JUDGMENT : **His Honour Judge Hicks QC :** Official Referees' Business : 6th April 1998.

Introduction

1. This judgment is supplementary to and is to be read in conjunction with the principal judgment in these actions handed down on 10 February 1998, to which I shall refer simply as "the Judgment". It deals with issues left outstanding in the Judgment and with applications and submissions consequential upon it, all of which were the subject of a hearing on 4 and 5 March 1998.

Damages

2. A number of points in this field were left outstanding in the Judgment, including the recoverability of certain heads of damage, the quantification of recoverable heads, credits to be given by the Plaintiff and interest. All but one have been resolved by agreement between the parties, the agreement being that, subject to that one point, the sums for which the Plaintiff shall be entitled to judgment shall be £940,000 against MDC and £807,388 against DLE, in both cases inclusive of interest.

3. The agreement between the parties extends to certain ancillary points. In particular the build-up of the above totals by reference to items or groups of items of loss is agreed in principle and is to be recorded in a schedule which was not ready at the hearing but will be lodged. As I understand it the nature of that schedule is such that the figures for all items or groups of items are common to MDC and DLE except those for which the only liability is that of MDC for breach of warranty, amounting in total, inclusive of interest, to the difference of £132,612 between the above sums.

4. Two corollaries follow from the above characteristics of the agreed schedule. The first is that £940,000 is the limit of the Plaintiff's total recovery (still subject to the one point in dispute). The second is that the agreed schedule, and accordingly the judgment against DLE, will not contain any sum in respect of the Plaintiff's loss of opportunity to call on the performance bond referred to in paragraphs 188 to 191 of the Judgment. That is because the Plaintiff and DLE are in agreement that the measure of that loss is the difference between the amount required to remedy defects and the total enforceable liability of the Defendants for those defects - in this case nil if my findings against MDC stand, but the £132,612 already mentioned if the "warranty only" defects are not compensated for by a judgment against MDC. The agreements on those points between the Plaintiff and DLE do not, of course, bind MDC, in particular in the contribution issue between it and DLE.

5. The outstanding dispute referred to above is whether the Plaintiff can recover as damages against both Defendants the professional fees already incurred in preparing the Sarnafil remedial scheme.

6. These fees were incurred for the purpose of designing the Sarnafil scheme and making progress towards the stage at which it could have been implemented. Had it been implemented they would have been part of its total proper cost. Had I held it to be the appropriate remedial scheme the relevant element of damages would have been quantified by reference to its total expected cost, including the amount already expended on these fees. They were, however, also incurred, in whole or as to a substantial part, in preparing for the trial of the action by providing a necessary foundation for the Plaintiff's case that Sarnafil was the appropriate scheme. It is their recoverability as damages in the first of those two guises with which I am at present concerned; I shall, if the question arises, return to the other later.

7. If expense is incurred by a plaintiff in carrying out remedial works before trial its recoverability will, absent objections on such grounds as remoteness or lack of causation, be tested by whether the plaintiff acted reasonably in incurring it, and it will usually be sufficient evidence of reasonableness that he obtained and acted upon competent professional advice. That is the test for expense incurred by way of mitigation, and I applied it in dealing with the cost of netting in paragraphs 196 and 197 of the Judgment. It was applied by His Honour Judge Newey QC to permanent remedial works in The Board of Governors of the Hospitals for Sick Children V McLaughlin & Harvey PLC and others (1987) 19 Con LR 25. As Judge Newey pointed out at page 98 of that report the position is different where at the date of trial no remedial works have been carried out; the "parties are entitled to put forward rival schemes and the court has to choose between them or variants of them". Simply crossing a reasonableness threshold is not necessarily enough. The question is which test applies to preparatory work for a scheme which it is not intended to implement, or indeed unconditionally to adopt, until after trial and which in the event is rejected by the court. (Different

considerations might apply if trial forestalled the implementation of a scheme which would otherwise have gone ahead, or possibly if it were urgently necessary to be ready for instant implementation, but it was not suggested that either situation obtained here.)

8. Counsel are agreed that there is no authority directly in point. The question must therefore be addressed as one of principle. In my judgment the answer is that in so far as the cost of such preparatory work is claimed as damages it is part of the total cost of the remedial scheme in question and stands or falls with the remainder of that cost. It was in fact pleaded in this case as an integral part of the total cost but the principle would apply even if that were not so. The reason is that damages are compensatory and that issues as to the sum required under any head for that purpose are in the case of dispute for the court to decide. Application of any test, such as the simple reasonableness of the plaintiff's conduct, which may actually or potentially produce a more generous award is to be confined to circumstances where justice truly requires that to be done, as it does where the plaintiff's decision to carry out work must necessarily be made before trial or has reasonably been so made. On the basis on which I am deciding this point - in particular that the Plaintiff was awaiting the outcome of the trial before deciding what, if anything, to do by way of permanent remedial works - there is here no such requirement.

9. I emphasise that I reach that conclusion solely in reference to the expenditure of the fees as part of the ultimate cost of the works, if executed, and without prejudice to the consequences of their having, in whole or part, also been part of the costs of preparation for trial. Mr Mauleverer (although not Mr Coulson) submitted that by pleading them as damages the Plaintiff had made an election which barred it from claiming them as costs if not recoverable as damages. I reject that submission. They were properly pleaded as damages for reasons apparent from the first half of paragraph 6 above, and necessarily so if the full cost of the Sarnafil scheme were to be claimed and, if upheld, recovered. There was no reason why the Plaintiff should have been put to its election to forego either the claim for that part of its properly quantified damages, if successful on that issue, or that part of its properly incurred costs, if not. The Defendants have in no way conducted the trial differently or incurred any other prejudice by the Plaintiff's having kept both courses open. The Plaintiff could not, of course, have obtained double recovery by including as disbursements in its bill of costs fees for which it had obtained judgment as damages, but that does not now arise. Who should pay the costs of the "Sarnafil -v- Soladex" issue is a separate question, to which I have not yet come, and how much of the preparation fees should be allowed as part of such costs is yet another, to be answered, if it arises, by the Taxing Master.

10. I therefore reject the claim for the inclusion in the award of damages of the professional fees for preparation of the Sarnafil scheme, amounting with interest to £51,362. The figures used in paragraphs 2 to 4 above therefore stand.

Costs

11. The parties are agreed on a number of points bearing on the orders which should be made as to costs in the light of the Judgment. In the first place MDC and DLE accept that the Plaintiff is entitled as against each Defendant to an order for the general costs of the action, although each argues for certain exceptions, reductions or partial counter-orders.

12. Secondly it is agreed that the costs of the hearing on 4 and 5 March 1998 (and I suppose of that on 10 February, although it was not expressly mentioned) are, as between Plaintiff and Defendants, part of those general costs and therefore the Plaintiff's.

13. Thirdly it is agreed that although there is a separate action against each Defendant the costs orders in the Plaintiff's favour should as nearly as may be produce the same result as if both Defendants had been joined in a single action. It seems to me, subject to any improvement which the parties can suggest, that for that purpose the appropriate order in each action will be:

    4. *That the Plaintiff recover from the Defendant [x% of] its costs on the standard basis [with any exceptions ordered below] of this action and of the Plaintiff's action no. 1994 ORB [yyy] against [name of other Defendant], except any such costs attributable solely to [name of other Defendant], such costs to be taxed, and that the Taxing Master certify how much of the costs so taxed are attributable solely to the Defendant and how much to the Defendant jointly with [name of other Defendant].*

14. Fourthly the parties are agreed in asking me to direct that for the purposes of taxation the time necessarily spent in preparing written closing submissions be treated as additional sitting days. That is clearly proper and I do so direct.

15. That brings me to the areas of dispute. There is a good deal of overlap between the submissions of MDC and DLE and I shall therefore address those areas topic by topic rather than Defendant by Defendant.

16. Before doing so I remind myself of the relevant rules and principles, which were not, as I understand it, in dispute. There are first the general principles, themselves in part derived from the rules, enunciated by Nourse LJ in In re Elgindata [1992] 1 WLR 1207, at page 1214A:

    (i) Costs are in the discretion of the court.

    (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made.

    (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.

    (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs.

17. Secondly there are the rules specific to payments in and **offers**. I need not quote the familiar rules dealing with payments into court and the consequences in costs because there was no payment in here and no point of detail turning on the wording of the rules therefore arises but their existence, and the general principle that where a partially successful defendant could have protected his position as to costs by a payment in but has failed to do so that is a factor to be taken into account in deciding whether to exercise in his favour the discretion to make some departure from a full order for the plaintiff's costs, are material. As to **offers** Order 22, rule 14, provides for what are commonly called "*Calderbank*" **offers**, and Order 62, rule 9(1)(d) reads:

    5. The Court in exercising its discretion as to costs shall take into account

    (d) any written offer made under Order 22, rule 14, provided that [with an irrelevant exception] the Court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into Court under Order 22.

18. The first topic in dispute concerns Scott Schedule items which the Plaintiff withdrew before trial or failed to establish at trial. Under that head MDC rely on items 12 and 15, both withdrawn, and DLE chiefly on 13 and 14, which failed, although Mr Coulson's submissions covered all those not wholly established against DLE. There is a separate and additional argument by MDC on 12, to which I shall come, but all the others fall squarely, in my judgment, within head (ii) and the first part of head (iii) of the Elgindata principles and within the general principle as to the position of defendants who fail to take available steps to protect their position as to costs. Costs should follow the event, and the abandonment or loss by the Plaintiff of these items in the circumstances of this case, including in particular the relative number and weight of the items in question and the absence of any payment in, does not justify any departure from that rule.

19. The special feature of item 12 is that on 25 September 1995 MDC's solicitors wrote to the Plaintiff's solicitors contending that six items, including 12, concerned structural steelwork, were without substance and should be withdrawn in order to save unnecessary costs and the need to join Severfield Reeve if they were pursued. They were not at that stage withdrawn and Severfield Reeve was joined as a Third Party. In 1997 item 12 was withdrawn and on 30 September 1997 MDC's solicitors wrote to the Plaintiff's solicitors, who were also acting for Severfield Reeve, offering to recommend the discontinuance of the Third Party proceedings if the Plaintiff bore all the costs of those proceedings. That offer, if it was such, was not accepted, and the Third Party proceedings continued until ended by consent at trial on the terms set out in paragraph 14 of the Judgment, namely discontinuance with no order for costs. I do not consider those circumstances adequate to justify a special order in relation to item 12. In the 1995 letter it was only one of six items, of which the remainder were pursued to trial, in some cases successfully. As to the 1997 letter

MDC chose of their own volition to settle the Third Party proceedings on less favourable terms than their solicitors were suggesting.

20. The second topic concerns items 27 and 28 of the Scott Schedule, relating to a fire protection barrier and collar. At some stage before trial (I was not given the date) DLE made an offer to settle this part of the claim on terms which were equivalent to the acceptance of full liability. The Plaintiff accepted that offer and did not thereafter pursue MDC further. MDC seeks its costs attributable to those items, or at least for an order that it not be liable for the Plaintiff's. The costs in question are of course those incurred down to the **settlement**, since none have arisen since. The position is therefore that these are costs of a part of the claim against MDC which has not been disposed of on its merits, by the parties or the court, and never will be. Plainly MDC cannot be better off than if it had won - the situation dealt with in paragraphs 18 and 19 above. There is therefore no justification for a special order in respect of these items.

21. The last and most substantial topic arises out of my decision that damages should be assessed on the basis that the appropriate remedial scheme for the roof defects is the Soladex scheme propounded by the Defendants, not the more expensive Sarnafil scheme advanced by the Plaintiff. MDC and DLE submit that the Plaintiff should pay the costs incurred in contesting that issue, or at least should not recover them. Two grounds are relied upon for those submissions, one turning on the application of the Elgindata principles and the other on what are said to be **offers** within Order 22, rule 14.

22. Since an order for payment by the Plaintiff is the more drastic I shall deal with it first. It is sought by Mr Mauleverer both under Elgindata principle (iv) and on the basis of **offers**, but by Mr Coulson on the latter basis only. I have no doubt that Mr Coulson was right to confine his submissions as he did. This was not a case which came anywhere near satisfying the criterion that "the successful party raises issues or makes allegations .... unreasonably" (impropriety was not alleged).

23. I therefore turn to consider the submissions, essentially common to MDC and DLE, based on what were said to be relevant **offers**. The letters relied upon for that purpose, all to the Plaintiff's solicitors, begin with one dated 20 August 1997 from DLE's solicitors, which included the following passages:

> *6. As you know, our client's engineering expert, Mr Billington, has proposed an alternative remedial scheme to that proposed by Mr McEwan. We understand from our quantum expert, Mr Ashworth, that Mr McEwan's remedial scheme is priced at approximately £1.85 million whereas Mr Billington's is priced at approximately £500,000.*
>
> *7. We would invite your client, at this stage, to agree that, in the event that there is a finding of liability against our client, Mr Billington's remedial scheme should be implemented. You will appreciate that, in the event that your client refuses to accede to our reasonable request at this stage, a considerable amount of time will be expended by all parties concerned in arguing, before the court, the benefits and disadvantages of both remedial schemes on offer. It will clearly represent a considerable saving in both court time and costs were your client to agree to the implementation of the Billington scheme, in the event of a finding of liability, at this stage.*
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> *8. Accordingly, we are instructed to make the following offer to your client. This offer is made under RSC Order 22, rule 14. This offer relates only to issues as to the appropriateness of the rival remedial schemes proposed and the costs thereof and in no way relates to any question of liability. Accordingly, we are not able to make any payment in under RSC Order 22.*
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> *9. We are instructed to offer to enter into an agreement, for the purposes of these proceedings only, that the cost of an appropriate and reasonable remedial scheme to address all the defects for which it is found by the court trying these actions that our client is responsible, would be £500,000. For the avoidance of doubt, this offer will only come into effect if and insofar as the court makes a finding of liability against our client.*
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> *10. If your clients do not so agree, we reserve our client's rights to show a copy of this letter to the court when it comes to decide the question of costs. We would, of course, at that stage, make an application that the above wasted costs should by paid by your client in any event.*

24. Next there is a letter dated 8 September 1997 from MDC's solicitors: *" .... Therefore, in the same way as DLE have requested in Park Nelson's letter to you of the 20th August, we invite your clients to agree that in the event that there is a finding of liability against MDC, the appropriate measure of damages is £500,000. The basis upon which we*

make tthis offer is that Mr Billington's scheme of remedials is the appropriate one and the cost of it is approximately £500,000.

11. As Park Nelson have pointed out a considerable amount of time would be expended ....

12. This offer is made under RSC Order 22, rule 14; it relates only to issues as to the appropriateness of the remedial schemes proposed and the costs thereof and does not relate to any question of liability. Our clients are in the same position as DLE and are unable to make a payment into court ....

25. Finally DLE's solicitors wrote again on 12 September 1997, as follows: *"Without prejudice to our offer of 20 August 1997 we wish to confirm the following:*

1. We believe that, in the event of any findings of liability against DLE in respect of the roof, the maximum measure of costs will be by reference to the scheme proposed by Mr Billington.

2. We therefore invite you to agree that the Billington scheme is the appropriate scheme in all the circumstances.

3. If you do not accept this offer, it will mean that a considerable part of the trial .... will be taken up with arguments about the differing remedial schemes. This issue is plainly separate from the issues relating to liability.

4. If, at the conclusion of these arguments, the Judge finds that the appropriate scheme is the Billington scheme, then a vast amount of costs will have been wasted because of your insistence on seeking a wholly inappropriate measure of damages calculated by reference to a far higher standard of roof than Fischer would have obtained under the original contract.

5. We accordingly reserve the right to argue that your client should pay all of those costs on that separate issue .... We reserve the right to show this letter to the Judge on the question of costs at the end of the trial."

26. In order to be effective as an offer to be taken into account under Order 62, rule 9(1)(d), a letter must meet a number of requirements, including the following:

(1) It must be such an offer as is contemplated by Order 22, rule 14.

(2) The party making it must have been unable to protect his position as to costs by a payment into court under Order 22.

(3) The event must be as favourable to the offeror as the offer, or more favourable.

27. The letters of 20 August and 8 September can be dismissed from consideration at once as plainly failing to meet requirement (3). They were **offers** to settle for "500,000 issues (in the former case, at least, it was indeed "all the defects") on which the Plaintiff recovered much more. The letter of 12 September did not so obviously suffer from that flaw, since it was not expressed in monetary terms and related only to the roof defects, and it is therefore necessary to consider the requirements a little more closely.

28. Taking them in reverse order, the Defendants' case on (3) (assuming in MDC's favour that it can take advantage of an offer by DLE) is that the offer was that the Billington scheme be agreed as the appropriate scheme of remedial work for the roof defects and that the Judgment found that to be so. That, however, equates the "Billington scheme" of 12 September 1997 with the Soladex scheme as it stood at the close of evidence on 20 November 1997. In fact the scheme, as pointed out in paragraph 194 of the Judgment, was by no means fully developed even at the latter date and was certainly less advanced at 12 September - it was being elaborated and modified to answer questions and meet criticisms down to and during the trial. It does not, therefore, at all follow that because I preferred it in the form which it took at the end of the trial the same would have been true at the date of the letter.

29. I am accordingly by no means satisfied that requirement (3) is met. Since the position there may be equivocal, however, I turn to (2). In my view that requirement was not met, since the Defendants could have protected their positions as to costs by payments into court. The ground for asserting inability to do so advanced in the letters of 20 August and 8 September was that the offer related only to the appropriateness of remedial schemes and not to any question of liability. I cannot see that that differentiates this case from the common run in any significant respect. A defendant who considers that an action has but a small prospect of success may make a payment in of a fraction of the worth of the claim in order to tempt the plaintiff to accept it, but that will afford no protection against costs if the action is fought and lost, and is not intended to do so. Where contributory negligence is in issue or there is a counterclaim or where, as here, there are many distinct heads of claim a payment in with a view to protection against costs can be pitched at a level which takes those factors into account. But subject to those considerations it

is always the case that a payment in for protection against costs must, to be effective for that purpose, assume that the plaintiff succeeds on liability. That has always been so and does not suffice to displace the general rule that the appropriate method of obtaining protection against liability for the costs of a purely monetary claim such as this is to make a payment into court.

30. In case I am wrong about that I turn finally to requirement (1), that there must be such an offer as is contemplated by Order 22, rule 14. That rule relates to an offer which is expressed to be *"without prejudice save as to costs"*. There is no point in so expressing an offer, and no **privilege** from production in evidence obtained thereby, unless the offer is a genuine attempt to compromise the action or an issue or issues in the action. That confirms what would in my view be the understanding of the character of such **offers** in any event. A simple invitation to accept the proponent's case is not an attempt to compromise and is not in my judgment an offer within the rule. That conclusion is supported, in my view, by the analogy of a payment into court. If a plaintiff makes a money claim and the defendant admits part but denies the balance it is not a proper or effective use of the procedure under Order 22 to make a payment into court of just the sum admitted due; it should simply be paid over to the plaintiff. The letter of 12 September 1997 was a simple invitation to accept DLE's case on the relevant issue, not a genuine attempt to compromise it, and not therefore an offer within Order 22, rule 14.

31. There is therefore no ground for an order that the Plaintiff pay any part of the Defendants' costs, and I turn finally to the question whether the Plaintiff should be deprived of part of its costs because of its failure to establish the Sarnafil scheme as the appropriate remedial design. That brings me back to heads (i), (ii) and (iii) of the Elgindata principles and the position of defendants who could have made payments into court but have failed to do so. The discretionary decision to be made here involves a similar balancing exercise to that undertaken in paragraph 18 above.

32. There are, however, two significant differences, one tending each way. On the one hand the extent to which the issue in question, the relative merits of the two remedial schemes, increased the length and cost of the proceedings, was clearly more substantial than in the case of the lost or abandoned Scott Schedule items. On the other hand it was not an additional issue *"raised"* or allegation "*made*" in the sense which Nourse LJ seems to have had chiefly, or perhaps solely, in mind, given the facts of Elgindata itself, and which is true of the Scott Schedule items, that is an "*optional extra*" in the sense that strictly it need never have been part of the proceedings. What was an appropriate remedial scheme had to be canvassed, the onus was on the Plaintiff to advance and support a scheme, and that had been done and developed for some considerable time before the alternative, advocated initially by DLE and only still later adopted by MDC, appeared, and even longer before it reached the stage of being demonstrably preferable.

33. Taking all the relevant circumstances into account I conclude that I should not deprive the Plaintiff of any part of its costs on the ground of its failure to show that the Sarnafil scheme was preferable to Soladex. For the reasons given in paragraph 9 above those costs will include, so far as allowable on taxation, the professional fees incurred before trial and included in the pleaded cost of the Sarnafil scheme.

Leave to Appeal

34. It was common ground that in dealing with applications for leave to appeal I should apply the principles stated in Virgin Management Ltd v De Morgan Group PLC (1994) 68 BLR 26, to which I was referred, and I do so.

35. DLE makes no application for leave to appeal. MDC applies for leave to appeal against various findings of fact. It is of course necessary to identify each relevant finding specifically, but I do not understand that to entail listing all the passages in a judgment which introduce or flow from the relevant finding, and it seems to me that on that basis the findings in question and their locations in the Judgment can be specified as follows:
    (i) that MDC authorised the inclusion of Appendix A in the letter of intent and the variation in its wording from that of the document of 22 March 1988 (paragraph 62);
    (ii) that MDC cannot dissociate itself from the further amendment of the document of 22 March 1988 and its incorporation by reference in the contract documents of 10 April 1989 (paragraph 64);

(iii) that the entry of the Plaintiff into the contract constituted by the letter of intent was made in "reliance", in the sense discussed in paragraph 39 of the Judgment, on MDC's promises, so far as they were to be performed under the contractual elements of the letter of intent (paragraph 61);

(iv) that the lowest section of each run of roof panels, adjoining the gutter, had its slope reduced or reversed, so as to produce a "dished" profile, and that that was a design defect (paragraph 141).

36. I have considered all these applications on the principles described above and in each case decline to give leave.

37. The Plaintiff makes one application for leave to appeal, although its intention, as I understand it, is that even if leave is granted the point will be pursued only by way of cross-appeal if there is an appeal by MDC. The finding concerned is that the Sarnafil scheme had not been designed in full detail (paragraph 194).

38. I have considered that application on the principles described above and decline to give leave.

Contribution

39. It follows from the agreed facts set out in paragraphs 2 to 4 above that of the total damages the sum of £132,612 is the responsibility of MDC alone and that the issue of contribution arises only in respect of the balance. Mr Mauleverer conceded that that was so but advanced, both as to contribution proper and as to the apportionment of costs, arguments which seemed to go behind that concession by asserting that *"it was DLE's fault that MDC became solely liable for certain items"*, and that this was a factor to be taken into account. I do not see how it can be. Contribution under the statute is concerned solely with rights between parties who are each liable to another *"in respect of the same damage"* (Civil Liability (Contribution) Act 1978, section 1(1)). A claim, if maintainable at all, on the basis that DLE, in breach of some legally enforceable duty to MDC, did or omitted something which gave rise to MDC's liability for items in respect of which DLE is not in breach of any duty to the Plaintiff, would be an independent claim in damages and is not raised in the proceedings before me.

40. I am therefore concerned with the concurrent liability of MDC and DLE for "807,388 damages, as to MDC for breach of warranty and as to DLE for breach of duties of care and skill in approval of design and in inspection.

41. As to the law it is common ground, and I accept, that in having regard, as the Act requires, to the extent of each party's "responsibility for the damage in question" (Section 2(1)) I must take into consideration both causation (or "causative potency", as it is sometimes called) and what is commonly described as "culpability" or "blameworthiness".

42. I take account for the purposes of my decision on contribution of my detailed findings as to liability in the Judgment, and so far as accessible their respective implications in damages (I have not been asked to postpone a decision until the schedule referred to in paragraph 3 above is available and no arguments were addressed to me which turned on its contents); no purpose would be served by rehearsing those findings again in detail here and it is common ground that issues of contribution are to be approached by taking a broad, common sense view.

43. Two features of the case call for more specific attention. The first is the distinction between the bases of liability of the Defendants. MDC warranted the "sufficiency of the completed works and the operational performance of the project". DLE was the employer's representative or supervising officer with the responsibilities described and explained in paragraphs 91 and 92 of the Judgment.

44. If that were the only distinctive difference between the Defendants it would in my view justify a significantly greater contribution from MDC than from DLE. Although no rigid rule governs the situation it has been common, as between contractors and persons with supervisory responsibilities, to assess relative contributions of 75% to 25% or thereabouts. The present situation is of course not identical, but it has some similarities. A warrantor is not a contractor, but like a contractor he has strict liability. DLE's responsibilities were not purely supervisory, but its design-related tasks were not those of primary design.

45. Mr Mauleverer submitted that in terms of "*culpability*" the warranty liability could be ignored. That cannot be right. It is true that the presence of this form of liability draws attention to the difficulty of using in this context words such as culpability or blameworthiness which have moral connotations; perhaps

"accountability" would be better. But that there is an element other than pure causation to be considered seems o me to be clear both in principle and on authority. It is true also that liability under a warranty, being strict, may possibly (I do not have to decide the point) not lend itself as readily to the concept of different degrees of culpability or accountability between several warrantors as it naturally and commonly does between two or more persons all in breach of duties of care. But there is certainly no such difficulty in a comparison between a warrantor on the one hand and a negligent supervisor on the other; on the contrary the very fact that the liability of the former is strict suggests that it is comparable with a high degree of negligence. Moreover such a comparison must explicitly or implicitly have been made in all the numerous cases in which contribution has been awarded between a contractor subject to strict liability and a supervisor, with the results summarised above.

46. If I were wrong in attributing a high degree of accountability to a warrantor solely because of his strict liability then it would be necessary to have regard to the fact that MDC was not a mere warrantor, not otherwise involved, but was for much of the damage for which it is concurrently liable with DLE (including in particular that resulting from defective lap joints) also the negligent designer, so that my conclusion would not be materially different.

47. The other feature requiring special attention is DLE's responsibility for the issue of the Certificate of Practical Completion and its consequences. The relevant facts and findings appear in paragraphs 159 to 192 of the Judgment. The peculiarity of this breach is that it did not itself cause any of the Plaintiff's primary loss; rather it deprived the Plaintiff of one or more opportunities of recouping that loss, in whole or in part, without or before recourse to either of the Defendants. That peculiarity, and the fact that Mr Coulson says that it was MDC's fault that DLE issued the certificate, have enabled Mr Coulson on the one hand and Mr Mauleverer on the other to advance diametrically opposed arguments as to the effect of this breach, each of which, taken to its logical conclusion, would have led to an indemnity in favour of its proponent. Mr Coulson shrinks from that extreme, and accepts that the certificate is but one of the factors to be taken into account, but I am not sure that Mr Mauleverer does. However that may be I am clear that it is simply one of the factors, albeit an important one, and that its effect is to require DLE's contribution to be greater than it would otherwise have been.

48. In assessing the weight to be given to that consideration I again bear in mind all the relevant findings I have already made and shall not burden this judgment with a repetition of them, but there are three points which require some attention.

49. The first is Mr Coulson's submission that MDC was responsible for DLE's issue of the certificate. That turns essentially on MDC's failure to disclose Mr Murfin's findings to DLE (see paragraph 110 of the Judgment) because Mr Fitt wrongly believed that MDC owed the Plaintiff no duties. In my judgment that is a factor, but not one of much weight. One of the primary reasons why DLE should not have issued the certificate was that there was a serious problem of leakage through the roof. DLE knew perfectly well that that problem existed and that there was no assurance that it had been cured. The only additional information of significance which it would have obtained from Mr Murfin's report was that he had no confidence in the remedial measures then being tried.

50. The second point is that although most of the argument centred on the effect of the certificate in losing the right to call on the performance bond Mr Mauleverer also submitted that a further consequence was that the Plaintiff lost the part of the retention money released in consequence of the certificate, amounting to £148,336. This again, although a factor, is not in my view one of great weight. As always, what happened must be compared with what would have happened had DLE exercised due care and skill. That is discussed in some detail in paragraph 183 of the Judgment. There was clearly a likelihood that all or some of the £148,336 would have been released in any event. I do not feel called upon to evaluate that likelihood more precisely, but I take it into account.

51. The last and most substantial point concerns the effect of the lost opportunity of calling on the performance bond. Mr Mauleverer submits that that should be valued at the full £715,000 secured by the bond, plus interest from the date when the money would have been received. In my judgment there must in any event be a substantial discount because of the manifold and imponderable chances that full recovery would not have been achieved. That, like so much else in this exercise, is not susceptible of more precise evaluation; it

is simply an element contributing to an overall apportionment. There is, however, a distinct question which should in principle be capable of an answer. It is whether, if the bondsman had paid out on the bond to the Plaintiff, he could have had recourse to the Defendants for recoupment in whole or in part. Plainly, to the extent that he could and would, the interposition of an assumed call on the bond has a merely circular effect. Of course whether, if he could have done so, he would, and with what results, are again factual questions open to the same uncertainties as others of the same kind, but the chance would have to be taken into account and the question of principle must therefore be faced.

52. Unfortunately it does not, so far as the researches of counsel have been able to extend, seem to be one on which there is any direct authority. In principle I should find it surprising if a party in the position of a bondsman under a performance bond, having no personal involvement in the defaults which have led to his having to answer to his liability under the bond, had no redress against the true authors of the bondholder's misfortune. It is of course clear that if, as here, the main contractor is jointly liable under the bond itself, there is a right to an indemnity from him, but it is only too likely that in the circumstances in which a bond is called that right will be of little or no value, as it would have been against MCL here. It will also be not uncommon that there are other parties, like MDC and DLE, who have some responsibility for the defaults.

53. Two possible bases for claims over by the bondsman in such circumstances have been canvassed. The first, which was in the forefront of Mr Coulson's submissions on the point, is the Civil Liability (Contribution) Act 1978 itself. That looks at first sight unpromising, because as already noted the Act requires that the claimant and the prospective contributor both be liable to another (in this case the Plaintiff) "in respect of the same damage", whereas liability on a bond in the traditional form used here is ostensibly not in respect of damage at all; it is a simple debt for a fixed sum of money, albeit one avoided if certain conditions are fulfilled. The relevant words in this case were as follows:

15. By this Bond, we [MCL] ("the Contractor") and London & Kingston Insurance Company Limited .... ("the Surety") are held and firmly bound unto [the Plaintiff] ("the Employer") in the sum of £715,000.00 for the payment of which the Contractor and the Surety bind themselves, their successors and assigns jointly and severally by these presents.

[Recital of the building contract ("the Contract")]

16. Now the Conditions of the above-written bond are such that if:-

a) The Contractor shall subject to Condition (c) hereof duly perform and observe the terms .... of the Contract .... or if

b) on default by the Contractor the Surety shall satisfy and discharge the damages sustained by the Employer thereby up to the amount of the above-written bond or if

c) The Supervising Officer named in the Contract shall .... issue a Final Certificate of Completion then upon the date stated therein ....

this obligation shall be null and void but otherwise shall remain in full force and effect .... .

54. In matters relating to bonds, however, all is not necessarily as it seems and the general effect of such words, although not the precise point before me, is the subject of several reported cases, two of which were put before me.

55. In **Tins Industrial Co Ltd v Kono Insurance Ltd** (1987) 42 BLR 110 the bond was in similar form to that used here, except that there was no provision corresponding to Condition (c) above. The employer obtained summary judgment against the bondsman, which was set aside by the Hong Kong Court of Appeal. For present purposes I need quote only one short paragraph from the judgment of that court, delivered by Hunter JA:

17. In our judgment therefore the trial judge was wrong to say that he could disregard the underlying contract. This is in our view a case where a claimant under the bond has to prove first breach, and secondly damages. (page 121)

56. The last part of that passage was cited with apparent approval by the House of Lords in **Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Ltd** (1995) 73 BLR 32. In that case also summary judgment had been obtained in an action on a bond in substantially identical terms to that in the Tins case. It was set aside by the House of Lords. Lord Jauncey, with whom the other members of the House agreed, said immediately following his reference to Tins:

18. My Lords, I have no doubt that the Court of Appeal were in error in concluding that the bond was not a guarantee but was akin to an on-demand bond. No distinction can, in my view, properly be drawn between the effect of this bond minus the second part of the condition [Condition (b) above] and the bond considered by Lord Atkin in the Workington case [1937] AC 1, 17 and other bonds using this or similar wording have for many years been generally treated as guarantees .... . [After quoting from the speech of Lord Atkin in Workington Harbour Dock Board v Trade Indemnity Co Ltd (No 2) [1938] 2 All ER 101 he continued:] This dictum makes it clear beyond doubt that proof of damage and not mere assertion thereof is required before liability under such a bond arises.

19. I have therefore no hesitation in concluding that the .... bond without the second part of the condition would amount to a guarantee and that the [bondsman] would be entitled to raise all questions of sums due and cross-claims which would have been available to [the contractors] in an action against them for damages. (page 41D)

20. Lord Jauncey went on to hold that the second part of the condition in that bond, corresponding to Condition (b) above, "in no way alters the effect to be given to the remainder of the bond". (page 42I)

57. Clearly the further addition of Condition (c) cannot tell against that construction, and I conclude that here also the Plaintiff, if it had called the bond, would have had to prove breach and damage and would have recovered only the damages proved, subject to any set-offs and cross-claims.

58. There is no direct authority on how that relates to the 1978 Act, but I was referred to three cases which cast some light on what can amount to *"the same damage"* for that purpose. The first was **Friends' Provident Life Office v Hillier Parker May & Rowden** [1996] 2 WLR 123. In that case the plaintiff had funded part of the cost of a property development in expectation of a share of the profits. The defendants were surveyors engaged to advise the plaintiff and to check and authorise payment of the developers' claims for the plaintiff's share of the cost. The plaintiff sued the defendants in negligence and breach of contract for allegedly authorising overpayments. The defendants joined the developers as third parties, claiming contribution under the 1978 Act on the grounds (inter alia) that (i) the overpayments, if established, were made under a mistake of fact or for no consideration, and so repayable by the developers, or (ii) the developers were trustees of any money overpaid and liable to compensate the plaintiff for breach of trust. The claims for contribution were struck out as disclosing no reasonable cause of action but restored by the Court of Appeal. Auld LJ, with whom Saville and Rose LJJ agreed, quoted from section 1(1) of the Act, referred to in paragraph 39 above, and from section 6(1), as follows:

21. A person is liable in respect of any damage for the purposes of this Act if the person who suffered it .... is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of contract or otherwise).

22. Dealing with the first, restitutionary, ground of alleged liability on the part of the developers to the plaintiffs, he said:

23. In my judgment, despite the distinction between a claim for restitution and one for damages, each may be a claim for compensation for damage under sections 1(1) and 6(1) of the Act of 1978. The difference between asking for a particular sum of money back or for an equivalent sum of money for the damage suffered because of the withholding of it is immaterial in this statutory context, which is concerned with "compensation" for "damage".

.... [After considering the purpose of the Act and quoting again from sections 1(1) and 6(1) he continued:]

24. It is difficult to imagine a broader formulation of an entitlement to contribution. It clearly spans a variety of causes of action, forms of damage in the sense of loss of some sort, and remedies, the last of which are gathered together under the umbrella of "compensation". (page 135G)

25. He then addressed an argument that restitution was akin to debt, and that debt was implicitly recognised by section 3 of the Act, in the phrase "debt or damage", as being distinct from damage, and dismissed it as follows:

.... even if the judge was right in associating a claim for restitution in quasi-contract with an action for debt, that would not exclude it from being a claim for compensation in respect of damage .... within the meaning of sections 1(1) and 6(1) of the Act of 1978. (page 136H)

26. He then considered the claim in breach of trust and came to the same conclusion.

59. That was a case in which the distinctions relied upon, without success, to take the claims to contribution outside the Act concerned the form of remedy. The damage suffered by "another" (in that case the plaintiff) was on any economic or common-sense test plainly the same, and was certainly suffered by the same person in the case of both of the putative liabilities in question. The Friends' Provident case was cited in argument in **Birse Construction Ltd v Haiste Ltd** [1966] 1 WLR 675, but not in the judgments, no doubt for the good reason that the point there was whether the damage itself was indeed the same, and suffered by the same person. The plaintiff contractor had settled a claim by the employer, arising out of the construction of a reservoir, and then sued the defendant, its consultant engineer. The defendant joined as third party the employer's certifying engineer, claiming contribution under the 1978 Act. The Court of Appeal held that the relevant claims were not in respect of the "*same damage*" within section 1(1) of the Act, one of their reasons, it would seem, being that it was not suffered by the same person. The facts and the issues were very different from those in the present case and I think I need refer only to the fact that the damage suffered by the employer was characterised as being its "*not having a completed working reservoir at the time .... expected*" (per Sir John May at page 680E) or "*the physical defects in the reservoir*" (per Roch LJ at page 682E). On that basis the damage suffered by the Plaintiff here was its not having a completed working warehouse and office building at the time expected or the physical defects in the building.

60. Finally, in **Jameson v Central Electricity Generating Board** [1997] 4 All ER 38, the Court of Appeal held that a claim by a deceased workman against his former employer for negligence and breach of statutory duty was a claim in respect of the "*same damage*", for the purposes of the 1978 Act, as one by his executors under section 1 of the Fatal Accidents Act 1976 for loss of dependency, since the relevant damage was the wrong which caused both the injury and the death (per Auld LJ at page 62j).

61. The formulations in the **Birse** and **Jameson** cases are not easy to reconcile, although the former is referred to in the latter and the decisions on the facts are no doubt compatible. Jameson was of course concerned solely with liability in tort and for breach of statutory duty, and one of the explicit grounds for the decision was that any other interpretation would result in narrowing of the provision for contribution previously provided by section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (page 63b). That consideration does not arise in contract cases such as Birse and the present action, and I find the formulation in **Birse** more helpful in the present context and more in accordance with the ordinary meaning of the word "damage". It is also consistent with the approach implicitly adopted in the Friends' Provident case, where this aspect was not directly addressed. On that basis **there is clearly no difficulty here of the kind which arose on the facts of Birse itself. Friends**' Provident, although not directly binding, also encourages me in holding, as I do, that the form of the bond would not have prevented the bondsman's liability under it, had the Plaintiff made a claim based on the defective performance by MCL resulting in the same defects as feature in the present action, from being liability "in respect of the same damage", for the purposes of the 1978 Act, as the liability for those defects of MDC and DLE.

62. I therefore hold, somewhat against my initial impression, that the bondsman, if called upon to pay under the bond, could have claimed contribution under the 1978 Act from MDC and DLE.

63. The second possible basis for claims over by the bondsman is subrogation to the Plaintiff's rights. As it need be considered only if I am wrong in the conclusion which I have just reached, and as the authority to which I was referred on it is even scantier, I shall be very brief. It is true that in theory subrogation is the stronger right, since a contribution order can be for less than a full indemnity, but in the circumstances of this case, in which each remedy is being considered only hypothetically, and affects only indirectly an outcome to be reached by taking the broad approach already described, I do not consider it necessary to recall the parties for further submissions.

64. Since it would clearly be inconsistent with the existence of any subrogated rights for an employer who had successfully claimed on a performance bond to be obliged in law to give credit for the proceeds in an action against persons in similar positions to those of the Defendants there was some discussion of the question whether such credit must be given. Mr Coulson conceded that in his experience it commonly was given in fact, but that may be done for a number of reasons and cannot resolve the issue in the absence of binding authority or a clear foundation in principle. Mr Mauleverer referred me to the cases of **Bryanston Finance**

Ltd v De Vries [1975] QB 703 and Townsend v Stone Toms & Partners [1981] 1 WLR 1153, but in neither could the question of subrogation conceivably have arisen, so I find them of no assistance.

65. In ***Goff and Jones*** on Restitution (fourth edition) suretyship is described as one of "*the main areas where English courts have undoubtedly accepted that a person may be subrogated to the rights or assets of another*" (page 590), and the facts of this case do not seem to fall within any of the exceptions discussed under the heading of "*the limits of subrogation*" (pages 594 to 599). On the other hand the specific discussion of sureties as one of the established categories deals with the matter only in terms of subrogation to securities, not to personal rights of action (pages 602 to 604). Since neither these nor any other references were canvassed in argument, and since the answer does not affect the outcome for the reasons given in paragraph 63 above, I leave the matter there, although as at present advised I see no reason in principle why the doctrine should not apply.

66. Taking all these matters into account I consider it just and equitable that MDC and DLE should contribute equally to the £807,388 for which they are concurrently liable, so that DLE's share will be £403,694. MDC, being also solely liable for £132,612, will have to find £536,306.

67. Very little was said about contributions towards costs. Under the form of order set out in paragraph 13 above there will be some costs payable to the Plaintiff by each Defendant separately and some payable jointly. As I understand it there is no submission on either side that one Defendant should contribute to the costs payable separately by the other, except possibly that by Mr Mauleverer which I have rejected in that respect, as well as more generally, in paragraph 39 above. Mr Coulson asked for the same apportionment of joint costs as of the £807,388 damages. Perhaps because that is more favourable to MDC than the alternative of following the overall split of the total £940,000 Mr Mauleverer did not, I think, demur. Treating that as meaning that the parties are at one on this issue I do not find it necessary to debate the point and shall order accordingly.

68. Were I wrong in my conclusion that the bondsman, if required to pay, could have had recourse in some form against the Defendants, I would consider it just and equitable that in place of the conclusions reached in paragraph 66 above DLE should contribute 70% of the £807,388, namely £565,171.60, and MDC 30%, namely £242,216.40, which with its sole liability for £132,612 would make a total of £374,828.40. Joint costs would in that event be borne in the same proportions of 70% by DLE and 30% by MDC.

Conclusion

69. Since the agreement between the parties recorded in paragraph 2 above was for a sum inclusive of interest and had been reached, as I understand it, on the basis of interest calculations to 4 March 1998, the money judgments entered in both actions should be dated with that date, and I so direct.

70. There had better be minutes of orders (one in each action) giving effect to my decisions set out at various points above.

71. This judgment will be formally handed down and dated at an early appointment. Unless there are further applications or submissions no-one need attend or be represented on that appointment.

Howard Palmer for the Plaintiff (Solicitors: Masons)
Bruce Mauleverer QC and Charles Manzoni for Multi Design Consultants Ltd (Solicitors: Rowe and Mawe)
Peter Coulson for Davis Langdon & Everest (Solicitors: Park Nelson)