TFW Printers Ltd v Interserve Project Services Ltd [2006] ABC. 06/27

CA on appeal from Central London County Court (HHJ Knight) before Sedley LJ; Dyson LJ; Carnwath LJ. 27th June 2006

Lord Justice Dyson:

Introduction

1. This appeal raises two issues of construction on the standard JCT Agreement for Minor Building Works (1993 revision). At the conclusion of the argument, we allowed the claimant's appeal. In this judgment, I give my reasons. I shall refer to the claimant as "*the Employer*" and the defendant as "*the Contractor*".

2. The Employer is the leasehold owner of 28 Tidal Basin Road, Silvertown, London E16 (*"the Building"*). By an agreement made on or about 28 September 1998 between the Employer and the Contractor, the Contractor agreed to carry out various building works (*"the Works"*) to the building for £328,640 exclusive of VAT. The agreement incorporated the terms of the standard JCT Agreement for Minor Building Works (1993 revision).

3. Practical completion occurred on 5 February 1999. On the night of 29/30 May 1999, there was heavy rainfall which caused flooding to part of the building. The Works had included the replacement of a pressed steel valley gutter to a part of one of the roofs of the Building. The downpipe situated at the western end of the gutter had been removed by the Contractor but had not been replaced by the time of the storm. The flood was caused by the lack of the downpipe.

4. The Employer alleges that the flood was caused by the Contractor's breach of contract and/or negligence and that it suffered loss and damage which has been quantified at £22,442.07. These losses are in respect of damage to fixtures and fittings, damaged stock, damage to artwork, printing plates and transparencies and uninsured losses.

5. The two issues of construction are (i) whether the Employer's obligation in clause 6.3B to insure in the parties' joint names against loss or damage ceased upon practical completion or whether it continued until the Contractor had discharged the defects liability obligation referred to in clause 2.5; and if the insurance obligation did so continue, (ii) whether a claim by the Employer against the Contractor for damages for breach of contract and/or negligence is barred by clause 6.3B. Judge Brian Knight QC tried these as preliminary issues on the assumption that the Employer's pleaded allegations were true. He decided that the obligation to insure continued for the duration of the defects liability period, and that the Employer's pleaded claim for damages was barred by clause 6.3B. It is common ground that the second issue only arises if the judge reached the right conclusion on the first issue. The Employer appeals with the permission of the judge.

The contract

6. Clause 1.1 provides that the Contractor will with due diligence and in a good and workmanlike manner carry out and complete the Works in accordance with the Contract Documents. Clause 2 provides for commencement and completion of the Works. The Works shall be completed by 31 January 1999 ("the date for completion") (clause 2.1). If it becomes apparent that the Works will not be completed by the date for completion for reasons beyond the control of the Contractor, then the Contractor shall so notify the architect, who shall make in writing such extension of time for completion as may be reasonable (clause 2.2). If the Works are not completed by the date for completion or by any later completion date fixed under clause 2.2, then the Contractor shall pay or allow the Employer liquidated damages at the rate of £7,000 per week between the completion date (or extended completion date) and the date of practical completion (clause 2.3). The architect shall certify the date on which in his opinion the Works have reached practical completion (clause 2.4). Clause 2.5 provides that any defects, excessive shrinkages or other faults to the Works which appear within 12 months of the date of practical completion and are due to materials or workmanship not in accordance with the Contract shall be made good by the Contractor at his own cost unless the architect shall otherwise instruct. The architect shall certify the date when in his opinion the Contractor's obligations under clause 2.5 have been discharged.

7. Clause 3.5 provides that the architect may issue written instructions which the Contractor shall forthwith carry out. Clause 3.6 provides that the architect may issue instructions for variations which shall be valued on a fair and reasonable basis, and such valuation shall include any direct loss and/or expense incurred by the Contractor due to the regular progress of the Works being affected by compliance with such instruction.

8. Clause 4 provides for payment. It includes the following:

"Progress payments and retention

4.2 The Architect/The Contract Administrator shall if requested by the Contractor, at intervals of not less than four weeks calculated from the date for commencement, certify progress payments to the Contractor in respect of the value of the Works properly executed, including any amounts either ascertained or agreed under clauses 3.6 and 3.7 hereof, and the value of any materials and goods which have been reasonably and properly brought upon the site for the purpose of the Works and which are adequately stored and protected against the weather and other casualties, less a retention of 5%/……..% and less any previous payments made by the Employer, and the Employer shall pay to the Contractor the amount so certified within 14 days of the date of the certificate.

Penultimate certificate

4.3 The Architect/The Contract Administrator shall within 14 days after the date of practical completion certified under clause 2.4 hereof certify payment to the Contractor of 97½%/……% of the total amount to be paid to the Contractor under this Contract so far as that amount is ascertainable at the date of practical completion, including any amounts either ascertained or agreed under clauses 3.6 and 3.7 hereof, less the amount of any

progress payments previously made by the Employer, and the Employer shall pay to the Contractor the amount so certified within 14 days of that certificate.

Final certificate

4.4 The Contractor shall supply within three months ..... from the date of practical completion all documentation reasonably required for the computation of the amount to be finally certified by the Architect/the Contract Administrator and the Architect/ the Contract Administrator shall within 28 days of receipt of such documentation, provided that the Architect/the Contract Administrator has issued the certificate under clause 2.5 hereof, issue a final certificate certifying the amount remaining due to the Contractor or due to the Employer as the case may be and such sum shall as from the fourteenth day after the date of the final certificate be a debt payable as the case may be by the Employer to the Contractor or by the Contractor to the Employer."

9. Clause 6 contains the provisions for insurance and liability for injury and damage to property. Clause 6.1 deals with the allocation of responsibility between the parties for the consequences of personal injury or death. Clause 6.2 deals with the allocation of responsibility for the consequences of injury or damage to property. It provides:

"Injury or damage to property

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 or statutory duty, omission or default of the Contractor, his servants or agents, or of any person employed or engaged by 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 and shall cause any sub-contractor to 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 which shall be for an amount not less than the sum stated below for any one occurrence or series of occurrences arising out of one event:

insurance cover referred to above to be not less than:

£ TWO MILLION"

10. Clause 6.3A in the standard form was struck out by the parties to the present contract. But it is relevant as will become clear. It provides:

"6.3A The Contractor shall in the joint names of Employer and Contractor insure against loss and 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, for the full reinstatement value thereof plus .....% to cover professional fees, all work executed and all unfixed materials and goods delivered to, placed on or adjacent to the Works and intended therefore.

After any inspection required by the insurers in respect of a claim under the insurance mentioned in this clause 6.3A the Contractor shall with due diligence restore or replace work or materials or goods damaged and dispose of any debris and proceed with and complete the Works. The contractor shall not be entitled to any payment in respect of work or materials or goods damaged or the disposal of any debris other than the monies received under the said insurance (less the percentage to cover professional fees) and such monies shall be paid to the Contractor under certificates of the Architect/the Contract Administrator at the periods stated in clause 4.0 hereof."

11. Clause 6.3B provides:

"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 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 hereof."

12. Clause 6.4 provides inter alia that where clause 6.3B is applicable, the Employer shall produce such evidence as the Contractor may reasonably require that the insurance has been taken out and is in force at all material times.

The first issue: does the insurance obligation in clause 6.3B continue between the date of practical completion and the date when the defendant's obligations under clause 2.5 have been discharged?

The submissions

13. On behalf of the Employer, Mr Aeberli submits that, in construing clause 6.3B, it is relevant and permissible to have regard to the JCT Practice Note 22 and Guide to the Amendments to the Insurance and Related Liability Provisions published by the Joint Contracts Tribunal in 1986 ("JCT Practice Note 22"). It was part of the admissible background that would have been reasonably available to the parties at the time when they entered into the contract. He relies on the speech of Lord Hoffmann in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896, 912F-913E. He submits that JCT Practice Note 22 shows that the Joint Contracts Tribunal was concerned in all its standard form building contracts to limit the duration of insurance of the Works, whether to be arranged by the Contractor or the Employer, up to the date certified as the date of

practical completion. He contends that this concern is equally relevant to the duration of the equivalent insurances under clauses 6.3A and 6.3B of the Minor Works form of the contract.

14. Mr Aeberli relies on the fact that clause 6.3B provides that, if loss or damage referred to in that clause is made good, it is pursuant to architect's instructions under clause 3.5 and valued in accordance with clause 3.6, ie as a variation. He submits that the contract contains no machinery which accommodates the issue of variation instructions and their consequences after practical completion. There is no machinery for altering the value of the Works after practical completion (as opposed to ascertaining the value of the Works for purposes of the Final Account) or for the issue of interim certificates for variations instructed after that date. Further, there is no machinery for extending the contract period to reflect the time involved in complying with such instructions: clause 2.2 is concerned with delays to completion, not delays occurring after completion has occurred. Nor is there any machinery for rescinding the certificate of practical completion to reflect the fact that new work has been instructed after practical completion, and for re-issuing it once that work has been completed. In short, Mr Aeberli submits that it cannot have been intended that the architect should be able to issue instructions for variations requiring the contractor to carry out work in circumstances where the contract machinery is not available to deal with the time and money consequences of that work. None of these difficulties arise if the obligation to insure under clause 6.3B ceases at practical completion.

15. Mr Aeberli submits that the insurance obligation in (the struck out) clause 6.3A subsists only until practical completion and, if that is right, it is difficult to see why the insurance obligation in clause 3.6B should subsist for any longer period. He points out that clause 6.3A requires the defendant *to "restore or replace work or materials or goods damaged…and proceed with and complete the Works".* It is also to be observed that any insurance monies received shall be paid to the Contractor under certificates at the periods stated in clause 4.0. It is implicit in this language that the obligation to restore etc and the right to be paid the insurance monies can only subsist during the period before practical completion.

16. Mr Aeberli also submits that it is commercially impractical to expect the contractor to maintain insurance in respect of the Works of the type envisaged by clause 6.3A after practical completion, since after that date it no longer has possession of the site and thus no control over the Works. It makes commercial sense after practical completion for the building owner to insure its building under an owner's building and contents policy. So too in relation to insurance of the type envisaged by clause 6.3B.

17. Finally, Mr Aeberli submits that, if there is ambiguity and doubt as to the duration of the obligations contained in clause 6.3B and as to the meaning of "at all material times" in clause 6.4, these clauses should be construed in favour of the claimant, since in effect (if the judge reached the right conclusion on the second issue), clause 6.3B is an exclusion clause which bars what would otherwise have been the Contractor's liability. In short, Mr Aeberli relies on the contra proferentem rule: see *Chitty, the Law of Contracts* (29th edition) paras 14-009 and 14-010.

18. Mr David Sears QC submits that the point based on the alleged lack of contractual machinery has no substance. There is machinery for increasing the value of the Works after practical completion. There is no stated time limit for the issue of architect's instructions, whether under clause 6.3B or clause 3.5. The architect may issue instructions under clause 6.3B at any time before the end of the defects liability period. These are not variation instructions within the meaning of clause 3.6; they are instructions issued under clause 6.3B which fall to be valued under clause 3.6.

19. Clause 3.6 enables the architect to order "an addition to or omission or other change in the Works or the order or *period in which they are to be carried out*" (emphasis added). There is nothing in clause 4.3 or 4.4 which precludes either the issue of an instruction under a combination of clauses 6.3B and 3.5 or its valuation after practical completion. Indeed, there is no reason why any works instructed under these two clauses should not be instructed and valued independently of the final certification process. He further submits that it is of no consequence that there is no machinery for extending the contract period to reflect the time taken to comply with an instruction to reinstate or make good the relevant loss and damage after practical completion, because no such machinery is needed. Once practical completion has taken place and been certified, there can be no liability for liquidated damages. Nor is there any need to have machinery for rescinding the certificate of practical completion.

20. Mr Sears also submits that there is no evidence that it was commercially impractical for the Contractor to maintain Works insurance of the type envisaged by clause 6.3A after Practical Completion.

Discussion of the first issue

21. The judge accepted the submissions of Mr Sears. He rejected the submission of Mr Aeberli that JCT Practice Note 22 could be used as an aid to construction. He also rejected his submissions in relation to the contract machinery. At para 24 of his judgment, he said that there were "sound practical and commercial reasons why the obligation in clause 6.3B should continue for the duration of the defects liability period. He said:

> *"24. It also seems to me that there are sound practical and commercial reasons why the joint insurance provision under 6.3B, the parties having struck out 6.3A, should continue up to the date of the expiration of the defects liability period. If, for example, the contractor is called back to deal with work instructed under that clause, it is for the benefit of both parties that that joint insurance should remain in place, otherwise the parties would not only lose the benefit of that provision but it would lead to uncertainty as to where responsibility for that loss and damage lay. Mr. Aeberli says that clause 6.2 would remain in force, and, so far as the employer is concerned, he would be able to fall back on his property insurance. That may be the case, but it seems to me that that introduces an*

element of uncertainty and is a far worse situation than if the employer maintains the insurance pursuant to clause 6.3B."

22. It is to be regretted that the Joint Contracts Tribunal, who are responsible for the drafting of this standard form of contract which is widely used in the construction industry, did not make express provision for the duration of the joint insurance that the Employer is obliged to maintain in accordance with clause 6.3B. The position is spelt out clearly in other standard forms of contract. For example, clause 22A.1 of the Standard Form of JCT contract (1998 version) requires the contractor to take out and maintain in the joint names of contractor and employer all risks insurance for the full reinstatement value of the Works "up to and including the date of issue of the certificate of Practical Completion or up to the date of determination of the employment of the Contractor".

23. In the absence of any such express provision, it is necessary to resolve the first issue by applying well-established principles of construction in order to determine what the parties must be taken to have intended.

24. In my judgment, the judge was right to hold that no assistance is to be derived from JCT Practice Note 22. Even if the Practice Note gave a clear indication as to how long the JCT believed or intended the insurance obligation in clause 6.3B to subsist, it is uncertain whether it would have been admissible as an aid to the true construction of the clause. I doubt whether the answer to this question is to be found in the observations of either Lord Hoffmann in the *Investors Compensation Scheme* case or Lord Bingham or Lord Hoffmann in ***Bank of Credit and Commerce International SA v Ali*** [2002] 1 AC 251, paras 8 and 39. But even if it is legitimate in principle to have regard to such material in construing a standard form of contract, there is nothing in JCT Practice Note 22 which supports Mr Aeberli's interpretation of clause 6.3B. Indeed, it could be said that, since the JCT decided to provide expressly that the joint names insurance obligation in the Standard Form of JCT Contract should cease upon practical completion, but made no such provision in the Minor Works form of contract, they did not intend the obligation in the latter form of contract to cease at that date. But Mr Sears does not rely on JCT Practice Note 22, and in my judgment he is right not to do so. Clause 6.3B is silent as to the duration of the obligation. It is a matter for the court to determine when it ceases.

25. In my judgment, there are several reasons for holding as a matter of construction that the obligation ceases upon practical completion.

26. First, the Employer's obligation in clause 6.3B is to 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 delivered to, placed on or adjacent to the Works and intended therefor…."*. In so far as the obligation relates to unfixed materials and goods intended for the Works, it applies to a period before practical completion. By the time that practical completion is achieved, all the materials and goods intended for the Works will have been fixed. I consider it most unlikely that the draftsman intended these words also to relate to materials or goods that are brought to the site after practical completion for the purpose of making good defects during the defects liability period.

27. What about the obligation in so far as it relates to the Works? The Works are defined in Article 2 of the contract as *"the work referred to in the 1st recital together with any changes made to that work in accordance with this Contract"*. The work referred to in the first recital is described as "*Extension of first floor office area together with recladding of the warehouse area and general refurbishment"*. The recital also refers to a specification and other contract documents which are said to show and describe the work. In my judgment, the phrase "*the Works"* refers to the work and materials required by the contract to bring the project to its finished state: it is not a description of that finished state.

28. The conditions of contract contain a number of references to *"the Works"* in different contexts all of which show that the phrase does not refer to the finished state of the project. What follows is not an exhaustive list. Thus, the Contractor is obliged to *"carry out and complete the Works" in accordance with the Contract Documents using proper materials and workmanship (clause 1.1). The architect shall issue any further information necessary "for the proper carrying out of the Works"* (clause 1.2). The Contractor is required to complete the Works by the completion date (clause 2.1). The Works may not be subcontracted without the consent of the architect (clause 3.2). The Contractor is required to keep at all reasonable times upon the Works a competent person in charge (clause 3.3). The architect may issue instructions requiring the exclusion from the Works of any person employed thereon (clause 3.4). Clause 4.2 provides for the certification of progress payments *"in respect of the value of the Works properly executed"*.

29. In all of these cases, it is clear that "*the Works"* refers to the work that is being carried out and not the building in its finished state. When I put this point to Mr Aeberli in the course of argument, he did not embrace it. He gave clause 2.5 as an example of a context where the phrase "*the Works*" refers to the finished state: *"any defects, excessive shrinkages or other faults to the Works which appear within 12 months of the date of practical completion…"* At first blush, this might appear to be an example of a reference to the finished state of the building. But I do not think that this is a necessary reading. In my view, clause 2.5 can equally be read as referring to any defects or faults in the work carried out before practical completion which appear during the defects liability period.

30. I would, therefore, hold that "*the Works*" in clause 6.3B is a reference to the work carried out under the contract, and not the finished state and that the obligation to insure the Works ceases upon practical completion. If the obligation to insure against loss or damage to the unfixed materials and goods and the Works ceases upon

practical completion, then it cannot have been intended (and has not been suggested) that the obligation to insure against loss or damage to the existing structures and contents should be for a different period.

31. The second reason for my conclusion is that an examination of other provisions of the contract shows that it cannot have been intended that the architect should be authorised to issue instructions under clause 3.5 and 6.3B after practical completion. That, however, is the only mechanism by which the reinstatement and making good or loss or damage can be effected under clause 6.3B. It is clear from the reference to clause 3.6 that the instructions are to be treated as orders for variations and to be valued as such.

32. Clauses 4.2 to 4.4 set out a clear sequence. Under clause 4.2, the architect certifies "progress payments" less a retention of 5%. The very use of the phrase "progress payments" indicates that these are stage payments for the work as it proceeds. Clause 4.2 is dealing with the position before practical completion. Clause 4.3 provides that within 14 days after practical completion, the architect shall certify 97.5% of the total amount to be paid so far as the amount is ascertainable at the date of practical completion ie half of the retention money is released at this stage. The heading to this clause is "penultimate certificate". There is nothing to say that one cannot have regard to the headings in construing the conditions of contract. Clause 4.4 provides for the issue of the final certificate.

33. Mr Sears submits that a further interim certificate can be issued after practical completion. In my judgment, that is not what is contemplated by the carefully drafted provisions of clause 4.2 to 4.4. During the course of argument, we considered what would happen if the completed building were totally destroyed by fire during the defects liability period, so that the work would have to start again. On Mr Sears' argument, the architect could issue an instruction to the Contractor to rebuild the building and this would be valued as a variation. The contractor would be entitled to progress payments (subject to 5% retention) under clause 4.2. But the contract does not contemplate more than one penultimate certificate being issued under clause 4.3. Nor does the contract contemplate that the Contractor should have to wait for his final certificate in respect of the original work until the rebuilding under the instruction issued under clause 6.3B is completed.

34. In my judgment, the architect cannot issue instructions under clause 6.3B after practical completion for the same reason as he cannot issue instructions for a variation under clause 3.6 after practical completion. I would accept as correct the statement in *Keating on Building Contracts* (7th edition) para 18-142. It is there submitted that the architect cannot issue instructions requiring a variation after practical completion, so that if thereafter the employer wishes them to be executed, they should be the subject of a separate agreement: the Works are complete and the procedure for final adjustment of the Contract Sum begins. It is true that these comments are made in relation to the JCT Standard Form of *Building Contracts* (1998 version), but in my judgment they are equally applicable to the JCT Minor Works Form of Contract whose provisions are not materially different for the purposes of the present argument.

35. I would add that I also accept the submission of Mr Aeberli that it is most unlikely that the draftsman of the conditions of contract intended that the carrying out of the work instructed under clause 6.3B should not to be subject to the carefully crafted time regime of clause 2. The contract provides for the architect to grant an extension of time in certain circumstances and for the payment of liquidated damages by the contractor for late completion.

36. The third reason for my conclusion involves a consideration of clause 6.3A. I accept the submission of Mr Aeberli that, for the reasons he gives (see para 15 above), the obligation under clause 6.3A ceases upon practical completion. Mr Sears submits that the wording of clause 6.3A does not imply that the clause may be operated *only* prior to practical completion. I do not agree. Clause 6.3A provides that the Contractor is obliged to restore or replace work or materials or goods damaged "*and* proceed with and complete the Works" (emphasis added). This is what the Contractor is required to do in every case. There is no basis for saying that, after the Contractor has restored or replaced work or materials or goods that have been damaged, the obligation to proceed with and complete the Works only applies in some cases. Further, the clause provides that the Contractor is to be paid "under certificates of the architect …at the periods stated in clause 4.0 hereof". This means that the Contractor is entitled to 95% of the value of work done under clause 6.3A before practical completion and the balance after practical completion under clause 4.3 and 4.4. In other words, the payment provisions contemplate that the work done under clause 6.3A will be carried out and substantially paid for before practical completion.

37. Mr Sears also submits that, even if the clause 6.3A obligation ceases on practical completion, it does not follow that the position under clause 6.3B is the same. He refers to the fact that the words "proceed with and complete the Works" are absent from clause 6.3B. But in my view the absence of these words from clause 6.3B may reasonably be explained by the difference between the subject-matter of the insurance in the two clauses. The insurance in clause 6.3A is against loss or damage for the full reinstatement value of "all work executed and all unfixed materials and goods delivered to, placed on or adjacent to the Works and intended therefore". The insurance in clause 6.3B is against loss or damage to the Works and unfixed materials etc and "existing structures (together with the contents owned by him or for which he is responsible)". It is the inclusion of existing structures and contents that probably explains why the draftsman did not require the Contractor in clause 6.3B to reinstate and make good the damage and proceed to carry out and complete the Works.

38. Mr Sears is unable to advance any good reason why the insurance obligation in the two clauses should cease at different times. It is insufficient simply to say that the clauses are different. It is necessary to identify a feature or

features of the two clauses which rationally explain why one should cease at practical completion and the other should endure until the end of the defects liability period. This Mr Sears is unable to do. In my judgment, the fact that the obligation to insure under clause 6.3A ceases at practical completion supports the view that the obligation to insure under clause 6.3B ceases at the same time.

39. My fourth reason is that I do not agree with the judge that there are sound practical and commercial reasons why the parties should continue to have the benefit of joint insurance after practical completion. Once the Contractor has achieved practical completion, possession of the site is passed to the Employer. As building owner in possession, he bears the risk of damage to the building and contents.

40. It is true that the Contractor has the right and obligation to return to the site to make good at its own cost any defects, excessive shrinkages or other faults to the Works which appear within 12 months of the date of practical completion which are due to materials or workmanship not in accordance with the contract: see clause 2.5. In theory, however, no such defects may appear within that period. In that event, the Contractor will not return to the site at all. Almost certainly, some defects will appear and the Contractor will return to the site. But it is quite possible that the scale of the defects is such that the duration of a return visit is short.

41. It seems to me that it makes better commercial sense (and is therefore more likely to have been intended) that, once the Contractor restores possession to the Employer, the insurance of the Building and contents should be a matter for the Employer alone. The Contractor no longer has an interest in the Works (because they have been completed).

42. It is true that the Contractor has an interest in the sense that he has a continuing potential liability for breach of contract and negligence in carrying out the Works. But there are two points to make about this. First, that is a very different kind of interest from that of a contactor carrying out the Works before practical completion. The position at common law is that (frustration apart) the Contractor's obligation to carry out and complete the Works means that he takes the risk of damage caused by perils such as fire and flood (whether caused by his negligence or not). That is why the standard forms of contract contain joint name insurance provisions such as clauses 6.3A and 6.3B. Secondly, the Contractor's interest in insuring against the consequences of his negligence after practical completion is an interest that endures for as long as he may have a potential liability, ie well beyond the defects liability period. It makes little sense for the parties to agree a joint name insurance provision to protect *that* interest of the Contractor, but only until the end of the defects liability period.

43. I should add that I do not agree with the judge that in the interests of avoiding uncertainty it must have been intended that the joint names insurance should continue until the end of the defects liability period. For the purposes of considering this argument, it is necessary to assume that the judge reached the correct conclusion on the second issue. I am content to make that assumption. If damage occurs after practical completion (whether during the defects liability period or at some later date), there will always be scope for argument as to whether it was caused by the fault of the Contractor or something else. But that is no more a reason for supposing that it must have been intended that the joint names insurance should continue until the end of the defects liability period than that it must have been intended that it should continue for some longer period, for example until any potential liability on the part of the Contractor becomes barred by the Limitation Acts.

44. For all these reasons, I would hold that the obligation in clause 6.3B ceases upon practical completion. It follows that the second issue does not arise and that the appeal should be allowed.

Lord Justice Carnwath:

45. I agree that the appeal should be allowed for the reasons given by Dyson LJ.

Lord Justice Sedley:

46. I agree that this appeal succeeds for each and all of the reasons given by Lord Justice Dyson. One might arguably add to them the provision in clause 2.5 that defects appearing within 12 months of practical completion *"shall be made good by the Contractor entirely at his own cost"*. It would be odd if the contractor were nevertheless able under clause 6.3B to look the employer to effect insurance cover for him while he remedied defects in his own work.

Mr Peter Aeberli (instructed by Messrs Davies Lavery) for the Appellant
Mr D Sears QC (instructed by Messrs Davies Arnold Cooper) for the Respondent