Neutral Citation Number: [2005] EWCA Civ 1237
Case Nos: A3/2005/0287,0284,0331,0285 & 0259

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MRS JUSTICE GLOSTER DBE
[2005] EWHC 35 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2005

Before :

LORD JUSTICE BUXTON
LORD JUSTICE TUCKEY
and
LORD JUSTICE MAURICE KAY

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Between :

AMB GENERALI HOLDING AG **MANCHES** **SPRECHER GRIER HALBERSTAM** **PORTNER & JASKEL**	**Appellants**
- and -	
SEB TRYGG LIV HOLDING AKTIEBOLAG	**Respondent**
PORTNER &JASKEL	**Part 20 Appellant**
and	
AMB GENERALI HOLDING AG **ALEC MERRIFIELD**	**Part 20 Respondents**

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Mr I Gatt QC and Mr T Leech (instructed by **Herbert Smith**) for the **First Appellant**
Mr J Nash (instructed by **Barlow Lyde & Gilbert** and **Reynolds Porter Chamberlain**) for the **Second and Third Appellants**
Mr N Davidson QC (instructed by **DLA**) for the **Fourth Appellant**
Mr N Strauss QC, Mr D Matthews QC and Mr S Hossain (instructed by **Slaughter & May**) for the **Respondent**

Mr N Davidson QC for the **Part 20 Appellant**
Mr I Gatt QC and **Mr T Leech** for the **First Part 20 Respondent**
Mr T Carlisle (instructed by **Sykes Anderson**) for the **Second Part 20 Respondent**

Hearing dates : 12, 13, 17, 18, 19 October 2005

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Judgment

Buxton LJ :

This is the judgment of the court, to which each member has made a substantial contribution.

Introduction and background facts

1. In this judgment we set out only the facts necessary for an understanding of the issues in the appeal. Anyone who needs to know more about the case can refer to the exposition in the judgment of Gloster J [2005] EWHC 35 (Comm), no part of her statement of primary facts having been criticised before us. In what follows we have made extensive use of that account, either by direct quotation or by repeating its substance.

2. In April 1993 the total shareholding in an insurance company, Interlife, was sold by its owners to the claimants in the action, SEB. The corporate owners were four companies, which included the company that for convenience has been referred to in these proceedings as Old Aachener Re. That company had a participation of 12.5% in Interlife. In order to administer the dispute that arose as a result of the sale the four corporate owners jointly employed an insurance industry professional Mr Alec Merrifield [Mr Merrifield]. Mr Merrifield's contact at Old Aachener Re was a director of that company, Harry Hauptmann, referred to throughout these proceedings as Professor Hauptmann. That dispute arose, first, from the refusal of SEB to pay the balance of the purchase price. That led to arbitration proceedings commenced in the Stockholm Chamber of Commerce in November 1998 in which the vendors claimed against SEB, and SEB counterclaimed on grounds alleging the mis-selling of pensions by Interlife under its previous ownership. The proceedings were throughout entituled as having been brought by, amongst others, an Aachener Re company, and not in the name of AMB, which had by then succeeded to the claim (see paragraph 6 below).

3. The vendors were jointly represented from 1995 by Messrs Manches, instructed by Mr Merrifield, until Sprecher Grier Halberstam [SGH] took over in August 1999. In March 2000 Mr Matthew Clark, the partner at SGH with the conduct of the case, moved to Portner & Jaskel [P&J] and took the case with him. Mr Merrifield continued as the solicitors' point of contact with the vendors. The arbitration proceedings (which were solely concerned with the issues under the counterclaim, as the non-payment by SEB was admitted) occupied a substantial amount of time in the hearing of evidence in 2001, with further proceedings envisaged in 2002.

4. The present proceedings arose because in December 2001 SEB's solicitors wrote to P&J raising concerns about whether Old Aachener Re (against whom they thought themselves to be counterclaiming) in fact existed, and asking for confirmation of the entity for whom P&J acted. In order to understand why that was an issue it is necessary to set out the corporate history of "Old Aachener Re", which we can take from paragraph 3 of the judge's judgment.

The history of Old Aachener Re

5. The corporate history can be summarised as follows:

DATE	EVENT
21.4.93	Aachener Rückversicherungs-Gesellschaft Aktiengesellschaft ("Old Aachener Re"), Company registration number HR B137, sold its 12.65% holding in Interlife to SEB under the terms of the Interlife Sale Agreement and the Interlife Deed of Indemnity.
6.7.95	Old Aachener Re resolved to change its name from Aachener Rückversicherungs-Gesellschaft Aktiengesellschaft to AM Konzernrückversicherung Aktiengesellschaft.
7.7.95	Old Aachener Re entered into an Incorporation Agreement ("the Incorporation Agreement") with its subsidiary, Laurensberg Beteiligungs-Aktiengesellschaft ("New Aachener Re"), company registration number HR B6217, by which certain assets and liabilities were agreed to be transferred from Old Aachener Re to New Aachener Re, including its rights under the Interlife Sale Agreement and the Interlife Deed of Indemnity. The Incorporation Agreement took effect as from 1.1.95. (It is common ground that the rights transferred included the rights under the Interlife Sale Agreement and the Interlife Deed of Indemnity, but not Old Aachener Re's obligations thereunder, since those could only be assigned with the consent of all other parties to the Interlife Sale Agreement and the Interlife Deed of Indemnity and no such consent was ever asked for or obtained.)
14.7.95	New Aachener Re changed its name from Laurensberg Beteiligungs-Aktiengesellschaft to Aachener Rückversicherungs-Gesellschaft Aktiengesellschaft (ie the pre-6.7.95 name of Old Aachener Re).
14.7.95	Old Aachener Re registered its name change from Aachener Rückversicherungs-Gesellschaft Aktiengesellschaft to AM Konzernrückversicherung Aktiengesellschaft.
27.7.95	Employers Reinsurance Corporation ("ERC"), (a company in a wholly separate group from Old Aachener Re and AMB) acquired all the shares in New Aachener Re from Old Aachener Re.
11.9.96	New Aachener Re changed its name to ERC Aachener Rückversicherungs-Gesellschaft Aktiengesellschaft (also referred to as "ERC Aachener")
17.6.97	Old Aachener Re, under the name AM Konzernrückversicherung Aktiengesellschaft, merged with its parent company AMB Aachener und Münchener Beteiligungs-Aktiengesellschaft ("AMB"), company

registration number HR B 93 under the German Transformation Statute 1994. All of Old Aachener Re's assets and liabilities were transferred to AMB with effect from 1 January 1997 under the German law of universal statutory succession.

13.10.97 Old Aachener Re was dissolved and ceased to exist as a separate entity.

6. It will be convenient to summarise the effect of these changes on rights and obligations under the Interlife agreements. The Incorporation Agreement transferred Old Aachener Re's *rights* under the Interlife agreements to New Aachener Re, but the purported transfer of Old Aachener Re's *obligations* required the consent of the other parties to the Interlife agreements, including SEB, which was never obtained. Also, because no notice had been given of the assignment, Old Aachener Re (and thereafter AMB by the effect of the Transformation Agreement) retained the bare title to sue under the Interlife agreements, although the beneficial interest in those agreements had been transferred to, and was held by, New Aachener Re. Whatever rights Old Aachener Re held passed in full to AMB by operation of the Transformation Agreement of 17 June 1997.

7. It is also convenient to set out at this stage a number of other facts or findings by the judge. On 14 July 1995, Professor Hauptmann resigned as a director of Old Aachener Re and became on the same date a director of New Aachener Re. However he continued to be the person to whom Mr Merrifield, as the point of contact with Manches and the subsequent two firms of solicitors, reported in relation to the dispute and the arbitration. The judge found as a fact that, so far as Mr Merrifield was concerned, he continued to think that Professor Hauptmann, who had not informed him about the merger, was acting on behalf of Old Aachener Re. The judge also found that, in naming Old Aachener Re as the Fourth Claimant in the arbitration, Manches had no knowledge of the merger between Old Aachener Re and AMB, nor of Old Aachener Re's dissolution as a corporate entity in October 1997, more than a year before the arbitration proceedings were issued.

The emergence of the dispute

8. We have noted that late in 2001 SEB's solicitors asserted that if it were correct that Old Aachener Re had been dissolved the arbitration proceedings should not have been brought, and the counterclaim defended, in Old Aachener Re's name. To meet that complaint Mr Merrifield got in touch with Professor Hauptmann, who by then was no longer a director of New Aachener Re, having resigned as such on 3 September 1998. At the time at which he was contacted Professor Hauptmann was in Minneapolis and without his papers, but he sent from there an immediate reply to Mr Merrifield, dated 7 January 2002, in which he said that Old Aachener Re had retained a "participation" in Interlife after the Incorporation Agreement of July 1995, and that therefore AMB was entitled to the benefit of the claim. That was wrong, because Old Aachener Re had sold its "participation" (in the sense of its shareholding in Interlife) to SEB under the 1993 agreement. All that Old Aachener Re retained was title to sue under the Interlife agreements and liability under those agreements, as noted in paragraph 6

above. The judge nonetheless found that the person at AMB principally responsible for handling the issue in 2002, a Mr Schulze-Wierling the AMB in-house counsel, continued to believe until the issue of the present proceedings that Old Aachener Re had been, and therefore AMB was, beneficially entitled under the Interlife agreements.

9. On 16 January 2002 Mr Merrifield sent a fax to Professor Hauptmann asking for confirmation that AMB were the beneficial owners of the funds from the Interlife sale, and that Mr Merrifield continued to have authority to act for AMB in that matter. Professor Hauptmann forwarded that fax to Mr Schulze-Wierling, who on 18 January 2002 wrote to Mr Merrifield confirming both of those points. The judge found that the purpose of that letter was to enable Mr Merrifield to collect the payment of any sum awarded to AMB by the arbitral tribunal. That letter was followed by a further letter from Mr Schulze-Wierling to Mr Merrifield saying that the name of the relevant claimant in the arbitral proceedings must be changed from Old Aachener Re to AMB.

10. So far as SEB and the tribunal were concerned, the judge found that on 6 March 2002 Mr Schulze Wierling instructed Mr Clark of P&J to arrange for that change of name, instructions that were recorded in writing by P&J on 19 March 2002, on which date P&J also wrote to SEB's solicitors saying that they had such instructions. The actual step of altering the name seems to have hung fire, together with uncertainty about various other amendments, but P&J continued to act in the arbitration throughout 2002 albeit that, as we will see in more detail later, AMB now contend that they did so without authority. The judge made a specific finding about AMB's attitude to the arbitration in paragraph 112 of her judgment:

> Mr Schulze-Wierling, together with Dr Dageförde [General Counsel of AMB], decided that they would adopt a course whereby AMB would allow the name of the Fourth Claimant to be changed to enable it to collect any award in its favour, but in the event that an adverse award was made it would attempt to resist enforcement on the basis that AMB had not been served with the proceedings. They kept this strategy to themselves

11. Then, in the words of the judge in her paragraph 13, there was a volte-face on AMB's part. On 20 January 2003 AMB wrote to Mr Clark at P&J stating that neither Old Aachener Re nor AMB had ever authorized the Arbitration Proceedings; that Professor Hauptmann had no authority to act since his resignation in 1995; that Professor Hauptmann had "entirely acted on his own"; that there were therefore "no rights and obligations of the subject matter of this arbitration to be vested in AMB …"; and that, accordingly, AMB was not prepared to provide P&J with instructions to effect the amendments to the pleadings, substituting the name of AMB as the Fourth Claimant in place of Old Aachener Re. On 30 January 2003 P&J served a Notice of Ceasing to Act for the Fourth Claimant in the Arbitration Proceedings on the stated ground that they no longer had instructions to act on behalf of the Fourth Claimant either as Claimant or as Respondent to the Counterclaim. On 11 February 2003 SEB's solicitors wrote to the Tribunal, with a copy to Mr Schulze-Wierling at AMB, setting out the history of its correspondence with P&J and seeking an order for

the amendment of the statement of case to show AMB as the Fourth Claimant. In response AMB wrote to the Tribunal on 19 February 2003 asserting that neither it, nor Old Aachener Re, was or had ever been a party to the Arbitration Proceedings and that P&J had never been authorised to act for it or for Old Aachener Re, as the latter "had been non-existent at the time when the proceedings were initiated". AMB, in effect, also denied that the previous solicitors who had acted for the Arbitration Claimants, namely Manches and SGH, had ever been authorised to act on behalf of Old Aachener Re or AMB.

The present proceedings

12. SEB issued proceedings against the solicitors for damages for breach of warranty of authority on 9 April 2003. On 6 June 2003 SEB issued an arbitration claim against AMB to determine the substantive jurisdiction of the tribunal over AMB in the Arbitration Proceedings. On 31 October 2003 these two claims were consolidated by order of Langley J. On 19 August 2003 SEB requested a further arbitration against AMB, without prejudice to its contentions as to AMB's status as a party to the existing Arbitration Proceedings. In the consolidated proceedings SEB claims in substance the following relief:

i) against AMB, a declaration that AMB is a party to and will be bound by any award made by the arbitral tribunal on SEB's Counterclaim in the Arbitration Proceedings; and

ii) against each of Manches, SGH and P&J, damages and interest for breach of warranty of authority.

Additionally, P&J brought Part 20 proceedings: against AMB for a declaration that it had authority to act for AMB or that AMB ratified its actions; and against Mr Schulze-Wierling and Mr Merrifield for breach of warranty of authority.

13. The hearing before the judge was in form the consideration of an exorbitant list of no fewer than thirty (including sub-issues) preliminary points ordered by the judge's predecessor. The judge was able to extract the actual issues from that agenda, and held, relevantly to the present appeals, that:

i) The arbitral proceedings were not a nullity by reason of their having been commenced in the name of a company that no longer existed

ii) AMB was a party to the arbitration and is bound by its award, because Professor Hauptmann had had actual authority from Old Aachener Re in 1997 and thereafter to instruct Mr Merrifield, and through him the solicitors, to bring and continue the proceedings on behalf of Old Aachener Re

iii) AMB was further a party because even if Professor Hauptmann had not had actual authority to act for Old Aachener Re he had had ostensible authority in that regard

iv) Whatever the position may have been about authority on behalf of Old Aachener Re, AMB by its decisions and conduct in 2002 ratified the presence in the arbitration of Old Aachener Re and thus of its successor AMB

v) The conduct referred to in (iv) also estopped AMB from denying that it was a party to the arbitration proceedings

vi) The judge left to the wisdom of this court the question of whether AMB's conduct in 2002 amounted to a submission to the jurisdiction of the arbitral tribunal

vii) Because on the judge's findings the solicitors were authorised to act by Old Aachener Re, alternatively by AMB, they were not in breach of their warranty of authority, but they were in breach of a more limited warranty, that the client for whom they acted bore the name in which they pursued the proceedings

viii) Mr Merrifield gave a warranty of authority to P&J, but because of the judge's findings on the main issue was not in breach thereof. But since it was disproportionate of P&J to have joined Mr Merrifield, his costs were to be paid by P&J, who could not recover those costs from AMB

ix) Because they had not made common cause at the trial, the solicitors could each only recover 50% of their costs against AMB.

The appeals

14. The various appeals that have been brought as a result of those rulings are as follows:

05/0284 This is the main appeal, in which AMB challenge the judge's holding that they were and are parties to the arbitral proceedings, and the reasons that she gave for that holding.

05/0259,0287 and (in part) 05/0285 The solicitors appeal against the judge's finding of the limited warranty set out in paragraph 13(vii) above.

05/0331 P&J appeal against the costs order in their Part 20 claim against Mr Merrifield: see paragraph 13(viii) above. Mr Merrifield cross-appeals against the finding that he gave a warranty of authority to P&J, that cross-appeal only becoming active if AMB

succeeds in establishing that Professor Hauptmann had no authority to instruct Mr Merrifield.

05/0285 P&J appeal against the judge's costs order in the main action: see paragraph 13 (ix) above.

AMB's appeal, 05/0284

15. We consider first the main appeal, 05/0284. Logically that should start with the assertion that the proceedings were a nullity in any event, paragraph 13(i) above. However, for reasons that we trust will become apparent, exposition will be made easier by first considering the nature and extent of the authority, if any, of Professor Hauptmann. We start with the major issue before the judge, of whether Professor Hauptmann had actual authority to act on behalf of Old Aachener Re.

Actual authority

16. If Professor Hauptmann had been given actual authority to handle the claim, and to instruct Mr Merrifield, on behalf of Old Aachener Re, that would have had to have happened in 1995. Investigation into that question was very much handicapped by Professor Hauptmann's death on 10 February 2002, and thus his unavailability not only during the trial but also at any stage during the preparation of the proceedings. The evidence was that Professor Hauptmann had been continuously engaged in the Interlife matter, in so far as it was pursued, from 1995 until his death. For instance, as we have seen, it was to him that Mr Merrifield turned when the issue of Old Aachener Re's status arose at the beginning of 2002. Of particular importance was the fact that throughout that time he believed, or at least claimed to believe, that Old Aachener Re had retained the beneficial interest in the Interlife proceeds, as set out in his fax of 7 January 2002: see paragraph 8 above. The implications of that, and of how it would have impacted on whatever sort of person Professor Hauptmann was, should have thrown a good deal of light on why he acted as he did.

17. However, although the judge had no evidence from Professor Hauptmann, she heard a good deal about him. That was in particular from Mr Merrifield, but also from the only representative of AMB to give evidence, Mr Schulze-Wierling. The judge recorded, in her paragraph 98, her impression that Mr Schulze-Wierling had been influenced in his evidence by a desire to uphold AMB's position; which makes Mr Schulze-Wierling's expressed respect for Professor Hauptmann, as recorded by the judge in her paragraph 66, significantly cogent. As to Mr Merrifield and his evidence about Professor Hauptmann the judge said this, in her paragraph 51:

> I should say at the outset that, having heard him give his evidence, I found Mr Merrifield to be an honest and credible witness and reject the criticisms made of him by Mr Miles. He was not someone who would have concerned himself with the minutiae of corporate changes. I fully accept his explanation

> that he relied entirely on Professor Hauptmann in whom he clearly reposed considerable trust. I reject AMB's invitation to find that Mr Merrifield was not telling the truth, that he was evasive, and that he knew of the corporate changes. His task was to deal with administration of the claim on behalf of the corporate shareholders: if he knew of the corporate changes, he had no possible reason not to pass on the information on to the solicitors. Nor am I prepared to impute any dishonest or improper motive to Professor Hauptmann's failure to tell Mr Merrifield of the corporate changes. The evidence revealed that Professor Hauptmann was generally held in the highest regard as a man of integrity and was completely honest and straightforward in his dealings. He was a man of excellent and untarnished reputation and an extremely busy man. The claim was, on any basis, a small one and it is highly likely that he simply did not concentrate very closely on it or on the progress of the arbitration. Until 2002, when the matter was raised with him directly, he clearly never turned his mind to whether it mattered that the proceedings had been brought in the name of Old Aachener Re.

18. After an extensive review of the evidence, including such documentation as was available, the judge concluded, in her paragraph 79, that:

> It is, in my judgment, a fair inference that responsibility for pursuing performance of the Interlife Sale Agreement and in particular for recovering the balance of the purchase monies was specifically assigned to Professor Hauptmann after the corporate restructuring in July 1995, and that he retained express authority to deal with that matter at all times up until his death. Other possibilities, either that he was acting dishonestly or that he was acting on behalf of New Aachener Re, can be dismissed on the basis of the direct evidence which I have summarised above.

19. The judge continued in more detail, in her paragraph 81:

> Accordingly, I conclude, that, on the balance of probabilities:-
>
> Up to July 1995, Professor Hauptmann was entrusted in his capacity as a director and second in charge of the life reinsurance department with the task of dealing with this small scale dispute.
>
> It is to be inferred from all the circumstances that he had express actual authority to instruct Manches up to that date. If I am wrong about that, in any event, in that capacity he had implied authority to do what was necessary for the performance

> of the task referred to in (1) above, including instructing outside counsel.
>
> He would in 1995, whilst still a director, have needed no further authority to commence proceedings (i) because the dispute was on a small scale and (ii) because, in any event, once an executive is dealing with a legal dispute and has authority to instruct outside counsel, no additional authority is needed to instruct outside counsel to commence litigation.
>
> From the circumstances, I infer that from July 1995, when he ceased to be a director of Old Aachener Re, he nonetheless continued to have actual authority to continue to handle the dispute. I conclude that the way in which he behaved, the fact that demarcation of responsibilities was discussed between him and Mr Schmitz and the reaction of those within AMB in January 2002, none of whom questioned Professor Hauptmann's authority when the matter first arose, all lead to the inference that he was authorised to keep his function of handling the Interlife dispute after 14 July 1995, notwithstanding he was no longer a director.
>
> If I am right about that, then he, in my judgment, also retained, as incidental to that function, the implied actual authority to instruct English solicitors to commence proceedings. By the time proceedings were started in November 1998, they were still on a relatively modest scale: AMB's share of the claim was £400,000 and of the estimated counterclaim about £¾ million. Indeed, irrespective of the question of implied actual authority, it is also highly likely on the balance of probabilities (and I so find) that he was given express authority to instruct Manches to bring proceedings, although this is more likely to have been oral and informal, rather than by way of a formal Old Aachener Re board resolution.

20. These were all findings of fact on the judge's part, there being no challenge to the law that she assumed at this stage of the enquiry. An appellant who seeks to challenge a judge's factual findings, particularly findings reached after an enquiry as lengthy and detailed as in the present case, faces formidable difficulties. The reluctance of this court to differ from the view of a judge who has heard evidence and formed an opinion of witnesses needs no emphasis. In the present case, although the judge did not hear from the principal protagonist, Professor Hauptmann, she did hear a good deal about him, and from a witness whom she trusted, Mr Merrifield. The structure of the case makes it very difficult to reverse the judge without departing in some respects at least from her view of Mr Merrifield. In addition, Mr Strauss QC, for SEB, was right to remind us of Lord Hoffmann's remark in *Biogen v Medeva* [1997] RPC 1 at p45, that an unexpressed impression of emphasis, relative weight, minor qualification and nuance may play a significant role in a judge's assessment, which cannot be recaptured by the appellate court. As we refer to the competing contentions

it will, we think, become apparent that this is a case in which such considerations are particularly pressing.

21. Next, the case was unusual in that the judge had to make sense, by finding a narrative explanation consistent with them, of a mass of primary facts, documents and inferences from them. Mr Gatt QC said that in this task she was faced with what he described as a stark choice: either Professor Hauptmann had been given separate authority to continue to manage the Interlife matter; or he simply did not think about it, but carried on with it as part of his job; but in the latter case, since he ceased to be a director of Old Aachener Re on 14 July 1995, well before the dispute arose, he could not have been acting for Old Aachener Re when giving instructions to Mr Merrifield.

22. That choice was the more difficult because many of the known facts could point in either direction, or at least could be made to appear to do so with the benefit of forensic treatment. The claim was a small one, about which (at least until the emergence of the full extent of the counterclaim) Old Aachener Re were not much concerned: AMB said that that pointed to nothing specific being done about it, SEB that it was plausible that Professor Hauptmann, who knew all about it, would have been asked to take care of it even after he left Old Aachener Re. On transferring from Old Aachener Re to New Aachener Re Professor Hauptmann stayed in his old office with all his old files. AMB said that in those circumstances he could easily have wrongly thought that Interlife was a New Aachener Re matter, SEB that without a specific understanding with Old Aachener Re he would have queried what he should do with the Interlife file. Professor Hauptmann was acknowledged to have been a careful and meticulous businessman. AMB said that if he had been asked to take over the Interlife claim in 1995 he would have properly considered the agreements, and not thereafter laboured under a mistake as to the "ownership" of the claim, SEB that he was the sort of person who would have ensured that he had authority, albeit informal, to conduct the Interlife business. Professor Hauptmann never "reported back" to Old Aachener Re before 2002. AMB said that he would have done so if he had been authorised by Old Aachener Re to represent them, SEB that since he had been given authority he would not need to check back with Old Aachener Re. When the problems arose in 2002 Professor Hauptmann did not assert any conferment of authority on him by Old Aachener Re, but rather asked AMB to give authority to Mr Merrifield. AMB said that if he had had authority he would have mentioned it then, and would have stood on that authority to reassure Mr Merrifield, SEB that Professor Hauptmann's authority was never questioned in 2002, and that the approach to AMB was at the specific request of Mr Merrifield, which Professor Hauptmann would have been at best tactless not to pass on.

23. These and other implications of the basic facts were explored before us at considerable length, both on paper and orally. As we listened to two extremely able addresses, we had the unmistakeable impression that AMB were inviting us to replicate the task of the trial judge, and that SEB had been led down the same route in response. But as already emphasised, that is not the task of this court. AMB never successfully confronted the difficulty for it that we could not interfere with the judge's conclusion unless either she had omitted to consider some substantial and important piece of evidence; or had made a significant error, what might be termed a

knock-out blow. The judge omitted nothing from her analysis, nor was it suggested that she did; and although we quite accept that it would have been open to her or to another judge to view much, perhaps most, of the material in a different light from that which she adopted, she did not come anywhere near to making the sort of error that would undermine her conclusion.

24. We would therefore dismiss the appeal on the issue of actual authority. In these circumstances, it would not be appropriate for this court to allow itself to be drawn into more detailed analysis of the issue, but in case that is thought to be too bloodless a posture we would venture to mention two aspects of the case that in our view point strongly in the direction adopted by the judge.

25. First, in paragraph 50 of the skeleton argument settled by Mr Gatt's predecessor it was argued that the only explanation of the events and documents was that in 1995 and onwards Professor Hauptmann had assumed that the beneficiary of the Interlife claim was New Aachener Re and that he authorised the arbitration proceedings on that basis, but when questions were asked in 2002 he concluded that Old Aachener Re was the beneficiary, and then but only then informed AMB of the proceedings. This analysis was not pursued in oral argument before us, and it is not difficult to see why. It attributes a good deal of at best deviousness to Professor Hauptmann, in the face of the judge's conclusion about him (see paragraph 17 above); and it also attributes to him a remarkable degree of quick-thinking, it being remembered that his note of 7 January 2002, stating that Old Aachener Re was the beneficiary and why he thought that, was written without papers and almost immediately upon the issue being raised (see paragraph 8 above). The significance of the argument is, however, that in order effectively to rebut a finding that Professor Hauptmann saw himself as acting for Old Aachener Re because he had been authorised to do so, manoeuvring as extreme as that set out in the skeleton has probably to be attributed to him.

26. Second, in paragraph 71 of her judgment the judge said this:

> it does not seem to have occurred to any of Mr Schulze-Wierling, Mr Schmitz [who was described in Mr Schulze-Wierling's evidence as having been "the director" of Old Aachener Re and, apparently, the person with best knowledge of its files, and who though retired was in 2002 still a consultant to AMB], Mr Beissel and Mr Brockhoff, when they spent about a day agonising about whether to write the letter of 18 January, or when they wrote the letter of 30 January 2002 that the Interlife matter was nothing to do with Professor Hauptmann and that he should not have been dealing with it. They did not - as might have been expected, if they doubted his authority - contact Professor Hauptmann, ask him to explain why he had been dealing with the matter and ask him to send back the file. On the contrary, Mr Schulze-Wierling said in evidence that Mr Schmitz (who had been involved back in 1995 to 1997) was "clear that the matter fell within the responsibility of Professor Hauptmann" and that "it was a matter for

> Professor Hauptmann". Moreover, at no time prior to his death 10 February 2002, did anyone at AMB apparently question or raise with Professor Hauptmann the question of his past authority (or want of authority) to act on behalf of AMB.

We regard that as a cogent indication that persons who had been involved in 1995 accepted that Professor Hauptmann was indeed authorised to deal with the Interlife matter. Mr Gatt said that it was not surprising that nothing was said, nor Professor Hauptmann criticised, because it was not then realised that the arbitration carried the dangers for AMB that have now appeared. But as the judge pointed out the issue was already sufficient for senior people to spend a good deal of time over it, and it would have been very unlikely, if they had been in any doubt as to Professor Hauptmann's status, that they would have decided to confirm Mr Merrifield's authority without further enquiry of Professor Hauptmann: as Mr Schulze-Wierling did in his letter of 18 January 2002, referred to in paragraph 9 above, and again in his letter of 30 January 2002.

27. Our finding on the issue of actual authority makes it unnecessary to consider the further issues as to AMB's participation in the arbitration, identified in paragraph 13 (iii)-(vi), but we make some observations on them out of courtesy to the detailed arguments addressed to us.

Ostensible authority

28. The judge directed herself in accordance with article 123 in *Bowstead & Reynolds*, 17th edition:

> "Where a principal, by words or conduct, represents or permits it to be represented that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the termination of authority (unless perhaps by the death or insolvency of the principal), to the same extent as he would have been if the authority had not been terminated, with respect to any third party dealing with the agent on the faith of such representation, without notice of the termination of his authority".

29. She applied that principle to these findings of fact [Judgment, paragraphs 91 and 92]:

> "In my judgment, SEB's submissions and those of the Solicitor Defendants are to be preferred on this issue, to those of AMB. It is clear on the evidence (and indeed was implicitly accepted by AMB) that, prior to his resignation in July 1995, Professor Hauptmann was held out as having authority to tell Mr Merrifield to instruct Manches to claim the unpaid purchase price and resolve the dispute with SEB, and to communicate with Mr Merrifield for the purpose of progressing the disputed

> claim. To that extent, he was authorised by Old Aachener Re to hold himself out as having the authority, which he was in fact given. That was a representation made by Old Aachener Re, not only to Mr Merrifield but also to Manches, and the consequences of, and the obligations flowing from, that representation are binding on AMB. This again brings one back to the question, whether (prior to his resignation) such admitted actual authority did or did not extend to the commencement of proceedings. I have already held that it did.
>
> The facts are, as I have already stated, that Professor Hauptmann remained continuously involved with this matter from about February 1995, when he was party to the decision to instruct Mr Yonge, until his death on 10 February 2002. Accordingly, I accept Mr Strauss' submission that the position is that, in relation to a specific matter, Professor Hauptmann was held out to Mr Merrifield to have authority to give him instructions to be passed on to the solicitors handling the dispute. Nobody gave Mr Merrifield notice, at the time of Professor Hauptmann's resignation, either of the resignation or of the termination of his authority. Professor Hauptmann went on dealing with this specific matter, and the information as to the 'chain of command' was passed on to SGH and P&J. It also follows that, since Mr Yonge of Manches was, in August 1999, still proceeding on the basis that instructions were given by Professor Hauptmann through Mr Merrifield, he had actual authority so to inform a new firm of solicitors to whom he was handing over the papers; therefore Mr Clark was entitled, on behalf of SGH and subsequently on behalf of P&J, to rely on Mr Merrifield's authority. Thus in my judgment, on the particular facts, Professor Hauptmann had continuing ostensible authority, even if he was not actually authorised."

30. AMB contended that there was no such principle, and that the only case cited by the judge in support of it, *Rockland Industries v Amerada* [1980] SCR 2, did not carry the point with anything like the width asserted in *Bowstead*. Ostensible authority was analogous to estoppel, so AMB was only bound by the acts of Professor Hauptmann if he was held out by AMB as having its authority after he ceased to be a director, or if AMB had been aware that he was continuing to act and stood by without protest.

31. Recognition that ostensible authority operates as a form of estoppel goes back at least as far as the speech of Lord Selborne LC in *Scarf v Jardine* (1882) 7 App Cas 345. That was a partnership case, but the House accepted that in their dealings with third parties the partners acted as agents for each other, and could be liable by way of estoppel for acts of a former partner. In the commentary to article 123 *Bowstead* suggests that the operation of the doctrine of ostensible authority in cases of termination of authority has not been fully worked out, because most of the cases refer to the extent of the authority rather than to its duration. However, *Scarf v Jardine*, cited by *Bowstead*, was a termination case, as was *Willis Faber v Joyce*

(1911) LT 576, equally cited by *Bowstead* and shown to us by Mr Strauss. Once the underlying principle of estoppel is established, there is no logical reason why, subject of course to the facts of each particular case, the doctrine should not operate in cases falling into each category.

32. As to the facts of this case, *Bowstead* points out that ostensible authority covers two types of case: where the agent has been permitted to assume a particular position that carries a usual authority; and where a specific representation is made as to the agent's authority. If either type of conduct on the part of the principal gives rise to an estoppel, that is because of the understanding that it creates in the mind of the third party representee. An alteration on the principal's part of the relationship between himself and the agent cannot, once the estoppel has been created, alter or withdraw the representation if the alteration of the relationship is not communicated to the representee. That renders incorrect the argument advanced by AMB that on Professor Hauptmann's retirement as a director his ostensible authority necessarily came to an end, and could only be revived by a further step, active or passive, by the principal. *Rockland* is at least authority for the proposition, to which it is limited by *Bowstead*, that a representation of usual authority by the act of appointing to a position will normally continue until the deprivation of the position is known to the third party representee. But in any event the present case is more one of specific representation than of usual authority. The evidence, such as it is, suggests that Professor Hauptmann's status in the eyes of Mr Merrifield and through him of Manches did not spring, or at least did not principally spring, from his position as a director; indeed a good deal of energy was expended earlier in the case, though not before us, in seeking to demonstrate that Professor Hauptmann's position as a director did not confer authority to give instructions in litigation. Rather, Professor Hauptmann's authority sprang from representations by Old Aachener Re, albeit conveyed, with the authority of Old Aachener Re, by Professor Hauptmann, that Professor Hauptmann had been entrusted with the business. It was that representation that conferred ostensible authority on Professor Hauptmann to act on behalf of Old Aachener Re. That representation could not be avoided by AMB without Mr Merrifield being told by Old Aachener Re or on its authority that Professor Hauptmann's authority had been withdrawn.

33. Even, therefore, if we had been minded to differ from the judge on the issue of Professor Hauptmann's actual authority, we would have held that he had ostensible authority after June 1995 to act in relation to Interlife for Old Aachener Re and thus, after the Transformation Agreement, for AMB.

Ratification

34. When the difficulties about the proper name of the claimant in the arbitration became apparent, during the actual hearing of the arbitration proceedings in 2002, those then responsible for the conduct of AMB's business had to decide what to do about the problem. One aspect of this exercise has already been discussed in paragraph 26 above. Those principally involved were Mr Schulze-Wierling, Dr Dageforde, and Mr Schmitz. The judge heard evidence from Mr Schulze-Wierling and also from Mr

Clark, the responsible solicitor at P&J; and saw a great deal of documentation. She made detailed findings, the most relevant of which can be set out as follows.

35. The judge started with the initial contact between Professor Hauptmann and Mr Schulze-Wierling as a result of the query raised in the arbitration proceedings, to which we have already made extensive reference, and drew attention to the letters of Mr Schulze-Wierling to Mr Merrifield of 18 and 30 January 2002, referred to in paragraph 26 above. She found that those were discussed with Dr Dageforde and written with the authority of AMB. She then found that on 6 March 2002 Mr Schulze-Wierling instructed Mr Clark to change the name of the Fourth Claimant in the arbitration proceedings to AMB. She continued, in her paragraph 108:

> I find as a fact that during the course of this conversation Mr Schulze-Wierling instructed him to go ahead and get the name of the Fourth Claimant in the Arbitration changed to AMB. As I have mentioned, this was consistent with what had happened previously and the surrounding circumstances. By 6 March 2002, Mr Schulze-Wierling had already stated in his letters of authorisation to Mr Merrifield dated 18 and 31 January 2002, that the name of the fourth Claimant "must" be changed to AMB, that AMB was identical with the fourth Claimant and that AMB "continues to bring the claim of its former subsidiary Aachen Re". These letters evidenced a strategy of unreserved commitment to the Arbitration Proceedings. Mr Schulze-Wierling's further instruction to P&J to act on 6 March 2002 is entirely consistent with that strategy. Moreover on 6 February 2002, Mr Schulze-Wierling had already stated to his colleagues, Drs Dageförde and Becker, that AMB was participating in the Arbitration Proceedings and referred to AMB's desire to control the future course of the proceedings. Mr Schulze-Wierling accepted in evidence that he considered AMB to be "inevitably involved" in the Arbitration Proceedings. Nothing happened between 6 February 2002 and 6 March 2002 to alter Mr Schulze-Wierling's strategy. Although there was a clear change of strategy around 21 March 2002 following Dr Dageförde's suggestion that enforcement might be resisted in the event of an adverse award, Mr Schulze-Wierling's strategy as of 6 March 2002 was still that of unreserved commitment. I also find that Mr Schulze-Wierling had (at least) implied actual authority to give this instruction to P&J and, on the balance of probabilities, express actual authority to do so from his colleagues.

36. Finally of relevance in this connexion is AMB's reaction to advice from counsel that there was no dispute as to the liability of SEB on the claim; the claim was more than likely to exceed the value of the counterclaim; but at that stage of the proceedings it was unrealistic to place a value on the counterclaim. The judge found that, in the light of that advice, Mr Schulze-Wierling and Dr Dageforde adopted the strategy of

seeking to collect any award made in favour of AMB that is explained in paragraph 10 above.

37. The judge accepted that ratification is established by an unequivocal act on the part of the principal, which however does not need to be communicated to the third party. She quoted the classic statement to that effect of Rowlatt J in *Harrison &Crossfield Ltd v LNWR* [1917] 2 KB 755 at 758. AMB argued that there had been no effective act of ratification in this case: first, because Mr Schulze-Wierling had done no more than instruct P&J to alter the name by which the proceedings were entituled, and had been careful not to instruct P&J to act further; and second because P&J owed a duty to their client to advise it as to the potential difficulties for and conflictual position of P&J should the arbitration proceedings fail for want of authority. In the absence of such advice P&J could not properly accept instructions, and thus anything that they did was not with the authority of AMB.

38. We are not persuaded by either of those arguments. It is not necessary to determine whether P&J were authorised to pass on whatever AMB told them to do; although, as we note in paragraph 48 below, P&J undoubtedly had ostensible authority to act as they did. The extent of P&J's authority is irrelevant at this stage because the act of AMB in giving those instructions to P&J was a sufficient expression of will to constitute ratification. Mr Gatt argued, with proper diffidence, that what AMB had said to P&J was too tentative or conditional to meet the requirement of unequivocal adoption of the proceedings. That argument cannot withstand the judge's findings in, for instance, her paragraph 108, cited in paragraph 35 above. And there can in our view be no doubt that for AMB to decide to put its name on the proceedings is more than enough to amount to the ratification of its status as a party to those proceedings. That it decided to play only a limited role in those proceedings, in pursuit of the strategy identified by the judge in her paragraph 112, is of no consequence, once AMB had decided, as it did, to confirm that it was a party.

39. The foregoing arguments played a considerable role before the judge and in the written submissions before us, but it is fair to say that in his oral submissions Mr Gatt, without abandoning them, passed over them somewhat lightly. He concentrated his fire on the sub-rule that a principal can only ratify if he had full knowledge of all the material circumstances in which the act of ratification was done. Various items of alleged ignorance on the part of Mr Schulze-Wierling were originally relied on, but before us Mr Gatt concentrated on Mr Schulze-Wierling's lack of knowledge of beneficial entitlement to the claim and, although somewhat subsidiarily, on AMB's ignorance of the fact that it might have claims against P&J in respect of its handling of the case on AMB's behalf.

40. As to the former point, it will be recalled that the effect of the Incorporation Agreement in 1997 was that Old Aachener Re retained the legal title to the claim, but that the beneficial entitlement to the proceeds passed to New Aachener Re: see paragraph 6 above. When committing the acts of ratification relied on, Mr Schulze-Wierling thought that Old Aachener Re was beneficially entitled to the proceeds, because that is what Professor Hauptmann had told him in the exchanges referred to

in paragraph 8 above. Had Mr Schulze-Wierling known that AMB would not in fact benefit from being a party to the claim, he would never have ratified AMB's participation in the arbitration.

41. That was not an attractive argument. Mr Schulze-Wierling was a lawyer, Professor Hauptmann was not. Mr Schulze-Wierling had taken part in the drafting or at least the consideration of the Incorporation Agreement. The contention was that what otherwise was a plain act of ratification by AMB's legal adviser did not bind the company because the legal adviser had mistakenly accepted the advice of a layman about the effect of a contract in which the legal adviser had himself played a part. In these circumstances, it is not surprising that the judge was attracted to an argument that "knowledge" for the purposes of the present rule is case-specific, sometimes requiring actual knowledge by the party but sometimes only the means of knowledge. She continued in her paragraph 134:

> In my judgment, Mr Schulze-Wierling's lack of knowledge of the true effect of the Incorporation Agreement is not a bar to ratification. His lack of knowledge cannot in any way be laid at the door of P&J or [SEB]. He was involved in its drafting and if neither he, nor anyone at AMB realized its true construction and effect, then AMB has to take the responsibility for that. AMB had the means of ascertaining what rights, if any, it had under the Agreement, and if he failed to do so, at a time when consideration urgently needed to be given as to what steps had to be taken by AMB in relation to the Arbitration Proceedings, then in my view AMB should be regarded as having taken the risk that it was proceeding without a full comprehension of its position. Parties are normally deemed to know what the legal effect is of contracts to which they are subject, and absence a claim for rectification, or rescission or similar relief, they are not entitled to contend that they were mistaken as to its effect; *Powell v Smith* is at least authority for that proposition. Moreover, certainly, in the absence of any notice of assignment, AMB remained the legal party entitled to bring the claim, and thus there was no mistake in that respect, whatever the position about the beneficial entitlement to the claim. Furthermore, AMB remained subject to the liabilities in relation to the counterclaim, which, as I have found, at the material times it appreciated

42. The judge was right that *Powell v Smith* (1872) LR 14 Eq 85 was not a case that turned on agency, much less on ratification, but she was also right to say that it is authority for parties being bound by the legal effect of contracts into which they have entered. Rejecting an attempt to resist specific performance on the ground that the contractor's agent had not been authorised to enter into an agreement as construed by the court, Lord Romilly MR said, at p90:

> "the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain

> words that it contained. Now that is no ground of mistake at all. It is a question upon the construction of an agreement agreed to by everybody concerned."

43. If the judge's paragraph 134 is analysed, it will be seen that it contains two propositions at different levels of generality. The first is that a party who has means of knowledge of a fact, and is at fault as between himself and the opposite party as to his actual knowledge, cannot rely on his ignorance as a defence to a claim of ratification. The second, and narrower, proposition is that in accordance with the rule in *Powell v Smith* a party cannot meet a claim of ratification by saying that if he had properly understood the effect of a legal document he would not have acted as he did. It is not necessary in this case to pass on the first of these propositions, as to which Mr Gatt expressed considerable reserve. But we find it difficult not to agree with the judge in the second of her propositions. To hold otherwise would be to say that a party can assert ignorance of the law to avoid the effect of an act that objectively viewed exposes him to liabilities to third parties.

44. On that view, it is not dispositive that Mr Schulze-Wierling was involved in the Incorporation Agreement, and should have known if anyone did what its effect was in law. But one can at least say that if the principle adopted by the judge is correct, this is an ideal case to demonstrate its good sense.

45. As to the allegation that P&J did not make clear to AMB the possible availability of a claim against P&J, advice given to the parties by counsel representing them in the arbitration, Mr Driscoll QC, made clear that such issues might exist, and that the parties separately should take advice on them. The judge found in her paragraph 104 that Mr Schulze-Wierling was aware of that advice and, contrary to Mr Schulze-Wierling's claims in evidence, understood it. Mr Schulze-Wierling however told the judge that he had not acted on the advice because he thought that AMB were competent to deal with the matter themselves. There is thus no doubt, as the judge so held, that AMB went into the ratification of the original constitution of the arbitration with its eyes open on this point.

46. In an argument that does not appear to have been raised before the judge AMB relied on the close affinity of ratification to the doctrine of election. An effective election requires knowledge of the right in law to elect; the same it was argued should be the case in ratification. For this proposition AMB relied on paragraph 2-050 of *Bowstead*. It is quite true that there the learned author, after saying that ratification seems to be a notion *sui generis*, adds that in so far as it depends on the choice of the person concerned it can be said to be an application of the doctrine of election. But the rest of the paragraph is largely taken up with a list of the respects in which ratification differs from election, and the comparison urged by AMB is nowhere drawn. Nor should it be. The essence of election, as *Bowstead* points out, is that an innocent party chooses between parallel or inconsistent remedies, and once he has chosen and communicated his choice he is bound by it. Justice requires caution before that limitation of his rights is effected; quite apart from the fact that he cannot have "chosen" in any meaningful sense of that word if he did not know that the law

gives him a right to choose, or alternatively that it will interpret certain steps as an act of choice. By contrast, a person who goes through the physical steps of ratifying the acts of his agent will usually be seeking to *extend* his rights, by seeking an advantage for himself over and above what he would have absent the ratification: as the facts of the present case graphically illustrate. There is not the same need in this case as there is in the case of election to give the party the protection of not recognising the effect of what he did unless he knew not only the facts but also the law.

47. Accordingly, even absent both actual and ostensible authority for Professor Hauptmann to act for Old Aachener Re, we would hold that by Mr Schulze-Wierling's actions in 2002 AMB ratified the actions of Professor Hauptmann and Mr Merrifield in making Old Aachener Re, and thus its successor AMB, a party to the arbitration.

Submission to the jurisdiction and estoppel

48. These issues effectively overlap. Even if we are wrong about all that has gone before, we are wholly persuaded that by its conduct in 2002 AMB submitted to the jurisdiction of the arbitral tribunal, and is estopped from contending otherwise. AMB instructed P&J to take steps to make AMB a party to the arbitration, and P&J conveyed those instructions to SEB: see paragraph 10 above. Thereafter, although AMB denied that P&J had any authority to conduct the arbitration further, it took no steps to prevent P&J from so doing until the end of 2002. AMB's motive for those tactics was that found by the judge in her paragraph 112. P&J had at least ostensible authority to act as it did, and to conduct proceedings on behalf of AMB in circumstances that were held out as only awaiting a purely formal change of name. If AMB wished to remove itself from the arbitration, it had a clear duty to take active steps to inhibit P&J's conduct, about which it well knew. AMB wished in this respect to approbate and reprobate. It cannot do so.

49. AMB is therefore a party to the arbitration in its own right, even if it did not succeed to the position in the arbitration of Old Aachener Re.

Misnomer

50. This is the description given to the issue identified at paragraph 13(i) above. If the proceedings were started on behalf of a party who did not exist, then they were a nullity. If on the other hand it was clear who the party was, but there was simply an error in naming him, the proceedings were not a nullity and the error can, in appropriate circumstances, be corrected within them. This issue has usually arisen in, and decided authority relates to, litigation in which it is alleged that a named party is incompetent to conduct litigation, and that substitution of another party would infringe rules of court as to limitation. The present case differs from the orthodox in two ways. First, it concerns an arbitration, governed by the law of contract and not by rules of court. Second, it is a singular feature of the case that it is the claimant in that arbitration who asserts that the proceedings in which he has taken an active part are a

nullity because the claim was brought not in his name but in the name of a non-existent company.

51. We were shown a very great deal of authority on this issue, but much of it was of no direct assistance because it is mainly directed at limitation and at the rules of court. We prefer to state the question as one of principle, namely, who would reasonably have been understood by the party against whom the claim was asserted to be the entity bringing the claim? Within the misnomer cases, that approach is that of Lloyd LJ in *The Sardinia Sulcis* [1991] 1 Lloyds Rep 201, in particular at p 207, an approach adopted in the most recent case in this court, *Morgan Est v Hanson Concrete Products* [2005] 1 WLR 2557[44]. In our case, the proceedings were commenced on the instructions of Mr Merrifield, acting on the authority of Professor Hauptmann. But what was the nature of that authority? Plainly, to protect the interests of the vendors of Interlife. Mr Merrifield had no business to include a claimant in the proceedings, and Professor Hauptmann had no business to permit him to do so, unless that claimant was one of those vendors. The fourth claimant was therefore a claimant as, but only as, one of the vendors.

52. That would have been obvious, to the extent of not even needing thought, to SEB. And it would also have been obvious from a scrutiny of the pleadings, in relation to which we respectfully adopt the observation of Jacob LJ in *Morgan Est* at paragraph 31 of the report of that case, that the best source for what the claimant actually intended is to be found in the points of claim. In our case the pleadings unequivocally said that they were brought jointly by the Interlife vendors. In those circumstances the fact that the title of the proceedings did not record that the relevant vendor had transferred all of its rights to AMB under the Transformation Agreement was indeed a mere misnomer.

53. Nor is it anything to the point that Old Aachener Re had only a bare title to sue under Interlife agreements, but no beneficial interest in the proceeds (see paragraph 6 above). In the state of the relations between the parties, Old Aachener Re was not only a proper but also a necessary party if the joint claim of the vendors, which is what Mr Merrifield was employed to promote and what counsel advanced in the pleadings, was to be properly constituted.

54. The approach suggested above marches with that of this court in a case shown to us by Mr Strauss concerning a landlord's counter-notice, *Lay v Ackerman* [2004] EWCA Civ 184. The notice is valid if it leaves the tenant in no doubt that it comes from the landlord. By the same token, the pleadings in this case could not leave anyone in any possible doubt that they were advanced on behalf of the vendors of Interlife, and of no-one else.

55. The arbitral proceedings accordingly were not and are not a nullity. AMB even if not already a party to them joined in them by instructing its solicitors to put its name in the place of the Fourth Claimant.

The solicitors' appeals: 2005/0259 and 2005/0287 (Manches and SGH) and (part) 2005/0285 (P&J).

56. In these appeals the solicitor defendants challenge the judge's declarations that each of them, for the periods in which they were acting, was in breach of warranty "that the name of the fourth claimant in the arbitration proceedings by which they were authorised was Old Aachener Re". As the judge found that each of the solicitors had authority to act for AMB she also declared that they were "not otherwise in breach of warranty". She said she was uncertain whether SEB would be able to show that it had suffered any loss as a result of the breach of warranty as to name, but this was not something she had to decide as a preliminary issue.

57. It is common ground that a solicitor who starts, defends or continues litigation or arbitration on behalf of a client warrants that he has authority to do so. Such a warranty necessarily involves the solicitor representing that he has a client who exists. The question is whether he also represents that he has named his client correctly. Here, on the judge's findings, the solicitors had authority to act for their client, AMB, which existed. So the question is whether they were in breach of warranty by mistakenly naming or continuing to represent that their client was Old Aachener Re.

58. Understandably this question was not fully argued before the judge. But she answered it in the affirmative by reference to commonsense and the decision of this court in *Nelson v Nelson* [1997] 1 WLR 233 which she found of assistance.

59. There is a dispute about whether *Nelson* dealt with the question we have to answer at all, but it is common ground that there is no other authority on the point. Nevertheless we were taken through the old cases in which the law about solicitors' liability for breach of warranty of authority was developed. Interesting though this history is, we do not think it sheds any real light on what we have to decide. For this reason we will only refer to it briefly.

60. The legal basis for making a solicitor liable was settled by this court in *Yonge v Toynbee* [1910] 1 KB 215. In that case, unknown to his solicitors, the client was of unsound mind and therefore lacked capacity to instruct the solicitors to defend proceedings on his behalf. The court held that the solicitors were liable to pay the plaintiff's costs on the basis of an implied warranty or contract that they had authority. This contractual theory had been developed in earlier cases involving agents other than solicitors, notably *Collen v Wright* [1857] 8 E & B 647 where at 656 Willes J. said:

> The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for a another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of

> entering into the transaction with the professed agent, as such, is good consideration for the promise.

In other words he was describing what we would now call a collateral contract. Although this contractual theory presents some conceptual problems in the case of a solicitor conducting litigation, this is nevertheless the established basis for the liability. It is clear, as with any warranty, that liability for its breach is strict. Making the solicitor liable in such circumstances avoids the injustice which would otherwise be caused by the fact that the person for whom the unauthorised solicitor was purporting to act could not himself be made responsible for the opposing party's costs.

61. In *Nelson* solicitors started proceedings on behalf of a plaintiff who was (unknown to them) an undischarged bankrupt and whose claim had vested in his trustee in bankruptcy. The judge ordered the solicitors to pay the defendant's costs on the basis that the solicitors had behaved in a manner analogous to breach of warranty of authority. This court (McCowan, Peter Gibson and Waller LJJ) allowed the solicitors' appeal.

62. After referring to a number of authorities including *Yonge v Toynbee* McCowan L.J. at 235 G-H said:

> I see nothing in these authorities to contradict the contention of [counsel] for the solicitors, that a solicitor who lends his name to the commencement of proceedings is saying, (1) that he has a client, (2) that the client bears the name of the party to the proceedings and (3) that the client has authorised the proceedings. He does not represent that the client has a good cause of action. What the plaintiff in the present case was lacking was a good cause of action since any action in respect of [the] claim … was vested in his trustee in bankruptcy.
>
> In my judgment in commencing these proceedings the solicitors had authority from the plaintiff to do so and warranted no more than that. In particular they are not to be taken to be warranting that the plaintiff had a good cause of action vested in him.

The judge obviously thought (2), albeit obiter, supported SEB's case. But none of the authorities to which McCowan LJ referred say anything about a warranty as to name. It may therefore be, as Mr Nash for Manches and SGH suggested, that all McCowan LJ, and counsel whose submissions he accepted, meant was that the solicitor represents that the client who instructs him and the party named in the proceedings are the same person. In other words the warranty of authority given by a solicitor is made up of statements (1) (2) and (3). If so, McCowan L.J. was saying nothing about whether, additionally, the solicitor warrants that he has correctly named his client.

63. Peter Gibson L.J. at 237 E said:

> Prima facie [the solicitors'] authority is to bring the proceedings in the name of the client and I do not see that he warrants more than that he has a retainer from the client who exists and has authorised proceedings and against whom a costs order can be made. He does not warrant that the client has a good cause of action or that the client is solvent.

Waller L.J. at page 240 E-H and 250 F said:

> There is no question that if the person for whom the solicitor purports to act does not exist, e.g. a defunct corporation, the solicitor is on the analogy of breach of authority, held liable to pay the costs. Similarly, if the capacity of the would-be client is such that the client is simply not able to instruct a solicitor … But, in such cases, it is I think of some importance, (1) that the persons or entities simply have no power to retain solicitors at all and thus, (2) applying the analogy of want of authority it need go no further than warranting that the solicitors have a principal who has authorised them …
>
> I would have thought that the court is not concerned to make a solicitor strictly liable simply because the person who instructs him turns out not to be the right plaintiff, as opposed to ensuring that there is a party against whom the opposing party can obtain an order for costs…
>
> The warranty … is not a warranty of solvency or that the costs will be recovered; it is that the plaintiff exists and has authorised the proceedings and no more.

Self evidently neither of these judgments support the judge's conclusion. When Peter Gibson LJ refers to bringing proceedings "in the name" of the client he is not defining the scope of the warranty given by the solicitor but describing the authority of the solicitor to bring proceedings on behalf of his client.

64. Nevertheless, *Nelson* is helpful as to what a solicitor conducting proceedings does not warrant, even though we do not think it deals directly with the question we have to decide. As a matter of principle, therefore, is a warranty as to name justified?

65. Mr Matthews Q.C. for SEB says it is. Such a warranty, he submits, should be considered as part of the warranty of authority or something akin to it. The opposing party is entitled to be told the correct name of the client from whom the solicitor has authority and entitled to rely on the name put forward in the proceedings. This is the basis on which litigation or arbitration is conducted. It should not be difficult for a solicitor to ascertain the correct name of his client. The opposing party on the other hand has no right or obligation to do so.

66. In considering these submissions it is important to bear in mind that generally a solicitor conducting proceedings does not warrant what he says or does on behalf of his client. Thus he does not warrant that his client, the named party to the proceedings, has title to sue, is solvent, has a good cause of action or defence or has any other attribute asserted on his behalf. The solicitor relies upon his client's instructions for all these things, as he will normally do for naming his client correctly. As he gives no warranty as to the accuracy of his instructions generally, it is difficult to see why the naming of his client should be treated as an exception. Why should this be any different, for example, from the naming of a client who has no title to sue? There is an obvious distinction between such matters and the solicitor's own authority to act because the solicitor will usually know whether he has such authority or not. The imposition of strict liability on a solicitor for breach of warranty of authority is justified because otherwise the opposing party will be left without remedy against his supposed client.

67. The warranty which a solicitor gives is that he has a client who has instructed him to assert or deny the claims made in the proceedings against the opposing party. We do not think he warrants that the client has the name by which he appears in the proceedings. As a matter of principle it would not be right to impose strict liability upon a solicitor for incorrectly naming his client. Otherwise solicitors could be made liable for any case of misnomer including, for example, typographical errors or change of corporate name without a change of rights.

68. A further consideration is that the sort of loss caused by misnomer is unlikely to be large and in most cases the opposing party will be compensated by an order for costs against the party whose mistake it is likely to be. Mr Matthews argued that existence of the warranty should not be dependant upon the size of the likely loss. In any event, he said, the losses could be significant because a claim might become time barred or recovery against the solicitors' client might not be possible. In this case SEB say that as a result of the misnomer enforcement of any award against AMB in Germany might not be possible because it could argue that it had been unable to present its case during the arbitration (see Article V 1. (b) of the New York Convention). However, these arguments do not persuade us that the imposition of strict liability is justified. If the solicitor is really at fault a claim for a wasted costs order or even for negligence is possible.

69. For these reasons we conclude that solicitors conducting proceedings should not be held to warrant that they have correctly named their client and that the judge reached the wrong conclusion on this point. The defendant solicitors' appeals should therefore be allowed. No doubt the parties can agree appropriate declarations (if required) to be substituted for those made by the judge to reflect this result.

P&J's costs appeal in the main action: 05/0285

70. Following her findings on the preliminary issues, the judge made various orders as to costs. So far as the three solicitor defendants were concerned, she made an

order in their favour against AMB but on the basis that AMB should pay only 50% of the costs of each solicitor defendant. She made an exception in relation to costs of their expert on German law in respect of which she made a full order. Her approach and reasoning is contained in paragraph 157 of the judgment which is in these terms:

> "… I am concerned that no attempt seems to have been made to limit the representation of the Solicitor Defendants at trial to one firm of solicitors and one set of counsel, or at least, with merely junior counsel, if necessary, representing the separate interests of the three different firms. Although I received assistance by way of submission and otherwise from all three sets of counsel, and although, in theory at least, there was a conflict between the three firms by virtue of the different dates at which they had been retained, and the different periods when they had acted, that conflict was more apparent than real; in the event the Solicitor Defendants presented a united front at trial and no cut-throat defence was seriously advanced or indeed advanced at all. Nor do I see that P and J's conduct after 22 March 2002 in any way justified three different teams acting for the three firms at trial. Despite their subsequent written submissions, no, or no adequate explanation has been forthcoming from the Solicitor Defendants as to why they did not take the step of instructing one team of solicitors and counsel, if not from the start, at least from an early stage when it must have been obvious that, in relation to the preliminary issues, there was no real conflict between them that prevented a unified team. In my judgment, having carefully considered the further written submissions on this point, I remain of the view that the justice of the case is best reflected in an order that, subject to one point, AMB pays only 50% of the costs of each of the Solicitor Defendants of and incidental to the preliminary issues, which, for the avoidance of doubt, includes not merely the trial before me, but the costs of and incidental to the preliminary issues as a whole. That may be a somewhat rough and ready approach, but it reflects my view that, whatever may have been the justification at an early stage of the proceedings for separate representation, serious consideration should have been given to an arrangement which limited, in whole or in part, representation at trial to one legal team. The one point where I consider it appropriate that AMB should pay 100% of the costs, and not merely 50%, is in relation to the costs of the German expert, where all three firms sensibly instructed the same expert to provide one report."

71. P&J (but not the other solicitor defendants) now appeal against that order. It was undoubtedly a carefully considered order. Oral submissions as to costs were made on the occasion when judgment was handed down. The judge provided the parties with a draft judgment on ancillary matters including costs some three weeks later.

Thereafter further written submissions were made on behalf of the solicitor defendants inviting her to reconsider the 50% award. These submissions were answered in writing by AMB. Finally, the point was dealt with, along with other ancillary issues, in a supplemental judgment by which paragraphs 149–160 were added to the substantive judgment. The composite judgment was handed down on 20 January 2005, almost three months after the handing down of the substantive judgment on the preliminary issues.

72. It is common ground that the threshold for interference by this court with an order for costs made by a trial judge is as described by Stuart Smith LJ in *Roache v Newsgroup Newspapers Ltd* [1998] EMLR 161, 172, where he said:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale. See per Griffiths LJ in *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394, 403G."

This approach was subsequently approved in *AEI Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, 1523C, per Lord Woolf MR.

73. The first submission on behalf of P&J is that the judge did indeed err in principle in her approach. By CPR Part 44.3(2)(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. Plainly, AMB was the unsuccessful party and P&J the successful party. Whilst the court, having considered all relevant matters, may make a different order, the starting point is the general rule. Mr Davidson submits that the judge did not begin from the correct starting point but rather imposed a burden on P&J to justify separate representation.

74. Whilst it is true that the judge made no express reference to the general rule, we unhesitatingly reject the submission that it was not her starting point. It is implicit throughout her rulings on costs as between the various parties. Moreover, when first addressing the position as between AMB and the solicitor defendants she said (at paragraph 153):

> "I have come to the conclusion that, since AMB lost on the critical issues of authority and ratification, it should directly bear the costs of the Solicitor Defendants."

75. In our judgment, she undoubtedly started from the general rule but then departed from it for the reasons set out in paragraph 157 of her judgment (above).

76. Mr Davidson's second submission is that the retrospective award of costs on a 50% basis amounted to an inappropriate form of "cost capping". It is undoubtedly correct that, from the point of view of a party, it is more comfortable to know in advance of a hearing whether, if that party is successful, it may suffer some percentage reduction in respect of recoverable costs. At the first Case Management Conference Langley J had adverted to the possibility that the solicitor defendants might have single representation and Mr Leech, on behalf of AMB, had said that that was "a matter for them". No application was made for a capping order, nor was there any reference to a possible sanction if the solicitor defendants continued with separate representation. In our judgment all this is nothing to the point. The fact that a prior order had not been made or sought does not prevent a trial judge from departing from or modifying the application of the general rule in the light of all the circumstances which properly arise for consideration at the conclusion of the substantive hearing. By that time, the trial judge is particularly well placed to form a view of the factors which may impact upon discretion. That was certainly so in the present case after a lengthy and complex hearing. We see no reason in principle why a trial judge should not make a reduced order at that stage if the circumstances justify such a course.

77. That leads to Mr Davidson's third submission which is that the judge exercised her discretion wrongly in the light of the justification for separate representation in the particular circumstances of the case before her, especially in relation to P & J. He contends that it has always been made clear on behalf of AMB that they may yet have further claims against P&J; that P&J are more exposed than the other solicitor defendants because P&J alone had direct dealings with AMB; that there had always been a real possibility of conflict of interest if there had been joint representation; and that P&J have different insurers.

78. We are unimpressed by these submissions. The judge, with her unique and prodigious grasp of the dynamics of the trial, had well in mind the theoretical possibility of a conflict of interest but concluded that the conflict was "more apparent than real". She observed that the three solicitor defendants had presented a united front and that "at least from an early stage … it must have been obvious that, in relation to the preliminary issues, there was no real conflict between them that prevented a unified team". We do not consider that this analysis was in any way erroneous. We are entirely satisfied that the judge was entitled to view the matter of representation as she did. Her concern that there had been no attempt made to limit the representation of the solicitor defendants at the trial was understandable. In the event, she approached the matter in a way which she described as "somewhat rough and ready" but which we would prefer to describe as sensibly pragmatic. She did not limit the order to an amount which would equal the representation of one solicitor defendant. She ensured that all three were permitted recovery, albeit on a 50% basis, except in relation to the expert report. This seems to us to have been entirely fair and in accordance with the factors which she was required to take into account by CPR Part 44.3, having regard to the detailed submissions which she had received from the parties. Whilst P&J had the right to separate representation, that did not mean that, if successful, it would necessarily be entirely at AMB's expense. We are unpersuaded by P&J's appeal on this issue.

P&J's appeal in relation to costs arising from the Part 20 proceedings: 05/0331

79. P&J also seek to raise a second issue on costs. This relates to the position as between P&J, Mr Merrifield and AMB. The judge said (at paragraph 158):

> "So far as Mr Merrifield is concerned, P&J, who joined him as a Part 20 Defendant, must pay his costs. I do not consider that it was proportionate to have joined Mr Merrifield, an individual, as a defendant; none of the other firms did so, and sensible arrangements should have been put in place to obviate the need for him to have been joined as a party (even if the potential of a future claim against him was preserved), whilst ensuring his presence as a witness. Accordingly, P & J are not entitled to recover those costs from AMB."

80. P&J accept that order as between themselves and Mr Merrifield but complain that they should have been permitted to recoup the costs of Mr Merrifield from AMB. Mr Davidson criticises the judge's reference to proportionality and to the fact that Mr Merrifield is a private individual. He submits that Mr Merrifield was properly joined and, as a result, there was a typical "string" situation. In our judgment, there is no discernible error in the approach of the judge. There was and is no evidence that Mr Merrifield would have been an uncooperative witness if he had not been joined, or that he would have been unwilling to undertake to be bound by the judgment, even if he was not a party. We are satisfied that the conclusion of the judge on this point was reached with the same care as her other conclusions on costs. She was entitled to decide as she did. We therefore reject the appeal on this issue.

81. As noted in paragraph 14 above, Mr Merrifield cross-appealed in relation to the order against him, challenging on the facts the judge's conclusion that he warranted to P&J his authority to act for Old Aachener Re. We heard interesting submissions from Mr Carlisle on this point, but it does not arise for decision in view of our upholding the judge's conclusion that Mr Merrifield's authority validly came from Professor Hauptmann. We do not wish, or need, to say any more about it.