

CA on appeal from QBD [Order of Mr Justice Curtis] before Ward LJ; Carnwath LJ; Mr Justice Newman. 23rd July 2003

Lord Justice Ward :

1. On 30th October 2002 Curtis J. struck out the particulars of claim issued by the claimant, VAI Industries (U.K.) Ltd. ("VAI"). He did so because he concluded that the claimant's arguments that the claim was not statute barred were "doomed to failure". VAI now appeals with permission granted by Longmore L.J.

The Facts.

2. This claim arises out of major engineering works commissioned by Hindustan Aluminium Company ("Hindalco") of India which wished to modernise its hot and cold aluminium rolling mills in Renukoot, India. A predecessor of the claimant, Davy McKee (Poole) Ltd. ("Davy"), secured the contract for that work and over a period of time negotiated with the first defendant, Bostock & Bramley Transmissions Ltd. ("Bostock") for the supply of gearboxes, couplings and lubrication systems ("the equipment"). On 5th September 1994 Davy entered into an agreement with Bostock contained in the purchase order and Davy's standard terms and conditions of purchase to which I shall refer further. The total value of the order was some £400,000.
3. The purchase order made clear that the work related to the "Hindalco hot and cold mill modifications". The scope of the supply was described to be:-
"Design, detail, manufacture, assemble ... test and deliver to nominated packers ..."
The items of equipment to be supplied included the main drive gearbox. There were a number of indications that the equipment was required for installation in Hindalco's mills in India, for example, it was noted with reference to the entry coiler gearbox that:-
"The output shaft will be fitted in India, hence gear unit must be made with a dummy output shaft to enable the unit to be assembled with all gearing, for running test to be carried out. After acceptance test, output gear to be removed and separately packed."
The terms for payment set out stage payments and for the last 5% it was provided that there be "retention for 6 months from acceptance by client or 18 months from ex-works delivery".
4. More importantly for present purposes, the conditions of contract stipulated that Davy's "terms and conditions of purchase" were to apply "except where modified or added to by the clauses included within this purchase order". Material to this appeal was the warranty clause contained in the purchase order providing as follows:-
"WARRANTY
All equipment is to be warranted as free from defects in Design Materials and Workmanship and must conform to the specification and drawings.
The warranty period is for no longer than 24 months from F.O.B. Provided that delay in equipment acceptance is not attributable to equipment of your supply."
5. The standard terms and conditions of purchase contained the following definitions:-
"Delivery" means the delivery of the goods to the buyer or to the buyer's named destination or the placing at the buyer's disposal of the work or any part thereof in accordance with the terms of the order or the buyer's instructions as applicable.
"Acceptance" means the final acceptance of the work by the buyer following installation and their relevant commissioning and performance trials, and acceptance by the buyer's client or principal.
The crucial term, however, was the guarantee in clause 8. It seems to fall naturally into three parts and although these parts are not numbered as it stands in the printed document, I have for convenience inserted the sub-clause numbering thus:-
"GUARANTEE
(1) Unless specified in the order the Work or part thereof, supplied in execution of the Order, shall be guaranteed for a period of 12 months from the time when the Work or part thereof is accepted. Any work or part thereof which becomes defective during this period by reason of faulty materials, workmanship, quality or design shall be replaced free of charge and the goods or part thereof so replaced shall be guaranteed for a further period of 12 months from the date of putting to work or acceptance as appropriate. (2) Repairs to any defects in materials or workmanship shall not be carried out unless agreement has previously been obtained in writing from the Buyer. Failure to comply with this shall render the Supplier solely responsible for any and all claims which purport to be due to said defect as may be advised to the Supplier by the Buyer. (3) If any latent defect be found or shall appear in the Work within a period of 3 years or such other time as may be specified in the Order from the date of acceptance of the work the defects shall be made good by the supplier at his own cost and risk ..."
6. The business carried out by Davy was then taken over by Kvaerner Davy Metals Ltd. ("Kvaerner") and then in turn by the claimant, VAI Industries (U.K.) Ltd. For convenience, and where appropriate, I shall refer to the claimant and its predecessors collectively as "the buyer". Bostock has also gone out of business and is a dormant company. It is wholly owned by the David Brown Group for whom David Brown Special Products Ltd. ("David Brown") has acted as agent. Again for convenience and where appropriate, I will refer to the defendants collectively as "the supplier". The claimant alleges in the particulars of claim that there has been a novation so that the contract is to be treated as being between Kvaerner and David Brown and that Kvaerner's rights and interest in the contract have been assigned to the claimant.

7. The equipment was delivered to packers nominated by Davy on 28th July 1995. It is common ground that delivery FOB took place as at that date. It must follow that the 24-month warranty period would run from that time and expire on 28th July 1997. In fact the equipment was not shipped to India until early in 1996. Installation of the equipment began in about July 1996 and the hot mill was commissioned and commenced production in about March 1997. Provisional acceptance by Hindalco of the Hot Mill was given shortly after commissioning in March 1997.
8. On 31st August 1998 part of the equipment, being the main drive gearbox, suffered a catastrophic failure. Hindalco heard an abnormal noise from the main drive gearbox and on inspection it appeared that the second reduction pinion had sheared from the stepped position for mounting the first reduction wheel and the teeth of the reduction wheels were damaged. Various meetings were held and the minutes were put in evidence. On 1st September 1998 it was agreed that *"this was an unusual and premature failure"*. David Brown stated that the gearboxes were out of warranty and that should investigations prove that no material or design fault caused those failures, then David Brown would require reimbursement of costs. On 11th September 1998 David Brown *"firmly"* stated that the gearbox was out of warranty but that they *"have shown faith by sending an engineer to site to oversee temporary repairs and by initiating replacement parts without a commercial agreement"*. On 25th September 1998 David Brown wrote:-
"We propose to supply new first and second stage gear sets for both sides of the gearbox. The gear sets will include pinions, wheels and bearings and will be fitted under the supervision of our engineer. The first intershaft wheel seating will be increased in size to give added strength. Complete gear sets will facilitate ease of assembly on site and ensure any damaged gears and bearings found will be replaced. Although the gearbox was supplied by Bostock & Bramley, we will, in this instance and without prejudice, provide these parts free of charge."
There was a meeting on 30th November 1998 which Hindalco attended and the minutes of that meeting recorded:- *"Hindalco requested official notification from [David Brown] that both the Cold and Hot mill drives would be able to operate at the correct duty following the repairs. [David Brown] stated they would supply official comment in writing to [Kvaerner]. [David Brown] confirmed that they will supply engineer to oversee repairs to hot mill."*
David Brown's own note of the meeting was:- *"Failure of second pinion shaft was raised by [Hindalco's representative] who said his experts had questioned where keyway stopped. He also asked for confirmation that redesign would ensure unit was suitable for duty specified by Kvaerner. It was explained that unit was designed by Bostock & Bramley before being taken over by [David Brown] as none of the design engineers still work for us, we could not comment on Bostock design philosophy. However the changes made ensure the modified gears were suitable for duty. ... [David Brown] design to confirm suitability of hot mill for specified duty to Kvaerner."*
9. In about February 1999 David Brown supplied the replacement parts which were installed under the supervision of its engineer. It was not successful. From November 2000 onwards the replacement parts fitted by the supplier suffered progressive failures and began to break up. A further meeting was held on 4th April 2001 between VAI and David Brown. A minute records that:- *"After discussions it was concluded that based on the gears presently fitted then it would not be safe to approve any increase in power. It was also concluded that fitting uprated gears as outlined would not make the unit suitable for customer's requirements of overload capacity of 250%. It was concluded by the meeting that to meet the requirements of Hindalco then a completely redesigned unit was required."*
The order for this replacement was placed with Italian manufacturers at a price of about £97,000.
On 18th July 2001 Davy brought a claim against Bostock for damages, alleging that in breach of the express terms of the purchase order or the implied terms, the gearbox and driver units were not of a satisfactory quality and were not fit for their purpose nor free from defects. For some unexplained reason that claim was not served and those proceedings were withdrawn.

The claim.

10. On 1st February 2002 this claim was launched. Any cause of action which accrued before 1st February 1996 would be statute barred by operation of section 5 of the Limitation Act 1980.
11. In paragraph 21 of the particulars of claim the buyer relied first upon the express terms of the warranty that until 28th July 1997 the equipment would be free from defects in design, materials and workmanship and would conform to the specification and drawings provided to the supplier. Secondly the buyer relied on the express term of the guarantee in clause 8 that any latent defect found within three years from Hindalco's provisional acceptance in March 1997 should be made good by the supplier at its own cost and risk. Thirdly it was alleged that there was an implied term of the contract that if defects were made good pursuant to clause 8 of the standard conditions, then the equipment (including any replacement parts) would be free from defects in design, materials and workmanship and would conform to the specifications and drawings. Finally it was alleged in paragraph 22 that there was an express or alternatively an implied term of an agreement made with David Brown in November 1998 that after the replacement parts were fitted the main drive would be able to work at the correct duty.
12. The buyer alleged that there were breaches of the agreement in that the main drive gearbox was not free from defects in design and did not conform to the specifications on 28th July. Nor were the replacements and repairs. The main drive remained unable to work at the correct duty.
13. The supplier contended that:- *"Since the allegation of breach ... is of defects in design and/or non-conformity with specifications provided to the (supplier) the limitation period under the Limitation Act 1980 began to run from 28*

July 1995. Accordingly the limitation period expired at midnight on 27th July 2001. The present proceedings were not commenced until 1 February 2002. In the premises this action is statute barred so far as breaches of the contract are concerned."

14. The supplier accordingly applied for an order that the claimant's claims be struck out under Rule 3.4, alternatively for an order for summary judgment under Rule 24.2 because "the claimant has no real prospect of arguing successfully that claims under the 1995 agreement are not statute barred".

The judgment under appeal.

15. Curtis J. gave a very short extempore judgment. His view of the case was this:-
"The cause of action, I think it is agreed, arose on 28th July 1995. If it is not agreed, that is my finding of fact. ...
The other findings of fact I need to make are firstly that this is case of a complaint that the gearing was defective from the very start ...
In my judgment further, the work of replacement on which there has been reliance, was within the initial contract. ...
The claimants now say that the limitation iron curtain has not come down because of a warranty of 24 months which it is said started to apply on 28th July 1997. I do not consider that is a sustainable argument. The date is completely misconceived. In my judgment that warranty is not some further or other contract outside and in addition to the contract of September 1994.
Similarly, clause 8 of the standard conditions of the defendant's terms of business, which are in a not unusual form, provide for an extension of 3 years for a form of guarantee. In my view again, it is completely unarguable to say that that results in some period of extension, said to be 3 years, or even 24 months as the defendants say.
Again, that cannot possibly be some independently standing agreement outside the original agreement which would have the effect of extending the period of limitation provided by s.5 (that is to say 6 years) to start time running only from the end of the warranty period or the guarantee period.
So I am afraid I hold without hesitation that neither of those two arguments have any chance whatever of success.
The final route round the application of the period of limitation is what is said to arise out of what was done in February/March 1999 by way of rectification, if I may use that expression in a lay manner, of the failure of the parts of the gearing. In my judgment as I have already said on the question of fact, it was done within the initial contract and did not in any way, start a new contract (whether it was with the same or different people) at all. Consequently I see no merit in that submission by the claimants.
Having regard to my views as to (a) the true date of the breach of contract namely 28th July 1995; and (b) the expiry of the 6 year time limit, I have no doubt in my mind that this action is statute barred."

Permission to appeal.

16. Permission to appeal was granted by Longmore L.J. who said:-
"There is sufficient prospect of success for permission to be granted. I would suggest that the second way of putting the claimant's case is rather stronger than the first way. I doubt that Lord Diplock, by his use of the phrase "continuing warranty" in *Lambert v Lewis* [1982] A.C. 225, 276, meant to extend the limitation period to enable it to begin at such time as any defect in the goods was discovered. The warranty is more probably that, at the date of delivery, the goods must be fit for use for a reasonable period thereafter, cf *Mash & Murrell Ltd. v Joseph I. Emanuel Ltd.* [1961] 1 W.L.R. 862, 865 per Diplock J. Nevertheless, it is right that the claimants should be able to argue their whole case.
Strictly speaking the claimants would succeed if they can show that their case is sufficiently arguable to defeat the defendants' application for summary judgment or for striking out. It is therefore a condition of the granting of permission that, unless the full court otherwise orders at the hearing of the appeal, the claimants are to agree that the limitation period be treated as a preliminary point, so that the court's decision on the matter will be final."

The common ground.

17. It is agreed, subject to our deciding otherwise, that the argument on limitation be treated as a preliminary issue. It is, moreover, common ground that in contract time begins to run from the moment of the breach of the contract unlike cases in tort where time begins to run from the date of damage.

The first claim: breach of warranty.

18. It is important to note that this is not simply a claim for damages for defective goods, but a specific claim for the breach of warranty pleaded as follows:-
"21.1. Pursuant to the [warranty], it was an express term of the Contract that the Equipment would until 28 July 1997 be free from defects in Design, Materials, and Workmanship and would conform to the specifications and drawings provided to the First Defendant; ...
23.1. In breach of the term pleaded in paragraph 22.1 above, on 28 July 1997 the Hot Mill main drive gearbox was not free from defects in design and did not conform to the specifications provided to the First Defendant."
19. Ms Elizabeth Jones Q.C. submits in summary that that warranty imposed on the supplier a continuous obligation to have the equipment free from defect and conforming to the specifications throughout every day of the twenty-four month period so that failure to do so was a breach which occurs on each day including the last day. Thus time ran from the date of the last breach which would be two years after delivery i.e. 28th July 1997. Mr John Davies Q.C. relies on the ordinary rule that time begins to run from the date of the breach and submits that since the goods were defective when delivered, time began to run from delivery. He submits that the claimant confuses a

continuing warranty and continuing breach. His case is that once the breach has occurred, time starts to run for limitation purposes. There is not a fresh breach every day.

20. I am a little surprised not to find authority directly on the point. In *Mash v Murrell* a cargo of potatoes was properly stowed on the vessel in Cyprus bound for a normal voyage to Liverpool. On arrival at Liverpool the potatoes were found to be affected by soft-rot and unfit for human consumption. Diplock J. posed the question to be this:- *"whether merchantability in a contract of this kind does require that they should remain, from the time of delivery, which is, of course, in a c.i.f. contract, at the time of shipment, in a merchantable condition until delivery at destination and for a reasonable time for disposal."*

It was in other words a question about what kind of goods had to be delivered. Once that question was answered the next question was whether at the moment of delivery the goods were of that quality. There never was an issue about the date at which the goods had to meet the test. It was always accepted that the date of delivery was the only relevant date. Diplock J. held at p.870 that the answer was:-

"... these goods being bought c. & f. Liverpool, the warranty as to merchantability was a warranty that they should remain merchantable for a reasonable time, the time reasonable in all the circumstances, which means a time for the normal transit to the destination, Liverpool, and for disposal after. That warranty was, in my view, broken."

21. In *Lambert v Lewis* the claimant brought an action for damages for personal injuries sustained when a trailer became detached from the defendant's Land Rover and careered across the road into the claimant's path. A brass spindle and handle had broken off the trailer coupling. The defendant was negligent in failing, when he knew that the coupling was damaged, to have it repaired or to ascertain if it was still safe to use. He brought third party proceedings against the garage owners who supplied it. The case proceeded on the basis that the towing hitch was defective in design and dangerous in use. As Lord Diplock posed it:-

"... the first inquiry to be made is: what are the terms of the warranty which it is claimed was broken?"

22. The real question, however, was this:-

"The farmer's liability arose not from the defective design of the coupling but from his own negligence ... The issue of causation, therefore, on which the farmer's claim against the dealers depended, was whether his negligence resulted directly and naturally, in the ordinary course of events, from the dealers' breach of warranty. Manifestly it did not."

As to the nature of the implied warranty which arose under s.14(1) of the Sale of Goods Act 1893, Lord Diplock said this at p.276:-

"The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear. What is a reasonable time will depend on the nature of the goods but I would accept that in the case of the coupling the warranty would still continue up to the date, some 3-6 months before the accident, when it first became known to the farmer [the owner of the Land Rover] that the handle of the locking mechanism was missing. Up to that time the farmer would have had a right to rely on the dealers' warranty as excusing him from making his own examination of the coupling to see if it were safe; but if the accident had happened before then, the farmer would not have been held to have been guilty of any negligence to the plaintiff. After it became apparent to the farmer that the locking mechanism of the coupling was broken, and consequently that it was no longer in the same state as when it was delivered, the only implied warranty which could justify his failure to take the precaution either to get it mended or at least to find out whether it was safe to continue to use it in that condition, would be a warranty that the coupling could continue to be safely used to tow a trailer on a public highway notwithstanding that it was in an obviously damaged state. My Lords, any implication of a warranty in these terms needs only to be stated, to be rejected."

23. This was not a case deciding when a breach of the implied warranty would occur. It seems to have been assumed, as is ordinarily the case, that the breach occurred at the time of delivery. The question there was whether the warranty still had any operative effect at the time of the accident so as to justify the farmer's failure to repair the coupling. That is a different question from the one before us.

24. Chadwick L.J. commented on *Lambert v Lewis* in *Viskase Ltd. v Paul Kiefel GmbH* [1993] 3 All E.R. 362 a case which was referred to us late in the course of the oral argument. There the issue was where the place of performance was for the purpose of determining whether the proceedings should be stayed under Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. Drawing on Lord Diplock's observation that there was *"a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time"*, counsel for the claimant submitted that the seller continued to have obligations to perform. Chadwick L.J. held at p.378 that:-

"The question to which [Lord Diplock] was addressing his remarks in that passage was not when the obligation arose, but what was its scope. He pointed out that the obligation was to deliver goods which were fit for the purpose at the time of delivery and which (as delivered) could be relied upon to remain fit for that purpose for a reasonable time thereafter; but he said nothing to suggest that there was an obligation which required the retailer to do anything in relation to the goods once they had been delivered. Indeed it is difficult to see what the retailer could do in the circumstances. ... The plaintiffs' submissions, as it seems to me, seek to elevate the warranty as to fitness for purpose into an undertaking to guarantee future performance. I find nothing in the pleaded case which suggests that the plaintiffs seek to rely on a guarantee of future performance; and nothing in the documentation which has been put

before us which would justify a conclusion that the plaintiffs have any prospect of establishing that this defendant undertook to guarantee future performance. The obligation relied upon is, in my view, the obligation which arose (if at all) under an implied warranty that the machines would be fit for the known purpose."

25. The textbooks on this subject refer to *Chapman v Gwyther* (1866) L.R. 1 Q.B. 463. This case concerns the sale of a horse which the vendor "warranted sound for one month". The horse was delivered on 12th June, examined and considered sound until 8th July when he was discovered to be lame and the subsequent examination proved him to have navicular disease. The purchaser wrote to the defendant on 9th July informing him of this. The purchaser's claim failed. Blackburn J. held:-

"The real question is, taking the writing of the 5th June, "warranted sound", with the defendant's signature, and then "warranted sound for one month", what is the true construction of it? The words will admit of the construction that the vendor undertakes that the horse is now sound, will continue sound for one month; but that would be a most improvident bargain, and a very unlikely one for anyone to enter into. It would be much more likely that the words "for one month" were intended to apply to the duration of the warranty itself. ... I am therefore of the opinion that the meaning of this warranty is that the horse is warranted sound, provided that complaint must be made of the unsoundness within one month from the date of sale."

Lush J. was of the same opinion. He said:- "We are to put such a meaning, if possible, on the words used as to express the real intention of the parties. Now, it cannot be doubted that the seller intended, not to extend, but to limit the ordinary liability on a warranty of soundness. If the horse be simply "warranted sound", the buyer may claim damages, at any time within the time limited by the Statute of Limitations, for the breach, by shewing the horse had disease or the seeds of disease at the time of sale; and the longer time that elapses between the sale and the complaint the more difficult and expensive the question becomes. Therefore a person dealing in horses might very reasonably say, any dispute as to soundness shall be determined within a given time; and the defendant has expressed this in a very compendious form. He must have meant, "I won't be liable on my warranty unless complaint be made within a month". In order to put the construction contended for by the plaintiff, that the horse is warranted, not only sound now, but to continue sound for one month, some words must be inserted which the rules of law prevent. Whereas "warranted sound for one month," expresses without more that the horse is warranted for one month, that is, that the warranty shall continue in force for one month. The plaintiff failed to prove a breach within the meaning of this contract ..."

26. I have also considered *Bell v Peter Browne & Co.* [1990] 2 Q.B. 495 where limitation in a solicitors' negligence/breach of contract case was the issue. The solicitors had for years failed to take steps to prepare or execute a deed of trust which would have protected their client's interest in a property registered in his wife's name. Nicholls L.J. referred at p.501 to:- "... the normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligations in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast there are exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day so that on each successive day there is a fresh breach. A familiar example of this is the usual form of repairing clause in a tenancy agreement. Non-repair for six years does not result in the repairing obligation becoming statute-barred while the tenancy subsists. The obligation of the tenant or the landlord to keep the property in repair is broken afresh every day the property is out of repair ..."

27. Another example of a continuing breach is the unusual case of *Shaw v Shaw* [1954] 2 Q.B. 429 to which Ms Jones drew our attention. That was a claim for damages for breach of promise to marry where a married man representing himself to be a widower went through a form of marriage with the claimant. His wife died and a few years later he himself died intestate. Only after his death did the claimant become aware that she had never been legally married to him. Denning L.J. held:-

"Every man who proposes marriage to a woman impliedly warrants that he is in a position to marry her, and that he is not himself a married man; and he reaffirms that warranty when he afterwards goes through a form of marriage with her – whether in church or in a registry office. To take the familiar words of the banns of marriage, he warrants that there is no "cause or just impediment" why he should not marry her. Every day of their married life he continues the warranty; he warrants that their marriage was valid and that there was no impediment to it. In the present case the law imports that Percy Shaw gave such a warranty to the plaintiff. ... In my judgment Shaw broke his warranty at every point. He broke it when he proposed marriage; he broke it when he married the plaintiff; and he broke it throughout their married life. That breach continued all the time. The most important breach of all was at the moment of his death, because when he died she was not his widow as she thought she was. She was in law a stranger. That is the breach for which, in my judgment, damages can be recovered."

28. These cases show that there are three possibilities:-
- i) As Ms Jones contends this is a promissory warranty that each day the equipment would be free from defects in design and in conformity with the specification.
 - ii) Mr Davies' primary case is that the twenty-four month period simply defines the reasonable time after delivery that the equipment is to continue to be of proper quality.
 - iii) As with the warranted horse, the two year period serves to limit the duration of the warranty.

The answer to the problem will depend upon the true construction of this particular contract.

29. In ascertaining the meaning which this claim would convey to a reasonable person, one must have regard to the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. It was known, as words in the contract make abundantly clear, that the equipment was required for installation in the modifications to Hindalco's mill in India. It must have been apparent that time would elapse after delivery to allow for shipment, then for installation and then for commissioning before some kind of acceptance. There was not likely to be any opportunity for intermediate inspection which would be capable of revealing any fault before the system became fully operational. Yet if there was to be a breach of the obligation that the equipment was free from defects in design and conform to the specification, that latent defect was likely to exist at the moment of delivery.
30. Against that background I do not consider that the words *"the warranty period is for longer than twenty-four hours from F.O.B."* are words of limitation. As Blackburn J. said, that would have been *"a most improvident bargain"* for the buyer to have made. This term was in the buyer's purchase order and there would only have been disadvantage to the buyers if they were to preclude their having any remedy at all if they failed to notify a defect within two years. There were many uncertainties about how long it would take before a defect might reveal itself. As it was provisional acceptance was given about four months before the end of the two year period. It could have been longer. Moreover, the warranty must also be read in the context of the whole agreement including the guarantee. The guarantee in clause 8 operates from the time the work is accepted. The warranty governs the first period of two years or some lesser time than that. In the ordinary course of events one would expect acceptance to follow and then the guarantee kicks in. It seems to me to be highly unlikely that the parties intended that if a claim for defective work was not notified within the warranty period the buyer would lose all its remedies including those under the guarantee. The defence does not plead this meaning asserting only that:-
"Pursuant to the term [for delivery and the warranty] the warranty period commenced on delivery ... and accordingly expired without any breach thereof on 27th July 1997 ..."
- As the respondent's skeleton argument makes clear, this is pleaded as *"a factual allegation"*. So I reject any argument that the warranty was limited in time and that the claim would fail because notice of the defects was not given within that two year period.
31. I turn to Mr Davies' main submission that the twenty-four month period is there to avoid argument about how long a reasonable period would be and by fixing that at the maximum length of twenty-four months. But was this warranty intended to bring clarity to the definition of the durability of the equipment? I think not. The first part of the warranty was concerned with the definition of the quality standards the equipment had to meet – free from defects in design, conform to specification – and it does not seem to me to be a case where the extent of durability needed to be covered. The nature of the quality condition expressly prescribed in the warranty is explicit. If the equipment did not comply with that standard, the supplier was in breach. Little purpose seems to me to be served, as it was served in *Mash v Murrell*, by saying that the equipment had to remain in that condition for a reasonable time after delivery. Either the gears met the standard when they were delivered or they did not. A two year period would not make it significantly easier or more difficult to establish the breach. A purposive approach does not seem to me to assist this argument.
32. There seems to me, however, to be another and more fatal objection to the argument. If the purpose was to bring certainty to the uncertain concept of a reasonable time, then it is not achieved by providing a warranty period of *"up to twenty-four months"*. In what circumstances would it be reasonable to have less than twenty-four months? If the purpose was to define the reasonable time, this purpose is not accomplished by this provision and it destroys the basis of Mr Davies' argument.
33. That leaves Ms Jones's construction, but not by default only. There is force in her submission that:-
"Here, all parties knew that the goods would be shipped and installed elsewhere; what was needed was a warranty that (loosely speaking) when the goods were first used they would be in accordance with specification."
34. On that basis the warranty does meet the purpose of ensuring that during the expected passage of time taken from delivery to installation and commissioning the equipment would comply with the warranty standard. This interpretation makes it possible to understand why the period is *"up to"* twenty-four months. The earlier cut-off point of twenty-four months caters for the possibility that the latent defect will have become patent within the contemplated two years. Once it had become obvious then the warranty would no longer operate. Whilst, however, the warranty did continue, the supplier was promising that the equipment would meet the standard at the time when it was delivered, at the time when it was installed, at the time when it was commissioned (and by implication for a reasonable time after commissioning).
35. This was a warranty for the equipment to be free from defects in design and conforming with the specification. Either the design was good or it was not. If it was not the equipment would have been delivered with that defect. There is, as I have already indicated, no point in providing that it should remain free from defects in design for a reasonable period. The reasonable period becomes meaningless. So some other meaning has to be given to the warranty being for up to two years. If the warranty continues for two years it seems to me inevitable that it is a promise that for each day of the two year period the equipment will be free from defect. For every day it continues to have a defect there is a breach and in my view Ms Jones is right in her submission.
36. It follows that the claimants can rely on a breach of the warranty up to 27th July 1997 and the claim is not statute barred. I would so declare for the purpose of treating this as a preliminary issue and if consequential orders are

needed such as, for example, striking out certain paragraphs of the defence raising the limitation point, then further argument can be addressed to us by counsel failing their agreement about the right order.

The second claim: replacement under the guarantee in clause 8.

37. This claim relies on the third part of the guarantee that if any latent defect be found or shall appear within the Work within a period of three years from the date of Acceptance of the work the defects shall be made good by the supplier at his own cost and risk. It is then submitted that there was an implied term that if replacement equipment was supplied the replacement parts would be, like the original parts, free from defects in design and conform with the specification.
38. It will be remembered that it is expressly provided that the standard terms and conditions apply except where modified or added to by clauses included within the purchase order. So the first question is whether or not clause 8 of the standard conditions survives or whether it has been modified in some way by the terms of the purchase order. I can see no reason why it should not apply intact. The warranty describes the quality conditions the equipment must meet. The warranty begins with delivery. The relevant third part of the guarantee provides for quite a different remedy, namely making good any latent defect. The period is different, being a defect which appears within three years from the date of acceptance. The clauses serve different functions as Ms Jones submits in her homely analogy of a domestic washing machine which comes with warranties as to its fitness for purpose and a guarantee that parts will be replaced if it breaks down. The fact that they give separate remedies that they can survive independently: it does not mean that the guarantee has been "modified" in such a way as to have been replaced by the warranty.
39. As I have already set out, the guarantee is in respect of latent defects which appear within three years "from the date of Acceptance". Acceptance as there used must bear the meaning it was given in the standard terms namely "final acceptance of the work by the buyer following installation and their relevant commissioning and performance trials and acceptance by the buyer's client". There may be a dispute of fact as to whether or not the buyer has accepted and there is no doubt a dispute about what constitutes acceptance by Hindalco. Whether or not acceptance would include the provisional acceptance by Hindalco may be a matter of argument which will turn upon evidence to be given at the trial. It is not possible, in my judgment, for this court to resolve this dispute on the papers. I am, however, satisfied that the defendants failed to show that the claimants have no realistic prospect of establishing their claim for the purposes of summary judgment nor that their statement of case is so unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded as to merit being struck out. On the second claim I would not be prepared to treat this appeal as a determination of a preliminary issue.
40. The claim depends next upon an implied term that any replaced goods should meet the contractual conditions imposed for the original equipment. In my judgment this must have been the presumed intention of both the parties. It gives the contract business efficacy; it is not only reasonable to imply this term but necessary to do so, and it seems to me to be the obvious inference from the agreement so that the officious bystander would inevitably conclude that the implied term must of course have been intended.
41. In my judgment the judge was wrong to strike out this claim and I would restore it. If the claimant proves the facts alleged in the pleading, then the cause of action arises when the replacement parts are delivered or fitted, which is a date well within the limitation period.

The third claim: a new contract for the replacement parts.

42. The allegation in paragraph 16 of the statement of claim is that David Brown agreed with Kvaerner in November 1998 to replace the defective parts, promising that the main drive would then work to the correct duty specified in the contract. It is further alleged in paragraph 22 of the claim that if it was not an express term it was implied that the replacement parts would be able to work at the correct duty. The breach is that the replacement parts did not do so.
43. It is impossible to see how that claim, if substantiated by the evidence, can possibly be statute barred; yet limitation was the only basis upon which the strike out application was launched. The main objection now taken to this claim is that the second defendant was a volunteer and that no consideration moved for the performance of any promise given. The idea that David Brown was volunteering this help with no intention to be contractually bound is simply fanciful. If the defence pleading that any assistance was offered only "as a gesture of goodwill" is a defence raising lack of consideration, it could and would be met, as Ms Jones submits, by an application to plead that the consideration was Kvaerner's forbearing to sue for the defective design etc.
44. In my judgment the defendants cannot establish any grounds for summary judgment or for strike out and the appeal on this ground should be allowed and the claim permitted to go forward. Once again success depends upon establishing the facts and although on the facts no possible limitation defence can succeed, I would prefer not to deal with this by way of preliminary issue either.

Conclusion.

45. In my judgment this appeal must be allowed. If counsel are unable to agree on the form of order that follows this judgment, then we will hear further submissions as to precisely what consequences follow and what directions we should give.

Lord Justice Carnwath :

46. I agree that the appeal should be allowed in respect of the second and third claims for the reasons given by my lord. I am unable respectfully to agree with his conclusions on the first claim based on the terms of the warranty in the original contract.
47. The terms are as follows:
"WARRANTY
*All equipment is to be warranted as free from defects in Design Materials and Workmanship and must conform to the specification and drawings.
The warranty period is for no longer than 24 months from F.O.B. Provided that delay in equipment acceptance is not attributable to equipment of your supply.*"
48. As he says (para 28) there are three possible interpretations of the warranty. He prefers the first, that is that it is a promissory warranty that each day for up to 24 months the equipment would be free from defects in design and in conformity with the specification.
49. I find that difficult to reconcile with the terms of the warranty. If one took the first sentence alone, there would be no doubt. It would read simply as a normal warranty of freedom from defects, in respect of which time would run from the date of delivery. The wording of the second part of the warranty is far from clear. However, it does not seem apt to change the nature of the warranty, nor in particular to extend the obligation imposed upon the supplier. In context, as I read it, it is intended to place a limitation on the extent of the supplier's obligations.
50. This is confirmed by the last sentence which reads as a qualification on the first sentence. The reference to "your supply" has to be understood in a purchase order provided by the purchaser. The limitation constituted by the first sentence is not to apply if there is a delay in equipment acceptance caused by some defect in the equipment provided by the supplier. This suggests to me that the first part is concerned with the period in which any defect has to be discovered. The assumption is that it will be discovered at or about the time of acceptance, and accordingly if that is delayed for a reason attributable to the supplier then the time should be extended.
51. It is unnecessary for present purposes to decide whether the true interpretation is the second or third of those suggested. Either would result in the appeal failing. In any event the cases referred to by my lord, apart from *Shaw v Shaw* which was a very unusual case, give no assistance to the appellants. They tend to confirm the respondent's submission that a clause of this kind is generally to be interpreted as giving rise to a single breach at the time of delivery, even though the obligation at that point is to ensure that the goods are in a condition which will remain fit for the purpose for a reasonable time thereafter (see particularly *Viskase Ltd v Paul Piefel GMBH* [1993] 3 AllER 362, 378 per Chadwick LJ quoted by my lord at para 24). While each of these cases must be interpreted in the light of the particular wording of the contract in question, I believe that clearer words would be needed, certainly in a form of contract provided by the purchaser, to create a continuing obligation such as relied on the appellant.
52. In consequence, in my view, the appellant is entitled to pursue its case in relation to the defects in the replacement supply in February 1999, but not in respect of the original supply.

Mr Justice Newman :

53. I agree with the judgment of Ward L J on the second and third claims but agree with Carnwath L J on the first claim.
54. Following Lord Diplock in *Lambert v Lewis* [1982] AC 225. "...the first inquiry to be made is: what are the terms of the warranty which it is claimed was broken?"
55. In my judgment the warranty amounted to a promise that at the date of delivery the equipment would be "free from defects in Design Materials and Workmanship" and would "conform to the specifications and drawings". The words of the first sentence are unambiguous and clear in their meaning. The claimant does not dispute the meaning but argues that because of the second sentence it was promised that on each day thereafter for two years the equipment would be in the same state. In the light of this argument it is important to emphasise that it was not a promise that went to the future performance of the equipment but to its condition and state at the date of delivery. It is common ground that delivery took place on 28 July 1995. It is of no moment to the issue that some reasonable period for performance from the date of delivery could apply to the warranty by implication of law. The substance of the warranty goes to the state and condition of the equipment.
56. If a buyer has the benefit of a warranty which extends to the equipment at the date of delivery, it is not entirely clear under what circumstances such a warranty can extend to each and every day thereafter. If the equipment conforms to the warranty at the date of delivery, what are the circumstances in which it is envisaged that after the date of delivery it will not do so? If it does not conform a breach occurs and liability arises but the existence of a breach at the date of delivery may not become apparent until the equipment has been tested and used. As such, where in connection with a warranty going to the state and condition of the equipment at the date of delivery, a period for the warranty is provided, the warranty makes provision for a breach which occurred at delivery to be raised for a period of time thereafter notwithstanding it having been subjected to use and treatment by the buyer. The commercial sense of this is well established whereas the suggestion it was a continuing warranty giving rise to separate breaches is not. (See *Chapman v Guther* (1866) LR 1 QB 463. The relationship of landlord and tenant (*Bell v Peter Browne & Co* [1990] 2 QB 495) and husband and wife (*Shaw v Shaw* [1954] 2 QB 429) have

a continuing quality and character giving rise to an "exceptional" obligation and, in my judgment, are of no assistance when considering a commercial contract for the supply of goods.

57. The scope and meaning of the warranty is contained in the first sentence. The first three words of the second sentence, "*the warranty period*", relate not to the meaning and scope but to the period of time in which the warranty was to have effect as a promise to be answerable for any defect in "*Design Materials and Workmanship*" or lack of conformity with the "*specification and drawings*" which manifests itself in that period.
58. A warranty so expressed confers an advantage to a buyer. The occurrence of acceptance will not in itself avail the supplier and the impact of the buyer's use and treatment of the equipment, whilst not excluded from consideration, will have limited evidential significance and relevance where the evidence points to a breach at delivery. *Lambert v Lewis*, which concerned a warranty of a different character to the one under consideration, namely the implied warranty of fitness for a particular purpose, was determined on an issue of causation arising out of the use by the buyer.

Order; appeal allowed in part; counsel to lodge an agreed minute of order. (Order does not form part of the approved judgment)

Miss E. Jones Q.C. (instructed by Messrs Travers Smith Braithwaite) for the Appellant
Mr J. Davies (instructed by Messrs Lupton Fawcett) for the Respondent