MR. JUSTICE RAMSEY: 17th November 2006

1. In June 1996 the Cheltenham Ladies College ("the College") engaged Oxford Architects Partnership ("the Architects") to provide Architectural services in relation to a new art and technology block at the College. The agreement ("the Engagement") was under the RIBA Conditions of Engagement for the appointment of an Architect, CE/95. Then, in July 1997, the College entered into a building contract ("the Contract") with Cowlin Construction Limited ("Cowlin") under the JCT Standard Form of Building Contract Private With Quantities edition. Practical Completion of the Works under that contract was certified as taking place on 25 November 1998.

2. On 24 November 2004 the College served an arbitration notice on the Architects and in the Statement of Case the College made allegations of breach of contract and negligence against the Architects essentially under three heads: (1) problems with the basement tanking which led to water ingress, which I will refer to as the "basement tanking claim". In an earlier arbitration between the College and Cowlin, an arbitrator found that the water ingress was caused by failures in the Architects' design; (2) alleged defects in the design of the fire doors, which I will refer to that as the "fire doors claim"; (3) an alleged failure by the Architects to issue information and instructions in good time to the services engineering consultants Zisman Bowyer & Partners, which I will refer to this as the ZBP claim.

3. In their Defence in the arbitration the Architects pleaded at paragraph 2 that their primary case was that the College's claim was statute barred and should, therefore, be dismissed. In their Reply the College denied that the claim was statute barred and referred to the provisions of Article 5 of the Engagement which provides as follows: *"No action or proceedings for any breach of this Agreement or arising out of or in connection with all or any of the Services undertaken by the Architect in or pursuant to this Agreement, shall be commenced against the Architect after the expiry of [six] years from completion of the Architect's Services, or, where the Services specific to building projects Stages K-L are provided by the Architect, from the date of Practical Completion of the Project."*

4. The figure of six years was written in manuscript as CE/95 left a blank for the figure to be inserted.

5. In paragraph 3 of the Reply the College pleaded that Practical Completion was certified on 25 November 1998 and the arbitration notice was served on 24 November 2004 and further pleaded as follows:

   "(v) it is averred that for the purpose of assessing Limitation, the said Arbitration has been commenced within the limitation period agreed between the parties, as referred to above."

6. That is a reference to Article 5 of the Engagement. In the arbitration a preliminary issue was therefore raised in these terms: "whether the claimant's claim in this arbitration is statute barred". In his award on a preliminary issue dated 26 June 2006 the arbitrator held that on the basis of the pleaded issues none of the matters were time barred.

7. In relation to the basement tanking claim, the arbitrator held that the Architects were involved in this aspect of the works up to and after completion. He stated at paragraph 24 of his award:

   "CE/95 envisages such a situation and the parties accepted, in completing Article 5 and inserting the 'six' year period, the provision as binding on them.

   Under these circumstances I am satisfied that the action against them is not time barred, in so far as it relates to the basement tanking."

8. In relation to the fire doors claim the arbitrator held that the Architects were able to check their design and instructions up to the date of Practical Completion and after. He stated at paragraph 26 of the award: *"I am persuaded that the provisions of Article 5 must prevail in the circumstances brought to my attention. It follows that the action against them in relation to the fire doors was not time barred."*

9. In relation to the ZBP claim the arbitrator stated in paragraph 29 of the award that: *"From the information before me it appears that if there was a breach of the Architects' duty, that breach occurred well before Practical Completion. In its pleaded case the College relies on correspondence passing between the Architects and ZBP between July 1996 and April 1997. Although the absence of instructions or information required by ZBP may have related to revisions to the Architects' design, the alleged breach of their duty is not one that arose out of a failure to their design. Rather it is an alleged failure to administer that part of the Contract. By the time of Practical Completion the event had passed and there was nothing that the Architects could do to retrieve or remedy the ensuing loss by the College."*

10. He then referred to submissions made on behalf of the College in respect of Article 5 and continued at paragraph 31 of the award as follows: *"Despite the distinction between the Architect's obligation to review their design and any possible failure to supply information to the employer's other consultants, I am persuaded that the same provisions were accepted by the parties in terms of Article 5. It seems to me that in making their agreement the parties did not anticipate that there would be any distinction between any of the services to be provided by the Architects. Article 5 refers to a period following completion of the Architects' services or, where stage K - L are provided, from the date of Practical Completion. In my judgment to reach a different conclusion on the missing information point would be inconsistent. Accordingly, I conclude that the action against the Architects in relation to the alleged failure to pass information to ZBP is not time barred. "*

11. The Architects sought leave to appeal on the question of law raised by the preliminary issue under section 69 of the Arbitration Act 1996. On 31 October 2005 I directed that there should be an oral hearing of the application and if leave were given the appeal would be heard thereafter. I directed that argument should be particularly

directed to two issues: (1) the relationship between Article 5 of CE/95 and the Limitation Act 1980; (2) whether the "claims" were based on a failure to design or a failure to check the design and whether such causes of action are different.

12. At the hearing of the application on 9 November 2006 I gave leave to appeal and proceeded with the hearing of the appeal. This judgment now determines that appeal.

The Relationship Between Article 5 of CE/95 and the Limitation Act 1980

13. Mr. Patrick Clarke, on behalf of the Architects, submits that Article 5 acts as an additional contractual limit on proceedings but does not otherwise affect the question of whether a cause of action is statute barred under the Limitation Act 1980. He accepts that if under the Limitation Act 1980, including any provision for extension, the limitation period lasted for more than six years after Practical Completion, the contractual limit would apply to preclude the commencement of proceedings. Depending on the period of limitation and the period chosen in Article 5 of CE/95 he says that a shorter or longer contractual period could be imposed than that under the Limitation Act

14. Miss Lynne McCafferty, on behalf of the College, submits that Article 5 defined the date when a cause of action accrued for the purpose of the contract and as the Limitation Act 1980 was silent on that point there was no inconsistency between Article 5 and the Limitation Act 1980. Initially she also submitted that the parties could agree a shorter period than that in the Limitation Act but could not agree a period longer than six years as this would be contrary to the Limitation Act. That argument was not pursued.

15. The Limitation Act 1980 provides a statutory defence which a party may rely on. A party is not obliged to rely on a statutory limitation defence but is generally entitled to do so. It is possible for a party to agree that it will not rely on a statutory limitation defence or for the parties to agree that a statutory limitation defence will apply from an agreed date, for instance in a standstill agreement. In certain circumstances a party may be precluded from relying on a statutory defence because of an estoppel. However, absent such an agreement or an estoppel a party is entitled to rely on a statutory limitation defence. In common with all other such rights any provision which seeks to exclude a party's right to rely on a statutory limitation defence must do so in clear terms.

16. In this case I do not consider that Article 5 has the effect on statutory limitation periods for which the College contends. In summary it provides that "No ... proceedings ... shall be commenced against the Architect after the expiry of six years … from the date of Practical Completion." It therefore provides a contractual time limit on the College's ability to commence proceedings. It does not seek to prevent the Architects from relying on a statutory limitation defence, rather it is concerned with providing an additional contractual limitation on the ability of the College to bring a claim. It is convenient to consider an example. If a cause of action for breach of contract accrued one year before Practical Completion then, assuming a six-year limitation period applied under section 5 of the Limitation Act 1980, the cause of action would be statute barred five years after Practical Completion. The fact that Article 5 provides that no proceedings shall be commenced after the expiry of six years from Practical Completion would have no effect on the ability of the Architects to rely on the statutory limitation defence.

17. If the same cause of action accrued a year before Practical Completion but the Contract was under seal with a twelve-year limitation period under section 8 of the Limitation Act 1980 then the cause of action would be statute barred eleven years after Practical Completion. In this case Article 5 would provide a shorter contractual limitation and the provisions of Article 5 could be relied on by the Architects to prevent proceedings being commenced after six years from Practical Completion.

18. In particular, given the potential for the application of the extended period of liability under section 14(a) and (b) of the Limitation Act 1980 introduced by the Latent Damage Act 1986 and also the need for Architects to know their potential liabilities for the purpose of such things as professional indemnity insurance, the provision in Article 5 is evidently intended to bring certainty to the possibility of the proceedings being commenced many years after projects have reached Practical Completion. In principle, parties could agree any period, for instance one year, although in practice a short period is unlikely to be acceptable to clients.

19. In my judgment what Article 5 does not do is to exclude limitation defences which arise under the Limitation Act 1980. It is concerned with limiting not extending the ability of clients to bring proceedings. In other words it cannot be read as providing that proceedings may be commenced up to six years after Practical Completion even if they would otherwise be statute barred under the Limitation Act 1980. To do that I consider clear words would be needed. If Article 5 stood alone without the Limitation Act 1980 the corollary would be that proceedings could be commenced up to six years after Practical Completion. However, it cannot have that effect unless it excludes the right to rely on the limitation defences under the Limitation Act 1980, which it does not do by express words and cannot do otherwise.

20. Neither do I consider, as the College contends, that Article 5 can be relied on as defining when a cause of action accrues for the purpose of the Limitation Act 1980. It purposely avoids that issue. In essence it says that whenever a cause of action may accrue no proceedings may be commenced after six years from Practical Completion. The fact in this case that six years coincides with the statutory limitation period for causes of action for breach of a simple contract or negligence does not mean that there is an agreement that the cause of action accrued at the date of Practical Completion for the purpose of the Limitation Act. In principle it could accrue before or after Practical Completion but whenever it accrues the contractual limitation period applies from Practical Completion.

21. In summary, therefore, Article 5 provides an additional contractual limitation on the ability of the College to bring proceedings and does not affect the ability of the Architects to rely on statutory limitation defences. It may preclude proceedings which are not otherwise statute barred but it cannot permit proceedings which would otherwise be statute barred under the Limitation Act. In this case the preliminary issue referred to causes of action being statute barred. Because the arbitration proceedings were commenced within six years of Practical Completion Article 5 does not preclude proceedings in respect of any cause action in the notice of arbitration. It is, therefore, only necessary to see whether any causes of action are statute barred under sections 2 and 5 of the Limitation Act 1980. In this case there is no reliance on sections 14(a) or (b) of that Act or on estoppel.

The causes of action

22. In principle a cause of action for breach of contract accrues on the date of breach and the cause of action for negligence accrues when a breach of the duty of care gives rise to relevant damage. The application of those principles to obligations under construction contracts or agreements for the engagement of construction professionals has caused a number of difficulties. In terms of a cause of action for breach of contract it is sometimes said that contractors and Architects owe a continuing contractual duty up to at least Practical Completion. There is, however, in my judgment, a distinction to be drawn between the position of the contractor and the position of a professional such as an architect.

23. The position of a contractor of course depends on the terms of the Contract but generally there is an obligation to "carry out and complete" the works. Thus, there will be a cause of action for a failure properly to complete the work by the date for completion. If those circumstances a cause of action will accrue right up to Practical Completion if the contractor fails to complete the works properly, see Chitty on Contracts (29th edition) paragraph 28-054 and Keating on Construction Contracts (8th edition) paragraph 15-012. There may then, depending on the defects liability provisions in the contract, be a further cause of action after Practical Completion.

24. In the case of an architect the duty, again, depends on the terms of the engagement. If an architect merely carries out a design which is issued to a contractor for construction then it is difficult for a continuing duty to arise during the period of construction. Where, however, the architect's engagement includes services during the period of construction, there may a continuing duty. In this case the Architects agreed to carry out stages D, E, F to G, H and J, that is scheme design and detailed design, production information and bills of quantities, tender action and project planning. They also agreed to carry out stages K to L, operations on site and completion, which included: 01 Administer the terms of the building contract; 02 Conduct meetings with the contractor to review progress; 05 Generally inspect the materials delivered to the site; 06 As appropriate instruct sample taking and carrying out tests of materials, components, techniques and workmanship and examine the conduct and the results of such tests whether on or off site; 07 As appropriate instruct the opening up of completed work to determine that it is generally in accordance with the Contract Documents; 08 At intervals appropriate to the stage of construction visit the site to observe and comment on the contractor's site supervision and examples of his work relevant to the provisions of the building contract; 13 Monitor the progress of the Works against the contractor's programme and report to the Clients; 14 Prepare valuations of work carried out and completed; 15 Provide specially prepared drawings of a building as built.

25. In addition under clause 3.1.4 of the conditions of Engagement it provides: *"Except in an emergency the Architect shall make no material alteration or addition to or omission from the approved design during construction without the knowledge of and consent of the Client."*

26. In these circumstances it seems to me that the appropriate obligation on the Architects in relation to the period of construction is that identified by Dyson J as he then was in ***New Islington and Hackney Housing Association Limited v. Pollard Thomas and Edward Limited*** [2001] BLR 74 at page 79 where he said in relation to the Architects' continuing duty to review his design: *"In my judgment, the duty does not require the Architect to review any particular aspect of the design that he has already completed unless he has good reason for so doing. What is a good reason must be determined objectively, and the standard is set by reference to what a reasonably competent Architect would do in the circumstances."*

27. In terms of a breach of contract, if an architect has good reason to review any aspect of the design then a breach will occur if the architect fails to review the design or if the architect reviews the design but fails to do so properly in accordance with the terms of engagement. In this case, in particular, that duty is set out in clause 1.2.1 of the conditions: *"exercise reasonable skill and care in conformity with the Normal Standards of the Architect's profession"*

    The cause of action will therefore accrue if the Architects fail to review the design within a reasonable time of the duty arising or upon a failure properly to review the design in accordance with his duty.

28. There is, it seems, some confusion as to meaning of a continuing duty in this context and in particular the date when a cause of action accrues for a breach of that duty. If an architect produces a design which is in breach of the terms of engagement and issues it to the contractor who constructs the work to that design, then a breach of contract will occur when, for instance, the architect under stages F to G "*prepares production drawings"* or under stage J "*provides production information*" as required by the building contract, a cause of action will then accrue based upon that breach of contract.

29. The continuing duty does not, however, give rise to a single and continually accruing cause of action. Rather, a different cause of action accrues at various stages. Thus, the cause of action for a failure properly to review the

design is a different cause of action from a failure to provide a proper design in the first place. The causes of action will therefore accrue on different dates.

30. In terms of a cause of action in negligence the date on which it accrues depends on the date on which relevant damage occurred. In ***Pirelli General Cable Works Limited v. Oscar Faber & Partners*** [1983] 2 AC at 1 Lord Fraser said at page 18 G that: *"It seems to me, that except perhaps where the advice of an Architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building."*

31. In applying that principle to a claim in respect of a defective heating and air conditioning plant His Honour Judge Sir William Stabb QC held in the case of ***Tozer Kemsley and Millbourn (Holdings) Ltd v J. Jarvis & Sons Ltd*** (1983) 1 Construction Law Journal at page 79: *"... a building in that defective state is a damaged building. It is a damaged article in the sense this it is not a sound one ... a building is a manufactured thing, and if it is unsuitable or defective when it is handed over it seems to me that the cause of action arises when the person acquires it in its defective state."*

32. That passage was accepted and applied in the case of **London Congregational Union v. Harris & Harris** [1988] 1 All ER 15 where Lord Justice Ralph Gibson said this at page 23 F: *"I would accept that on the facts there alleged any cause of action for damage resulting from negligent design of, or supervision of, installation of the plant was rightly treated as arising when the building in that state was handed over to the client. In applying the principle established in the **Pirelli** case, as Judge Stabb sought to do in the **Tozer Kemsley** case, I see no reason why on the facts of a particular case the defect resulting from negligent design or supervision should not constitute physical damage to the building provided that the damaging consequences of the defect are immediately effective. In such circumstances there is no need for subsequent or later damage to complete the cause of action."*

33. There is an interesting academic debate as to how far those cases, which pre-dated ***Murphy v. Brentwood*** [1991] AC 398 can now be applied universally given the distinction between causes of action based on physical damage and causes of action based on economic loss. However, in ***Abbott v Will Gannon & Smith Ltd*** [2005] Building Law Reports 195 the Court of Appeal felt bound to apply ***Pirelli***. In giving the judgment with which Mummery and Clark LJJ agreed, Tuckey LJ said this at paragraphs 17 onwards:

> *"17. So what is the present state of the law of England? With three House of Lords' cases to guide us it ought to be possible to give a clear answer to this question, but I regret that I feel unable to do so with any confidence. **Murphy** establishes that, absent a special relationship, a claimant may only sue in tort for personal injury or damage to property caused by a latent defect in a building. But it is not clear whether this extends to damage to the building itself before the defect is discovered. And what is the position where there is a special relationship? It is clear that the duty in such a case extends to taking care not to cause economic loss. But when does such loss occur in a case such as the present and does the duty not to cause physical damage to property constitute a separate cause of action for limitation purposes?*
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> *18. Mr. Holwill for the engineers submits that in a case like the present a claimant will only suffer economic loss. In this case that loss occurred at the time when the defectively designed work to the bay window was completed, at which point the claimant suffered economic loss because their building was defective. Mr. Holwill further submits that the claimants' cause of action for negligent design was 'single and indivisible' and accrued when damage (economic loss) was first suffered. The fact that the claimants had chosen to claim the cost of carrying out work to remedy the physical damage to their building was not relevant and could not be used to get round the fact that their true claim was time barred.*
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> *19. I think the simple answer to these submissions is that we are bound by the decisions in **Pirelli** and **Ketteman** to uphold the decision of the District Judge. The facts in **Pirelli** are indistinguishable from those in the present case. **Pirelli** was approved in **Ketteman** and was cited without disapproval in **Murphy** by the House which included two members (Lords Bridge and Brandon) who were parties to the decision in **Pirelli**. It has not been expressly overruled and I am not persuaded that this has been done impliedly. Lord Lloyd left open the question as to whether **Pirelli** was still the law in England. It seems to me that only the House of Lords can decide whether it is or not.*
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> *20. If, contrary to what I have said, we are not bound by **Pirelli** and the claimants' cause of action accrued at the time they suffered economic loss, I do not accept Mr. Holwill's submission that this occurred in March 1997. The defective design had not caused any loss at that time. It would only do so when it manifested itself in some way which would affect the value of the building, measured either by the cost of repairs or depreciation in the market value. In other words I accept Lord Lloyd's analysis in **Invercargill** which, as he says, avoids almost all the practical and theoretical difficulties which cases of this kind have caused. The present case is, I think, the common case where the occurrence of the loss and its discovery coincide. On this view the cause of action in the present case accrued in 1999 so the claim was not time barred."*

34. In those circumstances the appropriate date on the basis of ***Pirelli*** is the date when physical damage occurred. Often latent defects only give rise to damage after completion of the works particularly in the case of a claim against a contractor. In this case as the pleadings demonstrate the basement tanking claim and the fire doors claim are both concerned with defects which became apparent before Practical Completion and were dealt with by instructions given by the Architects.

35. Further, the claims with which I am concerned are claims made by the College against the Architects and, in my judgment, relevant damage occurred during the course of construction. On the basis of ***Pirelli*** the cause of action

accrued at that date. If the alternative position by Tuckey LJ postulated in ***Abbott*** were to apply to this case and the cause of action accrued at the time the College suffered economic loss then this would, at latest, be when instructions were given to the contractor to remedy the defect.

36. It is convenient to take a simple example such as that in ***Abbott***. An Architect negligently designs a lintel. Before Practical Completion it cracks. There is then relevant physical damage. The Architect issues an instruction to the contractor to remove the defective lintel and replace it with a new properly designed one. That will be a variation and the employer will incur a liability to pay for remedial works. That will be economic loss, if indeed there has not already been such loss. If the Architect is negligent in reviewing the design at that stage then a new cause of action will accrue based on that negligent review of the design.

37. However, whatever the position in relation to economic loss, following ***Abbott*** the relevant date is the date of physical damage. Although an employer does not obtain possession of the building until Practical Completion, I consider that there is a complete cause of action in negligence as against an Architect at that stage. The College could, for instance, have brought an action in negligence against the Architects for the allegedly negligent design during the course of the works to recover the additional sums which they were liable to pay the contractor in terms of remedial works or other costs.

38. On the basis of those observations on the causes of action for breach contract and negligence it is now necessary to look at the particular causes of action in this case.

The basement tanking claim

39. Miss McCafferty has produced a very helpful chronology which shows that the sequence in respect of this claim was as follows:

February 1997: The Architects prepared the General Specification for the new arts and technology block. This included at section J40 the specification of the basement tanking.

27 February 1997: Sworn King & Partners ("SKP") issued a letter of invitation to tender to six contractors including Cowlin.

27 March 1997: Tenders for building contract due to returned.

23 April 1997: SKP submitted a Tender Report to the College recommending acceptance of Cowlin's tender.

30 June 1997: The Architects issued a drawing schedule and issue record which included drawing number 391 (details of services through DPM) and drawing number 392 (DPC to existing stairwell).

11 July 1997: The College entered into a contract with Cowlin in the JCT 1980 edition in the sum of £2.8 million.

1 December 1997: Fax from the Architects to Cowlin enclosing drawing number 392A which set out a revised specification for the works to the basement.

November 1998: The basement tanking failed as a result, the College says, of the Architects' defective design. This resulted in the first incident of water ingress. The Architects orally instructed Cowlin to carry out remedial works.

6 November 1998: Cowlin confirmed the Architect's instructions to carry out remedial works to the basement tanking.

25 November 1998: Practical Completion of the Works.

26 November 1998: Cowlin requested that the Architects provide a formal Architects' instruction for the remedial works to the basement tanking.

3 December 1998: The Architects issued the Certificate of Practical Completion certifying that Practical Completion occurred on 25 November 1998.

6 January 1999: The Architects reported a new breach of the basement tanking to Cowlin and requested that Cowlin effect a solution.

40. The particulars of the breach to which these facts give rise are set out in paragraphs 78(i) to (viii) of the statement of case. These include, for instance:

"(i) Failed to provide any or sufficient detail as to the waterproofing detail for any basement wall penetration

(ii) Failed to respond in good time as to a requests made by Cowlin for information as to the damp proofing detail to the basement so as to achieve a speedy and economical completion of the works ...

(vi) Failed to provide for express instruction within the Contract documents for Cowlin to comply with the guidance of BS8000 ...

(viii) Failed to respond to Cowlin's correspondence which stated clearly on a number of occasions that the membrane had been constructed with an open cavity with no physical restraints in accordance with the OAP's design, thus resulting in a dispute with Cowlin in relation to the cost of the remedial works."

41. It is clear that some of these causes of action accrued at an early stage. The allegation at paragraph 78(vi) is an allegation of a failure to include an instruction in the Contract documents with Cowlin which were entered into by them on 11 July 1998. The cause of action based on breach of contract would have accrued at that date and be statute barred.

42. Some of the other breaches might, on the facts, be breaches of a continuing duty up to Practical Completion and give rise to a breach of contract which accrued at that stage. Equally in terms of negligence the question will depend on when damage occurred. As presently pleaded it is possible that relevant physical damage did occur after 24 November 1998 for certain breaches of duty. However, for the underlying design failure damage

would have occurred when there was physical damage which was by November 1998 and led to the Architects' letter to Cowlin of 6 November 1998. Such physical damage would therefore lead to the underlying cause of action in negligence being statute barred.

43. In these circumstances there are questions of fact which will have to be a matter for the arbitrator, but so far as the questions of law are concerned the only general answer which it is possible to give is that all causes of action in respect of the basement tanking claim which accrued on or before 24 November 1998 are statute barred. In terms of breach of contract any cause of action based on a breach of contract on or before 24 November 1998 will be statute barred and any cause of action based on negligence where relevant physical damage occurred on or before 24 November 1998 will also be statute barred. The College's claim is therefore limited to any causes of action that accrued on or after 25 November 1998.

The fire doors claim

44. The chronology for this claim is as follows:

February 1997: The Architects prepared the General Specification for the new arts and technology block.

11 July 1997: The College entered into the Contract with Cowlin.

3 November 1998: On a site visit by the Architects, it became apparent that the fire doors in the new building were warped and distorted.

23 November 1998: The Architects issued Architects' Instruction number 17 instructing Cowlin to carry out further works to the fire doors to try to alleviate the problem of warping and deflection of the fire doors.

25 November 1998: Practical Completion of the Works.

3 December 1998: The Architects issued the Certificate of Practical Completion certifying that Practical Completion occurred on 25 November 1998.

7 December 1998: The Architects included the fire doors on the snagging list issued following the Practical Completion inspection.

45. The particulars of the breach relied on by the College are set out in paragraph 78(ix) of the Statement of Case as follows: *"Failed to properly design the fire doors sets, in that the specified material was the incorrect material to meet 1 hour fire regulations and in general unsuitable for a door construction."*

46. To the extent that this refers to a failure to carry out the initial design and include a proper design in the specification which formed part of the Contract documents, the breach of contract occurred by the 11 July 1997 when Cowlin entered into the Contract and the cause accrued at that date and will be statute barred. In addition, on the basis that the doors were warped and distorted on 3 November 1998 then relevant physical damage had occurred by that date and a cause of action based on a breach of those obligations occurred then.

47. By 23 November 1998 the Architects evidently reviewed the design and issued Architect's Instruction number 17 to Cowlin on that date instructing certain work. Again, therefore, on the facts it would seem that any cause of action based on a breach of contract based on reviewing the design in terms of the warping and distortion accrued on that date. A cause of action based on negligence would, however, depend on when relevant damage occurred. Further, given the close proximity of 23 November 1998 to Practical Completion and given that fire doors appeared on the "snagging list" at Practical Completion, issues again arise in relation to the precise timing of the obligation in relation to the duty to review the design. These are matters of fact which must be resolved by the arbitrator.

48. In relation to the questions of law on the pleaded facts these are the relevant conclusions:

(1) Causes of action for breach of contract or negligence in relation to the original design of the fire doors and inclusion of that design in the building contract accrued by 11 July 1997 in contract and by 3 November 1998 in negligence in relation to distortion and warping and, accordingly, are statute barred.

(2) A cause of action based on breach of contract in relation to the review of the design carried out in November 1998 accrued on the carrying out of the design and its issue to Cowlin which occurred on 23 November 1998 and is therefore statute barred. A cause of action based on negligence in relation to that design review will be statute barred depending on the occurrence of relevant damage as to which there is currently no pleaded allegation.

(3) Otherwise any cause of action based on a breach of contract on or before 24 November 1998 will be statute barred and any cause of action based on negligence where a relevant damage occurred on or before 24 November 1998 will also be statute barred.

49. This leaves, therefore, only limited, if any, causes of action.

The ZBP claim

50. The relevant chronology for this claim is as follows:

December 1995: The College appointed ZBP as consulting mechanical and electrical engineers.

14 June 1996: The College appointed the Architects as Architect.

25 July 1996: Letter from ZBP to the Architects requesting information required to advance its design of mechanical electrical services.

16 September 1996: Letter from ZBP to the Architects again requesting information required to advance its design of the mechanical electrical services.

13 November 1996: Letter from ZBP to the Architects again requesting information.

20 December 1996: Letter from ZBP to the Architects again requesting information.

21 February 1997: Two letters from ZBP to the Architects requesting information.

10 March 1997: Letter from ZBP to the Architects also requesting information.

8 April 1997: Letter from ZBP to the Architects again requesting information.

24 April 1997: Letter from Architects to ZBP outlining the effect of the Council's instructions on the design of the mechanical electrical services.

In relation to each of the letters from ZBP to the Architects the College says that the Architects failed to comply with this request in a timely manner and that is a matter of fact which is assumed for the purpose of this issue.

51. The allegation pleaded by the College at paragraphs 78(xiii) is that the Artchitects "failed to supply information to ZBP in good time to enable ZBP to progress their design".

52. At paragraph 73 of the College's statement of case it is pleaded that as a result of a demand for additional fees from ZBP the College agreed to pay ZBP an additional sum of £98,000 plus VAT in full and final settlement of the claim for the additional fees.

53. From the chronology it is evident that this claim arises out of alleged failures by the Architects to provide information to the ZBP in the period from July 1996 to April 1997. This gave rise to a claim from ZBP which led to the payment of additional fees. In terms of a breach of contract the breach occurred on the pleaded facts by about April 1997 and certainly well before 24 November 1998. As a result any cause of action based on breach of contract is statute barred.

54. In relation to negligence the cause of action accrued on the occurrence of relevant damage. I accept Mr. Clarke's submission that the date of incurring liability is the relevant date. The relevant date in this case is therefore the date when the College incurred a liability to ZBP to pay additional fees.

55. At paragraph 69 of the statement of case the College pleads that it was only after 16 August 1999 that ZBP claimed the additional fees from the College. I do not consider that the date on which a claim is made or compromised as between the College and the Architects is the date on which damage is suffered. Rather that claim related to additional fees for which the College incurred a liability in 1996 and 1997 and certainly well before 24 November 1998. As a result any cause of action based on negligence is, in my judgment, statute barred.

Summary

56. In those circumstances, for the reasons I have given, the claimant's claim in respect of the basement tanking claim and the fire doors claim are statute barred in so far as they are based on breaches of contract which occurred on or before 24 November 1998. In so far as they are based on negligence they are statute barred if relevant physical damage occurred on or before 24 November 1998.

57. In relation to the ZBP claim, this is statute barred both in contract and tort as both causes of action accrued before 24 November 1998.

MR. PATRICK CLARKE (instructed by Bond Pearce) for the Claimant
MS LYNNE McCAFFERTY (instructed by Thring Townsend) for the Defendant