of the duty to mitigate. He found that when a plaintiff is unaware of the defendant's breach of duty, the implications of his conduct do not fall to be determined according to the doctrine of mitigation but according to general principles of causation.

KNOCK FOR KNOCK AGREEMENTS IN THE CONSTRUCTION INDUSTRY
by David Rogers, Davies Arnold Cooper

Insurers are quite used to receiving claims from construction incidents. However, insurers wish to ensure perhaps unsurprisingly, that when a claim is made it is dealt with as quickly and as economically as possible. Delay simply incurs additional legal costs, often enhances the value of the claim and, of course, is unsatisfactory from the victim's point of view as well as insurers. However, this aspiration on the part of insurers rarely finds the appropriate response from the insureds in the construction industry.

Often, the standard forms of contract contain so-called indemnity clauses but what do these clauses provide? They provide that one party is responsible save insofar as he has been negligent or contributed towards the incident. In short, the heading of indemnity clause is a total misnomer and, in reality, the clause does nothing but return the parties to what is in fact their common law position. These clauses can be found in the standard JCT form, in the ICEE forms and, generally, they do nothing to assist or minimise the handling of claims involving injuries to persons on large construction projects. Indeed, they hamper the situation.

Let us take the classic situation which is all too common and familiar to scaffolding companies. They attend on site and they carry out their works, the job is completed and they remove the scaffolding. Nobody has suggested to them that their scaffolding is inadequate or that the failure to carry out some aspect of the quite stringent regulations relating to scaffolding has resulted in an incident. Eighteen months later, the injured man sues his employers, the employer in turn claim against the main contractors and the main contractors claim against the scaffolders. We have had an injured man whose claim has been delayed for at least 18 months to 2 years whilst one party or the other has been blaming somebody else resulting in three, four, or sometimes five party litigation. At that point, often the insurers of the Defendants or Third Parties will, if the claim is modest, simply dispose of the claim upon an economic basis often not caring whether or not there is really a responsibility on the part of their insured. Alternatively, they will refuse to become involved in the claim

and it is not until all of the parties are at the door of the Court that common sense prevails and one or other of the parties ultimately negotiates a settlement of the claim.

I am sure that this story is all too familiar to many of the readers and the question is, what can we do about it? Let us look at the North Sea oil industry and see what they have done and what they have done is to impose the "knock for knock" agreement. In simple terms, the oil industry has said "we shall be responsible for our own". How does it work? Let us take the classic example; there is a major contract which is to be controlled by one of the household names. I am sure that the contracting industry will not mind if I use household names as examples but I do emphasise that they are only examples. Wiltshiers, a well respected contractor, is engaged to construct a series of warehouses. They in turn will sub-contract various aspects of the work. They say to, let us say the company erecting the steelwork, if you injure a Wiltshiers' man even if you are negligent, we will be responsible for that claim and we will deal with that claim. In return, if any of your men or the employers of any sub contractors employed by you are injured, you will be responsible regardless of whether the accident is caused by Wiltshiers' negligence. That, in simple terms, is the "knock for knock" agreement. The sub contractor might then turn round to his sub contractors and say exactly the same, "I will be responsible for my men, but you will be responsible for your men and so on".

If these provisions are entered into the contractual chain which will exist upon any large construction site, then there can be considerable financial benefits. The party who is going to have to deal with the claim can be readily indentified and often, even though the Plaintiff may, for example, sue Wiltshiers, the insurers of sub contractors let us say RDL, will take over that claim and will handle it on Wiltshiers' behalf. It also has the benefit that often the party handling the claim knows the background of the claimant or his involvement with that particular project or work and thus, is able to deal more effectively with matters much as calculation of loss of earning, future loss and so on. However, the major benefit is that the prospect of multi-party litigation can often be substantially reduced. I say "often" because the system is not perfect and there will still be occasions when the circle of indemnities is not complete and the system may not work. Let us go back to the example that I have given. Wiltshiers have a contract with RDL for the erection of steelwork, they also have a contract with say GKN Kwikform for the erection of scaffolding. An RDL employee is injured as a result of a combination of circumstances involving alleged negligence against a Wiltshiers' employee and defective scaffolding. RDL cannot pursue a claim against Wiltshiers because of the contractual indemnities and their claim by that route is barred. However, they have no contractual relationship with GKN Kwikform and, thus, there could be claims against the scaffolders. However, even the elimination of one party in these situations will effect a considerable saving in costs and, of course, in

those situations it may well be that without the pressures incumbent upon them because of the potential financial responsibility for their insurers, Wiltshiers would acknowledge that they had made a mistake and were basically responsible for the accident and that it was not the scaffolder's fault. In this way, we would cut through a large chunk of the bluff and counter bluff that develops with many of these claims resulting, hopefully, in the claim being settled at a much earlier stage than would otherwise have been the case.

There are other disciplines which spring from the use of a "knock for knock" agreement. For example, we all know that an indemnity is only as good as the person behind it. Thus the use for "knock for knock" indemnity might well encourage the contractors and sub contractors to be more stringent with regard to the insurance of those persons employed on the site. I recognise that there is already a requirement in the contractual terms for production of insurance certificates and renewal slips but often the parties pay only lip service to these requirements particularly were contractors are on site for a relatively short period.

There are, however, three important points to remember. The first is that the "knock for knock" indemnity must be validly and properly incorporated into the contract. The second point is that the clause is an indemnity. This does not necessarily relieve, in the examples given, Wiltshiers from dealing with the claim and they will have to seek possibly a claim over in certain situations. Finally, it should be noted that there are occasions when the clauses will work against one of the parties. For example, if the scaffolding was badly erected and collapsed resulting in injury to a series of men perhaps serious injury, but all employees of Wiltshiers, then Wiltshiers would have to meet those claims without any right of recourse which they would otherwise have both under the construction regulations and their terms of the scaffolding contract.

In the main, however, the removal of multi party litigation enables one party to concentrate on the particular claim and bring it to a speedy conclusion and will provide substantial benefits not only for the claimant and defendant but ultimately for the industry as a whole.

Overall, "knock for knock" indemnities can limit and reduce contractors' exposure to third party claims, they can significantly reduce and sometimes completely avoid the need for lawyers and I therefore commend the "knock for knock" indemnity to contractors for their consideration in the hope that it will provide them with the benefits which I have indicated.