JUDGMENT : Mr Justice Roderick Evans: QBD. 16th July 2004

Background

1. The claimant Michael Humpheryes was born on 2nd February 1944. He has spent his working life in the construction industry as a steel erector and fabricator. He works on a self-employed basis and hires out his services through a company called M & M Steelwork Services of which he is the sole proprietor. At one stage he used to employ his own staff but he has not done so for many years.

2. In October 1999 the claimant was working for Bancroft Limited, a firm of electrical contractors at a construction site in Greenford, West London where a warehouse was being built. Although described in an accident report compiled on behalf of Bancroft Ltd. as an "electrical assistant" (p358) and in a similar document compiled by Jim Redfern on behalf of Vanderlande Industries UK Ltd as an "electrician's mate" (p227) I am satisfied that the claimant was engaged by Bancroft Ltd as a steel erector/fabricator to fabricate and fit the trays and trunking which were to carry electric cables. The claimant's two sons, both of whom are electricians, also worked for Bancroft Ltd at the same site.

3. There were other contractors on site. One of the main contractors was a Dutch company called Vanderlande Industries UK Limited ("VI"). VI's on site supervisor was Jim Redfern. VI engaged the first defendant Nedcon UK Limited ("Nedcon") to fabricate and install a shelving system at the warehouse. Their only employee on site was their site supervisor Mark Love. Nedcon, also a Dutch company, manufactured the shelving system but sub-contracted its installation to the second defendant, Storage Engineering Services Limited ("SES"). SES had a number of workmen on site and their site foreman at the relevant time was Martin Smith. I accept the evidence of David Mallet, then another site foreman employed by SES, that he did not start to work on the Greenford site until 18 October 1998

4. The warehouse was divided into three areas, one of which was called the bulk storage area. The dividing wall was made of plasterboard and near the north end of it was set a door which can be seen in some of the photographs produced at trial (see pages 302, 303 and 305). I am satisfied on the evidence that this door was not a fire door but was part of a walkway to be used by all.

5. The installation of the shelving required the setting of studs into the concrete floor of the warehouse – one stud at each corner of the shelving unit which would later be placed on top of, and secured by, the studs. The studs which can also be seen in the photographs referred to above stood about 5 inches proud of the floor. The datum lines upon which the studs were to be placed were plotted by Mark Love and then it was for SES to drill the holes in the appropriate places and fix the studs into the floor with a resin which would take approximately 30 minutes to cure. Thereafter, the shelving could be put into position and fixed.

6. Shortly before 12th October 1999, Mark Love plotted the datum lines for the placing of the studs in the bulk storage area and on 12th October, SES started to fix the studs into the floor. That work was completed by about 10am or shortly thereafter on the morning of Wednesday 13th October. When the work was completed, the workmen went for a tea break leaving the studs as they are shown in the photograph already referred to and in the photograph at page 306 of the bundle which shows the full run of the studs. Some idea of the similarity in colour between the studs and the concrete floor is apparent from the photographs.

The accident

7. At about 11.30am on 13th October the claimant went to the bulk storage area. The circumstances of the accident which he suffered as I find them to be are as follows. The claimant had been sent to the bulk storage area to do some snagging work on the trays which he had fabricated and installed. He had not been in the bulk storage area for some days and he was unaware that the studs had been fixed into the floor. He was accompanied by his son Paul who was walking a short distance behind him. The claimant entered the bulk storage area through the door which can be seen in the photographs. There was no warning sign on the door to indicate that there were studs placed in the floor of the bulk storage area. The studded area was not cordoned off and no tape was attached to the studs to draw attention to their presence. The claimant opened the door and stepped into the bulk storage area. A few paces ahead of him was a parked scissors lift (see photograph at page 302). He walked into the area and on his second step caught his left foot on a stud. The closeness of the studs to the door and the doorway can be seen in the photographs at pages 302, 303 and 305. The claimant tripped, his right leg went underneath him, he twisted his right knee and fell forward striking his head and shoulder on the scissors lift. Fortunately the claimant was wearing a hardhat. Paul Humpheryes

heard his father shout and saw him fall into the scissors lift. An ambulance was called and the claimant was taken to hospital. He did not return to his pre-accident work. After the accident Mark Love had the studded area cordoned off and the door through which the claimant had entered the bulk storage area locked.

The proceedings

8. The claimant seeks damages for the injuries he suffered and consequential loss. He claims against both defendants in negligence and breach of the duties created by regulations 4(2), 5 and 15 of the Construction (Health, Safety and Welfare) Regulations 1996. Each defendant denies negligence and while each admits that the regulations apply to the warehouse as a place of work, each denies that the regulations apply to them and alleges that the regulations apply to the other defendant. The case of each defendant as pleaded alleges that the accident was caused wholly or partly by the negligence of the claimant but though not abandoned that aspect of the case has, realistically, not been pursued with any vigour.

The Cherry Picker incident

9. Before turning to consider issues of liability, it is necessary to deal briefly with what was referred to at trial as the "Cherry Picker incident". In addition to scissors lifts, there were on site hoists with enclosed platforms at the end of an extendable arm. Workers on the platform can then be lifted to work at high locations. These hoists are called "Cherry Pickers".

10. The first reference in the witness statements to an incident involving a cherry picker is at paragraphs 12 and 13 of the witness statement of Mark Love dated 12th May 2003. Mr Love states that on the morning of 13th October before the claimant suffered his accident, the claimant had driven a cherry-picker from the bulk area through a doorway and in so doing damaged a plasterboard wall and a steel shutter. It is, according to Mr Love this incident to which he is referring in his report dated 27th April 2000 about the claimant's accident submitted to Norman Swift, contracts manager of Nedcon. The report reads: *"This operative is the same one I had a dispute with over a shutter door which he had damaged and I reported it to Vanderlande."*

11. The report contains no date for this incident and there is no assertion that the incident with the cherry picker occurred on the same day that Mr Humpheryes suffered his injury.

12. The next passage in the report reads: *"His company had not put any warning signs at the other side of the door warning other operatives about men working other side of the door, and also men working above signs as they were doing work on cable trays and wiring in roof area near the doorway."*

13. The same incident is referred to in paragraph 9 of the witness statement dated 28th May 2003 or Jim Redfern. He says: *"I should also mention that on the same morning of the accident, I had cause to speak to Mr Humpheryes because of some damage he had done to the shutter door. He was not particularly happy about being spoken to and did not like criticism. It was not the first time that he had to be spoken to as he was not a particularly careful individual and specifically was not careful with other people's equipment. "*

14. In evidence Mr Redfern said that there had been an incident some 2 – 3 weeks before Mr Humpheryes suffered his injury when Mr Love told him that he had spoken to someone in harsh terms about an incident with a cherry picker. He was not sure that that person was Mr Humpheryes but, he said, Mr Humpheryes was involved in an incident with a cherry picker on the day that he was injured.

15. In an earlier passage in his witness statement (paragraph 4) Mr Redfern severely criticises Bancroft Limited and in so doing states that as a company, Bancroft were not particularly interested in health and safety issues.

16. The evidence of the claimant, his son Paul Humpheryes and a works colleague, Daniel Gil, was that there had indeed been an incident in which the claimant, when driving a cherry picker, had caused damage but that incident had occurred some weeks before 13th October and that during the intervening period the claimant had been the subject of much "*mickey taking*" because of his driving. The claimant and his son said that there had been no incident with a cherry picker on the morning of 13th October and that prior to the claimant's sustaining his injury Paul Humpheryes had been with him at all times.

17. On this matter I accept the evidence of the claimant and his witnesses. There was only one incident involving the claimant and a cherry picker and that took place some weeks before 13th October. There was no such incident involving the claimant on 13th October. The evidence of Messrs Love and Redfern on this as on other significant matters to which I shall refer later was wholly unreliable. Moreover, the attempt to cast blame on and/or to malign Bancroft Limited who no one else has suggested bore any responsibility for the claimant's

injuries demonstrates a misunderstanding of who was responsible for what on site and a willingness to make allegations without knowledge or understanding of the facts.

The relationship between Nedcon and SES

18. Norman Swift, the contracts manager for Nedcon, knew Bob Handley, one of the directors of SES. They had both previously worked for a firm called Dexion and had known each other for 25 years. Mr Swift asked Bob Handley for a quotation for carrying out the work at the Greenford site. SES quoted for the work and the quotation (page 461A-B) dated August 1999 includes provision for *"construction, design, management – sundries – safety"*. This, Mr Swift says, would cover the costs of safety measures such as the provision of barrier tape.

19. Nedcon has a standard form of contract (an example is at page 247) which is amended as appropriate in the light of individual projects. An earlier contract dated 11th January 1999 between Nedcon and SES in relation to work at a site in Hatfield was produced in evidence (page 262). However, no written contract was produced in relation to the work to be carried out by SES at the Greenford site. Mr Swift's evidence was that a contract for this work had been produced by Nedcon and given to David Mallet of SES on or about 21st September 1999. He, Mr Swift, had not however pursued the matter and a signed contract was never returned. I reject this evidence. This assertion of delivery of the contract to David Mallet was not contained in Mr Swift's witness statement and I accept Mr Mallet's evidence that he was never given the contract. Indeed, at the relevant time he was working at Worksop.

20. It is clear, however, from Mr Swift's evidence that Nedcon were acting and regarded themselves as acting in accordance with the terms of the standard form contract. Clause 7 of the standard form contract provides that if in the opinion of Nedcon any personnel employed by or under the control of SES fail to carry out their duties with reasonable diligence or competence, or otherwise act in any way which may in the opinion of the contractor or the employer be prejudicial to either the subcontractor or the main contractor the subcontractor shall remove such personnel from the site immediately following the contractors request to do so and shall, at his own expense, replace such personnel with another or others acceptable to the contractor and/or the employer. Paragraph 8(1) of the standard form contract provides that the subcontractor should promptly comply with all instructions and decisions of the contractor and its authorised representatives.

21. Mr Swift also says that at the beginning of each project every subcontractor is provided with a health and safety plan by Nedcon. The health and safety documentation would include the method statement, risk assessments and other health and safety documentation. He said that he prepared five copies of these documents; he kept one himself, sent one to head office in Holland, gave one to VI, a fourth copy was kept by Mark Love and one was given to SES.

22. The method statement compiled for the Greenford site reads (page 472) at paragraph 4: *"For safety reasons the stud anchors will only be positioned in one area at a time, in front of the erection team."*

23. And (at page 476) a note at the end of the method statement reads: *"All working areas will be restricted to Nedcon operatives and associated trades. Wherever possible lifting, working areas and pre-positioned anchor bolts will be secured using safety tape to protect other trades and non-erecting personnel."*

24. Mark Love stated that he was familiar with the practice that if there is a method statement relevant to a particular subcontractor, the operatives of that subcontractor would be expected to read the control copy of the method statement and sign it to show that they had read it. He claimed that that had happened in this case but was unable to produce any signed documents as, he said, they had been sent to head office in Holland. He further stated that he had given a copy of the method statement to Martin Smith.

25. Mr Redfern stated that he had carried out the induction of SES employees onto the Greenford project and that this had included bringing to their attention the method statement, risk assessment and information about barriering off areas.

26. Mr Smith on the other hand while accepting that work was carried out in accordance with the instruction contained at paragraph 4 of the method statement referred to above had no recollection of ever receiving the health and safety plan and related documentation.

27. I am unable to accept the evidence that the health and safety plan and related documentation which would include the method statement was ever brought to the attention of SES and its employees. It is quite clear that what Nedcon regarded as normal procedures in respect of documentation were not followed in this case and

the evidence of Messrs Redfern and Love and the explanation of relevant documents being in head office in Holland were unsatisfactory. I am satisfied, however, that the content of this documentation was known to Mark Love.

The regulations

28. Regulation 4(2) of the Construction (Health, Safety and Welfare) Regulations 1996 provides that "it shall be the duty of every person ….. who controls the way in which any construction work is carried out by a person at work to comply with the provisions of these regulations insofar as they relate to matters which are within his control".

29. The regulations relevant to this case, which need not be set out in full for the purposes of this judgment, are Regulation 5 which requires the provision of a safe place of work and safe means of access to and egress from every place of work and Regulation 15 which requires that every construction site shall be organised in such a way that suitable traffic routes shall be provided for pedestrians and that pedestrians should be able to move about the site safely and without risk to health.

30. There is no issue that the work being carried out at the Greenford site was construction work and that the Greenford site was a construction site within the meaning of the regulations. The issue between the defendants is which of them was in "control".

31. Nedcon, by its contract with VI, was required to have on site a representative with sufficient authority to give day to day instructions to its own personnel and where VI consented to Nedcon subcontracting to another, Nedcon was not relieved of its obligations under the main contract and was to be liable for the acts and omissions of its subcontractors. The representative of Nedcon required to be on site by the contract was Mark Love and his evidence was that he was responsible not only for ordering and checking materials and dealing with individual requirements on site but also for health and safety matters and in particular matters arising with respect to subcontractors engaged by Nedcon. Mr Swift said it was his job to monitor health and safety aspects of SES's work.

32. Although no written contract was formally executed between Nedcon and SES, Nedcon intended that the terms of its standard contract would apply to its relationship with SES and believed that they did. Nedcon, therefore, approached this work on the basis that it, through Mark Love, had the power to require the removal of an employee of SES and to require SES to promptly comply with its instructions and decisions. Indeed, during his evidence Mark Love gave examples of occasions upon which he said that he had given instructions to SES and with which SES had complied.

33. It was Mark Love who was responsible for plotting the datum lines which defined the spots where SES was required to install the studs and in his report of 27th April 2000 about the claimant's accident Mark Love said when describing the work of installing the studs on 13th October 1999: "*We* had set the anchors" and "an operative had apparently fallen over *our* anchors which *we* had set." (my emphasis).

34. All these factors indicate that Nedcon possessed the necessary degree of control over the way the work was carried out to make Nedcon subject to the duties imposed by Regulations 5 and 15.

35. What of SES? SES were more than mere functionaries of Nedcon and though subject to the instructions of Nedcon, SES was a company trading as professional installers of all storage systems. SES retained responsibility for its work and a degree of control over the way in which it was carried out. Though properly described by Mark Love as at the bottom of the chain of command on site, I am satisfied upon the evidence before me that SES retained adequate control over the way in which work was done for the purposes of Regulation 4(2) and to impose upon it the responsibilities of Regulations 5 and 15.

The accident

36. As Mark Love had plotted the datum lines during the week prior to 13th October he knew how close the studs would be to the door. Thereafter he discussed with SES when SES would start installing the studs so that whether he was on site or not he would know when the work would begin. In evidence, Mark Love said that on 12th October he was not on site as he had gone to the Hatfield site to deal with snagging works. That was, he said, an all day visit and he had not visited the Greenford site that day. In his witness statement, however, he had said that he was not on site on the evening of 12th October and that the studs had not been put in place before he left the site on that day.

37. When questioned about the differences in his accounts he conceded that he could not be sure that he had gone to Hatfield on 12th October as he had no records to consult and all his records and timesheets had gone to Holland.

38. In evidence he also said that on two or three previous occasions when studs were being installed in a different area of the site he had had to instruct SES to put red tape around the studs and that SES had complied "at times". During the week prior to 12th October he claimed that he had told SES that they would need to put red and white tape around the studs and that on the morning of 13th October he had again raised the matter with Martin Smith. He had visited the bulk storage area on the morning of 13th before the claimant's accident and he had seen that some of the studs had already been installed and at that point he instructed Martin Smith to put tape around the studs and barrier off the studded area.

39. In his witness statement of 12th May 2003, however, although he set out an account of previous occasions upon which he had spoken to SES about taping off other areas where they were working and mentions previous failures of SES to put up tapes there is, importantly in my view, no mention in his witness statement of any instructions given to SES on the very morning of the accident and Mark Love was unable to give any explanation as to why such a crucial matter was not mentioned in his statement.

40. In the accident report of 27th April 2000 there is no criticism of SES and again no mention of his giving any instructions to SES or Mr Smith. In evidence Mark Love went no further than to say that it was possible that he had told Jim Redfern, after the claimants accident, that he had instructed SES to put up tapes that very morning. Jim Redfern, however, said he had no recollection of his being told this by Mark Love.

41. Jim Redfern's accident report of 18th October 1999 states that he instructed "Nedcon's supervisor" to barrier off the studded area before leaving site on 12th October and that on the Wednesday morning he again told Nedcon to barrier off the area. In evidence he confirmed that he had given these instructions but said that they were not given to Mark Love or to Nedcon. He said that he knew that Mark Love was not on site on 12th October and that when he referred to Nedcon in his report he was really referring to SES and Martin Smith. Jim Redfern expected that he would have told Mark Love that he had given two earlier instructions to cordon off the studded area but Mark Love said that he had no recollection of being told this by Redfern and that had he been told this he would have raised it with Mr Smith.

42. In his witness statement, Jim Redfern also said that on the morning of 13th October when he saw that the work being carried out was getting close to the door, he asked SES to lock the door or barrier it off. In evidence he said that it was not until after the accident that he told SES to lock the door.

43. The evidence on these matters of Messrs Love and Redfern is unreliable. I am satisfied that they have, with a degree of collusion with each other, tried to mislead me by lying about the use of barriers and tape on site and the instructions which they gave. They have done so in an attempt to deflect criticism from themselves and Nedcon and to pass blame onto SES.

44. The truth about the cordoning off or taping off of areas of the floor into which studs had been inserted comes from Martin Smith, the SES employee. He was an honest and straightforward witness. I accept his evidence that he had tape on his van for use in barriering off areas where work was being carried out but that the tape was not used on this site and no barriers were erected until after the claimant's accident when beams and red tape were used to barrier off these studded areas. Prior to the claimant's accident I accept that he had received no instructions from either Mark Love or Jim Redfern or from anyone else to put up a tape cordon or to tape the studs. He frankly conceded in evidence that the studs represented a hazard and that it would have been sensible to put tape on the studs.

Liability

45. I find that both Nedcon and SES failed to discharge the duties imposed upon them by Regulations 5 and 15. Erecting barriers to cordon off the studded area or the placing of warning signs or tapes was reasonably practicable and neither defendant has submitted to the contrary. Furthermore, these failures on the part of each defendant and the failure of each to institute and maintain a safe system of work amounts to negligence. In my judgment the responsibility of Nedcon was substantially greater than that of SES and I apportion liability between the two defendants as follows: as to Nedcon two thirds and as to SES one third.

46. The allegations of contributory negligence contained in the pleadings of the defendants all fail. There was no reason which was or which should have been apparent to the claimant why he should not have entered the bulk storage area through the door through which he did enter and which is shown in the photographs. He was not carrying a load which obscured his view and the presence of the scissors lift in the bulk area played no causative part in the accident. The studs were a clear tripping hazard which were placed very near the door and which had not been in the floor when the claimant was last in the bulk storage area. There was no reason why the claimant should have kept his eyes on the ground and allegations that he failed negligently to notice the studs have no substance.

The claimant's injury

47. The claimant suffered no bony injury to his neck or shoulder but due to the fall he experienced pain and stiffness in his neck and shoulder which persisted for some years. He had restricted movements to the right of his head and neck and any activity which required his right elbow to be above shoulder height produced pain. If he lay on his right side at night his sleep was disturbed by pain in the right shoulder. These symptoms, the claimant said in evidence, cleared up "a couple of year's ago".

48. The more serious injury was that to the claimant's right knee. He suffered an extensive tear of the medial cartilage and some damage to the back of the patella. An arthroscopy was carried out on 18th February 2000 to remove the torn meniscal tissue and thereafter the claimant failed to make a good recovery. At arthroscopy he was noted to have some pre-existing degenerative change in the joint not only in the medial compartment but also underneath the kneecap and these factors contributed to the delay in recovery. Subsequent investigations confirmed that degenerative changes were occurring in both knee joints before the accident and that these changes particularly involved the medial compartments of the joints. These arthritic processes may have been accelerated by the accident. The knee continued to be painful up to the date of trial. The claimant said in evidence that the knee had started to get better but in the 6 months or so before trial it had got considerably worse and was causing pain in the right hip. Discomfort in the right hip was noted by Mr MacLellan, the consultant orthopaedic surgeon instructed on behalf of the claimant, as long ago as November 2000 and he was of the opinion that it was possibly caused because the claimant had found that he could walk comfortably by walking with his right foot turned out a little. This compensatory gait would alter the loading through the claimant's hip and cause problems. The claimant confirmed in evidence that he turns his foot out in order to relieve discomfort in his knee. Painkillers taken to relieve the pain in his knee enable him to be more active, the result of which is that he walks more and by his gait increases the loading of his hip. I find that the pain in the hip is related to and a consequence of the injury to the knee caused by the claimant's fall.

49. On 1st March 2000 Mr Lang-Stevenson, the consultant orthopaedic surgeon who carried out the operation upon the claimants knee, expressed the view that the claimant would probably be able to manage returning to work despite the fact that his joint was arthritic. Mr MacLellan, however, expressed the view that it was unrealistic for him to return to heavy work in the steel-erecting business as he might represent a risk of injury to another employee if his knee were to cause pain which resulted in his dropping a heavy weight. He also thought it was unrealistic for him to return to climbing and descending ladders and was of the view that the claimant would have to find employment in a largely sedentary capacity.

50. A further consequence of the claimant's injury is that his previous pastimes of fishing, rough shooting, bird watching and walking can no longer be followed as he is unable to walk on rough ground or for long distances.

51. I award £14,000 by way of general damages.

Loss of earnings

52. The claimants work as a steel erector required him to walk over rough sites, climb ladders and lift or move heavy loads. He has worked all his life – usually long hours, seven days a week. I accept his evidence that prior to this accident he had never lost a days work due to illness and the last time he was unable to work due to lack of work was some 20 years ago. He has never had to advertise for work and obtains work because of his contacts within the industry. Much of his work has been within the Ford plant at Dagenham which was a ten minute drive from his home. As this was an established site the surfaces on which he was required to walk were smooth and he could often drive to the locations within the factory where he was required to work.

53. Following his accident the claimant was offered and accepted work with a company called CME in a supervisory capacity within the Ford plant. The claimant had done work for CME for a number of years in a self-employed capacity and the post accident supervisory work did not involve climbing ladders or physical work. The claimant was able to carry out this work despite his accident. When the claimant ceased working for CME to undergo his operation, CME filled the supervisor's vacancy and the claimant has not worked since.

54. The claimant said in evidence that he would have worked until he was sixty five had it not been for his accident and he would be prepared to work tomorrow were suitable work available. Due to the increase in construction work, the amount of work available for a steel erector and the rates of remuneration have increased over recent years. The claimant, however, is not now able to do this heavy work and the kind of light work which he undertook for Bancroft and the suitable supervisory work of the kind he was doing for CME are not now available. I accept that the claimant has tried to find suitable work but has failed. His difficulty is increased by the fact that once it is known in the industry that he has suffered an accident he is regarded as a potential liability. Moreover, the Ford plant has reduced drastically in size if not closed altogether the result of which is that firms like and including CME have ceased to trade. A further inhibiting factor in the claimant's search for work is the difficulty he has in driving long distances due to his knee and he would therefore be unable to accept work to which he would have to travel.

55. The claimant was secretly videoed on behalf of the first defendant on 27th and 28th January 2004 and the 3rd March 2004. In the video footage the claimant was seen in and around vehicles outside his house, driving a vehicle and going to a shooting range with a friend. No doubt it was hoped that these videos would demonstrate that the claimant was engaged in activities which he said he was unable to carry out. In fact the contrary is the case. The claimant was not shown to be doing anything which he claimed he could not do and indeed he can be seen walking awkwardly on some occasions in the video.

56. It was also suggested on behalf of the first defendant that the claimant might make a living by hiring out his tools commercially. It is right that the claimant had hired tools to Bancroft when he was working for Bancroft and indeed after the claimant's fall. However, there is no merit in this suggestion. The situation with Bancroft was a one-off situation and I accept the claimant's evidence that he does not have enough tools to hire out commercially.

57. In 1991 the claimant decided to reduce his workload. He ran down his company and his two sons who had worked with him returned to the electrical trade. At that time the claimant and his wife bought a large house which needed complete renovation and the claimant decided to carry out the work himself. He remained off work for a number of years and financed this time by insurance policies which matured and a sizeable tax rebate. The claimant returned to work in about 1998 having virtually completed the renovation works on his house.

58. The defendants suggest that the claimant would not have worked until he was sixty five. There are a number of bases upon which this suggestion is made.

59. Firstly it is suggested that the claimant's withdrawing from his work as a steel erector for a period of years to renovate his family home and the fact that his wife gave up work in October 2000 indicate that the claimant was winding down his working life. I find that this was not the case. Mrs Humpheryes was "medically retired" from her job from Cameron McKenna in October 2000. She remains on their books as an employee receiving 75% of her salary. Secondly, it appears to be suggested that minor ailments and conditions revealed by a trawl through the claimants past medical history as revealed in his general practitioner notes would have resulted in his ceasing work before he reached sixty five. Again I reject this suggestion. None of the minor matters relied upon would in my judgment have affected the claimants ability to work until he was sixty five.

60. Thirdly, the defendants rely upon the opinion of Mr MacLellan to suggest that the claimant's pre-accident condition, would have resulted in his not being able to continue to work until he was sixty five. Mr MacLellan reports that there were degenerative changes in both knee joints which predated the accident. He thinks it is probable that the claimant would have undergone arthroscopic surgery on his right knee within a short period of years whether the accident had occurred or not and it is probable that he would have had to undergo knee joint replacement within a few years on the right side and in a further few years on the left side in any event. Mr MacLellan refers to other patients who were unable to work beyond the age of fifty five in

heavy tasks with the type of arthritis in the knee which existed in the claimant's knees. However, he does not say that nobody can do heavy work beyond the age of fifty five with this type of arthritis and he does say that he has seen patients who have succeeded in doing so. His view is that the claimant would have been unlikely to reach sixty five doing the type of heavy work in which he had been engaged. However, he saw no medical reason why he should not seek employment in the future provided heavy physical loads are not placed upon him and he does not have to have a great deal of climbing of ladders or stairs to do.

61. I have considered the content of Mr MacLellan's reports and letters with care and have done so against the background of the evidence of this claimant. Having done so I am satisfied that had this accident not occurred, the claimant would have continued to work as he was working in 1998 and 1999 and that while he might have reduced heavy work, he would have been able to continue in the industry and work until he was sixty five. I am satisfied that the claimant has tried and failed to find suitable work and that there is no realistic possibility of his working again.

62. The claimant has instructed a forensic accountant to calculate his loss of earnings, as have the defendants jointly: Mr Paul Short for the claimant and Miss Gail Rifkind for the defendants. Neither has given evidence and neither has heard the evidence in this case although each, of course, has read and considered a large number of documents relating to the case and in particular to the claimants earnings. The fact that the forensic accountants have not heard the evidence which I have heard is of particular relevance when considering the report of Miss Rifkind as many of the queries she raises in her report in relation to the various scenarios which she sets out have been answered by the evidence.

63. The fundamental difference between the approaches of the two accountants can be shortly put. Mr Short calculates the claimant's annual net earnings by considering his income for the years ending 30th April 1999 and 30th April 2000 and he adds to the figure he achieves 15% per annum to reflect increase costs and income in the light of the state of the industry. Miss Rifkind has considered the claimants income over a three year period; the year ending 30th April 1998 together with the two years considered by Mr Short but she does not allow any percentage increase. In the year ending 30th April 1998 the claimant did not work for the whole year and, therefore, the figure produced by Miss Rifkind for average earnings is less than that produced by Mr Short.

64. In my judgment the approach of Mr Short is to be preferred. To include the figures for the year ending 1998 produces a result which is not a proper reflection of the claimant's earnings and inappropriately reduces what would otherwise be his average net earnings. Moreover, Mr Short's percentage increase is, on the evidence which I have heard, justified.

65. The claimant's calculation of loss of earnings up to the date of trial based on Mr Short's figures is £131,165.08. This figure has not been challenged as a figure and that is the sum I award for past loss of earnings. The multiplicand for future loss of earnings is £32,453 and a multiplier of 4.11 should be applied.

Loss of pension

66. The defendants have calculated this loss at £12,002. The claimant does not challenge the figures and there will be an award in this sum under this heading.

Care and assistance

67. The claimant's injury has resulted in his being unable to carry out tasks around the house which he would otherwise have carried out himself. Members of his family have assisted in these tasks. This aspect of the case has not been the subject of great contention and there is a measure of agreement between the parties. Mr Doherty on behalf of SES suggested in his closing submissions that a figure of £1,500 per annum for what he referred to as the "early years" would be appropriate. No contrary submissions were made on behalf of the first defendant and Mr Bassett on behalf of the claimant did not seek to disagree with this figure. My conclusion is that under this head there should be an award of £1,500 per annum up to the date of trial. There will in my judgment be a continuing requirement for care and assistance resulting from this fall which will diminish as the years go by as the claimant would in any event have been less able to carry out these tasks himself. For future care and assistance I award an annual figure of £750 up to the date of the claimants seventieth birthday. An appropriate multiplier is 8.73.

Mr John Bassett (instructed by Kenneth Elliot & Rowe) for the Claimant : Mr Glen Tyrell (instructed by Beachcroft Wansbroughs) for the 1st Defendant : Mr Bernard Doherty (instructed by Davis Lavery) for the 2nd Defendant

MR JUSTICE RODERICK EVANS: 11th November 2004.

1. I have given judgment in this case and have found the defendants liable to the claimant in negligence and breach of statutory duty. I have apportioned liability between the defendants as to two-thirds against the first defendant and one-third against the second defendant. The total amount of damages excluding interest is £304,221.41.

2. The questions of interest upon those damages and the costs of the case fall now to be determined.

Chronology

3. It is necessary to set out briefly the history of this litigation insofar as it is relevant to the matters now under consideration and insofar as it has been revealed to me during submissions.

4. The claimant suffered his accident on 13th October 1999 and notified the first defendants of the claim on 28th April 2000. The insurers of the first defendants acknowledged receipt of this notification and said that they were "presently investigating the matter" in their letter in reply dated 4th July 2000. On 20th December 2000 the insurers of the first defendant wrote to say that they were prepared to concede primary liability. However, they reserved the right to argue that the claimant had been contributorily negligent.

5. On 24th June 2002 the claimant's solicitors wrote to the insurers of the first defendant to make an offer under Part 36.10 in the sum of £311,490.15 inclusive of interest. Set out in the letter were details of how the claimant's solicitors valued the claim and enclosed with it were a calculation of special damages, the report of the accountant dated 23rd May 2002 which was relied upon by the claimant at trial, copies of statements of the claimant, his wife and son, the initial report of Mr MacLellan the consultant orthopaedic surgeon instructed on behalf of the claimant which was dated 8th November 2000 together with letters written by Mr MacLellan dated 8th January 2001 and 30th May 2001.

6. In the letter of 24th June 2002, which contained the Part 36 offer, the claimant's solicitors said: *"This is a substantial claim and if you require further time to consider the matter over and above the 21 days, please contact us within 7 days."* And a little later: *"If we are taking the case on, on a CFA basis when first instructed the success would have been in the order of 75% we estimate. There were obvious difficulties in regard to establishing the correct defendant and there have been massive difficulties in preparing a calculation of special damage. There were difficulties in regard to causation."*

7. On 28th June 2002 the first defendant's insurers flatly rejected the offer because, as Mr Tyrell put it during his submissions, this was a much bigger claim than had been anticipated. The first defendant made no counter offer and sought no further information. They did, however, state that they wished to obtain their own medical report but at trial they called no medical evidence.

8. The claim form was issued on 24th September 2002 and the particulars of claim served in December 2002. On 6th February 2003 the first defendants filed a defence in which they denied liability and alleged that the accident was caused or contributed to by the claimant's own negligence. At the same time they issued Part 20 proceedings against SES in which they claimed a contractual indemnity from SES against the claim made by the claimant, damages for breach of contract and/or breach of statutory duty and/or negligence and/or a contribution.

9. SES in its defence to the Part 20 proceedings denied the existence of a written contract, admitted the existence of an oral contract between it and the first defendant and denied that it was in breach of that contract, statutory duty or was negligent.

10. On 5th August 2003 the first defendant was given permission to withdraw the admission of liability made on 20th December 2000 and the claimant obtained permission to proceed against SES as a second defendant. The stance taken by each defendant was that it was not liable to the claimant and that it was the other defendant who was liable. Each defendant raised, but ultimately did not really pursue, allegations of contributory negligence. Issues of contractual liability as between the first and second defendant fell away. The first defendant was forced to concede that it could not prove a contractual indemnity and I found that the method statement was never served on the second defendant by or on behalf of the first defendant. These matters are referred to in the main judgment and do not need to be further developed here.

11. The implied terms of the contract which the second defendant accepted existed between it and the first defendant, namely, that SES would carry out the work with reasonable care and skill and would do so in a good and workmanlike manner added nothing to the allegations of negligence which were being pursued in the case and I was invited to deal with the case on the basis of a consideration of the allegations of negligence and breach of statutory duty. Mr Tyrell in accordance with the understanding reached at trial did not address me on breach of contract or seek a finding that the second defendant was in breach of the implied terms of the contract which existed between the first and second defendant.

12. SES had paid for public liability insurance. However, it is in effect uninsured, as its insurance company has gone into liquidation. The liquidator of the insurance company has, nevertheless, paid for SES to be represented in this case in order that it may attempt to limit its liability. SES has ceased trading and is unlikely to be able to meet the judgment in this case. Following the Part 36 offer of June 2002 neither defendant made any counter offer and no money was paid into court by either defendant. The first defendant did not attempt to do so and the second defendant was, it seems, unable to do so.

Findings in the iudgment

13. After judgment in this case had been handed down Mr Tyrell submitted on behalf of the first defendant that in the light of my finding of liability against the second defendant I should make a further finding, namely, that the second defendant was in breach of the terms of its contract with the first defendant in that the work carried out by the second defendant had not been carried out with reasonable care and skill and had not been done in a good and workmanlike manner. There had been no mention of the need for such a finding at trial, after the draft judgment was circulated or before the judgment was formally handed down. Mr Tyrell could not explain why this matter had not been raised earlier but stated that such a finding was now necessary and relevant as he apprehended that the second defendant might raise a certain argument as to costs. I refused his application. Whether the argument he apprehended as to costs was in fact raised I was not told. However, I approach the question of costs in this case in the knowledge that the second defendant's liability to the claimant is tantamount to a breach by the second defendant of the terms of its contract with the first defendant.

The calculation of interest

14. The calculation of standard rate interest on the damages awarded is agreed between the parties at £21,762.87, made up of £466.20 interest on general damages and £21,296.67 pence interest on special damages. The total of damages and interest is, therefore, £325,984.28.

Orders as between the claimant and the second defendant

15. Against the second defendant the claimant seeks orders that the second defendant pay the claimant interest on damages in the sum of £21,762.87 and that the second defendant pay the claimant's costs on the standard basis, those costs to be assessed if not agreed. The second defendant does not resist these orders and I accordingly make them.

Orders as between the claimant and the first defendant

16. The claimant seeks an order for costs against the first defendant but submits that in accordance with CPR 36.10(1) I should take the part 36 offer made by the claimant into account when making the order for costs.

17. The part 36 offer was in the sum of £311,490.15 to include interest and was expressed to be open for 21 days i.e. until the 15th July 2002. Interest at the standard rate has accrued since 15th July 2002 in the sum of £9,551.86 and when that sum is deducted from £325,984.28 one is left with £316,432.32. The claimant, therefore, argues that he has bettered his part 36 offer by nearly £5000 and that the consequence of that is that for the period from the latest date on which the first defendant could have accepted that offer without needing the permission of the court (see CPR 36.21 (2)) the first defendant should pay enhanced interest on damages, costs on the indemnity basis and enhanced interest on those costs.

18. Mr Tyrell submits that CPR 36.21 has no application to the situation that has arisen in this case. Firstly, he says, that the first defendant is liable only for two thirds of the judgment sum and, therefore, the amount for which the first defendant is liable is substantially below the offer that the first defendant

rejected. Secondly, he makes the bold assertion that CPR 36.21 does not apply to a case where there are two defendants as there are in this case.

19. Part 36.21 (1) provides; *"This rule applies where at trial-*
(a) a defendant is held liable for more; or
(b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's part 36 offer."

20. In my judgment CPR 36.21 does apply and it matters not whether one considers sub-paragraph (a) or (b) of paragraph l to reach that conclusion. Mr Tyrell is confusing liability with the apportionment of damages. The first defendant is liable to the claimant for the whole of the judgment sum and liable, therefore, to have the whole sum enforced against them. The claimant has beaten the Part 36 offer.

21. Where CPR 36.21 applies the court is required by paragraph 4 of that rule to make the orders sought by the claimant unless it considers it unjust to do so and in considering whether it would be unjust to make the orders the court should take into account all the circumstances of the case including those set out in CPR 36.21(5):
"(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;
(c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and
(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated."

22. Mr Tyrell argues that the reason why the case did not settle at an early stage is that the second defendant was unable or unwilling to make an offer of settlement and it is the second defendant and not the first who should be paying enhanced interest and costs on an indemnity basis. I reject this argument. This is precisely the kind of case where the claimant's claim should have been settled an early stage. Instead of trying to settle the case the first defendant has indulged in the conduct to which I referred in my judgment on liability. Mr Tyrell has drawn my attention to correspondence between the parties concerning disclosure of medical evidence and alleged delay. I have considered his submissions, the circumstances of the case as a whole and those matters specifically referred to in paragraph 5 of the rule. I am satisfied that it would be unjust not to make the orders sought by the claimant.

23. Accordingly, the claimant will be entitled to enhanced interest on the award of damages against the first defendant. The period for which he is so entitled is to start, on my interpretation of the rules, from the date of commencement of proceedings i.e. 24th September 2002.

24. I have to consider the rate at which the enhanced interest should be paid.

25. The claimant contends for the maximum rate of 10% over base rate. Mr Tyrell says that the appropriate level has been set by Lord Woolf MR, as he then was, in the case of ***Petro Trade Inc v Texaco Ltd*** where Lord Woolf said that in the circumstances of the case with which he was then dealing he would, if the matter had been one for his discretion at first instance, have awarded a rate in the region of 4% above base rate. Each case has to be looked at on its own facts and against the background of the way in which the litigation has been conducted. In the circumstances of this case I set a rate of 6% over base rate.

26. The first defendant will pay the claimant's costs on the indemnity basis for the same period and interest on those costs at the rate of 6% over base rate.

27. The claimant further seeks an indemnity from the first defendant for the claimant's costs of the claim against the second defendant. Having admitted primary liability the first defendant withdrew that admission, denied liability, sought to blame the second defendant and commenced Part 20 proceedings against the second defendant. The claimant was, therefore, obliged to join the second defendant as a party to the claim and has thereby incurred additional costs. The second defendant is effectively uninsured and may not be able to meet his liability to the claimant. The claimant is, therefore, left in a position where any shortfall in the recovery of costs will be borne by him personally and that will have the effect of reducing the damages which he has recovered.

28. It is primarily the conduct of the first defendant which has caused this litigation to proceed in the way it has whereas a more appropriate approach by the first defendant would have considerably limited the scope and costs of this litigation. It is just in the circumstances of this case that the claimant should be able to recover from the first defendant any shortfall in the costs recovered against the second defendant and I shall make the appropriate order.

Costs between the first and second defendants

29. The second defendant seeks to resist an order for costs in favour of the first defendant on the basis that the first defendant failed to prove its pleaded case against it and had to concede that no written contract or contractual indemnity existed between the defendants. That an oral contract existed between the defendants was admitted by the second defendant and the second defendant denied that it was in breach of that contract. The allegations of negligence made against the second defendant have, however, been proved and, therefore, the essence of the first defendant's case against the second defendant substantiated. In the circumstances of this case it is just that the first defendant obtains an order for costs against the second defendant on the Part 20 claim. The first defendant seeks a judgment against the second defendant on the Part 20 claim in a sum equal to 'A of the recovered damages and interest and an order that the second defendant pay the first defendant 'A of the standard costs that the first defendant has to pay the claimant in the main action. Neither order is appropriate in the circumstances of this case.