**JUDGMENT : His Honour Judge Richard Havery Q.C. TCC. 30th June 2005.**

1. This is a claim for contribution or indemnity in which I have to decide some preliminary issues.

2. The claimant is a building contractor. The defendant is a firm of consulting structural engineers. The claimant entered into a building contract with the South London Family Housing Association Limited, now known as the Horizon Housing Group Limited (which I shall call the Employer), for the design and construction of a block of nine residential flats with associated landscaping and car parks at Orchid Court, Whitefoot Lane, Lewisham. By a contract made on or shortly after 21st October 1994, the claimant retained the defendant as its consulting engineer in relation to that project. By a warranty for consultants executed as a deed the defendant covenanted with the Employer that it would exercise all the reasonable skill and care expected of a consulting structural engineer in relation to the works and in particular the design of the foundations and any inspections of their construction. The works began on 7th November 1994. Practical completion took place on 24th August 1995.

3. In January 1997 cracking began to appear at Orchid Court. In February 1997 the claimant arranged for the defendant to monitor the cracking and to advise on necessary remedial work. On 20th October 1998 the defendant advised that the cracking was slight. It recommended making good the cracks and carrying out a process described as stitching. The Employer was not satisfied with that recommendation. After much correspondence, the claimant in April 2000 appointed an independent consulting engineer, Elrond Consulting ("Elrond"), to report on the cracking, its cause and necessary remediation. In June 2000 Elrond produced a report which contained a recommendation to underpin a communal staircase area and an adjoining flat. The claimant agreed with the Employer that that work should be done. It was done by contractors instructed and paid by the claimant. The claimant also paid the Employer some money in respect of losses suffered by the Employer, including claims made by tenants, arising out of the works.

4. The claimant claims from the defendant a contribution or indemnity under the provisions of section 1 of the Civil Liability (Contribution) Act 1978 in respect of the monies expended by the claimant in having the underpinning works carried out at no expense to the Employer and in respect of the monies it paid to the Employer in respect of the Employer's losses.

5. It is common ground that the works of repair and the payment made to the Employer by the claimant were the subject of a settlement agreement between the Employer and the claimant. The date and terms of the settlement are in issue. The defendant says that the settlement agreement was made in or about August 2000 and no later than February 2001. The claimant says that it was made by deed dated 4th March 2005 and signed on 11th March 2005. These proceedings were issued on 8th April 2004. The question of limitation arises.

6. The numerous preliminary issues originally ordered have been reduced by consent of counsel to three. They are these:
   1. When was the settlement agreement reached?
   2. Does or did the settlement agreement give rise to a claim for contribution under the 1978 Act?
   3. If the answer to 2 is yes, when did time start to run for the purposes of section 10 of the Limitation Act 1980?

   For the purpose of those preliminary issues it is assumed that both the claimant and the defendant were liable to the Employer in respect of the same damage, namely the cracking of the building and the loss consequent upon that cracking.

7. The relevant statutory provisions are these. The Civil Liability (Contribution) Act 1978 provides, so far as material, as follows:

   *1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).*

   *1(2) A person shall be entitled to recover 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,*

*provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.*

*1(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.*

The Limitation Act 1980 provides, so far as material, as follows:

*10.(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.*

*10(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.*

*10(3) If the person in question is held liable in respect of that damage—*
*(a) by a judgment given in any civil proceedings; or*
*(b) by an award made on any arbitration;*
*the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be)……*

*10(4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.*

8. Those provisions of the Limitation Act 1980 are substantially in the form of amendments to the Limitation Act 1963 enacted by schedule 1 to the Civil Liability (Contribution) Act 1978.

9. As to the second preliminary issue, Mr. Chapman submitted that the right to recover contribution arises only where the person seeking contribution has made, or been ordered or agreed to make, payment of a monetary sum to the person who has suffered the damage. Where, or in so far as, the person seeking compensation has made reparation in some other way, specifically by carrying out works at his own expense, he has no entitlement under the Civil Liability (Contribution) Act 1978 to recover contribution from any other person liable in respect of the same damage. Mr. Chapman relied on the use of the word "payment" in subsections (2) and (4) of section 1 of that Act.

10. In further support of the above proposition, Mr. Chapman submitted that the right to recover contribution arises only in the circumstances mentioned in subsections (3) and (4) of section 10 of the Limitation Act 1980. Otherwise, there could be a right to contribution which would not be the subject of accrual under section 10(1) and there would be no limitation period. It could not have been the intention of the legislature, he submitted, that there should be circumstances in which there was no limitation period.

11. There is no question of subsection (3) of section 10 of the 1980 Act applying. I am concerned here only with subsection (4). Mr. Chapman submitted that apart from the comparatively small monetary sum, the settlement agreement was not an agreement to make payment by way of compensation to the Employer. It was an agreement to carry out, or cause to be carried out, work at no cost to the Employer. Moreover, though it was true that payment was agreed to be made between the claimants and the contractors who carried out the remedial works, no amount to be paid by the claimants was agreed between the claimants and any person to whom payment was to be made in compensation for the damage. Mr. Chapman submitted, and I accept, that the expression at the end of subsection (4) *"the person….. to whom the payment is to be made"* must refer to a person receiving the payment by way of compensation for the damage.

12. Mr. Chapman relied on the decision of Judge John Hicks Q.C. in ***George Stow & Co. Ltd. v. Walter Lawrence Construction Ltd***. (1992) 40 Con. L.R. 127. Judge Hicks appears to have regarded it as beyond argument that payment means a monetary payment. He said in paragraph 253 of his judgment, at p.133:

    Since such a payment is required where s 1(2) applies it follows that an individual, uninsured claimant who satisfies his liability to the victim by doing remedial work with his own hands cannot claim contribution to its value under the 1978 Act. That…..seems to me to be inescapable.

    See also paragraphs 229 (pages 127, 128) and 247 (page 132) of Judge Hicks's judgment.

13. Mr. Chapman also relied on the opinion of A. M. Dugdale in an article in (1979) M.L.R. 42 at p. 185 to the effect that where a wrongdoer settled on a basis other than payment, such as the repair of any damage, he might not be able to claim a contribution.

14. I asked Mr. Chapman whether his researches into the Law Commission report that gave rise to the 1978 Act threw any light on the meaning of the word "payment". The answer was no; there was merely a comment that the word "payment" reflected language used in other jurisdictions. It was used in a similar Irish statute.

15. Mr. Chapman's submissions were cogent, but I reject them. They lead to a conclusion as to the intention of Parliament which in my judgment is not borne out by the legislation as a whole. That intention could readily have been stated expressly if it had existed, and I can see no reason for it. The primary provision giving rise to the right to claim contribution is section 1(1) of the 1978 Act. There is no suggestion there of any limit or restriction on the right of a person to claim contribution from another person liable in respect of the same damage. Subsections (2) to (4) of section 1 are designed not to restrict the right, but to remove restrictions or defences that might otherwise be raised. Section 10 of the Limitation Act 1980, albeit that it arises out of an enactment of the 1978 Act, is directed to time limitation and not to narrowing the nature of the right to contribution.

16. The word "payment" in ordinary parlance is capable of including a payment in kind, as that well-known expression exemplifies. One talks, for example, of paying a debt to society by the performance of community service. In my judgment, the word "payment" in these statutory provisions includes a payment in kind, at any rate where the payment in kind is capable of valuation in monetary terms. In such a case the "amount to be paid by him" in section 10(4) of the 1980 Act refers not to the amount of the work, but to its value. That construction, in my judgment, best gives effect to what appears to me to be the intention of Parliament.

17. I turn now to consider when the settlement agreement was reached. The defendant contends that the claimant agreed to indemnify the Employer in respect of the loss and damage by way of an agreement reached in the period from August 2000 to February 2001 and, in any case, by February 2001 at the latest.

18. The principal relevant transactions are these. Following delays, the Employer's agents wrote to the claimant on 8th May 2000 threatening legal proceedings unless within five working days of the date of the letter the claimant provided a clear statement giving a date on which the contemplated remedial works would start and a date by which they would finish. The claimant wrote a holding letter on 16th May stating that the engineers for the scheme were now indicating that their original proposal might not be satisfactory in the current circumstances, stating that Elrond had been commissioned by the claimant's insurers to produce an independent report, and expressing the hope that the claimant could give a definitive answer by 1st June.

19. The minutes of a meeting between the Employer's and the claimant's representatives held on 28th June 2000 record a requirement on the part of the Employer that the claimant should give written confirmation that the remedial works would be undertaken on behalf of the Employer by the claimant's insurers, who would indemnify the Employer for all claims, disbursements, costs and fees associated with remedying the building. The minutes of a further meeting between representatives of the same parties held on 12th July 2000 record that the claimant's insurers would not give written confirmation of liability or confirm that remedial works and associated costs would be borne by them.

The claimant invited the Employer to submit details of its costs to them on a monthly basis. The minutes noted that if there were no satisfactory movement from the claimant and its insurers by 28th July then the Employer would be forced to resolve the matter through other legal means.

20. On 8th August 2000 the Employer's solicitors wrote to the claimant's solicitors expressing the hope that the matter could be resolved promptly and without the need to formalise matters further. There were set out a number of matters which it was said the Employers were looking for. Those matters included:

That the subsidence be rectified to the satisfaction of the Employer and the residents and that the rectification work be subject to a suitable guarantee;

That the claimant or its agent should act as project manager for the remedial works;

That the Employer be reimbursed for all of its costs in relation to the problem such costs to include:

Compensation for the Employer and the residents;

The costs of decanting the residents whilst any remedial work was undertaken;

Reimbursement of the costs incurred by the Employer in dealing with the matter since 1997, including legal costs and the costs of any structural engineer that the Employer believed it necessary to instruct.

21. On 10th August 2000 the claimant's solicitors replied to the Employer's solicitors' letter of 8th August. They stated that the Elrond report was in draft form and that the final version was expected within a few days, when copies would be sent to the Employer and the defendants. They stated that it was the claimant's intention to rectify the subsidence in accordance with the method set out in the Elrond report, which was understood to recommend the inclusion of a provision of an insurance-backed guarantee by the contractor who would be engaged to carry out the works; and that it was also understood that the report would include a recommendation that the project should be managed by an independent structural engineer who would be instructed on behalf of the claimant. They further stated that the claimant would meet only those reasonable costs for which it was properly liable.

22. The minutes of a meeting held on 22nd August 2000 between representatives of the Employer and of the claimant record that the claimant confirmed that it was progressing with the remedial action in accordance with Elrond's report; that it was not waiting for approval or agreement from the defendant's insurers, and that it would resolve liability for the work as a separate issue with the defendant's insurers. The claimant also confirmed that an independent structural engineer would work up the scheme in detail and project manage the works. Mr. Darryl Godwin, the development director of the Employer, told the claimant that the Employer would be commencing the compilation of the potential claims from leaseholders, compensation generally and the Employer's costs etc. to date to be presented to the claimant's insurers.

23. The claimant's insurers appointed Cameron Taylor Bedford Consulting Engineers to oversee the works. In September 2000 the claimant sought the Employer's approval of that appointment. On 24th October the Employer's agents wrote to the claimant's solicitors confirming that the Employer had appointed William J. Marshall and Partners (Consulting Engineers) to give an opinion on Elrond's remedial proposals. They sought information relating to the design of the foundations and the soil conditions at the site. On 26th October the claimant's solicitors replied asking for confirmation that the costs of the Employer associated with the retention of its own consulting engineers would be borne entirely by the Employer. On 2nd November the claimant's solicitors sent responses to the Employer's request for information.

24. On 8th December the Employer's solicitors wrote stating that the Employer had expressed concern at the apparent slow progress of the matter. On 21st December, the claimant's solicitors wrote to the Employer's solicitors stating that on the assumption (given their message of 8th December) that the Employer was content with the proposed remedial works, they, the claimant's solicitors, had sent the agreed terms of appointment of Cameron Taylor Bedford to the claimant for execution. The Employer's solicitors wrote back on 21st December that the claimant's solicitors' assumption was not

correct, but that they looked forward to receiving Cameron Taylor's proposals following their preliminary investigative work.

25. The claimant's solicitors wrote to the Employer's solicitors on 22nd December 2000 and again on 29th January 2001 asking for confirmation whether or not the Employer was content for them to proceed with the remedial works as communicated to the Employer. On 12th February 2001 the Employer's solicitors wrote to the claimant's solicitors stating

    We write further to our correspondence in this matter. We have now received instructions from our client. Our client confirms that it is content for your client to carry out the proposed remedial works at no cost to [the Employer] or the leaseholders.

    They invited the claimant's solicitors, for the future, to communicate direct with the Employer. Mr. Chapman submitted that the matter of the agreement culminated in that letter. He submitted that it was significant that, the agreement having been confirmed, the Employer's solicitors ceased to represent the Employer.

26. Mr. Chapman also relied on statements in the claimant's statements of case and letters as admissions or assertions of a relevant agreement. It is not suggested that the claimant is bound by any such admission or assertion.

27. Mr. Chapman accepted, rightly in my judgment, that for an agreement to start time running under section 10(4) of the Limitation Act 1980, it has to be an agreement in bona fide settlement of the claim made by the Employer against the claimant. He submitted that the correspondence between the Employer and the claimant and their respective representatives culminated in a settlement agreement by February 2001 at the latest. The claimant's solicitors were writing to the Employer's solicitors asking whether they agreed that Elrond's proposed remedial scheme constituted the works that should be carried out. After chasing, the response from the Employer's solicitors was yes, we are now content for that scheme to be carried out. Thus assuming that the scheme was properly carried out, any risk that it would not be successful was to be borne by the Employer. The matter could be tested in this way. If after the remedial works had been completed the Employer had told the claimant that it wanted the claimant to try another scheme, the Employer would have got pretty short shrift. The claimant would have said no, you approved that scheme and that is the settlement. The settlement agreement was that the claimant agreed to undertake the agreed remedial work and pay the reasonable costs occasioned by those remedial works that were incurred by the Employer and by the leaseholders. The fact that thereafter there was a quantification process did not change the fact that there was an agreement in 2000 or 2001 which was sufficiently certain to be legally binding. The agreement arose from an exchange of promises, the consideration going the other way being an undertaking on the part of the Employer to forbear to sue the claimant. It was an implied agreement, arising from the fact that the Employer did not sue.

28. I reject Mr. Chapman's submission. It nowhere appears from the correspondence that the Employer was giving up its claim against the claimant. It is true that it approved the works. It may be, as Mr. Chapman submitted, that it impliedly agreed to forbear to sue the claimant while the works were in progress. Clearly that is what the claimant wished and expected. So there may have been a contract. But in my judgment it did not constitute a settlement of the claim. Whilst the Employer wished to satisfy itself that the works were likely to be successful, there is no ground for inferring that it was willing, or undertook, to run the risk that the works would not be successful. The existence of the contractor's guarantee in my judgment does not negate that conclusion, and in any case may not cover any inadequacy in the design of the remedial works.

29. I have reached the above conclusion by considering the correspondence and minutes to which I have been referred. But I also heard the oral evidence of one witness, Mr. Godwin, whom I have mentioned above. Mr. Godwin was development director of South London Family Housing Association Ltd. He is now a director of Shared Horizons, a division of Horizon Housing Group Limited. South London Family Housing Association Ltd is a separate company within that group. He was questioned at some length about the dealings between the claimant and the Employer, of which he was to a considerable

extent aware. It is clear that his understanding was that the Employer had not settled its claim against the claimant by agreeing to allow the claimant to carry out the works at no cost to the Employer or the leaseholders. In re-examination he was asked what the Employer would have done if the remedial work had not resolved the problem. He answered that it would have required the claimant to come up with an alternative way of resolving the structural defects; and failing that, the Employer would have taken legal action. His understanding is in accordance with my conclusion from the documents.

30. Practical completion of the remedial works took place on 16th November 2002. There were remaining issues between the Employer and the claimant. On 14th February 2003 the Horizon Housing Group wrote to the claimant to the effect that the Association would be submitting a financial claim to the claimant for a number of issues that had arisen as a direct result of the cracking; both that which had been remedied and that which had not as yet. It was not until 19th January 2004, by a decision of an adjudicator, that the total sum due from the claimant to the contractor for the Elrond works, Abbey Pynford, was quantified. Thereafter further negotiations and exchanges of information took place between the claimant and the Employer. On 2nd March 2005 the claimant's solicitors wrote to the Employer making an offer in full and final settlement of all issues relating to Orchid Court. That offer was expressed to be subject to contract. It was accepted by letter dated 3rd March 2005. A settlement deed, the first draft of which had been sent to the Employer in January 2005, was prepared.

31. The settlement deed is dated 4th March 2005. It is agreed that it was signed on 11th March 2005. It is peculiarly worded, though no point is taken on the peculiarity. Clause 1.1 of the deed reads:

    The parties agree that in full and final settlement the [claimant] shall be responsible for £249,179.25 ("the Settlement Amount") of the costs of the Employer and the Leaseholders in relation to the Dispute. The [claimant] is hereby given credit for those costs that it has already paid and, to the extent that the sums comprising the Settlement Amount have not already been paid by the [claimant] (whether to the Employer, the Leaseholders and/or third parties), the balance (set out in clause 1.4 below) shall be paid by the [claimant] to the Employer and the Leaseholders within 28 days of the date of this Settlement Deed.

    The total sum of £249,179.25 included £168,845.84 and £42,788.19, totalling £211,634.03, which had been paid by the claimant's insurers to the works contractor and to the project manager respectively.

32. I thus decide the issues, which for convenience I repeat here, as follows:

    1. When was the settlement agreement reached?

    Answer: 11th March 2005.

    2. Does or did the settlement agreement give rise to a claim for contribution under the 1978 Act?

    Answer: Yes, it did and it does.

    3. If the answer to 2 is yes, when did time start to run for the purposes of section 10 of the Limitation Act 1980?

    Answer: 11th March 2005.

33. I should add that it is common ground that proceedings for contribution can be brought before accrual of the right as defined in section 10 of the Limitation Act 1980.

Mr. Martin Bowdery Q.C. and Ms. Serena Cheng (instructed by Jones Day) for the Claimant

Mr. Graham Chapman (instructed by Squire & Co.) for the Defendant