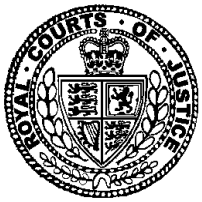

Neutral Citation Number: [2022] EWHC 956 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 29/04/2022

Case No: HT-2021-000075

Before:

MR JUSTICE EYRE

- -

Between :

THE RUGBY FOOTBALL UNION	**Claimant**
- and -	
1) CLARK SMITH PARTNERSHIP LIMITED	**Defendants**
2) F M CONWAY LIMITED	

Claim no: HT-2021-000101

Between:

F M CONWAY LIMITED

Part 8 Claimant

-and-

1) THE RUGBY FOOTBALL UNION
2) ROYAL AND SUN ALLIANCE PLC

Part 8 Defendants

- -

Paul Reed QC and Simon Kerry (instructed by **Plexus Law**) for the **Claimant and the Part 8 Defendants**
Michael Wheater and Catherine Piercy (instructed by **Keoghs LLP**) for the **First Defendant**
Karim Ghaly QC and Ruth Keating (instructed by **Clyde & Co LLP**) for the **Second Defendant/Part 8 Claimant**

Hearing dates: 21st, 22nd and 23rd March 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE EYRE

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be **10:30** on **29 April 2022**

Mr Justice Eyre:

1. The 2015 Rugby World Cup took place at the Twickenham stadium. In 2012 the Rugby Football Union ("the RFU") was undertaking substantial works of demolition, construction, and upgrading ("the Project") to prepare the stadium for the World Cup. The RFU engaged a number of contractors to perform the necessary works through a series of separate works packages or sub-projects.

2. The necessary works included the installation of High Voltage power cables in buried ductwork. The installation of the ductwork was to be undertaken pursuant to works package A07.1 and the pulling of the cables through the ductwork pursuant to works package A07.2. The current dispute is concerned with the former of those packages in respect of which the RFU engaged Clark Smith Partnership Ltd ("Clark Smith") to design the ductwork and FM Conway Ltd ("Conway") to install it. Neither of those was involved in the subsequent exercise of pulling the cables through the ductwork.

3. There were a number of pre-meetings and discussions between those acting for the RFU and for Conway the content of which I will return to below. On 19th June 2012 the RFU sent Conway a letter ("the Letter of Intent") the terms of which I will also consider below. Conway began to prepare to undertake the work then or shortly thereafter commencing on site in early July 2012. On about 17th July 2012 the RFU entered an all-risks insurance policy ("the Policy") which provided cover with effect from 16th July 2012. Royal & Sun Alliance Plc ("RSA") was the principal underwriter of the Policy. The operation and effect of the Policy are at the heart of the issues I have to consider. The Letter of Intent had envisaged that the RFU and Conway would enter into a contract adopting with amendments the terms of the JCT Standard Building Contract without Quantities 2011 ("the Contract") and they did so on 19th October 2012.

4. The RFU contends that there were defects in the ductwork which caused damage to the cables when they were pulled through it. It says that it has suffered loss in the sum of £4,440,909.45 made up of £3,334,405.26 being the cost of replacing the damaged cables and related sums and £1,106,504.19 as the cost of rectifying the ductwork itself. The RFU has been indemnified by RSA under the terms of the Policy in respect of the replacement and related costs of £3,334,405.26.

5. The RFU says that Clark Smith and Conway are liable for those losses. The former on the footing of defects in its design of the ductwork and the latter by reason of deficiencies in its workmanship. Those allegations are disputed by Clark Smith and Conway and will have to be resolved at trial.

6. There is also dispute as to the effect of the Policy. On 19th March 2021 Conway commenced Part 8 proceedings against the RFU and RSA. In those proceedings it sought declarations to the effect that it was a co-insured with the RFU under the Policy; that it had the benefit of the cover under the Policy to the same extent as the RFU; that as a consequence the RFU could not claim against it in respect of those alleged losses which were covered by the Policy; and that RSA was not able to make a subrogated claim against it in respect of the sum of £3,334,405.26.

7. On 1st March 2021 the RFU had issued a Part 7 Claim Form against Clark Smith and Conway. That was followed by amended Particulars of Claim asserting the breaches and claiming damages for the losses I have already mentioned.

8. Clark Smith accompanied its Defence denying breach with a Contribution Notice served on Conway. In that Notice Clark Smith sought a contribution under the Civil Liability (Contribution) Act 1978 ("the 1978 Act") on the footing that it and Conway are liable to the RFU for the same damage. For its part Conway also served a Contribution Notice on Clark Smith. In its Defence as well as denying liability on the merits Conway repeated its contention that the losses for which the RFU had been indemnified by RSA were not recoverable from it. In addition it now contends that as it has no liability in respect of those losses to the RFU then Clark Smith is not entitled to seek contribution under the 1978 Act.

9. Conway's case was put thus at [95] – [101] and [109] of its Defence:

> "95. During the tender phase in Spring 2012, Mr. Ian Higgs, then employed by RLF, acting on behalf of the RFU, told Mr. Brian Morris of FMC that the RFU would obtain a project insurance policy in respect of the upgrade works at the Twickenham Stadium, of which the A07.1 works formed part for the benefit of all involved in those upgrade works.
>
> 96. Conway authorised the RFU to procure project insurance for both itself and the RFU, on such terms as the RFU considered appropriate, provided that the cover was at least as comprehensive as necessitated by the intended contract terms.
>
> 97. In respect of paragraph 96 above, FMC will rely (without limitation) on the following facts and matters:
>
> 97.1 FMC made no allowance in its tender for insurance cover in respect of any loss or damage arising out of the A07.1 works.
>
> 97.2 FMC did not procure any insurance cover in respect of any loss or damage arising out of the A07.1 works.
>
> 97.3 FMC and the RFU continued to participate in the tender process and/or FMC commenced the A07.1 works on 16 July 2012 pursuant to the Letter of Intent and/or FMC continued with the A07.1 works.
>
> 98. Accordingly, FMC authorised the RFU to procure a project policy of insurance, and the RFU intended to do so, on the basis that, if FMC was awarded the contract for the A07.1 works, FMC would be jointly insured alongside the RFU.
>
> 99. At the pre-start meeting which took place on 4 July 2012 and was attended by representatives of Conway, the RFU and RLF (amongst others), it was again confirmed by or on behalf of the RFU that the RFU intended to and would be procuring a project policy for the benefit of Conway (as reflected at paragraph 2.4 of the minutes).
>
> 100.As explained further below, an insurance policy was procured by the RFU in respect of the upgrade works at the Twickenham Stadium, which made no distinction between the extent of insurance cover enjoyed by the RFU on the one hand and by FMC on the other hand.
>
> 101.FMC will rely on the facts and matters contained in paragraph 99 and 100 above in support of the fact that the RFU procured insurance cover for FMC on the same terms as the RFU
>
> …
>
> 109. FMC has the benefit of insurance cover under the project policy on the same terms as the RFU because:

> 109.1 The RFU had the necessary authority to procure and did procure the project policy on the basis that FMC would be jointly insured alongside the RFU to the same extent as the RFU; and/or
>
> 109.2 The project policy and the JCT contract read together establish that FMC is jointly insured to the same extent as the RFU."

10. The RFU served Replies to those Defences and it was in the light of those pleadings that HH Judge Kramer ordered the trial of the following preliminary issues:

11. First, "whether the insured losses said by the RFU and RSA to be in the sum of £3,334,405.26 are irrecoverable because RSA cannot exercise subrogation rights and/or because on a proper interpretation of the project policy and/or the project policy and the JCT contract the RFU and/or RSA are not entitled to claim the insured losses".

12. Second, "if the answer to Question 1 is that the RFU cannot recover its insured losses from Conway, does this prevent CSP from claiming a contribution from Conway under the Civil Liability (Contribution) Act 1978 in respect of any liability CSP may have to the RFU in respect of the insured losses".

13. This judgment follows the trial of those preliminary issues.

The Contractual Documents.

14. The Letter of Intent was dated 19th June 2012. It referred back to Conway's tender and to the parties' "subsequent meetings, discussions and correspondence". At [2] the letter said that the RFU intended to accept Conway's tender and to enter into a contract with Conway. It then stated:

> "3. It is intended that the form of the Contract will be based upon the document produced by Forsters LLP incorporating the JCT Standard Building Contract Without Quantities 2011 (DOC ID: 3202342 6)."

15. At [4] the letter authorised and instructed Conway to engage in site mobilisation, set up and related works. The letter continued:

> "5. Although the Contract has not yet been entered into, all the terms and conditions of the Contract will apply to any work carried out by you pursuant to the instructions contained in this letter.
>
> …
>
> "10. Within 7 days of the date of this letter and as a pre-condition of entry to the site of the Works in any event you must provide us with certificates of verification of insurance cover confirming that all insurances which you are (or will be) required to maintain under the terms of the proposed Contract are in place upon the required terms and at the required levels. In particular (to the extent that they have not been provided to us to date) we require evidence of your Contractor's All Risks, Professional Indemnity, Employer's Liability, Public Liability and (if applicable) JCT clause 6.5,1 (or similar) insurances."

16. At [14] the following appeared:

> "If the Contract is concluded between us, the terms of the Contract will supersede this letter which will thereupon cease to have any further effect. In that event, any work carried out by you pursuant to the instruction in this letter will be deemed to have been carried out under the Contract…"

17. The Policy was incepted on 17th July 2012. The Risk Details identified the Insured in respect of the Contract Works, Third Party Liability, Non Negligence, and Terrorism as:

> "(a) Rugby Football Union as the Principal and/or associated and/or subsidiary companies
> (b) The contractor for each Project
> (c) All other contractors and/or sub-contractors of any tier and others engaged to provide goods or services in connection with the Project insured hereunder.
> (d) Consultants, suppliers and vendors, all of any tier, whilst carrying out physical work associated with the Project on or about the Project Site or caused by their physical presence on or movement about the Project Site
> (e) Barclays Bank plc as financier and/or funder:
> (f) The employees, directors or officers of any of the above
> (g) Including all such parties, whether named hereunder or not, or whether appointed prior to inception of the Contract of Insurance or subsequently but excluding any such party to the extent that they are subject to any economic and trade sanctions, export control and anti- boycott laws and regulations ("Trade Sanctions") by the United States of America, United Nations or European Union.
> Each for their respective rights and interests"

18. The Initial Period of Insurance was defined as "the whole period of the Project" which was to be followed by a Maintenance Period of Insurance of a further 12 months. The Project was defined as:

> "The financing, pre-fabrication, design, engineering, procurement, demolition, site clearance, construction, erection, all testing including Hot Testing and Commissioning and maintenance of the Twickenham Stadium Upgrade Works Programme involving 17 Sub Projects comprising pitch replacement, mid tier LED advertising, hospitality box upgrades, MEU infrastructure, IT backbone, additional toilets, infill seats, public seat replacement, safety and security upgrade, turnstile and access control, additional catering facilities, debenture restaurant, west stand refurbishment, connected stadium, upgraded television facilities, replacement video screens and north car park resurfacing and all ancillary work connected therewith"

19. The Interest Insured in the Contract Works section was stated as "Property Insured" being:

> "Permanent works, materials (including those supplied free to the Project by or on behalf of the Principal, provided the value is included in the Contract Works sum Insured), temporary works, equipment, machinery, supplies, temporary buildings and the contents thereof, camps and the contents thereof and all other property used for or in connection with the Project"

20. In Information the Policy said that the Contract Conditions were "JCT 2011 with amendments". It then referred to:

> "RFU - Tender Package AO7.1 - General Conditions Volume 1 containing
> - Articles of Agreement and Contract Particulars -May 2012
> - Health and Safety Preconstruction Information
> - Volume 1 - Preliminaries / General Conditions including
> - Insurance requirements for:-
>
> 1. GBP 5m Public Liability,
> 2. Clause 6.5.1 may be required,
> 3. Option C with 15% Professional Fees,
> 4. Clause 6.12 Schedule 3 Terrorism cover

5. JCOP as a large project
   - Site Investigation Reports (Appendix C)
   - .RFU Safety Procedures For Working at Twickenham Stadium including:-

a) Health and safety Policy Document
b) Fire Safety Policy
c) Working at Height
d) Crane Lifting Operations
e) Risk Assessment Procedure"

21. The policy terms defined the Insured, the Property Insured, and the Project "as stated in the Risk Details".

22. The Insuring Clause provided that:

> "The Insurers shall, subject to the Terms of this Contract of Insurance, indemnify the Insured against physical loss or damage to Property Insured, occurring during the Period of Insurance, from any cause whatsoever whilst within the Geographical Limits including whilst in transit (other than by sea or air) including loading and unloading and/or temporary off-site storage."

23. The exclusions included at 1 under the subheading "Defects (option as confirmed in the Risk Details)":

> "**Design Exclusion 3 (DE3) Design, Plan, Specification, Materials or Workmanship `Consequences'**
> Damage to and the cost necessary to replace repair or rectify
> (a) Property Insured which is in a defective condition due to a defect in design plan specification materials or workmanship of such Property Insured or any part thereof
> (b) Property Insured lost or damaged to enable replacement repair or rectification of Property Insured excluded by (a) above
>
> Exclusion (a) above shall not apply to other Properly Insured which is free of the defective condition but is damaged in consequence thereof.
>
> For the purpose of the Contract of Insurance and not merely this Exclusion the Property Insured shall not be regarded as lost or damaged solely by virtue of the existence of any defect in design plan specification materials or workmanship in the Property Insured or any part thereof."

24. The General Memoranda included the following Multiple Insureds' Clause:

> "a) It is noted and agreed that if the Insured described in the Risk Details comprises more than one insured party each operating as a separate and distinct entity then (save as provided in this Multiple Insureds' Clause) cover hereunder shall apply in the same manner and to the same extent as if individual Contracts of Insurance had been issued to each such insured party provided that the total liability of the Insurers to all of the insured parties collectively shall not exceed the Sums Insured and Limits of Indemnity including any inner limits set by memorandum or endorsement stated in the Contract of Insurance
>
> b) It is understood and agreed that any payment or payments by Insurers to any one or more such insured parties shall reduce, to the extent of that payment, Insurers' liability to all such parties arising from any one event giving rise to a claim under this Contract of Insurance and (if applicable) in the aggregate.

> c) It is further understood that the insured parties shall at all times preserve the various contractual rights and agreements entered into by the insured parties and the contractual remedies of such parties in the event of loss or damage
>
> d) It is further understood and agreed that Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any of the insured parties in circumstances of wilful act or with fraud, material mis- representation, material non-disclosure or breach of any warranty or condition of this Contract of Insurance each referred to in this Memorandum as a Vitiating Act
>
> e) It is however agreed that (save as provided in this Multiple Insureds' Clause) a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured party who has an insurable interest and who has not committed a Vitiating Act
>
> f) Insurers hereby agree to waive all rights of subrogation which they may have or acquire against any insured party except where the rights of subrogation or recourse are acquired in consequence of or otherwise following a Vitiating Act in which circumstances Insurers may enforce such rights notwithstanding the continuing or former status of the vitiating party as an Insured."

25. General Condition 9 "Primary Insurance" said:

> "It is expressly understood and agreed that this Contract of Insurance provides primary cover for the Insured and that in the event of damage or liability covered by this Contract of Insurance which is also covered either in whole or in part under any other Contract of Insurance or policies of insurance effected by or on behalf of any of the parties comprising 'the Insured' the Insurers will indemnify the Insured as if such other Contract of Insurance or policies of insurance were not in force and the Insurers waive their rights of recourse if any against the Insurers of such other Contract of Insurance or policies of insurance other than claims where Memorandum 3 to Section 1 may apply"

26. General Condition 17 provided that the contract did not and was not intended to create rights under the Contracts (Rights of Third Parties) Act 1999.

27. The following provisions of the Contract are of note.

28. The Contract Particulars provided in respect of clause 6.4.1.2 that Conway's insurance for injury to persons or property was to be in the sum of £5m; in respect of clause 6.5.1 that Conway was not required to take out insurance in the name of itself and the RFU; and in respect of clause 6.7 and Schedule 3 that Insurance Option C was to apply.

29. The Conditions provided for the Contractor's Obligations at section 2 with clause 2.1 stating that:

> "The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan and other Statutory Requirements, and shall give all notices required by the Statutory Requirements."

30. Clause 2.3 set out requirements in respect of materials, goods, and workmanship with 2.3.1 having been amended from the standard JCT contract to impose an obligation that the Works should comprise only materials and goods which were "new and of sound and merchantable quality".

31. Clause 2.36 provided for the RFU's insurance obligation under C.2 to terminate in respect of the Relevant Part from the Relevant Date with the obligation under C.1 including the Relevant Part from the Relevant Date.

32. Clause 2.38 provided for schedules of defects and instructions governing the parties' obligations during the defects liability period.

33. Section 6 dealt with "Injury, Damage and Insurance". Clause 6.2 had been amended from the standard JCT contract and provided thus under the heading "Liability of Contractor – injury or damage to property":

> "The Contractor shall be liable for and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal insofar as any such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works or of any obligation pursuant to clause 2.38 and to the extent the same is due to any negligence, breach of statutory duty, or omission or default of the Contractor or of any of the Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 3, paragraph C1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril."

34. Clause 6.3 in part said this under the heading "Injury or damage to property – Works and Site Materials excluded":

> ".1 subject to clauses 6.3.2 and 6.3.1, the reference in clause 6.2 to `property real or personal' does not include the Works, work executed and/or Site Materials up to and including whichever is the earlier of:
> .1 the date of issue of the Practical Completion Certificate; or
> .2 the date of termination of the Contractor's employment."

35. Clause 6.4 required Conway to take out and maintain insurance in respect of its liability as referred to in clauses 6.1 (which addressed liability for personal injury or death arising out of or in the course of the Works) and 6.2.

36. Clause 6.7 stated that Insurance Options A, B, and C were set out in Schedule 3. I have already noted that the Contract Particulars had provided that Option C applied to the Contract.

37. Clause 6.8 defined various terms for the purposes of Schedule 3. These included:

i) "All Risks Insurance" which was defined as:

> "insurance which provides cover against any physical loss or damage to the work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify:
>
> …
>
> (b) any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such relied for its support or stability on such work which was defective;"

ii) "Joint Names Policy" which was defined as:

> " a policy of insurance which includes the Employer and the Contractor as composite insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.9, recognised as an insured thereunder."

iii) Footnote 60 to the definition of All Risks Insurance explained that "the risks and costs that All Risks Insurance is required to cover are defined by exclusions".

iv) Footnote 61 to sub-paragraph (b) of that definition provided that "In an All Risks Insurance policy for the Works, cover should not be reduced by any exclusion that goes beyond the terms of paragraph (b) in this definition". It proceeded to explain that an exclusion of "all loss or damage to the property insured due to defective design, plan, specification, materials or workmanship" would not accord with the definition or the Insurance Options. It noted that wider All Risks Cover might be available but that it was "not standard".

38. Clause 6.9 under the heading "Sub-contractors – Specified Perils cover under Joint Names All Risks Policies" provided that the RFU was to ensure that the Joint Names Policy referred to in paragraph C.2 of Schedule 3 included:

> "a waiver by the relevant insurers of any right of subrogation which they may have against [Conway] in respect of loss or damage by the Specified Perils to the Works or relevant Section, work executed, and Site Materials …"

39. Insurance Option C had the sub-heading "Insurance by the Employer of Existing Structures and Works in or Extensions to them".

40. C.1 provided for the RFU to take out and maintain a Joint Names Policy in respect of damage to the existing structures from any of the Specified Perils.

41. C.2 provided for a Joint Names Policy for All Risks in these terms:

> "[The RFU] shall take out and maintain a Joint Names Policy for All Risks insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees) and (subject to clause 2.36) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of [Conway's] employment (whether or not the validity of that termination is contested)."

42. C.4.1 is also of note. It was headed "Loss or damage – insurance claims and Contractor's obligations" and said:

> "If during the carrying out of the Works there is any loss or damage of any kind to any of the existing structures or their contents and/or if loss or damage affecting any executed work or Site Materials is occasioned by any of the risks covered by the Joint Names Policy referred to in paragraph C.2 or C.3 then, upon its occurrence or later discovery, [Conway] shall forthwith give notice both to the Architect/Contract Administrator and to [the RFU] of its extent, nature and location."

43. I will consider below the discussions and email exchanges on which Conway relies and the question of the extent to which those lead to a result different from that which would follow solely from consideration of those documents.

The Parties' Contentions in Outline.

44. In its essence Conway's case as advanced by Mr Ghaly QC was that it was insured under the Policy to the full extent of the wording of the Policy. This result followed, he said, either on the footing that Conway was an identified party to the Policy or that the RFU had effected the Policy on its behalf and with its authority intending Conway to have the full benefit of the Policy. That intention and authority had been manifested in the dealings leading up to and surrounding the commencement of the relevant works by Conway. As a consequence Conway was fully co-insured with the RFU. By reason of that or of the waiver of subrogation in the Policy Conway had no liability to the RFU for the latter's insured losses and/or RSA could not bring a subrogated claim against Conway and as a result Clark Smith could not seek a contribution under the 1978 Act.

45. For the RFU and RSA Mr Reed QC said that Conway was not an identified party to the Policy but was instead a party capable of being ascertained. The RFU had, indeed, entered the Policy as an agent for Conway as its undisclosed principal. However, the RFU's authority was derived from the Letter of Intent and the terms of the Contract with those documents also manifesting its intention with the consequence that the insurance effected for Conway had been such as sufficed to satisfy the requirements imposed on the RFU under Option C of the JCT contract but no further. Accordingly, Conway's cover under the Policy was limited to that extent with the operation of the effects of co-insurance and of the waiver of subrogation being also so limited and, in particular, not extending to the insured losses for which the RFU had been indemnified by RSA.

46. Mr Wheater for Clark Smith adopted the position of the RFU and RSA. He accepted that if the effect of the Policy was that Conway had no liability to the RFU then Clark Smith could not seek a contribution from Conway under the 1978 Act but said that on the proper interpretation of the parties' dealings that was not the position.

47. The core question was whether the insurance of Conway under the Policy was limited to the extent of the cover that was required under Option C of the amended JCT Contract in which case Conway was not co-insured with the RFU in respect of the relevant loss and the waiver of subrogation would not preclude a claim by RSA. Alternatively was Conway's cover under the Policy fully co-extensive with that of the RFU in respect of the losses for which the RFU has been indemnified here: in which case Conway would be able to rely on the fact of that co-insurance and/or the waiver of subrogation as a defence to the RFU's claim in relation to the insured losses?

Conway's Ratification Argument.

48. Conway did not advance in either its Part 8 Claim or its Part 7 Defence the contention that its entitlement to the benefits of the Policy arose by way of ratification on its part of the Policy which the RFU had entered as its agent. In his submissions to me Mr Ghaly sought to put that forward as an alternative basis for his contentions.

49. Mr Ghaly sought to characterise his invocation of ratification as a refinement of Conway's existing case of the kind which Fraser J had in mind when he said, at [31], in *Haberdashers' Aske's Federation Trust Ltd & another v Lakehouse Contracts Ltd & another* [2018] EWHC 558 (TCC) that "refinement of argument and submission often occurs, particularly when there are perceived to be difficult points of construction".

50. I disagree with Mr Ghaly's characterisation of this argument. In my judgement Mr Reed was right to say that it was not open to Conway to assert rights deriving from an alleged ratification at this stage. Ratification is a distinct way in which a person can become a party to and thereby obtain the benefits of a policy of insurance. It is capable of giving rise to issues of fact and at the very least there would need to be pleading of the acts which are said to have constituted ratification. Here Conway's pleaded case was that it was a party to the Policy by reason of the RFU having been authorised to obtain project insurance covering Conway and having entered the Policy armed with that authority and intending Conway to be jointly insured with the RFU. The ratification contention is not a development let alone a refinement of that case. It is a distinct case which should have been pleaded and on which Conway could not rely at the trial of the preliminary issues.

51. It was arguable that Mr Ghaly's argument that Conway was an identified party to the Policy and that its rights arose by reason of that status was also a departure from the pleaded case. However, no point was taken in that regard and it is not a matter in respect of which there would have been any scope for factual evidence. It is accordingly to be seen as a development of the pleaded case and I will consider the force of that argument in due course.

The Approach to be taken as a Matter of Law.

52. The starting point in addressing the preliminary issues is the principle that "the law [does] not allow an action between two or more persons who [are] insured under the same policy against the same risk" per Lord Hope in *Co-operative Retail Services Ltd v Taylor Young Ltd* [2002] UKHL 17, [2002] 1 WLR 1419 at [61]. The consequence for subrogated claims by insurers who have indemnified one such co-insured is that the insurer "cannot exercise rights of subrogation against a co-assured under an insurance on property in which the co-assured has the benefit of cover which protects him against the very loss or damage to the insured property which forms the basis of the claim which [the] underwriters seek to pursue by way of subrogation" per Colman J in *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyds Rep 582 at 614. It will be noted that there are two aspects of the principle or rather it has consequences for two relationships: that between the insured parties and that between the insurer and the party against whom, but for the principle, it would have a claim by way of subrogation to the rights of the indemnified party. The two aspects or applications of the principle are closely related because the consequences between the parties only come into play when the relevant insurance is in place and the extent to which an insurer has or does not have rights by way of subrogation is dependent on the terms of the relationship between the parties.

53. In *The Yasin* [1979] 2 Lloyd's Rep 45 and in *Petrofina (UK) Ltd v Magnaload Ltd* [1984] 1 QB 127 Lloyd J expressed the view that the rule that an insurer could not sue one co-insured in the name of the other was not "a fundamental principle of the law of insurance" but rather a consequence of "the ordinary principles of circuity" (see in *Petrofina* at 139G).

54. In *National Oilwell* the Defendant had been engaged in the construction of an oil production facility in the North Sea. The Claimant had supplied a subsea wellhead completion system which was to be part of that facility and sought payment for unpaid invoices. The Defendant counterclaimed for damages allegedly caused by the

Claimant's supply of defective parts. The Defendant had been indemnified in respect of its loss by its insurers under a Builders All Risks policy. The relevant issue for current purposes was the extent to which the Claimant was a co-assured with the Defendant under that policy with a consequent defence to the counterclaim. At 614 having expressed the principle in the terms I have quoted above Colman J said "the reason why the insurer cannot pursue such a claim is that to do so would be in breach of an implied term in the policy and to that extent the principles of circuity of action operate to exclude the claim".

55. In *Co-operative Retail Services* the building owner had brought proceedings against the defendants in respect of fire damage. The defendants sought a contribution under the 1978 Act from the building contractors who had been engaged by the claimant. There was in place an all risks insurance policy in the joint names of the building owner and the contractors. The House of Lords concluded that the effect of the contractual scheme between the parties was to replace the contractors' obligation to pay compensation for negligence or breach of contract with a requirement in the event of fire damage to carry out reinstatement works and authorise the release of insurance moneys.

56. In that case it was common ground that the effect of the co-insurance was that the claimant's insurers could not exercise rights of subrogation to bring a claim against the contractors because the building owner and the contractors "were all insured against the same risk under the same insurance policy" (see per Lord Hope at [16]). Although it was not necessary for the decision reached to do so Lord Hope considered the explanation for the rule. He set out, at [61] - [65], his preference for the analysis which had been undertaken by Brooke LJ in the Court of Appeal (a preference also expressed by Lord Bingham at [7]). As a consequence the explanation for the rule was not to be seen in the rules about circuity of action. Instead "the true basis of the rule is to be found in the contract between the parties". The court has to pay "careful attention to the terms of the contract actually made between the parties" (see [43]) and to ask "what does the contract provide?" (see [64]).

57. It is to be noted that although in *National Oilwell* Colman J regarded the explanation for the rule as being in part an implied term in the insurance policy the analysis approved by Lord Hope requires attention to be focused on the terms of the contract between the allegedly co-insured parties. This difference is a matter of some note. In *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286 Rix LJ (with whom the Master of the Rolls and Keene LJ agreed) had concluded that the insurance in question did not provide cover to any contractor in respect of structures outside its own works. That was sufficient to determine the issues between the parties there but Rix LJ went on to consider, albeit avowedly on an obiter basis, the explanation for the rule and the consequences of that analysis.

58. At [17] Rix LJ quoted [65] of Lord Hope's speech and then said at [18]:

> "Lord Hope is there contemplating that the provision for joint names insurance under a construction contract between an employer and a contractor would give rise to an implied term that neither party could make claims against the other in respect to damage caused to the contract works covered by the risks against which the policy insured both parties. Presumably, however, the position might be different if on the express terms of their contract one party might be liable to indemnify the other for its breach, default, or negligence."

59. Rix LJ returned to the issue at [74] and following. At [77] he explained that a provision for joint names insurance "may influence, perhaps even strongly, the construction of the contract in which it appears". However, he then pointed out that an implied term "cannot withstand express language to the contrary". Rix LJ next added that if the underlying contract envisaged one co-assured being liable to the other "even within the sphere of cover provided by the policy" he was "inclined to think" that an insurer who had paid the losses sustained by one party would not "in the absence of any express ouster of the right of subrogation" be precluded from suing in the name of that party to recover the sums paid. Thus the conclusion that the basis of the rule is an implied term in the contract between the parties (rather than in the insurance contract) means that its applicability is governed by the other terms of the contract in question.

60. In *Gard Marine & Energy Ltd v China National Chartering Co Ltd & another* [2017] UKSC 35, [2017] 1 WLR 1793 the Supreme Court confirmed that the rule was based on a term to be implied into the contract between the parties and identified the consequences which flow from this. Thus the rule was stated to be "that where it is agreed that the insurance shall inure to the benefit of both parties to the contract, they cannot claim against each other in respect of an insured loss" (see per Lord Sumption at [99] and per Lord Mance at [114]). Having stated the principle Lord Mance said it was "best viewed as resting on the natural interpretation of or implication from the contractual arrangements giving rise to such co-insurance". That means that to determine whether the principle applies in a particular case the court has to consider the terms of the contract between the parties. As Lord Toulson explained at [139]:

> "The critical question is whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction. It has become a common practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss. Like all questions of construction, it depends on the provisions of the particular contract: see, for example, *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] 1WLR 1419."

61. At [142] Lord Toulson noted that in the context of insurance being maintained by a demise charterer in the joint name of itself and the ship owner the commercial purpose of the joint insurance was "not only to provide a fund to make good the loss but [also] to avoid litigation between them or the bringing of a subrogation claim in the name of one against the other".

62. There was a division of opinion in the Supreme Court in *Gard Marine* as to whether where the principle applied the co-insurance operated to prevent any liability arising between the co-insured or to cause such liability to be discharged by the insurer's indemnification of the party who had suffered loss. The majority found that the former was the correct analysis and that "under a co-insurance scheme … it is understood implicitly that there will be no such claim. This understanding applies, in my opinion, whether or not the insurance moneys have yet been paid" (per Lord Mance at [122]).

63. The potentially co-insured party also has a relationship with the insurer. It is necessary to consider whether that person has become a party to the insurance policy and to what extent. That is a consequence of the principle's operation being limited to claims (or attempts to enforce subrogated rights) between parties who are insured under the same policy in respect of the same loss.

64. There are two ways of analysing the dealings. One is that the employer or contractor (considering the circumstances of a construction contract) takes out the insurance as an agent for the contractor or sub-contractor as the case may be with the latter being the undisclosed principal of the former. The other analysis is that the insurance policy constitutes a standing offer by the insurer which the contractor or sub-contractor accepts by executing the contemplated contract with the employer or contractor.

65. Applying the agency analysis it is necessary to consider whether and to what extent the party effecting the insurance had both authority to obtain cover for the other party and an intention to do so. The contractor or sub-contractor only becomes a party to the insurance if the employer or contractor was authorised and intended to contract on its behalf and only to the extent of the cover which the employer or contractor was authorised and intending to obtain. The position is different if there is subsequently ratification by the contractor or sub-contractor but as I have already explained it is not open to Conway to contend that there was ratification in the circumstances of this case.

66. At 15-022 – 15-028 the editors of *Colvinaux's Law of Insurance* (12th ed) identify three cumulative conditions which need to be satisfied for cover taken out by A to cover B's interest as well as that of A in circumstances where A is required or authorised by a contract with B to insure a risk on behalf of both. First, A's authority must extend to making the insurance contract in question. Second, A must have intended when taking out the policy to cover B's interests. Third, the terms of the policy must not be such as to preclude the extension of coverage to B. Before me the parties accepted this as an accurate summary of the necessary pre-conditions albeit in the case of Conway that acceptance was limited to cases where B was an undisclosed principal.

67. Colman J summarised the effect of the agency analysis thus at 596 – 597 of *National Oilwell* (although it will be seen that the second proposition is immaterial here in the light of my conclusion that it is not open to Conway to argue that it obtained the benefit of the Policy by ratification):

> "(1) Where at the time when the contract of insurance was made the principal assured or other contracting party had express or implied actual authority to enter into that contract so as to bind some other party as co-assured and intended so to bind that party, the latter may sue on the policy as the undisclosed principal and co-assured regardless of whether the policy described a class of co-assured of which he was or became a member.
>
> (2) Where at the time when the contract of insurance was made the principal assured or other contracting party had no actual authority to bind the other party to the contract of insurance, but the policy is expressed to insure not only the principal assured but also a class of others who are not identified in that policy, a party who at the time when the policy was effected could have been ascertained to qualify as a member of that class can ratify and sue on the policy as co-assured if at that time it was intended by the principal assured or other contracting party to create privity of contract with the insurers on behalf of that particular party.

> (3) Evidence as to whether in any particular case the principal assured or other contracting party did have the requisite intention may be provided by the terms of the policy itself, by the terms of any contract between the principal assured or other contracting party and the alleged co-assured or by any other admissible material showing what was subjectively intended by the principal assured."

68. Colman J emphasised that in *National Oilwell* it was:

> "…unnecessary to consider on the facts of the present case what is the position where, at the time when the contract of insurance was entered into, the alleged co-assured could not be ascertained as a member of the class referred to in the policy, but only qualified for membership at a later stage or where at the time of the policy it was only intended to insure all persons in the class or who might in future qualify as members of the class, although it would then have been impossible to identify the alleged co-assured as such."

69. It is also of note that Colman J explained that "the most obvious source of authority is the agreement… As a matter of construction there must be a strong inference that [the Defendant's] *authority* to insure was co-extensive with its *obligation* to do so" (original emphasis).

70. The authority of the party effecting the insurance and the intention of that party are separate pre-conditions both of which need to be satisfied and considered. In *National Oilwell* at 599 and following Colman J had regard to the subjective intention of the party effecting the insurance. The correct approach was clarified by Leggatt J in *Magellan Spirit ApS v Vitol SA* [2016] EWHC 454 (Comm) at [16] – [20] where he said that the existence of a relationship of agent and undisclosed principal and so, for present purposes, the extent of the insurance cover obtained depends "not on the state of mind of the supposed agent at the time of contracting but on whether the supposed agent had communicated to the supposed principal an intention to contract on its behalf" (see at [18]). Similarly, in *Haberdashers'* at [53] Fraser J explained that it was the objectively determinable or ascertainable intention of the supposed agent rather than that person's subjective intention which was relevant. However, the judge then noted that doubts as to the proper way of determining the agent's intention did not undermine the validity of the conclusions reached by Colman J or the consequences for the matters to be considered.

71. As Fraser J explained in *Haberdashers'* at [43] and following there are difficulties in seeing agency as the proper analysis at least in cases where those said to have the benefit of the insurance were not ascertainable at the time the insurance policy was entered by the supposed principal. Those difficulties are not present where the identity of the putative co-insured is ascertainable though undisclosed at the time the policy is taken out. It is those difficulties which caused Fraser J to conclude that the correct analysis, at least in cases where the insurance is said to "encompass a class of unidentified insureds" is that of a standing offer by the insurer (see at [56] – [59]). Fraser J explained the operation of the standing offer thus:

> "There are two points to note if the standing offer is the correct analysis, which I consider it is. The first is that the offer is said to be one made by the insurers. The second is that the offer is `made by the insurer to insure persons who are subsequently ascertained as members of the defined grouping'. The offer would be accepted by a sub-contractor joining, upon execution of the sub-contract, what the authors of McGillivray would describe as `the defined grouping'. The acceptance of that offer leads to the

> implication of a term in the contract between (here) [the party effecting the insurance] and [the party claiming to be a co-insured]. …"

72. It is to be noted that the standing offer analysis is not without conceptual difficulties. The analysis is of a standing offer by the insurer which is accepted by the contractor or sub-contractor's entry into the contract with the employer or contractor and which leads to the implication of a term in that contract. Although entry into a contract with a third party can operate as acceptance by conduct of the insurer's standing offer it is not immediately apparent how such acceptance gives rise to the implication of a term in the contract between the employer or contractor and the contractor or sub-contractor. Moreover, if the acceptance of the insurer's standing offer is the entry of the contractor or sub-contractor into the contract with the employer or contractor the analysis cannot assist in cases where the relevant contract has already been entered before the insurance is taken out (which is the situation envisaged by section 6.4 of the JCT contract). In those circumstances the analysis that the employer or contractor is acting as agent for the contractor or sub-contractor as undisclosed principal better fits the circumstances.

73. In *Haberdashers'* Fraser J was at pains to emphasise the difference between the facts of that case and those of *National Oilwell* (see for example at [46]). It is to be remembered that the difference of approach is as to the explanation for how the insurance comes to cover the third party. I do not need to explore further the merits of the competing analyses and would suggest that the correct explanation in terms of legal analysis for how a third party has obtained the benefit of insurance cover will be different in different circumstances with different legal mechanisms coming into play in different circumstances.

74. What is important is that the authorities are clear that in order to determine whether the insurance cover which a policy effected by, in my example, the employer or contractor applies to the contractor or sub-contractor and if to what extent (with the latter point determining the extent to which they are co-insured) it is necessary to look to the terms of the contract between those parties. It is those terms which provide the key to the existence and extent of the insurance cover. Thus in the passage at [139] of *Gard Marine* which I have quoted above Lord Toulson identified "the critical question" as being the effect of the "contractual scheme" between the parties with this being "a matter of construction".

75. I have already noted that in *National Oilwell* while seeing the proper analysis as one of agency Colman J said that the agreement between the parties was "the most obvious source of authority" being given by the putative undisclosed principal to the agent effecting the insurance. In *Haberdashers'* at [47] – [50] Fraser J had particular regard to the emphasis placed on the terms of the relevant agreements by Colman J in *National Oilwell* and in *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2005] 1 Lloyd's Rep 307. At [62] Fraser J said that "… on any approach – standing offer or the application of agency principles – it is necessary to consider the intention of the parties". The judge added that he considered the intention of the putative insured party "objectively assessed on the face of the … sub-contract … to be a powerful indicator to the correct answer, if not to constitute the answer itself." Similarly, at [69], Fraser J noted that:

> "Again and again throughout the authorities, emphasis is placed upon the fact that the answer in any particular case is one of construction, and it therefore critically depends upon the provisions of the particular contract in each case."

76. Thus whether the circumstances are such that the agency analysis is the better explanation of the parties' dealings (as will be the case where the putative co-insured is ascertained at the time the insurance policy is incepted) or such that the better analysis is that the putative co-insured has accepted a standing offer from the insurer (as where that party was not ascertainable let alone ascertained at the time of the policy's inception) it is necessary to focus on the contract between the parties. On the agency analysis that is because the contract determines the questions of whether and to what extent the agent had the requisite authority and intention to obtain cover for the undisclosed principal. On the standing offer analysis that is because the terms of the contract determine whether there was such a standing offer and its extent.

77. As appears from the passage quoted at [9] above Conway's case is put on the basis of contentions as to the authority given to the RFU and the intention with which the RFU entered the Policy.

78. The terms of the contract between the putative co-insureds not only determine whether there was in fact co-insurance in respect of a particular risk and the extent of the co-insurance but are also relevant to the interpretation of the provisions in a relevant insurance policy for waiver of the insurer's subrogation rights. It follows that where a number of persons are parties to an insurance policy they will not necessarily all qualify for the benefit of such a provision or qualify to the same extent.

79. The principle that an insurer cannot bring a subrogated claim against a co-insured of the party to whose rights the insurer is subrogated operates as if a waiver of subrogation were to that extent implied into the insurance policy between the insurer and the co-insured. In *National Oilwell* Colman J considered the proper interpretation of an express provision for the waiver of subrogation and concluded that the waiver there was to the same effect as the implied waiver.

80. The relevant clause provided that "underwriters agree to waive rights of subrogation against any Assured and any person, company or corporation whose interests are covered by this policy…". Colman J held that the words from "against any Assured" onwards confined "the effect of the waiver to claims for losses which are insured for the benefit of the party claimed against under the policy. In other words one does not qualify for the benefit of the waiver clause merely by being a party to the contract of insurance. The benefit is only available for insured losses" (see 603).

81. Colman J's reasoning was as follows. The principle that a party suffering loss could not bring proceedings in respect of that loss against a party insured under the same policy against the same loss had the consequence that the insurer of the first party could not seek to recover from the latter by way of subrogation to the former the sums which it had paid to the former. In those circumstances and to that extent there was an implied waiver of subrogation. That led Colman J to the view, at 604, that:

> "Given that, if the parties had not inserted an express waiver of subrogation, such a term would have been implied and such a term would have had the effect of a waiver of subrogation only in respect of losses insured for the benefit of the sub-contractor, it is, in my view, entirely unsurprising that the parties should have inserted a waiver clause in their policy and that its proper construction should give it an effect exactly equivalent to the term which business efficacy would otherwise require to be implied."

82. Colman J rejected as misconceived the argument that giving effect to the commercial purpose of the policy required the waiver clause to be construed as spanning "the whole scope of cover expressly provided by the policy [to the party which had suffered the loss in question]". Colman J had found that National Oilwell (UK) Ltd was only entitled to take the benefit of the cover provided by the policy to a limited extent. In those circumstances "the commercial purpose of this contract of insurance has to be defined by reference to that limited cover…". It followed that "the waiver clause operates consistently with the commercial purpose of the contract if its meaning is confined to the waiver of claims based on losses insured for the benefit of [National Oilwell (UK) Ltd]".

83. It was understandable that Colman J conducted his analysis by reference to the implied terms of and the commercial purpose of the insurance policy given that his starting point was that the general rule was to be seen as a term implied into that policy. The subsequent authorities have made it clear that the starting point is to be the terms of the parties' contract. This will influence the approach to determining the proper interpretation of a provision for the waiver of subrogation. For current purposes the insurer's right is one of subrogation to the entitlement of an insured who has been indemnified and as explained above the extent of that entitlement against a co-insured will depend on the underlying contract between the co-insured parties.

84. The preceding analysis relates to cases in which a person becomes a party to the insurance policy as a consequence of the actions of another whether as the undisclosed principal of an agent who has entered the policy or through accepting a standing offer which the other party to an underlying contract has caused the insurer to make. The need to refer to the authority and intention of the agent or to the terms of the underlying agreement do not arise where a person becomes a party to an insurance contract solely by that person's own dealings with the insurer. In those circumstances the court's task is to interpret the policy as between insured and insurer by application of the general rules of contractual interpretation.

85. Mr Ghaly contended that this approach of looking solely to the terms of the insurance policy is applicable whenever a person is identified as a party to the insurance contract and he said that Conway was such a person here. In the light of that Mr Ghaly said that my task was to look to the terms of the insurance policy and interpret it as between RSA and Conway without having regard to the underlying contract between Conway and the RFU.

86. As I will explain shortly Conway is not identified as a party to the Policy. However, even if Conway were so identified Mr Ghaly's approach is not correct. Being named as an insured does not without more make a person a party to the insurance contract. A person who is named as an insured but who is not otherwise a party to the insurance contract does not become a party to the contract simply by reason of having been named in it. That person remains a third party unless and until it becomes a party in a way recognised as constituting it in law a party to the insurance contract or obtains the benefit of the policy in question in some other way. As Fraser J said in *Haberdashers'* at [34] "the way in which [the policy in question] comes to provide insurance to any particular sub-contractor must … be analysed in terms of existing legal principle". Similarly the editors of *Colvinaux* rightly say at 15-018 "the mere fact that a policy states that it covers the interests of named or identifiable third parties does not of itself

give those third parties the right to enforce the contract or to rely upon its terms (e.g. the benefit of a waiver of subrogation clause)".

87. Even if Mr Ghaly's argument had been correct as a matter of law it would not have assisted here. That is because Conway was not a named or identified party to the Policy. Conway was, of course, in existence at the time of the Policy and its identity as an intended contractor or sub-contractor could have been ascertained at that time. However, that could not be done solely by reference to the terms of the Policy. It was necessary to refer to other material outside the Policy to discover Conway's identity and position. Conway was not named in the definition of "the Insured". The reference to "the contractor for each Project" in sub-paragraph (b) is ambiguous where "the Project" is defined as being the totality of the upgrading works and as "involving 17 Sub Projects". Conway came within the scope of sub-paragraph (c) of the definition as being within the term "all other contractors and/or sub-contractors of any tier and others engaged to provide goods or services in connection with the Project insured hereunder". However, whether Conway was within (b) or (c) it was not possible to identify it from the terms of the Policy alone. The Information referred to "tender package A07.1" and Mr Ghaly sought to construct an argument based on the fact that Conway had been engaged to undertake that work package but that again was not apparent from looking at the Policy alone.

88. In the course of his submissions Mr Ghaly developed his argument in this regard to say that Conway was identifiable as a party at the time the Policy was incepted. He was right to say that Conway's identity as an insured party could be ascertained at the time of the Policy's inception. He went on to say where a person is identifiable as a party to an insurance policy it is unnecessary and impermissible to look beyond the terms of the policy to determine the rights and obligations inter se of that person and the insurer. Even in this developed form the argument is untenable and for the same reasons as the argument in the undeveloped form. A person does not become a party to an insurance contract simply by reason of being named or identifiable as an insured and when a person becomes a party as a consequence of the actions of another person then the terms of the contract between the insured party and that other govern the extent of the insurance.

The Issues.

89. I have already explained my rejection of Mr Ghaly's arguments that Conway is to be regarded as having been an identified party to the Policy and that as a consequence the exercise for the court was solely that of considering the terms of the Policy. The consequence of that and of my conclusions as to the considerations which are relevant as a matter of law is that the following sub-issues have to be considered in order to answer the preliminary issues ordered.

90. The first is the basis on which the RFU effected the Policy on behalf of Conway. This will require an assessment of the RFU's intention at the time of its entry into the Policy and the extent of its authority from Conway. That assessment will require a consideration of the evidence of the dealings leading up to the sending of the Letter of Intent and a conclusion as to the contractual arrangements between them. Next it will be necessary to determine in the light of that assessment the effect of the Policy and the extent of the cover which Conway enjoyed by reason of the Policy. Consideration of the operation of the waiver of subrogation clause in the light of those matters will

follow. Those matters will then determine the questions of whether Conway is liable to the RFU; the extent to which RSA is precluded from bringing a subrogated claim; and whether Clark Smith is precluded from seeking contribution under the 1978 Act.

The Basis on which the RFU effected the Policy.

91. If attention is confined to the terms of the Letter of Intent, the Policy, and the Contract the position is clear. As Mr Wheater and Miss Piercy said succinctly in their skeleton argument the effect of those documents and the terms of Option C was that the RFU was obliged to take out insurance which gave Conway cover in respect of physical loss or damage to the work executed or to Site Materials. However, looking to those documents alone insurance in respect of the cost of rectifying damage caused by Conway's own defective works was excluded.

92. Through Mr Ghaly Conway says that was not the true position and that those documents are to be considered in the light of the parties' dealings at the time and that such consideration leads to a different conclusion. It was said that in the light of those dealings and in particular what Mr Higgs had said that there was an agreement or perhaps an understanding that the RFU would obtain comprehensive insurance for Conway and that the documents are to be read in the light of the dealings which had that effect.

93. The RFU had engaged RLF3PM LLP to provide project management services on the Project. Ian Higgs was a partner in RLF3PM and he was engaged in the project management work. His particular role in relation to the Project was concerned with the design and tender processes.

94. Mr Higgs had previously been involved in the RFU's redevelopment of the South Stand at Twickenham. He had been brought in two years after the start of the South Stand works when that project had run into difficulties. In particular there had been difficulties because of disputes between different contractors and between their different insurers as to their responsibilities and obligations inter se. Those disputes had caused delays but the difficulties had not been confined to delays.

95. Mr Higgs was concerned to avoid similar problems affecting the progress of the Project. He believed that a comprehensive project insurance policy covering all the contractors would be the solution to this problem. He described that belief in that regard in these words:

> "This insurance would prevent expensive delays which would inevitably occur if one contractor was unable to complete their works on time, and unnecessary costs. It would prevent claims arising between contractors and their separate insurance companies, and I considered it would make the whole process much smoother if any issues arose. It would avoid possible issues with gaps in insurance cover."

96. Mr Higgs pressed for there to be such an insurance policy for the Project. He believed that it had been agreed that insurance in such terms would be obtained. He said that Richard Knight, the RFU's stadium director, had told him that comprehensive ground insurance was being obtained. Mr Knight had expressed the hope that this would lead to a reduction in the tender prices because the tenderers would not need to include the cost of insurance in their tenders.

97. Mr Higgs accepted that responsibility for obtaining insurance in relation to the Project had been taken over by Jon Pettifer of Mace Group before the Policy was entered and he also accepted that the decision as to the nature and terms of the insurance cover was a matter for the RFU and not for him.

98. In support of the reliability of Mr Higgs's recollection reference was made to a number of email exchanges and minutes of meetings.

99. The exchanges and documents included advice being given to the RFU about the benefits of an Owner Controlled Insurance Programme for the Project. It is apparent that the RFU had been receiving advice about such a policy in the Spring of 2012 with a decision to move to such a policy having been made in late April 2012. However, it was only on 17th July 2012 that John Moulson of the RFU authorised entry into the insurance policy. The RFU and Conway both relied on passages in the exchanges between the RFU and its insurance brokers, Marsh, and in particular on the report of 17th July 2012 which Mr Pettifer of Mace had prepared about the Owner Controlled Insurance Programme. That report was the precursor to Mr Moulson's decision and I will consider it further below.

100. In early July 2012 Mr Higgs began pressing for the project insurance to be put in place and a number of email exchanges followed between Mr Higgs and Marsh with Mr Knight, Mr Pettifer, and others being copied in. At one point reference was made to Delay Start Up insurance. This prompted Mr Higgs to explain in somewhat exasperated tones that the issue was nothing to do with Delay Start Up insurance. He asked that the insurance be put in place "immediately" because "otherwise I am going to have to ask [Conway] to provide their own insurance". He said that those involved were "getting bogged down in detail and missing what is relevant" adding "the DSU can follow, we are missing the objective of having project insurance in place at the outset (save for the pitch)". On 4th July 2012 there was a start up meeting chaired by Mr Higgs and attended by representatives of Conway, the RFU, and others. Insurance was addressed at point 2.4 of the minutes which said:

> "2.4.1 The intention was to establish stadium work project insurance, although this would not cover plant, equipment and welfare, but this hasn't been achieved. [Conway] were asked to ensure they provide cover for all works.
>
> …
>
> 2.4.3 When the project insurance is established, [Conway] will be notified and any claims will need to be issued directly to Marsh. Claim Forms will be provided when available."

101. In his answers to cross-examination Mr Higgs was clear that he believed that the insurance to be obtained by the RFU was going to be more extensive than that envisaged in the standard terms of the JCT Contract.

102. Brian Morris was Conway's Director of Civil Engineering at the time of the Project. He explained that he had been told by Mr Higgs that there would be project insurance to cover all the contractors. He said that Mr Higgs had explained that the RFU saw this as a way of saving costs and "also avoiding issues created when one contractor claimed against another". Mr Morris said that this was an unusual arrangement and that he could not recall any other occasion when a client had told him that project insurance was to

be done in this way. Mr Morris confirmed the picture which appeared from the minutes of the start up meeting saying that it had been agreed that Conway should provide its own insurance "for their works" until the RFU put project insurance in place. It will be remembered that in its Defence Conway relied on the facts that it had not included for the cost of insurance in its tender and had not obtained insurance cover in respect of loss or damage flowing from its works.

103. The evidence for the RFU consisted of statements from Sarah Cook of Forsters, the solicitors who drafted the Contract; from Jonathan Cocksedge of Marsh; and from Nicholas Rolfe, also of Marsh. Miss Cook said that she had no recollection of any discussions about the RFU waiving the rights which would otherwise follow from use of the JCT contract; that she would have required and expected express written instructions if that was being proposed; and that her firm's file contains no record of any such instructions. Mr Cocksedge's statement is, in large part, an account of his understanding of the effect of the Policy and as such does not advance matters. Mr Rolfe was engaged in meetings with the RFU but not in meetings with Conway. Mr Rolfe said that he could not recall any suggestion in the meetings he attended that the insurance cover provided was extending beyond that envisaged in the JCT contract. He said that he would expect to have minuted carefully any such suggestion and he notes that there is no such suggestion recorded in the minutes of the meeting he attended on 5th April 2012.

104. Mr Ghaly submitted that I should draw an inference adverse to the RFU from the absence of any witness on its behalf giving evidence of his or her recollection of the meetings between the RFU and Conway in the period before and immediately after the Policy was taken out. He said that it was significant that there was no witness from the RFU directly confronting from recollection the contention that Conway was told that the RFU would be taking out insurance to cover all the works or to substantiate the pleaded denial that Mr Higgs had authority to commit the RFU in that regard. Mr Ghaly pointed in those regards to the absence of any evidence from Mr Knight. The inference I was asked to draw was in effect that if such a witness had attended they would have had to concede that Conway had been told of those matters or that Mr Higgs had the relevant authority.

105. The approach to be taken when considering drawing an adverse inference from the absence of a witness or witnesses who might be expected to have material evidence was explained by Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 at 340. I am satisfied that Conway has adduced evidence as to the exchanges in 2012 but I am also satisfied that no adverse inference is to be drawn from the absence of Mr Knight or of any other witness deposing to his or her personal knowledge of the exchanges between the RFU and Conway. The case put forward in Conway's Defence was that the relevant dealings had been between Mr Higgs and Mr Morris. The RFU responded by pleading that Mr Higgs did not have authority to make any statement as to the insurance being provided; by pointing to the passage of time since the events in question; and by adverting to other potential interpretations of the dealings. There was no pleaded allegation from Conway in respect of any acts of Mr Knight and in those circumstances it is not surprising that the RFU did not initially put forward evidence from him about dealings just short of 10 years ago. Reference was made to comments by Mr Knight in Mr Higgs's witness statements of November and December 2021 but the RFU is not to be criticised for not seeking to put forward evidence in rebuttal of the

matters in Mr Higgs's statements. It cannot be safely inferred from Mr Knight's absence that if called his evidence would support Conway's account of matters. Similarly it is not the position that the RFU put in no evidence or that it has failed to respond to Conway's case. It put forward evidence referring to the documents; it pointed to the passage of time; and it said that the material which might have been expected to exist if Conway's case was correct was not present. At this interval of time that approach is neither inappropriate nor surprising and there is no basis for the drawing of an adverse inference from the absence of more direct contradiction of Conway's case.

106. Mr Higgs and Mr Morris were patently honest and careful witnesses. It was apparent that at the time when they were giving evidence before me they both believed that the intention in 2012 had been for comprehensive insurance cover creating a fund recourse to which would be "the sole avenue for making good the relevant loss or damage" adopting the *Gard Marine* terms. I bear in mind the need for considerable caution in placing weight on the recollection of witnesses. Here Mr Higgs and Mr Morris were casting their minds back to 2012 in circumstances where they would have dealt with a considerable number of matters in the intervening period and where the question of the arrangements between Conway and the RFU will have been by no means at the forefront of their minds in that period. I find, however, that on the balance of probabilities the understanding and belief which those gentlemen expressed now was a reflection of the belief they had in 2012. In that regard the terms of Mr Higgs's emails in July 2012 are significant and are consistent with what he says now was his understanding then.

107. However, the question of whether the understanding which Mr Higgs and Mr Morris had accurately reflected either the terms of the agreement between the RFU and Conway and or the basis on which the Policy was taken out is a different matter. I have to consider whether the understanding which Mr Higgs had of the effect of the Policy was correct. In that regard I remind myself that the terms of the contract between the RFU and Conway are the key to ascertaining the effect of the insurance which was obtained pursuant to that contract. In addressing the terms of the contract between the parties the following are relevant.

108. The parties were substantial entities dealing at arm's length. The Project was a major exercise which involved the RFU in engaging several sub-contractors and in relation to which it was acting through a number of professionals including solicitors and insurance brokers. RLF3PM were not the only professionals acting for the RFU and it is of note that Mr Higgs accepted that responsibility for the insurance arrangements on behalf of the RFU was in the hands of Jon Pettifer of Mace. For its part Conway was a substantial civil engineering business with an in-house legal department and an internal insurance manager. This is not a case where the contractually effective dealings were conducted solely, or indeed principally, through Mr Higgs and Mr Morris. Rather the terms were agreed between teams of a number of professionals on each side.

109. I have quoted at [9] above that part of Conway's Defence which relates to this issue. Mr Morris confirmed that Conway did not take out insurance in respect of loss or damage arising out of its works under the Contract. This is, indeed, a factor supporting Conway's interpretation of the parties' dealings. At [109] the Defence puts forward two reasons why it is said that Conway and the RFU were insured to the same extent under the Policy. The first is the authority said to have been given to the RFU and the second is the conclusion flowing from reading the Policy and the Contract together. However,

the difficulties with this line of argument are, first, that I do not accept that when the Letter of Intent, the Policy, and the Contract are read together they indicate that the RFU and Conway were insured to the same extent in respect of the same loss and, second, that those documents are to be seen as indicating the extent of the RFU's authority and the intention with which it acted.

110. The Letter of Intent stated expressly that it was envisaged that the contract which would be entered between the RFU and Conway would be in the terms of the JCT contract and that if such a contract was entered it would apply retrospectively and supersede the Letter of Intent. The Contract when entered was in the form of the JCT contract. However, it is of note that a number of bespoke amendments were made to the JCT Contract. I have already said that the terms of the Contract, the Letter of Intent, and the Policy standing alone are consistent with the RFU's position and not with that of Conway. If the parties had been contracting on the footing that recourse to the insurance would be the sole avenue for redress for damage of the kind which occurred then further amendments to the standard JCT contract could have been made so as to provide for that in clear and express terms. That was not done and, moreover, was not done even though the Contract was entered 3 months after the Policy had been taken out. This is particularly significant given that the JCT contract sets out a detailed structure for allocating risks and responsibilities. Different options were available in respect of the insurance arrangements. The parties chose Option C but did so without any express modification or expansion of its effect.

111. The advice given to the RFU about the benefits of a comprehensive insurance programme made reference to a potential cost saving but more significantly to the benefit of avoiding disputes between the contractors and, more important perhaps, between the insurers for different contractors. The benefit to the RFU of preventing disputes arising between contractors can readily be understood. Similarly, the benefit to the contractors of knowing that all their fellow contractors were insured and were insured on the same terms can readily be understood. However, it is hard to see any benefit to the RFU in an arrangement which prevented it from making a claim against a contractor where the latter had failed to perform properly.

112. Mr Higgs did not suggest that the comprehensive insurance cover was to be limited to Conway. It appears to have been his understanding that it was the RFU's intention that it should apply in the same way to all the contractors. If that was the case it is, putting matters at the lowest, surprising that there was no greater express amendment to the JCT contract making the extent of the co-insurance clear and that neither the solicitors acting for the RFU nor the insurance brokers had any record of the alleged arrangement.

113. Mr Pettifer's report of 17th July 2012 was an internal document between the RFU and its advisers. It was not shared with Conway and so its relevance to my task is limited. However, both sides drew support from different passages in it and it does provide some assistance in determining whether the understanding which Mr Higgs had was shared by others acting on behalf of the RFU.

114. The report summarised the problem which was being addressed in these terms in the Executive Summary:

> "Construction programmes (the process of managing several related projects) provide insurers with a unique challenge in that no one programme faces the same risk exposures as another. An important element of the successful management of a construction

> programme is tailoring the risk management/insurance approach to the programme's specific exposures. Insurance brokers therefore rely on the project team provide details for each specific project and for the governance in place to minimise risk in order to reduce the premiums."

115. Mr Pettifer explained that Mace had been negotiating with Marsh "to find a suitable insurance product to cover the 16 approved projects given their varying degree of complexity, value and delivery timeframe" following the acceptance in April 2012 of the recommendation to take out an Owner Controlled Insurance Programme.

116. Under the heading "considerations" Mr Pettifer said that there should be a saving in terms of the insurance premiums paid. He added that there would be an additional benefit "from wider cover allowing more claims to be covered". Mr Pettifer then said:

> "This is an important point given that Rugby Football Union's contracts may utilise various agreements with several different contractors. One policy covering all parties will ensure wide, consistent cover for all, and avoid difficulties with any phase and/or partial handovers.
>
> "Importantly, an OCIP only transfers the responsibility for the arranging of specific insurance coverages to the owner. It does not affect the contractual and legal responsibilities or liabilities of contractors, subcontractors, suppliers or consultants; the risk still remains with those parties."

117. At 3.01 the control which would be exercised by the RFU was expressed to be an advantage of such a policy. This would enable the RFU to fix the deductible "at the optimum level to fulfil the twin functions of controlling the premium cost and the imposition of an acceptable level of discipline on the contractor without requiring him to effect an underlying insurance policy for his protection." Mr Pettifer then said:

> "All contractors are included in the policy – avoiding arguments over who covers what, as well as the need to check the policy is in place and covers what has been stipulated. This can be extended to cover all other contracting parties if required such as subcontractors."

118. At 3.03 under the heading "Cover" this was said:

> "The policy includes cover for own/direct contractors – where contracts have multiple agreements i.e. Rugby Football Unions building and civil contractors and in turn their subcontractors, design consultants civil and structural engineers, name suppliers and potential fit out contractors and others, the contractual relationships between the parties can be extremely complicated and particularly so where they relate to insurance arrangements. Any significant loss could inevitably end up in court to be settled. An OCIP would overcome this."

119. At 4.01 the report set out the advantages which would flow from the Owner Controlled Insurance Programme ("OCIP") covering the third party liabilities of the contractors.

120. As the arguments before me showed emphasis can be placed on different parts of the report to support each of the competing contentions here. The report does not give a definitive answer to the question I have to address of whether the intention was for the Policy to provide an insurance fund recourse to which was to be the sole remedy for making good the loss with which these proceedings are concerned (or rather the insured element of that loss). That is not surprising because it was not framed in those terms. However, that is itself of some significance if only because if that had been the intention

of the RFU and if it was believed that entry into the Policy would have that effect then the report would have been expected to have stated that clearly.

121. The report is more naturally read as putting forward a rather different proposal. The proposal is not one of an insurance fund recourse to which would be the RFU's sole redress in the event of loss caused by a contractor who was covered by the proposed policy. Instead although not expressed in these terms it is a proposal that the RFU should take out a single policy providing to all the contractors on the Project the cover envisaged by Option C of the JCT contract. The objective was that of avoiding the various contractors being covered by a multiplicity of insurance policies taken out by the contractors with different insurers and on different terms. The benefits to the RFU were principally to be those of avoiding such a multiplicity of policies. The proposal is entirely consistent with choosing the Option C route in the JCT contract and is a recommendation to take that course and to do so by means of a single policy for the whole Project.

122. It is significant that the Letter of Intent with its reference to the intention to adopt the JCT contract was sent after the RFU had accepted the recommendation to go down the OCIP route and while the RFU's agents were negotiating with the insurance brokers and seeking a suitable policy. This supports the view that all concerned were proceeding on the footing that when an insurance policy was obtained its effect would be compatible with the arrangements envisaged in the JCT contract. It is also evident that the decision to take out insurance for the Project as a whole was not a new development after the sending of the Letter of Intent nor one which in some way superseded or modified the arrangements envisaged in that letter.

123. The references to project insurance in the minutes of the meeting of 4th July 2012 are of note but they do not assist me on the question of the scope of the insurance.

124. It is important to keep in mind the nature of the loss under consideration here. The claim is for loss allegedly suffered by the RFU as a consequence of damage to the cabling caused by deficiencies on the part of Conway in respect of the ductwork. Was the RFU intending to take out insurance covering Conway in respect of the liability for such loss with the consequence that the RFU's recourse should be limited to a claim under the Policy?

125. I am satisfied that the agreement between the RFU and Conway did not provide that by taking out the Policy the RFU was creating a fund recourse to which would be the sole remedy for loss suffered by the RFU as a consequence of breach or other default by Conway. The terms of the Letter of Intent and the Contract make no reference to such an arrangement and are indicative of a very different arrangement. For me to find that the Policy was taken out on the basis alleged by Conway and with the intention and authority it now asserts there would need to be compelling evidence to counter the inferences from the natural reading of the Letter of Intent and the Contract. There is no such evidence. I am satisfied that the Policy was effected on the basis that it was providing the cover contemplated by Option C in the JCT contract. It was doing so in respect of the Project as a whole but it was not going beyond that. In particular it did not provide a common fund recourse to which was to be the RFU's sole redress for loss flowing from breaches by Conway or any other contractor. I am satisfied that the understanding which Mr Higgs had of the effect of the Policy did not accurately reflect

the terms on which the RFU and Conway were dealing nor the basis on which the Policy was taken out.

The Effect of the Policy.

126. It follows that the Letter of Intent, the Policy, and the Contract are to be read according to their terms. The Policy insured both the RFU and Conway but they were not insured to the same extent in respect of the same risk. In particular they were not co-insured in respect of the losses which the RFU is said to have suffered by reason of damage to the cables resulting from defects in the ductwork and for which the RFU has been indemnified by RSA.

The Effect of the Waiver of Subrogation Clause.

127. Mr Ghaly mounted a further argument. This was that even if Conway was not insured against the same risk to the same extent as the RFU then Memorandum 1(f) of the Policy operated as a waiver of subrogation precluding RSA from bringing a subrogated claim in respect of the RFU's insured losses.

128. Mr Ghaly emphasised the width of the language of Memorandum 1(f) under which RSA agreed "to waive all rights of subrogation which they may have or acquire against any insured party…". In addition he pointed out that the waiver was not qualified by the words "whose interests are covered by this policy" which had been present in the policy considered by Colman J in *National Oilwell*, see [79] and following above. Mr Ghaly said that the presence of those words had caused Colman J to conclude that the waiver of subrogation he was considering was limited to insured losses. Mr Ghaly contends that the absence of those words here should cause me to conclude that the waiver here has a wider effect than that in *National Oilwell*. It is correct that the presence of those words was expressed at 603 to be central to Colman J's reasoning. However, as I have explained at [83] above the starting point in considering the effect of a waiver of subrogation clause is now to be the underlying contract between the parties.

129. Mr Reed countered Mr Ghaly's argument by pointing out that "insured" is a defined term and that the definition includes the words "each for their respective rights and interests". Those words are to be read into the waiver in Memorandum 1(f) so as to have a similar effect to the clause considered in *National Oilwell* and to limit the waiver of subrogation to the risks against which Conway was insured. Mr Wheater adopted that argument and added the further point that by clause 6.9 of the Contract the waiver of subrogation was to be in respect of loss or damage arising from Specified Perils and the loss which is the subject matter of the current dispute was not caused by a Specified Peril but by Conway's own defective workmanship.

130. I reject Mr Ghaly's argument in this regard and conclude that the waiver of subrogation in Memorandum 1(f) only extends to matters in respect of which Conway is insured under the Policy. In the light of my finding that Conway is not co-insured with the RFU to the extent of the losses currently in issue that means this waiver of subrogation does not assist it in these proceedings. There is considerable force in the points made by Mr Reed and Mr Wheater but I reach the same conclusion by a different route which has regard to both the wording of the memorandum and the terms of the Contract between the RFU and Conway.

131. As between RSA and Conway Memorandum 1(f) is addressing rights which the former has against the latter as the latter's insurer. It is those rights which are rights of subrogation against Conway. Such a right can only arise to the extent that Conway is an insured party and in respect of matters where Conway is insured by RSA. If and to the extent that the RFU and Conway are co-insured of the same insurer in respect of the same loss to the same extent then a claim in respect of the insured loss against Conway would be a claim made by RSA as insurer against its insured and would be caught by the waiver of subrogation. Alternatively it would be a claim which could not be brought by the RFU and matters could not be improved by RSA exercising rights flowing from its indemnification of the RFU. However, if, as is the position here, the RFU and Conway are not co-insured in that way then the waiver does not operate to protect Conway. The waiver cannot operate to protect Conway against claims arising out of matters in respect of which it is not insured. The point can be put very shortly. If RSA were Conway's insurer in respect of these losses then the right being exercised would be one of subrogation against Conway. However, that is not the position and the rights which RSA is exercising against Conway are not rights of subrogation against Conway. Instead the right which RSA is exercising against Conway is the RFU's right to compensation for the loss caused to the RFU by Conway. RSA has acquired by virtue of its right of subrogation *against* the RFU the right to bring proceedings for that loss against Conway in the name of the RFU but the claim being made in that way is not a claim arising out of RSA's right of subrogation *against* Conway and so is unaffected by the waiver of such rights.

Is Conway potentially liable to the RFU?

132. If Conway had been co-insured with the RFU in respect of the same risk then the effect of the majority view in *Gard Marine* would be that Conway had no liability to the RFU in respect of that risk. My conclusion in respect of the extent and effect of the co-insurance here means this principle does not assist Conway and such liability as is otherwise established is not precluded by the co-insurance.

Is Clark Smith entitled to seek Contribution from Conway?

133. It was accepted by Clark Smith that if Conway's potential liability to the RFU was precluded by co-insurance under the Policy then Clark Smith could not seek contribution from Conway. That was because in such circumstances it could not be said that Clark Smith and Conway were liable in respect of the same loss. In the light of my finding that is not the position here and it is open to Clark Smith to seek contribution under the 1978 Act.

The Answers to the Preliminary Issue Questions.

134. It follows that the answer to the first preliminary issue is that the insured losses are not irrecoverable from Conway because of any restriction on the exercise of subrogation rights by RSA or because of the terms of the Policy and the Contract when properly interpreted. In those circumstances the second question does not arise.