in the bituminous adhesive which they had supplied, which adhesive had originally been sold to Biggin by Permanite. They then sought to recover the £43,000 from Permanite. There was no dispute that Biggin were indeed liable to the Dutch Government for breach of contract. The Court of Appeal concluded that the Judge had been wrong to regard the settlement as irrelevant. If the settlement was reasonable, even if it was at the upper limit, it should be taken as the measure of damage. Somervell LJ said that the plaintiff had to lead evidence, which could be cross-examined, as to whether or not the sum paid was reasonable, and the defendant could endeavour to demonstrate that it was not reasonable. The defendant, he said, "might in some cases show that some vital matter had been overlooked". Singleton LJ considered that the only issue was concerned with the reasonableness of the damages and that, if the Judge was satisfied that the damages would be somewhere around the settlement figure, he would be justified in awarding that figure as damages. He said: *"The question is not whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one; and, in considering it, the court is entitled to bear in mind the fact that costs would grow every day the litigation continued. That is one reason for saying that it is sufficient for the purpose of the plaintiffs if they satisfy the Judge that somewhere around the figure of settlement would have been awarded as damages."*

47. In the course of his judgment, Somervell LJ referred to the much earlier case of ***Kiddle v Lovett*** (1885) 16 QBD 605. In that case, the employers of a painter who had been hurt at work settled his claim against them by paying him £125. They then sued the defendant company who had put up the platform on which the painter was working when he fell. Although it was held that the defendant was in breach of its contract, the court concluded that the plaintiffs had acted reasonably in engaging the defendant to put up the platform in the first place, and they had not, therefore, been liable in law to the injured painter. The court concluded that, because they had never been liable to the painter, the money that they had paid to settle his action was not recoverable as damages. In ***Biggin v Permanite***, Somervell LJ said that the case demonstrated that: *"…It is open to the defendant to show that the*

plaintiff was not liable to pay anything, and therefore could not say that what he did pay was a sum which he could recover against the defendant."

48. In ***Comyn Ching & Co Ltd Oriental Tube Co Ltd*** [1979] 17 BLR 47, the employer was Queen Mary College, who engaged Minter as main contractors to build two halls of residence. Comyn Ching were nominated sub-contractors and were instructed to use a particular steel piping manufactured by the Oriental Tube Company. Comyn Ching were not persuaded that the piping would work and so they obtained letters of guarantee from Oriental. Comyn Ching's fears were realised: the piping failed and had to be completely replaced. Queen Mary's College pursued both Minter and Comyn Ching for damages for breach of contract. Those claims were compromised by Comyn Ching, who then pursued Oriental for the sums paid out in the settlement. Oriental took the point that there could be no claim against them, because the College's original claim against Comyn Ching was hopeless, on the basis that Comyn Ching had provided precisely the pipes that they had been instructed to provide by the College. Thus, at first instance, the claim was dismissed. However, the Court of Appeal allowed the appeal, on the basis that the letters of guarantee provided an indemnity in respect of *'claims'*, which were construed as meaning "*all claims having a reasonable prospect of success*". Thus, the Court of Appeal held that a loss would be sustained in consequence of a claim if it arose from a reasonable settlement of a claim which had some prospect or a significant chance of success. On that ground alone, as Brandon LJ pointed out, the argument that the only claims covered by the letters were those in respect of which there was proven legal liability, was bound to fail. Because the case largely turned on this point of construction, the discussion as to ***Biggin v Permanite*** was limited, although Goff LJ (as he then was) said: *"It is clear that in **Fisher v Val de Travers** (1876) 45 LJNS 479, Lord Coleridge CJ put two questions to the jury: (1) Was it reasonable to compromise and (2) Was the sum paid reasonable. In **Biggin v Permanite** Somervell LJ said (at page 32) the two question are really only one and so of course, for his purpose they were because in his case the defendant admitted that he was liable to indemnify the plaintiff and the only issue was that of quantum. In practice I think they will generally be found to merge into one another, although for example, if a point was one which could be speedily and cheaply determined, it might not be reasonable as against the indemnifier to settle, though if there was going to be a settlement, the amount might be perfectly reasonable ... Either the settlement as a whole was good as between Ching and the defendants because it was reasonable, or it was bad against them, and for the reasons I have already given it was, in my view, reasonable and therefore, good."*

49. In ***The Sargasso*** [1994] 1 Lloyds Law Reports 412 Clarke J (as he then was) was dealing with the situation in which a claimant sought to recover as damages an amount which he had been ordered to pay to a third party by a foreign judgment. It was not therefore a settlement case at all. But the Judge dealt with the principle with which we are concerned, because it was relevant to submissions that were made as to the need on the part of the plaintiffs to establish liability. Clarke J said:

*"That decision [in **Biggin v Permanite**] supports the proposition that in a case where there has been a settlement the Court cannot apply the reasoning advanced by Mr Schaff, namely that the settlement ascertains the plaintiff's liability to a third party so that unless the plaintiffs have acted unreasonably in failing to mitigate their loss or the loss is too remote in law to be recoverable the amount of the liability is the true measure of damages for which the defendant is liable.*

If this were a settlement case I would regard myself as bound to hold that the plaintiffs would have to prove that the amount for which they had settled was reasonable. … it is not entirely clear whether [the Court of Appeal] thought that the Court should consider facts which were not known (and could not reasonably have been known) to the plaintiffs at the time the settlement was known. Mr Nolan submits that the statement of Lord Justice Singleton that the defendant might in some cases show that some vital matter had been overlooked shows that he thought that it was open to the defendant to rely upon evidence which was not available to the plaintiff at the time. I do not so read it. It seems to me that Lord Justice Singleton may have meant no more than that if the plaintiff overlooked a point which he ought to have taken, the amount of the agreement would not be regarded as the correct measure of damages in the subsequent action.

***Biggin v Permanite** is in my judgment authority for the proposition that in a settlement case the plaintiffs must establish that the amount for which they settled was reasonable and that if they do they are entitled to recover that sum from the defendants provided that the loss is not too remote to be recoverable. It seems to me that it remains to be decided in a future case whether, if the settlement was reasonable on the basis of the facts where they were or ought reasonably to have been known to the plaintiff at the time of the settlement and if the plaintiff acted reasonably to mitigate his loss, the measure of damages can be reduced by facts which came to light later and which he could not reasonably have ascertained at the time."*

50. In ***General Feeds Inc Panama v Slobodna Plovidba Yugoslavia*** [1999] 1 Lloyds Law Rep 688, the ship owners faced a claim from cargo insurers as a consequence of a cargo of fishmeal that had been damaged by fire, heat and smoke. The claim was for US $2.4 million. The cargo insurers claimed that the damage was caused by bad stowage. The ship owners said that the fire had been due to the condition of the fishmeal at the time of the shipment, and relied, in particular, upon the failure to treat it with anti-oxidant, in accordance with the prescribed rules. Notwithstanding this defence, the owners settled the claim brought by the insurers for US $600,000. The owners then pursued the charterers, alleging that the charterers were in breach of their contract because the cargo did not meet the contractual description of "anti-oxidant treated". The owners sought to recover the US $600,000, on the basis that the settlement payment was loss caused by the charterers' breach of contract. However the charterers defended the claim, alleging that there had been no real risk that the owners would have been held liable to the insurers, because the evidence indicated that the over-heating was not caused by bad

stowage, but by the condition of the cargo at the time of loading. The charterers therefore said that the owners had caused their own loss to the extent of the US £600,000 and that the settlement agreement was unreasonable.

51. The arbitrators concluded that the overheating was due to the condition of the cargo on shipment and not to bad stowage. They therefore held that the owners would have had a good defence to the claim brought by the cargo insurers, on the ground that the fault was not that of the stowage of the cargo in the ship, but the condition of the cargo at the time of shipment. However, the arbitrators concluded that the charterers were in breach of their contractual description obligations, and they concluded that the owners were entitled to US $400,000 out of the US $600,000 paid under the settlement agreement. The charterers endeavoured to appeal on the ground that, given that the arbitrators had found that the cargo insurers' claim was ill-founded, they should not have been found liable to the owners in respect of any part of the sums paid in settlement of that ill-founded claim. Colman J considered ***Biggin v Permanite*** and summarised its effect at page 691 as follows: *"The effect of these judgments is, in my view that, assuming that loss attributable to a payment in settlement is not too remote, the plaintiff must prove that the fact and amount of the settlement were reasonable in all the circumstances. Unless he proves that, he fails to establish that the loss was caused by the relevant breach of contract by the defendant, for if and to the extent that an unreasonable settlement has been entered into, the loss has been caused not by the breach but by the plaintiff's voluntary assumption of liability under the settlement. Proving the existence of the settlement thus goes only part of the way to proving the recoverable loss. It would also be consistent with the duty to mitigate a loss to hold that if and to the extent that a plaintiff is unable to establish that the settlement on which he founds his claim had been reasonably entered into, he has to that extent failed to mitigate his loss."*

52. Colman J also considered the decision of the Court of Appeal in ***Comyn Ching*** and went on, at the foot of page 691, to say this: *"In other words, when properly analysed, the overall exercise which the court must do is to consider whether the specified eventuality (in the case of an indemnity) or the breach of contract (in a case such as the present) has caused the loss incurred in satisfying the settlement. Unless the claim is of sufficient strength reasonably to justify a settlement and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant eventuality or breach of contract. That is not to say that unless it can be shown that the claim is likely to succeed it will be impossible to establish that it was reasonable to settle it. There may be many claims which appear to be intrinsically weak but which common prudence suggests should be settled in order to avoid the uncertainties and expenses of litigation. Even the successful defence of a claim in complex litigation is likely to involve substantial irrevocable costs. It is thus an every day event for ship owners or their P&I clubs to settle cargo damage claims based on allegations of bad stowage or unseaworthiness for well under 50% of the claim where the alternative explanation for the damage is the inherent condition of the goods or some other cause for which the owners are not liable. Unless it appears on the evidence that the claim is so weak that no reasonable owner or club would take it sufficiently seriously to negotiate any settlement involving payment, it cannot be said that the loss attributable to a reasonable settlement was not caused by the breach by reason of which the goods are in a damaged condition."*

Colman J also referred to ***The Sargasso*** and agreed with the passage in the judgment of Clarke J set out at paragraph 49 above.

53. Towards the end of his judgment in ***General Feeds,*** Colman J also addressed the specific issue as to whether it can ever be reasonable to settle a claim for which there was no liability in the first place. He distinguished ***Kiddle v Lovett*** (see paragraph 47 above) on the grounds that the case was one where the claim that was the subject of the settlement was so hopeless that it was too weak to be left to a jury, and accordingly, the cause of the loss was not the defendant's breach of contract, but the plaintiff's decision to settle under a mistaken belief as to their own liability. He said:

*"Following **Comyn Ching & Co Ltd Oriental Tube Co Ltd** it would now be said that because the claim by Chalkley [the painter in **Kiddle**] was so hopeless, the settlement was unreasonable. It is clear, however, that in order to recover in respect of a settlement it is not necessary to prove that the claim settled would have succeeded or would probably have succeeded. It is enough to establish that it had sufficient substance for the settlement of it to be regarded as reasonable. Indeed, in **Comyn Ching & Co Ltd Oriental Tube Co Ltd** the trial Judge concluded that the settling party was not liable to the employer and therefore could not recover under the indemnity whereas in the Court of Appeal, in the face of that finding, it was held that it was sufficient to show that the employer "had a case or might reasonably have established a case".*

At the end of the day, the question whether the claim is so weak that no settlement can be reasonable or that the amount of the actual settlement is not reasonable must be a question of fact for the arbitrators, just as any other question of causation is a question of fact. Unless the arbitrators fail to apply the correct principles of law to the evaluation of that question, there can be no basis for disturbing their award …"

54. Mr Althaus also drew my attention to a more recent decision of Colman J in ***BP Plc v Aon Ltd & Ors*** [2006] EWHC 424 (Comm). It is unnecessary for me to deal with that case in any detail because Colman J cited the passage from ***General Feeds*** identified in paragraph 52 above, and it does not appear that any further points were taken in relation to those principles.

55. Also in 1999, there was the decision of His Honour Bowsher QC in ***P&O Developments Ltd v Guys and Thomas' National Health Service Trust & Ors*** [1999] BLR 3. In that case the Judge concluded that there were two reasons why an agreement that had been made with a person who was not a party to the action was relevant and

admissible. The first was by operation of a rule of evidence, as part of the policy of the courts to encourage settlements. Thus, if a third party's claim was settled, proof of that settlement was some evidence of its true value, although it was not conclusive. The settlement set a maximum value to the claim.

56. Secondly, Judge Bowsher concluded that the settlement was relevant pursuant to the second rule in ***Hadley v Baxendale*** (1854) 9 Ex 341. The reasonable settlement of claims was a matter which the parties may be held to have had in reasonable contemplation under the second limb of ***Hadley v Baxendale***. The Judge went on to point out that, in **P & O**, the report which had formed the basis of the settlement appeared to be based on inadequate information, and that it would be a matter of evidence whether or not the report was a reasonable assessment of liability in all the circumstances.

57. I should add, for completeness, that I was also referred to the decision of Cresswell J in ***The Marseilles*** [2002] EWHC 2622, although that merely cites from some of the authorities noted above. I do not regard it of any additional assistance.

58. Finally Mr Selby referred to paragraph 8-031 of **Keating on Construction Contracts**, 8th Edition, in which the learned Editors say this: *"Where a defendant's breach of contract renders the claimant liable to a third party, the claimant can normally recover the amount of that liability as damages for the breach provided it is not too remote. If the claimant reasonably compromises the third-party liability, the amount paid under the compromise is admissible prima facie evidence of the loss caused by the defendant's breach, although further evidence may be adduced to determine the actual loss. The claimant must prove that the settlement was reasonable but does not have to prove strictly the claim made against him in all its particulars.* ***It will usually also be necessary to establish the claimant's liability to the third party and the defendant's liability to the claimant, since evidence of the compromise is relevant only to the measure of damages"*** (My emphasis).

D3. Analysis

59. The passage from **Keating on Construction Contracts** cited in the preceding paragraph makes a convenient jumping-off point for the analysis of preliminary issue 3, in respect of the reasonableness of the settlement. It is the bedrock of Mr Selby's submissions that Hunt must establish their liability to Whitehall and Build, as well as ASME's liability to Hunt, before the sum paid in settlement becomes the measure of damage. He argued that this was because ***Biggin v Permanite*** was only concerned with quantum, and did not represent a method of establishing liability. For this reason, he contended that, in the present case, Hunt's failure to realise and/or act upon the absence of any liability on their part to Whitehall meant that the settlement was irrelevant or, at the very least, unreasonable. Thus, if the use of the word 'usually' in the highlighted passage in **Keating** set out above is taken to connote some sort of legal principle (rather than simply reflecting that, in the ordinary case, proof or agreement of A's liability to B will be an inherent feature of A's subsequent case against C), then that would go much of the way towards establishing Mr Selby's submission. Indeed, given that this is said to be an issue of principle, not fact, this was how Mr Selby was obliged to put his case.

60. However, I am not persuaded that the authorities cited above, many of which are identified in the footnotes to paragraph 8-031 of **Keating**, support the submission that A must prove his liability to B before utilising the principle in ***Biggin v Permanite*** to recover against C the sum paid in settlement. Thus, in my judgment, if and to the extent that the passage in **Keating** suggests that there is such a principle, it goes too far. Of course, ***Biggin v Permanite*** itself was a case in which there was no question as to the liability of Biggin to the Dutch Government, so it is therefore unsurprising that it dealt solely with the question of measure of loss. But subsequent cases have demonstrated that the courts have, from time to time, utilised the principle in ***Biggin v Permanite*** where a reasonable settlement could be demonstrated in all the circumstances, regardless of the ultimate liability of A to B. Thus, although Comyn Ching had no liability in law to the College, the Court of Appeal still concluded that it was reasonable for them to settle with the College and claim the sum paid in settlement against Oriental Tube.

61. In addition, I consider that the judgment of Colman J in ***General Feeds*** provides a cogent explanation of the proper approach in cases of this sort, where A's liability to B may be difficult, if not impossible, to establish. The court must consider whether the breach of contract caused the loss incurred in satisfying the settlement. Unless the claim was (or was reasonably considered to be) of sufficient strength reasonably to justify a settlement, and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant breach of contract. On the other hand, the settlement of an intrinsically weak claim in order to avoid the uncertainties and expenses of litigation may well be reasonable; on Colman J's analysis (with which I respectfully agree) a claim will usually have to be so weak as to be obviously hopeless before it could be said that the settlement of the claim was unreasonable. In my view, in the passages of his Judgment in ***Comyn Ching*** that I have cited above, Colman J provided an answer to preliminary issue 3 ("it is not necessary to prove that the claim settled…would probably have succeeded") and provided the clearest guidance as to the appropriate test to be applied ("it is enough to establish that [the claim] had sufficient substance for the settlement of it to be regarded as reasonable").

62. In addition, I should also refer to the associated problem of the time at which the weakness (or otherwise) of the claim is to be ascertained and on what evidence a court might conclude that, because A was not liable to B, the settlement was unreasonable. What if A reasonably thought, at the time of the settlement that there was a liability to B, only for it to emerge later that, following a landmark decision of the House of Lords, there was not? The authorities again suggest that the question of reasonableness has to be judged at the time of the settlement, not at a later date, although it is right to note that, as Clarke J pointed out in ***The Sargasso*** in the passage of his

Judgment cited at paragraph 49 above, this point has not been definitively decided. Again, that only serves to emphasise that this is an area of law where the points of principle are few, whilst the possibilities on the facts are many and varied.

63. Accordingly, to the extent that preliminary issue 3 raises a matter of principle, I consider that the answer is No. The authorities cited above do not demonstrate any rule or principle of law that A must prove that he was liable to B before recovering against C the sums which he paid to B by way of settlement. Of course, that is not to deny that, in the vast majority of cases, that liability will either be agreed by A and C or will, on investigation, be demonstrated. But there will be some cases, like ***Comyn Ching*** and ***General Feeds*** where, even though investigation of the underlying facts demonstrated that there was in truth no liability at all, the settlement of the claim that had been made was found to be reasonable in all the circumstances. Furthermore, it seems to me that this is entirely in accordance with normal rules of foreseeability and remoteness of damage. It must be reasonably foreseeable, at the time that the contracts were made between A and C, that A might settle a claim brought by B arising out of the same subject matter, even if, on a detailed analysis, A's legal liability to B might actually be hard or even impossible to establish.

64. The authorities demonstrate that questions of reasonableness of settlement are almost exclusively matters of fact. Whether or not the settlement between Hunt and the Kier companies was reasonable will be a matter of fact for the trial, and I cannot take that further at this stage without hearing some evidence. But, as a matter of principle, it seems to me that the mere fact that Hunt settled with the Kier companies when they had no liability to Whitehall at all (and therefore no liability for two-thirds of the sum originally claimed and two-thirds of the sum paid) does not, on its own, render that settlement unreasonable.

65. Preliminary issue 4 is concerned with whether, if the settlement was shown to be unreasonable for any reason, it becomes irrelevant altogether or whether, as Mr Althaus contends, Hunt can still rely on it, but only up to the amount that would represent a reasonable settlement. Again, whilst it seems to me that that question can be answered as a general matter of principle, the outcome is again likely to be dictated by the facts. However, I set out my brief conclusions on the point of principle below.

66. In my judgment, the settlement between Hunt and the Kier companies was either reasonable or it was not. If it was reasonable then, prima facie, Hunt can recover the £152,500. As I have said, whether or not it was reasonable will turn on the facts. However, if that settlement was not reasonable on the facts, then, prima facie, the settlement has no evidential value (see ***P&O***). Moreover, the amount paid pursuant to an unreasonable settlement agreement would not be recoverable under the second limb of ***Hadley v Baxendale***, because it would be unforeseeable; to put it another way, the payment of an unreasonable sum by Hunt to the Kier companies would break the necessary chain of causation as between ASME and the sum paid. The unreasonable settlement may well therefore become altogether irrelevant. That is what I take Goff LJ to mean when he said in ***Comyn Ching*** that the settlement was 'either good or bad': if it was bad, it seems to me that it cannot be relied on at all.

67. If, on the facts, the settlement is unreasonable, then in the ordinary case, the settlement will become irrelevant to the calculation of the true measure of loss: as Somervell LJ put it in ***Biggin v Permanite*** itself, if the settlement is reasonable, it is the measure of loss; it must therefore follow that, at least in the ordinary case, if the sum paid is not reasonable, it is not the measure of loss. In such circumstances, Hunt would be left to claim the direct losses they have suffered as a result of ASME's breach of contract: see, by way of example only, ***Bence Graphics International Ltd v Fasson UK Ltd*** [1998] Q.B. 87. In this case, such a claim would appear to have a maximum value of £43,512.88.

68. I accept that there may be many cases where the court will conclude, on the facts, that, for example, from a settlement made up of 4 discrete items, items 1, 2 and 3 were payable by A to B, and item 4 was not. A lesser sum (made up of items 1, 2 and 3 but excluding item 4) may then be identified as the reasonable sum which was recoverable by A against C. In my judgment, that is the sort of case that Colman J had in mind when, in the passage from ***General Feeds*** cited at paragraph 51 above, he uses the phrase 'if and to the extent that…'But I cannot see, without knowing all the relevant facts, any difference in principle between that situation, and the submission by ASME in the present case that, if there was no duty of care owed by Hunt to Whitehall, then the settlement at £152,500 was unreasonable and the maximum value of the original claim against Hunt, and therefore the current claim against ASME, was £43,512.88.

69. It seemed to me that Mr Althaus was urging upon me a type of 'near-miss' theory, in which a party who had paid out pursuant to an unreasonable settlement might not be able to recover the excessive sum that he paid, but could instead ask the court to identify a hypothetical reasonable figure (which would be more than the sum, if any, that was actually due from A to B, but less than the sum actually paid in settlement) as the measure of loss recoverable against C. He was unable to identify any previous case where such an approach had been argued as a matter of principle, let alone accepted by the Courts. Although he sought to rely on ***General Feeds***, that was a case where the settlement was expressly found to be reasonable, whilst, as I pointed out to him in the course of argument, preliminary issue 4 is predicated on the assumption that the settlement was unreasonable. For the reasons which I have outlined, I consider that such an approach would generally be contrary to the principles set out above, although I must emphasise (as I emphasised during argument) that these kinds of disputes are notoriously fact-sensitive.

70. I also consider that there is force in Mr Selby's submission that, absent a reasonable settlement, Hunt's claim against ASME would be for those sums for which they were liable in law to Build, and that ASME's liability should not in principle be increased by reference to negotiations in which they did not participate, and which led to a settlement which, on this hypothesis, was unreasonable.

71. For these reasons, therefore, to the extent that the point is one of principle, I consider that the answer to preliminary issue 4 is 4(b) and not 4(a): a sum paid by A to B pursuant to an unreasonable settlement is, prima facie, not recoverable against C, and, in such an eventuality in the present case, the maximum value of Hunt's claim against ASME would be £43,512.88.

72. I propose to deal with all outstanding issues arising from this Judgment on the preliminary issues at the time that it is handed down.

Mr Justin Althaus (instructed by Plexus Law) for the Claimant
Mr Jonathan Selby (instructed by Edwin Coe) for the Defendant