CA on appeal from Aberystwyth County Court (His Honour Judge Moseley) before Mance LJ, Mrs Justice Smith. 13th October 2000.

JUDGMENT : LORD JUSTICE MANCE:

1 This is an appeal by permission of HHJ Moseley QC against his order made 10th April 2000, declaring that the defendant solicitors were not in breach of duty to the claimants. The trial had taken place on the same day. It was of a preliminary issue, whereby the *"issue of breach of duty and of negligence, and causation of damage and limitation, [was to] be tried before the issue of quantum*". Since it is acknowledged that the defendant solicitors were negligent and in breach of duty in what must, on the judge's judgment, have been immaterial respects, it is necessary to examine closely the nature and causation of the claim actually advanced.

2 The claimants were and are husband and wife. I have the greatest sympathy for them. The case arises out of their first and only house purchase in July 1993. For reasons which were not on any view their responsibility, it has proved a disaster. The house is seriously defective, its builder is insolvent and, for reasons requiring careful consideration, the National Housebuilders Council ("NHBC") guarantee insurance on which they relied when purchasing has, so far at least, proved valueless.

3 The claimants contracted by two contracts on 14th July 1993 to buy a plot of land at a cost of £10,000, and to buy the house to be (in fact already) built on it at a cost of £30,250. The first contract was with a Mr Davies and Mrs Rogers, the second with Mr Rogers, the builder. The defendants, through their partner Mr Russell Jones, acted as the claimants' solicitors. In answer to pre-contract enquiries on 12th May 1993 the vendors' solicitors represented that the property would be sold with the benefit of NHBC cover, and that the relevant NHBC documentation would be delivered on exchange of contracts. The claimants had worked in the building trade and knew of the general significance and importance of NHBC cover. Broadly, it involves a tri-partite contract, with a ten year period, under which the builder gives various warranties and undertakings to a first purchaser, each subsequent purchaser and any mortgagee in possession and the NHBC undertakes to compensate each such purchaser and mortgagee if the builder due to insolvency or fraud fails to complete the home in accordance with the NHBC's requirements or fails to put right any defect reported in an initial guarantee period of two years or any major damage caused by defect or subsidence, settlement of heave in the remainder of the ten year period.

4 To make their purchase, the claimants required a £38,235 mortgage from the Britannia Building Society. The society's instructions to the defendants as solicitors included the following:

*"**The N.H.B.C. SCHEME***

9. Where the property is new or less than 10 years old please ensure that a N.H.B.C. agreement was entered into at the time of construction and that the benefit of the 10 year Protection Certificate will pass to the borrower and that the certificate is with the title deeds."

5 Contracts were exchanged by telephone on 14th July 1993, and, because the claimants were anxious to move home, completion was agreed for 16th July 1993. By letter dated 15th July 1993 the vendors' solicitors sent to the defendants the vendors' signed contract copy and NHBC documentation including a Buildmark Book BM, an Offer of Cover BM1 and an Acceptance Form BM. The letter was received by the defendants on 16th July 1993, the day of completion. The NHBC documentation had, clearly, been issued by NHBC, although no date of issue appeared upon it. It identified the plot with its address as the "home" and the builder as A. B. Rogers & Son. It gave a "*Buildmark No.*" - DA123306 - and, as expressed on the "*Offer of Cover*", a "*NHBC Member No*." - 66495 - for the builder. It came in an envelope under cover of a page bearing like information, and stating, with use of most emphatic capitals: *"**TO BUILDER/BUILDER'S SOLICITOR***

***PLEASE PASS THIS ENVELOPE, UNOPENED, TO THE PURCHASER'S SOLICITOR BEFORE OR IMMEDIATELY AFTER EXCHANGE OF CONTRACTS NOTE TO PURCHASER'S SOLICITOR** - **THIS ENVELOPE CONTAINS: THE ACCEPTANCE FORM (BM2)** Please complete all sections of the form and return the Acceptance to NHBC **BEFORE LEGAL COMPLETION.** NHBC will then issue the Ten Year Notice when the house is finished. If the postal address is not known before legal completion, please send it to NHBC as soon as possible thereafter, quoting the Buildmark number, and the purchaser's name."*

6 The Offer of Cover stated:
"The Builder and the NHBC offer the First Purchaser of the Home and all subsequent Purchasers the protection set out in the Buildmark Booklet which accompanies this Offer. This Offer is subject to the condition overleaf.
To accept this Offer, please complete the Acceptance Form BM2 and return it to NHBC. Your solicitor will have this form.
As soon as the Acceptance Form is received by the NHBC you will become entitled to the cover set out in part B section 1 and part C section 1 of the Booklet. You will become entitled to the cover set out in the rest of the Booklet only after the issue of the Ten Year Notice. The Ten Year Notice will be issued once the Acceptance Form has been received by the NHBC and the Home has been completed.
Signed on behalf of the Builder and the NHBC"

7 There followed the signatures of the Chief Executive and the Secretary of NHBC.

8 The Acceptance Form called for completion and return by the defendants as the claimant purchasers' solicitors. As well as accepting the Offer of Cover, it involved an undertaking to deliver the Offer to any subsequent purchaser. It said at its foot: *"This Form will be acknowledged by the issue of the Ten Year Notice which will be forwarded when the Home has been completed to NHBC's satisfaction. NO other acknowledgement will be issued."*

9 In its side margin it said in capitals: *"Please see the reverse of this form for important notes."*

10 The reverse of the Offer of Cover and of the Acceptance Form were, we were told, both in the same form, stating inter alia:
*"**Condition***
This Offer is made only to Purchasers who acquire or are to acquire:
(a) the freehold of the Home or a leasehold interest of 21 years of more of a share in such freehold or leasehold interest, and
(b) the Home for use as a residence by themselves, their tenants or licensees.
Notes to Purchases
1. This Offer is made by the NHBC and by the NHBC member who:
(a) is selling the Home to the First Purchaser; or(b) is building the Home on the First Purchaser's own land; or (c) is otherwise authorised in writing by the NHBC to make the Offer.
No other person can make the Offer. The NHBC member is described in this Notice and in the Buildmark Booklet as the "Builder".
2. The Buildmark provides protection for Purchasers as set out in the Buildmark Booklet. The NHBC cannot accept any other liability for the Home.
3. If the Ten Year Notice is not received within a few weeks after the Home has been completed ask you solicitor/licensed conveyancer to check why. It may be because the Acceptance Form has not been returned to the NHBC or because there are outstanding defects which prevent the issue of the Notice. If there are defects which prevent the issue of the Notice, your rights under the Buildmark are set out in the Buildmark Notice."

11 In parts of the Booklet summarising, though not part of, the Buildmark cover, it was explained that: *"Under the Buildmark the Builder is required to build your Home in accordance with NHBC's Requirements. This work will be subject to the NHBC's system of inspection and he must earn the NHBC's Ten Year Notice."*

12 A later footnote in the same parts explained:
"The Builder is:
- *the NHBC member who sold you your home or who built it on your land*
- *the person authorised by the NHBC to provide you with the Buildmark*

His name and address are given on the Offer of Cover."

13 Far from acting as advised by the covering letter, Mr Jones, failed - for reasons he could not explain - to complete or send off the Acceptance Form until 22nd September 1993. In response on 27th September 1993, the NHBC advised Mr Jones that the builder had been removed from their register and had ceased to be a member on 26th March 1993. That, they say, was after their issue of their documentation. The builder, they said, was not thereafter entitled to pass on such documentation to vendors of later sold houses. In a letter dated 8th August 1996 the NHBC assert, without particulars, that *"We always*

suggest to solicitors that such matters [i.e. the builder's continuing entitlement to pass on such documentation] be confirmed with NHBC when carrying out preliminary enquiries for a conveyance."

14 In a letter dated 3rd December 1996 the NHBC said:

"Properties are required to be registered with NHBC by our members prior to construction. It is at this point that they are allocated a Buildmark number and documents are issued.

When a Builder comes off the NHBC register, they are formally reminded by Recorded Delivery letter that they have no authority to deliver NHBC documentation for homes that have not yet been sold (i.e. Contracts exchanged or entered into), even those for which they have made an application for inspection prior to the date of deletion.

The offer of cover you received for the above property clearly states that it is subject to the conditions overleaf. The conditions show that the offer can only be made by the NHBC member. A. B. Rogers & Son has not been a member of NHBC since the 26th March 1993.

We again reiterate that the above mentioned property has no warranty."

15 The delay until 1996 in pursuing the matter with the NHBC does not appear to have been in any way the claimants' fault. Mr Jones appears not to have informed the claimants of any problem with cover. By a curious coincidence, it seems, the NHBC actually inspected the claimants' house after the claimants had reported defects, so reassuring the claimants that NHBC was dealing with their claim. In fact, NHBC had mistaken it for a next door house, on which a claim had also arisen. Following the NHBC's letters in 1996, the claimants or, more probably, their advisers concluded that the matter either had to be or should be left there. They did not pursue NHBC further.

16 Instead they turned to the present defendants, as the claimants' former solicitors. Until near trial, it does not appear to have been made clear that the defendants had had the NHBC documentation prior to September 1993. At an earlier stage, the Solicitors Indemnity Fund Limited, representing the defendants, had by letter 20th October 1998 been prepared to approach the matter, though without admission, on the basis that Mr Jones should have checked with the NHBC that the builder's registration still continued. The Fund contended, that, since the builder was not registered, NHBC cover could never have been achieved and that, even it had been a contractual term that NHBC cover should be provided, the claimants would (if they had learned before completion of its breach) have proceeded with the purchase and have had no more than a claim for damages. That contention was not pursued before us and seems without reality. The builder had through solicitors confirmed that the NHBC documentation would be provided (in a manner which may well have given rise to a collateral contract) and had on any view represented that he could provide it. If NHBC cover could not be provided and the claimants had known this, then (a) the claimants could have rescinded and refused to complete and (b) the mortgage monies would not have been forthcoming, so that they could not in any event have completed.

17 The claimants' pleaded claim alleges breach of a duty of reasonable skill, care and diligence owed in contract and/or tort. It pleads both that the defendants should have obtained the NHBC documentation and obtained confirmation from the NHBC of the builder's continuing registration or informed the claimants if they had not done so before exchanging contracts on 14th July 1993 *and* that they should have been obtained the same or, in the absence of the same, have refused to permit completion two days later. The nature of the causation and loss pleaded is important:

"13. The said breach of contract and/or negligence has caused the Plaintiffs to suffer loss and damage as aforesaid. If the Plaintiffs had been informed that the Property had no Buildmark guarantee they would not have proceeded with the purchase. In addition the Plaintiffs suffered inconvenience, distress and anxiety which caused the second Plaintiff who is aged 48 to suffer a depressive illness. ...."

18 Neither party's pleadings address very directly the question of the NHBC's liability or freedom from liability. But it is implicit in the claimants' claim that the NHBC's denial of liability was justified, and there was no assertion in the defendants' defence that the NHBC was liable.

19 However, when the matter came on for trial, the defendants' case was that the Buildmark documentation was properly issued and that there was nothing to suggest any change of circumstances or need to check on *subsisting* registration. This, we were told by Mr Pooles QC for the

defendants, led to discussion in front of the judge as to how far the defendants could go, bearing in mind that they had not advanced any positive case that the NHBC was liable. The defendants argued and it seems to have been accepted that they could advance the case that, whatever might be the true effect of the NHBC documentation, any reasonable solicitor would have believed that the NHBC documentation constituted an open offer, capable of communication by a builder to and acceptance by a purchaser's solicitors at any time, even after cessation of the builder's registration. They submitted on this basis that they could not have committed any breach of duty.

20 The judge's judgment was unreserved. It focuses for the most part on the defendants' duty to send off, and their failure until 22nd September 1993 to send off, the Acceptance Form. The judge observed that, whenever this form had been sent off, the NHBC's stance would have been that there was no offer to be accepted. In response to a submission that, if it had been sent off promptly before completion, the claimants would have discovered the true facts earlier and been able to refuse to complete the contract, the judge acknowledged that the claimants could have treated the contract as repudiated or at all events have rescinded it for misrepresentation. He went on: *"But the conclusion of the contract [query: completion] left them, as I see it, in no worse position than they were before. The position, it seems to me, essentially is this: by sending off the completion [sic: the judge no doubt meant acceptance] document earlier, Mr Russell Jones would not have secured for [the claimants] anything more valuable than that which in fact they did receive, and secondly by sending it off later rather than earlier, he did not lose for [the claimants] anything which they would have had, had he done it earlier. I cannot see, in the circumstances, that Mr Jones was at fault in the work that he did for [the claimants]. It seems to me that Mr Jones did everything a reasonable solicitor would have done, other than send off the acceptance form late; but sending off the acceptance form late did not, in my view, alter [the claimants'] rights as against the parties, and so is of no consequence."*

21 This reasoning is puzzling and deficient. First, it is somewhat difficult to reconcile with the scope of the preliminary issue, in so far as the judge purports to decide that completion could have caused no recoverable loss. The preliminary issue was confined to breach of duty, negligence and causation of damage. The damage pleaded was completing a purchase which would not otherwise have been completed. To what, if any, quantum of loss that led (although that too could involve its own aspects of causation) appears to me to have been a matter for another day. Secondly, if it was appropriate to make any assessment whether completion caused, or was likely to cause, loss, in circumstances where no NHBC cover could exist, then an affirmative answer seems obvious. After all, completion involved the claimants in disbursing some £40,000 and acquiring without NHBC cover a house which could and did prove a disaster for them. Finally, if the defendants had some subtle argument that the claimants could after completion still have rescinded for misrepresentation and would have been able to recover the price from the builder before his insolvency, it was neither pleaded nor investigated - and would seem most unlikely to have force, not least because it seems to have been the defendants's own continuing defaults that meant that the claimants remained in ignorance of the problem about NHBC cover for some years.

22 Unfortunately for the claimants, a claim on the basis identified by the judge faces another obstacle which the judge did not identify. That is that, even if the Acceptance Form had been sent off immediately it was received on 16th July 1993, completion would have taken place before the NHBC received it, let alone had any chance to reply denying cover. Before us, counsel for the claimants had effectively to accept that the fact that completion occurred could not be attributed to any delay in sending off the Acceptance Form. Further, I see no valid criticism of the defendants for not obtaining the NHBC documentation earlier than they did, so as to be able to send it off earlier. It was received in accordance with the procedure contemplated by NHBC in NHBC's covering letter, and the Law Society's own Conveyancing Handbook speaks of delivery of such documentation "on exchange of contracts". Here, it is true, the gap between contract and completion was unusually short, but, even if the documentation had been received in person on 14th July 1993 and the Acceptance Form sent off to NHBC on the same day, NHBC's reply would not have reached the defendants before completion on 16th July 1993.

23 The only relevant criticism that may therefore be made of the defendants is that they should, by telephone contact, have confirmed with NHBC between contract and completion that the offer was available for acceptance, or (to put the same point in a different way, in the light of NHBC's subsequent attitude) that the builder remained at the date of contract or completion a "*NHBC member*" entitled to pass on the offer. It is the case that the NHBC documentation gave NHBC's telephone number, though in this different context: "*For claims advice, please ring (0905) 795111"*.

24 So there would have been no difficulty in telephoning NHBC. One can presume that if this had been done then NHBC would have taken the same attitude as subsequently and asserted that Mr Rogers' lack of continuing registration invalidated the offer which he had purported to pass on.

25 This brings me to what I consider was the core issue in the case, with which the judge never dealt. Should the defendants as reasonable solicitors have telephoned NHBC to confirm the validity of the offer? The claimants submit that, normally, the gap between contract and completion would be sufficient to allow time for NHBC either to send a Ten Year Notice, so positively confirming cover, or at least to reply rejecting cover, if there was any problem. But, they submit, where as here the gap was very short, the solicitors should anticipate the possibility of some problem and should avert it by the simple step of telephoning the NHBC to confirm cover.

26 The defendants' response is to ask: why should they have done? They assert that any reasonable solicitor would, or a reasonable solicitor certainly could, have regarded NHBC's offer in its documentation as an open and continuing offer; and as holding out the builder as a NHBC member with authority to pass it on to a first purchaser. Why should a solicitor think that the offer, or authority to pass it on, might depend upon the builder member, through whom it was to be communicated and whose name and membership number appeared on it, remaining a member at the date of contract or completion? Their case is that a reasonable solicitor would know nothing of any private limitation or termination of authority as between NHBC and the builder and could disregard it as irrelevant; and that, as against a first purchaser, if NHBC wished to limit the builder's ability to communicate such an offer after termination of his NHBC membership, it was on the face of it for NHBC either (a) to ensure that on termination it recovered from the builder any documentation issued prior to such termination or alternatively (b) in or against the event that it could not achieve this, to include in the offer or covering letter a condition making it clear that the continuing validity of the offer (or, which amounts to the same thing) of the builder's authority to communicate it on depended upon the builder continuing to be registered with NHBC at the time of sale. They point out that nothing in the Law Society's Conveyancing Handbook, which summarises the NHBC scheme and its implications for solicitors, or in any other conveyancing work suggests any potential problem about, or any duty upon solicitors to consider, the continuing validity of an NHBC offer or the continuing membership of the builder member referred to in such an offer.

27 The defendants' response highlights another unsatisfactory aspect of the way in which this case has proceeded. It seems, as I have stated, to have been agreed that it was open to the defendants to argue that the NHBC documentation was in terms which gave no reason for them as reasonable solicitors to approach NHBC for any confirmation, although not open to them to advance any positive case that the offer was open for acceptance and that NHBC remained on risk (a case which would if open have had further implications for issues of causation and quantum). However, when considering whether the defendants failed to act with reasonable skill, care and diligence, the permissible argument and the impermissible case, appear to me, on the particular facts of this case, to be almost indistinguishable. The NHBC documentation does not involve an esoteric offer or esoteric or elaborate terms, requiring skill or legal knowledge which an ordinary reasonable solicitor might lack. Mr Pooles sought to reinforce the distinction between the permissible and impermissible arguments by arguing that the NHBC might be free from liability for some unforeseen reason which a reasonable solicitor could not in 1993 have been expected to contemplate. But, if the communication of NHBC's offer depended upon the builder continuing to be registered, the reason, I would have thought, is that a reasonable reader would understand from the offer that it, or authority to pass it on, depended upon the builder remaining a NHBC member at the time of sale: see **Investors' Compensation Scheme Ltd. v. West**

Bromwich B.S. [1998] 1 WLR 896. If so, then one would expect any reasonable solicitor to realise that this was its meaning. If, on the other hand, NHBC's offer was unconditional and authorised the named builder member to communicate NHBC's offer, without making such authority dependant upon such membership subsisting throughout some unspecified period between issue of the documentation and its communication to a first purchaser, then it is difficult to see why any ordinary solicitor should think it necessary to telephone NHBC to eliminate the possibility that NHBC might have, and wish to assert, a contrary view. We were told that unspecified passages in Bowstead on Agency were referred to below. One may surmise that they may have included those dealing with the subject of apparent authority and determination of authority - if so that again underlines the extent to which the permissible and impermissible arguments tend to merge on the issue of negligence.

28 When confronted with propositions along the lines outlined in the previous paragraph, Mr Thomas for the claimants submitted that, in the absence of any contrary plea, we should proceed, as against the defendants, on the basis that, under the relevant documentation, NHBC cover depended upon the builder's membership subsisting at the time of sale. Alternatively, he submitted that the judgment should be set aside in view of its inadequacies, and the case should if necessary be remitted for retrial to enable his clients to join the NHBC. Mr Pooles urged us on the other hand to address the limited issue which remained and which the judge did not address, whether a solicitor would or could reasonably have regarded the NHBC offer as one which it was open to the builder to communicate and open to the defendants, on behalf of the claimants, to accept.

29 In these less than satisfactory circumstances, I have come to the conclusion that, before attempting to grapple further with the problems raised by this case, we should take some steps to try to encourage its overall resolution. It is a matter of regret that all the relevant persons or bodies involved, including the NHBC, are not before the court. But the procedures of alternative dispute resolution ("ADR") do not depend upon commencement of proceedings. I consider that we should adjourn further proceedings in this court and stay delivery of any final judgment for a limited period, to enable the parties to take such serious steps as they may be advised to resolve their disputes by ADR, both as between themselves and, although the NHBC is not formally involved in proceedings, in relation to the NHBC. Mr Pooles sought to discourage us from such a step on the basis that the NHBC was most unlikely to participate, in the absence of any proceedings and after so long a period since claims were first made against it and since they were last pursued against it in 1996. I do not take so pessimistic a view. This order is of course only directed to the parties to this appeal. This court has no jurisdiction over the NHBC, but it seems to me that not only the present parties, but also the NHBC may, in the light of this judgment, consider that ADR has something to offer which it would be worth each of them exploring. If ADR procedures lead to resolution of this appeal, that will be a happy outcome. If they do not, the appeal should be restored for judgment. In the latter situation, if ADR procedures have in the meanwhile had the incidental effect of further elucidating NHBC's grounds for denial of cover, that may also assist consideration of the issue, what a reasonable solicitor would have understood about the availability of NHBC cover and the builder's ability to communicate the NHBC offer.

30 We should hear counsel on the precise terms of the order, but I set out a draft of the terms which I have presently in mind:

1. The claimants and defendants shall within two weeks of today's date identify, and shall (forthwith) invite the NHBC to identify within the like period, the names of three neutral individuals, or of one or more bodies or panels, available to conduct ADR procedures in this case within eight weeks of today's date.

2. They shall within three weeks of today's date in good faith endeavour to agree, both between themselves and with the NHBC, the identity of a neutral individual or panel to conduct such ADR procedures.

3. The parties shall take such serious steps as they may be advised, both between themselves and with the NHBC, to resolve any disputes by ADR procedures by the end of November 2000.

4. If the case is not finally settled by the end of November 2000, or if prior to that date ADR procedures or steps towards such procedures come finally to an end, the parties shall inform the court by letter within seven days or by 6th December 2000 (whichever is the earlier) as to the position, and, without prejudice to matters of privilege, as to why such steps have failed; and both parties shall in that event also have liberty to submit in writing to the court within seven days or by 6th December 2000 (whichever is the earlier) any further submissions about the basis on which the NHBC offer could or could not have been treated as open for communication through the builder at the time of sale of the property to the claimants; if either party wishes to address oral submissions on this or any other aspect, the matter shall be restored for oral submissions in court before judgment as soon as possible and in any event (unless the court otherwise orders) before the end of Michaelmas Term 2000.

Mrs. Justice Smith

31 I agree.

Order: Proceedings adjourned and judgment stayed pending the ADR scheme.

Mr. Bryan Thomas (instructed by Messrs Colin Taylor of Cardigan for the Appellants)
Mr. Michael Pooles Q.C. (instructed by Messrs Morgan Cole of Cardiff for the Respondent)