Aer Lingus v Gildacroft Ltd [2006] EWCA Civ 4

CA on appeal from QBD (HHJ Simon) before Sir Anthony Clakre MR, Rix LJ; More-Bick LJ. 17th January 2006

Lord Justice Rix :

1. Section 10 of the Limitation Act 1980 provides that a claim for contribution under the Civil Liability (Contribution) Act 1978 shall have a limitation period of two years from the date on which a person seeking contribution is "held liable…by a judgment".

2. The issue on this appeal is whether for these purposes the judgment spoken of by the statute includes a judgment on liability only, for damages to be assessed, or whether a judgment on quantum as well as liability is required to start time running.

3. The distinction is critical on the facts of this case. On 27 January 1998 William Smyth was badly injured while working for the claimants, Aer Lingus plc, at Heathrow Airport. His hand was trapped in a document lift which had been supplied to Aer Lingus and installed by Gildacroft Limited as primary contractors and Sentinal Lifts Limited as subcontractors. The accident arose out of a malfunction of the lift. Mr Smyth commenced proceedings against Aer Lingus, Gildacroft and Sentinal in November 2000. On 9 May 2001 he obtained judgment by consent against Aer Lingus for damages to be assessed. On 7 June 2001 his proceedings against Gildacroft and Sentinal were discontinued with Aer Lingus agreeing to pay their defence costs. By an agreement embodied in a further consent order dated 3 October 2003 there was judgment for Mr Smyth in the sum of £490,000 and costs. Mr Smyth's proceedings thereby came to an end.

4. Aer Lingus had not so far claimed any contribution against Gildacroft and Sentinal. On 4 February 2004, however, Aer Lingus commenced its own action for contributions or indemnities under the 1978 Act from both those companies. That was well within two years of the final judgment obtained by Mr Smyth against Aer Lingus on 3 October 2003, but well outside two years after the judgment on liability alone entered on 9 May 2001. The issue is which judgment marked the start of the statutory two year limitation period for Aer Lingus's claim against the contractors.

The Civil Liability (Contribution) Act 1978 (the "1978 Act")

5. The 1978 Act provides for the essence of contribution in the following terms:

> *"1. Entitlement to contribution*
>
> *(1) Subject to the provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)…*
>
> *2. Assessment of contribution*
>
> *(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."*

6. Thus the liability to contribute proceeds by reference to the fact that two persons are each liable in respect of "the same damage", which does not mean "the same damages". As Lord Bingham of Cornhill said in ***Royal Brompton NHS Trust v. Hammond & Others*** [2002] UKHL 14, [2002] 1 WLR 1397 (at para 6): *"When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?...I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of "damage" or of "loss" or "harm", provided it is borne in mind that "damage" does not mean "damages" (as pointed out by Roch LJ in* ***Birse Construction Ltd v. Haiste Ltd*** *[1996] 1 WLR 675, 682…)"*

7. It may be observed that, provided the liability is in respect of the same damage, the liability to contribute appears to arise at the same time as the primary liability to the person who has suffered the damage. As often happens, the same action incorporates both a primary claim by A against defendants B and C, and a contribution claim between B and C. For these purposes, it is not necessary for the quantum of A's claim to be established before the court can assess the quantum of contribution between B and C: for that quantum can be assessed as a matter of the respective percentages of their liabilities.

The Limitation Act 1980 (the "1980 Act")

8. Section 10 of the 1980 Act, beneath the heading "Special time limit for claiming contribution", provides as follows:

> *"10(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which the right accrued.*
>
> *(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.*
>
> *(3) If the person in question is held liable in respect of that damage –*
> *(a) by a judgment given in any civil proceedings; or*
> *(b) by an award made on any arbitration;*

the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).

For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

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

9. As stated above, the issue on this appeal is whether, for the purposes of section 10(3)(a), Aer Lingus was "held liable…by [the] judgment" given on 9 May 2001for damages to be assessed, or only by the judgment for £490,000 given on 3 October 2003.

10. The following matters may be noted about section 10. First, the references to "any damage" in subsections (1) and (2) and to "that damage" in subsections (3) and (4) must be a reference to the same concept of "damage" found in section 1 of the 1978 Act. Secondly, although the two year period is said to run from the date on which a right to recover contribution "accrues", it is difficult to think, in the absence of contrary authority, that that expression is intended to convey that the cause of action for a contribution under the 1978 Act only arises at the time of any judgment (whatever that means), award, or payment or agreement to pay compensation, for otherwise a defendant could not claim contribution from another defendant (or at best could do so only contingently) until his own liability (and perhaps the quantum of it too) had been established, or the payment or agreement to pay had been made. Moreover, the 1978 Act, which creates the right to contribution, is written in terms of the mere occurrence (or concurrence) of liability in respect of the same damage. There is no apparent need for that liability to have been established. On the contrary, section 1 of the 1978 Act makes clear that a person may be entitled to contribution even when he has ceased to be liable (subsection (3)) or, following a bona fide settlement, whether or not he is or ever was liable (subsection (4)). The difference between the 1978 Act's "person liable" and the 1980 Act's "held liable" (under section 10(3)) or "makes or agrees to make any payment" (under section 10(4)) would seem to be clear and deliberate. If the cause of action for a contribution only arose after judgment, award, or payment (made or agreed), then a defendant could never claim contribution from a co-defendant (or another party joined by him to the claimant's action for the purposes of a claim in contribution) at any earlier stage: but that is something which happens all the time. Rather, section 10 is stating a "special time limit for claiming contribution", as the heading to the section indicates, and the concept of the right accruing is fashioned merely for the purposes of dating the beginning of the two year limitation period.

11. Thirdly, in the absence of section 10 of the 1980 Act, there may have been a considerable dispute whether the limitation period would have been regulated by analogy by reference to the underlying liability in respect of the same damage, counting from the occurrence of that damage (as section 1 of the 1978 Act would suggest), or whether on the other hand the limitation period counted only from the ascertainment of the quantum of liability in question by judgment, award, agreement or payment, which is the underlying common law notion in the case of claims for contribution between co-sureties or for a contractual indemnity (see ***Wolmerhausen v. Gullick*** [1893] 2 Ch 514, ***Post Office v. Norwich Union Fire Insurance Society Ltd*** [1967] 2 QB 363, ***Telfair Shipping Corporation v. Inersea Carriers SA (The "Caroline P")*** [1984] 2 Lloyd's Rep 266, ***Bradley v. Eagle Star Insurance Co Ltd*** [1989] AC 957, and generally *Chitty on Contracts*, 29th ed, 2004, Vol I, at paras 28-047/049). In the former case, there would be a danger that the claimant in contribution would be time barred even before he knew he was being sued by the person who suffered damage at his hands; whereas in the latter case, there would be a danger that the right of contribution, being a creature of statute, would have no limitation period at all, or, if any by analogy, too extended a period. Section 10 may therefore be said to provide for a form of compromise. There would be a special limitation period starting not with the occurrence of the underlying damage but with judgment, award, or payment (made or agreed), and that limitation period would be two years.

The submissions

12. On behalf of the respondents, Gildacroft and Sentinel, their counsel Mr Jonathan Harvey and Mr Nicholas Heathcote Williams respectively, seeking to uphold the judgment below of Mr Justice Simon, submitted that the language of section 10(1)(a) was clear. Just as liability under section 1 of the 1978 Act referred merely to liability, without any determination of quantum, so section 10 of the 1980 Act did the same, save that there was need, in order to start time running, of the establishment of liability by judgment or award: hence "held liable". But there was no need for the ascertainment of any quantum, and no such need was expressly stated. A judgment on liability, with damages to be assessed would do. The only alternative was a payment, agreed or made. In that case, quantum would be established because agreed, and that would start time running whether or not the defendant accepted or continued to dispute liability.

13. On behalf of the appellants, Aer Lingus, Mr Michael Pooles QC submitted on the other hand, that the reference to "judgment" or "award" was ambiguous, but properly interpreted in context was a reference to a judgment which established not only liability but also quantum. That was why the postscript to subsection (3) mentioned the possibility of damages being varied on appeal. That was also why subsection (4) was premised on payment, made or agreed, and not on the mere admission of liability. If a judgment on liability alone were to be sufficient, then it was illogical not to find that a mere agreement to accept liability would be sufficient.

Authority

14. The issue is left open by authority. In ***George Wimpey & Co Ltd v. British Overseas Airways Corporation*** [1955] AC 651, the House of Lords was considering the wording of the predecessor to the 1978 Act, namely the Law Reform (Married Women and Tortfeasors) Act 1935 (the "1935 Act"). Prior to the 1935 Act, judgment in favour of the victim of a tort against one tortfeasor barred any further action against any joint tortfeasor, and the tortfeasor sued to judgment could not claim any contribution.

15. Both those rules were abolished by the 1935 Act, which provided by section 6 that –

> *"(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -*
>
> *(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage;...*
>
> *(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage…"*

16. No separate special limitation period applicable to the new right of contribution (such as is now found in section 10 of the Limitation Act 1980) was then enacted.

17. In ***Wimpey*** the claimant, an employee of BOAC, had been injured in a collision between a vehicle owned by BOAC and another owned by Wimpey. He sued Wimpey, who claimed a contribution against BOAC. The claimant later joined BOAC, but outside a special one year limitation period (provided for under section 21 of the Limitation Act 1939) applicable to public authorities (such as BOAC). At trial, the judge found Wimpey two thirds and BOAC one third to blame, but gave judgment only against Wimpey (for 100% of the damages awarded) since BOAC escaped liability altogether under its time-bar defence. The question then arose whether Wimpey could nevertheless claim a one-third contribution from BOAC. The trial judge, the Court of Appeal (by a majority) and the House of Lords all agreed that BOAC was not liable to contribute on the ground that its case did not fall within the wording of section 6(1)(c): "liable" in that subsection meant "held liable", and the subsection could not apply to a party who had been held *not* liable.

18. In the Court of Appeal (***Littlewood v. George Wimpey & Co Ltd v. British Overseas Airways Corporation*** [1953] QB 501) there was discussion on a separate defence run by BOAC to the effect that it could rely on the one year time bar under section 21 also against Wimpey in respect of its contribution claim. For these purposes it argued that Wimpey's cause of action for a contribution arose at the same time as the accident and that section 21 applied to that cause of action as well. On that separate point it failed, but the reasoning of the members of the court varied. The details of their judgments are now of only historical interest: but it may be noted that the court laboured (as had previous first instance judges) with the problem whether the cause of action for a contribution arose at the time of the accident or only upon judgment against the tortfeasor claiming contribution. The court favoured the latter solution. Both Singleton LJ and Denning LJ (but not Morris LJ) thought that the case of co-sureties was analogous (citing ***Wolmershausen v. Gullick*** and other authorities). The court also had difficulty with the issue of limitation within the contribution proceedings. Singleton LJ thought that section 21 did apply (at 514), but Denning and Morris LJJ thought that it did not, so that a six year period prevailed (at 520, 525).

19. The reference to the co-surety cases suggests that the liability upon judgment which (at any rate a majority of) the Court of Appeal had in mind was one which, as in that case, had itself determined quantum: but their language is not explicit.

20. In the House of Lords, however, these latter questions were put on one side, and the decision and discussion limited firmly to the point of statutory construction under section 6(1)(c). Viscount Simonds, giving the first speech, introduced the matter in the following way (at 177): *"My Lords, at the hearing of the action and of the appeal two questions were raised, upon which there was no argument before your Lordships, the first as to the date upon which Wimpeys' right to contribution arose and the second as to the period of limitation in respect of a claim for contribution against a public authority under section 21 of the Limitation Act, 1939. I am content to assume that the right to contribution arose at any rate not earlier than the date when the existence and amount of Wimpeys' liability to Littlewood was ascertained by judgment and that the relevant period of limitation was six years."*

21. Viscount Simonds' understanding, in other words, was that the concept of being "held liable" by a judgment for the purpose of setting time running in a claim for contribution involved the ascertainment of the quantum of the liability. That would reflect my understanding of the common law which was discussed in the Court of Appeal below. Of course, this was said by way of obiter dictum.

22. Lord Porter expressed himself thus (at 181): *"The quantum having been determined, the only question is: can the party against whom judgment has been given recover contribution from the other who was in part the cause of the injury?"*

    It is not clear whether, like Viscount Simonds, he was assuming that the determination of quantum was necessary to the claim for contribution, or whether he was simply speaking of the facts of the case. However, he continued (at 182/183) as follows:

    *"Substantially, their view was that Wimpeys were under no liability until judgment was given against them, that their cause of action arose then and not until then, and accordingly their cause of action against B.O.A.C. arose at that date. I need not, I think, set out the authorities and reasoning upon which these opinions are founded except to refer to such cases as **Wolmershausen v. Gullick** and **Robinson v. Harkin**, both of which were claims to contribution between*

*co-sureties, and **M'Gillivray v. Hope**, which was a claim involving the right of present and former employers to contribution inter se in respect of damages awarded to a workman employed by them consecutively.*

If this view be true, Wimpeys' liability did not come into existence until judgment had been given against them, and therefore they had whatever was the appropriate period of limitation from that date. What that appropriate period may be – whether it is a year because B.O.A.C. is a public authority and the action is brought in respect of any act, neglect or default or whether it is six years, because the claim is not in respect of any act, neglect or default, but for contribution – is immaterial in the present case inasmuch as Wimpeys made their claim to contribution in the original action before judgment was given."

23. In this passage, without committing himself to a personal view, it seems to me that Lord Porter, like Viscount Simonds, proceeds on an understanding of the Court of Appeal's reasoning as being founded on the common law position relating to contribution and indemnities.

24. Lord Keith of Avonholm merely said this (at 193): *"My Lords, your Lordships are not now concerned with a question which was considered in the courts below, namely, when the cause of action in the claim for contribution accrued. It is conceded, in conformity with the view taken by the Court of Appeal, that the cause of action accrued at earliest at the date when judgment was given in favour of Littlewood against the appellants."*

25. That is entirely neutral in its reference to "when judgment was given", save that it proceeds by reference to the view taken by the Court of Appeal, which Viscount Simonds had already interpreted as involving the ascertainment by judgment of the quantum as well as the existence of liability.

26. These remarks in the House of Lords are clearly obiter, concerned with an issue which was not before the House, and proceed on the basis of assumption only. Moreover, on the facts, the judgment in question was a judgment for damages and not on liability only. On balance, however, I would regard these dicta as being all consistent in understanding the reasoning of the Court of Appeal as proceeding on the basis that the ascertainment by judgment of the quantum of the liability in question was relevant to the accrual of a cause of action for a contribution and thus to the running of time for purposes of limitation. I do not think it right to regard Viscount Simonds as speaking purely for himself in his reference to "the existence and amount of Wimpeys' liability".

27. That was also, as it seems, the understanding of Donaldson LJ in ***Ronex Properties v. John Laing Construction Ltd*** [1983] 1 QB 398, for he said (at 406): *"The starting point of this submission is that a cause of action for contribution, under the Law Reform (Married Women and Tortfeasors) Act 1935, arises at the earliest when the claimant tortfeasor has been held liable, or has admitted liability to the plaintiff, and the amount of that liability has been ascertained by judgment or admission. This proposition is supported by dicta in **George Wimpey & Co. Ltd. v. British Overseas Airways Corporation** [1955] A.C. 169, per Viscount Simonds at p. 177, Lord Porter at p. 182 and Lord Keith at p. 193. It is also in accordance with the dictum of McNair J. in **Harvey v. R.G.O'Dell Ltd**. [1958] 2 Q.B. 78, 108, and it is consistent with the approach of Parliament in section 4 of the Limitation Act 1963. For my part I am content to assume that it is right."*

28. The learned editors of *Clerk & Lindsell on Torts*, 19th ed, 2006 , at para 33-84, cite ***Ronex*** as support for the proposition that "The judgment must determine the amount as well as the existence of the liability."

29. That reference by Donaldson LJ to section 4 of the Limitation Act 1963 is to the predecessor to section 10 of the 1980 Act. It would seem that the difficulties which *Wimpey* had exposed led in due course to a specific limitation provision being included in the 1963 Act. It was drafted by reference to section 6(1)(c) of the 1935 Act and was in the following terms:

> "(1) Where under section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 a tortfeasor (in this section referred to as "the first tortfeasor") becomes entitled after the passing of this Act to a right to recover contribution in respect of any damage from another tortfeasor, no action to recover contribution by virtue of that right shall (subject to subsection (3) of this section) be brought after the period of two years from the date on which that right accrued to the first tortfeasor.
>
> (2) For the purposes of this section the date on which the right to recover contribution in respect of any damage accrues to a tortfeasor (in this subsection referred to as "the relevant date") shall be ascertained as follows, that is to say –
>
> (a) if the tortfeasor is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be;
>
> (b) if, in any case not falling within the preceding paragraph, the tortfeasor admits liability in favour of one or more persons in respect of that damage, the relevant date shall be the earliest date on which the amount to be paid by him in respect of that liability is agreed by or on behalf of the tortfeasor and that person, or each of those persons, as the case may be;
>
> and for the purpose of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the tortfeasor."

30. It will be observed that section 4 is close to the present section 10 of the 1980 Act. It is relevant therefore that Donaldson LJ considered that section 4 was consistent with Viscount Simonds' assumption in ***Wimpey*** and was content to assume that quantum had to be ascertained by judgment or admission before time began to run. However, as in ***Wimpey***, no actual decision regarding the point under discussion was necessary.

31. When the 1978 Act was enacted, section 4 of the 1963 Act was amended (by paragraph 6 of Schedule 1 to the 1978 Act) essentially so as to replace the reference to the 1935 Act by a reference to the 1978 Act. Under the 1980 Act, section 4 has been substantially re-enacted as section 10, but section 4(2) has been separated out into subsections (2), (3) and (4) of section 10.

The statutory language

32. With this mainly historical background, I return to the language of section 10 itself. It is common ground that there is no express reference to the ascertainment of quantum in the language "held liable…by a judgment…or award"; and that an award, like a judgment, can be limited to a pure declaration or finding of liability without any ascertainment of quantum. It is also common ground that "that damage" is not a reference to damages, but to the victim's original loss or injury. In these circumstances, attention has been concentrated on the subscript of subsection (3) and on subsection (4), for both those passages do contain references to damages.

33. As for the subscript to subsection (3), Mr Harvey and Mr Heathcote Williams (for the respondents) both accept that it is unnecessary on their construction of the section, since time will begin to run as soon as liability is established, whether or not quantum has also been ascertained. In their submission, therefore, the subscript is merely a piece of cautious draftsmanship, to make clear, even if unnecessarily so, that any change in the level of damages will not delay the relevant date.

34. In my judgment, however, this is not a cogent explanation, although it was accepted by Simon J. If the ascertainment of damages is not a necessary condition for the accrual of the right to recover contribution, then it is confusing, rather than clarifying, to stress that a change in the level of quantum on appeal will not delay the accrual of the right or the running of time. On the contrary, the reference to a judgment or award varying the amount of damages is suggestive of the underlying assumption that the judgment or award already referred to earlier in the subsection is a judgment or award which ascertains damages. It seems to me, therefore, that on balance the subscript supports the case made by Mr Pooles on behalf of Aer Lingus, although perhaps not strongly so.

35. It seems to me that this pointer is underlined, but more strongly, by section 10(4). Where there is no judgment or award, but the victim's claim is dealt with simply by agreement, the relevant date is the earliest date on which "the amount to be paid…is agreed", and that is so whether liability is admitted or not. If, however, the ascertainment of quantum is irrelevant, it is difficult to understand why, where settlement proceeds by agreement in the absence of judgment, the statute does not focus on the earliest date on which liability is agreed, where it is, even before the settlement sum is arrived at. It is true that a settlement sum may be agreed without any admission of liability; but equally a settlement sum may be agreed for the very reason that liability is admitted. Indeed, that not infrequently happens: a tortfeasor admits liability, for that is not in dispute, but it may take time to work out the quantum for a settlement. The respondents submit that in such a case, a judgment for damages to be assessed is normally consented to, as in these proceedings: and that the statute looks to the formality of such a judgment, rather than to the relative informality of the mere agreement. However, there need be nothing informal about an admission of liability – on the contrary; and in any event, section 10(4) is intended to operate equally whether liability is admitted or not: in other words the subsection expressly contemplates the case where liability is admitted, and even so, the admission of liability is ignored for providing the relevant date. Section 10(4) therefore suggests that the critical matter is the ascertainment by agreement of the settlement sum. Parity would therefore suggest that, where the matter is dealt with by judgment or award, the critical matter is again the ascertainment of the quantum of liability. The judge accepted that section 10(4) is anomalous, but he regarded the statute as being otherwise too clear to permit any regard being paid to this anomaly. In my judgment, however, the language he relied on ("held liable") is not determinative.

36. What happens where there is agreement on a settlement sum followed by a consent judgment for payment of that sum, as must often occur? Or a judgment for damages to be assessed followed by agreement on a settlement sum? Are such cases governed by subsection (3) or (4)? They cannot be governed by both: there can in logic be only one "relevant date", and this is emphasised by the words which introduce subsection (4) – "If in any case not within subsection (3) above…". If subsection (3) requires only a judgment for damages to be assessed, then it must follow that, given such a judgment, subsection (4) never comes into play, for the case will already fall within subsection (3). If, however, subsection (3) requires a judgment for damages, then an agreement within subsection (4) could both follow a mere judgment for damages to be assessed and anticipate a consent judgment for the payment of the agreed sum: but it would be the agreement which comes first at a time when there is no judgment within subsection (3), and it would then seem that the relevant date is fixed by subsection (4). Do such considerations throw any light on the issue under appeal? I think they do, for subsection (4) appears to highlight the importance of the date of agreement of the settlement sum, but this would be undermined by allowing an earlier judgment for damages to be assessed to be determinative of the relevant date.

37. These observations are consistent with the decision of Crane J in ***Knight v. Rochdale Healthcare NHS Trust and others*** [2004] EWHC 1831 (QB), [2004] 1 WLR 371. In that case the two year period under section 10 had expired between the anniversary of the date on which an agreement to settle the victim's claim had been made and the anniversary of the consent order which had given effect to the agreement. So it was crucial to know whether the relevant date was fixed by subsection (3) or (4). It was held that the tortfeasor's claim in contribution was time barred, on the basis that subsection (4) applied. Crane J first determined that a consent order amounted to a

"judgment". That set up the choice between the two subsections. He then decided that subsection (4) was determinative. He reasoned (at para 23):

"My principal reason for doing so is if a firm agreement is made, as here, time undoubtedly starts to run at that moment. It would be different if the agreement required the making of a consent order before it took effect. Neither party so contends here. Although Parliament could have decided that a consent order should restart the clock, there are insufficiently clear words to indicate that. Indeed the words in subsection (1) "Where…any person becomes entitled" and the words in subsection (4) "the earliest date on which the amount…is agreed" suggest that the crucial moment is the first moment when liability arises. It is tidy to conclude that subsections (3) and (4) deal separately with cases decided by a court (or arbitrator) and cases of agreement."

38. Of course, Crane J was not there concerned with the issue before this court, of a consent judgment for damages to be assessed followed by a judgment for payment of an agreed sum. It also appears that he may have accepted a submission that the two subsections are mutually exclusive, subsection (3) dealing with cases resolved by the court's decision (Crane J emphasised the language "held liable" and "judgment given") and subsection (4) dealing with cases resolved by the parties' agreement. If that was so, then it might seem that subsection (4) would be the relevant subsection here in any event, in which case there would be no question of Aer Lingus's claim in contribution being out of time. However, that submission has played no part in the argument before this court (although it did below) and I express no opinion on it. Nevertheless, for the rest it seems to me that Crane J's reasoning is consistent with the observations I have made above.

39. I bear in mind that the words "held liable…by a judgment" are in themselves a powerful reason for thinking that a judgment on liability in the absence of a determination of quantum is sufficient for the application of subsection (3), a fortiori since, if the appellant's submission is correct, the subsection could easily have said "is held liable and quantum is determined…by a judgment". Nevertheless, for the reasons I have sought to set out above, I think that the language of the section is at least consistent with and marginally favours Aer Lingus's submissions.

40. However, the language of the statute does not exist in a void, and I revert to the background considerations with which this judgment began.

Further discussion and decision

41. The language of the 1978 Act is not the same as that of the 1935 Act considered in ***Wimpey***: moreover, the 1935 Act was not provided with its own limitation provision for a claim in contribution until the 1963 Act, and that postdates ***Wimpey.*** Nevertheless, it is tempting to see in section 4 of the 1963 Act, substantially reproduced in section 10 of the 1980 Act, the answer given to some of the issues raised in ***Wimpey.*** Whether it is true of the 1978 Act, as the Court of Appeal held and the House of Lords was prepared to assume of section 6(1)(c) of the 1935 Act in ***Wimpey,*** that no cause of action arises until judgment, is not necessary to decide. Nevertheless the reflection of the language of *Wimpey* ("held liable") in the 1963 and now in the 1980 Acts, together with the reasoning of the Court of Appeal in *Wimpey* reflecting the position at common law, and the House of Lords' understanding of that reasoning, most clearly stated by Viscount Simonds, strongly suggest to me that the correct interpretation of section 4 and now of section 10 is that time does not begin to run until the quantum of the claimant tortfeasor's liability has been ascertained either by judgment (or award) or agreement. In my judgment that is consistent with the language of section 10. Indeed the textual and background considerations support one another towards that conclusion.

42. In this connection, it was submitted by both sides that policy considerations favoured their respective positions. I have not been much assisted by policy. I can see that if the two years are only triggered by the ascertainment of quantum, then there is room for greater delay, and the law does not favour delay. I also recognise that the establishment of liability against a tortfeasor, even in the absence of the ascertainment of quantum, can be seen as a sufficient warning to him of the need to take formal steps to secure any contribution he considers he is entitled to. On the other hand, in *Wimpey* the House of Lords was prepared to assume, following the Court of Appeal, that a six year limitation period following the ascertainment of quantum was the correct answer. In this connection, the statutory choice of a special two year period, introduced in 1963, may well be regarded, as I have ventured to suggest above, as a suitable compromise. In any event, the fact that this point has not fallen for decision before this case seems to me to indicate that the practical (and thus policy) considerations are not of great moment.

43. For all these reasons, in respectful disagreement with judge, who preferred the arguments of the respondents, I would hold that the judgment or award referred to in section 10(3) of the 1980 Act as setting the relevant date for the running of time against a tortfeasor who seeks contribution under the 1978 Act is a judgment or award which ascertains the quantum, and not merely the existence, of the tortfeasor's liability. I would therefore allow Aer Lingus's appeal.

Lord Justice Moore-Bick

44. I agree.

Sir Anthony Clarke, MR:

45. I also agree.

Mr Michael Pooles QC and Mr Martin Porter (instructed by Messrs Beachcroft Wansbroughs) for the Appellant
Mr Jonathan Harvey (instructed by Messrs Kennedys) for the 1st Respondent
Mr Nick Heathcote Williams (instructed by Mr John A Neil) for the 2nd Respondent