TECBAR Review

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From the Chairman

The good news is that the high workload in the TCC continues, with sustained growth in the numbers of cases and trials. The August 2012 TCC Annual Report, covering the period from October 2010 to September 2011, records that there were 512 new claims brought in the London TCC in this period, compared with 502 claims in 2009 to 2010. These figures are consistent with an upward trend. In the period 2004 to 2008 the number of cases issued varied between 364 and 407. Further, in the period 2010 to 2011 there were some 51 contested trials at the London TCC. By comparison, in 2006 there were 31 contested trials. A number of trials were started in 2010 – 2011, but were settled before judgment. These are not treated as trials in the figures published by the TCC. To complete the picture, there were some 497 applications in the same period, including CMCs, PTRs and specific applications.

The area where we need to continue to work is in attracting foreign work to the TCC. The potential is there. It is generally said that about 60% of the workload currently passing through the Chancery Division and the Commercial Court is related to the former CIS. Three quarters of the cases in the Commercial Court involve overseas parties, and in half the cases in the Commercial Court there is no link to the UK, except that the parties have chosen London and the Commercial Court for the resolution of their disputes. Partly with this in mind, the TCC together with TECBAR, SCL and TeCSA organised the recent successful international conference *"Unlocking Disputes: Challenges in Construction Litigation & Arbitration'"*. It is incumbent upon us to ensure that the TCC remains in Lord Denning's words *"a good place to shop in: both for the quality of the goods and the speed of service"* (in *The Atlantic Star* (1972) referring to forum shopping and England) and that overseas clients and lawyers understand this.

Moving on to education: the specialist sections of the BSB Pupillage Checklists are prepared by the relevant SBA, in our case, TECBAR. We are in the process of reviewing the TCC Pupillage Checklist. If you or your Chambers have any particular comments, criticisms or suggested improvements please let us know by emailing David Pliener (david.pliener@hardwicke.co.uk)

Finally, one of the articles in this issue of the TECBAR Review, by Iain Munro, addresses the Bar Council's International Legal and Professional Development Grants Programme which he participated in. This programme is supported by TECBAR, and it offers members of TECBAR, who are of seven years' Call or less, financial assistance to participate in international legal events and conferences of their choice. The total cost of participating in such events (including travel, accommodation and registration fees), up to a maximum of £2,500, is shared equally between the successful applicant, his or her SBA and the Bar Council Scholarships Trust. Applicants need to demonstrate that participation will contribute to their professional development and legal practice. There are three rounds every year and I would strongly encourage TECBAR members to consider applying.

Chantal-Aimée Doerries QC, Chairman

From the Editor

The final TECBAR Review of the calendar year includes Iain Munro's report on his International Legal and Professional Development Grants Programme funded trip to China.

Further, Riaz Hussain addresses the interesting and practically important question of apportionment of liability.

It is very rare indeed for readers to volunteer articles for the Review unsolicited. I would be very happy to receive contributions, all of which will be carefully considered for publication.

The next issue of the Review will carry an obituary for His Honour John Toulmin CMG QC, who sadly died earlier this year. He is and will continue to be missed by those who practice in the TCC and by those who knew him.

Mark Chennells, Editor

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Readers are invited to submit material by email to be considered for possible publication. This may consist of correspondence, short articles or case notes, news of forthcoming cases or events, book reviews, or other matters of interest to members of TECBAR or SCL.

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Considering Apportionment of Liability between Construction Professionals under the Contribution Act 1978

Introduction – how apportionment issues arise

Contribution claims under the Civil Liability (Contribution) Act 1978 are a common feature of commercial disputes.

They are especially common in TCC proceedings given the nature of construction and engineering projects. There are often multiple professionals and parties involved in projects each owing a duty to the Employer either under direct contracts, collateral warranties or less commonly in tort.

The parties are best served in terms of early costs protection offers and also in terms of avoiding proceedings altogether if they put their mind to apportionment of liability at an early stage. Although parties will often plead a case that the contributor must offer a full indemnity, pleadings tend to be scant as to *why* the other party should bear the brunt of any apportionment. It is advisable to put one's mind to this issue and plead positive reasons why if one's client were liable to the Main Claimant for the same damage that the other party should pay more.

S.2 – Assessment of Contribution – Just and Equitable

S.2 of the Act states:

"2. Assessment of contribution.

(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be *just and equitable* having regard to the extent of that person's responsibility for the damage in question."

S.2 (2) of the Act makes clear that the Courts have a full discretion to award a 100% or a 0% apportionment against either Party.

Note also that under s.2(3) the Courts will apply any limitation of liability or contributory negligence defence a party could have raised in defence of an action by the Main Claimant. The former raises some potentially complex issues as to how the limitation is to be applied – see in this regard ***Nationwide v Dunlop Haywards and Cobbetts* [2009] 2 All ER Comm 715.**

The ambit of s.2(3) and the issues it raises are not considered in this Article. However as a precursor to considering apportionment under s.2(1) one must check the contracts to see for example (a) whether any party's Contract with the Main Claimant limits liability owed by the Party to the Main Claimant; (b) or whether any Party can reduce liability to the Main Claimant for contributory negligence and (c) whether the Parties have allocated responsibility in any contract between themselves for instance an indemnity to the other for claims by the Main Claimant.

Case Law under the Contributory Negligence Act 1945

When looking for case law that assists your client note that there is material similarity between the test under s.2(1) and s.1 of the Law Reform (Contributory Negligence) Act 1945 and there is judicial support for the tests being materially the same under both pieces of legislation if similar facts apply – see ***Jones v Wilkins* [2000] All ER (D) 2347 CA at Para 13 per Keene LJ.**

What is a Just and Equitable Apportionment?

Obviously this will depend on the facts of each case and judges do not appreciate attempts to straight jacket them using case law. Note in this regard Akenhead J's observation in ***Carillion v Phi* [2011] EWHC 1379** that **"[252] There is a slight danger in attaching too much weight to some Court of Appeal decisions because that Court reviews the apportionments made by the lower court and will not readily interfere with what the lower court has done; put another way, the appellate court in dismissing the appeal is accepting that the apportionment is within a range which is not obviously wrong."**

However there are a number of strands of authority from the cases which provide what I would call a default setting or a starting point which lawyers and Tribunals can adjust against the special factors in each case.

In ***Parkman Consulting Engineers v Cumbrian Industrials Ltd* 78 Con LR 18 HHJ Thornton QC** noted that in deciding the apportionment of liability under s.2(1) of the 1978 Act **"the 'responsibility' referred to relates to factual responsibility in a causal sense. Moral responsibility in the sense of culpability and organisational responsibility in the sense of where in the hierarchy of decision making and in the organisational structure leading to the damage the contributing party was located." [78 Con LR 18 at Paragraph 298]**

Causative potency and organisational responsibility are the key issues raised in TCC cases considering apportionment. A secondary consideration will be this notion of moral culpability which is sometimes called "non-causative".

Three Typical Scenarios in TCC Claims

Typically contribution claims and questions of apportionment may arise between:

(1) A Contractor who built defective works and the Supervisor or Inspector who failed to detect the defects **(*McKenzie v Potts* [1995] 50 Con LR 40);**

(2) A converse situation where a Contractor ought to have spotted defects in design by others before or while building to that design **(*Plant Construction Ltd v Clive Adams Associates (No.2)* (2000) 69 Con LR 106)**

(3) Design professionals on the same project either where a lead designer failed to warn of defects in a specialist's design or where both designers fail in their independent duties to the Main Claimant ***(Carillion JM Ltd v Phi Group Ltd [2011] EWHC 1379 (TCC));***

There are of course a myriad of other situations that could arise in addition to these (for instance a negligent manufacturer liable in tort to the Claimant). Equally there will be cases where the circumstances are various shades of the above situations. It could well be in a case involving many defendants that all three of these situations arise in the same proceedings.

Builder/Supervisor Cases – Defective Work (20/33% vs 80/66%) general view

In ***Parkman Consulting Engineers v Cumbrian Industrials Ltd* 78 Con LR 18,** HHJ Thornton QC considered the relative liability of a Contractor in a contribution claim by the Engineer for failure to properly construct a waste tip. The waste tip as constructed leaked and water carrying toxic chemicals was leached out onto adjoining watercourses and fields.

HHJ Thornton QC in considering apportionment under s.2(1) of the 1978 Act noted at Page 112 Paragraph 301 that: **"for damage caused by poor workmanship a supervisor traditionally is held to be responsible to an extent which ranges from 20% to 33⅓%."**

The Court of Appeal noted this observation with approval in the appeal of the same case at **79 Con LR 112 at Page 136 Paragraph 102.**

In ***McKenzie v Potts*** **(1997) 50 Con LR 40** where both defendants were found to be in breach of statutory duty, the builder in using inappropriate material and the architect in allowing its use, HHJ Roberts held the builder would bear 60% of the damages and the architect 40%.

"I bear in mind the test of culpability and causative potency that are relevant to this issue. As to the latter it seems that there is nothing between the two defendants; each of their breaches was as causative of the problem as the other. However, when one looks at the question of culpability it does seem to me that greater culpability is shown by the breach of duty of the builder. His breach, it seems to me, was one of commission rather than one of omission… In those circumstances, having the opportunity directly when the work was proceeding to know what was going on the [builder] should be held the more to blame."

This was upheld by the Court of Appeal **[50 Con LR 42]** although Russell LJ implied that the Architect possibly had been treated harshly

"I am satisfied that the learned judge applied the right tests. He considered questions of causation and culpability. I have to say that in my view other judges may have taken a more sympathetic view of the degree of culpability on the part of the architects, but…I cannot interfere with the apportionment as made by the judge."

In ***Worlock v Saws (A Firm) and Rushmoor Borough Council*** **(1982) 22 BLR 66 (CA)** Saws was appointed to build a home for Mrs Worlock and RBC was the successor to the Council responsible for inspecting the foundations to the Property.

The trial judge found SAWS had constructed the foundations defectively in breach of contract and RBC had failed in its duty of care in inspecting the foundations. He apportioned liability between SAWS and RBC 60:40%; departing from what was submitted as the conventional 75:25% split between builder and supervisor on the grounds that (1) RBC should have been aware that the builder was inexperienced and (2) in the absence of an appointed architect would have relied on the Council's inspection.

The Court of Appeal held these were not matters which could be taken into account in deciding apportionment and on appeal changed the apportionment to 75:25% *which the Court saw as a conventional apportionment*

Constructor/Designer - Duty to Warn about Defective Design Cases

There is certainly no express TCC rule of thumb as in the Supervisor/Builder cases. In cases where a duty to warn has been considered, the apportionment seems to be around 20–25% apportionment to the contractor.

See for instance ***Plant Construction v Clive Adams Associates (No.2)*** **(1998) 58 Con LR 1** where HHJ John Hicks QC considered the liability of a contractor (**"Plant"**) and sub-contractor **("JMH")** for damage caused by a roof collapsing during building works due to negligently designed temporary supports.

HHJ John Hicks QC held that although Plant bore liability for the design of the temporary works, JMH was under a duty to warn Plant about defects in that design and that JMH was in breach of that duty. On the facts he apportioned liability (as a matter of contributory negligence) between Plant and JMH for Plant's settlement with the Employer Ford as 80:20% between Plant and JMH.

On appeal to the Court of Appeal on the issue of the existence of a duty to warn this apportionment was not challenged **(2000) 69 Con LR 106.**

In ***EDAC v William Moss*** **[1984] 2 Con LR 1,** Contractors were held liable for failure to warn of lack of buildability inherent in curtain walling design. HHJ Newey QC held that they must have come to know of the lack of buildability in the design and by failing to warn of these known defects in the design they were in breach of their obligations. This led to a 15% liability for the consequent losses on the facts.

In ***Edward Lindenberg v Joe Canning*** **(1993) 62 BLR 147** the builder was held to be in breach of his implied duty to act with reasonable skill and care in failing at the very least to have raised doubts with the plaintiff's surveyor about a structural design that showed all the 9 inch walls and the chimney breast wall in a basement as non-load bearing.

The builder's liability was to be reduced to 25% of total damages paid by the plaintiff developer to the building owner on account of the plaintiff's surveyor's negligent design: effectively an apportionment (for contributory negligence) of 25% and 75% between the builder and the party liable for the defective design.

In ***Aurum Investments Ltd v Avonforce Ltd (in liquidation)*** **(2000) 78 Con LR 114** Aurum engaged Avonforce to carry out work which included the excavation of a basement and garage at House No. 68. Advanced Underpinning Ltd (Advanced) were engaged to do related underpinning in the adjacent property No.70.

Advanced completed the underpinning works and no complaint was made of the work. Some two months later Avonforce began the excavation of the basement in the area adjacent to the flank wall. No temporary support was provided for the flank wall or for the concrete bases that had been installed by Advanced.

In due course, the central section of the excavation alongside the flank wall collapsed. Aurum brought proceedings against Avonforce. Avonforce contended that Advanced was under a duty to warn it of the need to provide lateral support during the excavation for the basement.

Dyson J held that Advanced were not under such a duty to warn regarding the need for temporary support for works in a property adjacent to where it had worked.

Dyson J held: **"19. If I had found that there was a duty to warn, I would have held that Advanced was at fault only to a very modest degree. I would have assessed its liability to contribute at 15%."**

However it should be borne in mind that these are cases where generally the contractor had no design duty for the work in question. In ***Aurum*** the constructor was not even constructing the works which had not been designed properly.

In design and build contracts the situation would likely be different and the Contractor would face potentially a higher share of any apportionment.

Equally in areas of work which require the constructor to exercise particular skills, (for instance industry installation guidelines which require certain checks) it would be difficult for the constructor to argue that somehow it could blindly apply design provided by others and not bear in mind these requirements.

Apportionment between Design Professionals

This will depend as always on the facts but there seems to be possibly a different approach where one professional simply has a duty to warn about defects in another professional's design (what Akenhead J in ***Carillion v Phi*** called the game-keeper/poacher scenario) and a situation where the professionals have a free standing design duty each.

Checking Another Professional's Design

J Sainsbury v Broadway Malyan **[1999] PNLR 286** concerned the negligent design of a supermarket fire compartment wall by the architect and the consulting engineers.

HHJ Humphrey Lloyd QC found that the consulting engineer was not under a duty to comment on fire protection. However, he went on to examine what, had he held that the consulting engineer was under such a duty, the correct apportionment would be between it and the architect.

HHJ Humphrey Lloyd QC held he would have apportioned liability as 12.5% and 87.5% between the structural engineer and the architect. The Judge held that the architect's responsibility would have been substantially greater than that of the consulting engineer since the architect had overall responsibility for designing fire protection: their errors were elementary and fundamental and responsibility for the consulting engineer's failure to comment lay at least in part on the architect.

Free Standing Design Obligations

In the recent decision in ***Carillion JM Ltd v PHI Group Ltd*** **[2011] EWHC 1379**, Akenhead J considered the apportionment of liability between design professionals. The case concerned design and construction of a train servicing depot near Wembley Stadium.

In 2004 Carillion retained RWC as Consulting Engineer and Lead Consultant; RWC's retainer included advising on further site investigations for the area of the intended depot.

Phi were retained by Carillion in 2005 to carry out soil restraint and stabilisation works – Phi had no obligation to consider the adequacy of existing site investigation reports. In 2005 during construction slips occurred in the upper levels of the clay for which Phi undertook remedial works (not considered by RWC).

Further slips occurred in October 2005 for which Phi prepared a remedial design this time reviewed by RWC. Following further slips and settlement in 2006, Carillion commenced monitoring which established there was deep seated instability in the location that had not been adequately accounted for in the design calculations for Phi's works.

Carillion issued proceedings against Phi and RWC who sought a contribution from the other. Carillion and Phi settled Carillion's claim for £3.8 million inclusive of interest and costs.

In considering apportionment between RWC and Phi, Akenhead J recognised what he called the **"poacher/gamekeeper"** apportionment convention:

> **"[257] Therefore, the 'poacher/gamekeeper' or the perpetrator/ supervisor apportionment will often be in the 80-66.6% and 20-33% ranges respectively but where both contributors each have a responsibility towards their mutual client to have regard to the same dangers and difficulties that does not seem to suggest that there is a poacher/gamekeeper scenario."**

Akenhead J held that the facts on that instant case were distinguishable from the "poacher/gamekeeper" scenario as far as the failure to recognise the deep seated instability and the consequent damages were concerned:

> **"[259] It would be wrong to describe RWC as simply having a checking or reviewing function. RWC was contractually appointed to design the whole of the works but was, by variation, also the Lead Consultant. RWC had a specific responsibility to advise on the need for further site investigation, which Phi did not. This responsibility must in logic have entailed considering in detail the available site investigation reports as well as considering the information available at the site, including the known presence of counterfort drains and the visible signs of surface movement. In this context, RWC's obligation was intended to precede design work by Phi and in effect to assist Phi to perform its obligations, which would otherwise have involved Phi in producing detailed designs which took into account the existing site investigation data."**

Having reviewed all the circumstances Akenhead J apportioned liability (for the total damages awarded to Carillion of £6.8 million) as 60% payable by Phi and 40% by RWC **[Para 271]** .

It seems following the decision in ***Carillion v Phi*** that a contributing defendant seeking to diminish its contribution will argue that it was simply a gamekeeper or a reviewer of design whereas the contributing claimant will argue that the contributing defendant had a free standing design obligation to the Main Claimant.

In ***Hickman v Blake Lapthorn and David Fisher*** **[EWHC] [2005] 2715 (QB)** Hickman suffered serious head injury in car accident. On the morning of trial on liability his barrister F advised him to accept an offer of £70k which was a gross under-estimate of likely recovery given that it took no account of the real possibility that Hickman would be unable to work in the future.

Jack J held both the Solicitors (BL) and the Barrister (F) had been negligent and this had caused the same damage – namely prejudice to Hickman's recovery.

In apportioning liability between F and BL as ⅔ and ⅓ Jack J took account of the barrister's leading role, his seniority, the fact he had overall conduct of the case and that he gave the advice to settle **[see Para 60]** all these could be apposite to considering apportionment between design professionals.

Questions of "Moral Culpability" – Non Causative Factors

The short point is that these factors can be considered in determining apportionment but they will be secondary factors.

In ***Re-Source America International Ltd v Platt Site Services Ltd and another (Barkin Construction Ltd, Part 20 defendant)*** **(2004) 95 Con LR 1(CA)** Monde entered into a contract with Barkin (the Part 20 Defendants) for extension of a warehouse on the Deeside Industrial Estate in Flintshire. Barkin sub-contracted the erection of the steelwork to Henry Smith who sub-sub-contracted the cutting and welding work to Platt Site Services Ltd (Platt) (the Defendants).

Barkin gave Platt an indemnity for any damage caused to the Claimant's stock by the hotwork.

A fire took place which seriously damaged the premises and its contents. Re-Source brought proceedings against Platt, who brought Part 20 proceedings against Barkin under the indemnity and also for a contribution under the 1978 Act.

At first instance HHJ Thornton QC found that Barkin was 100% liable to Platt under the indemnity and *also* under the 1978 Act as a matter of apportionment of contribution **[90 Con LR 139]**.

In apportioning contribution at 100% HHJ Thornton QC found Barkin had taken responsibility for the hotwork and any damage to the stock from Platt's work moreover that it had inadequately protected the stock. He also took into account clearly non-causative factors such as his finding that Barkin's Managing Director on discovering the fire left the site in order to cover

up his own failings (the departure did not contribute to the fire damage in any way).

The Court of Appeal held that the trial judge could take into account non-causative factors in deciding apportionment although these would be secondary to causative factors **[Per Tuckey LJ]:**

> **"[51] Section 2 of the 1978 Act is not expressed exclusively in terms of causative responsibility for the damage in question, although obviously the court must have regard to this, as the section directs, and *it is likely to be the most important factor* in the assessment of relative responsibility which the court has to make. But in the result the court's assessment has to be just and equitable and this must enable the court to take account of other factors as well as those which are strictly causative. Such an assessment made by a trial judge will only be altered on appeal if it is clearly wrong."**

In ***Burford NW3 Ltd v Brian Warwicker Partnership v Hok International Ltd*** **(2005) 103 Con LR 112 (CA)** the Court of Appeal held that they were bound by the decision in ***Re-Source America*** and that non-causative factors could be taken into account.

Arden LJ did indicate that non-causative factors would play a secondary and potentially "limited" role compared to causative factors in deciding apportionment and that there would have to be a "sufficient relationship" between the non-causative action and the damage in question **[at Para 45, see also Keene LJ at Para 51]:**

Other "non-causative" factors that courts have considered relevant to apportionment include:

(a) Profit made by one defendant from the wrongdoing i.e. from the wrongful act in question ***Dubai Aluminium Co Ltd v Salaam*** **[2003] 2 AC 366;**

(b) Fraud by one party (for instance ***Nationwide v Dunlop Haywards and Cobbets*** **[2009] 2 All ER Comm 715** at 732 [Para 77])

(c) Insolvency of one contributing Defendant (***Dubai Aluminium*** Lord Nicholls at **[52]** referred to ***Fisher v C H T Ltd*** **(No 2) [1966] 2 QB 475, 481, per Lord Denning MR.)**

Insurance of a contributing party may not be relevant to Apportionment

In ***West London Pipeline & Storage Limited v Total UK Limited*** **[2008] EWHC 1296 Comm** Total was facing claims of over £700 million arising from a pipeline explosion and commenced a contribution claim against TAV for any liability it may have to the Claimants.

Total applied for information about TAV's insurance cover under CPR r.18.

In refusing to allow such disclosure David Steel J appeared to accept (although he did not explicitly state this) TAV's submission that **"As already discussed, it was well established that the issue of apportionment was dependent on an assessment of culpability and causative potency in respect of both of which the insurance position was irrelevant." [Paragraph 20(ii) and 21]**

One should however distinguish between the two separate issues of (a) what professional negligence insurance a party has in place (likely irrelevant to apportionment) and (b) how parties in a project have insured specified risks.

The latter is likely to be relevant to the parties' organisational liability for various heads of damage. See in this regard ***Co-operative Retail Services Ltd v Taylor Young Partnership*** **[2002] UKHL 18**. This case concerned a fire, for which both contractor and consultant were responsible that caused damage to the works under a building contract.

In accordance with the JCT building contract the works were insured in the joint names of the employer, the contractor and the electrical sub-contractor. Fire was one of the specified perils against which the contractor and sub-contractor were required to insure.

The architects and engineers claimed contribution from the contractor and the electrical sub-contractor. It was held that they could not recover a contribution from those parties. This was because, under the terms of their contract with the employer, the contractor and electrical sub-contractor were never under an obligation to pay compensation in respect of the fire damage caused by their negligence, as the entire cost of making good damage was to be paid out of the insurance policy in their joint names.

It is difficult to argue in light of this case that somehow insurance arrangements (as opposed to professional liability cover) are not relevant to apportioning liability.

Apportionment of Costs Liability to Main Claimant

It is important to bear costs in mind in pleadings and also in settlement negotiations.

Contribution under the 1978 Act includes contribution to liability for the Main Claimant's costs. See the summary of the authorities by Ramsey J in ***Mouchel v Van Oord (UK) Ltd No.2*** **(2011) 137 Con LR 105.**

In that case Mouchel's liability for the Main Claimant's costs was apportioned as per the apportionment of damages owed to the Main Claimant.

For a different situation where one party had to face disproportionately high costs in the Main Action because it was defending a fraud claim and therefore the parties' apportioned liability for the Main Claimant's costs was not in line with apportionment of their liability for damages see ***Nationwide Building Society v Dunlop Haywards and Cobbets*** **[2009] EWHC 254 (Comm) per Christopher Clarke J at [80] to [84].**

In ***Mouchel*** Ramsey J rejected Mouchel's claim for any contribution towards its own costs in dealing with the Main Claim up to settlement, stating at Para 53 that these were not recoverable under the 1978 Act but could be recoverable under the Court's wide discretion to award costs under the Senior Courts Act 1981 depending upon the facts of a particular case.

Net Contribution Clauses

These are clauses to watch out for in advising on apportionment.

They are also clauses to consider when advising on contractual terms. From the professional's perspective they are a potentially valuable protection. From the Employer's perspective they could lead to a black hole in recovery where one of the contributing party's is insolvent. Equally they could necessitate the Employer in having to pursue all potential contributors rather than suing one and letting that defendant seek contribution from others.

In 2009 the Scottish Court of Session (Outer House) considered the operation of a net contribution clause in the case of ***Langstane Housing Association Limited v Riverside Construction (Aberdeen) Ltd*** **[2009] CSOH 52**. The net contribution clause in that case was contained in the ACE standard form of appointment.

The employer in that case sought to exclude the defendant's reliance on the clause inter alia on the bases that (1) it was not incorporated into the contract as it was a particularly unusual and onerous clause which had not been brought to their attention (on the principle explained by Bingham LJ in ***Interfoto Picture Library Limited v Stiletto Visual Programmes Limited*** [1987] EWCA Civ 6) and (2) that it was incompatible with the requirements of Unfair Contract Terms Act 1977 as amended ("UCTA").

Lord Glennie found the relevant terms of UCTA (ss.16 and 17 in Scotland) did not apply as the net contribution clause was not a clause attempting to limit liability. Lord Glennie concluded that the clause did not exclude or restrict the liability of the consulting engineer itself. It operated so that the consulting engineer remained liable for the loss flowing from its own breach of duty but ensured that it was not also liable pursuant to the doctrine of joint and several liability for the loss arising out of the breach of others. Nor in his view was the clause "unusual or onerous".

There is no English reported case on net contribution clauses and their enforceability.

The TCC has enforced "no greater liability clauses": ***Safeway Stores Limited v Interserve Project Services Limited*** **[2005] 105 Con LR 60.** A Contractor's warranty to the Owner contained a clause stating **"The Contractor shall owe no duty or have any liability under this deed which are greater or of no longer duration that that which it owes the Developer under the Building Contract."** This was held to mean the Contractor could employ any set offs it would have against the (now insolvent Developer) in a claim by the Owner under the warranty.

With regards to the wording of net contribution clauses and of settlements of the Main Action with pending or contemplated contribution claims one should note the decision in ***Abbey National v Gouldman & Co*** **[2003] 1 WLR 2042.** In that case the Contributing Claimant "DG" settled the Main Action on the terms that the Main Claimant would not seek more damages against DG than it recovered against the Part 20 Defendant (DG having assigned the Part 20 Claim). The Part 20 Defendant argued that in light of the settlement it was not possible to arrive at a contribution that was "just and equitable" and therefore no contribution order should be made.

HHJ Simon Berry QC agreed:

> **"It would be very odd indeed if the settlement arrangements were entirely to abrogate any consideration of what the 'just and equitable proportion' might be by means of the overriding and agreed 50/50 share. Similarly, it would not seem to be just and equitable to assess the contribution or the basis of David Gouldman being 100% liable in circumstances where the settlement arrangements, which arrangements are the very thing which has given rise to the ability to make a contribution claim under section 1(4) of the 1978 Act have made a completely different provision."**

Points to take away

1. Useful to put one's mind to apportionment at pre-action stage and to plead a strong alternative case on apportionment.
2. Consider any defences/clauses limiting or excluding liability to the Main Claimant (contributory negligence and limitation clauses).
3. Consider any contractual allocation of apportionment between the parties.
4. Consider the guidance for various scenarios: Builder/Supervisor, Contractor's Duty to Warn, apportionment between Professionals.
5. Consider the organisational responsibility of the Parties – their respective hierarchy and scope of relevant duties.
6. Consider any relevant non-causative factors including moral blameworthiness.
7. Remember to seek contribution towards any liability for Main Claimant's costs to be claimed under the 1978 Act and also own costs of defending Main Claim under the relevant statutory costs regime.

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Chinese Shipbuilding and Arbitration

Beijing's Olympic Green was the focus of the world's attention in summer 2008. Thereafter its iconic landmarks – including the Bird's Nest Stadium – have held few major events. As in East London, there are questions about the legacy of the boom years and the old Olympic venues must reinvent themselves in order to survive. For example, the Water Cube now has a fun pool with corkscrew slides and the Tennis Centre is home to an experimental school.

It felt appropriate, then, that delegates from China's shipbuilding industry should convene by the Olympic Green for a conference on arbitration in London. True, the industry's boom years were not confined to the lead up to summer 2008; since 1980, China's share of world shipbuilding output has increased from around 5–40%. But to force an analogy, the shipbuilding industry's fortunes faltered at the same time. After the financial crisis in September 2008, the shipyards have faced cumulative difficulties: fewer orders, little finance and increased litigation. The shipyards, like the Olympic venues, must re-invent themselves.

Typically, Chinese shipbuilding contracts are governed by English law and arbitrated in England, either at the London Maritime Arbitration Association or the London Centre for International Arbitration. The Chinese shipyards' recent success rate in London Arbitration has been dismal, according to Li Hu, Secretary General of both the China Maritime Law Association and China Maritime Arbitration Commission. In 2010, for example, Chinese yards lost more than 95% of over 2,000 cases before the LMAA, paying substantial damages.

Such statistics have generated significant attention from the Chinese government, maritime lawyers, and shipbuilding industry. The newly merged law firm King & Wood Mallesons therefore organised a conference on London Arbitration, which I attended with the support of TECBAR and the Bar Council.

At the conference's opening, Zhang Guangqin (Director of the China National Shipbuilding Industry Association) told the delegates, including representatives of around 70 shipyards: "*If we want to be invincible, we must enrich our legal knowledge and our ability to secure the benefit of enterprise.*" As an attendee, I was struck by three characteristics: a sense of melancholy; a desire to learn; and sustained ambition.

At the peak of the Chinese shipbuilding market, between 2006 and 2008, there were a significant number of new entrants, joining the old conglomerates and state-owned companies. During the conference, stories were traded about yards that opened without experience or capital and that were dependent upon the payment of instalments on single orders to buy their first crane. Inevitably, these yards were early victims of the recession, but they are not alone. China's largest shipbuilder (if measured by order back log), Rongsheng Heavy Industries, has seen its net profits for the first half of 2012 drop by 82%. It only remains in profit because of government subsidies. During the banquet after the conference, my neighbour

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from a Shanghai-based yard explained, with pain and concern, how much things had changed since he joined the industry in 2005 and how uncertain the future had become.

The key uncertainty, of course, is the timing of the global recovery. However, the conference was focussed on a more immediate one. Many yards are embroiled in litigation, which takes place in London because of history and the standard form contracts it has produced. It was evident from my conversations with the delegates and their questions to the speakers that many regarded London-based arbitration with discomfort and distrust. The most extreme view was that London's tribunals were biased against the Chinese. Others saw patterns of cultural misunderstanding impacting upon the outcome. In order to help to address this, barristers from 20 Essex Street and 4 Pump Court attended to discuss different aspects of shipbuilding arbitrations.

Nick Vineall QC put the Chinese yards' troubles in global context. He noted that their difficulties were not unique. In the boom years, yards across the world took on a considerable amount of work. Then, in early 2008, the steel price spiked and yards often slowed work or reduced quality in order to weather increased raw material costs. The financial crisis, starting in September 2008 then reduced demand and financing options. With contracted prices now around 30% higher than market prices, ship buyers had little desire to receive their orders. And the yards, which – due to economic circumstances – often tendered delayed vessels of poorer quality, provided the buyers with good grounds for termination. In the audience, there was nodding recognition of this description. As a general theme, the conference delegates were keen to develop an understanding of the true merits of their cases.

Philip Eady QC addressed the conference on factual witness evidence in international arbitration. From my discussions, there appeared to be a popular view that the shipyards' unfamiliarity with the common law process of cross-examination had a significant impact on the outcome of cases. Mr Eady QC set out the witness 'dos' and 'don't'. For example, 'do' keep answers short and truthful, 'don't' embellish, be cut short or fill silences. In conversation afterwards, I explored other aspects of witness evidence, including the selection of witnesses and cultural difficulties with the process. Contrary to my expectations, I discovered that the principles of cross-examination were very familiar to the audience. Hong Kong's legal dramas are popular in mainland China and contain episodes of angry question and answer scenarios, familiar to any viewer of 'A Few Good Men', if unrepresentative of the average case at the International Dispute Resolution Centre. The delegates I spoke to placed emphasis on the selection of witnesses. Almost by default, the yards tender high ranking individuals for cross-examination, not those closest to actual events. This, it was recognised, often led to speculative evidence which contravened Mr Eady QC's golden rules. However, on occasions when a more junior (if more immediately involved) witness might give evidence, there was concern that a culture of deference to superiors might inhibit his or her evidence. I came away from these conversations wary of obvious stereotypes, but also with an appreciation that choice of witnesses required particular thought in future.

The conference speakers did not limit discussion to events at the hearing. The audience was particularly interested in how disputes could be avoided altogether. Nick Vineall QC described the importance of effective evidence gathering processes and a practical understanding of the contractual machinery. Newer entrants to the shipbuilding market had almost no claims management procedures in place; others recognised the need to reinvent them in order to be more effective. James Rowland of King & Wood Mallesons applied his experience as an in-house lawyer to this problem, emphasising the role of a responsible case manager. Michael Tselentis QC, Simon Milnes and David Lewis addressed delegates on the consequences in English law of hull renumbering, hull swapping and backdating of shipbuilding contracts to avoid International Maritime Organisation (IMO) safety regulations. It was apparent from the audience's questions that these practices were, for some, common place. In particular, the IMO regulations were causing yards difficulties because late delivery of vessels could subject them to additional (and costly) safety requirements.

After a morning of English barristers, lawyers from King & Wood Mallesons spoke on more ambitious subjects. Recently, the firm's shipbuilding practice has been boosted by the hire of Liu Shoujie, as a consultant. As a retired PRC Supreme Court judge, with a focus on maritime disputes, he spoke with authority and experience about the enforcement of arbitration awards. His colleague, Wang Xin, reduced the complex law of waiver and estoppels to about thirty minutes of apparent *tour de force*. Shen Mantang set out the various permutations of refund guarantees. For each, I was disappointed to catch only snippets, which were kindly translated by my neighbour. However, it was clear from the audience's reaction that they were eager to gain a greater understanding of technical or foreign concepts.

As a junior barrister with a passion for China, I was encouraged by the conference and the continued export of English law as the default for shipbuilding disputes. However, it was apparent that this predominance will be challenged. The conference was also promoted the services of the China Maritime Arbitration Commission (CMAC). Whilst this institution has not been internationally popular since its foundation in 1959, CMAC may become a contender over the longer term if Chinese trading partners become stronger and if they continue to distrust London-based arbitration. The foundation is already in place. Nick Vineall QC asked the audience where it would choose to arbitrate, if it had a unilateral choice. The almost unanimous answer was mainland China. Hong Kong, then Singapore, were the next preferences. Part of the Chinese shipbuilding industry's reinvention may involve amendment to the standard form contracts.

Shortly after my return from this shipbuilding conference on Beijing's Olympic Green, I was swept up by London's Olympics. Generally, the reception to the event in the Chinese newspapers was gracious and complimentary. For example, a *People's Daily* editorial praised Britain's "*distinctive culture and aspirations*", as encapsulated in Danny Boyle's Opening Ceremony. On a smaller scale, however, it was apparent to me from the shipbuilding conference that the Bar needed to increase its efforts in order to engage with Chinese lawyers and industry. Whilst there was warmth and interest, without sustained engagement, it is clear that Chinese parties will prefer familiar cultures and more convenient time zones.

I am grateful for TECBAR's financial support and hope to return to China as part of a larger TECBAR delegation.

Iain Munro,
4 Pump Court