JUDGMENT : His Honour Judge John Hicks QC. 8th January 1999.

Introduction

1. The Royal Brompton Hospital in Chelsea underwent major building works between 1987 and 1990 as Phase 1 of a programme of development.

2. As has unfortunately been all too common in recent hospital construction and development projects the works, inevitably expensive in themselves, have given rise to disputes of lamentable dimensions and cost.

3. The main contract was entered into in 1987 between the Plaintiff's predecessors and Taylor Woodrow Construction Ltd ("the contractor"). Using approximate round sums in all cases the contract price was some £18M. I shall sometimes call the Plaintiff or its predecessors "the employer". The Defendants were all professional persons, firms or companies advising the employer, and I shall refer to them by their respective roles. The First to Seventh and Thirteenth Defendants were project managers, the Eighth, Fourteenth and Fifteenth architects, the Ninth and Sixteenth mechanical and electrical ("M & E") engineers and the Eleventh structural engineers. The claims against all of them are pursued. The Tenth Defendants were the quantity surveyors, but the claim against them is not pursued.

4. The contractor made claims against the employer under the contract for extra payments and loss and expense for variations, delay, disruption and other matters amounting to some £22M against which the employer, on the advice of the quantity surveyors, paid some £5.2M. The contract contained an arbitration clause and the contractor in due course commenced arbitration proceedings, claiming (with interest) some £15M more. The employer counterclaimed for some £6.6M. The arbitration was settled on 19 December 1995 on the terms that the employer paid the contractor some £6.2M in satisfaction of the claim, after taking into account the counterclaim, and bore its own costs, which amounted (it says) to some £2M, and some £13K arbitrator's fees. The settlement compromised issues of liability as well as quantum.

5. The Writ in the present action was issued on 21 January 1993, after that arbitration had been commenced but before it was settled. The Statement of Claim was served on 5 August 1997, after the settlement, which it pleads. One of the heads of damage which the Plaintiff seeks to recover from the Defendants is the cost of that arbitration and settlement (the "***Biggin v Permanite***" issue). The Plaintiff asserts that one of the complaints by the contractor in the arbitration was that delay and disruption and other loss was caused by the number of instructions issued during the course of the contract and seeks to rely on a similar complaint against the Defendants (the "sheer number" issue).

The applications

6. Each of the Defendants issued summonses for the striking out of the whole or part of the Statement of Claim or for alternative relief. The M & E engineers did so on 25 June 1998, the project managers on 26 June, the structural engineers on 30 June and the architects on 19 October. The applications then on foot were listed on 10 July 1998 for one day but adjourned part heard and there was a further day's argument on all the applications on 27 November, at the close of which I reserved judgment.

7. The summonses vary in detail but each makes in substance three complaints. One is that the "sheer number" allegation discloses no cause of action, or should be struck out as an abuse of process or otherwise objectionable, or should be particularised by the identification of specific instructions which, on the Plaintiff's case, should not have been required or should not have been given. Another is that other, more specific, allegations of breach of duty are insufficiently particularised. The third is that the claim to recover the cost of the arbitration settlement is defective in a number of respects, in particular because there is no plea that the Plaintiff was in fact liable to the contractor, because the allegation is that the Plaintiff acted reasonably in reaching the settlement, not that the settlement itself was reasonable, and because the whole of the cost of the settlement is claimed against each of the Defendants.

8. I reserved judgment because the question of principle whether sums expended by way of settlement are capable of being a measure of damages if issues of liability, as well as quantum, were compromised in the settlement reached, and if recovery is sought from more than one defendant, seemed to me to require reflection. The other issues do not call for extended treatment. The position in each of them developed and was the subject of discussion during the course of argument, and I shall briefly record my understanding of the position reached before turning to the main topic of this judgment.

9. The allegations central to the Plaintiff's "sheer number" case are in the following terms:

121.2 By reason of the sheer number of instructions given and/or issued by each of them, [the architect, M & E engineer and structural engineer] were in breach .... and/or negligent .... .

121.3 Further, the deficiencies in the performance of [the architect, M & E engineer and structural engineeer] were such that:

121.3.1 [The project manager] should have realised that their respective designs and specifications were inadequate and/or defective .... .

122.2 In the arbitration [the contractor] advanced claims numbered 2, 3, 16, 19 and 34 .... by reason of the number of instructions issued and/or given during the course of the main contract.

10. I see no reason why such a plea should be bad in principle, but a number of points of detail arise. In the first place it should be clear whether the party making such an allegation does rely on numbers alone for that

purpose, without more, and if so its evidence and submissions on that issue should be strictly confined in that respect. Secondly each Defendant is entitled to know specifically which instructions are relied upon against it. Thirdly, as to each Defendant, a "sheer number" allegation implies an assertion that there is some assignable limit to the number of instructions consistent with due care and skill on that Defendant's part. Fourthly the alleged link between breach and damage should be properly pleaded and particularised, specifically here the allegation that this was one of the contractor's complaints in the arbitration. Mr Edwards-Stuart acknowledged the need for some amendment or further particularisation in these respects and on 27 November produced some draft amendments. The passage of time between that date and the handing down of this judgment should have enabled formal application for leave to amend to be made on adequate notice with a view to meeting all proper objections and calls for particularisation, and I will then or on an adjournment of that application decide any remaining disputes.

11. The complaints of inadequate particularisation of more specific allegations of breach were to some extent canvassed in argument, and I gave some provisional indications of my likely approach to certain categories of request for further and better particulars, but there was no exhaustive consideration of all the details and a reserved judgment of this kind would in any event not have been a suitable medium for disposing of this aspect of the applications. The parties have, I trust, used the time since the hearing to remove or narrow the areas of dispute as far as possible, and on the Plaintiff's side to serve such further and better particulars as are accepted to be due, so that I can be presented with the residue, if any, of questions still needing to be resolved and succinct submissions on each side.

Biggin v Permanite - the issues

12. The claims for recovery of the expense of conducting and settling the arbitration are pleaded separately against each Defendant and in respect of each allegation of breach against that Defendant, but it suffices to set out, as typical, those against the M & E engineers:

128.1 By reason of [the M & E engineer's] breaches of duty set out in paragraph 61 above [which contains various specific allegations of default], the Plaintiff has suffered loss and damage in that, had [the M & E engineer] not been in breach of duty:

....

128.1.3 The Plaintiff would have recovered money, damages and costs in the arbitration rather than making any payment to [the contractor] because [the contractor's] claims would have been significantly fewer and/or for lower sums and/or weaker and the .... counterclaims significantly stronger. Alternatively, the Plaintiff .... would have paid less and incurred lower costs.

128.2 By reason of [the M & E engineer's] breaches of duty set out in paragraph 121 above [which contains, inter alia, the "sheer number" allegation] the Plaintiff has suffered loss and damage in that, had [the M & E engineer] not been in breach of duty:

....

128.2.3 The Plaintiff would have paid less to [the contractor] in settlement of the arbitration and would have incurred lower costs because [the contractor's] claims would have been materially weaker and/or fewer and/or for lower sums.

13. Each Defendant was engaged upon the terms of lengthy documents, with numerous specific duties. For present purposes, however, as was implicit in the arguments, it is sufficient to confine attention to the duty alleged against each of them, as arising under an implied term and in tort, to exercise the skill and care which a reasonably competent member of their respective professions or disciplines would exercise in the circumstances.

14. The primary issues raised by the Defendants' objections to this head of damages are stated in paragraphs 7 and 8 above. There are a number of points which might on one view be categorised as discrete issues or sub-issues but which can, I think, more conveniently be treated as alternative ways of putting the primary issues or as arguments for or against a particular answer, and I shall deal with them as they arise.

15. These are striking-out applications in which all the possible grounds for that relief are advanced in the summonses of one or more of the Defendants. The realistic arguments for striking out, however (as distinct from those which in truth were complaints of pleading deficiencies), all turned on whether the Statement of Claim disclosed a cause of action. Moreover, although at one point there was a passing suggestion that the question be referred for trial as a preliminary issue, so that it could be determined on the facts (possibly on the assumption that only thus would the decision be accepted as binding in whichever sense determined), that suggestion was not pressed or taken up by any other party. On the other hand there was no indication how facts other than those set out in paragraph 4 above could affect the outcome. The main point of principle was therefore argued as one of pure law on which I could and should give what was, to the best of my understanding, the true answer, either way, rather than take refuge in a conclusion simply that it was "arguable". Nevertheless this remains in form simply a striking-out application and I shall need to be addressed as to whether the order can go beyond the simple grant or refusal of that relief.

Biggin v Permanite - preliminary points

16. On 10 July one complaint strongly pressed by the Defendants, I believe with justification, was that the Plaintiff claimed to recover from each of them the whole of the cost of the settlement although some of the allegations in this action, and equally some of the contractor's in the arbitration, are and were directed to the acts or omissions of only one or some of the Defendants. On 27 November Mr Edwards-Stuart accepted that to persist in such a

claim was "putting the case too high" and produced "Voluntary Particulars" in draft form giving assessments of the values of the claim and counterclaim in the arbitration at the date of settlement, a breakdown of the sum paid to the contractor as between damages and costs, an assessment of the "total cost" of the settlement to the Plaintiff (including the abandonment of its counterclaim but excluding legal costs and arbitrator's fees) and an apportionment of that total cost as between heads of claim in the arbitration.

17. That goes some way toward meeting the objection but its late arrival did not give the Defendants an adequate opportunity to consider it, while its draft status implies that the Plaintiff itself may have further thoughts. The inclusion of the value of the counterclaim in the "total cost" leads, as Mr Williamson for the project manager contended and Mr Edwards-Stuart accepted, to some duplication of items specifically pleaded elsewhere, which must be eliminated. There is a purported reservation of a right to amend the apportionment if parts of the Plaintiff's case are not established at trial to which Mr Taverner for the architects objected and the legitimacy and scope of which needs consideration. These matters, and any other objections to the detail of this pleading, whatever form it finally takes, must be dealt with when there is a proper application, but in principle each Defendant is entitled to know how much is claimed against him and on what basis.

18. Mr Bartlett for the M & E engineers submitted that the Plaintiff's pleading amounted to a case that it acted reasonably in reaching the settlement, rather than that the settlement itself was reasonable, which (as is common ground) was what was required. There is nothing in that objection. It is true that the Statement of Claim itself says nothing about reasonableness in either form, but the subject is addressed in Further and Better Particulars and it is to those that Mr Bartlett's complaint relates. There, in answer to request 10 the Plaintiff squarely replies: "The settlement was reasonable". As a matter of pleading that is in my view plain and conclusive. Mr Bartlett's criticism centres on the answer to request 11, which seeks particulars of the facts and matters supporting the contention that the settlement was reasonable. He says that the particulars given go to the subjective reasonableness of the Plaintiff's decision to settle rather than to the objective reasonableness of the settlement reached. I doubt whether that is so but the issue whether the facts relied upon, if proved, establish the pleaded case is one to be resolved at trial, not now. The nature of that pleaded case in this respect is clear.

Biggin v Permanite - the principle

19. It might be supposed, and Mr Edwards-Stuart's argument at one point suggested, that the recoverability of sums paid in settlement of claims by others caused by a defendant's wrong would best be addressed by reference to the doctrine of mitigation. I see no reason of principle why it should not, nor why such questions of scope as arise in this case should not be capable of satisfactory resolution by the application of that doctrine. Mr Bartlett submitted in reply that the settlement was not made in pursuance of a duty to his client to mitigate, but that is a misunderstanding of the doctrine, which is not concerned with or dependent upon duties to others; the rule is simply that on the one hand avoided or reasonably avoidable loss is not recoverable, while on the other hand expense incurred in reasonable efforts to avoid or reduce loss or suffering is, whether those efforts are in the event successful or not. On the face of it the settlement of what might have become far more expensive proceedings seems eminently capable of appraisal by reference to such a rule.

20. That is not, however, how the law has hitherto developed, and I do not believe that it is open to a court of first instance to deal with it in that way; Mr Edwards-Stuart's characterisation of the general issue as a *"House of Lords' point"* was perhaps apt in this regard at least. I am bound by the decision of the Court of Appeal in ***Biggin & Co Ltd v Permanite Ltd*** [1951] 2 KB 314, which treats the issue as one concerned with the measure of damages, not with mitigation. More particularly, whereas if this were a question of mitigation the issue would be whether the plaintiff acted reasonably ***Biggin v Permanite*** must be taken, for reasons which I gave in ***DSL Group Ltd v Unisys International Services Ltd*** (1994) 67 BLR 117, to have clearly established that the test is whether the terms of the settlement were (objectively) reasonable terms.

21. On that footing the question of principle is how widely ***Biggin v Permanite*** should be interpreted and applied. It was itself a case where only one defendant was sued, where there had been no counterclaim by the plaintiff against the party whose claim was settled and where, the present Defendants say, the liability of the plaintiff to that party was not in dispute; only quantum was in issue and the settlement was concerned solely with quantum. In the present case there are several Defendants and the settlement clearly involved a compromise of issues of liability on both claim and counterclaim, as well as quantum.

22. These additional features will undoubtedly complicate the practical application of ***Biggin v Permanite*** if, in principle, it is applicable, but that cannot in itself be a reason against applying it. It is indeed noteworthy that many of those complications arise from the existence of multiple Defendants, as is apparent from the questions canvassed in paragraphs 16 and 17 above. That, however, does not seem to be one of the grounds relied upon by the Defendants for distinguishing ***Biggin v Permanite.*** Nevertheless any consideration of the issue how far the ***Biggin v Permanite*** approach is generally applicable must in my view take account of that factor as well as the *"disputed liability"* factor which the Defendants advance as the crucial obstacle to reliance by the Plaintiff on its settlement with the contractor.

23. It is first relevant to take into account that if the ***Biggin v Permanite*** approach is to be confined to cases of the kind described in the second sentence of paragraph 21 above it will very rarely be of any use. It would not, as I understand it, have applied even in ***Biggin v Permanite*** itself but for what seems to have been taken to be a concession by the defendants. The report is much abridged but by the helpful industry of one of the advocates (I believe Mr Bartlett) I was provided with a transcript of the full judgments. In his recital of the facts Somervell LJ,

after recording the agreement between the plaintiff buyer and its customer, the Dutch Government, to submit the dispute between them to arbitration, recites part of the Statement of Claim at pages 3 and 4 of the transcript as follows:

3. After inspection of the documents disclosed by the Dutch Government .... it became apparent to Biggins and their advisers that it would be virtually impossible successfully to resist the claim .... and accordingly a compromise was arrived at .... . The said compromise was reasonable.

24. Plainly liability must have been in issue in the arbitration and there is no suggestion that there was any formal admission of liability before the compromise was negotiated. It would indeed be surprising if it had been; the plaintiff would have been most ill-advised to throw away that bargaining counter, however depreciated its value. On the other hand it does seem to be the case, although I have not found it anywhere made explicit, that the lengthy (unreported) appraisal by Somervell LJ of the value of the Dutch Government's claim against the plaintiff, for comparison with the settlement figure, was made on the basis of full liability. The explanation may lie in the words at page 317 of the report: *"the defendants do not dispute that the damages are to be assessed on the basis of liability to the Dutch government"*. Even that concession, however, when seen in context, may well have been directed to the issue whether the second limb of the rule in ***Hadley v Baxendale*** (1854) 9 Ex 341 applied rather than to the question whether the issue of liability was compromised or conceded by the plaintiff in the arbitration:

4. As I have said, there is no suggestion that the defendants did not contemplate the sale by the plaintiffs to the Dutch government, and the defendants do not dispute that the damages are to be assessed on the basis of liability to the Dutch government, subject, if necessary, to its being shown, for example, that some different term had been introduced into the contract. ([1951] 2 KB 317)

25. Those are reasons against restricting ***Biggin v Permanite*** artificially to its real or supposed facts. I turn to the more positive questions of what principles inform the decision and whether those principles extend to the facts before me. In ***DSL Group Ltd v Unisys International Services Ltd*** (unreported, 4 May 1995) I had to consider another proposition seeking to limit the scope of the ***Biggin v Permanite*** approach, namely that *"a reasonable **Biggin** settlement [should be treated] as eliminating further investigation of the extent of the defendant's responsibility for the plaintiff's liability to the third party, as well as of the quantum of that liability, and as therefore being applicable only where that responsibility is for an indemnity"*. Although different from the objections here it required attention to much the same questions. Continuing from the words just quoted I answered them as follows:

5. .... I do not see why that should be so. In Biggin itself, which concerned the resale by the plaintiff to the third party of goods purchased from the defendant, it was not disputed that the defendant's liability to the plaintiff was to be quantified by the plaintiff's to the third party, so [the] point never arose. The policy underlying the decision appears clearly, in my view, from the following passage in the judgment of Somervell LJ:

5. I think, although it is not conclusive, that the fact [the settlement] is admittedly an upper limit would lead to to the conclusion that, if reasonable, it should be taken as the measure. The result of the judge's conclusion is that the plaintiffs must prove their damages strictly to an extent to show that they equal or exceed £43,000; and that if that involves, as it would here, a very complicated and expensive inquiry, still that would have to be done. The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter (page 321).

*6. To "prove their damages strictly" would in **Biggin** have involved proving the "true" amount of their liability to the third party and it is that amount, I think, which the case authoritatively decides is to be measured by the terms of the settlement, if reasonable. The fact that in **Biggin** itself it was also the measure of the defendant's liability to the plaintiff was a consequence of the concession to that effect and not part of the ratio decidendi.*

*7. Should the ambit of the **Biggin** principle nevertheless be confined to indemnity cases as a matter of policy? There seem to be three elements to be extracted from the passage quoted in paragraph 5 above. One is the fairness of allowing the plaintiff to use the "reasonable settlement" figure as a floor, since the defendant can use it as a ceiling. A second is the wastefulness and inefficiency of trying an often complex issue or group of issues unnecessarily and in the absence of one of the primary parties. The third is the discouragement to a desirable settlement by the plaintiff of the third party's claim if the plaintiff has no assurance that the defendant cannot reopen the issue. These I respectfully accept nd adopt as factors to be taken into account in deciding how far to extend the principle.*

8. If the plaintiff's claim is not to a straightforward indemnity (as, for example, if he is a purchaser of defective parts from two suppliers which he makes up into goods sold to a single third party) the position is more complicated, but in my view the same considerations apply. As to the first, the settlement figure will not in the same sense be the upper limit of the liability of the defendant (or of either of them if both suppliers are joined in the same action), but the defendant will still wish to argue, in my view correctly, that his liability should not exceed a due proportion of that figure, so as to share in any benefit obtained by the settlement. As to the second, the cost and probable inaccuracy of trying the issue of quantum of the plaintiff's liability to the third party in the latter's absence will still be avoided. It is true that the settlement no longer eliminates all further need to examine quantum issues, but those which remain would have existed in any event, in particular for the reason given above in dealing with the first point. As to the third, the desirable end of encouraging reasonable settlements will still be served.

*9. A shorter answer to [the plaintiff's] submission is to consider its implications for pleading and fact-finding in a case like the present one. A plaintiff relying on a **Biggin** settlement must plead and will seek to prove that his liability to*

the third party was caused by the defendant's tort or breach of contract. If he makes that allegation good only in part, and the court so finds, on what basis is it disabled in principle from giving effect to that finding? ....

10. I therefore conclude that the application of ***Biggin*** *is not confined in the way contended for .... .*

26. I remain of the views there expressed and consider that they are applicable, mutatis mutandis, to the issues before me. Some adaptation is of course required. In paragraph 6 I accepted an understanding of the defendant's "concession" in ***Biggin v Permanite*** about which, for the reasons given in paragraph 24 above, I am not now so sure. In paragraph 8 the qualification in relation to the first "consideration" is different here, where in relation to the part of the Plaintiff's claim quantified by reference to the settlement the settlement figure is the upper limit, but there may be other, independent, heads of damage. In paragraph 9 the second sentence would here read: "*A plaintiff relying on a* ***Biggin*** *settlement may plead and seek to prove that he was indeed liable to the third party"* (there is a separate issue as to the effect of a plea that there was a chance of being found liable, which did not arise in the ***DSL*** case and which I shall address later). All these modifications leave my conclusion and the essentials of my reasons untouched.

27. I turn to consider the submissions of principle to the contrary advanced by the Defendants (those relying on authority are dealt with in the next section).

28. Many of those submissions turned on the terms of pleas by the Plaintiff, not that the relevant breach by a Defendant in fact caused loss or damage to the contractor, or that the Plaintiff was in fact liable to the contractor in the relevant respects, but that it was arguable that the breach caused the loss or that the contractor alleged such causation or liability.

29. There is here first, and most simply met, a drafting point. It may well be that some allegations of the kinds summarised in the last paragraph do not, without more, disclose any cause of action. Any such deficiency would however, be readily cured, in my view, by the addition of an averment, if not already express or implied, that there was a chance that such allegations by the contractor would have been made good had the arbitration been fought out to the end. Such averments are in fact implicit in, and quantified in some detail by, the draft Voluntary Particulars referred to in paragraph 16 above.

30. The other arguments look to the effect, rather than the wording, of such a plea and all amount to saying in one way or another that the Plaintiff cannot recover in respect of the settlement money attributable to any head of the contractor's claim without proving, on the balance of probabilities, that it was actually liable to the contractor on that claim. Before turning to the specific ways in which that is put I remark that, if correct, it must presumably enable the Defendants to have their cake and eat it. A 49% chance of the contractor's success on one of its claims would leave the Plaintiff unable to recover anything in respect of the part of the settlement money attributable to that claim, whereas on a 51% chance, although the logic of the Defendants' argument should entitle the Plaintiff to full recovery, the Defendants would still be able to rely on the amount actually attributable to that claim in the settlement (sc on the 51% basis) as a cap on the Plaintiff's entitlement. That is, of course, simply a particular illustration of Somervell LJ's "floor and ceiling" reason for the ***Biggin v Permanite*** decision.

31. Mr Bartlett drew attention to section 1(4) of the Civil Liability (Contribution) Act 1978, which provides that the right under that statute of a person who has settled a claim to obtain contribution from another liable in respect of the same damage "whether or not he himself is .... liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established". He relied on the fact that there is no such special statutory provision on which the Plaintiff can rely in the present case. But why need there be? The 1978 Act filled a lacuna in the law of contribution and the basis and extent of the statutory right had then of course to be spelled out in a number of respects, including that dealt with by section 1(4). There is no such lacuna and no such occasion for statutory intervention here; I am simply required to decide the reasons for and true ambit of an established rule of common law as to the measure of damages. In any event the requirement that the settlement be reasonable means that the party relying on it is far from being able to disregard the issue of liability in the way open to claimants under the 1978 Act.

32. Mr Bartlett next submitted that the Plaintiff's case presupposes that it was his client's duty to take care not to give the contractor an excuse for an unjustified claim against the employer. In my view the Plaintiff's case makes no such presupposition. The Defendants' duties relied upon are those pleaded, and in particular the duty to exercise due care and skill. Only upon proof of a breach or breaches of those duties will issues of damage arise. It is not in dispute that claims by the contractor can be a recoverable head of damage, if caused by a professional adviser's breach. The question is how damages under that head should be quantified if the contractor's claim has been settled without resolution of issues of liability as between it and the employer.

33. The arguments by reference to causation and remoteness follow similar lines; it is necessary, it is said, to prove that a Defendant's breach has caused an established legal liability by the Plaintiff to the contractor. But that, in my view, begs the question whether that has to be done afresh, item by item, in an action to which the contractor is not a party when there is direct evidence to hand of the basis on which those issues have been disposed of in the proceedings in which the contractor's claims were actually brought, when the Plaintiff will still have to establish not only the fact of that disposal but its reasonableness, and when the Defendants have an undoubted right to rely upon that same disposal for the purpose of limiting the amounts recoverable from them by the Plaintiff, even if the Plaintiff can prove that its legal liability to the contractor on the relevant claim was greater.

34. Mr Taverner, for the architects, developed what was essentially the same submission by reference to the evidence which would be necessary at trial. It would, he said, have to establish the Plaintiff's liability to the contractor for each item of the latter's claim. The only effect of ***Biggin v Permanite*** was to "*lower the threshhold";* the test was the same. In my view this approach is illuminating, and what it illuminates is the essential untenability of the Defendants' position. There are indeed potentially questions of some importance as to the nature and scope of the evidence required if the reasonableness of a settlement is in issue. Two things, however, seem to me to be clear. One is that the concept of *"lowering the threshhold"* is either incoherent or wrong. It cannot be the case that the Plaintiff has to prove its liability to the contractor but has to do so only to some standard lower than the balance of probability, which is the only conceivable way in which the threshhold which normally has to be crossed in civil proceedings can be lowered. The second thing which I find clear is that the issue whether a settlement was reasonable cannot be the same as the issue what would have been the event of the earlier proceedings if tried out, nor do I believe that the judgments in ***Biggin v Permanite*** itself, read as a whole, suggest otherwise, but rather the reverse.

35. I conclude that unless bound or persuaded by other authority to decide otherwise I should hold that the principle in ***Biggin v Permanite*** extends to cases in which there are several defendants against whom the settlement in question is relied upon and to cases in which that settlement involved a compromise of issues of liability on a claim and counterclaim as well as of quantum.

Biggin v Permanite - other authorities

36. A number of the cases cited to me go, as I understand them, to the issues of pleading and particularity dealt with in paragraphs 16 to 18 and 29 above. I see no need to discuss them here, since the final form of the pleading of this issue has yet to be considered.

37. I shall take the other authorities to which I was referred in date order. They are all later than ***Biggin v Permanite.*** The first is ***Fletcher & Stewart Ltd v Peter Jay & Partners*** (1976) 17 BLR 38. There the plaintiff employers had sued the defendant main contractors, architects and engineers for damages, alleging defective work which included electrical work. The main contractors had joined the electrical sub-contractors as third parties. The plaintiff and defendants reached a settlement under which (inter alia) the main contractors paid £15,000 to the plaintiff, but the third party refused to participate in it. The main contractor then sought to recover £15,000 from the third party without proof of more than the terms and the reasonableness of the settlement. The Court of Appeal upheld the decision of His Honour Judge Stabb QC, in this court, rejecting that claim. I agree with His Honour Judge Bowsher QC, who considered this authority in the ***Guy's Hospital*** case discussed below, that the reason for that rejection was quite plainly that the main contractors' reliance on the settlement attempted to by-pass the issue of the sub-contractor's liability to the main contractor. That appears from the following extracts:

[***Biggin v Permanite***] *is most certainly not an authority for the proposition that a settlement made between A and B, however reasonable it may be from the point of view of A and B, can affect the position of C, who is not a party to the settlement and has not assented to it, in respect of an issue as to C's liability to B* (my emphasis) - per Megaw LJ at page 43.

6. The nature and amount of any settlement .... between the defendant and the plaintiff had nothing at all to do with the liability as between the defendant and the third party - per Lane LJ at page 46.

7. Here the Plaintiff pleads and accepts that it must prove the liability of each Defendant independently and that the settlement is relevant only to the issue of damages and becomes relevant only if liability is first established. The ***Fletcher & Stewart*** *case is no obstacle to such a course.*

38. I need not linger over the next case, ***Comyn Ching & Co Ltd v Oriental Tube Co Ltd*** (1979) 17 BLR 47, since Mr Bartlett cited it only for the purpose of submitting that it turned on the construction of the very wide indemnity given by the defendant, on the basis of which it was held liable to reimburse the plaintiff for sums expended in the reasonable settlement of claims having a reasonable prospect of success, including costs, and that it was not, therefore, an authority requiring me to decide the issue before me in the Plaintiff's favour. I agree, but equally it does not determine that issue in favour of the Defendants either; the present point was simply not before the Court of Appeal there.

39. The case of ***Fairfield-Mabey Ltd v Shell UK Ltd*** (1989) CILL 514 was cited by Mr Nissen for the reference in the judgment of His Honour Judge Bowsher QC at page 515 to the fact that when considering the reasonableness of the settlement relied upon there it was necessary to consider in some detail some of the evidence in the action settled. As I have already noted in paragraph 34 above there are questions to be addressed at some stage as to the nature and scope of the evidence to be called on the issue of reasonableness, but that is not the issue at present before me.

40. Mr Bartlett cited passages in ***Galoo Ltd v Bright Grahame Murray*** [1994] 1 WLR 1360 rejecting the "but for" test of causation, but I did not understand Mr Edwards-Stuart to be advancing any such test, nor do I consider that it forms any part of the reasons which have led me to my conclusions.

41. Finally, I was referred to the judgment of His Honour Judge Bowsher QC on a trial of preliminary issues in ***P & O Developments Ltd v The Guy's and St Thomas' National Health Service Trust*** (unreported, 15 October 1998), and in particular to the following sentences in paragraph 21:

8. I would not rule out the possibility that in some very exceptional cases the law might impose on a wrongdoer liability computed by reference to a settlement which in the eyes of the law is unreasonable. But as a general rule, a party would be taken to have in contemplation a settlement which is reasonable in the sense that it is based on an assessment of what is legally due from the plaintiff to the third party.

42. I comment first that "the third party" in that context clearly refers to the person with whom the plaintiff has settled rather than (as in ***Fletcher & Stewart***) to a person who is formally a party in that capacity to the current proceedings. Secondly, as the word "contemplation" suggests, this passage must be understood in the light of Judge Bowsher's analysis of ***Biggin v Permanite*** as comprising both an evidentiary rule and an application of the second branch of the rule in ***Hadley v Baxendale***. Judge Bowsher is here considering the latter aspect.

43. Mr Bartlett relied on the second sentence in this passage in support of his submission that the Plaintiff cannot succeed without proving in what respects it was actually liable to the contractor. In my understanding it provides no such support. In the first place its main thrust is simply, by contrast to the previous sentence, to make the point that the (objective) reasonableness of a settlement is normally a necessary condition to reliance upon it (because the parties would not have contemplated any wider liability), rather than to provide a carefully framed definition of what precisely a party relying upon a settlement must prove. Secondly, even if it is to be construed as such a definition, the interpretation advanced by Mr Bartlett necessitates omitting the words "an assessment of" or treating them as referring to what takes place at the trial in which the settlement is relied upon, whereas they are plainly concerned with what happens when the settlement is negotiated. At that stage, of course, each party's assessment can be based only on the information it has, is likely to be provisional and may well be capable of being expressed only in terms of better or worse chances or prospects of success on the various issues. I therefore see no inconsistency between this passage and my own conclusions.

44. After considering these authorities, therefore, I remain of the view expressed in paragraph 35 above.

Conclusion

45. It will be apparent that this judgment is concerned with matters of principle and by no means concludes the detailed disposal of the applications before me. How that should proceed will need to be addressed when or after it is handed down. There is also the question raised at the end of paragraph 15 above to be considered. I have been made aware that some of the questions discussed in paragraphs 19 to 44 may arise in other pending litigation shortly to reach trial and I therefore propose, subject to any representations which the parties may wish to make, to release this judgment for publication when handing it down.

Antony Edwards-Stuart QC and Mark Cannon for the Plaintiff (solicitors: Masons)
Adrian Williamson for the First to Seventh and Thirteenth Defendants (solicitors: Davies Arnold Cooper)
Marcus Taverner for the Eighth, Fourteenth and Fifteenth Defendants (solicitors: Fishburn Boxer)
Andrew Bartlett QC for the Ninth and Sixteenth Defendants (solicitors: Berrymans Lace Mawer)
Alexander Nissen for the Eleventh Defendant (solicitors: Cameron McKenna)