OUTER HOUSE, COURT OF SESSION

[2006] CSOH 81

A1769/00

OPINION OF LORD UIST

in the cause

BALFOUR BEATTY LIMITED

Pursuers

against

(FIRST) GILCOMSTON NORTH LIMITED (formerly GILCOMSTON CONSTRUCTION LIMITED and (SECOND) O TURNER INSULATION LIMITED

Defenders

Pursuers: Martin QC, Francis; Brechin Tindal Oatts
First Defenders: Hodge QC, Primrose; Simpson & Marwick WS
Second Defenders: Cullen QC, Crawford; Dundas & Wilson CS

23 May 2006

Introduction

[1] On the morning of Friday 12 October 1997 a fire broke out in a cold store then under construction and nearing completion in Watermill Road, Fraserburgh. It spread rapidly causing total destruction of the premises. The premises were subsequently rebuilt. The question to be determined in this action is who is liable to pay for the works of reinstatement.

Procedural history

[2] The action began as a commercial action and was subsequently remitted to the ordinary roll. It called on the procedure roll on the parties' preliminary pleas. The pleadings, which extend to 104 pages, are unnecessarily lengthy and complex. The pursuers have eight pleas-in-law, the first defenders have five pleas-in-law and the second defenders have ten pleas-in-law. Each party was represented by senior and junior counsel and the submissions occupied six court days.

The Parties

[3] MacFish Limited ("the employer"), who owned premises in Watermill Road, Fraserburgh entered into a contract ("the main contract") with the pursuers ("the contractor") for the construction of a cold store with associated loading docks, plant rooms, offices and external works ("the cold store") at a site there adjacent to their then existing premises. The first

defenders ("Gilcomston") were subcontractors for cladding and structural steel under a subcontract ("the Gilcomston subcontract"). The second defenders ("Turner") were subcontractors for insulation under a subcontract ("the Turner subcontract"). The parties are not in agreement about the terms of the main contract and the two subcontracts, but consideration of the relevancy of the pursuers' case must proceed on the basis of their averments.

The Fire

[4] The pursuers' averments about the outbreak of the fire are briefly as follows. The second defenders were engaged in lining the cold store walls with 225 mm expanded polystyrene ("EPS") pre-fabricated composite panels constructed so that the EPS was sandwiched between layers of pressed steel. The exposed face of the panels was white polyester coated, the concealed face was galvanised and EPS was exposed at the ends of the panels before installation was completed, rendering them flammable, as the first defenders knew. On Thursday 9 October 1997 the respective subcontract works being undertaken by the first and second defenders were in an advanced state. Insulation panels had been fixed on the west gable of the cold store. A cooler pod gantry, a galleried structure floored with steel decking and backing onto the gable, was situated below the formation level of the ceiling. Two employees of the first defenders, Smith and Johnston, used electric arc equipment to weld a handrail stanchion in place. The invert of the gantry area, formed with horizontal floor panels, was situated about 2.5 m below the decking of the cooler pod. There was a gap between the floor panels at the edge of the cooler pod invert and the gable and other wall panels. An angled metal flashing detail, which had not been fitted, would have been fitted at completion. Sparks and slag showered from the rod and work piece onto the floor and floor panels below the cooler pod gantry. During these operations the activities of Smith and Johnston were observed by staff of the second defenders, including Bryan, a foreman insulator who was aware of the risk posed by welding or grinding in the vicinity of the panels as he had been present at the Birdseye Hall fire in 1974. Smith and Johnston took lengths of hardboard sheet (which is combustible) and placed them lengthwise with one edge against the gable so that they lapped over the cooler pod floor. As the work progressed the hardboard sheets were moved on one occasion and Bryan "saw to" their moving. At about 8.30 am on Friday 10 October 1997 Smith and Johnson moved the hardboard sheets. At about 10.45 am that day a fire broke out in the insulation panels below the place at which Smith and Johnston were working as a result of the products of the hot work being undertaken by them falling onto and igniting the hardboard and polystyrene of the panels. Smith and Johnston had not used fire blankets when working in the cold store, they had no fire extinguisher at the cooler pod and no fire watch was maintained. The first defenders aver and the second defenders admit that on Thursday 9 October 1997 Halldor Halldorsson, the second defenders' employee, warned the pursuers' site agent, Blair, of the risk presented by welding. The pursuers admit only that Halldorsson warned Blair of the fact of welding.

[5] In response the first defenders aver that the pursuers as main contractors were in overall charge of the site and responsible for safety and fire precautions, that their site agent Blair spoke to Smith and Johnston while they were

welding on 9 October, that he was aware all that day and the following day that they were welding but did not advise them as to the flammability of the insulation panels or instruct them to use fire blankets or a fire extinguisher, and that although on 9 October Halldorsson warned him of the risk of fire presented by the fire operation he did not arrange for a fire watch to be maintained . The first defenders also aver that in terms of their contractual obligations they provided the pursuers with a pack of method statements and a risk assessment including a document "Fire Prevention - Insulated Panels" which stated that panels were to be protected during hot work, that such work was to be closely monitored and that the use of blowtorches and naked flames was to be avoided, as a result of which the pursuers and their site agents were aware of the risk of carrying out hot work in the proximity of the insulation panels. The second defenders make similar averments about having provided the pursuers with a risk assessment containing the said document and aver that the advice and warning given by Halldorsson and the information contained in the risk assessment were not acted upon by the pursuers, that the pursuers did not prohibit smoking in the cold store, where there were no "no smoking" notices and where employees of Dave Walsh Electrical smoked.

The main contract

[6] The main contract between the employer and the pursuers was in terms of the Second Edition (1995) of the NEC Engineering and Construction Contract Core Clauses with option clauses A, G, M, P, R and U subject to certain amendments (no 6/1 of process). Core clause 8 deals with risks and insurance. It is in the following terms:

> **"80 *Employer's* risks**
>
> 80.1 The *Employer's* risks are
>
> - Claims, proceedings compensation and costs which are due to
>   - use or occupation of the Site by the *works* or for the purpose of the *works* which is the unavoidable result of the *works*,
>   - negligence, breach of statutory duty or interference with any legal right by the *Employer* or by any person employed by or contracted to him except the *Contractor* or
>   - a fault of the employer or a fault in his design.
> - Loss of or damage to Plant and Materials supplied to the *Contractor* by the *Employer*, or by Others on the *Employer's* behalf, until the *Contractor* has received and accepted them.
> - Loss of or damage to the *works*, Plant and Materials due to
>   - war, civil war, rebellion, revolution, insurrection, military or usurped power,
>   - strikes, riots and civil commotion not confined to the *Contractor's* employees,
>   - radioactive contamination.

- Loss of or damage to the parts of the *works* taken over by the *Employer*, except loss or damage occurring before the issue of the Defects Certificate which is due to
    - a Defect which existed at take over,
    - an event occurring before takeover which was not itself an *Employer's* risk or
    - the activities of the *Contractor* on the Site after take over.
- Loss of or damage to the *works*, and any Equipment, Plant and Materials retained on the Site by the *Employer* after a termination, except loss and damage due to the activities of the *Contractor* on the Site after the termination.
- Additional *Employer's* risks stated in the Contract Data.

81 The *Contractor's* risks

81.1 From the *starting date* until the Defects Certificate has been issued the risks which are not carried by the *Employer* are carried by the *Contractor.*

82 Repairs

82.1 Until the Defects Certificate has been issued and unless otherwise instructed by the *Project Manager* the *Contractor* promptly replaces loss of and repairs damage to the *works*, Plant and Materials.

83 Indemnity

83.1 Each party indemnifies the other against claims, proceedings, compensation and costs due to an event which is at his risk.

83.2 The liability of each Party to indemnify the other is reduced if events at the other Party's risk contributed to the claims, proceedings, compensation and costs. The reduction is in proportion to the extent that events which were at the other Party's risk contributed, taking into account each Party's responsibilities under the contract.

84 Insurance Cover

84.1 The *Contractor* provides the insurances stated in the Insurance Table except any insurance which the *Employer* is to provide as stated in the Contract Data.

84.2 The insurances are in the joint names of the Parties and provide cover for events which are at the *Contractor's* risk from the *starting date* until the Defects Certificate has been issued.

INSURANCE TABLE

Insurance against	**Minimum amount of cover or minimum limit of liability**
Loss of or damage to the *works*, Plant and Materials	The replacement cost, including the amount stated in the Contract Data for the replacement of any Plant and Materials provided by the *Employer*
Loss of or damage to equipment	The replacement cost
Liability for loss of or damage to property (except the *works,* Plant and Materials and Equipment) and liability for bodily injury to or death of a person	The amount stated in the Contract Data for any one event with cross liability so that the insurance applies to the parties separately.

(not an employee of the *Contractor*) caused by activity in connection with this contract	
Liability for death of or bodily injury to employees of the *Contractor* arising out of and in the course of their employment in connection with this contract.	The greater of the amount required by the applicable law and the amount stated in the Contract Data for any one event.

85 Insurance Policies

85.1 The *Contractor* submits policies and certificates for the insurance which he is to provide to the *Project Manager* for acceptance before the *starting date* and afterwards as the *Project Manager* instructs. A reason for not accepting the policies and certificates is that they do not comply with this contract.

85.2 Insurance policies include a waiver by the insurers of their subrogation rights against directors and other employees of every insured except where there is fraud.

85.3 The Parties comply with the terms and conditions of the insurance policies.

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

85 If the *Contractor* does not insure

86.1 The *Employer* may insure a risk which this contract requires the *Contractor* to insure if the *Contractor* does not submit a required policy or certificate. The cost of this insurance to the *Employer* is paid by the *Contractor*.

86 Insurance by the *Employer*

87.1 The *Project Manager* submits policies and certificates for insurances provided by the *Employer* to the *Contractor* for acceptance before the *starting date* and afterwards as the *Contractor* instructs. The *Contractor* accepts the policies and certificates if they comply with this contract.

87.2 The *Contractor's* acceptance of an insurance policy or certificate provided by the *Employer* does not change the responsibility of the *Employer* to provide the insurances stated in the Contract Data.

87.3 The *Contractor* may insure a risk which this contract requires the *Employer* to insure if the *Employer* does not submit a required policy or certificate. The cost of this insurance to the *Contractor* is paid by the *Employer*."

The pursuers aver that in terms of their respective subcontracts the defenders are deemed to have inspected the main contract. The first and second defenders aver in their answers that the precise terms of the main contract are not known and not admitted.

The subcontracts

[7] The subcontracts between the pursuers and each of the defenders were, according to the pursuers' averments, in terms of the Second Edition (November 1995) of the NEC Engineering and Construction Subcontract Core Clauses. These core clauses reflect the core clauses in the main contract. As in the case of the main contract, core clause 8 deals with risks and insurance. It provides:

"80 The *Employer's* and *Contractor's* risks

80.1 The *Employer's* and *Contractor's* risks are

- Claims, proceedings, compensation and costs payable which are due to

    - use or occupation of the Site by the *works* or for the purpose of the *works* which is the unavoidable result of the *works*,

    - negligence, breach of statutory duty or interference with any legal right by the *Employer* or the *Contractor* or by any person employed by or contracted to them except the *Subcontractor* or

    - a fault of the *Employer* or *Contractor* or a fault in their designs.

- Loss of or damage to Plant and Materials supplied to the *Subcontractor* by the *Employer* or *Contractor* or by Others on the *Employer's* or *Contractor's* behalf, until the *Subcontractor* has received and accepted them.

- Loss of or damage to the *works*, Plant and Materials due to

    - war, civil war, rebellion, revolution, insurrection, military or usurped power,
    - strikes, riots and civil commotion not confined to the *Subcontractor's* employees,
    - radioactive contamination.

- Loss of or damage to the parts of the *subcontract works* taken over by the *Employer* or *Contractor*, except loss or damage occurring before the issue of the Defects Certificate which is due to

    - Defect *(sic)*which existed at take over,
    - an event occurring before take over which was not itself an *Employer's* or *Contractor's* risk or
    - the activities of the *Subcontractor* on the Site after take over.

- Loss of or damage to the *subcontract works* and any Equipment, Plant and Materials retained on the Site by the *Employer* or *Contractor* after a termination, except loss and damage due to the activities of the *Subcontractor* on the Site after the termination.

- Additional *Employer's* or *Contractor's* risks stated in the Subcontract Data.

81 The *Subcontractor's* risks

81.1 From the *subcontract starting date* until the Defects Certificate has been issued the risks which are not carried by the *Employer* or the *Contractor* are carried by the *Subcontractor.*

82 Repairs

82.1 Unless the Defects Certificate has been issued and unless otherwise instructed by the *Contractor* the *Subcontractor* promptly replaces loss of and repairs damage to the *subcontract works*, Plant and Materials.

83 Indemnity

83.1 Each party indemnifies the other against claims, proceedings compensation and costs due to an event which is at his risk. The *Contractor* indemnifies the *Subcontractor* against all claims and liabilities against which the *Employer* indemnifies the *Contractor* under the main contract.

83.2 The liability of the *Subcontractor* to indemnify the *Contractor* is reduced if events at the *Employer's* or *Contractor's* risk contributed to the claims, proceedings, compensation and costs. The reduction is in proportion to the extent that events which were at the *Employer's* or *Contractor's* risk contributed, taking into account the responsibilities of each Party under this subcontract.

83.3 The liability of the *Contractor* to indemnify the *Subcontractor* is reduced if events at the *Subcontractor's* risk contributed to the claims, proceedings compensation and costs. The reduction is in proportion to the extent that events which were at the *Subcontractor's* risk contributed, taking into account the responsibilities of each Party under this subcontract.

84 Insurance Cover

84.1 The *Subcontractor* provides the insurances stated in the Insurance Table except any insurance which the *Employer* or the *Contractor* is to provide as stated in the Subcontract Data.

84.2 The insurances are in the joint names of the Parties and provide cover for events which are at the *Subcontractor's* risk from the *subcontract starting date* until the Defects Certificate has been issued.

INSURANCE TABLE

Insurance against	**Minimum amount of cover or minimum limit of indemnity**
Loss of or damage to the *subcontract works*, Plant and Materials	The replacement cost, including the amount stated in the Subcontract Data for the replacement of any Plant and Materials provided by the *Employer* or *Contractor*.
Loss of or damage to Equipment	The replacement cost
Liability for loss of or damage to property (except the *subcontract works*, Plant and Materials and Equipment) and liability for bodily injury to or death of a person (not an employee of the *Subcontractor*) caused by activity in connection with this subcontract.	The amount stated in the Subcontract Data for any event with cross liability so that the insurance applies to the Parties separately.
Liability for death of or bodily injury to employees of the *Subcontractor* arising out of and in the course of their employment in connection with this subcontract .	The greater of the amount required by the applicable law and the amount stated in the Subcontract Data for any one event

85 Insurance Policies

85.1 The *Subcontractor* submits policies and certificates for the insurance which he is to provide to the *Contractor* for acceptance before the *subcontract starting date* and afterwards as the *Contractor* instructs. A reason for not accepting the policies and certificates is that they do not comply with this subcontract.

85.2 Insurance policies include a waiver by the insurers of their subrogation rights against directors and other employees of every insured except where there is fraud.

85.3 The Parties comply with the terms and conditions of the insurance policies.

85.4 Any amount not recovered from an insurer is borne by the *Employer* or *Contractor* for events which are at their risk, and by the *Subcontractor* for events which are at his risk.

86 If the *Subcontractor* does not insure

86.1 The *Contractor* may insure a risk which this subcontract requires the *Subcontractor* to insure if the *Subcontractor* does not submit a required policy or certificate. The cost of this insurance to the *Contractor* is paid by the *Subcontractor*.

87 Insurance by the *Employer* or the *Contractor*

87.1 The *Contractor* submits policies and certificates for insurance provided by the *Employer* or the *Contractor* to the *Subcontractor* for acceptance before the *subcontract starting date* and afterwards as the *Subcontractor* instructs. The *Subcontractor* accepts the policies and certificates if they comply with this subcontract.

87.2 The *Subcontractor's* acceptance of an insurance policy or certificate provided by the *Employer* or *Contractor* does not change the responsibility of the *Employer* or *Contractor* to provide the insurances stated in the Subcontract Data.

87.3 The *Subcontractor* may insure a risk which this contract requires the *Employer* or *Contractor* to insure if the *Contractor* does not submit a required policy or certificate. The cost of this insurance to the *Subcontractor* is paid by the *Contractor*."

The pursuers' claims

[8] The pursuers aver that by virtue of clauses 81.1 and 82.1 of the main contract they had to rebuild the whole structure at their own cost and that by adjudication of 9 February 1998 they were found not to be entitled to contractual compensation from the employer. They conclude for payment to them by the defenders jointly and severally or severally of the sum of £2,644,544 as fully specified in the averments in condescendence 15. They aver that structural steelwork, cladding and metalwork were reinstated by the first defenders at a cost to the pursuers of £432,607.95 consisting of measured work and that insulation works at a cost of £317,906.93 were undertaken under subcontract by the second defenders. As the pleadings stand there are three separate legal bases for the pursuers' claim against the first and second defenders. These are (1) indemnity under the subcontract (condescendence10); (2) repetition and recompense (condescendence 10); and (3) breaches of contract by the first (condescendences 11 and 12) and second defenders (condescendence 13). It is not necessary for me to deal with the claims based on breach of contract in condescendences 11,12 and 13 as both junior and senior counsel for the pursuers conceded in the course of the debate that the pursuers' claims for damages for breach of contract set out in condescendences 11, 12 and 13 were irrelevant, that the pursuers' plea-in-law 4 (which is based on breach of contract) fell to be repelled and that the words "et separatim reparation" in their plea-in-law 5 fell to be deleted. (The word "reparation" in the pursuers' pleas-in-law is an error and should be substituted by the word "damages".) It was not conceded that the factual averments in condescendence 13 in support of the claim for breach of contract against the second defenders were irrelevant. It was contended that these averments could be used in support of the pursuers' first plea-in-law based on the terms of the subcontract and, in particular, that the averments in condescendence 13 were relevant to activity on the part of the second defenders for the purpose of interpreting the subcontract. Accordingly, I need now deal only with the first two bases of the pursuers' claim, omitting reference to all submissions based on the breach of contract claim.

Submissions of junior counsel for the first defenders

[9] Mr Primrose for the first defenders made four separate submissions (other than his submission on the breach of contract claims, which I need not now deal with).

[10] His first submission was that the pursuers' averments about the first defenders' alleged failure to obtain insurance were irrelevant and should be deleted. On a proper reading of the subcontract the insurance provisions had absolutely nothing to do with which party paid out in the event of a loss occurring. The averments made by the pursuers about insurance were to be found in condescendence 10 between p 52C and p 55A and are as follows:

> "The risk giving rise to these proceedings was that of the first et separatim second defenders in terms of clause 81.1. In terms of clause 84.1 of such respective subcontracts the first et separatim second defenders were bound to provide insurances stipulated in the Insurance Table set forth in 84.2 *(sic)*. In terms of clause 84.2 such insurances were to be in the joint names of the parties (as defined) to the respective subcontracts. Such insurances were to provide cover for events which were at the risk of the first et separatim second defenders from the starting date until the defects certificate had been issued. In terms of the Insurance Table the first et separatim second defenders were bound to effect such insurance against loss of or damage to the respective subcontract works, Plant and Materials. Under the column heading there 'minimum amount of cover or minimum limit of indemnity' it is provided that such cover should be for the replacement cost including the amount stated in the Subcontract Data for the replacement of any Plant and Materials (as defined) provided by the Employer or Contractor. In terms of the Insurance Table the first et separatim second defenders were bound to effect such insurances against liability for loss of or damage to property (except the subcontract works Plant and Materials and Equipment) caused by activity in connection with the respective subcontracts. Loss and damage was caused to such property by activity of the first et separatim second defenders in connection with the respective subcontracts. Under the column heading there 'minimum amount of cover or minimum limit of indemnity' it is provided that such cover should be for 'The amount stated in the Subcontract Data for any one event with cross liability so that the insurance applies to the parties separately'. In the Subcontract Data of the subcontracts between the pursuers and the first et separatim second defenders it is provided 'Any amount not recovered from an insurer is borne by the Employer or Contractor for events which are at their risk, and by the Subcontractor for events which are at his risk.' It is unknown to the pursuers whether the defenders effected the cover which they were bound to effect under the Insurance Table. No amounts have been recovered by the pursuers under the subcontract in respect of any of the heads of cover falling to be effected by the first et separatim second defenders. The defenders were bound so to insure and the pursuers thus believe and aver that they did as they were bound. Esto the defenders have not insured as they were bound, the pursuers have suffered loss and damage by reason of such failure to insure. In any event, in the circumstances, the first et separatim second defenders are bound to make payment to the pursuers of the amounts which remain unrecovered from insurers. Reference is made to the averments of loss hereinafter set forth."

Nothing in the subcontract obliged the defenders to make payment to the pursuers of insurance claim proceeds. That was patently clear from clauses 84 and 85, and also from clause 86, which provided what should happen if the subcontractor did not insure. Clause 85.4, which provided that any amount not recovered from an insurer was borne by the subcontractor for events which were at his risk, was important. By virtue of clause 86 the contractor insured at the subcontractor's expense if the latter did not take out insurance. Looking at all these provisions together, they had nothing to do with who should pay out in the event of a loss occurring. The contractor should have taken out insurance if the subcontractor had not done so, but here it was averred (condescendence 10, p 54C) that the pursuers did not know whether the defenders had taken out the insurance which they were bound to effect under the Insurance Table. Clause 85.4 governed what happened in the event that the subcontractor did not take out insurance. Then one had to look back at the allocation of risk events under clauses 80, 81 and 82.

[11] The insurance claim in condescendence 10 was misconceived on a further basis, namely, it was an attempt by the pursuers to recover the whole loss of about £2.6 million on the basis of an alleged failure to insure. It was not open to the pursuers to make such a claim because clause 85.4 of the subcontract took one back to the allocation of risk in clauses 80 and 81. The pursuers were attempting to recover their whole loss and so obtain more than they were entitled to under clause 83. In the absence of insurance, each party bore the risks in accordance with the Insurance Table. The pursuers should have been aware if there was no insurance, certainly no joint names insurance under clause 84.2.

[12] Mr Primrose's second submission was that the pursuers' claim in condescendence 10 about an alleged breach of clause 82 by the defenders was irrelevant on the basis that the first defenders had, as the pursuers aver, carried out the necessary repair work following the fire damage. The averments at p 55A-B are as follows:

> "Separatim, esto the first et separatim second defenders are not so liable in respect of amounts falling so to be insured, the first et separatim second defenders were nevertheless liable in terms of clause 82 of the respective subcontracts to replace loss of and repair damage to the respective subcontract works, Plant and Materials. Such replacement and repair of the respective subcontract works, Plant and Materials was undertaken at the expense of the pursuers pursuant to their counterpart obligation to the Employer in terms of clause 82 of the main contract."

Clause 82 had nothing to do with the question of who would be liable to pay for reinstatement works in the event of a loss. In condescendence 14 at p 77D-E the pursuers averred:

> "The works of reinstatement were undertaken by, amongst others, the pursuers and the respective defenders."

Accordingly, even on the pursuers' own averments, the obligation in clause 82 had been fulfilled and the passage at p 55A-C fell to be deleted as clearly irrelevant.

[13] Mr Primrose's third submission was that any indemnity owed by the first defenders to the pursuers was subject to clause 83.2 and fell to be reduced by the contribution of fault on the part of the pursuers and, on the hypothesis of fact put forward by the pursuers, the contribution of fault by the second defenders. This raised the correct interpretation of clause 83, the indemnity clause. The first defenders' contention was set out in answer 10 at p 58D-E to p 59B as follows:

> "Esto the fire was started by the first defenders' employees and esto it was caused by their negligence, any liability of the first defenders falls to be reduced in terms of clauses 80.1 and 83.2 in proportion to the extent that the pursuers' negligence and breach of statutory duty contributed to the fire and (on the hypothesis of fact upon which the pursuers proceed) to the extent that the second defenders' negligence or breach of statutory duty contributed to the occurrence of the fire."

The pursuers' contention to the contrary was set out in paras 3 and 4 of their Supplementary Note of Argument (no 25 of process). (This document refers to the main contract as "the ECC" and the subcontract as "the ECS". For ease of comprehension I shall substitute "the main contract" for "ECC" and "the subcontract" for "ECS". I shall also substitute the word "clause" for the word "paragraph" where the latter is wrongly used. In addition, I shall correct the punctuation when reproducing these paragraphs.) Paras 3, 4 and 5 (the last of which I include for the sake of completeness) are in the following terms:

> "3. In general, core clause 8 of the main contract and core clause 8 of the subcontract which includes the Insurance Table and other relevant provisions referred to above provides a comprehensive scheme of risk allocation and insurance amongst the Employer, Contractor (Pursuers) and Subcontractors (Defenders). The risks allocated to the Employer under the bullet points contained in clause 80.1 of the main contract remain with the

Employer. Amongst other things, risks of loss of or damage to the *works* other than from the happenings stipulated under the third bullet point fell to the Pursuers under clause 81.1. In a question with the Employer the risk of such loss etc of the *works* in the circumstances condescended upon passed to the Pursuers. Under clause 84.2 of the main contract the Pursuers were bound to insure (a) for replacement cost loss of or damage to the *works*; and (b) liability for loss of or damage to property except the *works*, Plant and Materials and Equipment caused by activity in connection with the main contract. The Pursuers were bound to repair the *works* and offer to prove that they did that.

4. Under the subcontracts between the Pursuers and the First *et separatim* Second Defenders, the risks allocated to the Pursuers were those coming within the bullet points contained in clause 80.1. Amongst other things, risks of loss of or damage to the *works* other than from the happenings stipulated under the third bullet point fell to the respective defenders under clause 81.1. In a question with the Pursuers the risk of such loss etc of the *works* in the circumstances condescended upon passed to the Defenders. Under clause 84.2 of the subcontract, the Defenders were bound to insure (a) loss of or damage to the *subcontract works* for replacement cost; (b) liability for loss of or damage to property except the *subcontract works*, Plant and Materials and Equipment in connection with the subcontract. The Defenders were obliged by clause 82 to repair the respective *subcontract works*: neither Defender did that. The Pursuers offer to prove circumstances showing that loss of or damage to the *works* under exception of the *subcontract works* was caused by the Defenders' activity in connection with their respective subcontracts. If so, the risk of liability for such loss or damage was one which arose from the *subcontract works* and passed to the respective Defenders.

5. In construing the subcontract regard may be had *mutatis mutandis* to principles stated in the main contract Guidance Notes (see p 106). Among these are: 81.1 'The *Contractor's* risks include those stated in the insurance table even when such risk is covered by insurance procured by the Employer' and 87.2: 'Whilst the Contractor is entitled to rely upon the Employer providing the insurances as stated in the Contract Data, it is important that the Contractor recognises that his risks include those shown in the Insurance Table'. In terms of page 106 of the Guidance notes it is stated under reference to Risks and Insurance: 'The Employer's risks remain, and the Contractor passes those of his risks under the main contract to the Subcontractor, where they apply to the *subcontract works'*. The risk of loss of or damage to the *works*, Plant and Materials which the Contractor is bound to insure under clause 84.2 of the main contract passes to the Subcontractor under the equivalent clause of the subcontract (i) in so far as it relates to the *subcontract works*, Plant and Materials; and (ii) in so far as it relates to liability for loss of or damage to property except the *subcontract works*, Plant and Materials caused by activity in connection with the subcontract."

[14] The pursuers' position was that on a correct reading of core clause 8 of the subcontract they could have no responsibility for damage to the works which occurred as a result of a subcontractor's activities even if they had in some way contributed to the events which gave rise to the loss. That was not the correct way to look at clauses 80 to 83. One should begin by looking at clauses 80 and 81 together with 84.2. Loss of or damage to the works in connection with the activity of the subcontractor is one which would fall upon the first defenders. One should then look at the indemnity in clause 83.1, but the matter did not stop there because of clause 83.2. The first defenders' averments in answer 6 at pps 38 and 39 and in answer 12 at p 71 amounted to an offer to prove that events at the contractor's (or pursuers') risk contributed to the occurrence of the fire and the subsequent loss. It was therefore clearly open to the first defenders to invoke clause 83.2 and seek a reduction because of contributory factors on the part of the pursuers. The pursuers could not get round clause 83.2 by pleading some other case. If the pursuers' proposition that they had no responsibility was correct that would mean that in respect of the corresponding provisions in the main contract the employer could never have responsibility for the loss of the works even if it was the employer's fault and negligence that had caused the loss. That would be an unlikely position for the pursuers to adopt in a question between them and the employer: if, for example, the building were destroyed through the fault of the employer, would the pursuers accept the obligation to

rebuild the structure at their cost? That would be a wholly unrealistic situation, and would not reflect the commercial reality of contracts such as this. The pursuers averred in condescendence 10 at p 56C-D:

> "The loss, damage and liabilities incumbent upon the defenders in respect of which the pursuers proceed were not claims, proceedings and compensation and costs coming within clause 83.1."

Quite simply that was wrong. After the fire the employer must have made some kind of claim against the pursuers and the pursuers must then have paid out on that claim. The pursuers were now seeking to recover the whole cost of the claim from the first and second defenders. The words "claims, proceedings, compensation and costs" in clause 83.2 were patently wide enough to cover the situation which prevails in this case. Following the basic rules of construction and giving the words their natural meaning, there was no room for any doubt that the phrase covered this situation. In *Crosse* v *Bankes* (1886) 13 R (HL) 40 Lord Chancellor Halsbury said:

> "The ordinary rule of construction of an instrument is that you should not, except to effectuate the plain intention of the parties, imply words which are not there, and that you should give effect to every word which is there if you can."

In the Oxford English Dictionary (2nd Ed) at p 988 the word "cost" was defined as "that which must be given or surrendered in order to acquire, produce, accomplish or maintain something; the price paid for a thing". The cost to the pursuers here was that which had to be given to rebuild the works. At p 261 the word "claim" was defined as "a demand for something as due; an assertion of a right to something". Here there had been a demand by the employer for the rebuilding of the works based on an assertion of a right by them to have the works rebuilt. At p 601 "compensation" was defined as "the action of compensating, or condition of being compensated; counterbalance, rendering of an equivalent, requital, recompense". Here the pursuers had compensated the employer for the damage caused by the fire. So far as proceedings were concerned, the averments of loss in condescendence 13 at p 75C made reference to an adjudication having taken place. In condescendence 13 practically every single loss was described as "costs".

[15] Mr Primrose's fourth submission was that the pursuers' claim based on unjustified enrichment was irrelevant and should be deleted. The averments in support of that claim were set out in condescendence 10 from p 55C to p 56C in the following terms:

> "The respective subcontract works were carried out by the first et separatim second defenders. The pursuers failed to comprehend that the first et separatim second defenders were bound to carry out such works at the cost of (through their being indemnified by) the respective insurers of the subcontract works. The pursuers met the cost of such work in the erroneous belief that they rather than the insurers of the first et separatim second defenders required, in the first instance at least, to do so. The final certificate *(sic)* issued to and docketed and acknowledged by the first et separatim second defenders are referred to for their whole respective terms which, in the interests of brevity, are herein held incorporated. Further, and in any event, it was not the intention of the pursuers gratuitously to confer a benefit upon the first et separatim second defenders. The first et separatim second defenders have thereby been enriched in respect that there has been performed at the pursuers' expense the replacement and repair of the subcontract works, which things were contractually incumbent upon those defenders. It is just and equitable that the pursuers should have repetition of, or esto they should not have repetition of, be recompensed for the cost to them of doing that in which the first et separatim second defenders were bound."

[16] The law of unjustified enrichment was dealt with in Gloag & Henderson, Introduction to the Law of Scotland (11th Ed) at chapter 28. Para 28.02 states:

> "The plea of repetition allows recovery of money which has been paid in circumstances where it would be unjust for the defender to keep the money. The cases are grouped under headings which reflect the Roman Law origins of some of the principles involved and the terminology used in some of the cases: the *condictio indebiti*; the *condictio causa data causa non secuta*; the *condictio ob turpem vel injustam causam* and the *condictio sine causa* (a term not much used in Scottish writings). These terms are not straitjackets but merely serve to distinguish various situations in which repetition may be available, and it may be that some cases could be classified under more than one heading."

Para 28.03, which deals with the *condictio indebiti*, or claim for recovery of a payment which is not due, states:

> "Money paid by the pursuer under the mistaken belief that it was due to be paid under a legal obligation to the recipient can be recovered in a personal action against the recipient, unless the defender establishes factors which would make retention of the money equitable. The pursuer's mistake may be as to the facts or as to the law relating to the transaction."

Recompense was wider than repetition and was described in para 28.12 as follows:

> "While unjustified enrichment by the payment or taking of money is dealt with under repetition, and unjustified enrichment by the transfer or taking of property is dealt with under restitution, cases where the defender has been unjustifiably enriched by the pursuer's expenditure, services or other actings, or by the defender's use of the pursuer's property, are generally treated in Scots Law under the heading of recompense."

At para 28.13 it is stated:

> "Except in special circumstances, the pursuer must have no other legal remedy. So where a local authority refused to comply with their statutory duty to construct sewers, and contractors constructed the sewers themselves, the contractors were not entitled to recover their costs because they could have brought proceedings to enforce the local authority's statutory duty."

The case referred to in the footnote to the second sentence in that passage was *Varney (Scotland) Ltd* v *Lanark Town Council* 1974 SC 245, in which Lord Justice-Clerk Wheatley stated at pps 245-6:

> "Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can be had only when no other legal remedy is or has been available. If a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense."

Moreover, a better result than would be obtained under the contract cannot be obtained by basing the claim on recompense. Gloag on Contract (2nd Ed) stated at p 320:

> ".... it is conceived that if the relations of the parties are regulated by a contract of which there is competent evidence, neither can ignore it and obtain better terms by framing his case as a claim for recompense."

The general principle had been stated by Lord President Boyle in *Smail* v *Potts* (1847) 9D 1043 at p 1045 as follows:

> "When a contract is reduced to writing, it must in the general case be held to regulate all questions between the parties, otherwise it is of no use to enter into a written contract at all. The contract is subject to a rational, not a judicial, construction; but if it is conceived in plain and explicit terms, it must form the rule by which the rights of parties are to be fixed."

[17] A claim for recompense was not open to the pursuers in this case for two reasons: (1) there was an alternative remedy available to them under clause 83 of the subcontract; and (2) it could not be used where there is a contract

between the parties to enable one party to obtain a better result than he would obtain under the contract. It was competent to bring a claim for recompense as an alternative to a contractual claim (*NV Devos Gebroeder* v *Sunderland Sportswear Ltd* 1990 SC 291 per Lord President Hope at p 302) but in this case the pursuers had brought cumulative claims, or at least it was unclear whether the claim for recompense was being advanced as an alternative to the contractual claim.

Submissions of junior counsel for the second defenders

[18] Miss Crawford's first submission was that clause 83 was the only conceivable basis of a claim for payment by the pursuers against the second defenders and that since there were no relevant averments that the second defenders were at risk she sought dismissal of the action in so far as directed against them. If she was wrong in that, she adopted the submissions of Mr Primrose about the averments which should be deleted (p 52C to p 55A) and moved that the pursuers' first and second pleas-in-law be deleted.

[19] Core clause 8 of the subcontract set out a framework and mechanism as regards the parties' rights and obligations. It was headed "Risks and Insurance" and structured into three parts: (i) allocation of contractual risks between the parties; (ii) provision for indemnities in respect of such risks as were carried by the parties; and (iii) provisions for insurance to be in the joint names of the parties. Clause 80 set out the risks of the employer and contractor and clause 81 set out the risks of the subcontractor. (Concomitant provisions in the main contract contained equivalent provisions as between the employer and the contractor.) Under clause 81.1 the subcontractors were only at risk in respect of matters which were not risks carried by the contractor. Under the first bullet point in clause 80.1 the employer's and contractor's risks included "claims, proceedings, compensation and costs" due to the matters mentioned. Clause 83 contained the indemnity provision which "kicked in" when a party was carrying the risk. It provided a mechanism where one party made a claim against another for items at the latter's risk. Under clause 80.1 the pursuers were at risk for the first defenders. The subcontractors in the Subcontract Data were Turner, the second defenders (see clause 11, the definition clause). On the averments made there was no question of the second defenders being at risk: the pursuers were at risk as a result of the first defenders' negligence and the pursuers' own negligence. The construction of the phrase "claims, proceedings, compensation and costs" proposed on behalf of the first defenders was adopted on behalf of the second defenders. It was averred in condescendence 14 that the pursuers paid the employer, and it must be the case that they did so as a result of the obligations incumbent upon them under the main contract. In a question with the employer the pursuers carried the risk. It is clear that the pursuers met the employer's claim or right or entitlement to payment. When one was asked who, if anyone, was to pay for the loss in a question between the pursuers and their subcontractor, one had first to go to the subcontract, which set out the terms and conditions under which the parties contracted, ask what happened and why and finally who was at risk for that event. If the pursuers asserted the second defenders were at risk, as they did in condescendence 10 at p 52C, then they next had to go to clause 83.1 and invoke the indemnity. If it was not clause 83 to which one looked to see who was to pay, one may ask - what is the point of clause 83? Why was it there in a clear, structured mechanism in core clause 8?

[20] If the above approach was correct, one ought then to turn to the Record to see what happened, why and whether it was due to a risk carried by the second defenders who were then bound under clause 83 to indemnify the pursuers. There were no relevant averments on Record which pointed to the second defenders being at risk and therefore liable to indemnify the pursuers. On record there were averments of a fire which, so far as the pursuers were concerned, was due to the negligence of the first defenders, and, so far as the first and second defenders were concerned, was due to negligence by the pursuers. There were no averments on Record sufficient to support the contention that the second defenders carried the risk of the fire. The averments did not identify the respects in which the second defenders were at risk. The second defenders were subcontractors for insulation works and had nothing to do with welding.

[21] Turning to the averments, it was averred in condescendence 5 at p 28C that the second defenders were engaged in lining the cold store with expanded polystyrene composite panels and the pursuers believed it to be true that Halldorsson, the second defenders' employee, warned the pursuers' site agent Blair of the fact of the welding by the first defenders. At p 29D the pursuers averred:

> "Welding products have an obvious potential for igniting other things."

There was nothing in condescendence 5 to suggest negligence by the second defenders. In condescendence 6 it was averred that on 9 October 1997, the day before the accident, Bryan, the second defenders' foreman insulator, warned Smith and Johnston, the first defenders' employees, of the fire risk which the insulation panels posed. The pursuers themselves were aware that welding was taking place on 9 October 1997. There was no reference to the second defenders' employees being present on 10 October 1997, the day of the fire. The admissions made by the pursuers on p 34 involved their admitting that they were to some extent negligent, but did not point to the second defenders being negligent. The second defenders' risk assessment was referred to at pps 34, 41, 50 and 72 and at p 34C-D the pursuers admitted having received that risk assessment. In that risk assessment the second defenders advised the pursuers on warnings and control measures. The averments referred to thus far all pointed to the fire having been caused by the fault of the first defenders and the pursuers. The pursuers averred in condescendence 10 at p 52 that the risk giving rise to these proceedings was that of the first *et separatim* second defenders in terms of clause 81.1, but, so far as the second defenders were concerned, how? No answer to that question could be found in the averments made by the pursuers. The risk of the second defenders had to be something beyond the first defenders setting the property on fire. Condescendence 7 related only to the first defenders. Condescendence 8 affected the second defenders, but they were supplying and installing insulation, not engaged in hot work. Nothing in condescendence 8 pointed to why the second defenders were at risk. The averments in condescendence 9 from p 49D to p 50C were directed against the first defenders only. The averments at p 50B-D indicated that the second defenders provided the pursuers with clear warning of what was to happen should hot work be carried out in the vicinity of the insulation panels: the risk had to be identified and steps taken to control it. The second defenders were not in a position to exercise control over the pursuers or the first defenders. Nothing in the averments referred to thus far supported the averment against the second defenders in condescendence 10

at p 52 referred to above. There was no relevant claim here that the fire was due to matters for which the second defenders carried the risk. The averments in condescendences 11 and 12 were directed against the first defenders only.

[22] The averments in condescendence 13 were directed against the second defenders. It was based on their alleged failure to comply with the pursuers' Code of Practice on Fire Prevention on Construction Sites (no 6/14 of process), in particular clause 3.7 (c) and (d). It was not averred how the second defenders did not comply with the Code. They had supplied and installed insulation and supplied a risk assessment saying "beware!". At p 72B the pursuers averred:

> "It was an implied term that the second defenders would not assist other subcontractors in breaching the terms of that Code."

It was not averred how the second defenders had "assisted" the first defenders. In what circumstances were insulation installers required to do the things set out in the Code and in what circumstances did they assist the first defenders to break the Code? The alleged implied term was a strange and unusual one: on what basis could it said to be implied into and form part of the subcontract? The averment about an implied term was just an assertion. There was no averment that the second defenders were even aware of what was happening on 10 October 1997, the day of the fire. It was difficult to know what the pursuers were saying in their averments in condescendence 13.2: the averments at p 73A-C were entirely irrelevant. So far as condescendence 13.3 was concerned, the clause of the letter of 2 April referred to did not form part of the contract between the pursuers and the second defenders, only of the contract between the pursuers and the first defenders. Condescendence 13.4 averred that the second defenders breached the obligation in clause 11.2 of the subcontract to provide the subcontract works, but clause 11.2 was a definition clause and could not therefore found any breach. The averments in condescendence 13.5 that the second defenders breached an implied term of the subcontract to use reasonable skill and care in carrying out the subcontract works in a tradesmanlike way by refraining from assisting others to carry out welding works in the circumstances condescended upon was just an assertion containing no specification.

[23] To summarise the first submission, there were no relevant averments anywhere on Record of the respects in which the second defenders could be said to have carried the risk for the fire and that they were therefore bound to indemnify the pursuers for the loss and damage arising therefrom. That being so, the action should be dismissed insofar as directed against the second defenders.

[24] Miss Crawford's second submission was that the pursuers' averments in respect of the alleged failure to obtain insurance were irrelevant. On this point she adopted the submission of Mr Primrose. He had submitted that the insurance provisions did not circumvent the indemnity provisions, but a better way to put it was to say that the insurance provisions in clauses 84-87 were not concerned with the question which fell to be answered in this case, namely, who is to pay? The insurance provisions were nothing to the point: they dealt with the question "who is to insure, and for what?". The pursuers' averments about insurance were to be found in condescendence 10 between p 52C and p 55A. To talk of loss arising from a failure to insure was somewhat of a non-sequitur. There was no obligation on the second defenders to account or to pay by reason of the insurance clauses in the subcontract. The insurance clauses did no more than set out a

duty to insure and what was to happen in the event of no insurance having been taken out. They did not found a basis for any subsequent claim for damages and were neither here nor there so far as the present action was concerned.

[25] The question had to be asked - why were the insurance provisions in core clause 8 of the subcontract, and did they provide a fit dealing with allocation of risk and indemnity? The answer was that they provided a perfect fit consistent with the submission made by Mr Primrose on behalf of the first defenders. Risk, indemnity and insurance all formed part of a mechanism. Clause 84.1 dealt with insurance cover and clause 84.2 provided that insurance was to be in joint names. It followed that the contractor was able to make a claim under the joint names insurance for any loss covered by it, so in this case the pursuers could make a claim under the policy. No separate obligation arose under the insurance clauses to pay for loss arising from the fire. Clauses 84-86 provided a mechanism in the subcontract which would in effect avoid the need for litigation at all as claims were to be made under the insurance policy in joint names. The insurance had to cover the subcontractor's liability for loss in connection with the subcontract. The effect of joint names insurance was to exclude the pursuers from exercising their rights of subrogation against the subcontractors. If the pursuers had claimed against any joint names insurers as opposed to claiming under their own policy then their rights of subrogation against the subcontractors would be excluded: they could not sue the second defenders because a right of subrogation could not be exercised against a co-assured. This pointed clearly to the fact that the insurance clauses did not give to the pursuers a separate right under which a claim for payment in respect of the loss arising from the fire could be made.

[26] The subcontract clearly set out the intention of the parties: they had worked out matters relating to (1) allocation of risk; (2) indemnity; and (3) insurance of the risk. Each clause dealing with these three separate areas performed its own distinct and discrete role. It would make no sense, and it would be wrong, to try to construct out of that some form or series of separate obligations. In this case the parties had agreed in the subcontract that they would not sue and the pursuers therefore could not construct some separate action under the insurance provisions. That insurance in joint names excluded subrogation was clear from *MacGillivray on Insurance*, p 610, para 22-100, which states as follows:

> "It has recently been stated by the House of Lords (*Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd* [2002] 1 WLR 1419) that ...... where two or more parties are co-assureds in respect of the same loss or damage which has occurred, there is an implied term of the contract of insurance that an insurer will not seek by the exercise of rights of subrogation to recoup from a co-assured the indemnity which he has paid to the assured. ...... The recent authorities indicate that there should be little difficulty in implying such a term where the contract which is the source of the obligation to insure requires the policy to be taken out in joint names. The courts will view this as a compelling indication that both parties are intended to have the benefit of the insurance, because the law will not allow an action between two or more persons who are insured under the same policy against the same risk (see *Co-operative Retail Services Ltd* v *Taylor Young Partnership Ltd* [2002] 1 WLR 1419, 1423 *per* Lord Bingham and 1437, *per* Lord Hope)."

Reference was also made to *Scottish Special Housing Association* v *Wimpey Construction Limited* 1986 SC (HL) 57 per Lord Keith of Kinkel at p 68, in which it was held that the employer could not sue the contractor for negligence in causing a fire because the terms of the contract provided that the employer should bear the whole risk of damage by fire, including fire caused by the contractor's negligence. In this case the pursuers and second defenders had agreed in the subcontract that they would not sue one another. They could not therefore construct some separate action under the

insurance provisions. It would be nonsensical if, the risk, indemnity and insurance having been set out in the subcontract, a claim could be made against the party said to have been at fault under the insurance provisions. That cannot have been intended by the pursuers and second defenders.

[27] If the insurance provisions could operate a separate right of action, at worst the second defenders could be liable only for loss to the subcontract work, plant and materials under reference to the Insurance Table. The second defenders' subcontract had nothing to do with the cause of the fire. It had not been caused by activity in connection with the second defenders' subcontract.

[28] Miss Crawford's third submission was that clause 82.1, which provides that the subcontractor promptly replaces loss of and repairs damage to the subcontract works, Plant and Materials, was simply not a payment provision. It did not set out who was to pay. If it were otherwise, what would be the point of clause 83? If she were wrong in that, then clause 82.1 was limited to the subcontract works, Plant and Materials. The second defenders had repaired the subcontract works.

[29] Miss Crawford's fourth submission (adopting Mr Primrose's third submission) was that, in the event of a proof before answer being allowed against the second defenders, clause 83.2 came into play. If the second defenders were liable to indemnify the pursuers, one did not stop there but had to go on and look at clause 83.2 and the question of contribution. The second defenders were offering to prove that the events in question were at the risk of the pursuers and first defenders. The supporting averments were to be found in answer 10 for the second defenders at p62D to 63A and in answer 13 at p 74D-E, and the relevant plea-in-law was plea-in-law 8 for the second defenders. The first defenders' submission that the construction advanced by the pursuers in paras 3 and 4 of their Note of Argument made no sense was adopted, as was the construction placed by the first defenders on the phrase "claims, proceedings, compensation and costs".

[30] Miss Crawford's fifth submission was that the pursuers' claim based on restitution and recompense was misconceived. She adopted the submission of the first defenders on this point but went further and submitted that in a question with the second defenders neither remedy operated at all. Both were remedies for a cause of action, that of unjust enrichment or a *condictio*. The cause of action was that one could recover what was retained without a legal basis. Repetition was for recovery of money paid by A to B in circumstances where it would be unjust for B to keep the money: in that situation it B has been unjustly enriched. For the reasons previously advanced in her first submission, there was no relevant basis for saying that the second defenders had been unjustly enriched. All that had happened was that they had been paid for the work they had done in connection with the subcontract: they got no more than their contractual entitlement. They had no obligation to pay the employer under the main contract. The fact that the pursuers had paid the employer under the main contract was simply nothing to the point. Recompense was generally thought to be the remedy where B was unjustly enriched by having had the benefit of A's services and the enrichment was reversed by B paying A a sum representing the value of those services.

[31] The law of unjust enrichment and the appropriate remedies were considered by Lord President Roger in *Shilliday* v *Smith* 1998 SC 725, particularly at pps 727D-728C. An unjust enrichment, a conferral of a benefit on the defender, was required. In this case there was no such conferral of a benefit on the second defenders. Whatever the correct classification of the remedy may be, no relevant basis or cause of action was pleaded. There was a contractual obligation owed by the pursuers to the employer under clause 82 of the main contract to repair and replace damage to the works and the pursuers did just that. There was a separate subcontract between the pursuers and second defenders. The second defenders replaced the subcontract works and in turn received payment from the pursuers. The second defenders had no contract with or engagement to the employer. Payment by the pursuers to the employer was not made in implement of any debt owed by the second defenders to the employer, and it therefore followed that there had been no conferral of a benefit on the second defenders. There had been no unjust enrichment. The pursuers complained that they had lost, but the second defenders had not been enriched by the pursuers' separate obligation to pay the employer. As Lord President Rodger, having reviewed the relevant cases, put the matter *Shilliday* at p 730G-I:

> "For present purposes the essential point which these cases vouch is that, if a person spends money or otherwise acts in his own interest (*in suo*), but his expenditure or actings incidentally benefit someone else, the first person cannot seek any payment from the other on the basis that his expenditure or actings have resulted in a benefit to that other person. The cases denying recovery involve situations where the *only* alleged basis for the pursuer's claim for recompense is that he has expended money or done work from which the defender has derived an incidental benefit. The law rejects the claim: a defender is not regarded as being unjustly enriched just because he enjoys an incidental benefit from expenditure or work which a pursuer has made or carried out for his own purposes."

The same result was arrived at from following the first defenders' submission that the subcontract here provided the remedy and that the remedies of repetition or recompense had no part to play. Here the cause of action was contained within the subcontract itself: the benefits were retained and recovered under that contract, that is, with cause. Unjustified enrichment was invoked where what was sought was the recovery of benefits retained without cause (*Shilliday* per Lord President Rodger at p 730B). It was not possible to seek both contractual and equitable remedies at the same time.

Submissions of junior counsel for the pursuers

[32] Mr Francis (whose submissions were sometimes difficult to follow) opened his submissions by stating that the argument central to the issue was whether the sole port of call was the indemnity provision in clause 83. If the pursuers were correct that it was not, that cut a swathe through the other arguments. The pursuers took issue with the proposition that clause 83 sucked in all possibilities. The pursuers did not accept that clauses 83.1 and 83.2 operated in relation to the risks allocated to the subcontractors and which are reflected in the insurance table. The insurance table, while not the source of risk allocation, confirmed certain risks. Clauses 80.1 and 81 conferred the risks. The insurance table could be looked at as a cross-check. The risks were allocated entirely to the subcontractor. It followed from that that there were things, such as consequential loss sued for here, which fell to be dealt with under clause 83. Risks in connection with the

subcontract works and property generally were not subject to reduction under clauses 83.1 and 83.2. Plea-in-law 7 for the pursuers should therefore be sustained and the averments of the defenders founding on clauses 83.1 and 83.2 so far as they bear upon the subcontract works and/or liability for loss of or damage to property caused by activity in connection with the subcontract should be deleted.

[33] The defenders' contention was that the phrase "claims, proceedings, compensation and costs" in clause 80.1 was some sort of catch-all and that fault or negligence of the contractor operates under clause 83 to reduce the effect of the risk *prima facie* allocated to the subcontractor. Bullet point 1 in clause 80.1 did not operate upon liability which turned upon loss of or damage to the works because, with the exception of loss and damage caused in one of the ways referred to in bullet point 3, such risks fell to the subcontractor under clause 81. The residuum of risk fell to the subcontractor under clause 81. There was no reference to fault or negligence. There was here a single event, the loss of the works, and the risk from whatever cause passed to the subcontractor under clause 81. The first bullet point in clause 80.1 did not operate upon loss of or damage to the subcontract works. Bullet points 4 and 5 dealt with the employer's and contractor's risks where the subcontract works had been taken over. This was consistent with what was in the guidance notes. What was not covered by clause 80.1 "dropped down" through clause 81 to the subcontractor and fell to be insured. The liability attending the risk event passed to the subcontractor along with the event. That liability was not classed as "claims, proceedings, compensation and costs": it was simply the fruit of an allocated risk event. It was critical to an understanding of these clauses that the event passed to the subcontractor. The event was not the liability for the loss or damage, the event was the loss or damage. One could ask - who pays if the loss or damage is nobody's fault? It was a risk borne by the subcontractor, just as an event caused by the subcontractor, a stranger, the employer or the contractor. In every case the answer was the same. Loss of or damage to the subcontract works, plant and materials were risks allocated to the subcontractor and went unreduced for events at counter-risk. They were not covered by clauses 83.1 and 83.2.

[34] Quite a lot had been said by counsel for the defenders about the commercial reality of the matter, but the commercial reality was that the risk events and the attendant liability were to be insured. Insurance was envisaged but its absence or non-recovery did not make the risk allocation go away. What the insurance arrangements did was to shed light, as a cross-check, on how the parties had allocated the risk. Clauses 84 and 85 of the subcontract therefore served to confirm the construction of clauses 80 and 81 for which the pursuers contended.

[35] Clause 83.2 operated in relation to risk events other than the ones singled out above. The expression "claims, proceedings, compensation and costs" in clauses 83.1 and 83.2 did not include financial consequences attendant upon loss of or damage to the subcontract works, plant and materials or loss of or damage to property, except the subcontract works, plant and materials in connection with the subcontract. A better way of putting it was that clause 83.1 did include such things, so that an obligation on the part of the subcontractor to indemnify the contractor 100% emerged under clause 83.1, but that obligation to indemnify went unreduced for any counter-risk under clause 83.2 because the counter-risk event to which the defenders point is fault and negligence, and that counter-risk cannot operate on a risk in a manner

which excludes its effect. The risk events were allocated to the subcontractor on terms which excluded fault and negligence. The subcontract passed the risks to the subcontractor, unless they were the product of stipulated causes allocated to the employer or contractor, and these stipulated causes did not include fault or negligence. Put another way, fault and negligence could not be counter-risk events in relation to either such head of loss or damage because of the terms on which the risk of such loss or damage was allocated to the subcontractor, under exception of specific things which did not include fault and negligence. In a nutshell, if this particular risk event, which necessarily included fault and negligence, was allocated to the subcontractor and fell to be the subject of indemnity under clause 83.1 (which the pursuers said it did), why would it be reduced for fault and negligence under a general provision which could not bear reference to fault and negligence within that event, but which could only bear reference to other events? The position was that the subcontractor bore the loss 100%. Under clause 84.2 the risk insured was co-extensive with the risk assumed by the subcontractor. If a subcontractor did not insure he became his own insurer. Just as the contractor was obliged under clause 80 to insure the works, so the subcontractor did just the same to the extent of his part, but the employer was a stranger for the purpose of the subcontract. The subcontractor insured the property against loss caused by activity in connection with the subcontract. The insurance table confirmed clauses 80 and 81 and the rightness of the foregoing submission. The subcontract was simply the main contract provisions writ large. There was a perfect symmetry about the main contract and the subcontract. Clause 85.4 was a further cross-check. The event was the loss, not the liability for it. If there were several subcontractors, the insurers would be rateably liable for the loss on the principle of contribution. Clause 85.4 indicated that unabated liability rested with the subcontractor.

[36] Clause 84.2 provided for insurance cover for the replacement cost of loss of or damage to the subcontract works, plant and materials. The insurance had to be in the joint names of the parties and excluded liability for negligence as between them. When the parties had engaged for property insurance, which excluded liability *inter se*, is it really likely that the risk for the replacement cost of the works should be kicked about under the counter-risk provisions in clause 83.2? The compensation provisions under core clause 6 of the subcontract ("Compensation Events") would yield the subcontractor nothing by way of payment for the replacement. It was not accepted that it was not possible to have subrogation vertically between the employer's insurance and the subcontractor's insurance. Why on earth should there not be subrogation? There could be no subrogation upon the subcontract insurance, but here the contractor was paid out under the main contract insurance. On the ordinary principles of insurance the contractor's insurer could stand in his shoes and go against the subcontractor. The third column on the right hand side of the insurance table contained a significant provision as to the form of the insurance. It was not disputed that this provision was capable of taking in contractual liabilities from the indemnity in clause 83.1. Why was there a difference between column 1 and column 3 on the right hand side of the insurance table? Column 3 was there to avoid the insurer paying A having to go against B as negligent (*Petrofina Ltd* v *Magnaload Ltd* [1984] 1 QB 127 per Lloyd J at 139 F-G). This sought to exclude a subcontractor going against a contractor. The very purpose of insuring in that way was to ensure that liability stopped

where it fell. Was it really likely then that liability would be tossed about under clause 83.2? Clause 83.2 applied, for example, to a business interruption claim not covered by the risk. The guidance notes (no 7/2 of process) at p 106 simply confirmed the above. The notes were background against which one was entitled to assume the parties contracted.

[37] The motion made by Mr Francis on this limb of the case was that I should (1) sustain the pursuers' seventh plea-in-law; (2) repel plea-in-law 3 for the first defenders; (3) delete in answer 10 for the first defenders all averments from the beginning of line 5 on page 59 to the end of the answer; (4) repel plea-in-law 8 for the second defenders; (5) delete in answer 10 for the second defenders (i) at p 61D from the words "Said risks" to the word "hereof" on line 6 at page 63A; and (ii) at p 64B from the words "The second defenders" on lines 5 and 6 to "82.1" on line 10; and (6) delete in answer 13 for the second defenders from the word "Esto" to the end of that answer. Failing that, I should allow a proof before answer.

[38] Turning to the second defenders' argument that there could be no subrogation by the contractor against the subcontractor, Mr Francis submitted that the cases cited by Miss Crawford provided no support for the proposition advanced by the second defenders, namely, that despite the fact there were separate contracts of insurance, each of which insured different insured parties for different interests, the property insurers under the main contract could not be subrogated to the employer's or contractor's claims against the subcontractor. That was not the way the submission was put, but that was the proposition which the court was being asked to accept. The authorities did not vouch that proposition at all. The following question could be asked: why should the contractor's property insurer, who had paid the value of the works insured, not be entitled to stand in the shoes of the contractor for the purpose of saying to the subcontractor, by reference to the contractual rights of the contractor against the subcontractor under the subcontract "Get your insurer to pay or pay yourself" or, alternatively, "Indemnify me". The ability to say that was simply part of that which remained in the contractor although he had been indemnified under the main contract insurance. In *Castellain* v *Preston* 11 QBD 380 Brett LJ gave one of the classical descriptions of subrogation at p 388 in the following terms:

> "In order to apply the doctrine of subrogation , it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent to which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or for remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured , can be or has been diminished."

That passage was recently approved by Lord President Rodger in the Inner House in *Caledonia North Sea Ltd* v *London Bridge Engineering Ltd* 2000 SLT 1123 at p 1135L-1136B.

Here one found two tiers of insurance. The policy of the law was to treat co-assured as a single assured. The employer had no right against the pursuers in this case. That indirectly confirmed the rightness of the pursuers' approach.

Mr Francis' motion on this limb of the case was that I should delete in answer 10 for the second defenders the averments from the words "The second defenders" at p 63B to the word "excluded" at p 63D.

[39] Mr Francis then turned to deal with the second defenders' submission that the loss of or damage to the property was not caused by activity in connection with their subcontract works. He submitted that the pursuers did not need to aver negligence or to show that the activity was in connection with the loss of or damage to the subcontract works. The pursuers and the second defenders differed on how the word "caused" should be regarded, but the pursuers had said enough in the pleadings. One was dealing with something which was purposely open-textured language. The activity in question need not be the execution of the subcontract works themselves: it could be something in or about those works. It was averred that Mr Bryan, the second defenders' foreman insulator, perceived a problem with people welding and that there could be damage to the panels. He knew what the first defenders' employees were doing and how they were doing it. He knew, from his own employer's risk assessment, of the need for fire blankets. He knew that the removable combustible material should not have been there. One could say that omission (by the second defenders) was a cause. Activity included inactivity in the face of known risks. The tops of the panels were open so that resin was exposed. The taking of inadequate precautions in the face of a known risk could amount to "caused by". Silence by Mr Bryan in the face of known risks would be activity. In *Environment Agency v Empress Car Co* [1999] 2 AC 22, a case of a prosecution for the offence of causing polluting matter to enter controlled waters, Lord Clyde said at p 36F-G:

> "In many cases an omission may be analysed as the provision or operation of an inadequate system."

[40] It was accepted that the welding was not activity in connection with the second defenders' subcontract. There were two causes of the fire - (1) the first defenders' welding; and (2) the failure to take adequate precautions. "Caused" was a word of broad ambit which took its colour from the context (*Fairchild* v *Glenhaven Funeral Services Ltd* [2003] 1 AC 32 per Lord Bingham of Cornhill at p 45, para 12). The question of blame did not arise here: it was a simple contractual test. The context was risk allocation and a restrictive approach should not be taken; if anything, the opposite approach should be taken. Here we were a million miles away from the attribution of blame in delict or tort. The second defenders participated in the taking of inadequate precautions for protecting the works. Bryan moved the boards, which were combustible and implicated in causing the fire. It was unnecessary to go to the question of omission. This was a proof before answer point.

[41] Mr Francis concluded his submission by dealing with the issue of unjust enrichment. He submitted that this issue arose only if I were against the pursuers on the main point. In condescendence 14 at p 77D-E it was averred that the works of reinstatement were undertaken by, amongst others, the pursuers and the respective defenders. At p 79D-E it was averred that structural steelwork, cladding and metalwork were reinstated by the first defenders at a cost to the pursuers of £432,607.95 consisting of measured work. At p 80A it was averred that insulation works at a cost of £317,906.93 were undertaken under subcontract by the second defenders. Payment of those sums was admitted. The pursuers said they paid

the subcontractors in error and were entitled to go to proof on their unjust enrichment case. The reason there was such a case was because there was a dispute by the second defenders about the contract.

Submissions by senior counsel for the first defenders

[42] Mr Hodge adopted the submissions of Mr Primrose and extended the motion made by him by moving that the averments in condescendence 11 should be deleted. He submitted that the first defenders' case was simple and could be summarised in four propositions, the first two of which he considered to be non-contentious. These propositions were as follows:

(1) The principal claims by the pursuers are in contract, and one had to look to the subcontract to see the legal bases for recovery.

(2) The issue in this case, the works of reinstatement having been carried out, was which of the parties was liable in contract to pay for those works of reinstatement and the consequential damage from the fire, for which the contractor (the pursuers) had disbursed compensation.

(3) The reasons why the provisions allocating risk within the subcontract exclude other forms of claim by the pursuers against the first defenders outside the subcontract are:

   (i) the subcontract created a regime for the allocation of risks in respect of the subcontract, the aim being to create a simple regime by which the recovery could be effected;

   (ii) the parties envisaged insurance policies in joint names would cover most of the risks relevant in this case and exclude recourse by subrogation against a party named in the policy; and

   (iii) to allow claims for breach of contract or delict for allocated risks would be to create a parallel regime for a different and inconsistent allocation of risk from the main contract and the subcontract. (A concession to this effect had now been rightly made by on behalf of the pursuers and was in no sense overdue.)

(4) The claims for unjustified enrichment were irrelevant for the reasons given by Mr Primrose. Mr Francis had not attempted to answer what had been said in the cases.

[43] The first defenders accepted that the pursuers had pleaded a relevant *esto* case under the contractual indemnity in clause 83. The pursuers had pleaded a case on lack of skill against the second defenders (condescendence 13, p 74A). On the pursuers' own averments there appeared to be an apportionment of liability under clause 83.2. Mr Francis had conceded that that was so in relation to consequential losses: he had accepted that clause 83.2 applied for some heads of claim. The pursuers accepted that their *esto* case required a proof before answer: the first defenders said that was the only case for the pursuers.

[44] The principal submission for the pursuers was that certain risks in clause 81 were allocated to the subcontractor and certain risks were excluded from the clause 83.2 mechanism, by which one party could demand payment from the other

under the indemnities contained therein. The pursuers' construction of the contract was misconceived. There was common ground between the parties on three matters:

(1) While it was accepted that risk events in the insurance table in clause 84.2 were of loss or damage, the contractor's risk event included liability under bullet point 1.

(2) Certain risks set out in clauses 80 and 81 fell within the clause 83 indemnity mechanism and were subject to the reduction in clause 83.2. Where something went to the subcontractor under clause 81, clause 83 could apply.

(3) The pursuers appeared to accept that there was an implied limit on clause 81 to the effect that the risks were in connection with the subcontract.

[45] Where the parties differed was that the pursuers said that certain clause 81 risks, namely, those covered by the insurance table in clause 84.2, were excluded from the clause 83.2 mechanism. What the pursuers were saying was that the risks in the insurance table remained forever with the subcontractor and could not be reduced, but the contract did not say that at all: it said the opposite. Having regard to the practical operation of the provisions as a commercial agreement, the pursuers' interpretation was not a realistic one. Their position appeared to be that while they could claim against the subcontractor for a clause 81 risk, clause 83.2 did not operate in relation to the risk events allocated to the subcontractor in the insurance table. At the same time, the pursuers accepted that clause 83.2 did operate in relation to all other risk events allocated to the subcontractor and main contractor. The rationale for this suggested distinction appeared to be essentially twofold, namely:

(1) The risks allocated to the subcontractor which were to be insured under clause 84 flowed from an irreversible allocation of risks.

(2) There were no relevant risk events to set off against the subcontractor's risk. This involved the construction of clause 80. It was suggested that the first bullet point did not overlap with the other bullet points, and that the other bullet points effectively delimited the liability of the contractor and employer. The second point under bullet point 1 related to third party claims against the contractor.

The first defenders took issue with that approach. An interpretative approach and the practical operation of the provisions of a commercial agreement were against it. So far as irreversible allocation of insured risk was concerned, the pursuers accepted that clause 83.1 applied and clauses 83.1 and 83.2 had to be read together. In ordinary English usage clause 83 required a party to indemnify another party in respect of a loss arising from any event at the former's risk. Events at the contractor's risk were all of the listed events in clause 80. Events at the subcontractor's risk were all of the risks which fell within clause 81. Clause 81 risks included, but were not co-extensive with, the insured risks in clause 84. Nothing in clause 83.2 suggested that all risk events were not covered in clause 83.1. There could be an event which arose from more than a single risk. For the pursuers' submission to be correct it would be necessary to write in a restriction in clause 83.2 in line 1 after the word "contractor", namely, "in respect of an event which is at his risk (other than an event listed in the insurance table in clause 84.2)". There was no mention of insurance in clause 83. The pursuers said that because the

insurance was in joint names there could be no reduction exercise, but how would clause 83.3 work if the pursuers were right? The risk would be that of the subcontractor, full stop. The contractor's indemnity did not arise if there were a clause 84.2 risk.

[46] In relation to clause 80, the pursuers' submission was that no relevant risk events could arise to be set off against the subcontractor's risk, but three points required to be made:

(1) There was no mutual exclusivity between the bullet points listed in clause 80. There was no suggestion that claims or costs due to the negligence of the contractor or subcontractor in some way excluded costs relating to damage to the works or subcontract works. There were no words of limitation in the first bullet point. It did not say "other than those relating to loss and damage set out in the following bullet points" or "other than costs relating to loss and damage at the risk of the subcontractor under clause 81". *Prima facie* the contractor's liability was available for a clause 83.2 reduction exercise if the costs were due to those persons' negligence.

(2) The natural interpretation was that costs covered by the bullet point could and would cover loss covered by damage to the works and the subcontract works: see the third sub-bullet point in bullet point 1.

(3) Clause 80 was not restricted to third party claims. The party with the enumerated risks in bullet point 1 must have incurred a liability to someone else or have himself incurred costs. The liability of the contractor could be to any person, including the employer or the subcontractor. In the case of the subcontractor, the employer was a third party as the subcontractor had no contractual link with him. The contractor indemnified the subcontractor for claims at the contractor's risk. If the contractor had liability to the employer or incurred costs for the negligence of the contractor or subcontractor, that liability or those costs was a risk event which the subcontractor could plead against the contractor under clause 83.2. In both clauses there was an absence of any restrictive words. In this case there was no insurance policy as between the pursuers and the first defenders.

[47] So far as commercial operation of the contract was concerned, the pursuers' submission rested heavily on the allocation of risks in the insurance table, but here we were in the "no insurance world". The parties were in agreement that the clause 81 risks were in connection with the subcontract. Those risks did not cover the risk of a third party arsonist. The painter of an outhouse would not be at risk for a fire to the main building at the risks of the contractor and subcontractor. The risks in clause 81 were more extensive than the risks in the joint insurance table as that table did not cover consequential loss.

[48] The following points required to be made:

(1) The subcontractor has strict liability for the clause 81 risks. That was clear from the risks set out in the insurance table and the whole edifice of allocation of risk.

(2) The subcontract envisages joint insurance and in most cases that will cover the bulk of the subcontractor's risk. It does not cover consequential loss.

(3) Where joint insurance is in place, the contractor will be paid by the insurer for risks covered by the insurance table without any claim being made against the subcontractor. (None of points (1) to (3) is controversial but there was a difference between the pursuers and first defenders from hereon.)

(4) The subcontract had a different regime where, as here, there was no joint insurance policy, where there was a joint insurance policy not covering the particular risk and where there was a joint insurance policy but the insurer was entitled to refuse indemnity.

(5) In the "no insurance world", insurance does not remove disputes between the parties, but the parties must claim from one another in relation to events at the other's risk. That was done through the mechanism of indemnity. The pursuers accepted the claim was against the subcontractor under clause 83.1. We could set the insurance table to one side and address the indemnity.

(6) The pursuers suggested that if the risk were allocated to the subcontractor in clause 81 and fell within the list in the insurance table, that risk was irrevocably and irreducibly allocated to the subcontractor. They prayed in aid clause 85.4, which did not say that unrecovered losses arising from risks in the insurance table fell on the subcontractor alone. What clause 85.4 said was quite clear. It pointed to the clause 83 indemnity regime, including the balancing exercises under clauses 83.2 and 83.3. If the pursuers were correct, clause 85.4 would say that any amount not recovered by the insurer was at the subcontractor's risk.

(7) Clause 83 in its entirety governed in the "no insurance world". Where the contractor has paid for loss and damage for which the subcontractor is liable, the contractor claims in the first event from the subcontractor under clause 83.1, but if an event at the contractor's risk has contributed to the loss, then clause 83.2 applies. If there has been negligence, the circumstances have to be examined to determine the extent of the reduction.

(8) (A summary of points 1-7 above) In most cases, joint insurance prevents claims between the parties to the subcontract, at least to the extent of events listed in the insurance table. Where there is no insurance, clause 83 applies in its entirety and the subcontractor who has strict liability for clause 81 risks is protected from liability for loss caused by the negligent activities of the employer, contractor or another subcontractor, or any other risk event allocated to the employer or a contractor.

(9) The above was a sensible and fair arrangement, particularly where there may be the contractor and many subcontractors working on a large site at the same time. It was also consistent with the policy of the law, which did not like the person deriving benefit from an indemnity being able to obtain from the indemnifier an indemnity against loss caused by his own negligence. This policy was set out in Hudson on Building Contracts (11th Ed, 1995) at Vol 2, pps 1444-5, para 15-040 in the following terms:

> "It has already been seen ..... in the particular context of insurance that it is a rule of construction when interpreting indemnity clauses .... that they will be strictly construed if an indemnitee beneficiary of such a clause seeks to argue that it is to apply in his favour even in a situation caused by his own negligence or breach of contract. In the case of indemnity clauses, therefore, while there will be no difficulty in applying them to cases where *the indemnitor* is not at fault, they will be very strictly construed if *the indemnitee* seeks to enforce the clause in spite of his own negligence or fault."

The above principle was applied by the House of Lords in the case of *Smith* v *UMB Chrysler (Scotland) Ltd* 1978 SC (HL) 1. At p 7 Viscount Dilhorne stated:

> "While an indemnity clause may be regarded as the obverse of an exemption clause, when considering the meaning of such a clause one must, I think, regard it as even more inherently improbable that one party should agree to discharge the liability of the other party for acts for which he is responsible. In my opinion it is the case that the imposition by the proferens on the other party of liability to indemnify him against the consequences of his own negligence must be imposed by very clear words."

At pps 11-12 Lord Fraser said:

> "The principles which are applicable to clauses which purport to exempt one party to a contract from liability were stated by Lord Greene in *Alderslade* v *Hendon Laundry Ltd* [1945] KB 189, 192 and were quoted with approval by Lord Morton of Henryton in the Privy Council in *Canada Steamship Lines Ltd* v *The King* [1952] AC 192, 208 where he summarised them as follows:- '(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'. These rules were stated in relation to clauses of exemption, but they are in my opinion equally applicable to a clause of indemnity which in many cases, including the *Canada Steamship Lines Ltd*, is merely the obverse of the exemption. The statement has been accepted as authoritative in the law of Scotland, see *North of Scotland Hydro-Electric Board v D &R Taylor* 1956 SC 1, which was concerned with a clause of indemnity and it was accepted by both parties, rightly in my opinion, as being applicable to the present appeal."

See also Lord Keith of Kinkel at pps 16-18.

[49] These rules reflected an underlying legal policy based on a perception of fairness. The interpretation advanced on behalf of the first defenders was wholly consistent with that policy. The imposition upon the contractor for liability for his and others' negligence in a question with the subcontractor reflected the fair policy of not making the subcontractor indemnify the contractor for his (the contractor's) negligence. Clause 83.2 prevented this. The first defenders' interpretation was rational, consistent with legal policy and broadly fair. The pursuers' interpretation involved a submission which started with a desired outcome and worked backwards: it was supported neither by the words of the subcontract nor any interpretation based on the commercial operation of the agreement. The interpretation put forward by the defenders should be preferred. The first defenders' third plea-in-law, which would at least include consequential losses, should not repelled. It applied to all risks, insured and uninsured.

[50] Turning to the first defenders' case, the first two of the four propositions set out at the outset of these submissions were not contested. So far as the third proposition was concerned, if the first defenders were correct, the phrase "claims, proceedings, compensation and costs" were wide enough to cover the pursuers' losses. If the pursuers accepted they had a claim against the subcontractor, then these words covered the pursuers' entitlement to claim from the two defenders. It did not matter if the employer claimed against the contractor or the contractor carried out the works of reinstatement.

Here the employer must have made a claim against the contractor: see the claim for loss in condescendence 14 at pps 96-7 based on the employer's business interruption, and the averments relating to a deliverance in a contractual adjudication of 6 February 1998 at p 90B-C). The phrase was clearly intended to be comprehensive and achieved its aim. The employer had claims against the pursuers, and the pursuers had correlative obligations. The employer and pursuers had been involved in adjudication proceedings, and the pursuers had to pay compensation to the employer and reinstate the premises. The pursers had incurred costs in reinstating the premises. All the words in clause 83.1 applied to this case.

[51] It was not being suggested that there was a general rule that every indemnity or insurance clause excluded breach of contract or delict claims. What had to be considered was whether in the context of the particular agreement the parties had allocated risk in a way exclusive of other bases of claim. Reliance had to be placed on the actual words used in the contract and how the contract worked. As Lord Hope of Craighead said in *Co-op Retail Services Ltd* v *Taylor Young Ltd* [2002] 1 WLR 1419 at p1433B, para 45, echoing what Brooke LJ had said in the Court of Appeal, "the question is: what does the contract provide?". See also paras 14, 21-29, 38, 45 and 65. In *Scottish & Newcastle PLC* v *GD Construction (St Albans) Ltd* [2003] BLR 131 there was an allocation of fire risk to the existing premises to the employer, who failed to take out joint insurance in the name of itself and the contractor, as required by the contract, and the Court of Appeal held that the contract prevented the employer claiming against the main contractor. These cases interpreted different contractual provisions, but the court held that the contract in question had made an exclusive allocation of risk and gave effect to the intention of the parties.

[52] Here strict liability lay upon a subcontractor in connection with the subcontract works and damage to property in connection with subcontractor risks. Where there was negligence by the contractor or another contractor, the contract provided for contribution. It was envisaged that the bulk of liability would be covered by joint names insurance, but, if not, clause 83 provided a mechanism for contribution. Here, as in the *Co-op Retail Services Ltd* and *Scottish & Newcastle PLC* cases, there was an obligation to take out insurance in joint names and exclusion of recourse by the insurer of one named party against another named party - a clear basis for the exclusion of other remedies. If "parallel claims" were allowed, that could result in a different allocation of liability from that provided for in the contract. If the pursuers were allowed to go against the first defenders, that could result in a basis for recovery which ignored the subcontract. Normally it was not possible to claim contributory negligence for breach of contract (except where the breach consisted in a failure to exercise reasonable skill and care). There was an exclusive allocation of liability in the contract. What the pursuers were attempting to do amounted to a form of "remedy shopping". The court should hold that core clause 8 excluded other remedies on the part of the contractor, including quasi-contractual or equitable remedies. Mr Francis had failed to answer Miss Crawford's submission on repetition. Nobody had suggested that the contract was not operative.

[53] Mr Hodge concluded by stating that he could seek dismissal because of the joint and several conclusion, but he would be content if the pursuers amended. If the pursuer did not amend, dismissal was appropriate. The averments of

fact in the breach of contract case could not, as Mr Francis had suggested, support the pursuers' case based on clause 83.2.

Submissions by senior counsel for the second defenders

[54] Mr Cullen commenced his submissions by stating that he agreed with, and adopted on behalf of the second defenders, all the submissions made by Mr Hodge. He also adopted Miss Crawford's submissions to the extent that they were consistent with Mr Hodge's submissions. The basis of the pursuers' case had become somewhat clearer as a result of Mr Francis's submission and this had necessitated some shift in the focus of the defenders' submission, but the substance of the defenders' case had not altered. His motion was slightly different from that of Miss Crawford and was as follows:

(1) The first plea-in-law for the second defenders should be sustained and the action dismissed so far as directed against them.

(2) Alternatively, plea-in-law 1 for the second defenders should be sustained to the extent of excluding from probation those averments of the pursuers intended to instruct a case based on clauses 84 and 85 (that is, in condescendence 10 from the words "The risk" at p 52C to the words "set forth" at p 55A), and the pursuers' first plea-in-law should be repelled.

(3) As a further alternative, the second defenders' third plea-in-law should be sustained and the pursuers' averments in condescendence 10 from the words "*Separatim, esto*" at p 55A to the words "within clause 83.1" at p 56C, which sought to instruct cases based on clause 82 and on repetition and recompense, should be deleted, and the pursuers' second and fifth pleas-in-law should be repelled.

(4) As a further alternative, the pursuers' fourth plea-in-law should be repelled. Mr Francis had accepted that there was no independent case of breach of contract open to the pursuers. It followed that condescendence 13 should be deleted, since the averments therein could be read only as supporting a breach of contract case, and not some other case, as suggested by Mr Francis. Averments in pleadings had to be understood in the context in which they were presented and it was not appropriate in the course of a procedure roll debate to twist them to suit some other purpose. Condescendence 13 also included breach of clause 11.2(4) and breach of an implied term (p 74A-B).

(5) The pursuers' seventh and eighth pleas-in-law (to the relevancy of the defences) should be repelled.

[55] Mr Cullen then turned to deal with the general approach which the court should adopt. He supported the view that, despite the prolix nature of the pleadings, the case was in essence a simple one. The question was who was contractually liable to pay for the reinstatement works carried out following, and the consequential damage caused by, the fire at the employer's premises on 10 October 1997. The court had to look at the terms of the subcontract to identify the pursuers' grounds of claim against the second defenders. A simple and straightforward way to answer the question and ultimately to resolve the dispute was to look at the provisions in the subcontract allocating risk between the employer, contractor and subcontractor. The following aspects required to be emphasised:

(1) Core clause 8 of the subcontract contained a comprehensive risk allocation regime. It also envisaged joint insurance being taken, thereby excluding subrogation between the insured parties, but it did not exclude "vertical subrogation" (a point not argued by Miss Crawford).

(2) A telling weakness of the pursuers' approach was that only some of the heads of claim arising from the risks allocated to the subcontractor were said to be excluded from the clause 83.2 mechanism. It was very difficult to understand why that should be so. The pursuers' submission that this made commercial sense was undermined because they accepted that not all risks were excluded from the mechanism in clause 83.2. Such an approach detracted from the simplicity of the scheme, which was one of its avowed aims.

(3) It was clear that the clause 83.2 mechanism related to all the risk events covered by clause 83.1. Clauses 83.1, 83.2 and 83.3 had to be read together: that was why they were all contained within clause 83. Events at the contractor's risk were all of the items listed in clause 80, and all other events were at the risk of the subcontractor. Events could arise because of more than one risk. In clause 83 there was no reference whatsoever to the insurance table. That was because clause 83 was concerned with something different. Mr Hodge had made an important submission about clause 83.3 - that that clause simply would not work unless the insurance table risks came back into clause 83. If that was correct, it did very substantial damage to a central pillar of Mr Francis's submission. It must have been envisaged that risks within the insurance table would fall within clause 83.3.

(4) This case did concern the operation of provisions in core clause 8 in circumstances where clause 85.4 applied. The second defenders also inhabited the "no insurance world". Mr Hodge submitted that it was fundamental that a different regime applied when there was no insurance cover. In that event clause 85.4 applied and one was directed to the cross-indemnity system in clause 83.2. In the "no insurance world" it did not help to consider what would have happened if there had been insurance and claims had been made under it. Instead, one just had to look at what the subcontract provided about claims by one party against the other in such circumstances. Clauses 83.2 and 83.3 carried out the apportionment exercises. It did not matter why the risks were uninsured. The pursuers' submission must be that clause 83.2 applies to risks which should have been insured.

(5) Mr Cullen agreed with what Mr Hodge had said about bullet point 1 of clause 80: it was not subject to any limitation to the effect that it could not apply to the subcontract works. There were no such words of limitation anywhere in clause 80. The second defenders asked that that clause should be given its ordinary and natural meaning, bearing in mind the tract of authority referred to by Mr Hodge. Very clear words would be required to bring about the result contended for by Mr Francis, namely, imposition of liability on the subcontractor for negligence of the contractor and others. There were no such clear words. It was accepted that under the insurance table the cost of reinstating the second defenders' subcontract works was a risk *prima facie* allocated to the second defenders alone, but the matter did not stop there, because in the no insurance world that *prima facie* allocation of risk was not the end of the matter. Where the loss was contributed to by events at the contractor's risk, there had to be an apportionment of liability under clause 83.2.

[56] Having regard to the above principles, two basic but related submissions were advanced by Mr Cullen. The first was that in the present case it was clear on the pursuers' own averments that events at their risk contributed to the extent of 100% to the loss of or damage to the subcontract works. That being so, the pursuers' claim against the second defenders under clause 83.1 was, on the pleadings, reduced to nil when the clause 83.2 exercise was carried out. Secondly, in the circumstances of this case the second defenders were not liable for the risk in the third line of the insurance table *prima facie* allocated to them because any loss was not caused by any activity in connection with their subcontract. That was the basis on which decree of dismissal of the action so far as directed against the second defenders was sought. A subsidiary submission was that, even if the loss was caused by such activity, that was not the end of the matter because on the pleadings it was contributed to to the extent of 100% by events at the pursuers' risk, and under clause 83.2 the second defenders' liability was eliminated. Whichever way one approached it, it came down to an examination of the pursuers' averments. When these averments were properly understood, it became clear that the pursuers' case was fundamentally irrelevant.

[57] Turning to the first of these two submissions, Mr Cullen submitted that the fire was entirely caused by the pursuers' own negligence or by that of a party employed by them, namely, the first defenders. When the averments in condescendence 6 were considered, from the second defenders' perspective the following points could be made:

(i) The second defenders' supervisor Halldorrson warned the pursuers' site agent Blair that the first defenders' employees were welding (p 34C-D).

(ii) The second defenders' foreman insulator Bryan warned the first defenders' employees of the fire risk borne by the second defenders' panels (p 32D-E). That warning was given on 9 October 1997, the day before the fire. There was no averment that Bryan or anyone else employed by the second defenders gave any advice about the use of boards consisting of combustible material. The pursuers averred that hardboard was combustible, but not that Bryan knew or ought to have known that hardboard was combustible. At p 42B-C the second defenders averred that welding in close proximity to hardboard was unlikely to result in the hardboard igniting and flaming, that a smouldering fire could be started but the heat therefrom would be insufficient to ignite the polystyrene of the EPS panels. The second defenders had nothing to do with the repositioning of the hardboard sheets on 10 October 1997. It was not averred by the pursuers where the sheets were moved to, or that the second defenders even knew that welding was taking place on 10 October 1997. What could be taken from this was that the pursuers made no case that the second defenders had any responsibility for or involvement in the first defenders' decision to move allegedly combustible material on the day of the fire. The pursuers had not even said that the second defenders were on site on 10 October 1997 or that they knew that welding was taking place or that the boards had been repositioned. Mr Francis seemed to have suggested that the second defenders had in some sense advised the first defenders to use a combustible product in close proximity to the welding. The risk on the second defenders was wiped out at the clause 83.2 stage. Mr Francis said the second defenders took inadequate precautions in the face of a known risk, but there was no opportunity for the second defenders to take precautions on the

day of the fire. In answer 6 for the second defenders at p 41A-B it was averred that on 9 October 1997 Bryan told the first defenders' welders to stop welding until protective boards were laid. In their answer to this averment at p 35C-D the pursuers believed it to be true that Bryan asked the first defenders' welders "to stop welding until boards were laid": the word "protective" had gone. It was implausible that the second defenders would suggest using combustible material to prevent a fire. It was clear from the pleadings that on the day of the fire the second defenders were not involved at all. On a fair and realistic reading of the pursuers' averments the pursuers and the first defenders bore entire responsibility for the fire. So far as the second defenders were concerned, the court could carry out the clause 83.2 exercise without the need for any evidence. It was no doubt because of the paucity of the factual material that the pursuers were driven to making the contorted allegation of "assisting" against the second defenders. These factual averments could not survive for any purpose. They showed the difficulty the pursuers had in spelling out any basis for a case against the second defenders. One subcontractor had no responsibility for ensuring that another subcontractor fulfilled his responsibility to the contractor. It was clear that the fire was entirely caused by negligence on the part of the pursuers and first defenders. It followed that any *prima facie* liability of the second defenders was reduced to nil under clause 83.2, and so too was any liability of the second defenders for damage to other property in connection with the subcontract. On the pursuers' averments it was clear that loss of or damage to other property was not caused by activity in connection with the Turner subcontract. Mr Francis had suggested that the word "caused" had a vague and imprecise, even a somewhat ethereal, meaning. That imaginative submission should be rejected. According to Chambers' new English Dictionary the word "cause" meant "to produce or bring about the occurrence of". The second defenders were not suggesting a mechanical approach to causation: they accepted that there should be a common sense approach. As they had nothing to do with the selection or repositioning of supposedly combustible hardboard, it could not realistically be said that the fire was caused by any activity of theirs in connection with their subcontract. Mr Francis had said that the activity was the activity taken to protect the panels, but that would not do because on the pursuers' own averments that was activity on the part of Smith and Johnston, who were the first defenders' employees. Mr Francis had also said that the averments at pps 36E - 37A (that Smith and Johnston laid sheets of hardboard under their work in order to protect the surface face *(sic)* of the insulation panels) were significant. He had said that Smith and Johnston had laid the sheets of hardboard at Bryan's request, but that was simply not right. There was no such allegation by anyone, including the first defenders. Mr Francis had also said that the taking of inadequate precautions in the face of a known risk amounted to activity in connection with the second defenders' subcontract, but that assertion had no basis in the pleadings. The second defenders were not implicated, except on 9 October 1997. It was impossible to say on a fair and realistic reading of the pursuers' pleadings that the fire had been caused by the second defenders' activity in connection with their subcontract. It was not suggested that the way things had been left by the second defenders was inappropriate or dangerous. The pursuers themselves averred in condescendence 6 at p 33 that the fire had been caused by products of the hot work undertaken by Smith and Johnston falling onto and igniting the hardboard and the polystyrene of the panels. There were no averments to instruct a

case that the fire and resultant loss had been caused by activities of the second defenders in connection with their subcontract.

[58] Having concluded his submissions on core clause 8, Mr Cullen then reverted to part 4 of the motion which he had made at the outset of his submission, dealing with the averments in condescendence 13. The averments in that condescendence and the relative plea-in-law indicated that the claim being made was one for breach of contract. At p 73E the pursuers averred: "But for such breaches of contract loss and damage would not have occurred". It had now been accepted by Mr Francis that a claim for breach of contract was not open to the pursuers. It followed that these averments must now be struck out. They could not be used for a completely different purpose from that for which they were conceived in the pursuers' pleadings.

[59] So far as the pursuers' claim based on unjustified enrichment was concerned, Mr Cullen adopted the submissions previously made on behalf of the defenders. The pursuers had now accepted that core clause 8, which they invoked in these proceedings, was exhaustive. That being so, there could be no scope for an equitable remedy with the apparent objective of extending or varying the arrangements which the parties agreed. The pithy statement in Gloag on Contract appeared to be clearly in point. What the pursuers appeared to be seeking to do in their claim based on unjust enrichment was to recover the costs of the reinstatement works, which is something they accepted they could do under clause 83.1. That was a fatal concession. There was a remedy available to the pursuers, and contractual remedies should be used to solve contractual problems. The pursuers could not avoid the implications of clause 83.2 by attempting to circumvent the agreed contractual machinery through resorting to an equitable remedy. The averments in condescendence 10 began with a claim under clause 81.1. A great deal of the difficulty in this case had arisen from the very confusing manner in which the claim had been set out in the pleadings: see the averments at p 55C-D. The contractual and quasi-contractual remedies could not co-exist. There was no authority for the proposition that a quasi-contractual remedy existed for paying money in error through misunderstanding the terms of a contract. The pursuers here accepted that the contract survived, although they wished to avoid the application of the cross-indemnification exercise. Mr Francis had simply said that this part of the case should go to proof before answer as the pursuers had paid money in error. That was not a proper answer and failed to address the central point of relevancy in the defenders' submissions. Clauses 82 and 83 provided a remedy for money paid in error to the subcontractor.

[60] Finally, the submissions of Mr Hodge on the ineptness of the form of the conclusion were adopted. This was not a case of joint and several liability.

Submission of senior counsel for the pursuers

[61] Mr Martin renewed the motion made by Mr Francis and then made submissions falling into eight separate chapters.

[62] First, he made a series of general comments on the case. There was nothing inherently implausible in a contractual scheme in which certain risks were insured against irrespective of cause: the insurer received a premium and indemnified if the event insured against came about. It did not depend on the cause of the event or whether the insured himself was

responsible for it. An obvious example was comprehensive motor insurance. In such a scheme, where a party is bound to take insurance and fails to do so or the insurance fails (for example, because of material non-disclosure), there was nothing implausible about that party becoming responsible for a personal indemnity equivalent to what the insurance would have provided. If there was such a contractual scheme there was no room for equitable considerations in any form: it was not a question of attribution of fault but of allocation of risk and insurance. In relation to insurance, it was averred by the pursuers in condescendence 10 at p 54D that the defenders were bound to insure and that they believed that the defenders did as they were bound. That averment was covered by the general denial in answer 10 for the first defenders at p 59A-B. Mr Hodge in his submissions had relied on the first defenders' own denial. In answer 10 for the second defenders at p 63B it was averred that the second defenders had kept and maintained insurance at the appropriate levels as provided for in clause 84.1 of the NEC subcontract and that no claim had been made by the second defenders. It was therefore illogical of Mr Cullen to adopt the submissions of Mr Hodge. It did not matter whether the second defenders made a claim. The contractual régime which existed was not one in which negligence had to be proved by the pursuers. The second defenders' approach to condescendence 6 was to deal with the pursuers' averments as though the pursuers had to demonstrate negligence on the part of the second defenders' employees. That misunderstood the operation of core clause 8. Although the defenders had submitted that their approach provided simplicity and certainty, that was not the case. It was the defenders who complicated the issue by introducing into any case where liability fell *prima facie* on a subcontractor a competition based on alleged negligence which had to be determined before the clause 83 obligations could be identified. Core clause 8 as whole provided a coherent and comprehensive scheme. It provided for where risk lay, for insurance against such risks as fell on the subcontractor and for indemnity where such a risk event occurred, whether or not there was insurance in place.

[63] Secondly, so far as the construction of core clause 8 was concerned, clause 80 identified the employer's and contractor's risks and clause 81 identified by default the subcontractor's risks. In principle those risks taken together must encompass all risks arising as a result of the subcontract. The only question was whether a risk which would otherwise have fallen on the subcontractor was a risk which fell on the employer or contractor by the operation of clause 80, consistently with p 106 of the Guidance Note (no 6/14 of process). There would be subcontractor's risks and, in theory at least, employer's and contractor's risks. Under clause 83.1 each party indemnified the other against claims, proceedings, compensation and costs due to an event which is at his risk. What clause 83.2 did in principle was allow a reduction on the liability to indemnify the contractor where the event was partly at the contractor's risk. Clause 83.2 did not operate in every case, but only where there was a split risk or two events, one at the risk of the contractor and one at the risk of the subcontractor. The approach put forward on behalf of the pursuers did not fail to give content to clause 83.2: it was simply that clause 83.2 did not operate in the circumstances of this case. For example, if there were an insurrection causing damage to the subcontract works, that was an event at the risk of the contractor under the third bullet point in clause 81, but if because of that damage people came in and stole and did further damage, part of the loss (that part due

to the insurrection) would be borne by the contractor and part of the loss (that part due to the theft and further damage) would be borne by the subcontractor. In practical terms, the contractor would point to loss of or damage to the subcontract works which was *prima facie* at the risk of the subcontractor, and the subcontractor would point to clause 83.2 and seek reduction as an event at the contractor's risk contributed to the costs. The position of the pursuers was that the present case was not such a case and that clause 83.2 did not become engaged.

[64] Under clause 84.1 the subcontractor had to provide the insurances stated in the insurance table. Under clause 84.2 the insurance had to provide cover for events which were at the subcontractor's risk. Those events could be identified from the first three columns of the insurance table. Clause 85.4, which provided that any amount not recovered from an insurer was borne by the employer or contractor for events at their risk, and by the subcontractor for events which were at his risk, was entirely consistent with clause 83. Clause 86.1 gave an option to the contractor when the subcontractor did not insure: the contractor could himself insure the risk. It did not matter to the pursuers whether or not the defenders were insured, for they were their own insurers for events at their risk. The issue was whether the negligence of the contractor was an event at the contractor's risk in connection with a risk which would otherwise be a subcontractor's risk under clause 84. Clauses 85 and 86 were as important as the earlier clauses. The first defenders had acted consistently with this approach as they had paid for reinstatement of their own subcontract works. If they were correct that clause 83.2 was engaged in this case they should have claimed back a portion of that cost from the pursuers.

[65] In relation to clause 80, the submissions of Mr Francis were adopted. There was a distinction between "claims, proceedings, compensation and costs" in the first bullet point of clause 80 and "loss of or damage to" in the other bullet points. "Claims, proceedings, compensation and costs" did not include other risk events. The subcontractor did not obtain a reduction under clause 83.2 if the events which were at his risk were of the character of loss or damage. The scheme was a simple one if the pursuers' approach were followed: otherwise, in every case the subcontractor obliged to indemnify under clause 83.1 could identify some negligence on the part of a contractor and ask for a reduction. This case was not "claims, proceedings, compensation and costs".

[66] Thirdly, the submission for the defenders seemed to have been that within core clause 8 the provisions for risk and insurance were separate. That was not so: core clause 8 constituted a comprehensive scheme. In all cases, whether under clause 83 or the insurance provisions, the ultimate liability would fall in the same way. When an event occurred one had to ask - at whose risk was it? It did not matter whether that party was at fault or was insured. Mr Hodge had submitted that due to the application of the doctrine of subrogation when insurance was in force the subcontractor was prevented from taking any steps against the contractor even if the latter were negligent. That meant that when insurance was in force clause 83.2 was suspended. The defenders' submission was that the rule prohibiting subrogation against a co-assured operated to prevent cross-indemnity or reduction being sought only if insurance were actually in place. That could not be so. It would mean that the contractor or his insurer would be worse off if there were no insurance in place. There was no authority for this. To the contrary, in *Scottish & Newcastle PLC* v *G D Construction (St Albans) Ltd* [2003]

BLR 131 it was held that the fact that insurance had not been taken out by the employer under the contract did not alter the indemnity provisions. That was not consistent with the approach of Mr Hodge. It was not necessary to consider the other cases referred to. By necessary implication, whether or not there was insurance, even if the event at the subcontractor's risk was caused or contributed to by the contractor's negligence, there was no right to reduction under clause 83.2.

[67] Fourthly, so far as damage to the subcontract works was concerned, for the pursuers it was extremely straightforward: they simply required to aver that there had been loss of or damage to the subcontract works, and in the absence of an answer from the defenders they were entitled to succeed under clause 83.1, whether or not the subcontractor was insured. This had not really been disputed by counsel for the defenders. Mr Cullen accepted that the costs of reinstating the second defenders' subcontract works was a risk *prima facie* allocated to the second defenders under the insurance table. If the second defenders wished to escape that obligation to indemnify it was for them to aver a sufficient case to justify a reduction under clause 83.2.

[68] Fifthly, so far as loss of or damage to property (referred to in the third column of the insurance table) was concerned, exactly the same point could be made: this was an event at the risk of the defenders as long as it could be established as having been caused by activity in connection with the subcontract. That phrase was of broad ambit. The activity which caused the loss or damage need not be the execution of the subcontract works themselves, and it need not even be delictual. It included inactivity in the face of a known risk to the subcontract works. Bryan saw a problem from people welding and perceived possible damage to the panels, and he participated in the moving of hardboard, which was flammable. The risk assessments required fire blankets. In addition to the averments in condescendence 6 (about events leading up to the fire) the averments against the second defenders in condescendence 13 (based on their alleged breaches of contract) were relevant to the extent that they would permit the leading of evidence of activity of the second defenders as a cause of the loss or damage.

[69] Sixthly, the second defenders' approach that the pursuers were 100% liable was based on a misunderstanding of the working of the scheme. It was not for the pursuers to prove any cause of the loss of or damage to the subcontract works, and so far as other property was concerned, they need only prove that the loss or damage was caused by activity in connection with the subcontract: they did not require to make averments of negligence by anybody in order to trigger the indemnity. It was inconceivable that the pursuers' claim could be dismissed on the basis suggested by the second defenders, namely, that the pursuers were 100% liable. Even if the contractor and the other subcontractor were negligent, the scheme nevertheless required the subcontractor to indemnify as the loss or damage was due to an event at his risk. For the subcontractor to obtain a reduction under clause 83.2, he had to aver and prove negligence for which the contractor was responsible. There were no averments by the second defenders that the pursuers were 100% liable for the loss and damage. On any view the pursuers were entitled to an indemnity for loss of or damage to the subcontract works.

[70] Seventhly, the way the scheme worked was that each subcontractor had an obligation to insure in respect of events which were at his risk. Consistent with that obligation to insure, each subcontractor was obliged to indemnify under clause 83.1 in respect of events at his risk. Here a fire had occurred resulting in loss and damage. The first defenders were obliged through insurance for indemnity to accept responsibility for loss of or damage to their subcontract works, and the second defenders also for loss of or damage to their subcontract works. Because it was averred that the fire had been caused by activity in connection with both subcontracts, both defenders were obliged to indemnify under clause 83.1 in respect of loss of or damage to property, and the extent of the liability of each depended upon the extent to which their activity had contributed to the loss or damage. The pursuers' submission was that there was in these circumstances no right of reduction under clause 83.2 because the negligence of the contractor was not an event justifying reduction since each subcontractor had agreed to insure and indemnify against all of the loss or damage in the three columns in the insurance table.

[71] Eighthly, so far as the claims for breach of contract were concerned, junior counsel's submissions were adopted and it was conceded that plea-in-law 4 for the pursuers should be repelled, but the averments in condescendence 13 did not fall to be repelled as they were relevant to the question of activity. So far as unjust enrichment was concerned, it was accepted that if the pursuers were entitled to indemnity under clause 83.1 no question of unjust enrichment would arise. The indemnity and unjust enrichment remedies could not co-exist. It appeared from the second defenders' averments in their answer 4 at pps 26E-27A that they did not accept that core clause 8 was part of the contract. The unjust enrichment claim against them therefore proceeded on an *esto* basis and arose only if there was no contract as averred.

[72] In conclusion, a proof before answer should be allowed, plea-in-law 7 for the pursuers sustained and the relative averments for the defenders deleted and plea-in-law 3 for the first defenders and plea-in-law 8 for the second defenders repelled. It was inevitable that there should be some alteration to the conclusion and pleadings in light of the second defenders' amendment and the case should be put out By Order.

Discussion and Conclusions

(i) The subcontractor's liability to indemnify the contractor: construction of clause 83.2 of the subcontract

[73] The true construction of clause 83.2 of the respective subcontracts was the major issue on which submissions were made in the course of the debate. All parties were agreed that core clause 8 contained a coherent and comprehensive scheme dealing with the allocation of risk and insurance, but the pursuers were not in agreement with the first and second defenders on the true construction of clause 83.2.

[74] It is appropriate, in my opinion, in order to reach a conclusion on the true construction of clause 83.2, to concentrate first of all on the provisions of core clause 8. Core clause 8 as a whole, as its side heading announces, deals with risks and insurance. Clause 80 sets out the employer's and contractor's risks. Clause 81 deals with the subcontractor's risks and provides that, during the relevant period, risks not carried by the employer or contractor are carried by the subcontractor. Clause 82 deals with repairs and obliges the subcontractor, during the relevant period, to replace loss of, and repair

damage to, the subcontract works, plant and materials. Clause 83 deals with the question of indemnities and, in short, provides that each party indemnifies the other against claims, proceedings, compensation and costs due to an event at his risk. It may be said that clause 83.1 provides a cross-indemnity. Clause 84, dealing with insurance cover, provides that, subject to the exception stated, the subcontractor has to provide the insurances stated in the insurance table in the joint names of the parties. Clause 85, dealing with insurance policies, requires the subcontractor to submit policies and certificates for the insurance which he has to provide to the contractor for acceptance before the subcontract starting date and afterwards as the contractor requires, and that any amount not recovered by an insurer is borne by the employer or contractor for events which are at their risk and by the subcontractor for events at his risk. Clause 86 provides that if the subcontractor does not insure the contractor may insure for the subcontractor's risks at the latter's expense. Clause 87, dealing with insurance by the employer or contractor, is not relevant for present purposes.

[75] These provisions indicate that the risks set out in the insurance table as falling upon the subcontractor are to be insured in the joint names of the contractor and subcontractor. If that is done, then in the event of what has been described as a risk event occurring, and the subcontractor failing to indemnify the contractor, the contractor could be compensated by making a claim as a co-assured under the subcontractor's insurance policy: there would be no need for litigation to enforce the indemnity in clause 83.1. The need for the contractor to bring proceedings against the subcontractor to enforce the indemnity in clause 83.1 arises only if the risk is not covered by the insurance table when insurance has been taken out, or if no insurance has been taken out. It is clear in this case, despite the coy averments of the pursuers, that there has certainly been no insurance taken out in joint names of the contractor and subcontractor. It is not averred that there was any such joint insurance. That being so, the rule against subrogation as between co-assured cannot apply. For what it is worth, there are averments by the first defenders that they were not insured and by the second defenders that they were insured but have not made a claim under the policy. In the absence of joint names insurance the contractor now invokes the indemnity in clause 83.1. In response the subcontractors invoke clause 83.2 and seek a reduction in their liability to indemnify the contractor by claiming that events at the contractor's risk, namely, claims, proceedings, compensation and costs which are due to negligence by the contractor (under clause 80.1, bullet point 1, sub-bullet point 2) contributed to the claims, proceedings, compensation and costs. The contractor responds that clause 83.2 does not apply in the circumstances of this case.

[76] What is the basis of the pursuers' submission that clause 83.2 does not apply in the circumstances of this case? It is that clause 83.2 allows a reduction in the liability of the subcontractor to indemnify the contractor where the event was partly at the contractor's risk. In other words, clause 83.2 operates only where there is a split risk or two events, one at the risk of the contractor and one at the risk of the subcontractor.

[77] In order to test the pursuers' proposition it is, in my opinion, first of all necessary to consider and thereafter apply the proper legal approach to the construction of indemnities. The first decision in Scotland to deal with this topic in relatively modern times is that of the Second Division in *North of Scotland Hydro-Electric Board* v *D & R Taylor* 1956

SC 1, in which the defenders contracted to carry out work for the pursuers. A clause in the contract provided: "The contractor shall indemnify the Board against all claims from third parties arising from his operations under the contract". One of the defenders' employees who was injured by an electric shock recovered damages from the pursuers on the ground that his injuries were caused by their negligence. The pursuers then sought to be indemnified by the defenders in terms of the above clause. The Second Division, applying the decision of the Court of Appeal in *Alderslade* v *Hendon Laundry* [1945] KB 189 and the decision of the Privy Council in *Canada Steamship Lines* v *The King* [1952] AC 192, held that the clause did not entitle the pursuers to be indemnified against claims based on their own negligence and dismissed the action as irrelevant. Lord Justice-Clerk Thomson stated at p7:

> "The law has .... in certain circumstances set a limit to the scope of such a clause of indemnity. A party is to be indemnified against a claim for which he would be legally responsible in virtue of his own negligence only if it is clear that the other party consented to the situation."

The decision of the Second Division was followed by the House of Lords in *Smith* v *UMB Chrysler Limited* 1978 SC (HL) 1. It is, in my opinion, clear from those two decisions that, for an indemnity clause to have the effect of indemnifying a party for the consequences of his own negligence it must contain the word "negligence" or some synonym for it.

[78] It seems to me that the approach of the pursuers in the present case is to look at the risks requiring to be insured against by the subcontractor in clause 84.2 and to say that in the circumstances of this case the subcontractor must indemnify the contractor against those risks to the extent of 100%, even if the contractor's negligence has contributed to the loss or damage, so that the contractor is not liable to contribute to the loss or damage even if his negligence (a risk event under bullet point 1 of clause 80) contributed to the loss or damage. I fail to see why this should be so. On the face of it clause 83.2 should apply in the circumstances of this case. It was never suggested on behalf of the pursuers that there was any provision in the subcontract which expressly indemnified the pursuers for the consequences of their own negligence. Indeed, it is fair to say that the proper legal approach to the construction of indemnities did not receive attention in the submissions made on behalf of the pursuers. In my opinion the pursuers' approach involves an unnatural and strained construction of the relevant clauses and their construction of clause 83.2 fails the first test in *Smith*. They did not attempt to deal with the decision of the Second Division in *North of Scotland Hydro-Electric Board* and the decision of the House of Lords in *Smith* that an indemnity will not cover the negligence of a party seeking to be indemnified unless clear words are used. If the pursuers' submission is correct they would be entitled to be indemnified even if the loss of the property had been caused to a large extent by their own negligence. Even without clause 83.2 taken along with clause 80, I would not be inclined to construe the indemnity as giving the contractor an indemnity for the consequences of his own negligence. I consider that Mr Hodge was correct to say that clause 83.2 was in accord with the policy of the law and was fair and sensible. For the sake of completeness, I should record that it was never submitted that the approach to the construction of an indemnity taken by the Second Division in *North of Scotland Hydro-Electric Board* and by the

House of Lords in *Smith* should not be followed because the indemnity in this case was a cross-indemnity (see *Caledonia North Sea Ltd* v *London Bridge Engineering Ltd* 2000 SLT 1123 per Lord Coulsfield at p1192H-J).

[79] The pursuers have pleaded (condescendence 10, p 56C-D) and submitted that the loss, damage and liabilities incumbent upon the defenders in respect of which the pursuers proceed were not "claims, proceedings, compensation and costs" within the meaning of clause 83.1. I do not think that there is any merit in that submission. I accept the submission of Mr Primrose that these words are wide enough to cover the situation in this case for the reasons which he gave. It is obvious that a claim is required for an indemnity to be triggered. In condescendence 14 (p 75C) the pursuers aver that they had to rebuild the whole structure at their own cost and in condescendence 10 at p 57C they admit that the replacement and repair which they carried out was in implement of their contractual obligations to the employer. I consider that Mr Hodge was correct in his submission that all four words apply in this case.

[80] In my opinion Mr Hodge was also correct in the submission he made on the general approach to, and the construction of, clause 83.2 of the subcontract and the construction of clause 83.2 contended for by the defenders is correct. Accordingly, clause 83.2 does apply in the circumstances of this case, with the result that the liability of a subcontractor for the occurrence of an event at his risk is reduced to the extent that there has been negligence on the part of the contractor.

(ii) Unjust Enrichment

[81] Mr Martin accepted that if the pursuers were entitled to indemnity under clause 83.1 no question of unjust enrichment would arise and that the indemnity and unjust enrichment remedies could not co-exist. He could do no other in light of the authorities referred to in full by Mr Primrose. He then proceeded to submit that the unjust enrichment claim arose against the second defenders on an *esto* basis if they succeeded in their averments in answer 4 that there was no contract as averred by the pursuers.

[82] The difficulty for the pursuers is that that is not the basis upon which their claim for unjust enrichment is pleaded in condescendence 10 from p 55C to p 56C. Mr Martin's concession that the indemnity and unjust enrichment claims could not co-exist inevitably involves acceptance that the unjust enrichment claim as it is presently pleaded on record is irrelevant, for that claim is a cumulative claim directed against both the first and second defenders. If the pursuers seek to make an alternative claim against the second defenders only based on unjust enrichment they will require to seek and obtain leave to amend in order to do so. Otherwise, as the pleadings stand the averments based on unjust enrichment are in my opinion irrelevant.

(iii) The claim based on the defenders' failure to insure

[83] It was not entirely clear to me whether the pursuers' concession that they had no claim for breach of contract covered the claim made by them in condescendence 10 based on the failure of the defenders to obtain insurance. This claim is set out separately from the breach of contract claims in condescendences 11, 12 and 13 and was treated by both

Mr Primrose and Miss Crawford in their submissions separately from the other claims based on breach of contract. Indeed, their submissions on this point seem to have been ignored as the debate progressed.
[84] If the pursuers' concession that their breach of contract claims are irrelevant does not cover this claim, I can deal with the matter briefly by saying that in my opinion the submissions of Mr Primrose and Miss Crawford on this point are well-founded. The remedy of the contractor for the failure of a subcontractor to take out insurance is set out in clause 86.1, which provides that the contractor may insure a risk which the subcontractor does not insure. If the contractor does not insure then he must rely upon the indemnity in clause 83: he is not entitled to pursue a separate remedy based on the subcontractor's failure to insure.

(iv) The indemnity claim against the second defenders based on "caused by activity in connection with this subcontract"

[85] The second defenders strongly submitted that the claim against them for loss of property (except the subcontract works, plant and materials and equipment) caused by activity in connection with their subcontract was irrelevant. The averments upon which that claim is based are to be found in the averments of fact in condescendences 5 and 6 and were referred to in detail in the submissions of Miss Crawford and Mr Cullen set out above. Mr Cullen went so far as to suggest that it was clear on the pursuers' own averments that events at their risk contributed to the extent of 100% to the loss of or damage to the subcontract works and I could therefore on the pleadings hold the pursuers to be 100% liable. Mr Martin drew attention to the fact that there were no averments by the second defenders that the pursuers were 100% liable for the loss and damage and submitted that it was inconceivable that the pursuers' claim could be dismissed on that basis. I agree with him. I have no hesitation in rejecting Mr Cullen's submission that I am in a position to carry out the exercise required by clause 83.2 without the need for any evidence. I do not see how, in the absence of agreement between the parties, I could determine to what extent the pursuers were liable by reason of their negligence without evidence being led and the extent of their contribution being assessed.
[86] The question which I have to decide is whether the pursuers have made sufficient averments to entitle them to a proof that the event which occurred, namely, the fire, was at the risk of the second defenders by reason of having been "caused by activity in connection with this subcontract", which was the Turner subcontract for insulation works. In the course of her submission Miss Crawford, at least at one point, seemed to suggest that the pursuers had to aver negligence on the part of the second defenders in order to plead a relevant case against them: she submitted that the pursuers' averments at p 34 involved an admission on their part that they themselves were negligent but did not point to the second defenders being negligent. In my opinion Mr Martin was clearly correct in his submission that, in order to trigger the indemnity, the pursuers do not have to make averments of negligence by anybody. The only question for me to decide is whether the pursuers have relevantly averred that the fire was to any extent "caused by activity in connection with this subcontract" (column 3 of the insurance table).
[87] I do not think that, in the context of construing an indemnity, the word "caused" should, as was submitted by Mr Francis, be considered as a word of broad ambit and that a restrictive approach to its construction should not be taken,

but, if anything, the opposite approach. In the cases of *North of Scotland Hydro-Electric Board* and *Smith* (supra) the Inner House and the House of Lords respectively adopted the same restrictive approach to the construction of an indemnity as they would have adopted to the construction of an exclusion clause and I consider that, in light of those decisions, I am bound to take the same approach. In my opinion the word "caused" must be construed in its context as meaning the activity relied upon by the pursuers was the sole cause of, or made a material contribution to the cause of, the loss of the property.

[88] At its highest the case pleaded by the pursuers against the second defenders is as follows. The second defenders were the subcontractors for insulation works under their subcontract. The fire was caused on the morning of Friday 10 October 1997 by the products of hot work undertaken by Smith and Johnston, employees of the first defenders, falling onto and igniting the hardboard of the polystyrene of the insulation panels which had been installed by the second defenders. It was known to the second defenders that such panels were flammable. On the day before the fire Halldorsson, the second defenders' supervisor, warned Blair, the pursuers' site agent, of the risk presented by welding and the second defenders' foreman insulator, Bryan, who was aware of the risk posed by welding or grinding in the vicinity of the panels, observed the welding activities of Smith and Johnston. Smith and Johnston took lengths of hardboard sheet, which are combustible, and placed them lengthwise with one edge against the gable so that they lapped over the cooler pod floor (on which they were working) and as the work progressed they were moved on one occasion. Bryan "saw to" (whatever that may mean) the moving of the sheets. At about 8.30 am on the morning of the fire Smith and Johnston moved the sheets. There are no averments that any of the second defenders' employees were present on the day of the fire or that they were aware of the welding operation being undertaken by the first defenders' employees that day.

[89] Against the background of these averments Mr Francis submitted that "activity" included inactivity in the face of known risks and that the silence of Mr Bryan in the face of known risks would amount to "activity". I do not agree. The word "activity", if it is to be given its ordinary and natural meaning, in my view clearly requires the doing of something, as opposed to refraining from doing something: if it had been intended to include refraining from doing something the words "act or omission" could easily have been used. I think it flies in the face of common sense to give the word a meaning which includes the opposite of activity. In my opinion counsel for the second defenders were correct in their submission that, on the pursuers' averments, the loss cannot be said to have been "caused by activity in connection with this subcontract". In my opinion Mr Cullen was correct in his submission that one subcontractor had no responsibility for ensuring that another subcontractor fulfilled his responsibility to the contractor. No reference was made in the course of submissions to the fact that the expression used is "caused by activity", and not "caused by *their* activity". In my opinion the absence of the word "their" means that the activity in question does not require to be that of the second defenders themselves, but on the other hand the activity in question does require to be "in connection with this subcontract", that is, the insulation contract. I consider that on any reasonable reading of the pursuers' averments the loss of the property (other than the subcontract works, plant and materials and equipment) cannot be said to have been caused by activity in

connection with the second defenders' subcontract. It follows that the pursuers' averments directed against the second defenders for such loss is irrelevant. On the other hand, I consider that the pursuers' claim directed against the second defenders for loss of or damage to the subcontract work, plant and materials (column 1 of the insurance table) is relevant as such loss or damage does not require to have been "caused by activity in connection with this subcontract". In light of the view I have taken on the construction of clause 83.2 it will be open to the second defenders to seek a reduction in their liability to indemnify the pursuers if they can show that the pursuers' negligence contributed to the claims, proceedings, compensation and costs.

(v) The averments in condescendence 13

[90] While it was accepted by the pursuers' counsel that the averments made against the second defenders in condescendence 13 could not support a claim based on breach of contract, they maintained that the factual averments therein were relevant in that they were relevant to "activity" in the phrase "caused by activity in connection with this subcontract" and should therefore not be deleted. Mr Cullen took issue with this proposition. As he put it, the averments in condescendence 13 cannot be used for a completely different purpose from that for which they were conceived in the pursuers' pleadings.

[91] It is my opinion that Mr Cullen's submission is correct. Averments of fact have to be considered in the context in which they are made. It is clear from a reading of condescendence 13 that it is a claim against the second defenders for breach of contract, and that is the legal context in which the averments of fact have been made. The only purpose for which the averments of fact in condescendence 13 have been made is to support a case for breach of contract. If the breach of contract case goes, the supporting factual averments go with it. In the absence of amendment (and no motion to amend condescendence 13 was made at the Bar in the course of the procedure roll debate) I do not think that the factual averments can be pointed to as supporting a different legal claim for the simple reason that no notice has been given in the pleadings that they would be so used. If the pursuers had wished to make use of the factual averments in condescendence 13 to support a different claim from breach of contract they could and should have made the appropriate averments, even on an *esto* basis. Accordingly, in my opinion the averments in condescendence 13 fall to be deleted following upon the concession made on behalf of the pursuers that their breach of contract claim in condescendence 13 is irrelevant.

(vi) The form of the first Conclusion

[92] The first Conclusion seeks decree for payment of a sum of money to the pursuers by the defenders jointly and severally or severally. Both Mr Hodge and Mr Cullen attacked the form of the decree as inept on the ground that on no view was this a case of joint and several liability. Mr Hodge stated that he would be content if the pursuers were to amend the first Conclusion, but that, if they did not do so, dismissal of the action was appropriate. I agree that on no

view is this a case of joint and several liability. Mr Martin accepted that there would require to be some alteration to the terms of the first Conclusion and, that being so, I shall consider any motion by the pursuers for leave to amend it.

Decision

[93] I shall appoint the case to call By Order for the purpose of determining the terms of the interlocutor to be pronounced in light of my above opinion, the concessions made on behalf of the pursuers and any motion to amend.

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