JUDGMENT : HIS HONOUR JUDGE GILLILAND Q.C. Salford District Registry. TCC. 29th June 2007

1. By a written Package Contract *("the Contract")* dated 14 November 2002 the Claimant agreed to design, install, commission and complete a fire protection system at the Defendant's new assembly plant at Goodwood in West Sussex. Practical completion of the Claimant's Works occurred on 26 November 2003. Practical completion of the whole assembly plant occurred on 31 May 2004.

   However on 30 July 2003 an escape of a large quantity of water occurred from one of the main supply pipes on the sprinkler system in one of the buildings within the assembly plant known as B50. The sprinkler system was part of the fire protection system installed by the Claimant and was part of its Works as defined in the Contract. The Defendant had prior to this escape of water already taken early occupation of part of B50 pursuant to clause 9 of the Contract. Under clause 9, although it was provided that the Defendant should assume responsibility for risk and the protection of the works in the event of taking early occupation, nevertheless it was expressly agreed that the Claimant would give a full indemnity to the Defendant in respect of latent defects arising at any time in the Claimant's works following such occupation being taken. It has not been suggested by the Claimant that the provisions about risk in clause 9 modify or exclude any liability of the Claimant in respect of the escape of water.

2. Following the escape of water, the Claimant repaired and made good the damage to the sprinkler system and to its Works and no issue arises for present' purposes in relation to any damage caused to the Claimant's Works as a result of the escape of water. This action concerns only the liability if any of the Claimant for other damage which the Defendant claims it has suffered as a result of the escape of water. The Defendant claims that it has suffered loss as a result of damage to parts of the building not forming part of the Claimant's Works, loss of goods and stock and loss of contents as well as in respect of clean up costs. The Defendant's claims were referred to adjudication and by a decision dated 7 April 2005 the adjudicator directed the Claimant to pay £393,562.14 as damages plus interest of £39,765.95 and costs of £100 to the Defendant. The Claimant has paid that sum to the Defendant. It may be that there are still outstanding issues in relation to value added tax and interest in respect of the sum the adjudicator directed to be paid. The Claimant in the relief sought claims that it is entitled to be repaid £433,425.08 including interest, but I have not heard any submissions or argument as to the total amount actually paid. This action is concerned with the issue of principle which was decided by the adjudicator in favour of the Defendant, namely whether or not on the true construction of the contract the Claimant was in breach of its obligations to the Defendant and was liable in respect of the heads of damage claimed in the adjudication. The present action was commenced by the Claimant on 15 December 2006 and in it the Claimant seeks a declaration that the Defendant is not entitled to recover any compensation in respect of any damage, expense, or loss arising from the escape of water on 30 July 2003 and an order that the Defendant repay the monies it has paid.

3. There is no issue between the parties as to the relevant facts and for the purposes of the present action (but only for those purposes) the Claimant accepts (1) that the escape of water was due to the negligence of its servants or agents in failing properly to connect or fasten a joint in the main supply pipe, and (2) that the escape of water has caused the Defendant loss and damage amounting to £393,562.14.

4. There is also no dispute that although it was the obligation of the Defendant under clause 13.5 of the Contract to maintain joint names insurance of both the existing structures and of the Works (meaning thereby the Claimant's Works) the Defendant failed to do so and at the time of the escape no such insurances were in force. That was a clear breach by the Defendant of its obligations and may entitle the Claimant to damages if it has suffered loss as a result of such breach. However, again, that is not in issue in this action. This action is concerned with the different question, namely whether the provisions in clause 13.5 of the Contract have the effect of relieving the Claimant from liability in respect of the risks covered by the insurance which should have been in place under clause 13.5. There is no dispute that the Defendant cannot rely upon its own breach of contract in failing to maintain such insurance as a factor in favour of the view that the Claimant was in breach of its obligations under the Contract. The question of the Claimant's liability for losses which would have been covered by insurance under clause 13.5 must be determined as if the insurance under clause 13.5 had been in force at the time of the escape of water. That that is the correct approach clearly appears from the decision of the Court of Appeal in ***GD Construction (St. Albans) Limited v Scottish & Newcastle Plc*** [2003] EWCA Civ 16 where the employer had failed to take out the required policy and was seeking to sue the defendant in respect of damage which should have been covered by the joint names policy.

5. The joint names policy which should have been maintained pursuant to clause 13.5 of the Contract would have provided cover against the Specified Perils set out in Schedule 2 to the Contract. The *"Specified Perils"* were set out in the following terms: *"Fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquakes, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, (but excluding any loss or damage caused by ionising radiations or contaminations by radioactivity from any nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds)".*

6. It is now well established that express provisions for the insurance in the joint names of the parties to a construction contract against specified perils which occur during the construction works, such as for example fire or other risks, may have the effect of relieving the parties of liabilities which they might otherwise have incurred towards each for loss or damage suffered by reason of the occurrence of one or more of the specified perils even where the

specified event has occurred or been brought about by reason of the negligence or other breach of contract by one of the parties or by others. The rationale for such a conclusion is that by so contracting in relation to the specified perils the parties have established a special contractual arrangement whereby they have agreed to look exclusively to the proceeds of the insurance policy in the event of losses arising from the occurrence of the specified perils during the construction works and that necessarily excludes the bringing of an action for damages against the party in breach. It also follows that in such cases neither the party who has suffered loss nor the insurers will be entitled to pursue an action by way of subrogation against the party who is in default since the same policy protects both parties against losses arising as a result of the occurrence of the specified risks.

7. Such a contractual scheme can have significant advantages for the parties to a construction contract because it will obviate the need for arguments and inquiries to be made as to who, if anyone, was at fault in relation to the occurrence of the specified risk and is likely to enable the damage to be remedied more speedily with a consequent avoidance of unnecessary delays. A characteristic feature of such a scheme is that if the specified risk occurs before practical completion and the works are damaged, it is the responsibility of the contractor carrying out the works to make good that damage. The contractor will be entitled to an extension of time to make good the damage to the works and will be entitled to be 'paid for making good the damage but only to the extent to which the employer is entitled to receive payment from the insurers. In other words, the contractor has to make good the damage and looks exclusively to the insurance policy for payment for making good the damage and has no claim against the employer for additional payment should the proceeds of the insurance prove inadequate to cover the full costs of making good the damage. Equally the employer does not have to pay out any more monies than are provided by the insurers and in this way the employer is also protected by the policy whenever a specified risk occurs.

8.. It is also well settled that the question whether the provisions for joint insurance against specified risks in a particular contract do have the effect of establishing a special regime whereunder the ordinary principles for liability for negligence or breach of contract are displaced in relation to loss and damage occurring as a result of the specified risks is a question to be determined upon the proper construction of the contract and there is no dispute between counsel that this is the correct principle to be applied in the present case. Counsel are also agreed that the wording of the Contract differs from the wording used in other contracts which have been the subject of judicial construction. It follows that unless the previous authorities have laid down or established rules or principles of construction, the previous authorities are of limited assistance in the present case, although they do of course provide illustrations of the approaches which have been adopted by the Courts to the question of construction. It has not been suggested by either Miss Lee or Mr. .less that the authorities to which I have been referred or which have been mentioned in their helpful skeleton arguments do lay down any relevant binding rules of construction the application of which will determine the true construction of the Contract. The true construction of the Contract and the intention of the parties must be ascertained from the language which the parties have used and agreed to. It has not been suggested that the language used in the Contract is to be interpreted or understood in the light of any special facts or circumstances known to the parties at the time the Contract was made and there is no dispute that the language used should be understood as bearing its ordinary meaning and that the provisions of the Contract should be read as a whole in order to ascertain the true meaning of the Contract.

9. The first question which arises is whether the Defendant was obliged to maintain joint insurance with the Claimant. If the Claimant was not included within the scope of the required insurance, the Claimant's contention that the insurance provisions in clause 13.5 has the effect of relieving it from liability must fail. Clause 13.5 is only one of the provisions of the Contract which requires consideration. At the forefront of her submissions Miss Lee places clause 2.3 which in unqualified terms provides that the Claimant shall *"indemnify the Employer against any damage, expense, or loss whatsoever suffered by the Employer or incurred to any third party to the extent that the same arises out of or in connection with any breach of this Contract or any negligence or breach of statutory duty on the part of the Contractor or any subcontractor or supplier of his or any tier"*. As I have already stated, it is accepted by the Claimant for the purposes of the present action that the escape of water was due to the negligence of the Claimant's servants or agents. It thus follows, if Clause 2.3 is applicable in accordance with its terms, that the Claimant cannot succeed in this action and the Claimant will be liable to indemnify the Defendant against any damage or expense or loss it has suffered as a result of the escape of the water. Miss Lee has also referred to other provisions of the Contract which it is said the Claimant has broken as well as to the indemnity under Clause 9 to which I have already referred but these other alleged breaches or the indemnity under Clause 9 do not it seems to me in substance add anything to the liability of the Claimant under clause 2.3 save to emphasise that the Claimant undertook several different obligations to carry out the work properly using proper care and in the ordinary way the Claimant would if there were nothing more clearly be liable to compensate the Defendant for the losses it has suffered in relation to the damage to other parts of the building and other items.

10. Clause 13 of the Contract has the general heading: *"Risk In The Works and Insurances"*. Clauses 13. 1 and 13.2 deal with risk and protection of the Works. They provide that risk and protection of the Works is (subject to clause 9 where early possession is taken) upon the Contractor until practical completion not of the Works but of the Project. Nothing turns for present purposes on these provisions. The insurance provisions in the Contract are to be found in Clause 13.3 onwards. Clause 13.3 opens with the words: *"Without prejudice to his liability to indemnify the Employer or his other obligations under this Contract or at law"*. These words are then followed by the substantive insurance obligations on the Claimant. Under clause 13.3.1 the Claimant was obliged to maintain and

to cause his sub-contractors to maintain insurance in respect of claims for personal injury or death arising out of or in the course of employment of employees. Under clause 13.3.2 the Claimant was obliged to maintain and to cause his sub-contractors to maintain and also any third party whom the Defendant should require to be jointly insured and who had an insurable interest in the Works to maintain public liability insurance of not less than £2,000,000 in respect of any matter for which the Claimant was liable to indemnify the Defendant under clause 2.3 of the Contract and which had not been insured under clause 13.3.1. It was also expressly provided that this insurance should extend to death or personal injury not covered under clause 13.3.1 and also to "*injury or damage to property real or personal*". Since clause 13.3.1 related only to death or personal injury to employees, it is clear that clause 13.3.2 was intended to and did require the Claimant to insure against personal injury or death to third parties for which the Claimant might be liable to indemnify the Defendant under clause 2,3. So far as damage to real or personal property was concerned, there was however an express exception in relation to damage to *"the Works and the Project"*. In the Contract, the Works were defined as the Claimant's own works and the Project meant the whole development of the assembly plant or any part or parts thereof where the context so admitted. It is thus clear that although the insurance to be effected under clause 13.3.2 was linked to the liabilities of the Claimant under clause 2.3 and was to provide cover for such liabilities, it was not intended that the policy should respond in relation to damage to the Defendant's buildings or to other property comprised either within the assembly plant or the Claimant's own works. Miss Lee has, correctly in my judgment, not sought to suggest the contrary.

11. The next insurance provision is that contained in clause 13.3.3. This required the *"Contractor"*, i.e. the Claimant, to take out and maintain for a period of 12 years from the *"Development Completion Date"*, a professional indemnity insurance policy *"against any negligent act or default and to cover the Contractor's obligations and liabilities under or in connection with this contract of not less than"* £15,000,000. Development Completion Date was not expressly defined in the Contract but would appear to be a reference to the completion of the whole development. However this obligation to effect and maintain professional indemnity insurance against negligent acts or defaults and liabilities under or in connection with the Contract was only applicable *"If so stated in Schedule 2 hereto"*. Part 1 of Schedule 2 is headed *"Contractor's Insurances"*. After a specific reference to public liability cover under clause 13.3.2 in the sum of £2,000,000 the following appears on the next line: *"Professional indemnity is/is not required (clause 13.3.3): £ "*. It is to be noted that neither alternative has been crossed out and that no figure for any professional indemnity cover has been written in after the £ sign. There do however appear on the next line the words: "*Minimum limit of indemnity for professional indemnity cover: £15,000,000"*.

12. Mr. Jess has submitted that because neither of the alternatives *"is/is not required"* has been crossed out, it has not been *"so stated"* in Schedule 2 that professional indemnity was to be taken out and maintained by the Claimant. Miss Lee on the other hand has submitted that the reference on the next line in Schedule 2 to the minimum amount of indemnity being £15,000,000 shows that it was intended that the Claimant should take out and maintain professional indemnity cover for a minimum of £15,000,000. In my judgment Mr. Jess is correct as a matter of construction of the Contract. The opening words in clause 13.3.3 *"If so stated in Schedule 2 hereto"* clearly contemplate that if professional indemnity insurance is to be taken out and maintained, that requirement will be *"stated"* in Schedule 2. Schedule 2 however simply does not so state. At its highest, it leaves the question whether professional indemnity insurance is to be effected by the Claimant wholly unclear and unanswered. It also fails to state for what sum any such insurance is to be effected yet the second line of the Schedule clearly contemplates that the parties may wish to insert a specific figure. The fact that there is a reference in the next line of the Schedule and also in clause 13.3.3 itself to a minimum cover of £15,000,000 cannot it seems to me dispense with the requirement that the obligation to effect insurance cover is to exist *"if so stated in Schedule 2*". The parties have in my judgment addressed their minds to 2 quite distinct situations. In one it has been agreed that professional indemnity cover will be obtained by the works contractor. In the other that such cover will not be obtained. By failing to state that such insurance is to be effected, the parties must in my view be taken to have agreed that such insurance was not required to be effected or maintained by the Claimant in the present case. Nothing would have been easier for the Defendant, whose document the Contract is, to have crossed out the words "is not" and to have made the position clear. It is correct that the word *"is"* could have been deleted, thus making clear that insurance was not required but where the obligation to insure is to apply where Schedule 2 *"so states"*, it cannot it seems to me fairly be said that Schedule 2 does state that professional indemnity insurance is to be effected. The reference in the schedule to a minimum cover of £15,000,000 does not carry the matter further since that simply reflects what is stated in the body of clause 333 but that clause is only to apply where it has been so stated in the Schedule.

13. Mr. Jess also submitted that if the Claimant had been liable to effect a professional indemnity policy, the negligence which the Claimant has conceded for the purposes of this action had occurred would not have been within a professional indemnity policy, because the negligence conceded was in the nature of a failure to tighten a joint properly and was not for example in the nature of a design fault. I am bound to say that seems to me to be a difficult argument in the light of the presence of the words *"any negligent act or default"* and the reference to liabilities in very wide terms in clause 13.3.3. I do not need however to resolve this issue which on the view I have taken of clause 13.3.3 does not arise. There has also been only limited argument on the point and I propose to leave that issue unresolved.

14. I do not need to refer in detail to clause 13.3.4 or to clause 13.4 which deal with what is to happen if such professional indemnity insurance either cannot be obtained at reasonable commercial rates or if the works

contractor fails to comply with the obligation to take out or maintain such insurance. It is clear from clause 13.3.4 and 13.4 that the insurances referred to are insurances which are intended to back up and to provide security for the obligations of the contractor and to provide protection to the Defendant as well as to the Claimant.

15. The next insurance provision is that in clause 13.5 upon which this case turns. This is the provision for the Employer, that is the Defendant, to maintain joint names insurance. The clause provides as follows: *"The Employer shall maintain, in the joint names of the Employer, the Construction Manager and others including, but not limited to, contractors, insurance of existing structures, and in the name of the Employer, the Construction Manager, the Contractor and his sub-contractors of any tier, insurance of the Works and all work executed or in the course of execution and any goods and materials on Site which have become the property of the Employer against the risks covered by the Employer's insurance policy referred to in Schedule 2 (i.e. the Specified Perils) subject to the terms, conditions, exclusions and excesses (uninsured amounts) of the said policy. The Contractor when instructed by the Construction Manager prior to Practical Completion of the Project shall restore and repair the Works, replace any goods and materials which have been destroyed or damaged, remove any debris from the Site, and complete the Works. Such instruction shall be treated under this Contract as if it were an instruction for a Variation provided that the Contractor's entitlement to be paid under Clause 3 in respect of such Variation shall not exceed the amount recoverable by the Employer in respect of the Works under the relevant policy of insurance. The Contractor shall observe and comply with the conditions of the Employer's policy contained in the said policy of insurance and referred to in Schedule 2".*

    In Part 2 of Schedule 2 under the heading of *"Employer's Insurance"* it is stated that details of *"the Employer's policy of insurance for the Project are set out in the attachments annexed hereto and the policy is available for inspection at the Employer's principal place of business"*. No such attachments have been provided. The conditions of the Employer's policy are stated to be to give prompt notification of claims, to advise the Construction Manager of any loss or damage which may exceed the "*said policy excess"* of £2,000,000 (sic), to submit claim forms to the Construction Manager and to render such assistance in connection with claims under the policy as the Insurer's appointed representatives should require. There was also a Notice to Contractors On Insurance Provisions stating as item 1 under the heading of *"Contract Works"* that *"Cover to Contractors is limited to the Specified Perils ... on the permanent and temporary works and materials for incorporation therein but excludes Contractors' or their Sub-Contractors' constructional plant, tools, tackle, temporary buildings (including contents) and any other things not for incorporation in the works"*. It was also stated that the policy excess *"which is the responsibility of the Contractor"* was £1,500 for each and every loss. Item 1 shows a clear intention that the works contractor was to have the benefit of the policy if his works were damaged by a Specified Peril. Item 2 of the Notice To Contractors On Insurance Provisions stated in relation to third party liability that public liability was not provided under the *"Project Policy"* and that all contractors must maintain their own insurance for a minimum of £2,000,000 for any one occurrence. Item 3 of the Notice stated that Contactors were responsible for effecting employer's liability insurance.

16. It is to be noted that under clause 13.5 provision is made for 2 different insurances to be maintained. The first is for the insurance of "existing structures" against damage from the specified perils. The second is for insurance of the Works (meaning thereby the fire protection works of the Claimant) and also all work executed or in course of execution and goods and materials on site which have become the property of the Defendant. In the present case the losses or damage for which the Defendant is making a claim are not part of the Works and it is the provision for the insurance of the existing structures which is of relevance.

17. Miss Lee has submitted that the provision for insurance of the existing structures does not require the Defendant to maintain such insurance in the joint names of the Claimant and the Defendant. She has drawn attention to the difference in wording in relation to the 2 insurances as to the persons in whose joint names the insurances are to be maintained. In relation to the insurance of the Works, the Claimant as the *"Contractor"* is expressly named as one of the persons in whose name the policy is to be maintained whereas, she submits, the Claimant is not so named in relation to the insurance of the existing structures. Accordingly she has submitted that the Claimant, not being one of the persons listed was not intended to be covered by that policy. Miss Lee has also submitted that the policy in respect of the existing structures is a property insurance and not a liability insurance,

18. In my judgment as a matter of construction of clause 13.5, it is clear that the Claimant is one of the persons in whose name the policy was required to be maintained. The Claimant has not been individually named but is clearly one of the persons comprised within the general description of *"others, including, but not limited to contractors"*. Although Miss Lee submitted that this general phrase did not include any works contractor, she was, it seemed to me, unable to say who was intended to be included within these words if works contractors in general or the Claimant in particular were excluded. Her submission, it seems to me, involves disregarding clear general words which in their ordinary meaning include the Claimant. It is I consider particularly difficult to construe the words as not including the Claimant when it is expressly stated that the word "*others"* includes but is not limited to contractors. It is difficult to think of a wider scope of persons intended to be covered. There is no reason why an insurance policy against specified perils should not be expressed to be made in the name of a group ascertained by reference to a general description such as contractors. Indeed this would be perfectly natural where the construction of the assembly plant was to be carried out under a series of separate Package Contracts with individual works contractors and which are likely to be entered into at different times. The employer's insurance which is referred to is one which it is clear from fart 2 of Schedule 2 was already (or at least was intended to be) in place before the Package Contract with the Claimant was entered into. The use of the general phrase *"others*

including... contractors" in such circumstances would be perfectly sensible when the identity of the individual works contractor may not have been known at the time the contract was prepared. The fact that the policy may be a property insurance does not alter the position. What is to be insured are the existing structures against loss or damage from the specified perils. It is to provide cover in respect of damage to the existing structures caused by a specified peril or perils. In the context of the construction of a new assembly plant, the existing structures must it seems to me be a reference to those parts of the structure of the assembly plant which are in existence and are damaged by the specified peril. Miss Lee has not sought to suggest that the parts of the plant damaged by the escape of water were not part of the existing structures.

19. The next question concerns the extent of the risk to be covered by the insurance policy. It is not disputed that the escape of water which occurred is capable of amounting to "flood, bursting or overflowing of water tanks, apparatus or pipes". The meaning of such words such as flood and burst was recently considered in ***The Board of Trustees of the Tate Gallery v Duffy Construction*** [2007] EWHC (TCC) 361. The water clearly escaped from a pipe and it seems to me that the pipe in question clearly burst in the present case.

20. Miss Lee has submitted however that on the true construction of these words in the Specified Perils, the policy referred to does not and was not intended to cover bursts caused by negligence on the part of the Claimant. Miss Lee has referred to cases such as ***London Borough of Barking & Dagenham v Stamford Asphalt Co. Limited*** (1997) 82 BLR 25 and ***Dorset County Council v Southern Felt Roofing Co. Ltd.*** (1990) 48 BLR 96. In each of those cases it was held that the contractor was liable for negligence and was not relieved from liability by (in the Barking decision) a requirement that the employer should take out a policy in joint names against damage to the existing structures and the works caused by fire and other risks such as those mentioned in the Specified Perils or (in the Dorset decision) by a provision that the employer was to bear the risk of damage caused by fire and other risks. In those cases (and in the other cases referred to) the provisions of the contract were different and the Court reading the contracts as a whole construed the relevant provisions as not being intended to relieve the contractor from liability for damage caused by his negligence.

21. In the Barking decision as well as an express provision that the contractor should indemnify the employer in respect of any damage to any property (other than the Works) caused by the negligence or breach of duty of the contractor or his sub-contractors, there was also an express provision requiring the contractor to take out and to cause any sub-contractor to take out an insurance policy for loss or damage to the property caused by his or their negligence or breach of duty. In those circumstances, it would clearly be difficult successfully to argue that the employer's insurance policy was intended to relieve the contractor from liability for damage caused by the negligence of the contractor. There is however no such similar insurance requirement upon the Claimant in the present case. In ***Barking,*** Auld LJ construed the employer's obligation to insure as not requiring the insurance to cover damage caused by negligence of the contractor, thereby avoiding the possibility of any conflict or double cover under the 2 policies. In this he differed from the view which had been expressed by Nourse U in the earlier case of National Trust v Haden (1994) 72 BLR 1. The view of Auld LJ has however been questioned by the Court of Appeal in the more recent case of ***GD Construction (St. Albans) Limited v Scottish & Newcastle PLC*** [2003] EWCA Civ 16 at paragraphs 39 and 59. Whatever might have been the position if there had been an express provision that the Claimant had to insure against his own or his sub-contractor's negligence that is not the present case and this part of the reasoning of Auld L7 does not in my judgment assist in the present case.

22. Miss Lee has submitted that although some of the risks listed in the specified perils, for instance, flood may in theory be caused by a range of events including the Claimant's negligence, nevertheless the clause should be read as a whole and each event read in the context of the others. She has next submitted that if this is done, it is apparent that the list comprises typical force majeure events outside the control of the contracting parties and that, considered objectively, it was not intended that the list should include the negligent or deliberate act of any of the insured parties. Auld LJ made a similar point in Barking. However, leaving aside deliberate acts on the part of the insured which would not normally be covered under an insurance policy in any event, I cannot agree with this submission. While some of the specified perils are in the nature of acts of God or force majeure, that certainly is not true of fire or explosion or of bursting or overflowing of water tanks, apparatus or pipes. In my experience it is by no means uncommon for fires or explosions or escapes of water to occur on construction sites which are not due to extraneous things such as Acts of God or force ma majeure. Indeed one of the commonest causes of fire is negligence on someone's part. There is in my judgment no justification for cutting down the clear meaning of those words which are perfectly apt to provide for insurance in respect of both negligent and non-negligent fires or water damage. It is not unusual for fires to occur or for water to escape in the course of construction works and in the ordinary way an employer is likely to wish to have in place insurance cover for such risks irrespective of whether those risks come about as a result of the negligence of a contractor or of others or acts of God. If a person insures his property against fire or water damage, the policy will in its ordinary signification respond if the risk materialises, irrespective of whether or not it has been caused by negligence. There may of course be qualifications or conditions within the relevant insurance policy which if they are not observed may avoid the policy but there is no evidence that this is the situation in the present case and there is nothing in clause 13.5 or the Schedule to the Contract limiting the cover to be obtained. This conclusion is also consistent with the approach adopted by the Court of Appeal in ***GD Construction (St Albans) Ltd. v Scottish & Newcastle PLC*** [2003] EWCA Civ 16.

23. In my judgment the Contract, on its true construction required the Defendant to maintain in joint names of, among others, the Claimant insurance cover in respect of damage to the existing structures caused by flood, bursting or

overflowing of water tanks, apparatus or pipes whether or not such damage was caused by the negligence of the Claimant or his agents.

24. The final question is whether the effect of clause 13.5 is to limit the scope of the contractual indemnity in clause 2.3 or to exclude the Claimant's obligation to compensate the Defendant for negligence if the damage was occasioned by one or more of the Specified Perils. The Claimant's case is that the express provisions of the Contract show that it was the intention of the parties that in the event of loss or damage occurring to the Works or to the existing structures that the parties should look to the joint insurance to the exclusion of the indemnities or other duties imposed under the Contract. That provisions for joint insurance in respect of damage caused by specified perils such as fire or water can have such an effect is not in dispute. In seeking to answer the question whether the insurance did have the effect of relieving a party from what would otherwise have been his liability under the relevant contract, Lord Bingham in ***Cooperative Retail Services Ltd, v Taylor Young Partnership*** [2002] 1 WLR 1419 approached the matter by asking 2 main questions:

"(1) Is the contingency which, on the assumed facts, has arisen one for which CRS, Wimpey and Hall made express provision in the contracts into which they entered?

(2) If so, is the effect of that provision such as to preclude, on the assumed facts, a claim for compensation by CRS against Wimpey or Hall?".

25 The ***CRS*** case involved the question whether another contractor who was sued by CRS could recover a contribution from Wimpey and Hall in respect of fire damage for which the defendant contractor was said to be liable. This depended on whether the provisions of the relevant contracts between CRS and Wimpey and Hall respectively had the effect of requiring CRS to look exclusively to the joint insurance which had been effected by CRS. It was held by the House of Lords on the assumption that the fire had been caused by the negligence of Wimpey and Hall that the contractual provisions on their true construction did have the effect of relieving Wimpey and Hall from. what would otherwise have been their obligation with the consequence that the other contractor could not maintain contribution proceedings against Wimpey and Hall because they were not liable for the damage which had been suffered.

26 Applying Lord Bingham's approach, it is clear in my judgment that the parties in the present case have in clause 13.5 made express provision as to what is to happen if the damage is occasioned by the occurrence of a specified peril. So far as damage to the Works is concerned the Claimant when instructed to do so is under clause 13.5 obliged to restore and repair the Works, replace any goods and materials which have been destroyed or damaged, remove any debris from the site and to complete the Works. That work is to be treated as if it were a variation but the Claimant's entitlement to be paid for that work is not to exceed the amount recoverable under the joint policy in respect of the Works. In other words the Defendant has the right to require the Claimant to make good the damage to the Works occasioned by the Specified Perils irrespective of whether the peril was brought about by the negligence or fault of the Claimant, the Defendant or anyone else. The agreement is that the Claimant will look to the proceeds of the joint insurance policy for payment. It is also implicit in treating the work as a variation that the Claimant will be entitled to an extension of time and that the Defendant would not be entitled to claim liquidated and ascertained damages from the Claimant for the consequent delay in completing the Works. That is a loss which the parties have agreed that the Defendant should bear, just as it has been agreed that the Claimant must bear any excess under the policy or deficiency in the proceeds recoverable under the policy.

27 Clause 13.5 which imposes on the Claimant an obligation to make good the damage in the event of a Specified Peril irrespective of whose fault it was in my judgment points clearly to an intention to establish a special scheme which is to apply whenever a Specified Peril causes damage or loss and which is significantly different from what the position is under clauses 2.3 or 9 or the other provisions of the Contract or the general law. It is also significant in my view that whereas the obligations on the Contractor to effect insurances under clauses 13.3.1, 13.3.2 and where stated in Schedule 2 under 13.3.3 are all expressed to be without prejudice to the Contractor's obligations to indemnify the Employer or his other obligations under the Contract or at law, there is no such saving in relation to the joint insurance to be effected under clause 13.5. It is clear that the draftsman of the Contract was well aware that provisions for insurance could have the effect of limiting a party's other obligations under a contract and that he expressly dealt with the point in relation to the insurances to be effected by the contractor thereby making clear that those insurances were not to limit or restrict what were the other obligations of the Contractor under the Contract. No similar saving however appears in clause 13.5. Equally there is no express qualification of the Contractor's obligations and unlike the CRS case there are no express provisions in relation to subrogation. However in my judgment it is necessary when construing the Contract to read the Contract as a whole and to seek to give effect to what the parties as commercial persons should from the language they have used be taken to have intended. If it really had been the intention of the parties that the Claimant should remain responsible for damage occasioned by a Specified Peril due to his negligence or breach of duty, it is difficult to see why the employer should be under an express obligation to effect a joint names insurance in respect of Specified Perils and why that was not to be the fund to which both parties had agreed to look in the event of such damage.

28 The joint insurance required under clause 13.5 to be maintained in joint names is not restricted to the works for which the Claimant is responsible but also extends to require the Defendant to maintain insurance of the existing structure against the Specified Perils. Prima facie the existing structures will be the property of the Defendant. While a prudent employer will normally in his own interest maintain insurance of his own property it is less usual to

find the employer entering into an obligation with his contractor to maintain a joint names insurance of the employer's property. if the question is asked why is the policy to be in joint names, the natural answer would be that the policy was intended to be for the benefit or protection of the named party in addition to that of the employer. It would be a perfectly sensible and practical scheme for the parties to a construction contract to agree that until the works have been finally completed there should be insurance cover in place against such risks as fire or flood or bursts which cause damage to the works. In the case of a package contract where there may be a large number of different contractors engaged on separate packages of work, it would be sensible for the package contract to provide what is to happen should a problem arise in relation to the work comprised in one package but which as well as damaging the work in the particular package also damages work comprised in other packages or the structure of the premises. There would be clear advantages to all concerned if the damage could be made good as quickly as possible without the need for investigating whose fault it had been or operating any dispute mechanisms in the contract. It is perfectly possible to obtain insurance against risks such as those mentioned in the Specified Risks and if there are provisions in the package contract which require the individual package contractors to make good any damage to their own works and to look to the proceeds of the joint insurance policy for payment, there will be an effective and reasonably speedy mechanism for bringing the works back on schedule. Where damage has been caused to the existing structure which may not be within a particular work package, that too will have to be made good and that would explain why there should also be joint names insurance required in relation to the structure. In the event of such damage, it would be for the employer to make his own arrangements in conjunction with the loss adjusters or insurers to put right the damage. There would be no reason why the individual works contractor should be involved in rectifying damage to anything apart from his own parts of the works. The express inclusion of the Construction Manager as one of the persons in whose name the policy was to be maintained as well as the general reference to others but not limited to contractors also points towards an intention that the policy in respect of the existing structures should enure for the benefit of a wide range of persons some or all of whom might in some way be involved in or affected by the occurrence of a Specified Peril.

29 Miss Lee has submitted that the wording of clause 2.3 is clear and unambiguous and that the clause in terms provides that the Claimant is responsible for *"any damage, expense, or loss whatsoever"* arising out of any breach of duty on the part of the Claimant or his sub-contractors of any tier. She has also drawn attention to the fact that the provisions of the Contract are different from those in the CRS case. In particular there is no express linkage in the present case between clause 2.3 which is unqualified and clause 13.5. In CRS the obligation to indemnify the employer against damage to property expressly excluded the works and site materials. The joint names insurance was an all risks insurance and was to be an insurance for the full reinstatement value of the works and site materials. The contract also provided for the insurers to waive any rights of subrogation under the joint names policy. None of these features exists in the present case. However as in CRS the obligation of the Claimant under clause 13.5 was to make good the damage, not to pay compensation. It does not seem credible to suppose that it was intended that the Claimant should, having made good the damage to his own works, also be liable to pay compensation under clause 2.3 if the insurance failed to provide full recompense to the Defendant. The insurance in terms was to provide cover for damage from the Specified Perils occasioned not only to the individual works of the Claimant but also for damage to the existing structures. Damage to the works of other package contractors would in principle be covered by the same insurance policy and on the same basis.

30 Having considered the terms of the Contract, although it is differently worded from the contract in CRS (and in other reported cases), nevertheless the Contract does in my judgment show a clear intention that damage caused by the Specified Perils whether to the Works or to the existing structures was to be treated differently from damage not involving the occurrence of a Specified Peril. In my judgment the indemnities given in clauses 2.3 and 9 and the other provisions of the Contract imposing liabilities on the Claimant should be read as subject to the special regime laid down in clause 13.5 in relation to damage caused by Specified Perils. Such reading of the Contract will give a sensible commercial effect to all the provisions of the Contract. The issue is not it seems to me one of excluding liability for negligence but rather of ascertaining how the parties have agreed that the risks and liabilities in relation to the Specified Perils are to be borne. It is not a case of construing the Contract "*contra proferentem*". The contract is a Package Contract intended to regulate a number of different packages of work and which is to be entered into between a number of different contractors. It is not a contract proffered by any of the contractors but is a contract issued by the employer intended to set out the terms on which (subject to any express agreement with a particular contractor) all the contractors are likely to be engaged.

31 The clear conclusion at which I have arrived is that the Claimant is entitled to a declaration that the Defendant on the true construction of the Contract is not entitled to recover any compensation from the Claimant in respect of any damage expense or loss arising from the escape of water on 30 July 2003 and I so declare. It also follows that the Claimant is entitled to be repaid the movies it has paid pursuant to the decision of the adjudicator together with interest. I would ask counsel to agree the amounts of principal and interest involved. The Claimant will also in principle be entitled to its costs of the action as it has been the successful party. I have not heard any submissions however on costs or on the precise amount to be repaid. If these matters cannot be agreed or if there are other outstanding matters, I will deal with them on the formal handing down of this judgment or at some other convenient time.

Mr. Digby Jess, counsel instructed by Weightmans LLP, solicitors, Manchester, appeared for the Claimant.
Miss Krista Lee, counsel instructed by Shadbolt & Co.LLP, solicitors, Reigate, appeared for the Defendant.