Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd [2008] Adj.L.R. 04/02

CA on appeal from QBD, (HHJ Gilliland QC) before MR, Rix LJ; Keene LJ. 2nd April 2008

Lord Justice Rix :

1. The new owners of Rolls-Royce Motor Cars Limited ("Rolls-Royce") have built a green-field-site new manufacturing plant near Goodwood in West Sussex. Tyco Fire & Integrated Solutions (UK) Ltd ("Tyco") was one of the contractors at the site, providing fire protection services including a sprinkler system (the "Works"). It did so under a package contract dated 14 November 2002 (the "contract") with Rolls-Royce. Unfortunately, one of the mains supply pipes burst and caused an escape of water (the "flood"), damaging both the Works and other parts of the plant. For present purposes it is assumed that that occurred by reason of Tyco's negligence. The issue which has arisen is whether Tyco is liable to Rolls-Royce with respect to the damage to "existing structures" other than to the Works. As for the damage to the Works, Tyco has repaired that and no issue arises. As for the damage to other parts of the development, Tyco says that, because the contract provided for joint named insurance under Rolls-Royce's employer's policy, it is relieved of liability for its negligence. The judge, HH Judge Gilliland QC, sitting as a deputy High Court Judge in the Technology and Construction Court, agreed with Tyco and entered judgment against Rolls-Royce in the sum of £433,428.08 (by way of repayment of sums paid after an adjudication in Rolls-Royce's favour). He granted Rolls-Royce permission to appeal.

2. The critical clause in the contract on which Tyco relies is clause 13.5, the opening words of which provide 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…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."

3. Rolls-Royce had not in fact taken out any insurance in the joint names of Tyco and itself, but it was common ground that the issue between the parties had to be resolved just as if it had. The Schedule 2 Specified Perils included *"bursting or overflowing of water tanks, apparatus or pipes"* and it is common ground for these purposes that the flood was caused by such Specified Perils. Tyco submits that it is axiomatic that one joint named insured cannot recover from another joint named insured in respect of the same loss.

4. The critical terms on which Rolls-Royce, on the other hand, rely are clauses 2.3, 3.3, 9 and 18:

   "2. Contractor's Obligations

   The Contractor shall: - …

   2.3 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 sub-contractor or supplier of his or any tier.

   3. Construction Manager's Instructions *…*

   3.3 Notwithstanding any other provision of this contract the Contractor shall no[t] be entitled to an increase in the Contract Price and/or to a change in the Completion Date to the extent that any Instruction for a Variation results from or is necessary in order to overcome the adverse effects of any lack of performance or error or omission or negligent act or default or breach of contract on the part of the Contractor or any supplier of his or any tier.

   9. Early occupation of the Works.

   The Employer may upon written notice from the Construction Manager to the Contractor take occupation of any part of the Works or any area within such part prior to practical completion of the Project in which event the Employer shall assume responsibility for risk in relation to such part or area within such part of the Works (notwithstanding Clause 13.1) and (except to the extent otherwise instructed by the Construction Manager) protection of the Works (notwithstanding Clause 13.2) and may at his discretion ensure early release to the Contractor of any unpaid balance of the Contract Sum provided that the Contractor shall and hereby agrees to give its Employer a full indemnity for latent defects appearing in the Works arising at any time following such occupation being taken.

   18. Liability

   The rights and liabilities conferred upon the Employer by this Deed are in addition to any other rights and remedies it may have against the Contractor including without prejudice to the generality of the foregoing any remedies in negligence."

5. The relevance of clause 9 was that Rolls-Royce had taken early occupation of Tyco's Works where the burst pipe occurred. Rolls-Royce submits that clause 13.5 did not expressly, and therefore could not impliedly, exclude liability which otherwise fell on Tyco under the contract.

The background facts

6. The escape of water had occurred on 30 July 2003 in one of the buildings on the site known as B50. Rolls-Royce had already taken early occupation of the relevant part of B50 prior to the flood, but Tyco does not suggest that the provisions about risk in clause 9 modify its responsibilities. Following the flood, Tyco repaired and made good the damage to the sprinkler system and to its Works and no issue arises for present purposes about that. This action concerns only the liability if any of Tyco for other loss and damage which Rolls-Royce claims to have suffered as a result of the flood to parts of the development not forming part of Tyco's Works, and also to goods, stock and contents and in respect of clean-up costs (Rolls-Royce's "*loss and damage*").

7. Practical completion of Tyco's Works occurred on 26 November 2003, and practical completion of the whole assembly plant occurred on 31 May 2004.

8. On 1 March 2005 Rolls-Royce referred its claims for its loss and damage to adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996, and by a decision dated 7 April 2005 the adjudicator directed Tyco to pay £393,562.14 plus interest of £39,765.95 and costs of £100 to Rolls-Royce. It was the total of those sums which the judge ordered Rolls-Royce to repay to Tyco in these proceedings. So, the financial risk and consequences of the flood in the relevant respect have at present fallen on Rolls-Royce. An adjudication under the 1996 Act, unless accepted by the parties as determinative, is without prejudice to ultimate liability as finally determined by legal proceedings, and on this basis acts only as a speedy means to adjust cash flow between disputing parties to a construction contract.

9. On 15 December 2006 Tyco issued its claim form to recover the sums paid to Rolls-Royce pursuant to the adjudication. The claim form stated that for the purposes of these proceedings but not otherwise Tyco accepted that the flood was caused by its negligence in failing properly to connect or fasten a joint in the main supply pipe, and that it had in turn caused Rolls-Royce its loss and damage. It claimed a declaration "*in accordance with the judgment of the House of Lords in* ***Co-operative Retail Services Limited v. Taylor Young Partnership Limited***" that Rolls-Royce was not entitled to recover any compensation from it in respect of the loss and damage caused by the flood, and repayment of what it had paid to Rolls-Royce pursuant to the adjudication.

Co-operative Retail Services Limited v. Taylor Young Partnership Limited ***("CRS")***

10. It is not, I think, disputed that, subject to clause 13.5 and ***CRS*** [2002] UKHL 17, [2002] 1 WLR 1419, Tyco would be liable to Rolls-Royce for the negligence which is acknowledged for the purpose of these proceedings. It is accepted by both parties that ultimately each dispute under a contract has to be decided on that contract's own terms: but, as expressed in Tyco's claim form itself, it founds itself on the analysis to be found in *CRS*, and on this appeal Mr Antony Edwards-Stuart QC submits that *CRS* sets out a rule in relation to joint names insurance which at one time he described as a "*rule of law*" or overriding rule, and which even to the end of his submissions he was saying was at least a rule of construction which could only be escaped by the plainest of contractual language. So, although it might make sense to begin with an analysis of the contract between the parties in this case, as the judge perfectly properly did, I think that it is perhaps more helpful, at any rate against the background of the clauses already cited above and the prima facie position in which a negligent contractor would stand, subject to clause 13.5, to begin with *CRS* itself and the doctrine of joint names insurance.

11. *CRS* concerned the construction of new office premises. Before practical completion there was a fire on site. The contractor reinstated the works in accordance with its contract, using the funds provided by a joint names insurance policy taken out pursuant to the contract with the building owner for the purposes of these works. The building owner did not make any claim against the contractor, but sued its architect and engineer (the defendants in *CRS*) for negligence and breach of contract. The damages claimed were primarily the costs of reinstatement, but also included associated professional fees and losses consequential on delay. The defendant architect and engineer sought to bring contribution proceedings against the contractor on the ground that they were liable to the building owner in respect of the same loss. The contractor denied liability to contribute on the ground that he had no liability to the building contractor by reason of the insurance provisions in the main building contract. That issue was tried as a preliminary point on the assumption that the fire had been caused by the negligence of contractor, architect and engineer.

12. The joint names insurance clause in *CRS* was clause 22A. The primary provision (clause 22A.1) required the contractor to take out a joint names policy for all risks insurance for the full reinstatement value of the works and to maintain that policy until practical completion. The joint names policy was to cover specified perils which included fire. Further provisions of clause 22A stated that the contractor authorised the insurers to pay the insurance proceeds to the building owner, who would pay them on to the contractor by instalments under architect's certificates as the reinstatement work proceeded. In particular, clause 22A.4.5 stated that the contractor "*shall not be entitled to any payment in respect of the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris other than the moneys received under the aforesaid insurance*". Other provisions of the contract made it clear, moreover, that the contractor was *not* to be liable to the building owner in respect of any negligence (or "*breach of statutory duty, omission or default*") in respect of any damage to "*the works, work executed and/or site materials up to and including the date of issue of the certificate of practical completion*": see the combination of clauses 20.2 and 20.3 set out by Lord Hope of Craighead at para 21. There were similar provisions in effect between the main contractor and sub-contractors.

13. ***CRS*** was a complex case, but in essence two issues were debated, the first an issue of construction relating to the terms of the building contract itself, the second an issue relating to a "*rule*" to be derived from the fact that the building owner and the contractor were said to be co-insureds of the same policy in respect of the same risk. For either reason, the contractor submitted that it could not be liable to contribute with the defendants for the damage assumed to be caused by the negligence of each. The decision in the Lords in favour of the contractor was premised on the first issue: in the circumstances the second issue did not need to be resolved, but observations were nevertheless made upon it.

14. In the present case, both parties rely on the way in which their Lordships determined the issue of construction, but in addition Tyco relies on what Lord Bingham said about the position of joint names insurance. It was the issue of construction, however, that was decisive.

15. Lord Hope gave the main speech, with which all their Lordships agreed. Lord Bingham and Lord Rodger gave shorter speeches of their own, while also agreeing with Lord Hope, and Lord Hope for his part also agreed with their reasons. Lord Bingham also agreed with Lord Rodger, and vice versa. Lord Rodger, however, only addressed the first issue. Lord Mackay and Lord Steyn each agreed with Lords Bingham, Hope and Rodger. It is submitted by Mr Edwards-Stuart that Lord Bingham spoke somewhat differently from Lord Hope in respect of the *second* issue, but, since all their Lordships agreed with Lord Hope (as well as with Lord Bingham) that might be surprising.

16. At any rate, I will begin with the first issue, that of construction, where all their Lordships agreed that the contract expressly precluded any liability in negligence on the part of the main contractor (Wimpey) to CRS, the employer and building owner: see at para 6 (Lord Bingham), paras 26 and 39/48 (Lord Hope) and para 68 (Lord Rodger). I think I am entitled to take two passages from Lord Hope's speech as reflecting that consensus, where he said –

> *"26. The effect of these clauses is that the contractor is not liable to pay compensation to the employer for loss and damage to the works which may have been caused by fire prior to the date of practical completion. Clause 20.3 excludes the contractor's liability for any such loss or damage, even though the fire was caused by his negligence, breach of statutory duty or default. Instead the funds necessary to pay for the restoration of the physical damage caused to the works by fire, including the associated professional fees, are to be provided by means of insurance under the joint names policy…*
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> *48. The position therefore is that there is no liability to pay compensation on either side. The employer has no claim for compensation against the contractor. All he can do is insist that the contractor must proceed with due diligence to carry out the reinstatement work and must authorise the release to him of the insurance moneys. The contractor has no claim for compensation against the employer. All he can do is insist that the employer must use the insurance moneys for payment of the cost of carrying out the reinstatement work. It makes no difference whether the fire was caused by the negligence of the contractor or one of his sub-contractors or of the employer or of some third party for whose acts or omissions neither of the parties to the contract is responsible. The ordinary rules for the payment of compensation for negligence and for breach of contract have been eliminated. Whatever the cause of the fire, the obligation of the contractor is to carry out such work as is needed to put the matter right. His obligation is to restore the fire damage at his own cost, except in so far as the cost of doing so is met by sums under the joint names insurance policy."*

17. As for the second issue, Lord Hope dealt with this under an entirely separate section of his speech under the heading "*The effect of the joint names policy*" (at paras 61/65). He briefly referred to earlier jurisprudence concerning the true rationale of a rule concerning the inability of one joint name insured to sue another in respect of a risk covered by their co-insurance. He also referred to this subject as having been reviewed in some detail by Brooke LJ in the court of appeal, [2000] 2 All ER (Comm) 865. He concluded thus:

> *"65. Although your Lordships do not need to resolve the issue in this case, it seems to me that there is much force in the point that the rules about circuity of action do not provide the explanation. I would prefer to say that the true basis of the rule is to be found in the contract between the parties. In **Hopewell Project Management Ltd v Ewbank Preece Ltd** [1998] 1 Lloyd's Rep 448, 458 Mr Recorder Jackson QC said that in his view it would be nonsensical if those parties who were jointly insured under a contractors' all risks policy could make claims against one another in respect of damage to the contract works, that such a result could not possibly have been intended by those parties and that had it been necessary for him to do so he would have held that there was an implied term to that effect. I would be content to accept that as a satisfactory basis for the rule on which, had it been necessary for them to do so, Wimpey and Hall would have been entitled to resist the claim."*

18. Lord Hope is there contemplating that the provision for joint names insurance under a construction contract between an employer and a contractor would give rise to an implied term that neither party could make claims against the other in respect to damage caused to the contract works covered by the risks against which the policy insured both parties. Presumably, however, the position might be different if on the express terms of their contract, one party might be liable to indemnify the other for its breach, default or negligence.

19. Lord Bingham put the matter still more briefly in this way:

> *"7. Under the contract and Wimpey's all risks insurance policy, CRS would be effectively indemnified by the insurers' provision of a fund enabling it to pay Wimpey by repairing the fire damage. The insurers could not then make a subrogated claim against Wimpey because Wimpey was a party co-insured (with CRS) under the policy, and the insurers would be obliged to indemnify Wimpey against any liability which might be established, an obvious absurdity. The rationale of this rule may be a matter of some controversy (although I lean towards the explanation favoured by the Court of Appeal) but the rule itself is not in doubt."*

20. Mr Edwards-Stuart submits that Lord Bingham here elevates the rule relating to joint names insurance to, or to something like, a rule of law. I will revert to this below. But first it is necessary to consider the parties' contract here in greater detail to see whether, as Tyco submits, this contract is in essence like that in *CRS*, or whether, as Rolls-Royce submits, it is very different.

The contract

21. I have set out the principal terms relied on by either side for establishing liability or excluding it respectively, namely clauses 2.3, 3.3, 9 and 18 (relied on by Rolls-Royce) and clause 13.5 (relied on by Tyco). However, in addition the parties have referred to the following provisions of the contract.

22. The contract is made between Rolls-Royce (under its former name Hireus Limited) as "Employer" and Tyco as "Contractor". It refers to the "Development" as the construction of the facility as a whole, to the "Project" as being all the works necessary or appropriate for the Development, to the "Works" as being the design, execution and completion of what had to be done by the Contractor, and to the "Site" as that part of the Project in which Tyco's Works were to be carried out. Not defined is the expression "existing structures" found in clause 13.5.

23. Clause 13 is headed "Risk In The Works and Insurances" and provides as follows:

"*13.1 Subject to clause 9 until practical completion of the Project the Works shall be at the risk of the Contractor. The Contractor shall carry out at his own cost any necessary repairs or remedial works instructed by the Construction Manager so that the Works are as required by this Contract at practical completion of the Project.*

13.2 The Contractor shall carry out any protection to the Works as may be necessary or as may be required by the Contract Documents during the carrying out of the Works and (subject to clause 9) following the completion of the Works and until practical completion of the Project.

13.3 Without prejudice to his liability to indemnify the Employer or his other obligations under this Contract or at law;

13.3.1 The Contractor shall maintain and shall cause any of his sub-contractors to maintain insurance in respect of claims for personal injury to or the death of any person employed by…the Contractor…arising out of or in the course of such person's employment.

13.3.2 The Contractor shall maintain and shall cause any of his sub-contractors and any third party who the Employer requires to be joint insured and who has an insurable interest in the Works to maintain public liability insurance with a limit of indemnity of not less than the amount stated in Schedule 2 hereto for any one occurrence or series of occurrences arising out of any one event against any costs, expense, liability, loss, claim or proceedings for which the Contractor may be liable to indemnify the Employer under Clause 2.3 and which arises out of or in connection with personal injury to or the death of any person whomsoever or injury or damage to property real or personal (other than the Works and the Project) but which is not insured under Clause 13.3.1.

13.3.3 If so stated in Schedule 2 hereto, The Contractor shall take out and/or maintain for a period expiring no earlier than twelve years from the Development Completion Date with reputable insurers carrying on business in the United Kingdom professional indemnity insurance 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 million pounds (£15,000,000) for each and every claim arising out of any one event PROVIDED ALWAYS that such insurance is generally available in the market to the Contractor's profession at commercially reasonable rates. The Contractor shall when required to do so supply to the Employer documentary evidence of such insurance together with the receipt for the current years premium…

13.5 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 instructions 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."

24. Schedule 2, headed "Insurance Details", contained the following provisions:

"Part 1: Contractor's Insurances

Minimum limit of indemnity for public liability cover: (Clause 13.3.2): £2,000,000

Professional indemnity is/is not required (Clause 13.3.3): £

Minimum limit of indemnity for professional indemnity cover: £15,000,000…

Part 2: Employer's Insurance

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.

The conditions of the Employer's policy require the Contractor:

to give prompt notification to the Construction Manager of all incidents likely to give rise to a claim under the policy;

to advise the Construction Manager of any loss or damage which may exceed the said policy excess of £2,000,000…

Notice to Contractors On Insurance Provisions

1. ***Contract Works***

Cover to Contractors is limited to the Specified Perils detailed below on the permanent and temporary works and materials for incorporation therein…

The policy excess which is the responsibility of the Contractor is £1,500 each and every loss…

2. Third Party Liability

Public liability cover is not provided under the Project Policy. All Contractors must maintain their own Insurances for a minimum limit of indemnity of £2,000,000 any one occurrence…

Specified Perils:

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)."

25. In connection with clause 13.5's concern with the Specified Perils Rolls-Royce also relies on clause 7.3, within clause 7 which is headed "Commencement, Completion And Extension Of Time and Damages":

> *"7.3 So soon as may be practicable after receipt of the said notice, particulars and estimates, the Construction Manager shall either issue an Instruction to accelerate the Works or any part of the Works as a Variation under clause 3 or shall grant to the Contractor in writing such extension of time for the Works or any part of the Works as he then estimates to be fair and reasonable if, in his opinion, the regular progress of the Works or any part of the Works is likely to be delayed or has been delayed beyond the Completion Date (as extended) by reason of any of the following:-*
>
> *7.3.1 loss or damage occasioned by any of the Specified Perils;".*

26. A number of observations may be made about the critical clause 13.5. First, details of the "*Employer's insurance policy referred to in Schedule 2"* are there stated as "*set out in the attachments annexed hereto*": however, nothing has been produced as having been attached and for reasons which have not been explained to us by either party disclosure does not seem to have produced anything either. We are merely told that there was no joint names policy: but it seems to me that it is highly unlikely that Rolls-Royce embarked upon this development without insurance, and we have at least been informed that Rolls-Royce is insured. If the details of the Schedule 2 policy relevant to clause 13.5 had been attached, it might of course have thrown light on the question of construction before us. For instance, the reference in Schedule 2, Part 2, to "*the said policy excess of £2,000,000"* is a mystery. That may be contrasted with the excess of *"£1,500 each and every loss*" which is the "*responsibility of the Contractor"* (see the Schedule 2 provisions under the heading "*Notice To Contractors On Insurance Provisions*"). We have had no submissions on these aspects of Schedule 2. In particular we have not been addressed as to any possible relevance of the limitation (contained under the same notice to contractors) of "Cover to Contractors" to *"the Specified Perils detailed below on the permanent and temporary works and materials for incorporation therein*" but excluding plant, tools, tackle, temporary buildings and any other things not for incorporation in the works. That would suggest that Specified Perils cover for contractors, even in respect of existing structures, was limited to their works (and materials for incorporation therein), and thus was a form of property and not liability insurance.

27. It is I suppose possible that the absence of disclosure or information about Rolls-Royce's employer's insurance policy is connected with the parties' common ground attitude (at any rate at this stage of their litigation) that Rolls-Royce's failure to take out joint names insurance is not relevant. The judge put it in this way (at para 4 of his judgment):

> *"There is also no dispute that although it was the obligation of [Rolls-Royce] under Clause 13.5 of the Contract to maintain joint names insurance of both the existing structures and of the Works (meaning thereby [Tyco's] Works) [Rolls-Royce] failed to do so and at the time of the escape no such insurances were in force. That was a clear breach by [Rolls-Royce] of its obligations and may entitle [Tyco] 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 [Tyco] from liability in respect of the risks covered by the insurance which should have been in place under clause 13.5."*

28. Secondly, the opening words of clause 13.5 dealing with existing structures as distinct from Tyco's "Works", being that part of the clause which Tyco needs to rely on for the purpose of this litigation, do not in terms concern the "Contractor" but rather, generally, "*others including, but not limited to, contractors*". This raises a point of construction between the parties, for Tyco submits that these words include the "Contractor", but Rolls-Royce submits that they do not.

29. Thirdly, it may be noted that the important second and third sentences of clause 13.5 are limited to the Works, as distinct from the existing structures. The references within that sentence to *"replace any goods and materials…remove any debris"* are all within the context of restoring and repairing and completing the Works. That is again underlined by the fact that such work of restoration and repair is performed by way of an instruction by the Construction Manager which is to be treated "*as if it were an instruction for a Variation*" under the contract. However, if it be the case, as Tyco submits, that the opening words of clause 13.5 mean that Tyco is excused liability for the consequences of its negligence so far as damage to the existing structures, as distinct from the Works, is concerned, then that meaning has to be derived from those words by themselves, unassisted by the second and third sentences and any impact they may have on the position so far as the Works themselves are concerned.

30. Fourthly, the clause 13.5 obligation to insure is limited to the "Specified Perils" as described in Schedule 2. It may be noted that the perils there listed are a mixture of force majeure (such as lightning, storm, tempest, flood, earthquakes, aircraft, riot and civil commotion) and other matters, such as fire and bursting or overflowing of water tanks, apparatus or pipes and explosion, which may themselves be entirely a matter of force majeure or may on the other hand be caused by the negligence of parties to the contract. In the context of the contract as a whole, Rolls-Royce therefore submits that the clause 13.5 obligation to insure in joint names is only an obligation to insure against those perils to the extent that they are caused without negligence on the part of any of the insured parties. Rolls-Royce relies on ***London Borough of Barking and Dagenham v. Stamford Asphalt Company Ltd*** [1997] 82 BLR 25 ("*Barking*") in support of that submission. It may be noted that whereas the majority of the perils listed are strictly of the force majeure type, fire and escape of water from apparatus are much commoner perils and are frequently caused by negligence.

31. Moving beyond clause 13.5 itself into the earlier parts of clause 13 as a whole, I would further observe as follows. (i) The opening sentences of clause 13 to be found in clause 13.1, like much of what follows in clause 13, are concerned exclusively with the Works. In that context clause 13.1 is a reminder that until practical completion of the Project, but subject to clause 9, the Works remain at the Contractor's risk. Clause 9 says that if the Employer takes occupation of any part of the Works prior to practical completion of the Project, risk then switches to the Employer pro tanto, but subject to the proviso that the Contractor promises "*a full indemnity for latent defects*". There is no suggestion, however, that the passing of risk constitutes an exclusion of obligations of proper performance. (ii) Clause 13.3 opens with the language "*Without prejudice to the liability to indemnify the Employer or his other obligations under this Contract or at law*". Both parties rely on this wording. Tyco relies on the contrast with clause 13.5, which does not open with similar wording. Rolls-Royce, however, submits that this wording emphasises that the provisions regarding insurance are without prejudice to liability; and explains the absence of similar wording from clause 13.5 with the consideration that the provisions of clause 13.5 are too complex to allow of the same formula.

32. (iii) Clause 13.3.2, while requiring the Contractor to maintain public liability insurance to meet a liability to Rolls-Royce for loss arising out of death or personal injury or "*damage to property real or personal*", nevertheless excludes the Works and the Project from the scope of such insurance (because of the words "(other than the Works and the Project")). Tyco submits that this is a strong indication that the insurance provisions as a whole are intended to supplant any liability to indemnify Rolls-Royce in respect of the Specified Perils. It would be unfair, the submission goes, for Tyco to be liable to indemnify Rolls-Royce for damage to the Works or Project (which must include the existing structures) when Tyco is instructed not to maintain public liability insurance in respect of any liability to indemnify Rolls-Royce in respect of the Works and the Project. As Tyco's skeleton argument puts it: *"Rolls-Royce is demanding an indemnity from Tyco in the very circumstances against which it told Tyco that it need not take out liability insurance*". Rolls-Royce on the other hand submits that this provision is not concerned with liability in respect of the Works or the Project at all, but primarily with liability in respect of death and personal injury to persons other than employees of the Contractor or of sub-contractors (for they would be the subject-matter of clause 13.3.1 insurance): and to the extent that it extended beyond that to "property real or personal (other than to the Works and the Project)" what was contemplated was something like an explosion which might not only cause injury or loss of life to non-employees but might also affect nearby property outside the development.

33. (iv) Clause 13.3.3 is concerned with professional indemnity insurance *"against any negligent act or default and to cover the Contractor's obligations and liabilities under or in connection with this contract*". Tyco takes two points about this provision. First, Mr Edwards-Stuart submits that *"professional indemnity insurance*" is only designed to cover professional duties, such as those of design, but not what might be described as common and garden faults such as negligence in the course of construction, for instance as in this case, on the assumed facts, failing properly to tighten a piping connection. Secondly, Mr Edwards-Stuart points to the opening words of this clause ("*If so stated in Schedule 2*"), and submits that Schedule 2 did not so state, because the words "*Professional indemnity is/is not required (Clause 13.3.3): £"* had not been amended so as to state (a) that such insurance was required or (b) in what amount. There again, Tyco makes the submission that it would be surprising and unfair if Tyco were to be expected to meet a liability in negligence when it had not been required to insure against a possible liability. On behalf of Rolls-Royce, Mr Thomas counters by submitting that: professional negligence insurance is not so limited; that the insurance described in clause 13.3.3 is where you would expect to find a contractor such as Tyco protecting itself against its liabilities referred to in the clause itself; that for these purposes it did not matter whether or not Schedule 2 actually imposed an obligation upon Tyco to maintain such insurance because in any event clause 13 as a whole had to be construed on its wording whatever Schedule 2 did or did not require, and clause 13.3.3 showed in that context that a contractor such as Tyco was still regarded as being responsible for its negligence or other default; but that in any event Schedule 2 did require Tyco to maintain such insurance because the figure for "*Minimum limit of indemnity for professional indemnity cover*" in the line immediately after the line on which Tyco relied had been filled in at "£15,000,000" and in these circumstances it was an inconsequential error that "*is/is not required"* in the previous line had not been properly completed so as to strike out the words "*is not*".

34. Finally, moving outside clause 13 itself, Rolls-Royce draws attention to clauses 2.3, 3.3, 7.3 and 18 as providing an overall acceptance of liability for negligence (and not only negligence) as a default under the contract giving rise to liability and/or an express indemnity. In clause 2.3 Mr Thomas underlines the plain and unqualified indemnities there given, internally emphasised by the word "*whatsoever*". In clause 3.3, he draws attention to the opening words "*Notwithstanding any other provision of this Contract*" and to the stress given there to the idea that

the Contractor cannot obtain an increase in the Contract Price or a change to the Completion Date to overcome the adverse effects of its negligence or any breach of its contract. In clause 7.3, he contrasts the fact that a Variation or an extension of time may be given to deal with loss or damage occasioned by a Specified Peril, which he submits only makes sense if the Specified Peril is not brought about by the Contractor's negligence. In these connections, he refers to clause 13.5's provision that the instruction to repair consequent upon damage to the Works caused by a Specified Peril is to be treated as an instruction for a Variation under clause 3, but on special terms. This again, he submits, for consistency means that what is contemplated is an occurrence which has not been caused by the Contractor's negligence. Finally, he refers to clause 18, the effect of which he submits is to re-emphasise at the end of the contract that there is no escape for the Contractor from Rolls-Royce's remedies in negligence.

35. On behalf of Tyco, on the other hand, Mr Edwards-Stuart submits that clause 13.5 should be read broadly rather than narrowly, as a provision which formed part of a standard template of a series of package contracts with a range of contractors employed in the construction of the new plant. The intention was to replicate the special code in the case of Specified Perils found in *CRS*. Although there was no express derogation from the earlier indemnities in clauses 2.3 and 9, and indeed those indemnities were not extinguished, nevertheless there was a limited carve-out in the case of loss caused by Specified Perils. It made no sense at all to think of an insurance contract which covered such Perils only where they were not caused by negligence. As for ***Barking,*** even if that authority could survive ***CRS,*** the terms there were different.

The authorities

36. I have already referred to the leading authority of ***CRS.*** Subject to the separate point about the so-called "rule of law" in relation to joint names insurance policies, I am doubtful that, as a matter of construction, ***CRS*** is of any assistance to Tyco for there it was plain on the express wording of the contract that liability for negligence and other defaults was excluded so far as damage to the works up to the date of practical completion was concerned. That was plain (in clause 20 of the *CRS* contract) even before one arrived at the joint insurance provisions of clause 22A. Those latter provisions, moreover, were a highly detailed and developed code which made it completely clear that they were designed to supplant any possible liability for negligence on the part of the contractor so far as damage within the scope of the joint names policy provisions was concerned. There was a separate liability regime, and a separate insurance regime, in respect of injury or damage outside the works: in that respect liability and the contractor's obligation to insure were expressly stated in clauses 20.2 and 21. In the present case, on the other hand, the liability clauses are general and not specifically crafted to exclude the Works but expressly cover the Works, and the insurance clauses do not themselves distinguish sharply between insurance in respect of the Works and Project on the one hand and other insurance on the other. Thus, even on Tyco's limited construction of clause 13.3.3, it might have been required to take out its own professional indemnity insurance for a minimum of £15 million to cover (certain) liabilities under the contract. Moreover, ***CRS*** throws no light at all on the particular problem which we have in this case concerning "existing structures" outside the Works themselves. I therefore turn to other authorities to which we have been referred.

37. ***Surrey Heath Borough Council v. Lovell Construction Ltd*** [1990] 48 BLR 108 *("Surrey Heath")* concerned a JCT contract similar to that found in *CRS* but with a crucial difference. In the words of Lord Hope in *CRS* at para 43:

"As [Brooke LJ] pointed out [in the court of appeal in CRS], in the Surrey Heath case the court was concerned with the JCT Standard Form of Building Contract with Contractor's Design, 1981 Edition. Clause 20.2 of that contract did not (unlike clause 20.3 in the present case) expressly exclude the works from the property in relation to which the contractor provided the employer with an indemnity if it was damaged through his negligence" (emphasis added).

38. So the position in ***Surrey Heath*** was that there was a straightforward clash between an indemnity clause for contractor's negligence (clause 20.2) and a provision for a joint names policy to cover specified perils (clause 22A(1)). It was held that the clause 20.2 indemnity extended to all damage to the employer's property, including the works, even if it was the subject of joint insurance under clause 22A (at 117). So much for construction. There was then an additional point as to whether the contractor was even so exempted from liability under its indemnity in respect of matters covered by the joint names insurance provisions of clause 22A. That was put on the basis that –

"there is an overriding principle, derived from insurance law, that where a policy of insurance is effected for the benefit of two persons jointly, neither can sue the other in respect of any matter within the policy even if there is apparently a collateral contractual term between them entitling the one to sue" (at 120).

39. However, Dillon LJ said of that submission that it was put "too widely" *(ibid)* and continued (at 121):

"The effect of the contractual agreement must always be a matter of construction. People are free to contract as they like. It may be the true construction that a provision for insurance is to be taken as satisfying or curtailing a contractual obligation, or it may be the true construction that a contractual obligation is to be backed by insurance with the result that the contractual obligation stands or is enforceable even if for some reason the insurance fails or proves inadequate."

40. Even so, Dillon LJ appears to have contemplated that jurisprudence on the subject of joint insurance might have prevented a recovery by the employer if that employer had already recovered in respect of the relevant loss from his insurance (which it had not) and/or if the employer's claim was really for the benefit of the insurer, by way of subrogation (at 120). Dillon LJ seems therefore to have considered that the question of construction was separate from a principle of insurance law whereby one joint named insured could not recover from another joint

named insured (and neither could the insurer by way of subrogation) if the former had already recovered a full indemnity by way of insurance recovery.

41. So far as construction is concerned, however, the House of Lords appears to have regarded ***Surrey Heath*** as good law, albeit distinguishable. I have already recorded what Lord Hope said at para 43; see also at para 45. There is no suggestion anywhere in ***CRS,*** whether in the House of Lords or in this court, that ***Surrey Heath*** is wrong in its approach to construction.

42. *Barking* concerned facts which in their way are closest to those to be found in this case, although I am conscious of course that (even small) differences in wording can make all the difference. That too concerned a fire assumed to have been caused by the contractor's (sub-contractor's) negligence, which damaged both the contractor's works and the employer's building and its contents. The contractor gave an indemnity against loss by negligence for any damage "other than damage to the Works" and also promised to insure himself in respect of such damage (condition 6.2). The employer promised to take out insurance in the joint names of employer and contractor "against loss or damage to the existing structures (together with the contents owned by him…) and to the Works (condition 6.3B). Thus the joint names policy was to cover both property covered by condition 6.2 and also the works. The cover was to be against the same list of perils as we find in Schedule 2's Specified Perils. If any loss within such joint names cover occurred, the architect was to issue instructions for reinstatement to be valued as variations. The employer failed to take out the joint names insurance, and the contractor argued that its indemnity under condition 6.2 should be reduced by the amount that would have been recoverable under the condition 6.3B insurance had it been effected. This defence failed.

43. Auld LJ (with whom Millett LJ and McCowan LJ agreed) reasoned the matter as follows:

"First, condition 6.2 is primarily concerned with liability, that of the contractor, and requires it to insure in support of it. Condition 6.3B is concerned only with insurance, which it does not expressly relate to the existence or non-existence of any liability. It says nothing about liability. Neither condition refers to the other…" (at 30).

Most of the specified perils for which insurance is required under condition 6.3B are of a type resulting only from natural phenomena – "Acts of God" – or are not normally the responsibility of either contracting party. That is how Slade LJ interpreted it in ***Dorset County Council v Southern Felt Roofing Company Ltd*** *(1989) 48 BLR 96, at page 106, when considering a comparable brace of provisions, the latter clearly imposing on the employer the risk of a number of similar natural hazards, including fire:*

> *"Now fire, no less than the impact of lightning, can occur without the negligence or fault of any human agency. If the draftsman chose to refer to a number of possible other causes of damage which involve no fault on the part of anyone, I do not see why, in referring to fire, he should not be taken to have similarly had in mind damage by fire occurring without negligence on the part of the Contractor."*

The ruling of this court in ***Mark Rowlands Ltd v Berni Inns Ltd*** *that it is of the essence of fire insurance that it covers damage from fires caused by accident or negligence is to no point in this context. The court is not here concerned with a contract of fire or other insurance; it is concerned with a building contract containing an obligation to insure against fire as one of a class of perils most of which ordinarily do not result from anyone's negligence.*

If the condition 6.3B insurance were required to cover loss or damage caused by the specified perils, including fire, for which the contractor was liable, there would be unnecessary expense and duplication of insurance cover because the contractor is already bound to insure against it in respect of the building and contents under condition 6.2. In that instance both parties would be providing the same cover. If they had chosen the alternative provided by condition 6.3A, there would be double cover in respect of the works. Neither outcome could have been intended by the draftsman of these provisions" (at 36/37).

44. Mr Thomas submits that mutatis mutandis these observations apply here. Mr Edwards-Stuart submits on the other hand that the particular wording of this contract (viz, the reference to clause 2.3 in clause 13.3.2, the absence from clause 13.5 of clause 13.3's introductory phrase "*Without prejudice to his liability to indemnify*" etc, and the absence of any duplication to insurance cover in respect of the existing structures) makes a crucial difference. He also effectively submits that ***Barking*** was wrong to accept that it makes sense to insure for the Specified Perils on the basis of the absence of negligence.

45. We were finally referred to ***Scottish and Newcastle plc v. GD Construction (St Albans) Ltd*** [2003] EWCA Civ 16, [2003] Lloyd's Rep IR *("Scottish & Newcastle")*. There clauses 6.1.2 and 6.1.3 made it crystal clear that the express indemnity given by the contractor in respect of damage to property caused by his (or his sub-contractor's) negligence did not apply (a) to his works or to "loss or damage to any property required to be insured" under clause 6.3C.1. Clause 6.3C.1 required joint names insurance "*in respect of the existing structures*" and the employer's contents thereof "for the full cost of reinstatement, repair or replacement" due to specified perils, which included fire. Moreoever, the contract defined "*joint names policy*" to mean a policy "*under which the insurers have no right of recourse against any person named as an assured*". The house under repair was badly destroyed by fire, caused (as was again assumed) by negligence. The employer had failed to take out the required insurance. The trial judge, following ***Barking,*** held that the specified risks did not include fire caused by negligence. This court, however, held that liability for the relevant damage was excluded, inter alia because a fire policy had for hundreds of years covered loss caused by fire of any kind (other than the insured's arson), including fire started even by the negligence of the insured.

46. It is in my judgment completely clear upon the terms of that contract that the employer could not recover an indemnity for the contractor's (sub-contractor's) negligence causing damage by fire to the existing structures the

reinstatement of which the parties had agreed should be covered by the insurance recovery without any liability on the part of an insured. In the circumstances, that contract can throw no light upon the construction of the terms with which we are concerned. That said, the following observations were made in that context. Aikens J, who gave the leading judgment with which Ward and Longmore LJJ agreed, said this about *Barking*:

> *"39. I would respectfully doubt whether Auld LJ was right to conclude that the employer would have fulfilled its contractual duties if it had obtained a policy that did not cover negligently caused fire…But in any case there are clear differences between the contract wording in the* ***Barking & Dagenham*** *case and the present case…*

47. Aikens J went on to speak about ***CRS*** and the second issue there relating to the effect of the joint names policy. He observed (at para 50):

> *"Lord Hope concluded that where two parties entered into a contract which stipulated that one party had to obtain an insurance in the joint names for both, then one joint insured could not sue another joint insured for damages where the loss was covered by the insurance because there was an implied term in the contract preventing such action. That is the position in the present case. Mr Taverner was unable to provide a reason why the same result would not apply in this case, particularly given the addition of the "no right of recourse" provision in the contract."*

48. Longmore LJ, while agreeing with the reasons of Aikens J, put the matter slightly differently. He said this about ***Barking*** and ***Dorset County*** (to which Auld LJ had referred in the course of his judgment in the former):

> *"58…in these cases there was no express link between the exclusion of the contractor's liability for liability for fire and the employer's obligation to insure. It was thus an open question whether it was the parties' intention to exclude liability for a fire caused by the negligence of the contractor or those for whom he was responsible.* ***No one could quarrel with a decision that that was not the intention of the parties.*** *In that context the courts observed that the obligation of the employer to insure against fire did not extend to an obligation to insure against fire negligently caused by the contractor…These observations must, however, be read in their context and cannot apply to cases where it is expressly agreed that the insurance policy is to be in joint names and without recourse to rights of subrogation as between the co-insured. In such cases it would be absurd to exclude, from the ambit of the obligation to insure, fire negligently caused by one of the co-insured since that is the very instance in which subrogation would normally arise. [emphasis added]*
>
> *59. Other things being equal, I would, like Aikens J (see paragraph 39), prefer to say that any building contract, which imposes an obligation on one of the parties to insure against the risk of fire, intends to require that party to insure against both fires caused by negligence of one of the parties and fires not so caused. That is what insuring against fire means, see eg* ***Harris v Poland*** *[1941] 1 KB 462, 464-5 per Atkinson J. It does not mean that the party carrying out the insurance obligation must insure against some fires but need not insure against other fires.*
>
> *60. But whatever the position in general might be, if a building contract exempts one of the parties from liability for loss or damage caused by specified perils which it then requires should be insured by a joint policy without right of subrogation between co-insurers, it makes no sense for the contract to be construed to permit loss or damage caused by the specified perils to be recoverable by one of the parties in cases where the peril occurs as a result of the negligence of the other party or those for whom he is responsible."*

49. Ward LJ agreed with both Aikens J and Longmore LJ.

50. In the light of these observations, I would think it hard to say that doubt was cast on the decision in *Barking* on its wording, as distinct from the wholly clear wording exempting the contractor from liability in ***Scottish & Newcastle.*** After all, Longmore LJ, with whom Ward LJ agreed, said in the sentence emphasised above that no one could quarrel with the construction in the ***Barking*** case that the parties there did *not* intend to exclude liability for a fire caused by the negligence of the contractor.

The judgment below

51. The judge defined the issue in terms of whether this contract constituted one of those cases, the rationale of which was well established, where the parties had agreed to forego questions of liability between them and to establish a special arrangement to look exclusively to the proceeds of insurance mutually taken out in their joint names. He said that it was well settled in law and common ground between the parties that that issue had to be determined upon the proper construction of the contract. He then proceeded to decide individual points of construction. He recognised the obligation to indemnify under clause 2.3. He recognised that Tyco's obligation to insure under clause 13.3.2 did not extend to the Works or the Project. He held that clause 13.3.3 insurance was not required, because it was not "*so stated*" in Schedule 2. The parties must therefore be taken to have agreed that such insurance was not required of Tyco in the present case. That made it unnecessary, he thought, to decide whether the professional indemnity insurance spoken of in clause 13.3.3 would have covered a non-design fault such as was assumed to have occurred in the present case.

52. He then turned to clause 13.5 "*upon which this case turns*". He reminded himself that the claim concerned damage to existing structures, not to the Works. In this connection he rejected Rolls-Royce's submission that Tyco as *"Contractor"* was not among "others, including, but not limited to contractors" for whose benefit the joint names insurance of the existing structures was intended. He said: *"It is difficult to think of a wider scope of persons intended to be covered"*. It made sense in context to describe the numerous persons for whose benefit the insurance was to be made generically. It made no difference that the policy concerned might be a property and not liability insurance. He next turned to the *Barking* case and to Rolls-Royce's submission founded upon it that the Specified Perils insurance was only designed to cover such perils if not caused by negligence. However, he

distinguished that case on the ground that there, unlike the present case, there was a requirement for the contractor to take out his own insurance. Mutual cover for negligence would therefore have created double insurance: but here, without mutual clause 13.5 cover for negligence, there would have been a gap in protection. He said (at para 21):

"Whatever might have been the position if there had been an express provision that [Tyco] had to insure against his own and his sub-contractor's negligence that is not the present case…"

He also disagreed with the submission (accepted as the heart of the reasoning in *Barking*) that a distinction was to be made between negligently and non-negligently caused perils. He said (at para 22):

"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."

53. In this respect he naturally referred for support to ***Scottish & Newcastle***. He therefore concluded that it had been intended to insure Tyco in respect of damage to the existing structures caused by Specified Perils, whether or not such damage was also caused by the negligence of Tyco or its agents.

54. The judge then returned to the outstanding question of the clause 2.3 indemnity, but accepted Tyco's submission that the *"express provisions of the contract*" showed an intention that the parties should look exclusively to the joint insurance to the exclusion of the indemnities or other duties imposed under the contract. He did so by applying what he evidently considered to be the relevantly similar decision in ***CRS***, even if the wording was there different, illustrating his conclusion primarily by reference to the (non-instant) case of what would have happened if it had been the Works which had been damaged. He considered that the parties had adopted "*a special scheme*" or *"special regime"*. It was also significant that clause 13.5 did not open with the saving that the obligation to insure was without prejudice to Tyco's obligations to indemnify. As for existing structures, although damage to them lay in one sense outside the special non-fault regime for reinstating the works of any contractor, because their (the existing structures') reinstatement would involve Rolls-Royce and its loss adjusters alone without any obligation of reinstatement on the part of Tyco (although it might of course involve the works of other contractors), nevertheless the reference to the Construction Manager and "others" (not limited to contractors) pointed towards an intention that the joint insurance should enure for the benefit of a wide range of persons. He then concluded quite rapidly as follows (at para 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 should be read as subject to a 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."*

55. It will be observed that no part of the judge's reasoning depended on the second issue discussed but not ultimately resolved in ***CRS*** relating to the question of whether there was an overriding principle (if only of construction) derived from a provision for joint names insurance. The judge did not decide the matter on the basis of an "implied term" inherent in a provision for joint names insurance, but, by direct application of the learning of the first issue in ***CRS,*** on the basis that the express provisions of the contract mandated the result. On this appeal, Tyco has no respondent's notice to support its submission that there is an overriding principle, even if it is ultimately an issue of construction, inherent in a provision for joint names insurance: but Rolls-Royce has not on that ground sought to shut out the argument.

56. Subject to that additional argument, the submissions of construction on this appeal have followed those below, reflected in the judge's judgment. In addition, Rolls-Royce has submitted that the judge erred in his treatment of the earlier authorities discussed above.

The issue of construction

57. Under this issue I propose to deal with the issue of construction as the judge dealt with it, and as the House of Lords did as well in *CRS*, without going on to consider (for the moment) what additional or alternative fire-power the provision for joint names insurance brings to bear for reasons possibly of insurance doctrine beyond that of pure construction, even if that ends up as an element in the overall issue of construction. I will then consider that second *CRS* issue below.

58. Before coming to clause 13.5 itself, I should state my conclusions on some of the peripheral issues of construction which arise under clause 13 as a whole.

59. First, therefore, what if any is the significance of the fact that under clause 13.3.2 the scope of the insurance which Tyco is required to maintain excludes the Works and the Project ("*other than the Works and the Project*")? In my judgment, very little. It is of course to be observed that clause 13.3.2 is not designed to give either party any protection in respect of damage to the Works or the Project. Beyond that observation, however, there is nothing in this point. Clause 13.3.2 is concerned with Tyco's "*public liability",* ie essentially liability to the public at large, not in particular to its employer, Rolls-Royce, in respect of whom its obligations are governed by contract. The primary focus is on personal injury or death; but of course damage to surrounding property, or to the property of third parties, might occur. Therefore, it seems to me that Mr Edwards-Stuart's emphasis on clause 13.3.2 above

any other is misplaced. All that can be said is that this is not where any insurance protection for Tyco (or for Rolls-Royce for that matter) is to be found.

60. Secondly, as for clause 13.3.3, I agree with the judge that there is no requirement on Tyco to maintain the professional indemnity insurance there spoken of: because it is not "*so stated*" in Schedule 2. It is not so stated in Schedule 2 because the alternatives *"is/is not required*" have not been addressed by the striking out of one or the other. That may be a mere oversight, but if it is it cannot be helped. I do not agree with Mr Thomas that the error or omission of failing to strike out "*is not*" is of no importance in the light of the figure of £15,000,000 entered for *"Minimum limit of indemnity*". It is suggested that this is the minimum obligation. But as such that figure merely reflects the same figure found in the first sentence of clause 13.3.3. That sentence makes it clear that that minimum obligation does not arise in any case, but only "*If"* the obligation to insure "*is so stated in Schedule 2",* which it is not. What is more significant, therefore, is that no figure has been entered against the Schedule 2 line "*Professional indemnity is/is not required (Clause 13.3.3): £".* If a figure had been entered there, whether £15,000,000 or (say) £20,000,000, then there would have been a strong argument that the failure to strike out *"is not*" did not matter. As it is, however, I reject Rolls-Royce's submission that professional indemnity insurance was required.

61. Thirdly, what is the scope of the professional indemnity insurance spoken of in clause 13.3.3? Tyco submits that it is limited to professional design faults, and does not extend to (as it were) a plumbing mistake. However, that seems to me unlikely, and I would not be willing to draw that inference merely from the language of the clause in the absence of expert evidence to that effect. Although the judge did not resolve this issue, he did say that Tyco's was *"a difficult argument*" in the light of the presence of the words "*any negligent act or default*" and the reference to liabilities in the wide terms found in clause 13.3.3. It will be recalled that the clause speaks of insurance "*to cover the Contractor's obligations and liabilities under or in connection with this contract"*. I respectfully agree, and conclude that professional indemnity insurance under clause 13.3.3 would have covered Tyco for its liability for assumed negligence in failing to tighten the pipe joint in question. The clause speaks without limitation, so that damage to Tyco's Works, or to the Project as a whole, would be covered.

62. Fourthly, what is the significance of the fact that clause 13.3.3 insurance has not been required of Tyco? Again, it must of course be observed that it is not a requirement of the contract that Tyco (and, through Tyco, Rolls-Royce) be protected by insurance of this kind. That, however, is not a stipulation that excludes Tyco's liabilities, although it is consistent with a stipulation elsewhere which might exclude Tyco's liabilities. However, whatever the width and effect of clause 13.5 in relation to Specified Perils, it would be wrong (and probably commercially foolish) to think that the Specified Perils would cover all the possible consequences of Tyco's negligence or other breaches of contract. Therefore, it would be a brave contractor who undertook work without liability insurance to cover his negligence in the performance of his undertakings. I do not think we know whether Tyco has such insurance or not. Moreover, although the completion of Schedule 2, whether deliberate or not, means that there is no clause 13.3.3 requirement on Tyco in this case, nevertheless the existence of clause 13.3.3 in the overall structure of the contract and the construction of clause 13.5 within that overall structure cannot change depending on how Schedule 2 is completed in individual cases. It is not as though the presence of clause 13.5 in the contract is itself optional. If it had been, that would have supported an argument that the "*is not required*" option in respect of clause 13.3.3 was intended to go along with the option in favour of clause 13.5. A case could then have been built on the option in favour of clause 13.5 insurance and the absence of clause 13.3.3 insurance. However, this contract, which the judge, I am sure rightly, considered to be used in common form among Rolls-Royce's package contractors generally, contemplates the co-existence of both clause 13.3.3 insurance and clause 13.5 joint names insurance. Therefore, it seems to me that the "*is not required*" alternative of Schedule 2 is not particularly significant.

63. And so one comes to clause 13.5 itself. The first issue, and for present purposes it is a potentially critical one, is whether Tyco as "*Contractor*" is involved at all in connection with the joint names insurance of the "*existing structures"*. The phrase here is "*in the joint names of the Employer, the Construction Manager and others including, but not limited to, contractors, insurance of existing structures*". That phrase can be contrasted with the following phrase which deals with insurance of the Works, namely "*and in the name of the Employer, the Construction Manager, the Contractor and his sub-contractors of any tier, insurance of the Works*" etc. It may be noted in passing that the insurance of the Works is not referred to as joint names insurance, but no one has adverted to that and I pass on. A number of things, however, are striking about the insurance of existing structures. First, the "Contractor" is not named, although he is named in connection with insurance of the Works. It would have been so easy to include the Contractor in the first part of the clause. Secondly, the whole of the rest of the clause is about insurance of the Works. Nothing further is said about how a joint names policy in respect of the existing structures is intended to work. Thus, there is nothing (in relation to the existing structures) comparable to the provision in relation to the Works that the Contractor's entitlement shall not exceed the amount recoverable by Rolls-Royce under the policy. What therefore is to limit the Contractor's liability to the amount of any recovery under the policy, or, therefore, at all? Thirdly, and a fortiori in this context, the expression "*others, including but not limited to, contractors"* is an odd phrase. The expression *"contractors*" is at least an identification by description, but "others" is wholly undefined. Fourthly, what is the insurable interest in respect of which "others" are to be insured? Where "*Works"* are concerned that is not a problem, for a contractor has an insurable property interest in his works pending their completion, but not thereafter; otherwise, however, his interest can only be in respect of liability (see ***Deepak Fertilisers and Petrochemicals Corporation v. ICI Chemicals & Polymers Ltd*** [1999] 1 Lloyd's Rep

387 at 399/400). We are told that no point is taken against Tyco on the basis of lack of an insurable interest, but the issue still remains: what is the interest in respect of which Tyco and Rolls-Royce are to be treated as co-insured? Is this co-insurance intended to be a mixture of liability and property insurance at all? If so, it is not in pari materia with the co-insurance in respect of Works.

64. Fifthly, what light does Schedule 2 throw on these questions? The *"Notice To Contractors On Insurance Provisions"* suggests that cover in respect of the Specified Perils is limited, where contractors are concerned, to their Works, ie *"to permanent and temporary works and materials for incorporation therein*". If so, as one would suspect, the cover under the Employer's joint names insurance is limited, so far as any contractor is concerned, to his interest in his works. There is nothing in Schedule 2 to suggest that Tyco or any contractor is insured against liability in respect of Rolls-Royce's property outside any contractor's own works.

65. In my judgment, the opening part of clause 13.5 is not intended to give Tyco or any individual contractor separate liability insurance in respect of the existing structures outside the area of its own works. All that this phrase is intended to do is to state that the Employer's policy insuring its own property on the Site embraces a series of joint name policies which protects "*others"* including but not limited to contractors. Contractors are told this so that they may have the confidence that, if disaster strikes the development, the Employer will have the resources to reinstate it including the resources to repair and see to completion the performance of contractors' Works. It seems to me that "others" is not a natural way to refer, even inclusively, to the Contractor under an individual package contract, and that the position is not improved by saying that "others" includes "contractors", a phrase which does not in terms embrace the "Contractor". Contrary to Mr Edwards-Stuart's submission and unlike the judge, I respectfully find nothing in the definition section ("The words and phrase "other" "including" and "in particular" shall not limit the generality of any proceeding [*sic*, query preceding?] words or be construed as being limited to the same class…") to incline me to read "others" or "contractors" as including Tyco.

66. That is sufficient to resolve this appeal: but in my judgment this conclusion is supported by more general considerations of the construction of this contract as a whole.

67. Thus, unlike the cases of ***CRS*** and ***Scottish & Newcastle***, there is nothing express in the language of our contract, unless it is to be found in the mere mention of joint names insurance, to emphasise that there is a special regime in relation to the existing structures which excludes Tyco's obligations found elsewhere in the contract, such as in clauses 2.3, 9 and 18.

68. The position may possibly be different so far as damage to the Works is concerned, for there at least there are the second and third sentences of clause 13.5 which themselves impose an obligation to repair the damage to the Works but suggest that in return Tyco will receive payment for such further work albeit limited to the amount recoverable under the joint names insurance. Even in that connection clause 3.3, in addition to the other clauses I have just mentioned, would seem to contemplate that the essential structure of the contract so far as liability for negligence is concerned remains unaffected. This would seem to follow from the fact that the third sentence of clause 13.5 itself refers to clause 3 ("*the Contractor's entitlement to be paid under Clause 3 in respect of such Variation*"). But under clause 3.3 Tyco "*shall not be entitled to an increase in the Contract Price…to the extent that any Instruction for a Variation results from…any…negligent act…on the part of the Contractor…*"). In such a case, payment under the insurance will be paid to Rolls-Royce as employer, but, where there is negligence on the part of Tyco, it seems that Rolls-Royce might be entitled to retain the payment (presumably in trust for the insurer which has supplied it, provided Tyco fulfils its obligation to reinstate the Works) in recognition of the indemnity owed by Tyco. In any event, if the reinstatement of the works would cost more than the insurance would generate, Tyco's liability to reinstate and/or indemnify would remain.

69. Moreover, the analysis in ***Barking*** remains, undisturbed by anything said in ***CRS*** where it does not seem to have been cited, to the effect that in such a situation the obligation to insure in joint names only extends to the Specified Perils so far as loss by such perils has not been caused by negligence. That analysis it seems to me remains binding on this court, at any rate in the absence of the type of plain language which in ***CRS*** and ***Scottish & Newcastle*** permitted the courts in those cases to distinguish ***Surrey Heath.*** It is true that in ***Scottish & Newcastle*** it would seem that the *Barking* analysis was not viewed with favour by at any rate Aikens J, on the ground that fire insurance was a well-known concept which included all loss by fire save in the case of arson with the complicity of the insured. However, Longmore LJ seemed to accept that on its own facts the ***Barking*** decision could not be impeached: see the sentence which I have emphasised in the citation at para 48 above ("No one could quarrel with a decision that that was not the intention of the parties.").[1]

70. I am therefore inclined to think that even in respect of damage to the Works, clause 13.5 does not succeed in excluding liability for Tyco's negligence (or the negligence of those for whom Tyco is responsible). Whether that is so or not, however, the matter is still plainer in my judgment in connection with damage to the existing structures.

71. I do not think that considerations of single or duplicate insurance assist other than in a marginal and (in this case) ultimately ineffective way. Duplicate insurance, i.e. insurance taken out by separate parties to cover the same peril, is by no means unusual among business parties. Commercial litigation is often between insurers. The fact that there is no obligation on Tyco to insure the Works or Project for its own interests is certainly consistent with such

[1] See also, in the somewhat different context of an exclusion clause, *In re an arbitration between Polemis and Furness, Withy and Company, Limited* [1921] 3 KB 560 at 573/4, 575/6, and *The Emmanuel* C [1983] 1 Lloyd's Rep 310 at 314.

insurance being found elsewhere in the contract – and it is, so far as the Works are concerned – but ultimately that cannot by itself operate to exclude a liability which is expressly recognised and indeed imposed.

72. In this connection, I am inclined to think, or at any rate prepared to assume, that the joint names insurance of the works (of Tyco and other contractors) would probably be taken out in a standard form which would not exclude loss caused by negligence. For one thing, a Specified Perils policy which excluded loss caused by negligence would not do the employer much good where his negligent contractor became insolvent, unless perhaps that contractor had his own liability insurance in hand (which admittedly under this contract neither clause 13.3.2 nor clause 13.3.3. requires). That is exactly the case where the employer would want to have in hand an insurance fund which could be used to defray the necessary repairs even if they had to be undertaken by some entirely new contractor. However, as Auld LJ pointed out in ***Barking,*** that is a different question from the separate issue as to whether the employer is obliged under the joint names insurance clause of his contract with his contractors to maintain insurance for his contractors against their own negligence. If he was not so obliged, then the fact that his insurance did protect even against negligently caused Specified Perils should not redound against him.[2]

73. So much for the construction of the contact without having specifically in mind the particular consequences of a joint names policy as a matter of insurance law. Do those consequences make all the difference to the construction of the building contract? That brings me to the second main issue debated before us, which may be expressed as whether the provision for joint names insurance by itself provides an overriding reason to construe the contract in which it appears in such a way as to override provisions under which one of the joint named insureds is expressed as being under a liability for its negligence or other default to the other joint named insured.

Does the provision for joint names insurance have an overriding effect?

74. In the circumstances, as, albeit for different reasons, in *CRS*, this issue is reached only for the purpose of obiter observations. I have construed clause 13.5's first sentence, so far as it deals with the existing structures, which is all that we are concerned with on this appeal, as not applying to Tyco as Contractor or therefore extending the ambit of clause 13.5 as a whole beyond that of Tyco's Works. That is enough to decide this appeal.

75. There is another reason why I would therefore be reluctant to trespass far on what is a difficult and controversial area. That is because the parties on this appeal have been prepared, not unnaturally, to take the analysis of the consequences of a joint names policy from the authorities cited above, and in particular from *CRS* in the House of Lords. However, the difficulties of doctrine in this area are more fully explored in the judgment of Brooke LJ in this court in *CRS* at [2000] 2 All ER 865 at paras 51/73, where he discusses the underlying authorities such as ***The Yasin*** [1979] 2 Lloyd's Rep 45, ***Petrofina (UK) Ltd v. Magnaload Ltd*** [1984] QB 12, ***Mark Rowlands Ltd v. Berni Inns Ltd*** [1986] 1 QB 211, ***Stone Vickers Ltd v. Appledore Ferguson Shipbuilders Ltd*** [1991] 2 Lloyd's Rep 288 and ***National Oilwell (UK) Ltd v. Davy Offshore Ltd*** [1993] 2 Lloyd's Rep 582. We have not been asked to look again at this learning. It appears, however, that the following doctrines have at times been put forward to explain the impermissibility for an insurer to sue by way of subrogation in the name of one co-assured to recoup himself from another co-assured on the basis of the latter's negligence or default: the doctrine of circuity of action and the doctrine of an implied term in the insurance contract. It also appears that the doctrine of circuity of action is no longer favoured (see Brooke LJ at para 69 and Lord Hope at para 64), and that the doctrine of an implied term in the insurance contract has now been replaced by a doctrine of the true construction of the underlying contract for the provision of joint names insurance (Brooke LJ at para 73 and Lord Hope at para 65): and that this last doctrine may operate with the assistance of an implied term to the effect that co-insureds cannot sue one another in respect of damage in respect of which they are jointly insured (Lord Hope at para 65).

76. I too would respectfully wish to adopt Lord Hope's preference to say that "the true basis of the rule is to be found in the contract between the parties" (*ibid*). That works in a straightforward way in a case like ***CRS*** or ***Scottish & Newcastle*** where it is clear that there is to be no liability of a contractor to his employer in the area of the regime for joint names insurance. What, however, is to happen in a case where there is no such clarity in that direction, but on the contrary, if anything, there is, or appears to be, clarity in another direction, namely in favour of the contractor's continued liability to his employer for his negligence?

77. That will have to be worked out in cases in which such problems arise. I can well see that a provision for joint names insurance may influence, perhaps even strongly, the construction of the contract in which it appears. It may lead to the carving out of an exception from the underlying regime so far as specified perils are concerned. But an implied term cannot withstand express language to the contrary. Moreover, if the underlying contract envisages that one co-assured may be liable to another for negligence even within the sphere of the cover provided by the policy, I am inclined to think that there is nothing in the doctrine of subrogation to prevent the insurer suing in the name of the employer to recover the insurance proceeds which the insurer has paid in the absence of any express ouster of the right of subrogation, either generally or at least in cases where the joint names insurance is really a bundle of composite insurance policies which insure each insured for his respective interest. Most co-insurances are of such a composite kind: see the discussion in ***McGillivray on Insurance Law***, 10th ed, 2003, at paras 1-194/5 and at paras 22-99/102. It is unusual for an insurer to sue his own insured to recover insurance proceeds due under his own policy, but it must be recalled that he does so in the name of and under the right of another party, viz the employer. In similar or analogous fashion, an insurer may find that one co-insured's fault cannot be held against another co-insured so as to save the insurer from liability: see ***Samuel &***

[2] See, in this context again, footnote 1 above.

Co Ltd v. Dumas [1924] AC 431 at 444/6, ***General Accident Fire and Life Insurance Corporation Ltd v. Midland Bank Ltd*** [1940] 2 KB 388 at 405/6, ***State of Netherlands v. Youell*** [1997] 2 Lloyd's Rep 440 at 447/8.

78. Of course, an employer would not be entitled to be indemnified twice over, once by his insurer and once by his contractor: but as long as the recovery from the contractor returns to the insurer by way of subrogation, only the negligent contractor is out of pocket, and no one is indemnified twice. Nothing I say here is intended in any way, however, to discourage the upholding of regimes where employer and contractor contract on the basis that, within a narrower or wider sphere of risks, matters are to be settled between them not on the basis of liability and litigation, but on the basis of an insurance funded solution.

79. That said, the issue may always arise in any event, were an insurance company to fail, as to who bears that ultimate risk. If upon their contract's true construction the regime for joint names insurance has supplanted and excluded any liability on the part of the contractor to compensate or indemnify the employer, then that risk will fall on the employer. If, however, the true construction is that the contractor's liability is supplanted only to the extent of a recovery obtained from the insurer, then the risk of the insurer's insolvency would appear to fall back on the contractor.

80. I do not consider Lord Bingham's observations in *CRS* to require a rule of law. In my respectful judgment Lord Bingham was speaking to the facts of the contract in that case. That is the difficulty with a number of similar observations concerning subrogation (such as the observations of Dillon LJ in ***Surrey Heath***), which may either depend on the facts of the individual case, or on an analysis of this controversial area which preceded the latest thinking to the effect that it is all ultimately a matter of the parties' intentions as found in their contracts.

81. I make these comments cautiously, in response to submissions made before us, but without full exposure to relevant texts. However, Mr Edwards-Stuart did accept in the course of his submissions, that the overriding rule of law with which he began, simply based on the reference to joint names insurance, is rather ultimately to be regarded as a doctrine of construction.

82. I see nothing in the considerations under this heading to revise my views expressed above about the issue of construction as it arises in this case.

Conclusion

83. For the reasons contained above, under the heading "*The issue of construction*", this appeal should be allowed.

Lord Justice Keene:

84. I agree.

Master of the Rolls;

85. I also agree.

Mr Antony Edwards-Stuart QC and Mr Digby Jess (instructed by Messrs Weightmans LLP) for the Respondent/Claimant
Mr David Thomas QC and Krista Lee (instructed by Messrs Shadbolt & Co LLP) for the Appellant/Defendant