BEFORE: VC SIR RICHARD SCOTT, LORD JUSTICES ALDOUS and THORPE : CA on appeal from Ch.Div (Mr T Lawrence Collinson). 4th July 2000

1. **THE VICE-CHANCELLOR**: This is an appeal by the defendants, Microstar Limited and Thomas Charles Combrinck, against the judgment of Mr Lawrence Collins QC, sitting as a deputy judge in this division and given on 9th December 1999. Permission to the defendants to appeal was given by Aldous LJ. The order under appeal was made by the deputy judge on an application under CPR 24. CPR 24 enables either a claimant or a defendant to apply for summary judgment on the whole or part of a case on the ground that the respondent to the application has no real prospect of success in the claim or in the defence, or in the part of the claim or defence, as the case may be.

2. Mr Martin QC, counsel for the appellants, commenced his submissions by referring us to the judgments given on 21st October 1999 in this court in **Swain v Hillman**. Lord Woolf, then Master of the Rolls, emphasised in his judgment the importance of confining the use of CPR 24 summary judgment powers to their proper place. The summary judgment power, he said, and this is at page 6 of the judgment:

   "... is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As [counsel] put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

3. The approach which we should adopt in present case must be the approach which Lord Woolf pointed out as correct in **Swain v Hillman.**

4. It is convenient I think before I come to describe the contents of the summary judgment order which the deputy judge made, to describe the facts of the case. Without that preliminary the order is very difficult to understand and follow. The facts are fully dealt with in the judgment, so that I can deal with them in a reasonably summary way for present purposes. The respondent to this appeal, the claimant in the action, is Mr Bates. Mr Bates is a chartered accountant his speciality is giving tax advice. He practices as the sole proprietor of a firm, SMD & Co.

5. In August 1997, Mr Bates met Mr Combrinck. Mr Combrinck is, as I would judge from the papers I have seen in this case, an entrepreneur. His speciality as an entrepreneur is in the telecommunications industry. He provides services in connection with the telecommunications industry. At the time he met Mr Bates, in August of 1997, Mr Combrinck had in mind setting up a company by means of which he would carry on business in the field that I mentioned. He took tax advice from Mr Bates regarding the setting up of the company. Mr Bates and he concluded that the company should be an off-shore company. In the event, the company set up was Microstar Limited, the first of the defendants and one of the appellants before us. It was incorporated in Jersey on 29th August 1997. It was the vehicle by means of which Mr Combrinck proposed to carry on his business in the telecommunications industry.

6. Prior to the incorporation of this company in Jersey, Mr Bates had taken advice from tax counsel, advice about setting up a company off shore, the tax implications and the matters that should be paid attention to. This is relevant, as will become apparent, because in the course of consulting tax counsel Mr Bates prepared a document, by way of being a brief to counsel, which enumerated his, Mr Bates', proposals for the setting up of the company. Among the points which Mr Bates recorded in this document were the following. There were nine points in all. They are preceded by this introductory sentence:
   "To ensure there is no question of UK tax residence it is proposed that"

7. Then follows the enumerated points. Numbers 4 and 5 provide as follows:
   " 4. No individual director has the power to commit the company to significant contracts (above a set financial limit);
   5. All contracts are signed outside the UK or subject to ratification by the board of directors before they become binding on the company."

8. Point number 5 was a precaution in the order to try and ensure that the company did not become for tax purposes resident in the UK. Perhaps I should mention also point 6:
   "(6). All board meetings are to be held in Jersey;"

9. Following the incorporation of Microstar in August 1997, Mr Bates began supplying professional services to Microstar. This of course was a consequence of an agreement between himself and Mr Combrinck that he should do so. His services were not confined to the tax services that were his speciality. He provided, in addition, administrative services. He became responsible, among other things, for advising in connection with the establishment of Microstar as an operating company in Jersey.

10. Microstar was a new company. Its shares were vested in nominees holding at least the bulk of the shares for Mr Combrinck. Mr Combrinck controlled the company. Mr Combrinck was in a position to make contracts on behalf of the company but, as was clear from the tax brief from which I quoted, the contracts were intended to be ratified by the board of directors in Jersey before they could become binding.

11. No firm agreement was come to in August 1997 as to the remuneration which Mr Bates was to receive for the services he was providing to the company. As the company was a new company, it was not flush with funds. Both Mr Bates and Mr Combrinck no doubt hoped, perhaps anticipated, that it would become a prosperous company in due course but at its inception it was not that, it was merely a hope. Therefore, it was understood that Mr Bates would not be paid any substantial amount of remuneration until the company was able to afford it.

12. The defence filed in this action on behalf of Microstar pleaded, in paragraph 12, that in return for the services he was to supply or was supplying to Microstar, Mr Bates was to be paid fees of £60,000 a year, ie £5,000 per month, plus 6.5 per cent of the company's net profits, but with a guaranteed minimum of £10,000 per month. He was also to be reimbursed for his expenses on production of proper vouchers. In addition, according to the defence, it was agreed that Mr Bates was to receive ten per cent of the amount of any tax saved by Microstar, calculated by reference to the tax Microstar would have had to pay if it had been resident in the United Kingdom for tax purposes. That, according to Microstar's pleading, is the agreement it had with Mr Bates as to his remuneration for the services he was providing to Microstar following its August 1997 incorporation.

13. Microstar began carrying on some scale of business as soon as it was incorporated. By 1998, however, Mr Combrinck, and perhaps Mr Bates, but certainly Mr Combrinck, had concluded that the company needed more capital. They desired, or Mr Combrinck desired, to purchase for the purposes of the telecommunications business a number of very expensive compressors, as I understand they are called. I pass on what these compressors actually do. In addition, it was desired to acquire business premises in Jersey. The appropriate premises were identified and in due course a 25-year lease was taken. But, in addition, expenditure on the building needed to be incurred in order to fit it out for the conduct of the sort of business that Mr Combrinck had in mind.

14. Mr Bates was asked to estimate the cost of fitting out, and he provided an estimate of £1.5 million for that purpose. All of these financial requirements, the fitting out of the building and the purchase of the compressors, required a substantial sum of money. So a partner who would inject money into the new business was necessary.

15. Mr Bates had a tax client, a Mr Woods, who was thought to be a potential investor of finance. Mr Woods had a company, Fortman Limited, by means of which he invested funds in ventures which attracted his attention. A deal was negotiated mainly by Mr Bates, with Mr Woods, under which Mr Woods agreed to enter into a joint venture agreement with Mr Combrinck.

16. The joint venture agreement was drafted by Mr Bates and was signed on 25th June 1998 by Mr Woods on behalf of Fortman Holdings and by Microstar. Before that happened, however, Mr Combrinck and Mr Bates had an important meeting at the Mountbatten Hotel, Covent Garden, at which the association of Mr Bates with Microstar was discussed. Mr Combrinck has said in his evidence that at the meeting a number of requests were put forward by Mr Bates regarding his remuneration and the rewards he might expect for his services to Microstar. I use the word "requests"; I think that Mr Combrinck has used the word "demands", but it does not matter. The two men at this stage were co-operating, they were on good

terms, and what was undoubtedly discussed was the entering into of a more formal and detailed agreement regarding Mr Bates' remuneration for his services.

17. On a sheet of the hotel writing paper notes were made of the matters on which agreement had been reached at this meeting. It is quite a short document and I think it is appropriate for me to read it out in full. It provides as follows: "Re: David Bates Involvement In Microstar Ltd."

18. Then there are a number of asterisks:
"* Salary based on £60,000 plus 6.5 per cent of profits paid at a minimum rate of £120K per annum, £IOK per month. Profits after all fixed Salaries and all running costs but before tax. ie TOM £500; DLB £120; VK £60; DR £50"

19. After each of those figures there should have been a "K" or three noughts.
" Minimum commitment of parity with VK and DR."*

20. VK and DR were two other directors of Microstar. "* Shares. 2.5 per cent of issued capital."

21. This was a new term that had not figured in what had been agreed in August 1997.
" Sale Price: 6.5 per cent proceeds (net of costs)."*

22. This too was new and appears to relate to the possible sale by Mr Combrinck of his Microstar's shares.
"* 10 per cent of tax saved (being saved vs UK tax) (not the personal tax position of TCC)"

23. TCC is Mr Combrinck.
" All expenses paid. * 12 month notice period (Rolling).*
**TCC to obtain life insurance to DLB's benefit, paid by company £250K."*

24. At the bottom of the page was written the date, 28 March 1998. On the left-hand side at the bottom edge of the sheet of paper the word "agreed" was written by Mr Combrinck and underneath is his signature. On the right-hand corner Mr Bates has written "agreed" and underneath that is his signature.

25. This is the so-called Mountbatten Memorandum. It is no more than a piece of paper on which the two signatories have jotted down in rough the items discussed between them and on which they had reached agreement. This is the agreement on which Mr Bates is suing.

26. The defendants in their evidence deny that the Memorandum constituted an agreement intended to be binding. They take a number of points in this regard. The first is that, to the knowledge of Mr Bates, the agreement, if it was to bind Microstar, had to be ratified by the board of directors of Microstar. This was Mr Bates' own proposal in the brief for tax counsel that he had drawn up in the previous year. The defendants take the point also that a number of the items apparently agreed upon were inherently uncertain. For example, the reference to "*Sale Price, 6.5 per cent of proceeds (net of costs*)" does not indicate for how long a period the entitlement should continue. Suppose, for example, that Mr Bates' association in Microstar were to come to an end and that thereafter the Microstar shares were sold, what would the position be? Would Mr Bates still be entitled, by reason of sale of the shares some years later, to a percentage of the proceeds of the shares?

27. The same point applies to the entitlement to "*10 per cent of tax saved*." This item, it should be noted, had been agreed in principle in August 1997, according to Mr Combrinck. But would this entitlement continue indefinitely or would it continue only for the period during which Mr Bates' association with the company continued?

28. Be that as it may, following the signing of the Memorandum, Mr Bates was paid in accordance with the salary details contained in it, namely the £60,000 a year and 6.5 per cent of profits paid at a minimum rate of £120,000 a year or £10,000 a month. It seems that in the period down to, say, the end of 1998, Microstar made no profits, subject to a capital profit that it may have made which I shall mention later. Accordingly, the remuneration to which Mr Bates would have been entitled under the agreement would have simply been the £10,000 per month. I should perhaps emphasise that the £5,000 that represented, in a sense, an advance against profits would not be returnable in the event of profits not being earned in the requisite amount.

29. The manner in which the case was presented to the judge below was on the footing that this written Memorandum was the last contractual word so far as the evolution of the contractual entitlements of Mr Bates are concerned. In fact it seems that that was not so. Following the Hotel meeting, it was left to Mr Bates, I infer by agreement, implied if not expressed, between himself and Mr Combrinck, to prepare a written agreement giving effect in more appropriate legal form to the bare bones that had been agreed at the Mountbatten Hotel meeting. Mr Bates did that. He prepared two written agreements; one expressed to be between Microstar and SMD, Mr Bates' proprietary firm; the other between Mr Combrinck and himself. I should perhaps refer to the contents first of the latter of the two agreements, that between Mr Combrinck and Mr Bates. It contains the following recital:

"TCC has a beneficial interest in the share capital of Microstar Limited."

30. TCC is Mr Combrinck. Then the registered address of the company is given.

"DLB [Mr Bates] provides accounting, UK taxation and administration services through his wholly owned accountancy firm, SMD & Co [address given] TCC wishes DLB to provide Microstar with accounting, UK taxation and administration services (hereafter referred to as the `Services') and DLB wishes to provide such Services through SMD."

31. Then the document continues:

"NOW THEREFORE, intending to be legally bound, the parties agree as follows:
1. This Agreement commenced on the 1st September 1997.
2. The Services are defined as the non-exclusive time of David Leslie Bates only during normal working hours and conditions, under the exclusive direction and control of SMD & Co.
3. TCC agrees to procure that Microstar enters into a Contract for Services with SMD.
4. TCC agrees to transfer 2.5 per cent of the entire issued share capital of Microstar into the name of DLB."

32. Paragraph 4 follows the relevant item in the Mountbatten Memorandum.

"5. TCC further agrees that in the event of a sale of shares in Microstar, DLB will be entitled to a payment from TCC's beneficial shareholding equivalent to 6.5 per cent of the total gross proceeds received from the sale of the Microstar shares."

33. That, too, was in the Mountbatten memorandum. Paragraph 6 provides for an insurance policy to be taken out for Mr Bates' benefit. An item to that effect had been in the Mountbatten memorandum. Paragraph 7 provides that Mr Bates:

"... will receive equal treatment as regards benefits, remuneration increases, shares or share equivalents with Vijay Khakhria and David Risbey in connection with Microstar and Microstar business interests in whatever form they are undertaken over and above the position as at 1st May 1998."

34. This, too, reflects an item in the Mountbatten Memorandum. Paragraph 8 is a jurisdiction clause.

35. The other agreement, between Microstar and SMD, contains the following recital:

"Microstar wishes to enter into an agreement to obtain accounting, UK taxation and administration services from SMD, and SMD wish to provide Microstar with such services (hereafter referred to as the `Services')."

36. That was the description of the services to be provided by Mr Bates -- accounting, UK taxation and administration services. This agreement as well was expressed to commence on 1st September 1997. It, too, contained an introductory passage stating that the parties were intending to be legally bound. Paragraph 1 gave the commencement date. Paragraph 2 repeated paragraph 2 of the other agreement and referred to the "*non-exclusive time*" of Mr Bates. Paragraph 3 said that in respect of the period from 1st September 1997 to 30th April 1998, Microstar agreed to pay Mr Bates £35,000, exclusive of VAT, on or before 31st March 1999. That was the remuneration that Mr Bates was to receive for the period before the Mountbatten Memorandum was signed. Paragraph 4 provided that, with effect from 1st May 1998, Microstar would pay SMD a monthly retainer of £15,000 on the 15th day of each month.

37. Paragraph 5 contained an agreement by Microstar to pay SMD additional amounts each quarter calculated at 6.5 per cent of the quarter's net profits, and then followed fairly elaborate provisions as to how the profits were to be calculated; the provisions broadly followed the outline which had been indicated in the Mountbatten Memorandum.

38. Paragraph 6 contained Microstar's agreement to pay SMD annual amounts calculated at ten per cent of tax saved. Then there were provisions as to how the tax saved was to be calculated.

39. Paragraph 8 of the agreement is interesting. It provided that the agreement was to continue in force until 30th September 2002. That provision replaced the 12-month notice provision that had been an item in the Mountbatten Memorandum.

40. The agreement between Mr Combrinck and Mr Bates was signed by Mr Combrinck. His signature was witnessed by somebody else, or perhaps by two people. The witnessing signatures are fairly incomprehensible. The agreement between Microstar and SMD was signed by Mr Combrinck as director of Microstar. His signature there too has been witnessed by somebody. Nothing much about these agreements was said before the judge below. There was very little indeed in the evidence about them. The agreements were produced to us on the hearing of this appeal.

41. Mr Chapple, counsel for Mr Bates, who might have been expected to place some reliance on the contractual effect of these agreements, disclaims any reliance on them. He has explained his position by telling us, on instructions, that Mr Bates had indeed prepared these two agreements, as it had been arranged that he should do following the March meeting at the Mountbatten Hotel; that he had placed these agreements before Mr Combrinck for Mr Combrinck's approval and signature at a time when Mr Combrinck was about to go abroad. He said that Mr Combrinck had signed them and had said that he was going to send them immediately to his solicitor to ensure they were acceptable, and that the matter was left on that footing. The signed documents were either kept by Mr Combrinck or, perhaps, were handed to his solicitor. Mr Bates kept copies, which he had previously prepared, but not copies of the signed versions.

42. Both parties appear to have treated these written documents, signed by Mr Combrinck, as having no relevance to the matters in issue in this litigation. I am not of that view. I think they are very interesting documents indeed and highly relevant for our purposes. They provide, or at least seem to provide, some confirmation of what Mr Bates thought had been agreed by the parties at the Mountbatten Hotel.

43. There is another matter of background that I have omitted so far to mention. The joint venture agreement, signed on behalf of Fortman and Microstar at the end of June 1998, led to the formation of a joint venture company called Tele-Linx Holdings Jersey Limited. Fifty per cent of the shareholding in Tele-Linx Holdings was held by Microstar and 50 per cent was held by Fortman. Tele-Linx Holdings had two subsidiaries; one was Tele-Linx Limited, the operating company that actually carried out the telecommunications business which generated, or it was hoped would generate, the profits for the joint venturers. The other subsidiary was Cordoba Holdings in which was vested the property in Jersey, held under the 25-year lease, and in respect of which the £1.5 million of fitting-out costs had been estimated to be necessary.

44. The £1.5 million of fitting-out costs turned out to be a very considerable underestimate. The fitting-out expenditure, according to the evidence, ran to some £9 million; a £7.5 million underestimate appears to have taken place. The excessive expense of the setting up of the building led, it seems, to some financial difficulties for the joint venture company. Additional finance was needed in order to enable the business to progress.

45. Mr Combrinck, in his evidence and through his counsel, Mr Martin, has complained that the ability of Microstar to raise additional capital, both to cater for the unexpectedly high costs of the fitting out of the building and to provide the finance for a successful expansion of the new business, was made very difficult by the terms of the joint venture agreement that had been drawn up by Mr Bates and signed by the two joint venturers.

46. That is a matter which loomed large later in the story. I have had the feeling, and I suspect that the judge below had it as well, and perhaps my brethren on the bench with me now have had it too, that there is a great deal in this story that is not yet in evidence. I should perhaps have added that Tele-Linx Limited had three directors, one appointed by each joint venturer. Mr Combrinck was the Microstar appointee, Mr Bates was the Fortman appointee, and there was a third, to hold the balance between them, a Mr Owen Williams.

47. The joint venture companies were set up and commenced business, or were about to do so, when out of the blue, so far as the evidence in the case reveals, came a letter of 18th October 1998 from a director of

Microstar, the "VF whose initials featured in the Mountbatten Memorandum. The letter is dated 19th October 1998. It is headed "Without Prejudice" and reads as follows:

"Dear David,
You were retained by this company as its tax consultant.
By your own admission this morning these services have been ineffective and may well have been performed negligently.
Accordingly your retainer is suspended forthwith pending a detailed, independent examination of the work you have performed.
You are instructed to return all documents and information supplied to you during the course of this engagement.
With regard to your expenses, you are required to supply a detailed breakdown to the company with supporting vouchers for all expenses claimed and received to date. Any outstanding claims will be settled immediately upon verification."

48. Before referring to the response which this letter evoked, there are a few comments to be made. It will be noted that it refers to Mr Bates' status as Microstar's tax consultant. It made no reference to the other duties that he had to discharge for Microstar in regard to administrative services and in regard to accounting services. It was simply in relation to tax consultancy that the letter appears to have been written. Secondly, the charge that Mr Bates' services had been ineffective and performed negligently was not accompanied by any detail as to the particular services that had been ineffective and negligently performed or detail that would enable Mr Bates to know with what he was being charged. Thirdly, the letter suspended Mr Bates' retainer. It did not permanently terminate it. The language of the letter does not permit the inference of an intention to terminate his retainer because the reference to suspension is followed by the words "*pending a detailed independent examination of the work that you have performed*". This suggests that there will be an examination of the allegedly negligent work after which conclusions will be reached as to what further, if any, action should be taken. This is not a termination letter and cannot, in my judgment, be construed as being such. Finally, in regard to the last paragraph of the letter, the 19th October letter asks Mr Bates to detail his expenses and says that they will be settled immediately upon verification. This letter, written with knowledge of Mr Bates' alleged negligence, nonetheless says that his expenses will be settled immediately upon verification.

49. Letters of this sort in my experience do not come out of the blue. It appears to come out of the blue to someone, like a judge, reading this correspondence, to my brethren and myself and the learned judge below. But it must, I think, have been preceded by a breakdown in the relationship between Mr Bates and Mr Combrinck for reasons that neither party has put in evidence, and of course were not obliged to put it in evidence. This state of affairs produces, in me at least, an uneasy feeling that I am being asked to come to a conclusion on a matter in respect of which I do not know the full story.

50. The next day, 20th October, there was a board meeting of Tele-Linx Limited. Present at the board meeting were its three directors, Mr Williams, Mr Bates and Mr Combrinck. The breakdown in the relationship between Mr Bates and Mr Combrinck continued to manifest itself at this meeting. The meeting opened with the three directors present but Mr Combrinck, according to the minutes, declined to remain for the rest of the meeting and walked out. The minutes do not say in terms that he walked out, but he plainly did.

51. In Mr Combrinck's absence the meeting, being still quorate, continued. Mr Williams was appointed chairman. Mr Bates was appointed financial director. The meeting dealt with various other matters such as bank mandates, accommodation matters, company solicitors. Under "any other business" alternate directors were dealt with and the status of Mr VJ Khakhria as Mr Combrinck's alternate was discussed. His status was held to be invalid. He had not been properly appointed alternate director was the conclusion to which the remaining two directors came. Other alternates were appointed.

52. The events at this meeting have been represented by Mr Combrinck and Microstar, through their counsel, as constituting some sort of repudiation by Mr Bates of the agreement under which he was currently retained. For my part, I do not see how that contention is at all arguable. There no doubt had been a breakdown in the relationship between Mr Combrinck and Mr Bates which led to the events at the board meeting on 20th October, but Mr Bates' duty as director was a duty to Tele-Linx Limited. There has been no suggestion made that any act of his constituted a breach of that duty. Mr Combrinck refused to stay at the meeting. Steps were taken in regard to alternate directors, which may or may not have been justified in point of law but no one has suggested that they were not. The alleged repudiatory

character of the events at that meeting seems to me, on the evidence before this court, to be unsustainable.

53. Mr Bates' office as director of Tele-Linx Limited did not continue long. Whether he was removed as a director or constrained to resign, does not for present purposes matter. It may have been the latter. At all events, he and Mr Williams left the board. Mr Woods and Mr Combrinck combined to ensure that that result was brought about. They, of course, through Microstar and Fortman controlled Tele-Linx Holdings and thereby controlled Tele-Linx Limited.

54. Mr Bates was paid by Tele-Linx Limited his remuneration as director for the month of October. He was not paid by Microstar his remuneration for the month of October. He was paid by neither his remuneration for November or for any succeeding month. He consulted solicitors, Dibb Lupton Alsop. On 10th February 1999 they wrote a highly peremptory and, in my view, unnecessarily aggressive letter before action. They demanded payment of a number of different items due to Mr Bates, they said, under the March 1998 agreement. They enclosed a draft statement of claim setting out, in pleaded form, Mr Bates' complaints and claims and announced that proceedings would be commenced unless Mr Combrinck and Microstar gave way and conceded Mr Bates' entitlements by Monday 15th February, some five days' time.

55. The response on behalf of Microstar and Mr Combrinck came from solicitors, Tibber Beauchamp-Ward, in a letter of 15th February. They agreed that Mr Bates had been employed to provide services to Microstar and they did not deny that an agreement had been reached at the Mountbatten Hotel meeting. But they did not make any admissions as to the effect of that agreement or to the terms of it. They agreed to retain the sum of £68,285, part of the proceeds of the sale by Microstar of its shares in Tele-Linx Holdings Limited, in their current account to provide some security for sums that Mr Bates might be entitled to from Microstar. They commented, in my opinion understandably, on the aggressive nature of Dibb Lupton's letter.

56. On the same day, 15th February, came the second letter from Dibb Lupton. They continued in much the same mode as they had started. They made various requests and demanded a response by the next day, failing which, they said, proceedings would be commenced. And, indeed, proceedings were commenced on 17th February.

57. I should have referred to the sale of Tele-Linx Holdings. In December 1998, Microstar sold its 50 per cent shareholding in Tele-Linx Holdings to Fortman, thereby making Fortman the owner of the whole of the joint venture corporate vehicle. The sale price was £10 million. At the same time as the sale by Microstar to Fortman of the 50 per cent interest, Fortman sold to another company the whole of the erstwhile joint venture vehicle for the sum of £30 million. The £5 million difference between the value of the half share, taking the £30 million sale price as the guide, and the £10 million actually obtained by Microstar on the sale to Fortman, is said by Microstar and Mr Combrinck to be a loss suffered by Microstar by reason of the inadequacies of Mr Bates' drafting of the joint venture agreement and his underestimate of the costs of the fitting out of the building from which the business was to be conducted. These are matters which are fleshed out to some extent in the pleadings.

58. The commencement of proceedings by Mr Bates was followed by an application for summary judgment. The commencement of proceedings took the form of a written statement of claim issued, as I have said, on 17th February. On 6th April defences were put in by Microstar and by Mr Combrinck, and on 20th July 1999 the summary judgment Part 24 application was made.

59. Mr Lawrence Collins QC, the Deputy Judge, gave a reserved judgment on 9th December. He found in favour of Mr Bates. He found that there had been a binding contract concluded on 28th March on the terms set out in the Mountbatten Memorandum. He concluded that the contract between Microstar and Mr Bates on the terms set out in the Memorandum had continued until Microstar's repudiation of the agreement had been accepted by Mr Bates by the issue of proceedings on 17th February 1999.

60. Accordingly, he held that Mr Bates had a contractual right to all the remuneration rewards provided for in the agreement up to 17th February 1999. He held, also, that Mr Bates was entitled to remuneration under the agreement for a full year from 17th February 1999, as though Mr Bates had given notice on

that date to expire in a year's time. This he regarded as a consequence of the 12 month rolling notice provision in the Mountbatten Memorandum agreement. He agreed that it was uncertain for how long the 6.5 per cent of profits provision or the ten per cent of tax savings provision should continue to apply. This was a consequence of the lack of clarity in the agreement, a lack of clarity I note repeated also in the September 1998 written agreement, as to the duration of the period over which the 6.5 per cent of profits or the ten per cent of tax savings could be claimed.

61. He therefore sent to trial those two issues. He made a declaration that Mr Bates was entitled to 2.5 per cent of the shareholdings in Microstar. That too was a provision introduced in the Mountbatten Memorandum. One of the contentions put forward in the defences, and by Mr Combrinck in his evidence before the court on behalf of Microstar, was that Microstar had a counterclaim against Mr Bates for breach by Mr Bates of his contractual duties under the agreement. The underestimates that it was said he had been responsible for in regard to the cost of fitting out the building, was said to be actionable negligence. His failure to provide in the draft joint venture agreement that he had prepared for Microstar to be able to raise finance without the need to get the consent of Mr Woods and Fortman Limited was said to be negligence. It was alleged that Mr Bates' obligation under the agreement had been to provide his services full-time to Microstar and that he had failed to do that.

62. In all these respects, it was said, Microstar had a cross-claim against Mr Bates for damages. It was claimed that the cross-claim should be regarded as a set-off available in equity to be treated as a defence to the claims being made by Mr Bates against Microstar.

63. The judge refused to accept that the pleaded cross-claim could be used as a defence to resist summary judgment for the specific matters that he thought Mr Bates was entitled to under the Mountbatten Memorandum. But he was anxious not to prevent the defendants from perfecting the deficiencies in their pleaded cross-claim and bringing such a claim later. Accordingly, he extracted an undertaking from Mr Bates that Mr Bates would not plead res judicata or issue estoppel or anything similar so as to bar the cross-claim if it were brought in the future.

64. Microstar and Mr Combrinck have appealed. The points raised on the appeal, although they have taken some time to explain to us, are really quite short. It is said that the judge was in error in conducting, in effect, a trial of factual issues which are in dispute. What is in dispute particularly, it is submitted, is whether the Mountbatten Memorandum evidenced a binding agreement. It is not disputed, and I think it never has been disputed, that Mr Bates was providing his services to Microstar under an agreement with contractual effect. But Microstar contends that the agreement under which he was providing his services was the agreement reached in August 1997, varied after the March meeting by allowing him the £60,000 per annum, plus 6.5 per cent with a minimum of £120,000 a year paid in amounts of £10,000 a month. It is accepted that it was a term of the August 1997 agreement that Mr Bates was to have ten per cent of the tax savings. But it is denied that anything additional which found its way into the Mountbatten Memorandum represented a contractually binding term. The basis of this contention is that it was known both to Mr Bates, because he had so advised, as well as to Mr Combrinck, that any important agreement entered into by Microstar needed ratification by the Microstar board in Jersey.

65. A further point, that Mr Martin has relied on before us, is that either or both of the issues left by the judge to be resolved at trial, namely whether the entitlement to ten per cent of tax savings and the entitlement to 6.5 per cent of Microstar's profits can survive and continue notwithstanding the termination of the employment contract, may lead the judge at trial to conclude that the parties were never ad idem on all the terms. If that is so, it may be that no contractual agreement was ever reached. The reference to these two terms in the Mountbatten Memorandum does not itself indicate what the answer to that question should be. Mr Martin submitted that if the result is that these two terms of the Mountbatten Memorandum agreement were never sufficiently certain to be contractually enforceable, it is well arguable that their importance is such as to deprive the Mountbatten Memorandum agreement as a whole of contractual validity.

66. It seems to me that this is an argument which cannot be resolved simply on a summary judgment application. It seems to me to depend on a view taken as to the intentions of the parties at the meeting,

and in preparing and signing the memorandum. It is in this regard that, it seems to me, the contents of the September draft agreements are relevant. Both September drafts are expressed to be intended to be legally binding. They spell out with much more detail than one would expect to find, or does find, in a heads-of-agreement type of document, such as the Mountbatten Memorandum, the terms agreed between the contracting parties.

67. If it is a fact, and there is some supporting evidence to suggest it may well be a fact, that the parties intended that after the Mountbatten Hotel meeting the heads-of-agreement were to serve as a guide to Mr Bates as to what to include in the formal written agreements that were to be prepared, and were to be signed and approved on behalf of Microstar and by Mr Bates, then it seems to me that the argument that the Mountbatten Memorandum was not itself intended it to be contractually binding is substantially assisted.

68. The conduct of Mr Bates, following the March meeting at the Hotel, in preparing these two draft agreements seems to me to provide some additional support for that contention. The judge below did not have the advantage of seeing these draft agreements. But we have seen them and I do not think it is right, on a summary judgment application, to conclude that there was necessarily a binding agreement on the terms of the Mountbatten Memorandum reached at that meeting.

69. However that is not the end of the issues that arise on a summary judgment application. Microstar and Mr Combrinck have throughout accepted that Mr Bates was providing his services under a contractually effective agreement. The agreement, they contend, was entered into in August 1997 and varied as to the amount of remuneration after the March meeting. According to the Mountbatten Memorandum, the agreement would be terminable on 12 months' notice. According to the September drafts the agreement was to last for a fixed period expiring in 2002. If neither of those terms was contractually binding, the law would imply, in my judgment, that the agreement under which Mr Bates was providing his services, was terminable on reasonable notice. What would be reasonable notice? It would, I think, at least be a month. It might be three months. This is a matter which we cannot decide in this court. It is not a summary judgment issue. It needs to be decided at trial.

70. Mr Martin has pressed us with the proposed cross-claim and set-off of his clients. The judge was dismissive of that and I concur in the judge's view of it. It is to be noted that the matters relied on in regard to the underestimate of the fitting-out costs and the contents of the joint venture agreement took place in June 1998. After those events had happened, and in full knowledge of them, Microstar continued to use the services of Mr Bates and continued to pay him at the remuneration rate of £10,000 per month. No mention of these matters of complaint was made in the suspension letter. No mention was made until the defences were filed, and even then the details were deficient, had to be supplemented by requests for further information and further information was subsequently given.

71. One of the issues that must be resolved before this litigation can be laid to rest is the issue as to when the agreement under which Mr Bates was engaged came to an end. Mr Bates contends that it came to an end on 17th February 1999 by his acceptance of the defendants' repudiation. What is the date contended by the defendants? Mr Chapple is entitled to point out that they have been elusive in pinning themselves to any particular date. There is a sentence in the defence alleging that the agreement came to an end "shortly after" the 19th October suspension letter. But in further particulars of that allegation the defendants appear to say that the agreement came to an end ipso facto when the letter was received.

72. I have already said I do not think that that is a tenable construction of the letter. In submissions to us Mr Martin suggested that the repudiatory conduct on the part of Mr Bates at the Tele-Link meeting on 20th October could be accepted by the defendants at any time, and that the termination would then be retrospective to the date when the repudiatory conduct took place. I am sure I have not done credit to his submission. I have to say that when he made it I could not follow it and I do not accept it. The date of termination is an important issue and it is not one, in my judgment, that we should now decide thereby binding the judge at trial to adopt that same date. It is a date which in my view should be settled at trial after full evidence has been heard.

73. I now come to consider the exact terms of the order made by the judge below. The appeal asks us to set aside the whole of the order. The judge ordered, first, that Mr Bates have summary judgment for £35,000 in respect of his remuneration up to March 1998 when the Hotel meeting took place, and, according to Mr Bates, the new remuneration levels became payable. Indeed the defendants agree that, shortly thereafter, the new remuneration level began to be applicable. The £35,000 figure has been agreed between the parties.

74. The only answer to Mr Bates' claim for payment that can be put forward by the defendants is the set-off claim. The set-off, in my judgment, is no sufficient answer. The matters relied on regarding set-off post-date by some months the period in respect of which this remuneration is due. In my judgment, Mr Bates is entitled now to payment of the £35,000. The judge was quite right to make a summary order for payment of that sum.

75. The next item that was ordered was £3,285 in respect of expenses. That figure too is agreed. The only defence is the set-off defence. A person providing services such as Mr Bates was providing, under an agreement that he was to be reimbursed his expenses, should be entitled to receive the reimbursement as soon as he has incurred the expenses and presented proper evidence of them. This was the view expressed in the last paragraph of the 19th October suspension letter. In my judgment that last paragraph was entirely proper. It is not open to the defendants to seek to assert a set-off in order to avoid paying Mr Bates the expenses that he incurred. The judge was quite right to make a summary judgment order in respect of that sum.

76. The next item is £35,000, in respect of the £10,000 monthly payments that would have been due under the agreement up to the date 17th February 1999, the date up to which, on Mr Bates' contention, the agreement continued. The judge accepted that contention, which was why he gave summary judgment for the £35,000, three months at £10,000 and £5,000 in respect of half of and February is how the sum was calculated.

77. This is a matter which has caused me the greatest trouble in considering the issues on this appeal.

78. Mr Chapple, as I have said, is entitled to point out that the defendants have failed to provide a satisfactory case for the termination of the agreement at any earlier date than 17th February 1999. Nonetheless, in my judgment, this is a matter which, for the reasons I have given, is something that should be left open for the decision by the trial judge. But I regard the defendants' defence on this issue to be essentially shadowy and unsatisfactory in view of the lack of detail to which Mr Chapple has referred. In my judgment, the right way to deal with the £35,000 is for that sum either to be paid into court or to be held by agreement between the parties in a solicitor's account pending the result of the trial.

79. Next, the judge gave summary judgment in two sums, £96,986 odd, in respect of the period up to the date of the hearing, and £22,847 odd, in respect of the period from then up to 16th February, the expiration of 12 months from 17th February. In my judgment, the summary judgment for that sum cannot be sustained. As from the termination of the agreement, Mr Bates' claim, if he succeeds in establishing his claim, is for damages for breach of contract, not for his contractual remuneration. There would need to be an assessment of damages in order to decide what the correct amount was. To award the remuneration rate as though that were bound to be the measure of damages is, in my judgment, wrong in principle.

80. With respect to paragraph 2 of the judge's order, in which he awarded interest on the various sums he had ordered to be paid, I would uphold his order in respect of the two items I have indicated, and unless there is a reason for varying the interest provision I would leave that standing. We have not been addressed about interest. Let me come back to it because I am not sure that I understand the interest provisions at the moment.

81. Paragraph 3 of the judge's order contains a declaration that Mr Bates is entitled to be treated as a beneficial owner of 2.5 per cent of the issued share capital of Microstar. That term in the Mountbatten Memorandum requires the Memorandum to be established as a binding agreement. That must, in my judgment, await trial. I would set aside that declaration.

82. In addition various directions for the hearing of this matter were given by the judge. Those, too, I would set aside, save that, in my view, an application notice for a case management conference should be issued by the claimant, Mr Bates, as soon as possible.

83. In conclusion to my judgment, I want to make a few observations about litigation of this sort. The litigation has, to my mind, clearly sprung up due to a falling out between Mr Combrinck and Mr Bates. They were associates. They fell out. It is undoubtedly the case that Mr Bates must be paid for the services he rendered Microstar. The matters in respect of which the parties appear to have considered him entitled to remuneration are set out in the Mountbatten Memorandum. They are set out in the draft agreements of September 1998 prepared by Mr Bates. These indicate the rewards that the parties have considered reasonable to allow Mr Bates in return for the services he was providing to Microstar. Microstar and Mr Combrinck have complaints about Mr Bates' performance of his duties. These complaints only emerged in their pleading. They are not to be found reflected in any earlier correspondence, and it seems to me that this is a case in which the parties might very well be assisted by some form of mediation.

84. It is entirely possible for Mr Combrinck and Mr Bates to spend a great deal of their money making quite a number of lawyers really quite well off. Litigation is extremely expensive in this country, and they will no doubt receive highly skilled services for which entirely appropriate rewards will be required to be paid. Whether that is how they want to spend their money is of course up to them, but it seems to me that in a commercial dispute of this sort, where Mr Bates needs to go on pursuing his profession as an accountant and Mr Combrinck needs to continue being an entrepreneur, they ought to have better things to do with their money. They really ought to meet with a neutral mediator and try to come to a conclusion about what Mr Bates ought to receive for the services rendered to Microstar for the period he worked for them.

85. There is nothing the court can do to require parties to go into mediation. Mediation, of course, is not always successful, but this seems to me a case that cries out for mediation. The aggressive tone of the letters before action that were written are, in my judgment, to be deplored. The solicitors ought to be calming down their clients not stirring the coals. I have said that a case management conference should be convened as soon as possible. Perhaps I should withdraw that. I think the first thing the parties should do is to consider the way to pursue proper mediation, and I would be prepared to allow them for a period of a month or a month and a half to do that before requiring a case management conference to be convened. No doubt at a case management conference, if one becomes necessary, they can tell the judge who conducts it that they have done their best to reach an accommodation and have failed. If they proceed down the litigation road they will be incurring very heavy expenses, which will make at least one of them, possibly both, very sad in the end.

86. **LORD JUSTICE ALDOUS**: I agree.

87. **LORD JUSTICE THORPE**: I also agree and would only add on behalf of the Court of Appeal the A.D.R. scheme remains open to the parties in the aftermath of the appeal. If they wish to avail themselves of this scheme, they have only to approach Mr Broderick or Mrs di Mambro who will explain what is required as a preliminary to the appointment of a mediator.

(Appeal allowed; set aside paragraphs I (c) and I (d), 3 and 4 of the order; no order for costs here and below; counsel to submit consent summary)