OUTER HOUSE, COURT OF SESSION

[2015] CSOH 92

CA162/12

OPINION OF LORD WOOLMAN

In the cause

SSE GENERATION LTD

Pursuer;

against

(FIRST) HOCHTIEF SOLUTIONS AG

(SECOND) HOCHTIEF (UK) CONSTRUCTIONS LTD

Defenders:

Pursuer: Keen QC, Barne, CMS Cameron McKenna LLP

Defenders: Currie QC, Richardson; Simpson & Marwick

14 July 2015

Introduction

[1] In December 2005, SSE Generation Ltd ("SSE") engaged the first defender to design and build a new hydro-electric scheme at Glendoe, Fort Augustus ("the scheme"). Glendoe is within a geological area known as the Conagleann Fault, or Great Glen Fault.

[2] Subsequently SSE agreed to treat the first and second defenders jointly as the contractor for the purposes of the contract ('Hochtief'). Hochtief engaged Jacobs (UK) Ltd to provide it with engineering assistance during the construction of the scheme. Following completion, the scheme began operating in January 2009. In August 2009, however, a major tunnel collapsed and it ceased to generate electricity.

[3] The parties entered into discussions about rectifying the problem. They were unable to agree the scope and nature of the remedial works. More fundamentally, they disagreed about who bore the risk of the collapse. In the absence of agreement, SSE employed another contractor to carry out the remedial works. They took place between 2010 and 2012. During that period the scheme did not generate electricity.

[4] The present litigation arises out of those events. In the principal action, SSE seeks to recover a sum of over £130 million, being the loss it claims to have sustained as a result of the tunnel collapse. In the alternative, it claims £102 million based on a different ground of action. Hochtief counterclaims for a sum of almost £10 million. That

represents the profit it would have made if it had carried out the remedial works itself, together with the costs of investigating the tunnel collapse.

[5] The case came before me on a preliminary point relating to insurance. The parties chose to base their contract upon the core clauses of the NEC Engineering and Construction Contract 2nd edition (November 1995), together with various options of option Y(UK)2 of April 1998. They signed the contract on 22 and 28 December 2005 ("the NEC contract"). In accordance with its terms, Hochtief took out a policy in joint names of itself and SSE in respect of contractor's risk events.

[6] Hochtief submitted that SSE is barred from raising the present proceedings. It should instead have made a claim on the joint names policy. In its note of argument, Hochtief sought dismissal of the action. In the course of oral submissions, however, it modified its position. It contended that the joint insurance clause responds to some of the grounds of action advanced by SSE. Accordingly, some parts of the claim should be deleted before the case is remitted to proof.

[7] SSE maintained that it was appropriate that the case go to proof on the whole pleadings for both parties, leaving all the pleas-in-law standing. The case turns on the proper construction of the relevant documents.

The Terms of the NEC Contract

[8] The core clauses of the NEC contract are divided into nine parts. I shall summarise the ones that are relevant for the present action.

Part 1 – General

[9] This part defines a number of material terms:

a. "Works Information" is information that either specifies and describes the works, or states any constraint on how the contractor provides the works: clause 11.2(5).

b. "A Defect" is "a part of the works which is not in accordance with the Works Information or a part of the works designed by the Contractor which is not in accordance with … the Contractor's design which has been accepted by the Project Manager": clause 11.2(15).

c. The “Defects Certificate” is a list of uncorrected defects that the Supervisor has notified before the defects date: clause 11.2(16).

Part 2 – The Contractor’s main responsibilities

[10] The contractor must provide the works in accordance with the Works Information: clause 20.1.

Part 4 – Testing and Defects

[11] If a test or inspection shows a defect, then the contractor must correct it and the test or inspection will be repeated: clause 40.4. If the supervisor notifies a defect, the contractor must correct it before the expiry of the specified period: clause 43.1. If the contractor fails to do so, the project manager assesses the cost of having it corrected by another person and the contractor pays that amount: clause 45.1. With regard to latent defects in the civil works, the contractor must make good any defect that appears within a period of 12 years after completion: clause 46.4 (as inserted by option Z3.1). An exception is made for normal wear and tear.

Part 6 – Compensation Events

[12] If an employer’s risk event occurs, the contractor is entitled to compensation for any works then required: clause 60.1(14).

Part 8 – Risks and Insurance

[13] The employer’s risks include loss of or damage to the parts of the works it takes over. It is not, however, responsible for loss or damage occurring before the issue of the defects certificate that is due to a Defect that existed at take over: clause 80.1. The contractor carries all the other risks from the starting date until the issue of the Defects Certificate: clause 81.1.

[14] Until the Defects Certificate has been issued, the contractor must promptly repair damage to the works, plant and materials: clause 82.

[15] Clause 83.1 provides that "Each Party indemnifies the other against claims, proceedings, compensation and costs due to an event which is at his risk." That obligation is qualified in two respects. First, any sum payable is reduced in the event of contributory negligence: clause 83.2. Second, the total liability of each party to the other

in respect of loss of or damage to the works, plant and materials is limited to the total tender price: option Z11.

[16] Clause 84 is the insurance provision. It requires the contractor to take out a policy in joint names to provide cover for contractor's risk events. The policy is to endure from the starting date until the Defects Certificate has been issued, which is 104 weeks after the completion date.

[17] The provision stipulates that the policy should include a waiver by the insurers of their subrogation rights against directors and other employees of the insured except in the case of fraud: clause 85.2. There is no similar waiver in respect of the parties themselves. Clause 85.4 provides that:

> "Any amount not recovered from an insurer is borne by the *Employer* for events which are at his risk and by the *Contractor* for events which are at his risk."

[18] With regard to design liability, the parties incorporated option M, which states that:

> "The *Contractor* is not liable for Defects in the *works* due to his design so far as he proves that he used reasonable skill and care to ensure that it complied with the Works Information."

The CAR Insurance Policy

[19] The joint names insurance that Hochtief took out is a construction all risks policy (the "CAR Policy"). It contains two conditions about the insurers' rights of subrogation.

[20] The first provision is contained in the section headed "Insuring Conditions":

> "It is agreed that this Insurance is effected for the protection and benefit of those mentioned under the heading 'Insured' and covers the interest and liabilities of each of them and also their mutual liabilities subject, however, to the terms and conditions of this Insurance. Whilst Insurers waive recourse or subrogation directly or indirectly against any of the Insured, in whose interest this Insurance is effected, they do, however, retain all rights of recourse against any other person …"

[21] The second is contained in "Memoranda applicable to Section II":

> "Insofar as the 'Insured' … comprise more than one party each shall be considered as a separate and distinct entity and the words 'Insured' shall be

> considered as applying to each party in the same manner as if a separate policy had been issued to each of the said parties and the Insurers hereby agree to waive all rights of subrogation or action which they have or may acquire against any of the aforesaid parties arising out of any occurrence in respect of which any claim is made hereunder …"

The Facts

[22] The following outline must be read subject to the proviso that the facts will be determined at proof.

[23] In return for the contract price of £125.9 million, Hochtief undertook to design and build the scheme, which comprises an underground powerhouse, a dam, an upper reservoir, two tunnels and various ancillary works. The completion date was 28 February 2009. The civil works had a projected design life of 75 years, during which they were to provide a reliable service without the requirement for a major refurbishment or significant capital expenditure. No employees were to be based at Glendoe. Instead, the scheme was to be monitored by SSE staff at its General Operation Centre ("the GOC") in Perth.

[24] The two tunnels are a significant part of the scheme. The headrace tunnel is 5m in diameter and conveys water from the reservoir to a turbine 6.3km below in the powerhouse. The tailrace tunnel conveys water for discharge into Loch Ness. Hochtief used a tunnel boring machine to excavate the rock. It chose a design to support the tunnel that relied on the inherent strength of the surrounding rock. It varied over the length of the tunnel and was categorised by reference to different rock excavation classes.

[25] Hochtief completed the headrace tunnel in early 2008, well ahead of schedule. There followed a period of inspection and testing. Inspections in February and again in October 2008 disclosed some evidence of deterioration in surrounding areas of rock. In late October, Hochtief "watered up" the headrace tunnel for wet commissioning, which appeared to be successful and the scheme began operating. In February 2009, SSE issued a completion certificate. It was backdated to 18 December 2008, which became the defects date.

[26] In May 2009 the staff at the GOC noticed that the scheme was generating anomalous data readings. SSE asked Hochtief to investigate and report. Apart from one

short test run, SSE did not operate the turbine between 2 and 29 June. It wished to preserve the reservoir level in advance of the official opening of the scheme by Her Majesty The Queen on 29 June.

[27] On the day of the opening ceremony, the scheme generated a "fail to start" message. Some days later, on 10 July, the GOC staff noticed further odd data readings. They wondered whether they were caused by instrumentation error. SSE again asked Hochtief to investigate and report.

[28] In the week commencing 13 July, an SSE hydro-engineer visited the scheme. He noticed a discharge of black water into Loch Ness. He thought that it might be due to peat from the upper reservoir, which would have been harmless to the turbine. The discolouration was still present in early August.

[29] On 5 August the plant did not run normally. It did not reach its set load of 100MW. Preliminary investigations indicated that that the headrace tunnel was blocked. SSE shut down the scheme. The following day it issued a Defects Notice stating that there appeared to be inadequate support in part of the tunnel.

[30] The parties investigated the cause of the problem over the course of the following week. They arranged to de-water the headrace tunnel to allow access. On inspection, they found a significant blockage. It appeared to have been caused by the collapse of the crown of the tunnel.

[31] Believing the collapse to be a contractor's risk event, on 31 August SSE instructed Hochtief to remedy matters within a reasonable period. Hochtief replied the next day to the effect that the collapse was an employer's risk event. Accordingly, it was entitled to carry out the remedial works and to be paid in full for doing so.

[32] The parties continued to negotiate until the end of 2009, but their discussions did not ripen into agreement. SSE indicated that it would allow Hochtief to carry out the remedial works, subject to three conditions: (a) SSE would have control over the design of the works; (b) Hochtief undertook to commit to the contract programme set out by SSE; and (c) Hochtief bore half of the costs.

[33] Hochtief did not accept those conditions. On 24 March 2010, SSE engaged BAM Nuttall Limited ("BAM") to undertake the remedial works, which lasted over two years. During that period, the scheme did not generate electricity. SSE notified Hochtief of further problems in the headrace tunnel. The scheme re-opened on 21 August 2012.

Matters in Dispute

[34] The parties' respective cases are set out in detail in the pleadings. SSE's grounds of action can be summarised as follows:

a. Hochtief failed to classify the rock mass and install rock support in accordance with the Works Information.

b. It failed to implement the contractual design for tunnel support.

c. The collapse was a Defect (inadequate tunnel support) that existed at take over. It was therefore a contractor's risk event in terms of clause 81.1.

d. Hochtief's design was not approved by the project manager. In any event, it did not exercise reasonable skill and care to ensure that the design complied with the Works Information and the relevant geological information.

e. Hochtief failed to correct the Defect that had been notified to it, contrary to clauses 43 and 46.4 (as inserted by option Z3.1).

f. SSE was entitled to engage another contractor to carry out the remedial works and to seek payment from Hochtief in terms of clause 45.1.

g. Hochtief failed promptly to repair the damage to the works, contrary to clause 82.1. That obligation arose regardless of whether the damage to the works was a defect, or whether it was an employer's risk event.

[35] Hochtief contests every branch of the claim. In particular, it disputes the key questions of causation and loss.

Why did the collapse occur?

[36] According to SSE, when water began to flow through the headrace tunnel, it washed out erodible rock. As the erosion continued, the rock mass relaxed and opened up seams in the Conagleann Fault. That led to block-fall. Over a period of time, the accumulated debris caused a partial blockage. The de-watering of the tunnel resulted in a decrease in pressure, which in turn led to the major collapse and complete blockage.

[37] Hochtief advances a different causal theory. It attributes the collapse to bad ground conditions above the crown of the headrace tunnel. Prior to construction, the

parties did not know the size and nature of the Conagleann Fault and whether it would intersect the headrace tunnel. Hochtief maintains that the collapse was an employer's risk event. It also states that SSE either caused the collapse or at least materially exacerbated the damage. According to Hochtief, SSE should have made routine checks of the operating parameters. It should have closed down the scheme in May 2009, when it received the anomalous data reading. If it had done so, the cost of investigation and repair would have been considerably less.

What was the extent of the damage?

[38] SSE contends that the main collapse extended to 71 metres, that there were two further collapses, and that the rock support at various other locations in both of the main tunnels did not fulfil the contractual requirements. Hochtief challenges these assertions. It alleges that SSE refused to give it sufficient access to determine the cause, scope and extent of the collapse. It also maintains that (a) SSE failed properly and promptly to investigate the collapse; (b) the main collapse was only 8–10 metres in length; and (c) there were no other collapses.

What loss has SSE suffered?

[39] SSE seeks to recover the cost of the remedial works, which totals about £130 million. It also seeks to recover the maximum sum available under the NEC contract for a failure to meet the minimum guaranteed performance criteria (£1 million), plus lost management time (*c.* £2 million). In the alternative, it seeks to recover the difference between the amount it paid to BAM and the total amount that it would have paid to Hochtief to carry out the remedial works (*c.* £102.6 million).

[40] Hochtief submits that in carrying out the remedial works, SSE wrongly abandoned the original design concept for the tunnel. It also argues that some of the works in question were unnecessary and that they took place over an unjustifiably long period.

The Counterclaim

[41] Hochtief's principal position is that the collapse amounted to an employer's event and that it had the right to carry out the remedial works. It challenges SSE's right to impose the three conditions in respect of the remedial works. In particular Hochtief regards the proposed timetable set by SSE as unachievable. In the counterclaim, it seeks

to recover two sums for breach of contract by SSE. First the profit it would have received if it had carried out the works itself (*c.* £3.1 million). Second, the technical and legal costs of investigating the collapse and its consequences (*c.* £6.5 million).

Submissions

Hochtief

[42] Mr Currie contended that the NEC contract is intended to limit liability. The parties intended that the CAR policy should take the place of liability. Each of them is therefore barred from bringing any proceedings against the other in respect of a loss covered by the CAR policy. If the contractor is unable to fulfil its obligation to carry out the necessary remedial works, for example because of insolvency, then the employer can engage another contractor and make a claim on the policy.

[43] Mr Currie founded on the following propositions.

a. An insurer that has indemnified one party under a policy cannot exercise rights of subrogation against another party insured under that same policy.

b. Where there is a joint names policy, the parties may by contract exclude claims against one another for a loss covered by that policy.

c. As the CAR policy expressly waived subrogation, the parties intended that they could not make claims against one another in respect of risks it covered.

d. Hochtief's primary liability is to rectify any defects at its own cost, and that is covered by the CAR Policy.

[44] It is important to distinguish between Part 4 (defects) and Part 8 (damage) of the NEC contract. The present case involves damage caused by a defect. Under Part 4 the employer can appoint a third party and claim the cost from the contractor, but Part 8 envisages that the contractor will carry out the works and recoup the cost from the CAR policy.

[45] In other words, the joint names policy responds to Part 8 claims of damage (which include those caused by defect). It does not, however, cover Part 4 claims, for example ones made under clause 46.4. The reason that SSE pleads damage caused by a defect is that it is concerned that under clause 80.1, it would otherwise be an employers' risk.

[46] SSE has failed properly to discriminate between the two parts, but it was plain from condescendence 59 that it brought its case under Part 8:

> "The collapses were due to Defects (i.e. the inadequate tunnel support) which existed at take over. The collapses were therefore risks carried by [Hochtief] in terms of clause 81.1 of the Contract."

[47] Clause 83.1 is not intended to cover the present situation. The effect of clause 84 is that insurance should take the place of liability in respect of matters covered by the policy. There would have to be an express term to override the natural construction stemming from the provision for joint names insurance.

[48] Even if SSE does have a relevant case, for breach of clause 82.1, a proof restricted to that issue will be substantially shorter, because there will be no need to look at the cause of the collapse or legal liability.

SSE

[49] Mr Keen's submissions were as follows. Hochtief had conflated two distinct issues: (a) subrogation between joint insured, and (b) a contractual provision for joint insurance. The present case turns on the proper construction of the NEC contract. It is unnecessary to consider the terms of the CAR policy.

[50] The rule of insurance law in respect of a simple joint names policy is well-known. If two persons insure a property in joint names, which is destroyed by fire due to A's negligence, the insurers will pay out on the policy. But they cannot then make a claim against A, because of the rule against subrogation in such circumstances.

[51] The position is different, however, where another contract is involved. In those circumstances, a different question must be asked:

> Where parties enter into a contract for insurance against certain risks, does the existence of that provision in isolation exclude the right of one party to sue the other for breach of contract, because the consequences could be covered by a joint names insurance policy?

[52] Looking at the documentation in the present case, the answer to that question is No. On a natural construction of the NEC contract, SSE did not accept the joint names policy in lieu of Hochtief's obligations. Clause 83.1 makes it plain that the parties adopted the opposite position. Each party expressly agreed to indemnify the other.

[53] SSE had set out its grounds of action carefully in articles 59 to 61 of condescendence. It averred that Hochtief had failed to install the appropriate tunnel support in accordance with the Works Information. That involved a breach of its duty of care. The collapse of the tunnel was an event that manifested the existence of a Defect. Hochtief was bound to rectify the defect or pay for its rectification.

[54] Hochtief has itself encapsulated and adopted SSE's position in the first sentence of paragraph 10 of the counterclaim, which states:

> "In terms of clause 83.1 of the Contract, each party indemnifies the other against, *inter alia*, costs due to an event which is at his risk."

The Legal Framework

The Function of Joint Names Insurance

[55] Mr Justice de Grandpre considered the utility of joint names policies in *Commonwealth Construction Co Ltd* v *Imperial Oil Ltd*(1977) 69 DLR (3d) 558, a decision of the Supreme Court of Canada. He stated that the basic principle is that "subrogation cannot be used against the insured himself" (p561) and continued:

> "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." (pp 562-3)

The English Line of Authority

[56] From 1979 onwards, a number of English courts have discussed joint names policies in the context of different factual circumstances: *The Yasin* [1979] 2 Lloyd's Rep 45; *Petrofina (UK) Ltd* v *Magnaload Ltd* [1984] QB 127; *Rowlands Ltd* v *Berni Inns*

Ltd [1985] 2 Lloyd's Rep 437; *Surrey Heath Borough Council* v *Lovell Construction Ltd* (1990) 48 BLR 108; *Stone Vickers Ltd* v*Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288; *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; and *Hopewell* v *Ewbank Preece* [1998] 1 Lloyd's LR 448.

[57] Several of those cases cite de Grandpre J's observations with approval. Some of the judges also made statements that have become part of the ingrained jurisprudence in this area. In *National Oilwell*, Colman J stated:

> "For the insurers who had paid the principal assured to assert that they were now 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." (p 614)

[58] The precise basis for the principle has been left uncertain. In *Petrofina* it was suggested that it might be based on the older concept of circuit. In*Hopewell* Mr Recorder Jackson QC (as he then was) favoured an implied term:

> "In my view it would be nonsensical if those parties who were jointly insured under the CAR policy could make claims against one another in respect of damage to the contract works. Such a result could not possibly have been intended by those parties. I have little doubt that they would have said so to an officious bystander." (p 458)

[59] In *Surrey Heath* one party argued that where there is a joint names insurance, there is an overriding principle that neither party can sue the other in respect of any matter within the policy, even if there is another term entitling that to occur. Dillon LJ rejected that argument as being too wide. He stated that:

> "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." (p 121)

Co-operative Retail Services Limited v *Taylor Young Partnership Ltd*

[60] The analysis of joint names policies came before the House of Lords in *Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd* [2002] 1 WLR 1419. The facts were as follows. CRS engaged Wimpey as the main contractor to build a new headquarters in Rochdale. Three other parties were involved: Hall was the electrical sub-contractor, TYP was the architect, and HLP was the consulting engineer. Pursuant to clause 22A of the main contract, which was JCT 80 private with quantities, a joint names policy was taken out. It insured Wimpey, Hall and CRS against the risk of fire. Prior to practical completion, the building was extensively damaged by fire.

[61] CRS could not raise proceedings against Wimpey or Hall, because all three were insured against the same risk under the same insurance policy. CRS therefore raised an action against TYP and HLP. They in turn claimed contribution against Wimpey and Hall under section 1(1) of the Civil Liability (Contribution) Act 1978. The main contract expressly excluded liability for damage to the works.

[62] The question of contribution was tried as a preliminary issue. For that purpose, it was assumed that the fire was caused by negligence and breach of contract on the part of all the parties involved: Wimpey, Hall, TYP and HLP. The claim for contribution failed both at first instance and on appeal.

[63] In the Court of Appeal, Brooke LJ reviewed the earlier authorities: [2000] 2 All ER 865. He stressed the importance of paying careful attention to the terms of the contract actually made between the parties (para 62). He suggested that:

> "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?" (para 72)

[64] Brooke LJ construed the contract as follows:

> "To put it quite simply, [Wimpey and Hall], 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." (para 73)

[65] In the House of Lords, Lord Hope of Craighead delivered the leading judgment. He identified two questions for determination (para 34). The first related to the proper construction of the main contract. The second related to the effect of the joint names policy.

[66] Lord Hope answered the first question as follows (para 50):

> "In my opinion the meaning and effect of the main contract was to exclude Wimpey's liability to CRS for loss and damage caused by the fire in so far as this was due to its breach of contract."

[67] Because of that answer, it was strictly unnecessary for Lord Hope to address the second question. He chose to do so, however, and concluded that Wimpey and Hall would have been entitled to resist the claim on the basis of an implied term, as discussed in *Hopewell* (para 65). Although there has been some discussion on the point, it appears that Lord Hope was there referring to the rule of insurance law: see *Halsbury's Laws of England*, 5th ed, vol 60 at para 223.

Post CRS cases

[68] In *Scottish & Newcastle plc* v *GD Construction Ltd* [2003] Lloyd's LR 809, the owner of a public house in Reading employed a building contractor to refurbish it to create a family inn. During the course of the works, a workman using a blowtorch ignited the straw thatch on the roof and the building burned down. Although there was provision for joint names insurance, no policy had in fact been taken out. In consequence, the issue turned on the construction contract, which stated that the contractor had no liability for damage caused by his negligence.

[69] Delivering the decision of the Court of Appeal, Aikens J held that if the employer had fulfilled its obligation and taken out an insurance policy, it would have stated that the insurers had no right to use the name of the employer to sue by subrogation the contractor. He regarded the fact that there was no right of recourse as of material importance.

[70] The next case in the sequence is *Board of Trustees of the Tate Gallery* v *Duffy Construction Ltd* [2007] BLR 216. During the course of hard landscaping works at the Tate Gallery in London, a large quantity of water escaped causing substantial damage to the works and to the gallery itself. By the time that the escape was discovered, the basement of the gallery was 1.4m deep in water. The Board of Trustees were

indemnified by the insurers under a combined contract works insurance policy. The insurers then commenced proceedings against the contractor on the basis of subrogation.

[71] The contractor relied on a number of lines of defence. In particular, it said that the main contract imposed obligations on the trustees to insure against liabilities and that it was a co-insured under the combined policy.

[72] Jackson J held on the assumed facts (a) that the contractor had failed to disclose material information to the insurers; (b) that it therefore had no claim against insurers for indemnity; and (c) that it had no defence based on the main contract, nor was it a co-insured in respect of damage. He concluded his judgment with three propositions, the first of which is not relevant for present purposes.

> "(ii) it is an implied term in contracts such as the present that one party will not sue the other in respect of loss or damage for which they are both co-insured.
>
> (iii) That implied term does not extend to a situation in which the defendant's breach of policy has (a) caused the policy to be avoided *vis-a-vis* himself, or (b) made it impermissible for the defendant to claim under the policy in respect of the loss which is in issue."

[73] Mr Currie founded on those propositions in support of his argument. Mr Keen submitted that they were "highly suspect", but he founded on the substance of the decision, which he said contradicts Hochtief's submission.

[74] In *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls Royce Motor Cars Ltd* [2008] EWCA Civ 286, a claim arose when the new Rolls-Royce manufacturing plant in West Sussex was damaged by water after a mains pipe burst. For the purposes of the litigation it was assumed that Tyco, which had installed the sprinkler system at the plant, was responsible. The contract provided that the employer should take out an insurance policy in the joint names of itself and the various contractors. In fact, Rolls Royce had failed to take out such a policy, but the parties accepted that the issue had to be resolved as if it had.

[75] Rix LJ framed the issue as follows (para 73):

> "whether the provision for joint names insurance by itself provides an overriding reason to construe the contract in which it appears in such a way

as to override provisions under which one of the joint named insureds is expressed as being under a liability for its negligence or other default to the other joint named insured."

[76] He thought that the matter was straightforward in cases such as *CRS* and *Scottish & Newcastle* "where it is clear that there is to be no liability of a contractor to his employer in the area of the regime for joint names insurance" (para 76). In cases, however, where the contractor continues to have a liability to the employer for negligence, the question would have to be worked out on a case by case basis (para 77). He added:

> "I can well see that a provision for joint names insurance may influence, perhaps even strongly, the construction of the contract in which it appears. It may lead to the carving out of an exception from the underlying regime so far as specified perils are concerned. But an implied term cannot withstand express language to the contrary. Moreover, if the underlying contract envisages that one co-assured may be liable to another for negligence even within the sphere of the cover provided by the policy, I am inclined to think that there is nothing in the doctrine of subrogation to prevent the insurer suing in the name of the employer to recover the insurance proceeds which the insurer has paid in the absence of any express ouster of the right of subrogation, either generally or at least in cases where the joint names insurance is really a bundle of composite insurance policies which insure each insured for his respective interest." (para 77)

[77] The most recent case concerned a demise charter, rather than a construction contract: *Gard Marine & Energy Ltd* v *China National Chartering Co Ltd* [2015] EWCA Civ 16. The same points, however, were in issue. In delivering the opinion of the Court of Appeal, Longmore LJ stated (para 79):

> "Although there has been discussion in the authorities about the basis of this principle of construction there is now no doubt that it exists. Some earlier cases favoured circuity of action or the true construction of the policy of insurance as being the basis of the principle but it is now clear that it ultimately depends on the underlying contract of the parties rather than on the terms of the insurance policy made pursuant to that contract."

[78] He added that (para 83):

> "Although, therefore, we would not disagree with Rix LJ about the need carefully to construe the underlying contract between the parties making agreements about insurance, we would, like this court in *GD Construction (St Albans) Ltd* v*Scottish & New Castle plc* [2003] EWCA Civ 16 at paragraphs 39 and 59, say that the *prima facie* position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other. That will be all the more so if it is agreed that the insurance is to be in joint names for the parties' joint interest or if there are other relevant circumstances …"

Decision

[79] I begin with four propositions. First, this is a difficult area of the law: *Tyco* per Rix LJ at para 75. Second, the thrust of the authorities is in favour of joint names insurance displacing contractual liability: *Gard Marine & Energy Ltd.* Third, care must be taken not to merge the law of insurance with the law of contractual interpretation. Fourth, the primary focus in each case is on the words used by the parties set in their context.

[80] In construing the NEC contract, the starting point is clause 83.1. It expressly stipulates that each party undertakes liability to the other. Accordingly, that distinguishes the present case from those cases such as *CRS*, where the relevant provisions excluded liability.

[81] I see no warrant to override clause 83.1 and give primacy to clause 84. Each provision deals with a different point. One deals with indemnity, the other with insurance. The requirement that a joint names policy should be taken out is based on obvious considerations of utility and prudence. Both parties have an interest in knowing that they have the security of a fund to finance any necessary works. But there is no obvious reason to construe that as supplanting liability.

[82] If Hochtief's submission is correct, it renders clause 83.1 redundant. There is no need for a liability provision if SSE has no right to sue in the first place. A similar point can be made about the limitation provision in option Z11. Why have the parties sought to limit liability to the total tender price? The inference is that they have done so because they recognise that each is obliged to the other in respect of loss and did not

intend the CAR policy to supplant liability. Hochtief has pleaded the limitation provision in the defences. In consequence, SSE has restricted the sum it claims to reflect the limitation provision.

[83] I also observe that the parties did address the question of subrogation in the NEC contract. Clause 85.2 waives any subrogation rights against the directors and employees of the joint insured. The waiver of such rights in respect of one another is potentially a much more significant matter. It would therefore be odd if it has been left to implication or construction. One would expect such a waiver likewise to be in express terms.

[84] I find support for my approach in *Keating on NEC3* (1st ed) 2012 at para 9-029:

> "It is unlikely on its face that clause 84 would have the effect of displacing any liability that would otherwise attach to the Contractor for its negligence. Moreover, clause 85.4 appears to be clear in its intent to maintain the underlying risk allocation by the parties: any amount not recovered from an insurer is to be borne by each party according to the contractual risk clauses. The wording of clauses 83.1 and 83.2 also implies that each party bears the risk of its own negligence."

[85] Mr Currie submitted that that passage is wrong. I disagree. It strikes me as a cogent analysis of the contractual regime created by the NEC contract. I also acknowledge that expressions of perception and practice within the construction industry deserve consideration.

[86] In *CRS* Lord Hope concluded that where two parties entered into a contract which stipulated that one party had to obtain an insurance policy in the joint names for both, then one could not sue the other for damages where the loss was covered by the insurance because there was an implied term in the contract preventing such action.

[87] In the present case, I hold that there was no such implied term. It was not necessary for purposes of business efficacy. Instead, it would do violence to the language selected by the parties. There is no irrebuttable presumption that they have no liability to one another simply because a joint names policy is in place. That would tend to merge the law of insurance with the law of contractual interpretation.

Conclusion

[88] I conclude that the provision for joint names insurance does not displace the parties' liability under the NEC contract. Accordingly, SSE is not barred from bringing

any part of the present action. I shall fix a by order hearing to consider further procedure in the light of this opinion.