Case No: HT–03–470

Neutral Citation No: [2004] EWHC 2206 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House,
133–137, Fetter Lane,
London, EC4A 1HD

Date: 6 October 2004

Before:

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.

MOWLEM PLC
(TRADING AS MOWLEM MARINE) **Claimant**
– and –
STENA LINE PORTS LIMITED

Defendant

Richard Gray Q.C. and Sean Brannigan (instructed by Fenwick Elliott for the Claimant)
Vivian Ramsay Q.C. and Piers Stansfield (instructed by Eversheds LLP for the Defendant)

JUDGMENT

H.H. Judge Richard Seymour Q. C. :

Introduction

1. This action arises out of the construction of a new ferry terminal, called Terminal 5, in the port of Holyhead, in Anglesey. The owner and operator of that port is the defendant, Stena Line Ports Ltd. (*"Stena"*).

2. The work of constructing Terminal 5 was divided into four packages. One of those packages comprised what were described as marine and onshore works (*"the Works"*). The Works were undertaken by the claimant, Mowlem Plc (*"Mowlem"*), through its Mowlem Marine division.

3. It was common ground at the trial that the Works were undertaken by Mowlem pursuant to a series of letters of intent written on behalf of Stena by Mouchel Consulting Ltd. (*"Mouchel"*), which had been engaged by Stena as consulting engineers for the purposes of the Works. It was also common ground that each of the relevant letters of intent took effect in law as an offer capable of acceptance so as to bring into existence what Robert Goff J, as he then was, described in *British Steel Corporation v. Cleveland Bridge & Engineering Co. Ltd.* (1983) BLR 94 at page 120 as *"an "if" contract"*, that is to say a contract under which A requests B to carry out a certain performance and promises B that, if he does so, he will receive a certain performance in return, usually remuneration for his performance. It was the case of Stena that the contract brought into existence by acceptance of the offer contained in each letter of intent superseded the previous contract, so that, in the events which happened, it was only the contract brought into existence by the acceptance of the offer contained in the final letter of intent, one dated 4 July 2003, which was relevant to the matters in dispute between the parties. That analysis was not formally accepted on behalf of Mowlem, but I do not think that it was really disputed.

4. I shall have to consider the allegations made and relief sought in the respective statements of case of the parties a little later in this judgment, but, broadly stated, what was in contention between Mowlem and Stena was upon what basis, and subject to what, if any, limitation, Mowlem was entitled to be paid for the execution of the Works.

5. The parties had agreed, for the purposes of the trial, a statement of the facts material to the matters which I was asked to decide. That statement of facts was comprehensive, so far as it went. I therefore heard no oral evidence. The statement of facts was not comprehensive only insofar as there were not set out in it in full the terms of documents passing between the parties which were said to be relevant to the matters in dispute between them. Instead, it was agreed that regard might be had as necessary to all documents disclosed on behalf of either party for the purposes of the action.

6. It was suggested on behalf of Stena by Mr. Vivian Ramsay Q.C., who appeared with Mr. Piers Stansfield, that in their written opening note that Mr. Richard Gray Q.C. and Mr. Sean Brannigan, who appeared on behalf of Mowlem, had sought to extend the scope of the issues beyond those comprehended by the statements of case. Before coming to set out in detail the issues with which this judgment is concerned it is therefore necessary to give some attention to the Amended Particulars of Claim and the Defence and Counterclaim.

The Amended Particulars of Claim and the Defence and Counterclaim

7. In the Claim Form by which this action was commenced the *"Brief details of claim"*

"Declaration as to valuation of the marine works carried out at Holyhead by the Claimant on behalf of the Defendant. "

8. In paragraph 3(a) of the Amended Particulars of Claim it was pleaded that the Works were carried out pursuant to 14 letters of intent, of which the first was dated 17 October 2002 and the last was that of 4 July 2003. Paragraph 3(b) went on to allege that after the series of letters of intent the Works were carried out pursuant to:–

> *"Stena's further acceptance of works after the 18th July 2003 and/or once the value of the Works being carried out exceeded the value of £10 million and/or Stena's further request after these events that the said works be carried through to completion. "*

9. The analysis of the matters set out in paragraph 3 of the Amended Particulars of Claim for which Mowlem contended in its statement of case was as follows:–

> *"4. Each of the said Letters of Intent took effect as a contractual offer from Stena which Mowlem accepted by carrying out the Works outlined in that letter. Accordingly, the said letters took effect as a series of simple "if" contracts whereby Mowlem agreed to carry out the Works and Stena agreed to pay a reasonable sum for those works up to the sum set out in the respective Letters of Intent.*
>
> *5. The last Letter of Intent, sent on the 4th July 2003, expressly committed Stena to pay for the Works only up to the 18th July 2003 and/or for Works up to the value of £10 million. It was an implied term of the contract created by Mowlem's acceptance of that Letter, however, that if Stena permitted Mowlem to carry out the Works beyond that date and/or so that they exceeded that value, then Stena would pay a reasonable sum for those works.*
>
> *6. Further or alternatively:*
>
> *(a) Mowlem's actions in attempting to carry out the Works beyond 4th - 18th July 2003 and/or to the extent that the value of the said works exceeded £10 million amounted to an offer to carry out the said works for a reasonable price which Stena accepted in permitting the said works to be done and/or accepting and making use of the said works; or alternatively;*
>
> *(b) Mowlem having carried out works beyond the 4th - 18th July 2003 and/or the value of £10 million and Stena having accepted and made use of the said Works, Mowlem is entitled to be paid a reasonable sum for those works as a Quantum Meruit;*
>
> *(c) in any event, Mowlem having carried out works for the benefit of Stena and Stena having accepted and made use of the said Works, Mowlem is entitled to be paid a reasonable sum for those works as a Quantum Meruit. "*

10. The last three paragraphs of the Amended Particulars of Claim followed a heading *"Relief Sought"* . Paragraph 8 of the Amended Particulars of Claim articulated that

> *"Mowlem are now entitled to and claim a declaration that it is entitled to be paid a reasonable sum for the works carried out by it on Stena's behalf in relation to the Holyhead Marine Terminal. "*

The prayer in the Amended Particulars of Claim sought only a declaration in exactly those terms.

11. At paragraph 9 of the Amended Particulars of Claim was set forth an explanation of Mowlem's case that it was entitled to that declaration:–

> *"The said claim is made on the following several bases:*
>
> *(a) that the relationship is governed by a series of contracts arising from the said letters of intent to the effect that such a reasonable sum will be paid;*
>
> *alternatively;*
>
> *(b) that the relationship is governed by the said series of contracts in relation to works up to the 18th July 2003 and/or the value of £10 million and by a further simple contract thereafter arising from Mowlem offering and Stena agreeing that Mowlem would carry on the works to completion; alternatively*
>
> *(c) that the relationship is governed by the said series of contracts in relation to works up to the 18th July 2003 and/or the value of £10 million with Mowlem being entitled to be paid on a quantum meruit basis for any further work carried out for Stena;*
>
> *(d) that the relationship is governed by the said series of contracts in relation to works up to the 18th July 2003 and/or the value of £10 million with Mowlem being entitled to be paid on a quantum meruit basis for any further work carried out for Stena;* [sic - (d) as incorporated in paragraph 9 was in fact in identical terms to (c)]
>
> *(e) in any event, Mowlem having carried out Works for the benefit of Stena and Stena having accepted and made use of the said Works, Mowlem is entitled to be paid a reasonable sum for those works as a Quantum Meruit. "*

12. In the Defence and Counterclaim was set out extensively a narrative account of the negotiations between Stena and Mowlem and of the sending of the various letters of intent to which I have referred. It was pleaded, correctly, at paragraph 19 of the Defence and Counterclaim, that the first such letter, that dated 17 October 2002, written by Mouchel was in these terms:–

> *"On behalf of Stena Line Ports Limited we confirm that it is their intention to award to you the above Contract, subject to this being confirmed by execution of a written contract in due course.*

In the meantime, pending finalisation and agreement of a number of outstanding issues this letter of intent authorises you to proceed with the following works:

1. Secure and mobilise marine plant.

2. Secure and mobilise drilling equipment.

This letter of intent is valid until rescinded, at any time, by written notice (which shall have immediate effect) by Stena Line Ports Ltd., or a Contract is executed. You will be paid in accordance with the provisions in the Tender Documents during this period such reasonable amounts as can be substantiated in respect of your costs for orders placed or work done, subject to the maximum amount given below.

In the event that this letter of intent is rescinded and the Contract is not awarded to you, Stena Line Ports Ltd's total obligations to yourselves and any other parties will be limited to a maximum of £400,000.00.

We confirm that Stena Line Ports Ltd's commitment to expenditure up to a maximum of £400,000.00 will enable you to proceed with the marine works in accordance with your programme, until 15th November 2002.

This letter is not intended to bind Stena Line Ports Ltd. to enter into the Contract with you nor does it constitute an offer that it will do so. This letter represents only the current intentions of Stena Line Ports Ltd. "

13. The further letters of intent were then dealt with in the Defence and Counterclaim, with only the respects in which each differed from its immediate predecessor being the subject of specific mention. For present purposes I need not catalogue all of the letters of intent and the differences between them. It is enough to set out in full the terms of the final letter, that of 4 July 2003, which was pleaded in paragraph 26 of the Defence and Counterclaim, but with only the verbal differences between it and its immediate predecessor being set out. The full text of the letter was:–

"On behalf of Stena Line Ports Limited we confirm that it is their intention to award to you the above Contract, subject to this being confirmed by execution of a written contract in due course.

In the meantime, pending finalisation and agreement of a number of outstanding issues, this Letter of Intent supersedes the Letter of Intent issued on 20 June 2003 and authorises you to proceed with the following works:

1. Secure and mobilise marine plant.

2. Secure and mobilise drilling equipment.

3. Supply and delivery of reclamation material.

4. Proceed in accordance with the Contract both for on and off site works.

This Letter of Intent is valid until rescinded, at any time, by written notice (which shall have immediate effect) by Stena Line Ports Ltd, or a Contract is executed. You will be paid in accordance with the provisions in the Tender Documents during this period such reasonable amounts as can be substantiated in respect of your costs for orders placed or work done, subject to the maximum amount given below.

In the event that this letter of intent is rescinded and the Contract is not awarded to you, Stena Line Ports Ltd's total obligations to yourselves and any other parties will be limited to a maximum of £10,000,000.00.

We confirm that Stena Line Ports Ltd's commitment to expenditure up to a maximum of £10,000,000.00 will enable you to proceed with the Works in accordance with your programme, until 18 July 2003.

This letter is not intended to bind Stena Line Ports Ltd to enter into the Contract with you nor does it constitute an offer that it will do so. This letter represents only the current intentions of Stena Line Ports Ltd.

Again, the extension of this letter of intent is entirely without prejudice to our position and Stena's that a contract already exists, so an extension is unnecessary.

Please confirm your acceptance of the terms set out in this letter by return. "

14. A comparison of the terms of the letter dated 4 July 2003 with those of the letter dated 17 October 2002 demonstrates that the principal respects in which they differed were, first, that the letter dated 4 July 2003 stated in terms that it superseded its immediate predecessor. That was a feature of all of the letters of intent other than the first. Then there were the addition of two items to the elements of work requested, the statement of a different value to which work was authorised and the statement of a different date to which it was anticipated that works in accordance with Mowlem's programme could proceed. Finally, as from the letter of intent dated 16 May 2003, all letters contained a penultimate paragraph in identical terms to those of the penultimate paragraph of the letter dated 4 July 2003.

15. In the Defence and Counterclaim the analysis of the relevant exchanges between the parties for which Stena contended was this:–

"30. Each letter of intent took effect as a contractual offer from Stena which Mowlem accepted by entering the site and/or carrying out the works referred to in the letter. Since each such letter superseded the previous letter, the contractual relationship between the parties is now governed by the terms of the final letter of intent, dated 4 July 2003.

31. Stena contends that the proper interpretation of the letter dated 4 July 2003 is that:

31.1 Mowlem is entitled to be paid such reasonable amounts as it is able to substantiate in respect of its costs for orders placed

31.2 Mowlem's entitlement to be paid for all works carried out is subject to a maximum of £10,000,000;

31.3 The procedure to be used for payment was to be as described in the tender documents;

31.4 Mowlem was not prohibited from carrying out works after 18 July 2003. Insofar as Mowlem chose to carry out works after 18 July 2003, those works would be subject to the terms of the letter of intent. In particular, they would be subject to the limit of £10,000,000. "

16. The Defence and Counterclaim included a detailed response to the individual allegations in the Particulars of Claim - it was not amended after the Particulars of Claim were amended - which mirrored the points made in paragraphs 30 and 31. Paragraph 3(b) of the Particulars of Claim was denied, as was the alleged implied term pleaded at paragraph 5. The answer given to the allegations in paragraph 9 of the Particulars of Claim was:–

"*38. As to paragraph 9 of the Particulars of Claim:*

38.1 It is admitted that a series of contracts were created by the letters of intent. Each such letter superseded the previous letter.

38.2 The parties' relationship is therefore now governed by the final letter of intent, dated 4 July 2003. This letter, in common with all of the previous letters, provides that Mowlem is entitled to be paid in accordance with the provisions of the tender documents such reasonable amounts as can be substantiated in respect of its costs for orders placed or work done, subject to a maximum.

38.3 In the final letter of intent the maximum is stated to be £10,000,000, and this therefore represents a cap on Stena's liability.

38.4 Mowlem is not entitled to be paid on a quantum meruit, since there is a contract between the parties. "

17. In support of Stena's pleaded analysis of the contractual position of the parties declarations were counterclaimed that:–

"*1. × Mouchel's letter dated 4 July 2003 amounted to a contractual offer made on Stena's behalf which Mowlem accepted by entering the site and/or carrying out works thereafter.*

2. ×the contract made on the terms of Mouchel's letter dated 4 July 2003 superseded that made under their previous letter dated 20 June 2003, so that the relationship between the parties is now governed by the terms of the said letter dated 4 July 2003;

3. × Mowlem's entitlement to payment for works carried out is subject to a maximum of £10,000,000. "

The issues in this action

18. In the light of the way in which Mowlem's case was set out in the Amended Particulars of Claim, and in particular in the light of the terms of the declaration sought, it appeared the principal issues, at any rate, in this action were whether, as was contended on behalf of Mowlem, it was entitled to be paid for the execution of the Works as a whole a reasonable sum because the execution of the Works had continued beyond 18 July 2003 and/or had cost in excess of £10 million, and/or Stena had waived or was estopped from relying upon any limit upon its obligation to pay a reasonable sum for the Works, or whether, as was contended on behalf of Stena, the effect of the letter dated 4 July 2003 in the events which happened was that Mowlem was only entitled to be paid in accordance with the terms of that letter. There were logically subsidiary issues, on Mowlem's case, of whether it was entitled to be paid a reasonable sum, regardless of any limit which applied to what it might recover in respect of those parts of the Works executed up to 18 July 2003, in respect of any work in fact done after 18 July 2003, or at least any work which it was requested to do by an instruction given after 4 July 2003, or, perhaps, 18 July 2003. What did not obviously appear from the parties' respective statements of case was any issue as to how much Mowlem was in fact entitled to be paid or on what precise basis such sum should be assessed. That is to say, there was no pleaded allegation that any particular matter was, or was not, to be taken into account in assessing the sum to which Mowlem was entitled. That notwithstanding, at the beginning of the trial Mr. Gray sought to persuade me to entertain an issue which was not very precisely identified but which was introduced in the written opening submissions of Mr. Gray and Mr. Brannigan in this way:–

> "***THE FIRST ISSUE THAT MAY ARISE: WHETHER OR NOT MOWLEM IS ENTITLED TO BE PAID A REASONABLE SUM FOR THE WORKS WHICH INCLUDES PROVISION FOR OVERHEADS AND PROFIT***
>
> *10. This issue arises because of the restrictive definition of "costs" which, Mowlem understands, Stena wishes to argue should be adopted. In particular, Stena wishes to contend that the phrase* "such reasonable amounts as can be substantiated in respect of Mowlem's costs for orders placed or work done" *should be interpreted very differently from the traditional view of* "a reasonable amount or sum" *in that it should exclude any recovery for overheads or profit.*
>
> *11. If that is not Stena's position, and if it is accepted that Mowlem are entitled to be paid their costs inclusive of overheads and reasonable profit, this point does not arise.* "

19. Mr. Gray did not propose that any amendment should be made to the Amended Particulars of Claim so as to raise such an issue as that adverted to in the quotation in the preceding paragraph. It was unclear whether that issue would arise if Mowlem was successful on its main case in this action, or only if Stena was successful in its contention that Mowlem's entitlement to payment for the execution of the Works fell to be determined solely by reference to the terms of the letter dated 4 July 2003. The written opening of Mr. Gray and Mr. Brannigan seemed to suggest that the issue would arise only in the latter eventuality. Mr. Ramsay objected to the proposition that some such issue should be dealt with at this stage. He told me that the consideration of the question of Mowlem's entitlement to be paid sums in respect of overheads and profit had in fact progressed no further than Mowlem claiming a flat percentage for overheads and profit and Stena indicating that that approach was not acceptable. He submitted that as Mowlem claimed to have incurred disbursements in connection with

the Works of in excess of £10 million the issue which Mowlem sought to raise would not arise at all if Stena's case as to the effect of the letter dated 4 July 2003 succeeded and Mowlem was in fact able to justify the alleged disbursements at a figure in excess of £10 million. Further, contended Mr. Ramsay, it was impossible usefully to consider recovery of overheads and profit in the abstract. It may well be that when particular overhead costs, at least, were identified and demonstrated it would not be in dispute that Stena was in fact liable to make payment to Mowlem in respect of them.

20. I was persuaded by Mr. Ramsay's submissions that it would not be of assistance to the parties to consider at this stage, and in the abstract, the sort of issue urged upon me by Mr. Gray. My feeling was that, if I were to seek to deal with it now, the answer would be so vague and qualified as to be of no value. This judgment is therefore concerned only with the declaration claimed on behalf of Mowlem and with the declarations counterclaimed on behalf of Stena.

Further facts relevant to the submissions of the parties

21. The central facts relevant to the disputes between the parties I have already set out. However, there were some additional matters, all agreed as facts, which were relied upon by Mr. Gray in support of his submissions.

22. It was recorded in the statement of facts to which I have referred that a number of site instructions were given by Mouchel to Mowlem on and after 4 July 2003. The relevant agreed facts in relation to these instructions were:–

> *"61. By site instruction 120, dated 4th July 2003, Stena, through Mouchel, instructed Mowlem to modify the Bankseat. Further details of this modification to the Bankseat were provided by Mouchel by a memorandum dated 9th July 2003.*
>
> *62. By site instruction 121 dated 10th July 2003, Mowlem, through Mouchel, were instructed to modify the capstan.* ×
>
> *68. By site instruction 122 dated 15th August 2003, Mowlem, through Mouchel, were instructed to modify the Dolphin handrailing. By memorandum dated 19th August 2003 Mowlem, through Mouchel, were instructed to carry out remedial works to the Dolphins.* "

23. At paragraph 65 of the statement of facts was set out a list of the works in fact carried out by Mowlem after 18 July 2003, apart from the works the subject of the instructions mentioned in the preceding paragraph of this judgment. The detail of that work is not presently material. What is material is simply that work was done after 18 July 2003.

24. In a letter dated 17 June 2003 to Mr. Ian Manser of Mouchel, Mr. John Henderson of Mowlem wrote:–

> *"I am disappointed that we do not seem able to agree a proper limit for the letter of intent.*
>
> *In order to try and bridge this impasse I propose that you authorise expenditure to a limit of £10,700,000 (Ten Million Seven Hundred Thousand Pounds) to completion and give us a further letter of intent to cover this sum and period.*

The above sum has been calculated as set out in Appendix A attached and as you will note it excludes the sum for the rock issue, which is being put to conciliation.

It goes without saying that all costs incurred would be subject to verification.

I look forward to your response, by return, hopefully to put this particular issue behind us while we try to resolve the other matters on this contract. "

The reference to *"the rock issue"* was to a claim which Mowlem had made in respect of encountering during the course of carrying out the Works a vertical or steep sloping batter in rock along the alignment of certain monopiles.

25. Following the writing of the letter dated 17 June 2003 Mouchel wrote a letter of intent dated 20 June 2003 in which the sum expressed as the limit of Stena's potential liability to pay for work done by Mowlem was £10 million and the date to which that sum was said to be that which *"will enable you to proceed with the Works in accordance with your programme"* was 4 July 2003.

26. Mr. Ford of Mowlem referred to the letter of intent dated 20 June 2003 in a letter dated 3 July 2003 to Mouchel in which he said:–

"*We confirm that the value of the Letter of Intent to which we are currently working is sufficient to cover the cost of carrying out the remaining work on site, the rock issue being a separate matter, which is being resolved by conciliation, as previously agreed by both parties.*

We will however need the existing Letter of Intent to be extended to Friday, 1st August 2003. "

27. The letter of intent dated 4 July 2003 was written the day after the date of Mr. Ford's letter.

28. Mr. Wyn Parry of Stena responded to Mr. Ford's letter dated 3 July 2003 to Mouchel in a letter dated 7 July 2003. The substantive part of Mr. Parry's letter was in these terms:–

"*In order that there is no misunderstanding as to Stena's position, it is correct that your clause 12 claim on the "rock issue" is being referred to conciliation as agreed. It is Stena's position that a contract for the whole of the Works exists and Mowlem's entitlements to payment are in accordance with that contract. Without prejudice to that, the amount of £10 million in the letter of intent of 4 July is the limit, which applies to all works done pursuant to the letters of intent.* "

29. The reply to Mr. Parry's letter dated 7 July 2003 was provided by a letter dated 10 July 2003 written by Mr. J.S. Jones of Mowlem. His comment was:–

"*We consider that the latest Letter of Intent was issued in response to our letter to Mouchel dated 3 July. It is upon this basis that we have continued on site. It is only on this basis that we can continue, as the costs on the project to carry out*

the works required by yourselves including the rock issue will exceed £10 million. "

30. Mr. Ford of Mowlem wrote again to Mouchel on 17 July 2003. He said:–

> "*We confirm that the value of the Letter of Intent to which we are currently working is insufficient to cover the cost of carrying out the remaining work on site and that this would need to be extended to £10,150,000 to cover the additional instructions recently received, the rock issue being a separate matter, which is being resolved by conciliation, as previously agreed by both parties.*
>
> *We confirm that the new letter will need to be extended to Friday, 1st August 2003.* "

It does not appear that there was any response to that letter. Certainly there was no further letter of intent, but Mowlem continued with its work.

31. Mr. Parry did reply to Mr. Jones's letter of 10 July 2003 in a letter dated 18 July 2003:–

> "*We have made our position quite clear on a number of occasions. We believe a contract exists for the whole of the Works. The letter of intent to which you refer was issued without prejudice to that position and to mitigate our potential loss against your continued threats to cease work.*
>
> *The stage of the Works now is such that the very substantial losses, which would have been incurred had you failed to continue with the Works previously, will not be incurred. However, it remains our position that if you do not continue and complete the Works you will be in breach of contract.* "

32. The final document upon which Mr. Gray relied in the course of his submissions was a letter dated 1 August 2003 written by Mr. Ford of Mowlem to Mouchel:–

> "*Further to our letter ref. 0451, dated 3.7.03 we confirm that the value of the Letter of Intent is insufficient to cover the cost of carrying out the remaining work on site and that this will need to be extended to £10,400,000 to cover the additional instructions received, the rock issue being a separate matter, which is being resolved by conciliation, as previously agreed by both parties.* "

Submissions on behalf of Mowlem

33. At paragraph 17 of the written opening on behalf of Mowlem were set out the facts upon which Mr. Gray particularly relied in support of his submissions. The focus of attention was upon the letter dated 3 July 2003 written by Mr. Ford, Mr. Jones's letter dated 10 July 2003, Mr. Ford's letter dated 17 July 2003, Mr. Parry's letter dated 18 July 2003 and Mr. Ford's letter dated 1 August 2003. The opening continued:–

> "*(i) Nonetheless, Stena did not withdraw its instruction, made in the letter of 18th July 2003, that the Works were to be continued to completion. Nor did it withdraw the allegation that if*

Mowlem did not complete the Works it would be in breach of contract.

(j) After the 18th July 2003 (the limit date set out in the final (4th July 2003) Letter of Intent), Mowlem continued to carry out works on behalf of Stena. Stena was fully aware of this. [A list of these works, together with details of meetings at which they were discussed is set out at Agreed Fact 65, et seq. ×];

(k) Indeed, Stena (through its agent, Mouchel) issued various orders for extra work after being informed that the cost of the works as they stood would exceed £10,000,000 and after the limit date of the 18th July 2003;

18. Accordingly, the reality of this case is that Stena expressly instructed Mowlem to complete the Works in the full knowledge that that instruction involved Mowlem working beyond the final Letter of Intent limits of the 18th July 2003 and cost of £10,000,000. Because of its mistaken belief as to the contractual terms which govern those Works it even contended that Mowlem would be acting in breach of contract if it did not do so. It ordered additional and varied works during this time. It has had the full benefit of those works.

19. In spite of Stena's insistence, (or rather command backed with the threat of substantial litigation), that Mowlem not only carry out the works for Stena's commercial benefit, but continue without interruption up until completion, and in the knowledge that this would last beyond the 18th July 2003 and was at a cost far exceeding the £10m, Stena apparently seriously now contends that it may retain the benefit of Mowlem's works, costing as it well knew in excess of £10m, and only pay what it knows to be a knock–down price for those works. The irony of the contention will not be lost on the Court. Such a contention was of course only capable of being advanced by Stena after it belatedly conceded that there was no formal contract governing the Works. A more flagrantly opportunistic stance might be hard to conceive.

20. More to the point it is clearly incorrect as a matter of law. Stena are clearly obliged to pay for the works in circumstances where it used as much compulsion as it was able to muster to compel Mowlem to complete and of which it has since enjoyed the benefit. The nature of that obligation arises from the parties' conduct as follows:

(a) Whilst Stena ordered the work completed, the parties failure to agree the terms pursuant to which that would be done once the costs exceeded £10,000,000 means that Mowlem is now entitled to a reasonable sum for that work as a quantum meruit;

(b) Alternatively, the parties conduct - Stena's order to complete the work notwithstanding the warnings as to the cost implications and Mowlem's conduct in doing so - took effect as a further "if" contractual agreement to vary the letter of intent so as to dispense with the £10 million and date specific limit;

(c) Alternatively Stena's conduct took effect as a waiver by it of the limits placed upon the final Letter of Intent; or

(d) Alternatively, the parties conduct gives rise to an estoppel by convention and Stena is now estopped from denying that Mowlem is entitled to be paid a reasonable sum in respect of the said works and/or that the limits placed upon the final Letter of Intent are ineffective. The common assumption shared by both parties was that Mowlem would be paid a reasonable sum for the Work which it carried out at Stena's insistence. In relation to that Mowlem will rely upon Chitty on Contracts, 29th Edition, paragraphs 3–107 to 3–114 and the cases referred to therein. In particular the Claimant will rely upon the case of ***Amalgamated Investment & Property Co. Limited -v– Texas Commerce International Bank Limited*** *[1982] QB 84. "*

34. The highest that Mowlem's case was put was that the effect of the matters relied upon - in particular the alleged insistence on the part of Stena that Mowlem carry on after 18 July 2003 and after its costs allegedly had exceeded £10 million and complete the Works - was that Mowlem became entitled as a result of compliance with the alleged instruction to be remunerated for the whole of the Works on a quantum meruit basis. However, in his oral submissions the focus of Mr. Gray's attention was not so much on that extreme position as on the contention that the effect of the matters relied upon was that there was something to which the £10 million limit did not apply and in relation to that something Mowlem was entitled to be remunerated by payment of a reasonable sum. At different times during the course of his oral submissions Mr. Gray identified different matters as being the *"something"* which I have mentioned in the previous sentence. The first in time of these matters which Mr. Gray addressed was what was referred to contemporaneously as *"the rock issue"*. Mr. Gray contended that Mowlem made clear in Mr. Ford's letter dated 3 July 2003 that the then prevailing limit in the current letter of intent, that of 20 June 2003 of £10 million, was sufficient only on the basis that the rock issue was not included within that figure. Although he accepted that Mr. Parry refuted that in his letter dated 7 July 2003, Mr. Gray asserted that Mr. Jones restated the position of Mowlem in his letter dated 10 July 2003 and Mr. Parry did not repeat in his letter of 18 July 2003 the position set out in the letter of 7 July 2003. In those circumstances, submitted Mr. Gray, Stena was insisting that Mowlem complete the Works and by not repeating its position that the £10 million limit included the rock issue, led Mowlem to believe that Mowlem's position on that was accepted. The next *"something"* for which Mr. Gray contended was any work in fact done by Mowlem after 18 July 2003. Mr. Gray's submission was simply that as a matter of construction of the letter dated 4 July 2003 the limit of £10 million only applied in relation to work done up to 18 July 2003, so that Mowlem was entitled to be paid whatever was a reasonable sum, regardless of any limit of £10 million, in respect of work done after that date. Mr. Gray also submitted that, on proper construction of the letter dated 4 July 2003, the limit of £10 million only applied until that limit had been reached. Thus, if a reasonable sum for the work in fact done by Mowlem exceeded £10 million, the limit ceased to be material. In the context of this submission Mr. Gray relied in particular upon Mr. Ford's letters dated, respectively, 17 July 2003 and 1 August 2003 as notifications that the limit had been exceeded. The final *"something"* for which Mr. Gray contended was any work which was the subject of an instruction issued to Mowlem after 4 July 2003. The submission was that logically any limitation imposed by the terms of the letter dated 4 July 2003 could not apply to such work.

Submissions on behalf of Stena

35. In their written opening Mr. Ramsay and Mr. Stansfield placed considerable emphasis on what they contended was the effect in law of a letter of intent, such as those in the present case, which, if acted upon by the addressee, gave rise to an *"if"* contract. In particular, they submitted that under such a contract the offeree had no obligation to continue with work embarked upon and could cease at any time to execute work begun without thereby being in breach of contract. In support of that submission they reminded me that in *British Steel Corporation v. Cleveland Bridge & Engineering Co. Ltd.* , supra, at page 122 Robert Goff J had said:–

> *"I only wish to add to this part of my judgment the footnote that, even if I had concluded that in the circumstances of the present case there was a contract between the parties and that that contract was of the kind I have described as an "if" contract, then I would still have concluded that there was no obligation under that contract on the part of BSC to continue with or complete the contract work, and therefore no obligation on their part to complete the work within a reasonable time. "*

That observation was obiter because in fact Robert Goff J held that no contract at all had been concluded. However, Mr. Ramsay and Mr. Stansfield submitted that it was a correct statement of the law. What it meant, submitted Mr. Ramsay orally, was that the correct course for Mowlem to follow in the event that it considered that the limit of £10 million imposed by the letter dated 4 July 2003 was too low in the light of work carried out, was to stop work, or at least to threaten to do so. Mr. Gray accepted that such threats had been made by Mowlem from time to time during the course of the execution of the Works. Stena's case, as set out at paragraph 46.2 of the written opening of Mr. Ramsay and Mr. Stansfield, was that Mowlem's entitlement in the circumstances as they in fact turned out was simply to be paid in accordance with the terms of the letter dated 4 July 2003.

36. Despite the somewhat colourful terms of paragraph 20 of the written opening of Mr. Gray and Mr. Brannigan, Mr. Ramsay and Mr. Stansfield did not accept on behalf of Stena that Mowlem had in fact incurred costs in excess of £10 million. Mr. Ramsay in his oral submissions accepted that Mowlem contended that it had incurred costs in excess of £10 million, but he told me that Mouchel's valuation of the Works was considerably under that figure, namely £8,897,741.61. In those circumstances, submitted Mr. Ramsay, any submission on behalf of Mowlem which depended upon Stena knowing that Mowlem had incurred costs in excess of £10 million at any point was misconceived.

37. Mr. Ramsay contended that, on proper construction, what Stena agreed by the letter dated 4 July 2003, was to pay to Mowlem in respect of whatever work Mowlem undertook in connection with the Works,

> *"such reasonable amounts as can be substantiated in respect of your costs for orders placed or work done, "*

up to a maximum of £10 million. Mr. Ramsay emphasised that the proper construction of the words which I have just quoted was not before the Court in this action. What in effect I did have to decide, according to Mr. Ramsay, was simply whether the limit of £10 million applied and, if so, to what. The actual evaluation of the sums to which Mowlem was entitled in respect of the execution of the Works was for another occasion.

38. Mr. Ramsay submitted that the limit of £10 million, on proper construction of the letter dated 4 July 2003, applied to all work done by Mowlem in connection with the

were given. It was immaterial, contended Mr. Ramsay, that a particular item of work should have been unknown as at 4 July 2003 because once it had been instructed it became part of the work to which the limit of £10 million applied. In the submission of Mr. Ramsay the date of 18 July 2003 mentioned in the letter dated 4 July 2003 was in fact irrelevant to any issue which I have to decide. He contended that the expression,

> *"We confirm that Stena Line Ports Ltd's commitment to expenditure up to a maximum of £10,000,000.00 will enable you to proceed with the Works in accordance with your programme, until 18 July 2003. "*

was simply a statement of the anticipation of Mouchel as to how much work the limit of £10 million would cover, and not in any sense a temporal inhibition on the application of that financial limit. Mr. Ramsay disputed the analysis of Mr. Gray that the date 18 July 2003 was that to which the expression *"during this period"* in the third paragraph of the letter dated 4 July 2003 referred. Mr. Ramsay asserted that that expression, in the second sentence of the paragraph, simply referred back to the period identified in the first sentence of that paragraph as the period of the validity of the letter of intent, namely until it was rescinded or a contract was executed.

39. Mr. Ramsay and Mr. Stansfield did not accept that Mr. Gray was right to characterise Mr. Parry's letter dated 18 July 2003 as an order or a command given by Stena to Mowlem to complete the execution of the Works. Mr. Ramsay submitted that the letter merely contained assertions, which Stena now accepted were erroneous, that there was a contract in existence between Stena and Mowlem and that Mowlem would be in breach of that contract if it did not complete the Works. Far from being a threat of substantial litigation, said Mr. Ramsay, the letter indicated that the very substantial losses which had been feared at one stage had been avoided.

40. A consequence of the fact that the parties had made a contract in the terms of the letter dated 4 July 2003, submitted Mr. Ramsay, was that there was just no question as a matter of law of Mowlem being able to claim payment on a quantum meruit basis for work which was covered by the contract. In support of that submission Mr. Ramsay relied upon a passage in *The Law of Restitution* , 6th edition, 2002, by Lord Goff of Chieveley and Professor Gareth Jones at paragraphs 1–063 to 1–068. In that passage there was reference to the speech of Lord Dunedin in *The Olanda* , reported as a note to the report of *Steven v. Bromley & Son* [1919] 2 KB 722, at page 730 in which Lord Dunedin had said:–

> *"As regards quantum meruit where there are two parties who are under contract quantum meruit must be a new contract, and in order to have a new contract you must get rid of the old contract. "*

That passage was referred to and applied by the Court of Appeal in *Gilbert & Partners v. Knight* [1968] 2 All ER 248. Lest those authorities might be thought to have been tainted in their references to the necessity for a new contract, if there was to be an entitlement to payment on a quantum meruit basis, by the former theory of the justification for a quantum meruit being an implied contract, Mr. Ramsay drew to my attention a decision of the Court of Appeal of New South Wales, *Trimis v. Mina* (2000) 2 TCLR 346. There were a number of issues in that case. The only substantive judgment was that of Mason P. In paragraph 54 of the judgment, at pages 357 and 358 of the report, Mason P said, so far as is presently material, this:–

> *"The starting point is a fundamental one in relation to*

supplied. No action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject–matter of the claim. This is not a remnant of the now discarded implied contract theory of restitution. The proposition is not based on the inability to imply a contract, but on the fact that the benefit provided by the plaintiff to the defendant was rendered in the performance of a valid legal duty. Restitution respects the sanctity of the transaction, and the subsisting contractual regime chosen by the parties as the framework for settling disputes. This ensures that the law does not countenance two conflicting sets of legal obligations subsisting concurrently. As Deane J explained in the context of the quantum meruit *claim in* Pavey & Matthews *(at 256), if there is a valid and enforceable agreement governing the claimant's right to payment, there is "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration." "*

Mr. Gray did not contest that the statement of principle contained in that passage accurately represented the law of England and Wales, as well as the law of New South Wales. I do not think that he contested the applicability of the principle to the present case. At all events, I am satisfied that the law as stated by Mason P does accurately represent the law of England and Wales and that the principle so stated is applicable in the present case.

41. In their written opening Mr. Ramsay and Mr. Stansfield set out in some detail their responses to the submissions contained in paragraph 20 (a), (b), (c) and (d) of the written opening of Mr. Gray and Mr. Brannigan. About the submission in paragraph 20 (b) they said, in addition to points to which I have already referred, this:–

> *"68. First, this new contention is contrary to the Agreed Statement of Facts which records that the parties agree that their relationship is governed by the letters of intent (Agreed Facts, paragraph 41).*
>
> *69. In any event, although the order to complete the works is not identified, it appears to be Mowlem's case that the instruction was contained in Stena's letter dated 18 July 2003.*
>
> *70. It is quite impossible to construe that letter as a further letter of intent giving rise to an "if" contract. The letter does not contain any request that Mowlem carry out further works, nor any statement that any further works carried out by Mowlem would be paid for in addition to the sums which could be claimed under final letter of intent. "*

42. The answer given by Mr. Ramsay to the contention on behalf of Mowlem that Stena had waived the right to rely on the limitation contained in the letter dated 4 July 2003 was short. Stena did nothing which would reasonably have led Mowlem to conclude that Stena would not seek to rely upon that limitation. Moreover, submitted Mr. Ramsay, Mowlem understood perfectly well the significance of the letter dated 4 July 2003 and that Stena would rely upon it, as can be seen from Mowlem's attempt in the letter dated 10 July 2003 to have *"the rock issue"* excluded from the limit of £10 million and its requests in the letters dated, respectively, 17 July 2003 and 1 August 2003 for further letters of intent with increased figures.

43. Mr. Ramsay's answer to the submission on behalf of Mowlem that Stena was estopped by convention from denying that Mowlem was entitled to be paid a reasonable sum in respect of the Works and/or that the limitation placed in the letter dated 4 July 2003 was ineffective was equally short. Any such estoppel could only arise as a result of a common assumption as between Mowlem and Stena and there was not one. None was set out in the agreed statement of facts and thus there was no evidence to support the conclusion of a common assumption. Per contra, the agreed fact that the relationship between the parties was governed by the letters of intent was inconsistent with any such common assumption.

Conclusions

44. I find all of the submissions of Mr. Ramsay and Mr. Stansfield persuasive and I accept them. In my judgment, as from 4 July 2003 the relationship between Stena and Mowlem was governed by the letter dated 4 July 2003. Under the terms of that letter the obligation of Stena was to pay Mowlem in respect of the execution of the Works, including any variations thereto after 4 July 2003,

> "*such reasonable amounts as can be substantiated in respect of your costs for orders placed or work done, subject to the maximum amount given below* [namely £10 million]."

I have heard no argument as to the proper construction of the first two lines of the passage which I have just set out and I express no view as to what elements fall, or do not fall, to be taken into account in evaluating the sum to which Mowlem is in fact entitled. I am satisfied that the letter dated 4 July 2003 did not have effect only until 18 July 2003 or only in relation to work done before that date or only in relation to work instructed before that date. The reference to the date had, as it seems to me, only the significance for which Mr. Ramsay contended. I accept the submission of Mr. Ramsay that the period during which the obligation to make payment to which I have referred endured was until the letter dated 4 July 2003 was rescinded or a contract was executed. Grammatically that is what the letter said, and it would make no commercial sense to have a financial limit on Stena's obligations to make payment which could be avoided by the simple expedient of continuing to carry out work after 18 July 2003. It would be even more bizarre commercially if the financial limitation on Stena's obligations could be avoided simply by Mowlem exceeding that limit. I reject the argument that the term set out in paragraph 5 of the Amended Particulars of Claim was to be implied into the contract incorporating the letter dated 4 July 2003. There was, as it seems to me, no justification in law for any such implication. I do not accept that Stena conducted itself on the material before me in such a way as to lead Mowlem to believe that it would not seek to rely upon the terms of the letter dated 4 July 2003. I reject the submission of Mr. Gray that by not in terms restating in his letter dated 18 July 2003 the position on *"the rock issue"* set out in his letter dated 7 July 2003 Mr. Parry led Mowlem to believe that Stena had altered its position on that question and had accepted the position of Mowlem. In the letter dated 18 July 2003, as it seems to me, Mr. Parry did say that Stena's position had been made quite clear on a number of occasions in relation to the matter raised in Mr. Jones's letter dated 10 July 2003, to which the letter dated 18 July 2003 was a response. While Mr. Parry went on to repeat the assertion that there was a contract between the parties which governed the whole of the Works and contended that Mowlem would be in breach of that contract if it did not complete the whole of the Works, no reasonable interpretation of those contentions is that Stena was accepting the position of Mowlem in relation to *"the rock issue"*. Equally, in my judgment, those contentions did not amount to any request or instruction or order or command to Mowlem to complete the Works. They were simply a statement of Stena's position as to Mowlem's existing obligations. I do not see how that statement could possibly be interpreted as some sort of offer to pay

additional sums for work. I accept the submission of Mr. Ramsay that there is no evidence of any waiver on the part of Stena of its right to rely on the terms of the letter dated 4 July 2003. I also accept his submission that the terms of Mr. Ford's letters dated, respectively, 17 July 2003 and 1 August 2003 demonstrate that Mowlem did not believe at the time that Stena would not seek to rely on the letter dated 4 July 2003. While those letters did inform Stena that Mowlem was anticipating that the cost of the Works would exceed £10 million, even apart from *"the rock issue"*, the fact that in each letter a further letter of intent was sought demonstrates, in my view, that Mowlem well understood at the time the significance of the terms of the letter dated 4 July 2003 and that Stena would seek to rely upon those terms. I reject the submission of Mr. Gray that there was a common assumption between Stena and Mowlem that would prevent Stena from denying that Mowlem is entitled to be paid a reasonable sum in respect of the Works or that the financial limitation in the letter dated 4 July 2003 is ineffective. I accept the submissions of Mr. Ramsay that there is no evidence of any such common assumption and that the existence of any such assumption would be contrary to the agreed statement of facts put before me.

45. In the light of the conclusions which I have reached it is not appropriate to make the declaration claimed on behalf of Mowlem. Mowlem's claim in the action has failed and the claim is dismissed.

46. It follows from my findings that the Counterclaim has succeeded. As the matter has progressed I do not think that it is in fact in dispute between Mowlem and Stena that Stena and Mowlem entered into a contract in the terms of the letter dated 4 July 2003. Thus it is not necessary to make the first of the three declarations claimed on behalf of Stena. In the light of the course of the argument before me, I have the impression that the second of the declarations claimed on behalf of Stena is also uncontroversial. However, if that is not so, I am certainly prepared to make a declaration in the terms of that sought. I do make the third of the declarations claimed on behalf of Stena, namely that Mowlem's entitlement to payment for the Works is subject to a maximum of £10 million.

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CHAPTER 29

RESTITUTION[1]

[1] For a full treatment of the subject matter of this Chapter, see Birks, *An Introduction to the Law of Restitution* (1985); Virgo, *The Principles of the Law of Restitution*, 2nd edn (2006); Burrows, *The Law of Restitution*, 2nd edn (2002); Goff and Jones, *The Law of Restitution*, 7th edn (2007); Hedley and Halliwell (eds), *The Law of Restitution* (2002). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Burrows (ed.), *Essays on the Law of Restitution* (1991); Mitchell, "Unjust Enrichment" in Burrows (ed.), *English Private Law*, 2nd edn (2007); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); Mason and Carter, *Restitution Law in Australia* (1995); Palmer, *The Law of Restitution* (1978) (four Vols); Stoljar, *The Law of Quasi-Contract*, 2nd edn (1989); *The American Law Institute's Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (1937); Winfield, *The Law of Quasi-Contracts* (1952) (also his *Province of the Law of Tort* (1931), Ch.7).

1. INTRODUCTION

(a) *Nature of Restitution*[2]

29–001 **The essence of restitution.** The law of restitution is concerned with whether a claimant can claim a benefit from the defendant, rather than whether the claimant can be compensated for loss suffered. Restitutionary remedies are therefore distinct from those which are traditionally available in contract or in tort, as was recognised by Lord Wright[3]:

> "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

The House of Lords has recognised that restitutionary remedies are available where the defendant has been unjustly enriched at the expense of the claimant.[4] It appears, however, that this is not the only principle which will trigger restitutionary remedies, since such remedies may also be awarded where the defendant has obtained a benefit by the commission of a wrong[5] or where the claimant can bring a claim to recover property held by the defendant in which the claimant has a proprietary interest.[6]

29–002 **Common law.** The obligation to make restitution can arise in a wide variety of situations, but their common framework is that they involve a special relationship between two persons where the law imposes a duty on one person to pay a sum of money or, exceptionally, to deliver specific property to another. This relationship is based either upon the involuntariness of the payment or transfer, its qualified nature, or the conduct of the transferee. A restitutionary claim resembles a contractual one in that liability is imposed upon one person to pay money or transfer property to another person, yet it differs radically in that restitutionary liability is imposed by the law irrespective of the agreement of the parties. Indeed, the law of restitution is subordinate to the law of contract in that, if a contractual relationship subsists between the parties, the contractual regime

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[2] Burrows at pp.1–7; Goff and Jones at pp.3–12; Virgo at pp.1–18.

[3] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 61. See also Lord Wright of Durley, *Legal Essays and Addresses* (1939), p.6.

[4] *Lipkin Gorman (A Firm) Ltd v Karpnale* [1991] 2 A.C. 548. See also *Woolwich Equitable Building Society v IRC* [1993] A.C. 70; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669; *Kleinwort Benson Ltd v Glasgow CC* [1999] 1 A.C. 153; *Banque Financière de la Cité v Parc Battersea Ltd* [1999] 1 A.C. 221; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349; *Foskett v McKeown* [2001] 1 A.C. 102; *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558.

[5] See below, paras 29–139 et seq.

[6] *Foskett v McKeown* [2001] 1 A.C. 102. See below, para.29–172.

will prevail.[7] Restitutionary liability, although like tortious liability in that it is imposed upon the defendant by operation of law, differs from such liability in that it need not be founded on the commission of any wrongdoing, although, as will be seen, such remedies are sometimes available where the defendant has profited from the commission of a tort.[8]

Equity. The common law has not been alone in providing restitutionary remedies. Equity independently developed some principles which are aimed at the same result of giving up to the claimant benefits obtained. In equity such restitutionary remedies may involve restoring value to the claimant or the return of property obtained or its traceable substitute. In equity restitutionary principles have been influential in a number of ways. First in the constructive trust, whereby a defendant is deemed to be a trustee of property for the claimant by operation of law, so that the claimant as beneficiary is able to recover what is due to him.[9] Secondly, the better developed rules of tracing in equity enable the claimant to recover property or its substitute from the defendant, despite being mixed with other property[10] Thirdly, there is the equitable remedy of an account of profits which involves the return of value to the claimant when the defendant has profited from the commission of an equitable wrong.[11] Fourthly, the equitable doctrine of acquiescence has enabled relief to be given to a person who has expended money on the property of another.[12] Fifthly, the equitable concept of unconscionability has proved important in the development of certain grounds of unjust enrichment, especially those relating to the exploitation of the claimant by the defendant.[13] In the United States these different principles of common law and equity have been amalgamated into a single topic in the law called "Restitution", as is evidenced by the volume published in 1937 entitled *The American Law Institute's Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts.*[14] English lawyers are now aware of the interrelation of law and equity in the field of restitution,[15] and it has been said that, in the context

29–003

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[7] *Guinness Plc v Saunders* [1990] 2 A.C. 663, 697–8 (Lord Goff); *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) at [23] (Cooke J.); *Mowlem Plc v Stena Line Ports Ltd* [2004] EWHC 2206; *S and W Process Engineering Ltd v Cauldron Foods Ltd* [2005] EWHC 153 (TCC); *Lumbers v W Cook Builders Pty Ltd* [2008] HCA 27, para.46 (Gleeson C.J.). The contract itself may provide for a restitutionary (gain-based) remedy, but this is a contractual rather than a restitutionary remedy within the distinct law of restitution.

[8] See below, paras 29–141 et seq.

[9] See below, para.29–160.

[10] See below, para.29–164.

[11] See below, para.29–155.

[12] See below, para.29–161; *Ramsden v Dyson* (1866) L.R. 1 H.L. 83; *Plimmer v Wellington Corp* (1884) 9 App. Cas. 699, 710; *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17, see Watts (2006) 122 L.Q.R. 553. See also Birks at pp.277–279, 290–293. cf. Burrows (1988) 104 L.Q.R. 576, 583–586; and *The Law of Restitution*, p.123.

[13] See below, paras 29–137 et seq.

[14] Seavey and Scott (1938) 54 L.Q.R. 29; Winfield at p.529; Lord Wright, *Legal Essays and Addresses*, pp.34 et seq. For the history of the unjust enrichment principle in the United States see Kull [2005] O.J.L.S. 297.

[15] Winfield (1948) 64 L.Q.R. 46. See also Lord Wright (1936) 6 C.L.J. 305 (reprinted in his *Legal Essays and Addresses*, p.1); Holdsworth (1939) 55 L.Q.R. 37; *Nelson v Larholt* [1948] 1 K.B. 339, 343 (see also Denning (1949) 65 L.Q.R. 37); *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 581; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890 QB and CA, [1996] A.C. 669; *Tribe v Tribe* [1996] Ch. 107; Birks at pp.32–33, 71–72, 81–82, 154–156, 163–164, 277–279, 359–362, 420–423; Goff and Jones at p.11, Chs 3, 7, 11, 33 and 34; Virgo (ed. Getzler),

of restitution for unjust enrichment, there is no need to treat the action for money had and received and an action for an equitable remedy "as any longer depending upon different concepts of justice".[16] Accordingly, in this Chapter some indication will be given of the scope of equitable claims and restitutionary remedies.

29–004 **Classification.** There is no generally accepted method of classifying the instances of restitution. Writers[17] have suggested various methods of classification, in lieu of the old method of classifying by the form of action used, e.g. the action for money had and received, the action for money paid, quantum meruit (for the value of services provided) or quantum valebat (for the value of goods transferred). But these causes of action were abolished by the Common Procedure Act 1852 and, whilst they are useful to describe the nature of the benefit obtained by the defendant, they do not assist in the definition of the cause of action.[17a] Alternatively, a pragmatic classification can be adopted with reference to the route by which a particular type of benefit was received,[18] such as "restitution" where the defendant is obliged to restore or pay for a benefit received from the claimant, "reimbursement" where the defendant is obliged to repay the claimant in respect of money paid by the claimant to a third person, "liability to account to the claimant" for money received from a third party and "recompense", such as quantum meruit claims for services rendered. But with the recognition of the unjust enrichment principle by the House of Lords and, further, the apparent recognition that the law of restitution is founded on three distinct principles, this pragmatic classification will not be adopted here, especially because the nature of the claim is typically affected neither by the nature of the benefit nor the route by which it was received. Consequently, the classification adopted in this chapter will focus on the nature of the underlying claim. The final section of this chapter consists of a number of miscellanous claims which might once have been treated as restitutionary, but are better now treated as analytically distinct. These claims are included in this chapter for convenience only.

Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn (2003), Ch.5; Mason [2007] R.L.R. 1.

[16] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 914 (Hobhouse J.); see also [1996] A.C. 669.

[17] Goff and Jones at pp.81–83; Winfield, *Province of the Law of Tort* (1931), pp.148–149 (also *Quasi-Contracts* (1952), pp.26–27); Clarence Smith (1956) 19 M.L.R. 255; Munkman, *The Law of Quasi-contracts* at pp.19–20; Birks at pp.99–108; Burrows at pp.1–15; Virgo at pp.6–18.

[17a] In *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55 the House of Lords recognised a distinct restitutionary claim in quantum meruit but without explaining what needed to be proved to establish such a claim or how it differed from a claim in unjust enrichment which was also recognised, as was a claim for a consideration which has wholly failed. The better view is that these all form the same cause of action which is properly characterised as one in unjust enrichment.

[18] As adopted in some of the earlier editions of this work.

As to the defendants Ryjack Ltd., there must also be judgment against them on a like basis for plainly they were jointly liable with Mr. Edwards up to March 11, 1982, and continued thereafter to use the car for their own purposes until they returned it on December 3, 1982.

Judgment for plaintiffs with costs. Damages of £13,282·50 with interest from February 23, 1981, on half that amount at short term investment rate.

Solicitors: *W. T. Jones; H. Davis & Co.*

[Reported by PAUL MAGRATH, ESQ., Barrister-at-Law]

[HOUSE OF LORDS]

* AILSA CRAIG FISHING CO. LTD. . . . APPELLANTS

AND

MALVERN FISHING CO. LTD. AND ANOTHER . . RESPONDENTS

MALVERN FISHING CO. LTD. . . . . RESPONDENTS

AND

AILSA CRAIG FISHING CO. LTD. . . . . APPELLANTS

AND

SECURICOR (SCOTLAND) LTD. . . . . RESPONDENTS

1981 Oct. 21, 22; Nov. 26

Lord Wilberforce, Lord Elwyn-Jones, Lord Salmon, Lord Fraser of Tullybelton and Lord Lowry

Contract—Exemptions clause—Limitation of liability—Complete failure to perform contract—Whether defendant entitled to rely on limitation clause

The appellants A.C.F., owners of a fishing boat, were members of an association with whom the respondents S. Ltd. had entered into a contract to provide a continuous security service supervising their boats in the harbour while berthed. On the night of December 31, 1971, and January 1, 1972, the appellants' boat, through fouling another boat, the owners of which were M.F., sank there, becoming a total loss. By condition 2 (*a*) of the contract the liability of S. Ltd. was totally excluded in certain circumstances. By condition 2 (*f*):

"If, pursuant to the provisions set out herein, any liability on the part of the company shall arise . . . to the customer for any loss or damage of whatever nature arising out of . . . the provision of, or purported provision of, or failure in provision of, the services covered by this contract, such liability shall be limited to the payment by the company by way of damages of a sum: (i) In the case of all services . . . (*a*) Not exceeding £1,000 in respect of any one claim arising from any duty assumed by the company . . . which involves the provision of any service not solely related to the prevention or detection of fire or

theft . . .; (*b*) Not exceeding a maximum of £10,000 for the consequences of any incident involving fire, theft or any other cause of liability."

In an action for damages brought by A.C.F. against M.F. and S. Ltd. the trial judge held that the loss had been caused by the negligence and breach of contract of S. Ltd. and assessed the damages at £55,000. On appeal to the First Division of the Court of Session, S. Ltd. conceded their negligence and breach of contract, but their appeal was allowed on the ground that condition 2 (*f*) limited their liability to £1,000 despite their total failure to perform the contract.

On appeal by A.C.F.:—

Held, dismissing the appeal, that, though limitation clauses were to be read contra proferentem and must be clearly expressed they were not to be construed by the specially exacting standards applicable to exclusion and indemnity clauses, and the terms of condition 2 (*f*), which were clear and unambiguous, were wide enough to cover the liability of S. Ltd. for their negligence (post, pp. 966F–H, 968B, 970D–F, 972C–D).

Mechans Ltd. v. *Highland Marine Charters Ltd.*, 1964 S.C. 48 doubted.

Decision of the First Division of the Court of Session, 1981 S.L.T. 130 affirmed.

The following cases are referred to in their Lordships' opinions:

Canada Steamship Lines Ltd. v. *The King* [1952] A.C. 192; [1952] 1 All E.R. 305, P.C.

Mechans Ltd. v. *Highland Marine Charters Ltd.*, 1964 S.C. 48.

Pollock (W. & S.) & Co. v. *Macrae*, 1922 S.C.(H.L.) 192, H.L.(Sc.).

Smith v. *U.M.B. Chrysler (Scotland) Ltd.*, 1978 S.C.(H.L.) 1, H.L.(Sc.).

The following additional cases were cited in argument:

Alderslade v. *Hendon Laundry Ltd.* [1945] K.B. 189; [1945] 1 All E.R. 244, C.A.

Suisse Atlantique Société d'Armement Maritime S.A. v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; [1966] 2 W.L.R. 944; [1966] 2 All E.R. 61, H.L.(E.).

CONSOLIDATED APPEALS from the First Division of the Court of Session.

These were appeals from interlocutors of the First Division of the Court of Session (Lord President Emslie, Lord Cameron and Lord Dunpark) dated November 13, 1980, in two actions of damages arising out of casualties to two vessels in Aberdeen Harbour which occurred during the early hours of January 1, 1972. In the first action the appellants, Ailsa Craig Fishing Co. Ltd., were pursuers and the respondents, Securicor (Scotland) Ltd., were the second defenders. The first defenders in that action were the Malvern Fishing Co. Ltd. In the second action the appellants were defenders and the respondents were third parties. The pursuers in that action were the Malvern Fishing Co. Ltd.

In the first action the case against the Malvern Fishing Co. Ltd. was dismissed as irrelevant by interlocutor of the Lord Ordinary (Lord Robertson) dated January 23, 1976. That decision was not reclaimed against and was not sought to be reopened. Thereafter the respondents were found to be liable to the appellants in damages for breach of contract and negligence after proof by interlocutor of the Lord Ordinary (Lord Wylie) dated April 6, 1979.

In the second action, also after proof and by interlocutor of the Lord Ordinary (Lord Wylie) dated April 6, 1979, the appellants were found to

be liable to the Malvern Fishing Co. Ltd. in damages for negligence, subject to their being entitled to relief against the respondents by reason of the breach of contract and negligence of the latter.

Subsequently reclaiming notices were enrolled by the present respondents against the interlocutors of April 6, 1979. They were heard before the First Division of the Court of Session on October 14–17, 1980. The liability of the present appellants to Malvern Fishing Co. Ltd. in negligence was not disputed before the First Division and is not disputed in this appeal. The Malvern Fishing Co. Ltd. was accordingly not a party with an interest in these appeals and took no part in them.

The reclaiming motions in each of the actions were heard together, the only parties addressing the court being the present appellants and the present respondents, argument in the first action being presented as argument in the second action. It was common ground there that the issues between the parties were substantially the same in each action.

By the interlocutors dated November 13, 1980, the First Division allowed the reclaiming motions to the extent of holding that the present respondents were protected by a contractual condition which had the effect of limiting their liability to the sum of £1,000 in each case. The First Division, however, agreed with the Lord Ordinary (Lord Wylie) that the present respondents were not protected by any condition exempting them from liability.

The facts are stated in their Lordships' opinions.

A. M. Morison Q.C. and *W. A. Nimmo Smith* (both of the Scottish Bar) for the appellants, Ailsa Craig Fishing Co. Ltd.

Richard Yorke Q.C. (of the English Bar) *Kenneth Osborne Q.C.* and *P. H. Brodie* (both of the Scottish Bar) for the respondents, Securicor (Scotland) Ltd., were not called on to argue.

Their Lordships took time for consideration.

November 26, 1981. LORD WILBERFORCE. My Lords, the only questions for decision in these appeals are (i) whether the liability of the respondents, Securicor (Scotland) Ltd., under a short-term contract made on December 31, 1971, has been effectively limited by a special condition in that contract and if so (ii) whether the applicable limit is £1,000 or £10,000.

Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra proferentem. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think that the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure.

It is clear, on the findings of the Lord Ordinary, that the respondents were negligent as well as in material breach of their contractual obligations.

A The neglience consisted in a total or partial failure to provide the service contracted for, viz., " continuous security cover for [the pursuers'] vessels from 1900 hours on 31/12/71 until 0700 hours on 5/1/72 " over the increased area specified in the contract. It is arguable, in my opinion, that the failure was not total, in that some security against some risks was provided, though not that which was necessary to prevent the actual damage which occurred. But I do not think that it makes a difference as regards B the applicability of the clause of limitation whether this is right or not, and since their Lordships in the Inner House were of opinion that the failure was total, I will proceed on the asumption that this was so.

The clause of limitation was as follows (special condition of contract 2 (*f*)):

C " If, pursuant to the provisions set out herein, any liability on the part of the company shall arise (whether under the express or implied terms of this contract, or at common law, or in any other way) to the customer for any loss or damage of whatever nature arising out of or connected with the provision of, or purported provision of, or failure in provision of, the services covered by this contract, such liability shall be limited to the payment by the company by way of damages of a D sum . . ."

(Alternatives are stated to which I shall refer later.) This clause is on the face of it clear. It refers to failure in provision of the services covered by the contract. There is no warrant as a matter of construction for reading " failure " as meaning " partial failure," i.e., as excluding " total failure " and there is no warrant in authority for so reading the word as a matter E of law. I am clearly of opinion that *W. & S. Pollock & Co.* v. *Macrae*, 1922 S.C.(H.L.) 192 is no such authority and if the later case of *Mechans Ltd.* v. *Highland Marine Charters Ltd.*, 1964 S.C. 48 so decided, it ought in my view not to be followed.

The appellants tried to find an ambiguity in this clause in three ways.

(i) First they relied upon the finding of the Lord Ordinary, with which F the Inner House generally agreed, that there was such an inconsistency between the provisions of condition 2 (*a*), excluding liability, and those of condition 2 (*f*) as to create uncertainty as to the meaning of the former condition. It was this inconsistency which led the courts below to conclude against the validity of the exclusion clause. So it was argued the same inconsistency and the doubts engendered by it must invalidate condition 2 (*f*). But this is transparently fallacious. Because clause A casts doubt G upon the meaning of clause B, it does not follow at all that the converse is true and that clause B casts doubt upon the meaning of clause A. Clause B must be looked at on its own, and may turn out to be perfectly clear. A similar argument was presented as to an inconsistency between condition 2 (*f*) and condition 4 (i) and, in my opinion, fails for the same reason.

(ii) It was contended that the initial words " If, pursuant to the provi- H sions set out herein " are ambiguous and that their ambiguity invalidates the whole subclause. But I accept on this the conclusion of Lord Dunpark that the words are " open to construction " and I agree on the construction which he prefers. The possibility of construction of a clause does not amount to ambiguity: that disappears after the court has pronounced the meaning.

(iii) There is an inconsistency between subclauses 2 (*f*) (i) (*a*) and (*b*) so that it is impossible to arrive at a figure of limitation clearly expressed.

Therefore, it is said, no limitation has effectively been made. I reproduce these subclauses:

> "(i) in the case of all services other than the special delivery service (*a*) Not exceeding £1,000 in respect of any one claim arising from any duty assumed by the company which involves the operation, testing, examination, or inspection of the operational condition of any machine, plant or equipment in or about the customer's premises, or which involves the provision of any service not solely related to the prevention or detection of fire or theft; (*b*) Not exceeding a maximum of £10,000 for the consequences of any incident involving fire theft or any other cause of liability in the company under the terms thereof; and further provided that the total liability of the company shall not in any circumstances exceed the sum of £10,000 in respect of all and any incidents arising during any consecutive period of 12 months . . ."

For my part I find these clauses, though intricate, perfectly clear. Subclause (*a*) limits any one claim; subclause (*b*) limits any aggregate of claims the consequences of any one incident; the proviso limits the total liability of Securicor in respect of incidents arising in any period of 12 months. The clauses may overlap, in the sense that more than one may apply: they may give rise to difficulty, e.g., if the total liability is exhausted early in the 12 months' period, and other claims arise. But I cannot find any ambiguity in them, notably in relation to the present case. And this answers the second question. I have no doubt that subclause (*a*) applies so as to limit individual claims to £1,000 each. There is no question here of applying subclause (*b*). For these reasons I would dismiss the appeals.

LORD ELWYN-JONES. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Wilberforce and Lord Fraser of Tullybelton. For the reasons they have given I would refuse the appeal and I agree that the respondents must have their costs in this House.

LORD SALMON. My Lords, I have had the advantage of reading the speeches of my noble and learned friends, Lord Wilberforce and Lord Fraser of Tullybelton. Although I consider that Securicor's contract was deplorably drafted, I agree for the reasons stated by my noble and learned friends that the appeal must be dismissed.

LORD FRASER OF TULLYBELTON. My Lords, the only surviving issue in these appeals is whether the respondents ("Securicor") have succeeded in limiting their liability under a contract between themselves and the Aberdeen Fishing Vessel Owners' Association Ltd. ("the association") who were acting on behalf a number of owners of fishing vessels, including the appellants. Nothing turns upon the fact that the appellants were not themselves a party to the contract and I shall proceed as if the contract had been made with them.

The appellants were the owners of the fishing vessel *Strathallan* which sank while berthed in Aberdeen Harbour on December 31, 1971, at a time when Securicor were bound, under the contract with the association, to provide security cover in the harbour. Her gallows fouled the vessel moored next to her on the starboard side, called the *George Craig*, which also sank. Both vessels became total losses. Two actions were then raised. In one the appellants claimed damages from the owners of *George*

A *Craig* as first defenders and from Securicor as second defenders. In the other the owners of the *George Craig* claimed damages from the appellants, who brought in Securicor as a third party. The Lord Ordinary (Lord Wylie) held that the loss of both vessel had been caused by breach of contract and negligence on the part of Securicor. He found them liable to the appellants in damages for the loss of the *Strathallan*, and found them liable to relieve the appellants of their full liability to the owners of the B *George Craig* for the loss of that vessel. He assessed the damages in each case at a little over £55,000. The Lord Ordinary rejected arguments on behalf of Securicor to the effect that their liability was either wholly excluded, or limited in amount, by the terms of their contract. Securicor reclaimed against the Lord Ordinary's judgment but they did not contest his findings of breach of contract and negligence. Their contention on the C reclaiming motion was solely that their liability had been either excluded or limited by the terms of the contract. The First Division of the Court of Session (the Lord President, Lord Cameron and Lord Dunpark) allowed the reclaiming motion in part, holding that liability had been limited in amount but that it had not been excluded. The appellants now appeal to your Lordships' House against that decision in so far as it held that liability had been limited.

D In order to appreciate the contentions of the parties, it is necessary to refer briefly to the circumstances in which the contract came to be made. Until December 31, 1971, Securicor had for some months been providing a security service for vessels of owners represented by the association. They did so under a contract dated May 12, 1971, under which the service was limited to vessels berthed at the Albert Quay in Aberdeen E Harbour, and operated only during the nights and at weekends. The main object was to prevent intruders from boarding unmanned vessels and damaging them or stealing from them. Early on December 31 an official of the association realised that the service would not be adequate for the New Year period, partly because there were many more vessels than usual in the harbour and partly because they would be remaining there for several days. Owing to the unusual number of vessels they could not all be berthed F at Albert Quay, where the security patrols were already provided during certain hours, and some of them would have to be berthed at the Fish Market/Commercial Quay ("the Fish Market area"). The quay in the Fish Market area was of open structure, and there was a special risk that vessels might slide under the deck of the quay and become caught or "snubbed" by the bow. The risk arose especially on a rising tide. That G was just what happened to the appellants' vessel the *Strathallan*, during the evening of December 31, 1971, and caused her to sink taking the *George Craig* with her. As Securicor accept the Lord Ordinary's findings of fault against them, it is unnecessary to refer in greater detail to the events of that evening. Securicor also accept the decision of the First Division that the liability was not wholly excluded by the contract.

The question whether Securicor's liability has been limited falls to be H answered by construing the terms of the contract in accordance with the ordinary principles applicable to contracts of this kind. The argument for limitation depends upon certain special conditions attached to the contract prepared on behalf of Securicor and put forward in their interest. There is no doubt that such conditions must be construed strictly against the proferens, in this case Securicor, and that in order to be effective they must be "most clearly and unambiguously expressed": see *W. & S. Pollock & Co.* v. *Macrae*, 1922 S.C.(H.L.) 192, 199 *per* Lord Dunedin.

Pollock was a decision on an exclusion clause but in so far as it emphasised the need for clarity in clauses to be construed contra proferentem it is in my opinion relevant to the present case also. It has sometimes apparently been regarded as laying down, as a proposition of law, that a clause excluding liability can never have any application where there has been a total breach of contract, but I respectfully agree with the Lord President who said in his opinion in the present case that that was a misunderstanding of *Pollock*. *Pollock* was followed by the Second Division in *Mechans Ltd.* v. *Highland Marine Charters Ltd.*, 1964 S.C. 48 and there are passages in the judgments in that case which might seem to treat *Pollock* as having laid down some such general proposition of law, although it is not clear that they were so intended. If they were I would regard them as being erroneous. *Mechans* appears to have been relied upon by counsel for the appellants before the Second Division, but was not relied on in this House.

There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity: see particularly the Privy Council case of *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 192, 208, where Lord Morton of Henryton, delivering the advice of the Board, summarised the principles in terms which have recently been applied by this House in *Smith* v. *U.M.B. Chrysler (Scotland) Ltd.*, 1978 S.C.(H.L.) 1. In my opinion these principles are not applicable in their full rigour when considering the effect of clauses merely limiting liability. Such clauses will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the proferens from a liability that would otherwise fall upon him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when, as explained in condition 4 (i) of the present contract, the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for. It is enough in the present case that the clause must be clear and unambiguous.

The contract was arranged during the morning of December 31, 1971, in some haste. It is set out on a form partly printed and partly filled in in ink, which is headed "Temporary Contract or Contract Change Request" and in which the association "request Securicor Ltd. to carry out the services detailed below subject to the special conditions printed overleaf." The form requested "continuous security cover for your (sic) vessels from 1900 hours on 31/12/71 until 0700 hours on 5/1/72" and stated that the area covered was to be extended to include the Fish Market area. Nothing turns upon that part of the contract but I should mention that the appellants contended that this temporary contract, so long as it was in operation, entirely superseded the contract of May 12, 1971, and was the sole measure of parties' rights and obligations to one another. Having regard to condition 8 of the special conditions, I see no reason to question that contention.

The "special conditions of contract" were elaborate and are applied to services of several types. So far as this appeal is concerned, the part which is most directly applicable is condition 2, and especially clause (*f*) of that condition. Condition 2 (*f*) is in the following terms: [His Lord-

A ship read clause (*f*) and continued:] On behalf of the appellants it was argued that that clause, even if apparently clear in its own terms, is not applicable when read in the context of the contract as a whole, where there has been a total failure to perform the services contracted for or what is sometimes called a total failure of contract, and that this was such a case. It was said that clause 2 (*f*) must be qualified by the opening words of condition 2 and of clause (*a*) of that condition which show
B that liability can only arise for some fault in the course of providing the services contracted for, and not where there has been a total failure to provide the service. I cannot accept that submission, because clause 2 (*f*) expressly states that it applies to liability arising out of " the provision of, or purported provision of, or *failure* in provision of " the services contracted for. If this submission had not been so persuasively presented,
C I would have thought it to be unarguable in face of the provisions of clause (*f*).

The learned judges of the First Division found that this was a case of total failure or total breach of contract, in the sense of Lord Dunedin's speech in *Pollock*, 1922 S.C.(H.L.) 192. As that is the finding most favourable to the appellants on this part of the case it is not now material to consider whether this is strictly a case of total failure. If the question had
D been material at this stage I would have wished to give it further consideration, because there is no suggestion that the security cover was not duly maintained during the evening of December 31, 1971, in the Albert Dock area, which was part of the area covered by the temporary contract, and I think there is much to be said for the view that the contract was performed in part. But it is not necessary to come to a decision on that point.

E A further argument for the appellants was that clause (*f*) of condition 2 applied only to liability which arose " pursuant to " the provisions of the contract, and that pursuant to meant " in accordance with the express provisions of the contract." This meaning was said to be emphasised by the first sentence of clause 4 (iii). But that argument fails, in my opinion, if for no other reason than that clause (*f*) itself proclaims unambiguously that it applies to liability which shall arise under the " express or implied "
F terms of the contract. Next, the appellants argued that there is an inconsistency between clause (*a*) of condition 2 which purports to exclude liability altogether and clause (*f*) which purports to limit the amount of liability in certain cases. The existence of that inconsistency was one of the reasons for the First Division's decision that the exclusion clause was lacking in clarity, and counsel sought to apply the same argument in
G reverse to the limitation clause. But the argument is in my opinion unsound. It is one thing to say, as the First Division did, that when you find a provision for limiting liability coming after a provision which is capable of being read as excluding liability altogether, the limitation provision casts doubt on the meaning of the earlier one. But it is quite a different thing to say that the inconsistency casts doubt on the meaning of the limitation clause. If the exclusion clause had succeeded in its purpose,
H the limitation might have been unnecessary, but its meaning as a sort of long stop is in my opinion clear and is not affected by the existence of the exclusion clause.

A separate argument was advanced to the effect that clause (*f*) was confused and uncertain in itself because the provisions of sub-paragraphs (i) (*a*) and (*b*) did not make it clear whether the limit of liability in any particular case was £1,000 or £10,000. Perhaps the intention of sub-paragraphs (*a*) and (*b*) may not be immediately clear on first reading to a

person unfamiliar with provisions of this sort, but a very little consideration is enough to show, in my opinion, that the meaning is that explained by the learned judges of the First Division. Sub-paragraph (*a*) relates to any *claim* arising in any of the ways there mentioned and it limits the liability of Securicor to £1,000 for each claim. Sub-paragraph (*b*) relates to any one *incident* and limits their liability to £10,000 in respect of each incident. The two provisions overlap but they are in no way inconsistent. For example, in the present case the owner of each of the vessels has a separate claim which, if the clause is applicable, will be limited to £1,000. But both claims arise out of one incident, and if there had been more than ten claims for £1,000 each arising out of the same incident, the total liability of Securicor would have been limited to £10,000. That meaning is in my view clear and unambiguous and I reject this argument.

Having considered these particular criticisms of clause (*f*) the question remains whether in its context it is sufficiently clear and unambiguous to receive effect in limiting the liability of Securicor for its own negligence or that of its employees. In my opinion it is. It applies to any liability "whether under the express or implied terms of this contract, or at common law, or in any other way." Liability at common law is undoubtedly wide enough to cover liability including the negligence of the proferens itself, so that even without relying on the final words "any other way," I am clearly of opinion that the negligence of Securicor is covered.

For these reasons I would refuse the appeal. The respondents must have their costs in this House.

LORD LOWRY. My Lords, I have had the opportunity of reading in draft the speeches of my noble and learned friends, Lord Wilberforce and Lord Fraser of Tullybelton. There is nothing which I can usefully add, since I entirely agree with their reasoning and conclusions and with the order proposed. I, too, would dismiss the appeal.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan for Boyd, Jameson & Young W.S., Edinburgh; Hextall, Erskine & Co. for Strathern & Blair W.S., Edinburgh.*

F. C.