CA on appeal brom QBD (HHJ Bowsher QC) before Balcombe LJ; Stuart-Smith LJ; Peter Gibson LJ. 21st December 1993.

Stuart-Smith L.J.

1. On Saturday 8 October l988 at about l.30p.m. there was an explosion of a heat exchanger at the Plaintiff's works at Bootle, Liverpool. Fortunately, no one was injured; but much damage was caused to equipment, including the heat exchanger and even greater economic loss in terms of lost production.

2. The heat exchanger was installed in February l987, some 20 months before it blew up. It was supposed to have a life of 20 years.

3. The Plaintiff, formerly known as J. Bibby Edible Oils Ltd., extracts from seed, refines and packs various edible oils and processes and sells the residue.

4. The heat exchanger consisted of a cylindrical steel casing, having an external diameter of about l2" and a height of about l5 feet and was installed in one of three similar production lines. Inside the shell were a number of stainless steel tubes looping up and down the length of the casing. The oil to be heated was pumped through the tubes and steam was passed over the tubes so that heat was transferred to the tubes and so to the oil within them. The steam partially condensed in the process and was passed back to the boiler through a closed system for reheating into steam again. The steam was at temperatures of about 250C or more; the oil required to be heated to from l80C to 240C as part of the deodorising process. The steam was under pressure of about 65 Bar in the heat-exchanger. The casing was not made of a seamless tube, but consisted of three sections of flat steel, each of which was welded to form a cylinder and then the cylinders were welded together along their circumference and closed at each end.

5. The heat exchanger was part of plant provided for the Plaintiff by Wimpey Engineering Ltd. ("Wimpeys"). But any claim against them was barred by a contractual time limitation. The Plaintiff therefore claimed against the 1st Defendant, which was a sub-contractor to Wimpeys, under a contractual warranty made directly between the Plaintiff and the 1st Defendant. The Plaintiff contended that there were breaches of warranty in respect of the design, selection of materials and workmanship. The 1st Defendant had in fact sub-contracted the manufacture of the heat exchanger to other sub-contractors, but nothing turns on that.

6. By amendment the Plaintiff also sued the 2nd Defendant, who from time to time performed engineering repairs and maintenance on the instructions of the Plaintiff. The 2nd Defendant's employees came into the matter because on 24 August l988 a leak was discovered in the heat exchanger. The lagging which surrounds it was removed and there appeared to be a pin-hole from which steam was issuing under pressure. Further examination revealed a substantial crack in the outer surface of the casing along the vertical weld. The Plaintiff, by its engineers, gave instructions to the 2nd Defendant's men to repair the weld. This they purported to do; but they did not do it properly, in the sense that, unknown to them, the crack extended considerably further than the repair which was effected.

7. Having effected the repair, as it was thought, Mr. Jackson, one of the Plaintiff's engineers, instructed the 2nd Defendant's men to carry out a hydraulic pressure test. This involved pumping water into the heat exchanger to a test pressure of 90 Bar. But it failed that test, because it lost pressure. Nevertheless, the next day the Plaintiff's engineers decided to put the whole system back into operation again. Before any pressure test was done, still more before the line was put back into operation, there should have been an inspection by radiograph or ultrasound to see if the repair was effective. Had such an inspection taken place it would have revealed that the crack was more extensive than the part that had been rewelded. It was the Plaintiff's responsibility to arrange for such an inspection. The failure that caused the explosion was due to this crack.

8. The trial began before His Honour Judge Bowsher QC, sitting as an Official Referee, on l8 February l992. Up to that time the only claim made against the first Defendants related to the explosion. Paragraph 5 (l) of the re-re-re-amended statement of claim, which substantially followed the claim in the writ, was in these terms:

   "By reason of the First Defendant's breaches of the above warranties at about l.30 p.m. on Saturday 8th October l988 the heat exchanger blew up whilst in use and the Plaintiff has thereby suffered loss and damage and been put to costs and expenses.

   Particulars

   (l) The cost of repair £43,525.49

   (2) Loss of use of the heat exchanger and consequent shut down of the Plaintiff causing expense and loss of profit over some 10 weeks £676,542.00

   £720,000.49"

9. It was a claim which, together with interest, came to about £l,000,000.

10. In the course of his opening, the Plaintiff's counsel submitted that even if the Plaintiff could not establish liability against the 1st Defendant for the explosion, it was, in the alternative, entitled on the pleading, as it then stood, to recover the costs of making good the repairs to the heat exchanger and any consequential loss of profit on the hypothetical basis that, but for the explosion, these would have been incurred. The Judge ruled that it was not open to the Plaintiff to advance this point on the claim as pleaded.

11. However, on 24 February l992 the Judge gave the Plaintiff leave to make yet a further amendment to their statement of claim in these terms:

"5 (2) As appears above the Plaintiff's primary case is that the First Defendant's breaches of warranty caused the heat exchanger to explode on 8th October l988. For the avoidance of doubt however it is the Plaintiff's case that, in the event that it is held that the carrying out of the repair weld on 24th August l988 constituted a novus actus and caused or contributed to the explosion as alleged [by the First Defendant] the First Defendant is nonetheless liable to it in damages for breach of such warranties in like sums to those set about above, such sums representing the loss and/or damage which the Plaintiff would inevitably have incurred in replacing, alternatively carrying out some other scheme of repair, to the heat exchanger and including the cost of replacing, alternatively repairing, the heat exchanger together with all consequence (sic) loss of production, loss of profits and/or increased costs of working and/or all other expenses."

12. He ordered the Plaintiff to pay the costs of and occasioned by the amendment.

13. In his judgment given on 6 April l992 at the end of the trial, the Judge made the following findings:
    l. The 1st Defendant was in breach of warranty in that there were defects in the design and workmanship of the heat exchanger. So far from having a life expectancy of 20 years, it was likely to be nearer 20 months. Until 24 August these defects were latent.
    2. The 2nd Defendant was in breach of contract in that it failed to repair the crack as instructed, it repaired only part of it. If it had carried out a second dye penetration test, it would have discovered this. But it was not responsible in any way for the Plaintiff's failure to have a radiograph or ultrasound test.
    3. The cause of the explosion was, to use the Judge's words at p. 56/22, *"the recklessness of the Plaintiff in failing to apply to the heat exchanger any proper non-destructive test after causing a repair to be effected to a known defect and before bringing the heat exchanger back into service"*. The Plaintiff's engineers were well aware of the risk of explosion if the crack was not properly repaired.

14. Accordingly, he made the following orders: he dismissed the Plaintiff's claim against the 2nd Defendant. He dismissed the Plaintiff's claim against the 1st Defendant, in the respect originally pleaded, for the consequences of the explosion. But he gave judgment against it for damages to be assessed on the basis of the amendment contained in paragraph 5 (2) of the re-re-re-re-re amended statement of claim.

15. As to costs, he ordered (a) that the Plaintiff should pay the 2nd Defendant's costs, and (b) that the 1st Defendant should pay the Plaintiff's costs of the action (not including the costs which the Plaintiff had to pay the 2nd Defendant); save that the Plaintiff should pay the 1st Defendant's costs hitherto incurred attributable solely to damages.

16. In this appeal the 1st Defendant seeks the following relief:
    l. Leave to appeal the judge's order of 24 February permitting the amendment. If leave is given and the appeal allowed, judgment will be entered for the 1st Defendant.
    2. Alternatively, the 1st Defendant contends that as a matter of law the Plaintiff is not entitled to damages on a hypothetical basis of lost profit and that the Judge's order directing judgment for damages to be assessed should be set aside to this extent.
    3. In the further alternative, it seeks leave to appeal the Judge's order for costs, contending that it should have been awarded the costs of the action down to the date of the amendment in question and thereafter a substantial part of the costs.

17. The Plaintiff cross-appeals on the ground that the Judge should have ordered the 1st Defendant to pay the costs of the 2nd Defendant either directly or indirectly.

18. Before opening the appeal, Mr. Stow QC, on behalf of the 1st Defendant, sought leave to adduce further evidence. This related to the quantum of costs which, in the opinion of the 1st Defendant's solicitor, would fall upon the 1st Defendant as a result of the Judge's order, and also the 1st Defendant's position vis-a-vis its insurers. We decided to look at the evidence *de bene esse* and to rule on its relevance and admissibility thereafter. I will deal with these matters when I consider the issues to which it is said the evidence relates. I turn to consider the grounds of appeal.

l. Leave to amend to add the alternative claim

19. This being an exercise of the Judge's discretion, this Court can only interfere if it can be shown that the Judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong, because this Court is forced to the conclusion that he has not balanced the various factors fairly in the scale.

20. The guiding principle in giving leave to amend is that all amendments should be allowed at any stage of the proceedings to enable all issues between the parties to be determined, provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.

21. The main ground upon which Mr. Stow opposed the application for leave to amend before the Judge was that it was far too late, the 1st Defendant had come to trial prepared to deal with all issues, including quantum. It was impossible to meet the new case without an adjournment of about four months, and it would be a hardship to the 1st Defendant to have a split trial, standing over the assessment of damages on the alternative basis.

22. The Judge rejected Mr. Stow's submission. In my judgment, not only is it impossible for this Court to say the Judge was wrong, but I am quite satisfied that he was correct. If the Plaintiff won on its primary case, then the action

would go ahead as planned. It was only if the Plaintiff's primary case failed that there would have to be an adjournment, further pleadings and discovery, followed by the assessment. Although I recognise that there is undoubtedly some hardship to a defendant who has to face a prolongation of litigation, the disruption and inconvenience caused to people involved in running a business being something that cannot be wholly compensated in costs, an appropriate order for costs in my judgment substantially protects the 1st Defendant from any injustice.

23. There is a factor which has to be considered on the other side of the scale. Unless the Plaintiff was permitted to amend to add this alternative claim, it would be unable to bring a separate action to pursue the claim. This is because of the doctrine in ***Henderson v. Henderson*** [l843] 3 Hare 100, that save in special circumstances the court will not permit the same parties to re-open the same subject of litigation in respect of matters that might have been brought forward, only because they have from negligence, inadvertence or accident, omitted this part of their case, (see also ***Talbot v. Berkshire County Council*** [l993] 3 WLR 708). In my judgment, it would be a considerable injustice to the Plaintiff, if in truth it has a valid claim on the alternative basis, if it were not permitted to advance it.

24. Mr. Stow's second submission in relation to the amendment arises out of the 1st Defendant's insurance position. The 1st Defendant was insured under a public liability policy. The explosion and consequential damage was clearly an event which was covered by the policy and up till 24 February l992 insurers had taken over the conduct of the defence: if held liable, they would have to meet the damages and costs. But the claim advanced in the amendment very probably did not fall within the cover afforded by the policy. This obviously put the 1st Defendant in a difficulty, since it had to face for the first time a claim in respect of which it was not insured. There would be likely to be difficult negotiations with Insurers as to who should bear any costs if the Plaintiff succeeded only on the alternative claim.

25. After the Judge had made his ruling on this amendment, Mr. Stow raised this difficulty with the Judge. But he did not invite the Judge to reconsider his decision on the basis that the problem now faced by the 1st Defendant involved such prejudice that the amendment should not be allowed. He did not do so expressly; nor did he do so by implication.

26. Mr. Stow now submits to this Court that the Judge erred in principle because he did not take into consideration the prejudice caused to the 1st Defendant by reason of the insurance position. It was in this connection that he sought to introduce the further evidence as to what had occurred as between the 1st Defendant and its insurers. In my judgment, there are two answers to Mr. Stow's submissions.

27. First, since Mr. Stow did not invite the Judge to reconsider his decision on the amendment, I do not see how he can now say that the Judge erred in failing to take it into account. If that is right, any further evidence on the point is quite irrelevant.

28. Secondly, it is a common feature of litigation of this nature that a defendant faces some claims which are covered by insurance and some which are not. The matter of who bears the costs of defending the action and in what proportions has to be agreed, or if not agreed, settled by litigation. Where the claims are properly pleaded before trial, this will, or should be, settled in good time. Where the problem arises as a result of a late amendment, a similar solution has to be arrived at, if need be by means of a provisional arrangement which may have to be reconsidered after trial. But, although the lateness of the amendment clearly caused extra difficulty to the 1st Defendant, it is not different in kind from that which it would have faced if the case had been timeously pleaded. In my judgment, this ground of appeal affords no basis for disturbing the exercise of the Judge's discretion. And the details of the arrangements between the 1st Defendant and insurance is of no relevance.

29. Finally, in relation to this ground of appeal, I must deal with Mr. Knight's submission, for the Plaintiff, that the Plaintiff did not need leave to amend at all, because the alternative claim was in some way embraced by the original claim. I cannot accept this. Although the amended pleading purported to claim the same sum as that resulting from the explosion, this was manifestly incorrect. The fact is that the alternative claim was put on an entirely different basis and the calculation was quite different. This is now made clear by the Scott Schedule served since judgment in which the Plaintiff claims £2l,574 for the cost of repair and £270,000 loss of production in a detailed calculation that differs markedly from the original claim. The Judge was quite right to insist on an amendment.

30. 2. The second ground of appeal raises an interesting point of law upon which there does not appear to be any authority directly in point. Can the Plaintiff recover damages which he would have incurred by way of loss of profit on lost production during the period necessary to repair the defect in goods or materials supplied by the Defendant and caused by his breach of contract, where because of some supervening event those repairs are not carried out or are subsumed in other more extensive repairs?

31. The supervening event in this case was the negligence of the Plaintiff's engineers, who when they discovered the hitherto latent defect in the heat exchanger, put it back into service without making proper tests to see that the repair had been correctly carried out, in circumstances where they knew of the risk of explosion, if it was not. But the supervening event might equally have been caused by the breach of contract or negligence of the second Defendant, if it had been responsible for making all proper tests before the heat exchanger was put back into service; or it may have been some extraneous event, like a fire in the factory for which no-one could be held to blame.

32. It is common ground in this case that the 1st Defendant is liable for the cost of making good the defective casing of the heat exchanger. This is because what was damaged in the explosion was not a sound heat exchanger with l8 years life in it, but a defective one with much less. The Plaintiff's loss **caused by the explosion** was therefore much less than it would otherwise have been. And it could have recovered from its insurers, or the 2nd Defendant as the case may be, only the value of the defective heat exchanger.

33. Mr. Knight submits that the same principle should apply to the loss of profit which could have resulted during the time taken to make good the defect. The cause of action for damages for breach of contract arises at the time of the breach, even though this may not be quantifiable until later. On 24 August l988, therefore, the Plaintiff had a claim against the Defendant for breach of contract, the measure of which was the cost of repair and the as yet unquantified claim for lost profit. It is immaterial, he submits, that that loss was never in fact incurred or quantified because of the explosion.

34. Although there do not appear to be any cases in contract, there are a number of authorities in tort which bear upon the point.

35. In ***The Glenfinlas*** [l9l7] the Plaintiff's vessel was damaged in a collision in the Defendants' vessel, for which the Defendants were solely to blame. Temporary repairs were done; permanent repairs were to be done after the war. However, before they were done the vessel struck a mine and sank. Mr. Registrar Roscoe awarded the Plaintiff the cost of repairs, but not the £l60 a day for twelve days that the permanent repairs would have taken.

36. This decision was approved by the Court of Appeal in ***The Kingsway*** [l9l8] P 344 where the decision in ***The Glenfinlas*** is reported as a note. In that case the repairs had not been done at the time of the assessment of damages, but the Plaintiff proved that they would be done. The future loss of profit that was likely to be incurred while they were carried out was recoverable. Pickford L.J. distinguished the case from ***The Glenfinlas.*** At pp. 358-359 he said: *"I think the judge was quite right in the view he took. He took the view, and I should agree if it were necessary to decide it, that if at the time of a reference the ship had in fact been lost, as in the case of* ***The Glenfinlas (l),*** *and therefore the repairs never could be done, and there never could be a detention causing loss of profitable employment to the shipowner at all, then these damages could not be recovered. When I say lost, I mean lost by some circumstances outside the collision. Suppose that after the collision damage she had been torpedoed or sunk by perils of the sea, then clearly the shipowner would not have suffered a loss by reason of detention during the effecting of permanent repairs, because he never would or could do them; and the vessel never could be, by reason of the accident, detained from profitable employment, because she had gone and never could get any profitable employment. But that is not this case."*

37. Scrutton L.J. said, at p. 362: *"In the Courts of common law two things are perfectly clear. The first thing clear is that when damages which would be otherwise prospective come to be assessed, facts which have actually happened may be taken into account, and when damages are being assessed for a tort which would include some disability of the person or thing injured it may be taken into account that before the damages come to be* assessed the person or thing injured has ceased to exist, owing to circumstances not connected with the tort."

38. The Plaintiff must show that the chattel or equipment in question would have been profitable during the period in question. In ***The York*** [l929] P l78, Scrutton L.J., at p. l85, gave other examples where it would be impossible to substantiate a claim for damages for loss of profitable time, such as a ship that was detained in ice or subject to an embargo such that she could not trade at all during the period when the repairs were being carried out.

39. The authority, which in my judgment is of most assistance, is ***Carslogie Steamship Co. Ltd. v. Royal Norwegian Government*** [l952] AC 292. The Plaintiff's vessel, the Heimgar, was damaged in a collision with the Carslogie, for which the Defendants, owners of the latter vessel, were to blame. Temporary repairs were carried out to the Heimgar to make her seaworthy, but on the way to port where the permanent repairs were to be carried out, she encountered heavy weather and thereby suffered damage which rendered her unseaworthy and requiring immediate repairs. At her destination both sets of repairs were effected concurrently, the work occupying 30 days. l0 days would have been required to effect the repairs to the damage caused by the Carslogie if executed separately. The Plaintiffs were held not entitled to loss of profit during the l0 days it would have taken to effect them. The House of Lords, in so holding, followed an earlier decision of the House in ***The Vitruvia*** [l925] SC (HL) l. Viscount Jowitt, at p. 30l, said: *"I am willing to assume, without deciding the question, that the collision was a cause of her detention. Still the fact remains that when she entered the dock at New York she was not a profit-earning machine by reason of the heavy-weather damage which had rendered her unseaworthy. If there had been no collision she would have been detained in dock for 30 days to repair this damage. I cannot see that her owners sustain any damages in the nature of demurrage by reason of the fact that for l0 days out of the 30 she was also undergoing repairs in respect of the collision."*

40. It is important to note that in that case the collision with the Carslogie did not render the Heimgar unseaworthy. The House of Lords distinguished the case from that of ***The Haversham Grange*** [l905] P 307. In that case the Plaintiff's vessel, the Maureen, was damaged in two successive collisions; the first was due partly to the fault of the other ship and partly the Plaintiff's; in the second, the other vessel was wholly to blame. But each collision rendered the Maureen unseaworthy. The second tortfeasor was not liable for the loss of profit incurred while the ship was laid up during the repairs, since this was necessarily incurred in making good the damage caused by the first collision, which itself prevented the vessel earning profit. Those were the liability of the first tortfeasor and the Plaintiff. Lord Normand said, at p. 3l l, in the ***Carslogie*** case: *"If the fact is that one of two casualties made the*

vessel unseaworthy and the other did not, the problem of liability is solved and the time sequence is irrelevant. In ***The Haversham Grange*** *the time sequence was important because the damage suffered by the Maureen in each of the two collisions was enough to make her unseaworthy."*

41. Similar principles were applied in ***Jobling v. Associated Dairies Ltd.*** [l982] AC 794. The Plaintiff was injured through the Defendant's breach of statutory duty; in the accident he suffered injuries which disabled him from full employment. However, before trial the Plaintiff was found to be suffering from a serious condition, unconnected with the accident, which rendered him incapable of all employment. He could not recover damages for loss of earnings after the illness superseded and prevented him working.

42. In my judgment, the same principles should apply in contract as in tort in the assessment of damages under this head. This is generally the rule (see MacGregor on Damages (l5th Edition) paras. 234 and 239). It can make no difference that the damage to the Heimgar was caused in a collision as opposed to defective repair work carried out under contract by ship builders.

43. Mr. Knight advanced two arguments in support of his contention. First, he sought to distinguish the ***Carslogie*** case on the basis that the 1st Defendant's breach of contract was a cause of the explosion, even if it was only a *causa sine qua non* in as much as it was the original defect that gave occasion for the inadequate repair. The distinction between *causa causans* and *causa sine qua non* has not been much adopted in recent authority, partly no doubt because in ***Smith, Hogg & Co. v. Black Sea and Baltic Insurance*** [l940] AC 997 at p. l003, Lord Wright in effect said that expression *causa sine qua non* was not material in English law. He said: *"I cannot help deprecating the use of Latin or so-called Latin phrases in this way. They only distract the mind from the true problem which is to apply the principles of English law to the realities of the case.* ***"Causa causans"*** *is supposed to mean a cause which causes, while* ***"causa sine quâ non"*** *means, I suppose, a cause which does not, in the sense material to the particular case, cause, but is merely an incident which precedes in the history or narrative of events, but as a cause is not in at the death, and hence is irrelevant."* But in any event the point is expressly dealt with in the speech of Viscount Jowitt in **Carslogie** which I have cited.

44. Secondly, he relies upon an unreported decision in the case of ***Schering Agrochemicals Ltd. v. Resibel N.V.S.A.*** Transcript of the judgment of Hobhouse J. dated 4 June l99l and Court of Appeal 26.ll.92. The Defendants supplied the Plaintiffs with sophisticated equipment for filling plastic bottles with inflammable chemicals. Because of a defect, caused by the Defendants' breach of contract, the bottles were liable to stay under the capping machine too long; this caused overheating and the consequent risk of fire. Because of an incident which occurred on 8 September l987, this should have been appreciated by the Plaintiffs and the fault corrected. However it was not, and the production line continued in operation till a fire occurred on 30 September. Hobhouse J. held that the Defendants' breach of contract was a cause of the fire on 30 September, but that the Plaintiffs failed to mitigate their loss by taking the line out of action when they should have appreciated the fault and they could not recover for the damage caused by the fire. However, he held that the Plaintiffs could recover damages to be assessed on the basis that they would have sustained losses due to loss of production while correcting the defects, even though such loss was not in fact incurred because of the fire. One of the curious features of this case is that this point never seems to have been argued, or indeed pleaded, until the Judge permitted an amendment after judgment. The Plaintiffs appealed on the ground that the Defendants should have been held liable for the consequences of the fire. The majority of the Court of Appeal, Purchas and Scott LJJ, upheld the Judge, but on a different basis, namely that the breach of contract of the Defendants was not a cause of the fire, the Plaintiffs' own negligence breaking the chain of causation. Nolan L.J. adopted the Judge's reasoning and held there was a failure to mitigate. The majority of the Court of Appeal, therefore, treated the case in precisely the same way as Judge Bowsher did in this case. There was a third party in ***Schering's*** case from whom the Defendants had bought the offending equipment. By a cross-notice of appeal, the third party sought to appeal the Judge's decision on damages for the hypothetical loss of profit. It is not at all clear what happened to this cross-appeal, since there is no mention of it in the judgment of the Court of Appeal.

45. For my part, I do not derive any assistance from the ***Schering*** case. Hobhouse J.'s decision was *per incuriam*, since there was no argument on the point and he, like Judge Bowsher, was not referred to the authorities which I have cited. Without knowing what happened to the third party's cross-appeal, it is impossible to conclude that the Court of Appeal gave even tacit support to the proposition contended for by Mr. Knight.

46. Finally, Mr. Knight submitted that Judge Bowsher's decision can be upheld on the alternative basis adopted by Hobhouse J. and Nolan L.J. in ***Schering's*** case, namely that the Defendants' breach of contract was a cause of the explosion, but the Plaintiffs failed to mitigate their loss. With all respect to Mr. Knight, I am quite unable to follow this submission. In the first place, he has not appealed the Judge's decision on causation; secondly, the majority of the Court of Appeal in ***Schering's*** case held that the case should have been decided against the Plaintiffs on causation, not failure to mitigate; and thirdly, I have not been able to follow why in any event it should make any difference.

47. For these reasons, I would allow the 1st Defendant's appeal on this ground, the assessment of damages should be limited to the cost of replacement of the defective casing of the heat exchanger and such losses, if any, which were incurred on and after 24 August l988 due to loss of production while the repair was being effected.

48. In these circumstances, it is unnecessary to consider the alternative and more limited grounds of appeal raised in the amended notice which related to the terms of the Judge's order for the assessment of damages.

49. 3. I turn next to the question of costs. Apart from the costs of and occasioned by the various amendments, including that of the statement of claim on 24th February, which he awarded against the amending party, and the costs attributable to the issue of quantum as it had hitherto been dealt with, which he awarded to the 1st Defendant, the Judge gave the Plaintiff the whole of the costs of the action against the 1st Defendant.

50. Mr. Stow made the following submissions to the Judge.
   (a) that the 1st Defendant should have the costs down to and including 24 February l992, because the amendment was fundamental and without it the Plaintiff's claim would have failed entirely;
   (b) that the 1st Defendant should have the bulk of the costs thereafter because the late amendment put the 1st Defendant in a very difficult position from which it could not adequately protect itself by making a payment into court or in any other way. Furthermore, the 1st Defendant was substantially the successful party because the Plaintiff was aiming at recovering a sum in the order of £l,000,000, whereas all that it succeeded in getting was judgment for damages to be assessed, which on any basis were likely to be more modest.

51. The Judge rejected these submissions for two main reasons; first, that the 1st Defendant could and should have asked for an adjournment of the trial so that the question of the alternative basis of quantum could be investigated and payment into court made, and secondly, because he said that the 1st Defendant could have sent a Calderbank letter, by which I think he must be understood to mean that the 1st Defendant could have admitted the breach of contract and liability to compensate the Plaintiff for any damages found due.

52. In my judgment, the learned Judge erred in principle and his order for costs is so manifestly unfair to the 1st Defendant that he cannot have exercised his discretion judicially. As a general rule , where a Plaintiff makes a late amendment as here, which substantially alters the case the Defendant has to meet and without which the action will fail, the Defendant is entitled to the costs of the action down to the date of the amendment. There may, of course, be special reasons why this general rule should not be applied. An example of this is to be found in the case of ***Kaines (U.K.) Ltd. v. Osterreichische*** [1993] 2 Lloyd's Rep I at p. 9, where the judge was satisfied that, even if the amendment had been made earlier, the action would have been vigorously resisted. The judge disbelieved the Defendant's witnesses and the Plaintiff received substantial damages.

53. Mr. Knight argued that the lateness of the amendment was in some way brought about by a late amendment to the defence made on the first day of the trial to raise specifically the causation point that the acts of the Plaintiff and/or the 2nd Defendant broke the chain of causation between any breach of contract and the explosion. And, he submitted, in any event the 1st Defendant should have anticipated the alternative way in which the claim for damages was put.

54. I find this argument untenable. First, it is not factually correct; it was the amendment to the defence on 22 August l99l that quite clearly set up this defence. But, in any event, it ignores the fact that it is for the Plaintiff to establish causation in respect of the damage claimed. While the Defendant must plead a *novus actus interveniens* on which he is going to rely, if the Plaintiff's claim failed because he fails to establish causation, in the ordinary case the Defendant will recover all the costs of the action and not merely those after the service of the defence raising the specific matters.

55. The Judge's reasoning in rejecting Mr. Stow's submission was, in my judgment, flawed. First, he appears to have forgotten that Mr. Stow did ask for an adjournment. In resisting the application to amend, Mr. Stow said it should have been refused or, if it was granted, he requested four months adjournment to investigate the alternative claim. He never resiled from this at any time before the Judge ruled on the amendment.

56. Secondly, the Judge's view that the 1st Defendant could have protected its position by sending a Calderbank letter or admitting liability for damages to be assessed on the alternative basis, in my judgment, wholly ignores the reality of the situation or the difficulty in which the 1st Defendant was placed. It is quite plain that the 1st Defendant could not have made a payment into Court. There was no proper pleading of the alternative case, there had been no discovery, and the Defendant's experts had no opportunity to investigate or make any estimate of the proper value of the claim. The great advantage to a defendant in making a payment into court is that he can run all defences open to him in the knowledge that, even if some or all of them fail, he may still recover his costs after the date of payment in, if the plaintiff fails to get more.

57. In those cases where it is for technical reasons not possible to make a payment into court, a Calderbank letter can be written. The effect of such a letter is now enshrined in RSC Order 22, rule l4, which provides:*"(l) A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be **"without prejudice save as to costs"** and which relates to any issue in the proceedings."*

58. For the same reason that the 1st Defendant could not make a payment into court, it could not make a money offer under Order 22, rule l4. I do not consider that it was reasonable to say that the 1st Defendant should have admitted liability for breach of contract for damages to be assessed. This would have precluded it from arguing other defences, which, although the arguments were not successful, could have been run in a situation where a payment into court or Calderbank offer has been made. Moreover, it seems to me that the 1st Defendant might well have been precluded from arguing that the Plaintiff was not entitled to any damages for the hypothetical loss of production.

59. In my judgment, Mr. Stow's submissions are in line with the authorities. In ***Anglo-Cyprian Trade Agencies v. Paphos Wine Industries*** [l95l] l AER 873, the Plaintiff claimed £2,028, being the full value of certain wine bought by it

from the Defendant which the Plaintiff said was valueless by reason of the Defendant's breach of contract. The Defendant, while disputing the breach of contract, contended that any defect could be cured by a modest and inexpensive remedy. At trial the Plaintiff amended the statement of claim to claim damages on this alternative basis. Devlin J. rejected the Plaintiff's claim for £2,028, but awarded £52 on the alternative claim. He awarded the Defendant the entire costs of the action.

60. This decision was approved by this Court in ***Alltrans Express v. CVA Holdings*** [1984] I WLR 394. The Plaintiffs claimed £82,500 damages for breach of warranty on the sale of shares. Judgment under RSC Order I4 was entered for damages to be assessed. The Judge assessed them at £2 nominal damages and gave the Plaintiffs the costs of the action on the grounds that the Defendants could have made a payment into court. This Court reversed the order for costs and awarded them to the Defendant. The Court posed the question: *"Who was the successful party?"* and said that it was obviously the Defendant; the trial judge had paid far too much attention to the absence of a payment into court of a nominal sum which obviously the Plaintiff would not have accepted. The case was very similar to the ***Anglo-Cyprian*** case, but there had been no late amendment.

61. In ***Lipkin Gorman v. Karpnale*** [1989] I WLR I340, the Plaintiffs claimed £250,000, including by a late amendment a claim for conversion of a bankers draft in the sum of £3,375. The Plaintiffs failed on all but the claim for £3,375. The Court of Appeal, reversing the judge's order, awarded the Defendants the costs of the action down to the date of amendment and 80% of the costs thereafter. This was on the basis that the Defendants were the winners, subject to there being a discount in respect of the modest extent to which the Plaintiffs had succeeded.

62. What then should be the result in this case? I can see no reason to deprive the 1st Defendant of the costs down to the date of the amendment. Thereafter, they were essentially the winners, since the primary contest related to the damage caused by the explosion. Even on the basis of the Judge's conclusion that the Defendant would be liable for the hypothetical loss of production, it was a case in which the 1st Defendant should have been awarded a proportion of their costs thereafter, for the reasons I have already given. As it is, in the light of our decision that the only damages that the Plaintiff is entitled to recover is the cost of replacing the casing of the heat exchanger and such loss of production that occurred on 24 August as a result of the defect discovered on that day, this is likely to be no more than £2l,574.28 now claimed in the Scott Schedule and it may well be less. Although this sum cannot by itself be described as trivial, in the context of a claim for £l,000,000 and the enormous expense of this action, it is trivial. It makes no commercial sense to incur costs of this sum to recover such a small sum. And it seems to me very probable that if the 1st Defendant had had a proper opportunity to make a payment into court on the basis that its liability on the alternative claim was limited in the way we have held it to be, it would have done so. A payment in of £2l,574, plus interest, would obviously not have been accepted and it would have made sound commercial sense to have made it. But for the reasons I have indicated, the 1st Defendant had no chance to do so. Accordingly, in my judgment, although some discount should be made to reflect the very modest degree of success that the Plaintiff achieved, it should not be a large one. I would award the 1st Defendant 85% of its costs after 24 February I992.

63. Two further points arise on the question of costs. The first is the application by the 1st Defendant to adduce further evidence consisting of its solicitors estimate in money terms of the effect of the Judge's order for costs. It is said by Mr. Stow that this puts flesh on the bones of the Judge's order and makes plain the unfairness of it. In my judgment, the evidence should not be admitted because it is quite unnecessary. This Court is well aware of the enormous expense involved in a I7 day hearing before the Official Referee, involving three parties, two of whom are represented by leading and junior counsel and all of whom called expert witnesses. It adds nothing to see the figures, which are in any event only an estimate and not taxed costs.

64. Secondly, I must deal with the Plaintiff's cross-appeal on costs. The Judge ordered the Plaintiff to pay the 2nd Defendant's costs; that was obviously right and Mr. Knight does not challenge it. But the Judge rejected Mr. Knight's submission that the 1st Defendant should be ordered to reimburse the Plaintiff in respect of the 2nd Defendant's costs. The basis of Mr. Knight's argument before the Judge, and before this Court, was that the Plaintiff only joined the 2nd Defendant as a defendant because the 1st Defendant blamed the 2nd Defendant in its amended defence; therefore it was reasonable for the Plaintiff to add it as a defendant. There should, he submitted, be a ***Sanderson*** or ***Bullock*** order. The Judge refused to make such an order: he said the onus was upon the Plaintiff to assess the whole of the merits of the case before joining the 2nd Defendant.

65. The fallacy of Mr. Knight's argument is this: while an unsuccessful defendant, A, will normally be held liable to pay the costs of a successful defendant B, whether directly or indirectly, whom he had blamed, that does not apply where the Plaintiff fails against both. In such circumstances A is not ordered to pay the costs of B, even though he may have blamed him. It is, as the Judge said, for the Plaintiff to decide whether he is going to succeed against either.

66. Here the Plaintiff failed against both Defendants on the only claim pleaded against both, namely for the costs consequent upon the explosion. The 2nd Defendant is in no way concerned with the alternative claim raised in the amendment. The cross-appeal is misconceived and I would dismiss it.

Peter Gibson L.J.

67. I agree.

Balcombe L.J.

68. For the reasons given by Stuart-Smith L.J., I agree that this appeal should be allowed and the cross-appeal dismissed. I also agree with the orders which he proposes should be made.

Balcombe L.J.

For the reasons which are given in the judgment which has been handed down, this appeal will be allowed. We direct that the assessment of damages be limited to the costs of replacing the defective casing of the heat exchanger and such losses, if any, as were incurred on and after 24th August 1988 due to the loss of production while the repair was being effected. We discharge the order for costs made below and direct that the plaintiffs should pay to the first defendant all costs down to the date of the amendment of the Statement on Claim on 24th February 1992, and thereafter to pay 85 per cent of its costs. We dismiss the cross-appeal.

ORDER: Appeal allowed with costs; cross-appeal dismissed with costs; leave to appeal to the House of Lords refused.

Mr T Stow QC and Miss F Newberry (instructed by Messrs. Davies, Arnold, Cooper, London EC4) appeared on behalf of the Applicants.
Mr B Knight QC and Mr T Weitzman (instructed by Messrs. Herbert Smith, London, EC2A) appeared on behalf of the Respondents.