

CA on appeal from TCC (HHJ Newman Q.C.) before Peter Gibson LJ; Arden LJ; Mr Justice Collins. 19th January 2001.

LORD JUSTICE PETER GIBSON: This is the judgment of the court to which each member of the court has contributed.

- 1 Each of the three Defendants appeals from the order made on 23 May 2000 pursuant to the judgment delivered by His Honour Judge Cyril Newman Q.C. on 16 December 1999 in the Technology and Construction Court after an 18-day trial ending on 15 July 1999 of certain preliminary issues relating to liability. The Judge held that each of the Defendants was liable to the Claimant, Jarvis & Sons Ltd. ("Jarvis"). The First Defendant, Castle Wharf Developments Ltd. ("Castle Wharf"), was liable to Jarvis which was entitled to receive the value of works carried out for Castle Wharf by Jarvis on a quantum meruit or restitution basis. In addition Jarvis was held entitled to recover in tort any losses as damages for negligence for which Castle Wharf and the Second Defendant, Gleeds Management Services Ltd. ("Gleeds"), were jointly and severally liable. The Judge dismissed a claim that Jarvis was contributorily negligent. The Judge held that the Third Defendant, Franklin Ellis Architects Ltd. ("Franklin Ellis"), was liable in damages for breach of contract and that Jarvis was not contributorily negligent. In Third Party proceedings brought by Castle Wharf against each of Gleeds and Franklin Ellis, the Judge found Gleeds liable to Castle Wharf in respect of certain heads of damages, but he dismissed Castle Wharf's claims against Franklin Ellis.
- 2 Sadly, the Judge died before the completion of the order consequent on his judgment and without his judgment being fully revised by him. No one suggests that the order giving effect to his judgment was not properly made. On 19 April 2000 His Honour Judge Havery Q.C., after a 2-day hearing, gave each of the Defendants permission to appeal on the points on which each wished to challenge conclusions of the Judge.

The Background

- 3 Castle Wharf is a single purpose company created for the development of a site of that name by the Beeston Canal in Nottingham. Roy Coley, the managing director of Sowden Group Ltd., at all material times was the dominant figure acting for and on behalf of Castle Wharf. Castle Wharf retained Gleeds, a company of quantity surveyors, as its agent to coordinate the development and to pass information to contractors. It also retained Franklin Ellis, a company of architects, as its architect until 1 November 1996. Thereafter Franklin Ellis was retained by Jarvis.
- 4 The site was at a prominent and sensitive location in Nottingham. The first phase of the development comprised the demolition of existing buildings and the erection of an office block ("Office A"), a pub/diner, access roads and external works including a pedestrian bridge over the Canal. Office A was intended to be the offices for the Nottingham Evening Post, a newspaper of the Northcliffe Group ("Northcliffe"). Because of the site's importance the planning department of Nottingham City Council ("the planners") took a close interest in the development. An initial attempt to obtain planning permission failed in April 1996. But Mr. Coley was determined to obtain planning permission and to worry about costs only once that had been achieved. On 25 June 1996 planning permission was obtained on the basis of drawings submitted by Franklin Ellis for Castle Wharf, subject to conditions. One elevation, the Wilford Street elevation, was considered of particular importance. The drawing relating to it, drawing 24C, showed a stainless steel roof, a brise soleil and structural glazing. As the Judge was to find, that planning permission was based on a scheme which, when put out to tenderers (not including Jarvis), proved too costly, and a programme of cuts was undertaken to remove what Mr. Coley called "*the embellishments*" demanded by the planners. The aim was to have Office A completed by October 1997. Mr. Coley wanted the least expensive scheme satisfactory to Northcliffe whose presence in Nottingham the planners wished to retain (there being some prospect of Northcliffe moving to Derby), whilst the planners wanted the high quality of design and architecture based on the planning permission granted and over which the planners, through the conditions imposed, could keep close control.
- 5 Those conditions were unusually onerous. They included in condition 2:
"The development should not be commenced until the following have been submitted to and approved by the City Council:-
(a) Details, including samples and colours, of all external materials.
(b) Large scale details of all external doors, security shutters, windows, glazing systems, shop fronts, bays, cladding, louvres, car park entrances, balustrades, canopies, balconies, grilles, eaves.
(c) 1:50 vertical and horizontal sections through typical elements of all new elevations."
Despite the opening words of that condition, it was common ground at the trial that the conditions could be discharged as the works progressed, provided that the works carried out were in general conformity with the permission.
- 6 Condition 15 amounted to outline permission only for the design of the pub/diner. Revised elevational details were required.
- 7 Castle Wharf and Franklin Ellis entered into discussions with the planners to revise the approved scheme, in such manner as to allow savings to be made without the need to make a fresh application for planning consent. Franklin Ellis on 10 September 1996 produced a list of 22 potential savings on Office A which were discussed with the planners on 16 September. John Lynch, the Assistant Director of Development in Nottingham City Council with responsibility for planning, to whom had been delegated the authority to decide whether variations from the approved scheme were acceptable without a further application for planning consent, made some brief preliminary comments (e.g. in relation to item 13 which replaced structural glazing with cheaper standard curtain

walling, the Judge found Mr. Lynch to have said "Technologically safer," although Mr. Lynch's evidence (Day 10 p. 27) was that that was what he was told by Franklin Ellis). Castle Wharf took encouragement. By letter dated 18 September 1996 Gleeds, on behalf of Castle Wharf, invited (amongst others) Jarvis, a building contractor, to tender for the design and construction of the first phase of the development. The letter enclosed various documents, plans and drawings.

- 8 Among the documents supplied were the Employer's Requirements. This was a document which was sent out to the first round of tenderers but not properly updated, as can be seen from a statement therein that detailed planning approval was expected to be obtained on 13 June 1996. The Employer's Requirements were expressed to be a summary of known constraints to assist tendering contractors to formulate proposals and submit a tender. The successful contractor was to enter into a contract under the JCT Standard Form of Building Contract with Contractor's Design 1981 edition. The architect to the development was to be novated to the contractor. Under "Base Scheme", it stated that the Employer's Requirements and the drawings and specifications contained therein represented the Base Scheme for the shape and form of the development and that the Contractor's Proposals, which the contractor was expected to submit, should as a minimum comprise the developer's Base Scheme. But it said that the contractor might provide optional design proposals additional to those presented as part of the Base Scheme. The design team was to report back to Gleeds any design variations proposed by the contractors, and Gleeds would advise as to their acceptability to Castle Wharf. The contractor was to be responsible for ensuring that the works at all stages met with all relevant statutory requirements and for obtaining all necessary approvals.
- 9 The drawings were the then latest set of drawings and some differed from the planning drawings. The Judge found that Jarvis received the actual design upon the basis of which permission was granted, but that it was not specifically identified and was accompanied by both pre- and post- planning permission sequential drawings. The basis upon which the subsequent drawings had been raised was not made clear. Included with the letter of 18 September was the list of the 22 potential savings and Jarvis was encouraged to identify further savings. The contractor was required to respond by 25 October 1996.
- 10 On 19 September 1996 a meeting between Castle Wharf, Franklin Ellis (but not Gleeds) and the planners was held. Amongst the planners present at the meeting was Mr. Lynch and a planning officer, Peter Smith. Mr. Smith's evidence (Day 7 pp. 82-83) was that the planners were aware that for the scheme to proceed it was necessary to make savings in costs and that they were strongly supportive of the scheme at that stage. Some modifications discussed, as Mr. Lynch told the Judge in evidence (Day 10 p. 31), were not acceptable, others were quite minor or non-material and so not a planning concern, while others fell into a third category as being possibly non-material, subject to further details being provided. Glazing was discussed, Mr. Coley objecting to full structural glazing, and Mr. Coley thought that Mr. Lynch, who did not want to get into specific detail about glazing, took that objection on board (Day 8 p. 123). The planners' views were to be incorporated into a letter of 4 October 1996 to which we will come shortly. What was not to be included was the comment which the Judge found was made by the planners at that meeting that standard curtain walling was a change unlikely to be acceptable. But Mr. Smith accepted (Day 7 p. 88) that the outcome of the meeting was positive in the sense that the developers and the planners thought that they had a way forward in relation to the proposed savings.
- 11 Also on 19 September Gleeds wrote to Jarvis saying:
*"Further to my letter of 18 September 1996 and accompanying tender documentation, I would advise that our discussions with the planning officers have been concluded in respect of the potential savings identified on the schedule previously issued to you.
Our architects are currently preparing revised drawings which will be available on Thursday 26 September 1996 and arrangements will be made to deliver them to you.
It is suggested that you refrain from pricing the superstructure element of Block "A" office pending such time as the revised drawings are available.
It is highly unlikely that there will be any modifications to the internal finishes, external works or substructure."*
- 12 Those revised drawings, including drawing 24E, were supplied to Jarvis on 26 September. Drawing 24E showed the stainless steel roof replaced by concrete tiles, no brise soleil and standard curtain walling (instead of structural glazing). On 30 September Gleeds wrote again to Jarvis saying that following further meetings with the planners two of the proposed amendments identified on the drawings issued on 26 September for Office A could not be implemented and Jarvis was told to refer back to the earlier drawings.
- 13 In the meantime, on 26 September Jarvis met with the planners. Somewhat unusually, Jarvis, when invited to tender, had been instructed not to contact the planners. Despite this, Peter Lewer, an architect working for Jarvis as its Regional Design Controller and the person designated by Jarvis as the design manager for the development, met with Mr. Smith. Mr. Lewer's evidence was that he knew that Mr. Coley was anxious that Jarvis should not talk to the planners at all about Office A, and so he did not do so; the only discussions were about the pub/diner. Mr. Smith's contemporaneous notes of the meeting recorded that the discussions included the following topics:- *"Corner, brise soleil, columns, balconies, roof materials, 300mm raised floor level"*.
Mr. Smith's evidence, which the Judge accepted, established that Mr. Lewer introduced himself as somebody who was perhaps going to be guiding the project along and also as giving Mr. Smith an introduction to the idea that there might be changes to the scheme under what Mr. Lewer called "buildability"; that is he sought to make

changes to the scheme in order to make it "buildable". Accordingly, the Judge rejected Mr. Lewer's evidence that Office A had not been discussed. There was no examination of what Mr. Lewer thought was "the scheme", to which he wanted changes, and the Judge accepted his evidence that Jarvis did not have a copy of the planning permission until after 1 November. However Mr. Lewer accepted in cross-examination that he could have obtained a copy from Castle Wharf or Franklin Ellis or Gleeds or from the planners, it being a public document, but that Jarvis had not bothered to get it (Day 4 pp. 75, 85). On 23 September Mr. Lewer had made a note of his intention to ask Mr. Coley for a copy of the planning consent and he accepted that it was important for him to have the interlinked drawings as well (Day 5 pp. 18-20). It does seem extraordinary, when he knew that there were conditions attached to the permission which, having regard to the sensitivity of the site and the ongoing interest of the planners, might be onerous and that Jarvis were, following substantial negotiations with the planners, putting forward a non-compliant scheme, that he should not have been concerned to see the planning permission. The Judge's findings, which, in the light of Mr. Smith's notes were almost inevitable, do not reflect well on Mr. Lewer's reliability in relation to a potentially very important meeting at which he could have, and was likely to have, received some information about the true planning position. While we can accept that Mr. Lewer was not likely to assume that anything he had been told was incorrect or that he had not been informed of material matters, it is to say the least surprising that he did not explore what would or would not be acceptable and seek to discover, because he had not seen the planning permission, what the planners were likely to permit or to reject.

14 Also on 26 September Franklin Ellis wrote to the planners, formally setting out Castle Wharf's proposed amendments which were described as "minor". Nine such amendments were listed. It is interesting to see that the items noted in Mr. Smith's notes of the meeting with Mr. Lewer tie in with those referred to in the letter. There was no reference to the proposed change from full structural glazing. Franklin Ellis said that it would shortly issue drawings indicating the proposed amendments. With a letter dated 30 September it sent the planners copies of the revised drawings. Included amongst them was drawing 24F for the Wilford Street elevation. This differed from 24E in that it showed recessed frame glazing (which was a form of structural glazing cheaper than full structural glazing but dearer than standard curtain walling). The letter and enclosures were copied to Gleeds, but Gleeds did not supply copies to Jarvis, as the Judge found.

15 By letter dated 4 October 1996 the planners gave their comments on the amendments proposed in the letter of 26 September. Mr. Lynch said this:

"I refer to recent discussions, your letter dated 26 September, and the plans subsequently supplied which show various amendments to the scheme compared to the previously approved version.

I know that you fully appreciate the City Council's particular concerns regarding the quality of this development and that you are aware that officers have discussed your various suggested possible changes with this firmly in mind. At the same time the need to limit changes so as to avoid the necessity for a further planning application has been a key consideration in view of the tight timescale involved in securing the occupant for Block A.

Against this background I can offer the following response to the points as per the numerical list in your letter.

- 1) The raising of ground floor level by 300mm maximum may be considered as non-material in relation to Block A. It should be noted that this may not follow in relation to other parts of the development for which the need to achieve level access to the buildings was a particular requirement of the City Council.*
- 2) The substitution of an alternative roofing material in place of the stainless steel which was originally shown may be considered a minor change, depending upon the alternative chosen. At the very least, a good quality artificial slate is likely to be required. The recent plans appear to show an inter-locking concrete tile and I doubt whether this would be acceptable.*
- 3) Similarly the removal of the eaves solar shading louvres may be non-material, depending upon the details of the chosen alternative. The eaves and soffit detail shown on the latest plan appears to be fairly heavy in its visual impact and I would ask you to give this more consideration.*
- 4) The removal of the "arcade" to the rear courtyard can be considered non-material in the overall scale and context of the development.*
- 6) Removal of the semi-circular openings in the floors over the Wilford Street entrance may be non-material, subject to a more detailed illustration of the arrangement in the context of the glazed front elevation of which it forms part.*

Items 5, 7, 8, 9:- Adjustment of horizontal glazing bars, substitution of gratings for louvres to car park, replacement of stainless steel balustrading by painted mild steel and reduction in trees to be planted on Canal Street may all be considered non-material. Although it is not referred to in the letter, the latest plans indicate the possibility of a projecting plant housing on the pitch of the roof facing Wilford Street. This would certainly represent a material change which would be unlikely to be approved by the Planning Committee."

Mr. Lynch ended by saying that in relation to Castle Wharf's need to make early progress in relation to Office A he hoped that the contents of the letter were helpful.

16 Castle Wharf plainly considered the letter to be helpful. On 5 October it entered into a contract with Northcliffe, specifying in a letter of that date the drawings which were to be "a baseline for construction of [Office A]". They included drawing 24F. But the parties expressly recognised that the works would vary from the drawings, though the scope and intent presented in the drawings were to be maintained. Thereafter Castle Wharf was concerned

to ensure that the scheme produced by the contractor whom it chose would be consistent with what had been agreed with Northcliffe.

- 17 On 22 October 1996 Franklin Ellis wrote to Jarvis giving particulars of the fees which it had agreed with Castle Wharf for the project and which would be included in the novation agreement whereby its services as architect would be assigned to Jarvis if Jarvis was successful in its tender. The letter contained a warning to Jarvis that as the site was in a conservation area, savings could not be "at the expense of the agreed planning drawings which, if compromised, will inevitably cause a delay to the contract as well as additional work". In his evidence at trial Mr Ellis of Franklin Ellis admitted that this paragraph omitted to state that the drawings for which planning permission had been given had been the subject of later discussion with the planners (Day 13 pp. 66-7).

- 18 Jarvis produced its Contractor's Proposals on 25 October. In them it said: *"Jarvis has been able to identify a series of modifications to the indicated scheme included within the Employer's Requirements. Both this process and our desire to complete the design as conceived has through a great deal of investigation, brought about a considered value engineered solution."*

It said that due to the changes in the scope of the works, certain clauses of the Employer's Requirements were deemed not to apply. Thus in relation to two clauses it said: *"Due to the nature of the scheme and the desire to introduce innovation, it has been appropriate for us to hold discussions with the Planners."*

It listed the drawings on which its proposals were based. They included drawing 24E. It also listed certain drawings of its own which showed "alternative design solutions" which it had developed. One was drawing 01 of what it called the Northcliffe Street elevation, but which was in fact of the Wilford Street elevation. It said that its proposals were on the basis that where any discrepancy or difference became evident between the Employer's Requirements and its proposals, the latter were deemed to prevail.

- 19 Under "DESIGN DEVELOPMENT AND CLARIFICATION" it said:

"A preliminary brief, following discussions with the City of Nottingham Development Control has led us to the understanding that there is some further latitude to develop some areas of the scheme The sensitivities surrounding the detailing to Office A are driven by a desire to secure a high quality signature building/gate building (as viewed from Wilford Street bridge) to stand well against the neighbouring developments Our intent is to append planning amendments to the original application."

Reference was made to *"The curtain wall glazing to the Wilford Street Bridge elevation"* being *"faceted on the right hand side to a curved profile"*. Under "CLARIFICATION AND CONDITIONS OF TENDER" Jarvis said: *"The alternative "base scheme" as offered is conditional on our ability to secure, subject to client approval, the respective amendments to the current consents given."*

- 20 It cannot be doubted that Jarvis's Contractor's Proposals proposed a scheme differing from the approved scheme and from that contained in the drawings submitted to the planners by Franklin Ellis. For example, the steel work for Office A was to be in a different place from that in drawings 24E or 24F, Jarvis's scheme providing for wide columns at ground floor level to replace what were referred to as fins supporting a colonnade flanking the main entrance, and the columns being forward of where the fins would have been. Mr. Lewer's evidence was that he appreciated at the time that that change did not have planning consent but Jarvis hoped that the change would be treated as minor (Day 5 p. 92). A meeting took place between Gleeds, for Castle Wharf, and Jarvis on 30 October 1996 to discuss those proposals. One purpose of the meeting was to ensure that Jarvis's scheme complied with Northcliffe's requirements. Jarvis was told by Gleeds that 15 items in its proposals were unacceptable either to the planners or to Northcliffe or to Castle Wharf. After the meeting on 30 October Jarvis prepared a "menu of options" relating to the 15 items. Those options were priced and discussed at a further meeting on 1 November between Gleeds and Jarvis and agreement was reached on Jarvis's Contractor's Proposals as modified by the 15 items. Glazing was discussed. Mr. Lewer's evidence was that Ian McNair of Gleeds asked Jarvis to adjust its tender price for recessed frame glazing in place of standard curtain walling, but Jarvis felt it needed to go away and give that matter further consideration (Day 6 p. 123). However the Judge made no finding on this other than that the subject was raised on 1 November and was not presented as an essential element of a compliant bid. Mr. Coley for Castle Wharf then agreed with Jarvis a price of £4.26 million for Jarvis, as design and build contractor, to carry out the development in accordance with its Contractor's Proposals amended by the menu of options. It was agreed that if any savings were achieved by Jarvis by its menu of options, it would receive 20% of those savings.

- 21 Also on 1 November Mr. Coley for Castle Wharf wrote Jarvis a letter of intent, subject to contract, to enter into a contract with Jarvis for a price not to exceed £4.26 million and to be subject to *"final mutual agreement"*. The letter said: *"The contract is intended to include provisions that will comply with the conditions of the Detailed Planning Approval and that you will obtain all necessary additional Statutory consents."* The date for possession was to be 4 November 1996 to give a completion date of 31 October 1997. It recorded Castle Wharf's agreement that in the event of the contract not proceeding Jarvis would be paid on a quantum meruit basis.

- 22 Franklin Ellis on 1 November became retained by Jarvis instead of Castle Wharf. Jarvis met with Franklin Ellis on the same day and was told that the planners would take a great interest in the development. Jarvis asked for copies of the correspondence with the planners. On 4 November Franklin Ellis responded to that request by sending a number of documents. These included the planning consent itself, the letter dated 26 September setting out the proposed *"minor"* amendments and the reply dated 4 October. In addition, (although Mr. Lewer had

disputed this) there was the letter of 30 September from Franklin Ellis which had enclosed the revised drawings (including 24F) and a letter of 15 October from Franklin Ellis which included the following paragraphs:-

"Thank you for your letter of 4 October 1996 regarding the substitution of drawings for the approved scheme.....

We look forward to receiving a stamped approved copy of the substituted drawings and a decision on elevations of Pub/Diner A".

Two copies of drawings including 24F were supplied by Franklin Ellis to Jarvis on 5 November 1996 and in addition Gleeds provided some drawings including 24F to Jarvis on 6 November. On 8 November 1996 Mr. Brazier, the Commercial Manager of Jarvis, wrote to Gleeds that it was returning the drawings which Gleeds had provided, saying "I understand that these drawings form part of the agreement with [Northcliffe]. We are considering the content of the drawings but are advised that with regard to the elevations they are indicative only". At a meeting on 13 November Franklin Ellis was instructed by Jarvis to finalise Contractor's Proposals drawings in discussion with Mr Lewer. Those drawings were intended to "form [the] basis for detailed design to proceed where required", as the minutes of that meeting noted.

- 23 Jarvis had a number of meetings and discussions with the planners, including a meeting on 14 November 1996 at which Jarvis put the Contractor's Proposals (without the menu of options) to the planners to obtain views "from the horse's mouth" on its original scheme. The planners' views were unfavourable. Jarvis also discussed with the planners proposed revisions. On 27 November Franklin Ellis for Jarvis by letter submitted to the planners Jarvis's base scheme with accompanying drawings, inviting the planners' comments. The drawings included drawing 24G showing standard curtain walling, a reconstituted slate roof and at ground floor level the columns in place of the fins, to which we have already referred. Franklin Ellis expressed itself as making that submission under condition 2. But even before the planners' comments were received Jarvis, which had commenced work on 18 November at the site, proceeded with that work despite being warned by the planners at the meeting on 14 November that it did so at its own risk when planning permission for its scheme had not been obtained and by letter dated 19 December it was reminded of the terms of condition 2 of the 25 June 1996 planning permission. Meanwhile, Franklin Ellis warned Jarvis that valuable time had been lost "in resolving your planning changes".
- 24 On 14 January 1997 Franklin Ellis sent by fax to the planners (with a copy to Jarvis) a schedule of the proposed revisions to the original scheme, against 8 of which it had noted "Approved" by reference to the planners' letter of 4 October and against a ninth revision (in respect of the brise soleil) it had added to "Approved" the qualification "subject to submission of alternative detail". A schedule of the revisions and the current planning position in relation to them had been requested by Mr. Lewer from Franklin Ellis before he went on holiday on 19 December 1996.
- 25 On 16 January there was a meeting with the planners at which they stressed the need for the provision by Jarvis of details of the revised scheme. Any false impression gained by Jarvis from Franklin Ellis by reason of the wording of the schedule of revisions which Jarvis received two days earlier was corrected by Franklin Ellis before the meeting in that a revised schedule was made available to Jarvis and tabled for the meeting. Concern was expressed by the planners over a number of unresolved issues arising from the revision of the approved scheme. This heightened Franklin Ellis' concern about the lack of instructions from Jarvis on a number of points, and on 21 January 1997 it wrote to Mr Lewer asking for his urgent attention to these issues.
- 26 On 18 February 1997 the planners sent Franklin Ellis a letter in which they expressed their serious concerns in that the building works had reached the stage of steel work erection in the absence of responses from Franklin Ellis or Jarvis in two areas. One was the submission of details in compliance with condition 2. The other was the variations from the scheme for which planning permission had been granted, and the unresolved issues arising from the proposed revisions. Those variations which were said to be of particular concern were set out under 6 paragraphs. They included (a) additional plant occupying former balcony area, part of floor below and link to Canal Street buildings, (b) the effect of omitting the brise soleil, (c) alterations to the glazing, (d) the omission of the atrium, (e) a loss of interest and depth in elevational detailing including the replacement of the fins with columns, and (f) changes to elevational materials. The letter ended by urging that the supply of outstanding information be expedited and the resolution of those issues as quickly as possible. The planners warned that all works of construction were unauthorised and carried out at the developer's own risk and that unless they received a response within 7 days of receipt of the letter enforcement proceedings would commence. Jarvis was also sent a letter by the planners the same day concerning the pub/diner and warned that the planning committee would take an extremely unfavourable view of any works carried out in advance of their consideration of the revised proposals.
- 27 Although efforts were made to provide the required information, Jarvis continued with the development, and on 22 April 1997 the planners issued an enforcement notice expressed to take effect on 27 June 1997. The breach of planning control alleged was the carrying out of development without planning permission, the development being materially different from that for which permission was granted in June 1996. Work had to stop. A further revised scheme was then submitted for planning permission which was granted on 17 July 1997. On 23 December 1997 a contract was entered into by Castle Wharf and Jarvis for the completion of the development. Castle Wharf and Jarvis agreed that the amount to be paid by Castle Wharf to Jarvis would not exceed £6 million. A deed appointing Franklin Ellis as architects to the development was also executed that day. Office A was later duly completed.

- 28 Proceedings were commenced by Jarvis on 5 May 1998 originally against Castle Wharf alone, but subsequently in April 1999 Gleeds and Franklin Ellis were added as additional defendants. Jarvis claimed that it was only upon receipt of the letter of 18 February 1997 that it became aware that the scheme agreed on 1 November 1996 on which it was engaged did not have planning permission. It alleged that Castle Wharf and/or Gleeds induced Jarvis to tender for and carry out the design and building work on the basis of misrepresentations made by Gleeds between 18 September and 1 November 1996 and that by reason of Gleeds's and/or Franklin Ellis's negligence and/or Franklin Ellis's breach of contract, it suffered loss as a result of the absence of planning permission and the intervention of the planners.
- 29 No less than 38 preliminary issues (some of them being divided into a number of sub-issues) relating to liability were agreed between the parties, and were put before the Judge for decision. He identified in his judgment a further issue, which had not been suggested by the parties, and answered that too. In his judgment which ran to 121 pages, he dealt with all those issues.
- 30 We do not propose to set out the issues and the answers given by the Judge to them because the parties before us have not presented their cases by reference to the specific identified issues. Sensibly each party has concentrated on the findings of fact or law leading to the Judge's conclusions on liability which that party has sought to challenge or support on this appeal.
- 31 The case presented to the Judge by Jarvis against Gleeds and the Judge's conclusions were as follows:-
First, it was claimed that Gleeds owed Jarvis a duty of care, which Mr. Friedman Q.C. for Jarvis accepted on the last day of the hearing before the Judge, was not a positive duty to inform Jarvis, but a duty not to make inaccurate representations. Of the various ways in which that duty was pleaded, the Judge supported only one, viz. that in para. 9A 2 of the Re-Re-Amended Statement of Claim): *"Not to represent or state by conduct or otherwise, that the scheme agreed upon on 1st November 1996 would comply with the planning consent that had been obtained and any conditions attached thereto and/or that which had been agreed with the [planners]"*.
- 32 The Judge found that that was the relevant duty of care owed by Castle Wharf to Jarvis and that Gleeds owed a concurrent duty *"in similar terms"*. In relation to that duty it is relevant to note that the Judge found that there was no contract between Castle Wharf and Jarvis, there being *"a significant and substantial lack of consensus such as to rule out any contract"* at the meeting of 1 November 1996 (Judgment p. 41). Jarvis submitted its tender on the basis that the proposals, subject to the matters that had been separately listed, would be acceptable to the planners as within the existing planning permission. Castle Wharf on the other hand thought that Jarvis's price was in respect of the Northcliffe scheme as represented by Franklin Ellis's 24F drawing. The letter of intent did not create a contract for the works because it expressed an intention subject to contract to enter into a contract.
- 33 Second, it was claimed that Gleeds made the following four representations (pleaded in para. 9D of the Re-Re-Amended Statement of Claim). First were those in the letter of 19 September 1996. By the statement that discussions with the planning officers had been concluded and revised drawings would be issued, it was alleged that thereby *"it was represented that such revised drawings reflected a scheme for which planning permission had been granted and/or in respect of which agreement had been reached with the [planners]"*. Second were those in the letter of 30 September 1996. By the statement that following further meetings with the planners, two proposed amendments could not be implemented, it was alleged that thereby *"it was represented either expressly or by implication that the remainder of the scheme set out in the revised drawings would comply with planning consent and/or had been agreed with the [planners] and/or could be implemented."* Third were assertions by Mr. McNair and Mr. Hopkins of Gleeds on 30 October 1996 that there were 15 aspects of Jarvis's scheme which were unacceptable either because they infringed planning consent or because they did not comply with Northcliffe's requirements. Thereby, it was alleged, *"it was represented that the remainder of [Jarvis's] scheme would comply with planning consent and/or had been agreed with the [planners]."* Fourth were assertions by Mr. McNair and Mr. Hopkins on 1 November 1996 that Jarvis's changes in respect of the 15 items were in line with the agreement reached with the planners and would be acceptable.
- 34 The Judge concluded that *"Relevant statements of fact were made in the letters of 19th and 30th September 1996 and at the meetings on 30th October and 1st November 1996 which were calculated to and indeed in fact induced the belief that agreement had been reached with the planners pursuant to which, provided that the 15 items in the menu of options were put back into the scheme, the Contractor's Proposals thus modified would be acceptable to the planners and to Northcliffe"* (Judgment pp. 73, 74).
- 35 The Judge later in his judgment referred to what was pleaded in para. 9C of the Re-Re-Amended Statement of Claim (setting out Gleeds's role as coordinator and disseminator of information relating to planning, the knowledge of Gleeds that Jarvis had been told not to contact the planners and that Jarvis did not have and would not know of the planning history or the current planning position and of Jarvis's likely reliance on what it was told by Gleeds as to planning matters) and in para. 9D and said: *"Upon my findings of fact, it is clear that not only were the representations and statements pleaded at paragraph 9D made by Gleeds [but] also that the facts and matters alleged in paragraph 9C were established."* (Judgment p. 78).
- 36 The Judge was therefore referring back to earlier findings of fact. We know from the pleading in para. 9D that the alleged representations in the letters of 19 and 30 September 1996 are inferences sought to be drawn from the wording of the letters and in the case of what was said on 30 October the alleged representation is an inference sought to be drawn from what are pleaded to be the assertions made at that meeting. In other words

they were not express representations made in the terms alleged. In the case of the pleaded assertions at the meeting on 1 November, one might have expected that the Judge had made a previous finding that the pleaded assertions were made. But, as Mr. Friedman accepted, there was no such finding. Instead there are findings as to Jarvis's understanding or belief and references to representations made by Gleeds, which appear to refer to the inferences drawn from what was said. Mr. Friedman relied on what the Judge described as "the essence of Gleeds' representations", viz. that Jarvis's Contractor's Proposals together with the 15 items provided a "sufficiently compliant design for the purposes of arriving at a tender price" (Judgment p. 82).

- 37 Third, it was claimed that the representations and statements made by Gleeds were false to a material degree in the respects pleaded in paras. 10.1 to 10.4 of the Re-Re-Amended Statement of Claim and made negligently in the respects pleaded in paras. 10.5 to 10.13 and/or 10A. The Judge found that those representations were false to a material degree in respect of the matters pleaded in para. 10.1.1 ("*Castle Wharf*] had changed the roof covering material for Office A from stainless steel to slate"), 10.1.3 ("*Castle Wharf*] had removed the solar shading for Office A at eaves level") and 10.1.7 ("*Castle Wharf*] had removed the atrium feature in Office A"), in so far as those omissions were dependent upon an alternative of equivalent quality being designed. The Judge found that Gleeds was negligent in that there was no proper basis for the representations (para. 10.5) and it failed to disclose to Jarvis the planners' letter dated 4 October 1996 to Franklin Ellis and/or failed to understand the implications and communicate the same to Jarvis and/or warn Jarvis of the content at any time prior to 1 November 1996 or at all (para. 10.12). The Judge further found negligence in relation to what was pleaded in para. 10.1.4 ("*Castle Wharf*] had introduced standard curtain walling for Office A instead of structurally bonded finish curtain walling", but had failed to inform Jarvis of the reintroduction of structural glazing); he found that there was negligence in respect of para. 10.5 and para. 10.13 (Castle Wharf and/or Gleeds failed to inform Jarvis that prior to 26 September 1996 the planners had rejected a curtain walling glazing system and by the 24F drawing Franklin Ellis had submitted a revised drawing for planning consent which showed structural glazing).
- 38 Fourth, it was claimed that Jarvis relied on such representations and statements. The Judge found that Jarvis did so rely which reliance continued beyond 1 November 1996 through to the letter of 18 February 1997.
- 39 Fifth, it was claimed that Jarvis thereby suffered loss and damage. The Judge found that Jarvis did thereby suffer loss and damage which continued without a break in the chain of causation. The Judge found that subject to the rule against double recovery, the reasonable damages were the costs Jarvis incurred in carrying out the work, plus a sum in respect of the profits Jarvis would normally have expected.
- 40 The Judge rejected a claim by Gleeds that Jarvis had been contributorily negligent.
- 41 Jarvis claimed against Castle Wharf that Jarvis was entitled to be paid by Castle Wharf for work done on a quantum meruit or restitutionary basis. The Judge agreed, holding that Jarvis was entitled to be paid the market value of those works. We are told that £4.6 million has been paid so far. Jarvis also claimed that Castle Wharf owed a duty of care to Jarvis and the Judge found that it did in the terms of para. 9A 2. He also found that Castle Wharf was negligent through the representations and statements made by Gleeds to Jarvis and that it was vicariously liable for all the losses which flowed following Gleeds's representations and statements, that is to say the whole of the reasonable costs incurred, including losses incurred through the delay in completing the work, subject to taking into account what Jarvis received on a quantum meruit or restitutionary basis.
- 42 The case presented by Jarvis against Franklin Ellis and the Judge's conclusions were as follows. First, it was claimed that Franklin Ellis owed Jarvis a contractual duty of care. It was not disputed by Franklin Ellis that such duty arose on 1 November 1996, although the relevant deed containing the contractual terms was not executed until 23 December 1997.
- 43 Second, Jarvis claimed that Franklin Ellis was in breach of its contract with Jarvis in failing to advise it of the falsity of Gleeds's representations, and in informing it in the fax of 14 January 1997 to the planners that many of the proposed revisions to the scheme had been approved by the planners' letter of 4 October 1996. In addition Jarvis alleged (but this was not identified by the parties as a preliminary issue) that Franklin Ellis was in further breach of its obligations in failing to produce or to submit to the planners the detailed design drawings which were required to be submitted as a condition of the planning permission that had been granted.
- 44 Third, Jarvis claimed that by the breaches of contract it had suffered loss and damage.
- 45 The Judge held that Franklin Ellis was in breach of its contract with Jarvis in the following respects:
- 1) It failed to schedule accurately the summary of the design approvals as requested by Mr. Lewer before he went on holiday in December 1996.
 - (2) It failed to warn or explain the necessity for submission of details of the alternatives required in the letter dated 4 October 1996.
 - (3) It failed to submit the plans of the "as to be built" design pursuant to Condition 2.
 - (4) It failed to advise Jarvis of the implications of the project proceeding other than in accordance with the existing planning permission.
 - (5) It failed to obtain planning permission save only as an agreed compromise on enforcement proceedings.
 - (6) It failed to follow up the submission of the revised drawings at the end of November 1996 in any meetings with the planners or in any correspondence with them in order to ascertain whether the same were acceptable, and continued to fail to warn of the fact that there had been no approval of the Contractor's Proposals as re-

submitted as conforming to the basic scheme on 27 November 1996; on the contrary it advised in its fax of 14 January 1997 that the matters had been approved by the planners (Judgment pp. 89-90).

- 46 As regards the loss and damage claimed by Jarvis, the Judge held that Jarvis should have been fully advised by the site start date, 18 November 1996, as to the necessity for details of the alterations required in the letter dated 4 October 1996 and thereby it could have avoided costs in respect of some work which was inappropriate and unacceptable to the planning authority. The Judge further said that had Franklin Ellis followed up the submission to the planners on 27 November 1996, a basic scheme could have been established which limited the embellishments required to replace those removed in September and October to an economic level consistent with maintaining planning quality. Detailed plans of the basic design could then have been submitted under condition 2 and the concerns of the planners would have been satisfied, avoiding the enforcement notice and the other delays. Finally the Judge said that had Franklin Ellis agreed an accurate schedule of what had been approved by or was acceptable to the planners, changes could have been made to allow reasonable progress to a timely and acceptable conclusion. He therefore held that the measure of damages recoverable was the amount of the losses sustained by Jarvis in completing the building including costs wasted and losses due to delay, after giving credit for the quantum meruit or restitution received.
- 47 The Judge rejected Franklin Ellis's claim that Jarvis had been contributorily negligent.

Gleeds's appeal

- 48 Mr. Roger Stewart for Gleeds submits that the Judge was wrong in finding that
- (1) Gleeds owed a duty of care to Jarvis;
 - (2) Gleeds acted in breach of that duty;
 - (3) Jarvis relied on Gleeds's negligent misstatements;
 - (4) Gleeds's negligence caused the losses claimed by Jarvis;
 - (5) Jarvis was not contributorily negligent; and
 - (6) Gleeds was liable in damages to Jarvis for the entire costs of the project plus an amount in respect of profit.

(1) Gleeds's Duty of Care

- 49 The duty of care alleged by Jarvis and found by the Judge was of the type recognised in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, that is to say a duty in respect of the provision of information to another when the provider of that information knew or ought to have known that the other person would rely on that information, which duty when breached can give rise to a claim for economic loss. In *Caparo Industries plc v Dickman* [1990] 2 A.C. 605 at 638 Lord Oliver summarised the position as follows: "What can be deduced from the *Hedley Byrne* case, therefore, is that the necessary relationship between the maker of a statement or a giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at a time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent enquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions."
- 50 In *Henderson v Merrett Syndicates Ltd.* [1995] 2 AC 145 at 180, 1 Lord Goff emphasised by reference to *Hedley Byrne* itself that there must be an assumption of responsibility by the adviser to the advisee, and that once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark on any further enquiry whether it is fair just and reasonable to impose liability for economic loss. Lord Goff at pp. 184-6 accepted that a contract or contractual chain may be inconsistent with an assumption of responsibility.
- 51 The English courts have been slow to recognise a duty of care as arising when a professional agent acting within the scope of his authority on behalf of a known principal provides information to a third party with whom the principal has, or is about to enter into, a contract. Thus in *Gran Gelato Ltd. v Richcliff Ltd.* [1992] Ch. 560 at 571 Sir Donald Nicholls V-C said: "But, in general, in a case where the principal himself owes a duty of care to the third party, the existence of a further duty of care, owed by the agent to the third party, is not necessary for the reasonable protection of the latter. Good reason, therefore, should exist before the law imposes a duty when the agent already owes a duty to his principal a duty which covers the same ground and the principal is responsible to the third party for his agent's shortcomings".
- The Vice-Chancellor recognised that if the principal became insolvent, that might leave the third party without an effective remedy, but he said that the chance that those with whom one deals may become insolvent is an ordinary risk of everyday life.
- 52 Mr. Stewart submitted that the weight of English authority was against the imposition of a duty of care to a contractor, or prospective contractor, upon a member of the employer's professional team rather than the employer itself. He relied on the observations of this court in *Pacific Associates v Baxter* [1990] 1 QB 923 in which it was held that an engineer, while certifying for an interim payment, owed a contractor no duty of care in relation to the content of tender documents supplied by the engineer to the contractor. But that was a case where there was a contract between the employer and the contractor which contained a general disclaimer of liability,

and the actual decision was based on the inconsistency created by the chain of contracts with a duty of care. Mr. Stewart further relied on the views of the editor of Hudson on Building and Engineering Contracts 11th ed. (1995) at para. 1-288: "*An essential consideration in rejecting a proposed generalised or affirmative duty of care owed by an owner's construction professionals to a contractor within the framework of a typical construction project is the element of conflict of interest, calculated to detract from the whole-hearted performance of a professional's duty to his client, which the incorporation of such a duty into the parties' relationships must inevitably create, it is submitted.*"

But in the present case there was no contract between the employer and the contractor at the relevant times of the alleged misstatements, and, as the editor recognises at paras. 1-290 and 1-293, where there is a specific negligent misstatement which is relied on, undoubtedly liability may arise.

- 53 The position, as it appears to us, is this. There is no reason in principle why the professional agent of the employer cannot become liable to a contractor for negligent misstatements made by the agent to a contractor to induce the contractor to tender, if the contractor relies on those misstatements. But whether a duty of care in fact arises in any given situation must depend on all the circumstances, including in particular the terms of what was said to the contractor.
- 54 Mr. Friedman submitted that the information was provided to Jarvis by Gleeds in the knowledge that Jarvis would rely on it to design a scheme and fix a tender, that Gleeds was not merely discharging its duties under a contract with Castle Wharf as its employer but was providing information knowing and intending that it would be relied on, and that thereby there was an assumption of responsibility by Gleeds. He argued that there was nothing in any contractual chain which was inconsistent with the existence of a duty. The fact that there was a remedy against Castle Wharf for Gleeds's negligent misstatements, he said, does not prevent a duty arising, and the imposition of a duty of care gives rise to nothing which can properly be regarded as a conflict of interest, both Castle Wharf and Gleeds having the same interest to take reasonable steps to ensure that the contractor is not misinformed.
- 55 Mr. Stewart argued that it was not reasonably foreseeable that Jarvis would rely, without independent enquiry, upon information provided by Gleeds in circumstances where Gleeds had had no relevant meetings with the planners and was not the source of the information passed on, Jarvis was to be a design and build contractor, the Contractor's Proposals stated in terms that Jarvis had had discussions with the planners, and Franklin Ellis was the appointed architect for the development to whom planning queries could be addressed by Jarvis. Mr. Stewart stressed the inconsistency in the evidence of Jarvis's witnesses as to what was actually said by Gleeds to Jarvis at the meetings on 30 October and 1 November and the absence of a clear finding by the Judge.
- 56 We start with the pleaded representations by inference from what was contained in the letters of 19 and 30 September 1996 respectively and what was said at the meeting of 30 October 1996. We accept that the pleaded representations might possibly be implied but we do not accept that they must or should be implied. Indeed Mr. Lewer himself accepted that in relation to the letter of 19 September 1996 the pleaded representation was an entirely inappropriate assumption to make (Day 5 p. 64), although he attempted to say something different in reexamination (Day 6 p. 101). Neither as a matter of construction of the letters or of what is pleaded as actually having been said on 30 October 1996 nor as a matter of logic do the pleaded representations follow. As Mr. Stewart said, the letters and the pleaded statements made on 30 October 1996 are not inconsistent with the actual position created by the meeting with the planners on 19 September and the letter of 4 October 1996. We respectfully disagree with the Judge in so far as he was relying on the pleaded representations by inference.
- 57 That leaves the pleaded representations allegedly made on 1 November. On their face they are representations of opinion that the 15 items were "*in line with the agreement reached with the planners*" and that they "*would be accepted*". This contrasts with those of the pleaded representations by inference which asserted as a historic fact that Jarvis's scheme or the 15 items had been agreed with the planners. The evidence of Jarvis's witnesses was equally inconsistent as to whether a historic statement was made or an opinion was given.
- 58 Mr. Friedman rightly reminded us that it is not for this court to interfere with findings of fact made by a trial judge, who has had the advantage, denied to an appellate court, of having seen and heard the witnesses, unless it is apparent that the trial judge has misused that advantage (see, for example, *Watt v Thomas* [1947] A.C. 484 at 488 per Lord Thankerton). The difficulty in the present case is that the Judge has not made a clear finding as to what was said by whom and when but he has lumped together all the representations, inferred and actual, to arrive at the essence of Gleeds' representations to which we referred in para. 36 above.
- 59 No doubt, but for the Judge's untimely death, he could and would have been asked to revise his judgment and make clear his findings. That cannot now be done. It would seem to us to leave an unfortunate factual basis on which to make a finding of duty of care when such a finding has not been made before in comparable circumstances. We would equally be loth to order a retrial. But in the event we are prepared to assume, without deciding, that a duty of care did arise in the present case.

(2) Breach of duty by Gleeds

- 60 Again we shall assume, without deciding, that Gleeds breached a duty of care in similar terms to that pleaded in para. 9A 2 of the Re-Re-Amended Statement of Claim by making inaccurate representations that Jarvis's scheme in the Contractor's Proposals as modified by the 15 items would comply with the planning consent which had been

agreed with the planners. There is no doubt but that Gleeds should have supplied Jarvis with drawing 24F and with the letters of 26 September and 4 October 1996.

(3) Jarvis's reliance on Gleeds's misstatements

61 On the assumed bases referred to in the preceding two paragraphs we can accept that Jarvis relied on the misstatements to make the tender offer which it did the same day. But it is common ground that no contract was entered into, and Jarvis was free to walk away from the development to which it was not committed contractually, a fortiori once it knew the truth of what had been represented.

62 We have difficulty with the factual basis for the Judge's conclusion that reliance continued until the letter of 18 February 1997. The Judge said that the information which was given to Jarvis between 2 and 14 November 1996 when seen against the background and in the context of the representation made on 1 November was not sufficient to disabuse Jarvis of its reasonable belief, induced by Gleeds's misstatements, that Jarvis's scheme as modified by the 15 items would be acceptable to the planners. This, the Judge said, was evidenced by two matters. The first was Mr. Lewer's request, before he went on holiday in December 1996, to Franklin Ellis to produce a schedule of revisions. But that Mr. Lewer wanted the development's architect to provide a convenient summary of the current position in no way proves continued reliance on the misstatements on 1 November. The second was what the Judge described as "the state of knowledge which enabled Mr. Stones [Jarvis's project manager until January 1997] to fax Franklin Ellis on 3rd January 1997 in the terms "Can you sign off all the agreed tweaks/changes to external works with planners". Unfortunately the Judge did not quote the rest of Mr. Stones's sentence which was "and we can then seek British Waterways' agreement for the final proposed scheme." In addition the Judge did not refer to another item in the fax which read: "resolve all outstanding planning issues referred matters/materials etc." Had the Judge noted those matters, the Judge might have been alerted to the fact that Mr. Stones was referring to the pub/diner by the canal, not to Office A (see Mr. Ellis's evidence: Day 14 pp. 104-5). This does not prove continued reliance by Jarvis on Gleeds's misstatements. The Judge also relied on Mr. Lewer's evidence in reexamination that he was "quite gobsmacked" (Day 6 p. 106) when in February or March 1997 he saw the approved planning drawings and noted the differences from the tendered scheme. The Judge said that the shock was the realisation that the approved planning drawings were still effective. We will come back to this point after we have considered what information was made available to Jarvis shortly after 1 November 1996 and Mr. Lewer's evidence on that. But it is pertinent to observe that there is no direct evidence from Jarvis that it continued to rely on the misstatements by Gleeds until 18 February 1997.

63 The reasons for the absence of such evidence are, we suggest, obvious. As we have recounted in para. 22 above, Jarvis had on 1 November 1996 asked Franklin Ellis for copies of correspondence with the planners and this was supplied by its letter of 4 November. Further on 5 and 6 November three copies of drawing 24F were supplied by Franklin Ellis and Gleeds respectively to Jarvis. Mr. Lewer's own evidence was that he read the letter of 4 October 1996 with interest and sought to ascertain precisely what it indicated (Day 5 p. 139). He showed in cross-examination that he had a good grasp of the meaning of the letter:

"Q. As a result of reading this letter, you would have concluded, would you not, that the planners were indicating qualified approval but not final approval to matters?"

A. Most importantly, yes.

Q. You must have appreciated as a result of reading this letter that if the detailing was not satisfactory to the planners, they would say, "Yes, it does constitute a material change"?"

A. Insofar as it may have been a little more than detailing, because I believe the planners were taking a collective view. I think they were saying in here, item 2, as substitution of an alternative material and so forth, or an alternative system, which is clearly more than detail.

Q. Yes?"

A. Requesting alternatives in lieu.

Q. I take your point. It goes beyond detailing, it does depend upon the quality of the alternatives that you are putting forward?"

A. Yes.

Q. If they regarded those alternatives as unsatisfactory, then they would not sanction that particular development?"

A. Yes.

Q. So at this stage in carrying out these works, insofar as there were these revisions, Jarvis were carrying out these works at their risk, were they not, in that they did not have formal approval for them?"

A. Yes." (Day 5 pp. 141-2).

64 Mr. Friedman characterised that evidence as given at the end of a long hot day. No doubt it was, but Mr. Lewer's evidence was to the like effect on other days. Thus he was aware that the letter of 4 October 1996 was conditional over and above condition 2 (Day 6 pp. 17-18) and that Jarvis had to satisfy the planners. Mr. Lewer regarded what he had received under cover of the letter of 4 November 1996 as important and significant (Day 6 p. 31). He was aware that there was no written consent from the planners to Jarvis's scheme as modified by the 15 items. He knew that Jarvis was pursuing proposals which went beyond the savings which had been identified as acceptable to the planners (Day 4 pp. 121,2). He knew from the meeting on 14 November of the planners' adverse reaction to the unmodified scheme and had been warned that if Jarvis proceeded with the works without having satisfied the conditions it was doing so at its own risk. In para. 27 of his Supplemental Witness Statement

Mr. Lewer had said that Jarvis "would obviously proceed at [its] own risk insofar as [it] did not have the necessary detailed approval." Mr. Lewer was cross-examined on this:

"Q. It must follow, must it not, if the planners are telling you that the detailed approval is something which is yet to be achieved and that Jarvis is to proceed at Jarvis's own risk, that it is irrelevant what you were told by other people before that? You knew that Jarvis was proceeding at its own risk?

A. Yes." (Day 4 p. 145).

Mr. Lewer had instructed Franklin Ellis to make further revisions (which did not conform to the scheme agreed with Gleeds on 1 November, as can be seen from drawing 24G) which had been presented to the planners on 27 November, at a time when there was a risk that the planners might not give their approval (Day 6 pp. 40-45).

- 65 Jarvis had made numerous copies of drawing 24F, and sent a copy to its steelwork sub-contractors on 14 November when making a procurement order. It is hard to believe that Jarvis was unaware of the significance of that drawing or was relying on the misstatements of Gleeds on 1 November. In this context it must be borne in mind that not only was Mr. Lewer an experienced architect but Jarvis was a very experienced contractor with particular expertise as a design and build contractor, as its Contractor's Proposals made clear.
- 66 The matter does not stop there. On 29 November 1996 Mr. Lynch met with representatives of Jarvis and Castle Wharf. It was Mr. Lynch's uncontradicted evidence that at this meeting he emphasised the Council's anxieties because construction was proceeding on site when certain conditions of the planning consent had not been met. He made the point to Jarvis that such construction was a matter of possible risk to it (Day 10 pp. 111-112). Further, by letter of 19 December 1996 the planners expressly reminded Franklin Ellis of condition 2 and the letter was sent to Mr. Lewer on 2 January 1997. On 3 January Franklin Ellis had reminded Mr. Stones that the approval of Jarvis's scheme was still awaited and Jarvis in the meantime was at risk. Mr. Stones told Mr. Lewer that the meeting with the planners on 16 January 1997 had not been wholly satisfactory, that they had requested details of glazing and other matters and Mr. Lewer had understood that the planners had not indicated that Jarvis could proceed with all the matters in its proposals of 27 November 1996 (Day 6 pp. 71-72).
- 67 In these circumstances we find it hard to understand why the Judge was impressed with the evidence of Mr. Lewer that he was "gobsmacked" in February or March 1997 when Mr. Lewer had known the details of the planning permission early in November and could have obtained the planning drawings at any time before or after 1 November. Still less do we accept the Judge's finding on continued reliance. It is significant that nowhere does the Judge deal with Mr. Lewer's evidence about his understanding of the letter of 4 October 1996. It is not in dispute that the Defendants relied heavily on that evidence. In our judgment a judge must deal with the principal important points relied on and it is an error of law to fail to do so.
- 68 We therefore conclude that there was no reliance by Jarvis on Gleeds's misstatements on 1 November within a few days thereafter.

(4) Causation

- 69 The Judge concluded that on 1 November 1996 Jarvis was unaware of the caveats in the letter of 4 October 1996 or that the glazing should be in accordance with drawing 24F rather than 24E, that is to say, recessed frame or Category 2 as described by Mr. Lewer (Day 6 pp. 6 - 8). That would be more expensive by at least £20,000 than the curtain walling shown in 24E. Assuming that he was correct to find that Gleeds was therefore in breach of a duty of care owed to Jarvis, we must consider whether any damage resulted from that breach. The Judge concluded that Jarvis "may well have not quoted at all, or delayed or written in provisional sums as had the first tenderers making the prices too high and unacceptable to Mr. Coley" (Judgment p. 35). He decided that there was no break in the chain of causation so that Gleeds and Castle Wharf as its principal were liable for the costs Jarvis incurred in carrying out the work plus a sum in respect of the profits Jarvis would normally have expected.
- 70 The Judge did not reach a conclusion on what Jarvis would have been likely to have done if aware of all the relevant matters. His approach to damages followed the submission made by Mr. Friedman. But it is difficult to see how his conclusions can be justified. Castle Wharf had entered into a contract with Northcliffe which required its building to be constructed on particular terms which Mr. Coley believed had been or would be accepted by the planners. Thus a contractor was needed. The building was on a prestigious site and it is clear that Jarvis was keen to be involved. So much is apparent from its acceptance of the work involved in trying to modify the proposals by putting forward its own scheme on 14 November 1996 and its pursuit of a solution when things began to go wrong. There is in our view no reason to believe that it would have failed to tender. It would have discovered what was likely to be involved in the caveats and increased its tender price accordingly. Some savings could have been made, but it is difficult to conceive that Castle Wharf would not have agreed to a price. It could hardly fail to do so since it had committed itself to completing the building for Northcliffe.
- 71 Thus the foreseeable result of Gleeds's negligence would have been that Jarvis tendered in a smaller sum than was appropriate. In fact, there was no contract and so it was to be paid for what work it did on a quantum meruit basis. Accordingly, it is difficult to understand how Gleeds should be liable for all the work. The reality is, since following further negotiations there has been a new contract entered into in December 1997 between Jarvis and Castle Wharf, that Jarvis will (subject to the £6 million cap) be paid for the work done. It was suggested that Castle Wharf might not be able to meet its obligations. But there was no evidence to show that it would be unable to pay Jarvis the amounts due to it. What remains in dispute, and would be payable if a breach of duty of care and causation were established, is the amount resulting from the delay caused by the stoppage of work

between April 1997 and July 1997 following the service of the enforcement notice and from what have been described as embellishments. These are items which the planners had conceded but, because of their stronger negotiating position resulting from the need for the enforcement notice, had been reinstated as a condition of achieving the withdrawal of the enforcement notice.

- 72 Gleeds argues that the chain of causation was broken because within a few days of 1 November Jarvis received all the information which had been missing before but nonetheless chose to continue to proceed in accordance with the letter of intent. Mr. Friedman naturally accepted that had Gleeds given the information (which in context constituted the letter of 4 October 1996 and drawing 24F) he would have had some difficulty in maintaining a case against it. He would still perhaps have urged the continuing effect of the misrepresentation that the scheme presented would be acceptable to the planners, but that would have been a difficult argument in the light of the letter of 4 October. That letter must have put Jarvis on enquiry as to the terms of the planning permission. But, he submitted, different considerations applied when the information came later and Jarvis had no reason to assume that what it had been told before was erroneous. By then, there was no need to make enquiries and it was therefore reasonable not to do so.
- 73 We have already referred in para. 62 above to the Judge's conclusion that the further information given to Jarvis between 2 and 14 November was not sufficient to disabuse Jarvis of its reasonable belief that Jarvis's scheme as modified by the 15 items would be acceptable to the planners. That conclusion is attacked on the ground that it was not open to the Judge on the evidence before him and that in reaching it he failed to refer to, let alone deal with, the highly material evidence given by Mr. Lewer in cross-examination which we have referred to in para. 62 above.
- 74 We have already decided that the Judge's conclusion that reliance on Gleeds' breach of duty (assuming there was such a breach) continued until 18 February 1997 was wrong. That also means that causation cannot be established. But it is worth emphasising certain points even though we are to an extent covering matters already dealt with.
- 75 The letter of 4 October 1996 was clear enough. It was saying in terms that the planners were likely to accept most of the proposed amendments subject, in the case of three of them, to satisfaction about the quality of any substitute materials or alternative scheme. There was no guarantee. Nonetheless, Mr. Coley was persuaded that this letter represented a sufficient approval of the scheme he had agreed with Northcliffe to justify going ahead. That he was in the end correct is shown by the fact that the building has now been completed, but there was a need for speedy resolution of the outstanding concerns.
- 76 The letter should have put Jarvis on enquiry. Mr. Friedman submitted that that was not so. He identified nine separate matters which he said were material. They can be summarised as follows. The information came only five days after the meeting of 1 November when the misleading representations had been made and so it was not surprising that a pre-existing document should be regarded as less up to date; Jarvis had no reason to suppose matters had not moved on after 4 October. We would comment that there was nothing in writing to show that they had. The same points, namely that things had moved on, would apply to drawing 24F which was dated 30 September 1996. There had, on the Judge's findings, been a discussion about glazing on 1 November but it had not been put forward as a requirement for approval. We would comment that no doubt this was because all (save, it seems, Jarvis) appreciated that the type of glazing shown on 24E would not suffice and that that drawing had been superseded. Mr. Friedman continued that there had been no advice, warning or suggestion that anything Jarvis had been told earlier was wrong. The letter of 4 October, he said, was not easy to understand as was apparent from what Franklin Ellis said about it subsequently. The 4 October letter, he pointed out, does not deal with everything which turned out to be in issue and therefore, bearing in mind the lack of any warnings or advice from any of the professionals, there was no reason for any alarm bells to ring.
- 77 Attractively though Mr. Friedman's submissions were put, we are wholly unpersuaded by them. They and the Judge's reasoning do not deal with what seem to us to be most material admissions made by Mr. Lewer in the course of his evidence which we have set out in paras. 63 and 64.
- 78 Mr. Friedman has submitted that it was reasonable to suppose matters had moved on since the letter of 4 October. But there was nothing in writing and so that could not be assumed. It is to be noted that Jarvis was also aware that, apart from the need to have planning approval, its proposals had to comply with what had been agreed between Castle Wharf and Northcliffe. The drawings, which included 24F, received on 6 November were known to be part of that agreement. So much was accepted by Mr. Brazier (Day 3 p.28). He further accepted (Day 3 p.30) that it was obvious that if what was to be constructed was materially different from what was shown in 24F, Castle Wharf would be in breach of its obligations to the end user, Northcliffe. That Jarvis anticipated that 24F might well have to be used is also shown by the fact that on 14 November it sent a procurement order for steelwork based on 24F. However, when it started to build, the steelwork was not positioned in accordance with 24F; indeed, that triggered the letter of 18 February 2000, although in the end it turned out not to be of such importance. All this in our view is inconsistent with the contention that Jarvis was unaware of the significance of 24F.
- 79 In all the circumstances, we are satisfied that any damage could not have been caused by the negligence found against Gleeds. In any event, not only did Jarvis choose to proceed with the work but it presented a scheme to the planners which contained modifications beyond those it believed to have been agreed. No doubt it was

encouraged to do this by Mr. Coley's desire to achieve savings and the carrot that it would benefit to the extent of 20% of any such savings. It is surprising that its proposals, which were put forward on 25 October, were made in ignorance of the actual planning permission and approved drawings. At the very least one would have expected it to ascertain what precisely it was modifying.

- 80 This analysis makes it unnecessary to consider independently the allegations of contributory negligence which, to a large extent, mirror the matters relied on as breaking the chain of causation. There were later acts which have been raised and those we should consider in relation to the case against Franklin Ellis. As will become apparent, these are added reasons for not saddling Gleeds with the liability accepted by the Judge.

Castle Wharf's Appeal

- 81 It is convenient next to consider the appeal by Castle Wharf. It can be dealt with very shortly. It is accepted that Castle Wharf's liability, other than for the reasonable costs of works on the basis specified in the letter of intent dated 1 November 1996, can only arise if Gleeds, its agent, is liable. Our decision that Gleeds is not liable must exonerate Castle Wharf since no independent liability is or could be found against it.

Franklin Ellis's Appeal

- 82 Jarvis's claim against Franklin Ellis was for damages for breach of a contractual duty of care. From 1 November 1996 Franklin Ellis was employed by Jarvis as architects for the project. The agreement dated 23 December 1997 made between Franklin Ellis and Castle Wharf (and thereafter novated in favour of Jarvis) contains what appears to be a list of standard descriptions of the services it was to provide. These include such matters as developing the employer's requirements from the approved outline proposal, preparation of production drawings and the provision of additional alternative design details to seek approval from the planning authorities.
- 83 As to the content of the duty of care required in the provision of the services which Franklin Ellis agreed to provide, Mr. Friedman referred us to the joint report of the expert architects whom Jarvis, Castle Wharf and Franklin Ellis had instructed for the purposes of the trial being respectively Mr. F Bramble, Mr. D Isherwood and Mr. D Hands. The experts agreed that after 1 November 1996 Franklin Ellis should have taken steps to ensure that Jarvis was provided with a report on the current planning permission and subsequent negotiations and that Jarvis was properly advised as to the attitude of planners to changes generally particularly those which were at variance with the scheme which had received conditional planning permission.
- 84 The experts were not unanimous on what advice Franklin Ellis should have given Jarvis about the planners' letter of 4 October 1996, a copy of which Franklin Ellis sent to Jarvis on 4 November 1996. The expert witness for Franklin Ellis (Mr. Hands) took the view that Franklin Ellis need only give advice as to the planning position if it was requested to do so. The other experts (Mr. Bramble and Mr. Isherwood) thought that a reasonably competent architect should have provided a commentary to the client and a suggested course of action. However in cross-examination Mr. Bramble accepted that it was sufficient that Jarvis was told that the site was sensitive, and was then sent the up to date correspondence which it had requested (Day 16, pp. 92 - 3). Franklin Ellis dealt with both these matters in its letters dated 22 October 1996 and 4 November 1996 respectively.
- 85 The Judge made no reference in his judgment to the joint report of the experts. This may well be because (as we were told) none of the parties placed reliance on it at trial although it was in the trial bundles. The Judge does not set out what he considered to be the content of the duty of care owed by the architects or the evidential basis for it. He assumed that Franklin Ellis owed certain duties and then set out breaches of those duties.
- 86 Accordingly it is not clear from the judgment what evidence the Judge accepted or rejected as to the content of the duty of care to be performed by Franklin Ellis as reasonably competent architects. In the absence of those reasons the Judge's conclusions on breach of duty must be carefully scrutinised to see whether they are sustainable.
- 87 Mr. Elliott QC, for Franklin Ellis, submits that Jarvis knew that its scheme had to be submitted to the planners for their approval (although he did not suggest that Jarvis thought that there would have to be a new application for planning permission). Following its appointment Franklin Ellis almost immediately supplied to Jarvis a copy of drawing 24F, which Gleeds had in error failed to show Jarvis prior to its tender offer. Franklin Ellis did not know, however, that Jarvis had a limited and erroneous understanding as to the planning position because Franklin Ellis had not been involved in the tender process. Following its appointment, Franklin Ellis continued to be involved in planning matters and among other things Franklin Ellis was represented at the meeting on 14 November 1996 with the planners to discuss the revised scheme which Jarvis hoped to build. Subsequently Franklin Ellis submitted Jarvis's revised scheme to the planners on 27 November 1996. The planners could not provide an initial response until 16 January 1997. Unless and until the revisions had been agreed with the planners and the details required to be submitted for approval had indeed been approved, Jarvis was always proceeding at its own risk. Franklin Ellis was never in a position to warrant that any particular scheme or details would be acceptable to the planners.
- 88 Jarvis's pleaded case against Franklin Ellis may be divided into three main parts. First Jarvis claims that Franklin Ellis failed to warn or inform Jarvis of any of the facts and matters about which it had been given false information or representations at the meetings on 30 October and 1 November 1996. The second part of the claim made by Jarvis against Franklin Ellis is that on 14 January 1997 Franklin Ellis had erroneously informed Jarvis that the planners had approved the matters mentioned in Mr. Lynch's letter dated 4 October 1996. The third part of the claim which Jarvis makes against Franklin Ellis is that Franklin Ellis failed to produce detailed design drawings pursuant to condition 2.

- 89 Any failure to warn or inform Jarvis must relate to some time after the meetings on 30 October and 1 November 1996 because Franklin Ellis was not involved in those meetings nor in the tender process. Jarvis would have had to establish either that Franklin Ellis was under an obligation to inform or warn as a matter of professional duty arising in any event, or alternatively that Franklin Ellis became aware of the misrepresentation at some point in time. Neither was established. It was not pleaded that Franklin Ellis was put on enquiry.
- 90 Jarvis's second case against Franklin Ellis relies upon the schedule sent to the planners and Jarvis on 14 January 1997. As we have explained in para. 25 above, the inaccuracies in the schedule prepared by Franklin Ellis were corrected on 16 January 1997, and accordingly any negligence by Franklin Ellis could not have been causative of any loss suffered by Jarvis. We will refer to the sequence of events here in a little more detail at paragraph 102 below.
- 91 It was not pleaded that there was any duty on Franklin Ellis to find out about what had been said at the meetings of 30 October and 1 November 1996 and that matter was not addressed by the Judge. In those circumstances despite Mr. Friedman's submissions we consider that it is unnecessary for us to address it.
- 92 We now turn to the Judge's findings of breach of duty. We take them in turn using the numbering in paragraph 45 above. Jarvis has through Mr. Friedman made it clear that so far as it is concerned the crucial findings of breach of duty by the Judge are that Franklin Ellis failed to warn Jarvis of the necessity for submission of detailed alternatives required by the letter of 4 October 1996 and as to the consequences of the project proceeding otherwise than in accordance with the existing planning permission (sub-paras. (2) and (4) of para. 45 above). In those circumstances we deal more briefly with the other findings.

Finding (1)

- 93 Mr. Lewer had all the information about design approvals from shortly after 4 November 1996 and according to his evidence (to which we refer in para. 63 above) he understood the position with the planners as stated in their letter 4 October 1996. In our judgment, Jarvis cannot therefore have been misled by the schedule sent on 14 January 1997 and in any event it was corrected on 16 January 1997 before it could have been relied on.

Finding (2)

- 94 As explained above, Mr. Lewer understood the planners' letter dated 4 October 1996. Accordingly, as we see it, if Franklin Ellis had been negligent in failing to give explicit advice about this letter, no damage could have flowed from that negligence. As Mr. Elliott submitted, when dealing with a client with experience in the relevant area (and Jarvis was after all a design and build contractor on the project), there is only a duty to advise if advice is sought (see *Carradine Properties Ltd v D J Freeman & Co* [1999] LL.R. Practice Note 483). The fact that (as appears from the schedule sent on 14 January 1997) Franklin Ellis may have in part misunderstood the position does not avail Jarvis.

Finding (3)

- 95 Mr. Friedman accepted that this was not a finding which the Judge was entitled to make.

Finding (4)

- 96 As Mr. Lewer accepted in his evidence (Day 4, p. 121) Franklin Ellis gave this advice in its letter dated 22 October 1996, and accordingly this finding is against the weight of the evidence. As stated under finding (2) we accept the submission that Franklin Ellis was only under a duty to advise Jarvis on planning matters if it was asked to do so. Jarvis well knew that the start of building works without the planners' approval for its scheme was at its own risk. It is immaterial that, for reasons of which Franklin Ellis was unaware and for which Franklin Ellis was not responsible, that risk was greater than it understood it to be.

Finding (5)

- 97 This does not relate to any pleaded allegation forming part of Jarvis's case. In any event, Franklin Ellis did not at any time guarantee that planning permission could be obtained. From November 1996 to January 1997, Jarvis was still at the stage of getting approval from the planners for its base scheme (viz a scheme the outline of which was acceptable to the planners apart from condition 2). It was endeavouring to obtain approval under the planners' delegated powers without making a fresh application for planning permission. It was therefore inappropriate for Franklin Ellis to make any application for planning permission. Mr. Friedman accepted that if Franklin Ellis' duty was to take reasonable steps in this regard, this finding added little to (2) or (4).

Finding (6)

- 98 The evidence from Mr. Smith and Mr. Dudley shows that Franklin Ellis did press the planners for a decision but the planners were not in a position to give a decision until January 1997. In his final sentence under this finding (which is the only part of this finding which relates to any pleaded allegation forming part of Jarvis's case), the Judge found that Franklin Ellis failed to advise Jarvis about the absence of approval by the planners, but this cannot stand for the same reasons as finding (2) above.
- 99 In conclusion, we consider that the findings of breach of duty made by the Judge were against the weight of the evidence and that they cannot stand. The fact that the Judge considered that Mr. Dudley (who was an architect employed by Franklin Ellis and who was responsible for much of the work that Franklin Ellis did for Jarvis on this project) was an unreliable witness (Judgment, pp. 47-8) and that Franklin Ellis made errors, for example in labelling the request for approval made to the planners on 27 November 1996 as a request for approval under condition 2 (a mistake which the Judge regarded as more fundamental than an error of wording: Judgment pp. 51-2), does not affect this conclusion.

- 100 We now turn to consider the causation issues in relation to Franklin Ellis. As we have noted in para. 46 the Judge relied on three matters. First, he said Jarvis should by 18 November, which was the site start date, have been advised as to the necessity for details of the alternatives required so that the cost of some of the work which was inappropriate and unacceptable could have been avoided (Judgment, p. 90). In the light of Mr. Lewer's evidence about the letter of 4 October (see paras. 63- 4 above) and our conclusion that Jarvis could not have relied on Gleeds's misstatements after receipt of a copy of that letter, this finding cannot in our judgment stand. Further, Jarvis was aware of condition 2 which had to be met. While we accept that contractors may reasonably go ahead without meeting such a condition in the expectation that the planners will be prepared to await its fulfilment, the need to meet it in due course is clear, and as was common ground at the trial (see. para. 5 above) the works carried out had to be in general conformity with the planning permission which had been granted. Jarvis started work when it was aware that there was no concluded agreement to their proposals which differed from the planning consent and that the requirements of condition 2 had not been met. Any advice which it might have been given by Franklin Ellis would have been superfluous. Moreover, the reservations expressed in the letter of 4 October were likely to be relatively easily overcome since the planners' general approach was that the Council wanted the building to keep Northcliffe in the City. The extra expense attributable to the glazing might have led to a demand for an extra £20,000 or so to be added to the tender price. In the context of the overall sums and the tight time scales to which Castle Wharf had committed itself, that would not have been likely to prove an insurmountable obstacle. Accordingly, we do not think that the Judge's first point can be maintained.
- 101 Secondly, the Judge found as follows:- *"At the end of November 1996 when the basic scheme conforming to that which it was understood was acceptable to the planning authority was submitted, had Franklin Ellis followed up the submission a basic scheme could have been established which limited "the embellishments" required to replace those removed in September/October to an economical level consistent with maintaining planning quality. The planning officers would then have been informed, and able to inform all others concerned with the site, as to the work being carried out on site. Detailed plans of the basic design agreed could then have been submitted under condition 2 as well as being utilised as working drawings and the concerns of the planning authority would have been satisfied avoiding the Enforcement Notice and other delays"* (Judgment, p. 90).
- Since in due course it took from February until July to reach an acceptable compromise, it is difficult to follow how the submission of a detailed scheme in November would have produced such a miraculous result. As Mr. Elliott pointed out, there was no evidence given of what would have been likely to achieve the required compromise. In any event, the scheme submitted in November 1996 as detailed in the letter of 27 November, albeit wrongly described as being submitted under condition 2, had to be considered by the planners. In the meantime, Jarvis continued with the work despite the warnings from the planners.
- 102 It is convenient to deal here with the schedule faxed to Mr. Smith and copied to Jarvis on 14 January 1997. Mr. Lewer was going on holiday over Christmas until 22 January. He said that he had asked for the schedule and it was suggested that he may have seen it before he went on holiday. The evidence does not support that and he had no recollection of having done so. The suggestion is really based on nothing more than that the schedule itself is dated December 1996, but its second page refers to amendments requested by the Council on 9 January 1997. It is apparent that time was needed for the planners to consider their reaction to what had been proposed and that the meeting fixed for 16 January was intended to determine the position. There can be no doubt that Jarvis first saw the schedule on 14 January and that Mr. Lewer did not see it until after it had been amended following the meeting of 16 January on his return to the office on 23 January.
- 103 It is said that the schedule shows that Franklin Ellis did not understand the letter of 4 October. It notes that the items specified in the letter of 26 September 1996 had been approved. Mr. Smith was unhappy with that and it was amended on 16 January to *'not material'*. This was technically correct but Franklin Ellis's error was of little consequence except in relation to item 6 in the letter of 26 September. Franklin Ellis failed to note the caveat in the planners' response on 4 October to item 6. However the schedule included a reference to the letter of 4 October. Accordingly this error was not serious.
- 104 The Judge further relied on an exchange of faxes on 3 and 7 January 1997 as showing that Franklin Ellis did not properly understand the planning position. Mr. Stones (of Jarvis) referred in his fax of 3 January to Franklin Ellis signing off *'all the agreed tweaks/changes to the external works with planners'*. The response from Franklin Ellis on 7 January indicated that the changes had been discussed with the planners and *"the pub and changes to Office A have been submitted formally but have to go to the committee"*. That was correct as regards the pub/diner to which reference was being made (see para. 62 above). Even if there may have been some uncertainty we cannot infer from that that Franklin Ellis was unaware of the need to get some formal approval for the change. Indeed, that is made quite clear. No doubt it believed, as did all involved, that a solution should be reached without too much trouble. However, the planners were understandably beginning to lose patience because Jarvis had failed to settle the outstanding matters, including what was required by condition 2, but continued the construction work. All this supports the submission made by Mr. Elliott that the Judge's findings cannot support the conclusion drawn in support of causation.
- 105 The Judge's third finding was in these terms: *"Finally had they agreed an accurate schedule of what had been approved by or was acceptable to the planners the 'tweaks and changes' could have been made so as to show reasonable progress to a timely and acceptable conclusion"*.

The schedule which Franklin Ellis was found to have been negligent in producing was not "a schedule of what had been approved by or was acceptable to the planners", but what the planners had approved (see Finding (1) above, para. 93). We have largely dealt with that schedule. There was no evidence to support this conclusion nor in any event was the schedule substantially inaccurate (see para. 103 above). In any event, as we have said in para. 62 above, the Judge misunderstood the reference in the fax of 3 January 1997 to 'tweaks and changes'. His conclusion that this showed Jarvis understood that nothing material was left outstanding (Judgment p. 56) cannot be supported.

106 We therefore do not regard the Judge's reasons for deciding that any breaches of contract by Franklin Ellis caused damage to Jarvis as valid. They do not support the suggestion that, "after giving credit for quantum meruit/restitution received", Jarvis was entitled to claim "the amount of the losses sustained by Jarvis in completing the building including costs wasted and losses due to delay".

107 In the light of our conclusion on causation, it is unnecessary to consider the allegations of contributory negligence.

Conclusion

108 In the result these appeals will be allowed, the order of the Judge set aside, Jarvis's claims against Gleeds and Franklin Ellis dismissed and Jarvis's claim against Castle Wharf for damages dismissed.

ORDER: Appeals allowed, order of the Judge set aside, Jarvis's claims against Gleeds and Franklin Ellis dismissed and Jarvis's claim against Castle Wharf for damages dismissed.

We make clear that the orders that we have made, leave for the quantum trial issues which should be dealt with at that trial, that is issues as between Jarvis and Castle Wharf. We order that Jarvis pay Gleeds and Franklin Ellis's costs of the appeal, costs of the application for permission to appeal, costs of the action and costs thrown away in respect of the quantum trial. We order that Jarvis pay Castle Wharf's costs of the appeal on the standard basis. We do not accept that it is appropriate to order indemnity costs in the circumstances of this case. We order that Jarvis pay Castle Wharf's costs of the application for permission to appeal. We also do not accept that the costs of the action should be reserved to the Judge dealing with quantum.

We think it appropriate to make the order requested by Castle Wharf. We also order Jarvis to pay Castle Wharf's costs thrown away in respect of the quantum trial. We order assessment now of all the costs awarded to Castle Wharf, save for costs thrown away in respect of the quantum trial.

We think that should await the outcome of that trial when the cost's Judge will be in a better position to see what should await the outcome of that trial, when the cost's Judge will be in a better position to see what should be the costs thrown away. We should make clear that in relation to the contract issue we accept that it did not occupy much time, or argument, and we think therefore, that, looking at all the issues as between Castle Wharf and Jarvis, Castle Wharf was the substantial winner, and we therefore make no discount in respect of that issue. (Order does not form part of approved Judgment)

Mr. David Friedman Q.C. and Mr. Duncan McCall (instructed by Messrs Eversheds of London for the Respondent)

Mr. Nicholas Dennys Q.C. and Mr. Simon Lofthouse (instructed by Messrs Freeth, Cartwright, Hunt, Dickens of Nottingham for the 1st Appellant)

Mr. Roger Stewart and Miss Kate Vaughan-Neil (instructed by Messrs Kennedys of London for the 2nd Appellant)

Mr. Nicholas Elliott Q.C. and Miss Fiona Sinclair (instructed by Messrs Reynolds, Porter, Chamberlain of London for the 3rd Appellant)