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**IS THE CONSTRUCTION PROFESSIONAL
INSURING THE CONTRACTOR?**

INTRODUCTION

1. Over the years I, and many members of Chambers, have often defended or sued construction professionals, architects, engineers, even golf course designers, designers of sea defences – sometimes successfully, sometimes unsuccessfully. However, we have recently become increasingly uneasy at the way, in claims by the Employer, the construction professional and his insurer seem, more often than not, to end up holding the baby, and how the reverse appears true of the contractor who appears to be “getting away with it”. An examination of the development of case law over the last ten years demonstrates that this uneasiness is well founded, and that those insuring the professionals should recognise this and should perhaps bear in mind the warning of His Honour Judge Fox-Andrews Q.C. in **Wessex Regional Health Authority v HLM Design Ltd** [1995] 71BLR 31:

“Mr. Slater QC’s forceful arguments do suggest, however, that, if my decision is correct, those concerned with drafting contracts whether for the JCT and ICE contracts or for architects’ and engineers’ engagements should consider afresh whether the present contractual arrangements can be improved. It does not seem satisfactory that a contractor may be unjustifiably enriched out of the pocket of the professional man.”

2. It was with the judgment in **Wessex** that one can see, in retrospect, matters beginning to unravel. Prior to this, common sense prevailed in, for example, **Pacific Associates v Baxter** [[1989] 16 Con LR 90 [1990] 1 QB 993. In this case, the Plaintiff contractor undertook massive dredging work in the Persian Gulf for the Ruler of Dubai and encountered unforeseeable conditions which it claimed caused it considerable delay and extra expense. The contract allowed recovery for additional costs incurred in working in unforeseen ground conditions. The contractor alleged that the engineer under the contract had prepared inaccurate reports of the conditions which the claimant had relied on and that these inaccuracies had contributed to its failure to foresee actual conditions.

The claims were rejected by the Engineer and referred to arbitration between employer and contractor, which was compromised at a fraction of the sum being claimed. The paltry and hasty settlement may have been prompted, not by any objective assessment of the merits of the claim, but by the serious illness of the Ruler of Dubai and the fear that his successor would not honour any award.

3. The contractor then sued the engineer alleging that the engineer had owed it a duty of care in relation to the performance of its duties under the contract, had negligently broken that duty in negligently under certifying and that the contractor had incurred loss being the difference between what it had been paid (including the payment following the arbitration settlement with the employer) and what it was entitled to be paid had the remuneration conditions of contract been fully and properly operated. The claim struck out on a number of grounds, the most important being that the engineer owed the contractor no duty of care. The decision of the Judge of first instance was upheld by the CA.
4. A further ground, referred to at the end of their Lordships' respective judgments, demonstrated that their Lordships took a realistic and sensible view of what was being claimed. This was that the loss being claimed had been claimed from the employer in the arbitration by way of claims based upon an alleged entitlement to have opened up, reviewed and revised the engineer's allegedly under certified certificates. These claims were then settled at a significantly reduced figure due, possibly, to extraneous reasons out of control of any of the parties. It was held that this, the surviving loss being passed onto the engineer was, in truth, loss resulting from a poor settlement and a bad bargain in settling, and it had not resulted from any negligent administration of the contract.

INDEPENDENT CAUSES OF ACTION

5. But what if the facts are somewhat different, and the Employer, when taken to arbitration with the contractor, decides that rather than take on the commercial might and muscle of the contractor, he should buy him off with an overpayment and then pursue the professional? The **Wessex** case was one of the first to highlight the difficulties that arise in such circumstances in the context of the usual contractual arrangements for construction contracts. As the Judge said:

"These proceedings present in stark form problems which may arise in construction/ engineering contracts where there are three parties namely the employer, the contractor and the professional man whether he be architect, engineer or otherwise." . .

6. One might be forgiven for thinking that the result, in this case at least, makes no common sense at all, even though it may make legal sense. The Judge appeared to be aware of this, since he commented on the hearing of preliminary issues, *“If this action is well founded and is successfully pursued to judgment HLM (the architect) would end up paying to Wessex (the employer) sums which Wessex should not have agreed to pay but in fact did pay ARC (the contractor)”*. In other words, the contractor walked away with a windfall, for which the professional may well find himself or herself liable.
7. The facts were that the Employer, Wessex, engaged 1st Defendant, HLM, as architects in connection with construction of Phase 1A of Bournemouth General Hospital. Wessex engaged ARC Building Ltd (ARC), first third party, as main contractors under JCT Local Authorities with Quantities, 1980 Edition. Practical completion was certified as occurring 84 weeks later than the agreed completion date. HLM granted ARC 74 weeks eot and ARC were paid loss and expense for those 74 weeks. ARC started arbitration proceedings against Wessex claiming a further 10 weeks eot and loss and expense for those weeks. Wessex counterclaimed that ARC were only entitled to 30 weeks, and 44 had been incorrectly granted by HLM, and that therefore ARC should pay back the loss and expense relating to those 44 weeks. Wessex’s preparation for the arbitration was so shambolic that it stood no chance of succeeding, whatever might have been the true merits of its case (which appeared doubtful). So Wessex took fright and got out of it as fast and as best as it could by paying ARC a further £1.65m (to which, on Wessex’s own case, against both the Contractor and HLM) ARC were not entitled.
8. Having failed to present its case adequately in the arbitration proceedings, Wessex commenced proceedings against HLM, seeking to recover sums paid by Wessex to ARC on the grounds that these payments had been caused by the negligent extensions of time (“eots”) granted by HLM. This claim comprised both the loss and expense paid in respect of the 44 weeks eot which should not, on Wessex’s case, been granted in the first place, and the additional sums paid in the arbitration settlement. Wessex’s case was that HLM were negligent in issuing the eots, and that therefore ARC should not have retained the monies paid for the original eots and was NOT due further the monies which Wessex paid in settlement of the arbitration. Having failed to recoup the monies already paid and having in fact paid further monies to ARC to settle the arbitration, Wessex now wanted the money back from HLM as damages for breach of contract in issuing negligent eots to start with.

9. HLM's Defence was that the losses arose in consequence of the incorrect compromise in the arbitration, not as a result of their incorrect extensions of time; and that there was thus a break in the chain of causation, that Wessex had failed to mitigate its loss; that Wessex had no independent cause of action against his architect in respect of over certification of the contractor's entitlement to time and money save in limited circumstances such as insolvency of the contractor.
10. From a common sense point of view, the defence amounted to "If you had got your act together in the arbitration, Wessex, you would have got your money back and would not have had to pay out the further monies. That you failed to prepare your case properly is not HLM's fault. They had nothing to do with it, so why should HLM be liable for your failures in the arbitration?" Thus HLM argued that the settlement of the arbitration broke the chain of causation between HLM's negligence and the loss, and that the claim should be struck out.
11. It was held that an employer had independent, concurrent and unlimited causes of action arising out of over-certification against both the contractor and the architect. Therefore the settlement of the arbitration, even at an unreasonable sum, did not as a matter of substantive law give rise to a defence to Wessex's claim, and HLM's submissions as to foreseeability, remoteness, causation and *novus actus interveniens* failed. Thus the Judge held that even if the evidence established that Wessex acted incompetently in the arbitration and settled it unreasonably in all the circumstances, "it is difficult to see why this should be relevant".
12. This case (which was confined to decisions upon certain preliminary issues) left open at least two important questions:
 - a. would the Employer in fact be able to recoup from the architect the additional monies it paid in settlement?
 - b. would the architect be able, if it had to pay those sums to the Employer, to recoup those monies from the contractor who, not having been entitled to the extensions of time in the first place, had been unjustly enriched by the Employer's payments?
13. As to (a), the learned Judge expressed some doubt (at pg 92B) as to how Wessex were going to prove quantum, saying that "*Wessex must give precise details as to how they say the excess is made up and of course at trial they must be in a position to prove it. How they will prove in the absence of witnesses from [the contractor] is a matter which*

would have to be considered.” He commented that a “paper exercise” as had been carried out by Wessex’s Quantity Surveyor who prepared a draft Final Account, which was not agreed by the Contractor, allocating the monies to various heads, “would not appear to be relevant evidence.” This might appear to give the professional a shred of hope – unfortunately, as will be seen, the hope was misplaced.

14. As to (b), HLM had issued third party proceedings against ARC seeking contribution under the Civil Liability (Contribution) Act 1978, alternatively recovery on the grounds of unjust enrichment. ARC resisted the right of HLM to sue them under the Act on the grounds inter alia that because of the decision in **Northern Regional Hospital v Derek Crouch Construction C Ltd** [1984] 1 QB 644 they were not a potential defendant within the meaning of S1(6) of the Act. This defence does not now need to be discussed as the effect of Crouch has since been overruled. However, as will be seen, a contractor in ARC’s position has now – as of 2005 - many defences to any claim by a professional for contribution.
15. None of the arguments in the third party proceedings were tested during the hearing of the preliminary issue, or thereafter, since the case settled before the full trial.

EFFECT OF FINAL CERTIFICATES

16. At around the same time, the Court of Appeal handed the contractor a defence (at least in respect of defects) against any such claim for contribution from the Architect, in **Crown Estates Commissioners v John Mowlem** [1995] 70 BLR 1, by “confounding the received wisdom as to the effect of a final certificate under clause 30.9 of the 1980 JCT Standard Form of Building Contract”. The CA held that on a true construction of the clause, all matters of standards and quality of work and materials were for the reasonable opinion of the architect and so were concluded (in the absence of a suitable notice of arbitration) by the issue of a final certificate. In other words, if a final certificate had been issued prior to a notice of arbitration, the contractor had a defence both against the Employer and – as we will see when we look at the Contribution Act – any professional who might seek contribution.
17. This decision was greeted with surprise – and a certain horror – by professionals and their insurers. What, as the Editors of the Building Law Reports suggested, if the development had collapsed one month after the date of the final certificate as a result of latent structural defects which resulted from poor workmanship? On the approach of the Court of Appeal, the Employer would have no recourse against the Contractor. He

- would, however, probably have recourse against his architect for failures of supervision/inspection. The architect would normally expect to be liable for, say, 20% of the damages after apportionment between the architect and the criminal he failed to catch, the contractor. But after **Crown Estates**, the architect's claim for contribution might be defeated by the contractor's reliance upon the Final Certificate, and the architect would be liable for the full 100%.
18. The difficulties faced by an architect in such a position and seeking contribution thus became two fold. First, by Sections 1(1) and 1(6) of the **Civil Liability (Contribution) Act 1978**, if the contractor is to be liable to contribute to the architect, the contractor and architect must be "liable in respect of the same damage" to the Employer, and that liability must be "liability which has been or could be established in an action brought against him in England and Wales" by the Employer. If there were arbitration provisions in the contract, the Employer could not establish such liability in an action (though, as mentioned above, this particular argument has now gone by the board). Secondly, the architect now faced a new difficulty: since the final certificate was an absolute defence, the contractor's liability to the Employer could never be established in an action. All attempts to take the **Crown Estates** case further – to the House of Lords – failed.
19. Indeed, as feared, the final certificate was used in just the way contemplated above, in **Oxford University Fixed Assets Ltd. v Architects Design Partnership** (1999) 64 Con LR 12. The University engaged Tarmac to construct a pharmacology unit under the JCT 80 standard form of building contract. The defendant architects issued a final certificate which constituted conclusive evidence (as between the University and Tarmac) that the work was in accordance with the contract. The University alleged that certain defects had not been remedied and sued the architects. The architects claimed contribution from Tarmac. Tarmac argued that they were not liable to the University because the final certificate was conclusive evidence that they were not in breach; in the absence of any liability of Tarmac to the University, the architects had no right recover contribution from them under the Act. The architects argued that the contractors were liable for their own breach and that the final certificate was only a procedural bar, amounting to a cessation of liability within section 1(3). Essentially, the architects said, the final certificate was no different from a compromise, or being struck out for want of prosecution, it did not affect the underlying liability.
20. Section 1(3) of the Act reads: *A person [the contractor] shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be*

liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

21. Note: the proviso is NOT a reference to the ordinary provisions of the Limitation Acts, which bar the remedy but do not extinguish the right: **Nottingham Health Authority v Nottingham City Council** [1988] 1 WLR 903 CA.
22. HHJ Humphrey Lloyd Q.C. held that an architect was not entitled to contribution from the contractor in respect of a claim by the employer for damages for negligence and breach of contract which was barred as between the employer and the contractor by the issue of the final certificate. He rejected an argument that the final certificate was to be disregarded because it merely constituted a cessation of liability of the kind contemplated by section 1(3). See pg 30 para 23. In summary his finding was that the existence of the final certificate meant that liability could not be established in the first place, not that it had existed but had then ceased. It was not a cessation of liability. Thus the contractors were not liable to the University and the architects could not claim a contribution.
23. Unsurprisingly, since the **Crown Estates** and **Oxford University** cases, architects have been wary of issuing final certificates. This causes its own practical problems for the administration of the contract, but better safe than sorry. There have also been some attempts at redrafting the Final Certificate clause in the standard forms.

PRE ACTION SETTLEMENTS

24. So, returning to question (a) which was left open by the judgment in **Wessex** – would the Employer in fact be able to recoup from the professional the additional monies it paid in settlement? After **Wessex** and **Crown Estates**, there followed a number of cases where the Employer sought to recoup a settlement made with a contractor – either before or at an arbitration – from the professional, and the concept of a “reasonable settlement” considered by the Court of Appeal in **Biggin v Permanite** [1951] 2 KB 314 was much debated.
25. In that case, Biggin bought adhesive from Permanite for onward sale to the Dutch Government. The goods being defective, an arbitration ensued between the Dutch Government and Biggin. Biggin upon reliable legal advice settled by paying out £43,000 which it then claimed from Permanite. The Judge at first instance held that the

settlement sum was irrecoverable on the grounds that a settlement was unforeseeable and voluntary. This was reversed by the Court of Appeal which allowed the settlement figure as a recoverable measure of damage in the circumstances. Having heard evidence of the claims made against the Dutch Government, the Court was satisfied that the Dutch Government would have recovered more than the amount of the settlement. Accordingly the settlement was reasonable and it was enough to say “we were advised to settle for £x, we did so, and we now claim that sum.”

26. The CA judgment shows that the Claimant must not only call evidence to establish and prove its case, but must also prove that the settlement was a reasonable one. It has been much debated as to what is meant by a “reasonable” settlement – whether the Claimant acted reasonably in settling or whether it settled for a reasonable sum, though it appears to me that Singleton LJ makes it quite clear that it is the latter when he says: *“The question is not whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one.”*
27. But in large construction cases the Employer faces considerable problems when settling with the Contractor. He is unlikely to be in possession of the full facts, having no access to the Contractors’ documentation until a certain point in an arbitration. Further, most Contractors want to do a global deal – they do not want a Final Account because they want to be completely unfettered when negotiating settlements with their Subcontractors. Many Contractors try to force a deal even before the contract is completed, so that they are, in effect, holding the Employer to ransom. Often Contractors tender low and see “claims” as their way of making a profit, so that the claims consultants are on site early in the job, mounting a case against the Employer which the Employer has not the resources or information to counter. (One often finds when reading through the papers that the reference to the “site hut” which appears for no reason early in the contract is actually reference to the “claims hut”. I have had cases where there are more resources in the claims hut than on the construction part of the site). So what does the Employer do? He takes some professional advice – usually from a Quantity Surveyor or Claims Consultant who have not been near the job until this moment, cuts a commercial deal and then looks to his professionals.
28. This is what happened in **The Guy’s and St.Thomas’ National Health Service Trust v P&O Developments Ltd and others** [1999] BLR 3. Guys entered into a management contract with Higgs & Hill for the construction of Stage 2, Phase 3, of Guy’s Hospital. H&H entered into a number of works contracts. Construction was delayed and disrupted;

and the architect granted extensions of time to H&H who granted them in turn to the works contractors. Having received advice from Davis Langdon Everest, quantity surveyors, Guy's settled the dispute with H&H for an global figure slightly higher than recommended (approx £83M). Guys sued P&O (the project managers) and AA (the M&E services engineers) alleging they caused the delays, and claiming £6.7M (about 8 per cent of the settlement sum). This sum was based on the DLE assessment, which had been made, in certain areas, on the basis of very little information or documents, the Contractor, naturally, being reluctant to provide too much ammunition. Indeed, no agreement was made with H&H as to the allocation of the £83M paid, and there was no evidence as to what H&H had paid its subcontractors.

29. HHJ Bowsher, on hearing preliminary issues, held that
- (a) The Employer must prove that
 - (i) the breaches of contract of the professionals caused the delay and disruption suffered by the contractor and any works or subcontractors (*this is, however, contrary to a later 1st instance decision, Brompton (8) – see below.*)
 - (ii) it was liable to the contractor in respect of such delay and disruption; (*again, this is contrary to Brompton (8)*)
 - (iii) the settlement reached with the contractor was reasonable; “as a general rule, a party would be taken to have in contemplation a settlement which is reasonable in the sense that it is based on an assessment of what is legally due from the plaintiff to the third party”. This was the approach of CA in *Biggin v Permanite*”; (*query whether the concept of “legally due” survives other TCC 1st instance decisions*)
 - (iv) the contractor probably incurred loss and expense or damages roughly equivalent to or at least the sum of the settlement figure
 - (b) To establish that the settlement was reasonable, it will be relevant to show that the employer acted upon independent advice and that any allocations made within the global settlement relating to the delay and disruption were reasonable
 - (c) To the extent that the settlement was not reasonable the amount of the settlement (or any allocation within the settlement) will not be recoverable.
30. Questions left open
- (1) whether the settlement sum (or the appropriately allocated figure within the settlement) is excessive (i.e. exceeds that which would have been proved to have been due) but was otherwise commercially reasonable (excess paid by employer to avoid long time consuming costly litigation or arbitration) what happens then? The answer may well that

- the excess is only recoverable to the extent that it can be shown that payment of such an excess was mutually foreseeable by the parties at contract stage as the likely consequence of breaches by the professionals (i.e. 2nd limb of rule in **Hadley v Baxendale**). Logic would be that it was reasonable in all the circumstances of the case for the employer to have paid an excessive amount, having been put in that unfortunate position as a demonstrable consequence of the professionals' breaches. But this is contrary to **Biggin** where it is the reasonableness of the sum, not of the Employer's decision to settle which is paramount.
- (2) apportionment of the settlement sum. What if only part of it caused by professionals' breach? What if the employer would have been liable for more than the settlement sum . . etc.
31. There is disagreement between HHJ Bowsher Q.C. on the one hand and HHJ Hicks QC (**DSL Group Ltd v Unisys International Services Ltd (1994) 67 BLR 127**, and **Royal Brompton Hospital v Hammond** [1999] BLR 162 and HHJ Lloyd Q.C. (**Sainsbury plc v Broadway Malyan** [1998] 61 Con L.R. 31 at 64) on the other as to whether it was necessary to show that it was reasonable to settle. HHJ Bowsher considered this might be relevant whilst HHJ Hicks and HHJ Lloyd thought evidence on this issue would be neither relevant nor admissible. Thus all the evidence as to Wessex's chaotic conduct of their arbitration would have been admissible before HHJ Bowsher but not before HHJ Hicks.
32. On the whole, Judge Bowsher's decision suggests that the Claimant must lead evidence to show that the amounts its allocates to certain heads, and claims against the professional defendant, are reasonable. Though the overall settlement might be reasonable, it did not follow that sums allocated by Guy's to individual contractors' claims were necessarily reasonable sums. Guy's still had to prove that the sums allocated were reasonable sums in themselves. Given the Contractor's usual reluctance to furnish documents relating to itself and its subcontractors (there being no power to force such disclosure unless they actually engage in an arbitration) the Claimant eager to avoid the costs of an arbitration may find itself in difficulties proving its quantum in litigation against the professional.
33. But there again, he may not. In **Bovis Lend Lease Ltd v RDS Fire Protection** [2003] 89 Con L.R. 169, His Honour Judge Thornton Q.C. considered "reasonable" settlements and what a Claimant had to prove over some 70 pages. This is not a claim which concerns professionals, but the principles are relevant nevertheless. Bovis was the management contractor, engaged by Braehead Glasgow Ltd. under Design and Build Contract for a

shopping and leisure centre in Glasgow. Bovis let packages for fire protection and dry lining works to Baris. In due course, Bovis removed parts of the work packages from Baris and appointed R D Fire protection to complete fire protections works. Bovis commenced proceedings against Braehead for £37.7M for balance of contract sum whilst Braehead counterclaimed recovery of alleged overpayments, LaDs and damages for defective work for £65.8M. The claims for defective fire protection amounted to about £4.8M of that £65.8M. Bovis joined R D Fire as Part 20 Defendant, claiming £6.4M for the fire protection. Baris commenced proceedings against Bovis for additional sums due. Bovis and Braehead settled the main contract claims.

34. The action between Bovis and Braehead was compromised. The other actions between Bovis and the Fire Protection works contractors continued. Bovis's claim was either (i) £6.4M which it claimed to be the cost of necessary remedial works but which it admitted were never going to be carried out, or (ii) £4.8M being the amount originally claimed by Braehead or (iii) 22% of £6.4M. As to (iii), Bovis's case was that it had made a loss on the settlement because of the breaches of the works contractors, but that it could not show what part of the settlement related to that loss and those breaches. Nevertheless by carrying out a purely arithmetical exercise applied to the settlement sum, Bovis quantified its claim. The Judge's view was that such a pure arithmetical exercise, without any supporting evidence to show that the apportionment was appropriate and reasonable was not acceptable. However, the general thrust of the judgement was that were *some* evidence in support provided, the court could do its best and make its own assessment, even if only rudimentary evidence of how the settlement was arrived at was adduced. The Court, he held, could make its own assessment with only very limited material to work with.
35. Such a finding should strike terror into the heart of any insurer of a professional. Its practical effect is that, if the Claimant gets the right judge, then, with a little skilful and imaginative arithmetic and *some* documentation and evidence, the Claimant might be able to piece together sufficient for the Judge to "do his best". There will be no strict proof required to demonstrate what amounts were paid, or to show that the Contractor was in fact entitled to those amounts in respect of certain claims. So long as there are some pegs for the Judge to hang his hat on, that may be acceptable. One should bear in mind that HHJ Thornton Q.C. represented Wessex both in the arbitration and litigation, and so may well sympathise with the position of the Employer, even if he found the stance taken by Bovis in this particular case unattractive.

PROFESSIONAL LIABLE EVEN IF NO ACTUAL CAUSATION

36. But perhaps one of the most lethal blows to the professional is one that, fortunately, has not received a great deal of attention – possibly because unless one were in the case (and in it for a very long time which many of us were) the ramifications of the judgment are not easy to follow. This is **Royal Brompton Hospital NHS Trust v Hammond and others (No 8)** [2002] 88 Con L.R. 1. It runs for some 200 (confusing) pages, and the gist of the judgment is directly contrary to HHJ Bowsher's rulings in **Guy's**.
37. This case concerned major building works at the Royal Brompton Hospital in Chelsea. The Hospital, having settled with the contractor, Taylor Woodrow, on the brink of an arbitration hearing (in circumstances which suggested that the hospital had merely thrown in the towel, but there was no evidence as to why it caved in), sued (amongst others) the Architects, the mechanical and electrical consultants (AA), and the project manager. One of the claims related to late and inadequate provision of information about the M&E Services, which TW alleged delayed and disrupted its progress on site, and in respect of which the architect granted 16 weeks extensions of time and certified loss and expense. Further loss and expense was paid in respect of those 16 weeks, it was alleged, in settlement of the arbitration, though there was no breakdown of the settlement sum.
38. The Judge found that AA's M&E drawings were late (in that they were supplied later than the agreed dates) and inadequate. However, RBH called no evidence from Taylor Woodrow or any expert on what delay (if any) might actually have been caused, given that TW were already in delay themselves and understaffed in their drawing office. It was quite possible that the lateness and inadequacy of the drawings caused no delay at all in the circumstances and that the contractor was the author of his own delay. In fact there was evidence that even when the drawings were finally supplied, the contractor did not use them straight away.
39. Neither the architect who issued the extensions of time, nor the quantity surveyor who valued the losses allegedly incurred by TW during those periods, were in possession of the full facts. They were not negligent, but, had they had access to the documents and evidence that emerged in the run up to the arbitration and at trial, they could well have awarded less time and money. Indeed, the Quantity Surveyor, in his statement in the arbitration, said that had he seen the documents that were made available in the arbitration he would not have valued the contractor's claim as high as he did.

40. In fact, the Learned Judge found that the critical delay caused by the M&E drawings was only eight weeks. It therefore follows that any negligence or breach of contract by the M&E engineer did not in fact cause the other eight weeks' delay. Nevertheless, they were liable "on the basis of [the architect's] extensions of time" = that is, the whole 16 weeks which had been granted.
41. His reasoning is to be found at Paragraphs 258 to 260. Brompton's claim was that its case in the arbitration had been weakened by the M&E's negligence/breach of contract, hence the settlement. Having explained the Main Contract provisions which provide for the grant of extensions of time and loss and expense, the Judge held at Paragraph 259, that *"By agreeing to leave certain matters to the decision of a third party [the architect] and, unless and until agreed or decided otherwise by an arbitrator or court, to be bound by the decision, the contracting parties [the Employer and Contractor] necessarily also accept that, in so far as the decision requires the formation of a judgement (whether of fact, of opinion or of law), the decision may not be perfect, or even right either in fact or in law."*
42. He further held that *"a consultant who is aware that its advice or its services may be employed under such a contract must be taken to have foreseen both that its acts or missions may lead to the architect issuing a certificate, forming an opinion or making a decision which will have the effect of altering the rights and obligations of a party and to that party thereby losing something to which it would have been entitled but for the act or omission."* In other words, a consultant is to be taken as foreseeing that his acts or omissions might lead to a certificate being issued that is neither right in fact or in law.
43. Having established this, he went on to find that even if the certificate is neither right in fact or in law, it does not break the chain of causation between the consultant's acts or omissions and the loss suffered by the Hospital: the consultants. He held that *"all agreed to act under the contract between RBH and TW by which RBH became liable to TW. That contract provided mechanisms whereby the rights and obligations of the parties were adjusted by the architect's decisions . . . Certainly as a matter of common sense there can in my view be no doubt that the breaches of contract which I have found caused TW to make claims which WGI considered to be justified under the contract. [note: not "caused delay" but "caused TW to make claims"] Since all but one of WGI's decisions, even if containing errors in fact or in law, were ones which it was not negligent for WGI to make, I cannot see how any defendant can avoid liability for RBH for the consequences. It is not in my judgment necessary for RBH to establish that WGI's*

judgments can be supported in full i.e. that TW was delayed (or disrupted) to the extent decided by WGI. . . .the Claimant has established a causal link between the breaches of duty and the extensions of time (as formulated by RBH)”.

44. As if that were not clear enough, he stresses, at Page 203: “*even if WGI’s decision had been “incompetent or ill advised or ill judged”, the chain of causation would not have been broken, unless they had been negligent. Thus even the admitted error of two weeks may be ignored.*” He continues, at Para 263: “*If the consultant’s duty were viewed solely as one actionable in tort then the object would be expressed in terms of taking care to see that RBH was not exposed to liability to TW. The liability does not arise as a result of RBH having to prove each of the steps [duty, breach, causation, loss]; it arises as a result of WGI’s decisions and any resulting dissatisfaction by either party with them which gives rise to one or more disputes referable to arbitration.*
45. In other words, if the standard JCT contract is in place, with its provisions for certification of extension of time and loss and expense, and if erroneous but non negligent certificates are issued, and the Employer ends up settling with the Contractor, all the Employer has to do to prove a case against the Consultant is to establish breach. And if **Bovis Lend Lease Ltd** is followed, all the Employer then has to do is to provide some rudimentary apportionment and justification of that apportionment in order to succeed in a claim for the settlement sum from the consultant.

CONTRIBUTION FROM THE CONTRACTOR

46. And what of the Contractor who has received this windfall and pocketed the ill gotten gains of the settlement or over certification? Surely one might expect that the Consultant held liable to pay damages to the Employer in the amount of that windfall can be reimbursed by him?
47. But no – Section 1(1) and 1(6) –
- (1) *Subject to the following provisions of this section, any person [the consultant] liable in respect of any damage suffered by another person [the Employer] may recover contribution from any other person [the contractor] liable in respect of the same damage (whether jointly with him or otherwise).*
- (6) *References in this section to a person’s [the consultant’s or the contractor’s] liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person [the Employer] who suffered the damage; but it is immaterial whether any issue*

arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

48. The difficulty lies in the interpretation of “same damage”. The case of **Birse Construction Ltd v Haiste Ltd** [1995] 76 BLR 31 CA concerned a defective reservoir built by Birse for Anglian Water. Birse replaced the reservoir and claimed the cost from consulting engineers Haiste. Haiste claimed contribution from Anglian’s project engineer. The Court of Appeal struck out the contribution claim. They distinguished between the “damage” suffered by Anglian (the physical defects in the reservoir) and the “damages” suffered by Birse (the financial cost of having to build a new one). Anglian and Birse did not suffer the same damage.
49. Attempts have been made to simplify what is meant by “the same damage” by the “mutual discharge” test. Sir Richard Scott V-C as he then was, came up with the mutual discharge test in **Howlins U Harrison v Tyler** [2001] Lloyds Rep PN 1, CA.. Assuming that the consultant and the contractor are both liable to the Employer, if the consultant pays a sum of money to the Employer, does that reduce the contractor’s liability? Conversely, if the Contractor pays a sum of money, does that reduce consultant’s liability? The Contribution Act applies only if both of those questions are answered “yes”. The problem of applying it to a contribution claim by a consultant against a contractor after a settlement has been entered into by the Employer and contractor is, of course, the grounds on which the contractor can be said to be liable to the Employer for what was, in effect, an over payment.
50. This particular situation was the one which arose in **Royal Brompton Hospital NHS Trust v Hammond (No 3)** [2002] UKHL 14 [2002] 1 W.L.R. 1397. The facts have been touched on above. I have, so far, concentrated on the position of the Engineer. The Engineer’s co-defendant, the Architect who issued 43 weeks of extensions of time (including the 16 in respect of the M&E works which I have already mentioned) was sued by the Hospital for negligent certification, and the monies paid to the Contractor on the basis of these certificates and in the settlement of the arbitration. The Architect claimed contribution from the Contractor on the basis that the Contractor was liable to the Hospital in respect of the same damage as the Architects. The Hospital’s claim against the Architects was quantified by reference to the liquidated damages and loss and expense payments which the Hospital had not been able to recover from the Contractor in the arbitration because of the extensions of the time. The Architects argued, therefore,

that they were liable to the Hospital in respect of the same damage as the Hospital had claimed from the Contractor in the arbitration but had failed to recover.

51. The argument failed before Judge Hicks Q.C. who struck out the Architects' claim on the grounds that the Architects and the Contractor were not liable to the Hospital in respect of the same damage. The Court of Appeal and the House of Lords dismissed the Architect's appeals, holding
- a. the purpose of the Civil Liability (Contribution) Act 1978 was to enlarge the category of persons from whom contribution could be claimed, by removing earlier restrictions on qualifying causes of action, but the root of the contribution principle remained "common liability to pay compensation for having caused the same harm";
 - b. the words "the same damage" in the Act should be given their ordinary meaning without gloss. In particular, the words did *not* mean "substantially similar or materially similar damage";
 - c. it was important to keep clearly in mind the distinction between "damage" and "damages". The fact that the *damages* payable by each of two parties to another are quantified in the same or similar ways does not necessarily mean that those parties are liable in respect of the same *damage*.
52. One must consider, it was held, "the essence" of the claim in each case and analyse the nature of the damage in respect of which the Hospital claimed compensation from each of them. The Hospital's case against the Contractor (in the arbitration) was that the Contractor's breach of duty gave rise to the late delivery of the completed building and the subsequent disruption to the Hospital. The compensation claimed in respect of that damage was liquidated damages and repayment of loss and expense payments. (In settling the arbitration as it did – by the Hospital paying the Contractor another £6.2M – the Hospital had failed to recoup this compensation.)
53. The damage alleged to have caused by the Architect's breach of duty was NOT delay to the completion of the building. Negligent issue of extensions of time does not *cause* a delay. Such negligent acts cause an impairment of the Hospital's ability to obtain compensation from the Contractor. The issue of the certificates meant that the Hospital faced much greater difficulty in its arbitration claim against the Contractor than it would otherwise have done, since it was seeking to overturn acts already issued. Thus the damage suffered by the Hospital at the Contractor's hands was delay in completion of the building, whereas the damage suffered by the Hospital at the Architect's hands was the

weakening of its position in negotiating a financial settlement with the Contractor in relation to that delay. Thus the Contractor and the Hospital were not persons who were liable to the Hospital in respect of the same damage.

54. It is therefore, unfortunately, now irrelevant that as a matter of pounds/pence, quantum, the compensation claimed was the same, that the Hospital had sought the return of the loss and expense and the payment of LaDs in the arbitration from the Contractor and also sought the payment of that loss and expense and LaDs from the Architect in the proceedings.
55. Does this distinction apply to claims for defective work? In **Hurstwood Developments Ltd v Motor & General and Andersley Co insurance Services Ltd** [2002] PNLR 250), both parties were alleged to be liable to a building contractor for the costs of certain remedial works which the contractor was obliged under the building contract. The party seeking contribution was the contractor's insurance broker: its breach of duty to the contractor was a failure to arrange insurance for the contractor against such costs. The defendant was the contractor's site investigation subcontractor whose breach of duty had brought about the need for the remedial works. The broker's claim for contribution against the subcontractor was, pound for pound, the same as the building contractor's claim against the insurance broker.
56. Judge Gilliland QC held that the parties were not liable to the building contractor in respect of the same damage. The damage caused by the insurance brokers was the financial loss caused by the absence of insurance cover. The damage caused by the subcontractor was the need for remedial works. The Court of Appeal allowed the brokers' appeal. The House of Lords held that the Court of Appeal had erred. The Judge's distinction between the different types of damage was correct and the parties were not liable in respect of the same damage. The House of Lords also held in **Bovis Construction v Commercial Union** [2001] 1 Lloyds Rep 416 and **Bovis Lend Lease Ltd v Saillard Fuller & Partners** [2001] 77 Con LR 134 that damage comprising pure financial loss could not be equated to damage representing the cost of repairing defective construction works.
57. This cases, of course do not address the situation where the Architect is sued for failing to spot defective work and seeks contribution from the Contractor towards the cost of the remedial works claimed against the Architect. Absent the issue of a Final Certificate, which would ensure that the Contribution Act did not apply, is the Architect's claim likely

to succeed? One would hope that the Courts would take the sensible view, namely that the damage suffered by the Employer at the hands of both Architect and Contractor is the need to carry out remedial works and the cost of those remedial works, and thus that the Architect's claim for contribution would succeed. I am however not aware of any case in which this has yet been tested.

CO-INSURANCE

58. As if the difficulties put in the professional's way by the Courts' application of the Contribution Act were not enough, another problem reared its head in **Co-op Retail Services Ltd v Taylor Young Partnership & Others** [2002] 1 WLR 1419 [2002] BLR 272. This is the problem which arises in the context of building contracts which require co-insurance on behalf of the Employer and Contractor. These are common clauses in Building contracts. CRS employed Wimpey as main contractor to construct a new office block in Rochdale. The main contract incorporated the JCT Standard Form of Building Contract 1980 Edition, Private with quantities. Wimpey engaged Hall Electrical as electrical subcontractors. The subcontract was in the DOM/1 1980 Edition form. Hall entered into a warranty with CRS and Wimpey that it had exercised and would exercise all reasonable care and skill.
59. Before practical completion, a fire occurred at the site and the building was extensively damaged. CRS sought damages from their architects, Taylor Young Partnership, and their mechanical and electrical engineering consultants, Hoare Lea and partners. TYP and HLP joined Wimpey and Hall for contribution alleging that the fire was caused by Wimpey's breaches of the main contract and Hall's breaches of its warranty. The losses claimed by CRS fell into three categories:
- a. the cost of reinstatement works
 - b. the cost of associated professional fees
 - c. losses consequential on the delay to the project
60. Clause 22A.1 of the main contract provided that the contractor should take out and maintain a policy in the joint names of the Employer and Contractor for all risks insurance for cover no less than defined in Clause 22.2 for the full reinstatement value of the works. This insurance was to provide cover for physical loss or damage to work executed and site materials and also provided that the subcontractors were to have the benefit of the policy in respect of loss or damage by specified perils, including fire. Back to back provisions were contained in the subcontract which also provided that Hall was not to be

liable for damage to the works caused by specified perils (including fire) and that Wimpey was required to take out the joint names insurance against damage by specified perils. The requirements of Clause 22A of the main contract were met by a joint names policy with the CGU (“the joint names insurance”) which insured Wimpey, CRS and Hall. This covered the cost of the reinstatement works and the related professional fees. The consequential losses were borne by a different insurer, who insured the Co-op for consequential losses.

61. For the purposes of legal argument it was assumed that the fire was caused by breach of contract by Wimpey, Hall, TYP and HLP. The third parties, Wimpey and Hall, argued
- a. The law of contribution is concerned with situations where 2 people are liable to the claimant. It then defines situations where if the claimant sues one person, that person can seek contribution from the other. If the other is not liable to the Claimant, the person seeking contribution cannot succeed.
 - b. There was no liability between CRS, Wimpey and Hall because they were all parties to the joint names policy and there is no liability between co-insured (see the rule in **Petrofina Ltd v Magnaload Ltd** [1984] 1 QB 127 QBD). Also this was what the JCT contract intended.
 - c. Wimpey were not liable to CRS for the delay related schedule 3 because the JCT contract allowed them and extension of time for delay caused by the fire. Any other delay would be compensated by liquidated damages which were a complete remedy.
 - d. As Wimpey and Hall had no liability to CRS for anything, the Defendants could not claim contribution from them.
62. The defendants countered
- a. Insurance is *res inter alios acta* – loosely translated “mind your own business”
 - b. The rule in *Petrofina* was a procedural bar, much like being struck out for want of protection as covered by section 1(3). It did not relate to underlying liability and did not preclude a claim in contribution.
 - c. It was unfair. It could not be right that by reason of insurance arrangements between themselves, the Co-op, Wimpey and Hall could impose a liability on the professionals which exceeded their proper culpability.
63. At the trial of the point as a preliminary issue, HHJ Wilcox found for Wimpey and Hall, as did the Court of Appeal. Wimpey and Hall had never been liable to CRS for any damage arising out of the fire. One assured cannot sue a co assured for a loss in respect of

which the co assured is entitled to the benefit of the same insurance and insurance is not *res inter alios acta* if it has been contractually agreed between the parties. Section 1(3) of the Act does not create a right of contribution where there was no such right before, and presupposes that contractual arrangements in place at the time of the damage are to be respected. As to the plea of unfairness, Lord Justice Brooke said

So far as considerations of equity are concerned, aspects of the law of contribution were perceived to be much less fair before Parliament intervened, but not even Parliament has considered it appropriate to create a right of contribution as against a party which has not been held liable in respect of the relevant event and against whom such liability could not be established.”

64. Lord Hope giving the leading speech in the House of Lords was unable to find any fault with the Court of Appeal's judgment. A further question was considered: whether the time for determining whether a person was liable in respect of the same damage for the purposes of section 1(3) was the time when the damage occurred or the time when contribution was claimed. Lord Hope concluded, obiter, that the time for determining liability was when contribution was claimed.
65. So the professional – or his insurers – loses out again, this time by reason of contract arrangements to which he is not party. Even though the professional may have been truly responsible for only a share of the loss (if one were to apportion blame), the professional is liable to recompense the Employer (and thus the insurers of the Employer and Contractor) for the whole of the loss.

UNJUST ENRICHMENT/RESTITUTION

66. As soon as the words “unfair” spring to one's mind, yet there seems no way out, one's thoughts turn to equity. You may remember that in the first case mentioned, **Wessex v HLM**, the architects had sought contribution from the contractor, ARC, and recovery of the monies overpaid to ARC in the settlement of the arbitration on the grounds of unjust enrichment. The viability of such a claim was not tested due to settlement of the case.
67. At one point, it seemed that this might indeed be the way to ensure that the contractor did not escape with his ill gotten gains. See **Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)** [1997] QB 85 (CA). In this case, an agreement between developers, a city council and the plaintiff provided for the construction of a shopping centre, the profits of the development to be shared between the parties. The plaintiff

engaged the defendant firm of surveyors as adviser and development consultant, part of its responsibilities being to check and authorise the developer's claims to be paid by the plaintiff for the plaintiff's share of the development cost. The plaintiff paid the claims on the defendant's recommendations, which included a recommendation to pay notional interest. Subsequently the plaintiff demanded repayment of the notional interest on the ground that it was not part of the development and litigation between the plaintiff and developers ensued but was eventually abandoned. The plaintiff thereafter commenced proceedings against the defendant firm claiming damages in negligence and breach of contract amounting to the amount of the allegedly wrongly paid interest. The defendants issued third party proceedings against the developers claiming contribution. The Judge struck out the third party claims. The Court of Appeal allowed the defendant's appeal and set aside the order.

68. The CA held that it was arguable that the plaintiff had a claim against the developers for repayment of the notional interest on the ground that it was paid under a mistake of fact or for no consideration. The CA further held that the difference between demanding recovery of a particular sum and claiming an equivalent sum for the damage suffered because of the withholding of it was immaterial in the broad context of the Act of 1978. Thus despite the distinction between a claim for restitution and one for damages, each of them was capable of being a claim for compensation for damage under sections 1(1) and 1(6). Accordingly, since the plaintiff's restitutionary claim against the developers under either head would be a claim in respect of the same damage as that alleged by the plaintiff against the surveyor defendants, if the developers were liable to compensate the plaintiff for payment of some or all of the notional interest, they would be also liable under Section 1(1) of the Act to pay contribution to the defendants.
69. The CA also held that it was arguable that receipt by the developers of the notional interest made them trustees of the alleged overpayment, and Section 1(1) applied to a claim for restitutionary compensation based on such liability so as to enable the defendants to claim contribution.
70. These findings were immediately criticised by Goff & Jones, The Law of Restitution (5th ed, 1998) at pg 396: "*To conclude that a restitutionary claim is one for "damage suffered" cannot be justified in principle; nor is it, in our view, consistent with the natural meaning of the statutory language. A claim for restitution cannot be said to be a claim to recover compensation within the meaning of section 1(1).*"

71. This criticism was accepted by Lord Steyn in **Royal Brompton (No 3)** (see para 33 of his judgment). So, no recovery for “unjust enrichment” either. This was followed in **Niru Battery Manufacturing Xo v Milestone Trading Ltd** [2003] EWHC 1032 (Comm) [16] – [27] Moore-Bick J. It has to be said that this is consistent with Parliament’s intention at the time of enacting the 1978 Act to limit its scope to claims between different types of wrongdoer, since actions in unjust enrichment are not founded on the assertion that the defendant has committed a wrong in the sense of negligence or breach of contract.
72. Moore-Bick J did however find a way out: he held that the defendant (professional) should be able to recover from the third party (the contractor) by acquiring the Employer’s rights against the contractor via subrogation and enforcing them for his own benefit. Thus the professional having paid the full amount, was subrogated to the Employer’s rights under the judgment and could recover from the contractor. This appears a tortuous route, and I am not aware that it has been tested in any other case.

CONCLUSION

73. Faced with most avenues of recovery being cut off one by one since **Wessex**. what are the professional and his insurers to do? I am grateful to Andrew Bartlett Q.C. and Kim Franklin (who appeared in the CRS case) for some of the following suggestions:
74. First, as to the final certificate, architects are now wary about issuing these and there have been some attempts at redrafts to the standard wording, which may or may not have been successful.
75. Second, there are “net contribution clauses” in some professional’s contracts of engagement which are intended to have the result that, if a liability arises to the Employer for an event for which both the professional and contractor are to blame, the professional only has to pay the Employer his fair share. In the absence of such a clause, the Employer can sue the professional for the full amount of the loss. In principle, therefore, if the loss is 10% the professional’s fault and 90% the contractor’s fault, with the benefit of such a clause the professional will only be liable to the Employer for 10%. But the drafting of such a clause must be effective. If, for example, the clause refers to the sharing of “liability” the clause would not achieve its objective. Where the contractor is not liable to the Employer – perhaps because of a settlement – there is no liability to share, and the professional would still end up paying 100%. Similarly there must be question marks over the use of the words “same damage”, given the Courts’ readiness to

distinguish between types of damage even when they amount to the same in monetary terms. And even if such drafting can be achieved, the commercial question will still remain, whether such a clause is acceptable to the Employer and, more to the point, the Employer's project insurers.

76. Contractor's all risks insurance, or CAR, is the commonest method of providing the joint insurance. The employer simply joins in as an insured on the policy which the contractor already carries. Joint insurance can also be achieved by the employer taking out a policy, and the contractor joining in, in which case the contractor is not liable to the Employer. So the best thing is for the professional to join in on the same insurance, so that he is also a co-insured and can not be liable to the Employer either.
77. There are a variety of arrangements (see the discussion in **Hopewell Project Management Ltd v Ewbank Preece Ltd** [1998] 1 Lloyds Rep 448). On non JCT contracts, professionals are sometimes covered by the project policy, particularly for their on site activities and occasionally more widely. Maybe such arrangements should become more common. We believe that discussions have taken place within the JCT as to whether provision should be made for professionals to be added to the joint insurance. I am not aware of the outcome, if any. Bespoke arrangements can be made if the relevant parties agree, but insurance to cover all parties may be more expensive, since the lack of the possibility of recovery from the consultants may affect the level of the premium.
78. An alternative to the above would be for a clause to be inserted into the professional's agreement with the Employer to the effect that the professional shall not be liable to the Employer in respect of any losses caused by perils co-insured by the Employer and contractor.
79. The above are merely suggestions. It is clear that insurers and their professional clients should be well aware of the risk now run by professionals, as a result of the cases I have discussed, that they end up, in a sense, insuring the contractor by default.

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