

HOUSE OF LORDS before Lord Bingham of Cornhill Lord Mackay of Clashfern Lord Steyn Lord Hope of Craighead Lord Rodger of Earlsferry 25th April 2002.

JUDGMENT : LORD BINGHAM OF CORNHILL : My Lords,

1. I agree that this appeal should be dismissed for the reasons given by my noble and learned friend Lord Hope of Craighead, whose summary of the facts, the contract and the legislation I gratefully adopt and whose abbreviations I use. I also agree with the reasons given by my noble and learned friend Lord Rodger of Earlsferry for reaching the same result.
2. CRS commissioned Wimpey as main contractor to build a large new office block. Hall was the electrical sub-contractor. TYP and HLP were engaged as architects and consulting engineers respectively. Within the extended period for completion of the contract the new building was extensively damaged by fire. For purposes of legal argument at this stage it is assumed (although it has not been proved) that the fire was caused by negligence in breach of their respective contracts on the part of each and all of Wimpey, Hall, TYP and HLP. CRS has claimed damages against TYP and HLP, who have in turn claimed contribution against Wimpey and Hall under section 1(1) of the Civil Liability (Contribution) Act 1978. TYP and HLP would in principle be entitled to such contribution, if any, as is found to be just and equitable under section 2 of the Act, but only if Wimpey and Hall are persons liable to CRS, together with them, in respect of the same damage. In this appeal the issue does not, as in *Royal Brompton Hospital National Health Service Trust v Hammond* [2002] UKHL 14, relate to the identity of the damage; the issue is whether Wimpey and Hall are "*liable*" to CRS, because if they are not they cannot be called upon to contribute.
3. In the ordinary way, and in the absence of any contractual exemption or limitation or statutory immunity, a party who breaches a contract with or commits a tortious act against another is liable to that other. Where there are multiple breaches or tortious acts many parties may be so liable. The 1978 Act provides, in the cases to which it applies, for the sharing of common liabilities. Our code of civil procedure is designed to enable claims, cross-claims and claims against third parties to be resolved justly, consistently, comprehensively and expeditiously.
4. It is however open to contracting parties (subject to certain statutory constraints not relevant for present purposes) to vary by agreement the ordinary rules which impose legal liability for breaches of contract or tortious acts on those responsible for committing them. The House recently had occasion to consider such a scheme in *Caledonian North Sea Limited v British Telecommunications Plc (Scotland) etc* [2002] UKHL 4 where the parties, in accordance with the prevailing practice in the offshore oil industry, agreed that liability for death or personal injury should in general be borne by the employer of the victim, whether or not the employer had broken its contract with the victim or committed any tortious act against him. *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211 considered another such scheme, very different on its facts but somewhat similar in principle. In the present case, it is said, CRS had agreed with Wimpey and Hall that in a contingency such as is assumed to have arisen it should not be entitled to recover compensation from them, with the result that they are not liable in respect of the damage suffered by CRS (section 6(1) of the Act) and TYP and HLP cannot accordingly recover contributions from them (section 1(1) of the Act). Two main questions in my opinion arise:
 - (1) Is the contingency which, on the assumed facts, has arisen one for which CRS, Wimpey and Hall made express provision in the contracts into which they entered?
 - (2) If so, is the effect of that provision such as to preclude, on the assumed facts, a claim for compensation by CRS against Wimpey or Hall?
5. As Lord Hope has convincingly demonstrated, the answer to question (1) is plainly Yes. Fire was one of the specified perils defined in clause 1.3 of the main contract against which Wimpey was obliged by clauses 22A.1 and 22.3.1 to take out and maintain all risks insurance providing cover or protection for (among others) itself and Hall. Clause 22A made detailed provision for investigating, repairing and paying for damage caused by fire to the works included in the main contract and clause 25 provided for time to be extended to allow for delay thereby caused. No doubt because fire is not a rare or

unforeseen event, the standard forms of contract used by CRS, Wimpey and Hall made detailed arrangements to govern the consequences if it should unhappily occur.

6. As Lord Hope has again convincingly demonstrated, the answer to question (2) is also Yes. Under clause 20 of the main contract Wimpey accepted a liability against which (by clause 21) it was obliged to insure. But damage to the new works to be carried out under the main contract was expressly excluded from the scope of clause 20, and clauses 22 and 22A applied to such damage a markedly different contractual regime. If damage were caused to the new main contract works by fire Wimpey was obliged to make it good (clause 22A.4.3) and was to be paid for doing so out of a fund provided by insurers under the joint names policy (clause 22A.4.4) and not otherwise (clause 22A.4.5). The contractual scheme did not protect CRS and Wimpey (or Wimpey's sub-contractors) against the possibility of loss if damage was caused to the new works by fire. Such fire damage would in all probability lead (as in this case it did) to an extension of the contract period, which would be a source of loss to CRS for which it could not recover liquidated damages. The extension would also involve expense for Wimpey and its sub-contractors for which they would not be fully compensated. Thus the contract provided for loss to be shared between CRS, Wimpey and Wimpey's sub-contractors. But it plainly precluded any claim for compensation by CRS against Wimpey or a sub-contractor such as Hall: their duty was to make good, not to compensate.
7. Under the contract and Wimpey's all risks insurance policy, CRS would be effectively indemnified by the insurers' provision of a fund enabling it to pay Wimpey for repairing the fire damage. The insurers could not then make a subrogated claim against Wimpey because Wimpey was a party co-insured (with CRS) under the policy, and the insurers would be obliged to indemnify Wimpey against any liability which might be established, an obvious absurdity. The rationale of this rule may be a matter of some controversy (although I lean towards the explanation favoured by the Court of Appeal) but the rule itself is not in doubt. Similarly, the insurers could not make a subrogated claim against Hall, because Hall also was a party co-insured (with CRS) under the policy. Thus any claim by CRS against either Wimpey or Hall was effectively barred.
8. It is of course theoretically possible that a contractor in Wimpey's position might fail in breach of contract to perform its duty to make good under clause 22A.4.3 (although that is not what happened here: Wimpey duly did what it was contractually bound to do). If it did default, the employer would have a claim for damages for breach of contract. But it would be a claim arising from breach of the contractual obligation to make good and not from negligence in causing the fire, and that is not damage for which architects or consulting engineers could themselves be liable.
9. I agree, for reasons persuasively given by the Court of Appeal, that the liability of a person in respect of damage suffered by another person is to be judged as at the date when contribution is claimed against him.
10. TYP and HLP complain with some force that the conclusion expressed above may lead to a very inequitable result: the bearing of the entire financial consequences, of a catastrophe by a party which may have had a very minor responsibility for causing it. This is indeed a possible outcome, and may be the case here. But this is the effect of the standard form contract which CRS, Wimpey and Hall made, and it is a standard form of which TYP, HLP and their professional indemnity insurers must be taken to have been aware. It would no doubt have been open to TYP and HLP to seek to be included as co-insured in the joint names insurance, or to have made other arrangements. In reality, the present issue arises between TYP and HLP's indemnity insurers on one side and the joint names insurers on the other. The latter have provided the full indemnity they undertook to give. The real complaint of the former is the failure to take steps to guard against the contingency which has in fact occurred, a contingency which could in my opinion have been foreseen had the right questions been asked at the right time.

LORD MACKAY OF CLASHFERN : My Lords,

11. I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Rodger of Earlsferry. I agree with them that this appeal should be dismissed for the reasons they give. I also agree with Lord Hope of

Craighead in his conclusions on the two further points which were raised in argument, although these conclusions are not necessary for the determination of the present appeal.

LORD STEYN : My Lords,

12. For the reasons given by my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Rodger of Earlsferry, I would also dismiss the appeal.

LORD HOPE OF CRAIGHEAD : My Lords,

13. On 16 March 1995 a fire occurred at a site in Rochdale where a new head office headquarters building was being constructed for Co-operative Retail Services Ltd ("CRS"). The generator was being commissioned, and the works were already far advanced. But the certificate of practical completion had not yet been issued. The building was extensively damaged, and CRS sustained loss for which they seek damages in this action. They allege that the fire resulted from negligence or breach of contract on the part of their architects, Taylor Young Partnership Ltd ("TYP"), and their mechanical and engineering consultants, Hoare Lea & Partners ("HLP"). TYP and HLP have joined as third parties the main contractors, Carillion Construction Ltd (formerly Wimpey Construction UK Ltd ("Wimpey")), and the electrical sub-contractors, East Midlands Electricity Electrical Installations Services Ltd (trading as Hall Electrical ("Hall")). TYP and HLP allege that the fire was caused by breaches of the main contract by Wimpey and by breaches by Hall of a warranty entered into by Hall with CRS and Wimpey. This appeal follows the trial of a preliminary issue between TYP and HLP on the one hand and Wimpey and Hall on the other.
14. The preliminary issue arises in this way. As is commonplace in major construction projects, contractors' all risks insurance cover against physical loss and damage to the works and materials on site caused by fire was provided by means of a joint names policy which insured CRS, Wimpey and any sub-contractor including Hall. The purpose of this arrangement was to keep to a minimum the difficulties that are bound to arise where several different parties are working on a construction site. It had the obvious advantage of making it unnecessary for any investigation to be carried out into the duties owed to each other by the various parties under their respective contracts in the event of loss or damage to the works from a cause such as fire. But the separate interests of TYP and HLP, who had their own insurance arrangements, were not covered by this policy.
15. It is to be assumed for present purposes that the various allegations which the parties make against each other can be proved and that the fire resulted from breaches of obligation on the part of each and all of them. The losses claimed by CRS consist of (i) the cost of works of reinstatement, (ii) the cost of associated professional fees and (iii) losses consequential on delay. The losses falling under the first two of these three categories were borne by the insurer under the joint names policy. The losses falling under the third category were borne by a different insurer under a separate insurance in the name of CRS.
16. It is common ground that CRS's insurers, acting through rights of subrogation, could not pursue in CRS's name an action against Wimpey or Hall, since all three parties were all insured against the same risk under the same insurance policy. TYP and HLP nevertheless claim that they are entitled to seek a contribution from Wimpey and Hall under section 1 of the Civil Liability (Contribution) Act 1978. They do so on the basis that Wimpey and Hall are liable to pay compensation to CRS in respect of the same damage as that for which they themselves are said to be liable. The question is whether this argument can be maintained, having regard to the provisions of the main contract, the sub-contract, the joint names policy and the 1978 Act.
17. On 21 December 1999, following a trial of the preliminary issue in the Technology and Construction Court, Judge Wilcox held that TYP and HLP were not entitled to maintain their claim for a contribution from either Wimpey or Hall in these circumstances. On 4 July 2000 the Court of Appeal (Peter Gibson, Brooke and Robert Walker LJJ) affirmed the decision of the trial judge and dismissed the appeal by TYP and HLP, who have now appealed against this decision to your Lordships' House.

The facts

18. The main contract between CRS and Wimpey was entered into on 8 April 1993. It incorporated the JCT Standard Form of Building Contract 1980 Edition, Private with Quantities, incorporating amendments 1-2 and 4-11. The sub-contract between Wimpey and Hall was entered into on 25 March 1993. It incorporated the Sub-Contract Conditions for use with the Domestic Sub-Contract DOM/1 1980 Edition, with amendments 1-3 and 5-9, published by the Construction Confederation. On 11 October 1993 Hall entered into warranty with CRS and Wimpey to the effect that it had exercised and would exercise all reasonable skill and care in the performance of the sub-contract.
19. The contractual date for completion of the main contract was 23 December 1994. During the course of the works TYP issued extensions of time under clause 25 of the main contract covering the period up to 18 September 1995. Practical completion was certified under clause 17 on 26 February 1996. A certificate of non-completion was issued under clause 24 on 21 November 1997, in respect of which Wimpey paid liquidated damages to CRS for the period from 18 September 1995 to 26 February 1996. In the result, the whole of the time from the original contractual completion date to the date of practical completion has been accounted for either by the granting of extensions of time by TYP or by the deduction from the contract sum of liquidated damages.
20. Clause 2.1 of the conditions of the contract between CRS and Wimpey describes the contractor's primary obligations under the main contract in these terms: *"The contractor shall upon and subject to the conditions carry out and complete the works in compliance with the contract documents, using materials and workmanship of the quality and standards therein specified, provided that where and to the extent that approval of the quality of materials or of the standards of workmanship is a matter for the opinion of the architect, such quality and standards shall be to the reasonable satisfaction of the architect."*

The "works", as defined in clause 1, were those briefly described in the first recital to the contract as "the construction of a five storey office building and associated external works at Ashfield Valley, Rochdale" and shown upon, described by or referred to in the contract documents including any changes made to those works in accordance with the contract.
21. Clause 20 of the main contract deals with injury to persons and property. Clause 20.1 provides that the contractor is to be liable for all claims for personal injury arising out of or in the course of or caused by the contract works and for the employer to be indemnified by the contractor against any liability for any such claims. In regard to liability for damage to property, clause 20.2 provides: *"The contractor shall, subject to clause 20.3 and, where applicable, clause 22C.1, be liable for, and shall indemnify the employer against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the carrying out of the works, and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the contractor ..."*

Clause 20.3 however, to which clause 20.2 is subject, provides: *"the reference in clause 20.2 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 certificate of practical completion ..."*
22. Clause 21 provides that the contractor shall take out and maintain insurance in respect of claims arising out of his liability in clauses 20.1 and 20.2. Insurance of the works, injury or damage to which is the subject of the exception stated in clause 20.3, is provided for in clauses 22 and following. Clause 22.1 provides for a choice to be made between three alternative clauses. Clause 22A applies to the erection of new buildings where the contractor is required to take out a joint names policy for all risks insurance for the works. Clause 22B applies where the employer has elected to take out such a joint names policy. Clause 22C is to be used for alterations of or extensions to existing structures under which the employer is required to take out a joint names policy for all risks insurance for the works and also a joint names policy to insure the existing structures and their contents against loss or damage thereto by perils such as fire. As this was a contract for the erection of new buildings and Wimpey were required to take out the joint names policy, the relevant clause in this case was clause 22A.

23. Clause 22A .1 provides: *"The contractor 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 (plus the percentage, if any, to cover professional fees stated in the Appendix) and shall ... maintain such joint names policy up to and including the date of issue of the certificate of practical completion or up to and including the date of determination of the employment of the contractor ... whichever is the earlier."*

The phrase *"all risks insurance"* is defined in clause 22.2 as insurance which provides cover against any physical loss or damage to work executed and site materials, subject to certain exceptions which are not material to this case. Clause 22.3 provides that nominated and domestic sub-contractors are to have the benefit of the joint names policy referred to in clause 22A in respect of loss or damage by the specified perils to the works and site materials. The phrase *"specified perils"* as defined in clause 1.3 includes fire.

24. Clause 22A.4 provides:

"22A.4.1 If any loss or damage affecting work executed or any part thereof or any site materials is occasioned by any one or more of the risks covered by the joint names policy referred to in clause 22A.1... then, upon discovering the said loss or damage, the contractor shall forthwith give notice in writing both to the architect and to the employer of the extent, nature and location thereof.

22A.4.2 The occurrence of such loss or damage shall be disregarded in computing any amounts payable to the contractor under or by virtue of this contract.

22A.4.3 After any inspection required by the insurers in respect of a claim under the joint names policy referred to in clause 22A.1 has been completed, the contractor with due diligence shall restore such work damaged, replace or repair any such site materials which have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the works.

22A.4.4 The contractor, for himself and for all nominated and domestic sub-contractors who are, pursuant to clause 22.3, recognised as an insured under the joint names policy referred to in clause 22A.1... shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 22A.4.1 to the employer. The employer shall pay all such monies (less only the percentage, if any, to cover professional fees stated in the Appendix) to the contractor by instalments under certificates of the architect issued at the period of interim certificates.

22A. 4.5 The contractor shall not be entitled to any payment in respect of the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris other than the monies received under the aforesaid insurance."

25. Clause 23 provides for possession of the site to be given to the contractor, who is thereupon to begin the works, proceed with them and complete the same on or before the completion date. Clause 24 provides for the payment or allowance of liquidated damages in the event of the contractor's failure to complete the works by the completion date. Clause 25.3.1 gives power to the architect to give to the contractor an extension of time for their completion if he is of the opinion that the cause of the delay is a relevant event and the completion of the works is likely to be delayed thereby beyond the completion date. Clause 25.4.3 provides that one of the relevant events referred to in clause 25 is loss or damage occasioned by any one or more of the specified perils which, as already mentioned, includes fire. Clause 26 provides for payments to be made to the contractor for loss and expense in the event that the regular progress of the works is materially affected by any one or more of the matters referred to in clauses 26.2. But the matters referred to in clause 26.2 do not include any of the specified perils, and in particular they do not include fire.
26. The effect of these clauses is that the contractor is not liable to pay compensation to the employer for loss and damage to the works which may have been caused by fire prior to the date of practical completion. Clause 20.3 excludes the contractor's liability for any such loss or damage, even though the fire was caused by his negligence, breach of statutory duty or default. Instead the funds necessary to pay for the restoration of the physical damage caused to the works by fire, including the associated professional fees, are to be provided by means of insurance under the joint names policy. As for delay caused by the fire, the contract leaves it to each party to bear its own losses arising from the delay. The employer cannot claim damages from the contractor for any delay which the fire may have caused to

the completion of the works. This is because the contractor is entitled to an extension of time for their completion under clause 25. The additional cost of extending the period for the completion of the contract works falls on the contractor, as he is not entitled to payment for this additional loss and expense under clause 26.

27. These features of the clauses which regulated the main contract between CRS and Wimpey are reproduced in the clauses which regulated the sub-contract between Wimpey and Hall. Clause 6.3 of the conditions of the sub-contract provides that the sub-contractor shall be liable for and 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 in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the sub-contract works. But clause 6.4 provides: *"The liability and indemnity to the contractor referred to in clause 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."*

Clause 6.1 provides that the term "**terminal dates**" means the date of practical completion of the sub-contract works, the date of the issue of the certificate of practical completion of the works under clause 17.1 of the conditions of the main contract or the date of the determination of the employment of the sub-contractor.

28. Clause 8.1 of the conditions of the sub-contract, which deals with loss or damage to the works and to the sub-contract works, provides that clause 8A shall apply where it is stated in the appendix to the sub-contract that clause 22A shall apply to the main contract. Clause 8.5 provides: *"The occurrence of loss or damage affecting the sub-contract works occasioned by one or more of the specified perils shall be disregarded in computing any amounts payable to the sub-contractor under or by virtue of this sub-contract."*

Clause 8A.1 provides: *"The contractor shall, prior to the commencement of the sub-contract works, ensure that the joint names policy referred to in clause 22A 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."*

Clause 11 provides for the extension of time for the completion of the sub-contract works by reason of delay caused by a relevant event as defined in clause 11.10, which includes loss or damage occasioned by one or more of the specified perils such as fire.

29. The contractual arrangements between CRS and Wimpey and between Wimpey and Hall were supplemented by the warranty which was entered into between CRS, Wimpey and Hall, by which Hall warranted that it had exercised and would exercise all reasonable care and skill in the design of the sub-contract works, in the selection of the kinds of materials and goods for the sub-contract works and the satisfaction of any performance specification or requirement included or referred to in the description of the sub-contract works. The requirements of clause 22A of the main contract were fully complied with by Wimpey, by whom a contractors' all risks insurance policy in the joint names of the contractor, the employer and any subcontractor was effected with Commercial Union Assurance Co plc. Subject to a small deduction described in the policy as the insured's retained liability, the cost of the reinstatement works and the associated professional fees resulting from the fire was fully covered by the joint names policy.
30. Section 1 of the Civil Liability (Contribution) Act 1978 provides:
- "(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise). ...*
- (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he*

ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based. ...

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage. ... "

31. Section 2(3) of the 1978 Act provides: *"Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to - (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred; ... the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced."*
32. Section 6(1) of the 1978 Act provides: *"A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."*

The issues

33. The claims which are made by TYP and HLP, in terms of the third party notices which they have served on Wimpey, are for an indemnity or a contribution from Wimpey pursuant to section 1 of the 1978 Act. This is sought if and to the extent that CRS proves that TYP and HLP are liable to it in respect of the fire, and for such, if any, losses as CRS may prove to be recoverable in the action which it has raised against them. The claims for relief against Wimpey are made on the ground that the start of the fire was caused or contributed to by breaches by Wimpey of one or more terms of its contract with CRS. The claims for an indemnity or a contribution against Hall are made on the ground that Hall is liable to CRS in contract for breach of its warranty.
34. As Brooke LJ explained in his judgment in the Court of Appeal, [2000] 2 All ER (Comm) 865, 869-870, paras 5 and 6, it is common ground that CRS's insurers, acting through rights of subrogation, cannot pursue in CRS's name an action against Wimpey or Hall, since all three parties are insured against the same risk under the same insurance policy. But TYP and HLP say that this principle is not effective to prevent them from claiming an indemnity or a contribution from Wimpey and Hall under section 1(1) of the 1978 Act. Wimpey and Hall, for their part, have two answers to this argument. The first is that, as they had a complete defence in contract to any claim that CRS might bring against them for the fire damage, they are not "persons liable in respect of the same damage" within the meaning of section 1(1) of the Act as that for which TYP and HLP are liable. The second is that any such claim is barred by the fact that they and CRS are all insured under the same joint names policy, as Wimpey and Hall would simply have passed on the claim to the insurers who had caused the action to be raised in the first place.
35. Against this background the first question in this appeal relates to the meaning and effect of the main contract between Wimpey and CRS. It is whether on its proper construction the effect of the main contract was to exclude Wimpey's liability to CRS for loss and damage caused by the fire in so far as this was due to its breach of contract; or whether its effect was that Wimpey was liable to pay compensation to CRS for the loss and damage which it sustained in the fire except to the extent to which the amount of such loss and damage was recoverable from the insurers under the joint names policy.
36. Mr Blackburn QC for TYP and HLP accepted that, if the effect of the main contract was to exclude Wimpey's liability to pay compensation to CRS for the fire damage, that would be an end of the appeal. He accepted that no distinction was to be drawn as to the result in Wimpey's case between the cost of making good the fire damage which was covered by the joint names policy, and the losses consequential on the delay to the project which were not covered by that policy. This was because the occurrence of the fire was an event which entitled Wimpey to an extension of time under its contract with CRS. The effect of its agreement with CRS was to place a limit on CRS's entitlement to damages

within the meaning of section 2(3)(a) of the 1978 Act which excluded any liability in damages for the delay.

37. Mr Blackburn also accepted that, if the effect of the main contract was that Wimpey was not liable to CRS for loss and damage caused by the fire, it would not be open to him to argue that Hall was liable to CRS in respect of that loss and damage on the ground that Hall was in breach of its warranty. This was because the contractual arrangements between the parties would preclude any such claim. But he submitted that, if the effect of the contractual arrangements was that Wimpey and Hall were liable to pay compensation to CRS for the cost of making good the fire damage except to the extent that its losses were recoverable under the joint names policy, Hall (unlike Wimpey) was also liable to CRS for losses caused by the delay. This was because there was no provision in the warranty given by Hall which imposed a contractual limit on the amount of its liability to CRS in damages.
38. The second question relates to the effect of the joint names policy. It arises only if the liability of Wimpey and Hall for the fire damage was not excluded by their contractual arrangements with CRS. It is whether Wimpey and Hall are liable in respect of the same damage as TYP and HLP on the ground that they are persons from whom CRS were entitled to recover compensation in respect of that damage within the meaning of section 6(1) of the 1978 Act, despite the fact that they and CRS were all insured against the fire damage under the same insurance policy.

Were Wimpey and Hall ever "liable" to CRS in respect of the fire damage?

39. The issue which lies at the heart of this question is whether the effect of the contractual arrangements between these parties is to be taken to be that Wimpey and Hall were never under any obligation to pay compensation to CRS for fire damage caused by their negligence, omission or default, as the entire cost of making it good was to be recovered from the insurers under the joint names policy; or whether they were under an obligation to pay compensation for that damage to CRS until it was made good in the event that the insurance cover failed or proved to be inadequate.
40. The argument for TYP and HLP is that the latter alternative is the true effect of these arrangements. They rely on what was said by Dillon LJ in *Surrey Heath Borough Council v Lovell Construction Ltd* (1990) 48 BLR 108, 121: *"The effect of the contractual agreement must always be a matter of construction. Parties are free to contract as they like. It may be the true construction that a provision for insurance is to be taken as satisfying or curtailing a contractual obligation, or it may be the true construction that a contractual obligation is to be backed by insurance with the result that the contractual obligation stands or is enforceable even if for some reason the insurance fails or proves inadequate."*
41. In that case it was held that the indemnity under clause 20.2 of the conditions of contract extended to all damage to the property of the employer even if it was damage which was subject to insurance under clause 22A of the contract. Mr Blackburn submitted that the Court of Appeal in this case had misunderstood the building contract. As he put it, the question was simply whether on its true construction its effect was to exclude liability or whether the risk remained with Wimpey. In this case, he said, the risk remained with Wimpey. This was because Wimpey was obliged by its contract with CRS to carry out all the work that was needed to restore the fire damage and to replace or repair any lost or damaged materials, irrespective of whether the cost of doing so was met by the insurance policy. The risk that the insurers would not pay for this was with Wimpey. So it was wrong to conclude that Wimpey's liability to make good the consequences of a fire caused by its breach of contract had been excluded and replaced by the joint insurance scheme.
42. Mr Blackburn referred to the well-known rule that clear words are needed to exclude liability for negligence. In *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 WLR 459 and *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 1 WLR 995 it was held that on the true construction of the standard form it was intended that the employer should bear the whole risk of damage to the works by fire, including fire caused by the negligence of a contractor or sub-contractors. He pointed out that in each of these cases work was being carried out to an existing building or existing buildings, and that in each of these cases the contract provided expressly that the existing structures and the works were to be at the sole risk of the employer as regards loss or damage

by fire. He said that he was unable to find any such clear exclusion of liability in the contract between the parties in the present case.

43. The Court of Appeal did not accept these arguments. Brooke LJ referred at p 882, para 62 of his judgment to the importance of paying careful attention to the terms of the contract actually made between the parties. As he pointed out, in the *Surrey Heath* case the court was concerned with the JCT Standard Form of Building Contract with Contractor's Design, 1981 Edition. Clause 20.2 of that contract did not (unlike clause 20.3 in the present case) expressly exclude the works from the property in relation to which the contractor provided the employer with an indemnity if it was damaged through his negligence. As to the situation in the present case, he said, at p 885, para 73: "*To put it quite simply, [Wimpey and Hall], like CRS, had entered into contractual arrangements which meant that if a fire occurred, they should look to the joint insurance policy to provide the fund for the cost of restoring and repairing the fire damage (and for paying any consequential professional fees) and that they would bear other losses themselves (or cover them by their own separate insurance) rather than indulge in litigation with each other.*"
44. Having reviewed the provisions of the contract, he said, at p 886, para 75, that the cost of the reinstatement work and the professional fees attendant on that work was completely provided for under the contractual scheme. In these circumstances there could be no question of Wimpey being liable to CRS for anything once the contractual scheme had worked itself out, even if otherwise allegations of negligence might have been sustained against them.
45. I have reached the same conclusion on this issue, and I am unable to find any fault in the Court of Appeal's reasoning. As Brooke LJ said, the question is: what does the contract provide? The conditions of the standard form of building contract which was in use in this case are different in several important respects from those in use in the *Archdale*, *Scottish Special Housing Association* and *Surrey Heath* cases. So I do not think that any assistance is to be gained from those decisions. In any event this case is concerned with new works and not with works carried out in or as extensions to an existing structure. It is the effect of the contractual scheme that was adopted in this case that must determine the issue which TYP and HLP have raised.
46. There is no doubt that both the main contract and the sub-contract contain provisions which have the effect in the clearest terms of excluding liability for damage to the works, work executed and site materials due to the negligence, breach of statutory duty, omission or default of the contractor and the sub-contractor respectively: see clause 20.3 of the main contract and clause 6.4 of the sub-contract. This has not been disputed by Mr Blackburn. It is also plain that the purpose of the all risks insurance which the contractor is required to take out and maintain in joint names of the employer, the contractor and the sub-contractors is to provide funds for the reinstatement of the works in the event of their being damaged up to and including the date when the certificate of practical completion is issued, whatever the cause of the fire. But the contractual scheme does not end there. For an understanding of its true effect it is necessary to pay close attention to the provisions of clause 22A.4, which deal with what is to happen in the event of loss or damage affecting work executed or any site materials occasioned by any one or more of the risks covered by the joint names policy.
47. The effect of clause 22A.4 may be summarised in this way. On the one hand there is the position of the employer. He is not entitled to deduct anything from the sums payable to the contractor under or by virtue of the contract as compensation for any loss and damage which he has sustained due to the fire. This is so even if the fire was caused by the contractor's act or omission or default or by anyone else for whose acts, omissions or defaults he would otherwise be responsible. Clause 22A.4.2 provides that the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the contractor under or by virtue of the contract. On the other hand there is the position of the contractor. Clause 22A.4.3 requires him with due diligence to restore the work that has been damaged by the fire, to replace or repair any site materials that have been lost or damaged by it and to proceed with the carrying out and completion of the works. Clause 22A.4.4 requires him to authorise the insurers to pay all monies that are payable from the insurance in respect of the fire to the employer, who is required in his turn to use this money for the purpose of paying the contractor and the associated professional fees for the restoration work. Clause 22A.4.5 provides that the contractor is not to be entitled to any

payment for the reinstatement work other than the monies received under the insurance policy. As the contractor is entitled to an extension of time under clause 25, he is not liable to the employer for losses due to any delay caused by the fire in the completion of the works under the contract.

48. The position therefore is that there is no liability to pay compensation on either side. The employer has no claim for compensation against the contractor. All he can do is insist that the contractor must proceed with due diligence to carry out the reinstatement work and must authorise the release to him of the insurance monies. The contractor has no claim for compensation against the employer. All he can do is insist that the employer must use the insurance monies for payment of the cost of carrying out the reinstatement work. It makes no difference whether the fire was caused by the negligence of the contractor or one of his sub-contractors or of the employer or of some third party for whose acts or omissions neither of the parties to the contract is responsible. The ordinary rules for the payment of compensation for negligence and for breach of contract have been eliminated. Whatever the cause of the fire, the obligation of the contractor is to carry out such work as is needed to put the matter right. His obligation is to restore the fire damage at his own cost, except in so far as the cost of doing so is met by sums recovered under the joint names insurance policy.
49. This is not to say that the contractor may not be found liable to the employer for any loss or damage which the employer may sustain due to his failure to take out and maintain the joint names policy, or his failure to fulfil his obligation with due diligence to carry out the reinstatement works under clause 22A.4.3. But this feature of the contractual scheme is of no assistance to Mr Blackburn. Any liability which the contractor may be under to pay compensation to the employer for those breaches of contract is entirely separate and distinct from the liability of those who caused or contributed to the fire. It could not be said in that event that Wimpey were liable to CRS "in respect of the same damage" within the meaning of section 1(1) of the 1978 Act read together with section 6(1) of that Act. CRS would not be entitled to compensation from Wimpey for the same harm or the same wrong as that for which TYP and HLP are said to be liable, as the harm for which Wimpey would be liable would be that resulting from its failure to insure or its failure to carry out the reinstatement works.
50. For these reasons I consider that the Court of Appeal were right to dismiss the appeal by TYP and HLP against the answers which the judge gave to the preliminary issue. In my opinion the meaning and effect of the main contract was to exclude Wimpey's liability to CRS for loss and damage caused by the fire in so far as this was due to its breach of contract. Mr Blackburn accepted that the same reasoning must be applied in Hall's case also. So, as Wimpey and Hall are not persons from whom CRS is entitled to recover compensation in respect of the fire damage, it is not open to TYP and HLP to recover contribution from either Wimpey or Hall in respect of the fire damage for which they are said to be liable.
51. For completeness however I should like to comment briefly on two other points which were examined with great care by Brooke LJ in his helpful judgment and on which both parties made submissions in the course of the argument before your Lordships. The first point relates to a submission which Mr Blackburn made under reference to section 1(3) of the 1978 Act about the time at which it is to be determined whether a person is liable. The second point relates to the second issue about the effect of the joint names policy.

The time for determining whether a person is liable

52. Section 1(3) of the 1978 Act provides that a person shall be liable to make contribution by virtue of section 1(1) of the Act notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred. This rule is qualified by a proviso to the effect that the rule does not apply if he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based. As Brooke LJ observed, at p 874, para 27 of his judgment, the effect of this subsection is to reverse the decision in *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169. In that case the House held by a majority that a person could escape liability in contribution proceedings under section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 if he

had been sued unsuccessfully by the injured person because his action was statute barred as it was brought outside the relevant limitation period.

53. Mr Blackburn submitted that the time for determining whether the person was liable in respect of the same damage for the purposes of section 1(3) was the time when the damage occurred. According to his argument, Wimpey's and Hall's liability did not need to be an existing or continuing or present liability at the time when the contribution was sought to be recovered. So the fact that the fire damage was subsequently made good at the cost of the insurers under the joint names policy did not mean that Wimpey and Hall were not persons from whom TYP and HLP could recover contribution under section 1(1) of the Act. For Wimpey and Hall Mr Bartlett and Mr Blunt submitted that at the date when contribution was sought they were not liable to CRS because the fire damage was covered by the joint names policy required by clause 22A.1 of the main contract and the damage had been made good, without additional expense to CRS, under those arrangements.
54. Support for Mr Blackburn's argument is to be found in *RA Lister & Co Ltd v E G Thomson (Shipping) Ltd (No 2) (The Benarty (No 2))* [1987] 1 WLR 1614, where it was claimed by the charterers under reference to section 1(6) of the 1978 Act that a contribution notice by the shipowners should be struck out because liability to the cargo owners could not be established in an action brought against them in England and Wales because the action against them in this jurisdiction had been stayed. Hobhouse J rejected this argument for two reasons. The first was that on its true construction section 1(6) was concerned with the character of the liability which gave rise to a claim for contribution and not with the procedural considerations of how that liability might be enforced. The second was that, even if a procedural criterion was applied, the scheme of the Act showed that its requirements were satisfied because the charterers' liability had the character of a liability at the time the damage was suffered. His second reason is the one that is relevant to Mr Blackburn's argument.
55. Hobhouse J said, at p 1623B-C, that the charterers' argument about the effect of section 1(6) was inconsistent both expressly and by implication with section 1(3): "*The liability of the respondent does not need to be procedurally enforceable as a current and subsisting liability; it can be subject to a procedural time bar. What is required is that it should have had the character of a liability at the time the damage was suffered by the injured party. The submission of the charterers before me cannot be fitted in with this because they say that the procedural position at the later stage is critical. Their argument must be rejected.*"
56. There is however some authority on this point to the contrary. In *Logan v Uttlesford District Council*, 14 June 1984 (unreported), Sir John Donaldson MR said at p 5 that the material time in relation to the determination of liability was probably the moment when proceedings are begun for the purpose of enforcing the claim for contribution or when that claim is first advanced in the course of existing proceedings. In *Oxford University Fixed Assets Ltd v Architects Design Partnership* (1999) 64 ConLR 12 Judge Humphrey Lloyd QC held that an architect was not entitled to contribution from the contractor in respect of a claim by the employer for damages for negligence and breach of contract which was barred as between the employer and the contractor by the issue of the final certificate. He rejected an argument that the final certificate was to be disregarded because it merely constituted a cessation of liability of the kind contemplated by section 1(3). He said at p 30, para 23, that section 1(3) was dealing solely with a technical point. This was that a person could not resist being called upon to contribute simply because liability had ceased: "*The person claiming contribution must nevertheless still establish that prior to the cessation the person was liable, as defined by section 1(6). If the liability is in contract the question will be whether a breach of contract can be established. All the facts and all the terms of the contract have to be examined. If the contract were to say that no action shall be brought in respect of a certain default which is otherwise recognised as a breach of contract then liability for that breach could not be established. It would be perverse to describe that situation as one where liability has ceased.*"
57. Brooke LJ accepted Wimpey's and Hall's argument that Hobhouse J's remarks in *The Benarty (No 2)* were inconsistent with the terms of the 1978 Act and with the decision of the judge in the *Oxford University* case. He did so for reasons which I too find to be compelling.
58. First there is the language of section 1 of the 1978 Act. The reference in section 1(1) to the recovery of contribution from "*any other person liable in respect of the same damage*" suggests that liability to the

injured party is to be seen at the time when contribution is being sought. The fact that it was thought necessary to include section 1(3) is consistent with this approach, as it would be irrelevant that the person from whom contribution was being sought had ceased to be liable if the test was whether he was liable at the time when the damage was suffered by the injured party. It is only under the first part of section 1(3) that, exceptionally, the court is asked to look at the position at an earlier date than the time when the contribution is being sought. Then there is the fact that section 1(6) refers to liability "*which has been or could be established in an action.*" This suggests that the question is not whether liability could have been established in the past but whether it has been established or could be established as at the time when the contribution is being sought. As for the decision in *The Benarty (No 2)*, Brooke LJ observed, at pp 877-878, para 45 that these arguments did not affect it at all. At the time when the judge was considering whether to order contribution the charterer's liability to the shipowners had not ceased for a reason permitted by section 1(3), as it could still be established in an action brought against them in England and Wales had that action not been stayed because of the procedural bar.

59. Then there are two other points which I would add to those mentioned by Brooke LJ. The long title to the Act states that it is an Act to make new provision for contribution between persons "who *are* jointly or severally, or both jointly and severally, liable for the same damage." [Emphasis added] The use of the present tense fits in well with the indications which are to be found in the language of section 1. A further indication is to be found in the fact that Parliament chose not to adopt the form of words about timing in the equivalent clause in the Law Commission's draft Bill, which would have had the contrary effect. It read: "*Subject to the following provisions of this section, any person who is liable in respect of any damage suffered by another person at the time when the damage in question occurs may recover contribution from any other person who is liable in respect of the same damage at that time (whether jointly with him or otherwise).*" [Emphasis added]
60. For these reasons I would have held, had it been necessary to do so, that it cannot be established that Wimpey and Hall are "*liable*" to CRS in respect of the fire damage. The fire damage was covered by the joint names policy required by clause 22A.1 of the main contract and it has been made good, without additional expense to CRS, under those arrangements.

The effect of the joint names policy

61. Mr Blackburn made it clear that he accepted that the law would not allow an action between two or more persons who were insured under the same policy against the same risk: see *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127 where, applying the decision of the Supreme Court of Canada in *Commonwealth Construction Co Ltd v Imperial Oil Ltd* (1977) 69 DLR (3d) 558, Lloyd J held that the insurers had no right of subrogation in the name of one co-insured against another co-insured under the same policy. But he submitted that, if his argument on the first issue was sound, TYP and HLP were not prevented by this principle from claiming contribution from Wimpey and Hall under section 1(1) of the Act.
62. The answer for Wimpey and Hall was that the fact of their co-insurance with CRS provided them with a defence to the claim. To allow it would be inconsistent with the intentions of the parties, as it would have the effect of depriving them of the benefit of the insurance which had been effected in their names. Mr Bartlett said that where there is valid cover under a joint insurance no insured can say as against another that he has suffered a loss for which the other is liable. He pointed out that the joint insurance required by clause 22A was a property insurance, not a liability insurance. The fact that the policy did not provide either Wimpey or Hall with liability cover against a claim by CRS would mean that they would be deprived of the benefit of the insurance if they were to be found liable.
63. There is considerable scope for debate as to the true basis for the rule which was applied by Lloyd J in the *Petrofina* case that the insurers can never sue one co-insured in the name of another. The authorities on this question were reviewed in some detail by Brooke LJ. He referred to two cases in which Colman J had carried out a more detailed study of the reasons why sub-contractors who are named as co-assured on an insurance policy are entitled to resist a claim brought against them by insurers under rights of subrogation in the name of another person named as a co-assured in that

policy: *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.

64. In *The Yasin* [1979] 2 Lloyd's Rep 45, 55 Lloyd J gave the following explanation for the rule: "In my judgment, the reason why an insurer cannot normally exercise a right of subrogation against a co-assured rests not on any fundamental principle relating to insurance, but on ordinary rules about circuity."

In the *Petrofina* case at p 140B he said that, having reconsidered the point, he was still inclined to think that the reason for the rule was circuity. Brooke LJ said however, at p 884, para 69 of his judgment that this appeared to him to confuse rather than simplify the issues which the court had to decide. At p 885, para 72 he referred with approval to Colman J's view that the plea of circuity is an inappropriate plea if the insurer has provided a full indemnity to one co-assured, because it will have discharged its liability under the policy in respect of the losses in question and a second co-assured cannot look to the first co-assured to pay him those losses a second time. He said that in his judgment it would be much safer to jettison the language of circuity of action and to address instead the question asked by Dillon LJ in the *Surrey Heath* case: what does the contract provide? He summarised his conclusion, at p 885, para 73 in the words which I have already quoted in para 43 above.

65. Although your Lordships do not need to resolve the issue in this case, it seems to me that there is much force in the point that the rules about circuity of action do not provide the explanation. I would prefer to say that the true basis of the rule is to be found in the contract between the parties. In *Hopewell Project Management Ltd v Ewbank Preece Ltd* [1998] 1 Lloyd's Rep 448, 458 Mr Recorder Jackson QC said that in his view it would be nonsensical if those parties who were jointly insured under a contractors' all risks policy could make claims against one another in respect of damage to the contract works, that such a result could not possibly have been intended by those parties and that had it been necessary for him to do so he would have held that there was an implied term to that effect. I would be content to accept that as a satisfactory basis for the rule on which, had it been necessary for them to do so, Wimpey and Hall would have been entitled to resist the claim.

Conclusion

66. As Mr Blackburn very properly conceded, an answer in favour of Wimpey and Hall on the first issue is sufficient for the disposal of this appeal. For the reasons which I have given, and for those given by my noble and learned friends Lord Bingham of Cornhill and Lord Rodger of Earlsferry with which I agree, I would hold that the Court of Appeal reached the right conclusion on the first issue. I would dismiss the appeal.

LORD RODGER OF EARLSFERRY : My Lords,

67. I have had the privilege of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead and, for the reasons which they give, I too would dismiss the appeal.

68. Indeed the position can be stated shortly. Mr Blackburn QC accepted that, if he was wrong in his submission as to the effect of clause 22A.4.3 of the main contract, then the whole appeal must fail. Clause 22A.4.3 provides: "*After any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 22A.1 or clause 22A.2 or clause 22A.3 has been completed the Contractor with due diligence shall restore such work damaged, replace or repair any such Site Materials which have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the Works.*"

That was Wimpey's crucial obligation after the works had been damaged by fire; that was what they were liable to do in respect of the damaged work. Mr Blackburn contended that this liability of Wimpey - and no other - meant that the appellants were entitled to recover contribution from them. Significantly perhaps, there is not a hint of this approach in the third party notice which the appellants served on Wimpey. In that notice the appellants refer to various matters, such as failures in respect of the insulation of a flue, which were said to have caused or contributed to the start of the fire.

69. Under section 1(1) of the Civil Liability (Contribution) Act 1978 a person who is liable in respect of damage can recover contribution from any other person who is liable in respect of the same damage. It follows that the appellants can recover contribution from Wimpey in respect of the fire damage to the works only if Wimpey were "*liable in respect of*" the fire damage. Section 6(1) provides that a person is liable in respect of any damage if the person who suffered it "*is entitled to recover compensation from him in respect of that damage.*" So the appellants can recover a contribution from Wimpey only if CRS were "entitled to recover compensation from [them] in respect of" the fire damage to the works.
70. On no conceivable construction of section 6(1) can it be said that a person who is liable to restore damaged work is a person from whom the employer is "*entitled to recover compensation*" in respect of the fire damage to the works. It follows that, for the purposes of section 1(1), Wimpey are not a person who is liable in respect of the fire damage to the works and the appellants cannot recover contribution from them.
71. Wimpey carried out their obligation to restore the damaged work, but their position would have been no different, for these purposes, if they had failed to perform it. The fact that a party becomes liable to pay damages for failing to perform a primary obligation under a contract cannot alter the nature of that primary obligation. If Wimpey had failed to restore the damaged work, CRS would indeed have been entitled to recover damages from them, but the damages would have been for breach of their obligation to restore the damaged work, not for breach of their duties under the contract giving rise to the fire damage to the works. By contrast, CRS are seeking damages from the appellants on the ground that, by reason of their negligence or breach of contract, they were responsible for the fire. That being so, for the reasons explained by Lord Steyn in *Royal Brompton Hospital National Health Service Trust v Hammond* [2002] UKHL 00, even on this hypothetical scenario, Wimpey would not have been liable in respect of the same damage as the appellants and the appellants could not have recovered contribution from them.
72. Mr Blackburn's submission on the first issue must accordingly fail and so, too, must the appeal.