CA on appeal from TCC (HHJ Wilcox) before Peter Gibson LJ; Brooke LJ; Robert Walker LJ. 4th July 2000.

JUDGMENT : LORD JUSTICE BROOKE:

1. This appeal arises out of the trial in the Technology and Construction Court by Judge Wilcox on 21st December 1999 of a preliminary issue in an action brought by the claimants Co-operative Retail Services Ltd ("CRS") against their former professional advisers in connection with a fire that took place on 16th March 1995 at a site in Lancashire which was in the course of construction as CRS's new headquarters. The two defendants in the action, who are the appellants in this appeal, are CRS's architects, Taylor Young Partnership Ltd ("TYP") and their mechanical and electrical engineers Hoare Lea and Partners ("HLP"). The respondents to the appeal are the main contractors and the electrical subcontractors, who were joined as third parties in the action. I will call the main contractors "Wimpey" and the electrical sub-contractors "Hall". Although nobody has suggested that CRS was in any way to blame for what occurred, following the judgment on 21st December 1999 the defendants sought to put forward a revised case based on allegations of contributory negligence which I will explain in due course. On 15th March 2000 the judge refused to permit them to amend their defence in this regard, and the defendants also apply for permission to appeal against this ruling.

2. The preliminary issue was decided on the following assumed facts:
   (1) In April 1993 CRS engaged Wimpey to build a new office headquarters building on a site owned by CRS in Rochdale. The form of the main contract ("the main contract") was JCT 80 private with quantities with amendments 1-2 and 4-11 (File B Tab 51).
   (2) TYP and HLP were part of the professional team engaged in the project, TYP being appointed as Architect and HLP being appointed as Mechanical and Electrical Engineers.
   (3) Hall were the electrical sub-contractors for the building's generator system. The form of sub-contract ("the sub-contract") was DOM/1 1980 Edition with amendments 1-3 and 5-9 (File B Tab 55). Hall entered into a warranty with CRS and Wimpey dated 11th October 1993.
   (4) The requirements of Clause 22A of the main contract were met by a joint names policy with CGU ("the joint names insurance"), which insured Wimpey, CRS and Hall (File B Tab 52).
   (5) On 16th March 1995, after the intended completion date but before Practical Completion, a fire occurred at the site when the generator was being commissioned. The building was extensively damaged.
   (6) CRS allege that the fire resulted from negligence or breach of contract on the part of both TYP and HLP. The losses claimed by CRS fall into three categories:
      (i) the cost of reinstatement works ("Schedule 1 losses" - File A Tab 3)
      (ii) the cost of associated professional fees ("Schedule 2 losses" - File A Tab 4)
      (iii) losses consequential on the delay to the project ("Schedule 3 losses - File A Tab 5).
   (7) In their turn, TYP and HLP have alleged that the fire was the result of breaches of the main contract by Wimpey and breaches of warranty by Hall.
   (8) The fire was covered by the joint names policy so that the joint names insurance covered the cost of the reinstatement works and the related professional fees. Accordingly the Schedule 1 and Schedule 2 losses were borne by the joint names insurers, the CGU.
   (9) The Schedule 3 losses were borne by a different insurer, who insured CRS for consequential losses.
   (10) The contractual date for completion was 26.12.94. During the course of the works TYP issued extensions of time up to 18.9.95. TYP certified Practical Completion of the works on 26.2.96 and on 21.11.97 issued a certificate of non-completion pursuant to clause 24 of the main contract. Wimpey paid liquidated damages to CRS for the period 18.9.95 to 26.2.96, that is 23 weeks. Accordingly, the whole of the time from the original contractual completion date to the date of Practical Completion is accounted for either by the grant of an extension of time or the deduction of liquidated damages.

3. The statement of assumed facts ended in these terms:
   (11) ***Assumptions***
   It should be assumed (for present purposes only) that the allegations can be proved and that the fire therefore resulted to a greater or lesser extent from breaches of obligation on the part of each and all of TYP, HLP, Wimpey and Hall.

   (12) Issues

On the assumed facts and having regard to the provisions of the main contract, the sub-contract, the joint names insurance and the Civil Liability (Contribution) Act 1978, are:
(i) Wimpey and/or
(ii) Hall liable to make contribution to HLP and TYP in respect of:
(a) Schedule 1 of the Statement of Claim (cost of remedial works)?
(b) Schedule 2 of the Statement of Claim (cost of professional fees)?
(c) Schedule 3 of the Statement of Claim (consequential losses)?

4. The judge set out his conclusions at the end of his judgment under appeal in the following terms:
(1) Wimpey and Hall have never been liable in respect of any damage arising out of the fire, neither could such liability be established.
(2) The answers to the three questions are:
(i) No.
(ii) No.
(iii) No.

5. It was common ground that CRS's insurers, acting through rights of subrogation, could not pursue in CRS's name an action against Wimpey or Hall, since they were insured against the same risk under the same insurance policy. This is the effect of the judgment of Lloyd J in ***Petrofina (UK) Ltd v Magnaload Ltd*** [1984] 1 QB 127. He considered that the claim would be barred by circuity of action since those defendants would simply pass the claim on to the insurers who had caused the action to be brought in the first place. I will consider this reasoning later in this judgment but, as I have said, nobody questioned the existence of the principle.

6. The defendants say, however, that the existence of this principle is not effective to prevent them from claiming contribution against Wimpey and/or Hall pursuant to Section 1(1) of Civil Liability (Contribution) Act 1978 ("the 1978 Act."). Wimpey and Hall successfully resisted this contention before the judge on two grounds. The first was that they said that the application of the ***Petrofina*** principle meant that they were not *"other persons liable in respect of the same damage"* within the meaning of that section. The second, which arose quite apart from the ***Petrofina*** principle, was that they had a complete defence as a matter of contract to any claim CRS might bring against them, and for this reason they were once again not "other persons liable in respect of the same damage" within the meaning of Section 1(1) of the Act.

7. In order to understand the issues that arise on this appeal it is necessary first to say something about the contractual position as between CRS (the building owner), Wimpey (the main contractor), and Hall, who were the domestic sub-contractors responsible for the design and installation of the electrical works which formed the site of the fire. I would comment at this stage, however, that the agreed assumptions on which this preliminary issue was tried set the case off on the wrong foot because by Assumption 11 they assumed a breach of obligation by Wimpey and Hall in spite of the presence of a contractual framework involving the institution of a joint names all risks insurance policy and of a contract which precluded the need for any investigation into the existence, or otherwise, of legally enforceable duties in the event of a fire during the course of the works.

8. The main contract between CRS and Wimpey was an "**inclusive price**" "**new-build**" contract in the form described in Assumption 1. Clause 2(1) set out Wimpey's obligations in unambiguous terms: "*The Contractor shall upon and subject to the Conditions carry out and complete the Works in compliance with the Contract Documents ...*"

9. Clauses 20 and 21 are concerned with injury to persons and to property other than the Works (see clause 20.3.1), and with Wimpey's obligation to take out and maintain appropriate insurance in respect of claims arising out of its liability as identified in clause 20. Clause 20.2 is concerned with Wimpey's liability to indemnify CRS in broad terms for injury or damage to property (other than the Works) caused by its negligence, breach of statutory duty, omission or default. In this regard its wording is different from its predecessor, whose effect was considered by this court in *Surrey Heath BC v Lovell Construction Ltd* (1990) 48 BLR 108.

10. Clause 22 is concerned with the insurance of the Works. The Parties agreed that Wimpey should take out and maintain a Joint Names Policy for All Risks Insurance pursuant to clause 22A. By clause 22.2 All Risks Insurance was defined to mean: *"insurance which provides cover against any physical loss or damage to work executed and Site Materials."*

11. Clause 22.3.1 provides: *"The Contractor where clause 22A applies ... shall ensure that the Joint Names Policy referred to in clause 22.A.1 ... shall either provide for recognition of each Sub-Contractor nominated by the Architect as an insured under the relevant Joint Names Policy or include a waiver by the relevant insurers of any right of subrogation which they may have against any such Nominated Sub-Contractor in respect of loss or damage by the Specified Perils to the Works and Site Materials where clause 22A ... applies ..."*

12. Clause 22.3.2 provides that these provisions in regard to recognition or waiver shall also apply to Domestic Sub-Contractors (such as Hall). By clause 1.3 the specified perils are defined to include fire.

13. The insurance required by clause 22A.1 is All Risks Insurance for the full reinstatement value of the Works (plus the percentage, if any, to cover professional fees stated in the Appendix to the contract). In the event of loss or damage to the Works which is covered by the insurance, clause 22.4 provides for what is to happen:

    "22A.4.1 If any loss or damage affecting work executed or any part thereof or any Site Materials is occasioned by any one or more of the risks covered by the Joint Names Policy referred to in clause 22A.1 ... then, upon discovering the said loss or damage, the Contractor shall forthwith give notice in writing both to the Architect and to the Employer to the extent, nature and location thereof.

    22A.4.2 The occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under or by virtue of this Contract.

    22A.4.3 After any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 22A.1 ... has been completed the contractor with due diligence shall restore such work damaged, replace or repair any such Site Materials which have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

    22A.4.4 The Contractor, for himself and for all ... Domestic Sub-Contractors who are, pursuant to clause 22.3, recognised as an insured under the Joint Names Policy referred to in clause 22A.1 ... shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 22A.4.1 to the Employer. The Employer shall pay all such monies (less only the percentage, if any, to cover professional fees stated in the Appendix) to the Contractor by instalments under certificates of the Architect issued at the Period of Interim Certificates.

    22A.4.5 The Contractor shall not be entitled to any payment in respect of the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris other than the monies received under the aforesaid insurance."

14. Clauses 23 and 24 provide in familiar terms for the dates of possession and completion and for damages for non-completion, and clause 25 gives the Architect power to extend the time for completion appropriately in the event that he is satisfied that the completion of the Works are likely to be delayed beyond the original completion date by a "relevant event" (an expression which is defined to include loss or damage occasioned by fire: see clauses 25.4.3 and 1.3).

15. The sub-contract between Wimpey and Hall in Form DOM/1 is in similar terms. Clause 8A.1 provides: *"The Contractor shall, prior to the commencement of the Sub-Contract Works, ensure that the Joint Names Policy referred to in clause 22A of the Main Contract Conditions shall be so issued and endorsed that, in respect of loss or damage by the Specified Perils to the Works and Site Materials insured thereunder, the Sub-Contractor is either recognised as an insured under the Joint Names Policy or the insurers waive any rights of subrogation they may have against the Sub-Contractor..."*

16. Clause 8A.2.1 provides: *"... the Sub-Contractor shall ... be responsible for the cost of restoration of Sub-Contract work lost or damaged, replacement and repair of Sub-Contract Site Materials and removal and disposal of any debris arising therefrom ... except to the extent that the loss or damage to the Sub-Contract Works or Sub-Contract Site Materials is due to:*

    one or more of the Specified Perils (whether or not caused by the negligence, breach of statutory duty, omission or default of the Sub-Contractor or any person for whom the Sub-Contractor is responsible) ..."

17. Clause 11 of the sub-contract contains familiar provisions for the extension of the sub-contract time by reason of delay caused by a "relevant event" such as fire.

18. CRS and Hall were of course not in direct contractual relations, but by a Deed executed between all three parties on 11th October 1993 Hall warranted to CRS that it had exercised and would exercise all reasonable skill in the design of the sub-contract works, the selection of the kinds of materials and goods from them, and the specification of any relevant performance specification or requirement.

19. As appears from item (4) of the Assumed Facts, pursuant to their obligations under clause 22A of the main contract Wimpey procured the all risks joint names policy with CGU which insured CRS as employer, Wimpey as contractor, and Hall as sub-contractor to Wimpey's contract.

20. The provisions of Section 1(1) of the Civil Liability (Contribution) Act 1978 which are relevant to the issues we have to decide on this appeal are in these terms:

> *"1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise). ...*
>
> *(3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based. ...*
>
> *(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage ...."*

21. The first matter we have to consider on this appeal relates to the proper interpretation of the Civil Liability (Contribution) Act 1978. This Act represented the second stage of Parliament's efforts to fill what were seen to be unfair gaps, or to remedy unfair anomalies, in the law relating to contribution. The first of these stages was accomplished in 1935 when the Law Reform (Married Women and Tortfeasors) Act was enacted following the Third Interim Report of the Law Revision Committee (1934) Cmd 4637. Section 6 of this Act addressed the injustice which prevented one joint tortfeasor from recovering contribution from another in certain circumstances on the basis that *"no man can claim damages when the root of the damage which he claims is his own wrong"* (see ***Weld-Blundell v Stephens*** [1920] AC 956 per Lord Dunedin at p 976). In paragraph 7 of its report the Law Revision Committee recommended that "*the doctrine of no contribution between tortfeasors"* should be altered as speedily as possible, and Parliament responded promptly to this recommendation. At this first stage of the reform process no wider statutory revision of the law relating to contribution was under consideration.

22. Section 6(1)(c) of the 1935 Act provided that *"where damage is suffered by any person as a result of a tort .. any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage"*. The expression *"who ... would if sued have been liable"* gave rise to difficulties in interpretation. These difficulties were explained by McNair J in ***Harvey v R G O'Dell Ltd*** [1958] 2 QB 78 at pp 108-110. McNair J pointed out that on the one hand it was unreasonable and unjust that the third party should be exposed to suit many years after she had by lapse of time become protected as against the original injured party. On the other hand it was unreasonable that the defendants' rights against their joint tortfeasor should be determined by the whim of the injured party in not taking proceedings against the other tortfeasor in due time or at all. Because these arguments based on inconvenience seemed to be very equally balanced, McNair J could see no valid reason not to adopt what he regarded as the literal meaning of the words. He therefore interpreted them as meaning "who would, if sued at any time, have been liable" - that is, he said, "held liable".

23. In ***George Wimpey & Co Ltd v BOAC*** [1955] AC 169 the House of Lords did not achieve a majority consensus on the meaning of these words. By a majority of 3-2, however, it upheld a ruling by this court to the effect that a joint tortfeasor could escape liability in contribution proceedings if it had been unsuccessfully sued by the injured person in an action brought outside the relevant limitation period. When the Law Commission subsequently undertook a comprehensive examination of the law on

contribution, it concluded in paragraph 60 of its report (see (1977) Law Com No 79) that this result seemed unsatisfactory, and it recommended that it should be reversed by legislation.

24. In the same report the Law Commission also referred to problems that had arisen in connection with the lack of clarity in the language used in the 1935 Act in this context, and it suggested a different form of words as a remedy (see paragraphs 25 and 59 of the report).

25. The wording of its suggested remedy was not in fact adopted by Parliament. Clause 3(1) of the Law Commission's draft Bill had read: *"Subject to the following provisions of this section, any person who is liable in respect of any damage suffered by another person* ***at the time when the damage in question occurs*** *may recover contribution from any other person who is liable in respect of the same damage* ***at that time*** *(whether jointly with him or otherwise)."* (Emphasis added).

26. This language reflected the approach adopted by the dissenting minority (Lord Porter and Lord Keith of Avonholm) in ***George Wimpey & Co Ltd v BOAC*** [1955] AC 169. The draftsman of the Bill which became the 1978 Act preferred, however, to use different language. If one inserts the effect of the definition section 1(6) into section 1(1), the resulting provision reads: *"Subject to the following provisions of this section, any person whose liability in respect of any damage has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage may recover damage from any other person whose liability in respect of the same damage has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage."*

27. Section 1(3) of the Act, whose terms I have set out in paragraph 20 above, has the effect of reversing the decision in ***Wimpey v BOAC***.

28. The first issue we have to decide on this appeal is whether the different drafting techniques adopted by the draftsman of the 1978 Act betokened a change of meaning from the scheme recommended by the Law Commission or whether the draftsman was using different words to achieve the same end. Mr Slater QC, who appeared for CRS, contended that the time for determining whether the "***other person***" was liable in respect of the same damage was the time at which the damage occurred. Mr Bartlett QC, who appeared for Wimpey, contended that the relevant time was the time when contribution is being sought to be recovered. In ***Royal Brompton Hospital NHS Trust v Watkins Gray International (UK)*** (CAT 10 April 2000) this court held in a professional negligence claim that the damage to the claimant occurred at the time of the negligent certification, but that is a different matter.

29. Mr Slater called in aid in support of his preferred construction the decision of Hobhouse J in ***The Benarty (No 2)*** [1987] 3 All ER 1032. In that case a ship's cargo had been damaged on a voyage from Europe to Indonesia, and the cargo owners brought an action against both the shipowners and the charterers in respect of the damage. The English court possessed jurisdiction in the action against the charterers (see p 1039c-d), but the charterers obtained a stay of the action against them, relying on a provision of the bills of lading which conferred exclusive jurisdiction in favour of the Indonesian courts in relation to disputes arising under the bills. The shipowners thereupon claimed contribution from the charterers, and the charterers applied for an order striking out the contribution notice on the basis that liability could not be established in an action brought against them in England and Wales because of the stay.

30. Hobhouse J rejected this contention for two reasons. The first was that he considered that Section 1(6) of the 1978 Act imposed a substantial, or remedial, criterion for the concept of liability that was being used. He said that the subsection was concerned with the character of the liability and not with any merely procedural considerations as to how it might be enforced. His second reason was that even if a procedural criterion was applied, as the charterers contended, the requirements of the Act were satisfied because their liability had the character of a liability at the time the damage was suffered.

31. He was led to this conclusion by the language of Section 1(3) of the Act. He said that this sub-section made it clear that provided the respondent to the contribution claim was initially liable in respect of the relevant damage, it did not matter that he had ceased to be liable by the time the claim for contribution was made (subject to the exception mentioned in the second part of the sub-section).

32. Mr Bartlett's construction gains some support, as Hobhouse J recognised at p 1039e, from the language of subsection (6), which uses the words "could be established" as opposed to the words "could be or

could have been established". Hobhouse J went on, however, to deploy a number of reasons why he thought that this construction should be rejected. He said that if the time for determining whether a respondent to a contribution notice was a person "liable in respect of the same damage" was the time when the contribution notice was issued, it would subject the party claiming contribution to what might have been a procedural lottery which had nothing to do with the merits or demerits of his right to claim contribution.

33. He observed that the question whether the action should be stayed as against the charterers had been taken to the Court of Appeal in 1984, and that if the contribution notice had been served before the Court of Appeal's decision, no point could have been taken under the 1978 Act, because the potential liability of the charterers and the potential right of the shipowners to a contribution had undoubtedly existed before that time. He could see no justification in the wording of the 1978 Act for saying that the subsequent events which had occurred had deprived the shipowners of their previous right to claim a contribution. Similarly, it seemed to him absurd to say that the right of contribution subsisted when the injured party's action had been dismissed for want of prosecution (because subsection 1(3) gives continuing effect to the decision of this court to this effect in *Hart v Hall and Pickles Ltd* [1969] 1 QB 405), but that it did not subsist when it had merely been stayed by reason of an exclusive jurisdiction clause giving primacy to the courts in another country.

34. Mr Bartlett, for his part, referred us to the recent judgment of Judge Humphrey Lloyd QC in *Oxford University Fixed Assets Ltd v Architects Design Partnership* (1999) 64 Con LR 12. In that case the plaintiffs were the building owners, the defendants the architects, and Wimpey Construction Ltd the main contractors in connection with a contract to construct a building on JCT 1980 terms. In July 1994 the architects issued a final certificate under clause 30.9 of the contract, and in July 1997 the plaintiffs issued a writ against them claiming damages for negligence and breach of contractual duty of care. It appears from page 29 of the report that the plaintiffs complained that the architects did not secure that Wimpey erected the blockwork properly or that Wimpey put right the defects created by the damp blockwork. Above all, the plaintiffs complained that the architects negligently issued a final certificate when they knew or ought to have known that the building was still defective, as a result of which the plaintiffs had or would have to put right the defects at their own cost, since in any proceedings against Wimpey they would have been unable to establish that Wimpey was liable because of the effect of the final certificate

35. The architects denied liability and sought contribution from Wimpey in third party proceedings. Wimpey for their part contended that the architects' final certificate had effect as conclusive evidence of the matters set out in clause 30.9.1 of the contract, and that they could not properly be regarded as another person liable in respect of the same damage within the meaning of Section 1(1) of the 1978 Act.

36. In resolving this issue, the judge applied a recent dictum of Sir John May in ***Birse Construction Ltd v Haiste Ltd*** [1996] 1 WLR 675 at p 680B-C: "*I remind myself ... that the statute which has to be construed is concerned with contribution, that is the help that the law requires one party to give to another to satisfy their common obligations to a third person. The Act is in my opinion concerned with the relatively simple sharing of existing liability. I would be surprised if against this background the Act created potentially complicated and some might say tortuous legal relationships."*

37. Applying this approach, the judge held that Wimpey's liability to the plaintiffs in respect of the same damage was not one which had been or could be established within the meaning of Section 1(6) of the Act. It could not be established because of the evidential strength of the architects' final certificate. He rejected an argument that the final certificate merely constituted a cessation of liability of the type catered for in Section 1(3). In this context he said at pp 30-31: *"I am unable to accept that the final certificate constitutes a cessation of liability under s 1(3) but for reasons which in my judgment support Mr Taverner's case. The purpose of the subsection was evidently to reverse the effect of* ***George Wimpey Ltd v British Overseas Airways Corp****, ie a person who has been sued to judgment and found not liable may still be required to contribute unless the right to require contribution is itself barred by limitation or prescription (see* ***Nottingham Health Authority v Nottingham City Council****). Subsection (3) is thus dealing solely with a technical point: a person cannot resist being called upon to contribute simply because liability has ceased. The person claiming contribution must nevertheless still establish that prior to the cessation the person was liable, as defined by s 1(6).*

If the liability is in contract the question will be whether a breach of contract can be established. All the facts and all the terms of the contract have to be examined. If the contract were to say that no action shall be brought in respect of a certain default which is otherwise recognised as a breach of contract then liability for that breach could not be established. It would be perverse to describe that situation as one where liability has ceased. I can see no material distinction between that situation and the present one. The contract contemplates that liability to the employer will depend on whether or not a final certificate has or has not been issued. If it has not been issued because the contractor has satisfactorily rectified a breach of contract then liability can be established; if it has not been issued because it has wrongly been withheld but otherwise the work is in accordance with contract liability will not be established; if it has been issued but the work is not in accordance with the contract then it is not that liability exists and has ceased: it is that liability cannot be established."

38. Mr Bartlett had no difficulty in accepting that ***The Benarty (No 2)*** was correctly decided, on the grounds that the definition contained in Section 1(6) *("liability which ... could be established in an action brought against him in England ...")* was concerned with the substantive character of the liability and not with merely procedural questions as to how it could be enforced, whether in England or somewhere else. He also did not disagree with the second reason for Hobhouse J's decision at p 1039d-f, if the judge was to be understood as saying merely that a cessation of liability in England, in the sense that there had been a stay of the English action, did not take away the right of contribution.

39. He urged us, however, not to interpret Hobhouse J's remarks at p 1039d-f in a sense that would be inconsistent with the terms of the 1978 Act or with the subsequent decision in the ***Oxford University*** case. His arguments ran along the following lines.

40. First, Section 1(1) refers to recovering contribution from a *"person liable in respect of the same damage"*. This expression naturally refers to liability to the injured party as seen at the time when contribution is being sought. He might have added that this was the interpretation suggested by Sir John May at p 680C ("*the relatively simple sharing of existing liability")* and, indeed by Nourse LJ at p 682G-H in ***Birse Construction Ltd v Haiste Ltd*** [1996] 1 WLR 675.

41. Next, he said that Section 1(6) confirms this construction. It refers to liability *"which has been or could be established in an action"*. He suggests that the question the judge must ask himself at the time when contribution is being sought is this: Has liability to the injured party been established, or could it be established? The question is not: Could it have been established?

42. He argued that the existence and terms of Section 1(3) also confirmed this interpretation. If the judge had to ask himself "Was there liability at the time when the damage was suffered by the injured party?" this sub-section would be superfluous, because if this was the relevant question it would be irrelevant that liability had ceased since that time.

43. He went on to submit that the last part of Section 1(3) is similarly concerned with the position at the time when contribution is being sought. The judge must ask himself at that time, and not in relation to any earlier time: Has the person from whom contribution is sought acquired a prescriptive right which prevents liability being established by the person who suffered the damage? He said that the draftsman of the 1978 Act would have been well aware that the passing of an ordinary period of limitation merely barred the remedy, as opposed to extinguishing the right. Where the injured party's right to recover is extinguished, however, the court cannot order contribution.

44. Mr Bartlett said that it was only under the first part of Section 1(3) that, exceptionally, the court was directed to look at the position at an earlier date than the time when contribution is being sought. He said that this sub-section was included because what he called "the foundational principle" - that there can only be contribution where the third party is liable to the claimant - does not provide an answer to the question whether the principle does or does not apply where the claimant cannot himself recover for some procedural reason, such as the expiry of an ordinary limitation period or the dismissal of his claim for want of prosecution. Subsection (3) provides the answer that in such cases the third party is to be treated as liable within the meaning of subsection (1) notwithstanding that he has "ceased to be liable" since the time when the damage occurred (unless the case is governed by the second part of that sub-section). Mr Bartlett submitted that what counted as a cessation in this context should be construed in

the light of the purpose of including this provision which was to reverse the injustice of the *Wimpey v BOAC* decision (while maintaining the authority of ***Hart v Hall and Pickles Ltd*** [1969] 1 QB 405). He said that the sub-section was not designed to impose a new liability on a third party where in substance he was not liable to the claimant.

45. I accept these submissions. As Mr Bartlett accepted, they do not affect the decision in ***The Benarty (No 2)*** at all, since at the time when the judge was considering whether to order contribution the charterers' liability to the shipowners had not ceased for a reason permitted by Section 1(3). It could be established in an action brought against them in England and Wales, even if that action was not in fact available to the owners because of the procedural bar. On the other hand, they provide a satisfactory solution to the problem with which Judge Humphrey Lloyd QC was grappling in the ***Oxford University*** case.

46. Since the hearing ended, the court has had access to the transcript of the judgment of this court in ***Logan v Uttleford DC*** (CAT 14 June 1984). We are not concerned in the present case about the issue with which the court was principally concerned in that case, to which another division of this court has returned recently in ***Heaton v AXA Equity & Law*** (CAT 19th May 2000). However, during his review of the different provisions of the 1978 Act in *Logan*, Sir John Donaldson said at p 5G: *"The material time in relation to the determination of liability is probably the moment when proceedings are begun for the purpose of enforcing the claim for contribution or when that claim is first advanced in the course of existing proceedings."*

47. We do not have to decide on this appeal whether the material time is the moment when separate proceedings are instituted for the purpose of claiming contribution or the moment when the judge decides at the trial of such an action whether or not to order contribution. We have received written submissions from three of the parties about the effect of Sir John Donaldson's dictum, but for the reason I have given, it is not necessary to explore this matter further in the present appeal.

48. Mr Bartlett went on to argue that on the facts of the present case Wimpey was not liable to CRS at the time of the trial of the preliminary issue because of the effect of the co-insurance provisions in the JCT contract. To treat Wimpey as liable to pay contribution would, he said, disturb the contractual arrangements that were in place at the time of the damage, and would deprive Wimpey of the benefit of the insurance it was agreed in clause 22A it should have.

49. It is of course trite law that if A has a right of action against B, the fact that A has insured the whole of its loss with C does not bar A's right of action against B: it merely opens up the possibility that C, having paid A's losses in full, may choose to stand in A's shoes and sue B in A's name pursuant to rights of subrogation.

50. Mr Bartlett accepted the existence of this general rule. He observed that it was this rule which entitled CRS's insurers to maintain this action in CRS's name against TYP and HLP notwithstanding the fact that CRS had been indemnified in full by its insurers. He maintained, however, that the situation was different as between CRS and Wimpey, because they had agreed that any losses which either of them suffered if the works on site were damaged by fire should be covered by the all risks insurance policy taken out by Wimpey in their joint names. Accordingly, once the insurers had indemnified CRS, they could not bring an action in CRS's name against Wimpey because the same insurers had agreed to indemnify Wimpey under the same policy in respect of the same losses in pursuance of the agreement made between CRS and Wimpey to this effect.

51. In those circumstances, Mr Bartlett argued, Wimpey was not liable to CRS in respect of the damage in question because the parties had agreed that that damage should be covered by insurance, and also because CRS's insurers were barred by the doctrine of circuity of action from suing Wimpey in CRS's name once they had indemnified CRS. Alternatively, he maintained that there was an implied term of the joint insurance policy to the effect that once the insurers had settled a claim made under the policy by one co-assured they would refrain from using their rights of subrogation to pursue a right of action in that assured's name to recover those losses from another co-assured.

52. Before expressing any opinion of the correctness of these submissions, I must first refer to some decided cases which throw light on the issues we have to determine.

53. In ***Petrofina (UK) Ltd v Magnaload Ltd*** [1984] 1 QB 127 the contractual background was very similar to the present case. Main contractors engaged in works for the extension of an oil refinery had taken out a contractors' all risks insurance policy whereby insurers agreed to indemnify the insured against loss and damage to the property. Those insured under the policy included the main contractors, the relevant sub-contractors, and two plaintiffs who owned interests of different kinds in the refinery. In the events which occurred after a gantry had become displaced and caused substantial damage to the works, Lloyd J was satisfied that the relevant plaintiffs (whose claim was settled by the insurers who brought the action under their rights of subrogation) and the relevant defendant sub-contractors were both fully insured under the same policy with the same insurers in relation to the same property.

54. He observed at p 136 that in the case of a building or engineering contract, where numerous different sub-contractors might be engaged, there could be no doubt about the convenience from everybody's point of view, including, he would think, the insurers, of allowing the head contractor to take out a single policy covering the whole risk, that was to say, covering all contractors and sub-contractors in respect of loss of or damage to the entire contract works. Otherwise each sub-contractor would be compelled to take out his own separate policy. This would, he said, mean, at the very least, extra paperwork; at worst it could lead to overlapping claims and cross-claiming in the event of an accident.

55. He was satisfied that there was nothing which made it illegal for a sub-contractor to insure the entire contract works in his own name, since it had a *"**pervasive interest**"* in the entire property. In this context he relied on the decision of the Supreme Court of Canada in ***Commonwealth Construction Co Ltd v Imperial Oil*** (1977) 69 DLR (3d) 558 in which de Grandpre J said at pp 562-3: *"On any construction site, and especially when the building being erected is a complex chemical plant, there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole. Should this possibility become reality, the question of negligence in the absence of complete property coverage would have to be debated in Court. By recognising in all tradesmen an insurable interest based on that very real possibility, which itself has its source in the contractual arrangements opening the doors of the job site to the tradesmen, the Courts would apply to the construction field the principle expressed so long ago in the area of bailment. Thus all the parties whose joint efforts have one common goal, eg the completion of the construction, would be spared the necessity of fighting between themselves should an accident occur involving the possible responsibility of one of them."*

56. Lloyd J went on to hold at pp 139-140 that in those circumstances the fact that the defendant sub-contractors were fully insured under the same policy as covered the main contractors and the plaintiff refinery owners was sufficient to defeat the insurers' subrogated claim against them. He observed that in the ***Commonwealth Construction*** case and in the American cases mentioned in it, it had been assumed that it followed automatically that the insurers could have no right of subrogation. In *Commonwealth Construction* this was described as a basic principle, and in one of the American cases it was said that the rule was too well-established to require citation. The only discussion of the reason for the rule which Lloyd J could find in any of these cases was a brief reference in the ***Commonwealth Construction*** case to the English case of ***Simpson and Co v Thomson*** (1877) 3 App Cas 279. De Grandpre J said at p 561: *"The starting point of that submission is the basic principle that subrogation cannot be obtained against the insured himself. The classic example is, of course, to be found in **Simpson & Co et al v Thomson, Burrell et al** (1877) 3 App Cas 279. In the case of true joint insurance, there is, of course, no problem; the interests of the joint insured are so inseparably connected that the several insureds are to be considered as one with the obvious result that subrogation is impossible. In the case of several insurance, if the different interests are pervasive and if each relates to the entire property, albeit from different angles, again there is no question that the several insureds must be regarded as one and that no subrogation is possible. In **Agnew-Surpass Shoe Stores Ltd v Cummer-Yonge Investments Ltd** (1975) 55 DLR (3d) 676 Pigeon J wrote at p 691: `**When a building in construction is insured for the benefit of the owner and contractor, certainly the latter is not expected to be held liable for loss caused by the negligence of his workmen.**' Although this statement may be said to be an obiter, because made in a landlord-tenant case, it does, in my view, express correctly the principle."*

57. In ***Simpson v Thomson*** (1877) 3 App Cas 279 the House of Lords held that insurers who had settled a shipowner's claim for damage to his ship which had been caused when it collided with another ship could not exercise rights of subrogation in his name against the owner of the other ship, because he

owned that ship as well. After considering earlier decisions, Lord Cairns LC said at p 286: *"My Lords, these authorities seem to me to be conclusive that the right of the underwriters is merely to make such claim for damages as the insured himself could have made, and it is for this reason that (according to the English mode of procedure) they would have to make it in his name: and if this is so, it cannot of course be made against the insured himself."*

58. In ***Petrofina*** Lloyd J said at pp 139-140: *"The question whether there is a fundamental principle of the law of insurance that insurers can never sue one co-insured in the name of another came up in The Yasin [1979] 2 Lloyd's Rep 45. In that case I said that I was not satisfied that there was any such fundamental principle as had been suggested: the reason for the rule seemed to me to rest on ordinary principles of circuity. This idea has since been adopted by the current editors of* ***MacGillivray & Parkinson*** *on Insurance Law, 7th ed: `**The crucial question, therefore, in any case involving joint assured is whether the liability of one co-assured to the other is one of the matters covered by the policy.**' Thus where a bailee is insured against liability to the bailor, and the bailor is insured under the same insurance, it is obvious that the insurer could not exercise a right of subrogation against the bailee: circuity would be a complete answer. But in The Yasin I went on to contrast the position where the bailee had insured, not his liability to the bailor, but the goods themselves. Now that the matter has been argued again, I have come to the conclusion that the contrast I was seeking to draw is fallacious. Whatever be the reason why an insurer cannot sue one co-insured in the name of another, and I am still inclined to think that the reason is circuity, it seems to me now that it must apply equally in every case of bailment, whether it is the goods which the bailee has insured, or his liability in respect of the goods. The same would also apply in the case of contractors and sub-contractors engaged on a common enterprise under a building or engineering contract."*

59. The correctness of this decision was not questioned, except on an immaterial point, in *Mark* ***Rowlands Ltd v Berni Inns Ltd*** [1986] 1 QB 211. In that case a tenant had covenanted to pay its landlord an insurance rent equal to the amount spent by the landlord in insuring the basement against risks which included the risk of fire. Although the tenant had ordinary repairing obligations under its lease, the lease relieved it of its obligation to repair and to pay rent in the event of damage to the basement by fire. Although the tenant was not co-insured with its landlord under the policy, this court said that in the circumstances the insurance was intended to enure for its benefit to the extent of its interest in the subject-matter of the insurance.

60. Much of the judgment of Kerr LJ is devoted to addressing the problem caused by the fact that the tenant was not named as a co-assured in the policy. He said quite briefly at p 229A of the *Petrofina* and *Commonwealth Construction* cases that as the defendants were co-insured with the plaintiff under the same policy, it necessarily followed that the plaintiff's insurers in those two cases were unable to assert any right of subrogation. His judgment is of interest in the present context, however, because of the way he interpreted the intentions of parties to a contract (in that case a lease) who had agreed that the risk of fire damage (whether or not caused by the negligence of either of them) should be covered by insurance.

61. At pp 229-232 of his judgment Kerr LJ considered what he called an impressive series of North American authorities which were generally to the effect that in circumstances like these a tenant could rely on its landlord's covenant to insure the building against fire, and could refrain from insuring against any liability to the landlord for its own negligence. In rejecting submissions to the contrary effect, he said at pp 232G-233C: *"An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the plaintiff agreed to provide in consideration of, inter alia, the insurance rent paid by the defendant. The intention of the parties, sensibly construed, must therefore have been that in the event of damage by fire, whether due to accident or negligence, the landlord's loss was to be recouped from the insurance moneys and that in that event they were to have no further claim against the tenant for damages in negligence.*

Another way of reaching the same conclusion, on which [counsel] also relied, is that in situations such as the present the tenant is entitled to say that the landlord has been fully indemnified in the manner envisaged by the provisions of the lease and that he cannot therefore recover damages from the tenant in addition, so as to provide himself with what would in effect be a double indemnity. Although the receipt of insurance moneys by an innocent party is of course normally no defence to a wrongdoer (see ***Bradburn v Great Western Railway Co*** *(1874) LR 10 Ex 1) [counsel] relied on a number of passages in* ***Parry v Cleaver*** *[1970] AC 1, 13 to show that considerations of `**justice, reasonableness and public policy**' (per Lord Reid) may require exceptions to this general principle. I*

do not think it necessary to elaborate upon this line of argument in the present case save to say that I accept it and regard it as complementary to the conclusion which is to be derived from the construction and effect of the terms of the lease itself, as indicated above."

62. The importance of careful attention to the terms of the contract actually made by the parties in cases like these is illustrated by the decision of this court in ***Surrey Heath Borough Council v Lovell Construction Ltd*** (1990) 48 BLR 108. The court was concerned with the JCT Standard Form with Contractors Design 1981 Edition, in which Clause 20.2 did not, as in the present case, expressly exclude the Works from the property in relation to which the contractors provided the owners with an indemnity if they damaged it through their negligence. In those circumstances the court upheld the entitlement of the owners, suing in their own right, to recover from the contractors as damages for negligence such sums for damage to the works by fire as they had not recovered under the clause 22A insurance policy. After distinguishing the ***Petrofina*** and ***Mark Rowlands*** cases as cases which turned on the nature of subrogation, Dillon LJ said of the latter decision: *"So far as the covenants in the lease were concerned, which were the relevant contractual provisions, the case affords no foundation whatsoever for any submission that an insurance provision necessarily and by rule of law overrides any other contractual agreement between the parties.*

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

63. In two cases he decided in the early 1990s Colman J carried out a more detailed study of the reasons why sub-contractors who are named as co-assured on an insurance policy of this general type are entitled to resist a claim brought against them by insurers in the name of another person named as a co-assured in that policy under rights of subrogation. In ***Stone Vickers Ltd v Appledore Ferguson Ltd*** [1991] 2 Lloyds Rep 288 he said at p 302: *"Where a policy is effected on a vessel to be constructed and it is expressed to be for the benefit of sub-contractors as co-assured, if a particular sub-contractor negligently causes loss of or damage to the whole or part of the vessel which has been insured under the policy and the sub-contractor has an insurable interest in the vessel, it is not open to underwriters who have settled the insured shipbuilders' claim to exercise rights of subrogation in respect of the same loss and damage against the co-assured sub-contractor. To do so would be completely inconsistent with the insurer's obligation to the co-assured under the policy. The insurer would in effect be causing the assured with whom he had settled to pursue proceedings which if successful would at once cause the co-assured to sustain a loss arising from loss or damage to the very subject-matter of the insurance in which that co-assured has an insurable interest and a right of indemnity under the policy.*

In my judgment so inconsistent with the insurer's obligation to the co-assured would be the exercise of rights of subrogation in such a case that there must be implied into the contract of insurance a term to give it business efficacy that an insurer will not in such circumstances use rights of subrogation in order to recoup from a co-assured the indemnity which he had paid to the assured. To exercise such rights would be in breach of such a term. In such a case the law recognises the rights of the co-assured by enabling him to rely on his rights under the policy by way of defence in the proceedings which the insurers have caused to be commenced in breach of their implied obligation under the policy. This is an effective means of enforcing the co-assured's rights and makes it unnecessary for him to join the insurers as third parties in the action."

64. He therefore considered that there was an implied term of the insurance contract in which the shipbuilders and the sub-contractors were named as co-assured to the effect that if the insurers settled a claim from the shipbuilders in relation to the insured risk they would not use rights of subrogation to recoup from the co-assured sub-contractors the indemnity which they had paid to the shipbuilders they assured.

65. In ***National Oilwell (UK) Ltd v Davy Offshore Ltd*** [1993] 2 Lloyds Rep 582 Colman J revisited this issue in the context of an argument to the effect that once the insurers had settled the owners' claim they ceased to be under any liability in respect of the insured property under the relevant insurance policy. It was said to follow that the doctrine of circuity of action mentioned by Lloyd J in ***Petrofina*** could have no application in these circumstances, because the co-assured sub-contractors could not turn to their

insurers to satisfy the claim brought against them for damages for negligence by those insurers in the owners' name.

66. Colman J said at p 613 that he was not persuaded that the views he expressed in the ***Stone Vickers*** case were wrong: *"The explanation for the insurers' inability to cause one co-assured to sue another co-assured is that in as much as the policy on goods covers all the assureds on an all risks basis for loss and damage, even if caused by their own negligence, any attempt by an insurer after paying the claim of one assured to exercise rights of subrogation against another would in effect involve the insurer seeking to reimburse a loss caused by a peril (loss or damage even if caused by the assured's negligence) against which he had insured for the benefit of the very party against whom he now sought to exercise rights of subrogation. That party could stand in the same position as the principal assured as regards a loss caused by his own breach of contract or negligence. For the insurers who had paid the principal assured to assert that they were not free to exercise rights of subrogation and thereby sue the party at fault would be to subject the co-assured to a liability for loss and damage caused by a peril insured for his benefit. As I said in* ***Stone Vickers****, it is necessary to imply a term into the policy of insurance to avoid this unsatisfactory possibility. The implication of such a term is needed to give effect to what must have been the mutual intention (on this hypothesis) of the principal assured and the insurers, as to the risks covered by the policy. On this basis the purported exercise by insurers of rights of subrogation against the co-assured would be in breach of such a term and would accordingly provide the co-assured with a defence to the subrogated claim in the manner which I explained in the passage cited from my judgment."*

67. He concluded at pp 614-5: *"For these reasons I am firmly of the view that the conclusion arrived at by Mr Justice Lloyd in* ***Petrofina*** *was right: an insurer cannot exercise rights of subrogation against a co-assured under an insurance on property in which the co-assured has the benefit of cover which protects him against the very loss or damage to the insured property which forms the basis of the claim which underwriters seek to pursue by way of subrogation. The reason why the insurer cannot pursue such a claim is that to do so would be in breach of an implied term in the policy and to that extent the principles of circuity of action operate to exclude the claim."*

68. This analysis highlights the point made originally by Lloyd J in ***The Yasin*** [1979] 2 Lloyd's Rep 45 when he said at p 55 that the reason why an insurer under a joint insurance policy could not normally exercise a right of subrogation in the name of one co-assured against another co-assured rested not on any fundamental principle relating to insurance, but on ordinary rules about circuity. The circuity objection arose not out of the relationship of the parties as between themselves but out of their relationship with their insurers under the joint policy: viz A claims indemnity from insurer; insurer cannot claim by subrogation in A's name against B, because B will have the defence that the insurer by bringing the action is seeking to benefit from its breach of the term of the insurance policy which obliges it not to bring a subrogated action in these circumstances.

69. I have gone into these matters in some detail because it appears to me that Lloyd J's reference to a defence of circuity of action confuses rather than simplifies the issues we have to decide. The decision of this court in ***Post Office v Hampshire County Council*** [1980] 1 QB 124 rescued this doctrine from the comparative obscurity in which it had rested, except in the minds of those versed in shipping matters, for over 100 years. In the ***Post Office*** case leading counsel for the appellants had argued unsuccessfully (see the report at pp 127-128) that a pre-1875 edition of ***Bullen and Leake's Precedents of Pleadings*** had referred to an equitable doctrine of circuity in certain classes of cases, but that nothing had been heard of it for a hundred years and it had probably never applied to tort cases.

70. This doctrine had its origin in a very different world. In ***Aktieselskabet Ocean v B Harding and Sons Ltd*** [1928] 2 KB 371 Scrutton LJ said at p 385: *"I know of no case, and counsel could refer me to none, where avoiding circuity of action has been held good as a defence, except where the supposed cross-claim arose directly between the parties to the proceedings in which it was used as a defence. The defence had to be used at a time when it was not possible to counterclaim in a proceeding in which a claim was made, and it was strictly limited to cases where, if the plaintiff recovered against the defendant, the defendant could recover exactly the same sum, or if damages, exactly the same measure of damages, against the plaintiff:* ***see Turner v Davies*** *(1670) 2 Wms Saund 150, especially note (2) and* ***Bullen and Leake****, 3rd ed, p 558."*

71. See also ***The Susan V Luckenbach*** [1951] P 197 per Somervell LJ at p 203. In ***Goulandris Brothers Ltd v G Goldman and Sons Ltd*** [1958] 1 QB 74 Pearson J at p 95 distinguished the principles governing the

defence of circuity of action from a defence founded on the principle that a person should not recover from any other person in respect of the consequences of his own wrong, which he described for convenience as *"the equitable defence although it has no special connection with the Court of Chancery"*. That defence, and not the defence of circuity of action, was available where a plaintiff shipowner had limited his liability for a collision so that the amount of his claim for general average contribution was not identical to the claim against him for the loss he had caused. The following year, in ***Ginty v Belmont Building Supplies Ltd*** [1959] 1 All ER 414 the same judge said at p 425: *"... If that were the position, the litigation would go round in a circle, and for that reason it is, in my view, a valid plea of circuity of action. The plea of circuity of action is not usually found in these days because that situation is usually sufficiently provided for by the modern provision for set-off and counterclaim; but it is a valid plea ..."*

72. This antique plea dates from a world in which a counter-claim could not be pleaded in the same action as the claim and where contributory negligence on the part of a plaintiff was usually a complete defence. The reason why I believe that reference to it will tend to confuse rather than clarify in circumstances like the present is that Lloyd J used the expression as if English law made the parties' insurers direct parties to an action when one of them wishes to exercise rights of subrogation in the name of its insured whom it has indemnified in full and to sue another party which is itself insured. As Colman J observed, it is an inappropriate plea if the insurer has provided a full indemnity to one co-assured because it will have discharged its liability under the policy in respect of the losses in question and a second co-assured cannot look to it to pay him those losses a second time. In my judgment it would be much safer to jettison the language of circuity of action and to address the question asked by Dillon LJ in the *Surrey Heath* case: What does the contract provide?

73. When the situation is viewed in this light, I have no hesitation in concluding that the judge was right when he concluded that neither Wimpey nor Hall should be regarded as persons *"liable in respect of the same damage"* so as to open the way to a successful claim for contribution against them. To put it quite simply, they, like CRS, had entered into contractual arrangements which meant that if a fire occurred, they should look to the joint insurance policy to provide the fund for the cost of restoring and repairing the fire damage (and for paying any consequential professional fees) and that they would bear other losses themselves (or cover them by their own separate insurance) rather than indulge in litigation with each other.

74. If new-build works are damaged by fire (being a relevant event under clause 25.4.3) then as between CRS and Wimpey the contract provides that:
    (1) Wimpey is prima facie entitled to an extension of time under clause 25;
    (2) Wimpey must give notice of the damage and of the resulting delay under clause 22A.4.1 and 25.2;
    (3) CRS is not allowed to contend that it has suffered loss and thereby deduct anything from monies falling due to Wimpey; nor can it recoup interim payments it had previously made to Wimpey in respect of Works that had now been destroyed by fire (clause 22A.4.2);
    (4) After the insurance inspection is complete, Wimpey must get on with the reinstatement work (clause 22A.4.3);
    (5) CRS receives the insurance payments and pays them (except for the professional fees element) to Wimpey under interim certificates issued by the architect as the reinstatement work proceeds (clause 22A.4.4);
    (6) The insurance payments constitute Wimpey's only remuneration for the reinstatement work (clause 22A.4.5);
    (7) The architect must grant appropriate extensions of time to Wimpey to cover the delay caused by the fire (clause 25.3).

75. In other words, what are called the Schedule 1 losses and the Schedule 2 losses (the cost of the reinstatement work and the professional fees attendant on that work) are completely provided for under this contractual scheme, and there can be no question of Wimpey being liable to CRS for anything once this contractual scheme has worked itself out even if otherwise allegations of negligence might have been sustained against them. Similarly, so far as the Schedule 3 losses are concerned (being damages at large for delay), the parties have agreed to a tariff of liquidated damages in the event of late completion,

and if the architect grants an appropriate extension of time which covers the delay to the works caused by the fire, not even liquidated damages will be payable. In ***Temloc Ltd v Errill Properties Ltd*** (1987) 39 BLR 30 Nourse LJ said at p 39: *"If (1) clause 24 is incorporated in the contract and (2) the parties complete the relevant part of the appendix ... then that constitutes an exhaustive agreement as to the damages which are or are not to be payable by the contractor in the event of his failure to complete the works on time."*

76. Mr Bartlett observed that a further indication of the fact that the parties intended the consequences of fire damage to be worked out through this contractual insurance scheme and not through a claim and cross-claim based on civil liability can be seen in the fact that the additional cost to his clients of extending the period of the works following a fire falls on them. In many instances an event which generates an extension of time under clause 25 carries with it a right for the contractor to recover its additional loss and expense under clause 26. That clause does not, however, apply to delay caused by fire damage, in respect of which Wimpey must, if so advised, carry its own insurance.

77. Mr Slater argued that whatever might be the position as between CRS and Wimpey, Hall was not a party to that contract so that nothing in those contractual arrangements could provide Hall with a defence to a claim brought against it by CRS for damages for negligence. In response to this argument, Mr Acton-Davis QC, who appeared for Hall, submitted that the overall contractual framework provided a complete answer. He said that this framework operated along the following lines:
(1) Wimpey were bound to take out an all risks insurance policy (Main Contract, clause 22 A.1);
(2) Wimpey, CRS and Hall would all be named as insureds under the all risks policy (Main Contract, clause 22.3; Sub-Contract clause 8A.1);
(3) Hall would never be held responsible for the costs of restoration work caused by fire, even if that fire had been caused by their own negligence (Sub-Contract clause 8A.2);
(4) Thus it was plainly envisaged that any loss caused by fire would be covered by the all risks policy, and that there would therefore be no claims brought by any of CRS, Wimpey or Hall against each other.

78. It must be observed that although Hall was not in a direct contractual relationship with CRS, it was expressly provided in its sub-contract that it was either to be recognised as an insured under the Joint Names Policy to be taken out by Wimpey under Clause 22A of the main contract (of whose conditions it had notice) or that the insurers under that policy should waive any rights of subrogation they might have against Hall. We have been shown a copy of the CGU contractors All Risks Policy issued on 10th October 1994 from which it appears from the first page of the Schedule that Hall was expressly insured under that policy.

79. Mr Acton-Davis showed us two recent cases in which courts were invited to consider whether it was fair just and reasonable to impose a duty of care on a sub-contractor vis a vis an employer against a contractual background of this kind. In ***Norwich County Council v Harvey*** [1989] 1 WLR 828, a case where the owners had assumed responsibility for all risks insurance under clause 22C of the JCT contract, this court held that although there was no direct contractual relationship between the employer and the sub-contractor, they had nevertheless each contracted with the main contractor on the basis that the employer had assumed the risk of damage by fire. In those circumstances there was no sufficiently close and direct relation between them to impose on the sub-contractor any duty of care to the employer in respect of such damage. The mere fact that there was no privity of contract between them did not make it just and reasonable that such a duty should be owed.

80. In ***BT v James Thompson and Sons (Engineers) Ltd*** [1999] 1 WLR 9, another clause 22C case, the House of Lords reached a different conclusion in a case where a distinction had been made between nominated sub-contractors and domestic sub-contractors in the conditions of the insurance policy to be taken out by the employer under the main contract. The effect of this was that the insurer did not waive any right of subrogation it might have against a domestic sub-contractor. Lord Mackay of Clashfern observed at p 16 that the existence of this right would legitimately affect the question of premium. In his view these contractual provisions reinforced rather than negatived the existence of a duty of care by the sub-contractors towards the employers in the circumstances of that case.

81. I accept Mr Acton-Davis's submissions and his further submission that the existence of the direct warranty by his clients to CRS does not affect the position. If CRS asserted that it had suffered damage, following a fire, by reason of Hall's breach of warranty, Hall would have a defence to that claim to the effect that CRS had sustained no loss which it could recover from Hall because a single contractual scheme was in place, buttressed by a joint all risks policy to which it, CRS and Wimpey were all named as insured, which provided that the cost of restoration caused by fire (and the associated professional fees) would be covered by that policy, which would be procured by Wimpey. As to the Schedule 3 claim, Mr Acton-Davis observed that CRS brought no such claim against his clients: indeed their insurers' solicitors had expressly asserted in correspondence that they had no claim. The reason for this was that under the contractual framework the risk of delay caused by fire was expressly provided for and the parties knew where the relevant risks were to fall and assented to this scheme. In any event, if no duty was owed by Hall in respect of the physical damage caused by the fire, a Schedule 3 claim for consequential losses could not found a successful negligence action on its own, being a claim for pure economic loss which no recognisable principle of the evolving law of negligence would support. These submissions appear to me to be well-founded.

82. Mr Slater supported his arguments for the appellants against Wimpey by relying on four principal contentions. First, he said that the rules relating to circuity of action could have no application in a case like the present, in which his clients' claim to contribution could not be barred by such a plea. Then he relied on Hobhouse J's alternative ground for deciding ***The Benarty (No 2)*** as he did. Next he submitted that consideration of the position of the co-insurers offended against the general rule that English law pays no attention to the incidence of insurance. Finally, he argued that both subrogation and the right to contribution had their basis in equity, and that it would be inequitable if his clients, who might be only 10% responsible for the loss, were held to be unable to recover contribution from a party which might be much more blameworthy.

83. I accept Mr Slater's contention, for precisely the reasons he gave us, that in the absence of any special contractual scheme the doctrine of circuity of action could have no application. In general, English law ignores the incidence of insurance, and in the absence of an insurance scheme Wimpey could have had no defence based on that doctrine to a claim brought against it by CRS. For this reason it is in my judgment unnecessary for us to consider the arguments deployed by Mr Slater with reference to road traffic insurance and the odd results that might occur if husband and wife who are insured by the same insurers get themselves involved with third parties in different claims and cross-claims arising out of the same accident.

84. I have already stated my reasons for being unwilling to adopt Hobhouse J's second suggested reason for deciding ***The Benarty (No 2)*** as he did. As to Mr Slater's third argument I see no reason why contracting parties should not be able to deal with the incidence of risk of fire in the manner I have described in this judgment. There is no inconsistency with the rule in ***Bradburn v Great Eastern Railway*** (1874) LR 10 Exch 1 if they choose to organise their affairs in this way. Mr Slater relied on a dictum of Phillips J in ***Banque Bruxelles Lambert v Eagle Star*** [1995] 2 All ER 769, 820 in support of his contentions, but in my judgment there is a great difference between the sort of relationship (as between bank and allegedly negligent valuer) he was considering in that case and the relationship between CRS and Wimpey which is at the heart of the present case. So far as considerations of equity are concerned, aspects of the law of contribution were perceived to be much less fair before Parliament intervened, but not even Parliament has considered it appropriate to create a right of contribution as against a party which has not been held liable in respect of the relevant event and against whom such liability could not be established.

85. It appeared to me that the principal concern of the appellants (or their professional liability insurers) was the perceived harshness of the principle of English law that a tortfeasor, although only partly to blame, may find itself liable to pay 100% of a claimant's losses if it cannot find other blameworthy parties from whom it is entitled to recover contribution. If this rule is harsh, this court cannot remedy its harshness by inventing a new rule which would enable the appellants to recover contribution from the respondents in circumstances like the present when the respondents would have a complete defence, based on contract, against any claim brought against them by the present claimants. Mr Slater also deployed arguments

relating to the absence of a direct contractual link between Hall and CRS and to the recoverability (in any event) of CRS's Schedule 3 losses which I have considered earlier in this judgment.

86. For the reasons I have given, I consider that the judge was correct to answer the questions posed to him in the way he did, and I would dismiss this appeal.

87. The application for permission to appeal stems from an effort by the appellants to retrieve the situation, following the judge's original ruling, by relying on a supposed principle that the various co-insured are to be *"**considered as one***", so that the subrogated claim of the insurer who insured CRS, Wimpey and Hall in respect of their insured losses should fall to be reduced by fault on the part of Wimpey and Hall just as it would fall to be reduced by fault on the part of CRS itself. It is said that since it would be inequitable for the insurer to recover its losses in full when and to the extent that they are caused by fault on the part of one of the co-insured, the expression *"**as the result partly of his own fault**"* in Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 should in such circumstances include fault on the part of the claimant's co-insured. By Section 4 of that Act "fault" is defined to mean negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort, or would, apart from that Act, give rise to the defence of contributory negligence.

88. This bold submission was founded on the passage in the judgment of the Supreme Court of Canada in ***Commonwealth Construction Co Ltd v Imperial Oil Ltd*** (1977) 69 DLR (3d) 558, 561 which I have quoted in paragraph 54 of this judgment. If *"the interests of the joint insured are so inseparably connected that the several insureds are to be considered as one"*, Mr Slater argued that Wimpey's negligence was to be considered as if it was CRS's negligence in a subrogated claim brought by their joint insurer.

89. Mr Slater recognised that his submissions were unsupported by any authority, and he did not pursue this alternative contention with any very evident confidence that it was well founded as a matter of English law. The judge refused permission to amend on procedural grounds, on the basis that it was by now too late to make such an amendment with the trial of the action then due to take place in June. I would refuse permission to appeal on substantive grounds on the basis that a case based on the proposed amendment has no realistic prospect of success, and that it would be much better to stifle it at birth by refusing the proposed amendment. Mr Timothy Lamb QC, who appeared for CRS, helpfully referred us to Professor Glanville Williams' book ***Joint Torts and Contributory Negligence*** (1951) which at pp 446-9 gives no hint of any suggestion that prior to the enactment of the 1945 Act a defence of this kind would have defeated a plaintiff's claim in circumstances like the present.

90. For these reasons I would dismiss the application for permission to appeal against the judge's ruling on 15th March 2000 refusing permission to amend the defence.

Lord Justice Robert Walker:

91. I agree.

Lord Justice Peter Gibson:

92. I also agree

Order: Appeal dismissed with costs. Application for permission to appeal to the House of Lords refused. (Order does not form part of the approved judgment.)

John Slater QC & Julian Horne (instructed by Kennedys for the First Appellants and Hill Dickinson for the Second Appellants)
Andrew Bartlett QC & Kim Franklin (instructed by Berrymans Lace Mawer for the First Respondents)
Jonathan Acton Davis QC & Simon Henderson (instructed by James Chapman & Co for the Second Respondents)
Timothy Lamb QC (instructed by Bannisters for the Claimants)
Geoffrey Brown (instructed by Badhams Thompson for the Fourth Party)