JUDGMENT : The Hon. Mr. Justice Saunders: QB. 2nd June 2008

1. This case has a long and complicated history. Victor Nicholson (the Claimant) sues his former solicitors Knox Ukiwa and Co., and Philippa Knox (the 1st and 2nd Defendants) for damages for breach of contract. The nature of the breach of contract alleged is that Philippa Knox failed to take reasonable steps to ensure that the Claimant understood that the sum of £105,000 which he agreed to accept on 25th August 1999 in settlement of his claim against other solicitors, who had represented him in the past and who had admitted breach of contract, included interest.

2. The competing cases put shortly are these;
   a) The Claimant says that when he accepted the offer of £105,000, he believed that it was exclusive of interest. He believed that, because the 2nd Defendant failed to explain that the offer was inclusive of interest. Had he realised the true nature of the offer, he would not have accepted it but would have continued with his action.
   b) The Defendants say that it was made perfectly clear to the Claimant at the mediation during which the offer was made and accepted that £105,000 included interest. The Defendants say that the Claimant did understand the true nature of the settlement to which he agreed.

3. The Claimant says that had he realised the true nature of the settlement offer he would have rejected it; pursued the matter to trial and would have recovered substantially more than £105,000.

4. The Defendants say that he has suffered no loss because, if anything, the settlement figure overvalued the claim.

5. The factual decisions that I have to make relate to what happened at the mediation on 25th August 1999, when the settlement was reached. Before I deal with the mediation, it is necessary to set out a short history of the case.

6. In 1973 and 1974 the Claimant carried on business supplying office equipment through a limited company called Lewis Nicholson Ltd. The company had a bank account with the National Westminster Bank at its branch in Stevenage. Between 7th May 1973 and 16th September 1974 the bank dishonoured a number of cheques drawn on the company bank account. The Claimant maintains that these dishonours were made in breach of contract and he instructed solicitors to sue the bank. There were two solicitors involved in suing the bank at different stages: Roland Fernandes and Co., and Curwen, Jessop and James. Roland Fernandes were instructed first by the Claimant to sue the bank and later he decided to transfer these instructions to Curwen, Jessop and James.

7. Because the Bank's contract was with Lewis Nicholson Ltd., it was the claimant in the action against the Bank which was commenced in April 1979. Not known by the Claimant, Lewis Nicholson Ltd. had been struck off the Companies Register on 17th October 1978 for failing to submit accounts and was dissolved on 24th October 1978. The Company had ceased to trade in 1975.

8. When the Bank discovered that the company no longer existed, it succeeded in striking out the claim. That happened on 26th March 1981.

9. The Claimant was successful in certain steps that he took to remedy the situation. On 18th June 1981 Lewis Nicholson Ltd. was restored to the Companies Register as notice of its proposed removal had not been sent to the correct address. On 25th February 1983 the company assigned its rights of action against the Bank to the Claimant and in April 1983 the company was wound up.

10. Steps were then taken to appeal the Order striking out the claim but the Claimant was unsuccessful in getting leave. The refusal to grant leave was upheld by the Court of Appeal in July 1985.

11. The Claimant issued writs against both Roland Fernandes and Co. and Curwen Jessop and James claiming damages for breach of contract in the way they had conducted the litigation against the Bank.

12. It is accepted by the Claimant that he did not have a case against Roland Fernandes and Co. for negligence in relation to the Bank claim. He does however have claims against them in relation to other claims. These were included in, but made up a small part of the settlement on 25th August 1999, and it has been agreed before me that the value of these claims including interest on 25th August 1999 was £5000. The Claimant asserts that he did have a good action against Curwen Jessop and James in relation to the Bank claim.

13. The Claimant instructed Kingshill and Co. to sue both Roland Fernandes and Co. and Curwen Jessop and James. Kingshill and Co. were negligent in failing to pursue these claims expeditiously and by June 1992 all claims by the Claimant against Roland Fernandes and Co. and Curwen Jessop and James had been struck out and all possibility of appeal had failed or been abandoned.

14. In October 1993 the Claimant commenced his action against Kingshill and Co. By consent, judgment on liability was entered on 23rd August 1994 with damages to be assessed. In the course of the action against Kingshill and Co., the Claimant instructed a number of solicitors to act on his behalf. In April 1998 he instructed the 2nd Defendant who then worked for Ness and Co. In June 1998 the 2nd Defendant set up her own firm with others (the 1st Defendant) and the Claimant stayed with the 2nd Defendant when she moved.

15. Agreement was reached in April 1999 to mediate the claim and it was referred to mediators called CEDR and the date for the mediation was agreed.

16. In order to properly understand the events which took place at the mediation it is necessary to consider the preparations made for it.

17. Before the mediation, both parties had to assess what the Claimant was likely to recover if the matter went to trial and a Judge assessed the damages. The damages had to reflect the loss of the chance of successfully suing the Bank. The quantum of these damages was the amount the Claimant would have recovered against the Bank less any discount to reflect the risk that the Claimant would not have succeeded in his action against the Bank and/or in his action against Curwen Jessop and James.

18. An important part of this calculation would be the amount of interest to be recovered. The Claimant would be entitled to interest on the value of the Bank claim at least from the notional trial date which everyone has always taken as January 1984 until the date of the mediation, i.e. a period of 15 to 16 years.

19. Both sides entered the mediation in the knowledge that interest made up a significant proportion of the damages.

20. The Defendants were represented by Pinsent Curtis. They had a comprehensive advice on quantum from Jalil Asif of Counsel (5 – 1185). He valued the claim as at 28 February 1999 at £70,500. To the Defendants the claim had significant nuisance value. It had gone on in one guise or another for a very long time. They had some idea before the mediation of the range at which they might get instructions to settle based on Asif's advice and the nuisance value.

21. Parts of Asif's advice were disclosed to the Claimant before the mediation but not the detailed calculations.

22. The Claimant had himself received a number of advices on quantum from different counsel. None were as comprehensive as Asif's and not all of the advices reached a definite figure, but those Counsel that did attempt to quantify the damages advised that the Claimant would recover significantly less than the figure reached by Asif.

23. It is apparent that the Claimant did not accept his Counsel's quantification of his claim. He did so on a reasoned basis. His calculation of damages ran into millions, although he indicated a willingness to compromise in order to reach a settlement.

24. Before the mediation, the parameters between which the negotiations would take place had to be decided. This was necessary to decide the fees to be paid to the mediators and to assist in achieving settlement by having some base from which to start.

25. On 30th March 1999 Pinsent Curtis wrote to the Defendants about the mediation (9 – 2497). In that letter they wrote *'we shall recommend to our client negotiating between …… £25,000 and £100,000.'* and asked the Defendants to confirm the Claimant's agreement to that.

26. According to an attendance note written by Chris Ofokansi, (who worked for the 1st Defendant), the Claimant agreed parameters of £25,000 and £100,000 without interest (9 – 2507). That note is dated 23rd April 1999. There was an exchange of letters between solicitors (9 – 2510 and 9 – 2512). The letter from Pinsent Curtis (9 – 2512) reads *'we are grateful for your client's confirmation the mediation will proceed within agreed parameters of £25,000 to £100,000, the higher figure being exclusive of interest.'* Although curiously phrased, I am satisfied that the wording used was designed to include the possibility that, if a figure of less than £100,000 was agreed, it could, as part of the agreement, include interest.

27. In a later letter dated 13th August 1999 (9 – 2622) the Claimant disputed that he had accepted these parameters. Not only does the attendance note of 23rd April (9 – 2567) support the assertion that he did, but further support is given to that indirectly in a further attendance note dated 29th April (9 – 2516) where the Claimant is recorded as confirming that he would accept £100,000 plus interest.

28. I am satisfied that the Claimant did indeed accept these parameters. He says in a letter dated 13th August 1999 (9 – 2622) that he was suffering from mental exhaustion in April and this may explain the difference in his recollection.

29. The attendance note on 29th April 1999 (9 – 2516) also records that the Claimant was looking for interest of over £300,000. So that the total figure he was saying he would be willing to accept was over £400,000.

30. The Claimant went into the mediation realising that it may or may not end in agreement and that he could not be forced to agree a settlement. I am however satisfied that both the Claimant and Pinsent Curtis were keen to reach a settlement if they could.

31. I am also satisfied that the 2nd Defendant wished to settle, if at all possible. She was not in 1999 a very experienced civil litigator and she was faced with Pinsent Curtis, who certainly were. She was also likely to get paid much more quickly and in full if the claims were settled. Her firm was relatively new, and I have no doubt that, as with many young firms dependent on legal aid work, cash flow was a problem. The Claimant, however, took the leading role in conducting this litigation. He produced most of the documents; he had considerable knowledge of the areas of law affecting the amount of his damages, and I have no doubt that the 2nd Defendant went into the mediation believing that it was the Claimant who would decide whether and at what figure to settle. No doubt he would listen to her advice but he would make up his own mind.

32. I have some difficulty in deciding what figure the 2nd Defendant believed before the mediation that the Claimant should settle for. She had been advised by Counsel that £40,000 was an appropriate figure but she, as we shall see, advised the Claimant to refuse £70,500 or £75,000. That might have been because it was obvious that Pinsent Curtis would go higher, indeed they more or less said that they would, but the 2nd Defendant insisted in evidence that she independently concluded that that offer was too low.

33. Present at the mediation, apart from two mediators, were the Claimant, the 2nd Defendant and Chris Ofokansi on one side and Martin Brookes and Martin Finigan from Pinsent Curtis representing the S.I.F. Mr Brookes was the solicitor who had had conduct of this action for a number of years and he was assisted by Martin Finigan who was a trainee solicitor. Mr Finigan's function was to make a note of the proceedings. A typed copy of his note is at 9 – 2671. There was an issue whether Mr Ofokansi attended the meeting at all. I am satisfied he was present although, as he himself accepts, not for the whole time. As with Mr Finigan, his main function it seems was to make a note. His note is a good deal less comprehensive than Mr Finigan's but it may be that Mr Finigan made such a comprehensive note for the purpose of reporting back to his client the S.I.F.

34. I have heard oral evidence from all those present at the mediation except the mediators and Mark Brookes. I have 3 witness statements from him but he has been unable to attend because he now works in Australia. I, of course, take into account that the Claimant has been unable to cross-examine him to investigate any differences there may be between Mr. Brookes and the Claimant. Mr Brookes, however, as he explains has very little independent recollection of these events and he had, in preparing his statement, to rely heavily on Mr Finigan's note.

35. No-one can be expected to have a very clear recollection of events which happened so long ago. I have no doubt I should rely substantially on the notes which were made contemporaneously in deciding whose account is to be preferred. I am satisfied that both Martin Finigan and Chris Ofokansi were trying to accurately record the events although neither of them recorded everything.

36. The best evidence as to the morning session is Martin Finigan's note (9 – 2671). It is clear that this time was spent by the Claimant setting out his contentions personally and Mark Brookes replying. Towards the end of that session, one of the arbitrators intervened to record his impression that the Claimant seemed to want to go outside the parameters, i.e. above £100,000 not including interest. The Claimant appeared to confirm this. The note records that Mr Brookes suggested that if agreement on the whole claim could not be agreed then part of it could.

37. The negotiation in the afternoon session was between solicitors. The mediator recorded that the Claimant was now back within the parameters. Presumably this information had come from the Claimant or the 2nd Defendant. The meeting went on to discuss S.I.F.'s position and the details of any offer. It ended with an offer of £70,500 inclusive of interest being made by S.I.F. The last sentence recording events before the meeting broke up reads 'MB explained that MB had authority to settle up to £70,500 inclusive of interest. MB stated that MB could phone the fund but MB would not if the figures offered by the Claimant were fantastic.'

38. The meeting then broke up; presumably for the 2nd Defendant to put the offer of £70,500 inclusive of interest to the Claimant and, if it was refused, which must have been likely, for the Claimant to put forward a counter offer

39. There was then a meeting between the Claimant and the 2nd Defendant in the presence of Chris Ofokansi. His notes are less comprehensive but they state that the offer from the S.I.F. was put to the Claimant. It is misreported as an offer of £75,000 rather than £70,500 but it is expressed to be inclusive of interest.

40. The 2nd Defendant says that it was made clear to the Claimant that the offer of £70,500 was inclusive of interest. The Claimant says it was not. The contemporaneous note kept by Mr Ofokansi specifically records that the offer, when made by Brookes, was inclusive of interest. It was agreed that that offer should be rejected. I will return to the question of whether or not the Claimant realised that the offer was inclusive of interest.

41. The next stage was for the Claimant to come up with a figure that he would accept. There clearly was a discussion between the Claimant and 2nd Defendant as to what to do next. Mr Ofokansi's notes record some parts of that discussion (Core: 918). Options were considered. The risks were considered; sums of money were considered. According to Martin Finigan's note (9 – 2677) Pinsent Curtis were spoken to by a mediator who passed on information from the 2nd Defendant that if £105,000 or £110,000 were offered to the Claimant he was likely to accept.

42. As a result of that, Mark Brookes went back to the S.I.F. and got authority to offer £105,000.

43. I am satisfied on the basis of the evidence and particularly the contemporaneous notes, that that offer of settlement at £105,000 was made by Pinsent Curtis, not by the Claimant, but an indication having been given that the Claimant was likely to settle for a sum in excess of £100,000.

44. There clearly was some discussion about a sum of £100,000 with the Claimant. Where that came from it is impossible after this length of time to say. It could have been a suggestion of one of the mediators, but I do not believe there was a formal offer of £100,000 made by Pinsent Curtis.

45. In so far as that runs counter to the evidence of the 2nd Defendant, I do not accept her account. I do not believe that she was formally instructed by the Claimant to tell Pinsent Curtis that he would accept £105,000 if they offered it. What happened, I am satisfied, is that as a result of a discussion with the Claimant, the 2nd Defendant felt able to indicate to the mediator what is set out in Martin Finigan's note.

46. As a result of that indication the offer of £105,000 to settle all the claims inclusive of interest plus costs was made by Pinsent Curtis as is recorded in the notes of both Martin Finigan and Chris Ofokansi.

47. The Claimant agrees in his latest statement that he accepted £105,000 plus costs. He did so, he says, in the belief that that offer was exclusive of interest. He believed that, he says, either because the 2nd Defendant never told him the offer was inclusive of interest or because she failed to make it clear to him that it included interest.

48. The 2nd Defendant says she made it perfectly clear to the Claimant that the offer was a once and for all settlement of all his claims. She does not claim to remember using the words *'inclusive of interest'*. I would probably not have believed her if she had said she could remember the exact words she used so long after the event. She does say that the Claimant well understood the true nature of the offer. She is supported in this by Chris Ofokansi.

49. A Tomlin Order was then drawn up encapsulating the agreement. The Tomlin Order in its terms specifies that the sum of £105,000 includes interest.

50. Included in the Tomlin Order was an agreement by the S.I.F. not to enforce previous Costs Orders which had been made in their favour against the Claimant. Both the 2nd Defendant and Chris Ofokansi say that that was included in the Tomlin Order at the Claimant's request which shows that the Claimant was involved in the drafting of the Tomlin Order. If correct that supports their account that he knew exactly what was being agreed.

51. The Claimant does not accept that that provision as to previous costs orders was included at his insistence. He says, as is agreed, that he had made it perfectly clear to the 2nd Defendant in the past that any settlement would need to include that provision, and that it must have been included on the day at her insistence, not his.

52. The Tomlin Order was signed by the 2nd Defendant on behalf of the Claimant, he did not sign it. Mr Brookes says that the Claimant was present when it was signed and indeed asserted that in contemporaneous correspondence. Whether or not that is correct does not help me in deciding whether or not the Claimant was aware of the true effect of the agreement.

53. After the mediation the parties left. Pinsent Curtis and the mediators were pleased that they had settled a dispute which had been going on for a very long time. No mention was made by the Claimant of interest or when it was going to be agreed, when he left.

54. The Claimant says he was not given a copy of the Tomlin Order when he left the mediation. The 2nd Defendant cannot remember. I accept that the Claimant did not get his own copy of the Tomlin Order until he received it through the post on 1st September 1999. This is supported by the fact that he wrote on that day to the Court asking them not to seal the Tomlin Order. It also seems that the Claimant and 2nd Defendant met on 1st September. The Claimant made it clear he did not wish to settle on the terms of the Tomlin Order.

55. On 7th September 1999 the Claimant wrote a long and detailed letter to the 2nd Defendant (9 – 2701). In it he makes a long list of complaints, mainly against Pinsent Curtis of professional misconduct. He also says that his ill-health disadvantaged him at the mediation. He says at 9 – 2707 *'In agreeing to accept Pinsent's offer of £105,000, I knew from the parameter terms that this excluded interest. After the Tomlin Order was signed and I received a copy, I was astonished to discover that the £105,000 included interest. I went into an immediate depressive state and was unable to respond.'*

56. There is no evidence to support the allegations of professional misconduct made by the Claimant against Pinsent Curtis and I am quite satisfied they are misconceived. I am satisfied that the Claimant was suffering from and being treated by his G.P. for depression and nervous exhaustion (9 – 2694), but I do not accept that such ill-health prevented him from participating in and understanding the mediation proceedings. The letter does support his account that he was complaining at an early stage that he believed the settlement figure was exclusive of interest.

57. The critical factual issues for me to decide are:
    i) Did the Claimant know when he accepted the offer of £105,000 that it included interest?
    ii) If he did not know that, is that because the 2nd Defendant failed properly to explain to the Claimant the true nature of the settlement.

58. The Claimant is a perfectly intelligent and capable man who had been deeply involved in this litigation for years. It is no disrespect to the 2nd Defendant to observe that he probably knew more about the claim than she did. If he did not understand that the offer was inclusive of interest then I would have no hesitation in concluding that was because the 2nd Defendant failed to make it clear.

59. The Claimant makes the following criticisms of the 2nd Defendant's evidence.
    i) She has no or little independent recollection of the events.
    ii) She was having cash flow problems at the time which would have been eased by a settlement.
    iii) She broke her professional rules by taking money from the Claimant to pay mediation fees and then did not use it for that purpose.
    iv) She borrowed money from a relative of the Claimant which was, as she accepts, unwise.
    v) She knew that she would benefit in the amount of cash she recovered if she settled.

60. The Claimant does not assert that financial concerns led the 2nd Defendant to deliberately mislead the Claimant into believing he was agreeing to accept a settlement exclusive of interest knowing full well it was inclusive, and knowing he would not have accepted this offer if he had known its true nature.

61. Such conduct would have been fraudulent and had such an allegation been made I would have rejected it on the evidence that I have heard.

62. Rather, it is suggested, that these matters reflect on the general degree of care with which she conducted her affairs and which is likely to be reflected in her conduct of the mediation.

63. I accept that the 2nd Defendant made mistakes and errors of judgment which I have taken into account when assessing her as a witness.

64. In support of the Claimant's case it is submitted that the discussions pre-mediation make it extremely unlikely that the Claimant would have accepted £105,000. He had told the 2nd Defendant that his 'bottom line' was £100,000 plus £300,000 in interest. I accept that this is a powerful point but it does have to be seen in the context that £400,000 was a considerable drop from the £2m which had been the figure the Claimant had put forward in his written argument before the mediation.

65. Reliance is placed on the fact that as soon as the Claimant received the Tomlin Order, he disputed that it accurately reflected the agreement and specifically he said that in the letter of 7th September 1999.

66. This is an issue of fact which like all issues of fact I have to decide on the balance of probabilities.

67. On consideration of all the matters in this case, I am satisfied that at the time the Tomlin Order was signed, the Claimant was aware that the offer of £105,000 was inclusive of interest.

68. In reaching that conclusion I have relied on my assessment of the witnesses. I preferred the evidence of the 2nd Defendant supported by Chris Ofokansi's to that of the Claimant.

69. Having seen the Claimant I do not believe that he would have permitted any settlement to be reached without knowing exactly what the terms were. He was the prime mover in this litigation; he produced many of the documents in the case; he had been involved in it for years and had a very considerable knowledge of the relevant legal principles. I am satisfied that he saw the Tomlin Order before it was signed and that it was at his instigation that reference was made to the outstanding costs order. On the morning of the mediation he did most of the talking. While he was excluded from the afternoon meeting, I am satisfied that he would have made sure that he was kept fully informed of what was going on. I am satisfied that it was made clear to him that the offer of £70,500 was inclusive of interest. He would have known that was the figure which Mr Asif had come up with and, although the part of the advice disclosed to him did not contain all the calculations, it would be apparent from what the Claimant did see that the calculation of £70,500 must have included interest.

70. I am satisfied that the figure of £105,000 was offered by S.I.F. after the 2nd Defendant indicated that a figure beyond £100,000 would be needed. That came out of discussions between the 2nd Defendant and the Claimant. The Claimant well knew that Pinsent Curtis' parameters were £25,000 to £100,000 exclusive of interest. How could he have thought they had offered a figure of £105,000 exclusive of interest?

71. The Claimant accepts he walked away from the mediation without ever trying to agree interest or enquiring when that was going to be decided or whether a court hearing would be necessary. I consider this to be unlikely if he still believed the issue of interest was outstanding.

72. So why did the Claimant agree to such a dramatic reduction in what he was willing to settle for. There were in my judgment a number of reasons:

    i) The Claimant had received a number of advices on quantum from counsel. None of them gave him any grounds for optimism that he would recover £105,000 if the matter went to trial. Certainly none of them approached the figure of £400,000. On the basis of the professional advice he had received, £105,000 was a good offer.

    ii) There was a possibility that, if he rejected the offer, his legal aid would be withdrawn because of the legal advice he had received as to the value of his claim.

    iii) There was a risk of an application for striking out the claim succeeding.

    iv) His partner was very, very ill in Italy and he wished to go and join her.

73. What then of the argument that the Claimant's behaviour after he received the Tomlin Order suggests that he had not been aware that the offer was inclusive?

74. It is apparent to me on the evidence that the Claimant is a man who does change his mind readily. On 6th October 1996 he gave authority to settle the claim for £100,000. There was in fact no such offer on the table and his counsel was advising acceptance of £25,000 as being a good settlement. By letter dated 7th October 1996 the Claimant withdrew those instructions. It is fair to say that the S.I.F. had given no indication at that stage of being prepared to settle for such a sum but the Claimant demonstrated that he could change his mind rapidly as to the amount he was prepared to settle for.

75. Also, I am quite satisfied on the basis of the evidence and, in particular, the contemporaneous notes that the Claimant did agree to the parameters for the mediation of £25,000 to £100,000 exclusive of interest. Nevertheless he claimed subsequently and on a number of occasions that he had not agreed those parameters.

76. The assertion that the Claimant believed he was agreeing to a settlement of £105,000 excluding interest first appears in writing in the letter dated 7th September 1999 (9 – 2701). That letter includes a number of allegations mainly against Pinsent Curtis which in my judgment were completely baseless. Although it is a small point, the fact that those allegations were baseless does tend to reflect on the credibility of the assertion which is central to this action.

77. In the event, these findings of fact are sufficient to dispose of this action. The Claim must fail. The Defendants alternative defence, on which they do not now need to rely, is that even if the Defendants were in breach of

contract, the Claimant suffered no loss because what he recovered by way of settlement is more than he would been awarded if he had continued to trial. However, as I have heard detailed submissions on quantum, I do propose to set out my conclusion on those arguments, but I shall do so briefly.

78. The first matter about which I have heard detailed argument is the valuation of the claim against the bank. That there were a substantial number of cheques dishonoured by the bank drawn on the account of Lewis Nicholson Ltd. in 1973 and 1974 is not in dispute. There is no agreement on how many cheques were dishonoured. That is because, while a number of cheques have been produced marked refer to drawer, there are a greater number of debits for unmet cheques on the bank statements than match them. Further it has been suggested that, because a large number of cheques were not met by the bank for some time that is an indication that there had been previous occasions not shown on the bank statements when the cheques have been presented but not met. While I do not accept this last method of identifying unmet cheques, I do accept, as do the Defendants, that there were a substantial number of dishonoured cheques. I do not find it necessary to reach a conclusion as to exactly how many. The Claimant's business was small. He depended on a number of suppliers but not a great number. Once some of his suppliers had had cheques returned, the damage to his business would have been done and the returning of further cheques would not have increased that damage significantly or at all. So, although the damage is related, to some extent, to the number of cheques returned, once there were a significant number, any beyond that did not have any great further effect.

79. I am satisfied that the number was sufficiently large to cause substantial damage to Lewis Nicholson Ltd's credit and therefore its reputation. The Defendants concede that 43 cheques were dishonoured. The Claimant says it is significantly more. It is unnecessary for the reasons I have given to reach any firm conclusion as to the numbers that were returned.

80. The Claimant does not attempt to quantify a pecuniary loss to the Company but instead relies on the legal principle that it is unnecessary for him to prove special damage, and he can recover general damages for the injury done to the Company's credit.

81. The Claimant did assert in his evidence that it caused the business to close. His company did cease to trade in 1975 but the Claimant also said that it was affected by the recession. The company was providing the Claimant with an income, but no more than £4,000 a year which in January 1984 would have been about £9000.

82. It is quite impossible to say what if any actual loss was suffered by the company as a result of the dishonouring of the cheques or to what extent that contributed to its demise.

83. It is agreed that the company was entitled to recover general damages to compensate it for the damage done to its credit without proof of special damage. Those damages are not limited to nominal damages (**Rolin v Steward** ...1854) 14 CB 595).

84. It is agreed that the likely trial date for the action against the Bank would have been January 1984. So I have to decide what the level of damages would have been then. The value of money is 2½ times greater. So an award of £10,000 in January 1984 is the equivalent of an award of £25,000 now.

85. Mr. McGregor Q.C. argues I should take account of the fact that awards of damages have outstripped inflation since 1984. On the other hand it may be that the damage done in 1984 to someone's credit by dishonouring a cheque was greater in 1984 then now, because it was a less frequent occurrence. In my judgment it would not be appropriate to take account of either of these matters in assessing the amount of damages. Neither has been the subject of evidence before me nor is capable of precise calculation. Although inflation may have occurred in awards of general damages in personal injury cases, that may not have been replicated in this type of case.

86. It is difficult to get much help from the decided cases in calculating what would have been the amount awarded. In ***Rolin v Steward*** the Court of Appeal approved the direction of the Lord Chief Justice to a jury. Cresswell J. said, "*It appears to me that the direction of my Lord Campbell was perfectly right. He told the jury that they ought to give, not nominal, not excessive, but reasonable and temperate damages*". In ***Rolin's case***, the Plaintiff was a trader and the Bank wrongfully dishonoured 3 cheques and one bill of exchange. The jury awarded £500. The Court of Appeal said that was too much and the parties settled for £200, the equivalent of £6,900 in 1984.

87. In ***Davidson v Barclays Bank Ltd*** [1940] 1AER 316, the Plaintiff, a credit bookmaker successfully sued the Bank in libel. The libel proved was writing the words 'not sufficient' on a cheque issued by the Plaintiff when they dishonoured it. There was only one cheque but Hilbery J. thought the effect would have been significant because of the nature of the Plaintiff's business and the speed with which news of dishonour would travel. Hilbery J. said damages had to be "*a proper sum to be given as a reasonable compensation for the injury which has been done to the plaintiff, and of course it must be sufficient to mark beyond a shadow of doubt the complete lack of justification for making the aspersion which was made by this means on the Plaintiff's credit*". He awarded £250 which would have been £4,350 in January 1984.

88. In ***Kpohraror v Woolwich Building Society*** [1996] 4 AER 119 the Defendants wrongly dishonoured one cheque for £4,550 which was used to purchase goods for trading on. The bank said they would not meet the cheque because it had been reported lost. The Defendants corrected their mistake a day later. Damages were awarded for the dishonour of the cheque and the *'discreditable reason given by them for doing so'*. The damages included a small allowance for loss of reputation in Nigeria.

89. The Master awarded £5,550. Both sides appealed. The Bank argued that the Plaintiff should only have been awarded nominal damages. The Court of Appeal approved the approach of the Master and agreed that the Plaintiff was entitled to substantial damages. The equivalent award in 1984 would have been £3,200.

90. I find it very difficult to obtain much guidance as to the level of damages from these cases. I have also considered the advices of Counsel given closer to the date of trial as to the likely award. In so far as they help me in identifying factors to be taken into account in the assessment, I have taken them into account. In so far as they estimate the likely amount of an award, I do not place much reliance on them because they are largely speculative as there is so little authority on which any figure could be based.

91. What are the factors which are relevant to my assessment of damages?

i) The number of cheques is clearly a relevant factor. The greater the number of cheques the more widespread will be the harm to the company's reputation and in particular its creditworthiness. But there is no direct correlation, as the Claimant has suggested, between the number of cheques and the amount of the damages. After a certain number, the rate of increase in the damage diminishes.

ii) As the award needs to compensate the company for the injury suffered, I need to try to assess the actual effect it had on the company which is very difficult.

iii) I have to consider the creditworthiness of the company prior to the dishonour. There had been a small number of cheques justifiably dishonoured in 1971. While providing an income to the Claimant of about £4,500, the company was not prospering in 1973 and 1974 and that had been the position since 1966 and 1967 as is shown by the accounts. Accounts for 1973 and 1974 were not filed, and the reason for that is likely to have been the declining financial position. While the company was not flourishing, there is no reason to suppose that the company was not creditworthy in 1973 and 1974. After all, the Bank agreed to an overdraft, but its credit rating would not have been high.

iv) The sum needs to be large enough to mark the lack of justification for dishonouring these cheques.

v) The length of time over which the effects were felt, i.e., until the company ceased trading in 1975.

92. As has been seen there are very few precedents as to the appropriate measure of damages, and those we have demonstrate no clear pattern. The amount awarded could vary substantially for those reasons from Judge to Judge. The appropriate bracket is wide and is, in my judgment, between £10,000 to £20,000. This is an area where I should be generous to the Claimant but I am satisfied that it is much more likely that the award would have been closer to £10,000 than £20,000. A reasonably generous Judge would not in my judgment have awarded more than £15,000 in January 1984 which is the equivalent of £40,000 today. Accordingly, in my judgment, the appropriate figure for damages against the Bank at the notional date of trial is £15,000.

93. The Claimant has alleged that the Bank Manager dishonoured cheques maliciously, knowing that there was no good reason why they should not be met. It is accepted that my assessment of damages should not take any account of that. It is accepted, for the purposes of this case, that that could only be reflected in aggravated or exemplary damages and neither is appropriate in this case.

94. The Defendant argues that no interest should be awarded on that sum from the date the cause of action arose to the date of judgment. That is because,

a) No claims for interest were pleaded

b) That the damages compensate for loss of reputation up until the date of hearing so an award of interest is not appropriate.

95. The answer to a) given by the Claimant is that the writ would have been amended before trial had the case been pursued to trial. Competent solicitors would have dealt with that and an application for an amendment would have been allowed. I accept that on the balance of probabilities this is what would have happened.

The answer to b) is more difficult but in my judgment an award of interest is appropriate because:

1) The award is made in part to reflect damage done at the time of the dishonours even though it may not be quantifiable.

2) The damage to the reputation of the company was done at the time the cheques were dishonoured and therefore the damages are payable as soon as that damage is done.

3) Although it is described as a claim for loss of reputation, where a company is concerned the award of damages has to attempt to compensate for financial loss which must have been suffered through lost orders etc.

96. In my judgment for all those reasons it is appropriate to treat this claim in the same way as a claim for pecuniary loss rather than a defamation claim.

97. Interest is therefore payable on the damage from January 1974 to January 1984. It is agreed that the appropriate rate for interest for that period is the special investment account.

98. This action is for the loss of the chance of suing the Bank and the question arises whether there should be any discount in the damages to reflect the chance that the litigation against the Bank would not have succeeded. The Defendants submit that it is practically unheard of for there to be no discount in a professional negligence case.

99. If that is so it is not as a result of any principle of law. In ***Kitchen v R.A.F. Association*** [1958] 1 WLR 563 Lord Evershed M.R. said at p.574, "*If in this kind of action, it is plain an action could have been brought, and if it had*

been brought that it must have succeeded, of course the answer is easy. The damaged Plaintiff would recover the full amount of the damages lost by the failure to bring the action originally."

100. The same was said in ***Mount v Barker Austin*** [1998] PNLR 493. In his judgment Simon Brown L.J. at p.511 B to C said, "If and when the Court decides that the Plaintiff's chances in the original action were more than merely negligible it will then have to assess them. That requires the Court to make a realistic assessment of what would have been the Plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the Court to tend towards a generous assessment given that it was the Defendant's negligence which lost the Plaintiff the opportunity of succeeding in full or fuller measure."

101. The *'generous assessment'* can only relate to issues of fact where it is, for the reasons given by Simon Brown L.J., fair to make it. Where issues of law are concerned it is for the Judge hearing the lost claim case to decide those issues applying legal principles. In this case, as a matter of law, if the Bank wrongfully dishonoured the cheques, the company had a good claim in damages. There is no evidence to suggest that they were entitled to dishonour them. As a matter of fact the case never got to the stage when the Bank had to file a defence. Whether or not they had one would at this distance in time be speculative and accordingly cannot justify a discount.

102. The Defendants claim that there should be a discount because:

1) The risk that funding would not have been available so that the claim could not have gone ahead. I am satisfied that had funding been withdrawn the Claimant would have conducted the litigation himself. He has acquired a considerable amount of legal knowledge and has demonstrated considerable determination in pursuing the action. Further, in my judgement, I must deal with the case on the basis that, even if the Claimant did not have the help of Counsel, the Court would have reached the just result.

2) The risk that the Court would find that the assignment of the cause of action from Mr. Nicholson was invalid. This is largely a matter of law. There is very little argument on the facts surrounding the assignment so it is a matter I can determine on legal principles. The Defendants contend that the assignment would not have been permitted because:

   a) The terms of the company's contract with the Bank would have prevented assignment. As to that I agree with the Claimant. There is no evidence that there would have been any such term. It is certainly not something of which I am prepared to take judicial notice and, in my judgment, on the state of the evidence comes within the realm of speculation.

   b) The Defendants further claim that because the cause of action related to the reputation of the company, the action is personal to it and cannot be assigned. Further it is argued that the Claimant had no genuine commercial interests in the claim of the company and accordingly the assignment would be invalid.

While the distinction between a company and the person who operates it is clear, it is necessary for me to be realistic. The Claimant traded through this company; in ordinary parlance, he was the company. Any action affecting the company's reputation also affected his. Any loss suffered by the company as a result of the breach of contract was indirectly his loss. Any damages recovered by the company would benefit him. Having considered the speeches in ***Trendtex Trading Corporation v Credit Suisse*** [1982] AC 679, I am satisfied that there was no realistic prospect in law of a Court regarding the assignment as invalid. The unity of interests between the company and the Claimant in this litigation means that the assignment would not have been set aside on the basis that it amounted to trafficking in litigation. In my judgment, the Claimant had a genuine commercial interest in taking the assignment and enforcing it for his own benefit.

103. It appears to be accepted by the Claimant that there would be some deduction for the damages recovered because of the 'legal aid costs' which would not been recoverable as costs against the Bank. The Claimant estimates these at £800. He argues that I should be generous to him and only allow £500 discount. I see no reason but to apply a deduction for the damages of £800 as being a realistic estimate of the shortfall. In relation to the claim against the Bank, I do not consider that any further discount should be made.

104. **The Claim against Curwen Jessop and James.** It is accepted that the notional trial date for this action would be 30th June 1988. There were considerable factual issues in dispute between the Claimant and Curwen Jessop and James as are disclosed on the pleadings in that action. The claim asserted that Curwen Jessop and James failed to take steps on the Claimant's behalf to ensure that the action got to trial. There was a dispute as to whether they were under a duty to do any work for the Claimant and a further dispute as whether any loss was caused by any failure of theirs. The extent of those disputes are set out in Mr. Asif's opinion and in the Defendants' skeleton argument. I have considered the arguments put forward by the Claimant, but in my judgment there should be a discount against that claim to reflect the chance that the Claimant would not have succeeded in full. There were, in my judgment significant litigation risks for the Claimant in that action. He might well have failed to establish a contractual relationship or that there was any duty owed in tort. In assessing those risks I am mindful that I should be generous to the Claimant because they involve issues of fact and accordingly the discount will be no more than 25%.

105. I have already indicated that it seems to be agreed that any interest on the damages up until the notional trial date of the Bank action in January 1984 is the special investment account rate.

106. There is a dispute as to what interest rate should apply from January 1984 to 25th August 1999. In January 1990, in the case of ***Pinnock v Wilkins and Sons*** (unreported), the Court of Appeal decided that it was appropriate in solicitors' negligence cases to use the Judgment interest rate. That rate has since been criticised as being over

generous to Claimants (see ***Watts v Morrow*** [1991] 1 WLR 1421). The Law Commission, on the other hand, in their report on Pre-Judgment interest on Debts and Damages pointed out that use of the Judgement interest rate may not lead to over compensation in all cases.

107. At the end of para.1.5 in their report the Law Commission says: *'In practice the Courts often use the judgment interest rate of 8% as a rate which has not been changed since 1993 and which is now considerably greater than bank base rates.*

1.6 To a limited extent the Courts' tendency to award high rates of simple interest offsets the lack of compounding. This, however, is rough justice. The effect is to over-compensate claimants in most short running cases, while under compensating them in the longest cases.'

108. Because the aim of damages for breach of contract is to put the Claimant in the same position as if there had been no breach of contract, it seems to me to be appropriate to use the judgment rate for interest from January 1984 to August 1999. It is the rate of interest which comes closest in this case to achieving that aim.

109. This is without doubt a long running claim and had the Claimant had his money in January 1984, he would have been able to get compound interest on it. As the rate is a matter of judicial discretion, I would exercise it by taking the judgment rate.

110. I hope that I have now dealt with all the various and difficult legal issues that have arisen in this case. I have dealt with them briefly because they are academic in the light of my findings of fact but it seemed to me to be necessary to consider them, even if briefly.

Julian Greenhill (instructed by Burroughs Day) for the Claimant
Harvey McGregor Q.C. and Imran Benson (instructed by Weightmans) for the Defendants