

# CONTRIBUTION PROCEEDINGS

**Simon Hargreaves QC**



## Civil Liability (Contribution) Act 1978

section 1(1):

“Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).”

section 1(1):

“Subject to the following provisions of this section, [1] any person [2] liable [3] in respect of any damage suffered by [4] another person may recover contribution from any [5] other person [6] liable in respect of the [7] same damage (whether jointly with him or otherwise).”



- B must be liable to A in respect of damage suffered by A
- C must be liable to A in respect of damage suffered by A
- the damage under discussion must be the same damage

- B must be liable to A in respect of damage suffered by A
- **C must be liable to A in respect of damage suffered by A**
- the damage under discussion must be the same damage

“(3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.



- B must be liable to A in respect of damage suffered by A
- C must be liable to A in respect of damage suffered by A
- the damage under discussion must be the same damage



(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

- immediately before he **made** the payment
- immediately before he was ordered (e.g. by a Court) to make the payment
- immediately before he **agreed to make** the payment

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

*WH Newson Holding Ltd v IMI plc* [2016] EWCA Civ 773;  
[2017] Ch 27

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section [1] without regard to whether or not he himself is or ever was liable in respect of the damage, [2] provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

*WH Newson Holding Ltd v IMI plc* [2016] EWCA Civ 773;  
[2017] Ch 27

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section [1] without regard to whether or not he himself is or ever was liable in respect of the damage, [2] provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

“In my respectful view, that construction of the proviso is one that section 1(4) does not permit. It has provided expressly that there is to be no inquiry as to whether D1 was *or was not* actually liable to C and the proviso cannot therefore fairly be read as impliedly qualifying that prohibition so as to let in an inquiry directed at showing that D1 was not actually liable. Such an interpretation is repugnant to the express intention of the primary provision of section 1(4).”



If I may say so, I consider that Chadwick J [the Judge in *Hashim*] focused too closely on the trees in the proviso without also standing back and noting the nature of the wood in which they had been planted.

The result was that he wrongly allowed the tail of section 1(4) to wag the dog.

“59 The proviso of course shows that D1 must still prove at least something in order to succeed against D2. That is that “he would have been liable [to C] assuming that the factual basis of the claim against him could be established.” In my judgment ... all that D1 needs to show is that such factual basis would have disclosed a reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. If he can do that, he will be entitled to succeed against D2. There may of course remain issues as to quantum, as to which section 1(4) makes no assumptions.”

If B settles A's claim against it, C cannot argue in contribution proceedings that A's claim against B was time-barred so that it, C, is not liable in contribution.

If A's claim against B proceeds (and assuming C is in those proceedings), C can argue that A's claim against B was time-barred so that it, C, is not liable in contribution.

If B settles A's claim against it:

- C can defend B's contribution proceedings on grounds that, assuming the facts of A's claim against B, B was not liable in law to A.
- C can always argue in contribution proceedings brought by B, that B had paid too much by way of settlement (i.e. ss 1(4) does not extend to quantum) *Sainsbury v Broadway Malyan* (1999)
- C can argue collusion, dishonesty or absence of bona fides in the compromise

Abbey National plc v. Gouldman [2003] 1 WLR 2042 [Ch D]

Abbey National plc v. Gouldman [2003] 1 WLR 2042 [Ch D]

One of the challenges raised by the surveyor was that the settlement agreement was not bona fide because the pursuit by Abbey National of the solicitor's (assigned) Part 20 claim enabled Abbey National to circumvent the limitation defence which the surveyor would otherwise have had.

Abbey National plc v. Gouldman [2003] 1 WLR 2042 [Ch D]

“I do not see how the achievement of a means to avoid a limitation difficulty can be regarded as not in good faith. If such means is available, then there is no reason why advantage should not be taken of that availability.”

[see in particular 13-15, 17-18, 23-24, 27-31 of the judgment]

section 1(1):

“Subject to the following provisions of this section, [1] any person [2] liable [3] in respect of any damage suffered by [4] another person may recover contribution from any [5] other person [6] liable in respect of the [7] same damage (whether jointly with him or otherwise).”



*Royal Brompton NHS Trust v Hammond* [2002] 1 WLR  
1397 [HL]

*Royal Brompton NHS Trust v Hammond* [2002] 1 WLR  
1397 [HL]

“a common liability should be shared between those liable” [2]

“B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A” [5]

“B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A” [6]

“The question would then be whether the employer was advancing a claim for damage, loss or harm for which both the contractor and the architect were liable, in which case (if the claim were established) the court would have to apportion the common liability between the two parties responsible, or whether the employer was advancing separate claims for damage, loss or harm for which the contractor and the architect were independently liable, in which case (if the claims were established) the court would have to assess the sum for which each party was liable but could not apportion a single liability between the two” [7]

“this relief is available only where two or more persons have contributed, albeit in different ways, to the same harm or damage—that is, where a single harm has resulted from what they have done” [46]

“they share a common liability to pay compensation for having inflicted the same harm” [46]

“the concept of a common liability remains the basis of the entitlement to contribution in English law” [46]



“the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely in order to determine whether or not the damage is the same” [47]

“The context does not therefore justify an expansive interpretation of the words “the same damage” so as to mean substantially or materially similar damage” [27]

“It must be interpreted and applied on a correct evaluation and comparison of claims alleged to qualify for contribution .... No glosses, extensive or restrictive, are warranted. The natural and ordinary meaning of “the same damage” is controlling” [27]

*Hurstwood Developments Ltd v Motor and General*  
[2001] EWCA Civ 1785 [CA]



*Hurstwood Developments Ltd v Motor and General*  
[2001] EWCA Civ 1785 [CA]



Mr Berry contends that the damage or harm in the present case suffered by Hurstwood was the same. Hurstwood had to pay from its own resources, “put its hand in its own pocket”, to compensate [the contractor for the necessary remedial works]. That was the result of HBB’s negligence over its site investigation and the result of MGA’s failure to put in place the requisite insurance.



“...the Court of Appeal held that the claim by an employer against a contractor for negligent site investigation services and a claim by the employer against insurance brokers for failure to insure ... are claims for “the same damage”, entitling the insurance brokers to claim a contribution against the contractor. The fact is, however, that the insurance brokers had no responsibility for the remedial work. ... If my conclusions in respect of the claims under consideration in the present case are correct it follows that the *Hurstwood* case was wrongly decided.”

*Bovis Construction Ltd v Commercial Union Assurance Co plc* [2001] 1 Lloyd's Rep 416 (Comm)

“28. Bovis was liable for the flood damage to Friendly House: CU was liable under a policy of insurance. It is a misconception to describe those as liabilities "in respect of the same damage". The damage inflicted by the builder was a defective building susceptible to flooding damage and consequential loss of rent. CU has not inflicted that damage: the only damage it could inflict would have been a refusal to pay on the policy ... thereby imposing financial loss. This is not the same damage.”

*Bovis Lend Lease Ltd v Saillard Fuller & Partners* (2001) 77  
Con LR 134



“... the damage being inflicted must be seen from Rosehaugh's perspective. It suffered flood damage. GA was liable to indemnify Rosehaugh for that damage by paying a sum representing Rosehaugh's loss caused by the flood damage. Equally, Bovis was liable to pay damages to Rosehaugh for the loss incurred by Rosehaugh following the flood damage it suffered for which Bovis was liable. On the face of it, therefore, the damage for which each payment was or would have been made was the same.”

“... Judge Anthony Thornton QC took a contrary view. It will be obvious that on this point I prefer the view of David Steel J.”





*Nationwide Building Society v Dunlop Haywards* [2009]  
PNLR 20 (Comm)

“47. I am satisfied that DHL and Cobbetts are, at least to some extent, liable/responsible for the same damage. CBS would not have made either of the two advances but for the deceit of DHL and the negligence of Cobbetts and have suffered loss in consequence. It is, however, necessary to consider what exactly is “ the same damage ” for which they are both liable/responsible.”

“50. It is, however, necessary to distinguish between three different circumstances viz:

- (a) D1 and D2 are not liable for the same damage because they are responsible for different things;
- (b) D1 and D2 are both liable for the same damage and in the same amount;
- (c) D1 and D2 are liable for the same damage but D2 is liable for less than D1, e.g. because he has available to him defences which reduce what would otherwise be his liability for the damage in question e.g. contributory negligence and contractual or statutory limitation.”

55. ... It would not be just for D 1 who is liable for £20 million of damages ... to recover contribution in respect of amounts for which D 2 has no liability at all; or for D 2 to recover less contribution for the amounts for which they are both liable on account of the fact that D 1 is liable for much more. ... the contrary approach would have the odd result that an innocent defendant who had the misfortune to have a fraudulent co-defendant would recover less by way of contribution than he would have done if his co-defendant was merely as incompetent as he was.”

*Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1



Thank you for listening.