Neutral Citation Number: [2020] EWHC 3484 (Comm)

Case No: G40CF001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 18 December 2020

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

- -

Between :

ARAG PLC	**Claimant**
- and -	
LEIGHTON JONES	**Defendant**
-and-	
NEWBOLD & CO. (A FIRM)	**Third Party**

- -
- -

Charlie Newington-Bridges (instructed by **Berry Smith LLP**) for the **Claimant**
Samuel Parsons (instructed by **Robertsons**) for the **Defendant**

Hearing date: 16 December 2020
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10 a.m. on Friday 18 December 2020.

JUDGE KEYSER QC:

Introduction

1. This is my judgment upon the claim of the claimant, ARAG Plc, against the defendant, Mr Leighton Jones. By a previous case management order made in the county court, the district judge directed that this claim be tried by a judge of the Business and Property Courts before the Part 20 claim brought by the defendant against the third party, Newbold & Co, a firm of solicitors. The Part 20 claim has accordingly been stayed pending this judgment.

2. The claim is for only £20,500. However, the claimant considers that it raises issues that are of wider importance to its business. My own view is that the case does not raise any significant legal problems, although the way in which the parties have approached it has tended to give a different impression.

3. The trial was conducted on the basis of an agreed statement of facts and documentary evidence. I am grateful to Mr Newington-Bridges, counsel for the claimant, and Mr Parsons, counsel for the defendant, for their submissions and to their respective solicitors for the efficient preparation of the papers for trial.

The Facts

4. The defendant was co-tenant with Ms Gibson of a residential property. Together they brought a claim in the county court for disrepairs against their landlord, Mr Francis. He in turn counterclaimed for arrears of rent.

5. The third party, which was the firm of solicitors acting for the defendant and Ms Gibson, made an application for an ATE insurance policy from the claimant, which is a provider of such policies for use in litigation. The agreed basis on which this trial has proceeded is that the application for the policy was made on behalf of Ms Gibson only, not on behalf of the defendant also. The ATE policy ("the Policy") was issued to Ms Gibson on 29 January 2015.

6. By an order dated 17 March 2016 ("the Order"), judgment was given on the claim for £1,290 and on the counterclaim for £3,135. The defendant and Ms Gibson were ordered to pay Mr Francis's costs in an amount to be assessed if not agreed, and to pay him £25,000 on account of those costs within 28 days. It is common ground that the liability of the defendant and Ms Gibson under the Order in respect of costs was a joint and several liability.

7. The third party lodged a claim upon the Policy. Mr Francis put in a bill of costs of roughly £55,000. The third party ceased to act for the defendant and Ms Gibson, and they subsequently instructed Robertsons Solicitors to act for them.

8. On 28 February 2019 the amount of Mr Francis's costs was agreed at £40,000. The claimant paid that sum to Mr Francis or his solicitors on 20 March 2019. On or around the same date, the claimant also paid £1,200 inclusive of VAT to a firm of costs lawyers that it had instructed to consider the bill of costs.

9. By proceedings commenced on 14 June 2019, the claimant now claims a contribution from the defendant of one half of the costs (£20,000) and one half of the money paid to the costs draftsman (£600 inclusive of VAT). If the claim succeeds, the defendant seeks damages equivalent to an indemnity from the third party; but I am not concerned with that claim.

The Issues

10. The parties agreed a list of issues. However, it seems to me that the real issues for determination come down to three, which can conveniently be taken in the following order:

    1) Did the facts give to Ms Gibson a cause of action for a contribution from the defendant?

    2) If so, is a claim on that cause of action barred by limitation of time?

    3) If a claim for contribution is not statute-barred, is the claimant entitled to bring the claim?

    I shall address those issues in turn.

Ms Gibson's cause of action for a contribution

11. The first issue identified by the parties in their list of issues was: Can the claimant *prima facie* rely on section 1 of the Civil Liability (Contribution) Act 1978? The particulars of claim made no mention of the 1978 Act. It was first mentioned in paragraph 15 of the defence, which averred that the claim was brought under section 1 of the 1978 Act and raised a plea of limitation in reliance on section 10 of the Limitation Act 1980, which applies specifically to claims under section 1 of the 1978 Act. The reply responded by averring that the claimant, having paid the costs, "was entitled to recover contribution from the defendant as he was liable in respect of the same costs pursuant to s. 1 of the Civil Liability (Contribution) Act 1978" and by relying on section 10(4) of the 1980 Act (see further below).

12. On seeing the papers two days before the commencement of the trial, I notified counsel of my preliminary view that the 1978 Act had nothing to do with the case and that the rights of contribution, if any, arose at common law. In the event, counsel did not seek to dissuade me from that view. In my judgment, the pleaded and agreed facts do give Ms Gibson a cause of action for a contribution from the defendant, but simply on the basis that they were joint debtors in respect of the costs liability and there was accordingly a common law right to contribution to the extent that Ms Gibson paid more than one half of the debt.

13. Reference to section 1 of the 1978 Act led much of the written argument up interesting but blind alleys. Before briefly stating what I regard as the correct position, I shall consider section 1 of the 1978 Act, which provides:

> "(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.
>
> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
>
> (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.
>
> (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales."

Two further provisions of the 1978 Act may conveniently be mentioned here. Section 2(1) provides:

> "(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."

Section 6(1) provides:

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

14. Despite the terms of the defence, which he drafted, Mr Parsons had accurately explained in his skeleton argument why section 1 did not apply to a claim for contribution in respect of costs alone. At common law there was no general right of contribution as between joint wrongdoers: see *Merryweather v Nixan* (1799) 8 Durn & E 186. A statutory exception to this position was made in the case of joint tortfeasors by section 6(1)(c) of the Law Reform (Joint Tortfeasors and Married Women) Act 1935. In 1977 the Law Commission's *Report on Contribution Law* (Law Com No. 79) recommended that the right of contribution ought not to be limited to cases of tort but ought to be extended to any case of breach of duty. The 1978 Act gave effect to this recommendation; see the concluding words of section 6(1). However, the liability of Ms Gibson and the defendant for Mr Francis's costs arose by virtue of the court's exercise of its power under section 51 of the Senior Courts Act 1981. The costs order created a debt, or at the very least something analogous to a debt; it was not in the nature of a remedy for a wrong. An action for a debt is not within the scope of section 1 of the 1978 Act: *Hampton v Minns* [2002] 1 WLR 1. I agree with all of that.

15. In his skeleton argument, though not in oral submissions, Mr Newington-Bridges attempted to establish the application of section 1 by reliance on dicta of the Court of Appeal in *BICC Limited v Cumbrian Industrials Limited and another* [2001] EWCA Civ 1621 and the decision in *Nationwide Building Society v Dunlop Haywards Ltd* [2009] EWHC 254 (Comm). I do not think these cases support his argument. It is unnecessary to analyse them in detail in this judgment. *BICC Limited v Cumbrian Industrials Limited* was a case where a party that had settled a claim against it then sought and obtained contribution from another under section 1 of the 1978 Act. The Court of Appeal rejected the contention that contribution ought not to have been awarded insofar as the settlement sum included an amount for BCCI's costs: see [119]-[123]. Similarly, in *Nationwide Building Society v Dunlop Haywards Limited* the second defendant settled with the claimant by means of an accepted Part 36 offer and claimed contribution from the first defendant. The settlement included £550,000 in respect of the claimant's costs. The question arose whether a contribution under section 1 of the 1978 Act could apply to that element of the payment. Christopher Clarke J held that it could and followed the reasoning in *BICC Limited v Cumbrian Industrials Limited.* Both cases were therefore concerned with the question whether, where a settlement payment has been made by a party liable for damage within the

meaning of section 1 of the 1978 Act, contribution can be awarded in respect of the component of that payment that relates to costs. That is quite different from the question whether a party who, having no independent liability in respect of damage, is liable to pay costs under a costs order can claim contribution in respect of that costs liability under section 1 of the 1978 Act.

16. So much for the 1978 Act. As for the law that actually applies in this case, there was ultimately no disagreement at trial as to the basic principles and I can conveniently take them from the leading texts.

17. The different circumstances in which a contribution is available are summarised in *Goff & Jones: The Law of Unjust Enrichment* (9th edition) at para 19-06; I need only set out the first part of the paragraph:

> "The law of contribution and reimbursement is fragmented into several parts. First, claims by those who pay more than their share of a common liability for the same debt lie in equity and at common law. Secondly, claims by those who pay more than their share of a common liability for the same damage are generally governed by the Civil Liability (Contribution) Act 1978."

The relevant law is dealt with in *Chitty on Contracts* (23rd edition) immediately before the section dealing with contribution between persons liable for the same damage. I omit the references from the quotation:

> "17-027 Joint and joint and several debtors have a restitutionary right of contribution among themselves: that is to say, if one has paid more than his share of the debt, he can recover the excess from the others in equal shares, subject to any agreement to the contrary. In the absence of agreement to the contrary each co-debtor is liable for an equal share of the debt or obligation. This right is statutory in cases where a county court judgment against one joint debtor has been satisfied. The right of contribution is independent of any present right of the principal creditor. Thus one co-debtor can recover contribution from another although the principal creditor's right to recover from that other debtor has become statute-barred. Again, the right to contribution may be enforced against the personal representatives of a deceased joint debtor, even though (as we have seen) they would not be liable to the creditor. …
>
> 17-028 It is a condition precedent to the right to recover contribution that the claimant should have been liable to pay the whole debt and should have paid more than his share of it. If he merely pays his share and no more, he has no present right to contribution: but he will acquire such right as soon as anything happens in the future which discharges the debt and thus brings it about that he has paid more than his share, for instance if the debt should become statute-barred. Moreover, a

> surety against whom the principal creditor has obtained judgment for the full amount of the debt, but who has paid nothing in respect of that judgment, can obtain a prospective order directing a co-surety, on payment by the surety of his own share of the debt, to indemnify him against further liability, or (if the principal creditor is a party to the action) an order directing the co-surety to pay his proportion to the principal creditor. A surety suing his co-sureties for contribution must join as defendants all those who are liable to make contribution, unless one of them is insolvent or there is some other good reason why he should not be joined."

18. Where there is a judgment to give effect to a pre-existing liability, there is a specific statutory right to contribution (mentioned by *Chitty*) under section 48 of the County Courts Act 1984:

> "(1) Where a plaintiff has a demand recoverable under this Act against two or more persons jointly liable, it shall be sufficient to serve any of those persons with process, and judgment may be obtained and execution issued against any person so served, notwithstanding that others jointly liable may not have been served or sued or may not be within the jurisdiction of the court.
>
> (2) Where judgment is so obtained against any person by virtue of subsection (1) and is satisfied by that person, he shall be entitled to recover in the court contribution from any other person jointly liable with him."

That is a specific application of the general position to a particular circumstance. The present case, involving a liability that arises only by reason of an order under section 51 of the Senior Courts Act 1981, is governed by the common law rather than by section 48 of the 1984 Act.

19. Mr Parsons accepted the analysis set out above but nevertheless submitted that the claimant's claim ought to fall at this first hurdle, for two reasons.

20. First, Mr Parsons submitted that the claimant should be held to its case as stated in its reply, namely reliance on section 1 of the 1978, and that as that case was ill-founded the claim ought to be dismissed. That would be unjust and I shall not accede to the submission. The pleaded and agreed facts show a perfectly good, even commonplace, ground for contribution at common law on the basis of unjust enrichment. It is unnecessary for the claimant to rely on any new facts to ground its claim. The fact that it has previously advanced an incorrect legal analysis of the entitlement to contribution may or may not have consequences in costs; that is a matter for another day. It is no reason for failing to apply the law correctly to the agreed facts.

21. Second, Mr Parsons submitted that Ms Gibson did not have a claim for contribution at common law because she had paid nothing to Mr Francis. I regard that submission as plainly incorrect, because Ms Gibson discharged the costs liability to Mr Francis and it is immaterial that she did so by means of the Policy. As this point impinges to

some extent on the third issue, namely the claimant's rights, I shall say no more on the matter at this stage.

22. The conclusion is that Ms Gibson has a common law right to contribution from the defendant to the extent of one half of the costs paid to Mr Francis: that is, to a contribution of £20,000.

23. However, the claim for contribution of one half of the moneys paid to the costs lawyers falls at this stage. The only admitted or agreed facts in that regard are that the claimant instructed the costs lawyers to consider Mr Francis's bill of costs and thereafter paid them £1,200 inclusive of VAT. The facts do not show that the instruction was given jointly on behalf of Ms Gibson and the defendant. The defendant may well have benefited from the work done by the costs lawyers; if he did, that is his good fortune, but it does not mean that he has any obligation in law to share the bill.

Limitation

24. This issue was bedevilled by the reference to section 1 of the Civil Liability (Contribution) Act 1978. A claim for contribution under that section is subject to the limitation period set out in section 10(1) of the Limitation Act 1980, namely two years from the date on which the right to contribution accrued. The question addressed at length by the parties before trial was: what is that date? However, neither section 1 of the 1978 Act nor section 10 of the 1980 Act has anything to do with the case. The limitation problem is illusory, as counsel accepted at trial.

25. Section 10 of the Limitation Act 1980 provides:

> "(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.
>
> (2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.
>
> (3) If the person in question is held liable in respect of that damage—
>
> (a) by a judgment given in any civil proceedings; or
>
> (b) by an award made on any arbitration;
>
> the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).

> For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.
>
> (4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.
>
> (5) An action to recover contribution shall be one to which sections 28, 32 and 35 of this Act apply, but otherwise Parts II and III of this Act (except sections 34, 37 and 38) shall not apply for the purposes of this section."

Accordingly, section 10 applies only to claims under section 1 of the 1978 Act. It does not apply to common law or equitable claims for contribution.

26. If the claim were under section 1 of the 1978 Act, the relevant question would be whether the claim was within section 10(3)(a) or section 10(4). The two provisions are mutually exclusive: see the words "in any case not within subsection (3) above" in subsection (4). The defendant's case as pleaded and maintained until trial was that the applicable provision was subsection (3)(a), because Ms Gibson and the defendant were held liable for the costs by a county court judgment; and that the claim was statute-barred because the judgment was given more than two years before the commencement of these proceedings. The claimant's response was that the applicable provision was subsection (4), because the order of the county court did not fix the amount of the liability, which was only determined by an agreement between the parties; and that, as that agreement was made less than two years before the commencement of these proceedings, the claim for contribution was not statute-barred. If the 1978 Act were relevant, I should have considered that the claimant's argument was correct. One might think that the liability must be one held by a judgment under subsection (3), because it arose under a costs order: although the amount was subsequently agreed, not determined by the court upon an assessment, the liability was the result of judicial holding. However, authority is against this conclusion. In *Aer Lingus plc v Gildacroft Limited and another* [2006] EWCA Civ 4, the Court of Appeal (Rix LJ, with whose judgment Moore-Bick LJ and Sir Anthony Clarke MR agreed) held that a judgment for damages to be assessed does not start time running under section 10 and that the relevant date is the date when the quantum of damages is determined. The same position ought, I think, to apply in respect of an order for payment of costs in an amount to be assessed if not agreed. (No submissions were advanced in the skeleton arguments as to any possible relevance of the order for payment on account of costs. I doubt whether that order would have any bearing on the matter, but as the question is doubly irrelevant to my decision I need not consider it.)

27. None of this is to the point, however. The claim for contribution in this case lies at common law and is not subject to the limitation period in section 10 of the 1980 Act.

28. As to the period that does apply, *Goff & Jones: The Law of Unjust Enrichment* observes at para 33-02: "The law of limitation affecting claims in unjust enrichment is unfortunately in a poor state." Happily, such confusion as might exist does not affect the present case. The position is clear. The same text explains (I insert the references):

> "33-07 [I]n *Re Diplock* [1948] Ch 465, the Court of Appeal held that actions for money had and received fell within s.2(1)(a) of the 1939 Act (now s.5 of the Limitation Act 1980), which states that 'actions founded on simple contract' are barred after six years. Lord Greene MR was prepared (at 514) to assume that these words:
>
> > '… must be taken to cover actions for money had and received, formerly actions on the case …. The assumption must, we think, be made, though the words used cannot be regarded as felicitous.'
>
> Again, in *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890 at 942-943 Hobhouse J held that the words 'action founded on simple contract', within the Limitation Act 1980 s.5, 'are sufficiently broad to cover an action for money had and received'. In reaching this conclusion the ambiguity of the statutory provision enabled him to look to Hansard for guidance as to its meaning (*Pepper v Hart* [1993] AC 593). In the debate on the Limitation Act 1939, the precursor of the 1980 Act, the Solicitor-General stated that the statute was intended to implement the recommendations of the Fifth Interim Report of the Law Revision Committee and, in particular, the recommendation 'that the period for all actions founded in tort or simple contract (including quasicontract) … should be six years'.
>
> 33-08 It seems, therefore, that common law claims in unjust enrichment are generally barred after six years, unless a different period is laid down by the Limitation Act 1980 or another statute—a conclusion which more recent authorities have reaffirmed: *Investment Trust Companies (In liq.) v HMRC* [2015] EWCA Civ 82; [2015] STC 1280 at [23]; *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc* [2015] UKSC 38; [2015] 1 WLR 2961 at [25], followed in *High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah, His Exalted Highness the 8th Nizam of Hyderabad* [2016] EWHC 1465 (Ch) at [135]-[137]."

29. As no special statutory period applies to a common law claim for contribution, the limitation period applicable to the present claim is six years. Time runs from the date of the payment in respect of which a contribution is sought.

The claimant's right to sue

30. In its particulars of claim, the claimant asserts alternative bases of its right to bring these proceedings: first, an express or implied term of the Policy that it could bring such a claim; second, its right as insurer to be subrogated to Ms Gibson's claim.

The Policy

31. Construction of the Policy is governed by clear and well-established principles. See, in particular, *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215, *per* Lord Bingham of Cornhill at [12]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173; *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645, *per* Carr LJ at [17]-[19]; *Financial Conduct Authority v Arch Insurance (UK) Limited* [2020] EWHC 2448 (Comm) at [61]-[79]. I see no purpose in reciting in this judgment the familiar principles established by these cases.

32. The following provisions of the Policy may be noted:

> "*Policy Cover*
>
> 1. The Insurer will pay your opponent's legal costs if:
>
> a) a court orders you to pay them following a judgment made against you; …
>
> 2. The Insurer will pay your solicitor's reasonable disbursements other than barrister's fees, reasonably, proportionately and properly incurred by your solicitor on the Standard Basis:
>
> a) following a judgment made against you by a court where such disbursements have been incurred directly in relation to the action or part thereof for which judgment has been given against you; …
>
> *"Policy Conditions*
>
> 1. Your Responsibilities
>
> You must:
>
> …
>
> f) take reasonable steps to recover any costs that the Insurer pays and pay to the Insurer all costs that are recovered should these be paid to you
>
> …

> j) allow the Insurer at any time to take over and conduct in your name the claim, proceedings or investigation
>
> …"
>
> "4. Settlement
>
> a) We have the right to settle any claim by paying the reasonable value of your claim.
>
> b) You must not negotiate, settle the claim or agree to pay any costs incurred without our written agreement.
>
> …"
>
> "7. Dual Insurance
>
> The Insurer will not pay any claim covered by another policy or any claim that would have been covered by another policy if this policy did not exist. If there is another policy issued by a different insurer that provides cover for your claim, the amount that is insured under that policy as specified in the schedule must have been paid and the limit of indemnity exhausted before your cover with us can be called upon to make any payment. …"

33. A definitions section gave the meaning of certain words appearing in the Policy. The "Insurer" was a named Lloyd's underwriter. "We/Us/Our" was the claimant, "who is authorised under a binding authority agreement to administer the insurance on behalf of the Insurer". "You/Your" was "The person who has taken out this policy"; for the purposes of this trial, that is assumed to be Ms Gibson alone. "Claim" was "Your claim for compensation or other remedy against your opponent or such a claim by them against you." "Opponent" was "The party or parties against whom you are claiming compensation or other remedy or the party or parties claiming compensation or other remedy against you." "Opponent's Legal Costs" was "The legal costs, disbursements and barrister's fees (and their insurance premium if recoverable from you) of your opponent that you are liable to pay."

34. The Policy Schedule was expressed to be subject to the terms of the Policy itself. It records the Policy Start Date as 29 January 2015 and the date of the Conditional Fee Agreement as 22 January 2015. The "Limit of Indemnity" was stated to be £100,000. It is addressed to "YOU", which is shown as Ms Gibson.

Express or implied terms

35. Mr Newington-Bridges relied on conditions 1(f) and 1(j) of the Policy. I cannot see that condition 1(j) assists. In my judgment it relates to the conduct of the proceedings for which the Policy was provided, namely those between Ms Gibson and the defendant and Mr Francis. The present case constitutes different proceedings. Mr Newington-Bridges argued that in condition 1(j) "proceedings" must be different from

and potentially broader than "claim". However, this does not mean that it is properly construed as relating or extending to different though related proceedings. In my view, the words "claim, proceedings or investigation" are intended to show that the insurer's control is not limited to the substance of the dispute (the claim for damages and the cross-claim for arrears of rent) but to the procedural conduct of the case and the necessary evidential and legal investigations.

36. I am also of the view that condition 1(f) is not in point, for two reasons.

    1) As a matter of general construction, condition 1(f) does not concern the present situation. The construction advanced by Mr Newington-Bridges would mean that, where the insurer paid costs to the opponent (Mr Francis), Ms Gibson was under an obligation to take reasonable steps to recover those costs. That makes little sense; it is not, anyway, the present situation, which concerns not an attempt to recover costs but a claim for a contribution in respect of paid (and irrecoverable) costs. I agree with Mr Parsons that the situation to which condition 1(f) is directed is where the insurer has incurred costs in the course of the proceedings—for example, upon an application or interim hearing. The provision obliged Ms Gibson to seek recovery of those costs from the opponent.

    2) Even if that construction were not right, condition 1(f) would not assist the claimant. Even if one assumes that the obligation it imposed was capable of requiring Ms Gibson to allow the claimant to bring proceedings in her name for the recovery of a contribution to the costs paid by the claimant, it remains the case that neither the statements of case nor the statement of agreed facts says anything about any conduct on the part of Ms Gibson pertaining to condition 1(f) or the present claim. There is simply a claim by the claimant.

37. Reliance on implied terms takes the matter no further. If the claimant has a right of subrogation, the search for implied terms is redundant. If there is no such right, the implication of any relevant term would be impossible. I might add that, although Mr Newington-Bridges argued for an implied term, the particulars of claim do not aver the existence of any such term.

Subrogation

38. The principal argument on this point came down to the question whether the Policy was a contract of indemnity insurance or of contingency insurance. This distinction and its consequences are explained succinctly by Mr MacDonald Eggers QC in *Chitty on Contracts*:

> "42-001 Definition: A contract of insurance is one whereby one party (the insurer) undertakes for a consideration to pay money or provide a corresponding benefit to or for the benefit of the other party (the assured) upon the happening of an event which is uncertain, either as to whether it has or will occur at all, or as to the time of its occurrence, where the object of the assured is to provide against loss or to compensate for prejudice caused by the event, or to make provision for some identified contingency, such as for the assured's old age (where the event

> is the reaching of a certain age by the assured) or for the benefit of others upon his death (where the event is the death of the assured). …"
>
> "42-003 Indemnity insurance: Most contracts of insurance are contracts of indemnity, whereby the insurer agrees to compensate the assured for the loss that the latter may sustain through the happening of the event upon which the insurer's liability may arise, but this is not necessarily so. If the object of the contract is indemnification (that is, the insurer's obligation does not arise unless and until the assured has sustained a loss), the contract remains one of indemnity even if it quantifies in advance the value of the potential loss, in which case the insurance is called "valued". The agreed sum is deemed to be an indemnity even if in the particular circumstances it does not represent the true loss, and the insurer can avoid payment on the grounds that the assured is seeking to recover more than an indemnity only if the discrepancy is so great as to make the contract a wager, or unless the assured knew of such discrepancy but failed to disclose it to the insurer or misrepresented the true position to the insurer. The loss which can be indemnified under such an insurance contract may be physical damage to property, financial loss or a legal liability. …"
>
> "42-004 Contingency insurance: Contracts such as life insurance and certain accident insurances providing for the payment of a specified sum upon the happening of an event or accident are not contracts of indemnity; they are often described as 'contingency' policies; they do not possess the attributes of contracts of indemnity. The insurer's liability to provide the specified benefit to the assured is generally not dependent on the assured suffering a loss which is the equivalent in value of the specified benefit. Accordingly, the doctrine of indemnity, and related doctrines, such as subrogation, salvage and contribution, will not apply to contingency policies."
>
> "42-113 Rights of insurer: If the contract of insurance is not one of indemnity, then in the absence of a right to rescind the contract or of express contractual rights the insurer has no right to recoup from the assured or other persons any of the money paid under the contract: *Simpson v Thompson* (1877) 3 App. Cas. 279, 284; cf. *Edwards v Motor Union* [1922] 2 KB 249, 252. On the other hand, if the insurance cover is intended to indemnify the assured, the insurer may be entitled, apart from express contractual provisions, to exercise three distinct rights. These rights are salvage, subrogation, and contribution."

39. Counsel did not refer me to any authority on the legal nature of ATE insurance policies. However, I regard it as clear that the Policy was a policy of indemnity

insurance and that the claimant is entitled to be subrogated to Ms Gibson's rights to a contribution.

40. As this conclusion was strongly contested by Mr Parsons in his written and oral submissions, I shall briefly consider his arguments. They came to this:

1) The court should be careful not to find subrogation rights on the basis that this appeared to make good business sense for the claimant or merely because of the use of certain words such as "indemnity". The words of the Policy had to be objectively construed and its legal consequences must depend on its substance rather than on labels or formulae. I agree with this.

2) The rationale of giving subrogation rights to an indemnity insurer is twofold: first, "that the insured would otherwise be able to recover more than a full indemnity by accumulating recoveries from the insurer and the defendant"; second, "that the defendant would otherwise escape the burden of paying the insured in the event that the insured forbore from suing him, and thereby take the benefit of insurance for which he had not paid": see *Goff & Jones: The Law of Unjust Enrichment*, para 21-15. Again, I see no reason to dissent from this statement.

3) Those rationales have no application in the present case.

4) Specifically, there is no basis for subrogation for the following reasons, which were set out in paragraphs 44, 46 and 47 of Mr Parsons' skeleton argument and maintained at trial:

    a) The Policy did not provide that Ms Gibson would receive anything from the claimant in the events that occurred. On the contrary, it provided that the claimant would make a payment to Mr Francis.

    b) Therefore the Policy was not a contract of indemnity. "'Indemnity' in this context means an insured who might recover more than a full indemnity by accumulating recoveries from the insurer and the defendant. Indeed, Ms Gibson was not able to recover anything from Mr Francis or the claimant. The same point applies with even more force to the defendant."

    c) Further, in fact Ms Gibson has received nothing. "There is no risk of Ms Gibson (or the defendant) escaping any burden of paying the claimant, or accounting for sums received to the claimant. This is for the simple reason that neither Ms Gibson nor the defendant have (sic) received anything."

    d) There neither has been nor is a risk of double recovery. "Indeed, there has not even been 'single recovery', because Ms Gibson retained nothing under the Policy."

    e) "It follows that there is nothing in Ms Gibson's hands that must be disgorged to prevent her from unjustly recovering from both an insurer and a third party." She has not received any sum in compensation

under the Policy. The claimant has done what it contracted to do, namely by paying Mr Francis his costs.

41. With great respect to Mr Parsons, whose submissions showed much learning and more ingenuity, I regard his arguments on this point as evidencing a grasp of the wrong end of the stick. The correct analysis seems to me to be straightforward, as follows:

41.1 The effect of the Order and of the subsequent agreement as to Mr Francis's costs was to impose on Ms Gibson and the defendant a joint and several liability to pay to Mr Francis £40,000 for his costs.

41.2 Clause 1(a) of the Policy insured Ms Gibson against liability to pay Mr Francis's costs of the proceedings. This was an indemnity. In his oral submissions, Mr Parsons described this as an agreement to meet Mr Francis's losses. That is not correct. A contract for insurance of a third party's losses is liable to fail for lack of an insurable interest on the part of the insured. The Policy was one of insurance in respect of loss to be sustained by Ms Gibson, namely liability to Mr Francis for his costs.

41.3 The claimant performed its obligation to indemnify Ms Gibson by making payment to Mr Francis. But that payment was not some windfall to Mr Francis. It was a discharge of Ms Gibson's liability; and *that* was the relevant benefit for the purpose of the Policy. The payment counts as a payment from her. The fact that it was provided by an insurer is by the by: it is, in the time-honoured expression, *res inter alios acta.*

41.4 Once this is understood, it can be seen that both of the rationales mentioned in *Goff & Jones* have a straightforward application.

41.4.1 The first rationale (against accumulating recoveries) applies because of the rule that one joint debtor who has discharged the entire debt has a common law claim for contribution in equal shares from the other joint debtors. Ms Gibson has paid the entire £40,000. She is therefore entitled to recover £20,000 from the defendant. As she made her payment by means of insurance, to permit her to recover and keep £20,000 from the defendant would permit her to accumulate recoveries (that is, both the discharge of her liability and a 50% contribution to the extent of that liability).

41.4.2 The second rationale (escaping the burden and taking the benefit of an insurance for which one has not paid) applies because (a) one is concerned with the enrichment of the defendant not that of Ms Gibson and (b) this entire trial proceeds on the footing that Ms Gibson had insurance but the defendant did not.

41.5 In summary: Ms Gibson discharged the entire costs liability and is therefore entitled to a contribution of one half from the defendant; and, because she discharged the costs liability by means of an indemnity from the claimant under the Policy, the claimant is entitled to be subrogated to her right to claim an indemnity.

Parties

42. There is one technical matter to be mentioned. The claim has been brought in the name of ARAG plc, not in that of Ms Gibson. That is irregular, because there is no admission or evidence that Ms Gibson has assigned her cause of action to the claimant. The matter is dealt with as follows in *MacGillivray on Insurance Law* (14th edition) (I insert the references in the footnotes):

> "24-003 The cause of action for damages remains in the insured, and the insurer subrogated to the insured's rights requires the insured to bring the action: *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] AC 643 at 663; *Central Insurance Co Ltd v Seacalf Shipping Corp* [1983] 2 Lloyd's Rep. 25 at 30; *MH Smith (Plant Hire) Ltd v DL Mainwaring* [1986] 2 Lloyd's Rep. 244 at 246, and see the cases cited in fn.25 to para.24-012, above. It remains the insured's action: *Wilson v Raffalovich* (1881) 7 QBD 553 at 558; *MH Smith (Plant Hire) Ltd v DL Mainwaring* [1986] 2 Lloyd's Rep. 244. By contrast, if the insured has made an express assignment of his rights to the insurer, the cause of action has vested in the insurer who can exercise in his own name the rights originally belonging to the insured: *King v Victoria Insurance Co* [1896] AC 250; *Cia Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101."

(Cf. also *Lord Napier and Ettrick v Hunter and others* [1993] AC 713 at 732.)

43. Mr Parsons told me that this irregularity had been noted by the defendant's lawyers but that they had decided to take no point on it. That seems to me a very sensible approach. Nonetheless, it seems to me that it might be preferable if the position were regularised before judgment were entered.

Conclusion

44. For the reasons set out above, Ms Gibson is entitled to a contribution from the defendant of one-half of the costs she paid to Mr Francis. The claimant as her insurer is entitled to bring that claim by subrogation. Subject to addressing the point raised in paragraphs 42 and 43 above, there will be judgment for £20,000.