JUDGMENT : Mr Justice Neuberger : High Court of Justice Chancery Division. 21st December, 2000

Introduction

1. On 15th March 1999, Jacob J gave judgment in favour of AIB Group (UK) plc ("AIB") for £3,143,944.51 against Mr Alan Gold and Mr David Martin ("Mr Gold" and "Mr Martin" respectively). Mr Gold seeks, in effect, an indemnity in respect of his liability under this judgment from Mincoff Science & Gold a firm of solicitors ("Mincoffs").

2. Mr Gold's case, in summary, is that his liability to AIB arose out of Mincoffs' failure to appreciate that the effect of documentation provided by AIB, which, after obtaining advice from Mincoffs, Mr Gold signed, was to render Mr Gold liable for all the liabilities of Mr Martin to AIB and that, had Mincoffs properly advised him that that was the effect of the documentation, he would not have signed such documentation.

3. In brief, the basic facts are as follows. Mr Gold and Mr Martin embarked on a property investment and dealing partnership ("the Partnership") in 1984, which was financed by AIB, and they entered into mortgages from time to time with AIB. Those mortgages all appear to have rendered each of them liable for all the other's liabilities to AIB. During 1993, their arrangements with AIB were restructured, and they entered into a new mortgage with AIB on 22nd July 1993, under which, again, each of them accepted liability for the other's debts to AIB.

4. In April 1996, AIB brought proceedings seeking from each of them a sum equal to the aggregate liabilities of both of them to AIB. As I have said, that action was successful. Mr Gold says that, while he accepts that he at all times intended to be responsible for the debts of the Partnership to AIB, it was never intended that he should be liable for any debt owed by Mr Martin, outside the Partnership, to AIB.

5. In a nutshell, Mr Gold contends that Mincoffs were negligent:

(1) Between 1984 and 1990, in not advising him that the effect of mortgages ("the earlier mortgages") which he signed was to impose liability on him for all Mr Martin's debts from time to time owing to AIB;

(2)(a) In not advising him that the effect of a mortgage he signed on 22nd July 1993 ("the 1993 mortgage"), was to impose a similar obligation on him;

(2)(b) In not advising Mr Gold that, under the restructuring arrangements, AIB effectively transferred liability for a sum of over £800,000, which had been Mr Martin's sole liability, to the Partnership.

6. Mincoffs admit liability, in the sense that they accept that they failed so to advise Mr Gold, and that they were thereby negligent. However, they contend that the action should be dismissed on the grounds that:

(1) So far as their negligence in relation to the earlier mortgages is concerned, Mr Gold's claim is barred by the Limitation Act 1980("the 1980 Act");

(2) As to the 1993 mortgage, Mr Gold suffered no loss, because, owing to the earlier mortgages he signed between 1984 and 1990, he was already liable to AIB in respect of all Mr Martin's debts, including the sum of over £800,000 transferred to the Partnership.

7. At this stage, I am not being asked to assess damages, but to determine certain issues of principle and fact between the parties. While it is always easier to appreciate such a point with wisdom of hindsight, I think it is regrettable that the parties did not simply agree that the current hearing should determine all outstanding issues. It would not, I think, have required much further evidence or argument, and it would have put an end to all the issues between them. Further, during the course of argument, it became apparent that it was sometimes difficult to draw a line as to what was to be determined by me at this stage and what was to be left over for the assessment of damages. As I indicated to the parties, my role should, I think, be to determine as much as I properly can. The more I decide, the more likely it is that the parties will be able to settle their differences, or, if they cannot do so, the less expensive and time consuming the assessment of damages will be.

8. Before turning to a fuller analysis of the facts, it would perhaps be helpful to set out in a little more detail the issues between the parties as I see them. In this sort of case, it is possible to divide and sub-divide issues and sub-issues to an almost alarming extent. While over-elaborate analysis can lead to confusion, loss of direction, and failure to see the wood for the trees, a characterisation of the issues which is too general in its nature may cause one to overlook subtle, but nonetheless vital, points.

9. With that important, if perhaps rather anodyne, observation, and bearing in mind Mincoffs' admitted negligence so far as failure to advise on the provisions of the mortgages of central relevance to these proceedings is concerned, I believe that the issues between the parties can be conveniently summarised as follows:

(1) The claims based on the earlier mortgages

a. When did Mr Gold's cause of action against Mincoffs arise;

b. If the cause of action arose more than six years before the issue of the writ in these proceedings (March 1999), can Mr Gold rely on:

(i) Section 14A of the 1980 Act ("Section 14A");

(ii) Section 32 of the 1980 Act ("Section 32");

(iii) Mincoff's failure to advise him about the earlier mortgages in 1993;

(iv) The proposition that Mincoffs cannot rely on their own wrong.

(2) The claim based on the 1993 mortgage

a. Do Mincoffs have a complete defence based on the contention that Mr Gold was already *"locked in*", and, if not, how is Mr Gold's loss to be calculated in principle;

b. If Mincoffs do not have a complete defence, what is the right approach to the assessment of Mr Gold's loss.

(3) General points relating to damages

a. (i) Is Mr Gold entitled to an enquiry as to the loss of the value of his interest in the net Partnership assets;

(ii) Was Mr Gold entitled to a 60% or a 25% interest in the Partnership;

b. Is Mr Gold entitled to recover for the loss of one particular property, namely 37 Osborne Road ("No 37");

c. Is Mr Gold entitled to receive the whole of the cost of defending AIB's action against him;

d. Is Mr Gold entitled to claim for loss of income as a dentist between 1st March 1995 and 25th February 1999;

e. To the extent that Mr Gold is entitled to recover damages, are those damages to be reduced on the basis of his contributory negligence.

10. I propose to set out the factual history of this matter in a little more detail, and I will then turn to deal with the issues in the same order as set out above.

The Facts : 1984-1991

11. Mr Gold, and his brother Mr Howard Gold, were born and brought up in Newcastle. Mr Howard Gold became a solicitor, and is and was at all material times a partner in Mincoffs. Mr Gold became a dentist, and he practises, and at all times has practised, his profession in London. In early 1984, the brothers contemplated setting up a partnership with Mr Martin, with whom they had been at school. Mr Martin invested and dealt in property in Newcastle on his own account, and the contemplated partnership was to carry on the same business, with Mr Martin as the active manager.

12. Draft heads of terms were agreed, but there is nothing to suggest that they were ever executed. These heads of terms record the Partnership share to be 40% to Mr Martin and 60% to Mr Gold and Mr Howard Gold.

13. Although it appears clear that there was no formally executed partnership deed, it seems that the Partnership started business, on the basis of the shares being 40% to Mr Martin, 25% to Mr Gold, and 35% to Mrs Pamela Gold ("Mrs Gold") the wife of Mr Howard Gold. The Partnership started trading in the first half of 1984.

14. The Partnership maintained bank accounts with Allied Irish Banks plc, from who it received its funding. It also obtained finances from Allied Irish Finance Company Ltd (later AIB Finance Ltd). In about 1998, the Allied Irish Group was restructured, so that Allied Irish Banks plc and AIB Finance Ltd were effectively merged into AIB. Save where the difference is important, when I will mention "*the Bank*" or *"Finance*", as the case may be, I shall simply refer to them as "AIB" indiscriminately.

15. The choice of AIB as the source of finance for the Partnership was, I think, largely dictated by the fact that AIB was the main (and, at that time, possibly the sole) source of finance for the property investment and

dealing business which Mr Martin was carrying on in his own name. Some time in 1984, a formal authority to AIB to open a Partnership account was signed by Mr Martin, Mr Gold and Mrs Gold.

16. Thereafter, over the next six years or so, Mr Martin purchased properties from time to time on behalf of the Partnership, sold properties from time to time on behalf of the Partnership, organised the carrying out of work to properties owned by the Partnership, and collected rents, and paid any necessary outgoings, in respect of properties owned by the Partnership.

17. In other words, the partner managing the business of the Partnership was Mr Martin, and Mr Gold was very much of a sleeping partner. Naturally, when properties were acquired or sold by the Partnership, he had to sign documentation; his attitude was simply that he signed documentation as was required, provided that it was first checked by Mr Howard Gold, upon whom he relied for legal advice. When properties were acquired by the Partnership, and indeed, I think, when properties were sold by the Partnership, Mincoffs acted both for the purchaser, namely the Partnership, and the source of finance and mortgagee, namely AIB. Although that is a situation which can self-evidently lead to potential conflicts and sometimes increases the risk of negligence, it is, of course, very common, and understandably so. To have different solicitors acting for the purchaser and the mortgagee would increase the costs of any transaction quite substantially, and could lead to further delay, and sometimes to confusion.

18. So far as the finances of the Partnership were concerned, its year end was 31st May, and accounts were drawn up for each year until that ending in 1993. The accounts for the years ending in 1989 and 1990 were drawn up in about September 1991, and for the years ending 1991, 1992 and 1993, the accounts were drawn up in about January 1995. All these annual accounts were signed off by Mr Martin, Mr Gold and Mrs Gold, and they each showed that the division of the Partnership was 40% to Mr Martin, 25% to Mr Gold, and 35% to Mrs Gold. Mr Gold contributed £57,637, and Mrs Gold contributed £31,039, as initial capital for the Partnership. However, Mr Gold's case is that, in reality, Mrs Gold ceased to be a partner some time in 1985, and that he effectively acquired her share, and accordingly enjoyed 60% of the Partnership.

19. Apart from signing all the necessary legal documentation (after obtaining Mincoffs' advice) and signing off the Partnership accounts, Mr Gold himself played very little part in the Partnership's affairs, as I have mentioned. He left all the decision making (e.g. every aspect of purchases and sales and lettings and finance) and every aspect of management (e.g. arrangements with purchasers, vendors, tenants and sources of finance) to Mr Martin. He would occasionally discuss matters with Mr Martin on the telephone, and possibly, in Newcastle if and when he went to Newcastle to visit his brother or other members of his family. He normally received bank statements from AIB for the Partnership in January each year, but I did not get the impression that he paid much attention to them. Any discussions with AIB on behalf of Mr Gold were carried out by Mr Howard Gold.

20. Of central relevance to these proceedings are the earlier mortgages i.e. the mortgages which Mr Gold and Mr Martin signed over the period 1984 to 1990. In practice, almost every time Mr Martin purchased a property for the Partnership, he did so in the name of Mr Gold himself and with the assistance of a loan from AIB. AIB provided the money on the basis of a mortgage over the relevant property (sometimes over more than one property) executed by Mr Gold and Mr Martin. Partly because of the 1993 mortgage, some of these earlier mortgages have been lost. However, the majority of the earlier mortgages over properties which were still held by the Partnership in 1993 have survived.

21. Those of the earlier mortgages which I have seen are all in fairly similar terms, which I assume to be the standard terms of AIB (as no doubt varied from time to time). I do not need to set out those terms, which, to a very substantial extent, were unexceptionable in their effect. As one would expect, they identified the amount of the loan, provided for an appropriate rate of interest, contained a joint and several obligation on the two borrowers, Mr Gold and Mr Martin, to pay, and provided that the property in question was to be subject to a first charge in favour of AIB to secure the payment of the whole of the loan and any outstanding interest thereon.

22. The most important (and unusual) feature of each of the earlier mortgages for the purposes of this case was that, on its true construction, it rendered Mr Gold liable for any indebtedness which Mr Martin might incur from time to time to AIB (and vice versa). In other words, the earlier mortgages contained a clause which

did not merely render Mr Gold liable for any liability of the Partnership to AIB, but it extended his liability to any money owing to AIB by Mr Martin in any capacity (and in particular in respect of any account he had with AIB in his own name or in respect of any loan made to him (whether on his own or together with others). I shall refer to a clause that has this effect as "*the liability clause*", and it should be emphasised that it is common ground that it had the effect I have described, subject to the House of Lords giving leave to appeal, and subsequently allowing the appeal, against the decision of the Court of Appeal upholding the decision of Jacob J to which I have referred.

23. During the 1980s, Mr Martin carried on business not only in partnership with Mr Gold (and, at least for a time, with Mrs Gold) and, separately, for himself, but he also carried on business in partnership with a Mr Jerome Shaw. Each of the three businesses carried on by Mr Martin was of a similar nature, namely investment and dealing in property, but a substantial difference between the business he carried on with Mr Shaw ("*the Shaw partnership*") and the businesses he carried on in the Partnership and in his own name, was that Mr Shaw was responsible for most, and possibly all, of the management of the properties in the Shaw partnership. In particular, it was Mr Shaw, and not Mr Martin, who collected the rents for the properties owned by the Shaw partnership. The main (and possibly the only) source of finance for the Shaw partnership was, as for the businesses carried on by Mr Martin and the Partnership, AIB.

24. Mr Gold owned No 37, which he had been given by his father and which had nothing to do with Mr Martin or the Partnership. On the 4th April 1989, Mr Martin raised a further £60,000 from AIB on security of a property which he had already charged to AIB, namely Ascot House. On the same day, collateral to this charge of Ascot House, Mr Gold charged No. 37 to secure the borrowings of Mr Martin from AIB, and Mr Howard Gold charged a property he had been given by his father, 3 Bellegrove Villas ("No. 3") to AIB for the same purpose.

25. It is clear from the documentation that, by November 1989, AIB was contemplating restructuring the loans it had made to Mr Martin personally, to the Shaw partnership, and to the Partnership, because the "*structure of [the] accounts ... [was] very cluttered*".

26. Meanwhile, Mr Martin was getting into difficulties, at least in relation to his own borrowings from AIB. In particular, he failed to pay an instalment of interest due in August 1990 on one account in his own name, which can conveniently be referred to as "*the 008 account*". In May 1991, owing in particular to the arrears on the 008 account, AIB were contemplating appointing a receiver in respect of some of the properties owned by Mr Martin, but this did not materialise. In May 1991, negotiations ensued between Mr Martin (for whom Mincoffs acted in this connection) and AIB for the release of Ascot House from any charge in favour of AIB, because Mr Martin wished to charge Ascot House to UCB Bank (which in due course happened in December 1991). AIB agreed to release Ascot House, and sent the appropriate Land Registry form for that purpose, duly executed, to Mincoffs in June 1991. As a result, Mr Howard Gold obtained a release from AIB of No. 3, which, it will be recalled, he had put up as security for Mr Martin's borrowing (or, perhaps more accurately, his increased borrowing) on Ascot House in April 1989.

Fact : 1992-1995

27. Despite the fact that Mr Martin had obtained a degree of refinancing from UCB Bank in December 1991, AIB were still very concerned about the state of the borrowing by Mr Martin, the Partnership, and the Shaw partnership. The total borrowing of Mr Martin and the Partnership was estimated by AIB to be around £ 2.5m in aggregate by 19th May 1992. AIB's records were clearly in disarray. Thus, most of their employees concerned with Mr Martin's affairs were unaware that Ascot House had been released as security, even in June 1992. At least one such employee was still unaware of the release of Ascot House as late as February 1993.

28. On 13th August 1992, Mr Howard Gold wrote to AIB setting out proposals on behalf of Mr Shaw for whom he acted. These proposals culminated in a tripartite agreement between Mr Martin, Mr Shaw and AIB, whereby Mr Martin and Mr Shaw split the properties owned by the Shaw partnership between them, on the basis of a valuation which meant that they each had properties worth, in aggregate, roughly the same, and each of them separately took on a liability for half the total liability of the Shaw partnership to AIB (less about £50,000 which they repaid to AIB). This arrangement was duly completed. The effect of this arrangement was to render each of the two Shaw partners, Mr Martin and Mr Shaw, solely liable for only

half the previous debt of that partnership (less the £50,000 which was repaid). It also prevented Mr Shaw being liable for any other debt which had accrued or was to accrue on the part of Mr Martin, because, although Mr Shaw's new mortgage contained the liability clause, his liability under it did not extend to any debts to AIB other than those which he had himself, because no one other than himself and AIB was party to the mortgage.

29. No such proposal was ever put forward, or even considered by anyone, in relation to the Partnership. However, like AIB, Mr Howard Gold was concerned about Mr Martin's finances, and advised his brother that, if possible, he should effectively resign from the Partnership. Mr Gold was reluctant to take that course, but, as his brother was fairly insistent that he should seek to do so, he agreed that Mr Howard Gold should approach AIB with a view to asking them to release Mr Gold from his liability under each of the earlier mortgages, on the basis that Mr Gold would "*walk away*" from the Partnership, with no liabilities to AIB or to Mr Martin, but with no claim to any interest in any of the Partnership properties. It appears that Mr Martin was agreeable to this course (possibly subject to sorting out the taxation consequences). Mr Howard Gold approached AIB with a request to release Mr Gold from any liability to AIB on this basis, and it appears that he made the request twice, once in early Summer, and once in late Summer, 1992. Although the evidence on this point is scanty, it appears that AIB indicated to Mr Howard Gold that it was not prepared to agree to this course in December 1992, and Mr Howard Gold passed that on to his brother.

30. An event which apparently exacerbated Mr Howard Gold's concerns about Mr Martin, and certainly should have given Mr Gold concern, was that, in 1992, Mr Martin had paid rent which he had collected from tenants of Partnership properties to meet his own liabilities, rather than any liability of the Partnership, to AIB. This occurred without Mr Gold being aware of it at the time, because, as I have said, he had no involvement with the management or finances of the Partnership (save for receiving bank statements once a year). Once he discovered that rents which should have been paid into the Partnership account with AIB had not in fact been paid in, he took up the matter with Mr Martin, through Mr Howard Gold. Mr Martin admitted that he had done wrong, but he neither offered, nor was requested by or on behalf of Mr Gold, to repay the Partnership the monies which he had taken, and no record of this misappropriation of Partnership monies was ever recorded in the Partnership accounts.

31. Meanwhile, during 1992 and 1993, AIB was seeking to restructure the whole basis of the documentation and accounts relating to the liability of Mr Martin and those involved with him. It appears clear from documentation that there were a number of meetings between representatives of AIB and Mr Martin, and, indeed, some meetings between representatives of AIB and Mr Howard Gold, who, as I have said, represented Mr Gold. During the period of these negotiations, namely during 1992 and the first half or so of 1993, it is apparent that the debts of the Partnership (as opposed to the debts of Mr Martin on his own account or the debts of the Shaw partnership) were in the region of £800,000- odd, and that Mr Martin's liabilities were substantially greater than that.

32. At some point, someone at AIB concluded, apparently mistakenly, that what up to then had undoubtedly been an account which was the liability of Mr Martin alone, namely the 008 Account, was in fact an account for which the Partnership was liable. It is impossible to pinpoint the date on which this happened, but it seems clear that it was sometime in the second half of 1992, and was almost certainly between 12th August and 24th November in that year. Jacob J, in his judgment, thought this was due to a mistake on the part of someone at AIB, and I agree with him. I am confident that it had nothing to do with the fact that AIB thought that it was entitled to treat Mr Gold as well as Mr Martin (and hence the Partnership) as liable for what had previously been treated as Mr Martin's sole debt, due to the liability clause, because AIB was wholly unaware of the effect of the liability clause. Before Jacob J, evidence was given on behalf of AIB to suggest that Mr Howard Gold accepted on his brother's behalf that his brother was liable for the 008 Account, but Jacob J rejected that evidence, and it has not been suggested in evidence or argument before me that I should differ from him.

33. The effect of treating the 008 Account as a Partnership account was to increase the liability of the Partnership, by more than double the £800,000-odd for which it was liable.

34. Until February 1993, neither Mincoffs nor Mr Gold had any reason to think that AIB had made a mistake as to the extent of the Partnership's liabilities to AIB. However, by February 1993, the negotiations for

restructuring the debts of Mr Martin and the Partnership to AIB had progressed sufficiently for AIB to write facility letters, setting out the terms upon which it was prepared, and indeed proposed, to restructure the borrowings of Mr Martin and the Partnership. Those two letters were both dated 11th February 1993 (which superseded letters in similar, but not identical, terms, dated three days earlier). The first letter was addressed to Mr Gold and Mr Martin, and concerned the borrowing of the Partnership. The second letter was addressed to Mr Martin alone and concerned his borrowings. Although the first letter stated that a letter addressed to Mr Martin (which must have been the second letter) was included with it, Mr Gold said that it was not in fact enclosed. While Mr Gold was not a wholly satisfactory witness, he seemed to me in general to be reliable, and it is clear to me, as it was to Jacob J, that AIB was pretty chaotic in its administration. This leads me to the conclusion that the second letter was not in fact enclosed with the first letter.

35. I do not propose to go through the details of the two letters of 11th February 1993, but merely to emphasise their salient features.

36. The letter to Mr Martin and Mr Gold referred to a "*facility ... subject to payment on demand*" of £1.71m "*by way of loan facility*" to "*refinance property portfolio*". The letter went on to set out 46 properties which were to be security for this loan. They included all the properties owned by the Partnership and most, indeed probably all, of the properties owned by Mr Martin, which were already secured to AIB as collateral for his borrowings. The letter contained a number of "*additional conditions*" including this: *"We require overall borrowing level on the Mr Martin and Martin/Gold accounts to be reduced to a maximum of £200,000 ... within 12 months from completion of this new facility."*

The letter also referred to the fact that AIB had "*the right to withdraw or vary the terms of the letter"*. It ended by inviting Mr Martin and Mr Gold to sign a counterpart of the letter and return it to AIB, if its terms were accepted. The letter also stated that "*our solicitors are* [Mincoffs]", which was slightly confusing because it was immediately above the place for signature by Mr Martin and Mr Gold. The ambiguity is unimportant, because in practice Mincoffs acted for the Partnership (and indeed Mr Martin) as well as for AIB in the restructuring.

37. The letter to Mr Martin was in virtually identical terms, save that the amount of the facility was £591,000. In particular, the same properties were set out in the second letter as being the proposed security for Mr Martin's facility as had been set out as being the intended security for the facility to the Partnership.

38. It appears that Mr Martin countersigned both letters, and got Mr Gold to countersign the first letter. Mr Gold said that he countersigned the first letter on the understanding that it would be then sent to Mincoffs for approval, but it appears clear that Mr Martin sent or took it straight to AIB. Mr Gold also said that he would have read the first letter, and that he was not concerned about the figure of £1.71m (which was, as I have mentioned, rather more than twice the borrowings of the Partnership at the time) because he thought that it was a reference to the aggregate borrowings of Mr Martin and the Partnership. It is fair to say that this is not a wholly fanciful view, not least because of the inclusion of the properties belonging to Mr Martin as well as the properties belonging to the Partnership in the list of the securities to be provided for the facility. However, the sort of careful reading of the first letter one would have expected from a reasonably careful person in Mr Gold's position, even if he expected to be advised by Mincoffs, would have at least have put him on enquiry, in my view. The idea that £1.71m represented the aggregate facility to Mr Martin and the Partnership is impossible to reconcile in any sensible way with the requirement that the total borrowings be brought below £2m, and the fact that the letter naturally suggested that both addressees were to be equally liable for the £1.71m. Further, there was reference to another letter being enclosed which was not in fact enclosed, and this would have been something which any addressee who was being asked to countersign the letter would have been concerned about.

39. I am dubious whether Mr Gold actually bothered to read the letter. That is not to say that I think he was lying when he gave evidence to the effect that he did, and what he thought it meant. I believe that he has convinced himself, in light of the subsequent events and with the passage of time, that he adopted a more responsible and defensible attitude to the first letter before he signed it, than he in fact did. As had been the case up until then, he was, in my view, happy to leave everything to Mr Martin and to Mincoffs, and to sign virtually anything that was put in front of him. While he was surprisingly cavalier in this connection,

it should be borne in mind that the facility letter was merely a prelude to more formal documentation which he could obviously expect to be carefully considered by Mincoffs, that the facility letter was not well drafted (particularly in confusing the properties owned by the Partnership and by Mr Martin), and that Mr Gold (somewhat rashly, it is fair to say) assumed that Mr Martin would take the countersigned letter to Mincoffs for their consideration before it was sent on to AIB.

40. Meanwhile, copies of the facility letters had been sent to Mincoffs, but, for some reason, the copy of the facility letter to the partnership omitted the first page. Mr Howard Gold did not ask for that first page, as he ought to have done, and therefore he did not see that the proposed facility for the Partnership was more than £1.7m, as opposed to around £800,000, as he would have expected. Because Mincoffs were acting for the borrowers (the Partnership and Mr Martin) as well as for the lender (the Bank and Finance) in this restructuring, different individuals in the firm looked after the interests of the borrowers and the lenders. Mr Howard Gold was responsible for looking after the Partnership, and indeed Mr Martin.

41. The restructuring involved the earlier mortgages being replaced by new mortgages, and drafts of the proposed new mortgages, substantially in the then current standard forms of AIB, were sent to Mincoffs. The initial draft of the principle mortgage (which I have called "*the 1993 mortgage*") in respect of the Partnership borrowings from AIB, not only contained the liability clause, but also identified the facility to be provided to the Partnership, again at £ 1.71m. Regrettably, Mr Howard Gold appears not to have noticed this figure, or, if he did notice it, he did not appreciate that it was substantially more than it ought to have been, and therefore he did not mention it to Mr Gold. It is accepted on behalf of Mincoffs that he ought to have done so.

42. The final form of the 1993 mortgage still contained the liability clause, but it did not in fact identify the amount of the facility. Again, Mr Howard Gold regrettably did not notice the effect of the liability clause, namely to render Mr Gold liable not only for the debts of the Partnership to AIB, but also for any debts which his partner, Mr Martin, might have to AIB in any other capacity. On 22nd July 1993, without appreciating that this was the effect of the liability clause, Mr Gold executed the 1993 mortgage, as indeed did Mr Martin and AIB. Unlike the first of the two facility letters, the 1993 mortgage charged the obligation to repay only on the 14 properties then owned by the Partnership (which were, of course, already secured to AIB under the earlier mortgage).

43. On the same day, Mr Martin executed a mortgage in similar terms in respect of his own borrowing from AIB, which was secured (possibly with one or two exceptions) over all the properties which were already charged to AIB in respect of borrowings he had effected on his own account. A third mortgage was executed by Mr Gold in favour of AIB in respect of two properties, one of which was No. 37.

44. On the same day, 23rd July 1993, AIB closed the 008 Account by a credit of £773,000-odd, which reflected the restructuring, and the £773,000-odd was effectively debited to the Partnership account.

45. One can now move on some 18 months, to 27th February 1995, when AIB issued a formal demand to Mr Gold (and indeed to Mr Martin) on 14th February 1995 seeking repayment of what was said to be due from the Partnership to AIB, namely some £1.73m together with arrears of £43,000. Mr Gold said he was both surprised and alarmed not merely by the demand, but by its size, which appeared to him to be around twice as much as the Partnership had ever owed to AIB. Accordingly, he sought documents and information from AIB to explain how it was said that his liability for this sum arose.

46. Mr Gold, again not surprisingly, got in touch with his brother about this matter, and Mincoffs instructed counsel, Mr Ainger, who provided a preliminary Opinion in July 1995 and a more detailed Opinion in October 1995. With the latter Opinion, Mr Ainger sent a letter to Mr Howard Gold which suggested, among other things, that Mr Gold may have a claim for negligence against Mincoffs. Mr Gold said that he neither saw nor was told of this letter by his brother, although he was advised to go to other solicitors. Mr Howard Gold did not give evidence, and therefore I do not know whether he accepts that he did not show the letter to his brother. Given that Mr Howard Gold did not give evidence, given that Mr Gold seemed a reasonably reliable witness, and given that there is no other reason to doubt his evidence on this point, I accept that Mr Gold did not see, and was not told about, this letter.

47. The new solicitors instructed by Mr Gold, Judge Sykes Frixou, acted promptly, seeking information from Mr Howard Gold in early November 1995.

FACTS : 1996 to the present day

48. In January 1996, Judge Sykes Frixou sought information and documentation from AIB in order to assess how the alleged liability of the Partnership of over £1.7m arose. After desultory correspondence, AIB sent a letter before action seeking payment from Mr Gold of about £1.7m, which was said to have accrued on the Partnership account. Five days later, AIB issued the specially endorsed writ seeking recovery of this sum and appropriate relief in respect of the properties secured for this debt. In the same proceedings, they claimed the same relief against Mr Martin, but they also claimed recovery of all the money owed by Mr Martin, and appropriate relief against the properties securing his debt. AIB also sought the appointment of a receiver over all the properties.

49. After the service and preparation of evidence on all fronts, an interlocutory application by AIB came before His Honour Judge Boggis on 6th June 1996, when he refused to appoint receivers and refused judgment on admissions. He was very critical of the state of AIB's evidence, and indeed of their records. Thereafter, AIB's action against Mr Gold and Mr Martin proceeded relatively leisurely until December 1997.

50. In December 1997, it appears that AIB for the first time appreciated that the effect of the liability clause in the 1993 mortgage was to render Mr Gold liable not merely for all the Partnership debts, but also for all Mr Martin's debts. This had two important consequences. First, it deprived Mr Gold of the argument that he was not liable for over half of the £1.7m-odd claimed, on the basis that it had never been a Partnership debt, and had always been Mr Martin's debt, having been effectively the 008 Account debt. Secondly, it enabled AIB to claim more than the £1.7m-odd that it was currently claiming from Mr Gold: it enabled AIB to claim from Mr Gold repayment of all Mr Martin's debts even if they were not debts of the Partnership at all. Pursuant to permission given to that effect, AIB amended its writ in March 1998 to rely on the liability clause, and therefore to claim even more than it was currently claiming from Mr Gold.

51. AIB's action came before Jacob J in February 1999, and he gave judgment on 15th March. He said that during the late 1980s AIB "*began to lose grip of precisely what was going on*", there were "all sorts of blunders" and that "the overall picture is of a complete lack of control". He rejected evidence on behalf of AIB to the effect that Mr Howard Gold had acknowledged at a meeting on 12th August 1992 that the 008 Account was an account of the Partnership, and that, even at that meeting, whose purpose was to sort matters out, "*no proper attempt was made to identify whose accounts were which*". He also said that, at the meeting, Mr Howard Gold failed to pick up an error, and, had he done so, AIB might have been disabused of their mistaken view that the 008 Account was an account of the Partnership, as opposed to that of Mr Martin alone. He went on to conclude that, notwithstanding the fact that AIB was wrong in its contention that the 008 Account had ever been the liability of the Partnership, Mr Gold was nonetheless liable for it, and indeed for the whole of the sum claimed by AIB, because of the terms of the liability clause in the 1993 mortgage. He then rejected the contention put forward on behalf of Mr Gold that he was not bound by the 1993 mortgage because of the doctrine of *non est factum* .

52. Mr Gold issued a notice of appeal against Jacob J's decision on 21st June 1999, but the conduct of the appeal was effectively taken over by Mincoffs' insurers, who decided to base the appeal on the argument that the liability clause did not have the effect of rendering Mr Gold liable for all Mr Martin's debts. The appeal was dismissed on 27th June 2000, the decision of the Court of Appeal being reported at [2000] 2 All ER (Comm) 686. A petition for leave to appeal has yet to be determined by the House of Lords.

53. Meanwhile, on 31st March 1999, Mr Gold issued the writ against Mincoffs in the current proceedings, claiming an indemnity from Mincoffs against Mr Gold's liability to AIB under the judgment of Jacob J and, further or alternatively, damages. The claim is principally based on Mincoffs' (now admitted) negligence in failing to advise Mr Gold as to the effect of the liability clause in (a) the earlier mortgages and (b) the 1993 mortgage. It is also contended on behalf of Mr Gold that Mincoffs were negligent in failing to give him appropriate advice in relation to No. 37, and in relation to the effect of the facility letter he signed in February 1993.

54. At the beginning of the trial, an application was made to amend the Particulars of Claim and to serve a Reply. It was not suggested on behalf of Mincoffs that, if permission were given, it would cause Mincoffs any prejudice, so far as taking them by surprise or requiring further evidence was concerned, but it was indicated that it might prejudice Mincoffs in terms of negotiations or settlement offers which may or may not have been made. I gave Mr Gold permission to amend the Particulars of Claim and to serve a Reply, on the clear understanding that any negotiations or offers which were relevant on the question of costs would have to be assessed by reference to Mr Gold's pleaded case as it was at the time of the negotiations or offers.

55. The effect of the amendments to the Particulars of Claim and of the Reply was to seek to deal with the contention raised by Mincoffs in their Defence to the effect that any claim brought by Mr Gold based on the contention that Mincoffs were negligent in relation to the earlier mortgages was out of time, by virtue of Section 2 of the Limitation Act 1980 (i.e. was Statute-barred). Apart from denying that contention, Mr Gold seeks to rebut that argument by reference to Section 14A, Section 32, a contention that a new cause of action arose out of Mincoffs' failure to advise in 1993, and the contention that Mincoffs were not entitled to rely upon their own wrong.

56. During the trial, I heard evidence from Mr Gold, Mrs Gold (Mr Howard Gold's wife and Mr Gold's sister in law), Mr Jerome Shaw (who had been in a separate property partnership with Mr Martin) and Mr Derek Anderson, a manager in the Risk Department of AIB, who had been with AIB for some twenty six years, but who had not actually been involved in dealing with Mr Martin, Mr Gold or Mr Howard Gold, at least until 1996.

57. No evidence was called on behalf of Mincoffs. However, there was a short statement put in by Mr Howard Gold, which confirmed the evidence he gave before Jacob J, which consisted of a long witness statement, a shorter witness statement, and some fairly detailed cross examination (of which I was provided a transcript). Mr Gold elected to put in this evidence of Mr Howard Gold, but not to call him, as a result of which, as is agreed between the parties, the evidence of Mr Howard Gold as given to Jacob J is properly evidenced before me, albeit hearsay evidence.

58. There was a difference of approach between the two parties, in that the argument for Mr Gold proceeded on the basis that his primary case was that Mincoffs had been negligent in relation to the 1993 mortgage, and that all his damages flowed therefrom, and it was really only if I rejected the contention that he could recover the whole of the damages he sought by virtue of Mincoffs' failure to advise him as to the effect of the liability clause in the 1993 mortgage, that he sought to rely on the earlier mortgages. I accept that that may be something of an over simplification of the way the case was put in opening on behalf of Mr Gold, but I hope that it is not an unfair summary. It is to be contrasted with the approach adopted on behalf of Mincoffs, which was that I should consider the claim based on the earlier mortgages first, and should only then turn to the claim under the 1993 mortgage.

59. In my judgment, the approach put forward on behalf of Mincoffs is to be preferred. It is more logical, and more convenient, to consider the earlier claim first, and only then to turn to the claim which is later in time. Further, consideration of the claim on the earlier mortgages first does help to put Mincoffs' main defence in relation to the claim on the 1993 mortgage, namely that Mr Gold was already "locked in" into the liability clause by virtue of the earlier mortgages, in to a more convenient perspective.

60. I turn now to consider the various points raised before me.

The Earlier Mortgages: When did the Cause of Action Accrue?

61. The present action is brought in negligence only, not in contract. Section 2 of the 1980 Act provides: *"An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

Accordingly, what has to be determined for the purpose of answering this first question is the date upon which Mr Gold's cause of action against Mincoffs accrued in relation to their failure to advise him on the effect of the liability clause contained in each of the earlier mortgages.

62. Mr James Bonney QC (who appears for Mr Gold with Mr David Ainger) contends that time only began to run against Mr Gold when he suffered actual damage, that is when AIB actually called on Mr Gold to pay

what was due under the liability clauses in the earlier mortgages (as effectively substituted by the liability clause in the consolidated mortgage). If that is right, Mr Gold's cause of action only arose in 1995, and the six year limitation period even now has not expired. On that basis, this action based upon the earlier mortgages was brought well in time.

63. Mr Nicholas Davidson QC (who appears with Mr Anthony De Freitas for Mincoffs) argues that time began to run under Section 2 against Mr Gold from the moment that he signed each of the earlier mortgages. Indeed, given that he took on liability for Mr Martin's debts to AIB as they existed from time to time, under the liability clause contained in the first mortgage, it seems to me that Mincoffs' case is effectively that time began to run against Mr Gold from 1984, on the basis that in this connection all the subsequent earlier mortgages, merely confirmed Mr Gold's liability for Mr Martin's debts from time to time owing to AIB.

64. The most recent relevant guidance given by the House of Lords as to when time starts to run in a case of professional negligence was in **Nykredit Mortgage Bank plc v Edward Erdman Group Ltd** [1997] 1 WLR 1627(albeit a case concerned with the date from which interest runs). At 1630C, Lord Nicholls of Birkenhead said this: *"In case of tort the cause of action arises, not when the culpable conduct occurs, but when the plaintiff first sustains damage. Thus, the question which has to be addressed is what is meant by "damage" in the context of claims for loss which is purely financial ...."*

65. Lord Nicholls then went on to quote with approval an observation of Stephenson LJ in **Forster v Outred & Co**. [1982] 1 WLR 86at 94, upon which Mr Davidson strongly relies. Stephenson LJ said this (quoted at 1630D-E by Lord Nicholls in Nykredit): *"What is meant by actual damage? Mr Stuart-Smith said that it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. ... Whereas damage is presumed in trespass and libel, it is not presumed in negligence and has to be proved. There has to be some actual damage."*

66. In Forster, the Court of Appeal held that a claim based on the contention that solicitors had negligently failed to advise that a mortgage executed by a plaintiff had the effect of charging her house for all the liabilities from time to time accruing of a third party, rather than securing a bridging loan for a specific amount, was Statute-barred, because time ran from the date of the execution of the mortgage.

67. In my judgment, Mr Davidson is correct in his submission that the present case falls squarely within that principle. The nature of Mr Gold's claim against Mincoffs is very similar to that of the plaintiff in Forster. In each case, it is alleged that the extent of the liabilities of a third party being secured by a mortgage was far greater than the claimant mortgagor understood when he executed the mortgage, and that the defendant solicitor was negligent in failing to explain the extent of the mortgage to him before execution. It is true that in the present case matters go a little further: not only is the extent of the charge over the relevant property greater than Mr Gold understood, but the extent of his liability for repaying the money is, for the same reason, greater than he understood. Nonetheless, I can see no good grounds for not applying the reasoning in Forster to the present case.

68. The actual decision Nykredit, upon which Mr Bonney relies, appears to me to be a rather different type of case. A lender of money sued a surveyor for having negligently overvalued a property which was to be provided as security to the lender in return for a loan, in circumstances where the quantum of the loan was dependent on the value of the property. The effect of the decision was that, as summarised in the headnote, at 1627H, *"the plaintiffs' cause of action had arisen when a relevant and measurable loss had been first revealed"* and that when this occurred depended on the facts of the particular case.

69. In his speech, at 1634A-D, Lord Nicholls discussed **DW Moore & Co. Ltd v Ferrier** [1988] 1 WLR 267, with apparent approval. In that case time was held to run in respect of a claim against a solicitor, who had negligently obtained a valueless covenant for his client, from the date on which the covenant was entered into: the facts of that case were, in my view, comparable to those in Forster, and in the present case. At 1634D-G, Lord Nicholls considered **UBAF Ltd v European American Banking Corporation** [1984] QB 713 again with approval. In that case, to quote Lord Nicholls at 1634D-E: *"The measure of damages called for a comparison between the position of the plaintiffs as it would have been had they not made the loans and the position of*

the plaintiffs as participants in the loan agreements. The Court of Appeal ... declined ... to accept that it was self-evident that by entering into the transaction the plaintiffs were worse off. It was possible, even if unlikely, that the rights they acquired when they lent their money were at that time worth as much as the amount of the loans. The facts would need to be established at trial."

70. If one applies the approach of the Court of Appeal in **UBAF** to the present case, it seems to me that the position is this. It cannot be seriously doubted but that, from the moment that he signed the first of the earlier mortgages with the liability clause, Mr Gold was worse off than he would have been if he had signed the mortgage without that clause. It seems plain that he was getting nothing in return for entering into the liability clause, and that AIB would have been prepared to grant the Partnership the same loan on the same terms to cover the same property under a mortgage without the liability clause: that is inherent in Mr Gold's case (and commercial common sense). In a case such as Nykredit, the more the plaintiff was able to lend, the better for him (always provided that he was able to recover interest and principal), and therefore, subject to the ability of the borrower to pay, it was not self-evident that, merely because the plaintiff had lent more than he would and should have done on a proper valuation of the security, he had suffered loss at once. Equally, it may be that, when entering into the loan agreements in UBAF, the plaintiff in that case was initially better off is now worse off than he should have been, and it was only with the passage of time that he would have become worse off.

71. Mr Bonney argues that for a substantial amount of time, Mr Martin's debts to AIB may well have been, indeed, probably were, more than fully secured on properties owned by Mr Martin. That may well be true, but it does not alter the fact that, once he had signed a mortgage with the liability clause, Mr Gold immediately became liable to pay any and every debt owed by Mr Martin to AIB, and the fact that he would then have been subrogated to AIB's rights against Mr Martin does not, as I see it, enable Mr Gold to say that he has not suffered any damage as a result of what amounts to his having guaranteed Mr Martin's liability to AIB as it was from time to time.

72. Even if I am wrong, and the cause of action did not necessarily arise when the earlier mortgages were executed, but on a later date assessed in accordance with the approach of the House of Lords in Nykredit, as Mr Bonney argues, I do not think that it assists Mr Gold. In my judgment, on the basis of the evidence, it is more likely than not that, by some time in 1992, Mr Martin's liabilities to AIB exceeded the value of the properties he had provided to AIB by way of security. Further, at the end of 1992, despite his requests (through Mr Howard Gold) AIB refused to release Mr Gold from his liability under the earlier mortgages. At that point, even on the analysis put forward on his behalf, time stared to run under Section 2 of the 1980 Act against Mr Gold with effect from some time in 1992. As the instant proceedings were not brought until 1999, this means that, unless he can rely on some other provision of the 1980 Act or on some other act of negligence in relation to the earlier mortgages, his claim based on Mincoffs' negligence in relation to those mortgages would be Statute-barred.

The Earlier Mortgages: Section 14A

73. Section 14A was added to the 1980 Act by the Latent Damage Act 1986. Section 14A(1) provides that the section applies to negligence actions where the starting date under the section falls six years after the cause of action accrues. In such a case, Section 14A(2) disapplies Section 2. The effect of Section 14A(3) and (4) is that, in a case such as this, where the cause of action accrued more than six years before the writ was issued, time expires under the Act "three years from the starting date as defined by sub-section (5), which is subject to a longstop date of 15 years.

74. I must set out the subsequent sub-sections of Section 14A. In so far as relevant for the purposes of this case, they provide as follows:

"(5) ... The starting date ... is the earliest date on which the plaintiff ... first had both the knowledge required for bringing an action for damages in respect of the relevant damage and the right to bring such an action.

(6) ... "The knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both –

(a) of the material facts about the damage in respect to which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in sub-section (8) below.

(7) ... The material facts about the damage are such facts about the damages as would lead a reasonable person who had suffered damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts ... are

(a) That the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) The identity of the defendant ...

(9) The knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant ...

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek ..."

75. Plainly, at the time that he executed the various earlier mortgages, Mr Gold knew that he had entered into commitments to pay money, and to mortgage properties, to the Bank, and he also knew that he had entered into those agreements on the advice of Mincoffs. The first question between the parties is what "other facts" within Section 14A(6)(b) and (8) he needed to know before he had *"the knowledge required for bringing an action for damages in respect of the relevant damage"* within Section 14A(5). Mr Davidson contends on behalf of Mincoffs that the only other fact which Mr Gold needed to know was that each of the earlier mortgages exposed Mr Gold to a claim from AIB in respect of more than he had understood or intended, i.e. more than the debts of the Partnership, and in particular the debts of Mr Martin. I agree. In my judgment, "the other facts" represent all the facts, but no more than all the facts, which, when taken together, constitute the necessary ingredients of a claim in negligence against Mincoffs. In other words, what a claimant has to know before time starts running against him under Section 14A is those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation, against the defendants in negligence. That conclusion seems to me to be directly supported by the unreported decision of the Court of Appeal in **Johnson v Chief Constable of Surrey** (19th February 1992), approved and followed in **C v Mirror Group Newspapers** [1997] 1 WLR 131 -- see at 136-137.

76. It is clear that Mr Gold did not in fact appreciate that the 1993 mortgage, let alone the earlier mortgages, contained the liability clause and accordingly imposed an obligation on him to repay all the debts owing to AIB from Mr Martin, until December 1997 -- i.e. when AIB notified Mr Gold and his solicitors of its intention to rely upon the liability clause in the 1993 mortgage, and accordingly to claim against Mr Gold all the sums owing from Mr Martin to AIB.

77. Accordingly, if they are to defeat Mr Gold's claim to rely upon Section 14A, Mincoffs need to rely on Section 14A(10) and to show that Mr Gold "might reasonably have been expected to acquire" knowledge of the fact that the earlier mortgages each contained the liability clause before March 1996, i.e. more than three years before Mr Gold issued the current proceedings.

78. On behalf of Mincoffs, Mr Davidson relies on two separate events as bringing Mr Gold within the ambit of Section 14A(10) in this connection. In other words, he contends that there are two different occasions when information came to the attention of Mr Gold, so that it can be said that *"he might reasonably have been expected to acquire"* knowledge of the fact that the earlier mortgages contained the liability clause.

79. The first such occasion was in December 1992, when Mr Gold learnt, through Mr Howard Gold, that AIB had refused to agree to release him from his liability under the earlier mortgages. Mr Howard Gold had proposed on his behalf that he should be able to "*walk away*" from the Partnership and from any liability to AIB. Mr Davidson's contention in this connection is that AIB's refusal should have led Mr Gold to make enquiries as to why AIB was not prepared to release him, because, on his understanding of the extent of his liability, it would have been very difficult to explain AIB's attitude. On Mr Gold's understanding of the extent of his liability to AIB, it can be said that he could have expected AIB to release him, because, at least as he understood it, his obligation to AIB extended only to the debts of the Partnership to AIB, which were,

at least in his belief, significantly less than the aggregate value of the properties of the Partnership charged to AIB to secure that liability. Accordingly, runs Mr Davidson's argument, Mr Gold should have realised that there was something wrong, and a sensible person in Mr Gold's position would thereupon have carried out investigations, which would have begun with looking at the earlier mortgages which still represented the contractual arrangement between him and AIB, and that such an investigation would have led him to appreciate the reason for the Bank's not being prepared to release him, namely the effect of the liability clause.

80. I reject that argument. It seems to me that a reasonable person in the position, and with the knowledge and belief, of Mr Gold in December 1992, would not by any means necessarily have been put on enquiry by AIB's refusal to release him from his liability under the earlier mortgages. In the first place, as was made clear by Mr Anderson, a manager of AIB, Bank and Finance (and, apparently, banks in general) paid more regard to the ability of a debtor to meet his obligations than to the value of the property which secured those obligations. In other words, the primary concern of Bank and Finance, when lending money on a secured basis to a borrower was the ability of the borrower to meet his obligations. The security was regarded very much as a secondary, albeit obviously very important, factor. In these circumstances, there is nothing inherently surprising about AIB having refused to release one of two joint debtors even though it has sufficient security to cover their liability.

81. Even without this evidence, I consider that Mr Davidson's argument runs into difficulties. Mr Gold said, and I accept, that he was not very keen to pull out of the Partnership, not least because he believed that there was substantial equity in it, and that it was only because Mr Howard Gold was so keen that he should do so that Mr Gold authorised his brother to ask AIB to release him. He did not know what grounds, if any, were put forward by his brother to AIB to justify his release, nor did he know how hard his brother pushed for AIB to release him. Additionally, it is by no means clear to me how firmly or unequivocally AIB expressed its refusal to release him, let alone in what terms that refusal was communicated by Mr Howard Gold to his brother. There is documentary evidence to suggest that the point may have been still open in January 1993. I appreciate that it is no fault of Mincoffs that the evidence on this topic is so vague, but Mincoffs must take the evidence as they find it, given that the onus is on them to show that time started to run against Mr Gold by virtue of Section 14A(10) in December 1992.

82. Looking at the matter more generally, even if some people in Mr Gold's position in December 1992 might have thought of investigating matters on the basis that AIB's refusal to release him was puzzling, I do not think it can fairly be said that Mr Gold would fall within Section 14A(10) as at that date. It cannot, in my view, be said that it was not reasonable of him to have instituted the sort of investigations which Mr Davidson suggests. Even if one was unaware of the fact that a bank looked primarily to the ability of the borrower to repay, and only secondly to any security, it appears to me that a reasonable person in the position of Mr Gold might or might not have been puzzled by AIB's refusal to release him, and, even if he was puzzled, I am not convinced that it would have been unreasonable not to look at the earlier mortgages. In conclusion on this aspect, it appears to me that a reasonable person in Mr Gold's position in December 1992, faced with the refusal of AIB to release him, could have instituted a train of enquiry which ended with his considering the terms of the earlier mortgages, but equally, he might not have done so. Indeed, perhaps the word *"equally"* is inappropriate, in the sense that on the balance of probabilities, I think that he would not have done so.

83. I now turn to the second occasion upon which Mr Davidson relies to contend that Mr Gold should have appreciated that the earlier mortgages contained the liability clause. That occasion is 1st March 1995, when Mr Gold received AIB's demand for repayment of £1.7m. Mr Davidson's argument is that Mr Gold immediately realised that this sum was substantially more, namely around double, that which, in his belief, was owing from the Partnership. Accordingly, runs the argument, any sensible person in his position would have immediately instituted enquiries to find out how and why his liability was twice that which he understandably believed constituted the liability of the Partnership. Mr Davidson contends that a reasonable person in Mr Gold's position, having received that demand from AIB, would have immediately undertaken investigations as to how he was said to be liable for such a much larger sum than he believed was appropriate, and that, if carried out properly, those investigations would have led him to the liability

clause in the 1993 mortgage, which, in turn, would have led him back to the liability clauses in the earlier mortgage.

84. In my judgment, this line of argument must also be rejected. I reach that conclusion for a number of reasons. First, Mr Gold's reaction on receiving the demand for payment was that which I think any person in his position would have taken, namely to seek to find out from AIB why his liability to them was approximately twice as great as he thought it should be. The enquiry did not produce satisfactory answers from AIB, whose documentation and records were, as Jacob J said, in substantially less good order than one would have expected. Indeed, it appears to me that Mr Bonney is right in saying that the basis upon which AIB claimed that Mr Gold owed them some £1.7m was only after an order for discovery was made by Judge Boggis in June 1996, which, of course, would mean that the proceedings were brought within the three year period thereafter permitted by Section 14A. Judge Boggis was, as I have mentioned, dealing with the application by AIB for the appointment of a Receiver and judgment on admissions. He described AIB's evidence as to the state of the account as "a shambles" in which he could "feel no confidence". Indeed, it was to a significant extent because of this, that he refused AIB relief.

85. Secondly, on the basis that his liabilities were claimed by AIB to be substantially in excess of what he anticipated, Mr Gold justifiably concentrated his investigations by writing to AIB. Not merely did AIB take a long time to come up with any sort of explanation, but, when they did so, the answer had nothing to do with the liability clause. AIB's explanation as to why Mr Gold owed substantially more than he had anticipated was nothing to do with the fact that Mr Gold had assumed liability for all Mr Martin's debts to AIB under the liability clause. The reason why AIB was contending that Mr Gold's liability was much greater than he expected was due to the fact that liability for the 008 account had been transferred from Mr Martin to the Partnership in July 1993, in the circumstances I have explained above (in so far as they are capable of explanation on the basis of the evidence available). Indeed, once one remembers what happened in 1993, and the fact that AIB did not seek to amend its claim until December 1997 to rely on the full effect of the liability clause, that is self-evidently correct. If AIB had appreciated the effect of the liability clause in the 1993 mortgage before 1997, it would have claimed more than £1.7m from Mr Gold in March 1995 and indeed during 1996 and 1997: it would have claimed the sum which it only sought by amendment in December 1997, when it appreciated for the first time the effect of the liability clause.

86. Thirdly, even if, contrary to my view, Mr Gold should have investigated the terms under which he was liable to AIB following receipt of the demand for payment in March 1995, that would only have taken him to the 1993 mortgage. I accept that if he had looked at the 1993 mortgage and if he had been properly advised about its effect, and in particular the effect of the liability clause, that would, on the balance of probabilities, have led him to consider how he came to sign a mortgage with the liability clause in 1993, which in turn could well have led him to the earlier mortgages.

87. However, the problem with that line of argument is that Mincoffs were acting for Mr Gold in connection with AIB's claim by July 1995 at the latest, and continued acting for Mr Gold in connection with AIB's claim until November 1995 (when Mr Gold instructed other solicitors). Yet Mincoffs appear never to have considered the terms of the liability clause in the 1993 mortgage, let alone in the earlier mortgages, and they certainly never drew Mr Gold's attention to the liability clause or its possible effect. Accordingly, it seems to me unattractive for Mincoffs to contend that the effect of the March 1995 demand should have resulted in Mr Gold appreciating the existence and effect of the liability clause in the 1993 mortgage, let alone in the earlier mortgages.

88. In all the circumstances, therefore, I consider that Mr Gold's claim based on the earlier mortgages is not Statute-barred because, even though it would run into problems because of Section 2, it is, as it were, saved by Section 14A.

The Earlier Mortgages: Section 32

89. Section 32 provides a different basis, and one which works in a different way, from Section 14A whereby, if its requirements are satisfied, time can be extended beyond the six year period stipulated in Section 2 (among other sections). Unlike Section 14A, where Section 32 applies, Section 2 is not dis-applied: the beginning of the six year period is suspended. Mr Bonney contends that Section 32 can be relied on in the

present case by Mr Gold, because the effect of the liability clause in the earlier mortgages was concealed by Mr Howard Gold and only came to light in December 1997, when AIB first raised it.

90. Section 32, provides so far as relevant:

"(1) ... [W]here in the case of any action for which a period of limitation is prescribed by this Act ... (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant ... the period of limitation will not begin to run until the plaintiff has discovered the ... concealment ... or could with reasonable diligence have discovered it.

References ... to the defendant include references to the defendant's agent ...

... deliberate commission of a breach of duty in circumstances which it is unlikely to be discovered for some time amount to deliberate concealment of facts involved in that breach of duty.

(5) Section 14A ... shall not apply to any action to which sub-section (1)(b) above applies ..."

91. The effect of the decision of the Court of Appeal in **Brocklesby v Armitage & Guest** [2000] PNLR 33 appears to be that concealment of a fact is deliberate within Section 32 (1)(b), if it arises from an intentional act whether or not the defendant appreciates the legal consequences. Mr Davidson accepts that that is the effect of Brocklesby, and that it is binding on me. It is right to add that he wishes to keep the point open so far as the Court of Appeal is concerned, not least, because as he tells me, the decision in Brocklesby is to be reconsidered in the Court of Appeal in the fairly near future.

92. However, Mr Davidson does not accept on behalf of Mincoffs that, subject to the decision in Brocklesby representing the law, Mr Gold can succeed in an action based on the earlier mortgages in light of Section 32. He contends that there are two separate reasons why Mr Gold should fail in that respect. I can deal with one of the reasons relatively quickly. It involves relying on the contention that Mr Gold *"could with reasonable diligence have discovered the negligence"* more than six years before the action was brought. Mincoffs' case relies on the contention that Mr Gold should reasonably have discovered the existence of the liability clause in the earlier mortgages when he learned from Mr Howard Gold that AIB had refused to release him from his liability to AIB in December 1992. For the reasons I have already given when considering the virtually identical argument in relation to Section 14A, I reject this contention.

93. The other reason Mr Davidson puts forward for rejecting Mr Gold's reliance on Section 32 is that Mr Gold's argument involves wrongly eliding what is deemed to have been deliberately concealed under Section 32(2) with the fact which is treated as having been deliberately concealed under Section 32(1)(b). The argument runs thus. The fact which Mr Gold alleges was deliberately concealed from him for the purposes of Section 32(1)(b) was that the effect of the liability clause was to render Mr Gold liable for any liability which Mr Martin had from time to time to AIB, but it is not that fact, but *"the facts involved in the breach of duty"* which Section 32(2) requires to be treated as deliberately concealed.

94. This argument can be said to involve a fairly narrow construction of the relevant words in Section 32(2); one can see a powerful argument for saying that the rather loose expression *"the facts involved in [the] breach of duty"* extends to the very fact which the negligent adviser ought to have drawn to the attention of the claimant. On the other hand, if that is the effect of Section 32(2), then, particularly if taken together with the decision in Brocklesby, it could be said that the re-wording of what was Section 26 in the Limitation Act 1939 into what is now Section 32 of the 1980 Act effected a far more radical transformation to the law than had been appreciated, or as some might say, had ever been intended. Furthermore, if that is indeed the effect of Section 32, some might wonder whether there was a need for the legislature to introduce Section 14A at all.

95. The point is a difficult one, but it has been considered by Laddie J in **Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg** [2000] Lloyds LRPN 836, where it was held that the wider reading of Section 32(2), advanced by Mr Bonney in this case, was correct.

96. Given that what is at issue (a) is difficult, (b) arises in the context of a section of a statute which itself presents difficulties, (c) has been considered and determined recently by a judge of co-ordinate jurisdiction I think that the appropriate course for me to take, sitting at first instance, is to follow the approach of Laddie J. It is not as if an argument or authority has been presented to me that satisfied me that the recent earlier decision of Laddie J was plainly wrong. To have two conflicting decisions at first instance would

merely add to the uncertainty which already exists. I take comfort from the fact that the present uncertain state of affairs is shortly to be resolved by the Court of Appeal.

The Earlier Mortgages: Fresh Cause of Action in 1993

97. If Mr Gold cannot rely upon Section 14A or Section 32, so far as the earlier mortgages are concerned, Mr Bonney contends on his behalf that he has, in effect, a fresh cause of action in relation to the earlier mortgages, based on Mincoffs' failure to advise him about the existence and effect of the liability clause in the earlier mortgages in or about July 1993. The claim runs thus. If Mincoffs had properly advised Mr Gold when the draft 1993 mortgage with the liability clause was proffered, they would have appreciated that they had been negligent in relation to the earlier mortgages and would have been bound to advise Mr Gold to that effect. Had they so advised, he would not have been barred by the 1980 Act from suing Mincoffs in relation to the earlier mortgages. On this hypothesis, through Mincoffs' negligence in the first half of 1993, Mr Gold lost the right to sue Mincoffs for their negligence in relation to the earlier mortgages. If that contention is correct, then, albeit on the basis of a slightly different set of facts Mr Gold has not lost the right to sue Mincoffs for their failure to advise as to the effect of the earlier mortgages, even if his claim was otherwise Statute-barred.

98. Mr Davidson rightly warns against the court being too easily persuaded by the claimant that he has a fresh caurse of action against his solicitor on the basis that the solicitor failed to advise, at some point after his initial negligence, that he had been negligent. If such an argument were too readily accepted, it would have two unsatisfactory consequences. First, it would enable the provisions of the 1980 Act to be evaded in many cases in an artificial way. Secondly, it would effectively impose on a solicitor some sort of implied general retainer. Accordingly, I would accept that it would be a relatively exceptional case where the court would be prepared to hold that a solicitor's negligence claim that was otherwise Statute-barred could, albeit in a slightly different guise, be resurrected on the basis that, at a time within the limitation period and less than six years before the issue of proceedings, the solicitor failed to advise that he had been negligent. Only if the facts clearly warrant such a conclusion should the court adopt it, in my view.

99. It is clear that a solicitor *"who ... has acted negligently [does not come] under a continuing duty to take care to remind himself of the negligence of which, ex hypothesis, he is unaware*" -- per Oliver J in **Midland Bank Trust Co Ltd v Hett Stubbs and Kemp** [1979] Ch at 403C. It is also true, in my opinion, that the mere fact that, following his negligence and within the limitation period, the solicitor is instructed in the same matter by the same client, does not itself put the solicitor under a duty to discover, or advise as to, his negligence on the earlier occasion. As was said by Oliver J in **Midland** at 403A, the Court must be careful of imposing a duty on a solicitor which involves going beyond his specific instruction. Nonetheless, if the subsequent instruction was also negligently implemented by the solicitor, and, this later negligence concealed the earlier negligence then, subject to normal questions such as causation and remoteness, if the earlier negligence only comes to light outside the limitation period, the loss of the right to sue in respect of it can properly be the subject of a claim based on the later negligence. I derive support for this proposition from **Costa v Georgiou** (2nd May 1984, CA Transcript 15G-17D, 18H-19G). See also **Liverpool** [2000] Lloyds LRPN 836 at paragraphs 11 and 27.

100. In the present case, during 1992 and 1993, Mr Gold sought and obtained the advice of Mincoffs in connection with the consolidation of the Partnership's liabilities to AIB, and, in particular, in connection with terms and signing of the 1993 mortgage. It is common ground that Mincoffs ought to have considered, and advised on the effect of, the liability clause in the draft 1993 mortgage. Had they done so, they would have appreciated that it imposed a far greater liability on Mr Gold than either he or Mincoffs intended. They would have advised Mr Gold about this and could have done so up to the time he executed the 1993 mortgage, namely in July 1993, less than six years before the issue of these proceedings.

101. In my judgment, if they had appreciated the effect of the liability clause in the draft 1993 mortgage, it would have led Mincoffs inexorably to the terms of the earlier mortgages, and that would equally inevitably have led them to appreciate that the earlier mortgages contained the liability clause, which was already binding on Mr Gold. This would have been achieved in one of two ways. First, Mincoffs would have advised Mr Gold that he ought to approach AIB with a view to amending the liability clause in the draft, and that would have, or at least ought to have, led them to consider the then-current extent of Mr

Gold's present liability, i.e. under the earlier mortgages. Alternatively, if they had not been as efficient as they might have been, Mincoffs would have approached AIB objecting to the terms of the liability clause, in the draft 1993 Mortgage. In that event, from the evidence I have heard, AIB would have been reluctant to amend that clause, because, although it appears that they did not appreciate its full effect, it was in their standard form, and they were not anxious to depart from their standard form. That would have led Mincoffs, either off their own bat following negotiations, or (more likely) because their attention was drawn to it expressly by AIB, to the liability clause in the earlier mortgages, which represented Mr Gold's liability at that time.

102. In these circumstances, if Mincoffs had not been negligent in failing to advise Mr Gold as to the effect of the liability clause in the 1993 mortgage, before he signed it, they would have advised him as to the existence and effect of the liability clauses in the earlier mortgages. This would inevitably have required them to have advised Mr Gold that they had been negligent in connection with the earlier mortgages, and that he should seek separate legal advice, which would have led him to be able to bring proceedings against Mincoffs based on their negligence under the earlier mortgages. That follows, to my mind as a matter of law. It is also clear from paragraph 13.04 of the Law Society's Guide to the Professional Conduct of Solicitors (1990 Edition) which was then in force. This, I accept, is a somewhat indirect conclusion, but in my view, it is correct.

103. It may be said that this is a slightly different type of answer to Mincoffs' reliance on the 1980 Act, from the answers found in Section 14A and Section 32. The effect of those two sections, if they apply, is simply to extend the time within which Mr Gold can sue on the earlier mortgages. The effect of the argument I am currently considering is to give Mr Gold a new cause of action based on the earlier mortgages, albeit somewhat indirectly. It may be said that, unlike the other two answers, this answer involves a slightly different approach to assessing the damages suffered by Mr Gold as a result of having been entered to the earlier mortgages which contained the liability clauses. It is not a simple claim based on the loss flowing from his liability which arose under the liability clause in the earlier mortgages; it is more the loss of the opportunity to sue Mincoffs in 1993.

104. However, on closer analysis, it seems to me that (subject to a possible diffidence in relation to contributory negligence) there is no distinction in practice whether Mr Gold succeeds in defeating Mincoffs' limitation point on Sections 14A or 32, on the one hand, or, on the other hand, on this basis. If he succeeds on this basis, then, as a consequence of Mincoffs not advising him properly as to the effect of the liability clauses in the earlier mortgages, Mr Gold lost not merely the opportunity to sue Mincoffs for any loss he had suffered arising from that negligence, but he also lost the opportunity to draw a line under his liability and/or not to enter into the 1993 mortgage so long as it contained the liability clause. Accordingly, once one "adds" to Mr Gold's claim that he was not properly advised in 1993 as to the effect of the liability clause in the earlier mortgages, his further claim that he was not properly advised as to entering into the 1993 mortgage with the liability clause, it seems to me that the damages he can claim are effectively the same as if he succeeds on Section 14A or 32.

The Earlier Mortgages: Taking Advantage of Own Wrong

105. Given that I have found for Mr Gold under Section 14A, Section 32 and the fresh cause of action in July 1993, I need not deal with Mr Bonney's final argument on the limitation issue, but I shall do so as the point was fully argued and the case may go further. In effect, he contends that, as a matter of law, it is not open to Mincoffs to rely on the 1980 Act to defeat Mr Gold's claim for damages based on the earlier mortgages, because to do so would involve relying on Mincoffs' own wrong. This contention is tied up with Mincoffs' argument that Mr Gold suffered no damage, despite Mincoffs negligence in 1993, because, when he entered into the 1993 mortgage with the liability clause, he was already liable to the same extent by virtue of the liability clause in the earlier mortgages. Mr Gold contends that it is wrong in principle for Mincoffs to be able to rely upon that argument in respect of their negligence in 1993, and then to turn round and rely on limitation to defeat any claim brought against them in relation to their negligence in failing to advise on the earlier mortgages.

106. There is no doubt but that there is a principle (whose nature and extent may be a little obscure) that a person cannot rely on his own wrong -- see, for instances **Cheall v APEX** [1983] 2 AC 180 at 189F-G and

Alghussein v Eton College [1988] 1 WLR at 587 at 591D-E, 594C-D, 595G-H. Mr Bonney argues that it should apply here.

107. It is an attractive argument, but I reject it. The 1980 Act provides a statutory code on which it is open to any defendant to seek to rely, and, if a defendant can show that the facts establish that a claim against him is Statute-barred, then it is a point he is entitled to take, because the legislature has said so. To my mind, there is simply no room to imply a term into the 1980 Act that a defendant otherwise entitled to rely upon its provision is not so entitled because he would be taking advantage of his own wrong.

108. There are, of course, circumstances in which the court has set its face against a person being able to invoke a statutory provision as what is quaintly called "*an engine of fraud*". Indeed, that was the basis upon which equity developed the doctrine of part performance in relation to what was Section 40 of the Law of Property Act 1925 (now re-enacted in a very different way in Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989). The way in which Mincoffs wish to rely on Section 2 in the circumstances of the present case does not appear to me to be invoking the 1980 Act as an engine of fraud, or whatever the equivalent modern expression may be.

109. Further, as with many points of this sort, its forcefulness depends on how one looks at the matter. Given that Mr Gold's obligation to AIB arises directly from the 1993 mortgage, it is primarily on the basis of that mortgage that he initially brought his claim against Mincoffs, and, in light of that, one can well see how he feels aggrieved that Mincoffs, are, in a sense, relying on their own wrong. However, an equally appropriate way of looking at the matter is that his liability under the liability clause really goes back to the earlier mortgages, and any claim against Mincoffs arising out of those mortgages would not be Statute-barred (subject to other arguments raised by Mr Gold). In those circumstances, the fact that AIB wanted to restructure the mortgages in 1993, and did so on precisely the same terms, so far as the liability clause is concerned, means, far from it being unfair that Mincoffs can rely upon limitation so far as the earlier mortgages are concerned, it is Mr Gold's adventitious good fortune that AIB's desire to restructure the documentation and the debt has given him a cause of action which is not barred by the 1980 Act.

110. Further, Mincoffs are not really relying on their own wrong at all. In so far as Mr Gold's claim is brought on the 1993 mortgage, Mincoffs are not denying liability. Even in relation to damages, they are not relying on their own wrong, in the sense of relying on their own earlier failure to advise Mr Gold. They are relying on the fact that he entered into the earlier mortgages which contained the liability clause. Even where its application is appropriate, the principle that a person cannot rely on his own wrong is a narrow one -- see for instance **Re C L Nye Ltd** [1971] Ch. 442 .

The Position so far

111. In my view, for the reasons so far discussed, Mr Gold is able to claim damages for Mincoffs' negligence in failing to advise him as to his liabilities under the earlier mortgages notwithstanding the fact that his cause of action under Section 2 of the 1980 Act arose more than six years before these proceedings were issued.

112. As I see it, if that is right, then, subject to the General points relating to damages which I consider after the next two sections of this judgment, it may be that no further problems arise. At least as I understand Mr Davidson's argument, there was no suggestion that such damages should be assessed on the loss of a chance basis. If Mr Gold had been properly advised by Mincoffs in relation to each of the earlier mortgages, he would not have been prepared to sign them in the proffered form, so as to take on liability for all Mr Martin's debts to AIB. If Mr Gold had appreciated from the start (i.e. from 1984) that AIB were seeking to make him liable for all Mr Martin's debts, he would no doubt have insisted that his liability be restricted to the debts of the Partnership. It is hard to believe that AIB would have even put up token resistance to that proposal. It is normal for a bank to insist in partners being liable jointly and severally for the whole of the partnership's debts to the bank. It is abnormal, indeed unreasonable, for the bank to insist on each partner being liable for his co-partner's debts to the bank in any capacity, save in unusual circumstances. There were no such unusual circumstances in 1984.

113. If that is right, and I am correct in concluding that, for the various reasons I have considered, Mr Gold does not have limitation problems in respect of his claims for negligence in relation to the earlier mortgages, then it may, strictly speaking, be unnecessary to consider the extent and basis of Mincoffs' liability for

damages in relation to the their failure to advise him on the effect of the liability clause in the 1993 mortgage. However, in case I am wrong on that, or Mr Gold is Statute-barred from claiming damages from Mincoffs in relation to their failure to advise him properly on the earlier mortgages, it is necessary to consider what guidance I can give in relation to the assessment of damages for Mincoffs' failure to advise Mr Gold as to the effect of the liability clause as contained in the 1993 mortgage.

The 1993 Mortgage: Do Mincoffs have a Complete Defence?

114. I turn now to the questions which arise in relation to Mr Gold's claim based on Mincoffs' failing to advise him in relation to the inclusion of the liability clause in the 1993 mortgage. Mr Davidson's contention on behalf of Mincoffs is that, although his clients were plainly negligent in their failure to advise Mr Gold as to the effect of the liability clause in the 1993 mortgage, Mr Gold suffered no loss as a result, because he was already liable for Mr Martin's debts under the liability clause contained in the earlier mortgages.

115. In my judgment, it is not enough for Mincoffs to say that, because Mr Gold was already liable to AIB for all Mr Martin's debts to AIB, as the liability clause was contained in the earlier mortgages, he cannot have suffered any damage by signing a new replacement document, namely the 1993 mortgage, with the liability clause, which had the same effect. One may, of course, conclude that Mincoffs' failure to advise Mr Gold about the effect of the liability clause in the draft 1993 mortgage caused him no damage, but the point cannot be dealt with as simply as Mr Davidson suggests.

116. In my view, the correct approach to the issue, both as a matter of common sense and as a matter of basic legal principle, must be to ask what would have happened if Mincoffs had not been negligent, i.e. to ask oneself what would have happened if, some time in June or July 1993, before the 1993 mortgage was signed, Mincoffs had advised Mr Gold that he would be signing a document which rendered him liable for all Mr Martin's debts from time to time to AIB. Either he would have nonetheless signed the 1993 mortgage or would have refused to sign the 1993 mortgage. In the former event, he would have no cause of action in relation to the 1993 mortgage. In the latter event, he would have been held to the liability clauses in the earlier mortgages, (unless AIB had agreed to release him in any way) in which case he would again have no cause of action.

117. In my judgment, therefore, the proper approach to be adopted by the Court in a case such as this is tolerably clear. It must ask itself what would have happened if the negligent solicitor had given the advice which he ought to have given.

118. Once one concludes, as I have done, that any claim based on the failure of Mincoffs to advise as to the effect of the liability clause in the 1993 Mortgage is to be based on what would have happened if they had given the right advice, it seems to me that one proceeds as follows. If the claimant, Mr Gold, contends that he would have acted differently from the way he did act, then the onus is on him to establish that contention, and he must discharge that onus on the normal civil basis, namely the balance of probability. On the other hand, in so far as the claimant's case involves alleging that third parties would have acted in a certain way, the approach of the Court is a little more subtle. It has first to consider, on the evidence, whether there is a real prospect of the third party having acted as the claimant contends. If there is no real prospect, the claimant fails. If there is a very high prospect, then the claimant succeeds in full. If there is a real possibility, falling between the two extremes, then damages are assessed on the "*loss of a chance*" basis. That this is the correct analysis appears to me to follow from all three judgments in **Allied Maples Group Ltd v Simmons & Simmons** [1995] 1 WLR 1602.

119. The only real difference between the parties on this issue concerns the correct conclusion if the Court is of the view that the claimant has established a greater than 50% chance, but not an overwhelming probability, that a third party would have acted in a certain way. Mr Davidson contends that, in so far as the award of damages is dependent on the third party having acted in the way in which the claimant contends, damages must be calculated on a loss of a chance basis (albeit that the chance will be greater than 50%) whereas Mr Bonney contends that, once the claimant gets over 50%, as it were, he should not suffer any discount at all.

120. In my clear view, Mr Davidson's submission is to be preferred. It appears to me that the whole thrust of the reasoning in Allied Maples supports it, and the only reason that many passages in the judgments are directed to cases where the chance is less, rather than more, than 50% is because of the facts in that case. I

consider that Mr Bonney's submission would mean that there was an illogical and unfair inconsistency of approach to the assessment of damages where the award is dependent on the actions of a third party. I also consider that his contention is inconsistent with the decision of the Court of Appeal in **Kitchen v Royal Air Force Association** [1958] 1 WLR 563, approved in Allied Maples, where the plaintiff received an award of damages which self-evidently was based on the proposition that she stood around a two-thirds chance of success (see at [1995] 1 WLR 1611D). Further, the observations of Lord Reid in **Davies v Taylor** [1974] AC 207, which were cited in support of his views by Stuart-Smith LJ at [1995] 1 WLR 1613H to 1614C, are impossible satisfactorily to marry up with Mr Bonney's submission. In robust terms, he rejected the contention that one should *"apply ... two different rules to the two cases", t*he cases in question being where the plaintiff had a 40% chance of success and where the plaintiff had a 60% chance of success. (In this connection, see **Oakes v Hopcroft** [2000] Lloyds LRPN 946.)

The 1993 Mortgage: The Calculation of Mr Gold's Loss of a Chance

121. What would have happened if Mincoffs had told Mr Gold that the draft 1993 mortgage contained the liability clause? I have no hesitation in concluding that Mr Gold would have done his best, and indeed Mincoffs would have done their best, to persuade AIB to reword the 1993 mortgage, or to restructure the whole arrangement between AIB, Mr Gold and Mr Martin, so as to avoid Mr Gold taking on any liability (or, more accurately, continuing his liability) other than for his own debts or the Partnership debts to AIB. It is difficult to know how AIB would have been approached in tactical terms, because I think it more likely than not that, having appreciated the effect of the liability clause in the draft 1993 mortgage, Mincoffs would have gone back to the earlier mortgages, and therefore would have appreciated that Mr Gold was already "*on the hook*".

122. I suspect that Mincoffs would have approached AIB on an "*open*" basis, explaining that they now appreciated the effect of the liability clause in the earlier mortgages, while stressing that it was never the intention of AIB or Mr Gold, or indeed Mr Martin, that Mr Gold be liable for all Mr Martin's debts, and strongly representing to AIB that either the draft 1993 mortgage should be reworded or that the whole debt arrangement should be restructured.

123. Accordingly, in so far as his case involves asserting what Mr Gold would have done, I am satisfied, indeed easily satisfied, on the balance of probabilities, that in1993 he would indeed have pressed AIB very hard to enter into a fresh agreement with him, which limited his liability, and in particular did not continue to expose him to liability from any of Mr Martin's debts. I think he also would have appreciated that he was vulnerable because he had entered into the earlier mortgages which contained the liability clause, but, even in that respect, he would have felt on tolerably strong moral ground, on the basis that neither he or AIB had intended him to be liable under any of the earlier mortgages for Mr Martin's debts.

124. While I am clear as to Mr Gold's likely attitude, I find it far more difficult to assess the likely views of AIB, and the likely outcome, or even the quantification of the prospects of the likely outcome, of these notional negotiations. Mr Davidson advances a number of reasons why AIB could have taken a very tough stance. First, they had the benefit of the earlier mortgages, each of which contained the liability clause, and therefore each of which imposed a liability on Mr Gold to meet any obligation Mr Martin had to AIB. On the other hand, it seems pretty clear from the evidence of Mr Anderson, and indeed from the fact that AIB only amended its claim against Mr Gold in December 1997 to reflect the full extent of the liability clause, that AIB would have accepted that it was not intended that Mr Gold should be liable for Mr Martin's debts to AIB. However, there is nothing to suggest that the matter was directly discussed (and accordingly the prospects of a claim for rectification on the part of Mr Gold would have seemed very speculative). It is also relevant to bear in mind that Mincoffs might have managed to negotiate a rewording of the 1993 mortgage or a restructuring of the whole arrangement with AIB, without drawing AIB's attention to the fact that Mr Gold was already "*on the hook".*

125. Secondly, it is clear that, by July 1993, AIB were concerned about the state of Mr Martin's indebtedness. Accordingly, it can be said with some force that, if they had appreciated that, albeit inadvertently, Mr Gold was liable for Mr Martin's debts, they would have been particularly reluctant to release him. On the other hand, they had never regarded Mr Gold as being, in effect, a guarantor of Mr Martin's liabilities, and it is not as if Mr Gold had done anything to lead AIB to believe that he was effectively liable for Mr Martin's

debts. Further, as at 1993, AIB's worries about Mr Martin's debts do not appear to have been very great, although they were significant. The shortfall between his debts and the value of the properties to secure his debts (as opposed to the Partnership debts and properties), on the evidence, did exist but it was not very substantial.

126. Thirdly, there is evidence from MR Anderson that AIB would have been reluctant to alter the standard terms of any mortgage, and therefore (although they did not appreciate its full effect where members of a partnership signed) the liability clause. However, while a variation to a standard form mortgage would have required the proposed amendment to be considered by a member of the legal department at the head office of AIB, it appeared to me from Mr Anderson's evidence that this was something which did happen from time to time. Further, it is not fanciful to suggest that, if it were not possible to change the documentation, but AIB were otherwise prepared to assist Mr Gold, they may have entered into an arrangement whereby Mr Gold effectively took on liability for half the debts of the Partnership, Mr Martin took on liability for the other half of the debts, and the properties of the Partnership were divided between them, so as to be effectively apportioned between the apportioned liability. Indeed, that is precisely what was done in relation to the Shaw partnership.

127. Fourthly, Mincoffs rely on the fact that Mr Gold put up No. 37 as security for Mr Martin's debts, signed the facility letter in February 1993, by which he effectively indicated that he was accepting liability for a substantial part of Mr Martin's debts, (namely what was on the 008 Account) and did not object to rents which were Partnership property being used to pay Mr Martin's debts to AIB. Mr Davidson argues that Mr Gold would have thereby made it much more difficult for himself to persuade AIB that he should not be liable for all Mr Martin's liabilities. In effect, AIB might have regarded with some scepticism his contention that there was a real differentiation between Mr Martin's properties and liabilities and the properties and liabilities of the Partnership. That is particularly significant, because, as I have mentioned, Mr Gold relies on the fact that AIB were prepared to agree to divide the liabilities and security of the Shaw partnership between Mr Shaw and Mr Martin individually in 1993, thereby enabling Mr Shaw to achieve precisely the result which, had he been properly advised, Mr Gold says that he would have been able to achieve, but there were no factors relating to Mr Shaw such as those relied on by Mr Davidson. These are factors which would very probably have weighed with AIB, but they are not to my mind decisive although they are certainly relevant to the assessment of Mr Gold's prospects of success in his hypothetical negotiations.

128. Fifthly, Mincoffs are able to point to the fact that AIB were not prepared to release Mr Gold from liability in December 1992. There is something in that point, in that it can be said to indicate that AIB regarded Mr Gold's covenant as of real value over and above the covenant of Mr Martin and the security of the Partnership properties. Nonetheless, it seems to me that there is a considerable difference between releasing A from the joint liability of A and B, on the one hand, and, on the other hand, changing the liability, so that A and B are each separately liable for half the total sum for which they were previously jointly liable. Indeed, given that AIB were principally concerned about the state of Mr Martin's account, one can well see how they would have been reluctant to release Mr Gold from liability for a substantial sum for which Mr Martin was also liable, while they may nonetheless have been prepared to accept an arrangement whereby Mr Martin's total liability was reduced (albeit that he would become solely liable for half the Partnership debt).

129. Bearing in mind all these factors, I am satisfied that this is a case where the claimant easily crosses the threshold of establishing that there was a real prospect that that which it argues for would have occurred, namely that some sort of arrangement that had been entered into with AIB in 1993 whereby Mr Gold ceased to be liable for Mr Martin's debts, at least in so far as those debts were not debts of the Partnership. On the other hand, I am equally clearly satisfied that this is not a case where damages can be assessed in the confident assumption that AIB would have agreed to some sort of arrangement, acceptable to Mr Gold, which would have resulted in him no longer being liable for the debts of Mr Martin to AIB.

130. It is not possible, at least in this case, to explain in mathematical terms how one quantifies the extent of the loss of a chance. Particularly given that AIB had never appreciated that Mr Gold was in fact liable for all Mr Martin's debts, and Mr Gold had behaved entirely properly to AIB, I think that Mr Gold's prospects of a successful negotiation would be rather better than 50%. However, I do not think that they would have been

much better than 50% because of AIB's concerns about Mr Martin's liability, and because of Mr Gold having rather rashly signed the facility letter in February 1993, coupled with the fact that AIB may well have mistakenly thought that Mr Howard Gold had accepted that Mr Gold was liable for the 008 Account from about August 1992. I would put Mr Gold's prospects of successfully negotiating an arrangement with the Bank in 1993 so that he ceased to be liable for Mr Martin's liabilities to AIB at 55%.

Damages: Mr Gold's Loss of Interest in the Partnership

131. In my judgment, Mr Gold is entitled to an enquiry under this head if he can show that he has a real prospect of establishing a loss under this head. His case has two prongs. First, had he been properly advised on the earlier mortgages, he would never have entered into the liability clause, and matters would therefore have proceeded from the inception on the basis that he was only liable for the Partnership debts, and not for Mr Martin's separate debts. In the alternative, his case is that, if he is forced to rely on the failure to advise him in relation to the 1993 mortgage, he would have put an end to the Partnership at that time, as part of the restructuring arrangement agreed with AIB.

132. It appears to me clear that, if his claim is brought on the latter basis (in which case it is to be discounted by 45% in view of the contents of the previous section of this judgment) the Partnership would have to be valued at around July 1993. That is when I believe that it would have been dissolved. As I see it, the likelihood is that, if Mr Gold had been advised in 1993 as to the effect of the liability clause and had negotiated his way out of responsibility for Mr Martin's debts, he would have discovered AIB's concerns about Mr Marin, and indeed Mr Martin's difficulties at the time. I think that, if he had negotiated successfully with AIB, the arrangement would have probably have been the same as that negotiated in relation to the Shaw partnership. That would have left Mr Gold with half the assets and half the liabilities of the Partnership. He then would have had no relationship with Mr Martin and no other partner in Newcastle. As someone who had (albeit reluctantly) been prepared to pull out in 1992, I think that, in these circumstances, he would have sold up in 1993.

133. Unless guilty of an oversight, I was not specifically addressed on the appropriate date of valuation if Mr Gold's case is based upon Mincoffs' failure to advise him in connection with the liability clause in the earlier mortgages. It seems to me if that were the basis of his claim, his case may well be either that the loss under this head should be measured as at July 1993, when matters would have been brought to a head in any event (given that it was Mr Martin's difficulties at around that time which precipitated AIB's desire for restructuring) or that the Partnership would have been brought to an end in about March 1995, when AIB called in Mr Martin's loans, and presumably would have called in his loans in any event, bearing in mind Mr Martin's difficulties. In my view, as at present advised, the latter date, March 1995, is the more likely date to take on this hypothesis.

134. On the evidence so far available, it appears to me that not merely that Mr Gold would have a real prospect of persuading the Court that the Partnership had significant net worth in July 1993, but that it is more likely than not that the Partnership had significant worth at that time. However, it should be emphasised that I am not deciding that issue at this stage, and that, at any enquiry, it will be a matter for the Master, on the evidence and arguments then put forward to him, to decide whether there was equity in the Partnership, and if so how much it was.

135. I heard no first hand evidence on this issue, but it appears to me that virtually all the contemporary documentation points the same way. Most importantly, on 30th September 1992, a firm of chartered surveyors, Messrs. Brodies, on the instructions of AIB, valued all the properties charged to AIB on an open market basis and on a forced sale basis, and concluded that the forced sale value of the properties then owned by the Partnership was over £1.8m, which was around twice the amount which the Partnership had borrowed from AIB at that time. I accept that, on the evidence I have heard, it is likely property prices in Newcastle fell between September 1992 and July 1993. However, I think it nonetheless probable on the evidence that there was still substantial equity in the Partnership by July 1993. In this connection, I note that AIB were prepared to proceed on the basis that Brodies' valuations were still reliable in July 1993. The only contemporary evidence the other way is an internal AIB note which is, in some parts, inaccurate, and, so far as valuations are concerned, it is hard to understand.

136. If the correct date to take is some time in 1995, the evidence of value is far more sparse. However, bearing in mind that the Partnership borrowings did not change much between 1993 and 1995 (save for the accrual of some interest, I think) it is hard to believe, at least on the evidence to which I have been taken, that there is not at least a real prospect of establishing that there was equity in the Partnership at that time. Indeed, the evidence which I heard suggested that, between 1993 and 1995, the property market in Newcastle had not significantly deteriorated.

137. Mr Davidson points out, with no little force, that the fact that Mr Gold was prepared to "walk away" in December 1992, and only did not do so because AIB refused to release him, is cogent evidence to support the contention that the Partnership had no substantial value. I quite accept that it is a factor which calls into question the net value which the Brodies' valuations would appear to ascribe to the Partnership assets. I also accept that it provides fertile cross-examination for anyone who seeks to ascribe a high net value to the Partnership.

138. It is also understandable that Mr Davidson suggests that Mr Gold regarded this point as being of sufficient concern to cause him to invent the fact that he was expecting some payment (albeit a comparatively modest payment) from Mr Martin for giving up his share in the Partnership. Mr Gold suggested in his evidence that there had been some sort of agreement with Mr Martin that, if Mr Gold gave up his share in the Partnership, Mr Martin would repay him the sum that he had put into the Partnership, approximately £59,000. Until he gave that evidence, there was no suggestion in any previous witness statement, transcript of cross-examination before Jacob J, or other documentation that any such agreement had been made. I do not think that Mr Gold was lying, in the sense of deliberately misleading the Court, but I do think that he persuaded himself that there was some such agreement, whereas in fact there was not. Indeed, although he initially suggested that there was an agreement to that effect, it became increasingly clear to me as his cross examination proceeded that Mr Gold was not really saying that any such payment had been agreed: it was more a question of what he hoped would happen. It may be that he or Mr Howard Gold had vague discussions about the matter with Mr Martin: if so, in his evidence, he elevated these discussions to an agreement.

139. Of more assistance to Mr Gold on this aspect in his evidence that he was reluctant to leave the Partnership with Mr Martin, and that it was only his brother's insistence which caused him to instruct Mr Howard Gold to ask AIB to release him. Although his reluctance may have been rather less substantial than Mr Gold suggested in his evidence before me, I am satisfied that, left to his own devices in 1992 and indeed 1993, he would definitely have preferred to remain in the Partnership, because he thought that it was and would be profitable. It was only because of Mr Howard Gold's virtual insistence that he seek to get out of the Partnership, that Mr Gold did indeed instruct his brother to ask AIB to release him on terms that he left the Partnership.

140. In these circumstances, given all that I am asked to decide is whether there is a real prospect of Mr Gold establishing that the Partnership had value in 1993 or 1995, and I am so satisfied, this is an issue which should go to enquiry.

Damages: Mr Gold's Share in the Partnership

141. As I have mentioned, when the Partnership started in around May 1984, the 60% share not held by Mr Martin was split 35:25 as between Mrs Gold and Mr Gold. Each set of annual accounts prepared for the Partnership, signed by all three apparent partners, clearly indicated that that situation continued. However, Mr Gold's case is that, in 1985 or 1986, he effectively agreed with Mrs Gold that he would acquire her share of the Partnership. On that basis, to the extent that he is entitled to claim any loss of interest in the Partnership against Mincoffs, Mr Bonney contends on his behalf that such a loss should be calculated on the assumption that he beneficially owned 60% of the net Partnership assets.

142. Mr Davidson argues that, in light of the unequivocal effect of the contents of the annual accounts of the Partnership, and in light of the fact that Mr Gold and Mrs Gold each made it clear in cross examination that the accounts were not intended to mislead and represented the truth, Mrs Gold retained her 35% interest, and that accordingly, in so far as Mr Gold is entitled to recover any damages in respect of his loss of interest in the Partnership, he is limited to 25%. In this connection, Mr Davidson also relies upon the fact,

that throughout the existence of the Partnership, there was at least one Partnership account with AIB in the names of Mr Martin, Mr Gold and Mrs Gold.

143. So far as the single bank account is concerned, it was opened at a time when Mrs Gold was a partner on any view, and the failure to delete her name from the account, at the time she dropped out of the Partnership (as she did so) is not very hard to understand even if Mrs Gold ceased to be a partner. The account in question can be contrasted with the various accounts which were opened with the Bank and Finance thereafter, all of which were in the names of Mr Martin and Mr Gold alone. However, even by 1989 Mrs Gold was still being sent bank statements in respect of the accounts in question.

144. There is evidence in this case which could be said to point to the fact, well before 1990, Mrs Gold had no effective interest in the Partnership whatever, and that the only partners were Mr Gold and Mr Martin. First, all the paperwork, whether formal documents such as mortgages or conveyances, or informal documents, such as letters or notes of their meetings, strongly suggest that there were two partners, Mr Martin and Mr Gold. If Mrs Gold had been a partner, one would have expected to find her name on at least some of the voluminous documents which came into existence after 1986 in relation to the Partnership, if she had any interest in it. However, against that, it is clear that, even when Mrs Gold was on any view a partner, properties were purchased and mortgaged in the names of Mr Martin and Mr Gold alone.

145. There is also a case for saying that Mr Howard Gold's attitude and advice appear to have proceeded on the basis that his wife was not a partner. Thus, when he advised Mr Gold to put an end to his partnership with Mr Martin, that advice seems to have been given on the basis that the only partners were Mr Gold and Mr Martin. If the third partner had been a stranger to Mr Howard Gold, it would not perhaps be particularly remarkable that there was no apparent reference to that third partner in Mr Howard Gold's negotiations with AIB or in his discussions with his brother, Mr Gold. However given that the alleged third partner in the Partnership was Mr Howard Gold's wife, it can be said to be little surprising if the desirability of his wife leaving the Partnership had not been a significant factor which was raised between him and his brother. Particularly as Mrs Gold did not need the consent of AIB to pull out of the Partnership (because she had no liability under any of the mortgages) one might have thought that Mr Howard Gold would at least have insisted on his wife leaving the Partnership, whether or not his brother, Mr Gold, was able to do so. However, Mr Howard Gold may not have been too concerned about his wife's position, as opposed to that of Mr Gold, as she had no liability to AIB at all.

146. Of course, I did not hear from Mr Howard Gold, because Mr Davidson decided not to call him. The fact that he was not called is not as significant a factor as it would be in most cases. This is partly because his evidence in general would not have been of great relevance, given that negligence is admitted, and partly because the extraordinarily difficult position in which he would find himself as a witness, effectively giving evidence against his brother. Nonetheless, I do have the evidence of Mr Gold, who (subject to the somewhat unsatisfactory evidence he gave in relation to the idea that Mr Martin would repay him his initial investment in the Partnership if he had been released by AIB) appeared to me to be a reasonably reliable witness, as well as Mrs Gold, whose honesty is not in doubt.

147. The evidence of Mr Gold and Mrs Gold, when faced with the contents of the annual accounts, was confused. On the one hand, they were at pains to emphasise that the contents of the annual accounts were true and were not intended to deceive anyone. On the other hand they each said that Mrs Gold had effectively transferred her interest in the Partnership to Mr Gold some time in 1985 or 1986. In particular, Mrs Gold said that, she had anticipated receiving from Mr Gold a sum equal to her initial investment in the Partnership.

148. What I think happened was this. Mrs Gold was initially a 35% partner, partly because she and her husband thought it was best that she, rather than Mr Howard Gold, should be the third partner. She was also a party because it was anticipated that she would be involved in the activities of the Partnership, at least to the extent of carrying out some interior decorating and design work to some of the properties acquired form time to time by the Partnership. However, it soon became clear to her that she could not work with Mr Martin, and therefore any practical involvement she had with the Partnership soon ended.

149. Neither Mr Gold or Mrs Gold could remember any specific conversation to that effect, but they both said that they understood or agreed that, as between them, Mrs Gold would cease to have any beneficial interest in the Partnership, and that Mr Gold would effectively take over her interest. Such a conversation would have taken place around fifteen years ago, and could subsequently have been forgotten. Bearing in mind his credibility has been challenged, it is to Mr Gold's credit that he did not seek to invent such a conversation.

150. On the other hand, I have seen opinions of Mr Ainger provided to Mincoffs in July and October 1995 (in respect to which privilege has been waived for reasons which are not germane) and they record the fact that Mrs Gold was a 35% partner, without suggesting that she ceased to be a partner. Further, the statement of Mr Howard Gold in relation to the proceedings before Jacob J (which has been tendered as hearsay evidence on behalf of Mr Gold) does not refer to his wife ceasing to be a partner, although he does refer to the fact that she would arrange internal furnishing and that the "*working* relationship did not last very long" (emphasis added).

151. The fact that properties and borrowings were purchased in the names of Mr Gold and Mr Martin alone is not of particular assistance to Mr Gold's argument that Mrs Gold had no interest, because it is clear from the evidence that this modus operandi was under way from the start, when Mrs Gold was a partner on any view. Further, I note that, in one of his Opinions, Mr Ainger clearly assumed that properties purchased in the name of Mr Martin and Mr Gold alone were intended to be Partnership property, and that accordingly Mrs Gold would have, in effect, a 35% interest in the proceeds of sale.

152. I have reached the conclusion that Mr Gold had a 25% interest in the Partnership. The following factors, particularly when taken together, lead me to that conclusion:

(1) Mrs Gold initially had a 35% interest;

(2) Mrs Gold signed each set of annual accounts;

(3) each set of annual accounts signed by Mr Gold and Mrs Gold clearly showed that Mrs Gold retained a 35% interest;

(4) Mr Gold and Mrs Gold accepted that the annual accounts were intended to be accurate, and indeed that they were accurate;

(5) there is no direct evidence from Mr Gold, Mrs Gold or any document of any agreement having actually been made between them that Mrs Gold's interest would in some way become vested in Mr Gold;

(6) there was an active Bank account in the name of the Partnership, including Mrs Gold, and copies of statements were sent to Mrs Gold, at least until 1989;

(7) there is no suggestion in any of the evidence before Jacob J that Mrs Gold had given up her 35% interest to Mr Gold;

(8) Mr Ainger, who was instructed by Mincoffs, appears in 1995 to have been under the impression that Mrs Gold was still a 35% partner;

(9) the unsatisfactory and vague evidence from Mr Gold and from Mrs Gold as to the existence of an agreement between them;

(10) the absence of any indication of an intention to pay, let alone of any payment, by Mr Gold to Mrs Gold for her interest;

(11) although Mrs Gold did refer to leaving the Partnership, it seemed to me that she was directing her mind more to her active involvement than to her financial interest.

153. Accordingly, I conclude that Mrs Gold retained her 35% beneficial interest in the Partnership, and that Mr Gold's beneficial interest was limited to 25%.

Damages: Loss of No. 37

154. Mr Gold, it may be recalled, charged No. 37, which was his own property given by his father, as security to AIB for additional borrowing of Mr Martin, on his own account, in relation to Ascot House. Because Mr Martin owed AIB so much money in the end, and AIB retained No. 37 as security for his borrowings, they effectively obtained possession of No. 37, and Mr Gold effectively lost it.

155. Mr Gold contends that he is entitled to damages under this head against Mincoffs, who ought to have advised him in 1991, when AIB released Ascot House, to ask AIB to release No. 37. The strength of this point is underlined by the fact that Mr Howard Gold had proffered the property he had been given by his

father, No. 3, to AIB as security for Mr Martin's borrowings, and he successfully asked AIB to release No. 3 as security at that time.

156. In my judgment, this head of breach of duty of care is made out, and the claim for damages is in principle maintainable and is not Statute-barred. Mr Howard Gold knew that No. 37, like No. 3, had been proffered as security to help Mr Martin in connection with his borrowings on Ascot House. Mr Howard Gold had offered No. 3 on the same basis, and had appreciated that he could reasonably ask AIB to release No. 3 when it released Ascot House. Although it can be said to be advice of a more commercial nature than one might frequently expect of a solicitor, it seems to me that, given that Mr Howard Gold was conducting negotiations with AIB from time to time on behalf of his brother, he ought to have advised Mr Gold of the appropriate course in relation to No. 37 in 1991. After all, he knew that Ascot House was being released, because he was acting in the matter, and he also knew that Mr Gold was unaware of that. I think it is very likely indeed that AIB would have released No. 37 in 1991 in the same way as they released No. 3. Indeed, (given that they did not appreciate the full effect of the liability clause in the earlier mortgages) it is hard to think why AIB would have been prepared to release No. 3 for Mr Howard Gold and not No. 37 for Mr Gold.

157. Mr Davidson accepts there is no limitation point, because, although the negligence occurred in 1991, more than six years before the present proceedings were brought, it is clear that Mr Gold could not reasonably have discovered the important fact that Ascot House had been released in 1991 by AIB, until after March 1993, i.e. within the limitation period for the purposes of Section 14A (and, indeed, Section 32). Mr Davidson did not rely on the fact that Mr Gold charged No. 37 afresh in 1993 as part of the restructuring. In my view, he was right: it does not impinge on the issue as Mr Gold was unaware of the position as he had been in 1991, when Ascot House had been released.

Damages: Costs of Defending AIB's Claim

158. Although an element of Mr Gold's defence (namely *non est factum*) was initially said to be unjustifiable by Mincoffs, Mr Davidson realistically accepts that, at least in principle, all the costs incurred by Mr Gold (presumably including his objection to pay AIB's costs) in defending AIB's claim are recoverable as damages.

Damages: Loss of Income as a Dentist

159. Mr Gold contends that he was not able to work full time in his practice as a dentist from about the time that the demand for repayment of £1.7m-odd was made and the issue of these proceedings, because of the work and investigations he had to carry out to uncover what had occurred.

160. This raises a point upon which there appears to be no direct authority. The point is this. If a person is given negligent advice by a solicitor, can he recover the loss of earnings he suffers as a result of the investigative work that he has to carry out due to a liability which would not have arisen if the advice he got had not been negligent?

161. As a matter of principle, it seem to me that, provided that the loss of earnings he suffers was a reasonably foreseeable loss, and provided it flowed directly from the solicitor's negligence, there is no reason why it should not be recoverable. Sometimes a loss is not recoverable as a mater of policy; sometimes a loss is not recoverable because it is too remote; sometimes a loss is not recoverable as damages because, on analysis, it is properly to be treated as part of the costs of the ensuing negligence action. I can see no reason why the loss of earnings claimed by Mr Gold in the present case would be impermissible for any of those reasons. I believe that this conclusion gets limited support from **Lonrho plc v Fayed (No. 5)** [1993] 1 WLR 1489at 1497C-E. In that case, it was held that a claim for "the costs of managerial and staff time spent in investigating, or mitigating the consequences of, [an alleged] conspiracy" should not be struck out. However, while that provides a little assistance for the conclusion I have reached, it does not seem to me to take matters a great deal further. First, it was merely a decision that the claim was properly pleadable; secondly, it arose from a claim in conspiracy, and one can well see that the Court should be more ready to award damages under a certain head where the claim is in conspiracy than when it is in negligence. Thirdly, and probably least powerfully, it was a claim for expenditure, rather than a claim for income forgone.

162. Having concluded that a claim under this head is in principle recoverable, it is necessary to turn to consider whether, on the facts, Mr Gold has made out the proper claim. Mr Davidson argues on behalf of Mincoffs that Mr Gold appears to have put in a very large number of hours investigating the claim against him, and suggests that the real reason for his having had to incur the costs and expenses was that AIB's records were in a muddle, and that Mr Gold had been prepared to sit back and let the affairs of the Partnership continue without taking normal care to know what was going on, which one would have expected of a person in his position.

163. In my judgment, on the basis of the evidence I have heard, there is a great deal of force in those submissions. However, in the end, all I have to decide is whether, on the basis of the law and on the basis of the evidence I have heard, Mr Gold has made out enough of a case for there to be an enquiry as to damages under this head. In my judgment he has done so.

164. First, as I have said, damages under this head are, in my view, recoverable in principle. Secondly, I am satisfied that Mr Gold did have to cut down on his professional commitments as a dentist during the four year period he identifies due to AIB's claim. Thirdly, given that Mincoffs, through Mr Howard Gold, well knew that MR Gold was a dentist practising in London, it was reasonably foreseeable to them that, if he found himself facing a very substantial claim from AIB as a result of their negligence or otherwise, he would, of necessity, have to devote some of his working time to investigating that claim. Accordingly, it seems to me that the instant head of claim is one which is properly maintainable, and should go to an enquiry.

165. However, it is only fair to Mincoffs that I emphasise that the approach of the Court assessing damages under this head should be very cautious. First, Mr Gold would only be entitled to any loss of income which he could show was attributable to Mincoff's negligence, and it seems to me that this would not extend to the work he had to carry out due to the ignorance he had of the Partnership's affairs, the comparative dearth of paperwork, and AIB's poor, indeed possibly chaotic, records. None of those matters can be said to be the fault of Mincoffs. Furthermore, it is worth remembering that Mr Gold would have been liable to AIB even if Mincoffs had not been negligent, although the basis of his liability would, of course, have been rather different, much more limited, and probably covered by the security provided by the Partnership.

166. The Court, when assessing Mr Gold's claim for damages under this head would also have to bear in mind that he must establish not merely that the work he carried out was due to Mincoffs' negligence, but also that he lost professional work, and therefore income, as a result. I heard no argument as to whether the proper approach under this head requires Mr Gold to establish that, in respect of work he carried out which was attributable to Mincoffs, he would, on the balance of probabilities, have been able to earn money, or whether such damages should be assessed on the loss of a chance basis.

Damages: Contributory Negligence

167. Mincoffs argue that any damages awarded to Mr Gold should be reduced on the grounds of his contributory negligence. Two specific aspects of contributory negligence are alleged. The first is the way in which he exercised no control over, and sought no information in relation to, the way in which Mr Martin ran the affairs of the Partnership. The second aspect arises from the fact that in March 1993, Mr Gold signed the facility letter for £1.7m, without apparently seeking, or commenting on, the fact that it was for twice as much as it should have been.

168. As I understood his argument, Mr Davidson contends that both heads of contributory negligence only go to the claim based upon Mincoffs' failure to advise Mr Gold as to the effect of the liability clause in the 1993 mortgage. If that is correct, they play no part in so far as Mr Gold's claim is based on Mincoffs' negligence in relation to earlier mortgages.

169. In so far as his claim is based on the 1993 mortgage, it seems to me that I have already taken into account both aspects of Mr Gold's alleged contributory negligence. When coming to the conclusion that he had only a 55% chance of persuading AIB to release him from any liability for Mr Martin's debts to AIB (outside the Partnership) I took into account, as a factor reducing the chance to 55%, the fact that Mr Gold had made his position on this point significantly weaker than that of Mr Shaw, partly because he had signed the facility letter without comment (and therefore had given the impression that he was accepting

liability for a substantial tranche of Mr Martin's liability) and partly because his failure to know what Mr Martin was doing would, albeit to a limited extent, have encouraged AIB to think that he was prepared to accept liability for Mr Martin's debts.

170. Beyond that, it appears to me that, although I think it is fair to characteise Mr Gold as having been negligent in the two respects alleged, his negligence did not further contribute towards his loss. Basically, each aspect of his contributory negligence would have made it more difficult for him to persuade AIB to release him from his accrued liability for Mr Martin's debts in 1993, and I have already taken the two factors into account when assessing his prospects of so persuading AIB. At least on the arguments I have heard, it appears to me that, if I were to indicate that his damages should be reduced further due to contributory negligence, he would suffer through double counting. Although not directly in point, see discussion in **Platform Home Loans Ltd v Oyston Shipways Ltd** [2000] 2 AC 190 at 214D-E per Lord Millett. It is right to record that, as I understood it, during the course of his closing submission, Mr Davidson did not press Mincoff's argument based on contributory negligence for this reason.

171. However, it is right to record that I do consider that Mr Gold was contributorily negligent. Even as a sleeping partner, it seems to me that he was extraordinarily lax in taking any steps to check that Mr Martin was looking after the affairs of the Partnership properly, particularly after he learnt that Mr Martin had effectively stolen some of the rents he had collected. It is surprising that, even then, Mr Gold did not seek some sort of reconciliation statement. Further, Mr Gold was plainly negligent in signing the February 1993 facility letter without reading it properly. Had he done so, he could not have thought that the £1.7m it referred to was intended to represent anything other than the accrued debt to AIB of the Partnership. I accept that he was relying on Mincoffs to advise him and on Mr Martin to take the signed facility letter to Mincoffs, but that does not excuse him.

172. However, as I have mentioned, and as appears to have been accepted on behalf of Mincoffs, contributory negligence is only relevant insofar as Mr Gold's claim is based on Mincoffs' negligence in relation to the 1993 mortgage, and the acts of contributory negligence which can justifiably be raised against Mr Gold will have already been taken into account when assessing his damages, on the basis that they were features which would have reduced his prospects of persuading AIB to agree to his ceasing to be liable for the debts of Mr Martin to AIB (other than the Partnership debts). In these circumstances, it is unnecessary to consider contributory negligence, because it is not relied on in relation to the claim based on the earlier mortgages, and it has already been taken into account (in the 45% discount) so far as his claim is based on the 1993 mortgage.

173. However, in case that is wrong, it is right briefly to deal with the degree of contributory negligence. Both common sense and authority point to the view that the amount by which damages are otherwise recoverable should be reduced to take into account the claimant's contributory negligence should not be determined until the court has decided precisely what the damages would otherwise be. Apart from anything else, different heads of damage may justify different discounts due to contributory negligence. However, the point goes wider than that. In **Platform Home Loans** [2000] 2 AC 190, the House of Lords had to consider a case where not all the loss which had been suffered as a result of the defendant's negligence could be recovered, because the recoverable loss was limited by the principle laid down in **Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd** [1997] AC 191. It is clear from what was said in the House of Lords (and perhaps most clearly from what was said by Lord Millett at 214D-G) that, in such a case, the reduction to the damages awarded due to contributory negligence, can only, in effect, be decided after one has determined the damages which would be awarded in the absence of contributory negligence.

174. Accordingly, I can only give qualitative assistance on the measure of contributory negligence. The two aspects of the contributory negligence alleged against Mr Gold are, as I have indicated, well founded in principle, and they are both fairly significant, in the sense that each involves Mr Gold plainly not properly looking after his own interests as a person in his position could reasonably be expected to have done. However, it is easy to overstate Mr Gold's culpability (if that is the right word) in relation to each of them.

175. So far as failure to involve himself in the affairs of the Partnership is concerned, it appears to me that one of many occasions upon which his placing of complete trust in Mr Martin can be shown to be wrong was

when Mr Martin misappropriated the rents collected from the Partnership properties. Mr Gold can say with a degree of justification that his failure to chase Mr Martin in connection with the rents did not lead to Mr Martin acting wrongly, so far as one can tell, in relation to Mr Gold thereafter. Further, the fact that on one occasion Mr Martin paid rents which were the property of the Partnership to AIB to meet his other liabilities would not, in my view, have been a very significant factor in AIB's view of argument that Mr Gold had accepted that he was generally liable for Mr Martin's liabilities, or that the affairs of the Partnership and of Mr Martin were closely intertwined. It was a "*one off*" event, which Mr Gold could have explained to AIB as having been an unauthorised, indeed an improper, act on the part of Mr Martin, which he, Mr Gold, had forgiven.

176. So far as the signing of the facility letter is concerned, this was, as I have mentioned, an act which can fairly be characterised as contributory negligence. However, it was the only other occasion upon which it can be shown that Mr Martin did not act honestly to Mr Gold, in the sense that he led him to believe that he would be sending it to Mincoffs, whereas he sent it straight back to AIB. On the other hand, even in relation to the facility letter, Mr Gold not only relied on Mr Martin, but also would have assumed (correctly as it turned out) that the facility letter would have been supplied around the same time to Mincoffs. Had Mincoffs not been negligent, they would have asked for the first page of the letter, and would have appreciated that it recorded far too high a sum as the liability of the Partnership. Had Mincoffs appreciated the point, as they should have done, then the effect of Mr Gold having rashly signed the facility letter could have been corrected fairly quickly.

177. In addition to this, although the fact that Mr Gold had been prepared to sign the facility letter, and therefore to give to AIB the impression that he accepted liability for a substantial tranche of what had previously been Mr Martin's sole liability, I do not think that it would have been an overwhelming factor in AIB's thoughts and argument to the effect that Mr Gold had accepted liability for Mr Martin's debts, or, to put in another way, that the debts of Mr Martin and the Partnership were inextricably entwined. However, the fact that Mr Gold signed the facility letter with its reference to £1.7m, and with its reference to the security being properties owned by the Partnership and Mr Martin, would have made Mr Gold's negotiating position with AIB weaker.

178. When considering the extent to which damages should be reduced owing to contributory negligence it is common ground that one takes into account the extent to which the defendant has been negligent. The grosser or crasser the negligence established against the defendant, the smaller the amount by which one reduces the damages due to a particular act, or due to particular acts, of contributory negligence on the part of a claimant. It does seem to me that this is a case where the extent of the negligence established against Mincoffs is, I regret to say, pretty gross. To be blunt, it is one of those cases where nobody comes out very well (Mr Martin does not appear to have been very honest, AIB were shambolic, Mincoffs have been negligent, and Mr Gold was pretty supine). Almost all professional and business people have acted from time to time in ways which seem to them in retrospect not only wrong, but inexplicably wrong. Normally, such behaviour is not typical, and there is some, albeit often not much, consolation in the thought that it happens to many people, and that it is the reason why solicitors (and indeed those in other professions) are required to be insured.

179. Be that as it may, turning back to the facts of this case, it seems to me that, if a reduction to take account of Mr Gold's contributory negligence was appropriate, it would not be a large amount. It is particularly difficult for me to give any guidance, not merely because it is inappropriate to assess contributory negligence at this stage, but also because contributory negligence is either not pressed (in relation to the earlier mortgages) or appears to be irrelevant (in relation to the 1993 mortgage). All I can say at this stage is that, if contributory negligence is relevant for some reason, I find it very difficult to think that it would justify a reduction to any head of damage in this case by as much as 20%.

Conclusion

180. In these circumstances, I hope my conclusions on the various issues which I have been asked to decide are tolerably clear. I would express those conclusions in relation to the issues summarised early on in this judgment as follows:

1. The claim based on the earlier mortgages.

a. Time starts to run under Section 2 of the 1980 Act when each of the earlier mortgages was executed, and in particular in 1984 when the first of the earlier mortgages was executed.

b. However, Mr Gold can rely on Section 14A and/or Section 32 and/or Mincoffs' failure to advise him in 1993, but he cannot (and does not need to) rely on the proposition that Mincoffs cannot rely on their own wrong.

2. The claim based on the 1993 mortgage.

a. Mincoffs do not have a complete defence; Mr Gold's loss is to be assessed on the basis of loss of a chance.

b. I assess the chance of Mr Gold having been able to negotiate his way out of the full effect of the liability clause as 55%.

c. Mr Gold is entitled to an enquiry as the loss of the value of his interest in the Partnership and the date is probably to be 1995 if his claim is based on the earlier mortgages and 1993 if his claim is based on the 1993 mortgage; Mr Gold was entitled to 25% interest in the Partnership.

d. Mr Gold is entitled to recovery in full for the loss of Number 37.

e. Mr Gold is entitled to receive the costs he reasonably incurred in defending AIB's claim.

f. Mr Gold is entitled to claim for his loss of income, provided that he can show that he did lose income as a result of Mincoffs' negligence, and not otherwise.

g. Although Mr Gold was negligent, I do not consider that any damages should be reduced to take into account any contributory negligence.

181. It may follow from this judgment that Mr Gold is entitled to an indemnity from Mincoffs in respect of his liability to AIB under the judgment of Jacob J. Assuming that Mr Gold's claim is maintained on the earlier mortgages, then, in light of my finding that the claim is not statute-barred, and my understanding that there is no reduction on a "loss of a chance basis" and that contributory negligence is also irrelevant, the only question to my mind is whether Mr Gold would in fact have been liable to AIB because the assets of the Partnership were less than the total debts of the Partnership (ignoring the wrongly transferred 008 Account monies) at the time when AIB would have enforced its rights against the Partnership, which I presume would have been some time in 1995. As I have mentioned, on the evidence before me, there is a reasonably strong case for saying that the assets of the Partnership at that time actually exceeded its liabilities to AIB, but, given that that is a matter going to the Master, it seems to me, unless the parties otherwise agree or I am otherwise persuaded, it would not be right for me to conclude at this stage that Mr Gold is entitled to an indemnity from Mincoffs in relation to his liability under Jacob J's judgment.

182. There may be one or two loose ends particularly arising from the late re-amendment which I allowed Mr Gold to make to the Particulars of Claim and the late Reply. Partly because I think it would be unfair to the parties (and in particular Mincoffs) if I did not allow it, and partly because I am anxious to determine as much as possible, it may be appropriate for there to be a further short hearing so that, if there are indeed any loose ends which need to be tied up, (or indeed misunderstandings which need to be put right) this can be done before an order recording the effect of this judgment is drawn up.

Mr James Bonney QC and Mr W D Ainger(instructed by Messrs. Mark Gilbert Morse, Newcastle-upon-Tyne) appeared on behalf of the claimant.

Mr Nicholas Davidson QC and Mr Anthony de Freitas (instructed by Messrs. Crutes) appeared on behalf of the defendants.