Abbreviations, dramatis personae, etc

1978 Act : The Civil Liability (Contribution) Act 1978.

$ (the dollar symbol) : ` United States dollars.

Blackmon Mr : Max Blackmon, a senior member of SITA's full time managerial staff in the 1990s. A live witness for Watson Wyatt.

Cleak, Mr : Chartered Accountant who joined SITA's internal tax department in June 1995 and was involved in the employee share scheme from September 1995.

Crill, Mr : Representative of Mourant & Co. Partner in a leading ~ Jersey law firm.

Dwek, Mr : Solly Dwek, Secretary-General of SITA in the 1990s, and a senior member of SITA's internal legal department.

Equant : Netherlands holding company for former commercial subsidiaries of SITA. Originally called SITA Telecommunications Holdings NV. Became called Equant Holdings NV in 1998.

Fenwick, Mr : Justin Fenwick, QC, leading counsel for Maxwell Batley. ~ See also Lowe, Mr.

Hamedam, Mr : Forensic accountant who prepared an expert's report for SITA in anticipation of the trial of SITA's action against Watson Wyatt.

Hill, Mr : I Tom Hill, a solicitor. Expert witness for Maxwell Batley.

IPO : Initial Public Offering.

Jackson, Mr : I Calvin Jackson, an employee of Watson Wyatt.

Kassell, Kim : I A member of SITA's internal legal department.

Landon, Mr : Martin Landon, an employee of Watson Wyatt, and effectively the senior Watson Wyatt person involved in advising upon SITA's employee share scheme.

Lowe, Mr : Thomas Lowe, junior counsel for Maxwell Batley. See ~ also Fenwick, Mr.

Maxwell Batley : Firm of English solicitors. : Part 20 defendants in the present proceeding. See also McColl, Mr, and O'Shea, Mr.

McColl, Mr : Fraser McColl, a partner in Maxwell Batley, the Part 20 defendants. See also O'Shea, Mr.

Moger, Mr : Christopher Moger QC, leading counsel for Watson Wyatt. See also Salzedo, Mr.

Morgan Stanley : Leading United States investment bank. Subscribed ~ $200m for shares in Equant.

Mourant & Co. : Mourant & Co Trustees Limited, a Jersey trust company associated with Mr Crill's firm.

O'Shea, Mr : Francis O'Shea, a partner in Maxwell Batley, the Part 20 defendants. See also McColl, Mr.

Pett, Mr : I David Pett, a solicitor. Expert witness for Watson Wyatt.

Roworth, Jean : A chartered accountant, and head of SITA's internal tax department.

Salzedo, Mr : Simon Salzedo, junior counsel for Watson Wyatt. See also Moger, Mr.

SITA : Societe Internationale de Telelcommunications Aeronautiaues S.C. A Belgian cooperative company. Claimant in the original action brought by itself against Watson Wyatt.

SITA Foundation : Netherlands Foundation established to hold the title to Equant shares for SITA, SITA members, and the employees trust,

SITA INC : SITA Information Network Computing NV, a Netherlands holding company established by SITA in 2000 some of the shares in which were to be the subject of a new employees trust.

Titley, Mr : Francis Titley, an employee of SITA; deputy to Mr Blackmon.

Watson Wyatt : Designation used in this judgment to cover the first and second defendants in the main action, being also the first and second Part 20 claimants in the present proceeding. See further paragraph 2 below.

Watson Wyatt Partners : The second defendant in the original action and the second Part 20 claimant in the present proceeding. See further paragraph 2 below.

Watson Wyatt SARL : French company within the Watson Wyatt organisation. By amendments became the third defendant in the original action and (later) the third Part 20 claimant in the present proceeding. See further paragraph 3 below.'

Wyatt Company (UK) Ltd, The : The first defendant in the original action, and the first Part 20 claimant in the present proceeding. See further paragraph 2 below.

JUDGMENT : Mr Justice Park : Chancery Division, High Court. 9th October 2002

1. The first defendant and the first Part 20 claimant is called the Wyatt Company (UK) Limited. The second defendant and the second Part 20 claimant is called Watson Wyatt Partners. As the dramatis personae above indicates, I am referring to the two of them interchangeably as Watson Wyatt. The main events which this case is about commenced in 1994. In that year The Wyatt Company (UK) Limited was the United Kingdom subsidiary of an international group of companies which specialised in human resource consultancy, including advising on employee benefits and incentives.

2. There were discussions in progress for it, or possibly the group of which it was a part (I am not sure which), to establish a form of alliance with R Watson & Sons, a leading UK-based firm of actuaries. I do not think that I know the precise form which the alliance took, but it came into existence on 1 April 1995 and was called Watson Wyatt Partners. At that time the events which the case is about were still in progress. The case involved a contract which was originally formed between SITA and The Wyatt Company (UK) Limited, but which was subsequently performed between SITA and Watson Wyatt Partners. When things went wrong and SITA wished to bring legal proceedings it sued both The Wyatt Company (UK) Limited and Watson Wyatt Partners. No point has ever been taken about the different identities of the first two defendants, and it is in those circumstances that it is convenient to use the single description Watson Wyatt to refer to them both.

3. There is a third defendant, Watson Wyatt SARL. It is a separate French company, which originally was part of the Wyatt Company organisation and later became part of the Watson Wyatt organisation. In general in this judgment it is referred to as Watson Wyatt SARL, and is not covered by references to Watson Wyatt simpliciter.

Overview

4. The case arose from an employee share scheme which was established by SITA on the advice of Watson Wyatt. In circumstances which I will describe later the scheme resulted in SITA being liable for very large social security charges, particularly in France. Watson Wyatt had failed to warn SITA of the French social security charges, and, on the contrary, had advised SITA that there would not be any. The erroneous advice given by Watson Wyatt to SITA in this respect was based on incorrect information supplied to Watson Wyatt by Watson Wyatt SARL. SITA commenced an action in the English courts against Watson Wyatt, claiming damages for professional negligence. It said that it had already had to pay over US$58m in social security charges, with more to come. Later SITA Joined Watson Wyatt SARL as a third defendant, when it appeared that Watson Wyatt might seek to run a defence that it had not itself been negligent, because it had accurately passed on to SITA the information supplied to it by Watson Wyatt SARL, and it had no reason to suppose that the information was wrong.

5. SITA's action against Watson Wyatt and Watson Wyatt SARL was settled shortly before the time at which it had been fixed for trial. The defendants paid $35m to SITA in settlement. The whole sum was paid by Watson Wyatt to the exclusion of Watson Wyatt SARL. At an earlier stage - after the action had been commenced but before it was settled - Watson Wyatt had taken the appropriate procedural steps under CPR Part 20 to claim from a third party a contribution to any amount which it might be held liable to pay to SITA. The statutory provisions which permit a defendant to claim a contribution from a third party are contained in the Civil Liability (Contribution) Act 1978 (referred to in this judgment as the 1978 Act). The defendant to Watson Wyatt's Part 20 contribution proceedings was Maxwell Batley. They are a firm of English solicitors, and they had drafted the legal documents for the employee share scheme which had thrown up the unexpected social security charges. The settlement of the main action between SITA and Watson Wyatt still left in place the Part 20 claim by Watson Wyatt for a contribution by Maxwell Batley. The 1978 Act contains provisions under which a defendant who, instead of being held liable after the case has been tried, has paid an amount to a claimant by way of bona fide settlement, can recover a contribution from a third party. Accordingly, the case which has been heard before me and which I decide in this judgment is not SITA's claim for damages against Watson Wyatt, but Watson Wyatt's claim against Maxwell Batley for a contribution to the $35m which it has paid to SITA to settle SITA's claim against it.

6. In my judgment Watson Wyatt's claim against Maxwell Batley fails. For Maxwell Batley to be liable at all Watson Wyatt would have to show (i) that Maxwell Batley was in breach of a duty which it owed to SITA, and (ii) that Maxwell Batley's breach of duty, either alone or in conjunction with Watson Wyatt's own breach

of duty to SITA, caused the damage for which SITA brought its claim against Watson Wyatt. In my judgment Watson Wyatt does not succeed in showing either of those things.

7. The case which Watson Wyatt advances against Maxwell Batley is, in the broadest outline, as follows. The employee share scheme which SITA established involved the creation of an employees trust which held a block of shares in Equant (see the dramatis personae above). The scheme, including the creation of the employees trust, was based on the advice of Watson Wyatt. However, the legal drafting for the scheme, including but not limited to the drafting of the employees trust, was carried out by Maxwell Batley, who were instructed by SITA for the purpose. When the social security charges of which Watson Wyatt had failed to warn SITA came to light it emerged that in many countries, including in particular France, they were payable by SITA. Under the terms of the employees trust drafted by Maxwell Batley it was not possible for the social security charges to be paid by the trustee out of the trust fund, nor was it possible for the trustee to make a payment to SITA to reimburse it for the social security charges which it (SITA) had paid itself.

8. SITA itself made no complaint about this against Maxwell Batley, but Watson Wyatt alleges that SITA, as well as having a cause of action for negligence against Watson Wyatt, had a separate cause of action against Maxwell Batley. The allegation is in essence that, if Maxwell Batley had performed properly the duty which they owed to SITA, there would have been provisions in the trust deed which would have enabled the social security charges to be met, directly or indirectly, out of the trust fund instead of having to be paid by SITA from its own resources. Watson Wyatt also alleges that, if the trust deed had contained such provisions, they would have been put into effect so that SITA's funds would not have been depleted by the social security charges: the burden of the charges would have fallen on the trust fund instead. Therefore, Watson Wyatt argues, SITA had a cause of action against Maxwell Batley as well as its cause of action against Watson Wyatt, and Watson Wyatt, having paid $35m to SITA in compromise of SITA's cause of action against it, now claims a contribution from Maxwell Batley under the 1978 Act.

9. I do not agree with the arguments which Watson Wyatt has advanced. For reasons which I will explain in detail in this judgment I consider that, although Watson Wyatt was in breach of duty to SITA (or at least must be assumed to have been), Maxwell Batley were not. I also consider that, even if Maxwell Batley were in breach of duty to SITA as Watson Wyatt alleges that they were, the alleged breach did not cause the damage which SITA sued Watson Wyatt to recover. For either or both of those reasons it is my opinion that Maxwell Batley have no liability to make any payment by way of contribution to Watson Wyatt.

10. I should record that, if I had concluded that the conditions for Maxwell Batley to be liable to make a contribution were satisfied, a number of difficult and detailed questions would arise as to how much the contribution should be. Given that, on the view which I have formed about liability, those further questions do not arise, I do not intend to deal with them. At the end of this judgment I will briefly identify what the principal questions would have been, but I will not make any attempt to decide them.

11. I record that Mr Christopher Moger QC and Mr Simon Salzedo appeared for Watson Wyatt and Watson Wyatt SARL, and Mr Justin Fenwick QC and Mr Thomas Lowe appeared for Maxwell Batley. I am grateful for the thorough and helpful presentations which I received from all the counsel in the case.

The 1978 Act

12. In my opinion the provisions of the Civil Liability (Contribution) Act 1978 which are principally relevant to this case are section 1(1), section 1(4) and section 2(l). Those provisions are as follows:

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).

(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.

2. Assessment of contribution

(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

13. There are two points on the Act which are common ground and which it is convenient to spell out.
All of the references to `damage' mean `harm'. They do not mean damages in the sense of monetary compensation ordered by a court to be paid by a defendant. See ***Birse Construction Ltd v Haiste Ltd*** *[1996] 1* WLR 675 at 682, approved by Lord Bingham of Cornhill in the House of Lords in ***Royal Brompton NHS Trust v Hammond*** *[2002]* 1 WLR 1397 at 1402.

ii) A point recently established by the House of Lords in the Royal Brompton case (supra) is that the reference in section l (l) to `the same damage' really does mean the same damage, and is not wide enough to cover analytically different damage which arose out of the same background circumstances. The hospital trust arranged for the building of a new hospital. It entered into several contracts, including one with a firm of architects and another with a major building contractor. The contractor delivered the building late, but the hospital trust could not sue the contractor for delayed delivery because the architects had granted extensions of time to the contractor. The hospital trust sued the architects alleging negligence or other breach of duty on their part in granting the extensions. The architects served a Part 20 notice on the contractor arguing that, if they were eventually held to be liable to the hospital trust, they should receive a contribution from the contractor. The contractor succeeded in having the architects' Part 20 notice struck out on the ground that the damage which, according to the architects' allegation, the hospital trust had suffered at its (the contractor's) hands was late delivery of the building, and that that was not the same damage as that which the hospital trust was alleging that it had suffered at the architects' hands, namely the loss or impairment of the hospital trust's ability to recover compensation from the contractor for the late delivery.

14. It will be observed that section 1 of the 1978 Act deals with liability: that is with whether a defendant in a main action (here Watson Wyatt) is entitled at all to a contribution from a third party (here Maxwell Batley). Section 2 deals with quantum: if under section 1 the conditions for a third party to be liable to make a contribution are present, how much should the contribution be? The main criteria going to quantum are those referred to in section 2(1) (which I have quoted), namely what is just and reasonable, and the relative extents of the two parties' responsibilities for the damage (the harm) in question. There are other subsections in section 2, but I have not quoted them since I consider that they do not arise to any substantial extent in this case. Subsection (2) makes it clear that a contribution can be anything between nil and 100%. 1 *will* not be saying much more about section 2 in this judgment, since in my opinion Watson Wyatt fails to establish that Maxwell Batley is liable under section 1 to make a contribution at all.

15. It may be helpful for me to identify the points under section 1 which are not in dispute and the one critical point which is in dispute.

i) It is not in dispute that the $35m which Watson Wyatt paid to SITA was a payment in bona fide settlement or compromise of SITA's claim against Watson Wyatt: see the opening part of section 1(4).

ii) It is not disputed that the damage (harm) for which SITA sued Watson Wyatt was the same damage (harm) which, on Watson Wyatt's case in these contribution proceedings, was caused to SITA by the alleged breach of duty by Maxwell Batley. The damage which SITA complained about in the main action against Watson Wyatt was not so much that it had to pay social security charges as that, having to pay them, it did not have the possibility of their being met or reimbursed out of the trust fund, or of being met by itself (SITA) but out of assets which it had retained in order to meet the charges instead of putting them into the trust fund. The damage which Watson Wyatt alleges that SITA has suffered at the hands of Maxwell Batley is having to pay the social security charges without any possibility of being reimbursed for them out of the trust fund. That damage seems to me to be sufficiently close to the damage for which SITA sued Watson Wyatt for it to be regarded as `the same damage' within section 1(l).

iii) It is not disputed that, if SITA's claim against Watson Wyatt had gone to trial and SITA had established the factual basis of its pleaded claim, Watson Wyatt would have been liable to SITA. This satisfies the proviso at the end of section 1(4): Watson Wyatt can rely on SITA's pleaded factual case against itself (Watson Wyatt), and does not have to prove SITA's case against itself, an obviously difficult task where, until the compromise agreement, Watson Wyatt was vigorously denying that it was liable to SITA at all. In this respect the 1978 Act overcame the problem identified by the Court of Appeal in ***Stott v West Yorkshire Road Car Co Ltd*** *[1971] 2* QB 651 at 656-7.

iv) It is fundamentally disputed whether Maxwell Batley is a person liable in respect of any damage suffered by SITA, which it has to be before any contribution can be ordered against it. The key words are at the end

of section 1(1): `any other person liable in respect of the same damage'. And the critical single word in that expression is `liable'. If Maxwell Batley, had they been sued by SITA, would not have been liable at all, there is no basis on which the court can order them to make a contribution, large or small, to the $35m which Watson Wyatt has paid to SITA in compromise of its (Watson Wyatt's) liability to SITA. My view is that Maxwell Batley are not liable to SITA, and that is the reason why, in my judgment, this claim for contribution must fail.

The facts

16. In this part of my judgment I shall describe the facts to an extent which I hope will be sufficient to enable a reader to follow the later explanation of my reasons for my conclusion. I may, of course, go into some aspects of the facts in fuller detail in the later parts of the judgment. I should add here that not all details of the facts are as clear as they might have been. The reason is that I have had very little oral evidence. There is a mass of documentation, but for the most part it was prepared for what was to have been the main action between SITA and Watson Wyatt, not for the present contribution claim between Watson Wyatt and Maxwell Batley. I had before me in written form many of the witness statements prepared on behalf of SITA for the main action, but there was only one witness of fact called for Watson Wyatt in the case before me; and Maxwell Batley chose to call no evidence of fact, on the ground that the onus lay on Watson Wyatt, and it had not produced material which would discharge the onus. I shall return to this later in this judgment.

17. SITA is a Belgian corporate body, and a cooperative. It was founded in 1949 by the international air transport community to provide services to its members on a nonprofit making basis.

18. 1 do not know much about SITA's early history, but by the 1990s it was clearly a very substantial organisation. It was owned by about 550 members, 450 or so of which were airlines. It provided international telecommunications services to the world's airline and travel industries. One of the documents in the case says that it operated the world's most extensive private telecommunications network. It had over 5,000 employees in 151 countries. As I have said above, it was incorporated in Belgium. It paid tax in Belgium on a basis analogous to the United Kingdom concept of being a resident of that jurisdiction. However, the documents give me the impression that its largest offices where management functions were conducted were in Switzerland and France. SITA also had quite substantial operations in the United States and in the United Kingdom. There was a large board of directors consisting, as far as I can see, of representatives of several of the airlines which were SITA's owners. There was a substantial executive management, headed by a Director-General, and there were the usual head office departments for an organisation of SITA's size. They included a tax department and a legal department. However, despite the existence of those departments, SITA made regular use of outside professional advisers.

19. By the early 1990s SITA, as well as operating its telecommunications network in the interests of its members, was the holding company of a substantial number of subsidiaries. This was because at (I think) some time in the 1980s SITA, operating in this respect through subsidiaries, began to provide services on a commercial basis to outside customers. By the 1990s the group activities fell into two main classifications: non-commercial activities provided by SITA itself to its members on a non-profit basis, and commercial activities provided for profit through subsidiaries. In 1994 the subsidiaries were grouped under three intermediate holding companies, known as ITS, Scitor and Novus. These three sub-groups provided data network related services both to air transport community customers and to other commercial customers. By 1995 there were 26 subsidiaries with operations of one sort or another in 213 territories. They had their own employees, just as SITA had its own employees.

20. By 1994 SITA was planning a major reconstruction, which actually took place in 1995. This case is about one aspect of it - the creation of an employees trust - but I need to outline the reconstruction as a whole. The general plan was to have the commercial activities hived off into a separate group of companies which would be owned in proportions of approximately 60%, 30% and 10% by, respectively: (i) the airlines and other organisations which were the cooperative members of SITA; (ii) a new major commercial investor which would make a large subscription of capital for its shareholding; and (iii) employees, initially via an employee share scheme which in the event was structured as an employees trust (the employees trust which this case is about). SITA would itself continue as the entity which provided the non-commercial services to the airline industry. There would be a joint venture agreement between SITA and the Equant group. I know virtually

nothing about the joint venture agreement, but I imagine that one matter to be covered by it was the sharing of SITA's telecommunications network. The ultimate target was that, while SITA itself would continue as a cooperative owned by its airline (and other) members, the Equant shares would become publicly listed via an IPO (an initial public offer - see under Abbreviations and Dramatis Personae at the beginning of this judgment). All of this happened: the initial structure was established in 1995, and the first stage of the IPO was in 1998. 1 do not need to describe the mechanics in detail, but there are some specific points which I should make.

i) The holding company for the commercial subsidiaries was a Netherlands company initially called SITA Telecommunications Holdings NV. It later changed its name to Equant NV. It has been referred to throughout the case as Equant, and I refer to it by that name in this judgment.

ii) The major commercial investor was, in the event, Morgan Stanley. It subscribed $200m for its shareholding, and, given the magnitude of that sum, it was clearly a major and very important participant in the entire reconstruction. Its requirements would have to be met, or it would not be willing to proceed. It had very important requirements for employee incentive arrangements which it considered to be essential. It was insisting, first that there had to be an employee share scheme, and second (in the view which I have formed based on the documents and such of the oral evidence as bore on the point) that the employee share scheme had to have not less than 10% of the equity in Equant allocated to it. There is an issue in the case about whether Morgan Stanley would have gone along with a significantly lower proportion of shares in an employee incentive arrangement, but my view is that it would not.

iii) Whereas Morgan Stanley obtained its shares in Equant by subscribing $200m for them, the shares to be allocated to employees were to be provided without payment, and were to be provided by SITA. Witness statements prepared by SITA for the purposes of the main action clearly showed that this was a controversial matter for some of the airline owners of SITA. In the event the board and the general meeting of SITA both agreed to the employees trust, but I think that a 10% interest in Equant was as far as the board and the members would have gone. Morgan Stanley would have wished for a rather larger holding for the employees trust, but accepted that there would have been too much opposition within SITA. In the event the holding in Equant which was transferred to the employees trust by SITA was 9.8%.

iv) The employee share scheme was to be based upon shares in Equant, not in SITA, but the employee beneficiaries of it were to be employees not only of Equant and its numerous commercial subsidiaries, but also of SITA itself.

This case arises in connection with the share incentive arrangements, based within the employees trust, for the employees of SITA. The case does not extend to the consequences of the similar arrangements for the employees of Equant and its subsidiaries, notwithstanding that those similar arrangements were also based within the same employees trust.

v) A detail which I ought to mention is that, in the first instance and for several years thereafter, the legal titles (or, more strictly, the Dutch law equivalent of the legal titles) to the Equant shares attributable to the members of SITA (the 60%, or more exactly as it worked out, the 60.2%) and to the Equant shares attributable to the employees trust (the 10%, or more exactly the 9.8%) were not held directly by the members or the trustee, but were held by a Netherlands Foundation called the SITA Foundation. The SITA members and the trustee of the employees trust held their interests in the form of depositary certificates of the Foundation. However, the Foundation was transparent, analogous to a nominee, in the sense that one Foundation certificate represented the full beneficial ownership of one Equant share. The vesting of the shares in the Foundation had important consequences as regards voting powers, but it is not important as regards this case. The issues in this case would be exactly the same if the trustee of the employees trust had held Equant shares instead of holding SITA Foundation certificates.

21. Having described the overall shape of the reconstruction I can now concentrate on the facts so far as they bear on the employees trust. In the later part of 1994 the management of SITA, knowing that the company was proposing to establish some form of employee incentive arrangements, concluded that it ought to instruct a firm of human resource consultants which specialised in the subject. They invited a number of firms to apply for the role, including Watson Wyatt (then The Wyatt Company (UK) Limited). In November 1994 Watson Wyatt was appointed. Thereafter there were a number of meetings between Watson Wyatt personnel on the

one hand and directors and senior employees of SITA on the other. Watson Wyatt produced several reports. Watson Wyatt's appointment was confirmed, and its recommendations were accepted, at board meetings and at a shareholders' general meeting of SITA. For a time a sub-committee of the board was in existence before a final decision to proceed was made. However, I need not go into any of the details here because the final decision of SITA was that Watson Wyatt was instructed to advise generally on the share incentive arrangements.

22. Watson Wyatt's recommendations require a distinction to be kept in mind between the share schemes and the employees trust.

23. The share schemes were the detailed systems whereby individual employees might eventually acquire personal shareholdings in Equant. Watson Wyatt recommended two schemes: (1) an `award scheme', and (2) an option scheme. The award scheme was intended to apply to all or most of the employees of SITA and of the Equant group. The basic concept was that those responsible for the administration of the scheme would make awards of specific numbers of Equant shares (or of depositary certificates representing shares) to identified employees of SITA and of the Equant group, but that the awards would not `vest' for some years, and in some circumstances (in particular in the case of employees who left between the making of awards and the vesting of them) would not vest at all. The option scheme as proposed by Watson Wyatt was designed for a comparatively small number of senior personnel, and basically was to be in the form of a conventional employees' share option scheme. Options to purchase holdings of Equant shares would be granted to selected employees at values prevailing at the times of the grants, exercisable some years thereafter on various conditions, including the option holder not having left the group in the meantime. The option scheme would require the option holders to lay out money to exercise their options, whereas the award scheme would not require an employee to pay anything when his or her award vested. But the options would relate to larger holdings of shares, and carried the potential of significantly large capital gains for the option holders. In the event an option scheme as proposed by Watson Wyatt was not implemented in precisely the form which had been visualised at the outset. Instead a special kind of award scheme having essentially the same economic effects for participating employees as an option scheme was substituted. Nothing turns on this detail in the present case.

24. The employees trust was the vehicle which Watson Wyatt proposed should hold the shares required for the two share incentive schemes and should operate the schemes. It was visualised that the shares which employees were to receive under the schemes would not be issued to them by way of allotment of new shares by Equant. Rather the employees would acquire their shares by having existing Equant shares transferred to them. The transfers would be made by the trustee, and it would make them out of Equant shares settled on it by SITA. The shares so settled would be some of the Equant shares (or, more precisely, depositary certificates in the Equant Foundation) originally acquired by SITA at the stage in the reconstruction when SITA transferred the commercial subsidiaries to Equant in exchange for shares in Equant. It would, I suppose, have been possible for SITA to have retained 9.8% of the Equant shares itself, and for SITA to have made the transfers to employees as award scheme shares vested or as options were exercised. However, Watson Wyatt recommended that the matter be dealt with in another way. Its proposal was that SITA should at the outset transfer the whole 9.8% holding (in the form of depositary certificates of the SITA Foundation) to the trustee of an employees trust, that the trustee should (on the advice of an advisory committee nominated by SITA and Equant) operate the share schemes (making awards, granting options, etc), and that the trustee should make the transfers of Equant shares to employees which were required as awards vested or options were exercised. Watson Wyatt proposed that the trust should be an 'Anglo-Saxon discretionary trust', and that it should be established in an offshore jurisdiction for tax reasons. It also recommended that the running expenses of the trust should be met from time to time by the employing entities.

25. Watson Wyatt's proposals would involve a quantity of legal drafting. Three documents in particular would be needed: an employees trust, the rules of an award scheme, and the rules of a share option scheme. Watson Wyatt said in one of its reports to SITA that it could draft the documents itself if required, but suggested that SITA should instruct its own lawyers for that purpose. There is a note of a meeting on 23 February 1995 at which it was contemplated that a firm of United States lawyers would be instructed to do the drafting, perhaps through their London office. However, the documents show that on the next day, 24 February 1995,

Mr Dwek, the SecretaryGeneral of SITA (and also, I believe, an important member of SITA's internal legal department) instructed Maxwell Batley, a firm of English solicitors. It appears that the instructions were initially given by telephone by Mr Dwek to Mr McColl of Maxwell Batley. There is no attendance note of the conversation, but a fax from Mr Dwek shows that it happened. There is no specific evidence of what lay behind Mr Dwek's decision to instruct Maxwell Batley, but the correspondence shows that he and Mr McColl were on first name terms, and there is a later note from Mr McColl to a partner of his in Maxwell Batley which mentions that he had known Mr Dwek for over 20 years and that Mr Dwek was 'a good friend of the firm'. One of the witness statements served by SITA for the purposes of the main action said that Maxwell Batley had been chosen `on the basis of the SITA Legal Department's confidence in Fraser McColl and his familiarity with SITA'. After the telephone conversation of 24 February 1995 Mr Dwek sent, or caused to be sent, to Mr McColl relevant reports already written for SITA by Watson Wyatt, especially a `Design Report' dated 2 December 1994. A little later SITA also sent to Mr McColl some drafting notes, prepared by Watson Wyatt, containing guidance for the solicitors (in the event Maxwell Batley) who were instructed to draft the documents. I will refer to their contents, in so far as relevant to the issues now in dispute, at a later stage. See paragraphs 97 and 98 below.

26. In this account of the facts I am primarily concerned with what happened in connection with the trust deed for the employees trust, but the preparation of that document should be seen against the background that a great many other matters were being considered and acted upon in the spring and summer of 1995. There was much consideration of the detailed structure of the two proposed share schemes (the award scheme and the option scheme). Particularly important was what came to be referred to as the `exit route': if at the time when Equant shares vested in employees under the award scheme or were acquired by employees on exercise of options under the option scheme there had not yet been an IPO of Equant, so that the shares could not be sold on the open market, how were employees who wished to realise some or all of their shares (e.g. to recoup money which they had had to pay to exercise options) going to do so? Also there were important exchanges going on between SITA and Morgan Stanley. On a number of matters advice was sought from specialist outside advisers. Relevant to this case is advice given by the Brussels office of Price Waterhouse, a leading international accounting firm: `We *advise that SITA SC disposes directly and irrevocably of the 10% of [Equant] capital vis-a-vis the employees trust to avoid value increasing within SITA SC. '* And, particularly important for the background to the present case, Watson Wyatt were conducting a survey of anticipated consequences of the scheme for employers and employees in all of the significant countries which would be involved.

27. The Watson Wyatt survey took the form of a questionnaire, based on a draft prepared by Watson Wyatt, and circulated to Watson Wyatt offices or subsidiaries in many countries in the world. It raised a substantial number of questions about the tax and regulatory consequences of the proposed employee share schemes. For France the questionnaire was sent to Watson Wyatt SARL. (A striking fact is that, in November 1994 when Watson Wyatt was in the process of first securing its instructions to advise SITA, it had asked overseas offices or affiliates whether they could advise on local tax implications, M. Magot of Watson Wyatt SARL replied: `We have a perfect grasp of the subject from all legal and fiscal aspects.' In the event M. Magot got it disastrously wrong.) The questionnaire was circulated on 13 March 1995. The questions included whether there would be liabilities on employers for social security charges arising from the award scheme and the option scheme. Watson Wyatt SARL's reply for France (dated 27 March 1995), which Watson Wyatt passed on to SITA, said `no' for both schemes. That was wrong, but SITA proceeded towards the creation of the employees trust and the introduction of the share schemes in the belief that the information which had been supplied to it, on that and other matters, by Watson Wyatt was correct.

28. SITA's position in the main action against Watson Wyatt (the one which was compromised upon payment of $35m) was that it was acceptable for it (SITA itself) to be liable for modest costs which arose in the course of operation of the share schemes, but not for substantial costs. The French social security charges would have been substantial in that sense. Social security charges in France were `notoriously high' (the words of Jean Roworth of SITA's tax department in her witness statement for the main action), and SITA had a large number of employees in that country. SITA's case was that, if Watson Wyatt had advised it correctly about the French social security position, it would not have proceeded in the manner that it did, but would have made some other arrangement for the funding of its social security liabilities, probably by having them

payable out of the 9.8% interest in Equant which was to be devoted to the employee share scheme. It could have done that in two ways: either it could have inserted provisions into the trust deed permitting the trustee to pay or reimburse the social security charges, or it could have transferred less than a 9.8% interest in Equant to the trust, intending to meet the social security charges out of the part of the 9.8% which it retained. (It seems to me that SITA might have had major problems over getting Morgan Stanley to agree to either alternative, but SITA's case against Watson Wyatt was as I have described.)

29. 1 can now return to what happened about the preparation of the trust deed for the employees trust, because it is in connection with that that Watson Wyatt says that Maxwell Batley were in negligent breach of their duty to SITA. As I have explained earlier, on 24 February 1995 Maxwell Batley were instructed to draft the documents: the trust deed, and also the rules of the two schemes. If I have understood the position correctly Mr McColl (the partner in Maxwell Batley who personally received the instructions to the firm from Mr Dwek) attended to the drafting of the rules of the schemes. The documents indicate that he produced a first draft of the rules (at least for an option scheme) by 24 March 1995. However, he arranged for the first draft of the trust deed itself to be prepared by his partner, Mr O'Shea, who was the head of the firm's private client services department. Mr McColl wrote to Mr Dwek on 7 April 1995 to the effect that Maxwell Batley had already done work on the drafts for the share schemes, and were commencing to draft the trust deed. That exercise might require some input from the trustee, but the prospective overseas trustee had not yet been appointed. On 13 April 1995 Mr McColl wrote again to Mr Dwek, this time enclosing a first draft of the trust deed. The covering letter made a few comments on the draft, and ended: `I await your further instructions.' In submissions to me Mr Moger described this as a letter of advice, and said that it was a seriously inadequate letter of advice. I do not think that this is a fair criticism. The letter was from one lawyer to another, and they had known each other for over 20 years. Further exchanges and instructions about the draft deed were obviously expected by Mr McColl, and I do not think that he intended his letter to be anything as formal as a letter of advice. Nor do I think it likely that Mr Dwek and his colleagues at SITA regarded it as such.

30. The draft trust deed (which had been drafted by Mr O'Shea) was a discretionary trust for a class of beneficiaries consisting of present and former employees or executive directors or officers of `Participating Entities', and specified relatives or dependants of such persons. The main Participating Entities were SITA, Equant, and Equant's subsidiaries. The deed gave the trustee the usual powers which any discretionary trustees would normally have under a modern form of settlement, but also gave extensive powers to the trustee to establish and operate share schemes for the benefit of employees of SITA and the Equant group. SITA was not a member of the class of discretionary beneficiaries; nor was Equant or any other of the employing companies. There was a power to amend the deed, but not so as to cause it to cease to be an Employee Share Scheme (as defined in the deed). The trust period was expressed to continue for eighty years, but the trustee and SITA together had power to terminate it at any earlier time. The draft contained provisions for the disposition of any residue remaining in the fund when the trust terminated. It was to be held on trust for the employees, executive directors, and officers of the Participating Entities at the time, but if there were no such persons the draft set out two alternatives, indicated to be alternatives by square brackets. One was for the residue to be paid to the Participating Entities (which included SITA). The other was for it to be paid to charity.

31. As I have said the first draft was prepared by Mr O'Shea. In circumstances which I will describe later (see paragraph 53 below) I had before me a witness statement of his, but he did not give oral evidence. In his witness statement he explained that he had had previous experience of drafting employee share trusts, and had precedents of such trusts which he had prepared in the past. He used one of his precedents as his *`starting point for drafting the trust deed for the SITA trust*.' He went on to say:

> It was a good starting point for the scheme but the fact that the SITA parties were not UK companies, and that the scheme was an international one to be administered outside the UK, required considerable thought and amendment to adapt the precedent and to delete or change clauses which had been tailored for the specific requirements of UK company, financial services and tax law. ... Clearly, as the scheme was to be international in scope there were significant parts of my precedent which could be deleted or changed as they would only be relevant to a scheme based in the UK. However my instructions were to prepare an Anglo-Saxon discretionary trust and that is what I prepared.'

32. I divert from my account of the facts at this stage because it is convenient to deal with one matter of submission which arose from what I have just described. Mr Moger on behalf of Watson Wyatt, and also Watson Wyatt's expert witness Mr Pett (of whom more later), criticised Mr O'Shea for using as his starting point a precedent which had been prepared for a UK-based share scheme. It was submitted that what was required was a `bespoke' scheme, and that Mr O'Shea ought to have started with a clean sheet, not with a precedent. I do not accept the criticism. It seems to me to be entirely reasonable for a lawyer who has been instructed to draft a document of one sort or another to begin with a precedent if he has one available. He should of course be aware of the differences between the situation covered by the precedent and the particular circumstances for which he is instructed to draft, and he should make the departures from and modifications to the precedent which are appropriate. In this case Mr O'Shea's witness statement shows that he was aware of the differences between a wholly UK-based employees trust, which was the situation covered by his precedent, and the internationally based employees trust which SITA intended to create. He says that it required considerable thought and amendment to adapt the precedent. Watson Wyatt may or may not have an arguable case that Mr O'Shea, despite thinking about it, did not satisfactorily make the adaptations which the circumstances demanded, but in my judgment Watson Wyatt overstates its case when it argues that it was a breach of duty for Mr O'Shea to use his precedent as a starting point.

33. I resume my account of the facts. Once Mr O'Shea had completed his first draft of the trust deed and had discussed it with Mr McColl he had no further significant involvement. As I have recorded in paragraph 29 above Mr McColl wrote the covering letter of 13 April 1995 to Mr Dwek of SITA which sent the draft. Thereafter the stages leading up to the finalisation and execution of the draft were handled by Mr McColl. The draft was obviously reviewed by SITA's legal department (I think principally by Kim Kassell of that department rather than by Mr Dwek personally), by Watson Wyatt, and by the proposed Jersey trustee. The trustee was at some time around this stage identified as Mourant & Co, a corporate trustee associated with a leading fnn of Jersey lawyers. Mourant & Co was always represented by Mr Crill, one of the partners in the firm.

34. The next specific event affecting the trust deed (so far as I can ascertain from the materials which I have before me) was a meeting on 12 July 1995 to review the documentation generally. The meeting was held at SITA's offices in this country, near Heathrow. I have the impression that it lasted all day. There were three representatives from SITA: Mr Titley, who had been placed by Mr Blackmon in charge of the employee share scheme from October 1994; Kim Kassell from the legal department; and Mr McDermott, finance and administration manager for Northern Europe. There were two representatives of Watson Wyatt: Mr Landon and Mr Jackson. Also present were Mr Crill of Mourant & Co (the trustee), and Mr McColl of Maxwell Batley. Mr Titley's witness statement says: `The purpose of the meeting was to bring together for the first time the trustee, Maxwell Batley and Watson Wyatt, in order to ensure that Watson Wyatt's Design Specification would be correctly incorporated in the trust deed and plans.' There was no oral evidence about the meeting, so I am dependent on Mr Titley's witness statement and what I can glean from the documents, which include several rough notes of the meeting taken by some of the participants.

35. Quite a lot of the discussion was concerned with details affecting the draft rules for the two share schemes, but the meeting also considered the draft trust deed in detail, and, if I have followed correctly, effectively reached agreement on the final form of it. The final form did not differ in any major respect from Mr O'Shea's first draft. The class of beneficiaries was narrowed somewhat by excluding directors and officers of the Participating Entities (including SITA) and their relatives. Mr O'Shea's draft had indicated by square brackets that there were some matters on which a client's decision was needed. As it appears to me those matters were all resolved at the meeting. I have mentioned one earlier: should the ultimate trust of the residue of the fund at the end of the trust period be for SITA and the other employing companies, or should it be for charity? The decision was that it should be for charity. A note of `Design Decisions' made at the meeting records: `Funds should not be capable of return to the settlor or employing entities.' Another decision (essentially confirming what had all along been a part of Watson Wyatt's design proposals) was that the costs of operating the share plans within the trust would be borne by the employing entities. It is clear that such costs were to include local taxes and social security charges, and other costs arising from legal requirements.

36. On 14 July 1995 (two days after the meeting) Mr McColl circulated redrafts of all the three documents which had been considered, including the trust deed. Other documents show that Watson Wyatt considered the redrafts, and I assume that SITA and Mr Crill of Mourant & Co did the same. I assume that everyone was satisfied with the redraft of the trust deed. No-one suggested otherwise, and certainly no-one suggested that it might be defective in the way that Watson Wyatt now argue that it was. It was another two months before the trust deed was executed, but on 29 September 1995 it was executed by SITA, Equant, and Mourant & Co in (as far as I can see) the terms of Mr McColl's redraft of 14 July 1995, which was itself not significantly different from Mr O'Shea's first draft of 13 April 1995. No assets were transferred into the employees trust on 29 September, but on 11 October 1995 SITA transferred to the trustee 850,000 depositary certificates of the SITA Foundation, representing 850,000 shares in Equant. Once a further issue of Equant shares had been made to Morgan Stanley, which happened very soon afterwards, the trustee's holding (through the depositary certificates) represented 9.8% of the issued share capital in Equant.

37. The initiation of the share schemes still awaited formal action by the trustee. Indeed, if I have understood the witness statements correctly, there were still one or two details on the rules of the schemes which had not been finalised at the time when the depositary certificates were transferred to the trustee. For tax reasons it was thought desirable that the certificates should be injected into the trust before Morgan Stanley subscribed $200m for Equant shares. Time was getting tight for the Morgan Stanley transaction, and for that reason it was decided to establish the employees trust first, to carry out the issue of new shares to Morgan Stanley second, and later to finalise the share schemes which the trustee would then formally establish. The first round of awards under the award scheme was, I believe, made at the end of November 1995.

38. Before then, but after the Equant shares (via depositary certificates of **the SITA Foundation) had been irrevocably vested** in the employees trust, serious doubts were already being voiced within SITA about the advice which Watson Wyatt had given that in France there would be no employer's social security charges. The matter appears first to have been raised in late October 1995, after a presentation about the employee share scheme made in Paris to SITA plan co-ordinators from around the world. Some French representatives could not understand why there would be no French social security charges when shares vested in employees resident in France. SITA followed this up, and quite soon it emerged that the `no' answer which Watson Wyatt SARL had given to the relevant questions in the questionnaire was wrong. There would be French social security charges, payable by the employers as well as by the employees. Further, although the shares would be acquired by the employees from the trustee, not from the employer, the social security liability was imposed by French law on the employer, not on the trustee.

39. The discovery of Watson Wyatt's error was a serious matter. The problem was that the high rates of French social security charges coupled with the large number of SITA employees in France (the third highest number in the world) meant that the magnitude of the charges falling to be paid by SITA would be greater than would have been acceptable if SITA had known about it in advance. The great importance of France in this respect is shown by figures given by Jean Roworth, SITA's VicePresident, Taxation, in the witness statement which she prepared for the main action against Watson Wyatt. She calculated that, as at December 2001, 78.2% of the social security charges incurred by SITA in respect of the share awards arose in France.

40. The problem of the prospective French social security charges became known in late 1995 or early 1996. The charges would not become payable for some years, because they would only arise when shares vested or options were exercised (or at the time of the equivalent of options being exercised under the scheme which was in the event adopted as a substitute for a fully fledged share option scheme - see as to this the end of paragraph 23 above). The first vestings occurred in February 1999. These related to the first round of awards made at the end of November 1995. In the intervening years between 1995 and 1999 SITA explored a range of possibilities for, either, mitigating the amount of the social security charges, or shifting the incidence of them so that they fell on the employees trust instead of on SITA itself. One avenue which was examined was `early vesting' - arranging for awards to vest at an early date in order to crystallise the liability before Equant shares had risen greatly in value - but for various reasons that was not acceptable. Another possibility raised by SITA was whether, although the employers' social security charges were a liability of SITA itself, the trustee could pay them out of the trust fund. If on the original terms of the trust deed the trustee could not pay them, could the power to amend the deed be exercised in such a way as to give the trustee power to pay the charges after

all? To all of these questions, and to some other ideas which were looked into, the answer turned out to be: no. This was confirmed at a consultation with leading counsel in England in February 1998. (The employees trust was administered by Mourant & Co in Jersey, but it was expressed to be governed by English law.)

41. The result of all of the foregoing has been that SITA, as respects its own employees, was liable to pay and has paid the French and other social security charges attributable to its own employees as and when share awards have vested in them. The same has applied to Equant and its subsidiaries, but this case is concerned only with SITA itself and the employer's social security charges attributable to SITA's own employees. The amounts of the social security charges have depended on the values of the Equant shares as and when awards vested. They have been very large, since as it turned out the restructuring of the original SITA group and the creation of the Equant group to own the commercial activities was a huge success.

42. The employees trust acquired its interest in Equant in October 1995, just after the agreement for Morgan Stanley to acquire its shareholding was signed. At the price paid by Morgan Stanley for its shares the employees trust's holding would have been worth some $66m. In July 1998 an IPO was achieved in New York and Paris. Each Equant share was split into 20 shares and the IPO price was $27 per share. This valued the employees trust's holding (originally of SITA Foundation depositary certificates representing 850,000 Equant shares, not yet split into 20 shares for each original share) at $459m. The shares continued to appreciate. In February 1999, close to the time of the vesting of the first round of awards, there was a secondary share offering at $74 per share, which valued the employees trust's holding at $1,291m. In December 1999 there was another successful share offering at $90.91 per share. In November 2000 Equant was taken over by France Telecom. I cannot work out what the then value of the employees trust's original holding would have been, since the matter is complicated by some of the trust's shares having left the fund upon vesting in employees in the meantime, and also by the structure (part shares and part cash) of the France Telecom takeover. However, I can, I think, safely assume that the trust's holding still had a very high value.

43. The effect of these high values was that, by the time that evidence was being prepared for the main trial between SITA and Watson Wyatt, SITA itself had already incurred social security charges of over $58m, of which something like 78% arose in France. I do not know the equivalent figure for Equant and its subsidiaries. The evidence indicates that there are likely to be further social security charges, because not all of the shares covered by awards made by the trustee to employees under the share schemes have yet vested. One of the statements predicts a total liability for SITA of $70m or more. It is against figures of that order of magnitude that the main action was settled upon payment of $35m by Watson Wyatt to SITA.

44. There are no other facts which I need to record concerning the direct subject matter of the present case, but there is one other matter which I wish to mention. In March 2000 SITA wanted to establish a new employee share scheme. It did so through another employees trust which acquired shares in a new Dutch holding company, SITA INC. (INC is not an abbreviation of `incorporated', but stands for Information Networking Computing.) SITA instructed Maxwell Batley to draft the documents for this new scheme, as it had on the 1995 scheme which this case is about. (It had also instructed Maxwell Batley in connection with unsuccessful efforts to find a way to alleviate the impact of the French social security charges under the 1995 scheme). Under the SITA INC scheme the problem of funding the social security charges was dealt with by a contractual arrangement between SITA and the trustee: a contractual condition of SITA transferring shares in SITA INC to the trustee was that, if SITA became liable for social security charges or other similar liabilities by reference to share awards made by the trustee, the trustee would indemnify SITA against the liability. The possibility of SITA being a beneficiary under the trust was considered but was not taken further when Belgian and Dutch tax advice was received to the effect that it was too risky.

How the present case has progressed

45. The case has had a complicated history down to the present stage. The history has had consequences for the present state of the evidence on the basis of which I have to decide the issue between Watson Wyatt and Maxwell Batley. On 3 November 2000 the case was commenced by claim form issued by SITA against two defendants, The Wyatt Company (UK) Limited and Watson Wyatt Partners (referred to together in this judgment as Watson Wyatt). The claim form was served by a letter of 13 November 2000. Watson Wyatt served a defence, denying any breach and asserting that it was entitled to rely on advice received from

Watson Wyatt SARL. As a result SITA amended its claim so as to join Watson Wyatt SARL as a third defendant in March 2001. Watson Wyatt SARL served a defence, and at that stage appeared to be attempting to distance itself from the first two defendants.

46. Watson Wyatt (the first two defendants) also commenced its contribution claim against Maxwell Batley by issuing and serving a claim form under Part 20 of the CPR. The claim form was issued on 6 November 2001 and served on 8 November 2001. Maxwell Batley served a defence. So the Part 20 proceedings were commenced about a year after SITA's claim in the main action against Watson Wyatt. That was at a time when SITA was still pursuing its action against Watson Wyatt and Watson Wyatt intended to defend SITA's action. The Part 20 pleadings between Watson Wyatt and Maxwell Batley have been amended since they were first served.

47. Much preparation had been made for the main trial between SITA and Watson Wyatt, but on 1 May 2002, quite soon before the trial was due to begin, the action was compromised between SITA and all three defendants (i.e. Watson Wyatt and Watson Wyatt SARL) upon payment to SITA of $35m by the first and second defendants (Watson Wyatt, to the exclusion of Watson Wyatt SARL).

48. The compromise of SITA's claim against Watson Wyatt still left on foot Watson Wyatt's claim for contribution against Maxwell Batley. That claim was no longer one for contribution to any damages which might be awarded by the court against Watson Wyatt. Rather it had become a claim for contribution to the S35m paid by Watson Wyatt in settlement. That claim for contribution has been the matter tried before me.

49. Maxwell Batley's solicitors had indicated in correspondence that, if Maxwell Batley was held liable to make a contribution to Watson Wyatt (i.e. to defendants 1 and 2), Maxwell Batley would themselves claim a contribution against Watson Wyatt SARL. At an early stage in the hearing before me Watson Wyatt applied to join Watson Wyatt SARL as a third Part 20 claimant. The object was to ensure that the present hearing would deal with all outstanding issues, including the extent, if any, that the apparent negligence of Watson Wyatt SARL should impact on any contribution which Maxwell Batley might be ordered to make to the S35m paid to SITA. That would not be a live issue if I held (as in the event I am going to hold) that Maxwell Batley had no liability to make any contribution at all, but it would have been a live issue if I had come to a different conclusion. At the time of the application for Watson Wyatt SARL to be joined as a party to the Part 20 contribution proceedings I did not know how I was going to decide Watson Wyatt's claim against Maxwell Batley, so I joined Watson Wyatt SARL pursuant to the application. Mr Fenwick, on behalf of Maxwell Battey, did not oppose the application, although it became apparent later that he differed from Mr Moger and Mr Salzedo about what the consequences would be if the extent of any responsibility on the part of Watson Wyatt SARL became a live issue. Since it is not going to become a live issue, this is one of the issues which has been argued but which I am not going to decide.

The state of the factual evidence

50. So much for the tangled history of claims, defences, settlements, claims for third party contributions, and consequential claims for fourth party contributions. I move on to explain how the case before me has proceeded evidentially, and I begin with evidence of facts as opposed to expert evidence. In anticipation of the main trial between SITA and Watson Wyatt SITA served several witness statements. When SITA's claim was compromised the witness statements were not needed for the purpose for which they were intended. However Watson Wyatt has now put eight of them in, supported by Civil Evidence Act notices, as part of its evidence in its Part 20 claim against Maxwell Batley. Indeed, with one exception (which I will explain later in this paragraph) those statements are the only witness-evidence of fact which Watson Wyatt has. The witness statements by themselves do not particularly advance Watson Wyatt's case against Maxwell Batley. They provide background, but they were all prepared for the purpose of demonstrating how seriously Watson Wyatt had been at fault. None of them makes any criticisms of Maxwell Batley. The exception is the oral evidence of Mr Max Blackmon. In 1995 he held a senior position in SITA's management, but he has since retired. He was one of the witnesses who supplied witness statements to SITA for the purposes of the main action against Watson Wyatt before it was settled. His witness statement was one of the eight which Watson Wyatt indicated it would rely on backed by a Civil Evidence Act notice. However, shortly before the trial Watson Wyatt's solicitors intimated that Watson Wyatt would be adducing oral evidence from Mr Blackmon,

and a new witness statement by him was served. He duly gave oral evidence. I will describe and comment on the content of his evidence later. (See paragraphs 64 to 70 below.)

51. I specifically point out that I had no evidence of fact, either orally or in writing, from anyone employed by Watson Wyatt or by Watson Wyatt SARL. Mr Moger said that Watson Wyatt personnel could not contribute anything, since he was arguing, not that Maxwell Batley were in breach of duty to Watson Wyatt, but that Maxwell Batley were in breach of duty to SITA. There is an element of formal validity in what Mr Moger said, but Watson Wyatt personnel, in particular Mr Landon and Mr Jackson, were involved in the whole matter throughout, and I do not think that they had nothing to contribute to this trial. If they had been called as witnesses I have no doubt that they would have been subjected to rigorous and demanding cross-examinations by Mr Fenwick, and I consider that avoiding any such potentially damaging process had a lot to do with the absence of any evidence from any internal Watson Wyatt witness.

52. Watson Wyatt did adduce expert evidence, but for the moment I stay with evidence of fact. The other party to the trial before me was Maxwell Batley. I understand, though I do not have any details, that there was a stage in the preparations for this trial when a number of witness statements had been prepared on behalf of Maxwell Batley and served on Watson Wyatt. Mr Pett's second expert's report (see paragraph 60 below) specifies six witnesses, including Mr McColl and Mr O'Shea. However, at a later stage Maxwell Batley decided not to call any of the witnesses. At the start of the hearing before me it indicated tentatively that that was still its intention, and the intention became firm in the course of the hearing. I was told by Mr Fenwick that what prompted Maxwell Batley, despite having prepared and served several witness statements, to decide not to call any of the witnesses was learning that Watson Wyatt intended to call no witnesses of fact. (I believe that that was Watson Wyatt's intention for some time, because it was only at a late stage that it emerged that Watson Wyatt would be able to adduce oral evidence from Mr Blackmon. I say more about this in paragraphs 84 and 85 below.)

53. So I heard no oral evidence of fact from any witnesses called on behalf of Maxwell Batley. However, the CPR rule 32.5(5) provides that, if a party to proceedings has served a witness statement but does not call the witness, the other party may itself put in the statement as hearsay evidence. Watson Wyatt invoked this rule in relation to the witness statement of Mr O'Shea, but not in relation to the witness statements of Mr McColl or any of the other witnesses of fact in respect of whom Maxwell Batley had served witness statements. That is the explanation of how Mr O'Shea did not give any oral evidence, but his witness statement was before me as part of the evidence.

54. Watson Wyatt was asked by Maxwell Batley in the course of the pleadings to supply certain items of further information. In the light of its replies, which were thought by Maxwell Batley to make factual assertions about what had been understood by three employees of SITA (Mr Titley, Mr Cleak, and Jean Roworth), Maxwell Batley asked SITA to comment. SITA's response was made in writing by Jean Roworth on 13 June 2002. Maxwell Batley served a Civil Evidence Act notice in respect of the response. (For completeness I should record that Watson Wyatt served a Civil Evidence Act notice in respect of a 1996 letter from Mr Titley of SITA and a 1996 e-mail of Mr Cleak of SITA. No reference to either document was made in the trial, so I need not refer to them further.)

55. The effect of the foregoing is that the factual material before me consists of the following: (1) the documents; (2) the witness statements of seven witnesses served on behalf of SITA in the main action; (3) two witness statements of Mr Blackmon, and his evidence given orally; (4) the witness statement of Mr O'Shea; and (5) Jean Roworth's written answers, dated 13 June 2002, to certain questions asked on behalf of Maxwell Batley.

The state of the expert evidence

56. For the purposes of the main trial between SITA and Watson Wyatt, SITA served an expert's report prepared by a solicitor who specialised in employee share schemes.

Watson Wyatt responded with a report by an expert of its own. This was Mr David Pett. Mr Pett is a partner in a large firm of solicitors with offices in a number of cities, including Birmingham where he is based. He, like SITA's expert, is a specialist in employee share schemes. He says that if he had to apply a description to himself it would be `share schemes lawyer'. He is the author of books and articles on the subject, and I accept

that he is an acknowledged expert. It was clear from his oral evidence that he is a careful and impressive practitioner in his field.

57. I will refer to the report which Mr Pett prepared in response to the report of SITA's expert as his first report or Pett 1, since, as will appear, he has also produced a second report, or Pett 2. Pett 1 was prepared after Watson Wyatt had served its Part 20 notice claiming a contribution from Maxwell Batley. Nevertheless Mr Pett said that he was only focussing on SITA's claim against Watson Wyatt. The report consists of 13 main paragraphs, most of which are subdivided into several sub-paragraphs. Nearly all of the paragraphs are irrelevant to the case which Watson Wyatt is now advancing against Maxwell Batley, but one paragraph, paragraph 9, which has 10 subparagraphs, does contain relevant material. In particular Mr Pett says that it would have been reasonable for the draftsman of the employees trust to draft for maximum flexibility: the discretionary class of beneficiaries could have included SITA. It was not, in Mr Pett's view, reasonable for the trust to be drafted as it was. He observes that the drafting was not, however, the responsibility of Watson Wyatt.

58. Pett 1, though prepared for the defence of Watson Wyatt against SITA's claim in the main action, is now relied on by Watson Wyatt in its contribution claim against Maxwell Batley. The report prepared by SITA's expert is not part of the evidence in the present proceeding, and I have not seen it.

59. Maxwell Batley served an expert's report of their own in response to Pett 1. Their expert is Mr Tom Hill, a solicitor who is also qualified as a lawyer in the United States. He is presently employed by a leading firm of chartered accountants, having previously spent several years in legal practice with a succession of firms. He has had experience in employee share schemes, but I do not think that he would claim to be a pure specialist in the subject to the extent that Mr Pett is.

60. After Mr Hill's report had been served in response to Pett 1 Mr Pett prepared his second report, Pett 2, which was also before me on the trial.

61. Mr Pett and Mr Hill gave oral evidence, and each was cross-examined at some length. I will refer to the contents of their evidence at a later point. (See paragraphs 71 to 80 below.)

62. The expert evidence on the main issues in the case therefore consists of Mr Pett's two reports, Mr Hill's report and the oral evidence of each of them. I should mention that my attention was drawn by Mr Fenwick to authorities which question the admissibility of expert evidence on issues of English law and practice. See, for example, Oliver J in ***Midland Bank Trust Co Ltd v Hett Stubbs & Kemp*** [1979] 1 Ch 384 at 402; Simon Brown LJ in ***Bown v Gould & Swayne [1996] PNLR*** at 135. The point may in theory apply equally to the evidence of Mr Hill as to that of Mr Pett, but Mr Hill's evidence was tendered in response to Pett 1, and the main relevance of the point is its effect on Mr Pett's evidence. However, although Mr Fenwick drew my attention to the authorities he did not formally object to Mr Pett's evidence. I heard the evidence of each expert in full, and I found each of them helpful and informative in a number of ways. I have noted and reflected upon what they said. But I believe that my conclusion is based on my own evaluation of the whole case, taking into account the law and my own experience. My conclusion is not based on findings of my preferences between the views of the two expert witnesses.

63. I should briefly mention two other matters relating to expert evidence. First, the parties served experts' reports about Belgian and Dutch tax law, and one of the Belgian experts gave oral evidence. In my view, however, the expert evidence in this respect became something of a side issue, and I will not say anything more about it here. Second, for the purposes of the main trial before it was settled Watson Wyatt had obtained and served an expert's report from a forensic accountant, Mr Hamedani. That report and its annexures were included in the material which was before me. Mr Hamedani was not called as a witness to give evidence in person, but both parties from time to time referred to the contents of his report. I am not sure whether it was agreed between the parties or whether the formal position was that Maxwell Batley introduced it into the evidence pursuant to *CPR* rule 35.11. Either way, Mr Hamedani's report was part of the evidence. Except in a respect to which I draw attention towards the end of this judgment (see paragraph 143 below) the report did not address matters which were in dispute between Watson Wyatt and Maxwell Batley, but it contained much useful background information.

Mr Blackmon's evidence

64. In the circumstances which I explained earlier Mr Blackmon was the only witness of fact who gave oral evidence. The other evidence of fact is in the witness statements of SITA witnesses and of Mr O'Shea. That other evidence does not contribute much to the central issues which I have to resolve, so Mr Blackmon's evidence is of some importance. In 1994 and 1995 (the years of prime relevance to this case) he was SITA's Vice President, Strategic Planning, and had the responsibility within the SITA management for the restructuring project. The employee share scheme was only part of the project, and the witness statement of Mr Blackmon's deputy, Mr Titley, says that in October 1994 Mr Blackmon asked him to take charge of that scheme. From 1995 to 1997 Mr Blackmon was a Vice President at Equant. He returned to SITA in a different capacity, and then retired in January 2000.

65. He was one of the SITA witnesses who made a witness statement for the purposes of SITA's claim against Watson Wyatt. It is dated 13 December 2001, and is one of the witness statements as respects which Watson Wyatt served Civil Evidence Act notices in the present contribution proceedings. Thus that original statement is part of the evidence before me. However, it does not even mention Maxwell Batley, and is of little or no assistance to Watson Wyatt in its contribution claim. As I understand it the SITA witnesses who are still with SITA were not prepared to assist Watson Wyatt in its claim against Maxwell Batley, but Mr Blackmon, being retired, was willing to correspond with and to speak to Watson Wyatt's solicitors. He has signed a second witness statement which was prepared specifically for the purposes of the present proceedings. It is dated 14 June 2002, a Friday less than a week before the trial began. I understand that Maxwell Batley's legal advisers were told the previous day that there was to be further evidence from Mr Blackmon. I do not know whether they saw the witness statement on the Friday or only in the following week. If they saw it on the Friday they cannot have had much time to react to it then. (The six hours time difference between England and Texas, where Mr Blackmon lives, is relevant in this connection.) The trial began on the Wednesday of the following week, 19 June. Mr Blackmon gave oral evidence on Tuesday 25 June. He is American and lives in Texas. He came to this country specifically for the purpose of giving his evidence.

66. Mr Blackmon was an admirable witness. His answers were always directed precisely to the question. They were considered, clear, and contained no hint of partiality in any way. There were, nevertheless, some inconsistencies in his evidence and some respects in which I cannot be confident that his views and understandings represent the views and understandings of SITA as a whole. Mr Moger relies heavily on Mr Blackmon's evidence. It was indeed impressive, but in my judgment it was not enough to get Watson Wyatt home in its contribution claim against Maxwell Batley.

67. The main thrust of Mr Blackmon's second witness statement, before cross examination, was that, when the employees trust was created and the Equant shares were transferred to it (via SITA Foundation depositary certificates), he understood that SITA would be locking up the shares from the outset for the benefit of the employees: it was a `one way valve'. However, he was not aware that there was an alternative under which the trust property could be made available for SITA. He believed that, if he and his colleagues had been informed that there was an alternative, they would have recommended the alternative to the SITA board, and that the SITA board would have preferred it. He also expressed the view that Morgan Stanley would not have objected.

68. 1 have one comment of my own on Mr Blackmon's evidence in chief (as set out in his witness statement), and then there are several points which I shall make about the impact on it of his clear and frank answers in cross-examination. My own comment is that, when Mr Blackmon says that he did not realise that there was an alternative to a ·one way valve' trust, I accept implicitly that he did not, but I think that it is unlikely that the same applied to other members of the SITA management who were more closely involved than he was in that aspect of the reconstruction. (Mr Blackmon had overall responsibility for the reconstruction as a whole, but, as I have mentioned earlier, he asked his deputy, Mr Titley, to take detailed charge of the employee share arrangements which were to be part of the reconstruction.) What Mr Blackmon means, expressed in lawyer's terms (which are not, of course, terms which he, a nonlawyer, would naturally use), is that he did not know that, if SITA created an employees trust, it could itself be a beneficiary under the trust.

69. However, there were others involved who were lawyers or other professionals, and I would be surprised if they did not know that SITA could be a beneficiary under its own trust if it wanted. They included Mr Dwek and Kim Kassell, who were lawyers.

There is no specific evidence of whether Mr Dwek and Ms Kassell qualified as lawyers in jurisdictions which recognise the concept of a trust, but I am not prepared to assume that they did not, particularly since the onus of establishing its case rests on Watson Wyatt, not on Maxwell Batley. Mr Moger criticised Mr McColl's letter to Mr Dwek of 13 April 1995 (the covering letter with which Mr McColl sent the first draft of the trust deed to Mr Dwek) for not pointing out that SITA could be a beneficiary, but, as I have said earlier, I do not accept the criticism. It was a letter from one lawyer to another, and they knew each other well. On the restricted evidence which is before me I believe that I should proceed on the assumption that Mr Dwek, and several others who were also involved, probably did know that there was nothing to stop SITA being a beneficiary. In my view it is highly likely that the others included Watson Wyatt. Watson Wyatt was SITA's principal adviser on the employee share scheme as a whole. It is true that the Watson Wyatt personnel involved on this project were not qualified lawyers, but they certainly understood what a trust was, and I would be very surprised if they all believed that, if SITA created the employees trust, it was impossible for SITA to be a beneficiary. No witness has come forward from Watson Wyatt to say so.

70. I move to points which arose in Mr Blackmon's cross-examination. The following are worth mentioning.

i) In a response to a request for further information in the course of the pleadings Watson Wyatt had suggested that the trust could have been drafted so that it was revocable by SITA without needing the consent of anyone. As a matter of trust law that would indeed have been possible. However, Mr Blackmon said that the suggestion would have been unacceptable. (He had been more ambivalent about this in his witness statement.)

ii) He agreed that the overwhelming intention of SITA and its members was that, once the assets had been put into the trust, they were there for good for the benefit of the employees.

iii) Mr Pett's second expert's report had identified another possible form which the trust deed might have taken. This is an important part of the case, because in the event this is the way in which Mr Moger finally put Watson Wyatt's case as to the form the trust deed would have taken if Maxwell Batley had done what Mr Moger submits they ought to have done. Mr Pett said that SITA could have been included in the class of discretionary beneficiaries, and if it had been included `it would have been open to the trustees to apply the whole or part of the trust fund for the benefit of the settlor [SITA], to the exclusion of all other beneficiaries, if to do so was consistent with the objects and purposes of the trust.' On that Mr Blackmon said that he would be highly troubled by `to the exclusion of all other beneficiaries'. He agreed with Mr Fenwick that the scheme was not about providing benefit to SITA, but about benefiting the employees.

iv) Mr Blackmon adhered to the view expressed in his witness statement that it would have been prudent to have some provision for SITA to benefit in certain circumstances, but he qualified that in two important respects. First, SITA should not simply have been included as another member of the single class of discretionary beneficiaries:

"Q. ... *To lump them in with the other employees would have been unacceptable, wouldn't it?*
A. *Yes it would."*

Second, it would only have been acceptable for SITA to be a beneficiary if the purpose was limited to meeting costs of the employees trust and the employee share schemes:

"Q.*Does it really come to this, Mr Blackmon: the only kind of provision that you would have been prepared to see put in would have been one which expressly limited the right of the employers to recover[ing] the costs of the plan?*
A. *That is correct.*

Q. *Anything less specific would have been wholly unacceptable to you, to SITA, and to Morgan Stanley?*
A. *That is correct."*

v) Mr Blackmon considered that there should have been a provision in the trust deed which allowed for the unexpected, not just for the French social security charges.

vi) Finally I mention Mr Blackmon's evidence in cross-examination about Morgan Stanley. The background to this is that, given that Morgan Stanley was going to contribute no less than $200m to the assets of Equant and had insisted that 10% (or in the event 9.8%) of the shares in Equant should be committed to an employee share scheme, it would have been imperative for SITA to obtain Morgan Stanley's consent before including a provision in the trust deed which might have the effect of diverting some part of the 9.8% away from the employee beneficiaries. In Mr Blackmon's second witness statement he said that he was confident that Morgan Stanley would not have objected. However, his evidence in cross-examination was very different. He said that Morgan Stanley would have been most unlikely to give consent without the most compelling reasons. SITA management would, on this issue, have found itself between the SITA board and Morgan Stanley. `The dogfight with Morgan Stanley would have been inevitable.'

The expert evidence of Mr Pett and Mr Hill

71. I have already explained how Mr Pett and Mr Hill came to give evidence, and I have described their qualifications as experts. I now summarise the content of their reports and oral evidence.

Pett 1

72. It began with Mr Pett's first report, Pett 1, served at a time when the main action was still SITA against Watson Wyatt. He noted that the employees trust in this case was similar to employees trusts which were prepared for companies based in the United Kingdom. In such trusts the employer would be most unlikely to be a beneficiary. That was the effect of several United Kingdom statutory provisions. A particularly important one was section 86 of the Inheritance Act 1984, which conferred valuable exemptions from inheritance tax if certain conditions were met, one of which was that the beneficiaries, either throughout the life of the trust or until a fixed time, had to be confined to employees and their relatives or dependants. In SITA's trust deed SITA was not a beneficiary, as had of course become apparent when SITA was exploring whether the trust fund could be used to meet the unexpectedly large French social security charges. However, as it appeared to Mr Pett the reasons of United Kingdom law why an employing company would not be a beneficiary of an employees trust did not apply to an international scheme established by a non-United Kingdom company like SITA. Or, if they might still apply to some extent by reason of SITA and Equant subsidiaries having some employees in this country, the amounts involved would not be significant enough to outweigh the possible advantages of SITA being a beneficiary. Mr Pett considered that the non-inclusion of SITA as a beneficiary was an unnecessary loss of flexibility. It would have been reasonable to have expected the draftsman (i.e Maxwell Batley) to draft for more flexibility, and it was not reasonable for the trust deed to have been drafted as it was.

73. Watson Wyatt relied on Pett 1 in support of its contribution claim against Maxwell Batley. It also advanced further allegations in its pleadings. These included that Maxwell Batley ought to have provided in the trust deed for some or all of the following: for SITA to have had power to revoke the settlement; for the trustees to have a power or an obligation to pay social security liabilities falling on the employing companies; and, a more general provision, for SITA (and perhaps also Equant and its subsidiaries) to be a discretionary beneficiary under the trust.

Mr Hill's expert's report

74. That was the state of Watson Wyatt's case against Maxwell Batley when Mr Hill prepared his expert's report on behalf of Maxwell Batley. He expressed the opinion that, even in the case of an international settlement like SITA's, there was more force in the United Kingdom reasons for a settlor company not to be a beneficiary than Mr Pett acknowledged. I am not going to go into the details on this, but I agree with Mr Pett on it rather than with Mr Hill. Mr Hill made a number of other points, of which I wish to mention three.

i) Mr Pett, having formed the view that, because SITA was not a United Kingdom company, there was no United Kingdom reason why it should not be a beneficiary, concluded that Maxwell Batley ought without more to have made SITA a beneficiary. But he had not taken account of the possibility that, if SITA was a beneficiary, there might be disadvantages in other jurisdictions comparable to the United Kingdom disadvantages which there would have been if SITA had been a United Kingdom company. In my opinion this criticism is plainly valid. Mr Hill does not specifically refer in this connection to Belgium, but SITA was a Belgian taxpayer, and Mr Pett, by assuming that, because there was no significant United Kingdom objection to SITA being a beneficiary, therefore SITA could be a beneficiary, displayed the

inappropriate Anglocentric approach for which he was criticising Maxwell Batley. Might there have been a Belgian tax problem? Maybe so; maybe not. But in Pett 1 Mr Pett did not even refer to the possibility or allude to the need to consider the tax and regulatory regimes of jurisdictions other than the United Kingdom. However, Mr Pett modified his position on this in cross-examination.

ii) In Pett 1 Mr Pett appears to have assumed that, once the draftsman of the employees trust had realised that there was no significant United Kingdom objection to SITA being a beneficiary, he ought without more simply to have drafted the trust deed in such a way that SITA was a beneficiary. Mr Pett may also have considered that the draftsman should in a similar way also have included Equant and its subsidiaries as beneficiaries: right up to the end of Mr Pett's oral evidence I was not clear whether he did or did not think that Equant and its subsidiaries, as well as SITA, ought to have been beneficiaries. Mr Hill considered that for Maxwell Batley to have drafted the trust deed in that way would have been a departure from the client's instructions, and that a solicitor ought not to do it without the client's authority. I agree with Mr Hill about this. I will examine the content of Maxwell Batley's instructions at a later stage in this judgment. Again I should say that, as I understood Mr Pett, he modified his evidence on this point in cross-examination.

iii) Mr Hill made the point, which also seems to me to be entirely valid, that Maxwell Batley cannot be faulted for failing to include in the trust deed a provision providing expressly that the trustee had the power or the duty to pay employers's social security charges out of the trust fund. To Maxwell Batley's knowledge Watson Wyatt had conducted a survey which covered, among other matters, whether the proposed employee share scheme would give rise to employer's social security charges in the various countries where SITA and the Equant group had employees. Maxwell Batley could not be expected to have assumed that the answers to the questionnaire might be wrong, or that they should draft the trust deed so as to anticipate and deal specifically with international tax problems which should have been indentified by Watson Wyatt in the survey but had not been.

Pett 2

75. The next stage was Mr Pett's second report, Pett 2. It contains quite a lot of material about United Kingdom law, and I am in broad agreement with those parts of it. Mr Pett enlarged on why section 86 of the Inheritance Tax Act and other United Kingdom statutory provisions were not a significant objection to SITA taking some some sort of interest under the trust. Moving on, he disagreed with Mr Hill that it would have been necessary to investigate the legal position in countries outside the United Kingdom. I think that Mr Pett changed his mind on that in cross-examination, but in Pett 2 his position was that SITA could have been made a beneficiary without at that stage investigating the consequences in, for example, Belgium; the position should, however, be checked before the trustee exercised any discretion in favour of SITA, and it would always be possible to exercise a power under the trust deed to exclude SITA from any possibility of benefit in the future. On another matter Mr Pett seems to me tacitly to have accepted point (iii) from Mr Hill's report as summarised in the foregoing paragraph. Mr Pett wrote that Maxwell Batley's failure was not a failure to make specific provision for an anticipated liability to employer's social security charges; rather it was 'a*failure* to *recognise that there was no necessity to draft the trust deed in a manner which was so restrictive as to leave the settlors with no means of recovering the funds in the event that unforeseen circumstances frustrated the attainment of their commercial objectives. '* (`Restrictive' was an adjective which Mr Pett frequently used to describe the feature that the trust fund could not be used for the benefit of SITA, but could be used only for employees and their dependants. `Flexible' was his adjective for describing a trust deed under which it was possible for SITA to benefit. I see what he means, but I do think that the adjectives are somewhat loaded.)

The oral evidence of Mr Pett and Mr Hill

76. Finally I come to the oral evidence of Mr Pett and Mr Hill. Together their oral evidence occupied over four days. This judgment is already going to be very long, and in the interests of such brevity as I can still achieve I am only going to pick out a few particularly important points.

77. Mr Pett had considered the matter through the eyes of a share schemes lawyer. He had sought to give evidence about what he thought a share schemes lawyer would have done in the circumstances which were placed before Maxwell Batley. The matter that would have stood out to him was that Maxwell Batley were not instructed to prepare a United Kingdom-based employee share scheme, but an international scheme. So

the constraints, like section 86 of the Inheritance Tax Act, which circumscribed what could be achieved in a United Kingdom-based scheme did not apply. A general theme in his evidence (between the lines of it, perhaps, rather than explicitly spelt out in the lines) was that a share schemes lawyer like himself would not have felt himself particularly constrained by his instructions. He would have reflected on what the client wanted to achieve (or even, as it seems to me, on what he thought that the client ought to have wanted to achieve), and considered whether there were other and better ways of achieving it. I will quote one extract from his oral evidence.

"...as an employee share schemes lawyer, when a client comes to me I would expect it as my role not to take at face value the documentation which had previously been provided to the client by the consultants, or indeed by the client to the consultants, but to test and if I thought that it was appropriate to do so to raise queries with the client and to double check that what the client had said was against the background of full knowledge of the alternatives open to the client. In my experience, very often that leads the client down a slightly different road from the road which up to that point he had been intending to go down.

Q. *Do I understand your position to be that you have approached this on the basis that, despite the fact that Watson Wyatt had been retained for the design and implementation and agreed the brief with the client, Maxwell Batley, instructed to draft the trust deed and scheme rules, should have revisited the entire scheme from the outset and questioned each and every assumption which had been made by the client and Watson Wyatt before proceeding any further? Is that what you are saying because it seems to be?*

A. *Yes where there was a reason for doing so. And in this case the fact that, unusually, this was from the outset an entirely non-UK situation would, I believe, prompt me to do that ... "*

This passage might appropriately be considered with a later answer that - *"in any event it would have been incumbent on the shares scheme lawyer to point out to the client that in this sort of situation there may well arise circumstances unforeseen at the outset ..."*

78. I believe that Mr Pett's final evidence was that, contrary to what he had said in Pett 1 and Pett 2, a share schemes lawyer would not simply have drafted the trust deed with SITA included as a beneficiary in some form. Rather he would have gone back to the client and put before the client a `menu of choice', describing various provisions which the client might adopt, discussing them with the client, and finally drafting so as to give effect to the item on the menu which the client had chosen. In this case the menu would have included the trust being revocable at the instance of SITA, SITA being a discretionary beneficiary along with the employees and their dependants, SITA not being a beneficiary in the first instance but having power to add itself to the discretionary class, and SITA being the residual beneficiary of the fund at the end of the trust period, coupled with a power in SITA to bring the trust period to an end. Mr Pett did not say that the menu would have included the only provision which Mr Blackmon, in his evidence, said would have been acceptable, namely one which expressly limited SITA's interest to one where it could recover the costs of the plan. Mr Pett accepted that the sort of trusts which he would have presented to the client as possibilities would have been unusual, but added the fair comment that they would have been unusual in response to unusual circumstances.

79. One respect in which I think that Mr Pett clearly changed his position from what he had said in his written reports was on whether, before SITA could have been included as a beneficiary, advice should be taken about the consequences under non-United Kingdom laws. In Pett 1 and Pett 2 he had said that SITA should have been a beneficiary anyway, and that any problems under foreign laws could be coped with simply by having a power in the trust deed for SITA to be removed from the class of beneficiaries in future. In his oral evidence his final position was that the foreign advice, at least on the laws of the more significant non-United Kingdom jurisdictions, ought to be obtained first. I believe that Mr Pett was correct to modify his evidence in this respect. The point of foreign law which really mattered was whether, if the Equant shares increased in value in the ownership of the trustee and the trustee later disposed of them (e.g. to employee-beneficiaries), SITA could be liable to Belgian tax on the increase. A United Kingdom lawyer would not know the answer to that question, but he would probably think that it might be affected by whether SITA was a beneficiary under the trust or not. The question needed to be sorted out before the trust was created.

80. Mr Hill in oral evidence did not think that considerations of the United Kingdom consequences of SITA being a beneficiary were as insignificant as Mr Pett thought they were, but he did not suggest that they were of

major importance: *"... the UK considerations are not irrelevant but, being only part of the picture, they would not have the same paramount importance that you would attach to them for a UK company, for a purely UK situation."*

He was far less inclined than Mr Pett to take the view that a solicitor instructed as Maxwell Batley had been should question the client's instructions: *"I do not see it as the duty of a solicitor to educate clients as to all the possibilities of what the client might do instead of that which the client expressly says he wants to do."*

And later to the same effect: *"I do not think that it is within the scope of the duty of the solicitor to point out the fact that a legal structure such as a trust can be used to achieve something completely different from what the client's instructions have been."*

Discussion and analysis of the liability issue: some general observations

81. After the foregoing long account of facts, law, procedural complications, and evidence, I can now turn to the questions which will determine whether Maxwell Batley is liable to make a contribution to the $35m which Watson Wyatt paid to SITA in settlement of SITA's claim against it. I begin with some general observations before I turn to the more specific and detailed arguments.

82. In the main case SITA sued Watson Wyatt. In the present proceeding Watson Wyatt is suing Maxwell Batley, but of course the issue is whether, if in the main case SITA had sued Maxwell Batley as well as, or instead of, suing Watson Wyatt, SITA would have succeeded against Maxwell Batley. Would Maxwell Batley have been *`any other person liable'* to SITA within the terms of section 1(I) of the 1978 Act? The burden of showing that SITA would have succeeded against Maxwell Batley falls on Watson Wyatt, and there are a number of obvious hurdles which Watson Wyatt has to overcome. Mr Fenwick correctly points out that Maxwell Batley did what they were instructed to do (more on this later), that their work was effective in achieving its actual object (as opposed to an additional object which it did not have but, according to Watson Wyatt's case, ought to have had), and that, had Watson Wyatt not been negligent over the French social security charges, it would not have occurred to anyone to complain about Maxwell Batley's work. Indeed, even as matters turned out it did not occur to SITA that it could or should complain about Maxwell Batley's work. SITA continued to use the professional services of Maxwell Batley after the problem of the French social security charges was discovered, including using Maxwell Batley in a similar role for the preparation of the SITA INC employee share scheme in 2000.

83. Watson Wyatt's difficulties are compounded by the fact that it has very little evidence (other than expert evidence) to adduce in its support. Apart from Mr Blackmon no witness originating from SITA has given evidence in Watson Wyatt's support, and it has chosen not to adduce evidence from any of its own personnel, although several of them were very closely involved in the stages leading up to the creation of the employees trust in the autumn of 1995.

84. Mr Moger seeks to draw support for Watson Wyatt's case from the fact that Mr McColl and Mr O'Shea, the partners in Maxwell Batley who were concerned in the matter, have not given evidence. He has referred me to the observations of Brooke LJ *in Wisniewski v Central Manchester Health Authority* [1998] LLRM 223, a medical negligence case in which something had gone seriously wrong with the birth of a child and there was a noteable absence of evidence from the doctor who should have been in attendance but was not. I accept that there are cases where adverse inferences can be drawn from the fact that a witness is not called, but I am disinclined to draw inferences adverse to Maxwell Batley in this case. On behalf of Maxwell Batley witness statements for Mr McColl and Mr O'Shea (and for some other witnesses) were prepared and served, and I think that I can reasonably infer that, if Watson Wyatt had advanced a case supported by substantial live evidence of persons involved at the time, Mr McColl and Mr O'Shea would have been called.

85. However, as the matter was explained to me by Mr Fenwick (without any disagreement or qualification from Mr Moger), Watson Wyatt informed Maxwell Batley at a pre-trial review that it proposed to call no live factual evidence at all, in response to which Maxwell Batley reserved its position on whether it would call the witnesses who had made witness statements on its behalf. The judge gave Watson Wyatt until the Tuesday eight days before the trial to confirm whether or not it would be calling evidence, and, if it said that it would not, Maxwell Batley had until the Thursday to indicate whether they would be calling any live factual evidence. On the Tuesday Watson Wyatt said that it would not be calling evidence, and Maxwell Batley decided that in the circumstances they would not do so either. However, late on the Thursday Watson Wyatt

informed Maxwell Batley that it now proposed to apply to call live evidence from Mr Blackmon. Maxwell Batley then took some time to reflect on its position, but in the event it adhered to its decision to call no factual evidence of its own. In those circumstances I do not think that it would be appropriate to draw inferences against Maxwell Batley from its decision.

86. In any case it is not only Maxwell Batley which has taken decisions not to call live witnesses. Although Watson Wyatt has in the event called Mr Blackmon, it has elected not to call any of its own personnel. As I have indicated earlier I am unconvinced by Mr Moger's proposition that, because the issue is whether SITA could have sued Maxwell Batley, Watson Wyatt witnesses would have nothing to contribute. Watson Wyatt was SITA's principal consultant in the devising and creation of the employee share scheme. It was very closely involved in the whole process from start to finish. In my opinion there is a considerable element of tactics involved in Watson Wyatt's decision not to adduce evidence from its two employees who were most closely involved (Mr Landon and Mr Jackson). Watson Wyatt did not, I believe, want to expose them to cross-examination, and, while I can accept that Maxwell Batley did not want to expose Mr McColl and Mr O'Shea to cross examination either, I am out of sympathy with the submission that Maxwell Batley's understandable decision in that respect should incline me to draw adverse inferences against it.

87. In this connection it is particularly relevant that the overall burden in this Part 20 contribution claim lies on Watson Wyatt, not on Maxwell Batley. If the undisputed facts raised a prima facie case in favour of Watson Wyatt the silence from Mr McColl and Mr O'Shea could reinforce it. That is what in essence happened in the *Wisniewski* case (supra). But if the case that Watson Wyatt has put forward, with the evidence of Mr Blackmon but without the live evidence of any other witness of fact, leaves the matter, at the highest for Watson Wyatt, evenly balanced (and in my view it does not in any event reach that level), the absence of evidence from Mr McColl and Mr O'Shea cannot create a case for Watson Wyatt where otherwise Watson Wyatt would not have one.

88. Moving to another aspect, I point out that Watson Wyatt's case has changed in significant respects as the matter has proceeded. Of course it is not unusual for a party to litigation to modify and develop its case as the matter proceeds, and still to win in the end. I nevertheless think that in this case there is some force in Mr Fenwick's assertion that the shifts in Watson Wyatt's position demonstrate the difficulty which it experiences in finding a convincing way of saying that Maxwell Batley did something wrong. In Watson Wyatt's original pleaded case a central assertion was that Maxwell Batley should have inserted into the trust deed provisions dealing directly with social security charges; alternatively Maxwell Batley should have warned about the absence of such provisions in the trust deed. Those arguments are no longer pursued. Indeed, given the incorrect advice about French social security charges given to SITA by Watson Wyatt, there is no tenable case that Maxwell Batley were partly responsible for the failure to deal in advance with social security charges. Another change of position is that, although Watson Wyatt pleaded that the trust deed ought to have been revocable by SITA unilaterally, it has dropped that allegation now. Also, for quite some time Watson Wyatt said that Maxwell Batley ought to have gone ahead by itself and included in the draft trust deed provisions of some sort under which SITA could benefit from the trust fund. Watson Wyatt now accepts that Maxwell Batley would not have been right to do that, but should have sought further instructions from SITA first. It also accepts that SITA would first have needed to take non-United Kingdom tax advice before finally deciding that such provisions should be included in the trust deed.

89. The essence of Watson Wyatt's final case, as it emerged after Mr Pett's oral evidence and in the course of Mr Moger's closing submissions, can, I hope without doing injustice to it, be summarised as follows.

i) When Maxwell Batley were instructed in February 1995 to draft the documents for the employee share scheme, they ought to have noticed that, although it was not part of their instructions that SITA should have some sort of ability to benefit from the assets in the trust fund, there was no significant reason of United Kingdom law why not, and there might have been no significant reason under the laws of other countries either.

ii) Maxwell Batley ought to have drawn this to the attention of SITA, and laid before SITA a menu of choice of various ways in which SITA could have the possibility of benefiting under the trust.

iii) If Maxwell Batley had done that, SITA would have chosen to be a discretionary beneficiary. In form it would just have been one member of the discretionary class along with the employees and their

dependants, but in practice it would have been a beneficiary with a view to receiving benefits only if there were unforeseen costs of the scheme which would otherwise have to be borne by SITA itself.

iv) Anyone whose consent would in practice have been needed before SITA could realistically retain an interest of that sort would have given consent.

v) When the unexpected liability for French social security charges arose SITA would have asked the trustee to exercise its discretion in favour of SITA.

vi) The trustee would have agreed, and SITA would have received out of the trust fund a capital distribution which would have meant that the burden of the social security charges, though directly paid by SITA, was indirectly borne by the trust fund.

vii)That did not happen, and a reason why not (not the only reason, because Watson Wyatt's incorrect advice that there would be no French social security charges was another reason) was that Maxwell Batley, in breach of the duty which they owed to their client SITA, did not draw SITA's attention to the possibility that it might be a discretionary beneficiary under the employees trust which it was proposing to create.

viii)Therefore SITA's loss was caused, in part even though not entirely, by Maxwell Batley's breach of duty.

90. One aspect of Watson Wyatt's argument which should not be forgotten is that the reason why Maxwell Batley should have suggested the possibility of SITA being a discretionary beneficiary under the employees trust was not in order to cater for the employer's social security charges, if there were any. The reason was much vaguer than that. It was a `just in case' reason. Neither Maxwell Batley nor SITA had any particular reason to suppose that there would be any unexpected costs of the employee share scheme which would fall on SITA, but just in case any such costs emerged it might be a good idea for SITA to retain a beneficial interest of some sort under the trust deed.

91. There is another important point which should be kept in mind. It is clear that Maxwell Batley did not advise SITA that it might be possible for it to have some sort of interest under the trust, and did not lay a menu of choice before SITA. That is alleged by Watson Wyatt to have been a breach of duty by Maxwell Batley. However, the standard of care by which I must judge whether Maxwell Batley were in breach of their duty as solicitors is not the standard of the best possible advice that might have been given by a solicitor in the circumstances. Rather it is the standard of the reasonably competent practitioner having the skills necessary to undertake the task undertaken by Maxwell Batley. This is in essence an application of the principle established in the celebrated case of ***Bolam v Friern Hospital Management Company*** [1957] 1 WLR 582. I also draw attention to the words of Lord Diplock in ***Saif Ali v Sydney Mitchell & Co*** [1980] AC 198 at 220: *"No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made."*

92. The practical effect in the present case is this. It seems clear that, if Mr Pett had been instructed instead of Maxwell Batley, he would have approached the matter differently from how Maxwell Batley approached it. Suppose that I consider that Mr Pett's approach would have been better than Maxwell Batley's. That does not mean that Maxwell Batley must have been in breach of duty in adopting their approach. They would only have been in breach if their approach was such that no reasonably well informed and competent solicitors could have adopted it. On the facts of this case that sets a high hurdle for Watson Wyatt to overcome. One factor which is highly relevant is that SITA was a sophisticated client with specialist internal departments of its own. It also had other outside professional advisers who had already been consulted about the reconstruction and who, in the case of Watson Wyatt, had an overall advisory responsibility for the employee share schemes.

93. Finally under the heading of some general observations on the liability issue I say this. I accept the following:

Maxwell Batley, when instructed by SITA to draft the documents, might have gone back to their client, SITA, and suggested to it that it might be possible for it to be a beneficiary under the employees trust.

ii) If Maxwell Batley had done that, SITA might have become a beneficiary under the trust when, later in 1995, the trust was created.

iii) If that had happened the trustee *might*, when SITA found itself exposed to unexpectedly onerous social security charges, have made a capital distribution to SITA out of the trust fund sufficient to cover the liability.

However, the questions for me are not whether those things might have happened. As to (i) the question is whether Maxwell Batley ought to have suggested to SITA that it might be possible for it to be a beneficiary. As to (ii) the question is whether SITA *would* have become a beneficiary. As to (iii) the question is whether the trustee *would* have made a capital distribution to SITA. Question (i) is a question about the extent of Maxwell Batley's duty. Questions (ii) and (iii) are questions of causation. I examine those questions in the following sections of this judgment.

What was the extent of Maxwell Batley's duty?

94. To ascertain the extent of Maxwell Batley's duty to their client, SITA, the starting point must be the content of their retainer. This is clearly established by authorities. I begin with Oliver J in ***Midland Bank* Trust *Co Ltd v Hett Stubbs d'c Kemp*** *[1979]* Ch 384 at 402. Counsel had argued that the solicitor in that case had a general retainer imposing a duty to consider all aspects of the client's interests generally whenever the solicitor was instructed. Oliver J said: *"... but that cannot be. There is no such thing as a general retainer in that sense. The expression `my solicitor' is as meaningless as the expression `my tailor' or `my bookmaker' in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duty depends on the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do. ... I think that the court must beware of imposing on solicitors - or upon professional men in other spheres - duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious solicitor would, in his client's general interest, take it upon himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as [three specified cases] demonstrate that the duty is directly related to the tontines of the retainer."*

95. There are other cases to a similar effect. I will not prolong this judgment yet further by referring to a long list of them, but I will mention the decision of the Court of Appeal in ***National Home Loans Corporation PLC v Giffen Couch & Archer*** *[19981]* WLR 207. The solicitors were provided with written instructions by their client, a mortgage lender, and did everything which they were instructed to do. They were sued for the consequences to their client of their having failed to do something which they had not been instructed to do, namely to pass on to their client an item of information about the borrowers which had come into their possession. The Court of Appeal held that they were not in breach of duty to the client, and agreed with Oliver J (in *Midland Bank Trust Co v Hett Stubbs & Kemp,* supra) about the duties of a solicitor to a client by whom he has been retained. Peter Gibson LJ expressly quoted this sentence: *`The extent of his duties depends on the terms and limits of that retainer, and any duty of care to be implied must be related to what he is instructed to do. '*

96. I now apply the foregoing principles to the facts of this case. Maxwell Batley were instructed by Mr Dwek's telephone conversation with Mr McColl on 24 February 1995. There is no attendance note of that conversation, but I think that everyone accepts that Maxwell Batley were instructed to draft the documents for the employee share scheme - the trust deed and two sets of scheme rules. I think that everyone also agrees (and I would certainly infer if everyone does not agree) that nothing was said about Maxwell Batley advising SITA generally on the employee share scheme or on SITA's commercial objectives associated with the employee share scheme. SITA had engaged Watson Wyatt to do those things, for a substantial fee, and it would have made no sense for Mr Dwek to instruct Maxwell Batley to duplicate Watson Wyatt's role.

97. Maxwell Batley were sent a number of documents by SITA, and in my view the contents of the documents, in so far as they bore on what the trust deed and scheme rules should provide, were parts of Maxwell Batley's instructions. The important documents were the Design Report of 2 December 1994 prepared for SITA by Watson Wyatt, and notes for drafting plan documents, another document prepared by Watson Wyatt. The notes were intended to provide guidance for the lawyers instructed by SITA to draft the documents, who in the event were Maxwell Batley. The Design Report said that the shares which were to be committed to the employee share schemes should be held in a vehicle established for the purpose, and that the vehicle should be an employee trust set up in an offshore jurisdiction. It said: *`These trusts are usually 'Anglo-Saxon' discretionary trusts whose beneficiaries include all relevant employees.'* The notes for drafting were mainly

concerned with the contents of the share schemes, but in relation to the trust said this: *"The trust will be a discretionary trust whose class of beneficiaries will include all employees of SITA, the companies in the [Equant] group and the joint venture entity (the participating organisations), including former employees and relatives of deceased employees."*

98. Neither the Design Report nor the notes for drafting said anything about SITA being a discretionary beneficiary or having any other possibility of receiving any of the property comprised in the trust fund. The notes for drafting did say that the beneficiaries were to `include' employees, etc, but it would be ridiculous to suggest that that was an express instruction to Maxwell Batley to include as beneficiaries such other persons as they thought desirable.

99. To summarise, Maxwell Batley were instructed (by a sophisticated client with internal legal and tax departments and with a specialist outside adviser - Watson Wyatt - on international share schemes) to draft a discretionary trust the purpose of which (as accurately expressed by Mr Hill in oral evidence) was `to provide a vehicle for delivering benefits under the award plan and the option plan.' The beneficiaries were to include employees of SITA and of the Equant group and their dependants. Maxwell Batley were not instructed to do anything more. In particular (as Mr Fenwick correctly submitted) Maxwell Batley's instructions did not extend to vetting Watson Wyatt's scheme for the provision of employee share incentives or to questioning SITA's commercial objectives.

100. Maxwell Batley drafted a discretionary trust which was an effective vehicle to deliver benefits under the two plans. The beneficiaries included employees of SITA and of the Equant group and their dependants. There were other provisions in the trust deed; for example provisions under which any surplus in the trust fund at the end of the trust period could be transferred so as to be capable of being used for the purposes of future employee share schemes. Neither Watson Wyatt nor anyone else has made any complaint about any of the express provisions of the trust deed. There are no matters which, according to the Design Report or the notes for drafting, were to be covered by the trust deed but which were not covered or were covered inadequately. Maxwell Batley supplied a first draft of the trust deed to SITA, with a copy to Watson Wyatt, months before the final draft was executed. There was a long meeting on 12 July 1995, attended by representatives of SITA (including Kim Kassell from the legal department), Mourant & Co and Watson Wyatt, at which final details of the trust deed were worked out and agreed. In so far as the question whether Maxwell Batley were in breach of their duty to their client depends on whether they did what they were instructed to do and did it in a way that would work there is only one possible conclusion: Maxwell Batley were not in breach of their duty, but rather complied with it accurately and to the satisfaction of their client and (at that time) of their client's principal consultant on the employee share scheme, Watson Wyatt.

101. That is not quite the end of the issue on duty. There remains the question of whether Maxwell Batley's duty extended to pointing something out to the client (SITA) although to do so would have been to go beyond their specific instructions. The very recent decision of Laddie J in ***Credit Lyonnais SA v Russell Jones & Walker*** *[2002]* EWHC(Ch) 1310, shows that there can be cases where solicitors have complied with their specific instructions but are still in breach of duty by reason of not having done something more. Credit Lyonnais was a lessee and wanted to exercise a break option in the lease. To do so under the terms of the lease it needed to do two things: (1) to give the lessor a six months termination notice in writing; (2) to pay £11,500 to the lessor and to pay it not later than the termination date. Credit Lyonnais instructed their solicitors, the defendants, to ensure that requirement (1) was met, and the defendants drafted and served an entirely satisfactory notice. However, Credit Lyonnais did not pay the £11,500 to the lessor in time, having failed to realise that it had to be paid before the termination date. So Credit Lyonnais failed effectively to exercise the break clause and suffered loss in consequence. It sued its solicitors. Their defence was that they had done all that they were expressly instructed to do, but Laddie J held that they were liable. He accepted that normally solicitors' duties are defined by the terms of their retainer, but said that if, in the course of the solicitors doing what they were retained to do, they became aware of a risk to the client, it was their duty to inform the client. The defendants must have realised that, if the break clause was to be validly exercised, Credit Lyonnais, their client, as well as serving a termination notice, had to pay the £11,500 by a deadline date. Missing the date was an obvious risk to the client, and by failing to draw the client's attention to it they were in breach of their duty of care.

102. Mr Moger relies on this case, but in my opinion it does not help him. If solicitors know what their client wants to achieve, and also know that if they do what they are instructed to do that will not, or will not by itself, achieve the client's objective, it is obvious that they ought to point that out to the client. That was the situation in the *Credit Lyonnais* case. It is not the situation in the case before me. Maxwell Batley knew that SITA wanted to establish an employee share scheme. The trust deed which they were instructed to draft as part of their retainer and which they did draft was perfectly adequate to perform its part in enabling SITA to establish an employee share scheme. It would have been otherwise, and would have been comparable to the *Credit Lyonnais* case, if the trust deed would not have enabled SITA to establish an employee share scheme and Maxwell Batley knew that or ought to have known it. As it is, however, this is not the sort of case where it can be argued that SITA's instructions to Maxwell Batley would not have worked to achieve SITA's objective, and I do not consider that Maxwell Batley can be said to have been in breach of their duty for reasons comparable to those which meant that the defendants were in breach of their duty in the *Credit Lyonnais* case.

103. Further, I do not think that there is any other basis on which it can be said that this is a case in which, although Maxwell Batley did entirely satisfactorily what they were specifically instructed to do, they were still in breach of their duty to their client. The authorities, such as ***Midland Bank Trust Co v Hett Stubbs & Kemp*** (supra) and ***National Home Loans Corporation PLC v Giffen Couch & Archer*** (also supra), show that, even if the duty of solicitors is not inevitably limited to what they are explicitly instructed to do, nevertheless their duty is closely related to their instructions and does not extend beyond the instructions so as to become a general duty to advise at large in the best interests of the client. In saying that I am not saying that Mr Pett's perception of how a share schemes lawyer, and certainly Mr Pett himself, would have proceeded if instructed instead of Maxwell Batley would have been positively wrong. Mr Pett would have looked critically at his instructions, and if he thought that, although they would probably be adequate for what the client wanted, nevertheless they could be improved upon, he would gone back to the client and said so. I am sure that in a great many cases that would be an excellent thing for a solicitor to do, and Mr Pett said in oral evidence that he believed that his clients generally appreciated the manner in which he approached advising them. 1 would not for a moment criticise Mr Pett's approach. My only point is that it is an approach which goes beyond the limits of the duty arising from his instructions.

104. Mr Hill, I believe, would have been more hesitant about going on his own initiative beyond the terms of his instructions. A point which he made about this particular case was that, as he saw it, Watson Wyatt was SITA's outside adviser on the design of the employee share schemes and the structure within which they were to operate. Watson Wyatt's design and structure had been approved in principle by SITA before Maxwell Batley were instructed, and Maxwell Batley's role was to draft the documents to give effect to the design and structure, not to re-examine the design and structure critically. I think that there may be some force in what Mr Hill said in that connection. Although generally Mr Pett's clients and other advisers of his clients may welcome his critical and expansive approach to a matter on which he has been instructed, I am not sure that SITA and Watson Wyatt would have welcomed it in this particular case.

105. For the foregoing reasons my conclusion is that Maxwell Batley were not in breach of duty when they did not, on their own initiative and beyond the scope of their specific instructions, draw to the attention of SITA that it might be possible for it to be a beneficiary under the trust deed. My conclusion on that point, if correct, is sufficient in itself to mean that Watson Wyatt's Part 20 contribution claim against Maxwell Batley fails, but I will continue and consider also the causation issues which would arise if I was wrong on the issue of duty.

First causation issue: would SITA have acted upon advice that it might be possible for it to be a beneficiary?

106. Watson Wyatt's case is that, if Maxwell Batley had done what it contends they ought to have done, the consequence would have been that, when the trust deed was executed, SITA would have been one of the discretionary beneficiaries, along with the employees and their dependants. On behalf of Maxwell Batley Mr Fenwick submits that that is wrong, and that on the balance of probabilities SITA, having considered the advice from Maxwell Batley and consulted various third parties, would have decided not to become a beneficiary. I agree with Mr Fenwick.

107. In the foregoing paragraph I referred to SITA consulting various third parties. I am sure that it would have done that, but I will begin by asking myself what I think SITA would have done if it had considered purely internally within itself the assumed advice from Maxwell Batley that it could be a discretionary beneficiary

under the trust deed. Mr Blackmon said that, if SITA had been told that the trust deed could contain a provision which would enable SITA, in circumstances which were unforeseen but which related to the costs of operating the employee share schemes, to have any substantial unforeseen costs met out of the trust fund, he and, in his belief, his colleagues in the SITA management and the members of the SITA board would have wished to have the provision included.

108. Despite Mr Blackmon's clear and sincere evidence, I do not think that what he says is enough to determine this particular question. There are four points which I wish to make.

i) The provision would only have been a `just in case' provision, and on the assumption that Watson Wyatt had done its job properly (an assumption which I think that Mr Blackmon and his colleagues would have made at the time), the provision would not have seemed to be of major importance. SITA's intention at the time was that the trust fund should be exclusively for the employees, and the suggestion that SITA might be a beneficiary itself would only be relevant if something went wrong. SITA had no particular reason to expect that anything would go wrong, and one of the things for which it was paying fees to Watson Wyatt was to ensure that nothing did.

ii) There would have been considerations of employee relations to be weighed. The beneficiaries (employees of SITA and of the Equant group companies) were going to be informed about the employees trust, and its existence was meant to enhance their commitment to the businesses in which they worked. The presentations to the employees would not be as easy if it was necessary to explain to them that SITA was going to be a beneficiary itself and in future circumstances (which could not be identified for employees who wanted to know what they would be) might itself receive part of the fund which otherwise would have gone to employees. I am not suggesting that this consideration would by itself have stopped SITA deciding to be a beneficiary, but I do think that some of the SITA management, particularly those who would be in charge of presentations to employees, would have wanted to know how important the proposed provision was. If they were told that it was probably not important, but was proposed for `just in case' reasons, they might have argued against having it at all.

iii) Mr Blackmon's evidence does not mesh in exactly with Mr Moger's submission. It will be recalled from my earlier summary of his evidence (see paragraph 70(iv)) that he said that the only provision which would have been acceptable to him was one which expressly limited the beneficial interest of SITA to recovering costs arising from the employees trust and the employee share schemes. I have never seen a trust deed which attempted to circumscribe a discretionary interest in that sort of way, and Mr Moger did not advocate it in his submissions. His case was that SITA would simply have been a member of the discretionary class. But Mr Blackmon had said in evidence that that would have been unacceptable. If I understood Mr Moger correctly his response was that, although it would not have been written into the trust deed that SITA was a beneficiary only for the purpose of being able to be reimbursed costs of the trust and the schemes, that purpose would have been explained in advance to the trustee, and it could be assumed that the trustee would in practice only exercise its discretion in favour of SITA in conformity with the explanation. Mr Moger submitted that that would have been acceptable to Mr Blackmon and his colleagues if they had had what (according to Mr Moger) would have been proper advice from Maxwell Batley, Mr Moger might have been right on that, but Mr Blackmon certainly did not say it in his evidence. It is a major difficulty in the way of Mr Moger's case in this respect that he argues for something which is contrary to the express evidence of the only live witness of fact whom he was able to call.

iv) Mr Blackmon, though obviously of considerable seniority and importance within SITA, was only one member of a larger management structure. It is difficult to draw from the documents inferences about how SITA directors and other SITA management personnel would have reacted to a suggestion that SITA should be a beneficiary under the trust. On the one hand it is clear that some members of the SITA board had needed a lot of persuading to agree to SITA giving Equant shares away to an employees trust at all, and would have been attracted by the idea that SITA need not give them away irretrievably. On the other hand, other members of the board appear to have been unequivocally in favour of the scheme. Also, at the drafting meeting on 12 July 1995 (see paragraphs 34 and 35 above) attended by SITA personnel, Watson Wyatt personnel, Mr McColl from Maxwell Batley, and Mr Crill representing Mourant & Co, there was some discussion of whether SITA should have an interest under the trust deed: not an interest as a

discretionary beneficiary, but only an interest as a residuary or 'long-stop' beneficiary if the trust terminated and there were no current employee beneficiaries. The decision was that SITA should not have such an interest. There was no evidence from any witness about the reasons, and the notes of the meeting do not (as far as I can see) indicate what the reason was. I think it is unlikely that the reason was one of United Kingdom tax law (if it was I would accept that it would not have been a convincing reason). It is at least possible that a reason was a general feeling shared by everyone at the meeting that, given that the trust was explicitly to be an employees trust, it would be incongruous and inappropriate for SITA, the creator of the trust, to have a beneficial interest itself.

109. For the foregoing reasons, notwithstanding Mr Blackmon's evidence I am not convinced that, if Maxwell Batley had raised with SITA the possibility of its being a beneficiary under the trust and if SITA had taken a decision purely internally without reference to outside parties, the decision would have been that SITA would be a beneficiary. But in any case SITA would not have taken a decision without reference to outside parties, and I need to consider whom SITA would have consulted and what they would have said. There are three outside parties whom or which I shall consider: Watson Wyatt, Morgan Stanley, and tax advisers.

Watson Wyatt. what would it have said if consulted about SITA being a beneficiary?

110. If Maxwell Batley had suggested to SITA that it might itself be a beneficiary under the employees trust and ought to consider whether to instruct the trust deed to be drafted so that it would be, it is, in my opinion, obvious that one of the first things that SITA would have done would have been to ask Watson Wyatt what it thought. I think it is almost equally obvious that, if Watson Wyatt advised against it, SITA would have dropped the idea. Watson Wyatt has produced no evidence to me about what it would have said. Since I have said earlier on another aspect of this case that I am not prepared to draw adverse influences against Maxwell Batley from the fact that Mr McColl and Mr O'Shea have not been called to give evidence, I will not draw adverse inferences against Watson Wyatt on this particular issue either. Can I form any view from the inherent probabilities of the situation? I do not think that I can. It is possible that Watson Wyatt would have said that, the suggestion having been put to them, they thought it an excellent idea and that SITA should explore it further with a view to putting it into effect. But it seems to me at least equally possible that Watson Wyatt would have advised that there was no need for SITA to be a beneficiary, that it would go down badly with the employees, that further investigations (in particular of non-United Kingdom tax consequences) could cause delays, and that the suggestion was not worth following up. I cannot rule out the possibility that Watson Wyatt, perhaps subconsciously, would have reacted along the lines that Maxwell Batley should stick to their job, which was to draft the documents, and should not intrude themselves upon Watson Wyatt's role of advising on the overall design of the scheme. In the circumstances I think that there was no better that a 50/50 chance that, if the suggestion had been raised by Maxwell Batley, it would have survived being considered by Watson Wyatt.

111. I have just referred to a 50/50 chance. This raises the question of whether the sort of causation issues which I am considering now are `balance of probability' questions or `loss of a chance' questions. I need to say something about this distinction, but, since essentially the same point arises in connection with the next matter which I am going to consider, I will postpone what I have to say until later (see paragraphs 115 to 118).

Morgan Stanley: what would it have said if consulted about SITA being a beneficiary?

112. I have described earlier how Morgan Stanley was to subscribe $200m for new shares in Equant, how it insisted in negotiations that there had to be an employee share scheme, and how it would have liked to have more than 10% of the Equant shares committed to the scheme but agreed to 10% (which later became 9.8%). Morgan Stanley was a critically important participant in the wider reconstruction of which the employee share scheme was one part, and I think it is certain that, if SITA wanted to include itself as a beneficiary in the trust deed, SITA would have had to get Morgan Stanley's consent. There was already an agreement in place between Morgan Stanley and SITA, and the employee share scheme contemplated by it was not one under which SITA would have had a potential interest itself. I am not certain whether in law the terms of the agreement gave Morgan Stanley a power of veto, but whether they did or not I feel sure that SITA would not have considered making itself a beneficiary if Morgan Stanley objected.

113. The only evidence about whether Morgan Stanley would have agreed was Mr Blackmon's evidence about what he believed. (See paragraphs 67 and 70(vi) above.) In his oral evidence he departed from what he had said in

his witness statement. His final evidence was that Morgan Stanley would have been unlikely to agree, and he did not dissent from Mr Fenwick's expression that there would have been a `dogfight' about it between the SITA board and Morgan Stanley. I have to form my own view. My view is that Morgan Stanley would not have agreed. From the documents which I have seen I believe that 9.8% of the Equant shares was as low a percentage as Morgan Stanley would accept for the interest held within the employee share scheme. That percentage would have been enough to provide the incentives which Morgan Stanley wanted for senior level staff (the proposed option scheme, which Morgan Stanley cared about most) and for employees generally (the award scheme). But suppose that SITA was a beneficiary and, if it found itself exposed to some large and unexpected cost, would be asking the trustee to distribute a part of the trust fund to it (presumably a significant part, since according to Mr Blackmon SITA would only have been concerned about unexpected costs if they were substantial). In that situation it might have turned out that the fund would be quite significantly depleted by a distribution to SITA, which would mean that the scale of the employee share schemes would have to be cut back: there would no longer have been a 9.8% interest in Equant available for employees. That would have been contrary to Morgan Stanley's requirements, and I do not think that Morgan Stanley would have agreed to it. I also think that at the very least Morgan Stanley would have wanted to know what the purpose of the proposal was, and that, when it got the answer that it was not for any known purpose but was a `just in case' suggestion, it would have been reinforced in its refusal to agree.

114. It is worth adding that the matter might not have got to the stage of SITA asking for Morgan Stanley's consent. The SITA board and management, upon receipt of the suggestion from Maxwell Batley that SITA ought to consider making itself a beneficiary under the trust deed, would realise that SITA would need Morgan Stanley's consent and that, if it asked Morgan Stanley for consent, there would probably be a dogfight about it. The board and management would also be aware that it was only a `just in case' suggestion and that, according to the advice which they had received from their principal consultant, Watson Wyatt, there was no known situation in which SITA would wish to take advantage of being a beneficiary. Would the board and management have wished to risk a dogfight with Morgan Stanley on the issue? I very much doubt it. So, even if SITA quite liked the idea, it would have appreciated that Morgan Stanley would be opposed to it, and would have been quite likely to drop it and proceed on the already planned route under which the only beneficiaries of the employees trust would be employees and their dependants, with an ultimate longstop interest in favour of charity.

115. If, however, SITA did decide to pursue the matter to the extent of asking Morgan Stanley to consent, I have stated my opinion of the likely outcome: Morgan Stanley would not have consented. This is the point at which I wish to say something about the distinction, which I mentioned a few paragraphs above, between balance of probability questions and loss of a chance questions. When I said that in my view Morgan Stanley would not have agreed to a proposal that SITA should be a beneficiary under the employees trust I did not mean that it was certain that Morgan Stanley would not agree. Having had no direct evidence on the point I cannot be certain about it. I meant that on a clear balance of probabilities it seemed to me more likely that Morgan Stanley would refuse to agree than that it would agree. All the same, I would not say that there would have been no realistic chance of SITA securing Morgan Stanley's agreement. What effect do these considerations have on the issue of whether the alleged breach of duty by Maxwell Batley caused damage to SITA? The effect could depend on whether the hypothetical question of what Morgan Stanley would have said is, in the context of this case, a balance of probabilities question or a loss of a chance question.

116. I assume a case where a defendant is in breach of duty and the question is whether the breach caused the loss in respect of which the claimant wants damages. Put in simplistic terms, a balance of probabilities question is one where, if the court concludes that there was a 51% probability that the breach did cause the loss, the claimant recovers damages equal to 100% of the loss. If, on the other hand, the issue, given the particular way that it arises in the case, gives rise to a loss of a chance question, the claimant would recover 51% of the loss. If the court assessed the percentage at 49%, the claimant on a balance of probabilities question would recover nothing, whereas on a loss of a chance question he would recover 49% of the loss. See generally ***Allied Maples Group Ltd v Simmons & Simmons*** [1995] 1 WLR 1602. As to what sort of issues give rise to balance of probabilities questions and what give rise to loss of a chance questions, Mr Fenwick expressed it that, if the court has to ask itself what the claimant himself would have done if there had been no breach of duty, that is a balance of probabilities question, but if the court has to ask what a third party would have done, that is a loss

of a chance question. That seems to me to be a helpful way of encapsulating the point which is more fully explored in the judgment of Stuart-Smith LJ in the *Allied Maples* case, but I am not sure that it is a complete explanation in itself It is also necessary to identify how the particular question is relevant to the essential causation issue which the court has to decide.

117. Mr Fenwick said that the question of what Morgan Stanley would have done if asked to consent to SITA being a beneficiary under the employees trust was a loss of a chance question, and I think that Mr Moger agreed. I have to say that, with some diffidence, I am inclined not to agree. The loss which SITA complains about here is having to pay the social security charges without being able to meet the cost out of the value of the 9.8% interest in Equant which it had contributed to the trust fund. The essential causation question is whether that loss was caused by Maxwell Batley having failed to advise SITA that it (SITA) might be able to be a beneficiary under the trust, And that causation question depends on what SITA would have done if Maxwell Batley had advised SITA that it might be able to be a beneficiary. That is a question of what the claimant itself would have done, not a question of what a third party would have done. It seems to me to be a balance of probabilities question, and I do not think that it is changed into a loss of a chance question by the circumstance that what SITA, the claimant, would have done would have been influenced, even very strongly influenced, by what Morgan Stanley, a third party, would have said about it. It might be different if Morgan Stanley had a formal veto power against SITA including itself as a beneficiary under the employees trust, but, if I have understood correctly the state of the negotiations with Morgan Stanley at the time when, according to Mr Moger, Maxwell Batley ought to have given to SITA the advice that it might be able to be a beneficiary, Morgan Stanley did not have a veto power.

118. Let me illustrate what I mean by hugely simplifying the facts of the case. Suppose that SITA had simply sued Maxwell Batley, and had not sued Watson Wyatt. Suppose that I had held that Maxwell Batley were in breach of duty and that the question of whether their breach caused SITA to suffer loss realistically turned on whether or not Morgan Stanley would have agreed to SITA having a beneficial interest under the employees trust: Morgan Stanley's consent was not required as a matter of law, but the practical reality was that, if Morgan Stanley would have said yes, Maxwell Batley's breach of duty would have been a cause of SITA's loss; if Morgan Stanley would have said no, Maxwell Batley's breach would not have been a cause of SITA's loss. Now suppose, first, that I took the view that there was a 60% chance that Morgan Stanley would have said yes. In that situation I would say that, on the balance of probabilities, Maxwell Batley's breach was a cause of SITA's loss, and SITA would be entitled to recover from Maxwell Batley 100% of its loss, not just 60% of it. Suppose, second, that I took the view that there was a 40% chance that Morgan Stanley would have said yes. In that case I would say that on the balance of probabilities Maxwell Batley's breach was not a cause of SITA's loss, and SITA could not recover anything from Maxwell Batley; in particular it could not recover 40% of its loss. In the actual case I take the view that the chance of Morgan Stanley saying yes would have been considerably below 50%. In consequence I consider that SITA would not have been able to recover anything from Maxwell Batley, and this is another reason why, in my judgment, Watson Wyatt's claim against Maxwell Batley for a contribution should fail.

Non-United Kingdom tax advisers: what would they have said if consulted about SITA being a beneficiary?

119. If it had been suggested to SITA that it might be a beneficiary under the employees trust, it would not have acted on the suggestion without first taking tax advice about it in the significant non-United Kingdom jurisdictions, particularly Belgium and the Netherlands where SITA and Equant were respectively incorporated. In the end all the evidence was to that effect: Mr Blackmon said it; Jean Roworth said it in her statement of 13 June 2002 for which Maxwell Batley served a Civil Evidence Act notice (see paragraph 54 above); and Mr Pett, modifying in cross-examination what he had said in his expert's reports, agreed that it would have been the appropriate thing to do. It is an obvious corollary that, if the Belgian and Dutch tax advice had been that SITA ought not to a beneficiary, SITA would have given up the idea and established the employees trust without being a beneficiary itself.

120. The conclusion which I draw from the evidence is that the Belgian and Dutch tax advice would have been that SITA ought not to be a beneficiary. It is the Belgian tax advice which is particularly important, since SITA was incorporated in Belgium and was a Belgian taxpayer. The advice would have been that, if SITA retained a beneficial interest under a trust created by itself in, for example, Jersey (where the employees trust was

actually created), there would be a risk of SITA continuing to be subject to Belgian tax on income and gains arising from the Equant shares (or SITA Foundation depositary certificates, effectively the same thing as the Equant shares - see paragraph 20(v) above) notwithstanding that the shares (or certificates) were held by the trustee, not by SITA itself.

121. In making my finding about what the Belgian tax advice would have been I am not principally influenced by the expert evidence of Belgian tax. The experts were understandably hesitant to express definitive opinions about what the correct tax treatment under Belgian law would have been. Belgian practitioners whose practices take them into the world of international taxation understand the concept of a trust. Nevertheless trusts are not institutions which exist under the law of Belgium or of other civil law jurisdictions. Whereas United Kingdom tax law is replete with detailed provisions about how income tax, capital gains tax, and inheritance tax are to apply to trusts, settlors, and beneficiaries, the expert evidence indicates to me that Belgian tax law does not provide specifically for trusts (and I would not have expected it to). So if a Belgian taxpayer (like SITA) transferred assets which it had owned to a trust outside Belgium but retained an interest under the trust deed, it would not be at all surprising if the Belgian tax consequences, both of the initial transfer and of future events during the continued existence of the trust, were uncertain. The expert evidence left me with the impression that the consequences would indeed be uncertain.

122. 1 base my finding, not on the expert evidence, but on what actually happened some years later (in 2000) when the issue arose in connection with the proposed new employees trust to hold shares in SITA INC (see paragraph 44 above). By then SITA, its internal tax department, and its advisers generally were fully aware of the French social security charges problem which had arisen in connection with the 1995 trust and which, given the terms of the 1995 trust deed, could not be alleviated by a capital distribution by the trustee to SITA. Something needed to be done about this in the new 2000 trust. At one stage it was proposed that SITA should be a beneficiary of the new employees trust which was to be created in 2000, but advice was taken from a leading firm of accountants in Brussels, and they advised against. A note dated 11 July 2000 to Jean Roworth, the head of the internal tax department at SITA, from her colleague Andrew Cleak summarised the Belgian tax advice as follows:

"The trust must be irrevocable and discretionary or otherwise SITA may remain taxable on trust assets (particularly any contributed by SITA). Thus SITA should not be a potential beneficiary."

123. The obvious inference for the present case is that, if Belgian tax advice had been taken in 1995 on a proposal for SITA to be a discretionary beneficiary under the employees trust which was going to be created then, the advice would have been the same as the advice which was given on the same proposal in 2000: SITA should not do it. Accordingly I find that for this reason also, if Maxwell Batley had given the advice which Watson Wyatt argues it ought to have given, the advice would not have resulted in SITA being a beneficiary under the trust.

Summary on the first causation issue

124. I summarise on the first causation issue. Taking together all of the matters which I have examined in the foregoing paragraphs - how SITA would have reacted internally to a suggestion that it could be a beneficiary, what Watson Wyatt would have said, what Morgan Stanley would have said, and what non-United Kingdom (particularly Belgian) tax advisers would have said - my firm conclusion is that, while the suggestion would no doubt have been considered, it would not have been adopted. It follows that, even if Maxwell Batley had been in breach of duty in not making the suggestion to SITA, the breach of duty would not have been a cause of the loss for which SITA sued Watson Wyatt, and for which it accepted S35m in compromise settlement.

Second causation issue: would the trustee have made a capital distribution to SITA?

125. Suppose I am wrong on the two issues which I have considered up to now. The result so far would have been that Maxwell Batley ought to have advised SITA that it might be possible for it to be a beneficiary, and if Maxwell Batley had advised in that way the outcome would have been that SITA became a discretionary beneficiary. I think I would also be proceeding on the basis that, although in form SITA would simply be a discretionary beneficiary without any restriction on the circumstances in which the trustee might exercise discretions in its favour, SITA would have explained to the trustee that it did not intend to request an exercise of discretion except for the purpose of meeting unexpected costs connected with the trust or the employee

share schemes. If the case got to that stage there would still be another causation issue to be considered before SITA could have succeeded in a claim by it against Maxwell Batley, and thus before Watson Wyatt could succeed in its claim for a contribution from Maxwell Batley to the $35m which it has paid to SITA. When it emerged that SITA would be exposed to large and unexpected social security charges, particularly in France, would the trustee have made a capital distribution to SITA to cover it for the expense? Only if the answer is yes would SITA, and thus Watson Wyatt, be entitled to succeed against Maxwell Batley. The question subdivides into two questions. First, would SITA have asked the trustee to exercise its discretion in its favour? Second, would the trustee, if asked, have been willing to make the distribution?

126. On the first question I believe that the answer is: yes, SITA would have asked the trustee to make a capital distribution to it. My reason for taking that view is that, when the situation actually arose of SITA realising that it was going to have to face very large French social security charges, one of the first matters which it considered was whether the trustee could in some way meet the cost. It is, I think, evident that if counsel had advised that it was within the powers of the trustee either to pay the French charges itself or to reimburse SITA the cost of SITA paying them, SITA would have asked the trustee to do one or other of those things. Similarly, if counsel had advised that, although the trust deed as it stood did not permit the trustee to do either of them, nevertheless the power of amendment could be exercised so as to create the necessary power, SITA would have asked the trustee to concur with it in making the necessary amendment.

127. Mr Fenwick has submitted that SITA would not have asked the trustee to make a distribution to it without first obtaining the consent of Morgan Stanley. I can see the logic of the submission, particularly since I have agreed with Mr Fenwick that SITA would not have made itself a beneficiary of the trust without obtaining the consent of Morgan Stanley. However, when the situation actually arose and SITA was exploring whether it could ask the trustee to meet the cost of the social security charges, there is no hint in the evidence that it told Morgan Stanley anything about it. A factor which may have had some effect in this connection is that, by the time that the French social security charges started to become payable, the Equant project had already been hugely successful and Morgan Stanley's 30% shareholding had increased in value many times over. I can imagine that by then Morgan Stanley might have been entirely content with how things had worked out and might not have been as concerned about how many Equant shares were to be committed to the employee share schemes as it had been in the planning phase in 1995.

128. A different argument which Mr Fenwick and Mr Lowe put forward (this argument being primarily developed by Mr Lowe) was that SITA would have been restricted by law from making a request to the trustee for an exercise of discretion in its own favour. The argument assumed that, in the absence of evidence to the contrary, the law or laws governing the contracts of employment between SITA and its employees was the same as English law (an assumption which, as Mr Moger accepted, should properly be made). Under English law an employer owes an implied duty of good faith to its employees. It must not do anything which would unjustifiably impair the relationship of trust and confidence which subsists between employer and employees. See for example the decision of the House of Lords in *Malik v Bank of Credit and Commerce International* S.A. [1998] AC 20. Mr Lowe's argument, if I understood it correctly, was that it would be contrary to the implied duty of good faith for SITA to request a distribution from the trustee.

129. 1 cannot agree with that argument. I certainly accept that, as a matter of good management of SITA's relations with its employees generally, it would be sensible for it to think carefully before asking the trustee to pay a large sum out of the trust fund to itself, thus causing part of the fund to cease to be available for employee beneficiaries. But I do not think that as a matter of law the employer's duty of good faith precluded SITA from making the request. The assumptions which have been made before this question is reached are that SITA did choose to make itself a discretionary beneficiary under the trust (not in itself, unless I have misunderstood, something which is suggested to have been in breach of the duty of good faith), and that SITA's intention, known to the trustee, was only to seek to take advantage of its status as a beneficiary if it found itself exposed to large costs associated with the trust and the employee share schemes. In the situation which I am imagining SITA would in fact have found itself exposed to large French social security charges, and those charges were a cost associated with the employee share schemes. I cannot believe that SITA would be prevented by law from drawing the circumstances to the attention of the trustee and asking it to consider making an appropriate capital distribution.

130. So much for the first question: if SITA had been a discretionary beneficiary I believe that it would have asked the trustee to make a distribution to it. I take that view on the balance of probabilities: it is a balance of probabilities issue, because it depends on what the claimant, SITA, would have done. (See paragraphs 115 to 118 above.) I turn to the second question. Would the trustee, upon receiving a request from SITA, have decided to comply with it and make a large capital distribution to SITA? This is a critical causation question and it depends on what a third party would have done. As such it is a loss of a chance question. Mr Fenwick and Mr Moger agree on that, and in this instance so do I. The issue subdivides into two questions: first, was there `a real or substantial chance as opposed to a speculative one' that the trustees would agree to make a capital distribution to SITA? (The quoted words are taken from the judgment of Stuart-Smith LJ in ***Allied Maples Group Ltd v Simmons & Simmons*** [1995] 1 WLR 1602 at 1614.) Second, if so, in percentage terms how do I assess the level of the chance?

131. On the first of those subdivided questions, in my view there would certainly have been 'a real or substantial chance' that the trustee would have agreed to SITA's request. In the events which actually happened, it appeared likely that, if the trustee had had power to make a distribution to SITA, or could by an amendment to the trust deed have obtained such a power, it would have exercised it.

132. On the second question, I would assess the percentage chance of the trustee actually making a distribution as requested by SITA at about 60%. I assess the percentage at better than evens for two reasons. The first is because (repeating a point I made in the previous paragraph) the indications are that on the actual facts the trustee would have exercised a discretion in favour of SITA if the discretion had existed. The second is that the trustee would have been all the more likely to do that if SITA had been expressly named in the trust deed as a discretionary beneficiary and the circumstances were precisely of the kind for which, as SITA would have explained to the trustee, SITA had included itself in the discretionary class.

133. I do not assess the percentages at higher than 60% for several reasons. One is that the magnitude of the figures would have given the trustee pause. SITA claimed against Watson Wyatt not just for the French social security charges, but also for the full cost of all the social security charges in all countries, including countries where Watson Wyatt had correctly advised that SITA would have social security charges to pay. I assume that SITA's case must have been that, if Watson Wyatt had advised it correctly about the French social security charges, it would have made arrangements for the 9.8% interest in Equant which was to be allocated to the employees trust to be available to cover the worldwide social security charges, not just the French ones. I said earlier (see paragraph 43) that, shortly before the main action was due to begin, the social security charges for which SITA was already liable were over $58m, more were expected, and the total could eventually have been about $70m. If SITA would have been liable to Belgian tax on a capital distribution to it (which the Belgian experts thought that it probably would), SITA would have been asking the trustee for a grossed-up distribution such that, after Belgian tax had been paid on it, there would still have been about $70m left to cover the world-wide social security charges. That means that SITA could have been asking for as much as $100m. The trustee would think very carefully before making a distribution of that order.

134. The magnitude of the distribution to SITA which would have been required does prompt me to record one reservation to my view that the trustee would have been more likely (to the extent of 60%) to make it than to decline to make it. I have assumed that, if the trustee would have been minded to make so large a distribution, the trust fund would have been large enough to permit it to do so. This is a big assumption, and I am far from convinced that it is a correct one. There is a paragraph in Mr Hamedani's report (paragraph 2.4.13) which might indicate that all of the Equant shares (or depositary certificates) held by the trustee were required to fulfil awards which the trustee had made to employees under one or other of the incentive schemes. If that is right the trustee could not have made the capital distribution to SITA anyway. If it had appeared that the position on this point could be crucial to my decision on the case I would have been inclined to ask the parties whether they wished to make further submissions about it. Since, however, my decision is in favour of Maxwell Batley in any event I have not done that. I do, however, mention the point as possibly being a loose end which was not tied up one way or the other in the course of the evidence and submissions.

135. A related point is that, if the trustee had the funds to make the prospective distribution, it would have been so large that, before making it, the trustee would have been likely first to notify parties who might be affected

and invite them to make state their views about it. Representatives of the employee beneficiaries would probably have objected. Equant might have objected: the distribution would benefit only SITA, but the burden of it would fall on the employee beneficiaries as a whole, including the employees of Equant and its subsidiaries. Morgan Stanley, a major shareholder in Equant, could have been asked for its views. It might have said that it was neutral, but my guess is that it would have been more likely to say that it would not be in favour of the trustee complying with SITA's request.

136. Any persons consulted by the trustee could say that the social security charges which would have prompted SITA to request a distribution out of the trust fund were, under the laws of France and the other countries, the liabilities of SITA itself, not the liabilities of the trustee or of the employees. Part of Watson Wyatt's design plan for the structure was that the running costs of the trust and the schemes were to be borne by the employing entities. When one of the running costs turned out to be much higher than expected, why should SITA expect to be relieved of the cost, effectively at the expense of the employee beneficiaries? The last point might have prompted another thought. It might have occurred to the trustee that the situation which had caused SITA to ask for so large a distribution was all the fault of Watson Wyatt, which had wrongly advised that there would be no French social security charges. So SITA ought to look to Watson Wyatt to reimburse it for the cost, and ought to sue Watson Wyatt if necessary, rather than asking the trustee, and through it the employees, to pick up the bill.

137. However, while I think that the trustee would have considered objections from employees or Equant or Morgan Stanley, the discretion would have remained that of the trustee, and the objections would not have prevented the trustee from making the distribution (always assuming, of course, that the trust fund would have been large enough). Taking account of the factors mentioned in the foregoing paragraphs, while I do think it more likely than not that the trustee would eventually have made to SITA a capital distribution of the degree of magnitude which SITA requested, I do not think that the decision for the trustee would have been an obvious one. In my view there would have been a significant risk for SITA that the trustee would in the end decline to assist and leave SITA to pursue its remedy against Watson Wyatt. Those are the considerations which have led to my assessment of the chance at 60%.

Liability: conclusion

138. Although on the second causation issue, discussed in the immediately preceding paragraphs, I am in favour of Watson Wyatt to the extent of 60%, that does not assist Watson Wyatt to recover anything from Maxwell Batley. I have decided against Watson Wyatt on the two previous issues: in my judgment Maxwell Batley were not in breach of their duty to SITA; and even if they were the breach did not cause SITA's loss, because SITA would not have included itself as a discretionary beneficiary (or any other sort of beneficiary) under the trust. It follows that Watson Wyatt's claim against Maxwell Batley for a contribution fails.

Quantum issues

139. I said in the overview at the beginning of this judgment that there were several quantum issues which were argued but which do not arise in view of my conclusion that Maxwell Batley are not liable at all. I do not intend to deal with them or indicate how I would have decided them if I had needed to. I will, however, briefly indicate what the general nature of some of the issues was.

140. One issue arose from the feature that Watson Wyatt had not been held liable by a court to pay damages of $35m to SITA, but rather had paid that sum under a contractually agreed settlement. If it had been held liable in that sum there would have been no doubt of the sum to which it could, under the 1978 Act, claim a contribution from a third party: it would have been $35m. I think that Mr Moger's case is that Watson Wyatt is in the same position notwithstanding that the $35m was not determined by a court to be the amount of Watson Wyatt's liability, provided only that it was a reasonable settlement to have made. He relies on the Court of Appeal decision in ***Biggin & Co Ltd v Permanite Ltd [*** 1951] 2 KB 314.

141. On behalf of Maxwell Batley Mr Fenwick does not accept this. He points out that ***Biggin v Permanite*** was not a case about the 1978 Act or a predecessor of it, and he says that the decision does not govern the point which arises in the present case. His position is that a defendant can be in perfect good faith in paying a sum in settlement, yet still have settled at more than the claim was worth. If that happens the amount to which the defendant can claim a contribution from a third party under the 1978 Act is not the excessive sum paid in settlement, but the lower sum which is the maximum for which the defendant would have been properly

liable. Provided that the settlement was made in good faith section 1(4) does require it to be assumed that the defendant was liable for something, but it does not require it to be assumed that he was liable for the amount at which he settled. Mr Fenwick submitted that this case was like that. I recall him saying in oral argument words to the effect that Watson Wyatt were right to settle SITA's claim, but the claim was not worth $35m or anything like it.

142. So if I had found that Maxwell Batley were liable to make a contribution to Watson Wyatt there would have been an issue of whether it would have been a contribution to $35m (Mr Moger's case) or to a lower figure representing what Watson Wyatt's true liability to SITA would have been (Mr Fenwick's case). In either case I would still have had to decide under section 2(l) what would have been the just and equitable contribution having regard to the extent of Maxwell Batley's responsibility for SITA's loss, but the starting point, namely the amount to which Maxwell Batley's contribution was to be made, would have been different. There is a question of principle here, and in some cases it could be an important question of principle. But in this case it is not important, since I have concluded that Maxwell Batley are not liable to make a contribution at all. In the circumstances I think that it is best for me to have mentioned what the issue was, but to leave it to be resolved in a future case where it is necessary to decide it.

143. Given Mr Fenwick's proposition that it was open to Maxwell Batley to contend that $35m was larger than the sum for which Watson Wyatt would have been held liable if the main case had gone to trial, there were a number of detailed points argued which, according to Mr Fenwick, would in combination have reduced the damages payable by Watson Wyatt to an amount appreciably below $35m. This judgment is very long already. It would be further prolonged, and excessively so, if I went into these detailed arguments, and I am not going to do so. I note in passing that an intriguing and superficially curious aspect of the case was that most of the detailed points led to Watson Wyatt having to argue against the contents of what had been the report of its own expert forensic accountant, Mr Hamedani. He had prepared his report at a time when it was expected that there would be a contested trial between SITA and Watson Wyatt on liability, and he had put forward a range of detailed points on quantum which, if all correct, would almost certainly have reduced any damages payable by Watson Wyatt to an amount considerably below $35m. Given how matters had developed by the time that the case came to be heard before me, and in particular how the case had become one between Watson Wyatt and Maxwell Batley with SITA not being involved any more, I suppose that what happened with Mr Hamedani's report was inevitable. Nevertheless it was odd to see how Maxwell Batley enthusiastically adopted evidence which at an earlier stage had been intended to be given on behalf of its present opponent, and how Watson Wyatt found itself having to distance itself from its own expert.

144. There is one other potentially important point which might have arisen in connection with quantum and which I should mention. If I had concluded that Maxwell Batley did have a liability under section 1 of the 1978 Act to make a contribution, either to $35m or to some other sum, how much ought the contribution to have been? Prima facie this question would be governed by section 2(1), and the words therein: 'such as *may be just and equitable having regard to the extent of that person's responsibility for the damage in question.'* However, the position is much complicated in this case because of the difference between, on the one hand, the first and second defendants (referred to collectively in this judgment as Watson Wyatt) and, on the other hand, Watson Wyatt SARL. It may be recalled that at the very beginning of the trial before me the only parties to the Part 20 contribution claim were the two parties to which I have referred collectively as Watson Wyatt (in this context being the first and second Part 20 claimants) and Maxwell Batley (the Part 20 defendants). Watson Wyatt SARL was not a party to the contribution claim at all. The two Watson Wyatt parties were claiming a contribution from Maxwell Batley, and Maxwell Batley' solicitors were saying that, if Maxwell Batley were held liable to make a contribution to Watson Wyatt, they would then be likely to launch a further consequential claim against Watson Wyatt SARL claiming a contribution from it. In those circumstances the Watson Wyatt parties applied for Watson Wyatt SARL to be joined as a third Part 20 claimant, although it had not paid any part of the $35m and therefore had not paid anything to which it could seek a contribution.

145. 1 was told by Mr Salzedo, who dealt with this part of the case on the Watson Wyatt side, that to join Watson Wyatt SARL would remove the complications and enable me to deal with all issues in the one hearing. It would certainly do the latter, but, later in the trial, when I listened to submissions about what sort of orders I could and should make, I had the gravest doubts about the former. The submissions did not leave me with

the impression that complications had been removed. If anything the opposite was the case. I heard submissions of great sophistication and technicality which, no doubt as a result of my own fault, I doubt that I properly understood. The effect of Mr Fenwick's submissions on this aspect of the case appeared to me to be that the processes which had been gone through by Watson Wyatt and Watson Wyatt SARL had the effect that they would be worse off and Maxwell Batley would be correspondingly better off than if all three Watson Wyatt companies had effectively been taken together throughout.

146. Mercifully I do not need to come to any decision on these highly technical issues. I will only say that, if I had concluded that Maxwell Batley as well as Watson Wyatt could have been liable to SITA and it had been necessary for me in some way to allocate the burden of compensation to SITA between (1) and (2) the first two Watson Wyatt parties, (3) Watson Wyatt SARL, and (4) Maxwell Batley, I would have wished, unless precluded by the detailed structure of the legislation, to adopt a method of allocation which would place by far the greater proportion of the burden on (1), (2) and (3), the three Watson Wyatt parties (at this stage including Watson Wyatt SARL). I would leave only a small proportion, perhaps 15% but certainly no more, to be bornc by (4), Maxwell Batley.

147. On the facts of the case, if Maxwell Batley were liable to make a contribution to SITA's loss at all, it seems to me that they were far less responsible for that loss than were the three Watson Wyatt parties, including Watson Wyatt SARL, taken together. Further, in determining what percentage contribution Maxwell Batley (party (4)) ought to be required to make to the payment made by Watson Wyatt to SITA, it seems to me fair that Maxwell Batley should be entitled to have all three Watson Wyatt parties taken together. In particular, it seems fair that Watson Wyatt SARL's share of responsibility should be taken into account so as to reduce Maxwell Batley's share, notwithstanding that the $35m paid to SITA was paid only by the first two Watson Wyatt parties (parties (1) and (2)) and that Watson Wyatt SARL (party (3)) paid no part of it. Conversely it also seems to me fair in principle to the three Watson Wyatt parties taken together that their collective share of the burden should not be increased by reason of Watson Wyatt SARL not originally having been sued by SITA, not having paid any share of the $35m which was paid to SITA in settlement, and not having become a party to the present Part 20 contribution proceedings until a late stage. I am not saying that the statute would necessarily have permitted me to come to results which would have been in accordance with those aspects of fairness, but, if I had taken a different view on liability, they are certainly results which I would have wished to be able to achieve.

148. There are respects in which I could say more about quantum, but I will leave it at what I have said already. There are no other specific matters to which I desire to refer in this judgment.

JUDGMENT : Mr Justice Park : Chancery Division, High Court. 14th November 2002

Introduction

1. I handed down my main judgment in this case on 9 October 2002. Watson Wyatt had paid US$35m to SITA in settlement of SITA's claim against it. In the hearing before me Watson Wyatt was claiming a contribution from Maxwell Batley under Part 20 of the Civil Procedure Rules (`the CPR'). The effect of my judgment was that Watson Wyatt's Part 20 claim against Maxwell Batley failed entirely. The formal handing down of the judgment was followed by submissions on consequential matters, principally concerning costs and permission to appeal. The arguments on those issues occupied an entire court day, and I reserved judgment upon them. I now give my decisions on the various points which require to be decided.

Should Maxwell Batley be deprived of any part of its costs?

2. Maxwell Batley was wholly successful in the case, and in normal circumstances it would receive an order for its assessed costs to be paid by Watson Wyatt. (Whether they would be assessed on the standard basis or the indemnity basis is a different question, which I address under a later heading.) On behalf of Maxwell Batley Mr Fenwick applied for an order for costs, but Mr Moger, on behalf of Watson Wyatt, submitted that I should deprive Maxwell Batley of some of the costs which might otherwise have been awarded. The reason was that Maxwell Batley had, on three occasions before the case came to trial, declined to participate in a mediation. Mr Moger cited two cases as showing that a party who eventually succeeds in a case which goes to trial (or to appeal) may nevertheless be denied some or all of his or its costs by reason of having refused, before the trial (or appeal), to take part in a mediation. The cases are ***Dunnett v Railtrack plc*** [2002] 1 WLR 2434 (Court of Appeal) and ***Hurst v Leeming*** [2002] LL.R (PN) 508 (Lightman J). Notwithstanding those cases I do not accept Mr Moger's submissions. In my judgment Maxwell Batley are entitled to an order for the payment by Watson Wyatt of all of their assessed costs of the proceedings.

3. CPR 44.3(2) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but `the court may make a different order.' Later sub-paragraphs of rule 44.3 identify various factors which the court may take into account. They include the conduct of the parties before and during the proceedings (rule 44.3(5)(a)). The refusal of Maxwell Batley to participate in mediations was conduct of a party during or before the proceedings, and Mr Moger submits that because of it I should depart from the general rule that Watson Wyatt, the unsuccessful party, should pay Maxwell Batley's costs.

4. The factual context in which the question arises is as follows. The claim by SITA against Watson Wyatt was commenced in November 2000. It is clear from correspondence and other documents which I have seen (including documents which are marked without prejudice but which were properly shown to me when my judgment had been delivered and the case moved on to issues of costs) that Watson Wyatt was anxious to settle SITA's claim if it could. There must have been discussions of some kind between SITA and Watson Wyatt before Watson Wyatt commenced the Part 20 proceedings against Maxwell Batley. Those proceedings were commenced in November 2001, a year after the main claim by SITA against Watson Wyatt. On 27 November 2001 Watson Wyatt's solicitors informed Maxwell Batley's solicitors that mediation meetings between SITA and Watson Wyatt had been arranged to take place in the middle of January 2002. They invited Maxwell Batley to take part. Maxwell Batley's solicitors declined. There was a meeting between the solicitors and further letters were exchanged, but the mediation began on or around 14 January 2002 without Maxwell Batley.

5. That occasion turned out to be the first round in the mediation between SITA and Watson Wyatt, because the mediation was adjourned without agreement having been reached. It will be recalled from my judgment in the main case that SITA was alleging that it had already sustained $58m of loss, for which it said that Watson Wyatt was liable, and expected that its loss would mount to something like $70m, the whole of which it would claim from Watson Wyatt if no settlement was reached. In the first round of the mediation (the January round) SITA had indicated that it would settle for $42m plus $2m towards its costs. Watson Wyatt had offered $20m. The parties were still a long way apart.

6. There was to be a second round of the mediation in mid-April. In March and the earlier part of April Watson Wyatt again requested Maxwell Batley to take part. I will describe later the manner in which it made the requests, which is in my view of some significance to the present issue. Maxwell Batley again declined to take part. The second round of the mediation took place in mid-April between SITA and Watson Wyatt, and

resulted in SITA's claim being settled on terms that Watson Wyatt paid $35m. This was, of course, the amount towards which Watson Wyatt unsuccessfully claimed a contribution from Maxwell Batley in the Part 20 claim which was the subject matter of my main judgment.

7. Settlement terms were agreed between SITA and Watson Wyatt on 16 April 2002. The Part 20 proceedings between Watson Wyatt and Maxwell Batley were due to commence on 11 June. On 22 May (five weeks after Watson Wyatt settled with SITA and three weeks before the trial between Watson Wyatt and Maxwell Batley was due to start) Watson Wyatt's solicitors wrote to Maxwell Batley's solicitors inviting Maxwell Batley to participate in a new mediation to resolve the Part 20 claim. On 24 May Maxwell Batley's solicitors replied saying that it was too close to the trial to prepare for and attempt a mediation. However, if Watson Wyatt wished to make an offer of an amount which it would accept in settlement it should put the offer forward *`without further delay, and this will receive our clients' early and careful consideration'. Watson* Wyatt's solicitors did not put forward an offer of a settlement figure, and as far as I know the next event was the commencement of the trial before me.

8. So there were three occasions as respects which Maxwell Batley were invited to participate in mediations and declined: (1) for the first round (the January round) of the SITA/Watson Wyatt mediation; (2) for the second round (the April round) of the SITA/Watson Wyatt mediation; and (3) for a separate mediation simply between Watson Wyatt and Maxwell Batley in May or June. It is because Maxwell Batley declined to participate on any of those occasions that Mr Moger submits that they should be deprived of some of the costs which they would otherwise have expected to recover.

9. I can first deal with the third occasion. Mr Moger, fairly and reasonably in my view, did not press his argument in that respect. He tacitly accepted that Watson Wyatt's solicitors' letter of 22 May inviting Maxwell Batley to participate in a mediation was too close to the commencement of the trial for a mediation to be realistic, and he made no substantial complaint to me about Maxwell Batley declining to participate. He accepted that he could not justify a refusal of costs to Maxwell Batley on the ground that they had declined to go into a mediation so close to the commencement of the trial.

10. Mr Moger's argument that Maxwell Batley should be deprived of some of their costs rests on the first two occasions, when Maxwell Batley declined to participate in either the January round or the April round of the SITA/Watson Wyatt mediation. In my judgment, however, it was entirely reasonable for Maxwell Batley to decline to participate in those mediations. There are five specific points which I wish to make.

11. First, as respects the January round Maxwell Batley were invited to participate on 27 November 2001. Their solicitors replied on 30 November saying: *`We very much doubt that our clients will be in a position to take an active part in the mediation if it is held in mid-January. '* It is true that in later letters Maxwell Batley's solicitors laid stress, not so much on the shortage of time, as on the fact that Maxwell Batley had been advised by leading counsel and solicitors that they would not be found liable, and for that reason should not attend the mediation. Nevertheless, I think that the point about shortness of time had considerable force in itself. It was only on 8 November 2001 that Maxwell Batley had been served with Part 20 proceedings, and its legal advisers faced the task of picking up the details of what was potentially a very large case between SITA and Watson Wyatt. There were vast quantities of documents to be studied, and in addition Maxwell Batley's lawyers would be heavily involved with all the other matters needing to be undertaken by a new legal team brought into a large case which had been in preparation for over a year between the original parties to it. Preparation for and participation in what was clearly going to be a substantial mediation in January would have been a most inconvenient and unwelcome distraction.

12. Second, from the correspondence concerning Maxwell Batley's possible participation in the mediation (correspondence which I have read in full, but which, in the interests of not prolonging this supplemental judgment excessively, I will not describe at length) it is clear to me that the only reason of substance why Watson Wyatt wanted Maxwell Batley to take part was so that pressure could be brought on them to make a large contribution to whatever sum SITA was eventually willing to accept in settlement of its claim against Watson Wyatt.

13. Third, and a corollary to the second point: Watson Wyatt did not want to bring Maxwell Batley into the mediation because there was a dispute between the two of them (Watson Wyatt and Maxwell Batley), and it

believed that a mediation between them might succeed in resolving that dispute without litigation. That was not what Watson Wyatt had in mind when it was trying to get Maxwell Batley to participate on the first and second occasions. There is no hint or impression of Watson Wyatt saying or even thinking that, if Maxwell Batley would participate in the SITA/Watson Wyatt mediation, Watson Wyatt, influenced by the good offices of the mediator, just might be persuaded that there was no realistic claim against them. At the January and April mediation rounds Watson Wyatt was not interested in compromising the dispute between itself and Maxwell Batley. What it was interested in was getting Maxwell Batley to come up with the money which would bridge the gap between what it hoped itself to pay in settlement of SITA's claim and what SITA could be persuaded to accept.

14. Fourth, the way in which Watson Wyatt sought to press Maxwell Batley to join in the mediation between itself and SITA is, to me at least, disagreeable and off-putting. By letters and in meetings Watson Wyatt tried to browbeat and bully Maxwell Batley into the mediation. Two quotations give something of the flavour: *`Having discussed your client's approach with Watson Wyatt this morning, we can confirm that they are likely to take a tougher stance in respect of the conduct of the Part 20 claim if Maxwell Batley do not attend the mediation. ' `... we will pursue your clients if they do not participate at this stage and will be looking for a higher contribution than we would were settlement to occur now. '* On 19 March 2002 (after the January round and before the April round) there was a meeting attended by solicitors for the two parties and by an officer of Watson Wyatt. He is recorded in Maxwell Batley's solicitors' note of the meeting as having attempted to put pressure directly on to Maxwell Batley's solicitors by reference to their own reputation. The note includes this: *`In SC's view BLG's reputation would suffer as a result of the way we were conducting the claim ... '* When that sort of thing has been resorted to I am all the more unprepared to deprive Maxwell Batley of their costs on the ground that they refused to be dragooned into the mediation.

15. Fifth, the note of the meeting to which I have just referred records that those present on behalf of Watson Wyatt said this about what had happened at the January round of the mediation: *'There had been a lot of pressure from the mediator to settle - he told Watson Wyatt that they could get out for $35m and that they should be able to get at least $10m from Maxwell Batley. CP said that the mediator was `motoring' against Maxwell Batley - although initially sceptical as to why Maxwell Batley had been brought into the action, he has become completely convinced that Maxwell Batley were worth pursuing. '* It seems to me astonishing to complain about Maxwell Batley declining to join in a mediation when they had been told (and told by the person trying to get them to join in) that the mediator was already `motoring' against them.

16. The circumstances of this case are totally unlike those in the two cases referred to by Mr Moger and mentioned in paragraph 2 above. (In any event in one of those cases ***Hurst v Leeming*** - the judge did not in the event refuse costs to the successful party who had declined to take part in a mediation.) In my judgment it would be a grave injustice to Maxwell Batley to deprive them of any part of their costs on the ground that they declined Watson Wyatt's self-serving invitations (demands would be a more accurate word) to participate in the mediation. I award to Maxwell Batley the whole of their costs of the proceedings between them and Watson Wyatt, the first two Part 20 claimants.

Watson Wyatt SARL: costs

17. This is not a contentious issue. In so far as Maxwell Batley incurred costs attributable to the part of the case which was between them and Watson Wyatt SARL, it is agreed that those costs should be payable to Maxwell Batley by Watson Wyatt SARL, assessed on the standard basis. I would only add that I urge the parties to agree the amounts of these costs, or at least the amounts before the assessment process, in order not to inflict on the Costs Judge the task of understanding the case in sufficient detail to be able to disentangle Maxwell Batley's costs attributable to the proceedings between them and Watson Wyatt SARL from their costs attributable to the proceedings between them and the other two Watson Wyatt parties.

Costs payable by Watson Wyatt: the standard basis or the indemnity basis?

18. Mr Fenwick invited me to direct that Maxwell Batley's costs, in so far as recoverable from the two principal Watson Wyatt parties (the first and second Part 20 claimants), should be assessed on the indemnity basis rather than the standard basis. However, in my judgment they should be assessed on the standard basis.

19. Following the introduction of the CPR there have been a number of cases addressing the differences between the two bases of assessment, and the circumstances in which one or the other is appropriate. The matter falls

to be considered in the light of Part 44 of the CPR, and also of Part 36 sub-rules 20 and 21. Cases in this area can be affected by what offers the parties make before the trial began, and how, after such offers have not been accepted by the other parties, the cases are eventually decided when they have been fought out in court. There are a number of different permutations which can arise, and several of them have been considered in the cases which were cited to me. Those cases were ***McPhilemy v Times Newspapers Ltd*** [2002] 1 WLR 934, ***Reid Minty v Taylor*** [2002] 2 All ER 150, ***Kiam v MGN Ltd*** [2002] 2 All ER 242, and ***Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamner Aspden and Johnson*** *[2002]* EWCA 879. In addition the recent decision of the Court of Appeal in ***Mitchell v James*** *[2002] EWCA* Civ 997, was mentioned, though not examined in detail.

20. There is an important distinction to be drawn between a case in which the offer to compromise is made by the claimant (not the present case) and a case where the offer is made by the defendant (the present case). A simplified example of the first situation (an offer made by the claimant) is where the claimant alleges (a) that the defendant is liable, and (b) that the damages are, say, 100; the claimant makes a Part 36 offer that he will accept, say, 50 in satisfaction of his claim; the defendant refuses the offer; the case goes to trial; the claimant wins and the damages are assessed at 100 (or any amount in excess of 50). In that situation the claimant is likely to obtain costs on the indemnity basis for the period after the defendant refused the claimant's offer to accept 50 in full satisfaction. Further, for indemnity costs to be awarded against a defendant in such a case it is not necessary for the court to disapprove of some aspect of the way in which the defendant conducted the litigation: the refusal by the defendant to accept an offer which he later failed to beat at trial is itself enough. The foregoing propositions emerge from CPR rule 36, especially sub-paragraphs (3)(a) and (4), and also from the decision of the Court of Appeal in the ***McPhilemy*** case (supra).

21. A simplified example of the second situation (where the offer is made by the defendant) is as follows. The claimant alleges that the defendant is liable, and that the damages are (say) 100; the defendant denies that he is liable at all, and also contends that, if he is, the damages are less than 100; the defendant makes a Part 36 offer by paying, say, 50 into court; the claimant refuses the offer, and the case goes to trial; at trial the judge decides that the defendant is not liable at all. In that situation it appears from the decision of the Court of Appeal in the ***Excelsior*** etc. case (supra), explaining particularly CPR rule 36.20, that the defendant will not be awarded indemnity costs merely because the claimant refused the defendant's Part 36 offer but then lost at trial. The defendant may obtain an order for indemnity costs if there is something extra (the principal example of something extra being some respect in which the court disapproves of the way in which the claimant has conducted the litigation), but the mere refusal by the claimant to accept a defendant's payment into court is not in itself enough to justify indemnity costs being ordered against him.

22. Before I leave the example which I have considered in the previous paragraph I should add this. In that paragraph I assumed that the claimant, after refusing the defendant's offer of 50, lost the whole case at the trial. There is another possibility which ought to be considered. Suppose that the claimant won on liability but the judge assessed his damages, not at the 100 which he was arguing for, nor at the 50 which the defendant had offered by his payment into court, but at, say, 30. The claimant would still have won in a sense, because the judge held that the defendant was liable to him. But the claimant has recovered less than the payment into court which he could have accepted in settlement of the action. The defendant will not (at least not usually) be entitled to recover indemnity costs from the claimant, but the defendant will nevertheless be likely to obtain some costs benefit from his payment into court: although he (the defendant) lost the case on liability he will in all normal cases be entitled to recover his costs from the claimant (the costs being assessed on the standard basis) from the time when the claimant refused to accept his payment into court.

23. It could be argued that it is anomalous that a defendant who, after his payment into court is refused, is only partly successful at trial gets some costs benefit from having made the payment in, whereas a defendant who is wholly successful at trial gets no costs benefit from his payment in (unless the court disapproves of some aspect of how the claimant conducted the litigation): the wholly successful defendant who made a payment into court will recover his costs assessed on the standard basis, which is exactly what he would have done if he had not made the payment in at all. However, whether that is anomalous or not, it is the effect of the Court of Appeal's decision in the ***Excelsior*** case. The defendant had paid £100,000 into court, and the claimants did not accept it. There were two claimants. One of them failed entirely; the other was awarded £2 damages,

which in realistic terms was the same as failing entirely. The court made it clear that, but for its disapproval of one aspect of how the claimants had conducted the litigation, it would have awarded to the defendant standard costs only.

24. 1 can now turn to the facts of the present case. In 2001, well before the trial began, Maxwell Batley made a Part 36 offer to settle on the basis of paying a token sum into court (£1,000). A corollary, and in practice a more valuable component of the offer, was that, if Watson Wyatt accepted the £1,000, Maxwell Batley would pay Watson Wyatt's assessed costs down to the date of the acceptance: CPR rule 36.13(1). Watson Wyatt turned the offer down, and went ahead with the trial, hoping to win very much more than £1,000 and to get its costs of the whole Part 20 claim as well. In the event Watson Wyatt has lost altogether. It has not recovered £1,000 or indeed anything, and it is left having to bear all of its own costs. It would have been better off to have accepted Maxwell Batley's Part 36 offer. Further, Maxwell Batley has been put to the very considerable expense of the trial, which it would have been spared if Watson Wyatt had accepted the Part 36 offer. In those circumstances, does the refusal of Watson Wyatt to accept Maxwell Batley's Part 36 offer, coupled with the eventual outcome, justify an award of indemnity costs to Maxwell Batley?

25. In my judgment the answer in the light of the authorities is: no. The case which is most in point is the ***Excelsior*** etc. case, supra. In principle the circumstances are the same as those in the second simplified example which I considered above, where the claimant was suing to recover 100, the defendant paid 50 into court, and at trial the judge found that the defendant was not liable at all. Mr Fenwick complains that, if Maxwell Batley do not receive an award of indemnity costs, they obtain no benefit from their Part 36 offer. That is correct, but it appears to me to be the effect of the Court of Appeal's decision.

26. For Maxwell Batley to have a good claim for indemnity costs it would, in my opinion, be necessary for them to show, not just that Watson Wyatt refused their Part 36 offer, but also that there was some respect in which I ought to disapprove of Watson Wyatt's conduct of the litigation between it and Maxwell Batley. Mr Fenwick has drawn attention to some matters which he suggests should cause me to feel disapproval, but they do not. What they really boil down to is, first, that Watson Wyatt, having received a `protocol' letter from Maxwell Batley forcefully arguing that Watson Wyatt ought not to proceed with its Part 20 contribution claim, proceeded with the claim nevertheless, and, second, that Watson Wyatt pursued its claim with determination. I cannot regard Watson Wyatt's unwillingness to be persuaded to drop its claim as something which justifies me in awarding indemnity costs. Similarly, it is true that Watson Wyatt pursued the claim with determination, but there is nothing wrong in that. Watson Wyatt also pursued its claim scrupulously, fairly, and without any impropriety.

27. In those circumstances I decline to award indemnity costs against Watson Wyatt.

An interim payment on account of costs

28. Mr Moger accepts that it is appropriate for me to direct Watson Wyatt to make an interim payment on account of costs pending detailed assessment (see CPR rule 44.3(8)). Maxwell Batley's solicitors have prepared a schedule showing that at 9 October 2002 Maxwell Batley's costs attributable to the Part 20 claim were almost £1.07m. The schedule is far short of a fully itemised bill, but it appears to me to have been carefully prepared. The partner in Maxwell Batley's solicitors who has been responsible for the case says in a witness statement that he has carefully reviewed the costs charged to Maxwell Batley by third parties, and has challenged them where necessary. He considers them to be reasonable. He takes the same view of his own firm's fees. He requests that, if I award costs on the standard basis, I should order an interim payment of £650,000.

29. Mr Moger submits that £650,000 is too high an amount to order at this stage: a full bill still has to be drawn up, and then it will in all probability have to go through a process of detailed assessment before a Costs Judge. However, in my opinion the amount which Maxwell Batley's solicitors have requested is measured and reasonable. I accept their submission, and I will direct an interim payment on account of £650,000. In the ordinary way it should fall to be made within fourteen days of the drawing up of the order consequential on my main judgment and this supplemental judgment.

Permission to appeal?

30. Mr Moger has asked me to grant Watson Wyatt permission to appeal against the decision in my main judgment. I have found this particular question quite difficult and I have thought about it for some time. My conclusion is that I am not myself going to grant permission to appeal.

31. Under CPR rule 52.3(6) permission will only be given where the court considers that the appeal would have a real prospect of success. Where permission to appeal is requested by leading and junior counsel, as it has been here, I must assume that they consider that an appeal would have a real prospect of success. I must, and I do, accord respect to that opinion, and I should reflect carefully before declining permission. However, ultimately I have to form my own judgment about it, and, while I acknowledge that I might be wrong, my opinion is that the appeal does not have a real prospect of success. This has not been a case where I have reached my central conclusions only after hesitation, or where I have felt that the issues were quite nicely balanced but I have come down marginally in favour of Maxwell Batley. I believe that the issues come down decisively in favour of Maxwell Batley, and, large as the case is and profound as is my respect for the views of Mr Moger and Mr Salzedo, I do not think that this is a case where I should give permission.

32. That is my principal reason for declining to grant permission, but there are some supporting considerations, which I will mention. One is that, if this case goes to appeal, it could be very time-consuming for the Court of Appeal, and that court might appreciate having the opportunity to form its own view of whether it wishes to take on a case like this. The hearing before me occupied 16 days of sittings. There was an exceptionally large amount of reading to be done before the trial could start. There are about 70 lever arch files of documents. Further, as Mr Moger has himself submitted in support of his application for permission to appeal, the case has not depended to a great extent on oral evidence (which in the court of first instance occupies much time that is not required in the Court of Appeal), but has turned on the voluminous documents and the inferences to be drawn from them. Mr Moger's point is that the Court of Appeal is in as good a position as I am to evaluate those matters. That is true, but it also means that the Court of Appeal is likely to have a much heavier burden of deriving the facts that it would normally have where there has been a lot of live evidence upon which the trial judge has made findings in his judgment. The type of appeal which Watson Wyatt would have to conduct would be in large measure a re-run of the trial before me. I am in any event inclined to allow the CA to decide for itself whether it wishes to have such an appeal brought before it.

33. A final point is this. In paragraph 2.2.1 of the Practice Note issued by Lord Woolf, then the Master of the Rolls, on 19 April 1999 (see [1999) 2 All ER 490) I read: *`However, if the court below is in doubt whether an appeal would have a reasonable prospect of success or involves a point of general principle, the safe course is to refuse permission to appeal. ' To* state the matter in the most favourable way for Watson Wyatt, I am at the very least in doubt about whether its appeal would have a reasonable prospect of success. In those circumstances I shall follow the suggestion in the Practice Note and refuse permission to appeal, leaving it open to Watson Wyatt, if it wishes, to renew the application by making it to the Court of Appeal.