Before Tuckey LJ, Rix LJ, Mr Justice Wilson. 30th June 2005

JUDGEMENT : LORD JUSTICE TUCKEY.

1. This is an appeal by the 16th and 17th defendants in these proceedings ("Willis") from a decision of Cooke J., [2005] EWHC 409 (Comm), about the legal effect of exchanges between representatives of Willis and the claimants (C&W/Pender) at the end of November 2004. The exchanges relate to Willis' acceptance of liability for the conduct of their employee, Mr Peter Foulger. The judge rejected Willis' application for a declaration that no binding agreement had been made about this and made declarations to the contrary effect on a similar application for summary judgment by C & W/ Pender.

2. The background to the relevant exchanges can be stated shortly. In the proceedings C & W and Pender (its captive insurer) claim damages from five C&W employees and others who assisted them in an allegedly fraudulent scheme to divert premium income from Pender to companies which they beneficially owned. Mr Foulger, the 12th defendant, was employed by Willis to act as Pender's underwriting manager under the terms of a management agreement between Pender and the 16th defendant. He was also a director of Pender. It is alleged that he assisted the authors of the scheme to carry it out. The causes of action pleaded against him include conspiracy, procuring breaches of contract, and liability to account as a constructive trustee on the basis of dishonest assistance in their breaches of trust.

3. Some of the information used by C & W/Pender to mount their claim was provided by Willis who agreed to co-operate with their investigation and were kept informed of its progress. Mr Foulger was joined as a defendant in July 2004 and this raised the prospect that C & W/Pender would allege that Willis were vicariously liable for his conduct. The prospect became a reality when on 19 November Willis were told that C & W/Pender proposed to apply to join them as defendants at a CMC fixed for 26 November. Willis were anxious to avoid this and concerned as "deep pocket" defendants that they might have to pay the whole of C&W/Pender's loss.

4. The essential facts concerning the alleged agreement are not in dispute. On 23 November Mr Mitchell, a consultant with C & W reporting to the Group's General Counsel, Mr Garard, spoke on the telephone to Mr Bowden, Group General Counsel of Willis. Mr Bowden said that it was Willis' preference to deal with the consequences of Mr Foulger's conduct without the need for them to be joined in the proceedings. He proposed that Willis would accept legal responsibility for Mr Foulger's conduct and would not argue the facts. However there would need to be a mechanism (such as arbitration) agreed between C&W/Pender and Willis for quantifying the extent of Willis' contribution. Other terms were also discussed including the need for a standstill agreement and Mr Mitchell told Mr Bowden that he would ask C & W's solicitors to draft something for the parties to sign which would reflect this proposal.

5. The following day, after further discussion about the Willis proposal on the telephone between Mr Garard and Mr Bowden, Mr Garard e-mailed a draft letter of agreement to Mr Bowden for both of them to sign. It said:

   Dear Bill

   Cable & Wireless Plc and Pender v Christopher Valentine and Others

   Claim No. 2004 Folio 250

   I set out below the terms on which Cable & Wireless PLC ("C&W") and Pender Insurance Limited ("Pender") are prepared to defer the joinder of Willis UK Ltd ("Willis UK") and Willis Management (Isle of Man) Ltd into the above proceedings. If you are content with these terms, please sign a copy of this letter and return it to me overnight via pdf and courier.

   1. *Willis UK and Willis (Isle of Man) Ltd accept legal responsibility to C&W and Pender for the acts and omissions and breaches of duty of Peter Foulger, whether pleaded in Claim No. 2004 Folio 250 (the "Misfeasance Proceedings") or otherwise and will not seek to assert in any negotiations or proceedings (including the Misfeasance Proceedings) that they do not have legal responsibility for his acts and/or omissions and/or breaches of duty as regards C&W and Pender.*
   2. *Save to the extent that in the Misfeasance Proceedings an unappealed judgment at trial establishes that Peter Foulger is not liable to C&W and/or Pender in the respects alleged, Willis UK and Willis (Isle of Man) Ltd*

accept that the acts, omissions and breaches of duty alleged against Peter Foulger in the Misfeasance Proceedings occurred and will not seek to assert otherwise in any negotiations or proceedings (including the Misfeasance Proceedings).

3. Neither Willis UK nor Willis (Isle of Man) Ltd will seek to argue that they have been served late or out of time nor will they seek to delay the timetable for the hearing of the Misfeasance Proceedings or take any other point or defence of any nature against C&W and/or Pender arising out of C&W and Pender's agreement to defer service of proceedings.

4. Willis UK and Willis (Isle of Man) Ltd will enter into a general standstill agreement extending the limitation period for all other claims that C&W and Pender may have against them arising out of their and/or Peter Foulger's and/or other of their respective employees acts or omissions or breaches of duty owed to C&W and/or Pender.

Yours sincerely
Andrew S Garard
Group General Counsel
Cable & Wireless PLC
…….
Bill Bowden, Group General Counsel
Willis Group Holdings Limited

6. About two hours later the same evening Mr Bowden sent an e-mail to Mr Garard which said:
Andrew:
This looks fine, with one caveat, which I believe we both accept, that our acceptance of legal responsibility for what our employee did or didn't do properly is obviously only one aspect of what led to the problem at Pender. In our discussions we have always acknowledged candidly the difficulty of attributing fault to the various parties involved, including the principal bad actors, Pender, C&W and the other third parties you've identified, for the things they did or should have done in connection with what occurred.
I am therefore signing and returning the letter as you've drafted it, but with the understanding that our acceptance of legal responsibility is not intended to be an undertaking of full responsibility for the damages suffered by Pender and C&W, but in effect for a share in them which we are agreeing to discuss pursuant to the kind of standstill agreement that will give both of us appropriate cover as long as such discussions are proceeding in good faith and haven't broken down.
I believe this is what we both intended. If not, please give me a call … at any time …. to discuss.
Hope you feel better.
Bill

7. The following afternoon (25 November) Mr Bowden telephoned Mr Garard to reiterate what he had said in his e-mail. Mr Garard's note of this call reads:
BB [Bowden] confirmed that signing of letter is not acceptance for all losses only Willis' fair share
ASG [Garard] agreed.
ASG and BB agreed they would draft a statement of principles to set out process to agree Willis share.
BB agreed and said no rush
BB repeated that W [Willis] did not want to be joined.

In his witness statement Mr Garard elaborated on his note by saying:

I agreed that his "caveat" was in line with what we had previously discussed and that C & W and Pender agreed that Willis was accepting liability to pay only their fair share of the sums due. Mr Bowden said that the parties would need to agree a mechanism so as to determine or agree what that share should be and, as before, suggested that an arbitration or mediation might provide an appropriate means of doing so.

8. The following morning (26 November) Mr Garard counter-signed the letter agreement and sent it back to Mr Bowden. He then learned that Willis were saying that they did not accept that there was a binding agreement. He spoke to Mr Bowden about this on the telephone and the relevant part of his note reads:

BB said they were concerned (Willis UK) that they may be accepting liability for all Pender losses
ASG said not the case and Bill's e-mail of 24/11 was right in that W would be paying their fair share along with others (Marsh etc.)
BB wanted to draft a letter to supercede; ASG said no time but could do next week a statement of principles
BB said wanted another letter to supercede; ASG said no need as letter and agreement that W not liable for all CW/Pender losses is enough.

9. Later that day Mr Garard sent a confirmatory e-mail to Mr Bowden saying:
Dear Bill
Further to our discussions of this morning and last night and our written agreement of yesterday, I confirm that today neither C&W nor Pender sought to join any Willis company to the above proceedings.
As you requested, I also confirm our agreement of last night and this morning that (as you point out in your e-mail to me 24 November) Willis' acceptance of legal responsibility is not intended to be an undertaking of full responsibility for the damages suffered by Pender and C&W, but in effect is for a share in them which you and I will discuss in good faith.
Best regards

10. The judge dealt first with the argument that no contract had been made because the caveat destroyed the effect of the signed letter agreement by rejecting its essential feature of acceptance of full liability for Mr Foulger's activities. He rejected this argument on the basis that the caveat had been agreed by Mr Garard in the telephone conversation on November 25 and confirmed by his e-mail the following day. There was no reason why the letter of agreement and the caveat could not be read together. There is no challenge to this conclusion.

11. The issue therefore was whether, read together, the two documents constituted an agreement of sufficient certainty for it to be enforceable. The judge said that the caveat clearly set out a more limited acceptance of liability than the letter agreement (para. 28) and continued:
Whereas Mr Sumption Q.C. argued that this was acceptance for a share to be negotiated and that this amounted to an agreement to negotiate which was unenforceable, Mr Hirst Q.C. for C&W/Pender maintained that the second paragraph of the [caveat] e-mail had to be read in the light of the first paragraph and the prior discussions culminating in the telephone conversation of 25 November where it was agreed that Willis would be liable for "its fair share" which could be determined in any one of a number of different ways. The parties plainly had in mind the possibility of a negotiated conclusion but there had equally been mention of mediation or arbitration and the fact that proceedings were deferred left it open to the parties to refer the matter to the court for decision should that be necessary.

12. In para. 29 of his judgment the judge recognised that Willis were not prepared to accept liability for 100% of the damages for which Mr Foulger might be jointly and severally liable since other parties might be at fault and be held to have played a part in causing the damage and loss and there might have been contributory negligence by C&W/Pender. He continued:
What Willis wanted to be able to argue was that it should not bear the totality of the loss and damage suffered but it should be apportioned amongst the various entities at fault in a manner proportionate to that fault.

This is exactly the sort of exercise which the court performs under the Civil Liability (Contribution) Act 1978.

13. The judge concluded:

30. ….the effect of the caveat e-mail and the telephone conversation, as Mr Hirst Q.C. accepted, is an acceptance by Willis of its liability for a net share on this basis, taking into account the relative fault of other parties. That would represent a "fair share" being that which it was just and reasonable for it to bear in all the circumstances. There is no difficulty in the courts determining what is fair or what is just and reasonable or equitable as appears from the terms of the 1978 Act, the decision in the ***Didymi*** *[1988] 2 Lloyd's Rep. 108 at pages 115-116 and 119 and the decision in* ***Mamidoil v Okta*** *[2001] 2 Lloyd's Rep. 76 at para. 69.*

31. There is no reason to see the second paragraph as giving rise to an obligation to negotiate in order to determine the share for damages for which Willis is liable in respect of Mr Foulger's activities or the e-mail as requiring agreement to be reached on the figure for liability. The acceptance of legal responsibility is of a

share in the loss and damage which is just and equitable on the basis of attribution of fault to the various parties involved, which could be the subject of negotiation or mediation or determination by an arbitral tribunal or court. The agreement reached is akin to the kind of agreement frequently reached in litigation where a defendant accepts liability but not causation of damage nor the quantum of the loss claimed. Whilst the situation here is more complex the overall agreement is sufficiently clear in setting out the acceptance of vicarious liability but for a quantum figure which reflects the overall responsibility of all the parties involved in the litigation.

32. This agreement is quite certain enough to be enforced since the court can make any determination that is required. It is perfectly comprehensible and sensible from a commercial view-point and achieved a compromise solution which avoided the necessity for Willis to be joined in the proceedings in November 2004. No further agreement was required since, if the parties failed to reach agreement by good faith negotiation the matter was capable of resolution in the courts.

14. After hearing further submissions the judge made the following declarations:

3. Each of the 16th and 17th defendants is legally responsible to the claimants (and each of them) for the acts, omissions and breaches of duty of the 12th defendant as pleaded in these proceedings (save to the extent that in these proceedings an unappealed judgment at trial establishes that the 12th defendant is not liable to the claimants in the respects alleged) or otherwise and, subject to an assessment by the court or agreement with the claimants as to its share thereof, is liable to account and/or pay damages and/or indemnify the claimants (and each of them) in respect of the same.

4. The 16th and 17th defendants shall not seek or be permitted to assert in these proceedings or otherwise that as regards the claimants:

4.1. each of them is not legally responsible for the acts and/or omissions and/or breaches of duty of the 12th defendant as pleaded in these proceedings or otherwise; and

4.2. the acts and/or omissions and/or breaches of duty by the 12th defendant as pleaded in these proceedings did not occur (save to the extent that in these proceedings an unappealed judgment at trial establishes that the 12th defendant is not liable to the claimants in the respects alleged).

15. There is some doubt about what the judge actually decided. Mr Sumption submits that he decided that the caveat only limited the scope of Willis' admission that they were legally responsible for Mr Foulger's conduct. (What he called Option 3). Their admission of responsibility only related to that proportion of the loss corresponding to Mr Foulger's relative responsibility for what occurred. But it remained open to the parties to argue at trial whether Willis were liable for more than that, and if so, how much more up to 100%. In support of this submission he relies on the sentence from paragraph 29 of the judgment which I have quoted which refers to Willis' wish "to argue" that it should not bear the totality of the loss and the fact that neither in his judgment nor in his order does the judge say that the effect of the caveat was that Willis would not be liable for more than their proportionate share of the loss. So, if this is right, Willis are exposed to a potential liability for the whole of the loss despite the fact that this is precisely what they said they would not accept.

16. Mr Hirst does not accept that this was what the judge decided. Although his skeleton argument did not say so, in the course of the hearing he conceded that the judge did decide that the parties had agreed that Willis would pay only a fair share of the loss corresponding to Mr Foulger's relative responsibility for what happened, such proportion to be determined (in default of agreement or some other method) by the court. (Option 2).

17. I was tempted to think, having regard to the passages which I have cited from his judgment, that Mr Hirst is right about this. But in the course of argument about the form of the order the judge said:

The terms in my judgment are clear. The court which has to decide this matter will do so on the basis of a prior summary determination that there is a legally binding agreement, and will have to come to its own conclusion as to exactly what it is that that means.

The form of the order is certainly consistent with this and says nothing to suggest that Willis had limited its liability. However in view of the conclusion which I have reached on the main part of the appeal I do not think it is necessary to explore this further.

18. On the main point Mr Sumption submits that the judge should have concluded that this was no more than an agreement to agree. The parties were agreeing that Willis would pay a proportion of C&W/Pender's loss to be determined on principles which required further discussion and agreement by the parties (Option 1). There was therefore no binding agreement because it lacked certainty.

19. In support of this submission Mr Sumption says that if there was a binding agreement it must have been that Willis had some liability. The extent of that liability was all important and yet it had not been agreed. It had been left over for further negotiation and agreement by the parties. This was therefore an agreement which required further matters to be agreed in future negotiations before it was complete. What the parties believed was irrelevant because the test was objective, but if they thought they had made a legally binding agreement they were wrong because an agreement that Willis could be liable for a wholly indeterminate share of C&W/Pender's proved loss would lack legal certainty. Referring the question of Willis' share to the court would require the court to make the further determination which the parties' exchanges show they intended to make for themselves.

20. Mr Hirst submits that Mr Bowden and Mr Garard, both senior lawyers, obviously intended to enter into a legally binding agreement. The language of their written exchanges and the signing of the letter agreement (which looked "fine" to Mr Bowden) strongly support this view. The court should strive to give legal effect to what the parties intended. They were the masters of their contractual fate. Willis were most anxious not to be joined and in consideration for this they agreed that they would pay a fair share of C&W/Pender's loss. A binding agreement on these matters was essential for both parties. The agreement contemplated negotiation in good faith with a view to agreeing what that share should be, but the fact that no such negotiation took place does not mean the agreement was of no legal effect. An agreement to pay a fair share prescribed a purely objective standard or criterion. In the absence of agreement by the parties a court would be able to determine what that share should be by reference to this objective standard. In support of these submissions he relies, as did the judge, on ***The Didymi***.

21. The general legal principles applicable to the point we have to decide are well known and not in dispute. The judge summarised them in paras. 20-22 of his judgment. Mr Hirst also relied on the principle stated in paragraph 8.11 of The Interpretation of Contracts [2004] by Kim Lewison Q.C. that: *Where parties have entered into what they believe to be a binding agreement the court is most reluctant to hold that their agreement is void for uncertainty, and will only do so as a last resort.*

22. In ***The Didymi*** this court was concerned with a clause in a charter-party which required the hire to be "equitably" increased or decreased by an amount mutually agreed between owners and charterers if the speed and fuel consumption of the vessel differed from the guaranteed averages stipulated in the agreement. Dealing with the charterers' argument about uncertainty Bingham LJ said at p. 115:

    This argument centred on the use of the word "equitably", which they said had no precise or certain meaning and so lacked the certainty necessary for a term of the contract. In this context the expression "equitably" in my judgment means "fairly and reasonably". I am unpersuaded that there is any uncertainty as to the meaning of the word. There are many fields where judges and other adjudicators award general damages on the basis of what they judge to be fair and reasonable.

    Mr Sumption accepted this principle and that if the parties had simply agreed that Willis would pay a fair share of the loss (Option 2) there would have been no uncertainty.

23. So with these principles in mind I turn to the exchanges between the parties in this case. It seems to me that there is a consensus running through them that the parties would discuss and agree the way in which the Willis share of the loss would be determined. This was made clear in the first telephone conversation between Mr Mitchell and Mr Bowden – *"there would need to be a mechanism …. agreed for quantifying the extent of Willis' contribution"* (para. 4 above). It was repeated in the caveat e-mail:– Willis would not accept responsibility for the whole loss but *"for a share … which we are agreeing to discuss" under a standstill agreement which gives time "as long as such discussions are proceeding in good faith and*

haven't broken down" (para. 6). In the telephone conversation on 25 November Mr Bowden and Mr Garard agreed that they *"would draft a statement of principles to set out process to agree Willis share"* (Mr Garard's note) and "the parties would need to agree a mechanism so as to determine or agree what that share should be" (his statement) (para.7). In their conversation on 26 November Mr Garard said that he could do this the following week (para. 8). In confirming his agreement to the caveat in his e-mail of 26 November Mr Garard confirms that Willis is only accepting responsibility for a share of the total loss "which you and I will discuss in good faith" (para. 9).

24. Although at times in these exchanges the Willis share is described as a "fair" share, this was simply the label which the parties put on the outcome which they hoped to achieve. There was no unqualified commitment by Willis to pay a fair share. The parties were to discuss and agree how such a share was to be determined. They never did so. Mr Hirst conceded that if the parties had said "a fair share to be agreed" that would have been uncertain. But this, in effect, is exactly what they were saying. One of the main objectives of the exchanges must have been to find some agreed basis upon which Willis' contribution could be agreed or determined. Until this was done the agreement was incomplete in an essential respect. This is consistent with the fact that joinder of Willis was only deferred. If agreement could not be reached Willis would be joined.

25. The judge obviously did not see the case in this way. Although he cites the exchanges he does not appear to have attached any importance to the fact that they clearly show that it was for the parties to discuss and agree the way in which the Willis share would be determined. The judge's observation that the parties were leaving open the possibility of a determination of Willis' proportion by the court is not consistent with the evidence. The parties contemplated arbitration or mediation to determine Willis' share, but only in the context of an agreed statement of the principles to be applied. There is no suggestion that they intended the court to determine these matters, let alone that they intended it to carry out this task without the benefit of the parties' agreed statement of principles. If they had contemplated that the court might perform this exercise there would have been little point in deferring Willis' joinder. In para. 31 of his judgment the judge says that the second paragraph of the caveat e-mail did not give rise to an obligation to negotiate and agree on the figure for liability. The court could do that. I accept that this would be the case if there had been an unqualified agreement by Willis to pay a fair share, but there was not.

26. For these reasons I think the judge reached the wrong conclusion. Of course the court must strive to give legal effect to what parties have agreed and in this case it may be that Mr Garard and Mr Bowden did think that they had entered into a binding agreement. But an agreement to agree an essential term or terms is not such an agreement. The court cannot make for the parties the agreement which they have not made for themselves.

27. At the end of the hearing on 23 June we announced that the appeal would be allowed, the judge's order be set aside and that we would make a declaration that the parties had not reached a binding agreement. These are my reasons for this decision.

LORD JUSTICE RIX:

28. I agree.

29. The parties' agreement – whether it was a binding contract is the point at issue – is complicated by the fact that it was made partly in writing and partly orally, and also by the fact that that part of it in writing, namely the signed and countersigned letter and the caveat e-mail, were of such different natures, the first being a formal document, apparently drafted by C&W's solicitors and the second being a communication of a much more informal kind from Mr Bowden himself. That e-mail was then discussed and agreed in the course of a telephone conversation between Mr Garard and Mr Bowden on 25 November 2004. The formal letter itself arose out of an essential agreement arrived at in oral discussions between Mr Mitchell and Mr Bowden on 23 November, which the formal letter was intended to evidence. The fact that C&W's proposed draft in the formal letter did not faithfully replicate the essence of those earlier discussions is the background to the difficulties in which the parties now find themselves. Since the parties' agreement was only finally reached on the basis of the formal letter, the caveat e-mail and the parties' telephone conversation of 25 November, which itself

recognised that the formal letter had not adequately stated the parties' original discussions, the task for the court is to distil the true effect of these communications as a whole.

30. Therefore, while the terms of the formal letter cannot be ignored, because both parties have clearly assented by their signatures to what it contains, the effect of their overall agreement cannot be allowed to be inconsistent with other critical evidence of their consensus, such as that found in the e-mail and in Mr Garard's own statement of their agreement, viz his note of the 25 November telephone ("agreed they would draft a statement of principles to set out process to agree Willis share") and his e-mail to Mr Bowden of 26 November ("in effect for a share in [those damages] which you and I will discuss in good faith"). In this context it needs to be recalled that in the discussions of 23 November there was reference to arbitration and again in the telephone conversation of 25 November there was reference to both arbitration and mediation. There is also, of course, reference in both the formal letter and the caveat e-mail to the need for a standstill agreement in case after all, in default of everything else, the parties had to end up in court and Willis needed to be joined to the current (or other) proceedings.

31. What then was the essence of the agreement reached by the parties in these circumstances? Despite dispute as to its effect, a dispute which before the judge embraced each of Mr Sumption's three options but has been narrowed only in the course of submissions before this court to Options 1 and 2, it is at least common ground that an agreement was ultimately arrived at. The force of Mr Hirst's submissions concerning the formality of the signed and countersigned letter, which he said supported a contract, is in my judgment expended on showing consensus. Like my Lord, I am satisfied that what the parties agreed was to negotiate a fair share on principles to be discussed and agreed. They expressly contemplated that such principles would include a clause for arbitration or mediation, in case ultimate agreement on a fair share were not possible. It may be that if they had reached agreement on a set of principles, a fortiori one including arbitration, they would then have agreed enough to be bound. Mr Bowden did promptly propose a set of principles, but the arrangement had already broken down.

32. Alternatively, it is possible that the parties would only have been bound if they had reached ultimate agreement on the question of a fair share itself. That would be the case if the true effect of their agreement was for a fair share to be agreed. The distinction between an agreement for a fair share to be agreed or for a fair share on principles to be agreed is a narrow one, but they can be encompassed as variations of Mr Sumption's Option 1.

33. In either event, there is a substantial and important distinction between those variations of Option 1 and a simple agreement for a fair share. In the latter case, the court has itself been provided straightaway with the measure for its determination and can proceed to quantify the figure: *The Didymi*. In the former case the parties have agreed that they will themselves provide either the principles for finding the measure and/or the quantification of the share itself. It is like the distinction between agreeing, whether expressly or by implication, that the price of goods to be sold is to be a fair or reasonable price and on the other hand agreeing that the price is to be a price "to be agreed". In the first case the price will be set by the court (if none is previously agreed by the parties), but in the second case the parties have said that they, and not the court, will agree the price: see ***May and Butcher Ltd v. The King*** [1934] 2 KB 17, at 21, 22. It is true that where a binding contract already exists, a provision that prices for future years are to be agreed is likely to remain a binding part of that contract: see ***Mamidoil-Jetoil Greek Petroleum Co SA v. Okta Crude Oil Refinery*** *AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep 76, especially at 91, an authority relied on by the judge below. However, *Mamidoil* distinguished between a long-term contract which undoubtedly binds the parties initially and an agreement like the present where there is an issue from the very beginning as to whether it ever amounted to a contract at all.

34. In these circumstances Mr Hirst's best argument was that where he emphasised those terms of the formal letter, such as its paragraphs 3 and 4, which make stipulations premised on the possibility that at the end of the day Willis may have to be joined to the current proceedings (the "Misfeasance Proceedings") or other proceedings arising out of "other claims". Thus paragraph 3 states that Willis will take no point of procedure or substance about late service or joinder in the Misfeasance

Proceedings due to C&W's agreement to defer service; and paragraph 4 makes provision for a standstill agreement extending the limitation period for the other claims. Mr Hirst submitted that it must have been intended that such provisions would be binding, if Willis were not to be joined then and there in the Misfeasance Proceedings.

35. It seems to me, however, that this argument is at best a double edged sword, for the terms in question themselves contemplated that the parties would try but might fail to reach a binding agreement for themselves, thereby making litigation necessary. If, however, the parties failed to reach agreement for themselves, why should only certain aspects of their agreement, such as the concessions made by Willis, be binding? The formal letter expressly contemplated that the only concession to be made by C&W dealt with in that letter, namely deferral of joinder, was just that, potentially a deferral only. Moreover, even though the formal letter has been drafted without reference to the essential quid pro quo of those concessions, namely, not so much the deferral of joinder but the limitation of Willis's liability to a fair share, to be agreed, of the relevant damages, its language retains, like a first design covered over by later repainting, the parties' underlying agreement that the principles of their agreement had yet to be agreed and that a binding contract still lay in the future. Thus paragraph 4 speaks of a future standstill agreement yet to be made: *"[Willis] will enter into a general standstill agreement extending the limitation period for all other claims that C&W and Pender may have against them…").*

36. Moreover, although the terms of the formal letter, if not part of a binding contract, would not have contractual effect, so that C&W could not say, as perhaps they very much would have wished and may have thought that they were entitled to say, that Willis had bound themselves by contract in the terms of paragraphs 3 and 4 (and indeed paragraphs 1 and 2), there are at least three answers to that. First, there is no reason in logic or fairness why Willis should have been contractually bound by their concessions unless C&W were similarly contractually bound by their concession, namely that Willis's admitted liability was to be contractually limited to only a fair share. If that quid pro quo was left contractually unresolved, reflecting the different language of the caveat e-mail, the oral discussions and Mr Garard's confirmatory letter of the 26 November, then the whole agreement could not have contractual status. Secondly, although Willis's concessions recorded in the formal letter would not have contractual status, they could still have been of advantage to C&W in any subsequent litigation. Thirdly, there was nothing to prevent C&W protecting themselves by the issue and even service of other proceedings pending final agreement; nor was there anything to prevent C&W from issuing a further, albeit post CMC, application for joinder in the Misfeasance Proceedings.

37. For these reasons, as well as those of Lord Justice Tuckey, I agree that the appeal should be allowed, the judge's order set aside, and a declaration made that the parties had not reached a binding contract.

MR JUSTICE WILSON: I agree with both judgments.

Jonathan SUMPTION Q.C. and Colin WYNTER (instructed by Lovells) for the Appellants

Jonathan HIRST Q.C. Andrew MITCHELL and Patrick GOODALL (instructed by Clifford Chance LLP) for the First Respondent and Barlow Lyde & Gilbert (for the Second Respondent)