JUDGMENT : The Honourable Mr Justice Neuberger. Chancery Division. 8th July 2003.

1. This is an appeal brought by Mr Leser Landau from a decision of Master Bowles given on 10th April 2003. The facts are as follows.

The facts

2. In November 1989, Barclays Bank Plc ("the Bank") agreed to finance Mr Landau's purchase of a site at Newcastle-upon-Tyne, Sandgate, and to advance further monies in connection with its redevelopment. Between 1989 and 1994, the Bank advanced monies to Mr Landau, who provided Sandgate as security. Sandgate was then acquired pursuant to a compulsory purchase order. In May 1996, the Land Tribunal assessed the compensation payable to Mr Landau in respect of this compulsory acquisition at about £1.1m, which was duly paid to the Bank.

3. The valuation of £1.1m was very substantially less than the amount of money which Mr Landau had spent on acquiring and improving Sandgate, and was about £2m less than the amount which the Bank had advanced to Mr Landau on the security of Sandgate. Accordingly, the Bank was left with an unsecured claim for about £2m against Mr Landau, who said he was unable to pay. In any event, the Bank may well have encountered difficulties in enforcement, as Mr Landau was at all times resident in Switzerland.

4. Grimley J R Eve ("Grimleys"), the chartered surveyors, had prepared Reports, including valuations, of Sandgate, on 7th November 1989, 28th October 1991, and 16th July 1993. The first and third of these Reports were addressed to the Bank, and the second Report was addressed to Mr Landau. The valuations contained in those Reports were very substantially above the figure fixed at by the Lands Tribunal, mainly, £5m, £7m, and £5.25m respectively.

5. During 1996 and 1997, the Bank took advice about the possibility of bringing proceedings against Grimleys, on the basis that they had negligently overvalued Sandgate. By the beginning of October 1997, Counsel had drafted detailed particulars of claim, and they were served by the Bank's solicitors on Grimleys on 23rd December 1997. In those proceedings ("the Bank's proceedings") the Bank contended that the valuations contained in each of the three Reports were negligently high, and that, when advancing monies to Mr Landau after the provision of each such Report, the Bank relied on the valuations contained in such report.

6. On 28th October 1997, the Bank sent Mr Landau a letter ("the Letter") which was, so far as relevant, in the following terms: *"Further to our discussion on ... 4 March 1997, and the correspondence which has since been exchanged ..., I am writing to confirm that a consideration for and conditional upon your entering into an equitable assignment in the terms of the attached draft in relation to your rights and remedies in respect of the valuation report prepared by Grimleys on 28th October 1991 ("The Report"):*

1. *The Bank covenants with you not to issue proceedings for recovery of your liabilities on [your] accounts ... save that this covenant will not apply to the first £50,000 of those liabilities ....*
2. *as soon as reasonably practicable following the receipt of final damages from Grimleys arising out of or in connection with any claim which the Bank might bring against them by reference to the Report we will pay you a sum equivalent of 30% of the net recoveries (that is the sum recovered less costs, disbursements and -- if applicable -- tax); and*
3. *Subject to the Bank's absolute and unfettered discretion ... we may also then write off the residual balance of £50,000 ...*

The Bank will use its reasonable endeavours to pursue the claims by reference to the Report and ... will report upon progress to you on a quarterly basis.

Should the Bank elect its absolute discretion not to proceed with the claims by reference only to the Report, then we will give you written notice to that effect and ... you will be entitled to call for a reassignment to you of all your rights and remedies referable to the 28 October 1991 Report ..."

7. The equitable assignment referred to in the first paragraph of the Letter was duly executed. Thereafter, the Bank's proceedings continued, but they did not proceed to trial. That is because there was a successful mediation which resulted in an order dated 19th May 2000 ("the Order"). The Order provided that Grimleys would pay the Bank £1.3m with no order for costs, and that the proceedings

would be stayed save for the purpose of enforcing the terms of the Schedule to the Order. That Schedule included a confidentiality provision, but, for the purpose of this appeal, its central provision was paragraph 1, which was in the following terms: *"[Grimleys] shall pay to the [Bank] the sum of £1.3m (inclusive of costs and interest) in full and final settlement of all claims ... arising out of or in relation to the issues pleaded in this action and including (without limitation) any act carried out or omitted to be carried out in connection with the First Valuation, the Second Valuation, or the Third Valuation ... and any act carried out or omitted to have been carried out at any time in respect of ... Sandgate ...."*

The three valuations there referred to were, of course, the valuations contained in the three Reports, upon which the Bank' s claims against Grimleys were based.

8. Some time thereafter, Mr Landau issued these proceedings, in which he claims to be entitled to 30% of the £1.3m paid to the Bank under the Order, less the costs and disbursements incurred by the Bank in connection with its proceedings (herewith "the Costs"). In these proceedings, Mr Landau also claims damages for breach of the Bank's obligation to "report upon progress to [Mr Landau] on a quarterly basis". Mr Landau issued an application for summary judgment pursuant to CPR24, and it was that application which Master Bowles determined in his full and lucid judgment of 10th April 2003.

9. Towards the end of his judgment, Master Bowles concluded that he could and should award Mr Landau damages arising out of the Bank's failure to report on a quarterly basis in accordance with the terms of the Letter, and ordered an interim payment of £5,500 in respect of that head of claim. Neither party has appealed against that part of his decision.

10. The main part of the Master's decision was, of course, concerned with Mr Landau's claim for summary judgment for 30% of the £1.3m (less the Costs). In that connection, the Master concluded that:

i) (a) Construing paragraph 2 of the Letter as a matter of ordinary language, Mr Landau was right in his contention that, in light of the Order, he was entitled to 30% of £1 .3m (less the Costs);

(b) However, this conclusion was so inconsistent with commercial common sense, that the Letter should be construed as meaning that Mr Landau was only entitled to 30% of that part of the £1.3m which was properly attributable to the second Report, as opposed to the first or third Reports (less an appropriate proportion of the Costs);

ii) It was not possible to determine what proportion of the £1.3m was properly attributable to the second Report, and that there should be an inquiry into that issue.

11. While seeking to support the first of these three holdings, Mr Robert Hantusch, on behalf of Mr Landau, primarily contends that the second holding was wrong, and that, accordingly, Mr Landau is entitled to 30% of £1.3m (less the Costs). In the alternative, if the Master's second conclusion was right, then Mr Hantusch contends that, in light of the terms of the Order, the effect of paragraph 2 of the Letter is to entitle Mr Landau to 30% of one-third of the £1.3m (less an appropriate proportion of the Costs). The submissions of Mr Vernon Flynn on behalf of the Bank, effectively mirror those of Mr Hantusch: he challenges the Master's first conclusion, but contends that the second and third conclusions were each correct.

12. The first question to be considered is whether paragraph 2 of the Letter entitles Mr Landau to 30% of the whole of the £1.3m (less the Costs), or to 30% of that proportion of the £1.3m attributable to the second Report (less an appropriate proportion of the Costs). The resolution of that issue, as the Master rightly recognised, primarily turns on the meaning of paragraph 2 of the Letter, when read in the context of the Letter as a whole, and taking into account commercial common sense and the surrounding circumstances.

Summary resolution

13. The Master took the view, in light of the evidence before him, that he could safely construe the Letter at summary stage, rather than directing that the point go to trial. It seems to me that in some cases of construction, it will be necessary for the issue to go to trial, because there is a dispute as to the existence of certain alleged surrounding circumstances, and, even sometimes, because there is a dispute about the relevance and weight to be given to such surrounding circumstances. In the present

case, such a course could have been appropriate, particularly in light of the reference at the start of the Letter to a discussion on 4th March 1997 and the existence of correspondence thereafter.

14. However, in agreement with the Master, it seems to me that, at least in general, it is inappropriate for the Court to decline to determine a question of construction at a summary stage, merely because it is said that disclosure or witness statements might result in evidence of relevant surrounding circumstances. The respondent to the summary judgment application must normally come up with some evidence of such circumstances, or at least must satisfy the Court that there is reasonably likely to be such evidence.

15. After all, surrounding circumstances can only normally be taken into account when construing a contract, if both parties were aware of those circumstances, at the time of the contract. Accordingly, where, as here, the parties to the proceedings are the original parties to the contract, and there is no reason to think that the individuals involved in making the contract are unable to give instructions or to make a witness statement, it seems to me that it would normally not be good enough for a party to rely upon the possibility of relevant evidence of surrounding circumstances appearing at a later stage, unless he is able to give evidence of the existence of such surrounding circumstances, or at least to show a reasonable possibility that such surrounding circumstances may have existed.

16. It is self-evidently very unlikely that evidence of any relevant surrounding circumstances will appear if neither party is able to identify them, or even to suggest what they might be, at summary judgment stage. More generally, save in a case where the applicant's knowledge of relevant facts is likely to be significantly greater than that of the respondent, it would normally be unfair to refuse summary judgment, if it was otherwise appropriate, simply on the basis of the respondent's hope that something will turn up on disclosure or exchange of witness statements. After all, if the respondent came up with the allegedly relevant surrounding circumstances he relied on at summary stage, the applicant may well be prepared to agree the facts, while arguing that it should not affect the outcome.

17. In the present case, neither party has come up with even the suggestion of the existence of relevant surrounding circumstances other than those which have been identified in the witness statements prepared for the purpose of the present application. Accordingly, I agree with the Master that the question of construction is appropriate for determination by summary judgment, and it is right to record that the contrary contention was only raised as very much of a fallback position.

Is Mr Landau entitled to 30% of the whole of the £1.3m?

18. I turn to consider whether, in light of the terms of the Letter, and in particular paragraph 2 thereof, and the payment of £1.3m, by Grimleys to the Bank, Mr Landau is entitled to 30% of (a) £1.3m (less the Costs) or (b) 30% of that proportion of the £1.3m attributable to the second Report (less an appropriate proportion of the Costs). There are essentially two different bases upon which it is contended on behalf of Mr Landau that the first of the two interpretations is correct. The first, which is Mr Hantusch's primary contention, and which found favour with the Master as a matter of purely literal construction, is that, because the Bank's "*claim*" against Grimleys was based in part on the second Report, the payment of £1.3m constituted *"final damages from Grimleys ... in connection with [a] claim which the Bank [brought] by reference to the [second] Report"*. The second way in which Mr Landau puts his argument is that, as the £1.3m damages did not distinguish between the three Reports, it was paid in its entirety *"in connection with*" the second Report, albeit that it was also paid in connection with the other two Reports. I shall consider these two arguments in turn.

19. In my judgment, the first argument raised by Mr Landau involves misconstruing the word "*claim*", giving too much weight to the words "*in connection with"*, and giving too little weight to the words *"by reference to the [second] Report"*, in paragraph 2 of the Letter. Further, it is an interpretation of the Letter which is less commercially likely than that advanced by the Bank.

20. In my view, the word *"claim*" in paragraph 2 of the Letter means "*cause of action*" rather than "*proceedings*". First, it appears to me to be the more natural meaning of "claim" in this context, although I accept that the word can almost equally well mean "*proceedings*". Secondly, equating "*claim"* in paragraph 2 of the Letter with "*cause of action*", rather than with "*proceedings"*, appears to me to result

in the word "*claim"* or *"claims*" being given a consistent meaning throughout the Letter (in light of the word "*claims*" in the penultimate and final paragraphs). Further, when the parties mean "proceedings" they use that word: see paragraph 1 of the Letter. Additionally, as the particulars of claim in the Bank's proceedings had been prepared by the date of the Letter, one might have expected a reference to those proceedings if paragraph 2 was intended to apply to any damages recovered therein.

21. The Master was impressed by the potential width of the words "*in connection with*". There is some initial attraction in the argument that, if the words "*in connection with*" are not given a wider meaning than "*arising out of*", then they would be mere surplusage. However, on reflection, the point is self-defeating, because, if the words "in connection with" are wider than "*arising out of"*, it would follow that the words *"arising out of*" are themselves surplusage. The message conveyed by the use of the composite expression, at least to me, is that the draftsman of the Letter was anxious to ensure that all agreements or orders which led to damages being recovered from Grimleys for the claim based on the second Report fell within the ambit of the paragraph. In my opinion, the words "arising out of or in connection with" represent a "*belt and braces*" approach to drafting, of a sort familiar to lawyers. In many, probably most, cases where such expressions are used, it is therefore not helpful to seek to give different meanings to each expression either side of the "*or"*.

22. In any event, the words "*in connection with*", however wide a meaning they may justify, cannot escape the effect of the limiting words "*by reference to the [second] Report"*. Whatever damages might have been recovered by the Bank from Grimleys, it seems to me that these latter words were included to make it clear that it was only those damages which were in some way attributable to the second Report which should be the subject of what Mr Hantusch called the "*sharing arrangement*" between the Bank and Mr Landau.

23. In agreement with the Master, I consider that this conclusion is supported by commercial common sense, although it does not strike me as quite as powerful a factor as it seems to have appeared to him. In relation to its proceedings against Grimleys, the Bank only needed Mr Landau's involvement in relation to the second of the three Reports, which is the only Report even referred to in the Letter. On Mr Landau's case, he would be entitled to 30% of the total recoveries of the Bank from Grimleys, including the recoveries referable to the first and third Reports, which were not addressed to Mr Landau, on which the Bank could therefore vest a perfectly valid claim without the benefit of any assignment from Mr Landau, and in respect of which Mr Landau had no claim. The Bank was to bear all the costs and risks of bringing proceedings against Grimleys on the basis of all three Reports, and Mr Landau was getting "a free ride", so far as the risk on costs was concerned. Furthermore, the arrangement embodied in paragraph 2 was part of an overall deal which involved the Bank releasing Mr Landau from a liability which appears to have amounted to over £1.9m.

24. In these circumstances, it seems to me commercially more likely that the Bank's reading of paragraph 2 of the Letter, which involves the shared damages being limited to those recovered in respect of the second Report, is correct This view is reinforced by the evidence that the Bank did not in fact rely on Mr Landau's assignment of his rights in respect of the second Report as against Grimleys, and evidence that the Bank was consistently advised that its case against Grimleys, in so far as it was based on the second Report, was weak, and indeed the evidence that, in light of the mediation negotiations, it appears that Grimelys took the same view. However, I do not think it safe to rely upon these factors to support my view on the commercial realities. Some of these matters occurred, self-evidently, after the date of the Letter, and even those which may have been known to the Bank by 28th October 1997 may not have been appreciated by Mr Landau.

25. It is true, as Mr Hantusch says, that an interpretation of paragraph 2 of the Letter which is significantly more generous to Mr Landau, is rendered somewhat less unlikely by the last paragraph of the Letter. The Bank already had the option to abandon its right to rely upon the assignment of Mr Landau's rights in relation to the second Report at any time it so wished. Accordingly, to give the Letter the meaning for which Mr Landau contends is not as inimical to commercial common sense as it would be, if the Bank had been effectively forced to rely upon the second Report in its proceedings against Grimleys. Although I accept that this point renders Mr Landau's interpretation of paragraph 2

of the Letter less commercially insensible that it would otherwise be, I remain of the view, in agreement with the Master, that the Bank's construction accords considerably better with commercial common sense.

26. Before turning to the second basis upon which Mr Landau maintains his primary claim, it is right to mention that there is another argument based on practicality, which can be said to support Mr Landau's reading of paragraph 2 of the Letter. It is very likely that by the time of the date of the Letter, the Bank and Mr Landau could well have anticipated that it was possible, indeed probable, that the Bank might recover a global sum in respect of damages against Grimleys, based on all three Reports, in such a way that. it might be difficult, indeed well-nigh impossible to determine, what proportion of the total damages were attributable to, or "*by reference to*" the second Report. At least if they had stopped to think about it, the parties would have appreciated that there was a strong possibility of a "global" settlement of the Bank's proceedings (as in fact occurred), or that the damages assessed by the court would not enable one to identify with any ease or confidence how much could fairly be said to be attributable to the second Report. Further, there may well be some heads of damages which, either in a detailed judgment in the Bank's proceedings, or on analysis of a global settlement, could fairly be attributable to more than one of the Reports. Indeed, such potential difficulties would have been particularly appreciable at the time, in light of the way in which the particulars of claim in the Bank's proceedings had been drafted: having alleged negligence and reliance in relation to each of the three Reports, the pleading went on to contend that the loss suffered by the Bank was all the sums lent to Mr Landau (less the compensation for the compulsory acquisition of Sandgate).

27. I think that this is a valid point, and indeed it is vividly illustrated by the problem thrown up by the second main issue between the parties, in light of the actual basis upon which the Bank's proceedings were settled. However, in my judgment, it is a factor which falls well short of justifying the reading of paragraph 2 of the Letter which I have rejected. I consider that it would be dangerous to give great weight to this sort of factor, which may look pretty obvious with wisdom of hindsight in view of what actually happened, but which may easily not have occurred to, or may not have been pursued by, the parties at the time of the Letter. If the point had occurred to the parties, it would accord with commercial common sense that they might simply have left it, on the basis that they would expect to be able to work something out, once the Bank recovered damages, on some sensible basis. After all, if, as seems sensible, and to accord with the natural reading of the Letter, their intention was that Mr Landau should be permitted to share in any damages in so far as they were connected with the second Report, there may well have been difficulties in establishing a full and mutually satisfactory formula for apportioning any damages in advance, and this could even have led to the negotiations for the Letter breaking down. In effect, it seems to me by no means unlikely that, even if the parties had thought about this potential problem, they would either have agreed, or they would each have decided without discussing the point, to deal with the problem if and when it arose.

28. Mr Hantusch also contends that, if the Master's conclusion is right, there could be difficulties not merely in apportioning the damages between the three Reports, but also in apportioning the Costs. I was initially attracted by that. However, Mr Flynn has persuaded me that the argument takes matters no further. Once one accepts that there may be a need to apportion damages between the second Report and the other Reports, so it seems to me that there must be a similar apportionment of the Costs. The notion of apportioning costs between different claims is by no means unknown; indeed, it is an exercise which the Court is frequently called to carry out. Where a single sum of damages is awarded by reference to a number of negligent reports, there is in the absence of a good reason to the contrary, obvious attraction in the notion that the total costs should be apportioned in the same mathematical ratio as the total damages.

29. Having rejected the primary way in which Mr Landau justifies his primary case, I turn to his alternative basis, namely that, in light of the terms upon which the Bank's proceedings were settled, the whole of the £1.3m represents "damages from Grimleys" which were recovered "in connection with [the Bank's] claim ... [brought] against [Grimleys] by reference to the [second] Report". This contention rests on the proposition that the £1.3m is, in effect, referable to each of the Reports, because

the terms of the 2000 Order expressly make it clear that the £1.3m relates to each of the three Reports. There is nothing in the Letter which indicates that the "final damages" referred to in paragraph 2 need be solely "by reference to the [second] Report", and, therefore, runs the argument, the fact that the £1.3m can properly be attributed to each of the three Reports does not call into question the contention that it can properly be attributed to the second Report. The contention derives a degree of support from the relative width of the words "arising out of or in connection with", which I have already discussed. It also derives some support from the fact that, if it is rejected, there could be obvious practical difficulties in establishing what proportion of the £1.3m is fairly attributable to the second Report, again a point which has been discussed above.

30. Despite the force of this argument, I have come to the conclusion that it cannot be said that the whole of the £1.3m represented "*final damages*" which fall within paragraph 2 of the Letter. Given my view that, as a matter of construction, that paragraph is limited to damages which are recovered on a claim which is referable to the second Report, it appears to me that it would be inconsistent with that construction, and with the commercial purpose which supports that construction, if the whole of the £1.3m recovered under the agreement the Bank reached with Grimleys, reflected in the Order, was treated as damages recovered by the Bank *"arising out of or in connection with any claim ... by reference to the [second] Report"*.

31. In this connection, I think it is also important to bear in mind that, at the time the Letter was written, the Bank and Mr Landau were aware that the Bank was bringing proceedings for damages against Grimleys, based on the alleged negligence of Grimleys, and the alleged reliance of the Bank, in relation to all three Reports. In those circumstances, it seems to me that the purpose of referring specifically to the second Report in paragraph 2 of the Letter was to limit the scope of Mr Landau's right to share in any award to those damages which were attributable to the second Report, as opposed to the first and third Reports. Otherwise, the paragraph might just as well have referred to damages which were recovered against Grimleys or in the prospective proceedings. Indeed, as I have mentioned, the Bank's particulars of claim, which had been prepared by the time of the Letter, envisaged a single head of loss, namely, in effect, the total amount by which the Bank was out of pocket as a result of lending to Mr Landau on the security of Sandgate.

32. Further, it does not seem likely that the parties could have intended that the damages in which Mr Landau could share might depend so very substantially on how the judgment in, or any settlement of, the Bank's proceedings was expressed. It seems to me inherently improbable that the parties could have envisaged that Mr Landau would be entitled to share in the whole of the damages recovered by the Bank, if the Judge decided to award damages, or if (as happened) the parties agreed terms, on a global basis, but that Mr Landau's sharing rights should be limited to a substantially smaller sum if the judgment proceeded on a more analytical basis, or the Bank and Grimleys settled, as they could have done, by apportioning the damages as between the three Reports.

33. A great majority of professional negligence cases settle, and I find it particularly unlikely that the parties could have envisaged that Mr Landau's ability to share in the totality of the damages awarded to the Bank, as opposed to a proportion of the damages awarded to the Bank, could depend solely on the way in which the Bank and Grimleys chose to structure their settlement. It is not as if Mr Landau had any right of veto over any such settlement: he only had a right to be informed on a quarterly basis (see the penultimate paragraph of the Letter). If, for instance, the Bank had agreed a settlement with Grimleys that say, only £1,000 of the £1.3m was referable to the claim based on the second Report, then, while (for reasons I shall explain) I think that Mr Landau would have been entitled to seek to go behind the figure of £1,000 for the purpose of his claim, it would not alter the fact that he would be limited to sharing in only a proportion of the £1.3m.

34. I accept that, as a matter of language, where a third party is entitled to share in the "damages ... arising out of or in connection with any claim which the [claimant] may bring against [the defendant] by reference to X, then damages which are attributable to X and also to Y may be, depending on the circumstances, wholly within the ambit of the words, wholly outside the ambit of the words, or subject to apportionment so as to be partly within, and partly without, the ambit of the words. The

correct answer must depend upon the particular linguistic, commercial and factual context. In the present case, because of the factors I have already mentioned, I do not think that it is right to conclude that the parties, having expressly limited the damages to be shared as being those which were referable to the second Report, could have intended that a global sum by way of damages attributable to all three Reports (as pleaded in the Bank's particulars of claim, as would have been very likely to have been agreed by way of settlement, and as would have been tolerably likely to have been awarded in a judgment) should, in its entirety, be within the scope of paragraph 2 of the Letter.

35. In these circumstances, I am of the view that the Master was right in his conclusion that Mr Landau is not entitled to succeed to the extent of his claim for 30% of the £1.3m (less the Costs), but that he is entitled to recover such proportion of the £1.3m as is properly referable to the Bank's claim in relation to the second Report (less an appropriate proportion of the Costs).

How is the £1.3m to be apportioned?

36. I turn, then, to the second main point, namely, whether Mr Landau is entitled to succeed in his contention that the proportion of the £1.3m of which he is entitled to a share is one-third, or whether, as the Master concluded, the proportion must be the subject of an inquiry.

37. There is obvious force in the contention that, once one rejects the argument that Mr Landau is entitled to share in the whole of the £1.3m recovered in the Bank's proceedings, there has to be an inquiry as to how properly to apportion the £1.3m between that part which is referable to the second Report, and that part which is not so properly referable. However, such an inquiry could involve an expensive, difficult, and time-consuming exercise. If an agreement could not be negotiated between the Bank and Mr Landau, any resultant litigation would be likely to involve substantially greater difficulties and uncertainties than those involved in. the Bank's proceedings against Grimleys. One would have to assess the extent of any negligence on the part of Grimleys in relation to the preparation of each of the three Reports, the extent to which the Bank relied upon each of the Reports, and the quantum of loss attributable to each Report. That of itself could potentially be a more difficult exercise than assessing the total quantum of damages which the Bank would be entitled to recover in its proceedings, because that would not, at least of necessity, requires one to distinguish between the loss attributable to each of the Reports. In particular, an inquiry, such as that envisaged by the Master in the present case, might well be that some of the Bank's losses could be said to be attributable to more than one of the Reports, in which case there would have to be some sort of apportionment.

38. Over and above this however, there could be a further difficulty, in that one was not actually assessing the various claims which the Bank was making against Grimleys; rather, one would be assessing how to apportion the £1.3m, which would probably involve, not merely considering the strength of the Bank's various claims, but also how the actual negotiations proceeded, and how the Bank and Grimleys may have regarded the strength of their respective cases in relation to liability and quantum so far as each of the three Reports was concerned.

39. Furthermore, the inquiry contemplated by the Master's order would represent satellite litigation, and, indeed potentially complex and expensive satellite litigation. Of course, if such satellite litigation simply cannot be avoided without causing injustice, then there is no alternative but to permit it to proceed.

40. The question, therefore, to my mind is whether there is an alternative course to such satellite litigation, being a course which is convenient, logically justifiable, and consonant with justice and principle.

41. In my view, there is such a course available, namely that put forward on behalf of Mr Landau, to the effect that he is entitled to 30% of one-third -- i.e. 10% -- of a sum equal to the £1.3m less the Costs. That conclusion clearly satisfies the requirements of convenience. Apart from involving an assessment of the Bank's costs and disbursements in connection with its proceedings (which should be a very easy task, and in any event involves treading very familiar ground) the assessment could scarcely be simpler.

42. I believe that an apportionment of the £1.3m equally between the three Reports is logically justifiable. To my mind, it accords with the natural reading of the Order. At least on its face, it indicates that the

parties have made no distinction between each of the three Reports, so far as the payment of the £1.3m is concerned, and it is not as if the Bank had any basis other than the three Reports for raising any claim against Grimleys (notwithstanding the somewhat Delphic words at the end of paragraph 1 of the schedule to the Order). In those circumstances, to an ordinary speaker of English, and indeed to any lawyer, the message conveyed by paragraph 1 of the schedule to the Order is that the Bank and Grimleys did not discriminate between the relative importance of each of the three Reports.

43. It may well be that the Bank and Grimleys could not have sensibly apportioned, or at least agreed an apportionment of, the £1.3m as between the three Reports. However, I consider that if that is right, it would, if anything, tend to suggest that an equal apportionment should be regarded as appropriate, because no other apportionment could be easily, sensibly or confidently made.

44. The next question is whether this result accords with justice. On the evidence currently available, it seems to me likely, indeed very likely, that apportioning one-third of the £1.3m to the second Report would be generous to Mr Landau rather than to the Bank. Clearly none of the monies advanced by the Bank prior to 28th October 1991, the date of the second Report, can be attributable to that Report; that represents some two years of lending. On the other hand, there was clearly significant further lending following the provision of the second Report and before the provision of the third Report. However, it might be argued by the Bank that the second Report would merely have given comfort to the Bank, which would have continued to lend on the basis of the first Report, even if there had been no second Report, particularly as the latter was addressed to Mr Landau and not to the Bank. As to any lending after the third Report, the Bank would argue that, if the second Report, rather than the first Report, must held to be causative of any loss after the second Report, then the same logic must exclude any liability in reliance on the second Report in respect of any lending after the third Report.

45. Furthermore, there is fairly cogent evidence, in the form of advice given to the Bank in connection with its proceedings and by reference to what was said during the mediation, to suggest that neither the Bank's advisers nor Grimleys' advisers, thought that the second Report was of as much significance as the first Report or third Report. There is no evidence, and indeed no argument, put forward on behalf of Mr Landau to suggest the contrary. It would be wrong to place too much weight on. that aspect, because he was not involved in the negotiations, and, even now I understand that he has not received full disclosure. However, it has not been suggested on the not insignificant evidence available to Mr Landau that attributing one-third of the £1.3m to the second Report would be an unduly low figure.

46. In those circumstances, it seems to me, at least on the present evidence, that the question must be whether it would be unjust to land the Bank with an apportionment of one-third of the £1.3m as being the damages recovered "*by reference to the [second] Report*" in paragraph 2. of the Letter. In my view, while it would be wrong to pretend that there would be no ground whatever for the Bank feeling some sense of grievance, it cannot be characterised as an unjust result from the Bank's point of view. After all, it was entirely a matter for the Bank, at least as between the Bank and Mr Landau, as to whether it maintained its reliance on the second Report (in light of the last paragraph of the Letter), and (subject to the view of Grimleys) how it chose to structure any settlement with Grimleys. Mr Landau's only relevant right was to be informed of the terms of the Order, and of any other relevant "*progress*" in light of the penultimate paragraph of the Letter.

47. Of course, if the apportionment made (expressly, or, arguably as in this case, effectively impliedly) between the Bank and Grimleys in the Order could be shown to be unreasonable, and consequently unfair to Mr Landau, different considerations would apply. Mr Landau, unlike the Bank, had no control over the terms of any settlement of the Bank's proceedings. In those circumstances, while the justice of an equal apportionment might otherwise be justified, it could not be said to be in accordance with justice if it was plainly unfair to Mr Landau.

48. As I have indicated, while this conclusion is consistent with justice, it cannot be pretended that, on the facts of this case, it may leave the Bank with an understandable sense of grievance. However, in my judgment, the fact that the initial apportionment was, to a substantial extent, in the control of the

Bank, and the costs, delay and uncertainties of an inquiry as to an apportionment, considerably outweigh any sense of grievance which might reasonably be felt by the Bank.

49. I consider that this conclusion is consistent with authority, albeit that such authority is of somewhat indirect assistance. Mr Flynn referred to the decision of the Court of Appeal in **Biggin & Co. Ltd v Permanite Ltd** [1950] 2 KB 314. In that case, the defendants supplied defective goods to the plaintiff, who in turn supplied the goods to the Netherlands Government. The Netherlands Government's proceedings against the plaintiff were settled by a payment of £43,000, and the question was the relevance of the settlement in the first claim to the quantum in the second claim. The Court of Appeal held that the settlement figure of £43,000 not merely provided an upper limit to the quantum in the second claim, but (to quote from the head note at 315) *"If reasonable, it should be taken as the measure of damages, and whether or not it was reasonable was a question to be determined by evidence"*. The machinery whereby this was to be achieved was explained by Somervell LJ at 321 to 322, and by Singleton LJ at 424 to 325. Both judgments appear to me to suggest that a court would normally take some persuading that the settlement figure was unreasonable in such a case. Biggin was considered in two later cases in the Technology and Construction Court, where the issue was whether, where the settlement in the first action involved a number of different claims, or a number of different parties, the question of reasonableness should be considered in relation to each head of damage agreed, or, as the case may be, the amount agreed as being the liability of each defendant: see **P&O Developments Ltd v The Guy's and St Thomas' National Health Service Trust** [1999] BLR 3 and **The Royal Brompton National, Health Service Trust v Frederick Alexander Hammond** [1999] BLR 162.

50. I accept that thee are differences between cases such as Biggin and the present case. In Biggin, the settlement figure in the first action represented the upper limit on the damages which could be recovered in the second action, because the plaintiff cannot recover more from a defendant than he has actually lost. The present case is not dissimilar in that it seems to me very hard to conceive of circumstances where the amount agreed between the Bank and Grimleys as attributable to the second Report could not be regarded as effectively binding on the Bank, as against Mr Landau, albeit that it might well not be regarded as binding on Mr Landau if he could show that it was lower than reasonable or in someway artificially deflated. In other words, the settlement figure would represent the minimum sum upon which the 30% payment to Mr Landau is to be based.

51. At least in some respects, there is a stronger justification for applying such an approach in this case than in Biggin. In the present case, the agreement between the Bank and Mr Landau, upon which Mr Landau now sues, specifically contemplated any payment to Mr Landau being based on the terms upon which the Bank's proceedings were disposed of. In Biggin, the parties in the second action had not specifically contemplated, let alone agreed, that they would in any way be bound by any settlement in the first action.

52. In these circumstances, subject to one point, I am of the view that Mr Landau is entitled to recover a sum equal to 30% of one-third, i.e. 10%, of the £1.3m, less an appropriate proportion of the Costs. At least as at present advised, it appears to me almost impossible to resist the conclusion that the appropriate proportion of those Costs is one-third, for reasons which appear pretty obvious. I am told that the Bank's solicitor and own client costs in connection with its proceedings were just under £120,000, which suggests that judgment should be entered for Mr Landau for about £90,000.

53. I mentioned that this conclusion was subject to one point. As I have observed, the evidence and arguments so far advanced strongly suggest that Mr Landau has very little prospect of establishing that the attribution of one-third of the £1.3m to the second Report represents an unreasonably low figure. It would, however, be unfair not to give him the opportunity of specifically addressing evidence and argument to support the contention that he should be entitled to run that argument. However, if he were to persuade me that he should be entitled to challenge the prima facie conclusion that the attribution of one-third of the £1.3m to the second Report represented too low a proportion, then I think it would follow that it should be open to the Bank to contend that it is too high a proportion. It seems to me that that must follow from the above analysis. If there is to be an inquiry as to whether the attribution of one-third of the £1.3m is correct, at the insistence of Mr Landau, then the

arguments, based on convenience and justice, in favour of holding the Bank to that figure wholly or largely fall away. I do not believe that that conclusion is called into question by Biggin, because, in that case, the plaintiff could not have recovered more than the amount paid to the Netherlands company: that amount represented the maximum damages which the plaintiff could recover from the defendant. In that connection, the present case is plainly distinguishable.

The interrelationship of the two issues and conclusion

54. I acknowledge that there could be said to be a degree of inconsistency between the difficulty of apportioning the £1.3m justifying the argument that the £1.3m should be apportioned in equal shares between the Reports, on the one hand, while, on the other hand, rejecting that difficulty as a reason for accepting Mr Landau's argument that he should be entitled to 30% of the whole of the £1.3m. However, it seems to me that there is a difference both in principle and in degree between the two arguments.

55. So far as principle is concerned, Mr Landau's claim to be entitled to share in the whole of the £1.3m appears to me to run counter both to the language used in paragraph 2 of the Letter, and to commercial common sense in light of all the other terms of the Letter, and the circumstances in which it was written. The fact that the potential difficulty in apportioning any damages is not sufficient a factor to override such considerations does not mean that it could not be a very powerful factor as a reason for apportioning the £1.3m equally as between the three Reports, particularly in light of the terms of the Order. So far as the question of degree is concerned, the differences in the figures involved in the two aspects of the arguments speak for themselves.

56. Indeed, I would go a little further. The very fact that there is a simple way of apportioning the £1.3m between the three Reports tends to support my rejection of Mr Landau's reliance on the potential difficulties resulting from the construction of paragraph 2 of the Letter which I favour. Of course the terms of the Order were not known to the parties at the date of the Letter. However, as I have mentioned, it was reasonably foreseeable that the Bank's proceedings would be disposed of on the basis of a global payment simply attributable to all its causes of action against Grimleys.

57. In the event, I allow the appeal to the extent indicated.

Mr. Robert Hantusch (instructed by Teacher Stern Selby) for the Appellant.
Mr. Vernon Flynn (instructed by Reed Smith Warner Cranston) for the Respondent.