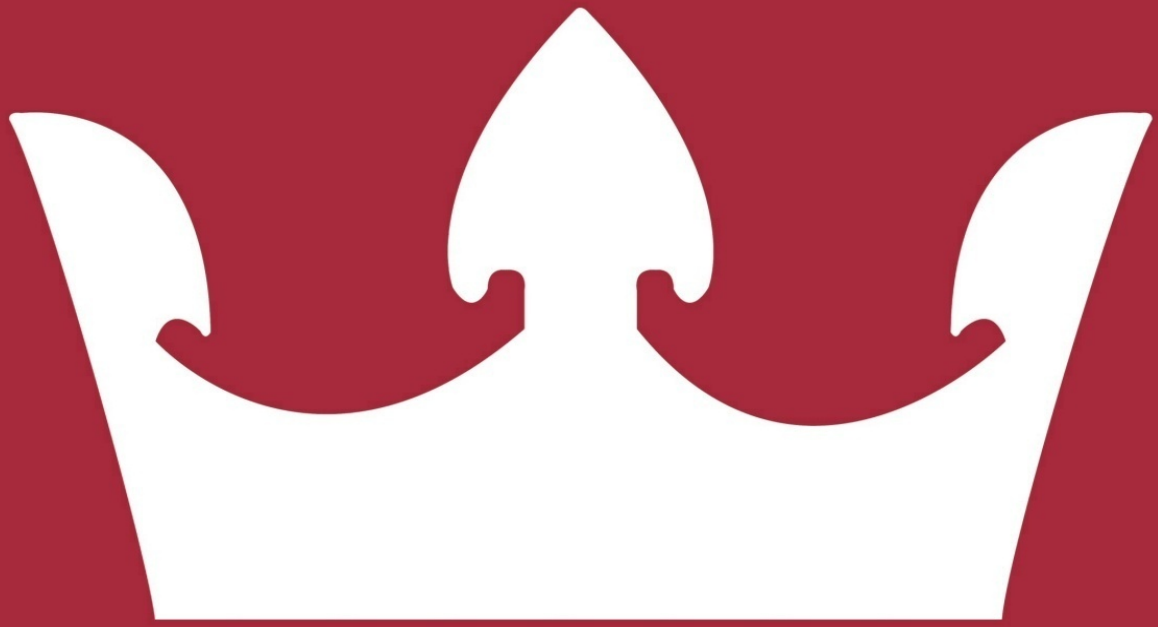

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CONSTRUCTION PROFESSIONALS

A REVIEW OF RECENT DEVELOPMENTS

DAVID SEARS QC

I LOVE IT WHEN YOU TALK DIRTY!

Hadley v Baxendale (1854) 9 Exch 341

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- *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it..."*

John Grimes Partnership Ltd v Walter Gubbins

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- *"Having reviewed all matters it is my judgement the 15 month delay caused by the Claimant has indeed caused loss to Mr Gubbins in that had breaches not occurred he would have commenced work in the March and pressed on to completion clearing the hurdles to progression. Specifically, it is my finding, on balance of probabilities, that Mr Gubbins would have proceeded on and would have achieved completion, with some slippage. Doing the best that I can I find that completion would have occurred, by June 2008. I also believe that he would have met the requirements of [the Housing Association]."*

- Lord Hoffman:
- *"Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action."*

South Australia Asset Management Corp v York Montague

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- *"How is the scope of the duty determined?... In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law best regards as giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking."*

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- *"12. It seems to me logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken. It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market, would not reasonably be considered to have undertaken..."*

- *17. The effect of the South Australia case was to exclude from liability the damages attributable to a fall in the property market notwithstanding that those losses were foreseeable in the sense of being "not unlikely" (property values go down as well as up) and had been caused by the negligent valuation in the sense that, but for the valuation, the bank would not have lent at all and there was no evidence to show that it would have lost its money in some other way. It was excluded on the ground that it was outside the scope of the liability which the parties would reasonably have considered that the valuer was undertaking...."*

John Grimes v Walter Gubbins

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- HHJ Cotter QC held:
- 1. This was a loss which was in the contemplation of the parties at the time they made the contract as the probable result of the breach
- 2. There was nothing in the commercial background to suggest that the engineer was not assuming responsibility for that loss; and
- 3. The appropriate measure of the loss was the diminution in value of the site by reason of the delay.

- Lord Reid:
- *"The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from a breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."*

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- *"The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it."*


CAUTION
KURTLEY BEALE

Grimes v Gubbins

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- *"It must in principle be wrong to hold someone liable for risks which the people entering into such a contract in their particular market would not reasonably be considered to have undertaken…*
- *…The question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, and this, like all questions of interpretation, is a question of law."*

Supershield Ltd v Siemens Building Technologies Ltd

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- Toulson LJ:
- *"Hadley v Baxendale remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as* ***not unlikely*** *to result from a breach. However, South Australia and Transfield Shipping ("The Achilleas") are authority that* ***there may be cases*** *where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties."*

Grimes v Gubbins

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- *"It seems to me to be right to bear in mind, as Lord Hoffmann emphasised in The Achilleas, that one is dealing with the law of contract, where the situation is governed by what has been agreed between the parties. If there is no express term dealing with what types of losses a party is accepting potential liability for if he breaks the contract, then the law in effect implies a term to determine the answer.*
- *Normally, there is an implied term accepting responsibility for the types of losses which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken.*
- *But if there is evidence in a particular case that the nature of the contract and the commercial background, or indeed other relevant special circumstances, render that implied assumption of responsibility inappropriate for a type of loss, then the contract-breaker escapes liability. Such was the case in The Achilleas."*

Grimes v Gubbin

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- 1. The test of remoteness is the contractual test.
- 2. The standard contract approach (*H V B* and the *Heron II*) will apply in the vast majority of cases.
- 3. The exception will be where there are particular circumstances demonstrating that the parties could not have contracted on the basis that the defendant was to bear the liability of a particular kind of loss.
- 4. It is for the defendant to show that the commercial background is such that the standard approach does not apply because it does not reflect the intentions reasonably to be imputed to the parties.
- 5. There is nothing to prevent the parties making express provision for the situation.

Earl's Terrace Properties Ltd v Nillson Design Ltd

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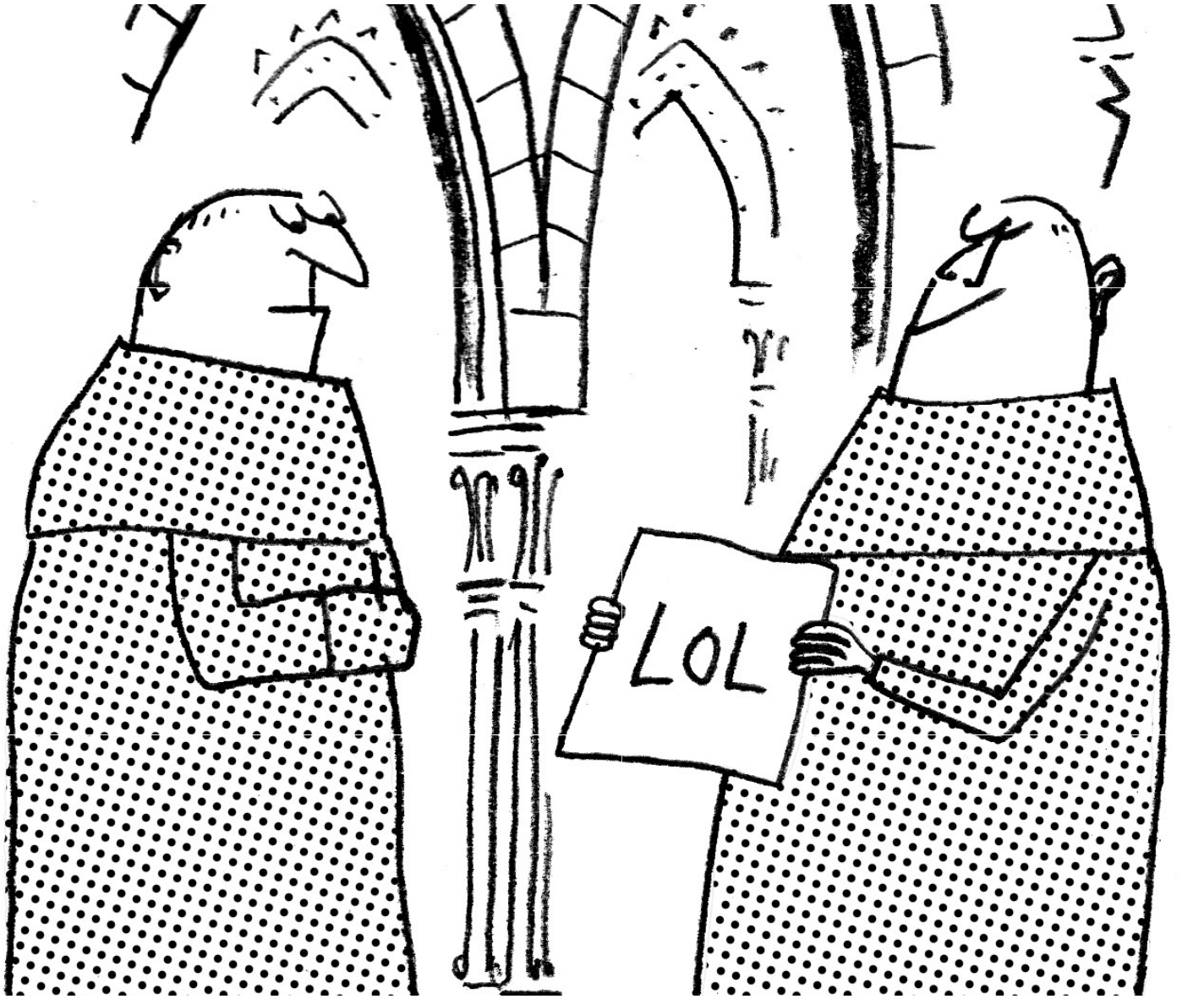
- HHJ Thornton QC:
- The recoverable loss would not, however, normally extend to losses occurring after completion including losses arising out of the sale of the properties as a result of the downward movement in property prices unless the scope of the architect's duty had been defined so as to include this loss and the possibility of its occurring had been brought to the architect's attention at the time of contract so as to bring it within the second limb of the *Hadley v Baxendale* rules.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Trustees of Ampleforth Abbey Trust v Turner & Townsend

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- HHJ Keyser QC:
- *"The execution of a contract is to be seen not as a mere aspiration but rather as fundamental. It is the contract that defines the rights, duties and remedies of the parties and that regulates their relationships...*
- *By contrast, letters of intent such as those used in the present case are contracts of a skeletal nature; they pave the way for the formal contract, once executed, to apply retrospectively to the works they have covered, but they expressly negative the application of most of the provisions of the formal contract until it has been executed. They do not protect, and are not intended to protect, the employer's interests in the same manner as with the formal contract; that is why their "classic" use is for restricted purposes."*
- *T&T effectively treated the contract as a dispensable luxury."*

Ampleforth Abbey v T&T

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- 1. *If it had received appropriate advice, it would have acted in accordance with that advice;*
- *2. If it had done so, there would have been a real or substantial chance, as opposed to a speculative chance, that Kier would have signed the contract including the liquidated damages provision; but it did not have to prove that Kier would have signed the contract;*
- *3. The signed contract would materially have improved the Trust's position as against Kier;*
- *4. The Trust would have availed itself of its improved position.*

Ampleforth Abbey v T&T

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- *"As against that party, the other cannot by reference to any contract term—*
- *(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or*
- *(b) claim to be entitled—*

  (i) to render a contractual performance substantially different from that which was reasonably expected of him, or

  (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
- *except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."*

Ampleforth Abbey v T&T

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- *"Liability for any negligent failure by Us [TTPM] to carry out Our duties under these Terms shall be limited to such liability as is covered by Our Professional Indemnity Insurance Policy terms. Liability is also limited to such a sum as it would be equitable for Us to pay having regard to the extent of Our responsibility for any loss or damage suffered by You on the basis that all other consultants, contractors and subcontractors who also have a liability shall be deemed to have provided contractual undertakings to You on terms no less onerous than these Terms and shall be deemed to have paid to You such sums as it would be just and equitable for them to pay having regard to the extent of their responsibility for any such loss or damage and in no event shall Our liability exceed the fees paid to Us or £1million whichever is the less."*

Ampleforth Abbey v T&T

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- *"The central factor that leads me to that decision is that the contract imposed on TTPM an obligation to take out professional indemnity insurance to a level of £10 million. The cost of such insurance would, as a matter of commercial reality, be passed on to the Trust within the fees payable. Yet the limitation clause would result in a limit of liability equal to the fees paid to TTPM, which is £111,321 (together with whatever might be awarded on the counterclaim). In the absence of any explanation as to why in this case TTPM should have stipulated insurance cover of £10 million despite a limitation of liability to less than £200,000, I consider it unreasonable that the contract purported to limit liability in that manner."*

Conclusions

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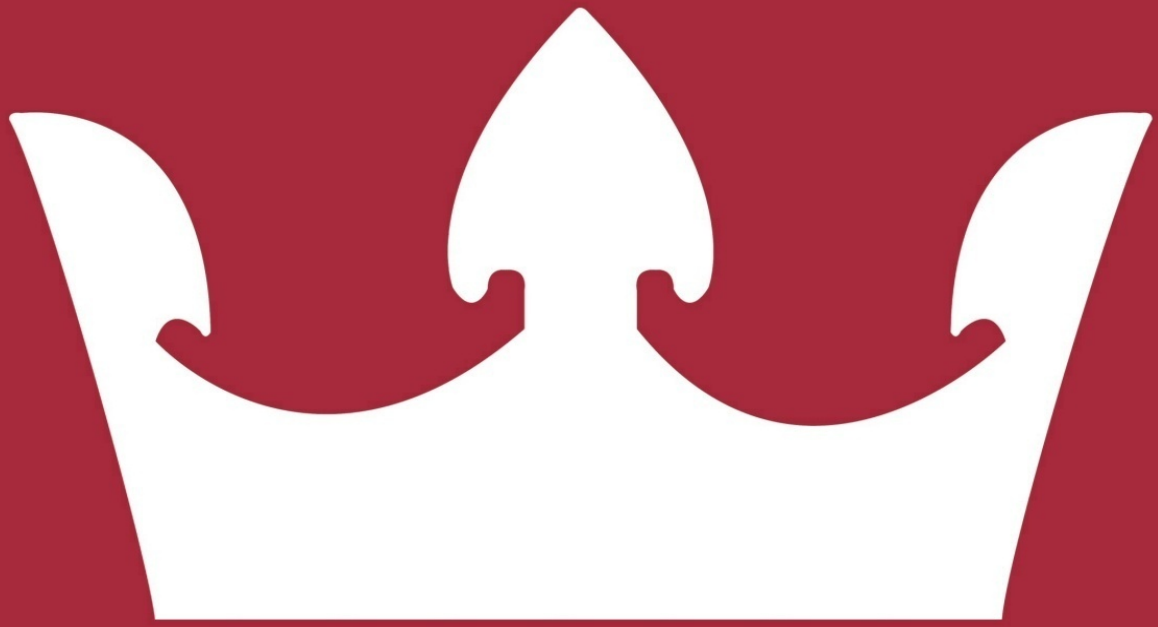
- 1. Make sure that any monetary limit is signposted; make it clear and draw attention to it.
- 2. Try to avoid any ambiguity of the type which was present in this case.
- 3. If it is to limit liability for delay consider either (a) defining the scope of the obligation to exclude any assumption of liability for a fall in the market or (b) importing a liquidated damages provision



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