Neutral Citation Number: [2016] EWCA Civ 773

Case No: A3/2015/2167

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mrs Justice Rose
[2015] EWHC 1676 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2016

Before :

LORD JUSTICE GROSS
LORD JUSTICE HAMBLEN
and
SIR COLIN RIMER

- -

Between :

W.H. NEWSON HOLDING LIMITED and OTHERS **Claimants**
- and -
(1) IMI PLC
(2) IMI KYNOCH LIMITED
First and Second Defendants/Part 20 Claimants/Respondents
- and -
(1) DELTA LIMITED (formerly DELTA PLC)
(2) DELTA ENGINEERING HOLDINGS LIMITED
Part 20 Defendants/Appellants

- -
- -

Helen Davies QC and **Charlotte Thomas** (instructed by **Addleshaw Goddard LLP**) for the **Part 20 Defendants/Appellants**
Paul Harris QC and **Rob Williams** (instructed by **Pinsent Masons LLP**) for the **Part 20 Claimants/Respondents**

Hearing date: 22 June 2016

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Approved Judgment

Sir Colin Rimer :

1. This appeal is against paragraph 1 of an order dated 18 June 2015 made by Rose J in the Chancery Division by which she answered a preliminary issue turning on the interpretation of section 1(4) of the Civil Liability (Contribution) Act 1978 ('the 1978 Act'). Her answer was that the effect of the subsection was to bar Delta Limited and Delta Engineering Holdings Limited (together 'Delta'), defendants to a Part 20 claim by IMI PLC and IMI Kynoch Limited (together 'IMI'), defendants in the main proceedings, from advancing a defence to the Part 20 claim based on limitation.

2. Rose J said in [29] of her judgment, [2015] EWHC 1676 (Ch), that she had found the point a very difficult one and it is with her permission that Delta appeals. I express my gratitude for the helpful arguments we have had from Ms Davies QC and Ms Thomas for Delta and from Mr Harris QC and Mr Williams for IMI.

Background

3. On 20 September 2006, in Case COMP/F-1/38.121 – *Fittings*, the European Commission found that IMI and Delta, amongst others, had participated in an unlawful price-fixing cartel in the market for copper and copper alloy fittings, which existed between 31 December 1988 and 1 April 2004. IMI was found to have participated from the start until 22 March 2001, and Delta from the start until 23 November 2001. The cartel was in breach of Article 101(1) of the TFEU. On 12 May 2012, W.H. Newson Holding Limited and 22 others brought follow-on damages claims against IMI and one other cartel participant, Legris Industries SA ('Legris'). I shall refer to the 23 claimants, which are all part of a group owned by Travis Perkins Plc, as 'Travis Perkins'. Their cause of action was breach of statutory duty, namely infringement of Article 101(1). On the basis that they had been active in the copper fittings market during the cartel period, Travis Perkins claimed they had suffered loss under various heads, including that the effect of the cartel was unlawfully to inflate prices so as to lead to overcharges as compared with the competitive price. The total amount claimed, with interest, exceeded £390 million.

4. IMI defended the claim on various grounds, including that it was barred by limitation. In paragraph 37 of its Defence of 14 February 2014, it asserted that 'in any event, the claim is time barred, the causes of action having accrued at the latest at the end of the pleaded Cartel Period, namely 1 April 2004' (the claim form had been issued over six years later). Travis Perkins pleaded a Reply on 12 March 2014, denying that the claim was time barred. In reliance on section 32(1)(b) of the Limitation Act 1980, they alleged in paragraph 17 that IMI had deliberately concealed facts relating to the cartel such that time did not start to run until the date on which they could with reasonable diligence have discovered the relevant facts. Paragraph 17 reads:

> 'Paragraph 37 is denied. IMI and the other Cartelists deliberately concealed the Cartel and the facts relating to it from (among others) the Claimants (see Recital 745 [of the Commission Decision]). The earliest date on which the Claimants could with reasonable diligence have discovered the concealment, and sufficient facts to plead a right of action, was the date on which the Summary Decision was published in the Official Journal of the European Union, namely 27 October 2007, alternatively the date of the European Commission press release announcing the Decision, namely 20 September 2006. Accordingly, pursuant to

section 32 of the Limitation Act 1980, the period of limitation runs from that date and the claims were brought in time.'

5. In the meantime, IMI had served Part 20 claims dated 16 October 2012 on 23 Part 20 defendants, of which Delta are the 11th and 12th. All 23 were addressees of the Commission Decision and found to be participants in the cartel. The Part 20 claims were for a contribution or indemnity under section 1 of the 1978 Act. IMI pleaded in paragraph 9 that it denied Travis Perkins' claims against itself but the essence of its contribution claims was that, to the extent that it might be held liable to Travis Perkins, each of the Part 20 defendants was jointly and severally liable with it for the same damage.

6. Delta defended the Part 20 claim against it. By its Defence of May 2014 (which followed Travis Perkins' Reply), it denied that either IMI or Delta caused any loss to Travis Perkins, asserting that Travis Perkins passed any overcharges resulting from the cartel on to their customers and thereby gained a profit rather than suffered any loss. Delta also pleaded the following case on limitation (certain of the particulars were in fact added by an amendment of 16 October 2014):

> '18. Further as to the first two sentences of paragraph 9, and as particularised below, it is averred that the Claimants' [Travis Perkins'] claim is time barred since the Claimants fail to satisfy the conditions of section 32(1)(b) of the Limitation Act 1980 as alleged, namely that prior 12 May or 17 September 2006:
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> 18.1. that they were unaware of, and could not with reasonable diligence have discovered, certain facts without which the cause of action against the Defendants would have been incomplete;
>
> 18.2 that such facts were being concealed from them by the Defendants; and
>
> 18.3 that any such concealment by the Defendants was deliberate.
>
> PARTICULARS
>
> (1) The Claimants were aware or could with reasonable diligence have become aware of the fact of price-coordination by at least Delta and IMI from 1988 for the reasons set out in the witness statement of David Pearce dated 5 September 2014.
>
> (2) Delta did not conceal that fact from the Claimants but supplied it or permitted it to be supplied to the Claimants for the reasons set out in the witness statement of David Pearce dated 5 September 2014.
>
> (3) The Claimants were also aware or could with reasonable diligence have become aware of the fact that price-coordination by at least IMI and/or Delta on the basis of the following publicly available information with the Claimants had or could with reasonable diligence have obtained:
>
> > [(a) – (e) particulars of Commission press releases and references to the investigation in IMI's and Delta's annual reports]

> (4) On the basis of the above, the Claimants were aware or could with reasonable diligence have become aware of the fact that such price-coordination between at least Delta and IMI had the object or effect of distorting competition, an effect on trade between Member States and could properly have pleaded damage as a result.'

7. Mr Pearce there referred to is a former managing director of Delta's UK plumbing fittings business. His witness statement asserted that Travis Perkins were at all times aware of price-fixing arrangements.

8. On 10 July 2014, IMI applied to the court for a direction that the limitation issue should be tried as a preliminary issue. A CMC to consider the application was fixed for 24/25 July 2014. IMI's Note for it explained: (i) that the pleadings had closed in accordance with a consent order of 15 April 2014, in particular by the preparation of Part 20 Defences, and that IMI had elected not to serve Replies; (ii) that Travis Perkins and IMI had reached agreements in principle to settle both the main claim and the Part 20 claim against Legris and that IMI had made significant progress in settling all its other Part 20 claims save that against Delta; (iii) that Travis Perkins and IMI had agreed there should be a preliminary issue on the question of limitation; (iv) that they had agreed that, as Delta had raised the positive case it had in paragraph 18 of its Part 20 Defence, it should take the lead in prosecuting the issue; (v) that whilst Delta did not oppose the preliminary issue proposal, it did oppose the suggestion that it should take such lead; and (vi) that IMI disagreed with Delta's suggestion that IMI should adopt its positive case on limitation. IMI's position as to the last point was that Delta had made the positive assertions that it had and, having done so, must either pursue or withdraw them; and that it was neither necessary nor appropriate for IMI to adopt Delta's case. IMI said, in paragraph 22(c) of its Note, that:

> 'The suggestion that IMI needs to adopt Delta's case, including its evidence is wrong in principle and would only lead to increased cost, inefficiency and complexity. Indeed, it is far from a foregone conclusion that IMI would wish to adopt Delta's case (and either way, that would not remove the need for the preliminary issue on limitation to be tried).'

9. The CMC was adjourned to 17 September 2014. By then, Travis Perkins' claim against Legris and all IMI's Part 20 claims save those against Delta, Alto Supergrif SL and Fra Bo SPA had been settled by agreement. Travis Perkins had, however, now withdrawn their support for a preliminary issue, and IMI was now neutral on it. Delta opposed IMI's application for a preliminary issue and the outcome was that none was directed.

IMI settles with Travis Perkins

10. Travis Perkins and IMI reached a settlement of the main claim in early December 2014. As a result of that and the previous settlements, the only remaining live claims were IMI's Part 20 claims against Delta, Altro Supergrif and Fra Bo. The latter two were minor overseas suppliers who had not acknowledged service of the Part 20 claim and so IMI proposed that its claims against them should be stayed. The only remaining live substantive claim was, therefore, IMI's Part 20 claim against Delta, which had now became one for a contribution to the amount for which IMI had settled

Travis Perkins' claim. The settlement terms are confidential but IMI provided the court and Delta with a confidential note of its amount.

11. On 18 December 2014, at a further CMC before Rose J, IMI and Delta explained that an issue had arisen as to whether it remained open to Delta to advance its pleaded limitation defence, namely that IMI was never liable to Travis Perkins because the claim against IMI was time barred. IMI's position was that, following the settlement of the main claim, its claim for contribution against Delta was governed by section 1(4) of the 1978 Act, which it said barred Delta from advancing that defence. Delta disagreed. Who was right turned on the true interpretation of section 1(4) and so Rose J directed the following preliminary issue for the purpose of answering that question:

> 'Whether section 1(4) of the [1978 Act] precludes Delta from relying on any part of its defence to IMI's Part 20 claim, and in particular whether Delta is permitted to argue that the Claimants' claim was time barred for the reasons set out in paragraph 18 of Delta's Amended Defence dated 16 October 2014.'

12. Following a hearing on 6 May 2015, by paragraph 1 of her order of 18 June 2015 the judge answered the issue by declaring that:

> 'Section 1(4) of [the 1978 Act] precludes Delta from arguing that the Claimants' claims are time barred for the reasons set out in paragraph 18 of Delta's Amended Defence dated 16 October 2014.'

13. It is that order that Delta challenges on this appeal. It is important to note that the only time bar point that Delta wishes to advance in resisting IMI's contribution claim is that *IMI* was not, or would not have been, liable to Travis Perkins because the claim against it was time barred. It is agreed that it will not avail Delta to argue that a claim by Travis Perkins against *Delta* would have been time barred, so that Delta would not have been liable to Travis Perkins. Delta's acceptance of that is driven by section 1(3) of the 1978 Act.

The legislation

14. First, the Limitation Act 1980. Section 32 provides materially:

> '32. **Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) … where in the case of any action for which a period of limitation is prescribed by this Act, … –
>
> (a) …
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) …;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the … concealment … or could with reasonable diligence have discovered it. …'

15. Section 32(1)(b) came into play on the pleadings by: (i) paragraph 37 of IMI's Defence, asserting that Travis Perkins' claim was time barred; (ii) paragraph 17 of Travis Perkins' Reply, asserting that there had been 'deliberate concealment' so that it was not time barred; and (iii) paragraph 18 of Delta's Part 20 Defence, asserting a positive case that there had been no concealment so that the main claim against IMI *was* time barred.

16. Turning to the 1978 Act, the dispute turns on the sense of the proviso to section 1(4). Section 1 provides:

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

17. Section 6(1) ('Interpretation') of the 1978 Act provides:

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

The Law Commission Report and the authorities on section 1(4)

18. Counsel's research unearthed only two authorities dealing directly with the interpretation of the section 1(4) proviso: (i) *Arab Monetary Fund v. Hashim and others,* 28 May 1993, unreported, a decision of Chadwick J; (ii) *BRB (Residuary) Ltd v. Connex South Eastern Ltd* [2008] EWHC 1172 (QB); [2008] 1 WLR 2867, a decision of Cranston J. Rose J's reasoning was materially influenced by the *Hashim* case. In addition, she considered the Law Commission's Report on Contribution (Law Com. No 79, 9 March 1977), which led to the enactment of the 1978 Act and explains the reasoning for the recommendations that led ultimately to section 1(4), although it is plain that section 1(4) did not simply enact the recommendations. Before coming to the judge's reasons for her decision, I shall refer first to the Law Commission report and then, so far as necessary, to the decisions in *Hashim* and *BRB.*

The Law Commission Report on Contribution

19. The report dealt in part with the current state of the law in relation to the right of a defendant who had settled a claim then to claim a contribution from another defendant, and it set out proposals for a reform of the law in that respect. Under the heading '*The bona fide compromise*', it said:

> '44. One of the problems that we discussed in our working paper concerned the defendant who settled the plaintiff's claim against him before judgment and then sought to recover contribution from another defendant. The problem was exposed in *Stott v. West Yorkshire Road Car Co. Ltd* [1971] 2 QB 651 where the first defendants settled the plaintiff's claim against them, which arose out of a traffic accident, by paying £10,000 without admitting liability; then they sought to recover a contribution from the other defendant who they alleged had contributed to the accident by the negligent parking of his vehicle. The Court of Appeal held that the contribution claim should proceed but pointed out that it would fail unless it was established in the contribution proceedings that the defendant claiming the contribution was a tortfeasor. If, therefore, the decision in the contribution proceedings was that the "settling" defendant had not been negligent but that the accident had been caused solely by the negligence of the other defendant the claim for contribution would have to be dismissed.
>
> 45. In our working paper we suggested that it was unsatisfactory to require the "settling" defendant to prove his own liability as a tortfeasor in order to entitle him to contribution from the other [Working Paper No. 59, para 28]. It is convenient to repeat here the three points that we made. The first is that it means turning all the usual conventions of civil litigation upside down; D1 (the settling defendant) has to call evidence that is in the possession of the plaintiff in order to establish his own liability in tort, and D2 (the other defendant) then calls D1's

witnesses in order to raise a doubt as to D1's liability. The second is that if the result of the contribution proceedings on the facts of *Stott's* case was that the liability of D2 was established but that the liability of D1 was not, the person who made the compromise, D1, would get no contribution towards the £10,000 although he was not in fact to blame, and D2 who really was to blame would have to pay nothing at all. The third reason is that defendants might be deterred from compromising claims in which liability was in doubt if their right of contribution was thereby put at risk. Salmon LJ said in *Stott's* case, [1971] 2 QB 651, 658-659, that it would be very unfortunate if a defendant was obliged to fight a case to judgment in order to protect his contribution rights. We attached particular importance to the third point and made the provisional recommendation [Working Paper No. 59, paras 28 and 56(b)] that a person who had compromised a claim made against him so as to benefit some other possible defendant should have the right to claim a contribution from the other defendant provided that the other could be shown to be liable; *we added that it should not be an answer to such claim that the person who settled the claim would not have been held liable if the action against him had been tried*.' (Emphasis supplied)

20. In paragraphs 46 to 54, after noting this had been the most controversial proposal in the Working Paper, the report considered and answered various objections that had been raised to it. It affirmed its proposal and then said:

> '55. We accordingly recommend that the defendant who compromises a claim against him should be entitled to claim a contribution from any wrongdoer against whom liability can be proved. However, this recommendation needs to be qualified.
>
> 56. It is important that the compromise should not be a sham but should be genuine. One test of its genuineness would be that it should confer a benefit on the plaintiff which he would have to bring into account in the assessment of the damages recoverable from the other defendant. Other relevant matters would be the amount of the settlement and the circumstances in which it was made. If it was made by one defendant behind the other's back or if it involved accepting liability for an extravagant amount it would no doubt be regarded by the judge with suspicion. We want to exclude the collusive or otherwise corrupt or dishonest compromise but do not consider that it would be appropriate to attempt to provide a detailed definition of what should amount to a *bona fide* compromise; this is something which should present no difficulty to the courts. We accordingly recommend that contribution should be recoverable by a person who had made a *bona fide* compromise of a claim against him for damages.'

21. Finally, in paragraph 81, headed '*Summary of recommendations for change*', the report said:

> '(e) We recommend, as an extension of recommendations (a) and (d), that contribution should also be recoverable by a person who has made a *bona fide* compromise of a claim against him; that it should be a defence to such a claim that the compromise was not made *bona fide* but that it should not be a defence, without more, that the plaintiff's claim would have failed if it had not been compromised (paragraphs 44-57 and clause 3(2)).'

22. The reference to clause 3(2) was to a sub-clause in the report's appended draft Civil Liability (Contribution) Bill, which was the forerunner of what became section 1(4) of the 1978 Act although it was in rather different form. It read:

> '(2) A person who, without actually being liable, 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 under this section as if he had in fact been liable in respect of that damage at the time when it occurred.'

The intention behind that was that the defendant who makes a *bona fide* settlement of a claimant's claim should be entitled to make a contribution claim against a co-defendant whether or not he, the settling defendant, was in fact liable to the claimant. Section 1(4) of the 1978 Act plainly does not go quite as far as that. Had it ended immediately before the proviso, it would have been to the like substantive effect as that of clause 3(2). The addition of the proviso, however, qualified that effect at least to some extent. The issue before the judge was as to the nature and extent of the qualification. The *Hashim* case provided guidance as to that.

The Hashim case

23. In the main action, the plaintiff, the Arab Monetary Fund ('the Fund'), made claims against: (i) Dr Hashim, in respect of money he was said to have misappropriated; and (ii) the First National Bank of Chicago and affiliates ('the FNBC defendants') in tort and as constructive trustees. The FNBC defendants settled the Fund's claim by a payment of some US$13 million and, by third party proceedings under section 1 of the 1978 Act, claimed to recover the sum so paid from Dr Hashim. The matter before Chadwick J was Dr Hashim's application to amend his third party Defence so as to adopt assertions in the FNBC defendants' Defences to the main action that, insofar as the Fund's claim against those defendants was based on constructive trust, breach of trust or breach of duty in relation to matters alleged to have happened in Switzerland, the claim must fail. That was because, even assuming the factual basis of the Fund's claim against those defendants to be established (see again the proviso to section 1(4)), the alleged trust could exist, if at all, only under Swiss law, whereas Swiss law did not recognise a trust; and as to the breach of duty claim, it was asserted that the Fund must prove that the claim was actionable under the laws of both England and Switzerland, whereas it was said not to be actionable under either law.

24. Chadwick J said the real issue on the application was the scope of the statutory hypothesis in the proviso to section 1(4). He referred to the Law Commission report and said the point of section 1(4) was to avoid, or at least to limit, the need for an investigation in contribution proceedings into whether the defendant who has made a payment in *bona fide* settlement of a claim was, in truth, liable to the claimant. He noted that section 1(4) did not go as far as the report's recommendation in paragraph 81(e), saying:

> 'It is clear, at the least, that that proviso is intended to preserve the rights of a person against whom a contribution claim is made to argue by way of defence to that claim that the claimant would not himself have been liable to the plaintiff notwithstanding that the factual basis of the plaintiff's claim had been established.'

25. That, however, raised the question of what such 'factual basis' was. In order to identify that, Chadwick J said that 'in a case where the issues between the plaintiff and the [Part 20] claimant have been defined by pleadings it is, I think, necessary to have regard principally, if not exclusively, to the terms of those pleadings.' He continued:

> '… Prima facie, therefore, the factual basis of the plaintiff's claim will include, and will include only, the material facts pleaded in the statement of claim. The assumption which the court is required to make is that those facts would have been established. It must follow that where a fact pleaded by way of defence is inconsistent with a material fact alleged in the statement of claim, the assumption which the court is required to make is that that inconsistent fact would not have been established.
>
> A more difficult question arises where the defence to the plaintiff's claim makes allegations of fact which are not inconsistent with the facts alleged in the statement of claim; for example, where the defence takes the form of confession and avoidance. It is necessary to keep in mind that, in so far as collateral allegations in the defence are not admitted by way of reply, the persuasive burden of proof in relation to those facts will rest on the defendant. It will be for the defendant to establish those facts at a trial of the action ….
>
> … In circumstances where it is for the defendant to establish some fact upon which he relies for his defence, can it be said that the negation of that fact forms part of the "factual basis of the claim against him"?
>
> In my view that question must be answered in the negative. The language in which the statutory hypothesis has been enacted – "assuming that the factual basis of the claim against him could be established" – does not bring within the assumption which the Court is required to make facts which do not form any part of the plaintiff's case against the defendant and which are not facts which the plaintiff would need to establish in order to succeed against the defendant. The proviso cannot properly be construed to mean … "assuming that the plaintiff would establish the factual basis of his claim against [the defendant] and that [the defendant] would fail to establish the factual basis of any collateral defence" …
>
> The view which I have expressed as to the proper construction of the proviso to s 1(4) of the 1978 Act leads necessarily to the conclusion that it will be open to the person against whom a claim is made in reliance on that sub-section to resist the claim on the ground that the claimant in the contribution proceedings would not have been liable to the plaintiff in the main action, notwithstanding that the factual basis of the claim against him could have been established by the plaintiff, not only (i) in circumstances in which the factual basis of the plaintiff's claim gives rise to no liability in law, but also (ii) in circumstances in which the claimant had a collateral defence to the plaintiff's claim arising out of facts which it would have been for the claimant, and not the plaintiff, to establish. Where the defendant in the contribution claim asserts that the claimant had a collateral defence to the plaintiff's claim, it will be necessary for the court hearing the contribution proceedings to investigate the allegations of fact which are said to support that collateral defence.

> I am conscious that this leads to the result that the effect of s 1(4) of the 1978 Act is rather more limited than that which might have been expected in the light of the Law Commission Report. But, as I have already said, it is plain that the legislature, by enacting the proviso, did intend some limitation to be placed on the words … "without regard to whether or not he himself is or ever was liable in respect of the damage" … over and above that inherent in the requirement that the settlement or compromise should be bona fide. The question what limitation was intended must be answered by construing the language which the legislature has used and not by proceeding from any expectation derived from the Law Commission Report. The legislature has, in my view, relieved the claimant who has made a payment in a bona fide settlement or compromise of the claim against him in the main action from the burden of showing, in contribution proceedings under section 1(4), that the plaintiff would have established the factual basis of that claim. It has thereby removed what was, perhaps, thought to be the most unsatisfactory feature of the law as it was before the 1978 Act – namely the need for the claimant in the contribution proceedings to call witnesses to prove his own liability. But the legislature has not gone so far as to deny to the defendant to the contribution proceedings the opportunity to show, if he can, that the claimant had the benefit of a collateral defence by which he could have avoided liability to the plaintiff. …'

26. That explanation of the section 1(4) proviso meant that, in principle, Dr Hashim was entitled to rely in his Defence to the contribution proceedings on allegations of fact in the FNBC Defence in the main action, but only in so far as they were not inconsistent with material allegations of fact in the Fund's statement of claim. Chadwick J explained that the FNBC defendants had raised their double actionability point in their Defence to the Fund's claim, pleading the propositions of Swiss law upon which they relied; and that the Fund had then pleaded a Reply joining issue and pleading the propositions of Swiss law upon it intended to rely in response.

27. Chadwick J turned to consider whether the Fund's pleading of that affirmative case in its Reply constituted part of the 'factual basis' of its claim against the FNBC defendants. If it was (and this is relevant to the position in the present case), his view was that it *was* within the scope of the assumption that the section 1(4) proviso requires the court to make and that it would therefore not be open to the court to investigate the inconsistent propositions advanced in the FNBC defendants' defence. He then considered whether propositions of foreign law were part of the 'factual basis' of the plaintiff's claim for the purposes of the proviso. As to that, his view was that if the proviso was construed in light of the provisions of section 1(6), the propositions of foreign law which the Fund had advanced, or would need to have advanced, in order to succeed against the FNBC defendants were not properly to be regarded as part of the factual basis of the claim against those defendants. That part of Chadwick J's reasoning turns on the foreign law considerations raised by the *Hashim* pleadings, whereas like considerations do not arise in this case and so there is no need to consider it more fully. The statements of principle set out in the extended passage from his judgment I have quoted, and the views referred to in the first two sentences of this paragraph, are what Rose J regarded as applicable to the disposition of this case.

28. I turn to the *BRB* case. It is unnecessary to set out the background raising the contribution claim there in issue. Cranston J referred to the Law Commission report and to the decision in *Hashim* as to the entitlement of a defendant to contribution proceedings under section 1(4) to defend the claim 'not only in circumstances in which the factual basis of the claimant's claim gave rise to no liability in law, but also in circumstances in which D1 had a collateral defence to the claimant's claim arising out of facts which it would have been for D1, and not the claimants in the main action, to establish'. He continued:

> '14. Had the matter been a blank sheet, it may have been that I would have been persuaded to adopt a more simple minded interpretation of the clause "the factual basis of [the] claim" in section 1(4). In other words, I would have said that the clause confined the inquiry to whether the facts as pleaded in the statement of claim grounded a cause of action. However, the result of the [*Hashim*] case is that the court in contribution proceedings must go further to investigate allegations of fact which are said to support a collateral defence. This could lead to a lengthening of the inquiry, which may be contrary to one of the policy aims implicit in the Law Commission's recommendations, to avoid having to go into aspects of the viability of the claim in the main action. However, the [*Hashim*] case is authoritative, and D2 has the benefit of a collateral defence by which D1 could have avoided liability to the claimants in the main action. D2 is entitled to rely on allegations of fact contained in D1's defence in the main action, although only in so far as they are not inconsistent with the material allegations of fact upon which the claimant in the main action relied on in its statement of claim.'

29. I infer from that passage that Cranston J had reservations as to the correctness of Chadwick J's view as to the breadth of the defensive investigation that, upon its true interpretation, the section 1(4) proviso permits the Part 20 defendant to make. In the event, however, and although *Hashim* was not binding upon him, he treated it as authoritative and applied the principles it explained. His decision does not relevantly develop them and there is no need to refer to it further. The point underlying his reservations is the subject of IMI's respondent's notice in this appeal.

30. The only other reference to authority I would make at this stage is to some observations of Lord Hobhouse of Woodborough in *Dubai Aluminium Co Ltd v. Salaam and others* [2002] UKHL 48; [2003] 2 AC 366. In *Hashim*, Chadwick J had observed that in order, for section 1(4) purposes, to identify the factual basis of the claimant's claim in the main action, it was necessary, in a case where the issues had been defined by pleadings, 'to have regard, principally if not exclusively, to the terms of those pleadings.' Chadwick J was there expressly not saying that the parties' pleadings were all that could be considered in order to identify the factual basis of the claimant's claim. The *Hashim* case was not cited to the House in the *Dubai Aluminium* case, but Lord Hobhouse also made clear in his speech, under the heading 'Settlements', that an inquiry under the section 1(4) proviso does not confine the court to a consideration of the, or any, pleadings:

> '69. Section 1(1) of the 1978 Act requires the person claiming a contribution to prove that he was a "person liable in respect of" the damage suffered by the injured party. But subsection (4) qualifies this where the person claiming the contribution has made a bona fide settlement or compromise of the claim against him, in which case all he need prove is that he would have been liable "assuming

> that the factual basis of the claim against him could be established". This raises the question: how is the factual basis of the claim against him to be identified? The answer to this question must obviously depend upon the circumstances. The claim may have been settled or compromised without the commencement of legal proceedings or it may only be settled later after the exchange of pleadings or during the trial. Some proceedings may be governed by strict procedural rules; others may allow a party to inform the other of the factual basis of the claim with greater informality. Pleadings may be dispensed with. In the Commercial Court factual allegations can be particularised informally in a number of ways.
>
> 70. In the present case the factual allegations in the pleadings were more than sufficient to lay the factual basis for a liability of the partnership under section 10 of the Partnership Act 1890 in the tort of deceit. … But I would not wish it to be thought that material other than pleadings may never have to be looked at. The variety of circumstances to which I have already referred demonstrates this. Further, if the state of the pleadings is to be decisive, a defendant wishing to compromise a case may have to insist that the claimant first amend his pleading so as to make express the basis of claim which justifies the settlement, even though neither would be taken by surprise nor able later to resist appropriate amendments. The purpose of subsection (4) is to facilitate bona fide settlements without prejudicing the rights of the paying party to claim a contribution from another. Of course the factual basis for the claim has to be identified in order to enable the remainder of section 1 to be applied but it would be mistaken to introduce inappropriate formalities into the criterion required by the subsection.'

Rose J's decision

31. Although she too was not bound by *Hashim* and *BRB*, Rose J applied the principles explained in the former. She said the problem raised by them was in knowing when a 'collateral defence' was raised in the defence of the settling defendant ('D1') to the main claim. Such a defence was one based on factual assertions that were not required to be assumed against D1 in accordance with the proviso to section 1(4).

32. IMI's argument to the judge was that a 'collateral defence' was one whose success or failure at the trial depended on facts which it was D1's task to prove. In this case, the limitation issue in the main action was not such a defence. That was because there was no issue that, as IMI asserted in its defence, the claim had not been issued within the six-year period applicable to the claim. What was in issue was whether, as Travis Perkins asserted in their Reply, this was a case of 'deliberate concealment'. IMI had not amended its Defence to plead a responsive positive case of relevant knowledge such as Delta had pleaded in paragraph 18 of its Part 20 Defence. Thus the state of pleaded play in the main action was, IMI said: (i) that the burden was on Travis Perkins to prove the concealment allegation, and (ii) no 'collateral defence' had been raised by IMI that imposed any burden of proof upon it. All, therefore, that the section 1(4) proviso required was an answer to the question whether, upon the assumption that the facts asserted by Travis Perkins in their statement of claim *and* their Reply could be established, they showed IMI to be liable in law to Travis Perkins in respect of the damage. There is no dispute that, upon that assumption, the answer was yes.

33. Delta's responsive argument was that IMI's limitation defence *was* a 'collateral defence'. It was not inconsistent with any of the facts pleaded in Travis Perkins'

statement of claim, but only with what Travis Perkins had pleaded in their Reply, whereas section 1(4) does not require an assumption that facts pleaded in a Reply could be established. Delta submitted that *Hashim* and *BRB* suggested that the court should look only at the particulars of claim for the identification of the facts that are to be assumed to be capable of being established for the purposes of section 1(4).

34. The judge preferred IMI's submissions, concluding her judgment as follows:

> '31. In my judgment Mr Kennelly's submissions [he was leading counsel for Delta] cannot be right. I prefer the submission of Mr Harris which is that the kind of defence that could properly be described as a collateral defence is one where the burden of establishing the facts that would determine that issue would be on the defendant in the main action. To ascertain whether this is the position as regards any particular issue one must look at the totality of the pleaded case as the pleadings stand at the date of settlement. That interpretation would also mean that the application of section 1(4) would avoid the first pitfall which the Law Commission regarded as undesirable whereby IMI would have to call evidence from Travis Perkins' employees as to the state of their knowledge of the existence of the cartel in order to establish its own liability to Travis Perkins in its contribution proceedings against Delta.
>
> 32. In the present case there are no facts pleaded by IMI in its defence in the main action that would have been in contention at any trial of the issue, had the pleadings remained at the state they were at the moment of settlement. The burden of succeeding on the limitation point would have fallen on Travis Perkins and not on IMI because it would have been up to Travis Perkins to adduce evidence to show that they could not reasonably have found out about the cartel earlier than six years prior to the issue of the Main Claim. IMI could have chosen to incorporate Delta's allegations in its pleading, just as BRB could have chosen to raise the point that Mrs Dines had sued the wrong defendant in the *BRB* case. As it is, the allegations made by Delta to the effect that Travis Perkins were not entitled to rely on the extension of the limitation period in section 32 of the Limitation Act were not raised by IMI on the pleadings. I referred earlier to the conclusion of Chadwick J in *Hashim* where he stated that:
>
> > '[t]he language in which the statutory hypothesis has been enacted … does not bring within the assumption which the Court is required to make facts which do not form part of the plaintiff's case against the defendant and which are not facts which the plaintiff would need to establish in order to succeed against the defendant.'
>
> 33. Applying that to the instant case, on the state of the pleadings it would have been for Travis Perkins to establish the facts that supported their reliance on section 32 of the Limitation Act – that allegation clearly formed part of Travis Perkins' case against IMI and were facts that Travis Perkins would need to establish.'

The appeal

35. Delta's four grounds of appeal are these. First, the judge was wrong to say (as she did in [31]) that she must look at the totality of the pleadings as at the date of the

settlement, an approach which it is said would produce arbitrary and unworkable results and is inconsistent with the more flexible approach that Chadwick J indicated in the *Hashim* case and that Lord Hobhouse explained in the *Dubai Aluminium* case. Second, the true teaching of *Hashim* and *BRB* is that a collateral defence is simply one that is not inconsistent with the factual basis of the claim and that there is no warrant in section 1(4) for confining such a defence to one in which the burden of proof is on D1. Third, the judge was wrong to hold that section 1(4) required the court to assume that the facts and matters relating to limitation pleaded by Travis Perkins could be established. The required assumption goes only to the facts necessary to establish primary liability in the main action, not to facts relating to a procedural limitation defence. Fourth, alternatively to the third ground, the judge was wrong in not accepting that section 1(4) required the court to assume to be established only those facts that made up the claimant's cause of action in the main claim.

36. In developing her argument for Delta, Ms Davies focused on the third ground. She did not develop the fourth ground, whose difference from the third ground I am not sure I have understood. I deal first briefly with grounds one and two.

37. As for the criticism that the judge said that she 'must look at the totality of the pleaded case as the pleadings stand at the date of the settlement', I cannot see what error she is here said to have made. The litigation had been proceeding in the Chancery Division and the parties had exchanged carefully drawn pleadings which had closed by the time of the December 2014 settlement. The pleadings, as was their job, had comprehensively defined the issues between the parties and the judge was, in particular, concerned to identify the 'factual basis of [Travis Perkins'] claim' against IMI. In the circumstances, there was no better place than the pleadings in which to do so. I do not read the judge as suggesting that in other cases, which had not been so fully pleaded, it would be neither legitimate nor necessary to look elsewhere than at the pleadings for the articulation of the factual basis of the claimant's claim. But in this case there was no need. The judge was correct to focus on the pleadings.

38. As for the second ground of appeal, the argument is that a 'collateral defence' as explained in *Hashim* is simply one whose factual basis is not inconsistent with the factual basis required to be assumed under the proviso to section 1(4) and that, contrary to Rose J's judgment, there is no warrant for the qualification that it must be a defence where the burden of establishing the facts that would decide it would be on D1. Delta accepts that such qualification is in fact supported by the reasoning in *Hashim*, but its submission is that this court is not bound by it. Delta developed this argument by considering the different positions that would have arisen if, for example: (a) Travis Perkins had not pleaded a 'deliberate concealment' case in their Reply to IMI's limitation defence; or (b) IMI had chosen (contrary to its deliberate decision otherwise) to incorporate into its Defence Delta's response to the 'deliberate concealment' case in its Part 20 Defence.

39. I find these hypothetical considerations unhelpful. If Travis Perkins had not pleaded their 'deliberate concealment' Reply, it may be that IMI would not have settled the claim, in which case the section 1(4) issue would not have arisen. IMI was, I consider, also under no obligation to incorporate Delta's limitation case into its own Defence. I accept that, had it done so, that might have changed the complexion of the case, but I fail to so see how a consideration of such hypothetical circumstances can assist with identifying the answer to the question with which Rose J was actually presented. She

was required to consider the question before her in light of the issues in the main action as they were, not as they might have been but were not.

40. The third ground of appeal focuses on how a limitation defence pleaded by D1 fits into the scheme of section 1(4). Ms Davies took us through section 1 of the 1978 Act and emphasised how section 1(2) shows that it is open to D2 to raise by way of defence to contribution proceedings the argument that, when D1 made an agreed payment to C, C's claim against D1 was barred by limitation. She submitted that the provisions of section 1(2) in that respect relevantly inform the true interpretation of section 1(4), which she said was parasitic on section 1(2), and that there is nothing in the proviso to section 1(4) that can be read as barring D2 from asserting that C's claim against D1 was statute-barred at the time of the settlement.

41. Turning to the present case (and using the like shorthand to refer to the parties), the critical point, said Ms Davies, is that D1's limitation case pleaded in its Defence raised no allegation that was inconsistent with the factual basis of C's claim. It simply amounted to an assertion that, even if such factual basis was established, C's remedy was time barred. If, as happened, C pleaded a 'deliberate concealment' Reply, that plea does not become part of the 'factual basis of [C's] claim'. It simply goes to meeting, if it can, D1's 'collateral defence'. Similarly, if (as we were told is nowadays sometimes done) C chooses to anticipate a limitation defence by pleading deliberate concealment in his particulars of claim, that does not make such anticipatory pleading part of the factual basis of C's claim. It is doing no more than meeting in advance a defence to the collateral defence that C expects D1 to raise. The submission was, therefore, that there is a material distinction between the 'factual basis' of C's substantive claim, namely their case that D1's participation in the cartel had damaged them, and that of C's case in its Reply to D1's limitation defence.

42. Building on this distinction, Ms Davies said the application of section 1(4) is straightforward. It requires the court to assume that the factual basis of C's substantive claim could be established and thus also to assume against D1 any factual assertions in his Defence that are inconsistent with such basis. On those assumptions, the court must then assess whether the factual basis of the claim discloses a reasonable cause of action against D1, namely one that would make D1 liable to C for the damage. If yes, in the case in which D1's Defence does no more than dispute the 'factual basis' of the claim, the court can conclude that D1 'would have been liable' to C within the intention of the proviso.

43. In, however, a case in which D1 has raised a limitation defence to C's claim, the court's finding that the assumed facts of the substantive claim disclose a reasonable cause of action will not be enough to get D1 home on section 1(4). Such a defence is a collateral one. The assumption as to the proof of the factual basis of the substantive claim tells the court nothing about whether the limitation defence would have succeeded, since the proviso does not mandate the making of any assumptions in relation to it. It is therefore open to D2 to argue in the contribution proceedings that D1's limitation defence would have succeeded. If he so argues successfully, D1 will not have satisfied the section 1(4) proviso and the contribution claim must fail. That is because, even assuming the establishment of the factual basis of C's substantive claim, D1 would not have been liable to C.

44. Ms Davies said that this approach to the interpretation of section 1(4) would relieve D1 in contribution proceedings from the significant probative burden that the subsection plainly intended. The Law Commission report regarded it as unsatisfactory that, if D1 settles with C, he should in contribution proceedings against D2 have to assume the burden of advancing C's case as to why he, D1, was liable to C. It is said that that is a material advantage to D1, and that the remaining burden that it is accepted will remain on D1 – proving that its limitation defence would have failed – should not be regarded as a significant one. Section 1(4) is not directed at relieving D1 from having to prove anything. It is common ground, for example, that a determination under section 1(4) that D1 'would have been liable' to C does not also determine the quantum of the claim for which D1 is entitled to make recovery from D2.

45. IMI's response was that Delta's bid to treat the factual basis of Travis Perkins' case on deliberate concealment pleaded in their Reply as relevantly distinct from the factual basis of their substantive claim is unreal. For Travis Perkins to succeed in a follow-on damages claim dating back to 1988 under a claim form that they did not issue until 2012, they were always going to have to meet the limitation defence that IMI would inevitably raise. In the event, they pleaded deliberate concealment. Their case on that was as much a part of the 'factual basis' of their claim against IMI as the factual basis of their substantive claim in the particulars of claim: to succeed against IMI, they needed to prove both bases. The judge was therefore correct to approach the case as she did, namely that the court is required to assume not only that the factual basis of the substantive claim could be established, but that so too could the factual basis of the 'deliberate concealment' case.

46. IMI also advanced an alternative argument raised in a respondent's notice. It was not put to the judge but she was informed that it might be advanced to this court. It draws on Cranston J's suggestion in [14] of his judgment in *BRB* that there might be a simpler interpretation of section 1(4) than that favoured by *Hashim.* The argument is that, on its true interpretation, all that the proviso requires of the court is that it should assume that the 'factual basis of [C's] claim' as pleaded in its particulars of claim could be established. Once that is done, all that remains for the court to consider is whether or not those facts disclose a reasonable cause of action in law against D1. If they do, that is the end of the inquiry: and D2 is not entitled to raise any other matters that might have defeated C's liability claim, including any collateral defences that D1 had pleaded against C (and regardless of where the burden of proof in relation to any such defence may lie).

Discussion and conclusion

47. I shall continue to use the shorthand C, D1 and D2 to refer generally to the main claimant and to the parties in contribution proceedings, as well as to the parties to these proceedings. I shall use the phrase 'collateral defence' to refer, as in the *Hashim* case, to a defence raised by D1 that does not involve a denial of the factual basis of C's cause of action against him, but is in the nature of a defence of confession and avoidance and may be one of limitation. Whether a defence of confession and avoidance will leave the burden of its factual proof upon D1, or will result in the burden of its factual disproof shifting to C, will depend on C's response to it. In some cases, C may simply join issue with it, in which case the burden of proof will remain on D1. In others, C may admit the facts of the collateral defence but plead a positive

case in his Reply which, if proved, will defeat the defence. In such a case, there will be a burden on C to disprove the collateral defence. If the collateral defence is one of limitation, then even if there is no more than a joinder of issue by C, the burden will be on him to prove that the claim is not time barred (see *London Congregational Union Inc v. Harriss & Harris (a firm)* [1988] 1 All ER 15, at 29, 20). First, a general word about section 1 of the 1978 Act.

48. Section 1 must be read as a whole. Section 1(1) establishes the right for D1, if 'liable in respect of any damage' suffered by C, to recover a contribution from D2 if he is 'liable in respect of the same damage'. Section 1(1) is, however, expressly stated to be '[s]ubject to the following provisions of this section …', which explain or qualify the need for D1 in contribution proceedings to show his and/or D2's liability in respect of the damage C suffered.

49. Section 1(2) covers the case in which at the time that D1 claims contribution from D2 for any payment he has made, been ordered to pay or has agreed to pay C, D1 has ceased to be liable to C in respect of the damage. D1 might have so ceased in various circumstances. He might, before any proceedings had been brought against him, have agreed to meet C's claim in full and have so satisfied the claim. He might have been sued by C to, and satisfied, a judgment. Section 1(2) shows that in cases such as these it matters not that D1's contribution claim against D2 is brought after he has ceased to be liable to C. It will be enough 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.

50. Whereas section 1(2) looks at the position from D1's viewpoint, section 1(3) looks at it from D2's. Its first half, down to the phrase 'when the damage occurred', mirrors section 1(2): if, as section 1(2) shows, D1 is entitled to claim contribution from D2 even though, by the time of D1's claim, D1 has ceased to be liable in respect of the damage to C, D2 is correspondingly answerable for a contribution even though he too has ceased to be so liable. There is, however, a qualification to that, namely that D2 will not be so answerable if he has ceased to be liable because the expiry of a limitation or prescription period has extinguished the right on which C's claim against D2 was based. The present case is not one in which an expiry of the limitation period would have extinguished C's right of action: it would have done no more than bar C's remedy. It is because of section 1(3) that it is no part of Delta's resistance to IMI's Part 20 claim that Delta was not, or would not have been, liable to Travis Perkins on the ground of limitation.

51. On its ordinary wording ('made … or agreed to make'), section 1(2) applies also to the case in which D1 has made a *bona fide* settlement or compromise of C's claim before he brings his contribution claim against D2. If, therefore, section 1 had stopped at section 1(3), in a case such as the present D1 would be faced in contribution proceedings against D2 with the burden of proving his own liability to C at the time of the payment or the agreement to make it. Section 1(4), however, deals expressly with the case of a *bona fide* settlement or compromise and is plainly directed at qualifying the provisions of sections 1(1) and 1(2) in relation to any contribution claim by D1 that follows the making of such a settlement.

52. Section 1(4) must also be read as a whole and its major part (down to the proviso) makes it clear that, subject to the proviso, a contribution claim by D1 against D2

made in the wake of D1's *bona fide* settlement or compromise of C's claim neither requires nor permits any investigation into whether or not D1 'is or ever was liable in respect of the damage …', that is whether or not he was actually liable. That is an express negation of the probative burden that, had they stood alone, section 1(1) and (2) would have imposed on D1. It is obvious that the policy underlying section 1(4) in that respect is that explained in the Law Commission report, which expressed the concern that, following a *bona fide* settlement between C and D1, D1 ought not in any contribution proceedings against D2 to have to prove its own liability to C. It wanted the law to be so reformed that, provided that D1's settlement with C was *bona fide,* D1 could recover contribution from D2, whether or not he, D1, was so liable. One driver behind that recommendation was that otherwise, as explained in paragraph 44 of the report, it would mean 'turning all the usual conventions of civil litigation upside down' – that is, it would have required D1 to prove C's case against himself. Another was that otherwise D1 might feel obliged to fight C's case to judgment in order to protect his contribution rights. Whereas the ordinary sense of section 1(1) is that, in contribution proceedings, D1 must prove his own liability to C, and section 1(2) clarifies the time at which he must do so, section 1(4) qualifies both requirements.

53. The qualification is not, however, absolute because it is subject to the proviso. The question is as to the breadth of the defensive response to D1's contribution claim that the proviso permits D2 to make. I shall consider first the argument raised by the respondent's notice.

(a) The respondent's notice

54. The argument in the respondent's notice is that 'the factual basis of [C's] claim against [D1]' within the meaning of the proviso is a reference only to the factual basis of the substantive claim pleaded in the particulars of claim. The proviso to section 1(4) gives D1 the benefit of an assumption that such basis could be established against him. To succeed against D2, it is said to follow that all D1 has to show is that, on such assumption, such factual basis discloses a reasonable cause of action in law against him so as to make him liable in respect of the damage C suffered. If he can do that, he will have shown that 'he would have been liable' to C, and it will not be open to D2 under the proviso to raise any other argument directed at showing that in fact D1 would not have been liable to C.

55. I would accept the correctness of that interpretation of the proviso to section 1(4). I agree, therefore, with the reservations in *BRB* that Cranston J expressed, but did not develop, as to Chadwick J's different interpretation in *Hashim.* It follows that I respectfully disagree with that interpretation. If I may say so, I consider that Chadwick J 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. I shall explain why I disagree with his approach.

56. The premise of a contribution claim by D1 based on section 1(4) is that there has been a *bona fide* settlement or compromise of C's claim against D1. It will no doubt be open to D2 to argue in any contribution proceedings that the settlement or compromise was not a *bona fide* one, for example that it was a collusive, corrupt or dishonest one (see the Law Commission report, paragraph 56), and if such a case is

made good the provisions of section 1(4) will not avail D1. In this case, however, there is no suggestion that D1's settlement with C was other than *bona fide* and so section 1(4) is in play.

57. If I may be forgiven for stating the trite, legal proceedings can range from the relatively simple to the very complicated. In some cases, C's claim may be based on straightforward facts and D1's Defence may do no more than deny them. In others, D1's Defence may question whether, even if proved, C's factual case would entitle C to relief; it may also deny the facts or material parts of them; it may raise a limitation or other collateral defence; and the outcome on the pleadings may be that the burden of proof on matters raised by the Defence will rest on D1 or that a burden of disproof will shift to C.

58. Whether, however, the case is simple or complicated, in arriving at a *bona fide* settlement C and D1 will respectively have assessed the relative strength or weakness of their respective cases in the litigation and have brought into account the commercial considerations bearing upon it. If the settlement involves a payment by D1 to C, then a claim by D1 for contribution to it by D2 will be one to which section 1(4) applies. The central feature of section 1(4), expressly spelt out in its main part down to the proviso, is that in any such claim there will be no question, and therefore no inquiry, as to whether or not D1 was in fact liable to C. In so providing, section 1(4) gave clear effect to the Law Commission's recommendation.

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 the sense of that is that 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.

60. Chadwick J's view expressed in *Hashim* was that there was more to the proviso than that since its stated assumption as to the establishment of factual matters did not extend to an assumption in favour of C of any factual matters forming the basis of a collateral defence raised by D1 in respect of which the burden of proof was on D1. His view was, therefore, that the proviso permitted an investigation by D2 of whether any such collateral defence might have succeeded; and, if it would have done, D1 would not have been liable to C.

61. 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). In my judgment, the only permissible interpretation of the proviso, read in the context of section 1(4) as a whole, is that the limit of the inquiry it permits is as I have summarised it in [59] above.

62. In my view, therefore, to the extent that the *Hashim* case decided that the proviso permits D2 to raise an inquiry as to whether, in light of any collateral defence raised

by D1 to C's claim, C would *not* have been actually liable to C, it was wrongly decided. It follows that I consider that in the present case Rose J applied the wrong principles, although I should repeat that the argument raised before us in the respondent's notice was not advanced to her. Since, however, there is no dispute that, on the interpretation of section 1(4) that I would favour, IMI satisfies the requirements of the proviso, I would uphold her decision, albeit for different reasons.

(b) The judge's reasoning

63. It is only necessary to consider this if I am wrong in my interpretation of section 1(4) and Rose J was correct to apply the guidance provided in the *Hashim* case. I shall express my views shortly and do so on the premise (contrary to my view) that the *Hashim* guidance was correct.

64. On that basis, the question is whether the judge was wrong not to hold that 'the factual basis of the claim' against D1 was confined to that advanced in the particulars of claim. Viewing the matter through *Hashim* spectacles, that is no doubt a reasonable interpretation of the phrase but, in the context of section 1(4) as a whole, it is not necessarily the only one. Section 1(4) must be interpreted purposively. It owes its origins to a policy directed at simplifying the basis upon which, following a *bona fide* settlement, D1 can claim a contribution against D2, a policy clearly directed in part at relieving D1 from having to prove C's case against himself. The key to a section 1(4) claim is that there will first have been a *bona fide* settlement of C's claim. The scheme of the subsection is that, given such a settlement, for the purposes of D1's contribution claim against D2, it is assumed in D1's favour that the factual basis of C's claim could be established at a trial of the main claim.

65. In light of the policy objectives underlying the subsection, it would in my view (still assessed through *Hashim* spectacles) be unduly technical to treat such 'factual basis' as confined to that of the substantive claim and as excluding that of a positive case pleaded by C in reply to a collateral defence raised by D1, being a defence in respect of which C bears the burden of disproof if he is to succeed on his claim. D1's settlement of the claim will have taken into account the strength of such positive case; and D1 will also have regarded it as part of C's claim with which it was faced. So would C have regarded it. If Travis Perkins had asked their lawyers what they had to prove in order to win their 'claim' against IMI, the reply would have been that they had to prove their case as pleaded in the particulars of claim *and* in the Reply, and that unless they succeeded on both elements, the claim would fail. In the present case, therefore, the correct sense of 'the factual basis of the claim' in the proviso is that it includes the entirety of the positive case that Travis Perkins had to establish in order to succeed in their claim against IMI, namely both the factual basis of the substantive claim in the particulars of claim and of the 'deliberate concealment' case pleaded in its Reply. The proviso to section 1(4) then mandates an assumption that the factual basis of both parts of their case could be established.

66. If therefore, contrary to my view, the *Hashim* guidance was correct, I would uphold the way in which Rose J applied it.

Disposition

67. I would dismiss Delta's appeal.

Lord Justice Hamblen :

68. I agree.

Lord Justice Gross :

69. I also agree.