Neutral Citation Number: [2024] EWHC 2805 (Ch)

Case No: BL-2023-000113

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 11 November 2024

Before :

MASTER BRIGHTWELL

- -

Between :

NICOLE MARLENE RIEDWEG	**Claimant**
- and -	
(1) HCC INTERNATIONAL INSURANCE PLC	**Defendants**
(2) MIKE SHERIDAN	
- and -	
(1) FORSTERS LLP	**Respondents**
(2) VICTORIA KATE JOHNS	

- -
- -

The Claimant did not appear and was not represented
Joshua Munro (instructed by **Weightmans**) for the **First Defendant**
The Second Defendant did not appear and was not represented
Nicholas Pilsbury (instructed by **Reynolds Porter Chamberlain LLP**) for the **First Respondent**
The Second Respondent appeared in person

Hearing date: 27 August 2024

- -

Approved Judgment

Crown Copyright ©

This judgment will be handed down 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 10:00am on Monday 11 November 2024

Master Brightwell:

1. This judgment concerns a question which appears not to have been previously decided, as to the construction of section 1 of the Civil Liability (Contribution) Act 1978 ("the 1978 Act") and its interaction with the Third Parties (Rights Against Insurers) Act 2010 ("the 2010 Act"). That question is whether the professional indemnity insurer of an insolvent insured is to be treated in law as being liable in respect of the same damage as that for which its insured is liable, for the purpose of enabling the insurer to pursue a claim to recover a contribution pursuant to the 1978 Act.

2. The issue arises in this claim in professional negligence, the claimant contending that the company, Goldplaza Berkeley Square Ltd ("Goldplaza"), carrying on business as Ian Scott International, negligently overvalued the property which she contracted to purchase for the sum of £8 million in December 2016. The second defendant was an employee of Goldplaza, who carried out the valuation of the property. The claimant claims that she would not have bought the property but for the overvaluation, and as a result of it she was unable to complete or assign the contract for the sale of the property. The seller subsequently sold the property to a third party for the lower sum of £5,500,000. As a result of the compromise of proceedings brought against her by the seller, the claimant is liable to the seller for the sum of £2,200,000. She claims that sum as damages, together with interest and other associated losses.

3. Goldplaza entered members' voluntary liquidation on 4 November 2021 pursuant to a meeting of the company held on that date.

4. The claimant's claim is pursued against the first defendant, HCC International Insurance plc ("HCC") pursuant to the 2010 Act. HCC is Goldplaza's professional indemnity insurer pursuant to a policy covering civil liability in respect of claims made during the relevant period arising out of the ordinary course of Goldplaza's professional business.

5. The claim first came before me for a costs and case management conference on 11 December 2023. On the eve of that hearing, the first defendant, HCC International Insurance plc ("HCC") indicated that they were to issue an application for permission to issue a Part 20 claim, naming the claimant's solicitors, Forsters LLP ("Forsters"), who acted for her in the underlying transaction as well as in this litigation, and Ms Victoria Johns, as defendants to that proposed Part 20 claim. HCC wishes in that claim to seek a contribution from the proposed Part 20 defendants pursuant to the 1978 Act. They are respectively the first and second respondents to HCC's application.

6. As HCC had intimated for a considerable time, including before the claim was issued, that it might seek to pursue a Part 20 claim, it seemed to me that the intimation of the application for permission to issue that additional claim the evening before the CCMC

was wholly unreasonable. The purpose of a CCMC is to set down case management directions, if possible to trial, and the Part 20 claim would, if permitted to proceed, very possibly require to be case managed together with the claim. Furthermore, an application to join the claimant's own solicitors as a Part 20 defendant is unusual and, if permitted, would have significant consequences for the future conduct of the claim. In circumstances where it was indicated to me that Forsters would likely oppose the application, it seemed appropriate for it to be heard on notice to them and to Ms Johns, and I therefore adjourned the CCMC with directions. Master Marsh gave further directions at a hearing on 1 March 2024, including the listing of the hearing on 27 August 2024. While the point of law concerning the ability of an insurer to pursue contribution claims was clearly flagged by Forsters in response to the application, it was anticipated that at this hearing the court would also consider other objections to HCC's application for permission to issue the Part 20 claim for a contribution.

7. The nature of the factual allegations which HCC wish to pursue in support of the contribution claims has developed over the course of this year. On 8 August 2024, HCC filed an amended application for permission to pursue those claims against Forsters and Ms Johns. That application was accompanied by significant witness evidence which had not previously been served. The parties then corresponded with the court at some length, with Forsters' solicitors indicating that they had not an adequate opportunity to consider and respond to the new evidence and that the point of law discussed in this judgment might usefully be determined first. In correspondence, HCC objected to that course. I indicated that Forsters' proposal seemed appropriate but that if HCC considered that it would be prejudiced by this course, i.e. by the point of law being determined first, it could apply at the start of the hearing for an adjournment. In the event, no such application was made.

8. Whilst the factual allegations sought to be raised by HCC in support of the proposed Part 20 claim are extensive, it suffices for the purposes of this judgment to refer to the relevant part of the brief details of claim set out in the draft Part 20 claim form, as they explain the causes of action relied on:

> 'Ms Johns acted as a lawyer and a business advisor and agent to the Claimant. Ms Johns was the driving force behind the purchase. The purchase was for Ms Johns' enterprise which was to be called Leather Inside Out. Ms Johns instructed Forsters LLP to act in the purchase.
>
> The First Defendant contends that Forsters LLP and Ms Johns acted in breach of fiduciary duty, breach of contract and/or negligently and that the said breaches or negligence caused the Claimant the same damage she alleges was caused [by] Goldplaza and / or the Second Defendant. The First Defendant claims against Forsters LLP and Ms Johns indemnity or contribution in respect of the Claimant's claim against the First Defendant.'

9. As I have indicated above, the question for consideration is whether the damage alleged to have been caused to the claimant by Forsters and Ms Johns is the same damage in respect of which HCC is potentially liable to the claimant.

10. The relevant subsection of the 1978 Act provides as follows:

> '1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).'

11. In *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675, the plaintiff building contractor settled a claim against it by a water authority concerning a defectively constructed reservoir. The plaintiff sued the defendant engineers, who had been retained by it, for breach of contract and/or negligence. The defendant then sought a contribution pursuant to s.1 of the 1978 Act from a third party who had been appointed as engineer directly by the water authority. The Court of Appeal held that, for damage to be the "same damage", it must be suffered by the person to whom the party seeking contribution was liable. In fact, the damage for which the third party was liable was the physical defect in the reservoir. The plaintiff was liable for the, distinct, financial loss in rectifying that defect. Sir John May explained at 680 why there was no right to seek a contribution from the third party in those circumstances, commenting on the approach of the court to construction of the statute:

> 'It is common ground that the issues in this case are ones of construction. I remind myself, first, that the statute which has to be construed is concerned with contribution, that is the help that the law requires one party to give to another to satisfy their common obligations to a third person. The [1978] Act is in my opinion concerned with the relatively simple sharing of existing liability. I would be surprised if against this background the Act created potentially complicated and some might say tortuous legal relationships. With respect to the judge and to the arguments put before us by counsel for Haiste, I think that the former was wrong to hold that the answer to the question raised in the summons should be in the affirmative.
>
> I see no reason to construe section 1(1) of the Act otherwise than directly and simply as it stands. Any person who is liable (see section 6(1)) in respect of any damage suffered by another may recover contribution, partial help, from another person liable in respect of the same damage. The simple direct reading of the subsection must in my opinion lead one to conclude, first, that "the same damage" can only refer to the damage spoken of some dozen or so words earlier in the subsection. Further the simple approach necessarily involves that the statutory draftsman intended that "the same damage" should be damage suffered by the *same* person. I do not think that the loss suffered by Anglian in not having a completed properly working reservoir at the time that they expected, the loss

sustained by Birse in having to construct a second reservoir as a result of their compromise with Anglian, or the damages which Haiste may have to pay Birse or for which Mr Newton may be liable to Anglian for their respective breaches of contract or negligence, or for both, are "the same damage" within section 1(1) of the Act, even though each may have been brought about because the first reservoir was badly constructed by Birse. A substantial part of the argument on behalf of Haiste on the appeal was based on the general contention that the damage founding the liability of all the parties in this case was, in substance, the defective condition of the reservoir and the need to replace it. Speaking loosely this is no doubt correct. In my opinion, however, the proper construction of section 1(1) of the Act of 1978 and its correct application to the facts of the instant case requires a more precise analysis.'

12. In *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397, the House of Lords subsequently considered further the requirement that the defendant to the contribution claim be liable for the same damage as the person seeking the contribution. This was another claim resulting from a building contract. The claimant NHS trust settled a claim against the contractor for the failure to deliver the building on time. It then sued the architect for damage caused by the granting of extension certificates, that damage being the loss of the ability to make a further claim against the contractor. The architect sought a contribution from the contractor, which claim was dismissed. Lord Bingham of Cornhill said this:

> '5 It is plain beyond argument that one important object of the 1978 Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is, however, as I understand, a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A. I find nothing in section 6(1)(c) of the 1935 Act or in section 1(1) of the 1978 Act, or in the reports which preceded those Acts, which in any way weakens that requirement. Indeed both sections, by using the words "in respect of the same damage", emphasise the need for one loss to be apportioned among those liable.
>
> 6 When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it? At the striking-out stage the questions must be recast to reflect the rule that it is arguability and not liability which then falls for decision, but their essential thrust is the same. I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of "damage" or of "loss" or "harm", provided it is borne in mind that "damage" does not mean "damages" (as pointed out by Roch LJ in *Birse Construction Ltd v Haiste Ltd* [1996] 1 WLR 675, 682)

> and that B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not.'

13. Mr Pilsbury also refers to the decision in *Bovis Construction Ltd v Commercial Union Assurance Co Ltd* [2001] 1 Lloyd's Rep 416. Bovis were employed to manage a construction project, and took out a policy with Commercial Union in the joint names of themselves and the employer to cover potential third party claims in connection with the project. There was property damage to the employer's property following a flood and the employer sued Bovis for damages, which claim was settled. Bovis, and their separate public liability insurers (who had met the claim), then sued Commercial Union. The judgment was primarily concerned with a claim to contribution by Bovis' separate public liability insurers. Bovis also sued Commercial Union for an indemnity or contribution under s.1 of the 1978 Act.

14. At [28], David Steel J said this:

> '28. Bovis was liable for the flood damage to Friendly House: CU was liable under a policy of insurance. It is a misconception to describe those as liabilities "in respect of the same damage". The damage inflicted by the builder was a defective building susceptible to flooding damage and consequential loss of rent. CU has not inflicted that damage: the only damage it could inflict would have been a refusal to pay on the policy (which in any event excluded consequential loss), thereby imposing financial loss. This is not the same damage: see *Royal Brompton v. Hammond* [2000] Lloyd's PN Rep. 643.'.

15. This statement by David Steel J was approved by Lord Steyn in the *Royal Brompton Hospital* case, at [34].

16. Forsters accordingly submits that, as a general proposition, the liability of an insurer to indemnify for a loss is not in respect of the same damage as that suffered by the injured victim who makes a claim in reliance on the relevant policy of insurance. Mr Pilsbury submits therefore that, if HCC had paid out upon a claim by Goldplaza (and thus satisfying any claim which the claimant had against Goldplaza), HCC could not make a claim in contribution against Forsters or Ms Johns.

17. However, Mr Munro submits and Mr Pilsbury accepts that if Goldplaza, and not HCC, were the defendant to the claim then Goldplaza would in principle be entitled to claim a contribution against a party in the position of Forsters. In that case (and recognising that the allegations are denied), if Goldplaza had provided a negligent valuation and Forsters had provided negligent advice on the transaction in relation to which the valuation was obtained, the damage suffered by the claimant in relation to

both claims would be the financial loss caused by her entry into a transaction which she would not have entered on such terms were it not for the breaches of duty. Even if the loss caused by each party's breach, if proven, would not necessarily be identical, there would at least be an overlap, enabling a contribution claim to be pursued.

18. It is against the decisions discussed above and the point mentioned in the paragraph above that I turn to consider the effect of the scheme of the 2010 Act. It is Forsters' contention that when one considers that scheme it is not capable, even if negligent, of being liable for the same loss as HCC because an insurer does not stand in the role of its insured for the purposes of enabling a claim to be brought directly against an insurer.

19. Section 1(1) and (2) of the 2010 Act provides, under the heading "Rights against insurer of insolvent person etc":

> '(1) This section applies if—
>
> (a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or
>
> (b) a person who is subject to such a liability becomes a relevant person.
>
> (2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the "third party").
>
> (3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.'

20. The third party may bring proceedings against the insurer for either or both of (a) a declaration as to the insured's liability to her, and (b) a declaration as to the insurer's potential liability to her: s.2(2).

21. A relevant person includes a body corporate that is or is being wound up voluntarily in accordance with Chapter 2 of Part 4 of the Insolvency Act 1986: s.6(2)(d). Goldplaza is, therefore, a relevant person for these purposes.

22. The position is thus different from the position as it previously obtained, under the Third Parties (Rights Against Insurers) Act 1930, where the existence and amount of the liability had to be established before proceedings could be issued by the third party against the insurer. Now, the third party is entitled, but not required, to sue the insurer and to seek resolution of all issues surrounding liability of the insured and the obligations of the insurer within the same proceedings. As Mr Pilsbury submits, the effect of this is that the claimant may now sue the insurer directly and, for that

purpose, she effectively stands in the place of the insured for the purpose of enabling the claim to proceed.

23. He goes on to submit that all the 2010 Act provides is a procedural mechanism whereby the claimant can claim directly against the insurer, and the insurer can defend both the underlying liability of the insured person to the third party, and the question whether the liability is covered by the policy of insurance. Accordingly, the insurer is permitted to rely in its defence on any points which the insured could rely on if the proceedings had been brought against the insured (s.2(4)), and the insurer's potential liability is limited to its own liability in respect of the insured liability, if established (s.2(11)). Indeed, in its defence in these proceedings HCC pleads a number of reasons why it is not liable, as between itself and Goldplaza, to indemnify Goldplaza for any liability it may have to the claimant. These express provisions are necessary because the insurer is not sued as if it were the insured and in its place; the statutory scheme respects the role of the insurer, who does not stand in the shoes of the insured.

24. Indeed, the 2010 Act provides that the third party may make the insured a defendant when bringing proceedings for a declaration as to the insured's liability to the third party: s.2(9)). The insured is bound only if it was joined as a defendant: s.2(10)). The Act does not expressly give the insurer the right to join the insured, but s.2(10) envisages that the insured might be joined by some other means than being joined by the claimant when the claim is brought.

25. Accordingly, Forsters submit that it is established outside the parameters of the 2010 Act that an insurer is not liable in law to a third party for the same damage as the damage for which its insured is liable, and that the implementation of the procedural scheme provided by the 2010 Act has not changed that.

26. In response, Mr Munro relies on the fact that it has been held that the 1978 Act was designed to provide a broad formulation of the entitlement to contribution. He refers to the decision of the Court of Appeal in *Friends' Provident v Hillier Parker May & Rowden* [1997] QB 85. Auld LJ at 102–103 referred to s.6(1) of the 1978 Act, which provides:

> '6(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).'

27. Auld LJ said that it was 'difficult to imagine a broader formulation of an entitlement to contribution', and that the 1978 Act was 'clearly intended to be given a wide interpretation' the issue there being whether a person liable in tort was capable of being liable for the same damage as a person liable in restitution. The House of Lords

in *Royal Brompton Hospital* recognised that the purpose of the 1978 Act (and, specifically, s.6) was to enlarge the categories of cause of action giving rise to a claim to contribution: see at [5] and [45]. However, at [33], Lord Steyn expressed the view that *Friends' Provident* was not a correct statement of the law, on the footing that a claim for restitution could not constitute a claim for compensation for damage so as to fall within s.6(1) of the 1978 Act. Lord Hope of Craighead also said, at [45], that 'it is a misconception to regard the Act as a whole as being open to the widest possible interpretation'.

28. It has since been held that Lord Steyn's remarks about the correctness of the *Friends' Provident* decision were *obiter*, and so the decision of the Court of Appeal in *Friends' Provident* remains binding on lower courts: *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 2 Lloyd's Rep 319 at [77]–[78]; *Re Dormco SICA Ltd (in liq.)* [2022] BCC 360 at [103]. This, however, applies only to the application of the 1978 Act to claims in restitution. It does not cast doubt on any point of principle about the interpretation of the 1978 Act as stated by the House of Lords in *Royal Brompton Hospital*, including as to what constitutes the "same damage".

29. In my view, the extension of the right to claim a contribution to different causes of action does not assist in an assessment of whether the person claiming the contribution is liable for the same damage as the defendant to that claim. Forsters does not suggest that it is not liable to make a contribution because the cause of action alleged against it (and against Ms Johns) is outside s.6(1) of the 1978 Act. That is not the issue in dispute. One must look instead to what the authorities say about the assessment of whether the damage is the same.

30. As noted above, HCC submits that the damage alleged to be suffered by the claimant due to the default of Goldplaza is coterminous with that which it alleges that Forsters and Ms Johns caused to the claimant. I do not consider that this engages with the relevant point, which requires a focus on the role of HCC. It is the sort of impressionistic approach rejected by Sir John May in *Birse Construction*. The fact that damages as against different defendants may be referable to the same loss does not without more mean that they constitute the same damage. As Lord Hope said in *Royal Brompton Hospital* at [47]:

> '47. …the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely in order to determine whether or not the damage is the same.'

31. I do not consider that HCC has sufficiently engaged with the analysis in *Bovis Construction*, as approved by Lord Steyn in *Royal Brompton Hospital*, that an insurer does not inflict damage on anyone, and that the only damage it is capable of inflicting is in refusing to meet its obligations under the policy of insurance. That would, conceptually, be damage to Goldplaza, which is potentially liable to the claimant

regardless of whether or not HCC has grounds to repudiate the insurance policy. I do not consider that it follows from the fact that Goldplaza would, if a defendant, have the right to seek a contribution from third parties that an insurer in the position of HCC has that right. For the reasons given by Mr Pilsbury and summarised above, I consider that the purpose of the 2010 Act is to provide a mechanism for a claimant to pursue an insurer directly in respect of the liability of its insured, and for the claimant to stand in the insured's place for that purpose. The insurer's liability is still that which flows from its obligations to the insured, which can only be to indemnify the insured against its liability to a third party. The insurer does not become liable to the third party for the damage caused or allegedly caused by its insured, which it did not inflict.

32. Mr Munro also posited the scenario where the claimant had made a claim against all three parties (i.e. HCC, Forsters and Ms Johns), and rhetorically asked whether, if she settled with one, she would have to give credit for the settlement monies in her claim against the others. This is effectively a statement of the mutual discharge test derived from *Howkins & Harrison v Tyler* [2001] PNLR 27.

33. In the *Royal Brompton Hospital* case, Lord Steyn said this at [28]:

> '28. In *Howkins & Harrison v Tyler* [2001] Lloyd's Rep PN 1, 4, para 17 Sir Richard Scott V-C (now Lord Scott of Foscote) suggested a test to be applied to determine the statutory criterion of "the same damage". With the agreement of Aldous and Sedley LJJ he observed:
>
> > "Suppose that A and B are the two parties who are said each to be liable to C in respect of 'the same damage' that has been suffered by C. So C must have a right of action of some sort against A and a right of action of some sort against B. There are two questions that should then be asked. If A pays C a sum of money in satisfaction, or on account, of A's liability to C, will that sum operate to reduce or extinguish, depending upon the amount, B's liability to C? Secondly, if B pays C a sum of money in satisfaction or on account of B's liability to C, would that operate to reduce or extinguish A's liability to C? It seems to me that unless both of those questions can be given an affirmative answer, the case is not one to which the 1978 Act can be applied. If the payment by A or B to C does not pro tanto relieve the other of his obligations to C, there cannot, it seems to me, possibly be a case for contending that the non-paying party, whose liability to C remains un-reduced, will also have an obligation under section 1(1) to contribute to the payment made by the paying party."
>
> If this test is regarded as a necessary threshold question for the purpose of identifying whether a claim for contribution is capable of being a claim to which the 1978 Act could apply, questions of contribution might become unnecessarily complex: see on this point *Eastgate Group Ltd v Lindsey Morden Group Inc*

[2002] 1 WLR 642, 652, per Longmore LJ. It is best regarded as a practical test to be used in considering the very statutory question whether two claims under consideration are for "the same damage". Its usefulness may, however, vary depending on the circumstances of individual cases. Ultimately, the safest course is to apply the statutory test.'

34. Mr Munro also suggests that the insurer has a right to join Goldplaza itself, and intimated that HCC might apply to do so in the event the Part 20 claim cannot proceed in its current form. It is not obvious to me that a defendant is entitled to join another party as a further defendant and to require it then to issue a Part 20 contribution claim against third parties. But, whether or not that is right, this is not the application before the court and the fact that HCC suggests it might make such an application in the future cannot affect the construction and effect of the 2010 Act or the question whether the damage for which the existing application seeks to pursue a contribution claim is the same damage as that for which HCC may be liable.

35. Mr Munro also submits that if HCC pays or is ordered to pay a sum to the claimant, then it will be subrogated to Goldplaza's rights. He did not contend that HCC is currently subrogated to Goldplaza's rights, nor did he suggest that it would be subrogated in the event that HCC successfully defends the claim on the pleaded grounds as to why it is not liable to indemnify Goldplaza. There is no pleaded reliance on subrogation and, again, I do not consider that it presently arises. In particular, I do not consider the fact that an insurer may in the future acquire rights through subrogation affects the analysis of whether that insurer is presently liable for the same damage as a third party.

36. Accordingly, for the reasons I have given above, I do not consider that HCC is potentially liable in respect of the same damage as that for which Forsters may be liable. The issue was argued before me as a pure point of law, and it was not suggested that the analysis set out above might depend upon the determination of any facts which are in dispute. This is the sort of point in relation to which the court should grasp the nettle at an interim stage.

37. Ms Johns adopted the submissions made on behalf of Forsters, and it was not suggested that any different considerations applied to any contribution claim against her such that it would fall to be treated differently. The analysis of whether she is potentially liable to the claimant for the same damage as that for which HCC is potentially liable is the same as that which applies to Forsters. The application falls to be considered in the same way in relation to both proposed Part 20 defendants.

38. The application for permission to pursue an additional claim is therefore dismissed.