CA on appeal from QBD Mercantile Court, Leeds District Registry (HHJ Behrens) before Arden LJ; Longmore LJ; Thomas LJ. 4th March 2008

JUDGMENT : Lady Justice Arden :

Introduction

1. This is an appeal by Dr Stephen Watkins and Mrs Elizabeth Watkins (to whom I refer as "the Watkins") from the order dated 4 January 2007 of HHJ Behrens, sitting in the mercantile list of the Leeds District Registry, answering certain of the preliminary issues which had been set down for trial before him. The proceedings seek damages for professional negligence from the respondents, Jones Maidment Wilson ("JMW"). The allegations are denied. The pleadings are complex, and the preliminary issues are designed to avoid the risk that substantial costs will be thrown away if certain defences raised under the Limitation Act 1980 are good in law. When I say that the pleadings are complex, I intend no criticism of Dr Watkins who acts in person and who argued this appeal with conspicuous skill.

2. The preliminary issues are directed to a single problem. The Watkins allege that JMW gave them (1) negligent advice leading to the execution of a building agreement on 3 April 1998 and (2) negligent advice leading to the loss of rights under cl 21 (ii) of that agreement, which on one view of the facts if given was given before 26 August 1998. On conventional principles, any cause of action in respect of that advice accrued before 26 August 1998 and thus became statute-barred prior to 26 August 2004 when the present proceedings were issued. The Watkins seek to meet this fundamental problem by utilising principles established in two recent decisions of the House of Lords, namely ***Law Society v Sephton*** [2006] 2 AC 543 and ***Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*** [1997] AC 1627. They say that under these authorities (a) the loss was contingent only and thus the limitation period did not start to run until the contingency matured, which was after 26 August 1998 (I refer to this as "the ***Sephton*** argument"), or alternatively (b) that there was no loss on entry into any agreement with Flemings since the net position was beneficial to the Watkins and thus the limitation period could not start to run until the net position was disadvantageous to them. This they say did not occur prior to September 1998 (I refer to this as "the ***Nykredit*** argument").

3. That takes me to the terms of the preliminary issues, which I have set in an appendix to this judgment with some modifications designed to make them easier for the reader to follow. This judgment should be read in conjunction with the appendix. A number of definitions are to be found in the appendix, namely the definitions of the "*pre-agreement claim", "the post-agreement claim", "the later transaction"* and "*the deferred start date"*. I will use those definitions in this judgment, where appropriate. It will be immediately apparent that the preliminary issues are directed to ascertaining the date of the accrual of the causes of action on which the Watkins rely.

4. For the reasons given below, I consider that the judge answered the first two preliminary issues correctly and that his decision not to answer the remaining issues cannot be challenged. Accordingly this appeal should be dismissed. Before I give my reasons, I will set out the relevant background and a general introduction to the relevant law on accrual of a cause of action, including an analysis of the two key decisions of ***Sephton*** and ***Nykredit***.

Background

5. In late 1997 the Watkins agreed to acquire a site at Littleborough, Rochdale, Lancashire ("the property") from a Mr Wilfred Fleming. They wanted to have a house built on the property by the seller and a Mr David Fleming (together "Fleming"), who were builders. The Watkins instructed JMW to act as their solicitors on the transaction on or about 27 November 1997. The Watkins allege that JMW negligently advised them in relation to the transaction. The Watkins executed various contractual documents on 3 April 1998. The documents comprised a contract for the purchase of a leasehold interest in the property, a legal charge, a 999 year lease and a building agreement. In this judgment I refer only to the building agreement, but references to that document should where appropriate be read as including the other documentation executed on the same date.

6. Cl 21 of the building agreement provided that, if Fleming failed to complete the works by 31 August 1998, the Watkins could terminate the building agreement and pay for work completed by that date. In the event of a dispute as to the value of the completed work, the parties could appoint an expert, whose determination would be binding, who could fix the amount due. Cl 21 thus provided:
"*Insolvency of Builder/failure to complete the works*
In the event of
i. the insolvency of the Builder and /or
ii. the failure of the Builder to complete the works by [31 August 1998]
then in either such case the Watkins may at their option pay to the builder an amount equal to the value of the works to that date completed (to be fixed in default of agreement by an independent chartered surveyor the identity of such surveyor either to be agreed between the parties or in default of such agreement the surveyor to be nominated by the President for the time being of the RICS who shall act as an expert and whose decision shall be binding) (but minus an allowance to be fixed by the said independent surveyor in favour of the Watkins to compensate them for the inconvenience of them having to complete the works) leaving the Watkins to complete the works thereafter. In the event of the Builder having been paid more than the amount due to him as becomes apparent after the independent surveyor's valuation, then the excess shall be repaid immediately to the Watkins."

7. On 6 August 1998, prior to completion of the house, the Watkins wrote a letter to Fleming, in the following terms:
"Completion date
We confirm our verbal agreement waiving the August 31 completion date insofar as it relates to work covered by provisional sums or work held up consequentially to those delays."

8. The Watkins allege they obtained the advice of JMW on this letter. They contend that they did not thereby waive the right to refer disputed costs for expert valuation under cl 21 of the building agreement, but that if they did so the advice given by JMW was negligent and they suffered substantial loss as a result. They contend that if they had not lost the right to use cl 21(ii), they would, at some point, have exercised that right and their dispute with Fleming would have been resolved swiftly and economically to their satisfaction; they would have secured possession of the property and would have been able to rectify what they say were defects. However, because they were unable to utilise cl 21(ii), they became locked into an expensive building dispute with Fleming. We are not concerned with the nature of the loss claimed or indeed with whether any of the allegations in either the particulars of claim or the defence can or will be proved at trial.

9. The Watkins allege that as at August 1998 they were aware only of various minor defects, amounting to some £2,000 in value, in the works, which they were prepared to waive, and that the loss arising from their dispute with Fleming crystallised when a National Housing Building Council ("NHBC") certificate was issued in September 1998. They contend that the contractual arrangements as a whole were not disadvantageous to them because of movements in property prices, and that their present loss under the pre-agreement claim is for wasted costs estimated in what today is the comparatively modest sum of £50,000.

The relevant law on the date on which a cause of action in respect of negligent advice about entering into a transaction accrues

10. Under s 2 of the Limitation Act 1980 a claimant in respect of negligent advice or omission to advise has six years in which to bring his claim, starting with the date on which the cause of action accrued. In the case of a breach of contract, the claimant has the same period (s 5 of the 1980 Act) but time begins to run when the breach of contract occurs. Where, as here, the claim lies also in negligence, damage is a necessary ingredient of the tort and the limitation period cannot begin until damage has occurred. This often, but not invariably, takes place when the claimant relies on the negligent advice or omission to advise.

11. We are concerned only with economic loss but even in this field many different types of cases can arise. In some cases, it will be obvious that the claimant has suffered a loss, for example where he is advised to enter into a compromise of legal proceedings on disadvantageous terms, or, as in ***D. W Moore v Ferrier*** [1988] 1 WLR 267 (cited with approval in ***Nykredit***), his solicitor fails to draft an agreement for a prospective employee with an enforceable covenant against competition, or, as in ***Knapp v Ecclesiastical Insurance*** [1998] PNLR 172, where he is advised to take out an insurance policy which does not provide appropriate cover. It may be difficult to quantify the damage shortly after the execution of the agreement, but this does not mean that damage has not occurred: see per Bingham LJ, as he then was, in ***Moore v Ferrier*** at pages 278 to 279. At 279, Bingham LJ held:

"*On the plaintiffs' case, which for the purposes of this issue may be assumed to be wholly correct, the covenants against competition were intended, and said by the defendants, to be effective but were in truth wholly ineffective. It seems to me clear beyond argument that from the moment of executing each agreement the plaintiffs suffered damage because instead of receiving a potentially valuable chose in action they received one that was valueless.*"

12. In some cases, entry into the transaction involves taking on a contingent liability that may or may not mature into an actual liability. In ***Forster v Outred*** [1982] 1 WLR 86, which was cited with approval in ***Nykredit***, the plaintiff on allegedly negligent advice mortgaged her property to pay for her son's debts and the mortgage was enforced some two years later. This court held that she had suffered a loss as soon as she signed the mortgage, as she had detrimentally affected her property at that point. In ***Sephton,*** both Lord Hoffmann and Lord Walker explained the decision on this basis (see [11] to [18] and [48] to [52]). The House also cited with approval ***Bell v Peter Browne*** [1990] 2 QB 495 (cited with approval in ***Nykredit***), where a husband agreed to transfer the matrimonial home into the sole name of his wife as part of a settlement on their divorce on terms that he was to receive one-sixth of the proceeds of sale. He lost his share because his solicitors failed to register a caution against the property with the consequence that his former wife was able to sell the property and spend the proceeds of sale. This court held that the cause of action accrued at the time of the failure, and not at the later date on which the property was sold and the proceeds distributed in disregard of his right. This was so even though the loss might never have occurred: it was open to the husband to register his interest at any time prior to sale.

13. In **Nykredit,** the plaintiff had made a loan to a borrower in reliance on the negligent survey of the property charged in support of the loan. The plaintiff would not have entered into the loan but for the negligent survey. The borrower immediately defaulted and the plaintiff obtained judgment for damages against the negligent surveyor. The House had to determine the date from which interest would run on the damages and this depended on when damage occurred. Lord Nicholls, with whom the other members of the House agreed, held that the first step was to identify the relevant measure of loss, which was a comparison between what the plaintiff's position would have been if the defendant had fulfilled his duty of care and the plaintiff's actual position. If the plaintiff would not have entered into the transaction but for the negligent advice, the comparison fell to be made between his position had he not entered into the transaction in question and his position under the transaction. The valuer was liable for the adverse consequences of the loan attributable to the deficiency in the valuation. Lord Nicholls held that damage occurred as soon as the lender sustained measurable, relevant loss. Sometimes this would be immediately on making the loan, such as in this case where the borrower's covenant to repay was worthless. In other cases this might be at the later time when the borrower defaulted. In yet other cases it might be at other points in time. It depended on the facts. But Lord Nicholls rejected the submissions that the loss did not materialise until the security was realised or after the lender became entitled to realise his security. As Lord Nicholls said at

1633D, "… within the bounds of sense and reasonableness the policy of the law should be to advance, rather than retard, the accrual of a cause of action."

14. The only other speech was given by Lord Hoffmann, who held that loss was suffered when the lender could show that he was "worse off" than he would have been had this security been worth the sum advised by the valuer (1639A). In the later case of ***Sephton,*** at [20], Lord Hoffmann held that *Nykredit* decides that:

"in a transaction in which there are benefits (covenant for repayment and security) as well as burdens (payment of the loan) and the measure of damages is the extent to which the lender is worse off than he would have been if he had not entered into the transaction, the lender suffers loss and damage only when it is possible to say that he is on balance worse off."

15. In this passage Lord Hoffmann uses the words "worse off", though on another occasion he uses the words "financially worse off". In *Sephton*, Lord Walker expressed the view that the latter expression was to be preferred and I have proceeded on that basis.

16. ***Sephton*** concerns the accrual of a cause of action when a breach of the duty of care has resulted in a party being subject to a contingent liability. The defendant accountants had negligently failed to identify a solicitor's fraud. The solicitor's clients in due course made claims against the Solicitors' Compensation Fund, of which the Law Society was trustee. The Law Society sued the accountants, who raised a limitation defence. The case turned on whether the loss suffered by the Law Society occurred when the solicitor had originally committed the fraud, thereby exposing the Fund to potential claims, or when the claims were actually made against the Fund. The House unanimously held that, until a claim was actually made, no loss or damage had been sustained by the Fund and no cause of action had accrued. The leading speech was given by Lord Hoffmann. The other members of the House agreed with his speech and with those of Lord Walker and Lord Mance. Lord Hoffmann held that cases like ***Bell*** **and** ***Knapp*** :

"are readily explicable as cases in which the damage was the difference between the plaintiff's position as it was and as it would have been if the defendant had performed his duty and in which it was possible to infer that the plaintiff's failure to get what he should have got from a bilateral transaction was quantifiable damage, even though further damage which might result from the flaw in the transaction was still contingent. The plaintiff had paid money, transferred property, incurred liabilities or suffered diminution in the value of an asset and in return obtained less than he should have got." [22]

17. Lord Hoffmann summarised his conclusion in ***Sephton*** thus:

"30. In my opinion, therefore, the question must be decided on principle. A contingent liability is not as such damage until the contingency occurs. The existence of a contingent liability may depress the value of other property, as in ***Forster v Outred & Co*** *[1982] 1 WLR 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damage in the circumstances). But, standing alone as in this case, the contingency is not damage."*

18. In his speech, Lord Walker referred to cases such as *Moore*, *Forster* and *Bell* and concluded:

"48. In all these cases the claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or has been disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy, or a claim for damages."

19. Subsequently to the decision in ***Nykredit,*** this court had to consider whether the cause of action in response to negligent advice to enter into an agreement on disadvantageous terms arose when the agreement was made or at a later date when loss occurred: see ***McCarroll v Staham Gill Davies*** [2003] PNLR 25. The claimant alleged that his solicitors had failed properly to protect his interests when drafting a partnership agreement into which he subsequently entered. He alleged that the agreement contained less favourable terms than those which should have been agreed and he claimed damages accordingly. In the alternative he claimed damages on the basis that the solicitors' breach of duty had caused him to lose the chance of securing an agreement on more favourable terms. He contended that the loss was only suffered when he ceased to be a member of the partnership. This court held that his cause of action accrued when he entered into the partnership agreement. That was the point in time when he suffered an actual loss. This court applied authorities such as *Moore v Ferrier* and distinguished ***Nykredit.*** Pill LJ, with whom Latham LJ and Morland J agreed, held:

"A monetary value could have been put upon the loss at that time though the extent of the loss would have depended on subsequent events and an accurate quantification of loss would have been likely to become clearer with the passage of time."

The *Nykredit* argument

20. This is the primary way in which Dr Watkins puts the case on Question 1. Dr Watkins pursues his appeal against the judge's ruling on Question 1 only on the basis that the Watkins would not have entered into the building agreement if the negligent advice had not been given. As the judge records, Dr Watkins accepts that, if this is not a "*no transaction*" case, his claim is statute-barred. Dr Watkins submits that he would have attempted to renegotiate more favourable terms and would not have succeeded so that the transaction would not proceed. Dr Watkins further submits that the financial benefits of the building agreement signed on the 3 April 1998 exceeded its burdens. He submits that the position became disadvantageous to the claimants when the NHBC

certificate was issued. He submits that, on the authority of ***Nykredit,*** the cause of action only arose on the deferred start date.

21. Dr Watkins submits that the fact that one claim for damages accrued immediately (and is accepted to be statute-barred) does not mean that the alternative claim is excluded. The judge accepted that proposition. His submission is that there is a critical difference between the residual claim for the loss of a chance, which he says is more than merely a head of loss, and the claim for loss resulting from entry into the transaction. He contends that there are two separate causes of action.

22. Mr Derek Holwill, for JMW, submits that, by executing the building agreement and related documentation, the Watkins obtained a bundle of rights which was worth less than they thought they were getting. They contend that they would not have entered into the transaction. The loss resulting from entry into the transaction occurred when the transaction was entered into. Mr Holwill submits that there is no material difference between this case and ***McCarroll.***

23. The judge rejected the Watkins' submission. He held that the loss of a chance was a separate loss which arose in any event at the time when the contract was entered into. It did not inevitably lead to the contract not being proceeded with. Accordingly there was an actual tangible loss at the time the contract was entered into and accordingly the claims based on the contract dated 3 April 1998 were statute barred.

24. In my judgment the judge was plainly correct for the reasons which he gave. If the advice had not been negligent, the claimant would have had the chance of negotiating a better agreement. That chance was an asset with a measurable value. Its absence meant that there was an immediate loss. Accordingly, the situation is not comparable to that in ***Nykredit.***

25. Moreover, it is not possible to say that there are two causes of action in law. Dr Watkins seeks to distinguish ***Hamlin v Evans*** [1996] PNLR 398. In that case, the plaintiffs discovered that the defendant surveyors had negligently failed to observe that there was dry rot but did not start proceedings until other negligence was discovered more than six years later. The action was struck out on the basis that although the negligent survey had led to two heads of loss there was only one cause of action. Since the plaintiffs had discovered the dry rot over six years previously, the action was statute barred. He relies on ***Brunsden v Humphrey*** (1884) 14 QBD 141. In that case, the defendant had negligently caused damage to a cab driver and his vehicle in the same accident. The cab driver obtained damages for the damage to his vehicle and was held not to be disentitled thereby from bringing fresh proceedings for damages for personal injury. The court by a majority held that there were two causes of action. However, in ***Talbot v Berkshire County Council*** [1994] QB 290, Stuart Smith LJ, with whom Mann and Nourse LJJ agreed, held that the decision in ***Brunsden*** might have been different if the court had considered the principle of abuse of process in ***Henderson v Henderson*** (1843) Hare 100, which was not cited to the court in ***Brunsden.***

26. Dr Watkins submits that the more recent case of ***Oakes v Hopcroft*** [2000] EWCA Civ 237 supports his proposition that there are two causes of action. In that case there was a negligent diagnosis of the plaintiff's medical condition leading to a negligent report and a compromise of her claim against her employer for negligence. Some years later she sought to sue the consultant and the case turned on when she first had knowledge of her claim against the consultant for the purposes of s 14A of the Limitation Act 1980. Reference was made to *Hamlin* on the question of knowledge, but not to the point that there was in that case a single indivisible cause of action. However, this court did not suggest that there were in that case two separate causes of action or that *Hamlin* was decided on the basis of constructive knowledge rather on the basis of an indivisible cause of action. In those circumstances the authority of *Hamlin* is undiminished.

27. The alleged negligent advice led on the Watkins' case to entry into the transaction. The cause of action was then complete. Even if the advice should have included advice to renegotiate the agreement, it was that same event which constituted the breach of duty. The claim for damages for loss of the chance of renegotiation was merely an alternative or additional head of loss.

28. Dr Watkins orally and in a submission filed with the court after the hearing suggested that the court need not answer question 1. However the matter was fully argued and accordingly I consider that this court should now deal with this question.

The *Sephton* argument

29. This is the primary way in which Dr Watkins puts his case on question 2, which is the most important for him. He contends that the loss of clause 21(ii) exposed the Watkins to a contingency, namely that Fleming would fail to complete the property. Dr Watkins submits that this date was 31 August 1998 (excluding minor snagging matters for which they had agreed an extended period). Because the loss was one arising on a contingency, the need to use cl 21 (ii), the cause of action did not accrue until the date on which the loss was actualised.

30. Mr Holwill submits that actual loss was caused to the Watkins on 6 August 1998 because it was on 6 August 1998 that the right to use cl 21 (ii) was lost. The right to use cl 21(ii) was a valuable right and its loss caused actual damage sufficient to cause the limitation period to start to run. He submits that all that is uncertain is the quantum of loss consequent on entry into a contract which the Watkins contend they would not have entered into. There was no contingency outstanding after they entered into the contract.

31. The judge accepted the argument of Mr Holwill. He held that the fact that cl 21 (ii) could not be used before 31 August 1998 and could only be used if Fleming failed to complete by that date did not mean that it did not have

a value prior to 31 August 1998. In his judgment, although its value depended on a number of factors including the likelihood of the Watkins being able to exercise it after 31 August 1998, it had a value before 31 August 1998 and thus ***Sephton*** was distinguishable.

32. In my judgment, the judge was correct for the reasons he gave. When the Watkins entered into the building agreement they acquired a bundle of rights. That bundle of rights was of lesser value than they were on their case led to believe that it would be. Those rights were an asset capable of valuation. Thus, the Watkins suffered measurable loss when they acted on the allegedly negligent advice to enter into the later transaction. Accordingly, that claim is statute-barred.

33. Dr Watkins particularly relied on [77] of the speech of Lord Mance in ***Sephton.*** The relevant passage is as follows:

> *"77. It may be that if the facts had been known contemporaneously, some statistical or experience-based assessment could have been made of the likelihood of a claim or claims emerging, and of the fund having eventually to make payments, as a result of Mr Payne being able to continue his scheme of fraud. A similar assessment might be made of the risk of future loss of a physical asset (deeds or valuables) of which a solicitor was failing to take reasonable care, but which had not yet been lost or stolen. But I do not consider that the law should treat purely contingent loss assessed on so remote a basis as sufficiently measurable, in the absence of any change in the claimant's legal position and any diminution in value of any particular asset. Even where negligence brings about a specific transaction and a change in the claimant's legal position, Lord Nicholls observed in the* ***Nykredit (No 2)*** *case [1997] 1 WLR 1627, 1631C-D in the passage cited in para 73 above, that the mere entry into a transaction under which "Financial loss is possible but not certain" is not sufficient detriment."*

34. The first two sentences of this passage confirm that a valuation may be possible even where a loss is purely contingent. However, the third sentence confirms the legal position as set out by Lord Hoffmann and Lord Walker in the passages already cited and indeed in the earlier authorities, such as ***Moore v Ferrier***. Likewise, the final sentence is not authority for the proposition that the fact that a contingent liability is incurred means the damage cannot have occurred at that point: see, for example, the passage cited from the speech of Lord Walker at [18] above.

Questions 3 and 4

35. The judge declined to answer these questions. The respondents pointed out that on causation the Watkins' case was that they would not have entered into the later transaction whereas they were seeking for the purposes of limitation to say that there were benefits which exceeded the detriments of entering into a later transaction. That meant that they were saying that even though it was a favourable transaction they would not have entered into it in order to retain the benefit of cl 21(ii). That seemed to make it unlikely that the agreement would have had benefits which outweighed the detriment. The judge considered that the Watkins' case was accordingly self-contradictory. In addition, the Watkins' calculation of the benefits appeared to include unquantifiable benefits in terms of relations with Fleming and the avoidance of an abandonment of the work and the avoidance of immediate litigation. The judge was not persuaded that the assumptions in question 3 or question 4 formed part of any pleaded case. Dr Watkins himself made the point that question 4 had been pleaded by no one. It was not part of his case. Question 3 formed part of his reply to JMW's primary case but was not the primary case of either party.

36. In those circumstances, the judge, who had reserved the right not to answer the preliminary questions before approving them and proceeding to the argument on them, concluded that it was inappropriate to answer these preliminary questions. They appeared to be largely hypothetical, the benefits relied on were very vague and there was difficulty in valuing them and it was improbable that the facts would be found in the way suggested in the questions.

37. Dr Watkins submits that the answer to question 3 should be 'no' but that the answer to question 4 might depend on the value of the lost opportunity. He did not displace the reasons put forward by the judge for finding that these questions were inappropriate.

38. There is no respondent's notice. Mr Holwill seeks to uphold the judge's judgment.

39. In my judgment the judge's ruling on questions 3 and 4 was a question of case management and this court should not interfere unless the judge was clearly wrong. That has not been demonstrated. On the contrary, the judge's reasoning appears to address the right considerations and thus to be unexceptionable. He was fully entitled to take the view that he should answer question 2, to which the answer appeared to be relatively clear, but he should not answer questions 3 and 4 although they related to the same claim. Accordingly I would dismiss the appeal against his ruling on these two questions.

Disposition of the appeal

40. For the reasons given above, I would dismiss this appeal.

Lord Justice Longmore:

41. I agree that this appeal must be dismissed because Dr and Mrs Watkins' cause (or causes) of action accrued before 26 August 1998. In these circumstances the judge was right to answer questions (1) and (2) as he did and to decline to answer questions (3) and (4). The complexity of the preliminary issues put before the judge has made this case more difficult than it ought to have been. If counsel cannot draft preliminary issues in simple terms, it is usually an indication that the questions in them should not be asked.

Lord Justice Thomas:

42. I agree with both judgments.

APPENDIX

The Preliminary Issues

Notes: The date of 26 August 1998 is relevant because the present proceedings were issued on 26 August 2004. Cl 21(ii) of the building agreement conferred an allegedly valuable right on the Watkins to terminate that agreement and to obtain an expert valuation of the costs of the completed works. The building agreement was dated 3 April 1998 and made between the Watkins and Fleming.

A. The Watkins' claim ("the pre-agreement claim") in respect of alleged breach of duties in relation to the terms of the building agreement

Question 1

Is the pre-agreement claim statute- barred on the following assumed facts?

The assumed facts are

(i) that JMW was, on or before 3 April 1998, in breach of its duties to the Watkins in relation to the contractual documentation executed by the Watkins on 3 April 1998, as alleged in the amended particulars of claim;

(ii) that as a result of such breaches of duty:
   a. the Watkins entered into agreements under which they did not obtain contractual rights which accorded with their instructions to JMW (although it is not certain whether such rights could have been obtained); and
   b. the Watkins lost a real chance of securing more favourable contractual terms from Fleming;

(iii) that the benefits which the Watkins actually obtained under the contracts with Fleming, executed on 3 April 1998, exceeded, at all material times prior to 26 August 1998, the burdens imposed upon the Watkins under those contracts.

B. The Watkins' claim ("the post-agreement claim") in respect of the alleged breaches of duty leading to the alleged loss of their rights under cl 21(ii) of the building agreement

Note: Questions 2 to 4 are directed to ascertaining whether the cause of action in respect of this claim accrued upon or after the time on which it is alleged that the Watkins entered into a further transaction (referred to below as "the later transaction") whereby the Watkins agreed to forego the benefit of cl 21(ii) of the building agreement or took steps which resulted in the loss of the right to use cl 21(ii). The date of the later transaction is disputed but for the purposes of the preliminary issues is assumed to occur before 26 August 1998. The Watkins contend that the cause of action accrued on a date after 26 August 1998. That date ("the deferred start date") is not ascertainable in advance of trial but is the date on which:

"the detriment to the Watkins consequent upon entering into the [later transaction], or taking the said steps, outweighed the benefits to the Watkins of entering into that [later transaction] or taking the said steps (such that, in the event that the detriment to the Watkins did not prior to 26 August 1998 outweigh the benefits, the Watkins' claim is not statute-barred)."

Questions 2 to 4 each seek a determination, on assumed facts, of the following question:

Could the post-agreement claim accrue prior to the deferred start date on the assumed facts?

The following are the assumed facts for each of Questions 2 to 4:

(i) that JMW was in breach of its duty of care to the Watkins as alleged in the amended particulars of claim;
(ii) that these breaches caused the Watkins to enter into the later transaction;
(iii) that the later transaction occurred prior to 26 August 1998;
(iv) that the later transaction also produced benefits for the Watkins;
(v) that, but for the breaches of duty alleged in the amended particulars of claim, the Watkins would not have entered into the later transaction.

The following further facts are to be assumed in respect of each question respectively:

Question 2

(vi) that, instead of entering into the agreement or taking the steps mentioned above, *the Watkins have procured the benefits referred to in (iv) above, whilst preserving the right safely to use Cl 21 (ii)*.

Question 3

(vi) that, instead of entering into the agreement or taking the steps mentioned above, *the Watkins have foregone the benefits referred to in (iv) above, whilst preserving the right safely to use cl 21(ii)*.

Question 4

(vi) that, instead of entering into the agreement or taking the steps mentioned above, *the Watkins would have pursued further negotiations with Fleming in an attempt to procure the benefits referred to in (iv) above, whilst preserving the right safely to use cl 21(ii), and would have had a real (as opposed to fanciful) chance of procuring, in those negotiations, the benefits referred to in (iv) above, whilst preserving the right safely to use cl 21 (ii)*.

Dr Stephen Watkins (in person) for the Appellants
Mr Derek Holwill (instructed by Messrs Weightmans LLP) for the Respondents