[2003] EWHC 83 (TCC)
Case No: HT 00/00386

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 24th January 2003

Before :

THE HONOURABLE MR JUSTICE FORBES

- -

Between :

Procter & Gamble (Health and Beauty Care) Limited

Procter & Gamble Technical Centres Limited

Procter & Gamble Limited

- **and –**

-

Carrier Holdings Limited

Toshiba Carrier UK Limited

- -

- -

Steven Walker(instructed by CMS Cameron McKenna) for the Claimants

Andrew Goddard(instructed by Edwin Coe) for the Defendants

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

The Hon. Mr. Justice Forbes

Mr Justice Forbes:

1.
Introduction. This judgment is concerned with the determination of a number of preliminary issues and associated applications with regard to actual or proposed amendments to the pleadings (as to which, see below) in proceedings in which the Claimants seek damages, in both contract and tort, because of a deficiency in performance of certain air conditioning units that were installed in the Claimants' new UK headquarters at Brooklands, Weybridge, Surrey ("the premises") during 1995.

2.
The Preliminary Issues. There are three preliminary issues, the terms of which are as follows:

(1) Did the cause of action in contract accrue before (a) 19th October 1994 and (b) 16th February 1995?

(2) Did the cause of action in negligent misrepresentation accrue before (a) 19th October 1994 and (b) 16th February 1995?

(3) Did the cause of action in negligence accrue before (a) 19th October 1994 and (b) 16th February 1995?

3.
The Assumed Facts. For the purposes of the preliminary issues, the parties invited me to assume (but not to decide) certain facts ("the assumed facts"), the written terms of which were agreed by the parties, as follows:

"1. In 1993 Proctor & Gamble (Health & Beauty Care) Limited ("H&B") proposed to construct a new office building on land that it owned at Brooklands, Weybridge, Surrey.

2. H&B retained Aukett Limited ("Aukett") to provide professional services in connection with the proposed development.

3. Aukett was retained to provide H&B with professional advice in relation to amongst other things the design of the mechanical and electrical building services that were to be incorporated in the proposed building

4. During the latter half of 1993 Aukett prepared an outline design on behalf of H&B. Aukett's outline design incorporated variable air volume diffuser units ("VAV units") manufactured or supplied by Carrier Holdings Limited ("Carrier"). The particular units selected at this stage were 37 AG and 37 AH units.

5. In December 1993 H&B issued an invitation to tender which included provisional sums in respect of mechanical services.

6. On 25th March 1994 H&B wrote a letter of intent to Costain Building and Civil Engineering Limited ("Costain"). The letter stated that it was H&B's intention to accept Costain's fixed price tender in the sum of £17,261,248. The said sum included a provisional sum in respect of mechanical services.

7. On a date unknown but some time during the early months of 1994 Aukett approached Carrier to see whether the number of VAV units in Aukett's outline design could be reduced.

8. In or about April or May 1994 there was a meeting at Aukett's then offices at Chelsea Embankment, London. Carrier's Alan Strachan and John Foster and Aukett's Robert Thorogood and John O'Hara attended the meeting.

9. At the said meeting Carrier made representations to Aukett concerning VAV units known as 37 HS units supplied by Carrier.

10. Carrier knew or should have known that the purpose of the aforementioned meeting was to enable Aukett to select a VAV unit for H&B's development at Brooklands.

11. The oral representations were:

(1) VAV units known as 37 HS units provided and would provide air flow and noise performance similar to that of the 37 AG and 37 AH units and,

(2) VAV units known as 37 HS units provided and would provide performance as set out in written product data handed to Aukett during the meeting.

12. The written data handed to Aukett during the meeting constituted a written and continuing representation as to the performance of 37 HS units. The written data contained the same information as that found at page 22 of Carrier's Selection Manual no.13786-79 (published in September 1994).

13. Aukett was for the purposes of the said representations the agent of H&B.

14. Carrier knew or should have known that Aukett would rely on the aforementioned oral and written representations in deciding whether to nominate 37 HS units for the Brooklands development. The representations were made in contemplation of the Brooklands development.

15. Carrier warranted that 37 HS units would provide the performance set out in Carrier's written data.

16. In making the aforementioned representations Carrier owed a duty of care in tort to exercise reasonable skill and care in respect of the representations. The said duty was a duty not to cause economic loss. The said representations were made negligently.

17. Carrier's representations were false because the 37 HS units supplied and installed at Brooklands do not provide the performance it was represented 37 HS units would provide.

17.1 The product data sheets inaccurately record the performance of the 37 HS Moduline terminal unit, such that the performance of any 37 HS unit would not meet all of the noise performance data set out in the product data sheet.

17.2 The performance of the 37 HS Moduline terminal unit is such that it does not provide air flow and noise performance similar to that of 37 AG and 37 AH units.

18. On 12th May 1994 Aukett asked Carrier whether it could supply 37 HS units with a modified profile to fit into Aukett's preferred ceiling layout.

19. On or about 2nd June 1994 Costain invited tenders for the M&E works. The invitees included two companies, Phoenix Electrical and AG Manly & Company Limited ("Manly"), who were to provide a joint tender.

20. In reliance upon the aforementioned representations Aukett decided to specify the use of 37 HS units. Part 3 of the Mechanical Specification dated 3rd June 1994 included a Schedule of Manufacturers and Specialists which at page 52 provided "VAV Terminals Carrier Moduline 37 HS 4".

21. The selection of Carrier's 37 HS VAV terminals was consideration for Carrier's warranty as to the performance of the 37 HS units. The nomination was induced by Carrier's representations which were false and which were made negligently.

22. On 6th July 1994 Manly requested Carrier to send "the quote" for the 37 HS units for the Brooklands project.

23. On 11th July 1994 H&B entered into a contract with Costain in the form of the BPF ACA Form of Building Agreement 1984 revised 1990 and subject to amendments.

24. On 15th July 1994 Carrier provided Manly with a budget price for the supply of 37 HS units and associated equipment in the sum of £425,000.

25. On 18th July 1994 Carrier requested that Manly provide a copy of the control specification and schematic drawings to enable a firm quotation to be produced.

26. On 18th July 1994 Manly's tender was submitted to H&B. Manly's tender excluded a firm price for the Carrier Moduline VAV units (because Carrier had provided a budget price for the 37 HS units).

27. On 28th July 1994 Carrier provided a quotation in the sum of £330,599 to Manly.

28. On 18th August 1994 Carrier provided a revised quotation to Manly.

29. On 30th August 1994 Carrier provided a price for special profile diffusers to Manly.

30. On 5th October 1994 Manly sought confirmation from Carrier that production time had been booked, that Carrier would confirm the air pattern is acceptable (with reference to Manly fax's dated 29th September 1994) and clarification of what was meant by "HS" in Carrier's technical literature. Manly required the said clarification in order to select the relevant noise data for the purpose of checking the noise data. Carrier responded to Manly the same day by fax. On the same date Carrier confirmed to Manly the agreed prices by fax.

31. There were further negotiations between Manly and Carrier concerning the proposed order as evidenced by correspondence dated 10th, 12th, 13th and 19th October 1994.

32. On 19th October 1994 Manly placed an order for the supply of 37 HS units and other equipment as detailed in the quotation dated 18th August 1994.

33. On 24th October 1994 Carrier acknowledged receipt of Manly's order.

34. On 31st October 1994 Carrier confirmed receipt of Manly's verbal order for VAV units as described in the quotation dated 18th August 1994. On the same date Manly asked Carrier to provide special diffusers as an extra to the order.

35. Also on 31st October 1994 Carrier wrote to Manly setting out a revised order value of £219,932.

36. Delivery of 37 HS units to the Brooklands site c/o Manly occurred between 26th January 1995 and 21st February 1995.

37. The installation of the 37 HS units and the associated controls required for their operation took place after 21st February 1995 and was completed (subject to faults) in July 1995.

38. Partial Take-Over of the development occurred on 1st June 1995. Take-Over of the remainder of the development occurred on 30th July 1995.

39. Noise tests carried out on 18th July 1995 showed that sound levels did not meet the specified noise levels at some frequencies.

40. In breach of contract, when put into operation the units supplied and installed at Brooklands did not comply with the data published by Carrier.

41. From July 1995 to September 1996 there were problems with the control of the air handling units. Such problems do not form part of the allegations made in the present proceedings. Further control problems were experienced in December 1996.

42. In December 1996 Greenshields Associates, building services engineers retained by H&B, had identified that the air conditioning was too noisy in some offices and conference rooms.

43. On 2nd January 1997 tests were carried out in a Carrier factory in the US. The Claimants had no knowledge of the test results until receipt of Carrier's letter dated 20th October 1997.

44. On 29th July 1997 tests were carried out at Sound Research Laboratories Limited ("SRL") on 37 HS units from Brooklands. On 30th July 1997 SRL prepared a written report for Carrier.

45. On 20th October 1997 Carrier's letter to Manly reported that it had received the results of the noise test carried out in Carrier's Syracuse laboratory. The letter states that the unit did not meet Carrier's published noise data. It also states that the data will be provided as and when a complete report is received.

46. In February 1998 Carrier carried out sound testing of an original and/or an improved VAV unit.

47. On 13th May 1998 further tests were carried out at SRL. On or about 18th May 1998 Carrier issued a summary report on those tests.SRL's full report was received in June 1998.The tests related to VAV units that had been modified by Carrier in an effort to reduce transmitted sound levels. H&B gave permission for the units to be modified on the basis the modifications would reduce the noise generated by the units.

48. There were several meetings during the period June to October 1998 to discuss the implementation of the modifications to the 37 HS units at Brooklands.

49. On or about 28th November 1998 a number of units at Brooklands were modified. The performance of the system deteriorated as a result of the modifications and the modified units were subsequently returned to their original configuration.

50. H&B suffered damage as a result of Carrier's breach of warranty, negligence and negligent misrepresentation."

4.
The relevant procedural history and other relevant aspects of the factual background. In March 1997, the freehold of the premises was transferred from H&B to the second Claimant, Procter & Gamble Technical Centres Limited ("Technical"). On 1st April 1999, Carrier's business was transferred to Toshiba Carrier UK Limited ("Toshiba"). In June 2000, Technical entered into a sale and leaseback agreement with the Prudential Assurance Company Limited. I am told that the present lessees of the premises are Technical and the third Claimant, Procter & Gamble Limited ("P&G").

5.
In April 2000, attempts to resolve the problems relating to the 37 HS units by discussion and/or agreement having apparently failed (see above), the Claimants put the matter in the hands of their solicitors, CMS Cameron McKenna. The partner in that firm who is responsible for dealing with the matter on the Claimants' behalf is Mr Henry Sherman. On 17th May 2000, Mr Sherman wrote to Carrier Air Conditioning ("CAC"), the business entity that he understood to be dealing with the matter on behalf of Carrier at the time, concerning the non-compliance of the 37 HS units with the published technical data.

6.
On 19th October 2000, further attempts to sort out the matter by agreement having come to nothing, Mr Sherman drafted and issued a Claim Form on behalf of H&B and Technical in order to protect their limitation position. In the Claim Form as originally drafted, Mr Sherman named only Toshiba as Defendant, because CAC was described in the correspondence as a division of Toshiba. Having issued

the proceedings, Mr Sherman did not take any immediate steps to effect service. Furthermore, the Claim Form did not incorporate any Particulars of Claim. However, in the brief details of claim that he drafted and endorsed on the Claim Form, Mr Sherman stated the claim to be as follows:

“Damages for breach of the Defendant’s duty of care to the first and/or the second Claimant in respect of shortcomings in the performance of type 37HS moduline VAV units supplied by the Defendant and installed in premises at The Heights, Brooklands, Surrey KT13 0XP.”

7.
Since Toshiba had not taken over Carrier’s business until April 1999, it is obvious that Toshiba could not have been the company that supplied the units in question for installation in 1995. Although there appeared to be a dispute about the matter at an earlier stage in these proceedings, by the time of the hearing before me it was accepted by Mr Goddard, on behalf of the Defendants, that Toshiba had been named in the Claim Form in mistake for Carrier Holdings Limited within the meaning of CPR 19.5, except in respect of the claim that is made against Toshiba in paragraph 21 of the Re-Amended Particulars of Claim (see below). So far as material, CPR 19.5 provides as follows:

“Special provisions about adding or substituting parties after the end of a relevant limitation period

19.5 – (1) This rule applies to a change of parties after the end of a period of limitation under –

(a) the Limitation Act 1980;

…

(2) The court may add or substitute a party only if -

(a) the relevant limitation period was current when the proceedings were started; and

(b) the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that -

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

…”

8.
However, although he accepted that Mr Sherman had made the foregoing mistake as to who had supplied the units in question, Mr Goddard also made it clear that his concession to that effect was made without prejudice to other contentions in respect of jurisdiction that the Defendants wished to make on this aspect of the matter, ie. that the Claimants’ proposed amendment did not constitute a substitution within the meaning of the relevant provisions of CPR 19.5 (see above and see also Rider 1 to the parties’ agreed “Amended Preliminary Issues and Facts to be Assumed”).

9.
In the event, having become aware of his mistake, Mr Sherman amended and reissued the Claim Form on 16th February 2001, before arranging to serve the proceedings together with the Response Pack on the Defendants’ solicitors later the same day (see below). The amendments in question were made without the permission of the Court and purported to be so made pursuant to the provisions of CPR 17.1(1) and (presumably, although not expressly) 19.4(1), which respectively provide as follows:

"**17.1** – (1) A party may amend his statement of case at any time before it has been served on any other party.

...

19.4 – (1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served."

10.
The purported amendments to the Claim Form that were made on 16th February 2001 were threefold, as follows:

(i) P&G were added as third Claimants;

(ii) Carrier were added as second Defendants and

(iii) the brief details of claim were amended to make express reference to a claim for breach of a collateral contract, thus:

"Damages forfirst and/or secondDefendant's breach ofa collateral contract and/orduty of care to the first and/or the secondand/or thirdClaimant in respect of shortcomings in the performance of type 37HS moduline VAV units supplied by the secondDefendant and installed in premises at the Heights, Brooklands, Surrey KT13 0XP."

Note: It can be seen that, as drafted, the precise order of words of the original brief details of claim was not maintained in the amended version: however, the relevant amendments are indicated by the underlined and italicised words.

11.
On 15th February 2001, the Defendants' solicitors, Messrs Edwin Coe, had confirmed that they were instructed to accept service on behalf of Carrier and Toshiba, without prejudice to their contention that any claim against Carrier was statute barred. The Claim Form was therefore served on Messrs Edwin Coe on the 16th February 2001, after it had been amended and reissued as detailed above. Messrs Edwin Coe duly completed the Acknowledgement of Service and the parties then agreed that there should be a general stay of the proceedings to permit further investigations into the performance of the units to be carried out.

12.
However, the agreed stay of proceedings did not prove to be successful in producing a settlement of the dispute. As a result, the Court gave appropriate directions for the service of pleadings and, on 31st October 2001, the Particulars of Claim were duly served on Messrs Edwin Coe.

13.
It should be noted that, in the heading of the Particulars of Claim, Carrier is named as the first Defendant (albeit added as the second Defendant: see above) and the Particulars of Claim must be read with that in mind. Broadly speaking, paragraphs 1 to 19 of the Particulars of Claim are concerned with the Claimants' case against Carrier only. The case against Carrier is based upon the following three causes of action: (i) breach of a collateral contractual warranty, (ii) misrepresentation under the Misrepresentation Act 1967 and (iii) negligence. The essential foundation of each of these three causes of action against Carrier is the allegation that various false representations concerning the performance of the 37 HS units were made by and/or on behalf of Carrier (a) orally to Aukett, in the course of a meeting held in or about April 1994 and (b) by the contents of the various product and

technical data sheets and associated documentation concerning the units that were made available to Aukett in the course of the same meeting (see paragraphs 7 to 10 of the Particulars of Claim and 8 to 17.2 of the assumed facts).

14.
So far as concerns Toshiba, the Claimants' case, as pleaded in paragraph 21 of the Particulars of Claim, is that Toshiba subsequently "assumed responsibility for the failure of the units to comply" with the original collateral warranty in a way that is contractually binding upon Toshiba and which renders it "jointly or severally liable for the … breach of warranty".

15.
On 8th November 2001, the Particulars of Claim were amended by consent in a number of minor respects and then reserved on the Defendants.

16.
On 23rd January 2002, the Defendants served their Defence. For the purposes of this judgment, it is only necessary to refer to certain parts of that pleading, as follows.

(i) **Paragraph 4**, the terms of which are as follows:

"This Defence is served without prejudice to Carrier's contention that the causes of action pleaded against it occurred more than 6 years prior to the Claim Form and are therefore statute-barred by reason of the operation of s.32 of the Limitation Act 1980."

(ii) **Paragraphs 5 and 11**, in which it is pleaded that Toshiba was incorporated on 25th February 1999 and that Carrier's business was transferred to Toshiba on 1st April 1999.

(iii) **Paragraph 14**, in which it is admitted (inter alia) that Carrier and Aukett "held discussions in or about mid-1994 concerning Carrier's air-conditioning units".

(iv) **Paragraphs 15 and 16**, in which it is denied (inter alia) that any of the alleged oral representations were made by or on behalf of Carrier and that the data sheets amount to representations.

(v) **Paragraph 22(1)**, in which it is admitted (inter alia) that "in certain conditions some of the 37 HS units installed at the Property may generate more noise than suggested by the data sheets".

(vi) **Paragraph 24**, in which (inter alia) the alleged representations and contractual warranty are all denied.

17.
The Claimants' Reply was served on 14th February 2002 and included the following paragraph 5:

"5. As to paragraph 4, Carrier's contention is misconceived because the relevant date for the purposes of limitation is the date upon which the proceedings were issued which was 19th October 2000."

18.
At the Case Management Conference that took place on 10th May 2002, HH Judge Humphrey LLoyd QC gave the following directions, amongst others:

"1. Trial of preliminary issues and any application relating to joinder of the First Defendant (Carrier Holdings Limited) to be heard on 30th and 31st July 2002 …

2. Preliminary issues referred to in 1 above to include those arising out of paragraph 4 of the Defence and paragraph 5 of the Reply. Counsel to agree preliminary issues and facts to be agreed or assumed for those purposes …; in default issues to be settled by the Court. …"

In the event, the actual terms of the preliminary issues as set out in paragraph 2 above were formulated in accordance with a further direction of Judge LLoyd made by letter to the parties dated 11th July 2002.

19.
The Associated Applications. On 10th June 2002, the Claimants issued an application for permission that Carrier be substituted in the proceedings for Toshiba, save in respect of the claim made in paragraph 21 of the Amended Particulars of Claim, pursuant to CPR 19.5. This is the first of the associated applications to which reference is made in paragraph 1 of this judgment. Mr Sherman's first witness statement dated 10th June 2002 was filed as evidence in its support.

20.
On 15th July 2002, the Defendants issued an application for the Claimants' amendments to the Claim Form of 16th February 2001, whereby Carrier was added as a Defendant and a claim for breach of collateral contract was added to the brief details of claim (see paragraphs 9 and 10 above), to be disallowed pursuant to CPR 17.2, the terms of which are as follows:

"**Power of the court to disallow amendments made without permission**

17.2 – (1) If a party has amended his statement of case where permission of the court was not required, the court may disallow the amendment.

(2) A party may apply to the court for an order under paragraph (1) within 14 days of service of a copy of the amended statement of case on him."

This application is the second of the associated applications to which reference is made in paragraph 1 above.

21.
On 24th July 2002, the Claimants issued an application for permission to amend the Amended Particulars of Claim to plead breach of collateral contract pursuant to CPR 17.4 which, so far as material, provides as follows:

"**17.4** – (1) This rule applies where-

(a) a party applies to amend his statement of case in one of the ways mentioned in this rule ; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980; …

…

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.

(4) …"

22.
In effect, the application is intended to amend the Claim Form to add a claim for breach of collateral warranty to the proceedings as the Claimants had purported to do on 16th February 2001: see paragraphs 9 and 10 above. This application is the third and final associated application to which I referred in the first paragraph of this judgment. Mr Walker pointed out that the Claimants' foregoing applications to amend had been made out of an abundance of caution and in order to deal with the possibility that some or all of the various causes of action might be held to have been statute barred, either at the date the proceedings were originally issued and/or at the date the Claimants purported to amend the proceedings without permission, i.e. on 16th February 2001. The position with regard to that particular aspect of these proceedings is, of course, the subject matter of the three preliminary issues.

23.
Since the answers to the various questions posed by the preliminary issues have a significant bearing upon various of the matters that need to be considered with regard to the associated applications, it is obviously both convenient and sensible to deal with the three preliminary issues first, before turning to each of the associated applications.

24.
The First Preliminary Issue: "Did the cause of action in contract accrue before (a) 19th October 1994 and (b) 16th February 1995?"

It is common ground that the various oral and written statements, that are said to have been made by or on behalf of Carrier concerning the performance of the 37 HS units and which are said to give rise to the collateral contractual warranty upon which the Claimants' claim against Carrier for breach of contract is based, were made before the 19th October 1994 (which date is, of course, six years prior to the date upon which these proceedings were issued: see paragraph 6 above). No precise date can be identified, but it appears to be agreed that the relevant events giving rise to the alleged collateral contract took place in April (or possibly May) 1994.

25.
It is also common ground that a cause of action for breach of contract accrues on the date of the breach in question. Therefore, the determination of the date upon which, on the assumed facts, the relevant term of the collateral contractual warranty was actually broken is the central question that is raised by the first preliminary issue.

26.
On behalf of the Defendants, Mr Goddard referred to paragraph 14 of the Re-Amended Particulars of Claim (permission for further minor amendments having been given by me during the course of the hearing) and emphasised that the pleaded claim in contract is not based upon a contract for the supply of the units in question, but upon a contractual warranty that the alleged representations as to the performance of those units were accurate. He pointed out that the actual parties to the contract for the supply of the units were Carrier and the M&E subcontractor, Manly (see paragraphs 31 to 36

of the assumed facts), and that there was, therefore, little “linkage” (to use his expression) between the warranty and the contract to which it is said to be collateral.

27.
Mr Goddard therefore submitted that, on the assumption that a collateral contract was concluded in the terms of paragraph 14 of the Re-Amended Particulars of Claim (see also paragraphs 15 and 21 of the assumed facts, in which the warranty in question is expressed in a somewhat different form of words) and on the further assumption that as designed and/or manufactured there was no 37 HS unit that could actually comply with the product data because the product data was incorrect in a number of respects (see paragraphs 17.1 and 17.2 of the assumed facts), breach of the alleged contractual warranty had occurred as soon as the contract was made (i.e. in or about April/May 1994). Mr Goddard contended that this must be the case because, necessarily on the assumed facts, none of the units that Carrier was going to supply was capable of complying with the terms of the warranty in question. He submitted that this was so, whether the position was considered as at the precise date of the warranty or at the slightly later date when Carrier had specifically allocated an appropriate number of units for the purposes of delivery to Manly.

28.
On behalf of the Claimants, Mr Walker submitted that the breach occurred when delivery of the non-compliant units to Manly was completed (i.e. 21st February 1995: see paragraph 36 of the assumed facts). He pointed out uncontroversially (although Mr Goddard was at pains to challenge the relevance and/or applicability of the point: see paragraph 25 above) that this would be the date upon which breach would have occurred for the purposes of a contract for the sale of goods: see the current edition of Chitty on Contracts at paragraph 29-048, which states:

“**Sale of goods**. … The buyer’s right of action for breach of the implied term as to title accrues at the time of sale … and in the case of a breach of the term as to quiet possession when the buyer’s possession is disturbed. Otherwise the buyer’s right of action for breach of an express or implied warranty relating to goods accrues when the goods are delivered, and not when the defect is discovered or damage ensues.”

29.
It was Mr Walker’s submission that there was, in this case, no proper basis for drawing any distinction between the position of the Claimants and that of a purchaser of goods who buys the goods directly from the seller. He suggested that the warranty in question was not a warranty in a vacuum: it was a warranty that related to the accuracy of detailed information and data as to the performance of a particular product that was to be specified for incorporation into H&B’s new headquarters. Mr Walker pointed out that everybody involved knew that the actual procurement of the 37 HS units for that purpose was to be by means of an M & E subcontract to which H&B would not be a party, but that it was H&B who was to be the actual owner and the party who would ultimately be using them. It was therefore Mr Walker’s submission that, for the purposes of considering when breach of the collateral warranty occurred, the position of H&B ought to be equated to that of a buyer of the units, because that properly reflected the reality of the situation – a reality of which all the relevant parties were fully aware at all material times.

30.
Mr Walker submitted that, until delivery of the non-compliant units had taken place, it could not be said that the promise that the units would have certain performance characteristics had been broken. He emphasised that the warranty in question was, in effect, a warranty given to the ultimate owner as

to the quality of the 37 HS units that were to be supplied for installation in its new headquarters (i.e. it was a warranty as to the performance that the units in question "**would provide**": see paragraph 15 of the assumed facts). He submitted that, when considering whether there has been a breach of warranty with regard to the quality of goods in such a case and, if so, the date upon which that breach has occurred, the only sensible date is the date upon which the goods are delivered, because it is only then that the ultimate owner should receive that to which he is entitled: i.e. units whose performance actually accords with the standards promised by the terms of the warranty.

31.
Mr Walker stressed the good sense in such an approach and submitted that Mr Goddard had only been able to develop his argument, to the effect that the breach had occurred as soon as the contract of warranty was made, by seeking to dissociate the warranty in question entirely from the underlying contract of sale to which, so Mr Walker submitted, it was inextricably linked.

32.
It was thus Mr Walker's contention that Mr Goddard's submission was founded on an unsound premise because, in truth and for the reasons I have summarised in paragraph 28 above, there was a very close and immediate connection between the contractual warranty and the contract of sale of the 37 HS units in question; both were concerned with the same subject matter (i.e. the 37 HS units) and, on the facts of this case, the contractual warranty (and the promise it contained as to the performance standards that the units would provide in due course) was the essential forerunner of the subsequent contract of sale – without the former, it is very unlikely that the latter would ever have come into existence. Mr Walker therefore submitted that it was appropriate to adopt a "sale of goods" approach for the purpose of deciding when the breach of this particular contractual warranty actually occurred.

33.
I agree with Mr Walker's reasoning on this aspect of the matter, as summarised above, and I therefore accept as correct his submission that breach of this particular warranty occurred when delivery of the units was purportedly complete (i.e. 21st February 1995). I reject Mr Goddard's submissions to the contrary effect.

34.
I also agree with Mr Walker's further submission that, if Mr Goddard's argument on this aspect of the matter is correct (i.e. that a breach of the collateral warranty occurred as soon as it was made, because there was no 37 HS unit in existence that would comply with the performance data in question) then this analysis merely identifies a breach that is in the nature of an anticipatory breach of the warranty in question, i.e. a warranty that "37 HS units **would provide** the performance set out in Carrier's written data" (my emphasis: see paragraph 15 of the assumed facts), but that this would be the first of two possible breaches in the circumstances of this case, the other breach of warranty occurring when the units were actually supplied in a defective state (i.e. incapable of meeting the performance criteria that the warranty promised would be provided).

35.
As stated in paragraph 25-020 of the current edition of Chitty on Contracts, an anticipatory breach of contract occurs when a party acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract and "entitles the other party to take one or two courses. He may "accept" the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue".

36.

Mr Walker submitted that there is no suggestion in Carrier's pleaded Defence or in the assumed facts that Carrier's breach of warranty was due to impossibility of performance. In effect, it was Mr Walker's submission that Mr Goddard's arguments were founded on an implied acceptance (or even assertion) that, at the time the warranty was given, Carrier lacked the intention of taking any steps to modify or adapt the existing 37 HS units and/or to produce new units that would actually comply with the performance data, thus evincing an intention from the outset not to fulfil its part of the contract (i.e. that the units in question **would provide** the specified performance).

37.
Mr Walker submitted, correctly in my view, that this analysis demonstrates the anticipatory nature of the breach upon which Mr Goddard had founded his submissions. As Mr Walker pointed out, it would have been impossible to prove such a breach and it was therefore inevitable that H&B would found its claim for breach of contract, as it was fully entitled to do and did, on the inevitable breach of warranty that had been anticipated by the breach identified by Mr Goddard and upon which he had based his submissions: see paragraph 25-025 of Chitty on Contracts, where the relevant principles are summarised in the following terms:

"**Anticipatory breach and actual breach**. When establishing whether or not there has been a renunciation of the contract, there is no distinction between the tests for what is an anticipatory breach and what is a breach after the time for performance has arrived. It follows, therefore, that where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he does not intend to fulfil his obligations under the contract when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith. The innocent party is not obliged to wait for the time for performance, because the renunciation, coupled with the acceptance of that renunciation, renders the breach legally inevitable and the effect of the doctrine of anticipatory breach is precisely to enable the innocent party to anticipate an inevitable breach and to commence proceedings immediately."

38.
Accordingly, I accept Mr Walker's submission that, even if Mr Goddard's submissions are correct as to the existence of a breach as soon as the contract of warranty came into existence, that particular breach was, for the reasons given above, an anticipatory breach of contract. This means that, not having accepted that breach and treated the contract as discharged, H&B was still entitled to base its claim for breach of contract, as it has done in these proceedings, upon the breach of contract that occurred when the 37 HS units were supplied that failed to provide the performance that Carrier had warranted they would provide. As already indicated in paragraph 32 above, that breach occurred when delivery was completed on 21st February 1995. Accordingly, the answer to both questions posed by the First Preliminary Issue is "No".

39.
The Second Preliminary Issue: "Did the cause of action in negligent misrepresentation accrue before (a) 19th October 1994 and (b) 16th February 1995?"

It was conceded by Mr Goddard that the cause of action in negligent misrepresentation accrued on the same date as the cause of action in negligence. There is therefore no reason to consider the Second and Third Preliminary Issues separately and the relevant submissions and conclusions can be conveniently dealt with together by reference to the Third Preliminary Issue.

40.

The Third Preliminary Issue: "Did the cause of action in negligence accrue before (a) 19th October 1994 and (b) 16th February 1995?"

It is common ground that a cause of action in negligence accrues when the claimant suffers actual and relevant loss: see the speech of Lord Nicholls of Birkenhead in **Nykredit Mortgage Bank Plc v. Edward Erdman Group Ltd**(1997) 1 WLR 1627 at 1630C-G, where he stated the relevant principle as follows:

"As every law student knows, causes of action for breach of contract and in tort arise at different times. In cases of breach of contract the cause of action arises at the date of the breach of contract. In cases in tort the cause of action arises, not when the culpable conduct occurs, but when the plaintiff first sustains damage. Thus the question which has to be addressed in what is meant by "damage" in the context of claims for loss which is purely financial (or economic, as it is sometimes described).

In Forster v. Outred … Stephenson L.J. recorded the submission of Mr Stuart-Smith Q.C.

"What is meant by actual damage? Mr Stuart-Smith says that it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by "actual" damage. It was also suggested in argument … that "actual" is really used in contrast to "presumed" or "assumed". Whereas damage is presumed in trespass and libel, it is not presumed in negligence and has to be proved. There has to be some actual damage."

Stephenson L.J. at p.98, accepted this submission. I agree with him. I add only the cautionary reminder that the loss must be relevant loss. To constitute actual damage for the purpose of constituting a tort, the loss sustained must be loss falling within the measure of damage applicable to the wrong in question."

41.
Stated broadly, it was Mr Goddard's submission that, if the product information for the 37 HS units was simply wrong (i.e. as stated in assumed facts 17.1 and 17.2) then H&B had suffered actual and relevant loss at the date that particular type of unit came to be specified by Aukett for incorporation into the new building (i.e. 3rd June 1994: see paragraph 20 of the assumed facts). Mr Goddard submitted that this was so because H&B's building contract with Costains was, as a result of Carrier's negligent misrepresentation and/or negligence, bound to be worth less than if the representation had been true, because the resulting building would inevitably be defective (i.e. it would have unacceptably noisy air-conditioning).

42.
Mr Goddard submitted that, absent a variation to the building contract to ensure the installation of acceptable air-conditioning units, the building contract would inevitably result in a less valuable building than would have been the case had the performance data been correct. However, if an appropriate variation were to have been instructed, that would have been bound to result in, at least, additional product, design and engineering costs being incurred. Either way, he submitted, the chose in action that is the building contract was worth less than would have been the case if the representations had been correct. It was therefore Mr Goddard's submission that H&B had suffered actual and relevant loss as the result of the foregoing reduced value of its building contract with

Costains and that that loss had been suffered at the date of the collateral warranty (i.e. April/May 1994: see paragraphs 8 to 15 of the assumed facts).

43.
In my view, Mr Goddard's submissions and supporting analysis on this aspect of the matter are very artificial and unconvincing. I am satisfied that they are wrong. Indeed, as Mr Walker submitted, the entire argument is probably flawed in at least one fundamental respect, namely that the building contract was actually reduced in value as the result of the alleged negligent misrepresentation. As Mr Walker pointed out, if H&B had assigned the building contract in circumstances that took account of the shortcomings in the performance of the 37 HS units, then it would have received whatever the building contract was worth and there would have been no loss. Similarly, if H&B had assigned the building contract without taking the reduced performance of the units into account, it would have received more than the contract was really worth and again there would have been no loss (although, of course, H&B might then have been exposed to a claim for breach of contract).

44.
Be that as it may, I entirely accept that Mr Walker is correct in his first main submission on this aspect of the matter, namely that this is not a case in which any material term of the contract of warranty itself was either worthless or was the actual direct cause of financial loss to H&B: cf. cases such as **Moore v. Ferrier** (1988) 1 WLR 267, **Bell v. Peter Browne & Co** (1990) 2 QB 495 and **First National Commercial Bank plc v. Humberts**(1995) 2 All ER 673.

45.
I also agree with Mr Walker's further submission that, so far as concerns the claims in negligent misrepresentation and negligence, H&B cannot be said to have suffered relevant loss when it specified the 37 HS units because the building contract was thereby rendered less valuable than if the specified units had conformed to the representations. In my opinion, in deciding when the actual relevant loss was suffered in such circumstances, it is far more natural to have regard to the question whether the units that were supplied were more or less valuable as a result of the misrepresentation, than to look at either the collateral warranty or the building contract as a chose in action which can be said to be worth less than it should have been. It is obvious that neither of these contracts can properly or sensibly be said to represent, constitute or contain any actual financial loss suffered by H&B as the result of the misrepresentation. On any sensible view of the facts, H&B suffered the actual relevant loss when it acquired a property interest in air-conditioning units that were actually less valuable than compliant units would have been. At the earliest, this would have occurred when the units were incorporated into the works (see paragraph 51 of Mr Walker's written skeleton argument dated 26th July 2002). In my opinion, it is not necessary, for the purposes of these proceedings to decide precisely when H&B did acquire a sufficient property interest in the units in question. On any view, as it seems to me, that occurred later than either of the dates suggested in the two questions posed by each of the Preliminary Issues.

46.
I accept Mr Walker's submission that the issues raised in these two preliminary issues are very similar to the issues raised in **Toprak Eneril v. Sale Tilney**(1994) 3 All ER 483. In that case, the Defendant had agreed to sell a second-hand production line for the manufacture of fluorescent tubes and had represented that the line was capable of producing 2,050 tubes per hour. The Claimant alleged that it had agreed to purchase plant for the manufacture of fluorescent tubes from the Defendant and that the delivered plant was not capable of performing in accordance with the representations. The Defendant argued, inter alia, that the claim for negligent misrepresentation had accrued when the

contract of sale had been entered into. That argument was rejected by H.H. Judge Diamond QC in emphatic and well reasoned terms: see pages 500b to 501j of his judgment. In my opinion, the reasons relied on by Judge Diamond in support of his decision on this aspect of the matter apply with equal force to the present case and will not be improved by repetition. I adopt the general thrust of his reasoning with gratitude. However, I do consider that it is worth repeating and emphasising the point made by Judge Diamond at page 501f, namely that I cannot see how it would have been possible for H&B to frame a cause of action in negligence and/or misrepresentation in the present case until the units had been delivered. In my view, this point alone is sufficient to expose the artificiality of Mr Goddard's submission that H&B suffered relevant loss by entering into a contract that was less valuable than if there had been no misrepresentation (whether the contract in question is the collateral warranty or the building contract).

47.
Accordingly, for the foregoing reasons I have come to the firm conclusion that the answer to both question posed by each of these preliminary issues is "No".

48.
The Associated Applications. As already indicated (see paragraphs 9, 10, 19 and 21 above), the Claimants seek permission for the following amendments: (i) to substitute Carrier for Toshiba pursuant to CPR 19.5, save in respect of the claim made in paragraph 21 of the Amended Particulars of Claim (the first associated application) and (ii) to add a claim for breach of collateral warranty (the third associated application). Having regard to my answers to each of the questions posed by the preliminary issues (see above), I am satisfied that all relevant limitation periods were still current on 16th February 1995, when the Claim Form was amended to add Carrier as second Defendants and to add a claim for breach of a collateral contract (see paragraphs 9 and 10 above). Since all periods of limitation were still current on that date and the original Claim Form had not yet been served, those amendments were therefore validly effected under the provisions of CPR 17.1(1) and 19.4(1).

49.
The Second Associated Application. In those circumstances, since I am satisfied that there is no proper basis for saying that permission would not have been granted if it had been required (e.g. because there is no jurisdiction to make the amendments in question or because they are scurrilous or vexatious), I am satisfied that there is no appropriate or proper basis for disallowing the amendments of the 16th February pursuant to CPR 17.2 (1) and that, therefore, the second associated application (see paragraph 20 above) must, for those reasons, be dismissed. Strictly speaking, therefore, a formal determination of either the first or third associated applications is no longer necessary. However, had it been necessary to do so, I am satisfied that I would have granted both applications for the following briefly stated reasons.

50.
The First Associated Application. In resisting the first associated application, Mr Goddard made the following two main points:

(1) the court does not have jurisdiction to grant the application under CPR 19.5 in the circumstances of this case because, when properly analysed, it can be seen that it is an application to add a party and not one of substitution (see paragraphs 26 to 33 of Mr Goddard's written submissions dated 6th October 2002) and, therefore, the requirements of CPR 19.5(3)(a) are not satisfied; and

(2) if (contrary to (1) above) there is jurisdiction to make the order sought, the court should not exercise its discretion in favour of the Claimants, for the reasons set out in paragraph 34 of Mr Goddard's written submissions.

51.
As to Mr Goddard's first point, I am satisfied that it is misconceived. In my view, applying the ordinary meaning of the word "substitution", it is clear that the amendment in question does involve the substitution of Carrier as Defendant in place of Toshiba in respect of all primary claims that had been formerly asserted against Toshiba alone. I accept Mr Walker's submission that it is, in effect, an abuse of language to characterise the amendment as constituting the addition of a Defendant, merely because the Claimants continue to maintain a separate and entirely distinct contractual claim against Toshiba in these proceedings (as pleaded in paragraph 21 of the Particulars of Claim). Indeed, as Mr Walker pointed out, section 35(6)(a) of the Limitation Act 1980 expressly permits substitution "in respect of any claim." For those reasons, therefore, I reject Mr Goddard's first point.

52.
As to Mr Goddard's second point, I accept Mr Walker's submission that, given the existence of the written product data sheets, the issues that require oral evidence are limited. Furthermore, Carrier have admitted that the units did not comply with the written data (see paragraph 22(1) of the Defence). In any event, there will be a trial of these various matters by reference to the claim against Toshiba. Accordingly, for those and the other reasons set out in paragraphs 21 to 28 of Mr Walker's written submissions dated 6th October 2002 (which reasons are, in my view, correct), I reject Mr Goddard's second point.

53.
I am therefore satisfied that I would have granted permission for the amendments in question, had it been necessary to do so, and I also reject Mr Goddard's submission that, in those circumstances, it would be appropriate to make it a condition of the grant of permission that the action against Toshiba be dismissed.

54.
The Third Associated Application. So far as concerns this application, Mr Goddard submitted that the claim for breach of collateral contract is a new claim within the meaning of section 35 (2) of the Limitation Act 1980 and, as such, jurisdiction to grant permission for the amendment in question only exists if it is a cause of action that arises out of the same or substantially the same facts as are already in issue: see section 35(5)(a) of the 1980 Act and CPR 17.4(2). Once again, Mr Goddard made two points, as follows:

(1) there is no jurisdiction to grant permission for the amendment in question because the claim for breach of collateral contract does not arise out of the same or substantially the same facts as the original claim, which was for breach of a duty of care in respect of the shortcomings in the performance of the 37HS units, supplied and installed in the Claimants' premises (see the brief details of claim endorsed on the original unamended claim form): see paragraphs 39 to 45 of Mr Goddard's written submissions dated 6th October 2002; and

(2) if (contrary to (1) above) there is jurisdiction to grant permission for the amendment, the court should refuse permission in the proper exercise of its discretion, for the reasons set out in paragraph 46 of Mr Goddard's written submissions dated 6th October.

55.

Again, I can deal with Mr Goddard's two points very briefly by stating that I agree with Mr Walker's submission that, on the basis that the claim for breach of collateral contract is a fresh claim (and, in my view, it is), it is clearly one that arises from the same or substantially the same facts as the claim in negligence and that the court's discretion should be exercised in favour of granting permission for the amendment in question: see paragraphs 32 to 34 of Mr Walker's written submissions dated 6th October 2002, which I accept as correct. Accordingly, for those briefly stated reasons, I am satisfied that I would have granted permission for the amendment in question, had it been necessary to do so.

56.

Conclusions. For the reasons given above, my answer to each of the questions posed by the three preliminary issues is "No". Furthermore, for the reasons already stated, the application to disallow the amendments of 16th February 2001 (the second associated application) must be and is hereby dismissed. Had it been necessary to do so, I would have granted permission for the amendments that are the subject of the first and third associated applications. I will hear the further submissions of Counsel with regard to the precise form of the Order that is to be made in the light of these various conclusions.