JUDGMENT : His Honour Judge Richard Seymour Q.C. TCC. 29th March 2001.

Introduction

1. The Claimant, **Scottish** & **Newcastle** Plc ("S & N"), is the owner of a public house called "The Thatchers" in Fairwater Drive, Woodley, Reading, Berkshire. The Defendant, G D Construction (St. Albans) Ltd. ("GD") carries on business as a building contractor. By an agreement in writing dated 30 September 1996 ("the Contract") made between S & N and GD GD agreed to undertake for S & N works ("the Works") described in the first recital to the Contract as *"Refurbishment of an existing public house, The Thatchers, Fairwater Drive, Woodley, Reading to create family inn including mechanical & electrical works".*

   The Contract was in the standard Intermediate Form of Building Contract for works of simple content IFC 84 published by the Joint Contracts Tribunal for the Standard Form of Building Contract, incorporating Amendments 1, 2, 3, 4, 5, 6, 7 and 9. In this judgment I shall refer to that form of contract as "IFC 84".

2. For the purposes of the hearing before me it had been agreed between S & N and GD that the following facts pleaded in the Particulars of Claim on behalf of S & N were to be taken to be correct.

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

   In this action S & N claims damages against GD in respect of the damage caused to the existing structure of the public house by the fire, in respect of the damage caused to the Works by the fire, and in respect of business interruption. S & N also claims an indemnity under clause 6.1.2 of the Contract in respect of the consequences of the fire.

3. The Defence to S & N's claim pleaded on behalf of GD is that none of the claims pleaded in the Particulars of Claim is good as a matter of law because the liability of GD for damage caused to the Works or to the existing structure by fire, whether caused by its negligence or not, and liability for business interruption, was excluded by the terms of the Contract. It is also pleaded, by an amendment for which I gave permission at the start of the hearing before me, that, in effect, damages for business interruption cannot, under the Contract, be claimed in addition to any liquidated damages payable in respect of any delay to the completion of the Works.

The Preliminary Issue

4. The parties agreed that I should decide as a preliminary issue in this action the question "If the breaches of contract and negligence pleaded in the Statement of Case are assumed, is the Defendant liable to the Claimant for the categories of loss set out at 3 (b) and (c)".

   The references to 3(b) and (c) are to damage to the existing structure of the public house and to business interruption, respectively. However, it was agreed that I should not, as part of my consideration of the issue which I have quoted, deal with any question arising in relation to the case of GD pleaded by the amendment for which I gave permission at the commencement of the hearing before me.

5. The case pleaded in the Particulars of Claim is that the fire was caused by the breach by GD of express terms in item 260 of the Preliminaries incorporated in the Contract ("the Preliminaries") and clause 1.1 of

IFC 84, and/or breach of a term which it is contended was to be implied into the Contract that *"the Defendant would carry out its services with reasonable skill and care"*

and/or breach by GD of an alleged duty of care *"to exercise all reasonable skill and care in the performance of its duties and obligations."*

The material part of item 260 of the Preliminaries read:- *"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"*

Clause 1.1 of IFC 84 is in the following terms:- *"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."*

Damage by fire caused by negligence

6. At the heart of the preliminary issue which the parties have agreed I should determine at this stage are the questions whether, on proper construction of IFC 84 in its current form,
   i. the liability of the contractor for the consequences of fire caused by his negligence is excluded; and/or
   ii. the risk of damage to existing structures caused by fire which is the result of the negligence on the part of a contractor during the execution of works is covered by the insurance for which clause 6.3C.1 provides so that it is not open to the employer to make a claim against the contractor in respect of such damage.

7. The provisions of IFC 84 which are relevant to the consideration of these questions are as follows:-

"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 in 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.

"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..

"6.3.2 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.

"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.

"8.3 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."

8. Mr. Eklund submitted that, upon proper construction of the provisions which I have set out in the previous paragraph, clause 6.1.2 dealt exhaustively with the liability of the contractor for damage caused to existing structures as a result of the negligence of the contractor during the execution of works governed by IFC 84. In effect his submission was that in relation to property to which clause 6.3C.1 applied, that is to say, existing structures, for whatever liability on the part of the Contractor would otherwise have existed either at common law or under other provisions of IFC 84 there was substituted the ability of the Employer to make a claim under the Joint Names Policy. Mr. Taverner, on the other hand, submitted that, while the last sentence of clause 6.1.2 meant that it was not open to the employer to claim an indemnity such as that for which clause 6.1.2 provided in the event that damage was caused by fire to existing structures other than as a result of the negligence of the contractor, it did not exclude the liability of the Contractor for negligence at common law or any liability of the Contractor under or for breach of some provision of IFC 84 other than clause 6.1.2.

The Authorities

9. The question of the relationship, if any, between provisions in one of the standard forms of building contract concerning the giving of indemnities, on the one hand, and provisions as to insurance or the assumption of risk of loss in respect of fire, on the other, has been considered in a number of cases. The conclusion in any particular case seems to have depended upon the precise terms of the relevant contract. At one end of the scale, and an authority especially relied upon by Mr. Eklund, is **Scottish Special Housing Association v. Wimpey Construction UK Ltd. [**1986] 1 WLR 995. In that case the form of contract under consideration was the JCT Standard Form of Building Contract, Local Authorities Edition with Quantities, 1963 edition (July 1977 revision). Clause 18(2) of that form of contract was in terms somewhat similar to those of clause 6.1.2 of IFC 84. The relevant wording was:- *"Except for such loss or damage as is at the risk of the Employer underclause 20[C] of these Conditions 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 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 provided always that the same is due to any negligence, omission or default of the Contractor, his servants or agents or of any sub-contractor, his servants or agents."*

Clause 20[C] provided, so far as is presently material, that:- *"The existing structures together with the contents thereof owned by him or for which he is responsible and the Works and all unfixed materials and goods, delivered to, placed on or adjacent to the Works and intended thereforeshall be at the sole risk of the Employer as regards loss or damage by 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"*

The House of Lords concluded that, on the wording of those clauses, it was plain that the Employer was to bear the risk of damage by fire, whether or not caused by the negligence of the Contractor. The wording considered was, of course, different from the wording of IFC 84 which I have to consider, in particular because clause 6.3C.1 of IFC 84 does not contain any express statement as to by whom the risk of damage by fire is to be borne. At the same time, the wording before the House of Lords did not

include any express exclusion of liability such as is to be found in the last sentence of clause 6.1.2 of IFC 84.

10. Mr. Eklund also relied upon the case of **Kruger Tissue (Industrial) Ltd. v. Frank Galliers Ltd**. (1998) 57 Con. LR 1. In that case the form of contract in question was the JCT Standard Form of Building Contract 1980 Edition. It was conceded by counsel that clause 22C of that form of contract, although primarily an insurance clause, was so worded as to qualify the liability of the Contractor in relation to existing structures under clause 20.2. The material part of clause 20.2 was in these terms:- *"The Contractor shall, subject to 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 the negligence, breach of statutory duty, omission or default of the Contractor, his servants or agents or of any other person employed or engaged upon or in connection with the Works or any part thereof, his servants or agents.."*

So far as is presently material, clause 22C of the contract provided:- *"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"*

In the light of the concession made by counsel the issue before H.H. Judge John Hicks Q.C. was whether the obligation to insure imposed by clause 22C included an obligation to obtain cover in respect of what was in effect business interruption. My attention was drawn by both Mr. Eklund and Mr.Taverner to what H.H. Judge Hicks said in his judgment at pages 6 to 7:-

"23. The issue here is whether an obligation to insure the existing structures and their contents "for the full cost of reinstatement, repair or replacement of loss or damage" includes an obligation to cover loss of profit from and increased cost of working in a business carried on in those structures. On the natural and ordinary meaning of words the answer is in my view plainly "no". The expression "cost of reinstatement, repair or replacement" is wholly apt in relation to buildings, fixtures, fittings and goods, but wholly inapt in relation to economic loss.

"24. Is there anything in the documentary context or the factual setting to displace or confirm the natural meaning? Mr. Coulson's arguments for a wider construction which would include economic loss and thus produce the former result rested, I believe, on the implicit but fallacious assumption that the sole, or at least primary, purpose of cl 22C.1 is to serve as a qualification to cl 20.2, and that it must be interpreted as if it were a kind of proviso to the latter. On that basis it might well be right to entertain and give some weight to general policy considerations such as whether there should be a wider or narrower exception to the contractor's liability for negligence and whether it is desirable to distinguish in that context between different kinds of damage.

"25. But although cl 22C.1 does indeed serve by reference to qualify liability under cl 20.2 its primary purpose is to deal not with liability but with insurance. It must be construed in its own right and not merely as an adjunct to cl 20.2. Viewed in that light its primary function is simply to ensure, in conjunction with the rest of cl 22C, that there will be a fund available out of which damage to the existing structures can be made good. That will no doubt generally be in the interests of the employer, who may indeed for the same reason extend the cover further, but no contractual obligation is needed for that reason; the contractual obligation, with the resulting expense to the employer, is imposed in the interests of the contractor and there is no policy reason why its meaning should be strained to extend more widely than to cover physical loss and damage.

"26. Of equal, if not greater, significance is the undeniable consideration that the construction of cl 22C.1 must be the same for whatever purpose it is being invoked. In particular, since it imposes a free-standing and binding obligation, that obligation can be enforced by the contractor at any time, without reference to cl 20.2. The construction contended for by Galliers therefore entails that if the employer insures only for material loss, or although covered also for consequential loss adds the contractor's name only to the material loss section of the policy, the contractor can at any stage sue for breach of contract or can himself, under cl 22C.3, take out a joint names policy covering the employer's consequential loss and charge the premium to the employer by adding it to the contract price. I do not find that a plausible intention to attribute to the parties to such a contract in the absence of plain words having that effect, let alone in the teeth if plain words which have the reverse effect."

Mr. Eklund placed considerable emphasis upon the fact that H.H. Judge Hicks expressed the view that clause 22C.1 of the form of contract before him qualified liability under clause 20.2 of that contract. He sought to suggest that the fact that there was no express cross-reference in the form of contract before H.H. Judge Hicks between the two clauses to which Judge Hicks referred made his, Mr. Eklund's, submission to me on IFC 84, where there is cross-reference, the stronger.

11. The third authority upon which Mr. Eklund sought to place reliance was a relatively recent decision of the Court of Appeal, **Co-operative Retail Services Ltd. v. Taylor Young Partnership** [2000] BLR 461. In that case the form of main contract was again the JCT Standard Form of Building Contract 1980 Edition, but this time it was the provisions of clause 22A which were relevant. The relevant type of insurance contemplated by the contract was thus All Risks. The conclusion of the Court of Appeal, expressed at paragraph 73 of the leading judgment, that of Brooke LJ, that:- *"To put it quite simply, they (that is to say, the contractor and the relevant sub-contractor),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."*, is thus not, perhaps, particularly surprising.

12. Mr. Taverner drew my attention, first, to the decision of Swanwick J in **County and District Properties Ltd. v. C. Jenner & Son Ltd.** [1976] 2 Lloyd's Rep 728, in support of a submission that there is an essential difference between a claim for damages for breach of a contract and a claim for an indemnity under an express provision in a contract. That distinction was graphically explained by Fry LJ in **Birmingham & District Land Co. v. London & North Western Railway Co.** 34 Ch. D. 261 at page 276 in a passage quoted by Swanwick J. Mr. Eklund did not challenge the existence or nature of the distinction for which Mr. Taverner contended, and in my judgment that distinction is both obvious and well-established.

13. Mr. Taverner went on to remind me of the opinion of the Privy Council in Canada Steamship Lines Ltd. v. R. [1952] AC 192 and of the passage at page 208 in the report of the opinion, expressed by Lord Morton of Henryton, dealing with the principles to be adopted in the construction of exemption clauses. What Lord Morton said was this:-

> *"(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens (3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some other ground other than that of negligence", to quote again Lord Greene in the Alderslade case. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied form Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants."*

The liberal use by Lord Morton in the passage quoted of Latin expressions which are no longer regularly employed in the courts of this country does not disguise the principles, which are now well-established.

14. Those principles were applied by the Court of Appeal in **Dorset County Council v. Southern Felt Roofing Co. Ltd.** (1989) 48 BLR 96, a case in which Mr. Taverner himself appeared. The form of contract in issue in that case was the Dorset County Council Architect's Department Conditions of Contract. That form of contract included the following provisions:-

"The Contractor Shall

1.7 INDEMNIFY the Council against any liability, loss claim or proceedings in respect of injury or death to persons or damage to property and shall, without prejudice to his liability to indemnify the Council, or cause any sub-contractor to insure against the above risks for a minimum of £500,000 in respect of any one occurrence, the cover to be unlimited in amount, except that the insurance in respect of claims for personal injury or death from the

Contractor's own employees arising out of and in the course of their employment shall comply with the Employer's Liability (Compulsory Insurance) Act 1969 or any amendment or re-enactment thereof.
"1.9 INSURE or cause any sub-contractor to insure against loss or damage by fire, etc. to any temporary buildings, plant, tools and equipment owned or hired.
"The Council Shall
"2.1 BEAR THE RISK of loss or damage in respect of the Works and (where appropriate) the existing structure and contents thereof (excepting temporary buildings, plant, tools and equipment owned or hired by the Contractor or any sub-contractor) by fire, lightning, explosion, aircraft and other aerial devices or articles dropped therefrom."

The leading judgment in the Court of Appeal was that of Slade LJ. At page 103 in the report Slade LJ identified as the question outstanding by that stage of his consideration *"Is clause 2.1 on its true construction wide enough to exempt the Contractor from the tortious liability under the common law which would otherwise fall upon it in respect of damage negligently caused to the Council's building and its contents?"*

Applying the approach indicated by Lord Morton in **Canada Steamship Lines Ltd. v. R.** Slade LJ reached the conclusion that that sub-clause did not have the effect of exempting the contractor in that case from the consequences of his own negligence. At pages 105 to 106 of the report Slade LJ said:- *"However, despite (counsel's) beguiling invitation to do so, it is not, in my judgment, permissible to break up the clause in the process of construction into a number of component parts and to read them in isolation from one another. One has to read clause 2.1 as a whole. When it is so read, two significant features emerge:*

1. *The heads of loss and damage to which the clause relates are by no means restricted to loss or damage by fire. They also include loss or damage by "lightning, explosion, aircraft and other aerial devices or articles dropped therefrom". Even if damage by explosion could be caused by the Contractor's negligence, damage by lightning, aircraft and other aerial devices could not. Accordingly, on analysis, to say that the Council must bear the risk of damage to the existing structure and contents falling within the last three mentioned categories is to do no more than state the obvious. Yet the draftsman has chosen so to state and, I think, for sufficient reason namely for the avoidance of doubt, particularly bearing in mind his reference to "the Works" to which I refer below. Now fire, no less than the impact of lightning, can occur without the negligence or fault of any human agency. If the draftsman chose to refer to a number of possible causes of damage which involve no fault on the part of anyone, I do not see why, in referring to fire, he should not be taken to have similarly had in mind damage by fire occurring without negligence on the part of the Contractor. Mr. Wright told us that the words "lightning, explosion, aircraft and other aerial devices or articles dropped therefrom" commonly follow the word "fire" in the specification of the risks in insurance policies, and that in such policies the reference to fire is commonly treated as covering the risk of fire occurring even through negligence. Accepting for present purposes what Mr. Wright told us, I do not think that this can affect our construction of this clause in these Conditions of Contract.*
2. *The loss or damage in respect of which clause 2.1 places the risk on the owner is not confined to the existing structure and contents; it extends to "the Works". It is, I think, common ground that "the Works" may include temporary buildings, plant and affixed materials. It can by no means be assumed that the property in "the Works" will necessarily be in the owner rather than the Contractor. One of them may own one part and the other may own the rest. In these circumstances, it is well understandable why the draftsman should have wished to make it clear where the risk of damage to "the Works", in particular, should lie. To provide that the Council must bear the risk of fire damage to "the Works" occurring otherwise than by the Contractor's negligence would not amount to merely stating the obvious. Such a provision would achieve a really useful purpose.*

"For all these reasons, I cannot accept the Contractor's submission that, in relation to fire, the only head of risk or liability upon which clause 2.1 can bite is negligence."

The consequence was that the clause was construed as only applying to fire caused without the negligence of the contractor and not as transferring to the council the risk of damage by fire caused by the negligence of the contractor.

15. Mr. Taverner also relied upon the decision of the Court of Appeal in London Borough of Barking and Dagenham v. Stamford Asphalt Co. Ltd. (1997) 82 BLR 25. In that case the relevant form of contract was

the JCT Agreement for Minor Building Works, October 1988 revision. The material clauses were in the following terms, so far as is presently of significance:-

"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 or in connection with the Works or any part thereof, his servants or agents. Without prejudice to his obligation to indemnify the Employer the Contractor shall take out and maintain insurance in respect of the liability referred to above in respect of injury or damage to any property real or personal other than the Works..

"6.3B The Employer shall in the joint names of 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 and all unfixed materials and goods intended for, delivered to, placed on or adjacent to the Works and intended therefore by 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.

"If any loss or damage as referred to in this clause occurs then the Architect/the Contract Administrator shall issue instructions for the reinstatement and making good of such loss or damage in accordance with clause 3.5 hereof and such instructions shall be valued under clause 3.6 .."

The employer did not in fact arrange the cover for which clause 6.3B provided. There was a fire. For the purposes of the trial of a preliminary issue it was assumed that the fire had been caused by the negligence of the contractor. The question was, on that assumption, whether the insurance which the employer ought to have arranged included cover against damage resulting from fire caused by the negligence of the contractor.

16. The leading judgment was that of Auld LJ. At page 30 to 31 in his judgment Auld LJ said:- "*Before turning to the arguments on appeal, I pause to draw attention to certain distinguishing features of those two provisions and to condition 6.3A, the standard form's alternative to condition 6.3B.*

"First, condition 6.2 is primarily concerned with liability, that of the contractor, and requires it to insure in support of it. Condition 6.3B is concerned only with insurance, which it does not expressly relate to the existence or non-existence of any liability. It says nothing about liability. Neither condition refers to the other.

"Second, condition 6.2 makes the contractor liable to the employer for direct and consequential loss from "any damage whatsoever" to the building or contents culpably caused by the contractor, but not for any loss from damage to the works, which are the contractor's responsibility and which, by condition 1.1 of the agreement, it is bound to complete. Condition 6.3B requires the employer to insure in its and the contractor's joint names the building, contents and the works, but only against certain specified perils. Those perils are, in the main, of the "Act of God" variety, unlikely in most cases to be caused by either the contractor or the employer

"Third, condition 6.3A, as an alternative to condition 6.3B, requires the contractor to insure it and the employer jointly against the same specified perils, but only in respect of the works and the cost of their reinstatement. Again, this condition says nothing about liability and does not relate the required insurance to the existence or non-existence of any liability."

As Mr.Eklund pointed out, it could not be said of the clauses which I have to construe that clause 6.1.2 does not refer to clause 6.3C.

17. Auld LJ went on, at page 33 of the report, to make these comments:- *"In my judgment, the primary task is to construe the contract on its own terms rather than to speculate on the effect of it of some notional contract of insurance which the employer might have effected under condition 6.3B. As they arise in this case, questions of insurable interest and whether such notional insurance would have been for the benefit of the contractor depend on the nature of the insurance called for by the contract.*

"Although it is clear that condition 6.2 is concerned primarily with liability and condition 6.3B with insurance, the critical question is whether the two overlap by condition 6.3B requiring the employer to insure, in the specified

instances, against damage for which the contractor is liable under condition 6.2. There is plainly no overlap in the following respects:

1.where the damage does not result from one of the specified perils in condition 6.3B;

2.the works the contractor is not liable to the employer under condition 6.2 for damage to them, but the employer is required to include them in the specified cover in condition 6.3B;

3.as to consequential damages the contractor is liable for them under condition 6.2, but the employer is not required to insure them under condition 6.3B."

Auld LJ expressed his conclusion, with which Millett LJ and McCowan LJ agreed, at pages 35 to 36 of the report as follows:- *"In my judgment, the two provisions are concerned with entirely different types of damage, in addition to the distinctions to which I have already referred. Condition 6.2 governs liability for damage culpably caused by the contractor. Condition 6.3B and its alternative 6.3A require insurance for certain damage not culpably caused by it. My reasons for that conclusion are as follows.*

"Neither condition refers to or qualifies the other. Cf ***James Archdale & Co. Ltd. v. Comservices Ltd****. [1954] 1 WLR 459; 6 BLR 52, CA, and* ***Scottish Special Housing Association v. Wimpey Construction (UK) Ltd****. [1986] 1 WLR 995; 34 BLR 1, HL; and other cases on comparable but clearly interrelating provisions in the JCT Standard Form of Building Contract discussed in Keating on Building Contracts (6th edn), pages 607-608. Condition 6.2 imposes an unqualified liability on the contractor. Condition 6.3B 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, in 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 under condition 6.2"****. Equally, there are no words in condition 6.3B expressly excluding the risk of damage to the building or contents for which the contractor was liable under condition 6.2. But none is needed, given the different function of the two provisions and the clear contrary effect of condition 6.2, imposing on the contractor, not only liability for damage caused by its negligence, but also an obligation to insure in respect of it. It follows that, in my view, if the employer had effected a condition 6.3B insurance it could properly, and consistently with condition 6.2, have excluded from cover any loss or damage caused by the contractor's negligence.*

"Most of the specified perils for which insurance is required under condition 6.3B are of a type resulting only from natural phenomena "Acts of God" or are normally the responsibility of either contracting party. In my view, that is how "fire" should be interpreted in that context. That is how Slade LJ interpreted it in ***Dorset County Council v. Southern Felt Roofing Co. Ltd.*** *(1989) 48 BLR 96, at page 106, when considering a comparable brace of provisions, the latter clearly imposing on the employer the risk of a number of similar natural hazards, including fire:"*

Mr. Taverner urged me to adopt the same approach as Slade LJ and Auld LJ to the construction of the word "fire" in the definition of "Specified Perils" in IFC 84 and to hold that the insurance required by clause 6.3C in respect of damage caused by fire did not include damage resulting from fire caused by the negligence of GD. He also submitted that I should follow the approach of Auld LJ in regarding the two clauses 6.1.2 and 6.3B in IFC 84 as dealing essentially with different things, so that the liabilities of GD at common law and under provisions of the Contract other than clause 6.1.2 were unaffected by the last sentence of clause 6.1.2 or the obligation to insure in clause 6.3B.

Consideration

18. It is a fundamental principle of the law of contract in England that the parties to an agreement can agree between themselves anything which is lawful. However, one of the qualifications to which that broad statement of principle is subject is, as Buckley LJ said in **Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd**. [1973] QB 400 at page 419, that *"it is inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence"*.

Consequently, while it is quite lawful for parties to agree that one of them takes the risk that the other will be negligent in the course of performing his contractual obligations, it is not to be expected that that is what parties will have agreed, and so in construing a contract which is said to contain a term which has that effect a degree of caution is appropriate. The requisite degree of caution and how such caution

should be applied to the task of construction are set out in the passage from the opinion of the Privy Council given by Lord Morton in Canada Steamship Lines Ltd. v. R. which I have cited above.

19. One way in which the practical result that one party is excused by contract from having to take the consequences of his own negligence in the performance of his obligations under the contract is if the contract expressly provides that one of the parties is to bear the risk of a particular type of loss or the risk of loss or damage to particular property or a particular type of property. If, on proper construction of the contract in question, it has been agreed that one of the parties shall bear a particular risk, the other is able to say that, to the extent that the relevant risk is to be borne by the first party, the second party is excused from the consequences of his own negligence. Such was the case in **Scottish Special Housing Association v. Wimpey Construction (UK) Ltd**. Again, if the particular contract provides for one or other or both of the parties to obtain insurance for the benefit of both against a particular risk or in respect of loss or damage of a particular type, and such insurance is in fact obtained, the practical result is that neither can be held liable to the other for negligence which results in a claim being made upon the policy of insurance. The reason is that if a claim is made upon the policy by one of the contracting parties, and that claim is paid, it is not open to the insurer to exercise the right of subrogation which he would otherwise have against the party which, by its negligence, actually caused the relevant loss, because that party is just as much entitled to the benefit of the joint insurance as the party which made the original claim upon the policy see **Petrofina (UK) Ltd. v. Magnaload Ltd**.[1984] 1 QB 127; **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. It is but a short step, as a matter of the 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.

20. Over the years various of the standard forms of contract issued by the Joint Contracts Tribunal for the Standard Form of Building Contract and the predecessors of that body have been considered by the courts in this country on numerous occasions. The quality of the drafting of some of the provisions in some of these forms of contract has attracted a degree of judicial comment. The terms of clause 6.1.2 of IFC 84 do not seem to me to be entirely straightforward. I am conscious that the wording of the sub-clause is quite similar to that of other clauses in other forms of contract which have been the subject of judicial decision. I have referred to some of those decisions earlier in this judgment. The first rather curious feature of the sub-clause as drafted is that, to an extent, it makes the contractor expressly liable for that for which he would be liable at common law, or by virtue of other terms of IFC 84, in any event. That is to say, the sub-clause provides that the contractor *"shall be liable for any expense, liability, loss.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 Worksto the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor, his servants or agents..",*

and such liability as that described would, in principle, arise either at common law for negligence or for breach of the contract which incorporated IFC 84 in any event. It is, of course, right to say that the form of words quoted does make it clear, as Auld LJ said in **London Borough of Barking and Dagenham v. Stamford Asphalt Co. Ltd**., that the liability of the contractor extends to include liability to pay damages in respect of consequential loss. It is correct, as Mr. Taverner submitted, that the liability for which the sub-clause provides is wider than that which would rest upon the contractor even if clause 6.1.2 was not included in IFC 84 in other respects also. In particular, there is a liability for "***anyclaim or proceedings***" which may broaden somewhat the scope of what the employer can recover as compared with a claim for damages for negligence or for breach of contract. Perhaps of greater significance is the fact that the liability for which the sub-clause provides on the part of the contractor includes liability for persons for whom at common law the contractor would not be liable, specifically *"any person employed 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, 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."*

It is not obvious that a useful purpose is achieved by providing in terms that the contractor shall be liable for what he would be liable for even without clause 6.1.2, but it seems likely that the draftsman thought that it would avoid confusion if there were gathered together in one place a comprehensive catalogue of the liabilities of the contractor in respect of existing structures. What I think is wildly improbable is that clause 6.1.2 was intended to extend the scope of the contractor's liabilities so that they could then be excluded. That, however, seemed to be the effect for which Mr. Eklund was contending, for his submission was that the effect of the words *"This liability where clause 6.3B is applicable excludes loss or damage to any property required to be insured there under caused by a Specified Peril."* was that the liability of the contractor for loss caused by a "Specified Peril", such as fire, which arose otherwise than under clause 6.1.2, was excluded. A more natural reading of the last sentence of clause 6.1.2, as a matter of English, in my judgment, is that the expression "This liability and indemnity" simply refers to the liability and indemnity for which the sub-clause itself provides. That construction links the sentence to the rest of the sub-clause. One would expect that the reference to "This liability and indemnity", as opposed to some other liability and indemnity, or to any liability and indemnity, to refer to an earlier part of the sub-clause, and that, in my judgment, is what it does. The effect of the sub-clause, so far as is presently material, is thus to exclude the liability for which clause 6.1.2 provides, and the obligation to indemnify, where clause 6.3B is applicable, in relation to any property which, by the latter clause is required to be insured, provided the loss or damage in question has been caused by a "Specified Peril". I reach that conclusion simply on a consideration of the words of the sub-clause and without seeking to apply the tests formulated by Lord Morton in Canada Steamship Lines v. R. If I were wrong in holding that, as a matter of English, the last sentence of clause 6.1.2 meant what I have held it to mean, so that it was necessary to consider the third of Lord Morton's tests, an application of that test in this case would lead to the same conclusion as that which I have reached. On the facts which I am required to assume for the purposes of the trial of the preliminary issue before me the last sentence of clause 6.1.2 does not avail GD.

21. The definition of the expression "Specified Perils" in clause 8.3 of IFC 84 is identical to the definition of that which was to be the subject of insurance cover in both Dorset County Council v. Southern Felt Roofing Co. Ltd. and London Borough of Barking and Dagenham v. Stamford Asphalt Co. Ltd. It may be that, strictly speaking, the views expressed in those cases by Slade LJ and Auld LJ, respectively, as to the proper construction of that definition is not binding upon me in the present case. However, not only are the views of Slade LJ and Auld LJ entitled to the greatest respect both in their own right and because the other members of the Court of Appeal in each case agreed with the views expressed, but I happen to agree with those views. I therefore hold that fire caused by the negligence of GD was not a "Specified Peril" and not within the exclusion contained in the last sentence of clause 6.1.2 of IFC 84 even if I had held that that sentence extended outside the confines of the liability and indemnity for which that sub-clause provides.

22. Clause 6.3C.1 of IFC 84 requires a Joint Names Policy to be taken out and maintained *"for the full cost of reinstatement, repair or replacement of loss or damage"* to existing structures and the contents thereof. That form of words does not seem to me apt to require that the cover include cover in respect of business interruption. A similar conclusion was reached by Auld LJ in London Borough of Barking and Dagenham v. Stamford Asphalt Co. Ltd. on wording which referred to that which had to be insured against as *"loss and damage to the existing structures"* and other items of physical property. H.H. Judge Hicks reached a similar conclusion on similar wording in **Kruger Tissue (Industrial) Ltd. v. Frank Galliers Ltd.** In my judgment clause 6.3B.1 does not require insurance to be obtained in respect of the consequences of business interruption or other consequential loss.

Conclusion

23. The answer to the preliminary issue, subject to the point covered by the amendment to the Defence for which I gave permission at the start of the hearing of the trial of the preliminary issue, is affirmative.

Marcus Taverner Q.C. for the claimant (Vizards Staples & Bannisters, Solicitors)
Graham Eklund for the defendant (Hill Dickinson, Solicitors)