CA on appeal from TCC(Mr Recorder Blunt QC) before the V.C.; Arden LJ; Keene LJ. 27th July 2005.

JUDGMENT : The Vice Chancellor :

Introduction

1. In 1994 Burford NW3 Ltd ("Burford"), the owner of 241-279 Finchley Road, London, NW3 wished to develop the same. For that purpose it engaged the services of, amongst others, an architectural practice, HOK International Ltd ("HOK") and a firm of mechanical and engineering consultants, Brian Warwicker Partnership ("BWP"). In due course the site was developed to provide a three storey building incorporating a mix of retail, leisure and restaurant facilities including a supermarket and a cinema. It is called the O_2 Centre. It has an entrance on to the Finchley Road to the east and, at a lower level, to a car park to the west.

2. A problem arose because the doors at both entrances were automatic and there was no wind-barrier within the building to prevent a through flow of air in the event of the doors at both entrances being open at the same time. There was also a question whether the problem was exacerbated by the shape of the façade at the Finchley Road end having the effect of funnelling an easterly wind towards the entrance.

3. The O_2 Centre was opened in November 1998. In the winter 1999 remedial work suggested by BWP was undertaken but proved to be insufficient to remedy the problem. In January 2000 Burford sought the advice of another mechanical and electrical engineer. By December 2001 the further remedial works recommended by that engineer were completed.

4. On 7th March 2003 Burford commenced proceedings against BWP seeking to recover by way of damages for negligence and breach of contract the cost of that further remedial work. On 6th May 2003 BWP made a Part 20 claim for contribution or indemnity against HOK. The claim of Burford against BWP was settled, without admission of liability, on 22nd April 2004 for £1.25m in damages, interest and costs but the Part 20 claim by BWP against HOK continued. That claim was tried by Mr Recorder Blunt QC over ten days in the summer of 2004. By his order made on 11th November 2004 the Recorder gave judgment against HOK for £398,500 and interest of £11,136. He refused permission to appeal.

5. By an appellant's notice issued on 10th January 2005 HOK sought permission to appeal on six grounds. On 11th February 2005 Chadwick LJ granted permission to appeal on ground 6 but refused permission to appeal on all other grounds. HOK notified BWP of its intention to renew its application for permission to appeal on grounds 1, 2 and 3, but abandoned grounds 4 and 5. In the event, that application was listed to be heard with the appeal on ground 6. Counsel helpfully prepared full arguments on grounds 1, 2 and 3 so that an appeal on those grounds might be disposed of if permission were granted.

6. Grounds 1, 2 and 3 relate to certain conclusions reached by the Recorder in paragraph 181 of his judgment. It is contended that such conclusions were not pleaded or supported by evidence. These issues are separate and distinct from ground 6. Ground 6 relates to a conclusion of the Recorder expressed in paragraph 200 of his judgment that acts and omissions which are not causative of loss may be taken into account for the purpose of assessing what (if any) contribution should be ordered pursuant to the Civil Liability (Contribution) Act 1978. HOK contends that such a conclusion is not correct in law.

Grounds 1, 2 and 3

7. To explain how these issues arise it is necessary to refer in some detail to the pleadings and the course of the trial. The relevant pleading is the Re-re-amended Part 20 Particulars of Claim. In paragraph 5 BWP described the damage for which it and HOK was liable for the purposes of the Civil Liability (Contribution) Act 1978 as: *"the problem of low winter temperatures and unacceptably unpleasant draughts within the Centre and/or the costs to Burford of carrying out remedial works to resolve the problem of low winter temperatures and unacceptably unpleasant draughts within the Centre."*

8. In paragraph 6 the contractual and other obligations of HOK were alleged. In paragraphs 7 to 11 the relevant features of HOK's design were described, including the doors and their juxtaposition, the

façade and its effect. In paragraph 12 BWP averred: *"A consequence of the architectural design of HOK was to capture any winds on the north-east elevation, channel them towards the Finchley Road doors and then funnel and/or tunnel them through those doors. In this way the effects of the winds were magnified by being concentrated on that entrance. As a result cold air above what might be described as a normal or usual level of cold air entered the building through the Finchley Road [doors] causing cold draughts causing low temperatures."*

9. Paragraph 14 dealt, at some length, with the alleged breaches of duty. For present purposes it is sufficient to refer to the following:

"14.1 In designing the structure of the Centre HOK failed to have any or any sufficient regard to the factors which might lead to low temperatures and/or discomfort being experienced within the Centre as a result of winds being funnelled and/or tunnelled towards and through the Finchley Road doors. In particular it failed to have regard to:

(3) the fact that the doors at the Finchley Road end provided no barrier to winds when open, as would be the case, for example, with the use of a lobby or revolving doors;

(6) the orientation of the Centre, in particular the fact that the Finchley Road doors faced the cold winds from the north-east. Further HOK failed to have any or any adequate regard to the principles of energy conservation in its design."

14.4 HOK failed adequately or at all to co-ordinate its design with that of BWP. BWP will contend it was HOK's responsibility to ensure that no feature of its design would imperil the efficacy of BWP's design. The risk presented by HOK's design was one within architectural expertise, rather than the expertise of a mechanical and electrical engineer. Alternatively, it was a risk which should have been apparent to a reasonably competent architect irrespective of whether it should also have been apparent to a reasonably competent mechanical and electrical engineer. Further and in any event, by reason of its role as lead consultant, HOK was obliged to ensure that the two designs were integrated. In so doing HOK acted in breach of clause 2.1 of the Deed and clauses 1.2, 6.1, 6.4 and 6.6 of Schedule 1 of the Deed and/or clause 3.11 of the Deed and/or clause 3.2.1 of the Deed and/or the like tortious duty.

14.5 HOK failed to consult adequately or at all with BWP as to the design change from manual doors to automatic doors at the Finchley Road end...."

10. In paragraph 15 BWP set out, at length, what it alleged to be the consequences of the alleged breaches of duty of HOK. It contended that: *"As a result of HOK's design....the areas adjacent to the Finchley Road doors have been subjected to cold draughts and low temperatures during the winter....BWP asserts that they were caused by HOK's breach of duty."*

A number of particulars of causation followed including;

"15.1.1. A reasonably competent architect would have advised Burford that unless a lobby or revolving doors were installed at the Finchley Road entrance there was a risk that cold draughts would enter the building and that the internal climate would be adversely affected. Further or alternatively a reasonably competent architect would have advised that this risk required investigation."

"15.3. Had HOK sought adequately or at all to ensure the coordination of its design with that of BWP it would have appreciated that BWP relied upon HOK's assertion that there was no wind problem and that BWP's design made no allowance for abnormal winds and cold draughts through the Finchley Road doors and that if there was a risk of such winds and draughts then there was a risk that BWP's design would not be able to perform to the requisite standard."

11. The pleading point on which counsel for HOK relies arises from the separate references and allegations to (1) cold draughts from doors being left open, and (2) abnormal winds being funnelled by the façade to the Finchley Road doors.

12. The Recorder heard evidence from, amongst others, Mr Edward Allan, the BWP director in charge of the O_2 Centre Project. In his witness statement he indicated that as it was the function of an architect to design buildings to keep out the elements so he, as a mechanical and electrical engineer, would assume that the architect had so designed the building that 'uncomfortable' winds would not enter it.

He said that he did assume that HOK had studied the likely winds round the centre and that it was satisfied that its design would prevent winds from causing discomfort to those in the Centre. He acknowledged that as a mechanical and electrical engineer he had to consider what winds would enter the building. In paragraph 125 he accepted that:

"(32) In all the circumstances, including the factors above, it seemed to me there was a potential for a small degree of tunnelling but I did not think that there would be a significant risk of uncomfortable winds arising from any tunnelling.

(33) Overall, it appeared that some winds would enter the Centre at the car park end and the Finchley Road end but there was nothing to suggest that winds, however caused, would lead to discomfort to the people using the different parts of the Centre as expected."

13. Mr Allan was cross-examined on these issues. He accepted that he was aware of the risk of uncomfortable draughts entering the Centre. He agreed that whether or not the ingress of air was going to be an issue would depend on calculations of velocity. He accepted that he would not expect an architect to make those calculations. He acknowledged that such calculations were made by BWP.

14. In paragraphs 67 and 68 of his judgment the Recorder referred to this evidence. In paragraph 119 he accepted that Mr Allan had assumed that HOK was satisfied that there would be no winds to cause discomfort because HOK had "designed out the wind effect". In paragraph 123 he noted that the belief of BWP that there was no need to make any separate assessment of air movement in the building was, at least in part, due to the assumption that HOK had successfully done so.

15. In paragraph 135 the Recorder found as a fact that at the material time a reasonably competent architect would have recognised that given its location and orientation the Centre might be subject to draughts whatever the shape of the façades and notwithstanding the provision of doors if there were entrances at both the Finchley Road and car park sides. He considered, in paragraph 136, that the reasonable architect would have been aware of the design options available for overcoming or alleviating the risk of wind-tunnelling or draughts.

16. In paragraphs 179 to 181 (I have added further numbers to paragraph 181 for ease of subsequent reference) the Recorder said:

"179. There is no evidence that HOK and BWP ever engaged either between themselves or with Burford in any discussion for the purposes of providing an assessment of the cost implications of the design options referred to in the last paragraph, or which focussed on identifying the methods which would give Burford maximum value taking into account costs in use, maintenance, energy and conservation etc. I am satisfied and find as a fact that there were no such discussions. If no-one else raised these issues at Design Team meetings, it was HOK's duty, as the lead consultant, to do so. There is no evidence that Burford ever requested to be provided with any detailed assessment or advice in relation to these matters but that may be because they assumed that the Design Team would comply with their obligations to take these matters into account. In any event, the Design Team would not be relieved from these obligations merely because Burford had not requested the provision of specific advice in relation to the subject-matter to which they related.

180. Accordingly, I am quite satisfied and find as a fact that HOK failed to exercise reasonable skill and care in relation to their duties under clauses 2.4 and 2.6 of Schedule 1 of their terms of engagement and under the general law. Additionally, HOK failed to discharge its duties as leader of the design team, both under clause 3.11 of its terms of engagement and clause 1.2 of that Schedule, as well as under the general law.

181. Furthermore I am satisfied that the breach of these duties was causative of the problem with draughts and of loss to Burford. If HOK and BWP had consulted in relation to the issues referred to above in order to provide Burford with the relative costs and benefits of the alternative design options, it is more likely than not that [1] BWP would never have made its assumption that HOK had satisfied themselves that the absence of revolving doors or lobbies would not give rise to any uncomfortable winds (see paragraph 119 above). [2] Additionally, BWP would be in a situation in which the question of how much air would enter through the doors would be a matter of "concern". In that situation it is likely that BWP would have considered that it had to make some assessment of specific wind velocities through the doors (see

paragraphs 123 and 124 above). [3] In any event, HOK and BWP would have been bound to give specific advice that without revolving doors (at the Finchley Road Entrance), or lobbies, the Centre would be subject to draughts, and that necessarily there would be additional heating costs in winter. Burford having the objections which they did so far as the overspill areas were concerned, would inevitably have wanted to know more about the draughts – how often, how cold etc. – and about relative costs. Burford might then have opted for a revolving door or lobby solution, which probably would have obviated further enquiry into the less conventional options, which enquiry, being more involved, itself would be likely to increase costs (including, possibly the cost of a wind study). This seems to me to be the most likely scenario, given that Burford was a commercial developer, anxious not to expend money unnecessarily. If Burford had opted to carry out further studies the end result would have been the same – see paragraphs 125 and 126 above."

17. In grounds 1 and 2 HOK contends that the part of paragraph 181 in which the Recorder found as a fact that *"If HOK and BWP had consulted in relation to the issues referred to above in order to provide Burford with the relative costs and benefits of the alternative design options, it is more likely than not that [1] BWP would never have made its assumption that HOK had satisfied themselves that the absence of revolving doors or lobbies would not give rise to any uncomfortable winds..."* was not pleaded and was inconsistent with the pleading. In ground 3 HOK maintains that the finding of fact in paragraph 181 *"In that situation it is likely that BWP would have considered that it had to make some assessment of specific wind velocities through the doors (see paragraphs 123 and 124 above)."* was not supported by the evidence.

18. Ground 1 is a pleading point. It is not necessarily the worse for that, but no objection was made at the trial; nor did I understand it to have been contended that HOK was in any way taken by surprise by the way the case was advanced then. Counsel for HOK points out that the re-re-amended Part 20 Particulars of Claim does not distinguish between winds and draughts. He submits that the allegations relating to design and breach draw no distinction between winds and draughts either but that in paragraph 181 of his judgment the Recorder does because sentence [1] relates to uncomfortable winds. It is submitted that such a distinction was not drawn in the pleadings so that the distinction apparently perceived by the Recorder is inconsistent with the pleaded claim.

19. I do not accept that the finding of the Recorder was not open to him on the pleadings. The relevant facts were fully pleaded in paragraphs 5 to 13 of the re-re-amended Part 20 Particulars of Claim. The allegations of breach made in paragraphs 14.1(6), 14.4 and 14.5 (paragraph 9 above) and of consequences in paragraph 15.1.5 and 15.3 (paragraph 10 above) are quite wide enough to entitle the Recorder to make the finding he did.

20. Then it is alleged in ground 2 that the finding was not justified by the evidence because Mr Allan accepted that he knew that there would be uncomfortable draughts and no distinction had been drawn in relation to uncomfortable winds. I cannot accept this submission either. The case for BWP was that had HOK done what it should have done the various assumptions made by BWP would have fallen away. There was ample evidence to justify the Recorder upholding this case whatever distinction might or might not have been drawn between winds and draughts.

21. In any event these two grounds only go to part [1] in paragraph 181 of the Recorder's judgment. That paragraph sets out three causal paths [1], [2] and [3], as they were described in argument, leading from the breach arising from lack of consultation to the damage sustained by Burford in having to carry out the further remedial measures. Part [1] relates to disabusing BWP of its assumptions. Part [2] finds that BWP would have been concerned at the ingress of air and would have made some calculations of wind velocity. Part [3] indicates the specific advice BWP and HOK jointly would have been obliged to give to Burford.

22. Each of those causal paths is independent of the others. Success on appeal in relation to the first alone would have no effect on the order made by the Recorder. HOK would have to succeed on all three if this court were to reverse the Recorder's finding. Though ground 3 seeks to undermine the second path there is no attempt to undermine the third.

23. In relation to ground 3 HOK contends that it is overwhelmingly probable that even in the event of BWP making further assessments of wind velocity it would not have produced any result different from that to which its assessment did arrive. But that seems to me to be pure speculation and no ground for differing from the conclusion of the Recorder.

24. For all these reasons I would refuse permission to appeal on each of grounds 1, 2 and 3. In my view none of them has a real prospect of success and there is no other reason, compelling or otherwise, why an appeal on those grounds should be heard.

Ground 6

25. In paragraph 198 the Recorder noted that his findings in paragraph 146 meant that HOK was in breach of duty as alleged by BWP in relation to specific aspects of consultation but that such breaches had not been causative of any loss. In paragraph 200 he said: *"...acts and omissions which are not causative may be taken into account for the purposes of assessing what contribution if any should be ordered pursuant to the Act (see paragraph 40 above), and I consider that the breaches of duties referred to in this section of this judgment should be taken into account for these purposes."*

26. In paragraph 39 the Recorder had set out the material provisions of the Civil Liability (Contribution) Act 1978, in particular the provisions of s.2(1) that: *"...the amount of contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to that person's responsibility for the damage in question."*

27. In paragraph 40 he considered the meaning in that context of the word "responsibility". He considered that: *"it encompasses more than causative responsibility: it encompasses "blameworthiness" as well as causative potency."*

As justification for that view of the law he referred to the judgment of Simon Brown J in **Madden v Quirk** [1989] 1 WLR 702, 707E and the statement of Tuckey LJ, with which Brooke and Laws LJJ agreed, in **Resource America International Ltd v Platt Site Services and Barkin Construction Ltd** [2004] EWCA (Civ) 665 at para 51 that: *"Section 2 of the 1978 Act is not expressed exclusively in terms of causative responsibility for the damage in question, although obviously the court must have regard to this, as the section directs, and it is likely to be the most important factor in the assessment of relative responsibility which the court has to make. But in the result the court's assessment has to be just and equitable and this must enable the court to take account of other factors as well as those which are strictly causative. Such an assessment made by a trial judge will only be altered on appeal if it is clearly wrong."*

28. The factors there referred to occurred after the accident the subject matter of the action. Accordingly they could not have been causative of the accident, nor were they causative of any further consequential damage. Counsel for HOK seeks to distinguish this case on the ground that in that case the factors taken into account did not involve breaches of any duty relied on in the claim whereas in this case they do.

29. I am unable to accept that the decision of this court can be distinguished on any such ground. If the non-causative factor also involves a breach of duty relied on in the action the more likely it is to be a relevant factor for the purposes of s.2(1). Accordingly I conclude that we are bound by the decision of this court in **Resource America International Ltd v Platt Site Services and Barkin Construction Ltd** [2004] EWCA (Civ) 665 to conclude that the proposition of law stated by the Recorder in paragraph 200 is correct.

30. It was not suggested that any of the non-causative breaches taken into account by the Recorder was irrelevant on any other ground to the issue of what contribution it is just and equitable for HOK to be ordered to pay to BWP. No argument was addressed to us in respect of any particular non-causative breach. In those circumstances ground 6 is no reason to interfere with the decision of the Recorder. I would dismiss the appeal accordingly.

Summary

31. For all these reasons I would
(a) dismiss the application for permission to appeal on grounds 1, 2 and 3, and
(b) dismiss the appeal on ground 6.

Lady Justice Arden

32. I agree with the judgment of the Vice-Chancellor on grounds 1, 2 and 3 of the appellant's notice. I agree that the appeal should be dismissed on ground 6 of the appellant's notice, but wish to give my reasons on this important issue.

33. Ground 6 concerns section 2 of the Civil Liability (Contribution) Act 1978 ("the 1978 Act"). My starting point is to examine that section in the context of the 1978 Act and the principal case law in which it has been construed.

34. Section 1 of the 1978 Act enables a person who is liable in respect of any damage suffered by another person to recover contribution from any other person liable in respect of the same damage. Section 2 of the 1975 Act enables the court to assess the amount of contribution. It provides that the contribution shall be: *"…such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."*

35. Section 2 provides in full as follows:-

*"**2. Assessment of contribution***

(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

(2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to—

(a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;

(b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or

(c) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced."

36. The provisions of section 2 are similar to the provisions of section 1 of the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act") dealing with the apportionment of liability in the case of contributory negligence. Section 1(1) of that Act also enables the court to reduce damages *"to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"*. Similarly, the proviso to section 1 provides as follows:- *"Provided that –*

i) this subsection shall not operate to defeat any defence arising under a contract;

ii) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable."

37. It is now established law that under both section 1 of the 1945 Act (see ***Davies v Swan Motor Co*** [1949] 2 KB 291) and section 2 of the 1978 Act (see ***Madden v Quirk*** [1989] 1 WLR 702) the court may have regard to both the causative potency of the fault of the claimant and also the blameworthiness of the claimant. Both elements are included in the concept of responsibility for the purposes of section 2(1).

38. It might be thought that where Parliament provides that the court shall have regard to one matter it did not intend the court to have regard to other matters. However this is not the case in section 2(1) of the 1978 Act. The court may take into account under section 2 of the 1978 Act the fact that one of the parties against whom contribution is sought has made a profit out of his wrongful conduct (see ***Dubai Aluminium Co Ltd v Salaam*** [2003] 2 AC 366 per Lord Nicholls at [51] to [53], with whom all the other members of the House, save Lord Millett agreed, and per Lord Millett at [164] with whom Lord

Hutton and Lord Hobhouse agreed). The court may also take into account the fact that one of the parties is insolvent (***Fisher v CMT Ltd*** [1996] 2QB 475). These, however, are exceptional situations.

39. I now turn to this case. The issue in this ground of appeal is whether the recorder was correct in law when he held: *"… acts and omissions which are not causative may be taken into account for the purposes of asserting what contribution if any should be ordered pursuant to the [1978] Act…" (at [200])*

40. The appellant submits that this conclusion is contrary to principle. Non-causative material could not be taken into account in determining the amount payable by HOK to Burford, and accordingly it should not be relevant to any contribution to that damage. Moreover, if non-causative material is capable of being brought into account, then there is nothing to stop statute-barred claims from also being brought into account. In that event, it would also be logical for the court to be able to disregard contractual limitations on damage which the defendant from whom contribution is sought agreed with the victim of the tort, but in fact the court is prohibited from doing this by section 2(3) of the 1978 Act. That limitation is an indication that Parliament did not consider that non-causative material should be capable of being brought into account. Likewise, where the person who suffered loss has been held to have been contributorily negligent and his damages have been reduced accordingly as against the party against whom contribution is sought, that party cannot be ordered to contribute more than the amount for which he was held liable in damages. Both these limitations proceed on the basis that that party liable to make contribution will not be liable for that for which he is not liable to the party suffering loss. It would be contrary to this underlying premise if non-causative material was, as such, a relevant consideration in the assessment of contribution under section 2 of the 1978 Act. That is the nature of the argument.

41. The appellant raises an absolutely fundamental question. But, as the Vice Chancellor points out, it has already been considered by this court in ***Re–Source America International v Platt Site Services*** [2004] 95 Con LR 1. At [51] Tuckey LJ, with whom Brooke and Laws LJJ agreed on this point, held as follows:-

> *"[51]Section 2 of the 1978 Act is not expressed exclusively in terms of causative responsibility for the damage in question, although obviously the court must have regard to this, as the section directs, and it is likely to be the most important factor in the assessment of relative responsibility which the court has to make. But in the result the court's assessment has to be just and equitable and this must enable the court to take account of other factors as well as those which are strictly causative. Such an assessment made by a trial judge will only be altered on appeal if it is clearly wrong.*
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> *[52]The judge found, as he said, a long catalogue of negligence against Barkin. It had undertaken entire responsibility for the way in which the hotwork was to be done and the protection of Re-Source's stock. Platt's fault, through its young welder Mr Atherton, was to acquiesce in the use of the unsatisfactory protection provided by Mr Andrews. Mr Atherton's evidence was that he had never used welding blankets before. His employer Mr Platt was unaware of the holes in the blankets.*
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> *[53]In these circumstances, whilst many judges would have apportioned some part of the blame to Platt, I am not persuaded that the judge's apportionment of 100% to Barkin was clearly wrong. His findings of negligence (at [192]) justified such a finding. It was clearly just and equitable in view of the way in which Barkin had run its defence."*

42. Thus in the ***Re-Source*** case the court held in a manner that is binding on this court that the relevant material for the purposes of section 2 is not limited to causative material although causative responsibility is likely to be the most important factor in the assessment of contribution. It is important to understand that holding against the circumstances of the case. The judge at trial had found that the party claiming contribution, a welding contractor whose "hot work" led to a fire, was entitled to 100% indemnity against the loss of the claimant's goods on the premises where he was working, because a representative of the employer had negligently instigated and directed the work and, in addition, had (a) deliberately decided to leave the site immediately after the fire started to avoid criticism and (b) had blamed the contractor and claimed to have left the site earlier than he did. This court held that the judge was entitled to take these factors into account. However, the representative's decision to leave

the site was relevant to an assessment of the seriousness of the employer's fault, since it was the employer who was responsible for supervising the welding work. This court considered that the employer's negligence in instigating and directing the work justified the order made by the trial judge, even without reference to the conduct of the employer after the fire (see [53]).

43. As I see it, in the ***Re-Source*** case, the judge relied on the employer's representative's decision to leave the fire as evidence of the relative seriousness of the employer's wrongdoing. In the same way, evidence which shows that the party against whom contribution is sought was dishonest (see generally the ***Dubai Aluminium*** case) or acted intentionally would be relevant to the assessment of contribution. In the *Re-Source* case, this court also referred to the way in which Barkin conducted its defence, even though that conduct occurred consequently to the fire and in no way could be said to have contributed to it. However, the final sentence of paragraph 53 of its judgment is not to be read as meaning that that factor was the sole factor justifying the order made. That factor was a separate and additional factor. I would however add this. In the ***Re-Source*** case, the only question with which the court dealt on this point was whether the judge was entitled to come to the conclusion that he did. This court gave no guidance as to the circumstances in which, or the manner in which, non-causative material could be taken into account under section 2(1).

44. In my judgment, there is some validity in the argument raised by the appellant. I would interpose that, if the court is able to place unrestricted weight on non-causative material, there would (subject to the express provisions in section 2 itself) be no limit on the matters which the court could take into account. It would on that basis be very difficult to determine as a preliminary issue that a matter was not relevant to the assessment of contribution, and the introduction of significant non-causative material could lead to lengthy and costly trials. That cannot have been the intention of Parliament. Moreover the anomaly would arise that a party who incurred some liability to the victim could be made liable for a 100% contribution on the basis of a non-causative matter, while a person who was liable for no loss at all could not be made liable to make any contribution at all.

45. In my judgment, the answer lies in the way section 2(1) is expressed. Parliament has particularly directed the courts when exercising their powers under section 2(1) of the 1978 Act to have regard to the extent of the defendant's responsibility for the damage in question. Section 2(1) is not an unstructured discretion. It is a semi-structured discretion which directs the court to attach most weight to the defendant's responsibility for the damage in question. If the defendant's action did not cause the damage in question, it cannot, as such, form part of the responsibility for the damage. It may, quite separately, be relevant to the court's evaluation of the blameworthiness component of responsibility. Putting that possibility aside, and while the point has not been fully argued, I would provisionally express the view that, if non-causative material is brought into account, there is only a limited role it can play. It must be given less weight than the material showing the defendant's responsibility for the act in question. Moreover, if any non-causative material is brought into account, the resulting order for contribution must, nonetheless, be just and equitable within section 2(1). Therefore, there will have to be some sufficient relationship between it and the damage in question.

46. In the present case, the judge dealt with the assessment of contribution in paragraph 288 of his judgment. He said: *"Whilst BWP must shoulder a greater part of the responsibility for the initial shortcomings in the internal climate of the Centre (for the reasons indicated in paragraphs 204, 221, 232 and 233 above), there were also serious shortcomings in HOK's performance of its duties (see paragraphs 179 to 200 above), probably all stemming from the erroneous concept that BWP were "uniquely responsible" for ensuring that the internal environment met Burford's requirements. Further the poor communication, liaison, and co-ordination evident in relation to the design process puts HOK, as leader of the design team, in a poor light. In all the circumstances it seems to me that the contribution which HOK should make to the settlement sum (reduced to £996,250 to reflect BWP's late acceptance of their breach of duty) is one of 40 per cent i.e. £398,500, exclusive of interest."*

47. The judge has not stated precisely how he has used this non-causative material. He appears however to have formed a view that BWP should bear the greater share of liability before taking the non-causative material into account. I therefore take the view that he can have done no more than treat

that material as showing the seriousness of HOK's conduct. Alternatively he must have treated that material as constituting additional factors on which to make his determination as to contribution. Neither section 2(1) as interpreted by this court in the ***Re-Source*** case, nor the provisional view which I have expressed above as to the role to be given to non-causative material, disentitled the judge from taking that course. Accordingly, I too would dismiss the appeal on ground 6.

Lord Justice Keene

48. I too would refuse permission to appeal on grounds 1, 2, and 3 for the reasons given by the Vice-Chancellor. I would also dismiss the appeal on ground 6.

49. This court is bound by the decision in the ***Re-Source*** case insofar as it was there held that section 2 of the 1978 Act is not concerned solely with causative responsibility. When one analyses the facts in the *Re-Source* case, it is clear that the trial judge, when assessing contribution, took into account not only the decision of the employer's representative to leave the site after the fire had started but also his subsequent "lengthy campaign" to show that he had left the site earlier than he did and that the welding contractor was entirely responsible. There can be no doubt that this conduct took place after the fire and could have had no causative potency. That, indeed, was what the appellant employer complained about, on the appeal, as paragraph 50 of the judgment shows: *"the judge relies on among other things [the representative's] behaviour after the fire which was obviously not causative of it."*

It was in response to this that Tuckey LJ, with whom the other two members of this court agreed, held that the court could take account of other factors as well as those which were strictly causative (paragraph 51).

50. It is right, as Arden LJ says, that the court in ***Re-Source*** considered that the trial judge's findings of negligence justified the 100 per cent apportionment but that statement in paragraph 53 is followed immediately by this statement about the apportionment: *"It was clearly just and equitable* ***in view of the way in which Barkin*** *[the employer]* ***had run its defence.***" (emphasis added).

51. I would accept that there needs to be some close connection between any non-causative factors taken into account in such an exercise and the acts or omissions which give rise to liability in the first place, such as to make it appropriate for them to be reflected in an amount that is ***"just and equitable"***, having regard to the extent of that person's responsibility for the damage in question. Inevitably it will not be easy to draw the line, which will have to be done on a case by case basis. But whatever the difficulties, it is not open to this court to depart from the approach adopted in the ***Re-Source*** **c**ase. I would nonetheless accept the point by Arden LJ that the role of non-causative factors should be a limited one.

Mr Justin Mort (instructed by Nabarro Nathanson) for the Appellant
Mr Ben Patten (instructed by Pi Brokerlink) for the Respondent