CA on appeal from TCC HHJ Seymour QC before Ward LJ; Longmore LJ; Mr Justice Aikens. 22nd January 2003

JUDGMENT : Mr Justice Aikens:

1. This is an appeal from a decision of HHJ Seymour QC, sitting as a judge of the Technology and Construction Court, on a preliminary issue of law. The decision of Judge Seymour is reported at *80 ConLR 76*. Permission to appeal was refused by the judge but granted by Dyson LJ. The case arises out of a building contract on a standard form published by the Joint Contracts Tribunal of the Standard Form of Building Contracts, known as "***IFC 84***". The contract, which was concluded on 30 September 1996, concerned refurbishment work to a public house in Reading. The terms of the contract provided that the Employer, who is the Claimant in this case, should take out an insurance policy in the joint names of both the Employer and the Contractor. This policy should have insured against any damage to the existing structure caused by a number of specified perils, including "*fire*". In fact the Employer failed to take out the policy. During the refurbishment there was a fire which damaged the existing building of the public house. For the purposes of the preliminary issue it has been assumed that this fire was caused by the negligence of sub – contractors when they were doing work on the roof of the public house. The Employer has sued the Contractor for damages, including the cost of rebuilding the existing structure. The Employer relies principally, if not exclusively, on a liability and indemnity clause in the Contract to recover its loss and damage. This is Clause 6.1.2 of the standard *IFC 84* terms. The Contractor relies on the same liability and indemnity clause in the contract to exempt it from this liability. It says that it has no liability for any loss or damage that would have been covered by the insurance policy that the Employer should have taken out.

2. The preliminary issue before the judge and this Court is, briefly, whether liability for damage to identified property which results from a negligently caused fire is excluded, because the parties have agreed that a clause defining the Contractor's liability and obligation to indemnify the Employer excludes loss or damage to the identified property which is required to be insured by the Employer against specified perils, one of which is "*Fire*". The identified property here was the existing structure of the public house. The judge held that the Contractor's liability for such damage was not excluded by the terms of the contract. The Contractor now appeals. The outcome depends ultimately on the correct construction of three principal clauses in the contract: clause 6.1.2; clause 6.3C.1 and clause 8.3, together with some ancillary clauses.

3. **The relevant Contract Terms :** The Contract identified the works to be undertaken in the first recital of the Contract. The works are: "*Refurbishment of an existing public house, The Thatchers, Fairwater Drive, Woodley, Reading, to create family inn including mechanical and electrical works*".

   As I have said, the Contract was in the standard Intermediate Form of Building Contract for works of simple content, known as *IFC 84.* It is one of many forms published by the Joint Contracts Tribunal for the Standard Form of Building Contract. The Contract incorporated standard amendments 1 to 7 and 9 and amendment 10, which amended Clause 6.1.2 itself and also Clause 8.3, which defines a "Joint Names Policy". The contract contained an Appendix, which gave information about the date of possession of the site by the Contractor, the rate for liquidated damages and the agreed limit of insurance cover for any one occurrence or series of occurrences arising out of one event. That was set at £2 million. The Appendix also provided that Clause 6.3C should apply to this contract.

4. The wordings of the relevant terms of the contract provide as follows:
   (1) **The Preliminaries.** A general note at the start of these provides that the "***Standard Preliminaries/General Terms***" will form part of the Contract Documents. The Preliminaries then itemise the Conditions that are to form the contract terms. Clause 6.3C is identified. Also in relation to Clause 6.3.1 the Preliminaries stipulate that "*the alternative which applies is: 6.3C (Existing structures; sole risk of Employer)*".

   (2) Item 260 of the Preliminaries: obligations of the Contractor in relation to fire etc "*The Contractor must take all necessary precautions to avoid the outbreak of fire and prevent personal injury, death and damage to work or other property from fire, particularly in work involving the use of naked flames. Before any works of maintenance, adaptation or extension to existing buildings or services are carried out or connections to services within existing buildings are made, the Contractor must discuss his proposals with the Contract*

Administrator to ensure that the extent of any fire hazards in the Works are known fully to both the Contractor and the Employer. The Contractor must comply with the Joint Code of Practice "Fire Prevention on Construction Sites" 1992 published by BEC. The Contractor must drawn [sic] the attention of all his workmen and those of Sub-Contractors to the dangers involved in the careless disposal of matches, cigarettes, tobacco ash etc. Smoking must not be permitted in ceiling spaces or crawlways…"

(3) Clause 1 of IFC 84: general obligations of the Contractor. *"The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in accordance with the Contract Documents identified in the 2nd recital: 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/the Contract Administrator such quality and standards shall be to the reasonable satisfaction of the Architect/the Contract Administrator."*

(4) Clause 6.1.2 of IFC 84: Contractor's liability and obligation to indemnify in respect of certain loss and damage

"6.1.2 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 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 Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor, his servants or agents or of any person employed upon or engaged upon or in connection with the Works or any part thereof, his servants or agents or of any other person who may properly be on the site upon or in connection with the Works or any part thereof, his servants or agents, other than the Employer or any person employed, engaged or authorised by him or by any local authority or statutory undertaker executing work solely in pursuance of its statutory rights or obligations. This liability and indemnity is subject to clause 6.1.3 and, where clause 6.3C.1 is applicable, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril".

(5) Clause 6.1.3 of IFC 84: definitions of "*property real or personal"* in Clause 6.1.2

"6.1.3 The reference in clause 6.1.2 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 or up to and including the date of determination of the employment of the Contractor…..*

(6) Clause 6.3.2 of IFC 84: further definitions

"6.3.2 In clauses 6.3A, 6.3B, 6.3C and, so far as relevant, in other clauses of the Conditions the following phrases shall have the meaning given below.

*"**Joint Names Policy**" means a policy of insurance which includes the Employer and the Contractor as the insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.3.3 recognised as an insured thereunder".*

(7) Clause 6.3C.1 of IFC 84: obligation of Employer to take out and maintain insurance

"6.3C.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 up to and including the date of issue of the certificate of Practical Completion or up to and including the date of the determination of the employment of the Contractor… The Contractor, for himself and for all sub-contractors referred to in clause 3.3 who are, pursuant to clause 6.3.3, recognised as an insured under the Joint Names Policy referred to in clause 6.3C.1 or clause 6.3C.3, shall authorise the insurers to pay all monies from such insurance in respect loss or damage to the Employer.

(8) Clause 8.3 of IFC 84: definition of "Specified Perils" for the purposes of Clause 6.3C1 of the IFC 84

"8.3 Unless the context otherwise requires or the Articles or the Conditions or an item or entry in the Appendix specifically otherwise provides, the following words and phrases in the Articles of Agreement, the Conditions, the Supplemental Conditions and the Appendix shall have the meanings given below:….

***Specified Perils:** Means fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, but excluding Excepted Risks."*

5. The Assumed Facts concerning the fire and the ensuing damage :

The preliminary issue was dealt with on the assumption that the relevant facts pleaded in the Particulars of Claim on behalf of the Employer are all correct. The facts, as pleaded, are as follows:

"5.1 The Defendant took possession of Thatchers on or around 30.09.96. The date and time for completion contained at Appendix 2 of IFC 84 (as amended) was 18.11.96. at 12 noon.

5.2 On 20th November 1996, employees of the Defendant's domestic sub-contractor, South Eastern Roofing ("SER"*) were engaged in applying a layer of bitumenised felt to a piece of board fitted between the vertical wall of the brick housing and the original thatched roof over the first floor kitchen at Thatchers.*

5.3 At about 11.30am on 20.11.96, a roofer engaged in carrying out this work on behalf of SER and/or the Defendant was using a blow torch to heat the felt when he ignited a section of the straw thatch on the roof.

5.4 The ensuing fire spread rapidly through the thatch and down into the building itself, causing extensive damage to Thatchers:

5.4.1 The thatched roof over the entire premises was burnt, and much of it had to be destroyed or dragged off the roof by the fire-fighters;

5.4.2 The majority of the roof timbers were destroyed;

5.4.3 The entire first floor was fire damaged, except for the corridor which led to the kitchen on the right side;

5.4.4 The manager's accommodation was badly damaged on the first and ground floors.

5.4.5 Further damage was caused by the collapse of water tanks above the new kitchen area."

6. The allegations pleaded by the Employer against the Contractor :

The Employer's pleading relied on certain express and implied terms of the contract. The express terms relied on are, first, Item 260 of the Preliminaries, which were all expressly incorporated into the Contract. Secondly, Clause 1.1 of IFC 84. Thirdly, Clause 6.1.2, which sets out the Contractor's liability to and obligation to indemnify the Employer in specified circumstances.

7. In addition the Employer also pleaded that there was an implied term in the Contract that the Contractor would carry out all its services with reasonable care and skill. Furthermore the Employer also pleaded that the Contractor owed the Employer a duty of care to exercise all reasonable skill and care in the performance of its duties and obligations, presumably under the Contract.

8. The Particulars of Claim allege that the fire was caused by the Contractor's breaches of the contractual and common law duties to take care that are said to derive from Item 260 of the Preliminaries; Clause 1.1 of *IFC 84* and the implied terms and duty that I have referred to above. As an alternative it is pleaded that the fire was caused by the negligence of the sub – contractors doing the work on the roof. It is alleged that, by the express terms of Clause 6.1.2 of the Contract, the Contractor accepted liability for and agreed to indemnify the Employer against any loss or damage to property that resulted from the sub – contractors' negligence.

9. It will be noted that the Employer's pleaded case is that the Contractor is liable to the Employer by virtue of alleged breaches of contractual or common law duties to take care. There is no allegation that the Contractor has been in breach of any strict or absolute contractual obligation, save for the alleged obligation to indemnify the Employer as a result of the other breaches of contract that have been pleaded. This reliance on breaches of duties to take care is, I think, of great importance when considering the proper construction of Clause 6.1.2 and related clauses.

10. The Employer claimed two heads of loss and damage as a result of the alleged breaches of the Contractor. These were the cost of repair to the existing structure (£436,301.59) and business losses resulting from the delay in rebuilding the public house (£138,415.00). As an alternative the Employer claims to be indemnified under Clause 6.1.2 in respect of the losses.

11. The pleaded response of the Contractor

The Contractor pleads in response that the Employer ought to have taken out an insurance on the existing structure that covered loss and damage caused by fire, in the joint names of the Employer and Contractor. The Contractor further pleads that, on the proper construction of the Contract terms, the parties' intention was that the Contractor would not be liable to the Employer for loss and damage caused to the existing structure by fire. Furthermore, if the Employer has failed to take out an insurance policy as demanded by the contract terms, then that is itself a breach of contract. If the Contractor is

liable to the Employer in the absence of that insurance, then the Contractor is entitled to recover damages from the Employer because of the Contractor's inability to recover under the insurance policy that the Employer should have taken out.

12. The Preliminary Issue before the Judge and his decision

The parties agreed the terms of the preliminary issue to be decided by the judge. The terms are set out in paragraph 4 of the judgment of HHJ Seymour QC, and are as follows: *"If the breaches of contract and negligence pleaded in the Statement of Case are assumed, is the Defendant [ie the Contractor] liable to the Claimant [ie. the Employer] for the categories of loss set out at 3(b) and (c)?"*

The reference to *"3(b) and (c)"* is a reference to the two categories of damages that were claimed by the Employers that I have set out above. The judge held that the answer to the preliminary issue is *"yes"*, in relation to both categories of alleged damage. The Contractor does not appeal against the part of the decision concerning liability for business interruption losses.

13. The arguments of the parties on this appeal

The Contractor's arguments, advanced succinctly by Mr Eklund QC, are as follows: (i) Clause 6.1.2 of the Contract sets out a contractual basis for the liability of the Contractor to the Employer and the Employer's right to be indemnified, in respect of losses due *only* to negligence or kindred types of fault in carrying out the contract works. (ii) The effect of the last sentence of Clause 6.1.2 of the Contract is that where Clause 6.3C.1 of the Contract is in force between the parties, then the Employer has to take out a policy of insurance in the Joint Names of Employer and Contractor against the loss or damage to existing structures caused by the "specified perils". (iii) At the same time the last sentence of Clause 6.1.2 excludes the Contractor from any liability and obligation to indemnify the Employer in respect of any loss or damage to any property that is required to be insured, provided that the loss or damage is caused by a "specified peril". (iv) The peril "fire" is a "specified peril". The peril "Fire" in an insurance policy on property covers a fire caused accidentally and also by the negligence of an assured. (v) Because Clause 6.1.2 is intended to set out the scope of the Contractor's liability and obligation to indemnify in respect of loss and damage caused by negligence and kindred defaults of the Contractor, the parties must have intended the last sentence of Clause 6.1.2 to limit the scope of liability of the Contractor for loss and damage caused by negligent acts. Therefore the word "fire" (one of the "specified perils") must be construed to include fire caused by the negligence of the Contractor, or those for whom he was responsible under the contract, including Clause 6.1.2. Otherwise the restriction on liability imposed by the last sentence of Clause 6.1.2 would have no content. (vi) The fact that the Employer failed to obtain insurance of the existing structure against the peril of "fire" can make no difference to the proper construction of the Contract. But if the Employer had obtained the insurance and had claimed on it, then the insurer could not have sued the Contractor by right of subrogation, because the Contractor is a Joint Insured and also because of the express provision in the Contract for the waiver of subrogation rights against a co – assured. This demonstrates the parties' intention that the Contractor should not be liable for loss and damage to the existing structure caused by a fire that was the result of negligence of those for whose acts the Contractor is generally responsible under the Contract. (vii) This case is analogous to the position of the contractors in the House of Lord's decisions in ***Scottish Special Housing Association v Wimpey Construction UK Ltd*** *[1986] 1WLR 995* and ***Co-operative Retail Services Ltd v Taylor Young Partnership and others*** *[2002] 1 WLR 1419.*

14. The arguments of the Employer, put attractively by Mr Taverner QC, were: (i) Clause 6.1.2 of the Contract makes the Contractor liable to the Employer for loss and damage which, (a) is caused not only by the Contractor's negligence but that of others, for whom the Contractor might not be responsible at common law; (b) in circumstances which might not amount to negligence or breach of contract by the Contractor and (c) covers an extensive range of losses that might not be recoverable in an action for negligence. (ii) Clause 6.3C.1 obliges the Employers to take out an insurance policy in respect of particular property (ie. the existing structures), but it does not define precisely the "specified peril" of "fire". (iii) Therefore the Employer would have fulfilled its contractual obligation to the Contractor if the Employer had taken out an insurance policy that did not cover "negligently caused fire". It is important to note that the Employer was not obliged to take out an "All Risks" policy. (iv) The last sentence of

Clause 6.1.2 is to be read as an exclusion of the Contractor's liability or obligation to indemnify in respect of certain types of loss and damage covered by the insurance policy to be taken out by the Employer. That exclusion must be construed like all other exceptions clauses on which the party otherwise liable seeks to rely. Thus, if the clause does not expressly exclude liability for negligence, then such liability is only to be excluded by the clause if, on a reasonable reading, it is wide enough to include liability for negligence and it cannot reasonably cover any other ground of liability. As set out in (i) above, that is not the case here, so liability for negligently caused fire is not excluded by the wording of Clause 6.1.2; Clause 6.3C.1 and the word "fire" in the "specified perils". (v) Clause 6.1.2 and 6.3C.1 together have the same effect as the clauses in building contracts that were considered by the Court of Appeal cases of ***Dorset CC v Southern Felt Roofing Ltd*** *(1989) 29 ConLR 61* and ***London Borough of Barking and Dagenham v Stamford Asphalt Co Ltd*** *(1997) 54 ConLR 25.* In both cases the Court of Appeal held that the contractor's liability for damage caused by a fire started by its negligence was not excluded by the simple word "fire" in, respectively, an employer's responsibility clause in a building contract, and an employer's obligation to insure clause in a building contract. Mr Taverner submitted that the House of Lords' cases on which Mr Eklund relied were distinguishable on the facts and the terms of the contracts involved.

15. Analysis

As I have already stated, in my view it is important to note the nature of the breaches of contract and duty that the Employer pleads against the Contractor. They are all based on duties to take care. The allegation is that the Contractor, or the sub – contractor for whose negligence the Contractor is said to be liable under the terms of Clause 6.1.2, failed to take care.

16. With that in mind it is necessary to consider the scope of Clause 6.1.2 of the Contract. It was accepted by both Counsel that although cases concerning other wordings may contain general principles that this court must follow, there are no cases which have considered precisely this wording. Therefore I will consider the proper construction of the clauses first and then I shall consider the cases as may be necessary.

17. Construction of Clause 6.1.2

The relevant wording of Clause 6.1.2 can be divided into two groups of phrases. The first group contains phrases defining the obligations of the Contractor. These phrases provide: (i) that the contractor shall be liable for and shall indemnify the Employer against (ii) any liability, loss or claim (iii) in respect of any damage whatsoever to any property, real and personal (iv) insofar as such damage arises out of or in the course of or by reason of the carrying out of the works (v) and to the extent that this damage is due to any negligence, breach of statutory duty, omission or default (vi) by the Contractor, his servants or agents or (vii) any person employed or engaged by the Contractor.

18. There are several points to note about this group of phrases. The first is that the Clause is, in my view, defining the scope and limits of the liability of the Contractor to the Employer for certain types of default. Secondly the type of defaults which are covered by this Clause are all based on negligence of one form or another. Hence the phrase "*to the extent that [loss, injury or damage] is due to any negligence, breach of statutory duty, omission or default [of the Contractor etc]"*. In my view the words "*omission or default"* are intended to embrace failures by the Contractor to fulfil contractual obligations to take care.

19. Thirdly, in agreement with the submission of Mr Taverner QC, this first group of phrases enlarges the classes of person for whose acts or omissions the Contractor is liable. That is the effect of the wording "*…servants, agents or of any person employed upon or engaged upon or in connection with the Works or any part thereof"* and so forth to the end of that sentence. Fourthly, again in agreement with Mr Taverner's submissions, this group of phrases widens the class of loss or damage for which the Contractor is liable to the Employer and for which the Contractor has to indemnify the Employer.

20. In short, the first group of phrases lays down the general scope of the Contractor's liability and obligation to indemnify the Employer as a result of all types of failure to take care, whether contractual or non – contractual.

21. As part of defining the scope of the Contractor's liability and obligation to indemnify, there are qualifying words in the second group of phrases in the last sentence of Clause 6.1.2. This sentence limits the Contractor's liability and its obligation to indemnify the Employer in several ways. First, this sentence cuts down the property embraced by the liability and obligation to indemnify. Thus "*The Works*" and other matters are excluded from the ambit of Clause 6.1.2 by virtue of the terms of Clause 6.1.3.

22. Next, this sentence deals with a case when (as under this Contract) Clause 6.3C.1 applies. In such cases the "*liability and indemnity….excludes loss or damage to any property required to be insured [under Clause 6.3C.1] caused by a Specified Peril*". In my view this means that the general scope of the "*liability and indemnity*" embraced by the first part of the Clause is cut down, when Clause 6.3C.1 applies. From the general scope of Clause 6.1.2 is excluded any loss or damage to any property required to be insured under Clause 6.3C.1, where the loss or damage complained of has been caused by a Specified Peril. Therefore it is necessary to identify three things in order to work out the precise extent of the exclusion of the Contractor's liability and obligation to indemnify the Employer when Clause 6.3C.1 applies. The first is: what type of property has to be insured under Clause 6.3C.1. The second is the nature of the Specified Perils to be covered by the insurance. The third is whether the loss or damage complained of was caused by one of those Specified Perils.

23. Clause 6.3C.1; "Joint Names Policy" and "Specified Perils"
When this clause applies, it places the Employer under a contractual obligation to take out and maintain a "*Joint Names Policy*" (as defined) in respect of property defined as "*existing structures*". A "*Joint Names Policy*" has to include both the Employer and the Contractor as an insured under the policy. It must also provide that the insurers can have no right of recourse against any person named as an assured. Clause 6.3C.1 also provides that if there is a claim under the "Joint Names Policy" then the Contractor must authorise the insurer to pay all the insurance proceeds to the Employer.

24. The "*Specified Perils*" includes "*fire*". As a matter of fact a fire can, of course, be caused by accident, inadvertence, negligence and a deliberate act of the assured or of third parties. So can some of the other perils identified as "*Specified Perils*", such as "*bursting of water tanks*". But yet other "*Specified Perils*", such as "*earthquake*" or "*lightning*", can have no element of human act or omission in their cause or creation.

25. The Link between Clause 6.1.2; Clause 6.3C.1 and the "Specified Perils" in cases when Clause 6.3C.1 applies
In my view Clauses 6.1.2; 6.3C.1 and the definition of "*Specified Perils*" and "*Joint Names Policy*" are intended together to define the whole scope of the liability of the Contractor to the Employers for negligent acts and defaults when Clause 6.3C.1 applies. None of the clauses can be looked at in isolation. So the extent of the exclusion of the liability of the Contractor and its obligation to indemnify the Employer must depend on what the parties intended should be insured under the "*Joint Names Policy*". That depends in turn on what the parties intended should be included within the definitions of the "*Specified Perils*" that are identified.

26. What is meant by "fire" in the "*Specified Perils*" clause?
The clause listing the "*Specified Perils*" identifies the particular perils that are to be covered by an insurance policy that has to be taken out by he Employer. To my mind the parties must have intended that the words or phrases identified as "*Specified Perils*" be given the meaning that is normally given to them when they are used to identify a peril covered by an insurance policy. If the parties had intended otherwise, then I think that they would have said so. For nearly two hundred years when the word "*fire*" has been used in an insurance policy to describe one of the perils covered by the policy, the meaning of the word "*fire*" has been clear. Unless qualified by other words or a warranty in the policy, the peril "*fire*" covers loss proximately caused by a fire, whether the fire was started by accident, was caused by the negligence of the assured or any third party or was caused by the deliberate act of a third party. (See eg: ***Busk v Royal Exchange*** *(1818) 2 B & Ald 73;* ***Shaw v Robberds*** *(1837) 6 Ad & E 75;* ***Mark Rowlands Ltd v Berni Inns Ltd*** *[1986] 1 QB 211 at 232G per Kerr LJ and 234F per Glidewell LJ).* If "fire" is an insured peril in the policy, then a loss that is proximately caused by "fire" is covered by the policy. It is irrelevant that the fire was itself caused by negligence or even the deliberate act of a third party. But,

in the absence of express words in the policy, the parties would not have intended to cover losses by fire when that fire was caused by the deliberate act of the insured itself.

27. Under Clause 6.3C.1 of the Contract, the Employer had a contractual obligation to take out and maintain a Joint Names Policy in respect of the existing structures which would pay for the full cost of reinstatement, repair or replacement of loss or damage due to the Specified Peril (amongst others) of "*fire*". If the Employer had fulfilled that obligation, then in my view that policy would have paid on a loss of the existing structure of the public house which was caused by a fire that was the result of the negligence of the Contractor's sub – contractors. Moreover, if the Employer had fulfilled its contractual obligation under *Clause 6.3.1* of *IFC 84*, the insurance policy would have contained a clause that stated that the insurer had no right to use the name of the Employer to sue (by subrogation) the Contractor, who would also be named as an assured under the policy. The effect of this "no recourse" provision in *Clause 6.3.1* would have been to prevent the insurers from using the name of the Employer to sue the co - assured Contractor for damages on account of the negligence of its sub – contractors. (See: ***Co – operative Retail Services Ltd v Taylor Young Partnership Ltd and others*** *[2002] 1 WLR 1419 at para 65 per Lord Hope of Craighead.* Lords Bingham, Mackay and Steyn agreed with Lord Hope on this point). I discuss this case more fully below. The point to note here is that the contractors had to take out an "all risks" policy against loss or damage in relation to a new construction site. Both the contractor and employer were named as joint assureds. Lord Hope concluded that the very existence of such a policy in joint names would prevent it being contended that the contractor was liable to the employer for damage resulting from a fire caused by the negligence of the contractor. The present case is even stronger, because of the existence of the "no right of recourse" provision in clause 6.3.2 of the contract.

28. In this case the Employer failed to take out policy it should have done. But that cannot detract from the conclusion that I reach on the proper construction of these clauses. This is that the whole scheme of Clauses 6.1.2; 6.3.2; 6.3C.1, the provisions defining a "*Joint Names policy*" and "*Specified Perils*" was to divide and allocate the risk of loss and damage to different types of property to the Employer and the Contractor. In my view, by the wording of those clauses the parties allocated to the employer the risk of loss and damage to existing structures by a fire which was caused by the negligence of a sub – contractor. The Employer's losses were to be covered by the Joint Names insurance policy that the Employer was contractually bound to take out and maintain. If the Employer had fulfilled its obligations, then it would have obtained the insurance proceeds because, under clause 6.3C.1, the Contractor was obliged to authorise the insurer to pay the insurance proceeds of a claim to the Employer.

29. The Case law.

Both sides relied on a number of decisions in support of their respective arguments. However, both counsel also accepted that none of the cases cited could be determinative because none considered precisely the same wording as in this contract. I will consider the principal cases cited to demonstrate that the conclusion I have reached on the construction of the clauses is supported by the reasoning in some and does not clash with any.

30. The first case, which was relied on by Mr Eklund for the Contractor, is ***Archdale (James) & Co Ltd v Comservices Ltd*** *[1954] 1 WLR 459.* In that case the claimant employers contracted with the defendant contractor to decorate their premises. Clause 14(b) of the contract provided that the contractor should indemnify the claimant against and should insure against any liability, loss or claim in respect of any injury or damage whatsoever to any property. The damage had to arise out of or in the execution of the works and be caused by any negligence of the defendants, their servants or agents. The clause also stated: "*subject also as regards loss or damage by fire to the provisions contained in Clause 15*". Clause 15(b) of the contract stated that the existing structures and the works and unfixed materials (with certain exceptions) should be at the sole risk of the claimant employer as regards loss or damage by fire and the claimants should maintain a proper policy of insurance against that risk.

31. During the works a fire, caused by the negligence of the contractor's servants, caused damage to the building. The claimant employer sued the contractor for damages and argued that Clause 15(b) constituted an exceptions clause and it did not exclude liability for the negligence of those for whom the

contractor was responsible. The Court of Appeal rejected this argument. As I read the judgments of Somervell, Denning and Romer LJJ, the Court of Appeal made two points. First it recognised that Clauses 14(b) and 15(b) of the contract set out a scheme of liability of the two parties for damage by defined causes. Secondly the Court emphasised the fact that the clauses linked the two parties' liability for damage to an obligation to insure against that liability. These two points led the Court to conclude that, under the contract wording, the contractor was not liable for damage to the building by a fire that was started negligently.

32. ***Scottish Special Housing Asociation v Wimpey Construction UK Ltd*** *[1986] 1 WLR 995* was also relied on by Mr Eklund. The owners of houses contracted with a contractor to modernise them. The contract contained similar wording to that in the ***Archdale*** *case.* When work was being carried out on one of the houses it was damaged by fire. The parties agreed a Special Case for the opinion of the Court of Session on whether the contractor was liable to the owners on the assumption that the fire had been caused by the negligence of the contractor. The Court of Session said that the contractor was liable. Its decision was reversed in the House of Lords. Lord Keith of Kinkel gave the leading speech. He stated (*at page 998H*): *"Clause 20(C) provides that the existing structures and contents owned by the employer are to be at his sole risk as regards damage by inter alia fire. No differentiation is made between fire due to the negligence of the contractor and that due to other causes. The remainder of the catalogue of perils includes some which could not possibly be caused by the negligence of the contractor, such as storm, tempest and earthquake, but others which might be, such as explosion, flood and the bursting or overflowing of water pipes. There is imposed upon the employer an obligation to insure against loss or damage by all these perils, in quite general terms. I have found it impossible to resist the conclusion that it is intended that the employer shall bear the whole risk of damage by fire, including fire caused by the negligence of the contractor or that of sub – contractors."*

Lord Keith also considered the ***Archdale*** *case* and noted that it contained similar clauses. He regarded that case as correctly decided and "*indistinguishable from the present case*". (See page 999E). In my view the approach of Lord Keith to the construction of the contract terms in ***Scottish Housing Association*** *case* lends support to the construction I have given to the contract in the present case.

33. Mr Taverner QC (for the Employer) relied on ***Dorset County Council v Southern Felt Roofing Co Ltd*** *(1989) 4 BBLR 96.* The County Council concluded a contract with Southern Felt Roofing Co Ltd to repair and replace the flat roof of a school. The contract contained two relevant clauses. The first, (Clause 1.7) provided that the contractor would indemnify the council against any loss in respect of damage to property and that the contractor "*shall, without prejudice to this liability to indemnify the council, [insure] or cause any sub – contractor to insure against the above risk.…*". The second clause (Clause 2.1) provided that the council "*….shall bear the risk of loss or damage of….existing structures….by fire, lightning, explosion, aircraft and other aerial devices or articles dropped therefrom*". During the works the school caught fire and the building and contents were severely damaged. The council sued the contractor for damages. The Court heard a preliminary point on whether the contractor was liable. The Court of Appeal held that it was.

34. Slade LJ (with whom Balcombe and Butler Sloss LJJ agreed) concluded that Clause 1.7 imposed an obligation on the contractor to indemnify the employer only against third party claims. He held that it did not impose any further contractual liability on the contractor except to insure. Therefore there was no express contractual liability on the contractor to compensate the council for loss caused by the fire to the school. However the contractor could still be liable in tort or under a contractual duty to take care. Slade LJ went on to hold that because clause 2.1 stated that one party to the contract should bear the risk of certain specified heads of damage, the clause "*may be capable of exempting the other party from tortious liability under the common law which he might otherwise incur in respect of damage of that kind*". If Clause 2.1 was to be considered as an exceptions clause, then it had to be construed in accordance with the principles set out by Lord Morton of Henryton in *Canada Steamship Lines Ltd v R [1952] AC 192.* Clause 2.1 did not expressly exempt the contractor from liability resulting from a fire caused by negligence. Moreover, in respect of the cause "fire", Clause 2.1 had content if the word "fire" was held to embrace only non – negligent fires. Therefore the parties "*in referring to fire in clause 2.1, intended to refer to fire occurring otherwise than by reason of the Contractor's negligence*".

35. The striking difference between the wording in the ***Dorset CC*** *case* and the present case is that in the former there was no clause that set out the scope of the Contractor's liability to indemnify the Employer for loss and damage caused by either the Contractor or those for whom he was to be held responsible under the contract terms. Nor was there any link between such a clause and a subsequent clause which placed the particular risk of loss or damage by fire on the Employer. Slade LJ recognised the importance of the absence of this combination of clauses, because he emphasised this fact when distinguishing the wording of the contract in the ***Dorset CC*** *case* from the wording in the ***Archdale*** *case* and the ***Scottish Special Housing*** *case.* He concluded that those cases gave no assistance in the ***Dorset CC*** *case.* That may be so. The converse is the case here, because the scheme of the contract wording in the ***Archdale*** and ***Scottish Special Housing*** *cases* is much closer to the wording in the present case.

36. Mr Taverner next relied on ***London Borough of Barking & Dagenham v Stamford Asphalt Co Ltd*** *(1997) 82 BLR 25,* a decision of this court. He submitted that this case was strongly in favour of his argument. The Council had engaged the contractor to do building work on the terms of the JCT Agreement for Minor Building Works, in the October 1988 revision. Under the terms of the contract the Council, as employer, was obliged to effect insurance in the joint names of the employer and contractor to cover loss or damage to the existing structures, the works and materials against specified perils, which included "fire". The employer failed to do so. During the works there was a fire that damaged the building and its contents. The employer then sued the contractor, claiming damages. A preliminary issue was heard on the issue of whether, given the contract terms, the contractor was exempted from liability to the employer. For the purposes of the issue, it was assumed that the fire was caused by the negligence of the contractor's sub – contractor. The deputy official referee held that the contractor was not exempt from liability. That decision was upheld by the Court of Appeal.

37. The two critical clauses in the contract were clause 6.2 and 6.3B, which contain similar elements to clauses 6.1.2 and 6.3C.1 of the contract in the present case. The clauses in the ***Barking & Dagenham*** *case* read as follows:

    "Clause 6.2:The Contractor shall 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 (other than injury or damage to the Works) insofar 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 upon nor in connection with the Works or any part thereof, his servants or agents. Without prejudice to his obligation to indemnify the Empoly6er the Contractor shall take out and maintain and shall cause any sub contractor to take out and maintain insurance in respect of the liability referred to above in respect of i jury or damage to any property real or personal other than the Works…"

    Clause 6.3B: Insurance of the Works – Fire etc – Existing Structures
    The Employer shall in the joint names of the Employer and Contractor insure against loss or damage to the existing structures (together with the contents owned by him or for which he is responsible) and to the Works…..by fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquake, aricraft and other aerial devices or articles dropped therefrom, riot and civil commotion…."

38. Auld LJ gave the leading judgment. He concluded that clause 6.2 was primarily concerned with liability and clause 6.3B was concerned with insurance. He said that the *"critical question"* was whether the two overlapped. He decided that there was in fact no overlap between the two provisions; clause 6.2 governed liability for damage culpably caused by the contractor, whereas clause 6.3B required insurance for certain damage not culpably caused by the contractor: (page 36). He concluded that neither clause referred to or qualified the other, and in this respect the contract differed from the ***Archdale*** *case* and the ***Scottish Special Housing Association*** *case.* Moreover, if the Employer had effected an insurance in accordance under clause 6.3B, it would have fulfilled its obligations (and acted consistently with clause 6.2) by excluding from the cover obtained any loss or damage caused by the contractor's negligence.

39. I would respectfully doubt whether Auld LJ was right to conclude that the Employer would have fulfilled its contractual duties if it had obtained a policy that did not cover negligently caused fire. There may also be argument on whether this decision is consistent with the analysis of the House of Lords in

the most recent case of ***Co – operative Retail Services Ltd v Taylor Young Ltd*** *[2002] 1 WLR 1419,* which I consider further below. But in any case there are clear differences between the contract wording in the *Barking & Dagenham case* and the present case. In particular in the former case there is no link between clause 6.2, setting out the liability of the Contractor, and clause 6.3B, setting out the insurance obligations of the Employer. Because of this lack of connection Auld LJ could say that the provision that governed the contractor's liability was clause 6.2 alone and that the insurance provision was subordinate to it. That construction cannot be adopted in the present case for the reasons that I have given above.

40. Mr Taverner relied also on the unreported decision of ***Casson and another v Osterley PJ Ltd and another*** *(decided on 20 June 2001),* which is also a decision of this court. The claimants engaged the first defendant to do renovations to a farm building. The works included renewing the plumbing. The first defendants subcontracted the plumbing work to the second defendants. Whilst that work was being carried out there was a fire, which caused substantial damage to the farm building.

41. The claimants sued the two defendants for damages. There was a preliminary issue between the claimant and the first defendant on whether, given clause 15 of the contract between those parties, the first defendant could be liable to the claimant. For the purposes of the preliminary issue it was assumed that this fire was caused by the negligence of the contractor or its subcontractor. Clause 15 provided: *"Works covered by this estimate, existing structures in which we shall be working, and unfixed materials shall be at the sole risk of the clients as regards loss or damage by fire and the client shall maintain a proper policy of insurance against that risk in an adequate sum. If any loss or damage affecting the works is so occasioned by fire, the client shall pay to us the full value of all the work and materials then executed and delivered".*

Clause 16 of the contract provided: *"The clients shall indemnify us against all liability, loss, costs, claims or demands in respect of injury to persons and/or damage to property arising from any cause other than our negligence or that of our employees".*

The first defendants had successfully argued before the Deputy Judge that clause 15 exempted them from liability for loss and damage if the fire was caused by their negligence or that of their subcontractors. The Court of Appeal reversed this decision. Schiemann LJ, who gave the first judgment, held that clause 15 had to be considered as an exemption clause and so had to be construed in accordance with the principles propounded by Lord Morton of Henryton in the ***Canada Steamship*** *case.* Schiemann LJ characterised the issue as being whether the words of clause 15, construed in context, could sensibly be regarded as exempting the builder from liability for causes other than his own negligence. He held that there were a number of ways (none "fanciful") in which a builder could be held liable for a fire resulting from either goods being supplied or work done by him. He concluded that "*the application of the third of Lord Morton's tests is fatal to the builder's contentions": (paragraph 24).* Schiemann LJ also stated that his view was not altered by virtue of the fact that clause 15 had an "*insurance aspect".* He considered that "*insurance provisions are primarily in a contract in order to provide a fund in the event of the risk eventuating. They are not there primarily for defining the obligations of one party to the other": (paragraph 25).*

42. Sedley LJ, whilst agreeing with Schiemann LJ, also held that clause 15 was not framed as an exemption clause at all but as in insurance clause. He concluded that "*the fact that the purpose of clause 15 is simply to require the client to insure both parties against fire damage, whilst powerful, is not sufficient to overcome the law's disinclination to let people contract out of the consequences of their own neglect"; (paragraph 34).* So he too allowed the appeal. Sir Murray Stuart –Smith agreed.

43. The structure of the contract in the ***Osterley*** *case* is very different to that in the present case. Thus the ***Osterley*** *case* contract does not have the following important characteristics that are present in this case: (1) here the contract provisions set out much more fully the ambit of the liability of the Contractor and the Employer; (2) here the clause defining the liability of the Contractor is specifically qualified by reference to the clause imposing an obligation on the Employer to take out a Joint Names insurance against Specified Perils; (3) "fire" is one of those perils and so that word should be construed as it is normally in an insurance policy context.

44. Lastly there is the most recent House of Lords case, ***Co – operative Retail Services Ltd v Taylor Young Partnership Ltd and others*** *[2002] 1 WLR 1419.* Mr Eklund relied in particular on this case. Co – operative Retail Services Ltd ("CRS") engaged Wimpey, as contractors, to build an office block. Wimpey engaged Taylor Young Partnership ("TYP") and Hoare Lea and Partners ("HLP") as architect and consulting engineers. Hall Electrical were the electrical subcontractors. During construction the office block was damaged by fire. For the purposes of the litigation it was assumed that the fire was caused by negligence and breach of contract of Wimpey, TYP, HLP and Hall Electrical. CRS were paid by their indemnity insurers, who then exercised their right of subrogation and sued TYP and HLP for damages. (CRS could not sue either Wimpey or Hall directly because they were joint assured with CRS on the indemnity policy, which had been taken out by Wimpey in accordance with its contractual obligations, to which I will refer below). TYP and HLP then claimed contribution from Wimpey and Hall Electrical under *section 1(1)* of the *Civil Liability (Contribution) Act 1978*. But Wimpey and Hall Electrical would only be liable to make a contribution if they were, themselves, persons who were liable to CRS in respect of the same damage. They denied that they were liable to CRS. The question of whether they were liable to CRS was tried as a preliminary issue by HHJ Wilcox. He held that Wimpey and Hall Electrical were not be liable to CRS. The Court of Appeal upheld that judgment and so did the House of Lords.

45. Lord Hope of Craighead gave the leading speech. He set out the key terms in the contract between CRS and Wimpey. The scheme is similar to the contract in the present case. Thus Clause 20.2 dealt with liability for damage to property as follows: *"The contractor shall, subject to clause 20.3 and, where applicable, clause 22.C.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 person 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, to which clause 20.2 was subject, provided: *"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…"*

    The question of provision of insurance for the subject matter of clause 20.3 was dealt with by clause 22, which provided for different options in different situations. Because this was a contract for the construction of a new building and the contract provided that Wimpey was to take out a joint names policy, the relevant provision applicable was clause 22A. Clause 22.A.1 provided: *"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…..and shall…..maintain such joint names policy up to and including the date [of completion]….."*

    The phrase *"all risks insurance"* was defined in clause 22.2 as insurance providing cover against any physical loss or damage to work executed and site materials with irrelevant exceptions. Clause 22.3 provided that nominated and domestic subcontractors would have the benefit of the joint names policy in respect of loss or damage by *"specified perils"* to the works and materials. Those perils were defined and included fire. Clause 24 dealt with the mechanism by which the contractor would claim on the joint names policy which it had taken out and also provided that the contractor must authorise payment of the insurance proceeds to the employer.

46. Lord Hope concluded that the effect of these clauses in the main contract, taken together, was that the contractor was not liable to the employer for loss or damage to the works by a fire which had taken place before completion. This was so even if that fire had been caused by the contractor's negligence. *"Instead the funds necessary to pay for the restoration of the physical damage caused to the works by fire….are to be provided by means of insurance under the joint names policy":* (paragraph 26).

47. Lord Hope then considered the terms of the sub – contract between Wimpey and Hall. Its terms were identical in effect to those of the main contract. In addition CRS, Wimpey and Hall had entered into a warranty agreement whereby Hall warranted to CRS that it had and would exercise all reasonable skill and care in the design and fulfilment of the sub – contract works. In that way there was a direct contractual link between Hall and CRS. It was accepted in argument that the position of Wimpey and

Hall were the same for the purposes of determining the issue of whether they were persons liable to CRS.

48. Lord Hope held that both the main and sub – contracts contained provisions that have the effect "*in the clearest terms*" of excluding liability for damages to the works, works executed and site materials due to the negligence, breach of statutory duty, omission or default of the contract and the sub – contractor respectively. He also concluded that the purpose of the all risks insurance, which the contractor was obliged to take out and maintain in joint names, was to provide funds for the reinstatement of the works if they were damaged during construction. He further emphasised the effect of clause 24 dealing with the mechanism whereby the contractor was to authorise payment of the insurance proceeds to the employer in the event of a claim under the policy.

49. Accordingly, Lord Hope decided (at paragraph 50: all the other law lords agreed with him) that any liability of Wimpey or Hall to CRS for damage done by fire was excluded by the terms of their contracts and the warranty. Therefore no contribution could be sought from either of them by TYP and HLP.

50. Lord Hope also stated (at paragraph 65) that Wimpey and Hall would have been able to resist liability to CRS on a separate ground, which I have already referred to above. This was that CRS, Wimpey and Hall were all jointly insured under one policy in respect of the same damage to the contract works. Lord Hope concluded that where two parties entered into a contract which stipulated that one party had to obtain an insurance in the joint names for both, then one joint insured could not sue another joint insured for damages where the loss was covered by the insurance because there was an implied term in the contract preventing such action. That is the position in the present case. Mr Tavener was unable to provide a reason why the same result should not apply in this case, particularly given the addition of the "no right of recourse" provision in the contract. In my view, as I have already stated, this is another reason why the Contractor is not liable to the Employer here.

51. Mr Taverner naturally relied upon the differences in the contract wording in the *CRS case* and in particular the express exclusion (in clause 20.3) of the contractor's liability for damage to the works executed. He also emphasised the fact that in the *CRS case* the contractor was obliged to take out an "all risks" insurance policy in joint names. He submitted that an "all risks" policy necessarily covered loss and damage from a fire caused by negligence and that contrasted with the position in the present case.

52. I accept that the wording of clause 20.3 in the ***CRS*** *case* makes it absolutely clear that the contractor is not liable for any damage to the works, even if caused by negligence. But Lord Hope emphasised that his conclusion was based on the entire contractual structure; not only the exclusory wording of clause 20.3, but also the insurance provisions in clauses 22 and 22A.4. It was the totality of these provisions that led to his conclusion that there was no liability on either side to pay compensation to the other. Likewise I have concluded that it is the totality of the contract structure in the present case that leads me to the conclusion that the Contractor is under no liability to the Employer in respect of the cost of repairs to the existing structure.

53. I regard the fact the policy in the *CRS case* was to be on "all risks" terms as an irrelevant difference. For the reasons that I have already given, an insurance policy that has "fire" as a specified peril will usually cover damage resulting from fires caused by negligence, just as a policy covering "all risks" does.

54. The Judge's Reasons.

The judge recognised, in paragraph 19 of his judgment, that if a contract provides that one party is to obtain insurance for the benefit of both parties for particular risks "*and such insurance is in fact obtained*" then the practical result is that neither can be held liable to the other for negligence which results in a claim being made on the policy. He also accepted that: *"….It is but a short step, as a matter of construction of a contract, to contemplate that if the parties have agreed that one of them will obtain insurance which, if in fact obtained, would provide cover to each of them in respect of the risk of loss or damage caused by the negligence of one of them, the correct construction of the contract is that the liability of that one for negligence has been agreed to be excluded".*

In paragraph 20 the judge went on to hold that the effect of clause 6.1.2 was to define the ambit of the liability of the Contractor, albeit in terms that were wider than they would have been at common law.

He then dealt with the proper construction of the last sentence of clause 6.1.2. That states: "*This liability and indemnity is subject to clause 6.1.3 and, where clause 6.3C.1 is applicable, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril".*

He concluded that the words "*this liability and indemnity"* referred back to liability and indemnity which is defined by clause 6.1.2. I agree with that; but the last sentence then goes on to state expressly that the liability and indemnity granted by clause 6.1.2 *"excludes"* loss and damage to any property required to be insured, provided it is caused by a Specified Peril. It is that wording which necessitates the enquiry of what is covered by the Specified Perils. It is the ambit of those perils that defines what loss and damage is excluded from the ambit of the liability and indemnity that is defined by the first part of clause 6.1.2. I have already given my reasons why, in this contract at least, the Specified Peril "*fire"* has a wider meaning than fire caused without negligence. Given that wider ambit and given the express requirement of the Contractor to obtain the joint names policy of insurance against loss or damage (by the Specified Perils) to the existing structures which includes a "no recourse" clause, then I have concluded that the judge was wrong not to take "*the short step*" and conclude that the parties had agreed to exclude the liability of the Contractor for its negligence in causing a loss to existing works as a result of one of the Specified Perils.

55. The judge points out (in paragraph 21) that the definition of the expressions "*Specified Perils"* in clause 8.3 of the IFC 84 terms is identical to that found in the ***Dorset CC*** *case* and the *London Borough of Barking and Dagenham case.* Fortified by the views of Slade LJ and Auld LJ in those cases as to the ambit of the term "fire", the judge concluded that "*fire caused by the negligence of [the Contractor] was not a "Specified Peril" and not within the exclusion contained in the last sentence of clause 6.1.2".* For the reasons that I have already given, I have concluded that the construction of the word "*fire"* in this contract is broader than that given to it in those earlier cases. As I have already pointed out, the word is used in a quite different context in the present case.

56. Conclusion.

I have concluded that, as regards the damage to the existing structure, the judge was wrong to answer the preliminary issue in the affirmative. I would allow this appeal and answer the preliminary issue thus: "*If the breaches of contract and negligence pleaded in the Statement of Case are assumed, the Defendant is not liable to the Claimant for the damage to the existing structure of the public house".*

Lord Justice Longmore:

57. I agree with Aikens J that this appeal should be allowed for the reasons which he gives. The combination of:

i) the specific exception in clause 6.1.2 of liability on the part of the contractor for loss and damage resulting from the Specified Perils which the Employer was bound to insure against under clause 6.3C.1; and

ii) the requirement that the insurance was to be in Joint Names and without rights of subrogation as between co-insured makes it clear that the intention of the parties, in the particular contract with which we are concerned, was that the contractor should not be liable for loss or damage caused by fire even if the fire was due to his own negligence. That is all the more so in the present case where, on the facts, we are asked to assume, the fire was caused not by the contractors' negligence but by that of his sub-contractors. The case thus falls fairly and squarely within the principles set out in **Archdale (James) & Co Ltd v Comservices Ltd** [1954] 1 WLR 459, **Scottish Special Housing Association v Wimpey Construction UK Ltd** [1986] 1 WLR 995 and **Co-operative Retail Services Ltd & ors v Taylor Young Partnership & ors** [2002] 1 WLR 1419. In those three cases and the present case there was and is an express link between the liability imposed on the contractor, the specific aspect of such liability which is excluded and the existence of insurance (intended to benefit both contractor and employer) in respect of that excluded liability. There is thus no need for, and no room for, the court to follow the path laid down in **Canada Steamship Lines Ltd v R** [1952] AC 192 for cases where there is a genuine question whether the parties to a contract intended to exclude liability for loss or damage caused by one of the party's negligence.

58. The judge in the present case was, with respect to him, beguiled by observations of this court in **Dorset County Council v Southern Felt Roofing Co Ltd** (1989) 48 BLR 96 and **London Borough of Barking and Dagenham v Stamford Asphalt Co Ltd** (1997) 82 BLR 25 in relation to the extent of the employer's obligation to insure; in these cases there was no express link between the exclusion of the contractor's liability for liability for fire and the employer's obligation to insure. It was thus an open question whether it was the parties' intention to exclude liability for a fire caused by the negligence of the contractor or those for whom he was responsible. No one could quarrel with a decision that that was not the intention of the parties. In that context the courts observed that the obligation of the employer to insure against fire did not extend to an obligation to insure against fire negligently caused by the contractor. Thus Auld LJ said of the relevant insurance obligation (condition 6.2), in the latter case, at page 36, that it:- *"contains no words indicating that the employer must insure against the specified perils in such a way as to suggest that they include those caused by the contractor's negligence. For example, it does not require the employer to insure against loss or damage* ***'howsoever caused'*** *or* ***'whether or not it is loss or damage for which the contractor is liable . . . .'*** *. . . . the employer 'could properly and consistently with condition 6.2, have excluded from cover any loss or damage caused by the contractor's negligence'."*

These observations must, however, be read in their context and cannot apply to cases where it is expressly agreed that the insurance policy is to be in joint names and without recourse to rights of subrogation as between the co-insured. In such cases it would be absurd to exclude, from the ambit of the obligation to insure, fire negligently caused by one of the co-insured since that is the very instance in which subrogation would normally arise.

59. Other things being equal, I would, like Aikens J (see para. 39), prefer to say that any building contract, which imposes an obligation on one of the parties to insure against the risk of fire, intends to require that party to insure against both fires caused by negligence of one of the parties and fires not so caused. That is what insuring against fire means, see eg **Harris v Poland** [1941] 1 KB 462, 464-5 per Atkinson J. It does not mean that the party carrying out the insurance obligation must insure against some fires but need not insure against other fires.

60. But whatever the position in general might be, if a building contract exempts one of the parties from liability for loss or damage caused by specified perils which it then requires should be insured by a joint policy without right of subrogation between co-insured, it makes no sense for the contract to be construed to permit loss or damage caused by the specified perils to be recoverable by one of the parties in cases where the peril occurs as a result of the negligence of the other party or those for whom he is responsible. I would allow the appeal.

Lord Justice Ward:

61. I so fully agree with my Lords' judgments that there is nothing I can usefully add. This appeal will therefore be allowed and the preliminary issue answered in the negative as set out in the conclusion of the judgment of Aikens J.

Order: Appeal allowed; order made in terms of agreed minute of order; permission to appeal to the House of Lords refused. (Order does not form part of the approved judgment)

Graham Eklund QC and (instructed by Hill Dickinson) for the Appellants
Marcus Taverner QC (instructed by Vizards Staples & Bannister) for the Respondents