JUDGMENT : His Honour Judge Thornton Q.C. TCC. 3rd March 1998

Introduction

1) This judgment provides the reasons why I granted the defendant leave to amend its defence following a hearing on 27th February 1998. I gave a summary of my reasons on that occasion and was asked by the parties to provide a judgment supporting that ruling and the summary of my reasons. I agreed to this request and said that I would hand down the judgment to the parties without the need for a further attendance in court.

2) The action is one of two actions which have been ordered to be heard together. This action was started by a writ issued on 3rd June 1996. The statement of claim was served soon afterwards and the defence served on 3rd September 1996. On 13th June 1997, in order to allow the plaintiffs to revamp the particulars of loss being claimed in an amended pleading which was easy to follow, I ordered that the original statement of claim should be struck out and that an amended statement of claim should be served followed by an amended defence, consequential upon the amendments to the statement of claim. This order was complied with by the service of a pleading entitled a substituted statement of claim dated 9th January 1998. It had been clear, at the hearing of a summons on 19th December 1997, that the proposed amended defence, with a counterclaim which would be served for the first time, would give rise to objections by the plaintiffs since this proposed pleading allegedly contained new claims which were said to be statute-barred by the Limitation Act 1980 and contained new allegations which fell outside the leave previously granted to make consequential amendments. Thus, the plaintiffs wished to contend that I should decline any application to amend the defence both because the propoesed amendments sought to add claims which would be statute-barred and because the width of the proposed amendments is such that, in the exercise of my discretion, they should not be allowed. I therefore directed that the draft of the proposed amended defence and counterclaim should be served on the plaintiffs who should notify the defendant of any parts thereof to which objection was taken. These steps were taken, the objections document being served on 19th February 1998. I had also fixed 27th February 1998 for the hearing of the application for leave to amend that part of the proposed pleading to which objection had been taken.

3) The plaintiffs objected to paragraphs 2A - 2N inclusive, 5(3), 8A - 8C inclusive, 34, 35, 36, 45 (to the extent it refers to paragraph 8A), 49(1), 51, 52, 53 and 54 of the draft defence and counterclaim to the substituted statement of claim (or amended defence and counterclaim if the terminology of my order of 19th December 1997 is adopted). Thus, the application to which this judgment relates is for leave to amend the defence by the addition of these paragraphs in the draft defence and counterclaim to the substituted statement of claim.

The Outline of the Claim and the Defence

4) The action is one of considerable technical complexity. It arises out of the supply by the plaintiffs of water treatment plants at two locations. For the purposes of the amendment application, the parties were content for me to deal with the action on the basis that the two plaintiffs be treated as one party. The plaintiffs allege that the first plaintiff contracted as agent for the second plaintiff who was a disclosed principal. The defendant's primary case is that the first plaintiff was contracting as principal but also contends that if it was contracting as agent, any act, omission or statement of the first plaintiff is attributable to, and founds a liability of, the second plaintiff. Many of the relevant acts and statements relied on by the defendant in the proposed amendments are those of Johnson Filtration Systems Limited, the name of the first plaintiff until it changed its' name to JFS (UK) Limited by a special resolution on 23rd December 1991. However, for the purposes of the amendment application, the parties presented their respective arguments on the basis that the two plaintiffs were a composite party and I will determine the application on that basis.

5) This action concerns the plant at Brynbwch in the Neath Valley in Wales. The plant was to treat water from the Ystradfellte Reservoir. Although originally planned for Brynbwch, the location had to be moved to Gwernblaedde about 2 miles downstream from Brynbwch. The water was described in the course of the hearing as being upland coloured acidic water of high turbidity. The treatment method, the Tricon process, is one that uses an adsorption clarifier and two mixed media filters of equal size for the pretreatment of the raw water. This method allows particularly rapid treatment to take place. The method causes contact flocculation to occur in the clarifier with previously removed flocs. The flocs are then filtered out in the clarifier.

6) The relevant timescale is of much significance in this application. In early 1990, Dwr Cymru Cyf, or Welsh Water Authority in English, decided to construct a new water treatment works at Brynbwch. Samples of raw water from the Ystradfellte Reservoir were both provided to and taken by the plaintiffs who analysed them and then advised that pre-treatment by adsorption clarifier might be appropriate. The defendant had prepared a design brief and this formed the basis of a proposal from the plaintiffs which was supplemented by a presentation in July 1990. Finally, representatives of the defendant visited the plaintiffs' parent corporation in the United States, were given various presentations and visited 3 water treatment plants. These presentations, meetings and proposals gave rise to what are now alleged by the defendant to be substantial and material misrepresentations as to the suitability and capability of the Tircon System which induced the material contractual relationships between the parties. The defendant's wish to rely on these perceived misrepresentations gives rise to the bulk of the disputed proposed amendments with which this application is concerned.

7) The tender documents were prepared between September 1990 and March 1991, the plaintiffs submitted a tender on 22nd March 1991 and this was accepted on 28th March 1991. The contract comprised the design, supply, delivery, off-loading, construction, erection and testing of the mechanical and electrical element of an automated rapid gravity water-treatment plant with its associated high lift pumping plant and standby

generating equipment. However, the necessary planning permissions, needed to enable the plant to be constructed, were not then available. The necessary application was not well received by Brecon Beacons National Park Committee, the relevant body and was not considered until 11th October 1991 when it was refused. Meanwhile, the plaintiff was undertaking some design and preliminary work. It is a matter of considerable controversy what the effect of this setback was on the contract. The plaintiffs contend that the contract was suspended, remained in being and was reactivated when, subsequently, the new site was made available. The defendant contends that the contract was discharged by agreement in September 1991, at a meeting convened to discuss how to proceed given the continuing inability to start work on site. Alternatively, it argues that the contract was discharged or frustrated by the refusal of planning permission.

8) Between January 1992 and April 1993, an alternative planning application was being processed at the alternative site at Gwernblaedde. This was received on 16th April 1993. In May 1993, the defendant asked the plaintiffs to reassess and revalidate the design of the water-treatment plant. The new site had an entirely different layout, there was no treated water reservoir and the various pumps associated with the plant were located differently. A schedule of rates for the work involved was agreed. The plaintiffs contend that this work was carried out under the subsisting contract with the aim of reaching agreement on a new lump sum for the work. The defendant contends that this work was carried out under a separate contract whose purpose was the revalidation exercise.

9) Further delays occurred, mainly because of difficulties in reaching satisfactory agreement with the landowner of the site. The plaintiffs demobilised its site team in January 1994. In July 1994, the plaintiffs submitted an approximate estimate for the cost of the proposed plant having reached agreement that they would be paid £10,294 for this estimating work. The plaintiffs contend this was on-going work under the original contract, the defendant that this work was undertaken under a third contract for this purpose, concluded by the agreement as to the sum to be paid to the plaintiffs for the work involved. Meanwhile, the defendant had become concerned as to the efficacy of the Tricon System and undertook a review of the plaintiffs' design of the plant with the assistance of Professor Ives of University College, London. His report in October 1994 led the defendant to decide not to proceed with the plaintiffs or their Tricon System at Gwernblaedde. This decision was communicated to the plaintiff in November 1994. The defendant had, in July 1994, indicated it would be seeking to determine its contract with the plaintiffs. This earlier letter is relied on by the plaintiffs as constituting repudiatory conduct by the defendant in relation to the still continuing first contract. The defendant, on the other hand, regarded that letter as terminating the second and third contracts it regarded as still being in place, the first contract having already been discharged.

10) It is the defendant's case that the scheme which had originally been designed by the plaintiffs for Brynbwch and then redesigned for Gwernblaedde, was fundamentally flawed. The adsorption clarifier was a proprietary process designed and manufactured in the United States by the plaintiffs' American parent corporation. The defendant became concerned about the efficacy of the proposed design of the plaintiffs, fuelled by apparently unsatisfactory performances of other absorption clarifiers supplied by the plaintiffs particularly at Bolton Hill, the subject-matter of the second action. It was this concern which led to the review of the design of the Gwernblaedde Scheme, undertaken by Professor Ives. In his report, dated 14th October 1994, he concluded that there was a probability that the floc formed in the clarifier in the proposed manner would be structurally fragile and liable to shear erosion. Additionally, the shear stress in the absorption clarifier units would be relatively high. These deficiencies would lead to lead to load shedding of the flocs on the filters and a consequent rapid clogging of the filters. Taken with the uncertain performance of the JFS system elsewhere in the UK, the process gave rise to an undesirable risk of malfunctioning at Gwernblaedde.

11) It was this advice that led the defendant to conclude that it would not continue with the plaintiffs at this site. A considerable amount of design and revalidation work had already been undertaken by the plaintiffs. No further mechanical and electrical work was undertaken by the plaintiffs after Professor Ives had reported.

12) The action started by the plaintiffs, after amendment, now claims approximately £64,500 as the value of unpaid-for work and £812,000 loss of profit. There is a further claim of loss of interest which would allegedly have been earned on these payments of approximately £400,000. In the first defence, served on 3rd September 1996, the defendant pleaded that the original contract, for the aborted scheme at Brynbwch, was discharged by agreement, frustrated or rendered impossible to perform by supervening illegality, because the defendant was unable to obtain the required planning permission for the scheme. As to the scheme at Gwernblaedde, the defence contended that no concluded contract came into being or, alternatively, that the uncertainties as to the efficacy of the proposed absorption clarifier process entitled the defendant to terminate any relevant contractual relationship concerned with mechanical and electrical work at Gwernblaedde. As a final string to its bow, the defendant pleaded that no profit could and would have been earned so that that part of the claim would, in any event, be irrecoverable. No counterclaim was pleaded or advanced at that stage.

The Proposed Disputed Amendments

13) The proposed amendments which the plaintiffs object to introduce new defences and counterclaims that may be summarised as follows:

1. Prior to the first contract being entered into, the plaintiffs communicated with the defendant and advised that the absorption clarifier was appropriate, made a detailed presentation of the proposed System, submitted a response to the defendant's design brief and other documents, made various oral statements at a presentation

meeting and made various statements to the defendant during a tour of various locations in the United States by several of its representatives. These various contacts had the effect of making several material representations of fact about the Tricon System, these representations were relied on to induce the first contract, they were false and the plaintiffs had no reasonable basis for believing the truth of the statements. In consequence:

(1) the defendant was entitled to rescind the first contract and, by the pleading, rescinds it.

(2) the plaintiff is not entitled to enforce the contract or seek damages for any breach of it.

(3) the defendant is entitled to claim rescission from the court pursuant to section 2(2) of the Misrepresentation Act 1967 or, in lieu of rescission, damages under the same section of the Act.

(4) the defendant is entitled to damages for negligent misrepresentation pursuant to section 2(1) of the Misrepresentation Act 1967.

2. In making the representations giving rise to the claims for misrepresentation, the plaintiffs owed the defendant a duty to take reasonable skill and care that these were accurate and true. The plaintiffs were negligent in making these statements which were not true. These statements were relied on by the defendant and they induced the first contract, thereby causing loss to the defendant.

3. By not correcting the misrepresentations already referred to prior to the entry into the second and third contracts, the plaintiffs continued them, the defendant relied on their truth and accuracy and entered into those contracts. The same defence of rescission and the same remedies of statutory rescission, damages in lieu of statutory rescission and statutory damages are claimed as for the first contract.

4. Because the three contracts are, or are susceptible to be, rescinded, the consideration for them has entirely failed and the defendant is entitled to recover any money paid to the plaintiffs as money had and received.

5. The claim of the plaintiffs for lost profits is not sustainable because none would have been earned as a result of the deficiencies in the Tricon System which led to the representations that were made being false. Previously the basis for this plea that no profits would have been earned was that the System exhibited the faults identified by Professor Ives.

14) Detailed particulars are given of the representations relied on, the statements these representations conveyed, the nature of the falsities exhibited by them, the alleged negligence of the plaintiffs and of the allegation that the plaintiffs had no reasonable grounds for any belief that the statements were true. In all cases, the damages claimed represent the expenditure to date on the aborted project by way of payments to both the plaintiffs and the engineers acting for the defendant, Wallace Evans. These claims are pleaded both as set-offs and as counterclaims.

Further Differences Between the Two Pleadings

15) As I have already stated, the original defence did not plead, expressly, any set-off nor a counterclaim. It is necessary to notice these further differences between the original defence and the substituted defence and counterclaim:

1. Rescission.

16) No claim for rescission and no allegation that the defendant had elected to rescind the first contract or the alleged second and third contracts was made originally. In the proposed amendments:

(1) the defendant alleges, in relation to the first contract, that *"[it] became entitled to rescind and hereby rescinds the contract...."*

(2) the defendant alleges, in relation to the second and third contracts, that *"[it] is entitled to rescind the agreements ... and hereby claims that the same be rescinded."*

17) The pleading does not make clear why the defendant asserts that the first contract is rescinded without the need for the court to grant this relief but the second and third contracts are the subject of a claim for rescission from the court and, presumably, remain in being until such an order is made.

2. Enforcement.

18) Only in the proposed amendments is it claimed that the plaintiffs are not entitled to enforce the first contract or seek damages for any breach of it. Presumably, although not specifically pleaded, the basis of this allegation is that, since the plaintiffs had induced the contract by misrepresentations, it cannot enforce its own side of the contract since to do so would be to flout the principle that a party may not profit from its own wrong.

3. Frustration.

19) In the original defence, the defendant pleaded that the first contract had been frustrated. In the proposed amendments, this is supplemented by a claim for the return of all sums already paid to the plaintiffs pursuant to the Law Reform (Frustrated) Contracts Act 1943.

4. The plaintiffs loss of profits claim.

20) In the original defence, the defendant pleaded that the plaintiffs would have made no profit had the contract been performed relying upon "the deficiencies in the process design set out in paragraph 46 above." These deficiencies were those identified by Professor Ives in his October 1994 report and those exhibited in the allegedly similar plant installed for the defendant by the plaintiffs at Bolton Hill, Haverfordwest. In the proposed amendments, the same allegation that no profit would have been earned is explained by relying upon "the deficiencies in the absorption clarifier set out in Paragraph 8A above". These deficiencies are those which are pleaded to show that the alleged representations were false.

Summary of Amended Defence and Counterclaim

21) The proposed amendments link the detailed representations as to the capabilities of the Tricon System, the alleged deficiencies which show these representations to be false and the reasons why the plaintiffs were negligent in giving the advice they did about the Tricon System and had no reasonable basis for giving that advice. The respects in which Professor Ives had advised that the System was deficient are still relied on as well. These are similar to the deficiencies particularised in the proposed amendments, albeit not nearly so extensive or detailed. It is worth noticing these similarities in the Ives list of deficiencies and in the proposed amendments:

1. The presence of colour in water of high turbidity would ensure that the flocs would be fragile. This, when coupled with relatively greater shear stresses produced by the absorption clarifier, would ensure that the flocs that were formed would break up.
2. Using the performance of other similar plants operating with similar water, the Tricon System could be seen to be suspect and unproved.
3. The upflow velocity of the water of 25m/hr was far too rapid to achieve the required flocculation.

22) The particulars of alleged negligence, that are also used to seek to show that the plaintiffs lacked any reasonable basis for making the representations that were allegedly made, find no place in the original defence. They amount to detailed and wide-ranging alleged failures by the plaintiffs to consider whether the Tricon System was suitable for use with coloured upland waters, particularly given the inevitability that the System would produce fragile floc from such waters. They also allege that the plaintiffs had no design engineers with adequate experience of such waters.

History of the Action

23) The parties' commercial relationship came to an end in November 1994.This action was started by the first plaintiff by a writ issued on 3rd June 1996. The action was rota'd to Judge John Loyd Q.C. who heard the first summons for directions on 26th. July 1996. He set a timetable for pleadings and discovery and fixed a date for trial, the first day of the Easter term in April 1999. However, little progress was made, partly because the parties became involved in the other action involving the Bolton Hill plant which had been started on 11th January 1995. That action was rota'd to me and, on 21st March 1997, I fixed a trial date for 5th October 1998 in that action and suggested that the parties apply to transfer this action to me to enable both to proceed together. Thus, when the next summons for directions was heard in this action, by me, on 13th June 1997, both actions were before me. Discovery had not taken place in either action but I directed that joint discovery should take place. Moreover, the parties had discussed my proposal that the actions be heard together and had agreed that they should be heard together. A formal order to this effect was, in fact, only made at the hearing of the next summons for directions on 19th December. On 13th June, I also confirmed the date of the joint trial for 5th. October 1998, which had the effect of bringing forward the trial date of this action. I gave directions for joint discovery by 25th July 1997 and for the experts to meet without prejudice to devise a testing protocol to deal with the water treatment tests both sides accepted were essential to help resolve the issues as to the alleged deficiencies in the design of the Tricon System to cope with the coloured upland waters. Since these issues were common to both actions, the experts' discussions, the testing protocol and the resulting tests were concerned with both actions.

24) The test protocol should have been completed by 27th June 1997, but it was not completed until much later in the year. I have not been provided with details of why this delay occurred, it is sufficient for me to record that the plaintiffs have not blamed the defendant or its expert for this delay. Following tests which were only carried out at the end of November 1997, the parties are in the process (in late February 1998) of finalising a further protocol and carrying out more tests. The experts had a without prejudice meeting on 13th February 1998, following which an open joint statement was produced. It is of significance that paragraphs 9 and 10 of this statement read as follows:

"All Adsorption Clarifiers installed in the UK, with water containing significant amounts of colour have failed to operate satisfactorily.

Not Agreed

[The plaintiffs' expert] The relevant data have not been explored.

10. The pilot plant experiments at Ystradfellte [or Gwernblaedde] did not prove that the proposed plant would have worked.

Not Agreed

[The plaintiffs' expert] The relevant data have not been explored."

25) Thus, discovery of the plaintiffs' documents was not given until late July 1997, the essential testing regime being conducted by all experts jointly is still being undertaken in late February 1998 and the plaintiffs' expert, for whatever reason, has not yet examined the vital data which is relevant in considering whether the Tricon System can be seen to be capable, or, alternatively, incapable, of treating upland coloured water.

Summary of the Limitation Act 1980 Issues

26) The plaintiffs object to the proposed amendments that I have summarised primarily on the grounds that they seek to introduce fresh claims which are already barred by limitation. The critical date, as the plaintiffs see it, by which the relevant causes of action accrued was the date of the first contract, 28th March 1991. Thus, since they allege that a six-year period of limitation relates to all new causes of action, these new claims became statute-barred at

least one year ago. This is said to preclude my granting leave to amend since section 35(3) of the Limitation Act 1980 precludes such leave being granted to the defendant and the section is couched in mandatory terms:

"Except as provided ... by rules of court, neither the High Court nor any county court shall allow a new claim [made in the course of any action] ... to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim."

27) To this objection, the defendant has a series of counter-arguments. These are, in summary, as follows:

1. The new claims are brought in a counterclaim, as such they are permitted to be raised even if they are statute-barred.
2. The rescission pleas are not claims by the defendant at all but are pure defences which are not subject to the constraints of limitation. This must also allow in, without any limitation objection, the pleas setting out the representations and their alleged falsity since these are necessary foundations for showing an entitlement to rescind the contracts.
3. The misrepresentation claims base on the second and third contracts cannot be statute-barred since the relevant period of limitation could only have started when these contracts were entered into in 1994, only 4 years ago.
4. The "claim" to abate the plaintiffs' loss of profits claim is not a claim at all and is not subject to the constraints of limitation.
5. The claims for money had and received cannot be statute-barred.
6. The balance of the claims and proposed amendments should be allowed in under Order 20, rule 5(5), given the contents of those amendments which should be allowed to be made as a result of the factors outlined in paragraphs 2 - 5 above.
7. The amendments setting up a claim for negligent advice, if they are potentially caught by the primary limitation period prescribed by the Limitation Act 1980, are not statute-barred by virtue of section 14A of the same Act.

Section 35(3) of the Limitation Act 1980.

28) The mandatory prohibition on the introduction of new claims provided for by section 35(3) of the Limitation Act 1980 is subject to this exception provided for in that section:

"... neither the High Court nor any county court... shall allow a new claim ... other than an original set-off or counterclaim, to be made in the course of any action ...

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of a counterclaim by a party who has not previously made any claim in the action."

29) Mr. Streatfield-James argues that this provision provides a short answer to the plaintiffs' objection to the application to amend, namely that the proposed new claims are already statute-barred. The original defence contained neither set-offs nor counterclaims and, by virtue of the definition of "original set-off or counterclaim", a defendant is entitled to one opportunity to introduce such claims, even if statute-barred and even if they were not pleaded in the original defence. In colloquial language, a defendant has one shot available to introduce statute-barred set-offs and counterclaims.

30) Mr. Royce argues that this section should be given a more restrictive interpretation. He argues that the section should be read as follows: *" For the purposes of this subsection, a claim [is] includes an original set-off or an original counterclaim..."*

31) In other words the "is" in the statutory provision should be read as if it was "includes". On that reading of the provision, only the first defence could include a statute-barred claim as a set-off or counterclaim. This way of interpreting the section, he argued, is one that can be spelt out of the language of the section. That language is therefore open to two different interpretations, one a restrictive interpretation and the other interpretation, favoured by the defendant, being a wider one. He argued that I should adopt the restrictive interpretation since it is one that is more appropriate to meet the justice of the case and it provides a more consistent approach to the application of the Limitation Act, which is, overall, an approach which discourages the litigation of old or stale claims. Further, in order to show the alleged unsatisfactory consequences of the wider approach to this section favoured by the defendant, he argued that, on the defendant's suggested approach, a defendant who pleaded neither a set-off nor a counterclaim initially could regroup, perhaps long after the initial pleading had been served, whereas one who had pleaded either of these claims initially, however insubstantial such a claim might be, could not add any further new claims.

32) Mr. Royce's suggested interpretation is fraught with difficulties:

1. The language of the provision, in which the disputed phrase occurs, suggests that it is providing a comprehensive definition of "original set-off or counterclaim". The language could not be clearer. It provides that a claim is an original set-off or counterclaim if it is a claim made by a party who has not previously made a claim in the action. This is the language of definition rather than the language of a provision that seeks to provide an example of what is being referred to without intending to cover all possible situations.
2. This interpretation of the words would not appear to have any purpose. It is self-evident that an original set-off or counterclaim is one made by one who has not previously made any claim in the action. The words in

question, therefore, would be tautologous if this interpretation is adopted. However, the words would have a purpose if a wider interpretation is adopted. On that basis, the words would be making it clear that an original claim can be made by amendment, so long as no claim had been made before.

33) There is no apparent injustice in a wider meaning prevailing. It has long been the policy of Limitation Acts to allow defendants to rely on statute-barred claims as set-offs and counterclaims. If that is the policy of the Limitation Act 1980, there seems no particular reason to confine this exception to the first defence served by a defendant. After all, leave to amend must be obtained and any injustice occasioned by a late attempted amendment, relying on this exception, would be shut out by the court refusing leave to amend on the conventional basis that a late amendment should not be allowed if it prejudices the plaintiff or is made unduly late in the proceedings.

34) It follows that I should give the words of the statutory provision their natural and wider meaning. A new claim may be introduced by amendment to a defence so long as no claim had been introduced originally even it it is statute-barred. I must, therefore, first determine whether the original defence puts forward any claim. Given the definition of "claim" in section 35(3), the defendant can only be shut out from relying on the statutory exception provided for in that section if it put forward a cause of action as either a set-off or counterclaim in the original defence. As I have already explained, the original defence makes no claim for rescission, for damages or for restitution. There are, thus, only two allegations in that pleading that are said to fall within the definition of claim, namely those that the contract was frustrated and that the plaintiffs' claim for lost profits should be abated.

1. Frustration.

35) The original pleading made no claim for a return of any payments as part of the claim that the first contract had been frustrated. It has long been a rule of the common law that a frustrating event automatically discharges both parties from further performance. No intervention of the court is required for that result. Court intervention, and a claim to the court, are only necessary if a party wishes to avail itself of the statutory provision in the Law Reform (Frustrated) Contracts Act 1943 which allows a court to order partial or complete repayment of sums already paid under the contract prior to the occurrence of the frustrating event. Such a claim has only first been made by the defendant in paragraph 55 of the proposed counterclaim.

2. Abatement.

36) The plea in paragraph 54 of the original defence reads: *"[the defendant] will rely on the deficiencies in the process design set out in paragraph 46 above and the costs of remedying the same to show that no profit would have been earned."*

37) This is not, in substance, a plea of abatement but an allegation that the plaintiffs will not be able to prove they incurred the relevant loss. However, the plea is, in form, a plea of abatement. In order to determine whether such a plea is susceptible to the Limitation Act, it is necessary to consider what an abatement is. The nature of an abatement was clearly explained by Lord Diplock in ***Modern Engineering v. Gilbert Ash*** [1974] A.C. 689 at page 717 as follows:

"... a building contract is an entire contract for the sale of goods and labour for a lump sum price payable by instalments as the goods are delivered and the work is done. Since the turn of the nineteenth century at least ... there has been a principle of law which is applicable to contracts of this type ... In so far as it applies to contracts for the sale of goods it has since been incorporated in section 53 of the Sale of Goods Act 1893; in so far as it applies to contracts for work and labour it still rests upon the common law. The principle is that when the buyer of the goods or the person for whom the work has been done is sued by the seller or contractor for the price

*"it is competent for the defendant ... not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject matter of the action was worth, by reason of the breach of contract;" (**Mondel v. Steel** (1841) 8 M. & W. 858, 871-872).*

Or, in the words of section 53(1)(a) of the Sale of Goods Act 1893, the buyer may "set up against the seller the breach of warranty in diminution or extinction of the price."

*This is a remedy which the common law provides for breaches of warranty in contracts for the sale of goods and for work and labour. It is restricted to contracts of these types. It is available as of right to a party to such a contract. It does not lie within the discretion of the court to withhold it. It is independent of the doctrine of "equitable set off" developed by the Court of Chancery to afford similar relief in appropriate cases to parties to other types of contracts ... That it was no mere procedural rule designed to avoid circuity of action but a substantive defence at common law was the very point decided in **Mondel v. Steel**, 8 M. & W. 858."*

38) The plea in paragraph 54 of the original defence is probably no more than a plea that the plaintiffs will not be able to prove that they have incurred the pleaded loss. However, the plea is, in form, an abatement. Even if the pleading is considered to be setting up a plea that the claim for loss of profits should be abated by the value of a notional cross-claim for damages for breach of contract by the plaintiffs, that plea would be in the nature of an abatement of the price of a contract for work and materials which, as Lord Diplock's analysis shows, is a pure defence, is a plea which would not be in the nature of an equitable set-off and would be a plea which a court would have no discretion to withhold. Such a plea is not, therefore, susceptible to the Limitation Act 1980 at all.

Discretion and Order 15, rules 2 and 5(2)

39) It follows that the original defence contained no claim in the nature of a set-off or counterclaim. Therefore, section 35(3) would appear to allow all the disputed amendments to be made. However, it was argued that I should

exercise my overall discretion to refuse leave to amend since the amendment would allow the defendant the privilege of availing itself of statute-barred causes of action. If I refused leave to amend, the defendant would be left to bring a fresh action and, in that action, it would not be able to take advantage of section 35(3) of the Limitation Act 1980. The short answer to that submission is that it is, in most cases, a wrong exercise of discretion to refuse leave to amend, in circumstances where the discretion would otherwise be exercised so as to allow the amendment, merely because the defendant would be able to take advantage of section 35(3) if leave to amend was to be granted.

40) This approach is best explained by a consideration of a passage from the judgment of Lightman J. in ***Ernst & Young (a firm) v. Butte Mining PLC (No 2***) [1997] 1 W.L.R. 1485 at pages 1495-1496. In that case, a counterclaim had been made in the original defence which was statute-barred. The plaintiff applied to strike it out on a variety of grounds including the ground that the claim, if brought as an original claim, was statute-barred. The defendant's answer to that argument was that it had a right to bring the claim as a counterclaim and that, therefore, there ought to be no question of that counterclaim being struck out or severed from the action and ordered to be tried as a separate action. The judgment is concerned with Order 15, rule 5(2) which provides: *"If it appears on the application of any party against whom a counterclaim is made that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient."*

41) Lightman J.'s judgment provides:

"We come now to the real issue between the parties, which is whether the subject matter of the counterclaim ought for any reason to be disposed of in a separate action.

There are two stages to be considered on this as on any application under rule 5(2). The first is whether the subject matter ought to be disposed of in a separate action. The second which only arises if the first is answered in the affirmative), is what order ought to be made.

Stage 1. Stage 1 involves essentially a balancing of the considerations of procedural convenience in favour and against disposal in a separate action. ...

Stage 2. ... The starting point in considering this issue is to determine what, if any, are the appropriate guidelines in the exercise by the court of its discretion under rule 5(2). I agree with [counsel for the defendant] that the starting point is to be found in the dictum of Neill L.J. in ***Boocock v. Hilton International Co****. [1993] 1 W.L.R. 1065 at page 1076c: "the surest guideline for the exercise of any general discretion is to consider what the justice of the case demands." But, in deciding what the justice of the case demands, in is in my view necessary to have in the forefront of the mind the statutory object of the creation of the counterclaim, namely procedural convenience.*

The essential question raised before me is how far I can or should take into account the limitation consequences of any order I may make. [Counsel for the defendant submits that, having acted regularly in making the counterclaim, [the defendant] now has a right to proceed with its claim, which is free from any attack on grounds of limitation, and I should not make any order e.g. for trial in a separate action. To do so would divest [the defendant] of a vested right to proceed with a claim within the limitation period as permitted by section 35. With respect, I disagree. [The defendant's] right to proceed with its counterclaim has always been subject to the right of [the plaintiff] to apply for a direction (and, I suspect, subject to the court on its own motion to direct) that the counterclaim should be struck out and that the subject matter should be raised (if at all) by way of a fresh action. So long as a successful application may be made under rule 5(2), a defendant's entitlement to proceed with a counterclaim and accordingly with the benefit of section 35 can be provisional only. Unilaterally by making a counterclaim a defendant can put his foot in the door, but this is always subject to the right of the [plaintiff] under rule 5(2) at an inter partes hearing to seek an order to have him ejected. [Order 15,] rule 5(2) is not intended to afford to defendants in all cases a lifeline enabling them by means of the service of a counterclaim to obtain a reprieve for the subject matter of such counterclaim from the ordinary consequences of the limitation period. This would involve a misuse of rule 2(1) as well as an injustice to the [plaintiff]. There can only be a vested right if the subject matter of the counterclaim is not one which ought to be tried in a separate action. If the counterclaim is one which ought to be tried in a separate action, then the future of the counterclaim (and with it the potential saving by section 35 from the consequences of the Limitation Act 1980) is a matter for the discretion of the court and in the exercise of its discretion in any ordinary case procedural convenience is the primary consideration and limitation consequences are at best only a secondary consideration.

I can conceive that there may well be circumstances in which the court may exercise its discretion to allow a counterclaim to stand in whole or in part in order the subject matter being statute-barred. ... But it seems to me, special circumstances should be required to justify allowing a counterclaim to stand and have this effect if the counterclaim cannot be justified on grounds of procedural convenience, which is its raison d'etre."

42) That case was concerned with the converse situation to this one, namely a situation where the question was whether the original counterclaim should be severed in circumstances where the only reason for keeping the counterclaim alive in that action was to preserve the defendant's ability to rely on section 35(3). Here, it is argued that I should not allow leave to amend, and the use of the counterclaiming procedure, in circumstances where the use of the counterclaim would be procedurally convenient and the only reason for refusing leave to use that procedure would be a limitation reason.

43) Lightman J.'s reasoning may be summarised as follows:

1. In considering an application for leave to amend by adding a counterclaim where the relevant claims are, or might be, statute-barred, the first question to answer is whether it would be procedurally convenient to disposal of the claims in this action.
2. The relevant consideration is "what does the justice of the case demand"?
3. If the justice of the case demands that the claims be brought as counterclaims, is the procedural convenience of joinder outweighed by the fact that statute-barred claims are, or may be, capable of being relied on by the defendant? Only in exceptional circumstances should this balancing exercise lead to a refusal of leave to amend.

44) The first two questions can be answered without difficulty. The joint action already includes claims at Bolton Hill which are similar to the claims for damages under section 2(1) of the Misrepresentation Act and for negligent misrepresentation. Moreover, the ambit of the particulars setting out the respects in which the representations about the System were false and in which the plaintiffs were in breach of duty are, in part already in play in the Bolton Hill action and, in part, although not yet in play, are both admissible in that action and capable of being introduced into it by amendment without reasonble objection. Moreover, many of the disputed allegations in the proposed amendments can be brought into this action by amendment without any limitation objection. Thus, unless the plaintiffs would be unduly prejudiced by the amendments or unlesss it can be shown that they are being made unduly late, the first and second questions must be answered in a way that favours the granting of leave to make the amendments. No sufficient prejudice or undue delay has been made out by the plaintiffs.

45) As to the third question, if all the proposed amendments consisted solely of new claims that were already statute-barred, I can see a case for the argument that that was sufficiently exceptional to call for a refusal of leave to amend, even though the counterclaiming procedure would be procedurally convenient. If this was such a case, it might well be successfully argued that, having failed to take the opportunity to make the counterclaim in the first case, the defendant should not be allowed to regroup at his convenience now. However, the reality of this case is that the claims for rescission of the second and third contracts are conceded not to be statute-bared as are the claims for damages for misrepresentation in relation to the second and third contracts, the claim under the Law Reform (Frustrated) Contracts Act 1943 is not objected to, the so-called abatement defence can be maintained on any view and the rescission claim relating to the first contract is arguably a pure defence and therefore not subject to the Limitation Act at all. Thus, given that the convenience of allowing in those parts of the proposed counterclaim is overwhelming, there seems no good reason for shutting out the balance of the counterclaim even if it is statute-barred.

Procedural Factors

46) There are several procedural factors which I need to take into account in finally determining whether the proposed amendments raise, for the first time, a new claim and whether, if they do, they should be allowed to be raised as a counterclaim pursuant to Order 15, rule 2. These are:

1. On 13th June 1997, I made this order relating to the original statement of claim:

"The statement of claim in 1996 ORB 799 be struck out. Plaintiff to serve Amended Statement of Claim by 11th July 1997."

47) Therefore, the substituted statement of claim, which was served pursuant to this order and which replaced the original statement of claim which had been struck out, is the first surviving pleading from the plaintiffs. The order made on 13th June 1997 also provided that an amended defence, consequential upon the amendments to the statement of claim, was to be served by 8th August 1997. It is not clear, from these orders, whether the substituted defence was to be treated as a new pleading for the purposes of section 35(3) of the Limitation Act 1980. Moreover, only consequential amendments, not new claims, were to be pleaded. However, the need for the plaintiffs to substitute one statement of claim for another and to have the first struck out mutes any procedural complaint they might otherwise have about the defendant's proposed new claims being introduced with the assistance of section 35(3).

2. The action is being heard with the related Bolton Hill action and at least some of the disputed allegations and issues sought to be introduced into this Gwernblaedde action by amendment are already in play in the Bolton Hill action. Therefore, the evidence relevant to those allegations and issues will be admissible in, and will be admitted into, this Gwernblaedde action in any event, given that the actions are to be heard together. Many of the issues now sought to be raised in this action by amendment are, therefore, already in the nature of joint issues.

48) These joint issues concern the design deficiencies of the Tricon System to deal with the type of water found in upland Welsh water, the design capabilities of the plaintiffs and their state of knowledge of the capability of absorption clarifiers to treat such water when they put forward the Tricon System as being suitable and incorporated it into design work at both locations. This can be seen from a consideration of the pleadings and particulars in the Bolton Hill action in which the defendant claims over £2m, representing the alleged need to completely replace the plant that has been supplied.

3. At the heart of both actions and the proposed disputed amendments is the question of whether the Tricon System can satisfactorily treat upland coloured water with high turbidity. To this end, joint testing of water treatment using an absorption clarifier in similar conditions to those pertaining at both Gwernblaedde,

treating the water from Ystradfellte, and at Bolton Hill, is essential. The testing process is still in progress with a second protocol being finalised, to be followed by further tests. No difficulty in meeting the further particulars of the defendant's technical case to be found in the proposed amendments, particularly in paragraph 8A of the draft, has been alluded to by the plaintiffs and none is to be expected given that, as I have already referred to, the plaintiffs' expert has yet to examine the relevant data, a task he has postponed until after the joint testing programme has been completed. Thus, not only is it desirable that all technical issues are brought within the framework of this joint action and the joint testing and investigation programme but, also, no significant prejudice has been caused to the plaintiffs in their technical investigations by the introduction of the proposed amendments at this relatively late stage.

Is Any New Claim Barred by Limitation?

49) It is not strictly necessary for me to determine the remaining issues outlined above in view of my determination of the first issue in favour of the defendant. However, these were fully argued and, since I am also satisfied that the defendant would have been granted leave to amend in relation to all the disputed amendments, even if the plaintiffs had succeeded in showing that section 35(3) could not avail the defendant, I will deal with these too.

1. Rescission

50) Paragraphs 8B, 8C and 36 plead that the relevant contracts have been rescinded or ought to be rescinded by the court. The defendant argues that this is a plea of a pure defence to which no limitation question arises. Support for this argument is sought from Chitty on Contracts, the relevant passage from which states:

"There is no doubt that a misrepresentation which would justify rescission of a contract may also be used as a defence to an action brought by the representor against the representee. ... Accordingly, it is thought that although section 2(2) of the 1967 speaks of rescission, its provisions would apply to a case in which the misrepresentation is set up by way of defence."

51) Rescission is, it would appear from the proposed amendments, being asserted in two different ways separately but cumulatively. Firstly, the defendant is claiming rescission in equity. This relief predates the Misrepresentation Act 1967 and was available for innocent and negligent misrepresentation. There was doubt as to the availability of this remedy where the representation had been incorporated into the contract and this was one of the reasons for the enactment of the Act of 1967. There is now doubt as to whether the equitable remedy survives the enactment of the 1967 Act but it is at least arguable that it does, at least for the purposes of preserving the remedies available to a representee once rescission has been ordered. For many years, and certainly since long before the enactment of the Misrepresentation Act, equity has provided restitution of benefits where the contract has been rescinded.

52) The second way in which rescission is being asserted is as a remedy provided for by section 2(2) of the Misrepresentation Act. Although Professor Beale, in the quoted passage from Chitty on Contracts quoted above, suggests that this plea is a defence, rescission has to be claimed and specifically awarded before the effect of the defence can be relied on. For those reasons, the claim for rescission might be regarded as being in the nature of a set-off and as a claim to which the law of limitation is applicable. No clear authority is available to help to resolve this conundrum.

53) However, even if limitation is applicable to a claim for rescission, the defendant can claim rescission of the first contract without any concern as to limitation. This is for the following reasons:

1. Following the views of Professor Beale, the claims are, in the context of the defendant's proposed claims, pure defences which are not susceptible to limitation.
2. The claims are for equitable remedies to which only the doctrine of laches is relevant. There is no suggestion by the plaintiffs that laches has occurred, and no such suggestion could succeed in this case.
3. The claims under the 1967 Act are claims on a statute. Since the relevant period of limitation is 12 years for such a claim, this manner of categorising the claims would present the defendant with no difficulty.
4. The claim is equivalent to a claim in tort. This is the view of the Law Commission, expressed in its Consultation Paper on Limitation of Actions. If so, the period of limitation would only have started when the cause of action accrued. It is never easy to identify when this point occurs for a claim in tort. A tort claim is usually a claim for loss and, when loss is claimed, the relevant tort cause of action accrues when that loss first occurs. The claim is for rescission and, if that is a tortious claim at all, the accrual date must, by analogy, be when rescission was first capable of being claimed. That date can only be when the defendant first had sufficient knowledge of the facts giving rise to the representation and its falsity to know that it was possible to claim that the relevant contract could be rescinded. Whenever that date was, it could not have been earlier than June 1993. This is because the taking over certificate was not issued at Bolton Hill until June 1993. There appears to have been no realistic way that the design work undertaken or advice given for the Gwernblaedde site could have been suspected to have been inadequate until the Bolton Hill plant had been taken over and the defendant had had some experience of that plant's operation.
5. The claims for rescission of the second and third contracts are now conceded by the plaintiffs not to be statute-barred since these contracts were entered into, in so far as they were ever entered into, in 1994.

2. Damages in Lieu of Rescission

54) The claim is one made possible by virtue of section 2(2) of the Misrepresentation Act. It is a claim for damages in lieu of rescission. The same reasoning applies as is applicable to the question of whether the rescission claims are

barred by limitation. This includes the possibility that the claim is, in reality, a defence since the award of damages under section 2(2) is "in lieu" of rescission. If the claim for statutory rescission is a defence, so too must be an award made "in lieu" of that relief which is awarded as an alternative to rescission because the court is "of the opinion that it would be equitable to do so."

3. Damages under Section 2(1) of the Misrepresentation Act 1967

55) These claims, arising out of each of the three contracts alleged by the defendants are, for the purposes of limitation, either ones made under a statute or are tort claims or are claims in equity. If the claims are in tort, the applicable period is either the one applicable for fraud (since the claim only arises "if the person making the misrepresentation would be liable had the misrepresentation been made fraudulently") or is the normal tort period. If the normal tort period is applicable, the cause of action would only have accrued when the loss had been caused, namely when the relevant payments were made. Thus, however these claims should be characterised, they are not statute-barred.

4. Money Had and Received

56) This claim is for the return of money paid under a consideration which has wholly failed. It is not clear when the cause of action accrued but the most likely date was when the plaintiffs were unjustly enriched, namely the dates upon which the relevant payments were made. These dates are all within six years from March 1992.

5. Damages for Negligence

57) This claim might be one for which the primary period of limitation has expired since the relevant accrual date might be the date on which the first contract was entered into. However, the defendant also relies on section 14A of the Limitation Act 1980. This allows actions in negligence to be brought within 3 years of the defendant acquiring the relevant knowledge which, in the context of this action, is knowledge of the material facts about the damage in respect of which damages are claimed and knowledge that the damage was attributable in whole or in part to the act or omission of the plaintiffs. The defendant alleges that this knowledge was not sufficiently acquired until the discovery process had been undertaken. This is because the defendant would not be aware of the acts and omissions giving rise to the negligence that led to the negligent misrepresentations until the plaintiffs' documents had been inspected. Thus, the relevant date is alleged by the defendant to be in, or after, September 1996.

58) This is disputed by the plaintiffs who argue that if Professor Ives was able to advise in October 1994 that the contract with the plaintiffs should be terminated, the defendant had the requisite knowledge at that time to start a negligence action. However, Professor Ives advised that the System was suspect and that termination was one option available to the defendant. Another option, Professor Ives advised, was to allow the plaintiffs the opportunity to install the System and only to terminate the contract if the System could not then prove itself. Thus, the advice as to the existence and cause of any deficiency was arguably not sufficient at that time to enable the defendant to satisfy the test provided for in section 14A(7), namely "*knowledge of 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 who was able to satisfy a judgment*".

59) In my view, the defendant's argument that the relevant date was September 1996 is an arguable one. This is because of the complex technology involved and the defendant's lack of any knowledge of the design processes involved in developing the System. The appropriate test as to whether or not leave to amend should be granted when section 14A of the Limitation Act is relied upon is provided by the decision of the Court of Appeal in ***Welsh Development Agency v. Redpath Dorman Long*** 1 W.L.R. 1409. The Court of Appeal approved the test which Judge Hicks had adumbrated in the judgment at first instance. The test was put in these terms by Judge Hicks:

"If, however, the amendment, though clearly adding a new claim, alleges that at the date of the amendment ... the section 14A limitation period has not expired, the amendment should be allowed, unless it is so clear on the facts that the relevant limitation period has expired or that if a fresh action were brought it would be struck out under R.S.C. Ord.18,r.19 as being an abuse of process: see ***Ronex Properties Ltd. v. John Laing Construction Ltd****. [1983] Q.B. 398 per Donaldson L.J., at p.405 and per Sir Sebag Shaw, at pp. 407-408."*

60) The defendant, in its proposed amendment, pleads as follows: *"It is averred that the earliest date upon which [the defendant] had knowledge required to bring an action for damages for [the plaintiffs'] negligent misrepresentation was a reasonable time after the issue of the writ and statement of claim, that is by about the start of September 1996."*

61) That plea is, at the least, arguable given the need for discovery to enable full particulars to be ascertained and formulated of the nature of the alleged misrepresentation, the lack of reasonable skill and care by the plaintiffs and the lack of any reaonable grounds for the plaintiffs' belief in the accuracy of the representations. That plea is certainly not capable of being struck out as being an abuse of process. Thus, the defendant satisfies the relevant test for being granted leave to amend to add the negligent misrepresentation claim where there is to be reliance on section 14A of the Limitation Act 1980.

Order 20, Rule 5(5)

62) This provision of the Rules of the Supreme Court allows an amendment to add a new cause of action which is statute-barred where: *"the new cause of action arises out of the same facts or substantially the same facts as a*

cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

63) The defendant seeks to rely on this provision for any claim which is one for which it has not obtained leave to amend by any other route. The defendant's argument is that the only relevant relief that could possibly be of this kind is the claim for damages under sections 2(1) and 2(2) of the Misrepresentation Act. The defendant's argument is that since the claims for rescission should be allowed to be made in any event, the additional facts needed to support these claims for damages do not involve substantially more facts than the facts which would be in play once those amendments have been made. Therefore, Order 20, rule 5(5) should be applicable.

64) There is a potential difficulty with this argument, namely that Order 20, rule 5(5) appears to involve a comparison between the proposed new facts being introduced with those facts "in respect of which relief has already been claimed". In this case, the totality of facts relied on by the defendant in support of its argument that the new allegations involve substantially the same facts as those already in play include some facts which would only come onto the pleadings if this current application has been allowed. The defendant argues that, if necessary, it could make two applications, one for amendments for which there can be no limitation objection and a second application thereafter for the balance. This would enable advantage to be taken, in the second application, of the new facts relating to the new causes of action for which no objection can presently be taken.

65) In some circumstances, such an argument would not succeed, involving as it does a procedural device which could amount to an abuse of process. However, in this application, I think the argument can succeed.This is for three reasons:

1. As I have already referred to, this action is being tried with the related action concerning Bolton Hill and this application can take into account the causes of action pleaded in that related action. Taking all existing facts currently pleaded in both actions into account, the new claims that are being introduced rely on substantially the same facts as those already pleaded to support the existing claims and defences in both actions.
2. The lateness of the relevant discovery would make the proposed procedure an acceptable one, particularly as all necessary procedural steps before trial can still be completed.
3. Most of the new claims can be introduced without the need to rely on Order 20, rule 5(5). Therefore, the claims which might need this provision are few in comparison to the allegations and claims which would be allowed to be made without the need for this provision.

66) It follows that, even without the suggested two-stage approach to the operation of Order 20, rule 5(2), I find that this provision would be applicable to allow the claims for damages for Misrepresentation which are claimed under both limbs of section 2 of the Misrepresentation Act. Since I have also found that this approach is an acceptable one in this application, my finding that this provision is applicable to the application to amend to add these new claims is reinforced and the defendant's ability to rely on it strengthened.

Discretion

67) The plaintiffs also argue that I should exercise my overall discretion to refuse these amendments, even if I am persuaded that there are no limitation reasons for refusing them. These arguments, and my answers to them, are as follows:

1. The defendant has substantially changed its case at a late stage.

68) I do not accept that the defendant has substantially changed its case in these amendments, particularly if the Bolton Hill action is also taken into account. What it is doing is to add claims for relief to existing allegations. The substance of both actions, namely the capability of the Tricon System to cope with Welsh upland waters, remains the same. This objection is without substance.

2. The defendant is adding causes of action which place, to some degree, the onus of proof onto the plaintiff.

69) This objection arises on two bases:

(1) Under the Misrepresentation Act. Section 2(1) places the onus on the plaintiffs of showing that there were reasonable grounds for believing that the representations were true.

(2) There is an onus placed on the plaintiffs to show that the defendant did not rely on the relevant statements. This is because such reliance will usually be readily inferred by a court.

70) I do not regard these factors as ones which point to the refusal leave to amend. The fact that an evidential burden is placed, by law, on the plaintiffs may be an unfortunate feature of the law, from the plaintiffs' standpoint, but this is not something which should affect the exercise of discretion. Otherwise, the court must make value judgments as to the nature of the causes of action which the plaintiff is seeking to introduce, which is neither a possible nor a satisfactory judgment for a court to make.

3 The defendant has not explained why the amendments were not made earlier.

71) This objection relies on the decision of the Court of Appeal in ***Reeves v. J.W. Haygarth Ltd.***, unreported, 12th December 1997. The Lawtel report of the case records this holding:

"The judgment [under appeal] raised three points for consideration:

(i) whether the appellants had given a reasonable explanation for seeking to amend after five years ...

The trial judge concluded correctly that as a preliminary to exercising his discretion to amend he had to consider whether the appellant had advanced a satisfactory discretion to amend he had to consider whether the appellant had advanced a satisfactory explanation for the delay . In the present case, the explanations given, ... were not satisfactory."

72) Since no explanation was provided by the defendant, the plaintiffs argued that the application must fail.

73) However, the **Reeves** case must be considered in the context of its own facts. In that case, the injury giving rise to the case had occurred five years earlier. A jack was being carried by the plaintiff when he dropped it. In its defence, the defendant accepted that the jack had fractured on being dropped. The proposed amendment, three years after the original defence had been served, sought to withdraw that admission and to allege that the jack had never fractured. The defendant was, therefore, seeking to alter the basis of its defence at a late stage. The plaintiff would have been prejudiced in trying, so long after the accident, to meet this new case, which was a complete volte-face from its earlier case. Moreover, the new case did not have to be resolved to enable the essential issue of liability to be resolved.

74) In this case, as I have already tried to show, although the new case is raised at a late stage in this action, it does not prejudice the plaintiffs and it raises essential issues some of which are already in play in the Bolton Hill action which is being heard at the same time as this one. It is true that the new case introduces allegations involving oral representations made nearly 8 years ago. However, most of the disputed representations were made in writing and the dispute arsing out of the misrepresentation claims is not, essentially, as to whether the representations were made but as to whether they were true.

75) For all these reasons, I do not regard it as incumbent on the defendant to explain to any greater degree than was done the delay in bringing forward these proposed amendments.

Conclusion

76) The proposed amendments will be allowed. They fall within the provisions of section 35(3) of the Limitation Act 1980 and they are within the ambit of Order 15, rule 2. Moreover, they are largely not subject to limitation considerations at all and, in so far as they are subject to limitation considerations, are not statute-barred or can arguably be brought within the ambit of section 14A of the Limitation Act. In any event, any statute-barred claim can be brought within Order 20, rule 5(5). Finally, there is no good reason to exercise any overall discretion to refuse leave to amend.

Mr. Darryl Royce and Mr. Simon Lofthouse, counsel, appeared for the plaintiffs instructed by Denton Hal
Mr. David Streatfield-James, counsel, appeared for the defendant instructed by Taylor Joynson Garrett.