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From the Chairman

TECBAR, TeCSA and the SCL, with the support of the TCC, are hosting an international construction law conference in London this September: 'Unlocking Disputes: Challenges in Construction Litigation & Arbitration'. We hope that it will bring together leading construction lawyers and practitioners from across the world to discuss contemporary issues in construction law and dispute resolution and it will celebrate the first year anniversary of the opening of the new Rolls Building in London. I hope many of you will join us. I would also ask that you advertise it widely among your clients and contacts. It will take place on 24 September 2012. The conference will be held at the Institution of Engineering & Technology, Savoy Place, Central London and will conclude with a drinks reception at the Rolls Building, and at a dinner at the Royal Courts of Justice. For further details please look at the TECBAR website (www.tecbar.org) under Events.

We are delighted to be hosting a TECBAR dinner on 24 May 2012 in honour of HH David Wilcox who recently retired from the Bench after an impressive 27 years service as a Circuit Judge. Again I hope that many of you will join us at the dinner to celebrate his career. For further details please contact the TECBAR secretary Lynne McCafferty (LMcCafferty@4pumpcourt.com).

Several members of TECBAR formed part of the Bar Council's trade mission to Singapore and Korea at the end of March. We participated in sessions with the Singapore Society for Construction Law, the Singapore International Arbitration Centre, and the Korean Arbitration Centre as well as speaking at the Bar Council session on international arbitration in Korea.

We are always looking for new ways of making TECBAR relevant to our members. Please do contact me if you have any suggestions for improvement or new ventures.

Chantal-Aimée Doerries QC, Chairman

From the Editor

There are two articles in this issue of the Review. The first is by Tim Reynolds, who was moved to develop Fiona Parkin's warning to "look before you leap" into the termination of a contract (Winter 2011 Issue). He identifies the ability to call upon a bond as an important factor in deciding whether and how to terminate, referring for illustrative purposes to the recent decision of the Supreme Court in *Rainy Sky*. Employers will wish to ensure, so far as possible, that the mode of termination adopted does not prejudice their ability to call on the performance security put up by the contractor. Second, Charles Pimlott argues for the comprehensive renunciation of the so-called '*Great Ormond Street* principle'. This is an important area of the law where, I would suggest, the merits of the cases at hand have had much to do with the approaches taken by different courts.

Mark Chennells, Editor

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A Look before the Leap

This article seeks to take up the invocation at the end of Fiona Parkin's article in the TECBAR Review to look before one leaps into either termination or acceptance of conduct as repudiatory.

Although there are many looks that have to be taken, this article concentrates on one only, namely the question of Bonds.

It is not the intention, save in the general terms below, to consider the various types of Bond that exist, but to look at key points that could apply to any type of Bond. It follows that the Article presupposes a general knowledge of the principles of Bonds.

Bonds remain curious documents, although large sums of money may be involved. Bonds have reached the Supreme Court or, formerly the House of Lords, on a number of occasions, as much as anything else, because of the arcane language in which they continue to be written. Furthermore, there remains an unwillingness to tie the Bond to the underlying contract for which it is intended to provide additional security. Many construction contracts in particular, seem to ignore the fact that there may be an obligation under the Bond that might depend on the same facts as a problem under the Contract.

Both the above points are critical to the 'look' situation. The essential purpose of a Bond is to provide additional financial cover for a situation where a party has defaulted. A default under the Contract may not amount to a default under the Bond, and indeed vice versa. The consequence of a lack of 'look' can be, and has been, that a party whom has exercised his rights under the Contract to determine or accept conduct as repudiatory, has been unable to rely on the same matters to make a successful call under the Bond, which he fondly thought was in existence precisely for the situation that had arisen. Why?

Perhaps one can start by taking a simple, but not unknown, situation. A Bond may be written to exist for a period of time, or to expire on the occurrence of a specific event, such as Practical Completion of the Works. If completion of the Contract Works has been delayed, and the period of the Bond not extended, there will be no claim. Similarly, if the Works are in a Defects Correction stage, and a major problem arises, then again a claim for the secured sum, usually 10% of the Contract Sum, will fail. A view of the terms of the Bond, and any modification of the same, becomes critical.

As set out above, it is the not infrequent lack of commonality between the wording of the documents that creates the greatest problems. The consequences may be dire, and as Lord Clarke observed in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2012] BLR 132 lead to a non recovery in the precise situation that the Bond was taken out to cover. This may come as an unpleasant surprise to the party whose financial calculations before the 'leap' took into account recovery of the Bond monies.

As Bonds are usually taken out to cover a default, it may seem strange that there might not be a recovery. The problem lies in the arcane wording of the Bond, and the lack of understanding of the same.

The threat of insolvency is usually the reason for the Bond in the first place, but, ironically, has become the biggest area of problem. Sometimes, one might not even be able to 'look' as the decision will have been taken for you.

Come back to the friction in wording; usually a call on the Bond is triggered by a default. What happens if an Insolvency Event amounts to automatic determination under the Contract, is there a default under the Bond or at least an event that operates as a trigger for a call on the Bond?

No, in the case of a JCT Contract containing provisions for automatic determination in the event of insolvency, said the Deputy Official Referee, and an unanimous Court of Appeal, in the case of *Perar BV v General Surety and Guarantee Co Ltd* (1994) 66 BLR 72. The commentary by the then editors of Building Law Reports at pages 75 et seq ought to be compulsory reading before leaping into the mire following an insolvency.

Furthermore as pointed out at p81 of the Court of Appeal judgment, the Bond in question also contained the kind of time provisions referred to above, in that proceedings had to be commenced by a fixed date, and had not been.

The claim failed on both counts.

The claim in *Rainy Sky* was successful, but only after a visit to the Supreme Court. Again insolvency was involved, this time on a ship building contract in Korea. The Contract in question actually referred to the Bond in the body of the Contract, which probably in the event helped the Claimant. The Bond was more obscurely drafted than many, and, as Lord Clarke observed at paragraph 31 of the sole judgment, was capable of more than one interpretation. Lord Clarke's view was that the purpose of the Bond was clear, and in a case of possibly conflicting interpretations, he would prefer that which gave effect to the intentions of the parties (see paragraphs 41–45 of the judgment).

So the Bond could be called, but it was to be noted that the contrary arguments were not impossible, and the obscurity played a part in the outcome.

On the basis of the above, I look at the position under two standard forms. In the case of the FIDIC forms, I think that the position is clear, but I am less convinced as to the JCT position.

FIDIC forms have separate termination clauses for Employers and Contractors. Each lists an Insolvency Event as giving a right to terminate. There is no automatic termination so one of the *Perar* problems is cleared. Furthermore, the clause enables a party to review the situation before a final decision on termination is made including a check on the Bond position. Because of the wording of the clause, I would regard an act of insolvency as giving an entitlement to make a call on the Bond, as there will have been a default. Under the FIDIC forms, including the 2008 Gold Book, only the Contractor can be asked to provide security, the Employer has the far vaguer obligation to provide evidence of satisfactory financial arrangements.

I remain unhappy as to the position under JCT forms. As far as I am aware, the comments I now make have not been tested in any court, one way or the other.

In the 2005 forms, the automatic determination provisions for an insolvency event have gone, but there are still separate sub-clauses for each party at Clause 8.

Clauses 8.4 and 8.9 are headed Default, and 8.5 and 8.10 Insolvency, 8.4 and 8.9 set out often used grounds for default.

I suggest it is at least arguable that where the Bond in question requires a breach or a default only the circumstances set out in 8.4 and 8.9 would amount to entitlements to make a call on standard bond wording, again leading to a defeat for the very purpose of the Bond.

Yes, the wording of the Bond could have been modified at pre-contract stage, but thought will not always have been given.

I note that in *Rainy Sky*, Article 12 listed insolvency as a default. I also note Lord Justice Peter Gibson's judgment in *Perar*, equating default with breach of contract. I also accept that the consequences of a termination under Clauses 8.4, 8.5, 8.9, and 8.10 may be the same, but that is the position under the Contract, and not necessarily the Bond.

The morals remain:

Firstly, if given the opportunity at pre-contract stage, review the wording of the Bond, and see if you can address the problem I have raised,

Second, if looking at the matter after the event, do not assume that just because the Contract appears to have been terminated correctly, there will be an automatic ability to recover under the security provided, then decide what would be in the Client's best interests,

Third, in the financial appraisal, look before counting on receipt of any money under the Bond.

Tim Reynolds

Does the Great Ormond Street principle exist?

(1) Introduction

1. This article considers the situation, which arises frequently in claims brought in the TCC, where a claimant seeks to justify a building works claim on the basis that (1) the building was damaged (or defective), (2) the works done to the building were done in accordance with advice from consultants, *therefore* (3) the claimant is entitled to the full cost of the works done. This approach is based on the 'principle' often said to have been laid down by HHJ Newey QC in *Governors of the Hospitals for Sick Children v McLaughlin & Harvey plc* (1987) 19 ConLR 25 at 94.
2. In that case there was a dispute over rival schemes for rectifying design and construction defects in a new building at the hospital. The claimant's rectification scheme had been implemented prior to trial. HHJ Newey QC held that in all the circumstances it was reasonable for the plaintiff to rely on the expert advice it had received as to the most satisfactory form for the remedial work. There was a choice and the plaintiff adopted the more extensive and expensive solution which "*was the product of caution and a resolve not to leave anything to chance which could be reasonably avoided*" (p105).
3. With respect to the learned Judge (an Official Referee of revered memory), the judgment in the *Great Ormond Street* case contains a considerable degree of legal confusion and error. Moreover, as far as the author is aware, the passage containing the so-called '*Great Ormond Street* principle' has never been applied in any subsequent authority in the TCC or any other Court. It was discussed by HHJ Coulson QC (as he then was) in *McGlinn v Waltham Contractors* [2007] EWHC 149 (TCC), and partly accepted obiter, in a much restricted form (see paragraph 827), but he did not apply it (see paragraphs 808–826, 828), and he seems to have noted its inconsistency with the subsequent Court of Appeal decision of *Skandia Property (UK) Ltd v Thames Water Utilities Ltd* [1999] BLR 338 (see paragraph 827 of *McGlinn*). Akenhead J approved HHJ Coulson QC's obiter remarks in *AXA Insurance UK plc v Cunningham Lindsey United Kingdom* [2007] EWHC 3023 (TCC) (at para 269) and more recently in *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931

(at para 130). This article suggests that the supposed principle is wrong in law.

(2) Problems with the *Great Ormond Street* case

4. In the published report of the *Great Ormond Street* case the discussion of the principles of damages commences on p93. One is immediately put on alert as to the accuracy of the legal analysis when one sees the proposition on p93 that the tort of negligence had *"only been recognised as applicable to claims in respect of damage to real property since* Dutton… *[1972]"*. This is not correct. The tort of negligence was already an uncontroversial basis for claims in respect of damage to real property in the nineteenth century (long before the modern extension of the tort in the wake of *Donoghue v Stevenson*). See *Le Lievre v Gould* [1893] 1 QB 491 at 497[1].

5. The penultimate paragraph on p94 on the touchstone of foreseeability[2] is an incorrect and misconceived analysis. While the test of foreseeability is relevant to the existence and scope of duties of care and to the rules of remoteness of damage, it has nothing to do with the question whether damages for injury to land should be measured by cost of reinstatement or by diminution in value. The court's choice of one of those two measures is not based on what was foreseeable by the defendant. The choice depends upon which measure better represents the claimant's true loss, and on what is reasonable as between the claimant and the defendant: see *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659.[3]

6. The reasoning in the paragraph at the foot of p94[4] is also wrong in law. The irrecoverability of unreasonable expenditure does not properly rest on the learned Judge's concept that the defendant would not have foreseen unreasonable expenditure. Such expenditure is irrecoverable because it does not represent the true loss caused by the tort, and because it is not reasonable as between claimant and defendant to charge the defendant with such expenditure.

7. The remark at the foot of the page (*"When the nature of the repairs is such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take advice and be influenced by it"*) is of no relevance to the measure of loss which properly compensates the primary harm suffered by the claimant. In a case of damage to property the amount will be measured, according to circumstances, either by the diminution in value of the property or by the reasonable cost of reinstating it to its former condition: see *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659, May J[5]. The influence of expert advice can neither increase nor reduce the proper measure of damage to compensate the primary harm. The foreseeability or otherwise of the claimant taking expert advice is of no relevance to the proper measure. Expert advice may be relevant, as a matter of fact, in the Court's assessment of the reasonable cost of reinstatement, but that is a different point.

8. On p95 the learned Judge refers to two House of Lords cases. He first cites a dictum of Lord Collins in *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 (*"I think the wrong-doer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after-events that another course might have saved loss"*). This is a reference to the ordinary principle that the claimant's conduct in mitigating his consequential losses is not to be judged too strictly and that he only need act reasonably in that respect. It is not relevant to the measure of compensation for the primary harm suffered by the claimant.

9. On pp95–96 the learned judge cites from *Lodge Holes Colliery Co Ltd v Wednesbury Corp* [1908] AC 323. That citation is an obiter dictum of Lord Loreburn which does not reflect what the House of Lords actually decided in that case. The question in the case was the proper measure of damages recoverable by the Corporation from a tortfeasor who had caused subsidence of a public road. The Corporation had restored the road to its former level, acting in good faith and on the opinion of skilled advisers, at a cost of £400. The defendant contended that for £80 or less the road could have been made as commodious to

1 Lord Esher: *'If one man is near to … the property of another, a duty lies upon him not to do that which may … injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near.'*

2 *'I think that today a plaintiff's claim for damages for injury to his land in negligence, if not in other torts, and in contract is probably governed by the test of foreseeability just as much as claims for other forms of injury…'*.

3 It appears that HHJ Coulson QC was misled by this part of Judge Newey's judgment: see *McGlinn* at paragraph 788. *Taylor v Hepworths* was not decided on the basis of what was foreseeable. The concept of foreseeability is nowhere mentioned in *Taylor v Hepworths*.

4 *"The plaintiff who carried out either repair or reinstatement of his property must act reasonably. He can only recover as damages the costs which the defendant ought reasonably have foreseen that he would incur and the defendant would not have foreseen unreasonable expenditure. Reasonable costs do not, however, mean the minimum amount which, with hindsight, it could be held would have sufficed. When the nature of the repairs is such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take such advice and be influenced by it"*.

5 Referred to with approval in *Ruxley Electronics v Forsyth* [1996] AC 344 and *Voaden v Champion* [2002] 1 Lloyd's Rep 623.

the public as the original road. The Court of Appeal decided in favour of the Corporation[6], but the House of Lords disagreed.

10. The obiter dictum of Lord Loreburn cited in the *Great Ormond Street* case needs to be understood in the context that the House emphatically overturned the Court of Appeal decision and held in favour of the defendant. The dictum of Lord Loreburn cited by Judge Newey was followed in the report at [1908] AC 323, 325ff by these words:

"*But when the proceedings at the trial and the preceding correspondence are examined, it appears that this* [that they had chosen the course they were advised was necessary] *was not the plaintiffs' contention at all. They did not in fact consider how they could make an equally commodious road without unnecessary expense. Their position was that they were in law entitled to raise the road to its old level and to charge the defendants with the cost of raising it.*" [p325–326]

"*The point of law which was advanced by the plaintiffs, namely, that they were entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, will not, in my opinion, bear investigation.*"

"*The plaintiffs acted quite honestly, but under the mistaken belief that they were bound, or at least entitled, to maintain the ancient level at the defendants' expense. So thinking, they did not consider whether it was necessary to do so in the interests of the public ….*" [p326]

11. Therefore what emerges from the decision made in *Lodge Holes Colliery* is that the cost of works is not recoverable, even if carried out in accordance with the opinion of highly-skilled advisers, where the scope of the works goes beyond what was necessary and does not match the proper extent of the defendant's legal liability.

12. At p96 HHJ Newey QC discusses causation. He correctly states that the plaintiff can only recover in respect of loss actually caused by the defendant, and not in respect of loss due to some independent cause. He then erroneously states that negligent advice breaks the chain of causation, while advice which is not negligent does not. Two observations can be made:

    (1) Whether the advice was negligent is not the test of causation: the inquiry is whether there was an independent cause, not limited to whether it was negligent or not: *The Sivand* [1998] 2 Lloyd's Rep 97 at 105, *Skandia Property (UK) Ltd v Thames Water* [1999] BLR 338 at 344, *Rahman v Arearose* [2001] QB 351, paras 28–29, 3233.

    (2) Considerations of post-incident advice are of limited relevance to damages in compensation for the primary harm done (substitutive damages). No advice given after the event can alter the extent of the physical damage which was caused by the breach. Expert advice is merely a factor which may assist in the determination of the reasonable cost of reinstatement.

13. At p97 the Judge states: "*A plaintiff's own action in failing to mitigate his loss by, for example, carrying out more remedial work than he need, may in itself break the chain of causation*". This confuses two different points. If a claimant has carried out more work than he needed to, that is not a failure to mitigate. The situation is simply that the cost of the extra work forms no part of the proper measure of damage; such cost is not objectively fair compensation for harm caused by the tort.

14. At p98 the Judge states:

"*Contrary to Mr Potter QC's submissions, in my view where works have been carried out, it is not for the court to consider de novo what should have been done and what costs should have been incurred either as a check upon the reasonableness of the plaintiff's actions or otherwise.*"

15. This is wrong in law. It is not supported by any binding authority. Depending on the facts of a particular case, it is potentially in conflict with two fundamental principles:

    (1) The claimant should be compensated only for that loss and damage for which the defendant should justly be held responsible: *Rahman* para 29, 30, 33, cf *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, paras 69–71, Lord Nicholls.

    (2) Damages must be reasonable as between the claimant and the defendant: *Voaden v Champion* (*The 'Baltic Surveyor'*) [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623, paragraphs 83–84. As Clarke LJ said in *The Maersk Colombo* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275, para 32: "*where reinstatement is the appropriate basis for the assessment of damages, it must be both reasonable to reinstate and the amount awarded must be objectively fair as between the claimants and the defendants*".

16. Reliance by a claimant upon expert advice does not automatically make the costs incurred by the claimant objectively fair as between the parties.

17. A claimant who seeks to recover a cost of reinstatement which goes beyond what was necessary to make good the damage caused by the tort cannot justify his claim by reference to foreseeable reliance on expert advice. On the insufficiency of the concept of foreseeability as

6 See in particular: Collins MR, at pp 83–86, Cozens-Hardy LJ, at pp 87–88 and Farwell LJ, at pp 91–92.

a guide to recoverable damages, in the Court of Appeal case *Mulvenna v Royal Bank of Scotland Plc* [2003] EWCA Civ 1112, Sir Anthony Evans said the following (at paragraph 33):

*"The authorities to which we were referred in connection with the legal issues of 'causation' and 'remoteness' demonstrate that the concept of reasonable foreseeability is not a complete guide to the circumstances in which damages are recoverable as a matter of law. Even if the loss was reasonably foreseeable as a consequence of the breach of duty in question …, it may nevertheless be regarded as 'too remote a consequence' or as not a consequence at all, and the damages claim is disallowed. In effect, the chain of consequences is cut off as a matter of law, either because it is regarded as unreasonable to impose liability for that consequence of the breach (*The Pegase *[1981] 1 Lloyd's Rep 175 Robert Goff J), or because the scope of the duty is limited so as to exclude it (*Banque Bruxelles SA v Eagle Star *[1997] AC 191), or because as a matter of commonsense the breach cannot be said to have caused the loss, although it may have provided the opportunity for it to occur (*Galoo Ltd v Bright Grahame Murray *[1994] 1 WLR 1360)."*

18. While the reasoning in the *Great Ormond Street* case is open to criticism, and the Judge decided in favour of the plaintiff's scheme on the basis of the principles which he set out, it should be noted that the result would have been substantially the same if the Judge's approach had been orthodox. He stated at p106–107:

"If I am wrong in my understanding of the law and if I ought to disregard the fact that remedial works have been carried out and decide today, ex post facto, what should have been done and therefore what damages are recoverable … I feel certain that I would not have accepted the defendants' experts' proposals, which, with all respect to them, appear to me not to be sufficiently cautious."

(3) Subsequent authorities

19. There have been a number of cases since the *Great Ormond Street* case in which the relevance of the claimant's reliance on expert advice has been considered in the context of an assessment of damages.

20. In *Skandia Property (UK) Ltd v Thames Water Utilities Ltd* [1999] BLR 338, the claimant's basement was flooded by water from a pipe owned by Thames Water. The claimant was (wrongly) advised by experts that the flood had damaged the effectiveness of the waterproofing system present in the building prior to the flood and that a particular tanking system was the only practical solution for repairing the water damage to the building and eliminating the risk of further water damage. The Court of Appeal held that the claimant was not entitled to recover because the assumption made by the claimant and its experts that damage had been caused to a comprehensive waterproofing system was not reasonable, and it was thus not reasonable to replace what was there with such a system. Having so found, Waller LJ went on to make the following (obiter) observations:

"… I would simply put the matter in the following way. If there has been an escape of water that causes some physical damage then prima facie it is only the cost of reinstatement of that physical damage which is recoverable. If a plaintiff is to recover damages for something beyond the cost of reinstatement of physical damage then he must on any view show that it was reasonable to incur expenditure beyond that quantifiable figure. It might in certain circumstances be reasonable to assume that physical damage had been incurred where a full investigation of the same was not reasonably possible. It would certainly be appropriate that a plaintiff should recover the reasonable costs of investigating the damage inflicted. During argument for example, the question arose as to what would be the situation if a plaintiff was advised that certain wiring hidden in the wall might have been damaged. If the advice was that it was impossible to check the accuracy or otherwise of that advice then the cost of putting in fresh wiring might well be recoverable. What should be emphasised is that it must be rarely if ever that a plaintiff will be able to establish the reasonableness of any assumption of damage to something which is accessible and inspectable. Certainly, simple reliance by a plaintiff on an expert cannot be the test as to whether a plaintiff has acted reasonably in making an assumption, albeit, provided the plaintiff has provided the expert with all material facts and the expert has made all reasonable investigations, the advice will be a highly significant factor."

21. Surprisingly, the *Great Ormond Street* case appears not to have been cited to their Lordships.

22. In *McGlinn v Waltham Contractors Co Ltd* (2007) 111 ConLR 1, HHJ Coulson QC distinguished the *Great Ormond Street* case on the facts but went on to make the following (obiter) observations (at paragraph 827):

"827. Now let us assume that I am wrong to distinguish the Great Ormond Street *case on the facts and/or that I am bound by whatever principle it is said that Judge Newey articulated in his judgment in that case. It might well be said that his decision is authority for the relatively narrow proposition that, if two remedial*

Continued on p8

schemes are proposed to rectify a defect which is the result of defendant's default, and one scheme is put in hand in on expert advice, the defendant is liable for the costs of that built scheme, unless it could be said that the expert advice was negligent. For what it is worth, I consider that, subject to one potentially vital qualification, set out below, this narrow proposition is generally in accordance with other authority and correct in law. On that basis, therefore, I reject the submission made by [one of the defendants] *that the judgment in the* Great Ormond Street *case was wrong and should not be followed. The important qualification that needs to be made is that outlined by Waller LJ in the* Skandia Property (UK) *case [1999] BLR 338 to this effect: although reliance on an expert will always be a highly significant factor in any assessment of loss and damage, it will not on its own be enough, in every case, to prove that the claimant has acted reasonably. Moreover, in the* Skandia Property (UK) *case, Waller LJ made clear (at 344) that to put in issue the reasonableness of a decision based on expert advice 'does not require proof of conduct amounting to professional negligence or something of that sort'. That seems to me, with respect, to be entirely right..."* [emphasis added]

23. HHJ Coulson QC's obiter remarks were cited with approval by Akenhead J in the cases of *AXA Insurance UK Plc v Cunningham Lindsey United Kingdom* [2007] EWHC 3023 (TCC) (at para 269) and more recently in *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC) (at para 130)[7].

24. In the *Linklaters* case, Akenhead J went on to make the following (obiter) observation in relation to the effect of negligent advice:

"132. Although this does not arise for decision in this case, because no negligence is alleged against Linklaters' consultants (CBP in this context), if a largely unnecessary or extravagant remedial solution is adopted as a result of the negligence of a claimant's expert, it can properly be argued that the actual or at least extra-over cost of that solution does not flow from or is not caused by the breach in question. There is in effect an intervening cause for which the original wrongdoer should not be held responsible. There is no injustice in that approach because the claimant theoretically has a cause of action against its expert for negligently advising it to waste money on unnecessary work"

25. It has to be said, with respect, that the suggestion implicit in this passage that only negligent advice will break the chain of causation (whereas non-negligent advice will not) is inconsistent with the Court of Appeal decisions in the cases of *The Sivand*, *Rahman* and *Skandia* referred to above, and overlooks HHJ Coulson QC's *"vital qualification"* in *McGlinn* (which was derived from *Skandia*) that to put in issue the reasonableness of a decision of the claimant or its experts in the sense relevant to causation does not require proof of professional negligence.

26. For the reasons outlined above, it is suggested that HHJ Coulson QC's obiter restriction of the *Great Ormond Street* principle in *McGlinn*, as approved by Akenhead J in *Axa* and *Linklaters*, does not go far enough, and that when a suitable opportunity arises the supposed 'principle' should be fully and unequivocally rejected.

7 See also, *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 1710 (TCC), at paragraph 481, in which Jackson J records his agreement with Judge Coulson's summary of the law.

Charles Pimlott
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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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