JUDGMENT : TUGENDHAT J. Q.B.D. 16th December 2005

1. Gosfield School Limited ***("the school")*** is an independent secondary school in Essex. In 1996 two brothers, Arran and Ross McLellan, were enrolled at the school. I shall refer to them either by their first names, or together as ***"the boys".*** Ross was born in February 1980 and Arran in November 1981.

2. Unfortunately, in 2000 a dispute arose between their parents, Mr and Mrs McLellan ***("the parents")***, and the school. By that time the boys were both aged over 18. This dispute was settled in November 2002, but it has given rise to a lamentable amount of other litigation.

3. The issues that I have to decide arise in a claim brought by the school against Birkett and Long, a firm of solicitors ***("the solicitors")*** which were retained by the school in its dispute with the parents. Mr Andrew Davies was counsel instructed by the solicitors, and he has been brought into the proceedings as Defendant to a claim for an indemnity. The solicitors make this claim against him in the event that the school succeeds in its claim against them. And the parents now also make a direct claim against Mr Davies. In one sentence (and I take this from the school's skeleton argument before me) the school blames its former solicitors and counsel for failing to do enough to avoid, or to protect it from, subsequent litigation, and the resulting costs, brought by the boys in 2004.

THE VARIOUS CLAIMS AND PROCEEDINGS

4. Briefly, the school sued the parents for unpaid fees in an action commenced in July 2000 in Chelmsford County Court number CM004292 (some of the proceedings in this action were also in Colchester and Southend County Courts). In September 2000 the parents made a cross claim against the school for breach of contract, alleging that the school had failed to give an adequate education to the boys. In May 2001 the school obtained summary judgment on its claim and the cross claim continued against it. The parents' cross claim was settled outside court just before it was due to be tried on 13 November 2002.

5. In February 2004 Ross issued proceedings against the school in tort and in October 2004 Arran issued his own proceedings against the school. These proceedings were in Gloucester County Court 4GL00428 and 4GL03657. They were consolidated under number 4GL03657. They have been referred to as ***"the New Ross and Arran Claims."***

6. In January 2005 the school made a cross claim in those proceedings against the parents, seeking damages for (amongst other things) breach of a warranty the school alleged that the parents had given to the effect that they had had the authority of the boys to advance claims on their behalf in the cross claims advanced by the parents against the school in Chelmsford. They claimed that the settlement in November 2002 was made on the basis that the parents warranted to the school that they had authority from the boys to settle, and did settle, the boys' claims. On the same factual premise (that is, that the boys' claims had been settled) the school made an application to strike out the boys' claims as an abuse of process. That application of the school was dismissed on 21 December 2004. The school discontinued their claim against the parents on 25 November 2005, about a week before this hearing.

7. On 8 March 2004 the school issued these proceedings against its insurers, and against the solicitors, in the High Court. The parents sought an indemnity from the insurers against its liabilities arising from the settlement made with the parents in November 2002. The insurers resisted the claim against them on the basis that notification had been too late. This dispute between the parents and the insurers was settled in April 2005.

8. In these High Court proceedings the school also made a claim against the solicitors. Initially that claim was on the basis that it was as a result of a breach of duty by the solicitors that they failed to obtain a full indemnity from their insurers. But in February 2005 the school added the claim that it was as a result of a breach of duty by the solicitors that they were exposed to the new claims brought by the boys in the Gloucester County Court.

9. On 21 May 2005 the solicitors brought their Pt 20 claim against Mr Davies. Finally on 5 December 2005, on the first day of the trial, the school applied to join Mr Davies as a Defendant to their claim already made against the solicitors. I gave permission for the joinder.

THE PRELIMINARY ISSUES

10. In May 2005 an order was made by Leveson J for the trial for preliminary issues. On 4 November 2005, that is a month before the trial, that order was varied. Amongst other procedural orders made on that day, the issues to be decided as preliminary issues were set out as follows:

"1. What is the meaning and legal effect of the settlement of the earlier action brought by Mr and Mrs McLellan against the Claimant (claim number CM004292) [that is the settlement in November 2002].

2. Whether the actions brought by Arran and Ross McLellan (claim number 4GL03657) are properly maintainable and/or amount to an abuse of process.

3. Whether Mr and Mr McLellan acted in breach of warranty and/or made the misrepresentations made by the Claimant in Claim number 5GL01172 [that is the cross claim in the proceeding started by the boys] and/or whether Gosfield School relied on the same?

4. Is Birkett Long liable to the Claimant in respect of the New Ross and Arran Claims (as defined in paragraph 10A of the Amended Defence of Birkett Long [see para 5 above]) for the reasons set out in paragraph 19(iv), 20(iii) and 23(xi) to 23(xix) inclusive of the [Re-]Amended Particulars of Claim?

5. Is Andrew Davies liable to Birkett Long in respect of the New Ross and Arran Claims as alleged in the Part 20 Particulars of Claim?"

11. The effect of my order giving permission to join Mr Davies as Defendant to the school's claim is that issue 5 should now be read as follows:

"5. Is Andrew Davies liable in respect of the new Ross and Arran Claims to Birkett Long as alleged in the Amended Part 20 Particulars of Claim, or to [the school], as alleged at paragraph 27 of the Re-Re-Amended Particulars of Claim?"

12. The passages from the Re-Amended Particulars of Claim referred to in issue 4 read as follows:

"19. It is averred that [the solicitors] owed the [school] a duty to advise on: . . . (iv) the need to adequately compromise the proceedings so as to avoid any future claims being brought against [the school] arising out of the same facts or events and any action being brought by Mr and Mrs McLellan's children.

20. It is further averred that it was an implied term of the contract between [the school] and the [solicitors] that they would exercise reasonable skill and care and, as an aspect of that general duty, that they would: . . . (iii) use reasonable skill and care in advising the school on settlement and how to avoid the possibility of future litigation . . .

23. The [solicitors] acted negligently and/or in breach of their contract with the [school] . . .

- *(xi) In the circumstances, failing to act as reasonable competent solicitors.*
- *(xii) Failing to advise the [school] of the need to compromise the claims which were initially made on behalf of Ross and Arran McLellan;*
- *(xiii) Failing to compromise the claims of Ross and Arran McLellan;*
- *(xiv) Failing to draft a suitable compromise (for example, including an indemnity by Mr and Mrs McLellan against any subsequent claim by Ross or Arran McLellan), protecting the [school] from future litigation against them arising out of the same facts and events;*
- *(xv) Failing to seek an effective dismissal of the claims made by Ross and Arran McLellan in action number CM004292 in the Southend [sic] County Court;*
- *(xvi) Failing to provide the [school] with any or any effective protection against future claims arising out of the same facts and events which were the subject matter of action CM004292 in the Southend [sic] County Court;*
- *(xvii) Failing at any time after 21 September 2000 to establish clearly the extent of Mr and Mrs McLellan's authority to act for and/or to claim damages on behalf of Ross and Arran;*
- *(xviii) Failing at any time after 21 September 2000 to ensure that any claim for damages by Ross or Arran would be disposed of in the existing proceedings, for example by stating to them in open correspondence that they should bring forward any claim that they might have against the [school] and that any subsequent claim would constitute an abuse of process;*
- *(xix) Failing to warn the [school] of the risk that a subsequent claim in respect of the losses allegedly suffered by Ross and Arran would not be barred by a settlement of their parents action."*

13. Paragraph 27 of the Re-Re-Amended Particulars of Claim reads: *"Alternatively, if (which is denied) the [solicitors] have a defence against the [school's] claim set out in paragraphs 19(iv), 20(iii) and 23(xi) to 23(xix) above by virtue of their alleged reasonable reliance on [Mr Davies], as particularised at subparagraph 11.12 of [the solicitors'] Re-Amended*

Defence and Counterclaim, the [school] will contend that [Mr Davies] is liable to it to the same extent, for the reasons set out in the [solicitors'] Amended Part 20 Particulars of Claim."

14. Because the cross claim by the school against the parents was resolved on 25 November 2005, all parties before me agree that the substantive questions to be resolved by me now are the fourth and fifth questions set out in the order for trial of a preliminary issue. However, the first three questions may be of some relevance to the answers to be given to the fourth and fifth question.

POINTS OF LAW RELEVANT TO THIS MATTER

15. Underlying this dispute is the common law doctrine known by the obscure name privity of contract. According to this principle, only a person who is a party ("privy") to a contract can sue on it. This remained the law until the coming into force of the Contracts (Rights of Third Parties) Act 1999. Before me all counsel have agreed that the common law was the applicable law in relation to the contract between the parents and the school for the education of the boys.

16. The effect of this doctrine may be that a person who has made a contract for the benefit of a third party (as the parents did for the boys) may not be able to recover damages if the contract is breached, because the damage may be suffered by the third party (here the boys). And the third party cannot sue in contract because it is (they are) not parties to the contract. The third party may or may not have an independent cause of action to recover such loss under the law of tort. The principle and its associated problems are discussed in **Chitty on Contract** 29th Ed paras 18-042ff.

17. The principle is, or ought to be, well understood by lawyers, but it would not be reasonable to expect non-lawyers to understand its effect. The practical importance of the point is that, if it had been overlooked, there was a risk that the school might have had to pay any damages twice over, once to the parents who (as the school argue) had not suffered the alleged loss which they claimed in the their action, and then later to the boys (who might have suffered the alleged loss, but had not claimed for it in the first action). Correspondingly, settlement with the contracting party will not bar claims from the third party.

18. There seems to have been some difference of view, or perhaps confusion, as to the effect of this on the side of the parents and their lawyers. This confusion on the side of the parents meant that the proceedings had a very complicated procedural history, involving numerous changes in the way the parents advanced the Pt 20 cross claim against the school.

19. To understand some of the problems that this caused it is necessary to refer to CPR Pt 20. CPR Pt 20 provides a procedure by which a Defendant to an action can bring a cross claim against the Claimant, or some other related claim against a person who is already a party, or a person who is not already a party. There is no provision in Pt 20 for a person who is not already a Defendant to make a Pt 20 claim. This is a procedural point. It arises because the boys were not Defendants to the claim for fees made by the school against the parents.

20. Both the recoverability point and the Pt 20 procedural point are to be distinguished from the merits of the claims. The issues on the merits were whether the school had been in breach of any legal duty, and, if so, whether any (and if so what) loss had in fact been suffered as a result.

THE PART 20 CLAIM BY THE PARENTS AGAINST THE SCHOOL

21. In its first form, dated 7 September 2000, the two parents, the two boys and the three younger siblings are all named as parties to the document headed "***Pt 20 Counter claim***". This should not have happened. The children were not Defendants to the school's claim for fees. If the children were to make a claim at all, they had to commence fresh proceedings. The parents subsequently consulted solicitors and counsel other than those whose signatures appear on this unusual document.

22. It is also important to note the content of the cross claim, since that too evolved. The gist of the cross claim in September 2000 was that *"the consideration for the payment of the school fees for the year 1998 to 1999 in respect of Ross and 1999 to 2000 in relation to all four of the Claimant's children [what is actually meant is the First and Second Defendants' other children] had failed completely or . . . in part"* and that *"the said sum is repayable"*. In fact no sum is specified. It is pleaded that the parents had suffered frustration embarrassment and distress. It is pleaded that the various setbacks and other matters pleaded in the defence were caused wholly or in part by the

negligence of the school, its servants or agents or by breaches of duty of care owed to the two boys and their younger siblings.

23. There is, of course, no dispute that in principle a claim for negligence, that is in tort, can be advanced by pupils against a school. The legal defect in this statement of case is not the lack of a cause of action at all, but that it included an attempt to advance the children's claims when that is not permitted under CPR Pt 20.

24. In this pleading the damage alleged to have been suffered in the case of Ross is *"loss of opportunity to secure A Level grades in Art and CDT which were commensurate with his abilities"* and in the case of Arran *"loss of opportunity to secure A Level grades in Art, Chemistry and Geography which were commensurate with his abilities; loss of opportunity to secure a place at a higher educational college or a university to take a degree course commencing the academic year 2000/2001"*.

In relation to both the boys (and their younger siblings) it is also pleaded that there was *"1. physical and psychological injury; 2. loss of self esteem; 3. loss of confidence"*. Under the heading ***"statement of value"*** it is pleaded *"the Claimants expect on the counter claim to recover between £5,000 and £15,000."*

25. In a witness statement dated 13 December 2000, made in support of the application to strike out the Pt 20 claim, Mr Corder-Birch, an experienced legal executive then handling the matter for the solicitors, had stated that the boys were not parties to the contract between the school and the parents and that the duties then relied on in the Pt 20 Claim must be treated purely as duties in tort and that the pleadings were defective in this and other respects.

26. In a Defence to Counterclaim dated 21 September 2001 and served on behalf of the school, objection was taken to the purported joinder of the children (the Pt 20 point). It was also pointed out that the children were not parties to the contract between the school and the parents (the recoverability point). On 15 December 2001 the solicitors gave notice of the school's application to strike out the Pt 20 Claim of the five children.

27. By an order that was drawn up on 2 May 2001 the three younger children (but not the boys) were ordered to be struck out of the proceedings by order of District Judge Silverwood-Cope. On the same day the judge entered judgment for the school for their claim for fees in the sum of £10,454.25p inclusive of interest and summarily assessed the costs at £9,697.49p. The order made clear *"for the avoidance of doubt the Pt 20 claim is now the only claim proceeding."*

28. Th**e** confusion on the parents' side continued. In a document apparently prepared by themselves in person they sought directions for the Pt 20 Claim. The document named three Pt 20 Claimants, themselves and Arran but not Ross.

29. On 3 July 2001 new solicitors, Coningsbys, gave notice that they had been appointed to act as the solicitors for the Defendants in that action. The confusion continues in that the Defendants named are not just the two parents, but also Arran, but not Ross.

30. On 8 August 2001 the solicitors issued an application notice to strike out the Pt 20 statement of case in so far as it still remained. On 29 August 2001 Coningsbys gave notice *"on behalf of the Defendant Mr McLellan and others"* of an application to amend the Pt 20 Claim and to add one of the younger children as a Pt 20 Claimant, in addition to the parents and Arran. The damages alleged to have been suffered by Arran included the lost opportunity to achieve the A levels he should have achieved (as had been claimed in the first statement of case in September 2000), but it added a new allegation that he was *"handicapped in the labour market"* and that his "entry into the labour market has been delayed, and he has lost two years' earnings at graduate level". No particulars are provided of the amount of the alleged damage. This application to amend the Pt 20 claim and add the younger sibling was dismissed by HHJ Yelton on 12 September 2001. The school's application to strike out the counterclaim was stayed for 56 days, to give an opportunity for settlement.

31. On 22November 2001 Coningsbys gave notice of an application to amend by substituting a revised draft Pt 20 Claim. This was the third attempt to state the case, the second attempted amendment. This time the only Pt 20 Claimants named were the parents. Part 20 was thus complied with. This statement of case pleaded a contract for the supply of services, and, by reference to the Supply of Goods and Services Act 1982, s 13, an implied term that the school would carry out the service with reasonable care and skill. Particulars of breach of contract were set out. In relation to Ross it was alleged that by reason of specified failures he was unable to obtain adequate passes at A Level in CDT/Art. As a result, it was claimed, the parents were entitled to a

return of the whole of the school fees paid amounting to £11,658.97p. In relation to Arran it was pleaded that as a result of the specified breaches by the school he failed in Chemistry Art and Geography. In relation to him the claim was for the cost of his re-sitting those A-Levels at another establishment in the sum of £23,700 and a full refund of all the school fees paid in respect of him in the two years of his A-Level course being £12,420. The damages counter claimed were thus £47,778.97p. All of this, it is to be noted, is claimed as losses suffered by the parents as a result of a breach of contract. The claim for alleged delay in entering into the labour market does not appear. This draft was reformatted and permission granted to amend in that form on 6 December 2001 by HHJ Yelton. The Pt 20 claim dated 7 September 2000 was withdrawn by the time of that hearing.

32. The Judge ordered an Allocation Questionnaire to be filed. The confusion on the parents' side continued. The form dated 31 January 2002 included notice that the witnesses would include Ross and Arran and that the facts as to which one (or perhaps both of them) were to give evidence included "***loss of earnings***". However, there was no such claim in the statement of case.

33. On 20 February 2002 the solicitors gave notice of the school's intention to apply to strike out the Pt 20 Claim. As a result another draft was put forward (the fourth attempt to formulate the claim). In this there remained the claims for return of fees in the sums of £11,658.97 and £12,420. There was added in respect of Ross a claim for damages for breach of contract, being the cost of *"a crammer or two years' subsistence, as he will take an extra two years to enter work, coupled with travel, books and any course fees payable".*

    To this there are appended the words *"Further he has been held back in the labour market".* There is a similar plea in respect of Arran, although in his case the claim is that *"his maintenance costs will be incurred for a further two years to re-sit the course estimated at £7000 per year, £14,000 in total, coupled with any course fees payable, travel, and cost of books. Further he has been held back in the labour market as he will not enter work until two years later as a result of the breach of contract."*

34. Following the receipt of this draft, the advice of Mr Davies was sought for the first time. Previously other counsel had been instructed. He advised against pursuing the application to strike out. That advice was accepted and the only issue then outstanding on that application was costs. On 12 June 2002 HHJ Yelton made an order giving permission to the parents to make the amendment, and other directions. I shall return to this below.

35. On 11July 2002 the solicitors served a Defence to the Re-Amended Pt 20 Claim. It included a limited admission that the school did not provide an adequate A level Art course between September 1997 and July 1998, while setting out substitute arrangements it had made. It referred to a discount of £200 that had been given in respect of CDT, and to a compromise of that part of the claim. Each of the other alleged breaches of contract is addressed and denied in detail over some eight pages. All the allegations of damage and loss are also denied specifically and generally. So far as the statements of case were concerned, the matter rested there (although there were settlement negotiations to which I shall return below).

36. On 25 September 2002, both boys made witness statements in support of the parents claim against the school. So far as damages are concerned, they say very little. The witness statement of Arran includes three paragraphs relating to damages. They are:

    "21. As a result of my experiences, I felt completely disillusioned. My original exam results were of course a failure and but for my mother's efforts I would not have passed any exams. By the time matters were sorted out I had missed as I have already pointed out the clearing scheme to go to university and these grades were low and would not have enabled me to start a course in any event.

    22. I therefore undertook charitable voluntary work in order to review my situation. I have now enrolled to do my A-Levels at Chelmsford College, it is a two year course, I will have to redo the course again. I have recently been offered the opportunity to do a one day a week foundation course in biological sciences which I can do at the same time as the A-Level course on a Saturday. This is a four year foundation course as a result of my charity work I have become interested in biological sciences. In order to obtain qualifications and work in this field I need the A-Levels. This will take a further two years."

37. The witness statement of Ross includes the following:

    "35.In February 1999 I was turned down by Anglia Polytechnic University because of poor projected A-Level grades. This resulted in my parents taking this up with the Bursar. When I received my grades in August 1999, they were not

enough to obtain a place on a course on film studies in University. I applied on the clearing system but was refused. This is a highly competitive course which is sought by many students today

36. As a result of my experiences I realised I would have to take and obtain better grades in order to be accepted at University for film studies or some other alternative course. I was however very disillusioned by my treatment at the school. I was not given any particular advice by the school that was helpful in careers, but more importantly, I was well aware that I had been badly let down. The Art course was not taught until a very late stage, and in CDT adequate facilities were never offered as with the GCSE IT.

37. I therefore decided at that stage that I did not want to go back to school as I was very disillusioned.

38. I have now worked for a local newspaper and some national newspapers. I believed that I could do well in a career in the media.

39. I have recently been rejected for the university course doing Film and Media studies due to the fact that my grades are very poor. This despite the fact that since leaving school I have gained experience working for both local and national newspapers in digital imaging. I will now have to apply to college to do a two year AS-Level course in order to achieve the necessary grades so that I can re-apply at a later date, which I intend to do. I am again disadvantaged for this year as September places are already allocated and another academic year has already commenced."

38. On 6 November 2002 the boys each made second witness statements. These give figures for the cost of the additional courses that they were to undertake (but had not yet undertaken). They do not give any figures for delay in entering the labour market.

39. On 11 November 2002 two days before the proceedings were compromised, a revised schedule of loss was submitted, signed by Mr Friel, counsel on behalf of the parents. This does not appear to have had any formal status as a statement of case. In it there was claimed the repayment of school fees, £12,060 in respect of Arran and £11,500 in respect of Ross. There is also claimed £14,600 in respect of each of the two boys, a total of £29,200, for maintenance and all other expenses (including books, photocopying, rent, food, utility bills, laundry, insurance, clothing, travel and spending money) involved in each of them spending a further two years in education. There is then added the following:

"7. Further it is submitted that both students have been held back in the labour market and that it is within the contemplation of the parties that this would happen. Alternatively, as education has effectively failed, they are entitled to damages for disappointment as the contract for education includes elements of satisfaction and achievement.

8. The average gross earnings currently are £20,088 per person nationally, see page 160 of the Ogden Tables.

9. In Ross's case he is interested in journalism. In Arran's case, a profession in the medically related services.

10. For authors, writers and journalists the figures are given at page 158 average being £27,107.25.

11. In Arran's case, his abilities indicate more than simply a medical technician, however, as an associate health professional the rate at page 152 is £23,500 a year.

12. On the evidence, both have been held back in the labour market for two years, given the imponderable factors such as illness, taking time off etc it is submitted that one years loss of earnings in each case is appropriate."

40. As noted above, the proceedings were settled on 13 November. I shall return to this below. The Order of the Court was for judgment by consent for the parents for £9,000. Following argument it was ordered that the school pay the costs of the parents on their Pt 20 counterclaim on the standard basis. An order was in fact drawn up in Tomlin form and signed by both counsel. It was headed with the title of the action naming the parents as Pt 20 Claimants and the school as Pt 20 Defendant. It recited in the Schedule that the agreement was *"in full and final settlement of all claims contained in the Pt 20 claim herein and of any other potential claim that may be available to the Pt 20 Claimants against the Pt 20 Defendant."*

41. Since the complaint is that this settlement should have precluded further claims by the boys, it is convenient to turn now to the new Ross and Arran claims that were in fact brought.

THE CLAIMS MADE BY ROSS AN ARRAN IN 2004

42. On 4 February 2004 Ross commenced proceedings in the Gloucester County Court. He was represented by new solicitors but the Particulars of Claim are signed by Mr Friel, the same counsel who had represented his parents. The claim is formulated in tort. The breaches of duty alleged are substantially the same as the breaches which had earlier been pleaded in the claim brought by his parents. The special damages claimed are in the total sum of £43,257. He claimed that he required a degree and that in order to take a degree he would have to stop working full time, although he could work part time. Thus he alleged that he would lose

half his current earnings in order to obtain appropriate qualifications. His current earnings are put at £28,838 and the figure claimed is three years at half that pay. Although the principle is similar, the total is substantially greater than the sum which had been claimed in the Schedule of Damage provided on behalf of his parents on 11 November 2002 (in which only one year's loss of earnings had been claimed in respect of each boy).

43. On 21 October 2004 Arran commenced a similar claim represented by the same solicitors and counsel as his brother. The allegations of breach of duty are substantially similar to the ones previously made in the claim brought by his parents. The damage alleged is the disillusionment he felt on failing his A-Levels in September 2000, the need to resit them over a two year course, the cost of maintaining himself for those two years and his loss of opportunity to enter the labour market as a graduate. The particulars of special damages total £44,000, again a substantial increase on the figure alleged in respect of his damage in November 2002. This figure is arrived at by taking £20,000 as the cost of two years maintenance to resit A-Levels, a further £20,000 for two years loss of earnings as a graduate on being held back in the labour market, together with £4,000 as the cost of tuition to retake the A Levels.

44. Meanwhile on 8 July 2004 the school, who were by this time represented by Berrymans Lace Mawer (the firm which had formerly represented the insurers), gave notice of an application to strike out Ross's claim as an abuse of process, being an attempt to relitigate matters which had already been settled. A similar application notice was issued on 28 October 2004 in relation to Arran's claim. Both applications are supported by a witness statement made by Mr Wilkins. He is a non-practising barrister employed by Berrymans Lace Mawer.

45. This allegation, and others, are denied in witness statements made by the solicitor acting for the boys. It is also denied in a witness statement by Mrs McLellan, who states that the settlement in 2002 was not made on behalf of her sons and that the sum of £9,000 did not even compensate her and her husband for school fees paid to the school in Ross's case alone.

46. On 21 December 2004. the district judge gave a detailed judgment declining to strike out the claims. He held there was no abuse of process.

47. On 26 January 2005 a Defence was served by the school to both claims. A limited breach of duty is admitted on behalf of the school insofar as it did not provide an adequate A Level Art course between September 1997 and July 1998. All other allegations of breach of duty are denied. In relation to Ross it is stated that his A Level results were not inadequate from the point of view of his abilities and efforts but rather that they were within the range reasonably to be expected of him. Damages are denied. In particular it is denied that he was obliged by reason of the school's alleged fault to retake his A Levels at that time, which was by then more than five years after first taking them. Similarly, in relation to Arran, it is denied that his results on retaking his A Levels more than two years after leaving school demonstrate that he has suffered any damage. Rather it is alleged that those results demonstrate that he has not been unfairly deprived of a university place or a graduate's earnings.

48. By consent orders made on 8 November 2005, about four weeks before this hearing commenced, each of these claims was settled on terms set out in a Tomlin Order. The school agreed to pay each of the boys £7,500 together with costs to be assessed if not agreed subject to certain exceptions.

THE SETTLEMENT OF THE CLAIMS IN 2002

49. As noted above, on 12 June 2002 there was a hearing before the judge in Southend County Court. He gave permission to the parents to re-amend their Pt 20 claim and he gave consequential directions for a trial expected to take place over three days in October. On 13 June 2002 Mr Allen wrote to Mr Woodcock. He was the Chairman of Governors from 1998 to 2001, and had responsibility for the conduct of the action on the part of the school, in collaboration with his successor in that capacity, Mr Sakal. Mr Allen was the partner of Birkett Long who had taken over the conduct of the case in November 2001. It had previously been handled by Mr Corder-Birch, a senior legal executive employed by the firm. Mr Allen reported that the judge had indicated that he believed that this was a case where, if it was proved, there would only be modest damages and that the costs were quite out of proportion. Mr Allen stated that he shared the judge's view, although he also thought the parents might have unrealistic ambitions and believe that their claim might be in excess of £30,000. He advised that consideration be given to an attempt to settle the matter and if necessary make a

payment into court. He advised that in order to decide on the amount of damages that might be payable the school should consider with him each item where there might be a fault on the part of the school and consider the consequences of that in terms of damages for the parents. As an example he said that if the school did not teach the Art class for one year, then if Ross was taking three subjects he should have a third of his fees repaid in relation to the non teaching of Art. He also advised that the school should there and then repay the deposits totalling £1,500 held in respect of the children and he believed that might reduce the anger felt towards the school by the parents.

50. On 17 June 2002 Mr Allen sent to the school a draft of an offer to be sent to the parents' solicitors pursuant to CPR Pt 36. The draft offer was £3,000 in *"full and final settlement of your clients claim including interest"*. The letter goes on to address in detail the items making up the parents` claim. Mr Allen wrote the following: *"However we find it very difficult to find any loss that your clients or their sons, Ross and Arran have suffered even if our client has breached the contract and/or been negligent."*

51. It is to be noted that in those words Mr Allen appears to distinguish between losses suffered by the parents and losses suffered by their sons, and between breach of contract and the tort of negligence.

52. The draft letter goes on to deal with the claim in respect of Ross. Mr Allen writes that there has been no total failure of consideration, but that if Art was not taught for one year, then there may be a claim in relation to that which may be a percentage of one year`s fees. He suggests a potential entitlement on the part of the parents to at most a quarter of the fees for one year. Mr Allen turns to the claims in respect of the maintenance of Ross and other costs for his re-sitting A Levels and for his being held back in the labour market. In relation to these two points Mr Allen remarks that, although there have been three new academic years starting since 1999, Ross has not in fact taken any steps to re-sit his A Levels, so that no loss under this head has in fact been incurred. As to the claim for being held back in the labour market Mr Allen states there is no evidence in respect of that.

53. The draft letter then turns to the claim in respect of Arran. He explains why it appears to him that no loss has in fact been incurred. As for Arran restarting his education, Mr Allen notes that two academic years have started since Arran completed his exams and he did not start in those years. He concludes that again there is no evidence that the losses claimed have in fact been suffered and no evidence of any disadvantage in the labour market.

54. Instructions were given and the letter was sent to the parents' solicitors on 25 June 2002. It was rejected on 4 July 2002 in a short letter from the parents' solicitors, which does not address in detail the arguments advanced by Mr Allen. On 12 August 2002 Mr Allen wrote to Mr Woodcock reporting that the offer had not been accepted, Mr Allen advised a payment into court which he suggested should be £5,000. Mr Woodcock discussed the matter with Mr Sakal and they gave instructions on 28 August that they had decided that £4,000 should be paid into court. That was done and notice given on 5 September 2002. On 17 September 2002 the parents solicitors wrote, in accordance with Pt 36.9, asking for clarification of how the school had arrived at the sum of £4,000.

55. On 20 September 2002 Mr Allen responded to the parent's solicitor's request. He confirmed that the only part of the school's payment into court that could be calculated was in relation to the non teaching of Art to Ross in his first year as an A Level student. The fees for the year were about £6,000 he said, and Ross was taking three A Level subjects. Therefore as he was not taught one of those subjects the school was suggesting a payment of one third of the fees namely £2,000. As to the balance of £2,000 Mr Allen said it was not based on any calculation, but on the comment that the Judge had made to the effect that damages would be modest. It is clear from this letter, as it had been from the Pt 36 offer itself, that nothing was being offered in respect of the claims for maintenance of the boys (which the parents were advancing on the assumption that they were to resit their exams) or for any delay in entering the labour market, or for that matter any other loss or damage that might have been suffered by the boys. This payment into court was rejected by the parents in a letter from their solicitors dated 25 September 2002. No detailed explanation is offered. The letter simply says: *"Our clients do not feel that the offer of £4,000 in any way compensates them for the damage to their children's educations, and as such this offer is rejected."*

56. Preparations for a trial continued and witness statements were exchanged. On 8 October 2002 Mr Allen wrote to Mr Woodcock. He had considered the witness statement served to support the parents' claim (see para 36

above). He advised that they gave absolutely no evidence of the financial losses that the parents claim to have suffered. On the same date Mr Allen had written to the parents' solicitors pointing out that there was £4,000 in court and that the parents had also received the benefit of £2,500 in the form of a deduction they had made to fees paid in respect of Art and CDT. The letter to the parents' solicitors pointed out that the parents had rejected two offers from the school and an offer of ADR (Alternative Dispute Resolution). Mr Allen invited the parents to indicate what they would be prepared to accept. Mr Allen advised the school to arrange a conference with counsel so that he could look at the papers and consider any further steps that should be taken prior to the hearing.

57. On 15 October 2002 the parents' solicitors made in writing what they referred to as an offer in accordance with Pt 36. The offer was to accept the amount of £20,000 inclusive of interest, however, it added that *"included as part of the settlement our clients would require an open letter of apology signed by Peter Sakal Brian Woodcock and Jim Holder"*. The offer was explained as being the return of a total of £16,000 paid in respect of school fees. As to the balance, it was explained as: *"the costs of maintaining Ross and Arran as students using NUS figures. It will take them both two years at college to resit their exams. They have also suffered the loss of a chance and a handicap in the labour market."*

58. As the terms of that letter made clear, neither boy had yet re-sat or taken any time to re-sit his exams. The letter from the parents' solicitors goes on to refer to recent press interest and publicity which would be of no help to the boys or to the school. That letter from the parents' solicitors makes clear that the losses suffered by the boys were at that stage quantified as no more than £4,000 in respect of the costs of sitting exams which they had not in fact sat.

59. On 17 October 2002 Mr Allen wrote to Mr Woodcock. He advised that the parents' solicitors letter was not a proper Pt 36 offer because it requested an apology, which was something that the court could not order. Nevertheless he advised that the school consider giving such an apology, and on the effect of the letter generally, if it was a proper Pt 36 offer. He also advised that the attempt to persuade the parents to mediate should be renewed. Mr Woodcock gave instructions that the gap, by which he meant the difference between the £20,000 asked for and the £4,000 paid into court, was small. He also said he would not give an apology.

60. On 28 October 2002 Mr Allen met Mr Woodcock and Mr Sakal in his office. There was a discussion as to whether to make any further offer. There was also discussion of the problem of publicity. That was recognised as a problem both by Mr Woodcock and Mr Sakal, but they expressed the view (held by Mr Sakal more strongly than by Mr Woodcock) that publicity could not be avoided, whether the case was fought or settled. It was agreed that there would be no further offer. Mr Woodcock and Mr Sakal felt that if a further offer were made, it would only encourage the claim, and that the parents would hold out for more.

61. On 30 October 2002 the parents solicitors rejected the proposal of mediation on the grounds that the mediator's charge would be likely to be over £4,000 and that was unlikely to represent a significant costs savings.

62. On 31 October 2002 there was a conference with counsel, Mr Davies. This was his first involvement since June. The conference was attended by Mr Woodcock and Mr Sakal for the school, and by Mr Wilkins (together with a trainee) for Messrs Berrymans Lace Mawer who were at that time representing the insurers. Mr Allen was not present. The attendance note was taken by Miss Bowler, as she then was, now Mrs Songhurst. She is a solicitor (admitted in 2003) with Birkett Long, and was at that time a trainee. The note covers over six pages of single spaced A4 paper. Subject to any omissions which it demonstrates (if the criticisms now made of Mr Davies are held to be well founded), it reads very well, suggesting that Mr Davies gave detailed, considered and clear advice, and that Mrs Songhurst understood what he was saying.

63. The attendance note includes the following paragraph on the second page:

> ***"Ross*** *In relation to Ross the Defendants are claiming either the return of the fees amounting to some £11,000 or they are claiming the cost of supporting Ross for two years at NUS rates of roughly £7,000 a year totalling £14,000 a year. [Mr Davies] advised that the Defendants are also claiming Ross has been held back in the labour market. [Mr Davies] pointed out that Ross is not a party to the proceedings and strictly speaking the claim is a contractual claim and Ross was not a party to that contract and whilst it was made for his benefit it was before the Third Party Contract Rights Act and therefore the only claims that can be raised by the Defendants are for their financial loss and not really loss suffered by Ross.*

Arran *The Defendants are claiming for the cost of crammer course which is in the region of £23,000 or return of their fees, or the cost of maintaining Arran and for Arran's claim they have also added in the cost of his travel and books for two years.*

[Mr Davies] advised that the maximum claim the Defendants have is for about £30,000."

64. Mr Woodcock pointed out that Ross did not seem to have made any attempt to re-sit his A levels in the intervening three years, but that there was some indication that Arran might be taking his options further. He is also recorded as making a number of other interventions. The note continues with a record of a detailed analysis of the various different allegations of failures by the school. It then includes the following:
"Ross – Overall – *[Mr Davies] advised that the Defendants would find it difficult to establish any tangible financial loss especially as they had been given a £2000 discount on the Art Course and also because on 10 September 2002 we had put £4000 into Court.*

Arran *[Mr Davies] advised that the most substantial complaint in relation to Arran is that he was taught the wrong Art syllabus. [Mr Davies] commented that there had been similar cases (he did not name any) and pointed out that if there is identifiable a financial loss, the Judge will probably award compensation to the Defendants. [Mr Davies] advised that in the absence of identifiable financial loss the Judge will only award nominal damages . . ."*

65. After further consideration of the detailed allegations in relation to Arran, the note continues:
"Problems with Mr and Mrs McLellan's offer – [Mr Davies] *commented that Mr and Mrs McLellan's Part 36 offer was over the odds but would save going to Court. He asked whether the school would be prepared to give a public apology and what was their attitude to publicity. He asked whether an apology would be appropriate. [Mr Woodcock] said that the Defendants have already had an apology in relation to Art and CDT and that they have had discounts. [Mr Sakal] said that he had spoken to Mrs McLellan at a social event in July 1999 and he had tried to talk/ apologise to her for the events but she would not accept it. His feeling was that they now want money."*

66. Under the heading '***Publicity***' Mr Davies is recorded as asking whether other parents were aware of the dispute and *"whether there was prospects of other parents coming out of the woodwork. . . . And whether there were other disputes the school were currently involved in".*

Mr Woodcock and Mr Sakal are both recorded as responding to these enquiries. It is clear that Mr Davies was directing attention to the possible implications of any disposal of this case on any other actual or potential claims in relation to other pupils. He did not specifically direct attention to the implications in respect of any potential claim from Ross or Arran. Mr Davies thought the implications were obvious, that Ross and Arran would be free to pursue their own claims. Mr Allen was not present. Mr Woodcock and Mr Sakal did not understand the implication that Ross and Arran would free to purse their own claims. Mr Davies did not advise that any further offer be made.

67. Near the end of the note it is recorded that Mr Davies advised that the Pt 36 Offer was still open for acceptance but it was not the proper way to include a request for a public apology. He advised that Mr Allen should write again regarding mediation.

68. On 4 November 2002 Mr Allen wrote to the parents' solicitors rejecting their clients offer made in the letter of 15 October 2002. He added that if the parents were to make a more sensible settlement then the school would consider that.

69. On 6 and 7 November there were exchanges between Mr Davies and Mr Allen, Mr Davies sending his draft skeleton argument and Mr Allen responding with comments.

70. On 7 November 2002 Mr Allen had a discussion with Mrs Songhurst. His note records that she suggested a point which he then set out in a letter to Mr Davies. It includes the following: *"We have also been considering the claim for damages and how it has been pleaded. There is a claim for the cost of maintaining Arran and Ross. Both these boys are of course over 18 and therefore there would be no duty on the parents to maintain Arran and Ross over that age. As there is no duty to maintain them, the McLellans will have suffered no loss. Any loss would be suffered by Arran and Ross and they would have to sue themselves. They would have to sue in negligence and then there would be an argument that any such loss was pure economic loss. There would also be an argument that they have not actually suffered that loss because their parents have maintained them."*

71. On 11 November Mr Davies emailed his skeleton argument to Mr Friel, counsel for the parents. The Skeleton argument is clearly the result of detailed preparation. It includes the following in two places, once in relation to Ross and again in relation to Arran: *"It is also suggested that [Ross] 'has been held back in the labour market'. Even if it could succeed on the facts, this claim is manifestly misconceived in an action brought by Ross' parents for breach of contract: it is elementary that such an action cannot ordinarily be brought in respect of damages suffered by a third party Chitty on Contracts . . .* **Woodar v Wimpey** *[1980] 1 WLR 277."*

72. There is also included a brief summary of the point raised in Mr Allen's letter of 7 November. It follows that the solicitors and Mr Davies were clearly alive to the point that there might be a claim which was misconceived as a claim by the parents but which might (if good on the facts, which they submitted it was not) be open to the boys to bring in a negligence action. They also communicated the point to counsel for the parents.

73. Meanwhile, on 8 November 2002 a further offer was made on behalf of the parents. Their solicitors stated that the parents had instructed them to make an offer of settlement in the amount of £14,000 inclusive of interest, the school to pay the parents` costs to the date of the offer to be assessed if not agreed.

74. On 8 November 2002 Mr Allen wrote to Mr Davies asking him to consider whether or not this offer should be accepted. On 11 November 2002 Mr Allen wrote to Mr Woodcock saying that he had sent the £14,000 offer to both counsel and the insurers to consider. He said: *"I would suggest that the most that you should do is return with a counter offer of say £9,000 in full and final settlement. I also do not believe that if we were willing to pay the £14,000 we should necessarily agree to your paying costs. We could agree to pay that on the basis that the Judge then decide liability with regard to costs. We could then argue that each party should bear their own costs in the matter since our offer to mediate in June of this year."*

75. On 11 November 2002 Mr Davies had a conversation with Mr Allen in which Mr Allen informed him that they were going to make an offer to settle the case with a payment to the parents of £9,000 with no order for costs, or on terms that the Judge should decide the issue of costs. Mr Davies told Mr Allen that Mr Friel had told Mr Davies that the parents had been advised to accept £12,000. Mr Allen informed Mr Woodcock of this in a letter that day. Mr Davies was not asked to advise at this point.

76. On the same day, the solicitors wrote to the parents' solicitors with an offer to ***"split the difference"*** between their £14,000 and the £4,000 in court, thus arriving at the figure of £9,000. He also explained why, by reference to well known authorities such as ***Dunnett v Railtrack*** [2002] EWCA Civ 303, [2002] 2 All ER 850 this should not result in the parents recovering all their costs of their claim which were as high as £50,000. The parents' solicitors replied with a counter offer of £9,000, the school paying their costs.

77. Also on 11 November 2002 Mr Friel exchanged with Mr Davies his own Skeleton Argument. The last two paragraphs address the recoverability of the damages claimed. It is implicit from the sketchy (and in parts incomprehensible sentences) that Mr Friel had difficulty in formulating this part of his clients' case. He had in mind the difficulty in claiming in contract losses suffered by a third party who had not contracted. The paragraphs read:

> *"50. Both boys would have started work having entered higher education therefore at an earlier stage. A contract for education is a contract for the provision of efficient and competent education for the benefit of a third party. It is in the contemplation of the parties, that a breach of contract will result in a young person having to retake exams, or obtain alternative qualifications, and that they will be kept out of the labour market while so doing. Thus it is in both cases relevant damage.*
>
> *51. Alternatively, a contract for education, like a contract for a holiday, also contains permanent of satisfaction achieving [sic]. In the same way that a Contract for a holiday which is broken results in an award for damages for disappointment, in education the same principles apply. Alternatively, it is to be pointed out that as in a Solicitor's breach of contract/negligence, there has been a loss of opportunity."*

78. On 12 November 2002 the solicitors wrote offering *"£9,000 and for the Judge to be asked to decide the issues of costs"*. Mr Allen also wrote to Mr Davies to inform him of the current position, but did not ask his advice on the offer. On 13 November 2002, when the parties arrived at court for the trial, it became apparent that the parents had misinterpreted the school's offer of 12 November, not realising that the school were proposing to pay their own costs and leave to the Judge only the question whether the school should also pay the parents'

costs. When this had been clarified between Mr Davies and Mr Friel, agreement was reached on that basis. The argument then proceeded before the Judge. The Judge ruled in favour of the parents, essentially on the basis that they had beaten the school's payment into court. The expected publicity followed in the form of a full report in the East Anglian Daily Times the next day.

STATEMENTS MADE SUBSEQUENTLY TO THE SETTLEMENT

79. As already noted, it was some fourteen months after the settlement in November 2002 that Ross issued his claim in the Gloucester County Court. Mr Wilkins made his witness statement on 27 October 2004 in support of the application by the school to strike out the claim. In the witness statement Mr Wilkins refers to the settlement agreement of 13 November 2002 and states that three individuals in particular were involved in it: Mr Woodcock, Mr Allen and Mr Davies. He then adds this: *"I have made contact with all three of these individuals. They have informed me that, so far as they were aware, the intention of the compromise was to bring about the complete resolution of the dispute between the McLellan family and the [school]. As such, it encompassed the claims relating to the losses allegedly incurred by Ross (who was at court on the day the matter was settled) as identified in the Particulars of Damage. The [school] believes that [Ross]'s parents and those advising them were well aware of the basis on which the [school] compromised the earlier proceedings. Not least it would hardly have been consistent with their belief that compromise would save witnesses if those witnesses would remain exposed to future claims. In these circumstances, [Ross]'s present claim represents an improper manipulation of the process of the court. A natural suspicion is that (if and to the extent that it was* not *compromised in the earlier proceedings) [Ross]'s claim was kept back deliberately by him."*

80. The first to third sentences of that paragraph are agreed by all to be accurate in so far as they relate to Mr Woodcock (and for that matter Mr Sakal as well), although it is to be noted that Mr Woodcock does not share the suspicion referred to in the last sentence. He thought Ross's claim was not deliberately held back. The thought that there may have been manipulation of the proceedings by Ross and Arran did not cross his mind.

81. The first sentence of Mr Wilkins' paragraph is incorrect in so far as it relates to Mr Davies. Mr Davies was contacted by Mr Wilkins, but did not hold the view attributed to him. There was a misunderstanding between them. As to the second and third sentences, in giving his evidence Mr Davies was very clear to the effect that it was obvious to him that when the compromise agreement was being negotiated and concluded, the parties to it were the school and the parents and not the boys, and that the boys remained free to bring a claim. Mr Nicol also told me that Mr Wilkins and the parents were in court throughout the hearing before me, and submitted that they could have been called to give evidence. At the hearing it was common ground that the only view that a lawyer could tenably hold as to who were the parties to the compromise agreement was the view expressed by Mr Davies.

82. The first sentence of Mr Wilkins' paragraph is problematic in so far as it relates to Mr Allen. On 6 August 2004 in a letter written by Mills & Reeve on behalf of Birkett Long, Mr Allen's state of mind is recorded as follows: *". . . at the time of the settlement Mr Allen did not believe that Ross and Arran were parties to the claim. However, he did believe that the settlement was compromising all of the items in Mr and Mrs McLellan's Counsel's schedule of damages as prepared for the hearing. This was reinforced by the witness statements from Ross and Arran that had been served in the proceedings. Mr Allen was of the view that the settlement was compromising all possible claims that could have been brought by Mr and Mrs McLellan and Ross and Arran."*

83. In his witness statement Mr Allen is not entirely clear. He states, as is obvious, that the offer of settlement was of all of the claims advanced against the school. He then adds: *". . . no one (including Andrew Davies) had suggested that Ross and Arran might bring, or be capable of bringing, a further action against GSL at some point after this action was compromised".*

    That is true. Mr Davies thought it so obvious that there was no need to suggest it. Later Mr Allen states in para 61 of his statement that: *". . . although Ross and Arran were of age . . . It was obviously the case that Mr and Mrs McLellan must have been advancing these claims with the full knowledge and involvement of their sons: I relied in effect on their pleaded case (in all its various re-amendments), on the correspondence and attitude of Conginsby's and John Friel (which at no time suggested that there was an issue as to the authority of Mr and Mrs McLellan to bring claims on behalf of their sons), and on the direct involvement of Ross and Arran themselves."*

84. I did not understand the reference to the *"the authority of Mr and Mrs McLellan to bring claims on behalf of their sons"*. There is simply no procedure by which the parents could have been bringing a claim on behalf of Ross and Arran once they were of age.

85. In his oral evidence, Mr Allen's position was made clearer. He said it never occurred to him that Ross and Arran would start separate actions, but with hindsight he wished he had considered their claims and had tried to include them in the settlement.

86. The papers before me include long and detailed instructions to counsel and letters drafted by Mr Allen. They demonstrate that he approached the case diligently and carefully. That does not, of course, exclude the possibility that he might have made a mistake, and even a negligent mistake. But it does lead me to the conclusion that he clearly understood the legal principles engaged in this litigation. He knew the difference between a claim by the parents and a claim by the boys, and had advised the school accordingly, as had Mr Corder-Birch before him. Mr Allen had read the file when he took it over. The following demonstrate this.

87. On 9 August 2001 Mr Corder-Birch had written to the school's bursar who worked with Mr Woodcock on the handling of the litigation. He had written: *"There were discussions between the two barristers [neither Mr Davies] before and after the Hearing. Arising from this discussion it appears that unless this litigation can be settled quickly Ross and Arran McLellan will apply for legal aid to pursue actions against Gosfield School Limited on the grounds of alleged teacher's negligence. If these actions are taken and even if they are successfully defended then it is highly unlikely that we shall be able to recover any costs from Ross and Arran McLellan because usually the Courts do not award costs against legally aided litigants . . . There is a risk that this whole case could get out of hand, prove very expensive for both parties and result in adverse publicity."*

88. On 28 January 2002 Mr Allen himself wrote to Mr Woodcock enclosing the instructions that he had drafted for sending to counsel (Mr Davies's predecessor). After a short introductory paragraphs the instructions include the following: *"The first point that strikes Instructing Solicitors is that this is a claim for breach of contract however, the McLellans have suffered no loss. Any loss would have been suffered by Ross and Arran and it should be them who are taking part in the proceedings. Both boys are now over 18 and can therefore take the proceedings in their own name. They of course would not be able to take an action for breach of contract but would have to sue in negligence. Counsel is asked to advise on this point and whether the whole of the claim should be struck out due to this."*

89. It is unfortunate that at the time of settlement Mr Woodcock did not remember or perhaps understand the implications of what he had been told earlier in the year, and that he was not reminded of it. Whether that is sufficient for the claim to succeed is a point I will have to consider below.

90. It is also unfortunate that Mr Allen's witness statement is not as clear as his instructions to counsel had been. The result has been that the case was opened by Mr Phipps on the basis that para 61 of Mr Allen's witness statement demonstrates confusion and negligence: that the solicitors are on the one hand saying that the parents were not able to advance claims for losses suffered by the boys and at the same time, and inconsistently, are saying that the compromise with the parents in November also compromised the claims of the boys. Mr Phipps went on to exploit the point, submitting that if Mr Allen thought the parents were authorised to bring the claims on behalf of the boys, then he further failed in his duty in omitting to verify that the parents did indeed have the necessary authority. That point can only be made on the false hypothesis that the parents could have had such authority in the first place.

91. I find that at the time of the settlement Mr Allen did not believe that Ross and Arran were represented by their parents or in any other way parties to the claim or to the compromise, but that he did not think that the boys would sue in the future.

THE ALLEGED BREACHES OF DUTY

92. Putting aside, as I do, the false point on authority, the alleged breaches of duty still advanced by Mr Phipps in his closing submissions amounted to these:
    i) Failure to warn to the school that there was a risk of a subsequent claim by the boys
    ii) Failure to advise the school to ensure that the boys were directly engaged in (that is parties to) the settlement negotiations and agreement
    iii) Alternatively, failure to warn the boys in writing that if they did not become parties to the action or the settlement, then any subsequent claim by them would be an abuse of process.

93. While the general duty of a solicitor to use reasonable skill and care in giving advice is not in issue, the content of that duty in the particular facts of any given case is not so clear. In support of his argument, Mr

Phipps relied on ***County Personnel (Employment Agency) Ltd v Alan R Pulver & Co*** [1987] 1 All ER 289, [1987] 1 WLR 916 at 922: where Bingham LJ said:

"The principles of law governing the decision on liability in this case were not in serious issue between the parties. The starting point is Salmon LJ.'s observation in **Sykes v Midland Bank Executor and Trustee Co. Ltd**. *[1971] 1 QB 113, 125:*

> *"In my view, it is quite impossible to lay down any code setting out the duties of a solicitor when advising his client about a lease. A great deal depends upon the facts of each particular case. A solicitor's duty is to use reasonable care and skill in giving such advice as the facts of the particular case demand."*

Attention was also drawn to a sentence in the judgment of Harman LJ in the same case, at p 124:

> *"When a solicitor is asked to advise on a leasehold title it is, in my judgment, his duty to call his client's attention to clauses in an unusual form which may affect the interests of his client as he knows them."*

It seems obvious that legal advice, like any other communication, should be in terms appropriate to the comprehension and experience of the particular recipient. It is also, I think, clear that in a situation such as this the professional man does not necessarily discharge his duty by spelling out what is obvious. The client is entitled to expect the exercise of a reasonable professional judgment. That is why the client seeks advice from the professional man in the first place. If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further."

94. Mr Chapman, for the solicitors, on the other hand referred me to ***Saif Ali v Sydney Mitchell & Co*** [1980] AC 198 at p 220D-E, [1978] 3 All ER 1033 where Lord Diplock said: *"No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted upon."*

95. Mr Chapman and Mr Nicol also referred me to authorities to the effect that the content of the duty depended on the scope of the instructions and the knowledge and experience of the clients: ***Carradine Properties v DJ Freeman*** decided in 1982 and reported at [1999] 1 Lloyd's Rep PN 483; ***Pickersgill v Riley*** [2004] PNLR 31. Mr Chapman reminded me of the words of Megarry J in ***Duchess of Argyll v Beuselinck*** [1972] 2 Lloyds Rep 172, 185. In that case Mr Beuselinck had been asked to advise the Duchess. His retainer was primarily to vet the proposed publication of her life story for libel, but it was not confined to that. She alleged that he had been negligent in failing to advise her in relation to possible tax liabilities that she might incur. Megarry J said this at p 185: *"In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence. The standard of care to be expected of a professional man must be based on events as they occur, in prospect and not in retrospect. . . . On any footing, the duty of care is not a warranty of perfection . . . disappointed the Plaintiff was; but that is a far cry from establishing that the disappointment was due to any negligence by the Defendant."*

96. Each of Mr Phipps and Mr Chapman rely on the history of the Pt 20 proceedings by the parents against the school. Mr Phipps submits that that context demonstrates the risk that the boys would sue. Mr Chapman submits that there was nothing to suggest that they intended to sue.

97. It must be remembered how this litigation came about. It started with the school suing the parents for fees, and obtaining summary judgment with costs. The parents' cross claim was an attempt to avoid the consequences of that, or perhaps to get even both financially and morally. Having started upon that course, it appears that they became increasingly committed to the litigation, both morally and financially. As is the case with most litigation involving individuals, the costs rapidly became disproportionate, as the Judge warned near the outset. More specifically, the convoluted history of the litigation demonstrates unpredictability on the part of the parents. Their proceedings involved a willingness to advance claims for losses for which they did not provide supporting evidence, and a questionable regard to the law on title to sue and the rules of procedure.

98. All that said, these are matters which are demonstrated in relation to the parents. The history of the litigation gives little basis for assessing whether the boys were likely to behave in a similar fashion. Their situation was different in a number of respects, including the following. First, if they were going to sue, it would be they

who were taking the initiative, not responding to a claim made against them by the school. Second, they might well be eligible for public funding. While that has advantages, it comes subject to constraints. Third, the only claims they could advance would be in tort, for which evidence of actual damage would be necessary. So long as they had not taken time to prepare to re-sit their exams, the potential costs of doing so could not be actual losses. They had given two witnesses statements each in support of their parents' claims, and those witness statements were not strong in support of any possible claims they might make for losses suffered by themselves. It is also to be noted that the boys had each been named as parties making claims against the school in September 2000. When that statement of case was struck out, it might have been thought that, if the boys were going to sue at all, that was the time when they might have done so. Proceedings could have been issued in their name at that stage to cure the procedural defect, but that did not happen.

99. I find that it was foreseen by Mr Allen that the boys might sue. I refer to the period from January 2002 onwards, and in particular during the period when the first settlement negotiations were being prepared and conducted in June (see his letters of 17 June and 7 November 2002 cited in paras 50 and 70 above). It may be that Mr Allen did not have this in mind on 13 November. If so, nothing turns on that, because the case against him is that he should have given the warning, and taken the steps to bring in the boys, well before the trial.

100. I also find that the school had in fact been advised of the difference between an action by the parents and one by the boys. See paras 87 and 88 above. They had also been advised of this by Mr Davies in the presence of a representative of the solicitors: see para 62 above. While the point is not spelt out, the implication must be that there was a possibility of an action by the boys, at least before the settlement agreement was reached. The effect of the agreement is, of course, a separate point. It is true that the school was not told that the agreement left open the possibility of an action by the boys.

101. Was this a breach of duty? Obviously with hindsight, everyone wishes that the school had had these matters spelt out to them. The disappointment of Mr Woodcock and Mr Sakal is genuine. It is also understandable, given that they did not in fact understand the implications of what they had been told. But neither of these factors establishes negligence. The proceedings had been greatly complicated by the procedural points taken on the forms of the various Pt 20 claims, and things said and done in the course of those procedural disputes could have given rise to misunderstanding on the part of even an alert non-lawyer, as both Mr Woodcock and Mr Sakal were.

102. Mr Woodcock was present at the conference with Mr Davies on 31 October and had been in regular communication with Mr Allen for many months. The impression given by his responses to letters and other communications are consistent with the impression given to me in court. He appeared to be a person accustomed to business and dealing with legal matters. Mr Woodcock was well aware of the evidential weaknesses in the claim that the boys' had suffered loss, since he intervened to point them out to Mr Davies on 31 October 2002.

103. In my judgment, from early 2002 through to 13 November 2002 the risk of the boys bringing any action, and if so, an action which represented a material contingent liability to the school, was not one that should have been considered by the solicitors to be great, and they took the view that there was little to be done about the risk in any case. In my view, as set out below, that was not an error. For these reasons, and because I also find the experience and understanding of Mr Woodcock were as I have stated, I conclude that it was not a breach of duty on the party of the solicitors to fail to spell out a warning to the school that a settlement with the parents would leave the school exposed to that risk.

104. I turn to the allegation of failure to advise the school to ensure that the boys were directly engaged in (that is parties to) the settlement negotiations and agreement. This is closely linked to the third point, namely failure to write to the boys to warn them that failure to come forward with any claim at that point would make any subsequent claim an abuse of process. The points have to be run together, because obviously there is no way in which the solicitors could have ensured that the boys were directly engaged in the negotiations and settlement if they declined to respond to an invitation to do so.

105. Unsurprisingly, Mr Phipps was unable to refer me to any authority that assisted him on these points. Such a duty could arise, if at all, only on the basis that those were the instructions of the client. There are many examples of cases where a Defendant faces a claim from one person which is related to actual or potential claims from other persons. Whether to settle the cases individually, or only collectively and all at once (if

possible), and whether to invite potential Claimants to bring forward claims, are questions that have to be addressed in the particular circumstances of each case. There can be no general rule.

106. The point is put this way in Mr Woodcock's witness statement: *"Had I been advised of the risk of a continuing dispute with Ross and Arran, it is inconceivable we would have not required steps to be taken to ensure that settlement was achieved that definitely prevented Ross and Arran from bringing claims in the future."*

107. One difficulty with this evidence, sincere though I accept it to be, is that it was given in circumstances where Mr Woodcock believed that that is what had been achieved. If he had been forewarned that a settlement might not achieve that, he would not at once have thought it inconceivable not to do as he there says. He explained the position in cross-examination. He had no understanding of the mechanism by which he thought that a settlement with the boys had been achieved in fact, or could be achieved. His experience is in engineering, where such arrangements have been achieved, but how they are achieved was a matter for the lawyers. If he had been told that the boys were not tied in, he would have discussed the matter with Mr Sakal, and they would have agreed to take legal advice. He thought that, if the boys were not tied in, then the school would have had to carry on to trial. But he could not explain why legally that would put the school in a better position in relation to the boys' claims. He was under the impression that a decision at trial would have been all encompassing.

108. In giving this evidence Mr Woodcock was at a disadvantage. It is plain to me that he would not have formed any view on the matter contemporaneously without discussing it, not only with Mr Sakal and the lawyers, but also with the school's insurers. The insurers were represented at the time by the same solicitors as now represent the school. But when Mr Woodcock signed his witness statement, he did not know what advice Birkett Long or Mr Davies would have given him at the time. Nor, so far as I am aware, did he know what the insurers would have said or advised. I have not been told this either. The insurers have called no evidence as to what their stance either was, or would have been. I include as one alternative *"what their stance was"*, because I infer that the insurers (like all the lawyers present) did in fact appreciate that the boys were not parties to, or bound by, the offers being discussed, and the settlement finally reached. Asking questions of Mr Woodcock in these circumstances casts little light on what would have been the situation at the time.

109. As the cross-examination proceeded and Mr Woodcock was given to understand the factors involved, he accepted that it was possible that he might have settled with the parents alone, as in fact happened. He could not say. He said he could not say what advantages going to trial might have brought. He thought that a settlement with the boys might have been achieved at little or no extra cost. But since it was never discussed, he had no idea whether the boys would have agreed.

110. It follows that I can make no finding on the basis of Mr Woodcock's evidence as to what instructions he would have given to the solicitors about settlement with the boys. I did, however, hear evidence from Mr Allen and from Mr Davies as to what advice they would have given, if they had been asked.

111. Mr Allen candidly stated that he did not turn his mind to the point at the time, and he wished that he had done so. At first he said that with hindsight he wished he had considered the boys' claims, and had tried to include them in the settlement. However, Mr Allen later said that he would not have advised writing a letter to the boys. That, he said would be inviting extra claims, saying please sue us, and it would not be good to advise that. He would not have written such a letter.

112. The reason why, he thinks, he did not address his mind to the point at the time, is that in assessing the values of the claims for settlement purposes (which he did in great detail as early as 13 June 2002: para 49 above) he had formed the view that the losses for which the boys might in principle be able to sue could not be proved on the evidence. Nothing happened to change that view. It was not until Mr Friel delivered the schedule of losses dated 11 November 2002 that any figure was attributed to the claim for delayed entry into the labour market. And that part of the claim, or schedule, does not appear to have come to the attention, or entered into the thoughts, of any of those negotiating the settlement figures. In addition, he says he relied on Mr Davies, because Mr Davies had been asked to advise generally.

113. Mr Davies's evidence was that he would not have considered it sensible to invite the boys to come forward with their claims in their own names. There was an additional reason for not taking that step in this case. There was a payment into court. He would have been concerned that inviting the boys to formulate their own

claims might have made it more likely that the parents would be able to beat the payment in. By the time he had become involved in October, the payment in had already been made, and there was no protection in costs from a claim by the boys.

114. Mr Chapman advanced other reasons why the suggestion of inviting the boys to make their own claims would not have been a sensible course to adopt. If invited, they might have taken separate legal advice, and obtained public funding. They would not have had the same concerns as their parents as to the consequences in costs if they failed, and so their representatives would have been under less pressure to settle. And if the boys' claims were litigated the school would be unlikely to be able to recover costs against them, even if successful.

115. In my judgment the points made by Mr Allen, Mr Davies and Mr Chapman are all such as to make it impossible for me to conclude that the solicitors ought to have taken the course, suggested by Mr Phipps, of trying to tie the boys into the negotiations and settlement. All I need conclude is that it was not a breach of duty to fail to take that course. I have no hesitation in reaching that conclusion.

116. It follows that it was not a breach of duty for the solicitors to omit to write to the boys warning them that any claim made in the future would be an abuse of process. In any event, I cannot see how such a letter would have achieved the effect of making a future claim an abuse of process, if it was not otherwise an abuse. Mr Phipps referred me to ***Johnson v Gore Wood*** [2002] AC 1. At p 31-2 Lord Bingham states the general principle, which he had invited the District Judge in Gloucester to apply. The District Judge did apply them. But I find no specific support for Mr Phipps's submission. I do not have the benefit of submissions on behalf of the boys, but I see no reason to differ from the conclusion reached by the District Judge on 21 December 2004. It is significant in the ***Johnson*** case that the facts were more favourable to the Applicant: one action in question was brought by the corporate embodiment of Mr Johnson. But the House of Lords rejected the abuse of process argument.

117. I conclude that there was no breach of duty on the part of the solicitors. I reach this conclusion for the reasons given above, and not on the further and separate ground put forward by Mr Allen, namely that he was entitled to rely on counsel, and that anything done or omitted by Mr Davies excused him.

118. Mr Davies was instructed (so far as is material to this point) only at the end of October, long after the settlement negotiations had been instigated. The instructions to Mr Davies in October did not involve him in the negotiations. It was not until he arrived at the door of the court that he became involved, and then all he did was to clarify an offer made in writing the previous day. I would not have accepted this point as a defence for the solicitors.

119. No question of breach of duty on the part of Mr Davies now arises. He is only alleged to be in breach of duty on the footing that Mr Allen would have been in breach of duty but for his reliance on counsel. But it is right that I should say that, for reasons similar to those given in relation to Mr Allen, I do not accept that omission by Mr Davies to spell out the effect of the settlement, or to refrain from attempting to tie the boys into the settlement would have amounted to a breach of duty on his part.

CAUSATION

120. In the light of the conclusions I have reached, questions of causation do not arise. I shall deal with the point only briefly.

121. For the reasons given above, the school has not discharged the burden of proving that it would have sought to tie the boys into the agreement. It would not have received advice to do so from Mr Allen or Mr Davies. The school's insurers would have been consulted before any decision was made, and there is no evidence as to what its insurers would have said about the possibility.

122. In my judgment it is improbable that the school would have sought to tie the boys into the settlement. Looking at the matter as at 13 November 2002 they would have had a choice. If the school invited the boys to bring forward and settle their claims they ran the risks identified above, and exposed themselves to the risk of having to pay more to settle the case. The offer of £9,000 contained no element specifically related to the claims of the boys, and that fact had been explained to the parents' solicitors. On the other hand, if they chose the course of letting sleeping dogs lie, they might never have to meet a claim by the boys. In my judgment, given the information available at the time, that could properly have appeared the more prudent course.

123. I also find that it is improbable that the school would have proceeded to trial in the absence of a settlement with the boys. There was no reason to think that a trial in those circumstances would have improved their position with regard to the boys, and even if there had been, the reasons they had for wishing to settle with the parents (notwithstanding the advice they had received from Mr Davies on the likely outcome of a trial) would have prevailed. He had not recommended that they increase their offer.

124. That is the end of the case on causation. But the case would also fail at the next step.

125. Mr Phipps submitted that there was at least a substantial chance that such negotiations would have resulted in an overall settlement on terms that attributed to Ross and Arran's claims the true value that they possess (however modest). The valuation of that chance would be for the next stage of the trial. He relied on ***Allied Maples v Simmons & Simmons*** [1995] 4 All ER 907, [1995] 1 WLR 1602, 1610A-1611, 1614C-1615B, 1620D-1621F and ***Harrison v Bloom Camillin*** [2000] Lloyd's Rep PN 89, 95-96. In ***Allied Maples*** the facts concerned the negotiations of a lease. At one stage of the negotiations there had been a clause in the draft which would have provided some protection to the Plaintiffs. This was later omitted. The issue related to the loss of the chance to renegotiate with the vendor to obtain proper protection. In ***Harrison*** the facts related to the loss of a chance to sue accountants for negligence within the relevant limitation period and recovering substantial damages. Now it is often the case that those who contemplate suing stand a chance of being both better off, if they win, and worse off, if they lose and have to pay costs. Although I raised this point in argument, I was not referred to any case in which the court had had to consider the impact of the loss of the opportunity which includes an opportunity of being exposed to the risk of being worse off.

126. There were a very large number of issues considered in ***Harrison,*** but the possibility that the Claimants might have faced exposure to the risk of being worse off (for example by losing the action and being ordered to pay the costs of the accountants) either did not arise on the facts, or was not argued. I know of only one case where that did arise for consideration, namely ***Bailey v Balholm Securities*** [1973] 2 Lloyd's Rep 404 (a case involving the loss of an opportunity to trade). In such cases the loss may be too speculative to allow a money value to be placed on it.

127. In the present case, assuming (contrary to my finding) that the school had passed the first hurdle of proving (on the balance of probabilities) that they would have invited the boys to join in the settlement, or gone to trial, the next question seems to me to be: what would have happened if they had done that (*cf* ***Harrison*** p 95)?

128. The school might have achieved a settlement as contended by Mr Phipps. He put forward a list of reasons why Ross and Arran should have joined in such a settlement if invited to do so. There is substance in these.

129. But the school might also have found itself faced with a quite different situation, as Mr Chapman submitted. He pointed to the evidence that the school were reluctant to offer more money than they did. The subsequent stance taken by the insurers is that £9,000 was already too much and must have reflected some consideration other than the true value of the claim. Concern about publicity is the factor suggested by insurers.

130. The boys might have gone to separate solicitors (as in due course they did), they might have advanced much larger claims (as in due course they did), their intervention might have caused the parents to adopt an unusual and unpredictable course (as they had on a number of occasions since the action had commenced). There might have been other adverse consequences, on which it is difficult to put a money value, but which were matters of concern to Mr Woodcock and Mr Sakal at the time. These included not only publicity, but also the unpleasantness for witnesses, in particular teachers, in having to give evidence at the trial, including on matters personal to the boys. The evidence of Mr Woodcock and Mr Sakal was that this was a very bitter dispute indeed, and they had real concerns as to what the parents might do. And as already noted, the insurers have stated their suspicions that the boys were manipulating the proceedings.

131. Looking at the balance of opportunity and risk, I find that the opportunity lost was too speculative to have a money value put upon it.

ANSWERS TO THE QUESTIONS

132. It follows that the answers to both questions is No.

C Phipps for the Claimant instructed by A Nicol for Andrew Davies
G Chapman for the Defendant instructed by Berrymans Lace Mawer; Mills Reeve; Davies Arnold Cooper