Neutral Citation Number: [2023] EWCA Civ 418

Case No: CA-2022-001415

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mr Justice Eyre
[2022] EWHC 956 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2023

Before:

LORD JUSTICE COULSON
LORD JUSTICE BAKER
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

FM Conway Limited	**Appellant**
- and -	
(1) The Rugby Football Union	**Respondents**
(2) Royal & Sun Alliance Insurance PLC	
(3) Clark Smith Partnership Limited	

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- -

Karim Ghaly KC, Alexandra Bodnar and Ruth Keating (instructed by **Clyde & Co. LLP**) for the **Appellant**
Paul Reed KC and Simon Kerry (instructed by **Plexus Law**) for the **First and Second Respondents**
Michael Wheater (instructed by **Keoghs**) for the **Third Respondent**

Hearing Dates: 8 & 9 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON :

1. Introduction

1. Co-insurance in the construction industry is common. But it has historically given rise to some potentially complex issues. This appeal arises out of arguments about the nature, scope and effect of just such a co-insurance policy and reveals at its heart a potential tension. On the one hand, the appellant contractor ("Conway") is seeking to rely on the co-insurance policy to avoid liability for what is alleged to be its own defective work, which was a type of cover which the first respondent employer ("the RFU") was not obliged to (and did not) procure pursuant to its building contract with Conway. On the other hand, there can be no argument that the policy covered the loss that eventuated, because if it had not, the second respondent insurer ("RSA") would not have paid out to the RFU under the policy and would not now be behind the subrogated claim against Conway. So if Conway were a co-insured under that policy, it might seem odd that their cover was different to that of the RFU. Happily, as we shall see, the law provides a complete answer to this conundrum.

2. The first respondent, the Rugby Football Union ("RFU") engaged the third respondent, Clark Smith Partnership Limited ("CSP") to design ductwork to accommodate high voltage power cables being installed as part of a major refurbishment of Twickenham Stadium before the 2015 Rugby World Cup. The RFU engaged Conway to install that ductwork. The relevant works package was A07.1. The RFU allege that there were defects in the design and installation of the ductwork which caused damage to the cables when they were pulled through.

3. The RFU claim that they suffered loss in the total sum of £4,440,909.45, made up of £3,334,405.26 ("relevant loss") being the cost of replacing the damaged cables, and £1,106,504.19 as the cost of rectifying the ductwork itself. Pursuant to the terms of the relevant insurance policy ("the Policy"), the second respondent, the RSA, indemnified the RFU in respect of the replacement costs of £3,334,405.26.

4. It is agreed that Conway were a co-insured under the Policy. They say that they gave the RFU wide authority to enter into the Policy and that it was the intention of both the RFU and Conway that the Policy be as inclusive as possible. As a consequence, it is Conway's case that: a) the RFU cannot claim against it in respect of the losses that were covered by the Policy; and b) RSA could not make a subrogated claim in respect of the sum of £3,334,405.26. Those were the principal issues which came before Eyre J ("the judge"), who decided that, for a number of detailed reasons, Conway could not rely on the Policy as a defence to the claim. His judgment is at [2022] EWHC 956 (TCC). On 13 September 2022, I gave permission to appeal against the order arising out of that judgment.

5. This judgment is structured in the following way. Having set out the relevant documents and events, I outline the proceedings between the parties, the preliminary issues that were ordered, and the relevant parts of the judge's judgment. I then address the case law and endeavour to summarise the applicable principles in order to see whether, at least at first blush, the judge correctly applied those principles. I then address the five grounds of appeal one by one, together with the point raised by the Respondents' Notices. At the outset, I wish to express my gratitude to all counsel for the excellence of their written and oral submissions.

2. The Letter of Intent

6. It appears that, at least in relation to the proposed ductwork at the Twickenham Stadium, there was a certain amount of urgency. Conway tendered for the work on 31 May 2012. There were then a series of meetings, discussions and correspondence relating to the proposed works. On 19 June 2012, the RFU sent Conway a Letter of Intent, saying it was their intention to accept the Conway tender and enter into a contract with Conway for the carrying out of the works, and authorising and instructing them to proceed with certain specified activities "to enable the intended start date on site and completion date to be achieved".

7. Relevant parts of the Letter of Intent included the following:

> "3. It is intended that the form of the Contract will be based upon the document produced by Forsters LLP incorporating the JCT Standard Building Contract Without Quantities 2011 (DOC ID 3202342_6)…
>
> 5. Although the Contract has not yet been entered into, all the terms and conditions of the Contract will apply to any work carried out by you pursuant to the instructions contained in this letter.
>
> 6. We have appointed RLF 3PM LLP to act as the contract administrator ("the Contract Administrator") for the purposes of the Works and to act on our behalf as stated in the Contract. You must liaise with the Contract Administrator and comply with all instructions issued by him in relation to the Works as if the Contract had been entered into…
>
> 9. We will pay you in accordance with the terms of the proposed Contract for any activities properly undertaken by you pursuant to the instruction contained in this letter, provided that our total liability under this letter shall not exceed FIVE HUNDRED THOUSAND POUNDS (£500,000.00) plus Value Added Tax. For the avoidance of doubt, we are not bound to enter into any further contract with you and our commitment at this stage is strictly limited as set out in this letter. You must obtain our further authorisation and instruction before committing to any expenditure above the limit stated in this paragraph.
>
> 10. Within 7 days of the date of this letter and as a pre-condition of entry to the site of the Works in any event you must provide us with certificates of verification of insurance cover confirming that all insurances which you are (or will be) required to maintain under the terms of the proposed Contract are in place upon the required terms and at the required levels. In particular (to the extent that they have not been provided to us to date) we require evidence of your Contractor's All Risks, Professional Indemnity, Employer's Liability, Public Liability and (if applicable) JCT clause 6.5.1 (or similar) insurances…
>
> 21. This letter supersedes any previous instructions, correspondence or other discussions between us in relation to the Works and represents the entire agreement between us in relation to its subject-matter."

It should be noted that the reference at clause 3 to the building contract was a reference to an existing and available set of documents (with a unique document reference number), not simply a reference to a standard form.

8. In total, the Letter of Intent ran to 4 pages and 21 paragraphs. It appears that Conway started on site almost immediately after receipt.

3. The Discussions

9. Although the Policy and the building contract were in writing, the background to them, and the nature and scope of the insurance cover to be provided, was the subject of a factual dispute between the parties. The judge therefore heard oral evidence on this, and his judgment is the best place to find the relevant material. I summarise the relevant passages of the judgment in the paragraphs below.

10. I noted during the appeal hearing that there was a dispute in the skeleton arguments about whether these passages were findings of fact or, at least in some instances, merely summaries of the evidence. I agree with Mr Ghaly KC that [91] – [125] of the judgment contain findings of fact made by the judge, and that is how they should be treated. No party seeks to go behind those findings of fact and permission to appeal was granted on that basis.

11. The section of the judgment headed "The Basis on which the RFU effected the Policy" runs from [91] to [125]. At [91]-[92], the judge identified the issue to which this material went, namely whether there was an agreement between the RFU and Conway that the RFU would obtain comprehensive insurance for Conway (to include the cost of rectifying damage caused by Conway's own defective work) or not.

12. At [93], the judge introduced Mr Higgs, who worked for RLF3PM LLP, who were providing project management services and who had been involved in the RFU's earlier redevelopment of the South Stand at Twickenham. The judge noted that Mr Higgs said that that work had involved disputes between different contractors and their different insurers, and that Mr Higgs was concerned to avoid similar problems this time round ([93]-[95]). At [95] the judge noted that Mr Higgs "believed that a comprehensive project insurance policy covering all the contractors would be the solution to this problem". He cited Mr Higgs' evidence that such a policy "would prevent claims arising between contractors and their separate insurance companies". At [96] the judge said:

> "96. Mr Higgs pressed for there to be such an insurance policy for the Project. He believed that it had been agreed that insurance in such terms would be obtained. He said that Richard Knight, the RFU's stadium director, had told him that comprehensive ground insurance was being obtained. Mr Knight had expressed the hope that this would lead to a reduction in the tender prices because the tenderers would not need to include the cost of insurance in their tenders."

13. The judge then addressed a number of email exchanges and minutes of meetings which had been relied on in support of Mr Higgs' recollection. Mr Ghaly placed considerable reliance on [100] of the judgment, in which the judge said:

> "100. In early July 2012 Mr Higgs began pressing for the project insurance to be put in place and a number of email exchanges followed between Mr Higgs and Marsh with Mr Knight, Mr Pettifer, and others being copied in. At one point reference was made to Delay Start Up insurance. This prompted Mr Higgs to explain in somewhat exasperated tones that the issue was nothing to do with Delay Start Up insurance. He asked that the insurance be put in place "immediately" because "otherwise I am going to have to ask [Conway] to provide their own insurance". He said that those involved were "getting bogged down in detail and missing what is relevant" adding "the DSU can follow, we are missing the objective of having project insurance in place at the outset (save for the pitch)". On 4th July 2012 there was a start up meeting chaired by Mr Higgs and attended by representatives of Conway, the RFU, and others. Insurance was addressed at point 2.4 of the minutes which said:
>
> '2.4.1 The intention was to establish stadium work project insurance, although this would not cover plant, equipment and welfare, but this hasn't been achieved. [Conway] were asked to ensure they provide cover for all works…
>
> 2.4.3 When the project insurance is established, [Conway] will be notified and any claims will need to be issued directly to Marsh. Claim Forms will be provided when available.'"

14. Mr Higgs was cross-examined on this material. The judge said at [101]:

> "101. In his answers to cross-examination Mr Higgs was clear that he believed that the insurance to be obtained by the RFU was going to be more extensive than that envisaged in the standard terms of the JCT Contract."

15. At [102], the judge introduced Brian Morris, Conway's Director of Civil Engineering, who said that he had been told by Mr Higgs that there would be project insurance to cover all the contractors. Mr Morris confirmed the picture which appeared from the minutes of the start-up meeting, that it had been agreed that Conway should provide its own insurance "for their works" until the RFU put project insurance in place. The judge reminded himself that, in its Defence, Conway had said that it had not included for the cost of insurance in its tender and had not obtained insurance cover in respect of loss or damage flowing from its works, something which, at [109], he described as "a factor supporting Conway's interpretation of the parties' dealings".

16. The judge then dealt at [103]–[104] with the evidence (or lack of it) from the RFU about the discussions, and a question of whether adverse inferences should be drawn from the fact that the RFU called no evidence relating to the meetings between the RFU and Conway in the period before and immediately after the policy was taken out. The judge declined to draw such an inference ([105]). However, he went on to make the following findings at [106]:

> "106. Mr Higgs and Mr Morris were patently honest and careful witnesses. It was apparent that at the time when they were giving evidence before me they both believed that the intention in 2012 had been for comprehensive insurance cover creating a fund recourse to which would be "the sole avenue for making good the relevant loss or damage" adopting the *Gard Marine* terms. I bear in mind the need for considerable caution in placing weight on the recollection of witnesses. Here Mr Higgs and Mr Morris were casting their minds back to 2012 in circumstances where they would have dealt with a considerable number of matters in the intervening period and where the question of the arrangements between Conway and the RFU will have been by no means at the forefront of their minds in that period. I find, however, that on the balance of probabilities the understanding and belief which those gentlemen expressed now was a reflection of the belief they had in 2012. In that regard the terms of Mr Higgs's emails in July 2012 are significant and are consistent with what he says now was his understanding then."

17. Therefore, at this stage in the chronology, the judge found that there was a general understanding between the project manager appointed by the RFU, and Mr Morris of Conway, that the insurance policy which the RFU would take out would be comprehensive: that it would "cover all the contractors".

18. Importantly, however, the judge went on to consider the next stages of the negotiations to see whether this mutual understanding between Mr Higgs and Mr Morris was subsequently reflected, either in the terms of the agreement between the RFU and Conway (i.e. the building contract), or the basis on which the Policy was taken out. He concluded that neither the Policy nor the building contract reflected the earlier understanding of the two men. I set out those findings in detail at paragraphs 35-36 below.

4. The Policy

19. The Policy was written on 17 July 2012 and back-dated to 16 July, the day Conway began work on site pursuant to the Letter of Intent, referred to in Section 2 above. There were two parts of the Policy, the Risk Details and the Policy Terms.

20. The Risk Details identified 'the Insured' as:

> "(a) Rugby Football Union as the Principal and/or associated and/or subsidiary companies
>
> (b) The Contractor for each Project
>
> (c) All other contractors and/or sub-contractors of any tier and others engaged to provide goods or services in connection with the Project insured hereunder…
>
> Each for their respective rights and interests."

There was some debate as to whether Conway fell within this definition at (b) or (c). However, it is plain that they fell into one or the other of those categories and were therefore capable of identification as an Insured under the Policy.

21. 'The Project' referred to the entirety of the works to Twickenham, which included, but was far from limited to, the work in respect of the ductwork. 'Interest Insured' included the Contract Works which was expressly said to cover the "Permanent works, materials…, temporary works, equipment, machinery, supplies…" That definition would doubtless have encompassed the cables which were damaged, and which led to the RFU's claim against RSA.

22. Under the heading 'Information', there were references to Tender Package A07.1, which was the installation of the ductwork. The other information expressly set out in relation to Tender Package A07.1 said, amongst other things:

> "2 Clause 6.5.1 may be required,
>
> 3 Option C with 15% professional fees"

Both of these were references to the JCT Standard Form of Building Contract, which had been identified in the Letter of Intent (see paragraph 7 above). Clause 6.5.1 was concerned with Contractor's non-negligence nsurance. Option C under the JCT Form was "Insurance by the Employer of Existing Structures and Works in/or Extensions to them". This option required the Employer to take out and maintain a Joint Names Policy for All Risk Insurance. It is common ground that Option C did not expressly require the RFU to effect insurance on behalf of Conway pursuant to which Conway would be insured against the cost of rectifying damage caused by Conway's own defective work.

23. The Policy Terms were extensive. The only provision relevant to the appeal was Clause 1(f) of the General Memoranda which provided as follows:

> "(f) Insurers hereby agree to waive all rights of subrogation which they may have or acquire against any insured party except where the rights of subrogation or recourse are acquired in consequence of or otherwise a Vitiating Act in which circumstances Insurers may enforce such rights notwithstanding the continuing or former status of the vitiating party as an Insured."

5. The Building Contract

24. The building contract was dated 19 October 2012. As set out in the Letter of Intent, it incorporated the JCT Standard Form 2011. It is agreed that it was in materially identical form to the version that was expressly referred to in the Letter of Intent. For present purposes, all that matters are the insurance provisions. There were three options, Options A, B and C. As I have said, the relevant Option in this case was Option C, because A and B were concerned with New Works, whilst Option C concerned this situation, namely Works to Existing Structures.

25. Option C was described as follows:

> "**Existing structures and contents - Joint Names Policy for Specified Perils**

> C.1 The Employer shall take out and maintain a Joint Names Policy in respect of the existing structures (which from the Relevant Date shall include any Relevant Part to which clause 2-33 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to any of the Specified Perils up to and including the date of issue of the Practical Completion Certificate or last Section Completion Certificate, or (if earlier) the date of termination of the Contractor's employment (whether or not the validity of that termination is contested). The Contractor shall authorise the insurers to pay all monies from such insurance to the Employer.
>
> **The Works - Joint Names Policy for All Risks**
>
> C.2 The Employer shall take out end maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees) and (subject to clause 2-36) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Contractors employment (whether or not the validity of that termination is contested). The obligation to maintain the Joint Names Policy under this paragraph C.2 shall not apply in relation to any Section after the date of issue of the Section Completion Certificate for that Section."

6. The Subsequent Events

26. Conway carried out the installation of the ductwork as part of the A07.1 works. Practical completion of the relevant sections was certified between 12 November 2012 and 24 January 2013.

27. In February 2013, water and debris were noted in the ducts. Some further works were carried out but it appeared that water was still getting in. For various reasons, in January 2014, high voltage cables were pulled through the ductwork. Subsequently, tests showed damage to those cables. Eventually, by reason of the need to provide a reliable electrical system for Twickenham before the World Cup, it was decided to replace the existing cables by waterproof cables which were better able to withstand a waterlogged environment. The replacement work cost in excess of £3 million. The RFU made a claim under the Policy, and RSA paid out.

7. The Proceedings

28. On 1 March 2021, the RFU commenced these subrogated proceedings against CSP and Conway. They allege that the ductwork was negligently designed and/or installed. They claim £4.4 million odd by way of damages, of which £3.3 million had been paid by RSA to the RFU. Both CSP and Conway deny the allegations of negligence. There are contribution proceedings between Conway and CSP.

29. On 19 March 2021, Conway commenced separate Part 8 proceedings against the RFU and RSA. They sought declarations to the effect that Conway had the benefit of the

Policy on the same terms as the RFU; that the RFU could not claim against Conway under the Policy; and that RSA could not exercise subrogation rights against Conway because the loss and damage was covered under the terms of the Policy. The two sets of proceedings have been case-managed together.

8. The Judgment

30. Preliminary Issues were agreed and ordered to be tried. Those Preliminary Issues were:

> "1. Whether the insured losses said by the RFU and the RSA to be in the sum of £3,334,405.26 are irrecoverable because RSA cannot exercise subrogation rights and/or because on a proper interpretation of the project policy and/or the project policy and the JCT contract the RFU and/or the RSA are not entitled to claim the insured losses;
>
> 2 If the answer to question 1 is that the RFU cannot recover its insured losses from Conway, does this prevent CSP from claiming a contribution from Conway under the Civil Liability (Contribution) Act 1978 in respect of any liability CSP may have to the RFU in respect of the insured losses?"

31. The trial of the Preliminary Issues took three days, between 21 and 23 March 2022. The judge produced his lengthy judgment with commendable speed on 29 April 2022.

32. The judge dealt with the law from [52] to [88]. I do not set out that part of the judgment in detail because I shall attempt my own analysis of the applicable law in the next section of this judgment. However it is right to note that the judge had the relevant authorities relating to co-insurance very much in mind. He said at [64] that there were two ways of analysing the dealings between the parties: the more common one was by reference to the principles of principal and agent; the other was to treat the policy as constituting a standing offer by the insurer. At [65], addressing agency, the judge said:

> "65. **Applying the agency analysis it is necessary to consider whether and to what extent the party effecting the insurance had both authority to obtain cover for the other party and an intention to do so.** The contractor or sub-contractor only becomes a party to the insurance if the employer or contractor was authorised and intended to contract on its behalf and only to the extent of the cover which the employer or contractor was authorised and intending to obtain. The position is different if there is subsequently ratification by the contractor or sub-contractor but as I have already explained it is not open to Conway to contend that there was ratification in the circumstances of this case." (My emphasis)

33. The judge summarised the authorities at [74] in these terms:

> "74. What is important is that the authorities are clear that in order to determine whether the insurance cover which a policy effected by, in my example, the employer or contractor applies to the contractor or sub-contractor and if to what extent (with the latter point determining the extent to which they are co-insured) **it is necessary to look to the terms of the**

> **contract between those parties. It is those terms which provide the key to the existence and extent of the insurance cover**. Thus in the passage at [139] of *Gard Marine* which I have quoted above Lord Toulson identified "the critical question" as being the effect of the "contractual scheme" between the parties with this being "a matter of construction"." (My emphasis)

34. The judge reverted to the principal task he had to perform at [90] in these terms:

> "90. **The first is the basis on which the RFU effected the Policy on behalf of Conway. This will require an assessment of the RFU's intention at the time of its entry into the Policy and the extent of its authority from Conway.** That assessment will require a consideration of the evidence of the dealings leading up to the sending of the Letter of Intent and a conclusion as to the contractual arrangements between them. Next it will be necessary to determine in the light of that assessment the effect of the Policy and the extent of the cover which Conway enjoyed by reason of the Policy. Consideration of the operation of the waiver of subrogation clause in the light of those matters will follow. Those matters will then determine the questions of whether Conway is liable to the RFU…" (My emphasis)

35. As to the facts, I have already identified at paragraph 16 above that part of the judgment dealing with the shared understanding of Mr Higgs and Mr Morris. The judge then dealt in detail with the subsequent negotiations, in respect of both the Policy and the building contract. Particularly relevant passages include the following:

> "107. However, the question of whether the understanding which Mr Higgs and Mr Morris had accurately reflected either the terms of the agreement between the RFU and Conway and or the basis on which the Policy was taken out is a different matter. I have to consider whether the understanding which Mr Higgs had of the effect of the Policy was correct. In that regard I remind myself that the terms of the contract between the RFU and Conway are the key to ascertaining the effect of the insurance which was obtained pursuant to that contract. In addressing the terms of the contract between the parties the following are relevant.
>
> 108. The parties were substantial entities dealing at arm's length. The Project was a major exercise which involved the RFU in engaging several sub-contractors and in relation to which it was acting through a number of professionals including solicitors and insurance brokers. RLF3PM were not the only professionals acting for the RFU and it is of note that Mr Higgs accepted that responsibility for the insurance arrangements on behalf of the RFU was in the hands of Jon Pettifer of Mace. For its part Conway was a substantial civil engineering business with an in-house legal department and an internal insurance manager. This is not a case where the contractually effective dealings were conducted solely, or indeed principally, through Mr Higgs and Mr Morris. Rather the terms were agreed between teams of a number of professionals on each side…
>
> 110. The Letter of Intent stated expressly that it was envisaged that the contract which would be entered between the RFU and Conway would be in the terms of the JCT contract and that if such a contract was entered it would

> apply retrospectively and supersede the Letter of Intent. The Contract when entered was in the form of the JCT contract. I have already said that the terms of the Contract, the Letter of Intent, and the Policy standing alone are consistent with the RFU's position and not with that of Conway. If the parties had been contracting on the footing that recourse to the insurance would be the sole avenue for redress for damage of the kind which occurred then further amendments to the standard JCT contract could have been made so as to provide for that in clear and express terms. That was not done and, moreover, was not done even though the Contract was entered 3 months after the Policy had been taken out. This is particularly significant given that the JCT contract sets out a detailed structure for allocating risks and responsibilities. Different options were available in respect of the insurance arrangements. The parties chose Option C but did so without any express modification or expansion of its effect…
>
> 122. It is significant that the Letter of Intent with its reference to the intention to adopt the JCT contract was sent after the RFU had accepted the recommendation to go down the OCIP route and while the RFU's agents were negotiating with the insurance brokers and seeking a suitable policy. This supports the view that all concerned were proceeding on the footing that when an insurance policy was obtained its effect would be compatible with the arrangements envisaged in the JCT contract. It is also evident that the decision to take out insurance for the Project as a whole was not a new development after the sending of the Letter of Intent nor one which in some way superseded or modified the arrangements envisaged in that letter…
>
> 124. It is important to keep in mind the nature of the loss under consideration here. The claim is for loss allegedly suffered by the RFU as a consequence of damage to the cabling caused by deficiencies on the part of Conway in respect of the ductwork. Was the RFU intending to take out insurance covering Conway in respect of the liability for such loss with the consequence that the RFU's recourse should be limited to a claim under the Policy?"

36. The judge set out his answer to that question at [125]-[126]:

> "125. I am satisfied that the agreement between the RFU and Conway did not provide that by taking out the Policy the RFU was creating a fund recourse to which would be the sole remedy for loss suffered by the RFU as a consequence of breach or other default by Conway. The terms of the Letter of Intent and the Contract make no reference to such an arrangement and are indicative of a very different arrangement. For me to find that the Policy was taken out on the basis alleged by Conway and with the intention and authority it now asserts there would need to be compelling evidence to counter the inferences from the natural reading of the Letter of Intent and the Contract. There is no such evidence. I am satisfied that the Policy was effected on the basis that it was providing the cover contemplated by Option C in the JCT contract. It was doing so in respect of the Project as a whole but it was not going beyond that. In particular it did not provide a common fund recourse to which was to be the RFU's sole redress for loss flowing from breaches by Conway or any other contractor. I am satisfied that the understanding which

> Mr Higgs had of the effect of the Policy did not accurately reflect the terms on which the RFU and Conway were dealing nor the basis on which the Policy was taken out.
>
> 126. It follows that the Letter of Intent, the Policy, and the Contract are to be read according to their terms. The Policy insured both the RFU and Conway but they were not insured to the same extent in respect of the same risk. In particular they were not co-insured in respect of the losses which the RFU is said to have suffered by reason of damage to the cables resulting from defects in the ductwork and for which the RFU has been indemnified by RSA."

37. Finally, the judge turned to deal with the effect of the waiver of subrogation clause set out at paragraph 23 above. The judge's conclusion on this issue did not follow precisely any of the parties' submissions to him. He said:

> "130. I reject Mr Ghaly's argument in this regard and conclude that the waiver of subrogation in Memorandum 1(f) only extends to matters in respect of which Conway is insured under the Policy. In the light of my finding that Conway is not co-insured with the RFU to the extent of the losses currently in issue that means this waiver of subrogation does not assist it in these proceedings. There is considerable force in the points made by Mr Reed and Mr Wheater but I reach the same conclusion by a different route which has regard to both the wording of the memorandum and the terms of the Contract between the RFU and Conway.
>
> 131. As between RSA and Conway Memorandum 1(f) is addressing rights which the former has against the latter as the latter's insurer. It is those rights which are rights of subrogation against Conway. Such a right can only arise to the extent that Conway is an insured party and in respect of matters where Conway is insured by RSA. If and to the extent that the RFU and Conway are co-insured of the same insurer in respect of the same loss to the same extent then a claim in respect of the insured loss against Conway would be a claim made by RSA as insurer against its insured and would be caught by the waiver of subrogation. Alternatively it would be a claim which could not be brought by the RFU and matters could not be improved by RSA exercising rights flowing from its indemnification of the RFU. However, if, as is the position here, the RFU and Conway are not co-insured in that way then the waiver does not operate to protect Conway. The waiver cannot operate to protect Conway against claims arising out of matters in respect of which it is not insured. The point can be put very shortly. If RSA were Conway's insurer in respect of these losses then the right being exercised would be one of subrogation against Conway. However, that is not the position and the rights which RSA is exercising against Conway are not rights of subrogation against Conway. Instead the right which RSA is exercising against Conway is the RFU's right to compensation for the loss caused to the RFU by Conway. RSA has acquired by virtue of its right of subrogation *against* the RFU the right to bring proceedings for that loss against Conway in the name of the RFU but the claim being made in that way is not a claim arising out of RSA's right of subrogation *against* Conway and so is unaffected by the waiver of such rights."

8. The Law

38. I turn to address the law. I take the relevant authorities as shortly as possible, and I do so in chronological order.

39. In *General Accident Fire and Life Assurance Corporation Limited & Anr v Midland Bank Limited* [1940] 2KB 388, Lord Greene MR drew a distinction between joint insurance policies and composite polices. A joint insurance policy could only exist in respect of joint interests. Where the co-insured had different interests, a policy which named more than one insured was a composite policy. The terms of the policy in that case insured the three co-insured "for their respective rights and interests" and was a composite policy. The distinction between joint and composite policies has been maintained in subsequent cases and was recently emphasised by Jing & Jiang in 'Restrictions on Insurer's Subrogation Rights in Co-Insurance' JIML 28 (2023) 3, 194-206.

40. In *Petrofina (UK) Ltd and Others v Magnaload Ltd & Anr* [1984] 1 QB 127, the two defendants were sub-contractors, as defined in the contractors' all risks insurance policy. It was held on the facts of that case that it was commercially convenient for all parties that a single policy would be taken out to cover all the contractors and sub-contractors working on the site and that, since the main contractor had taken out the insurance, the insurers had no right of subrogation against the co-insured sub-contractors. There was no underlying sub-contract between the main contractor and Magnaload but, on the facts of the case, that made no difference to the result. Furthermore, in the last paragraph of his judgment, Lloyd J (as he then was) expressly acknowledged that he could have found, in the alternative, that there was an implied contract between the claimants and the defendants to the effect that the claimants would not hold the defendants liable in the event of loss or damage to the works resulting from the defendant's negligence. The judge noted that there was much to be said for that argument but, having already found in favour of the defendants on the main ground, he need say no more about it. I think Mr Wheater was right to say that, in the light of the subsequent authorities, if this case was being decided today, it would probably be decided on the 'implied contract' basis.

41. In *National Oilwell (UK) Ltd v Davy Offshore Ltd,* [1993] 2 Lloyd's Rep 582, Colman J was dealing with a supplier who was covered by the term "other Assured" in the policy. As here, the issue was the extent of cover. The supplier, NOW, claimed that it was insured not only in respect of the items that were supplied prior to delivery, but also after they had been delivered. At page 596 (second column), the judge summarised the principles from the authorities as they then existed in the following terms:

> "The result of these authorities is, in my judgment, as follows:
> (1) Where at the time when the contract of insurance was made the principal assured or other contracting party had express or implied actual authority to enter into that contract so as to bind some other party as co-assured and intended so to bind that party, the latter may sue on the policy as the undisclosed principal and co-assured regardless of whether the policy described a class of co-assured of which he was or became a member.
> (2) Where at the time when the contract of insurance was made the principal assured or other contracting party had no actual authority to bind the other

> party to the contract of insurance, but the policy is expressed to insure not only the principal assured but also a class of others who are not identified in that policy, a party who at the time when the policy was effected could have been ascertained to qualify as a member of that class can ratify and sue on the policy as co-assured if at that time it was intended by the principal assured or other contracting party to create privity of contract with the insurers on behalf of that particular party.
> (3) Evidence as to whether in any particular case the principal assured or other contracting party did have the requisite intention may be provided by the terms of the policy itself, by the terms of any contract between the principal assured or other contracting party and the alleged co-assured or by any other admissible material showing what was subjectively intended by the principal assured."

The judge said at page 597 (first column) that the supplier, NOW, could establish privity of contract with the insurers by one of two routes: by establishing either that they were undisclosed or unnamed principals of Davy ("DOL", who had taken out the policy) or that they were entitled to and did ratify the policy. He went on to consider questions of authority and intention in detail.

42. Colman J said that "the most obvious source of authority is the agreement", that is to say the agreement between DOL and NOW. Clause 14.2 of that agreement imposed on DOL an obligation to effect insurance of 'the work'. In his words:

> "As a matter of construction, there must be a strong inference that DOL's *authority* to insure was co-extensive with its *obligation* to do so"

He went onto find that, in as much as the insurance clause referred to 'the work', it imposed an obligation on DOL to effect insurance on such of the work as comprised property, as distinct from services, but that once an item had been supplied it ceased to be 'work', and property insurance thereafter was not required. In this way, the judge found that the obligation to procure insurance was limited to covering items up to the time of delivery, but not beyond.

43. Thus far, Colman J focused his attention on the underlying contract between the parties. It is right to note that he went on to consider other evidence in his search for intention and authority. He did this at page 598 (second column) by identifying DOL's contractual obligation to insure, and then asking whether they were given authority from any other source to bind NOW to the policy to the (wider) extent contended for by NOW. He concluded that, not only was there nothing in the agreement itself which gave any wider authority, but "nor did anything pass between the parties in the course of the pre-contractual negotiations which could amount to the giving by NOW to DOL an authority to effect cover of the width now contended for".

44. As a separate exercise, Colman J considered whether NOW could ratify the contract provided that, at the time it was made, the principal assured or other contracting party had subjectively intended to contract on the claimant's behalf (see page 596). This part of the judgment was all *obiter*, given the judge's earlier findings. Perhaps unsurprisingly, his reference to "subjective intention" has subsequently been doubted: see for example, Leggatt J (as he then was) in *Magellan Spirit ApS v Vitol SA*

(Magellan Spirit) at [19]. Leggatt J also pointed out that the *obiter* proposition expressed by Colman J was not applicable to undisclosed principals, who cannot ratify a contract made without authority, even if the person who entered into the contract subjectively intended to act on the supposed principal's behalf: see *Keighley Maxsted & Co v Durant* [1901] AC 240 at 256.

45. In *Co-operative Retail Services Limited v Taylor Young Partnership Limited & Ors* [2002] UKHL 17; [2002] 1 WLR 1420 ("*CRS*"), the building owner issued proceedings against the architects and engineers following a fire. They in turn issued contribution proceedings against two sub-contractors, as persons liable in respect of the fire damage from whom the building owner was entitled to recover compensation. Those sub-contractors were co-insured with the building owner[1]. Both Judge Wilcox at first instance, and this court, held that, since the sub-contractors were not liable to compensate the building owner, the architects and engineers were not entitled to contribution. The House of Lords agreed. Lord Hope said:

> "48 The position therefore is that there is no liability to pay compensation on either side. The employer has no claim for compensation against the contractor. All he can do is insist that the contractor must proceed with due diligence to carry out the reinstatement work and must authorise the release to him of the insurance moneys. The contractor has no claim for compensation against the employer. All he can do is insist that the employer must use the insurance moneys for payment of the cost of carrying out the reinstatement work. It makes no difference whether the fire was caused by the negligence of the contractor or one of his sub-contractors or of the employer or of some third party for whose acts or omissions neither of the parties to the contract is responsible. The ordinary rules for the payment of compensation for negligence and for breach of contract have been eliminated."

46. Lord Hope considered how this elimination would be achieved. At [65] he said:

> "65 …I would prefer to say that the true basis of the rule is to be found in the contract between the parties. In *Hopewell Project Management Ltd v Ewbank Preece Ltd* [1998] 1 Lloyd's Rep 448, 458 Mr Recorder Jackson QC said that in his view it would be nonsensical if those parties who were jointly insured under a contractors' all risks policy could make claims against one another in respect of damage to the contract works, that such a result could not possibly have been intended by those parties and that had it been necessary for him to do so he would have held that there was an implied term to that effect"

47. In other words, the elimination was not achieved as a matter of law: it arose from an analysis of "the underlying contract between the parties". That approach was confirmed in *Tyco Fire & Integrated Solutions (UK) Limited v Rolls-Royce Motor Cars Limited* [2008] EWCA Civ 286; [2008] Lloyds's Rep 617, where this court

[1] Mr Ghaly pointed out that one of these sub-contractors, Hall, had entered into a collateral warranty with the employer and the court was prepared to say, on the particular facts of that case, that a term should be implied into the warranty to give effect to the fact that they were co-insured.

allowed Rolls-Royce's appeal against the judge's conclusion that clause 13.5 of the underlying contract meant that they could look only to insurers, and not to the contractor Tyco, for recovery of the loss and damage to existing structures and stock. Rix LJ referred back to *CRS*, and said that the true basis for the rule that co-insureds could not sue one another in respect of damages for which they were co-insured was to be found in the contract between the parties:

> "75. …It appears, however, that the following doctrines have at times been put forward to explain the impermissibility for an insurer to sue by way of subrogation in the name of one co-assured to recoup himself from another co-assured on the basis of the latter's negligence or default: the doctrine of circuity of action and the doctrine of an implied term in the insurance contract. It also appears that the doctrine of circuity of action is no longer favoured (see Brooke LJ at para 69 and Lord Hope at para 64), and that the doctrine of an implied term in the insurance contract has now been replaced by a doctrine of the true construction of the underlying contract for the provision of joint names insurance (Brooke LJ at para 73 and Lord Hope at para 65): and that this last doctrine may operate with the assistance of an implied term to the effect that co-insureds cannot sue one another in respect of damage in respect of which they are jointly insured (Lord Hope at para 65)…
>
> 77... Moreover, if the underlying contract envisages that one co-assured may be liable to another for negligence even within the sphere of the cover provided by the policy, I am inclined to think that there is nothing in the doctrine of subrogation to prevent the insurer suing in the name of the employer to recover the insurance proceeds which the insurer has paid in the absence of any express ouster of the right of subrogation, either generally or at least in cases where the joint names insurance is really a bundle of composite insurance policies which insure each insured for his respective interest. Most co-insurances are of such a composite kind: see the discussion in *McGillivray on Insurance Law*, 10th Edition, 2003, at paras 1-194 and at paras 22-99 to 22-102. It is unusual for an insurer to sue his own insured to recover insurance proceeds due under his own policy, but it must be recalled that he does so in the name of and under the right of another party, viz the employer. In similar or analogous fashion, an insurer may find that one co-insured's fault cannot be held against another co-insured so as to save the insurer from liability: see *Samuel & Co Ltd v Dumas* [1924] AC 431 at pages 444 to 446, *General Accident Fire and Life Insurance Corporation Ltd v Midland Bank Ltd* [1940] 2 KB 388 at page 405 and 406, and *State of the Netherlands v Youell* [1997] 2 Lloyd's Rep 440 at pages 447 and 448."

48. The leading case on this topic is now *Gard Marine Energy Limited v China National Chartering Co Limited & Anr* [2017] UKSC 35; [2017] 1WLR 1793. There were two distinct questions in play in that case. The first concerned the effect of co-insurance. The second was the question of how precisely, as between co-insured, liability was "eliminated": was it in some way excluded altogether, or did the liability exist and then become discharged? That second question mattered in that case because of the claim made by the third party, and it was the subject of Lord Sumption's minority judgment, in particular at [99] – [100]. The difference between the two questions was

explained by the Court of Session (Inner House) in *SSE Generation Limited v Hochtief Solutions AG* [2018] CSIH 26; 2018 S.L.579 at [402] – [404].

49. For present purposes, what is of importance is the answer to the first question (the effect of co-insurance), which can be found at [139] in the judgment of Lord Toulson. He said:

> "139. The critical question is whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction. It has become a common practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss. Like all questions of construction, it depends on the provisions of the particular contract: see, for example, Co-operative Retail Services Ltd v Taylor Young Partnership Ltd [2002] 1 WLR 1419."

It is to be noted that the Supreme Court did not have a copy of the relevant policy, so "the contractual scheme" being referred to could only have been the underlying contract between the parties.

50. That Lord Toulson was saying that what mattered most was the underlying contract (what he called the "contractual scheme") is apparent from a number of subsequent cases, including *SSE Generation Limited* and in particular the judgment of Lord Glennie at [398]-[403], and *Haberdashers' Aske's Federation Trust & Anr v Lakehouse Contracts Limited & Anr* [2018] EWHC 558 (TCC); [2018] Lloyd's Rep 382, in particular at [32], [34] and [62] of the judgment of Fraser J. At [34] of *Haberdashers',* he said that "the way in which the Policy Insurance comes to provide insurance to any particular sub-contractor must however be analysed in terms of existing legal principle". He referred to the importance of the underlying contract, calling it at [62] "a powerful indicator to the correct answer, if not to constitute the answer itself".

51. In that case, a sub-contractor, CPR, sought to claim the benefit of insurance taken out by the ultimate employer. Fraser J held that CPR could not rely on the project insurance by reason of agency, because the concepts of agency were being strained to accommodate the unusual situation that arose in that case. Neither could they rely upon the standing offer analysis, whereby an offer had been made by the project insurers to insure persons who were subsequently ascertained as members of the defined grouping. The case was largely concerned with complications arising from a party who was unidentifiable as an insured at the time of the relevant policy.

52. We were referred to a number of textbooks. I should refer in particular to *Colinvaux's Law of Insurance* (13th Edition). At 15-018, the editors say that "the mere fact that a policy states that it covers the interests of named or identifiable third parties does not of itself give those third parties the right to enforce the contract or to rely upon its

terms" (e.g. the benefit of the waiver of subrogation clause). At 15-022-15-028, the editors identify three cumulative conditions which need to be satisfied for cover taken out by A to cover B's interest, as well as that of A, in circumstances where A is required or authorised by a contract with B to insure a risk on behalf of both. They are that:

(a) A's authority must extend to making the insurers contract in question;

(b) A must have intended when taking out the policy to cover B's interests; and

(c) The terms of the policy must not be such as to precluded the extension of coverage to B.

53. Although I am aware of the dangers of summarising the applicable principles in a notoriously complex area of law such as this, it seems to me that the following broad propositions can be derived from the authorities:

53.1 The mere fact that A and B are insured under the same policy does not, by itself, mean that A and B are covered for the same loss or cannot make claims against one another: see *Colinvaux* at 5-018 and *Haberdashers'* at [34] and [62].

53.2 In circumstances where it is alleged that A has procured insurance for B, it will usually be necessary to consider issues such as authority, intention (and the related issue of scope of cover). Such issues are conventionally considered by reference to the law relating to principal and agent: see *Colinvaux* at 5-022 – 5-028, *National Oilwell* and *Haberdashers'*. Although an alternative approach, referrable to the existence of a standing offer, was identified by Fraser J in *Haberdashers'*, that was dictated by the particular facts of that case.

53.3 An underlying contract between A and B is not a necessary pre-requisite for a proper investigation into authority, intention and scope: see *Petrofina.* However, as the same case shows, a contract may well be implied in any event.

53.4 On the other hand, where there is an underlying contract then, in most cases, it will be much the best place to find evidence of authority, intention and scope: see *National Oilwell, CRS, Tyco, Gard Marine, Haberdashers'* and *SSE Generation.* The underlying contract has been called "the most obvious source of authority" (*National Oilwell*) and "a powerful indicator" (*Haberdashers'*).

53.5 That is not to say that the underlying contract will always provide the complete answer. Circumstances may dictate that the court looks in other places for evidence of authority, intention and scope of cover: see, for an example of that process, *National Oilwell*.

9. Overview

54. I shall turn in a moment to the specific grounds of appeal. However, having summarised the applicable principles of law, it may be helpful if I explain briefly why, as a matter of first impression, it seems to me that the judge followed those principles and reached a series of conclusions which are unassailable in this court.

55. The judge expressly considered authority and intention: see the passages in bold cited at paragraphs 32-34 above. When doing so, he paid particular attention to the underlying contract between the RFU and Conway. In that, he was following what Lord Toulson said was the correct approach in *Gard Marine*. Indeed, in any case where there is an underlying contract, I would suggest that it would be counter-intuitive if that was not at least the starting point for any consideration of authority and intention.

56. I accept the submissions made by Mr Reed KC and Mr Wheater that the present case is very similar to *National Oilwell*, and that the approach which the judge adopted here was very similar to the approach of Colman J in that case. Like Colman J, the judge thought that "the most obvious source of authority was the underlying contract", describing it as "key". Like Colman J, the judge concluded that the RFU's authority to insure was co-extensive with its obligation to do so: in other words, the RFU was obliged and intended to provide Option C cover, but nothing more. Like Colman J, the judge considered whether anything passed between the parties in the course of the pre-contractual negotiations which indicated that Conway gave authority, and/or the RFU intended, to effect cover that was wider than Option C. Like Colman J, the judge concluded that there was no such extraneous evidence of authority and/or intention.

57. I stress that, in the present case, the judge was very careful to go on and consider wider matters of fact, including the understanding reached by Mr Higgs and Mr Morris. But he explained why, as a matter of fact and law, that understanding was not determinative. First, at [107] and [108], the judge explained that Mr Higgs and Mr Morris were not solely or even primarily involved in the negotiations of either the Policy or the building contract. Instead the judge referred to the teams of professionals on both sides who were involved in that work. Secondly, the judge was careful to find that the shared understanding between Mr Morris and Mr Higgs of early July 2012 was not ultimately reflected either in the Policy or the building contract. It may have been their understanding at one point in the chronology but, as might be expected in a situation of this sort, matters moved on and passed into the hands of others. Whatever their understanding had been, it was not ultimately reflected in either the Policy or the building contract.

58. Accordingly, it seems to me that, on the face of it, the judge applied the correct principles of law; he considered the underlying contract between the parties, but he also went on to consider wider matters. His conclusion, both on the law and on the facts, was that the co-insurance defence failed. As I have said, that conclusion would appear to be unassailable. The remaining question is whether the grounds of appeal make any difference to that first impression.

10. Ground 1: Did The Judge Apply The Wrong Test?

59. On behalf of Conway, Mr Ghaly submitted that the judge had applied the wrong test: as he put it at paragraph 27 of his skeleton argument, "Conway's co-insurance defence failed because the judge determined the first preliminary issue by reference to a test that is irrelevant in the present context". He said (correctly) that the test that the judge adopted was taken directly from [139] of *Gard Marine*, and he said that that was a different case on different facts and inapplicable here. Mr Ghaly went so far as to say, at paragraph 37 of his skeleton argument, that "the judge's incorrect

characterisation and analysis of the question he had to address permeates the entire judgment".

60. Mr Ghaly was rather less clear as to what he said the right test was, but he did not dissent from the proposition that what mattered was the ascertaining of the necessary authority and intention. His real point was that these could be found at an early stage of the story (and in particular in the minutes of the start-up meeting identified at paragraph 13 above, and the shared understanding of Mr Higgs and Mr Morris) and that nothing mattered thereafter. In his submissions in reply, Mr Ghaly repeated his point to the effect that the judge was wrong to limit his investigations to the underlying contract.

61. On behalf of the RFU/RSA, Mr Reed took issue with those submissions. He said that, on a proper analysis, the judge had adopted the right test and had approached the issue in accordance with the authorities. There was no issue that the RFU intended to procure insurance for Conway; the issue was the extent of the cover they intended to provide. Mr Reed also said that Mr Ghaly was right to elevate the importance of Ground 1, because it was the only point of principle raised by Conway, and that, if Mr Ghaly was wrong about Ground 1, Grounds 2, 3 and 4 could not succeed in any event. On behalf of CSP, Mr Wheater made very similar points to Mr Reed.

62. In my view, as foreshadowed in paragraphs 54-58 above, I consider that the judge adopted the correct test. To jump straight in at the *Gard Marine* stage when reviewing what he did is to misunderstand the careful steps which the judge took in arriving at his conclusions.

63. First, the judge was aware that this was a composite insurance policy, which meant that each co-insured was to be treated as if they had their own policy. Thus, as the judge also recognised, the mere fact that Conway and the RFU were insured under the same policy was insufficient to allow the co-insurance defence: see the judge's express references at [52] and [86], and his reliance on paragraph 5-018 of *Colinvaux* and [34] of the judgment of Fraser J in *Haberdashers'.* What mattered was authority and intention: see [65], [74] and [90].

64. Second, when considering authority and intention, the judge's starting point was the Letter of Intent (together with the subsequent building contract)[2] and the Policy: see [91]. As he said in the same paragraph, "looking to those documents alone, insurance in respect of the cost of rectifying damage caused by Conway's own defective works was excluded." Indeed, it was common ground that, to the extent that the Letter of Intent/building contract was the only relevant and admissible evidence on authority and intention, Conway's co-insurance defence failed.

65. At [107], the judge found that the contract between the RFU and Conway was "the key to ascertaining the effect of the insurance which was obtained pursuant to that contract." However, as we have seen, and contrary to Mr Ghaly's repeated submission, the judge did not confine or limit his investigation to that document. From [92] onwards, the judge considered the other evidence including the understanding of Mr Higgs and Mr Morris, the subsequent negotiations by the

[2] I will treat these two documents together, for the reasons explained under Ground 2.

professional teams, and the documents they produced. It was by reference to that material as a whole that the judge concluded that the understanding was of no legal significance because it was overtaken by the subsequent negotiations, and, at [125], that there was no authority/intention to create a fund, recourse to which would be the sole remedy for loss suffered by the RFU. In my view, that finding – which was in many essential respects a finding of fact – was fatal to this appeal.

66. Mr Ghaly endeavoured to distinguish *Gard Marine* and *CRS* on the facts: indeed, this was an approach he adopted to most of the authorities that he himself cited. But in my judgment, there is no meaningful distinction to be made. The issue in *Gard Marine* concerned whether the demise charterer of the vessel could recover, in respect of the loss of the vessel, from the sub-charterer. The demise charterer could only recover in respect of that loss if it was itself liable to the owner of the vessel. The sub-charterer's argument was that, as a result of the co-insurance, it was not intended that the demise charterer would have any liability to the owner. In this way, although the underlying claim in *Gard Marine* was a claim over by a third party, the underlying issue was precisely the same as that here, namely whether a defence of co-insurance precluded liability between the co-insured parties. As to *CRS*, Mr Ghaly sought to distinguish that case on the basis of the point set out in footnote 1 above. But that is of no help to him because, unlike the Letter of Intent/building contract here, Hall's collateral warranty in *CRS* contained no provisions relating to insurance at all. The implied term in *CRS* would not be implied here because it would be contrary to the express terms.

67. I also agree with Mr Reed that such attempts to distinguish these authorities on small differences of fact rather miss the point. In all the authorities, not just *Gard Marine*, it is explained that, regardless of the precise facts of each case, as a matter of principle, when the court considers authority and intention in the co-insurance context, it is inevitable that its investigations will start (and possibly finish) with the underlying contractual arrangements agreed between the parties. That is what was said in *National Oilwell*, *Tyco*, *Haberdashers'*, and *SSE Generation*. In those circumstances, Mr Ghaly's submission amounted to saying that those authorities were wrong (indeed he expressly said that *Tyco* was "out of line"). I simply do not accept that proposition. The authorities speak with one voice and, in my view, point in a clear and common sense direction. Moreover, whilst the passage from *Tyco* to which I have referred is *obiter*, I regard it is a persuasive summary of the law by a highly distinguished commercial lawyer.

68. It is also worth just standing back and comparing the clear approach in the authorities to the uncertainties inherent in Mr Ghaly's argument. The high-water mark of his case was that Mr Higgs and Mr Morris reached an understanding that the insurance to be agreed would cover the relevant loss, and that this was (to use Mr Ghaly's word) "communicated" at the meeting on 4 July 2012 (see [100]). So he said, that was sufficient to demonstrate the necessary authority and intention and that, in essence, everything that happened thereafter was irrelevant.

69. I consider that position to be untenable. It fails to distinguish between individual employees and the companies who would be entering into the relevant Policy and the underlying building contract. It would allow an entity involved in negotiations to identify an early stage of discussions between Smith and Jones, in which there was an agreement which in hindsight was favourable to that entity, and then to ignore any subsequent stages of the actual negotiations (which did not primarily involve Smith

and Jones at all), in which different individuals, charged with negotiating the relevant terms, reached a different agreement. Such an approach would make for complete uncertainty. It would allow parties who had unequivocally agreed X to scrabble back through their earlier discussions to find a point where it might be argued that they had understood that Y would happen instead. There is no authority to support such a liberal approach to this question; all the authorities point back to the certainty of the underlying contractual regime as at least the starting-point for the investigation.

70. There are, I think, other insurmountable difficulties with Ground 1. Even if Conway was right in principle, on a proper construction of the Letter of Intent, it would not be open to them to rely on those earlier discussions. As both Mr Reed and Mr Wheater pointed out, clause 21 of the Letter of Intent (paragraph 7 above) prohibited any reference to "any previous instructions, correspondence or other discussions". That was an 'entire agreement' clause. As a matter of general principle, therefore, the matters on which Mr Ghaly placed such reliance could have no contractual status or effect. So not only was his reliance on those matters contrary to general principle, I consider that it was also contrary to the terms of the Letter of Intent/building contract in this case.

71. Another fundamental difficulty concerns the authority vested in Messrs Higgs and Morris. In order to get their argument off the ground, Conway would have had to show that Messrs Higgs and Morris had the necessary authority, at the relevant time, to bind the RFU and Conway; that there was, as Mr Reed put it, a "bright blue line" between their discussions and the subsequent discussions between the respective professional teams. Not only was there no evidence of that, and no finding to that effect by the judge, but the judge's other findings are contrary to that basic proposition.

72. For these reasons, I consider that the judge made no error of principle. In those circumstances, I reject Ground 1 of the appeal. Furthermore, I consider that there is considerable force in Mr Reed's submission that, if Ground 1 fails, so too must Grounds 2, 3 and 4. In one form or another, Grounds 2, 3, and 4 arise out of matters of fact, rather than any point of principle. That is why Mr Ghaly said the alleged error in Ground 1 "permeated" through Grounds 2, 3 and 4. However, since I am confident that there are complete answers to Grounds 2, 3 and 4 in any event, I go on to address them individually.

11. Ground 2: The Relevance (or otherwise) of the Building Contract

73. On behalf of Conway, Mr Ghaly submitted that the judge erred in undertaking his investigation by reference to the terms of the building contract, in circumstances where the building contract was entered into three months after the policy. He relied on what Flaux J (as he then was) said in *Hyundai Merchant Marine v Trafigura Beheer BV* [2012] 1 Lloyd's Rep 211 that:

> "Reliance on a subsequent contract to construe a written contract is, to say the least, a heretical approach to construction…it seems to me that the principle that the subsequent contract is inadmissible is equally applicable whether it is made the following day or long after".

74. In response, on behalf of the RFU/RSA Mr Reed submitted that, for a variety of reasons, Ground 2 was misconceived because it ignored the existence and terms of the Letter of Intent. On behalf of CSP, Mr Wheater submitted that the judge had been correct to say that his assessment required a consideration of the evidence of the dealings between the parties "leading up to the sending of the Letter of Intent and a conclusion as to the contractual arrangements between them": see [90].

75. I consider that Ground 2 is based on two false premises. The first is that the judge did not have regard to the building contract to construe another document: he was having regard to the building contract in order to consider the twin issues of authority and intention, in accordance with the authorities. That is a different exercise. *Hyundai* and other similar cases are irrelevant to the exercise the judge was undertaking.

76. The second false premise is even more fundamental. Mr Ghaly's skeleton argument deals with Ground 2 from paragraphs 44 to 70, yet it makes no reference whatsoever to the Letter of Intent. But in my view, the Letter of Intent is fundamental to Ground 2, because it was the pre-existence of that Letter of Intent, and the proper construction of its terms, which meant that the judge was bound to have regard to what Lord Toulson called "the contractual scheme" between the RFU and Conway.

77. At the date the Policy was written, the Letter of Intent meant that there was already a binding contract between the parties. The Letter of Intent made it plain that the JCT terms applied to any work undertaken pursuant to the instructions in that letter. It is common ground that, not only was there a reference to the JCT Standard Form, but there was already in existence a set of contract documents which incorporated that form and which contained all of the relevant terms, including Option C.

78. On a proper construction of the Letter of Intent, at the time that the Policy was written, there was a clear agreement that:

    (a) The form of the contract would be the JCT Form (clause 3);

    (b) All the terms and conditions in the identified contract would apply to any work that was carried out (clause 5);

    (c) Option C would apply (clause 3 of the Letter of Intent and the express provision in the policy referred to at paragraph 22 above);

    (d) There was an entire agreement clause which ruled out any prior discussions and negotiations (clause 21).

79. Accordingly, I conclude that the underlying contract between the parties was to the effect that the insurance cover was going to be in the form of Option C and nothing else. If Conway required insurance over and above the level identified in Option C, or if they wanted to make sure that the earlier understanding that Mr Higgs and Mr Morris had was reflected in the final agreement, then it was a simple matter to arrange. It was not as if all this was happening in secret[3].

[3] That is also the answer to Mr Ghaly's repeated complaint that Conway had not tendered for their own insurance. On that basis, it might be thought that they would have been even more keen to ensure that their

80. At the appeal hearing, Mr Ghaly endeavoured to take points about the potentially different rights and obligations arising under the Letter of Intent, on the one hand, and the building contract, on the other. Many of these were unheralded even in his skeleton argument, let alone the Grounds of Appeal. I seriously doubt whether these points were even open to him, since Conway's Defence correctly pleads that the relevant date of the building contract was 16 July 2012 as that was the date that the work began pursuant to the Letter of Intent. When the building contract was agreed 3 months later, entirely in accordance with the Letter of Intent, it is agreed that it was retrospective in effect.

81. That of course is the conventional position: where a detailed building contract is entered into in the identical form that was expressly referred to in the Letter of Intent, the building contract will usually be treated as having retrospective effect, although ultimately that is a matter of construction of the Letter of Intent: see *Trollope & Colls Limited v Atomic Power Construction Limited* [1963] 1 WLR 333; [1962] 3 All ER 1035. In that case Megaw J, as he then was, said that there was no principle of English law which provided that a contract cannot in any circumstances have retrospective effect, and in that case he concluded that there was an implied term that the contract would have retrospective effect.

82. The concession in the pleading and the effect of *Trollope & Colls* left Conway without any real room for manoeuvre on this aspect of the appeal. Although Mr Ghaly sought to rely on the decision of Edwards-Stuart J in *Twintec Limited v Volkerfitzpatrick Limited* [2014] BLR 150, that was an adjudication enforcement case, where there was a dispute about the appointment of an adjudicator where there was a disjunct between the letter of intent and the eventual contract. In *Twintec*, the letter of intent was in very different terms to the letter in this case: amongst other things, the employer had expressly said it was not yet in a position to enter into the sub-contract, and there was a general reference to a contract form rather than, as here, an existing and complete draft contract. In the circumstances of *Twintec*, Edwards-Stuart J found that there was no obligation to enter into the insurance prior to entering into the contract itself. That was a conclusion reached solely on the proper construction of the letter of intent in that case. *Twintec* is not (and does not purport to be) authority for any wider proposition.

83. Perhaps inspired by the result in *Twintec*, rather than any underlying principle of law, Mr Ghaly endeavoured to argue that the Letter of Intent in this case contained no provisions relating to insurance. That was not a point he took below. It is therefore not a point dealt with by the judge. But I consider it to be wrong as a matter of construction of the Letter of Intent, for the reasons explained in paragraphs 77-79 above.

84. I should deal here with a separate point that Mr Ghaly made about paragraph 6 of the Letter of Intent. He suggested that the power granted to Mr Higgs' firm to issue instructions amounted to "ostensible authority to inform Conway during the tender negotiation". The effect of that submission was not entirely clear and it seemed to me to muddle together a number of different things. RLF3PM LLP were the project

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representatives negotiating with the RFU ensured that the Higgs/Morris understanding found its way into the Policy and/or the Letter of Intent/building contract.

managers. They therefore had authority to direct the works on site. But they were not involved - and the judge made no findings to the contrary - in the tender negotiations. Beyond that, this submission came dangerously close to an attempt to get round the judge's finding that Mr Higgs' understanding was not ultimately reflected in the Policy or the underlying contract.

85. Finally, I consider that, whatever the position in respect of the Letter of Intent, the judge was entitled to have regard to the subsequent building contract in any event. As I have said, the issue was not a question of construing the Policy; instead, it was a question of authority and intention. It is admissible in such circumstances to determine the extent of the RFU's authority by reference to subsequent conduct: see *Bowstead and Reynolds on Agency*, 22nd Edition, paragraph 3-007. I understand, but do not need to decide, Mr Reed's additional submission that this conduct also gave rise to a contractual estoppel.

86. For all these reasons, I reject Ground 2 of the appeal.

12. Ground 3: Does Conway Only Have To Show Authority and Not Intention?

87. On behalf of Conway, Mr Ghaly submitted that, because Conway were not an undisclosed principal, but were instead identified or identifiable as a co-insured at the time that the Policy was incepted, any issue as to intention was irrelevant and all that mattered was the nature and scope of the RFU's authority. He suggested that, in consequence, it was either unnecessary to look at the underlying contract at all or, if it was necessary, it was only for a limited purpose. He said that the judge had erred in failing to deal with this argument, which he said was Conway's primary case.

88. On behalf of the RFU/RSA, Mr Reed did not accept that this had been Conway's primary case, pointing out that it had instead emerged right at the end of the trial before the judge. He went on to say that Conway were wrong in law to say that different rules applied depending on whether or not they were identified or identifiable as a co-insured. On behalf of CSP, Mr Wheater's skeleton argument at [53]-[55] neatly summarised the shifting sands of Conway's case on this point and concluded that, by the end of the hearing before the judge, it seemed to follow from Conway's submissions that the judge did have to look at the underlying contract, whatever Conway's precise status as an identified, identifiable or undisclosed principal.

89. It is not necessary for the purposes of this appeal to go too far into the dispute about what was or was not Conway's primary case before the judge. It is sufficient to say that, on my reading of the relevant documents, Conway went from a rather lukewarm attitude to the applicability of the law of principal and agent, to a whole-hearted embrace of it by the end of the trial. The same is true of their stance on the underlying contract; originally, Conway seemed to be saying that the judge should not even look at it, but by the end of the trial, they seemed to accept that the judge could and perhaps should do so. I make no criticism of them for these changes of position but, in consequence, it is unfair for Conway to criticise the judge for in some way misunderstanding what was or was not their primary case.

90. Much more importantly, I consider that the so-called primary case is wrong as a matter of law and was correctly rejected by the judge (see in particular [86] - [87]).

No reason in principle was put forward as to why the scope of Conway's cover might be different, depending on whether they were an identified or identifiable insured. It is not a proposition that can be found in *Colinvaux* or in any of the authorities. There was no rational or policy justification for it in any event, something which Mr Ghaly appeared to accept during the course of oral argument.

91. I consider that the law is correctly set out at paragraphs 15-022 to 15-028 of *Colinvaux's Law of Insurance,* 13th Edition, and I have summarised the three conditions at paragraph 52 above. Those paragraphs do not suggest that the second condition - namely that relating to intention - was somehow removed if party B was specifically named (or was identifiable) as an insured.

92. In his search for a source for this proposition, Mr Ghaly took us to a passage at 593 (second column) of the judgment of Colman J in *National Oilwell*, in which he said:

> "In view of the fact that NOW was not specifically identified as a co-assured on the face of the policy, the question arises by what means it could become bound to the insurers as co-assured on any of the terms of that contract. Since the first half of the 19th centurv there has been continuing discussion in the authorities and the textbooks as to the circumstances in which, where a contract of insurance is expressed to insure a named assured together with a class of others unnamed for their respective rights and interests, someone who qualifies as a member of that class can sue on the policy. Although, by the decision of the House of Lords in *Keighley, Maxsted & Co. v. Durant*, [1901] A.C. 240, it was made clear that an undisclosed principal could not ratify a contract made by someone acting at the relevant time without authority, the position of an unidentified member of a class of assured referred to in the policy has been left in some doubt."

93. I do not accept that this passage is authority for any proposition at all, much less an approach which, in certain circumstances, dispenses with intention altogether. Colman J did not say that intention was not required in the case of an identified or identifiable insured. I consider that whilst Mr Reed may not have been right to describe this passage as "a throwaway remark", it was not (and was not intended to be) a definitive statement of principle. All the authorities to which I have referred deal with both authority and intention and there is no case which addresses one and not the other.

94. Even if, contrary to my view, all that mattered was authority, it could not avail Conway because, at [125], the judge said that he was "satisfied that the Policy was effected on the basis that it was providing the cover contemplated by Option C in the JCT contract." As Mr Reed correctly submitted, that was the relevant finding on authority. So even if Conway could differentiate between the two, and avoid any investigation into intention, it would make no difference, since the judge made findings adverse to Conway on authority in any event.

95. As I have said, what I think Mr Ghaly was ultimately trying to do was to argue that, because intention was irrelevant, so too was the building contract, and the court should just look at the Policy. But that does not get round the difficulty that Option C was expressly referred to in the Policy. Further, this submission was tantamount to saying that, simply because Conway were co-insured, they were entitled, without more, to take full advantage of the Policy. That is emphatically not the law, as

explained above. Again, at the risk of repetition, there was no issue that Conway were insured: what mattered was the scope of the cover and, for that, it was necessary for the judge to look at authority and intention.

96. For all those reasons, I do not consider that there is anything in Ground 3. It is therefore unnecessary to address the issue of whether Conway were specifically identified or simply identifiable. At first blush, it seems to me that the judge was right to say that Conway was not expressly identified on the face of the documents, but that they were identifiable. In that regard, therefore, as Mr Wheater correctly pointed out, Conway's position is on all fours with NOW in *National Oilwell*, another point of similarity between that authority and the present case.

13. Ground 4: Conway's Alternative Case as to Undisclosed Principal

97. On behalf of Conway, Mr Ghaly argued that, if Conway was not identified in the Policy, then it participated as an undisclosed principal. In those circumstances, he said that all Conway had to demonstrate that:

(i) Prior to 17 July 2012, Conway had authorised RFU to procure cover in respect of the relevant losses;

(ii) Prior to 17 July 2012, the RFU had told Conway that it intended to procure such cover for Conway;

(iii) The policy terms covered Conway in respect of the relevant losses.

He said that Conway had done this, primarily by reference to the evidence of the understanding shared by Mr Higgs and Mr Morris and identified in detail above.

98. On behalf of the RFU/RSA, Mr Reed said that this was a misconceived attack because it treated the discussions between Mr Higgs and Mr Morris "as if those were the only relevant discussions between RFU and Conway". He went on to note that the judge had specifically rejected that contention and found that Mr Higgs' understanding of the position was not correct: see [107] and [125]. On behalf of CSP, Mr Wheater submitted that Ground 4 overlapped substantially with Grounds 1-3. He further argued at paragraphs 69-73 of his skeleton argument that the intention of the agent had to be assessed against two propositions: first, whether the putative agent intended to act as an agent at all and, secondly, what contract the agent intended to adopt on behalf of its principal. He said that *Magellan Spirit* was concerned only with the first question, whilst it is the second question that matters here (for the reasons previously explained). Mr Wheater argued that the second question had to be assessed objectively, which was what the judge had done.

99. In my view, the "undisclosed principal" argument in Ground 4 was, in reality, no more than another attempt (in addition to Grounds 1-2) to elevate the Higgs/Morris understanding into a complete answer to the first preliminary issue; and to ignore the other findings which the judge made and which comprehensively demonstrated that that understanding had no legal effect or relevance.

100. I agree with Mr Wheater that, in the present case, what mattered most was the contract that the agent (the RFU) intended to effect on behalf of its principal

(Conway). The judge rejected Conway's case that they gave the RFU broad authority to procure insurance provided that cover was no less than required for Option C. But even assuming that it was right, the RFU could have procured a range of different insurances which might have satisfied Conway's requirements. So it was always necessary to analyse the insurance that the RFU in fact intended to procure for Conway in respect of Conway's "rights and interests". The judge correctly assessed that objectively by reference to all the evidence and in particular the clear terms of the Letter of Intent and the reference to Option C in the Risk Information part of the Policy.

101. In short, I accept Mr Reed's and Mr Wheater's criticisms of Ground 4. In view of the other detailed reasons which I have set out above, it would only add to an already-overlong judgment to consider it further.

14. Ground 5: The Correct Interpretation of the Waiver Provision

102. I accept that this Ground is different in nature to Grounds 1 – 4. It is a short point based on a term of the Policy. If it is right, Mr Ghaly could fail on each of Grounds 1-4 but still win the appeal on Ground 5. This was because he maintained that, because of the waiver of subrogation clause (set out at paragraph 23 above) there could be no subrogated claim against Conway "even if Conway was not co-insured with RFU in respect of the relevant loss". He complained that the judge rejected this argument on a basis which was not argued by the parties: see [131], set out at paragraph 37 above.

103. On behalf of the RFU/RSA, Mr Reed rejected that submission. He accepted that the judge's reasoning at [131] was not entirely in accordance with the submissions that he had heard, but he placed particular reliance on the judge's finding, in the middle of [131], that:

> "However, if, as is the position here, the RFU and Conway are not co-insured in that way then the waiver does not operate to protect Conway. The waiver cannot operate to protect Conway against claims arising out of matters in respect of which it is not insured"

On behalf of CSP, Mr Wheater submitted that the answer to Ground 5 was simple: the waiver of subrogation did not extend to the relevant losses because Conway was not an insured party in respect of those losses.

104. I consider that, for three separate reasons, Ground 5 cannot succeed. First, I consider it to be contrary to commercial common sense. If Conway were not insured against losses caused by their own default, then it would be an extraordinary result if, because of a waiver of subrogation clause, they could achieve the effect of that cover by the back door. It was not explained how an exclusion clause could positively give rise to insurance cover that did not otherwise exist.

105. Secondly, I consider that the submission is contrary to the law. A very similar argument was run in *National Oilwell*. Colman J rejected it at p.603, saying:

> "It follows that if the effect of the waiver clause would be to preclude DOL's insurers from pursuing by subrogation post-delivery claims which but for the

> waiver clause would not arise out of losses insured for the benefit of NOW under the policy, this would place NOW in exactly the same position vis-a-vis insurers as regards such claims as if those losses had been fully insured under the policy. In effect the waiver clause would extend the scope of the insurance to cover losses which were never actually insured for the benefit of NOW. This gives rise to the question whether, as a matter of construction of the policy, if the provisions to the contrary clause limit the cover available to a sub-contractor to a scope less than the full scope provided by the policy to DOL, the waiver clause has the effect of protecting the sub-contractor against subrogated claims for losses which, so far as that sub-contractor is concerned, were uninsured by that policy. Such a consequence would indeed be remarkable. The policy would limit the cover with one hand and indirectly by waiver of subrogation remove the limit by another hand."

106. Colman J went on to note at page 604 (first column) that, if the parties had not inserted an express waiver of subrogation, such a term would have been implied in any event, but it would have the effect of a waiver of subrogation "only in respect of losses insured for the benefit of the sub-contractor…the meaning of the waiver of subrogation clause cannot therefore be stretched to accommodate a commercial purpose which this particular contract on its proper construction does not have. The waiver clause operates consistently with the commercial purpose of the contract if its meaning is confined to the wavier of claims based on losses insured for the benefit of NOW, that is to say pre-delivery loses, and that is how, in my judgment, it must be construed".

107. I respectfully agree with and adopt that analysis. It seems to me to be entirely applicable to the present case where, even though the language of the relevant terms is slightly different, their effect – at least for this purpose – was the same. During his submissions in reply, Mr Ghaly fairly accepted that his interpretation of the clause in the present case would have the "remarkable" effect which Colman J emphatically rejected in *National Oilwell*.

108. Mr Ghaly sought to distinguish *National Oilwell* because, he said, the policy in that case contained restrictive words which do not exist here, relying in particular on the "provisons to the contrary" clause in *National Oilwell*. But I do not consider that that provision was a significant element of Colman J's reasoning. Moreover, I consider that Mr Wheater was right to say, at paragraph 78 of his skeleton argument, that those words had the same effect as the "resepective rights and interests" provision in this Policy. Both terms limited the scope of cover to the extent of the insurance required by the underlying contract.

109. That brings me on to the third reason for rejecting Ground 5, namely the words "each for their respective rights and interests" in the definition of the insured (see paragraph 20 above). The RFU, RSA and CSP all say that, as a result, the insurance was limited to the respective rights and interests of each of the co-insured. Conway's rights and interests did not extend to the right to insurance for their own default because that was not included in Option C. Thus, the respondents say, the waiver of subrogation clause cannot affect this claim.

110. I consider that that submission is correct. Mr Ghaly said that the words were intended simply to demonstrate that this was a composite policy, but that ducks the question as to what these words actually mean in this context. When asked about that during oral argument, Mr Ghaly fairly accepted that the "rights" could include contractual rights (and therefore, on the face of it, Conway's contractual right to Option C insurance, but not more). On any view, there was no justification for adopting a restrictive view of these words so as to avoid the conclusion that Conway were insured as per their contractual rights, but not otherwise.

111. Of course, as Mr Wheater correctly pointed out, that conclusion has a consequence that goes well beyond Ground 5 of this appeal. It provides further support, if that were necessary, for the approach taken by the judge throughout, which was to consider the scope of the insurance cover by reference to Conway's rights and interests, assessed primarily by reference to the underlying contract. Conway's rights and interests went beyond their insurable interests. It included all their relevant rights, including their contractual rights. That is the natural meaning of these words. So these words support the conclusion, set out in detail above, that Conway were insured pursuant to their contractual right to Option C insurance but, in the circumstances of this case, not more.

15. Conclusions

112. In summary, I consider that the judge was right for the reasons that he gave. His analysis was entirely in accordance with the authorities. His findings of fact and his mixed findings of fact and law are also fatal to Conway's appeal.

113. It will be noted that all of these issues arise out of Preliminary Issue 1. Because of his conclusions on that issue, the judge did not address Preliminary Issue 2. Although helpfully the parties agreed the outcome in respect of Preliminary Issue 2 if Conway had been successful on the appeal, if my Lord and my Lady agree with my judgment, it is unnecessary to say anything more about it.

LORD JUSTICE BAKER

114. I agree.

LADY JUSTICE NICOLA DAVIES

115. I also agree.