JUDGMENT : Mr Justice Lawrence Collins: Chancery Division **:** 14 March 2003

I Introduction

1. Mr Robert Hurst qualified as a solicitor in 1975. In 1986 he joined the firm of Malkin Cullis & Sumption as a salaried partner. In 1988 he was offered and accepted an equity partnership to commence on 1 June 1989. Soon afterwards the firm entered merger negotiations with a firm called Janners and on or about 9 February 1989 Mr Hurst and 19 others agreed to the merger and as partners formed a new firm of solicitors practising under the name Malkin Janners ("the Partnership"). Mr Hurst contributed £37,000 as capital.

2. The Partnership moved into new premises, with four of the partners ("the Trustees") acquiring a 20-year lease at a rental of £95,000 p.a. on a property in King Street to hold on trust for the Partnership. The terms of the lease had been negotiated before Mr Hurst became an equity partner.

3. The Partnership commenced trading on 1 June 1989 but did not prosper. In the main this was because the Partnership's revenue was lower than expected due to the recession and did not cover the partners' drawings and the partnership's expenses. As Lord Millett recorded in *Hurst v Bryk* [2002] 1 AC 185, 190, by the spring of 1990 relations between the partners had deteriorated to such an extent that several of them were actively considering giving notice of retirement with a view to moving elsewhere. No agreement could be reached on how to reduce the drawing and expenses, and all the partners (including Mr Hurst), save for one, served retirement notices to take effect on 31 May 1991.

4. A dissolution agreement was signed on 4 October 1990. Some of the partners formed a new firm (Malkins) and the rest joined other firms. Mr Hurst refused to sign the dissolution agreement, and treated it as a repudiatory breach by the other partners. He joined D.J. Freeman & Co on 5 November 1990.

5. A steering committee was appointed to supervise the winding down of the firm. The 20-year lease on the King Street premises remained as the major liability of the Partnership.

II **Claims against the former partners**

6. Mr Hurst commenced proceedings against all 19 of his former partners on 27 January 1992 ("the partnership proceedings"). His claim sought damages, equitable compensation, access to the books, records and files of the Partnership and a declaration that the other partners would indemnify him for liabilities accrued as a result of the partnership. In addition, he sought: *"An order for all such accounts and inquiries to be taken and made upon the dissolution of the Partnership as the Court shall think fit and for payment to Mr Hurst of the amounts which are found to be due to him upon the taking of such accounts".*

7. In the meantime, the landlord of the King Street premises had brought an action against the Trustees on the lease and they counterclaimed against Mr Hurst for his share of the rent.

8. Between September 1990 and January 1993 Mr Hurst was represented by Baker & McKenzie. From January 1993 to January 1995 he acted in person. He instructed Penningtons on 25 January 1995. The trial was due to begin on 27 February 1995. On 23 February Harman J refused an application on behalf of Mr Hurst for an adjournment, and the trial of both claims came on before Carnwath J on 7 March 1995, when Carnwath J refused a further application for an adjournment. Initially Mr Hurst represented himself at the hearing. Legal aid was granted on the first day of the trial, and that night, Mr Ian Leeming QC was instructed by Mr Hurst's then solicitors, Penningtons, to act as leading counsel in the partnership action, although Mr Hurst says that at this stage this was done without his authority.

9. On 11 April 1995 Carnwath J delivered a substantial written judgment extending over some 70 pages.

10. Carnwath J identified the issues as being:

> *"(1) whether it had been agreed (a) that the Janners partners would bring all previously unbilled work in progress into the new firm and (b) that the expenses regime which had been operated in Malkin Cullis & Sumption would be abolished as part of the new partnership arrangements; and whether the management committee of the Partnership had been in breach of a duty to Mr Hurst by failing to ensure that similar terms were incorporated in the new partnership deed;*

(2) whether the members of the Management Committee were in breach of a duty of care owed to Mr Hurst by budgeting for excessive expenditure on travel and entertainment, promotional parties, cars and office premises, and generally in failing to take steps to secure a balanced budget;

(3) whether, by agreeing to dissolution without his consent, the partners wrongfully repudiated the partnership agreement, with the consequence that he was relieved of responsibilities under it, or whether, had the retirement provisions of the partnership deed been properly implemented, Mr Simmons, who as at 4 October 1990 was the only partner who had not given notice of retirement, would on 1 June 1991 have become liable under the deed to indemnify him against continuing losses;

(4) whether Mr Hurst was entitled to claim damages against the other partners for the loss of this indemnity resulting from their repudiation;

(5) whether he was entitled to an order for the taking of partnership accounts; and

(6) whether he had failed to account for his work in progress following the dissolution, and had also failed to pay his share of the ongoing liabilities, in particular the rent on the King Street premises. "

11. Carnwath J dismissed all of Mr Hurst's claims and held against him on the Counterclaim. As summarised by Peter Gibson LJ in the Court of Appeal (***Hurst v Bryk*** [1999] Ch 1, 7) the conclusions of Carnwath J were these: *"…(1) Mr. Hurst could not complain that the five Janners partners did not bring into Malkin Janners their unbilled work in progress. (2) The defendants were guilty of repudiatory breach of the partnership deed by entering into the dissolution agreement and Mr. Hurst duly accepted such repudiation. (3) If the partnership had not been terminated prematurely, Mr. Simmons would not have become the successor partner liable to pay all the debts and liabilities of the partnership, because on the true construction of the partnership deed there had to be more than one partner for the successor partners to be so liable; Mr. Hurst therefore lost no indemnity by Mr. Simmons through the unlawful repudiation. (4) Mr. Hurst remained liable to pay his share of debts, liabilities and losses of Malkin Janners, including ongoing liabilities and losses yet to be realised and the rent and other outgoings relating to 15, King Street. (5) The ordering of accounts was not justified in the very special circumstances of the case."*

12 The question of the claim for an account covered some nine pages of the seventy-three page judgment of Carnwath J. He gave seven reasons for exercising his discretion not to order an account *"in the very special circumstances"* of the case. One of the reasons was that, throughout the course of the proceedings, the partners had pressed Mr Hurst to give details of the points of concern which he wished to have investigated in the account, and that apart from two or three points (admitted to have been of relatively minor financial significance) Mr Hurst was unable to give particulars, and if that was the position four years after the dissolution it did not suggest that there were any outstanding matters of substantial concern. Carnwath J said that Mr Hurst had had ample time already to raise any points with the firm's accountants or its Steering Committee and had failed to come up with anything of substance. It was therefore hard to see what more the procedure was likely to achieve.

13. Mr Hurst appealed against conclusions (1), (3), (4) and (5), and his partners challenged conclusion (2). On the appeal Mr Hurst was represented by Mr Leeming QC with Penningtons acting as his solicitors. The Court of Appeal delivered its judgment on 4 February 1997 and held that the appeals should fail. Hobhouse LJ dissented on the issue whether the repudiatory breach discharged Mr Hurst's liability. Permission to appeal was given by the House of Lords on the issue of liability for the King Street rent, which on 30 March 2000 upheld the majority holding in the Court of Appeal: [2002] 1 AC 185. Mr Hurst wrote to the Judicial Office of the House of Lords asking their Lordships to reconsider their decision.

14. As regards the claim for an account, the Court of Appeal upheld the exercise of discretion by Carnwath J in refusing an account. Peter Gibson LJ said (at 16): *"Mr Leeming has not satisfied me that the judge's exercise of discretion can be impugned. On the contrary, it seems to me that in the unusual circumstances of this case to refuse to order an account was entirely justified. It is of some significance that all the other Malkin Janners partners who did not join Malkins in some capacity were in the same position as Mr Hurst, but have raised no complaint about the terms in which Malkins received partnership assets. Mr Leeming accepted before us that the judge was correct to say that there was no evidence of Mr Hurst being deprived of any asset not offset by corresponding liabilities. Where there has been an account which has not been shown to be*

incorrect, the court should not put the parties to the considerable expense and trouble that would be the consequence of ordering accounts and inquiries unless it be seen that some real benefit would thereby be obtained for the party seeking the order."

15. I was told that the question of the account was not an issue in the House of Lords, but Lord Millett said (at 192): *"The judge exercised his discretion by refusing to order the taking of a general partnership account, and in this respect also the Court of Appeal unanimously upheld his decision. As the judge pointed out, it would be very unusual for the court to order a complete audit of the firm's accounts to be undertaken by an independent accountant. Where, as in the present case, detailed accounts had already been prepared by competent accountants, these would normally form the basis for any further accounts and inquiries. Any partner would have the right to surcharge and falsify the accounts, but the burden would be upon him to do so."*

16. On 24 June 1997, Mr Hurst commenced a second action alleging that the original judgment of Carnwath J had been procured by fraud. The action was struck out as an abuse of process by the Master.

17. Mr Hurst appealed the Master's decision but his appeal was dismissed by a Judge.

18. On 16 December 1998, Mr Hurst issued a third set of proceedings seeking, inter alia, to have the order of Carnwath J set aside for fraud. This was struck out in so far as this action related to setting aside Carnwath J's judgment. The remainder of the proceedings were stayed in anticipation of the outcome of the appeal to the House of Lords.

19. On 9 August 2002, Mr Hurst issued a fourth set of Chancery proceedings against one of the Trustees seeking disclosure of partnership bank statements. The Trustee applied to strike out those proceedings as an abuse of process, and Mr Hurst applied for summary judgment. On 28 October 2002 Deputy Master Lloyd dismissed Mr Hurst's application and struck out Mr Hurst's statement of case.

20. Mr Hurst issued a further application to appeal against the decision of Deputy Master Lloyd but before that application could be heard Mr Hurst consented to an *Ebert v Venvil* [2000] Ch 484 Order halting all proceedings against them by Mr Hurst without the Court's permission.

III Claim against Penningtons

21. On 5 August 1997 Mr Hurst commenced proceedings against Penningtons for their alleged negligence in relation to the Court of Appeal stage of the partnership proceedings. The claim was that his case was not presented to the Court of Appeal with the necessary diligence and expedition, and that in consequence he lost the chance of having a substantial part of the judgment of Carnwath J reversed or modified by the Court of Appeal.

22. Penningtons issued an application to strike out the proceedings and on 16 January 1998 Pumfrey J delivered judgment in favour of Penningtons on the basis that the action was "in truth, an attempt to relitigate the appeal in the original action".

23. Following delivery of that judgment, Mr Hurst sought to amend his statement of case to include the allegation that Penningtons failed to select leading and junior counsel with expertise appropriate to the issues which Mr Hurst wished to raise in the Court of Appeal. Pumfrey J refused the application and dismissed the claim.

24. Mr Hurst then applied for permission to appeal against Pumfrey J's decision to refuse permission to amend. In the Court of Appeal Chadwick and Auld LJJ dismissed Mr Hurst's application.

IV Statutory Demand

25. On 12 May 1997 the Trustees served Mr Hurst with a statutory demand for the sum of £9,762.42 in respect of his share of the rent on the King Street premises.

26. Mr Hurst applied to set aside that statutory demand, and his application was dismissed by Deputy Registrar Middleton on 10 November 1997.

27. Mr Hurst appealed against the Order of Deputy Registrar Middleton but this appeal was dismissed by Ferris J on 24 May 2000. Mr Hurst wrote to Ferris J asking him to reconsider his decision but this was refused.

28. The Court of Appeal gave Mr Hurst permission to appeal against the decision of Ferris J. On 14 February 2001, the Court of Appeal delivered a draft judgment dismissing Mr Hurst's appeal. Mr Hurst asked the Court of Appeal to reconsider its decision but it declined to do so and handed down its judgment on 16 February 2001.

29. On 11 February 2003 Mr Hurst issued an application for review under section 375(1) of the Insolvency Act 1986 of the order of Deputy Registrar Middleton dismissing Mr Hurst's application to set aside the statutory demand served on him.

V Bankruptcy Petition

30. On 21 June 2000 some of Mr Hurst's former partners presented a bankruptcy petition. Mr Hurst issued an application on 10 July 2000 for an order to dismiss the petition but Deputy Registrar Brettle refused to do so. The petition was adjourned for Mr Hurst to obtain some advice on obtaining an IVA.

31. On 8 August 2000 Mr Hurst served a statutory demand on one of his former partners. The statutory demand was set aside on 16 October 2000 by Mr Registrar Baister, who declined to dismiss the bankruptcy petition against Mr Hurst. On 18 October 2000, Mr Hurst wrote to the Registrar asking him to reconsider his decision not to dismiss the bankruptcy petition but the Registrar declined to do so.

32. On 22 November 2000 Mr Registrar James rejected Mr Hurst's application for the dismissal of the bankruptcy petition and adjourned the hearing of the petition.

33. Mr Hurst appealed against this order but the appeal was dismissed by Etherton J on 15 February 2001.

34. On 15 March 2001, the day before the bankruptcy petition was due to be heard, Mr Hurst made an application under section 253 of the Insolvency Act 1986 for an interim order but this application was dismissed and the bankruptcy petition adjourned again until 12 April 2001.

35. Mr Hurst was unable to produce an IVA proposal by 12 April 2001 and accordingly, on that date, the Registrar made a bankruptcy order.

36. On 11 May 2001 Mr Hurst made an application seeking, inter alia, annulment of his bankruptcy and the reinstatement of his application for an interim order. The application was dismissed and the application for reinstatement adjourned. On 10 July Mr Registrar James delivered a draft judgment refusing Mr Hurst's application for an interim order. By a witness statement dated 10 July and by oral submissions on 11 July, Mr Hurst asked the Registrar to reconsider his judgment in light of certain alleged factual errors. The Registrar declined to do so.

37. On 16 July 2001 Mr Hurst appealed against the Order of the Registrar. The appeal was heard by Ferris J on 30 July 2001 and dismissed.

38. Mr Hurst applied to the Court of Appeal for permission to appeal from the decision of Ferris J and the Court of Appeal refused permission on 8 August 2001.

VI Claim against Kroll Buchler Phillips

39. Mr Hurst appointed Kroll Buchler Phillips ("KBP") to structure an IVA for him in March 2001. A dispute arose over fees and KBP refused to conduct any further work for Mr Hurst unless he agreed to a fee of £10,000. Mr Hurst would not agree and made no other arrangements for the preparation of an IVA so that a bankruptcy order was made against him on 12 April 2001. On 4 April 2002 Mr Hurst commenced proceedings against KBP for breach of contract alleging failure to complete the draft proposal within the relevant time. In June 2002 KBP applied for summary judgment against Mr Hurst, who in turn applied for summary judgment against KBP.

40. On 24 July 2002 Master Moncaster dismissed Mr Hurst's application on the grounds, inter alia, that: (a) Mr Hurst had to prove a real loss of a chance rather than a speculative one, and (b) the court would not have approved the IVA because Mr Hurst had refused to include a clause in the draft proposal in which he agreed to disengage from all other litigation.

41. Etherton J dismissed an appeal from the order of Master Moncaster on 4 December 2002.

VII First action against Mr Ian Leeming QC

42. On 20 February 2001 Mr Hurst commenced an action against Mr Leeming on the basis of alleged negligence in the conduct of the partnership proceedings. The Particulars of Claim sought both damages and an indemnity for "such sums as [Mr Hurst] has to pay his former partners and former Solicitors (Penningtons) in settlement of their respective claims for costs".

43. The pleaded case in the first action was as follows:

"(1) During the trial in March 1995, Carnwath J indicated his willingness to order an account provided that Mr Hurst supplied a schedule indicating the points of his concern.

(2) On 13 March 1995, Mr Hurst prepared a schedule referring to various page numbers of the trial bundle evidencing his points of concern, and a similar schedule was simultaneously prepared by Penningtons.

(3) The two schedules were sent to Mr Leeming so as to enable him to either present one of them to Carnwath J or to prepare his own schedule transcribing the contents of those prepared by Mr Hurst and by Penningtons.

(4) Negligently and in breach of his duty of care to Mr Hurst, Mr Leeming failed to supply to Carnwath J either the schedules prepared by Mr Hurst and by Penningtons or a new schedule transcribing their contents. Accordingly, neither the schedules nor the documents described in them were referred in a single list to Carnwath J.

(5) In his judgment of 11 April 1995 Carnwath J said:

"Throughout the course of the proceedings, the Defendants have pressed the Plaintiff to give details of the points of concern which he wished to have investigated in the account. Since he has had ample time already to raise any point with Jaye and Co or the Steering Committee, and has failed to come up with anything of substance, it is hard to see what more the procedure is likely to achieve."

(6) The relevant points had been raised by Mr Hurst in letters to Jaye and Company and to others, all of which were detailed in his schedule dated 13 March 1995. However, because the said schedule was not supplied to Carnwath J, his attention was not drawn to the letters by reference to a single list.

(7) Accordingly Mr Hurst was deprived of the chance of an account being ordered by Carnwath J, and Mr Leeming was negligent by virtue of his failure to present to Carnwath J the schedule requested by his Lordship during the trial and prepared by Mr Hurst on 13 March 1995.

(8) In accordance with Mr Leeming's written advice, Mr Hurst appealed to the Court of Appeal from the refusal of Carnwath J to order an account.

(9) Although junior counsel retained by Penningtons annexed the contents of Mr Hurst's schedule dated 13 March 1995 to his skeleton argument, Mr Leeming had not considered the skeleton argument in sufficient detail to enable him to explain its contents to the Court of Appeal, and when asked to describe the precise items in respect of which an account was required, Mr Leeming was unable to supply a proper answer.

(10) Simon Brown LJ enquired as to the likely value of the account that was being requested by Mr Hurst, and when Mr Leeming responded that it was a few hundred pounds Simon Brown LJ requested Mr Leeming to address the court on the next point of appeal, and subsequently told counsel for his former partners that he need not address the court on Mr Hurst's request for an account.

(11) The Court of Appeal declined to order an account and ordered Mr Hurst to pay his former partners' costs.

(12) Mr Leeming was negligent by virtue of his failure to:-

(a) peruse the documents in sufficient detail to enable him to explain to the Court of Appeal the nature of the account required by Mr Hurst;

(b) present to the Court of Appeal Mr Hurst's case for an account in a concise and detailed manner.

(13) Mr Leeming's negligence deprived Mr Hurst of the opportunity of securing an order for an account from Carnwath J and the Court of Appeal. If such an account had been ordered, Mr Hurst would:

(a) have received from his former partners the amount standing to the credit of his capital and current accounts in the partnership;

(b) have received the benefit of a substantial award of costs;

(c) not have been ordered to pay his former partners' costs;

(d) not have had to devote the majority of his time and resources since 11 April 1995 to his endeavours to mitigate the damages suffered as a consequence of Mr Leeming's negligence;

(e) have been able to devote his time and resources since 11 April, 1995 to his professional career."

44. Accordingly, the substance of Mr Hurst's complaint in the first action was

(1) Mr Leeming QC was negligent in failing to provide to Carnwath J details of Mr Hurst's points of concern on accounts prepared by Jaye & Co (the partnership accountants) either in the form of two schedules provided by Mr Hurst or in the form of a schedule provided by Penningtons, or in a consolidated schedule, and as a result of this alleged failure Mr Hurst was "deprived. … of the chance of an account being ordered by Mr Justice Carnwath".

(2) Although a schedule was annexed to the Skeleton Argument of Mr Leeming's Closing Speech lodged in the partnership proceedings, Mr Leeming had not "perused the documents in sufficient detail to enable him to explain…the nature of the account required" to the Court of Appeal and that he was unable to present the case in favour of an Order for an account in a concise and detailed manner. Thus, it was alleged, Mr Hurst was deprived of the chance of securing an order for an account from the Court of Appeal.

45. The defence in the first action pleaded in paragraph 21 as follows: *"Against the background of all the matters set out in paragraphs 17 to 20 above, and taking into account the views expressed by the Claimant and by Miss Dixon of Penningtons and his duty to the Court, the Defendant exercised his independent professional judgment (as it was the duty of a well informed and competent barrister to do) and decided that the contents of the Claimant's schedule and/or Penningtons' schedule were unlikely to make a favourable impression on the mind of the judge. In particular, the Defendant considered that it was against the Claimant's interests to press upon the judge unparticularised and/or unsustainable allegations, or allegations concerning sums which were of very minor financial significance."*

46. Mr Hurst applied for summary judgment in the first action, and Mr Leeming applied to strike out the Particulars of Claim in the action or, in the alternative, for summary judgment against Mr Hurst. The matter came on before Lightman J on 9 May 2002. Following what Lightman J described as "a frank exchange of views" between the Judge and Mr Hurst, Mr Hurst accepted that the action had no merit and reached the "fair and sensible decision" that the action must be dismissed. On that basis the parties agreed a consent order dated 9 May 2002 that: (a) summary judgment be given against Mr Hurst; (b) the claim be dismissed; and (c) Mr Hurst's application for summary judgment be dismissed.

47. Lightman J ordered Mr Hurst to pay Mr Leeming £55,000 in costs before 23 May 2002. In the course of his judgment on costs, Lightman J expressed the view that "there is no ground for any criticism of Mr Leeming. For what it is worth, on the material before me I would have reached the same conclusion as he did, and acted in exactly the same way" and that "the claims [against Mr Leeming] in fact lacked any substance or merit".

48. He also said: *"Mr Hurst now accepts (as he must) that his case was hopeless. He argues that, if Mr Leeming had agreed to mediation which he sought, the mediator could have had the same frank exchange of views with him which I have had, and this would have enabled the case to be resolved without the costs involved in this action. This is a formidable argument, but, after anxious consideration, I am persuaded, that, quite exceptionally, Mr Leeming was justified in taking the view that mediation was not appropriate because it had no realistic prospect of success. My reasons, in a word, are that on the material before the court … it is plain that Mr Hurst has been so seriously disturbed by the tragic course of events resulting from the dissolution of the partnership that his judgment in respect of matters concerning the partnership and partnership action, and the conduct of that action on his behalf is seriously disturbed: he is a person obsessed with the injustice which he considers has been perpetrated on him and is incapable of a balanced evaluation of the facts.*

…

Mr Hurst, though a solicitor, has appeared quite unable or unwilling to appreciate the full and clear explanation given refuting his claim. It needed no mediator to help him to evaluate the claim when furnished with the explanation by Mr Leeming."

49. Mr Hurst did not make any payment to Mr Leeming in respect of costs. Mr Hurst made an application for permission to appeal from the costs order of Lightman J both on paper and on an oral renewal of the application, which were refused by Chadwick LJ and Keene LJ respectively.

VIII The present action

50. On 14 May 2002 Mr Hurst wrote a formal letter of claim, a few days after the hearing before Lightman J in the first action. The complaint was that Mr Leeming had negligently advised that his chances of success on the appeal in relation to the account were strong. He then commenced proceedings against Mr Leeming on 28 October 2002 claiming damages for negligence.

51. The pleaded case in the second action is as follows:

"(1) On 10 March 1995 Carnwath J stated to Mr Hurst:-

"…if you are going to ask for me to order an account, I will need to have at some time before we are very much older a comprehensive statement of the things you are not happy with. I am certainly not going to go scrabbling around in the documents. Has there been an answer to this letter as such? No. That is obviously something you will want to consider with Mr Leeming when you are out of the box, but it certainly would help me to have a comprehensive, up to date list of the things which you say you are unhappy with and which have not been answered."

(2) On the afternoon of that day, Mr Hurst and Miss Dixon of Penningtons drew Mr Leeming's attention to several pages of the trial bundle evidencing Mr Hurst's concern about various accounting matters relating to the partnership.

(3) Mr Leeming requested Mr Hurst to prepare over the following weekend a schedule identifying the relevant pages of the trial bundle and describing the points of concern raised in them, with a view to providing the schedule to Carnwath J on 14 March 1995.

(4) Schedules were prepared by Mr Hurst and Miss Dixon, and sent to Mr Leeming, but he did not hand them to Carnwath J, and instead handed in a "Note on behalf of the Plaintiff Concerning Accounts and Inquiries", which had not been seen by Mr Hurst.

(5) During his closing speech, Mr Leeming made no reference to the schedule which had been requested by Carnwath J on 10 March, 1995.

(6) In his judgment dated 11 April, 1995, Carnwath J:

"Throughout the course of the proceedings, the Defendants have pressed the Plaintiff to give details of the points of concern which he wished to have investigated in the account. Since he has had ample time already to raise any points with Jaye and Co or the Steering Committee, and has failed to come up with anything of substance, it is hard to see what more the procedure is likely to achieve."

(7) Carnwath J dismissed Mr Hurst's request for an account and ordered him to pay his former partners' costs.

(8) By written advice of 2 June 1995, Mr Leeming advised Mr Hurst to appeal to the Court of Appeal and on the basis of that advice, the Legal Aid Board agreed to fund Mr Hurst's proposed appeal to the Court of Appeal.

(9) The skeleton argument presented by Mr Leeming to the Court of Appeal on 6 December 1996 incorporated the majority of the contents of the schedules prepared by Mr Hurst and Miss Dixon on 13 March 1995.

(10) After the Court of Appeal had on 16 December 1996 heard Mr Leeming's submissions on behalf of Mr Hurst in relation to the account, Simon Brown LJ indicated that he did not require counsel for Mr Hurst's former partners to respond to those submissions.

(11) On 4 February 1997, the Court of Appeal dismissed Mr Hurst's appeal and ordered him to pay his former partners' costs. In the course of remarks at the conclusion of his judgment, Simon Brown LJ criticised Mr Hurst for having appealed to the Court of Appeal in relation to the account.

(12) In his defence served on 23 March 2001 in the first action, Mr Leeming expressed the view that the queries raised in Mr Hurst's schedule dated 13 March, 1995 were "unsustainable", but Mr Leeming had not expressed that view to Mr Hurst at any point prior to 23 March 2001.

(13) That view was endorsed by Lightman J at the commencement of a hearing in the first action on 9 May 2002, as a consequence of which Mr Hurst decided to withdraw his claim in that action.

(14) If Mr Leeming had expressed that view to Mr Hurst:

(a) Between 13 and 23 March 1995, Mr Hurst would have endeavoured to conclude a settlement with his former partners prior to the conclusion of the trial and/or delivery of judgment.

(b) On 2 June, 1995 Mr Hurst would not have appealed to the Court of Appeal on the question of an account. He would have endeavoured to conclude a settlement with his former partners.

(c) On 6 December, 1996, Mr Hurst would have ensured that no "unsustainable" document was presented on his behalf to the Court of Appeal.

(15) Mr Leeming was negligent by virtue of his:

(a) failure to advise Mr Hurst between 13 and 23 March 1995 that the schedule dated 13 March 1995 was "unsustainable;"

(b) advice to Mr Hurst and the Legal Aid Board to prosecute an appeal to the Court of Appeal in relation to the account;

(c) presentation to the Court of Appeal of a document which was "unsustainable."

(16) As a consequence of Mr Leeming's negligence, Mr Hurst has been subjected to substantial orders for costs leading to his bankruptcy on 12 April 2001."

IX The schedule

52. Since Mr Hurst's first action against Mr Leeming depended upon Mr Leeming's failure to bring to the attention of Carnwath J to Mr Hurst's schedule of 13 March 1995, and since the second action is founded upon Mr Leeming's alleged failure to advise on it, and since in his witness statement Mr Hurst says that the contents of his schedule were fundamental to his claim for an account, I will describe its nature. It is headed "Outstanding accounting queries raised by Mr Hurst, based on his limited perusal of Malkin Janners' books and records". 14 matters are then listed, without any elaboration or argument. In 12 of the cases there is a cross-reference to pages in the core bundle, totalling about 16 pages. A first category consists of matters which would normally be dealt with in partnership accounts: "Work-in-progress" and "Value of goodwill of Malkins' name." A second category is "Other matters not yet discovered by Mr Hurst because of his difficulty in gaining access to the Partnership's books and records." Most of the other items are unparticularised references to queries, some of which relate to very small amounts, including 4 items of around £1000 or less.

53. The schedule does not on its face contain any material which could lead to a conclusion that the accounts prepared by Jaye & Co were suspect. Mr Leeming says that most (if not all) of the documents referred to in the schedule were raised by Mr Hurst during his cross-examination, and there is no allegation by Mr Hurst that the 14 documents referred to were not before Carnwath J.

X The applications

54. These applications are before the court:

(a) Mr Hurst's application for summary judgment on this claim under Part 24 on the basis that: (i) Mr Leeming has no real prospect of successfully defending the claim; and (ii) there is no other reason why the question of liability should be determined at trial;

(b) Mr Leeming's application that: (i) the particulars of claim be struck out pursuant to CPR 3.4(2)(a) and / or (b); or alternatively, (ii) summary judgment be entered against Mr Hurst on the ground that he has no real prospect of succeeding on the claim; or alternatively (iii) that the claim be stayed until after Mr Hurst pays to Mr Leeming the costs due under paragraph 4 of the Order of Lightman J made on 9 May 2002 in the first action; and

(c) Mr Leeming's application for an order that Mr Hurst be prohibited from issuing any proceedings, making any application or progressing in any existing proceedings against Mr Leeming without the permission of a Judge under the principle of ***Ebert v Venvil*** [2000] Ch 484.

XI The arguments

55. Mr Hurst's position on his application for summary judgment is that Mr Leeming's only serious defence is the allegation that various discussions took place between 13 and 23 March 1995 in which Mr Leeming allegedly advised Mr Hurst that it would be inappropriate to hand up to Carnwath J Mr Hurst's schedule dated 13 March 1995. But the first occasion since 19 March 1995 on which Mr Leeming questioned the propriety of the schedule dated 13 March 1995 was on service of the defence in the first action on 23 March 2001, and no mention was made in that defence of any advice given in connection with those items. It was only for the first time in the witness statement of his solicitor, John Bennett, that it was alleged that Mr Leeming had advised Mr Hurst between 13 and 23 March 1995 that it would be inappropriate to hand up to Carnwath J his schedule. Mr Hurst says that there were no such discussions, and the only serious issue in the proceedings is whether Mr Leeming gave Mr Hurst the alleged advice. He accepts that there is a conflict of evidence between Mr Bennett and himself, and under the old RSC Order 14 there would have been a triable issue preventing an

application for summary judgment, but under CPR Part 24 the test for summary judgment is whether the defence has a real prospect of success, and in his submission the prospect is low.

56. He submits that Mr Leeming should not be permitted to take the matter to trial without confirming the veracity of his solicitor's allegations in a witness statement signed by himself, and supplying written evidence of the alleged discussions. He also argues that evidence given by Mr Bennett on Mr Leeming's behalf in the past has been proved to be factually inaccurate. He says that he has no recollection of any such discussions, and Mr Leeming has supplied no written evidence, such as an attendance note prepared by his junior or himself, of the discussions which are alleged to have taken place. He asks why (if Mr Leeming advised him between 13 and 23 March 1995 that his schedule should not be presented) did he present parts of it to Carnwath J on 11 April 1995; and if the schedule was unsuitable for Carnwath J, why it suddenly became suitable for the Court of Appeal. He asks why Mr Leeming did not refer to the alleged discussions in his defence in the first action.

57. On the history of the proceedings, Mr Hurst says that it is a matter for regret that his endeavours have been unsuccessful, but he says that (a) he has been acting in person (b) his speciality has always been intellectual property law and (c) he has always been opposed by highly experienced counsel and solicitors specialising in the relevant area of law.

58. I indicated during the course of the hearing that this application was bound to fail. Mr Hurst's case is that Mr Leeming failed to advise him that the schedule contained unsustainable allegations. Mr Leeming's defence is (inter alia) that Mr Hurst was advised during the course of the trial before Carnwath J that it would be inappropriate to hand the schedule to the judge. Mr Hurst accepts there is a conflict of evidence but submits that for the purposes of CPR 24 the defence has no real prospect of success. Even apart from the application on behalf of Mr Leeming for summary judgment or for the claim to be struck out, with which I deal below, there would have been no question of Mr Hurst succeeding on a claim for summary judgment. Not only would there have been a serious issue as to whether advice of the kind alleged should have been given, and whether it was in fact given, but also on the question what Mr Hurst would have done had he been given the advice which he claims he should have been.

59. The application on behalf of Mr Leeming to strike out or for summary judgment is made under CPR Part 24.2, on the basis that (a) that the *"claimant has no real prospect of succeeding on the claim or issue"* (CPR 24.2(a)(i)) and (b) that *"there is no other compelling reason why the case or issue should be disposed of at trial"* (CPR 24.2(b)). The application to strike out Mr Hurst's statement of case is made under CPR Part 3.4(2)(a) on the basis *"that the statement of case discloses no reasonable grounds for bringing … the claim" or under 3.4(2)(b) on the basis "that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".*

60. It is submitted on behalf of Mr Leeming that the claims which Mr Hurst makes in connection with the trial of the partnership proceedings and the advice as to the appeal to the Court of Appeal fall outside the limitation period, and there is no basis for a suggestion that time is extended by section 14A of the Limitation Act 1980 on the theory that he did not have the relevant knowledge until receipt of Mr Leeming's defence in the first action on 23 March 2001 or until Lightman J expressed a view on 9 May 2002 and that as a result his current claim is not out of time.

61. Next it is said that Mr Leeming would not have breached his duty of care to Mr Hurst because the claim for an account depended on the contention that a partner was entitled to an account almost as a matter of course on the dissolution of a partnership and not on the points in the schedule. Carnwath J refused to exercise his discretion to order an account because of the "very special circumstances of the case" and not because the points in the schedule were unsustainable in themselves. Mr Hurst was at the time a qualified practising solicitor. It is submitted that Mr Leeming's duty to advise Mr Hurst would have been considerably restricted because of Mr Hurst's professional background: *Carradine Properties Ltd v DJ Freeman & Co* [1999] Lloyd's Rep PN 483. Therefore, Mr Leeming would have been entitled to assume that Mr Hurst understood that the schedule added nothing to his claim in the partnership proceedings .

62. In any event, in addition to Mr Leeming's primary contentions that (a) he did advise on the contents of the schedule and (b) that a failure to advise on the schedule would not be negligent in any event, it is submitted that the Court can be satisfied beyond any reasonable doubt that Mr Hurst was not or would not have been influenced by any adverse advice and would have followed precisely the same course that he did in fact follow with precisely the same consequences. Accordingly, even if Mr Hurst could establish the alleged breach at trial, it is submitted that he would be unable to establish that he suffered any loss as a result of Mr Leeming's purported actions and thus that there is no reasonable basis for the claim and no reasonable prospect of the claim succeeding. Mr Hurst's claim for an Order for an account was only one of the 8 heads of relief set out in the prayer to the particulars of claim in the proceedings. The principal claim was for damages and the abandonment of the claim for dissolution accounts would therefore have had little or no effect on the length or complexity of the trial. There is nothing to suggest that the claim for an account can reasonably be considered to have been of such importance in the context of the action that a concession of that part of the claim could or would have led to their settlement or materially affected their outcome. The claim to an account represented a fraction of the grounds of appeal: the main head being the case which ultimately reached the House of Lords, namely the question whether a partner was discharged from liability for partnership debts on a dissolution resulting from a repudiatory breach of the Partnership Agreement. It is fanciful to assume that the Mr Hurst would have taken any other course than the course which he actually took.

63. Mr Hurst was unwilling to accept advice that the merits were poor in relation to other aspects of the partnership proceedings. There is nothing to suggest that if in contrast to Mr Hurst's case, Mr Leeming advised him on the merits of the schedule, that Mr Hurst would have taken heed of that advice. In relation to the Court of Appeal, despite advice to the contrary Mr Hurst insisted that the Notice of Appeal be settled on wider grounds apparently under the threat of suing his solicitors. Mr Hurst was attempted to persuade Mr Leeming both to change his advice to the Legal Aid Board and to agree to broaden the scope of his appeal to include, inter alia, his claim in respect of negligence (notwithstanding that Mr Leeming expressly assessed its prospects of success as between 1% and 5%) and for an injunction and in respect of the Partnership's expenses regime (notwithstanding that Mr Leeming expressly assessed the prospects of their success to be even more remote). Furthermore, and again notwithstanding that advice, Mr Hurst subsequently insisted that a Notice of Appeal be produced and issued in respect of those additional claims. That Notice was later amended to withdraw those parts of the appeal.

64. On the application to strike out, it is said that the substance of the first action is identical to the substance of the present action. The present action is nothing more than a continuation of a campaign on Mr Hurst's part to reopen matters which have already been considered and dealt with by the Court in the clearest possible terms. In the circumstances, it is submitted that these proceedings represent an abuse of the process of the Court and on that basis alone should not be permitted to proceed any further.

XII Conclusions

65. It is now more than 11 years since Mr Hurst began his campaign of litigation against his former partners, solicitors, counsel, and other professional advisers in relation to the dissolution of the partnership of Malkin Janners in 1991. He conducted his case before me with moderation, courtesy and fairness, but I have to say that I am satisfied that he is a man obsessed with the consequences of what he described in court as "*the unexpected and disastrous*" judgment of Carnwath J in 1995.

66. That obsession has led to his bankruptcy, and he is effectively immune from costs awards made against him by the Court. Mr Hurst accepts that he is liable to the other parties to the various pieces of litigation in the region of £250,000 to £350,000, including £55,000 to Mr Leeming.

67. I am satisfied that his action is bound to fail and is an abuse of the process.

68. Under CPR Part 24.2(a)(i) and (b), in order to succeed in an application for summary judgment a defendant must establish (a) that the "*claimant has no real prospect of succeeding on the claim or issue*" and (b) that "*there is no other compelling reason why the case or issue should be disposed of at trial*". A claimant's

statement of case may be struck out under CPR Part 3.4(2) on the grounds (a) "*that the statement of case discloses no reasonable grounds for bringing … the claim*" or (b) "*that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings*".

69. In my judgment Mr Hurst has no real prospect of success, his pleading discloses no reasonable grounds for bringing the claim, and also the action is an abuse of the process in the classic sense. It is in apparent from the pleaded cases in the first action and in this action, which I have set out in paragraphs 43 and 51, that they cover substantially the same ground. Mr Hurst is in substance alleging matters which he raised or could have raised in the first action, in which summary judgment was given against Mr Hurst. In ***Johnson v. Gore Wood & Co***. [2002] 2 AC 1 it was held that whether an action was an abuse of process as offending against the public interest in the finality of litigation should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the claimant was in all the circumstances misusing or abusing the process of the court. The following points emerge from the speech of Lord Bingham: (1) litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court; (2) in accordance with the rule in ***Henderson v. Henderson*** (1843) 3 Hare 100 parties may not open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward; (3) these may include "issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them." (***Greenhalgh v. Mallard*** [1947] 2 All ER 255, 257); (4) it is not necessary to identify any additional element such as a collateral attack on a previous decision but where that element was present the later proceedings would be much more obviously abusive; (5) the crucial question was whether in all the circumstances a party was misusing or abusing the process by seeking to raise before it the issue which could have been raised before. Lord Bingham said (at 31): *" It is …wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what in my opinion should be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."*

70. In the first action Mr Hurst was complaining about Mr Leeming's conduct of the appeal, as he does in the present action. The thrust of his complaint as regards the Schedule in the first action was that it had not been presented to Carnwath J, and was inadequately presented to the Court of Appeal. But Mr Hurst now says that it was only when he saw the reference in the defence in the first action to the schedule containing unparticularised and/or unsustainable allegations that he realised that Mr Leeming had failed so to advise him. But he frankly concedes that he could have applied to amend his particulars of claim in the first action to make the allegation which he now makes, and I am satisfied that this is an allegation (however unfounded) which he could have raised in the first action and that it would be an abuse to raise it now.

71. Further, the substance of Mr Hurst's claim is plainly statute-barred. The action was commenced on 29 October 2002. For historical reasons which are not now easy to justify, in an action for negligence against a barrister it is the tort rules for limitation which apply, and therefore time runs from the date of actionable damage. The main act of alleged negligence (the failure to advise that the schedule was "unsustainable") occurred at the trial before Carnwath J in March 1995 and the substance of the damage alleged is that Mr Hurst lost the opportunity of settling with his partners. It is perhaps arguable that the damage in relation to the alleged deficiencies in the advice on appeal in June 1995 occurred less than 6 years before the commencement of the proceedings. The allegedly negligent presentation of a version of the Schedule to the Court of Appeal in December 1996 is not outside the limitation period, but (a) no damage is said to flow from it; and (b) since negligent presentation of the Schedule was already alleged in the first action, it would be an abuse of process to pursue it now.

72. There is no basis for the application of the extended period of limitation under section 14A of the Limitation Act 1980. Section 14A of the Limitation Act 1980 deals with *"actions in respect of latent damage not involving personal injuries."* For present purposes the relevant elements are these:

(a) if a three year period from the "starting date" expires after the normal six year period from the date of accrual of the cause of action, then the limitation period expires at the end of the three year period: section 14A (3)(4);

(b) the starting date for reckoning the three year period is:-
"the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action" (section 14A(5));

(c) knowledge includes:
"knowledge which he might reasonably have been expected to acquire—
(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek
but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice" (section 14A(10)).

73. In ***Glaister v. Greenwood*** [2001] Lloyd's Rep. PN 412, I reviewed the authorities on section 14A (and, so far as relevant, on section 14, which deals with actions in respect of personal injuries). It is for a claimant to plead and prove a date within three years of the commencement of the proceedings when he acquired the relevant knowledge; if a defendant wishes to rely on a date prior to the three year period immediately preceding the date of the issue of the proceedings, the onus is on the defendant to prove that the claimant had or ought to have had knowledge by that date: ***Nash v. Eli Lilly & Co***. [1993] 1 WLR 782, 796 (C.A.); ***Wilson v. Le Fevre Wood & Royle*** (1995) 66 Con LR 74, 82 (CA). The purpose is to avoid the injustice which arises if a cause of action accrues without the person who is entitled to sue appreciating that the damage which gives rise to the cause of action has occurred: ***Oakes v. Hopcroft*** [2000] Lloyd's Rep. PN 946, 947 *per* Lord Woolf CJ. The enquiry under section 14A must be approached in a broad common sense way in the light of the object of the section and the injustice it was intended to mitigate, although a desire to be indulgent to claimants should be resisted: ***Spencer-Ward v. Humberts*** [1995] 1 EGLR 123, at 126 *per* Sir Thomas Bingham MR.

74. It is hard to imagine a case further from the intended application of section 14A than this case. Mr Hurst says that the relevant knowledge for the purposes of section 14A(4)(b) was acquired either on 23 March 2001 (the date of the defence in the first action) or 9 May 2002 (when Lightman J expressed the view that the claim was hopeless). But I accept the submission for Mr Leeming that it must have been clear to Mr Hurst at the very latest when the Court of Appeal (which had had an opportunity to consider a schedule based very closely on Mr Hurst's schedule) gave judgment in the partnership proceedings on 4 February 1997 that the Schedule could not justify an order for an account. It must have been sufficiently clear to Mr Hurst following the Court of Appeal decision that his claim for account could be pursued no further.

75. Finally, I am also satisfied that there is no real possibility that Mr Hurst could succeed in his claim on the merits. The claim is wholly fanciful. No criticism could be made of the failure to hand to Carnwath J a schedule which is simply an unparticularised and vague list of headings with references to a few documents, most (if not all) of which had been explored at the trial.

76. Mr Hurst's claim is that if Mr Leeming had told him at the trial or in the advice on appeal that the points in the Schedule were unsustainable he would have endeavoured to conclude a settlement of the proceedings or would not have appealed to the Court of Appeal on the account. Mr Leeming says that he did discuss with Mr Hurst why he considered the Schedule to be unhelpful. But in any event this claim is, in my judgment, nothing less than absurd. The claim for an account was only one of several matters which were before Carnwath J, and it is absolutely inconceivable that Mr Hurst's whole

strategy would have been altered by such a piece of advice relating to only one aspect of only one of eight claims for relief.

77. Having read the judgments of Carnwath J and in the Court of Appeal and in the House of Lords, I am satisfied that the claim to an account represented a fraction of Mr Hurst's case. The main issue involved the question which ultimately reached the House of Lords, namely whether a partner was discharged from liability for partnership debts on a dissolution resulting from a repudiatory breach of the Partnership Agreement.

78. I am also persuaded by the argument for Mr Leeming that the court can be satisfied beyond any reasonable doubt that Mr Hurst was not or would not have been influenced by any adverse advice and would have followed precisely the same course that he did in fact follow with precisely the same consequences. It is fanciful to imagine that the Mr Hurst would have taken any other course than the course which he actually took.

79. If I had not decided that the action should be struck out, I would have stayed the current proceedings until Mr Hurst pays the costs (£55,000) awarded in Mr Leeming's favour under the order of Lightman J dated 9 May 2002. Under CPR Part 3.4 the court can make such an order where, before a claimant pays costs awarded against him in a claim which has been struck out, he starts another claim against the same defendant, arising out of facts which are the same or substantially the same as those relating to the claim in which the statement of claim was struck out. There can be no doubt that the second action arises out of facts which are the same or substantially the same as those relating to the claim in the first action. But the first action was dismissed, and not struck out. But even if CPR 3.4 does not apply, I consider that I would have had power under the inherent jurisdiction to impose a stay until the costs were paid, and I would have exercised it. Mr Hurst is an undischarged bankrupt, and if he had been able to continue these proceedings he would have been unable to meet any further award for costs against him.

80. Mr Hurst has consented to an order of the ***Ebert v Venvil*** [2000] Ch 484 type preventing him from making any further allegations against Mr Leeming without the permission of the court.

81. As I have said, Mr Hurst has been waging an obsessive campaign. I agree with the remark made by Ferris J that Mr Hurst has been unwilling to face up to reality, and with the remarks by Lightman J that he has been so disturbed by the consequences of the dissolution of the partnership that he is incapable of a balanced evaluation of the facts.

82. It is probably too much to hope that Mr Hurst, perhaps with independent advice, will take stock of the situation in which he now finds himself, and will devote himself to rebuilding his life and career, rather than pursuing this futile and wasteful campaign. Nevertheless I express that hope in the light of Mr Hurst's repeated statements to me that he is capable of taking and following advice.

83. I will hear argument on the form of the order if it cannot be agreed, and in particular whether the order should be made under CPR 3.4 or 24.2.

Mr Philip Heslop QC and Mr Sharif Shivji (instructed by Weightman Vizard) for the Defendant