JUDGMENT : Judge Raynor: TCC. 2nd October 2007

1. I can give judgment straightaway, because I have reached the firm conclusion, for reasons that I shall state, that this action is not statute barred. In order to understand that, however, I am going to have to state the chronology in some detail.

2. The Claimant is a company engaged in the manufacture of precision springs, and it has premises at Ruscombe Industrial Estate, Tywford in Berkshire. In the early 1990s the Claimant decided that it would have built an extension to those premises and it engaged architects known as Danks Reed Denby & Badnell in connection with the design of the extension. Those architects engaged a firm of consulting engineers named Broad & Gloyens, and at all material times the Defendant, Mr David Howes, a consulting structural engineer, was a partner in Broad & Gloyens.

3. There have been various changes in the partnerships of which the Defendant has been a member since that time, but of crucial importance in this case is the fact that at all times after 1993 until the end of 2003 the Claimant obtained and relied upon the structural engineering advice of the Defendant, Mr. Howes, in whatever partnership he was a member of at the particular time. Mr. Howes designed the foundations of the extension, and for the purpose of the preliminary issue which I have to determine it has been agreed between the parties that the question I must determine is upon what date did the Claimant first have the knowledge required for bringing an action for damages in respect of the relevant damage under section 14A(5)-(10) of the Limitation Act 1980, it being accepted that for the purpose of the primary statutory limitation period damage to the factory extension did occur more than six years before the issue of proceedings.

4. Further, for the purpose only of determining the above preliminary issue the following assumptions are to be made by the court:
   1. that the Defendant owed to the Claimant a duty of care at common law at all times to exercise reasonable professional skill and care;
   2. that he was negligent in the respects set out in paragraph 11 of the Particulars of Claim; and
   3. that such negligence caused the damage set out in paragraphs 5-10 of the Particulars of Claim.

   In essence what is alleged is that the Defendant, in designing the foundations for the extension, was negligent in that he failed to take any sufficient note of the particular soil conditions of the site and of the presence of trees on adjacent land, with the result (so it is alleged) that the foundations were inadequate for their purpose and as a result there has been structural movement of the building causing damage which is particularised in the Particulars of Claim.

5. The actual drawings and calculations for the foundations were prepared by the Defendant in the early part of 1994. Work commenced in May or early June 1994 and in July 1994 there was first noted slight movement of an adjacent building, but that is a red herring because that movement is in no way material for present purposes. In November 1994 the construction of the extension was completed. At about the end of August 1995 what was referred to as a "*potential problem with the floor in the extension of the production area"* was identified. What had been noted was that a gap that formed the perimeter expansion joint had become wider. That had been noted by the Claimant's works manager, Mr. Michael Ansell, and that is what brought the Defendant first back to the Claimant's premises.

6. What happened thereafter is well documented. At the end of August 1995 the Defendant visited the Claimant's premises to look at the widening of the gap that I have mentioned. By letter dated 1st September 1995 sent to the builder the architect stated that he had visited the premises together with Mr Howes, looking at the potential problem and *"On inspection we found that the relationship between the main floor and the perimeter strip against the external wall adjacent to the railway boundary had changed since construction, there is a difference in level of approximately 10mm. along the joint between the two areas of concrete*." It was stated that the Defendant, Mr. Howes, was considering what form of investigation should be undertaken. The Defendant in fact went on to propose that the slab movement be monitored for about three months, using tell-tales. That was done and there is a record of the tell tale findings both at that time and on later dates in the bundle at A26.

7. On 2nd November 1995 there was a meeting at the Claimant's premises attended by the Works Manager, Mr. Ansell, Mr. Smith of the builder, Forum Construction, the Defendant, Mr. Howes, and Mr. Badnell of the architects. There is a minute at page A27. It was noted (among other things) that the purpose of the meeting was "To inspect the crack in the floor of the factory extension close to the east gable end wall and assess what action should be taken." (par 1.03). It is important to note that that minute is misleading because it is common ground between the parties that the reference to a crack in the floor does not refer to a crack in the floor slab but to the movement in the expansion joint previously mentioned.

8. In section 4 of the minute there is then a recital of what was noted and agreed. There was first of all a description (in par 4.01) of where the expansion joint gap was noted and mention of the installation of tell-tales and of further movement having been found during monitoring. Mr. Howes in paragraph 4.3 was noted as stating that the perimeter strip was out of level with the main floor slab and that he was keeping dimensioned notes. He said that there appeared to have been a 0.5mm movement in the last month. The question was then raised as to whether the perimeter step was sinking or the edge of the main floor slab lifting, and Mr. Howes stated that he had speculated along the same lines and that he had laid a builder's level which appeared to suggest that the perimeter concrete strip was dropping relative to the slab, but that was not conclusive. It was pointed out that

cracks had appeared in two other bays of the gable end. An inspection was made of the facing brick outer skin of the gable wall, but no obvious cracking was seen. The brickwork at the junction of the east and south elevations was considered and no obvious cracking seen there. Then in paragraph 4.09 it was *"agreed that although movement had taken place it did not appear to be dramatic*." In paragraph 4.10 the architect stated that he was concerned "*that there did not seem to be sufficient evidence at the moment to warrant opening up the work. This was agreed. It was therefore agreed that the Defendant should monitor the tell-tales for a further three months*." It is clear that at the meeting the Defendant expressed no concern about any possible inadequacy of the foundations.

9. The Claimant's works manager, Mr Ansell, gave evidence before me and he told me (and I accept) that the impression that he obtained as a result of that meeting and from what the Defendant said was that the Defendant at that stage was not unduly concerned and was fairly convinced that what had occurred had been due to climatic seasonal movement, and that, on at least two occasions, the Defendant had stated that he could live with *"minor wall cracking"* but if and when the main floor slab cracked "*things would be getting serious*". The Defendant himself gave evidence and he agreed that he did indeed make the comment, the gist of which I have quoted above.

10. The management structure of the Claimant at the material time was that the managing director and majority shareholder was Mr. Brian Harris. His fellow director and assistant was his son, Mr Philip Harris, who gave evidence before me. Mr Ansell, the works manager, was not a director but it was he who kept a (layman's) eye on the movement.

11. The monitoring by way of tell-tales continued, and in January and February 1996 there were written letters by the Defendant to the architect which as I see the matter represent the high point of the Defendant's case on knowledge. By letter dated 23rd January 1996 the Defendant wrote to the architects saying:

"With reference to the apparent movement of the gable end foundations, which we understand from the Works Manager has seen a slight recovery, since we have been monitoring only the movement and not carried out any investigation work, we consider it may be prudent to ask the Contractors if they would dig a trial pit to establish the actual depth of foundation, on condition that you would release their retention.

Since we cannot establish why there is structural movement it seems rather unfair not to release their money.

We would propose to take soil samples for testing and seek the advice of a geotechnical engineer……."

12. If matters stopped there, there would be legitimate criticism as to why the Defendant's proposal was not followed up. But matters did not stop there. On 31st January 1996 the Defendant carried out a further site visit, and on 5th February 1996 he wrote a further letter to the architect, saying:

"With reference to our site visit on Wednesday 31st January 1996 to inspect the tell-tales at the far gable end of the building, we confirm that there has been a slight recovery rather than a continuation of the movement.

What is difficult to establish is, whether the gable end foundations are moving relative to the floor slab, or whether the situation is the reverse, because of not being able to fix a suitable reference point. …

As usual, we carried out a visual inspection of both the internal blockwork and the external brickwork, and could not detect any significant cracking in either the mortar bed joints or perpends.

As you are aware, because of the sloping nature of the original site, the front part was lower than the rear, therefore the amount of compacted fill under the slab was greater at the front than the rear. …

Although there are trees along the rear boundary, as far as we aware during construction all foundations were taken down below the level of all tree roots found within the excavation.

Therefore the sub-soil towards the rear of the site is more susceptible to climatic seasonal variations, which directly affect the moisture content of clay.

Any change in moisture content will cause either expansion or contraction of the clay and consequently structural movement will occur.

We are satisfied on the evidence collected to date, the amount and direction of movement has not caused any instability to the building.

We consider that it would be sensible to replace the mastic sealer in the ground slab adjacent to the end gable wall that has pulled apart, so that it will be immediately obvious if the movement continues to be ongoing."

That letter was sent as I say to the architect. There is no evidence before me to suggest that it was communicated by the architect to the managing director, Mr. Brian Harris, and it is clear that it was not communicated to Mr. Philip Harris.

13. However, the Claimant, it seems to me, is to be imputed with knowledge that the architect obtained from the correspondence because the architect was the agent of the Claimant for the purposes of the building project. Of significance though is the fact that in the letter of 5th February the Defendant no longer made the recommendations contained in the earlier letter of 23rd January. The only recommendation that he made in the later letter was for the replacing of mastic sealer in the ground slab so that it would be immediately obvious if the movement continued to be ongoing. In my judgment, a reasonable interpretation of that letter (as the Defendant accepted in the course of his evidence) was that the structure of the building was not defective and that rather the building was responding to seasonal changes in soil moisture content and was not unstable.

14. I do not know why the mastic sealer in the ground slab adjacent to the end gable wall was not replaced, as had been recommended by the Defendant, but it seems to me that there can be no reasonable criticism of the

Claimant, in the light of the February letter, for failing to follow what had been originally recommended in the letter of 23rd January.

15. What then next occurred was that in the middle of 1998 Mr. Ansell, looking at the building, as he did in the course of his work, noted that cracking had occurred through a brick in the wall. When he gave evidence he said, although he is not an expert, that the question of settlement at that stage went through his mind. He did not, however, say or suggest -- quite the contrary in fact, as will appear -- that any question of foundation problems went through his mind.

16. As a result of the noting of the crack the Defendant was asked to attend and did so and took measurements. He did not express any concern to Mr. Ansell. All he advised Mr. Ansell to do was to carry on monitoring the situation, nothing else being suggested at that stage. In August and then September 1998 the architect asked the Defendant for the results of the monitoring and any conclusions, and does not appear to have received a reply.

17. In the middle of 2001 there was then further contact between the Defendant and the Claimant. This is because the Claimant had to find new insurers following the demise of the Independent Insurance Company. The insurers they approached were AXA who noted cracking on their inspection and expressed concern. Through brokers instructed by the Claimant the Defendant was asked to report on movement since 1995. On 14th August 2001 the Defendant inspected again and he noted that there had been 3mm. of movement in 3 years. In evidence before me he made it clear that he did not regard that degree of movement as significant.

18. On 1st October 2001 the Defendant wrote to the Claimant's brokers about the movement, and that letter was copied to Mr. Phillip Harris and is at page 34 of the bundle. What he stated was that the factory extension was designed by Broad & Gloyens, and completed on site during the latter part of 1994. He went on to say

    "Movement was originally noted about a year after the building was completed, and at the time it was assumed to be shrinkage of the masonry walls.

    There was an attempt to monitor the movement, but the tell-tales were dislodged and were unable to be used.

    Tell-tales were refixed in June 1998. To date, there has not been any significant movement along the back wall. However, there has been a slight increase in movement along the side wall, more noticeably on the external wall where a maximum of 2mm. has been recorded to date.

    It is not immediately apparent why the movement has occurred, but it would appear to confirm that it is the masonry cladding and not the structural frame."

    He concluded:

    "We assume that the policy is renewed annually and would suggest that the movement is monitored during this period to establish whether it is ongoing or has stabilized.

    Should you require any further information, please do not hesitate to contact the writer"

19. AXA were sufficiently reassured by that letter as to remove what had been a larger than usual excess (namely £5,000 rather than the usual excess of £1,000) that they proposed to put on the policy cover for subsidence. Not only was AXA reassured but so was Mr. Phillip Harris, who, as I say, obtained a copy of that letter and was reassured that there was no cause for concern.

20. However, Mr. Ansell had been told by the Defendant that there would be cause for concern if the floor slab cracked, and indeed by reason of an incident that occurred according to the Defendant "very suddenly" a pencil thick crack appeared in the floor slab, which was reported to Mr Ansell by an operative in 2003. Mr Ansell immediately reported the cracking to Mr Philip Harris, who asked him to contact Mr Howes, which he did in October 2003. In his witness statement Mr. Ansell was not definite as to when precisely the cracking was first reported to him, but in evidence he was confident that it must have been within a month or two before Mr. Howes re-inspected (on 19 November 2003), and I am satisfied that on the evidence the probable date when it was reported to Mr. Ansell was not earlier than about the beginning of October 2003.

21. Mr. Howes inspected and his first reaction was to say that at this stage, there being floor slab cracking, there was a conflict of interest so that he could not act further for the Claimant. But for whatever reason he did accept a brief to inspect and report on structural movement and did report to the Claimant in a document dated December 2003. In that document he noted that during October 1995 and February 1996 movement was detected along the isolation joint that I have mentioned and was monitored during that period with the result that movement appeared to be not ongoing, and even showed signs of recovery, as was reported back to the architects in his letter of 5th February 1996. He went on to say that ***"Since the movement was not significant*** [my emphasis] *and was only related to the floor slab, monitoring was not continued."* This was thus how the Defendant had seen things at the time he wrote his letter.

    He reported that a further inspection during August 2001 revealed only a slight increase in the previously reported movement. After reporting what he had seen on his November 2003 inspection, he concluded as follows:

    "It would appear from the pattern of movement, that the rear right hand corner is gradually moving outwards and the foundations along Grid Line 1 are tending to rotate.

    Since the bearing strata is a medium shrinkable clay, it is most probable that movement is being caused by drying out of the subsoil, because of the previous long dry summer period…..

In our opinion the present structural movement has developed very suddenly, and shall need remedial work to restore stability, but before recommendations can be made, it will be necessary for the following investigation work [which he went on to specify] to be carried out"

Those proposals for investigative works are reminiscent of those that he had made in the letter of 23rd January 1996 but not pursued in the February letter when, as stated, he had not considered the movement significant.

22. When they gave evidence both Mr. Philip Harris and Mr. Ansell stated, as I accept, that at no stage prior to becoming aware of the cracking of the floor slab did they either know or suspect that there was or might be any problem with the foundations. I am not surprised by this given their communications with the Defendant.

23. Proceedings in this case were commenced on 28 July 2006 and would be statute barred if prior to three years before that date the Defendant had the knowledge required or should have had the knowledge required for bringing an action for damages in respect of the relevant damage.

24. After that recital of the facts it is necessary now to consider the law.

25. It is necessary for me to set out in full the relevant provisions of sects. 14A(3) – (10) of the Act.

(3) An *action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.*

(4) That period is either --

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the casue of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above 'the knowledge required for bringing an action for damages in respect of the relevant damage' means knowledge both --

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

(b) of the other facts relevant to the c urrent action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are --

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

(9) Knowledge that any acts or omissions did or did not, as a mattaer of law, involve negligence is irrelevant for the purposes of subsection (5) above.

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

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

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

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

26. I have been referred to abundant authority on section 14A. The knowledge that the Claimant was required to have for the purpose of sect 14A(8)(a) is agreed by the Defendant to be knowledge that the foundations were inadequate and that the damage was attributable in whole or part to this. There is, however, disagreement as to the level of certainty of knowledge that is required by the authorities for this purpose. The Defendant submits that it is sufficient if the Claimant believes that it is a real possibility that cracking in the building was due to some problem with the foundations. However, for reasons I shall state I consider that this disagreement is probably academic in the light of my findings of fact regarding the Claimant's actual state of knowledge.

27. The leading case on actual knowledge is the decision of the House of Lords in ***Haward and Others v. Fawcetts*** *[2006] 1 WLR 682*. There are various statements of the law in the various speeches in that case which I must confess that I have not found easy to reconcile. However, I start with the proposition that what is required, leaving aside constructive knowledge for the moment, is *"knowledge"* of the material facts. The Act does not refer to *"suspicion"*.

28. The speech of Lord Nicholls in the ***Haward*** case provide support for the Defendant's submission. I refer in particular to paragraphs 9 – 11 and paras 20 – 21. In the latter paragraphs, Lord Nicholls stated:

"20. … This feature is the very essence of Mr. Haward's claim. Stated in simple and broad terms, his claim is that Mr. Austreng did not do his job properly. Time did not start to run against Mr. Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility.

21. There may be cases where the defective nature of the advice is transparent on its face. It is not suggested that was so here. So, for time to run, something more was needed to put Mr. Haward on inquiry. For time to start running there needs to have been something which would reasonably cause Mr. Haward to start asking questions about the advice he was given."

29. However, in paragraph 49 of his speech, Lord Scott says that: *"the requisite knowledge is knowledge of the facts constituting the essence of the complaint of negligence."*

That seems to me to require knowledge of more than just there is a "*real possibility*" of the existence of the facts constituting the essence of the complaint of negligence. Similarly with regard to the speech of Lord Walker: I refer to paras 57 and 58, to the approval of the passages in the judgment of the Court of Appeal in ***Hallam-Eames v Merrett Syndicates Ltd*** *[2001] Lloyd's Rep PN 178,* and to para 66. Further, read as a whole I do not consider that the speech of Lord Mance (and I refer to paras 112 – 114 -- para 126 seems to me to add nothing to para 112) supports the Defendant's submission. Indeed, in para 113 Lord Mance repeats Lord Scott's statement as set out above and moreover approves the statement of principle of Brooke LJ in ***Spargo v North Essex DHA*** *(1997) 37 BMLR 99, 106-107,* which includes the following propositions:

"'(3) A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation.

'(4) On the other hand she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree; or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was.'"

It seems to me that there is a tension between the two propositions in para (1). Moreover, I do not find the final proposition in para (4) easy to reconcile with paras 20 and 21 of the speech of Lord Nicholls.

30. Mr Haward at least knew that the investment he had made on the Defendant's advice was lost and that the outcome was very different from what he had been led to expect. It seems to me in the present case that if all that the Claimant has is a suspicion that there might be a problem with the foundations then that would not constitute actual knowledge for the purpose of the Act. For my part (and doing the best I can to reconcile the speeches in *Haward*) I would also say that if all that the Claimant knows is that there is a real possibility of a problem with the foundations and that damage may have resulted from this, but would need the further help of an expert before coming to a more definite view, then there is not actual knowledge for the purposes of the Act, but the question will then arise as to whether in the circumstances it was reasonable for the Claimant to take further steps so as to obtain the requisite knowledge as envisaged by s.14A(10).

31. However, as I have already mentioned, on the facts of this case it seems to me this is academic, because I am quite satisfied that the Claimant --and by this I mean for the moment Mr. Philip Harris and the works manager Mr. Ansell -- neither knew nor suspected that there was or might be any problem with the foundations at any time prior to the floor slab crack being seen in the autumn of 2003. Mr. Whitting, counsel for the Defendant, points out that I have not heard from the managing director at the material time, Mr. Brian Harris. That is correct, but it seems to me wrong to infer in this case that he is likely to have had any greater knowledge than that possessed by Mr Ansell or Mr Philip Harris. On the evidence before me, it does not seem to me that there is any reasonable basis on which I could find that he suspected prior to the autumn of 2003 that there might be a problem with the foundations. Further, even if knowledge of the January and February 1996 letters be imputed to the Claimant, there would not in my judgment thereby be communicated to the Claimant knowledge anywhere near sufficient to justify the investigation of whether there was a claim against the Defendant as envisaged in the speeches in the *Haward* case: I refer to what I have stated in para 13 above. Not even the Defendant regarded the movement as significant at that stage; nor in my view should the Claimant.

32. I thus find that the Claimant did not actually have the knowledge required for bringing an action prior to 3 years before its commencement. The remaining question is whether or not more than three years before the commencement of proceedings the Claimant might reasonably have been expected to acquire such knowledge from facts ascertainable by him with the help of appropriate expert advice which it was reasonable for him to seek, in other words whether or not there was constructive knowledge more than three years before the commencement of these proceedings. I have been referred in this context to statements in the ***Haward*** case on constructive knowledge and also to the decision of the House of Lords in ***Adams v. Bracknell Forest Borough Council*** [2005] 1 AC 76 where it is stated, reading the headnote:

"*In determining under the corresponding provision of the Act whether a claimant had knowledge which he might reasonably have been expected to have acquired the court must consider how a reasonable person in the situation of the claimant would have acted."*

33. Regardless of on whom lies the burden of proving constructive knowledge or the lack of the same (on which there is a difference of judicial opinion: see Clerk & Lindsell on Torts, 19th ed, par 33-03n25), I am satisfied on the evidence before me that the Claimant cannot reasonably have been expected to acquire the requisite knowledge sooner than it did. I find that it would not have been reasonable for the Claimant to have sought expert engineering advice from somebody other than the Defendant at any time before becoming aware of the floor slab cracking mentioned in para 20. The Defendant was perfectly content to continue to provide such advice and input at all times until he mentioned the conflict of interest in late 2003, and indeed thereafter

34. Mr. Trotman, counsel for the Claimant, submits it is of key importance in the circumstances of this case that the structural engineer to whom it resorted for help was the Defendant and that the Defendant was prepared to advise. I agree. It is clear that the Claimant relied on his advice as to structural engineering matters at all times until the end of 2003, and in my view it was reasonable for them to do so at least up to the time when the cracking in the floor slab was noticed. I repeat the Defendant's own statement that he did not see the pre-2003 movement as significant, and in those circumstances I fail to see how the Claimant should reasonably have been expected to take a different view or to question his advice.

35. I have stated already my view as to the letters of January and February 1996. But it may make for clarity if I summarise my views as to what a reasonable person in the position of the Claimant might have been expected to have done at each of various dates that arise in the chronology.

36. 2nd November 1995, the date of the meeting previously mentioned. In my view, the Claimant cannot reasonably have been expected to do anything other than concur in the agreed course of action, namely monitoring. Mr. Ansell was reassured by what the Defendant stated as mentioned in para 9 and I do not think that it would have been reasonable to expect the Claimant at that stage to go elsewhere.

37. The high point of the Defendant's case, as mentioned, comprise the January and February 2006 letters, which I believe I have sufficiently dealt with. True it is that the mastic was not replaced as recommended, but there is no evidence to suggest that anything of significance would have been revealed had it been replaced, and indeed Mr Howes, when he gave evidence, accepted that he could not say that anything would have been.

38. The next date is May 1998 when there was the cracking through the brick. I have said already that all that the Defendant advised Mr. Ansell to do was to carry on monitoring. Mr. Ansell said that he was told that in effect nothing had changed. I do not believe that the Claimant ought reasonably to have sought other advice at that stage.

39. Then there was the period from August to October 2001. The Defendant's letter of 1 October 2001 reassured not only Mr Harris but also AXA. It was not suggested to Mr Harris that he should have sought alternative advice at that stage, nor do I think he should. The position only changed with the cracking of the floor slab.

40. So I find that the Claimant did not have the knowledge required under section 14A within the period of three years prior to 28th July 2006.

MR. TROTMAN: *Your Honour, in those circumstances I ask for the Claimant's costs.*

JUDGE RAYNOR: *We are now coming to formalities. The first thing I should say presumably, It is declared that the -- is it sufficient for me to say that the claim is not barred by the Limitation Act or shall I in fact say it is declared he has not had the knowledge, etc.?*

MR. TROTMAN: *Truthfully, I do not care, but it may be that one simply answers the agreed question -- I cannot remember precisely how it is phrased.*

JUDGE RAYNOR: *The agreed question may require me to actually specify a date, which I do not think I am going to be prepared to do other than to say …*

MR. TROTMAN: *I am happy with whatever formulation.*

JUDGE RAYNOR: *It is declared that the Claimant did not have the knowledge required for bringing an action for damages earlier than three years before 28th July 2006. That is sufficient, is it not?*

MR. TROTMAN: *Yes, your Honour.*

JUDGE RAYNOR: *Second is now the question of costs.*

MR. TROTMAN: *Yes, I seek the Claimant's costs of the trial of the preliminary issue on the standard basis.*

JUDGE RAYNOR: *Can you resist that?*

MR. WHITTING: *No.*

JUDGE RAYNOR: *The Defendant do pay the Claimant's costs of the trial of the preliminary issue to be the subject of detailed assessment on the standard basis in default of agreement.*

MR. TROTMAN: *Thank you. Can I also ask that a direction be made for a telephone CMC.*

JUDGE RAYNOR: *Do you want me to make further directions today?*

*(**Counsel took instructions**)*

MR. TROTMAN: *Yes, I think we would prefer to put it over to a telephone CMC.*

JUDGE RAYNOR: *Could I just say that I am unhappy to have a telephone CMC if it appears that there will be any substantial argument that will require recourse to bundles of documents and the like, that is all. But I cannot imagine there will be at this stage.*

MR. TROTMAN: *I do not think there will be at this stage, no.*

JUDGE RAYNOR: *Could I just ask when you would like a CMC because I can fix it now.*

MR. TROTMAN:	*Half an hour on the next available date after 14 days.*
MR. WHITTING:	*That would certainly be acceptable to us.*
JUDGE RAYNOR:	*That is acceptable. 14 days is 16th October.*
MR. TROTMAN:	*I do not know whether we should build some reading time into that.*
JUDGE RAYNOR:	*If I need to do any reading I would be very unhappy to allow only three-quarters of an hour.*
MR. TROTMAN:	*Say half an hour. If it is obvious that there are any disputed issues arising we will notify the court.*
JUDGE RAYNOR:	*I will say Monday, 22nd October 2007, 9.45 a.m. for 45 minutes, CMC,* ***Harris v. Howes****. I am happy to do that by telephone provided it is clear there is no substantial dispute.*
MR. WHITTING:	*One final matter which may not come as a surprise. I do seek permission to appeal. This was a matter of application of law and quite difficult law to more or less agreed facts with which the Defendant does disagree. We say that the agreed evidence or the evidence as it emerged did show that the trigger for the date of knowledge was long before 2003 regardless of any subsequent reassurance, and therefore it is a matter which should fairly be considered by the appellate court.*
JUDGE RAYNOR:	*I do not consider on the material before me in the light of my findings that there is any real prospect of success. Therefore I refuse permission to appeal.*

MR. TIMOTHY TROTMAN (instructed by Messrs. Berrymans Lace Mawer) appeared for the Claimant
MR. JOHN WHITTING (instructed by Messrs. Beale and Company) appeared for the Defendant