

CONSTRUCTION LAW & PRACTICE CONFERENCE

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INDEMNITY CLAUSES – MATERIALS

Some Indemnity Clauses

“2.5.1 insofar as the Contractor obligations under the Main Contract, as identified in or by the Schedule of information, relate and apply to the Sub-Contract Works or any part of them, the Sub-Contractor shall observe, perform and comply with those obligations ... and shall indemnify and hold harmless the Contractor against and from:

-1 any breach, non-observance or non-performance by the Sub-Contractor or his employees or agents of any of the provisions of the Main Contract; and

-2 any act or omission of the Sub-Contractor or his employees or agents which involves the Contractor in any liability to the Employer under the provisions of the Main Contract.”

Modified JCT Design and Build Sub-Contract Conditions

“The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer or of any of the Employer’s Persons”

Wording common to all JCT forms

In Clause 2.1 there was also effectively an indemnity in these terms:

“in the event of any breach of an obligation under this deed, [Kvaerner] shall be liable to [Trucidator] and [Slaughter & May] for (i) the reasonable costs of repair, renewal and/or reinstatement of any part or parts of the Project to the extent that [Trucidator] or [Slaughter & May] incurs such costs and/or [Trucidator] or [Slaughter & May] is or becomes liable either directly or by way of financial contribution for such costs and (ii) the reasonable additional costs to [Trucidator] or [Slaughter & May] of alternative accommodation and/or the net loss of rent together with the cost of relocation to and/or from alternative accommodation to the extent that such costs, loss or relocation were necessarily incurred as a result of a physical defect in or damage to the Development or Property for which [Skanska] is liable to [Trucidator] or [Slaughter & May] or the imminent threat of such defect or damage.”

Indemnity in Siemens v Supershield [2009] EWHC 927

Indemnity Clauses and Limitation

“Where a contract of indemnity is to indemnify a person against liability to a third party (e.g. under a liability insurance policy), the general modern rule is that the limitation period starts to run when the indemnifying party’s liability is established by judgment, arbitration or binding settlement. However, that general rule is subject to the construction of the contract of indemnity. This may mean that the indemnifying party is liable as soon as the indemnified party is liable (that is, even before any establishing of that liability by, for example, judgment). At the other extreme, the contract may on its true construction provide that the indemnity is conditional on actual payment by the indemnified party in which case the cause of action will accrue only when such payment has been made.”

Chitty Vol 1 34-049 (see also **Telfair Shipping Corporation v Inersea Carriers SA (‘The Caroline P’)** [1985] 1 WLR 553 for the classic analysis).

Can have an indemnity against “damage” (which is common to property insurance) and, on rare occasions, indemnity against the incurrance of liability: see **Bosma v Larsen** [1966] 1 Lloyds Rep 22.

But the general approach is to construe any indemnity clause which refers to “loss” or similar as creating an obligation which crystallises on ascertainment of quantum.

“The question being one of construction I consider it helpful, as a start, to look at the list of matters to be covered by the indemnity and the verbs which indicate how they arise in order to see whether they show any consistency, or at least preponderance, in one direction or the other. On that approach ‘loss’, ‘damages’ and ‘compensation’ all naturally fit with one or both of ‘suffer’ and ‘be obliged to pay’ and all these combinations look to the date of realisation. ‘Proceedings’ is not so obviously paired with either verb, but can clearly not be relevant until litigation has begun. That leaves ‘liability’ as the only word consistent with the date of inception, and it lacks the obviously appropriate verb ‘incur’. In my view the preponderance is heavily in favour of the date of realisation.”

HH Judge Hicks QC in **The Mayor and Commonality and Citizens of the City of London v Reeves and Company Limited & ors** [2000] BLR 211 per HHJ Hicks QC

Canada Steamship

In **Canada Steamship Lines Ltd v The King** [1952] AC 192, 208 the Crown leased to a shipping company a shed for storing freight situated on the bank of a canal in Montreal. Clause 7 of the lease provided that “the lessee shall not have any claim ... against the lessor for ... damage ... to the ... said shed ... or to any ... goods ... placed ... in the said shed.” By clause 8 the Crown undertook to maintain the shed. Clause 17 provided that “the lessee shall at all times indemnify ... the lessor ... against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.” On 5th May 1944 while repairs to the shed involving the use of an oxy-acetylene torch were being carried out by the Crown’s employees, a spark from the torch was negligently allowed to fall on some bales of cotton waste, which caught fire. The shed and its contents were destroyed. In a claim by the company against the Crown for damages for negligence, the Crown relied on clause 7 as relieving them from liability, and under clause 17 claimed from the company to be indemnified against claims by the owners of goods destroyed by the fire.

The Privy Council, reversing the decision of the Supreme Court of Canada, found in favour of the plaintiff. Since the fire had been caused by the negligence of the Crown’s employees, clause 7 did not exempt the Crown from liability and clause 17 did not entitle the Crown to an indemnity.

Lord Morton at 208:

“(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called “the *proferens*”) from the consequence of the negligence of his own servants, effect must be given to that provision ... (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens* ... (3) If the words used are wide enough for the above purpose, the court must then consider whether “the head of damage may be based on some ground other than that of negligence”, to quote again Lord Greene in the Alderslade case. The “other ground” must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it, but subject to this qualification, which is no doubt to be implied from Lord Greene’s words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are, *prima facie* wide enough to cover negligence on the part of his servants.”

(“The Canada Steamship Principles”)

Applications of Canada Steamship

In **Walters v Whessoe Ltd** (1960) 6 BLR 23 Whessoe were erecting a large oil tank for Shell Refining Co Ltd (“Shell”). This work involved electric welding. As a result of Shell’s negligence a drum of highly explosive vapour was nearby. Because of Whessoe’s negligence the welding work was done in an unsafe way in that the method of earthing the electric current was unsatisfactory. The electric welding caused the vapour in the drum to explode. The lid of the drum flew off and killed the plaintiff’s husband, who was assisting one of the welders. The plaintiff brought a claim under the Fatal Accidents Acts 1846–1908 against both Whessoe and Shell. After a trial at the Liverpool Assizes she succeeded against both defendants, with liability apportioned 20% to Whessoe and 80% to Shell. Shell claimed an indemnity against Whessoe pursuant to clause 3 of their contract. This provided

“Clause 3: ‘Injury and Damage: The Contractor shall indemnify and hold Shell their servants and agents free and harmless against all claims arising out of the operations being undertaken by the Contractor in pursuance of this contract or order or incidental thereto in respect of: (a) personal injury including death and industrial disease, sustained by any employee of the Contractor or a Sub-contractor; (b) loss or damage to the property and personal injury, including death, to the person of any Third Party; and (c) loss or damage to the property, equipment or tools of the Contractor, a Sub-contractor or any of their employees.’”

The Court of Appeal applying the Canada Steamship principle dismissed Shell’s claim. Devlin LJ stated that the court was applying a rule of construction, which he summarised in this way. “It is now well established that if a person obtains an indemnity against the consequences of certain acts, the indemnity is not to be construed so as to include the consequences of his own negligence unless those consequences are covered either expressly or by necessary implication. They are covered by necessary implication if there is no other subject-matter upon which the indemnity could operate. Like most rules of construction, this one depends upon the presumed intention of the parties. It is thought to be so unlikely that one man would agree to indemnify another man for the consequence of that other’s own negligence that he is presumed not to intend to do so unless it is done by express words or by necessary implications.”

In **AMF International Ltd v Magnet Bowling Ltd** [1968] 1 WLR 1028 the plaintiff was installing bowling equipment at the first defendant’s building. The second defendant was still constructing that building pursuant to a building contract in the old RIBA form (which preceded the JCT contracts). Clause 14(b) provided: “... (b) Injury to property. Except for such loss or damage by fire ... the contractor shall be liable for and shall indemnify the employer against any loss, liability, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the execution of the works, and provided always that the same is due to any negligence, omission or default of the contractor, his servants or agents or of any sub-contractor ...”

As a result of the negligence of both defendants the plaintiff's equipment suffered water damage. Mocatta J held both defendants liable to the plaintiff under the Occupiers Liability Act 1957. He apportioned liability 40% to the first defendant and 60% to the second defendant. There was a separate claim by the first defendant against the second defendant for an indemnity pursuant to clause 14 (b) of the RIBA contract. Mocatta J, applying the Canada Steamship principle as developed by the Court of Appeal in *Walters v Whessoe*, dismissed the claim for an indemnity. The wording of clause 14 (b) was wide enough to cover damage caused by the first defendant's negligence, but it could also cover damage occurring without any fault on the part of the first defendant. Therefore the clause was confined in its operation to the latter situation, namely to damage which had not been caused by the first defendant's negligence.

Review of Canada Steamship

“There can be no doubting the general authority of these principles, which have been applied in many cases, and the approach indicated is sound. The courts should not ordinarily infer that a contracting party has given up rights which the law confers upon him to an extent greater than the contract terms indicate he has chosen to do; and if the contract terms can take legal and practical effect without denying him the rights he would ordinarily enjoy if the other party is negligent, they will be read as not denying him those rights unless they are so expressed as to make clear that they do. But, as the insurers in argument fully recognised, Lord Morton was giving helpful guidance on the proper approach to interpretation and not laying down a code. The passage does not provide a litmus test which, applied to the terms of the contract, yields a certain and predictable result. The courts' task of ascertaining what the particular parties intended, in their particular commercial context, remains.” Lord Bingham in **HIH Casualty and General Insurance Ltd v Chase Manhattan Bank** [2003] 1 AER (Comm) 349:

“The question, as it seems to me, is whether the language used by the parties, construed in the context of the whole instrument and against the admissible background, leads to the conclusion that they must have thought it went without saying that the words, although literally wide enough to cover negligence, did not do so. This in turn depends upon the precise language they have used and how inherently improbable it is in all the circumstances that they would have intended to exclude such liability.” (Emphasis added in judgment.)

..... The authorities show that there has been an increasing willingness in recent years to recognise that parties to commercial contracts are entitled to determine for themselves the terms on which they will do business..” Lord Hoffmann in **HIH Casualty and General Insurance Ltd v Chase Manhattan Bank**

“1. A clear intention must appear from the words used before the court will reach the conclusion that one party has agreed to exempt the other from the consequences of his own negligence or indemnify him against losses so caused. The underlying rationale is that clear words are needed because it is inherently improbable that one party should agree to assume responsibility for the consequences of the other's negligence: *Smith*, p 168D—E; *Ailsa Craig*,

p 970; *HIH*, paras 11, 63; *Lictor*, para 36.

2. The Canada Steamship principles are not to be applied mechanistically and ought to be considered as no more than guidelines; the task is always to ascertain what the parties intended in their particular commercial context in accordance with the established principles of construction: *Smith* at p 177; *Ailsa Craig* at p 970; *HIH* at paras 11, 61—63, 116; *Lictor*, para 35. They nevertheless form a useful guide to the approach where the commercial context makes it improbable that in the absence of clear words one party would have agreed to assume responsibility for the relevant negligence of the other.

3. These principles apply with even greater force to dishonest wrongdoing, because of the inherent improbability of one party assuming responsibility for the consequences of dishonest wrongdoing by the other. The law, on public policy grounds, does not permit a party to exclude liability for the consequences of his own fraud; and if the consequences of fraudulent or dishonest misrepresentation or deceit by his agent are to be excluded, such intention must be expressed in clear and unmistakable terms on the face of the contract. General words will not serve. The language must be such as will alert a commercial party to the extraordinary bargain he is invited to make because in the absence of words which expressly refer to dishonesty the common assumption is that the parties will act honestly: *HIH*, paras 16, 68—75, 97.”

Popplewell J in **Capita (Banstead 2011) Ltd v RFIB Group Ltd** [2014] EWHC 2197 (Comm)

Importance of the Commercial Context

Greenwich Millennium Village Limited v Essex Services Group plc, Hoare Lea (a firm), HS Environmental Services Limited (in administration) v DG Robson Mechanical Services Limited [2014] EWCA Civ 960

HSE was appointed as the M&E sub-contractor and engaged Robson as its sub-contractor.

Clause 2 of HSE's terms and conditions provided, so far as material: "The Sub-contractor hereby agrees to indemnify HS Environmental Services Ltd against each and every liability which HS Environmental Services Ltd may incur to any other person or persons and further to indemnify HS Environmental Services Ltd in respect of any liability, loss, claim or proceedings of whatsoever nature such as shall arise by virtue of the breach or breaches of this Subcontract Agreement by, or act, default or negligence of the Subcontractor."

The Court found both HSE and Robson at fault but that HSE was entitled to a complete indemnity. Robson appealed. The first ground of appeal was that the Judge erred in holding that HSE was entitled to recover against Robson under clause 2 of the sub-contract: upon its true construction that clause did not permit recovery where HSE was itself at fault.

The Court of Appeal rejected this argument. Jackson LJ

Most building projects involve chains of contracts in which entitlement to be paid and liability for non-performance pass up or down the line. The basic intention is that each party in the chain should be paid for the work it does and should be responsible for the shortcomings in its own work.

If a sub-contractor (or as in this case a sub-sub-sub-contractor) perpetrates defective workmanship, contractors and sub-contractors higher up the chain can be criticised for failing to notice the mistakes. Nevertheless it would largely defeat the commercial purpose of the contractual chain if "failure to notice" prevented the indemnity clauses from operating. The participants in building projects arrange their affairs and take out insurance cover on the basis that they are likely to be held liable for shortcomings in their own work.

In my view the rule of construction stated in Canada Steamship and Walters v Whessoe is of general application. Nevertheless it is based upon the presumed intention of the parties. In applying that rule the court must have regard to the commercial context of the contract under consideration. In the case of a construction contract a failure by the indemnitee to spot defects perpetrated by its contractor or sub-contractor should not ordinarily defeat the operation of an indemnity clause, even if that clause fails expressly to encompass damage caused by the negligence of the indemnitee.

Review by the Supreme Court

Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29 per Lord Leggatt

”108 The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations...

111 To the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in *Canada Steamship Lines Ltd v The King* [1952] AC 192, 208, and the “contra proferentem” rule are steadily losing their last vestiges of independent authority and being subsumed within the wider Gilbert-Ash principle. As Andrew Burrows QC, sitting as a deputy High Court judge, said in *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] 1 CLC 207, para 34 (iii):

“Applying the modern approach, the force of what was the contra proferentem rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the *Stoczna* case, at para 23, ‘The more valuable the right, the clearer the language will need to be’. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party’s liability for its own negligence...”

Subsequent Commentary

“In submissions for Cigna, it was accepted that the overarching principle is and always has been the ascertainment of contractual intention on objective grounds. However in the light of the judgment in *Triple Point* it seems to me that Cigna puts the matter too highly when it describes the *Canada Steamship* principles as guidance and submitted that one should approach the question of contractual interpretation on the basis of what will in general be an “inherent improbability” that the parties should agree to allocate responsibility for one party’s wrongdoing to the other. In my view the principle (at least so far as negligence is concerned) is that the Court should bear in mind that a party is “unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words” and if and to the extent that the words “inherent improbability” suggest a higher threshold, it is not consistent with *Triple Point*. Further applying Lord Leggatt’s approach, there is no need for express words to have been used to exclude negligence”.

Dame Clare Moulder, in *PA (GI) Limited v Cigna Insurance Services (Europe) Limited* [2023] EWHC 1360