CA on appeal from QBD (Mr Justice Morison) before Schiemann LJ; Tuckey LJ; Longmore LJ. 23rd October 2003.

JUDGMENT : Lord Justice Tuckey:

1. This is the judgment of the court to which all the members of the court have contributed.

Introduction

2. On 28th May 1991 the VLCC, ABT Summer, was lost in the South Atlantic at a position 900 miles off the coast of Angola when on a voyage between Fujairah and Western Europe. The immediate cause of that loss was a large explosion on board. 5 crew lost their lives.

3. This was a sad blow to the vessel's owners Somatra Ltd and to Mr Alireza, a Saudi Arabian business man who ultimately controlled that company. The vessel was mortgaged to Banque Indosuez ("the Bank") and a large part of that loan was outstanding. The vessel was, however, insured for $40.5 million, including lost freight and disbursements, which was considerably more than the outstanding amount of the loan. The proceeds of any insurance policy had, however, been assigned to the Bank and it was in the interests of both Somatra and the Bank to make a claim for total loss of the vessel against insurers. A number of different insurers were on risk. The lead insurer was Arab Insurance Group ("Arig"); other Middle Eastern insurers could be expected to follow Arig's lead; a smaller overall proportion was insured in London at Lloyd's and elsewhere. The contract of insurance was governed by Norwegian law; important provisions of Norwegian law were (1) that the insurers would not be liable if the vessel was unseaworthy at the time of the loss and owners knew or ought to have known of that unseaworthiness and (2) that, if loss was caused partly by such unseaworthiness and partly by a cause for which insurers were liable (such as crew negligence), the loss was to be apportioned.

4. Somatra instructed both English solicitors and Norwegian lawyers. Their English solicitors were Watson Farley Williams ("WFW") who submitted a claim to insurers in August 1991. Arig refused to pay the claim saying, amongst other things, that the vessel was unseaworthy and that owners either knew or ought to have known of that unseaworthiness. The claim was also being processed by Somatra's Norwegian lawyer, Mr Haakon Stang Lund and, when it became clear that insurers would not agree to Norwegian jurisdiction but only to English jurisdiction, Mr Stang Lund instructed WFW to issue proceedings in England. On 27th February 1992 WFW served Points of Claim asserting that underwriters were obliged to pay for the total loss of the vessel. Mr Alireza thought WFW were giving Somatra over-pessimistic advice about the prospects of recovery and partly for that reason and partly because he came to feel that WFW's first loyalty was to the Bank who were also their clients, he decided in May 1992 to terminate WFW's retainer and instruct Messrs Sinclair Roche & Temperley ("SRT") in relation to Somatra's claims. At about the same time insurers' solicitors, Holman Fenwick & Willan ("Holmans") and Ince & Co served Points of Defence; therefore the question of a Reply was a matter to which SRT had to give their early attention.

5. SRT are the defendants in the present action. Somatra complain (and the judge has found) that SRT were in breach of duty as solicitors in a number of respects in the way in which they advised Somatra and conducted the proceedings. Mr Harvey Williams was the relevant partner in SRT at the material time, assisted by a junior solicitor, Mr Atkinson. Somatra say that, as a result of SRT's breaches of duty, they lost confidence in SRT shortly before the trial was to begin in April 1994 and that they were forced to take over negotiations with insurers on the eve of trial. A settlement was agreed at two-thirds of Somatra's full claim but Somatra say they lost the ability to settle at 75% of that value.

6. The judge accepted a number of allegations of breach of duty on the part of SRT and awarded the difference between the settlement and 75% of the value of the claim, which is the figure at which he decided that the claim would have been settled but for SRT's breach of duty.

7. SRT appeal. They now accept the judge's decision in relation to breach except for one particular breach of duty but contend that Somatra suffered no loss because the two-thirds settlement was what the case would have settled for, in any event. Somatra oppose the appeal and have not pursued an original cross-appeal to the effect that they would have won the action against the insurers and would be entitled to recover the difference between the two-thirds settlement they achieved and the full value of their claim.

8. The judge has helpfully made findings about the issues that arose in the original action and has held that, if it had gone to trial, Somatra would indeed have won. He concluded, however, that, if there had been no

breach of duty, the case would have settled for 75% and it is for that reason he awarded the difference between two-thirds and three-quarters of the claim.

Breaches of duty

9. The judge found several relevant breaches of duty. Only one of these findings of breach of duty is the subject of the appeal to this court. But it is relevant to make brief reference to the now admitted breaches in order to put the challenged finding into its proper context.

10. Breaches of Duty as found by the Judge and not now challenged

(1) Professor Bull

Since the insurance contract was governed by Norwegian law which differed in material respects from English law, it was necessary to have expert advice (and, if necessary, evidence) on this matter. Mr Stang Lund had given such advice at an early stage in the proceedings but SRT suggested (and Mr Alireza agreed) that it would be sensible to obtain a second, more independent, opinion and in early 1993 Professor Bull was chosen to give that advice. Mr Alireza wished to be involved in giving instructions to Professor Bull and made that clear to Mr Williams of SRT, by saying that he wanted Mr Williams to send him (Mr Alireza) draft instructions to Professor Bull. Mr Williams deliberately decided not to comply with these instructions but pretended to Mr Alireza that he had. When Mr Alireza discovered that Mr Williams had not complied with his instructions, Mr Williams asserted that, despite the date on his letter of instructions, it had not been sent until a supplementary corrective letter had also been sent in a total package. In his evidence he accepted that his letter of instruction had been sent but said that that was a mistake by his secretary; the judge held that to be a lie and an attempt to deceive the court. In the event no monetary loss was caused to Somatra by this incident on its own but it was the first in a line of incidents which caused Mr Alireza to lose his trust and confidence in SRT. As a result Mr Alireza decided to retain an outside consultant to review SRT's handling of the case and to try to ensure that Somatra could have a greater input into the running of the case. The consultant he retained was Mr Rayner Hamilton of the American law firm, White & Case.

(2) Failure to appreciate the need to join the Bank as a co-claimant in the action

Somatra's relationship with their Bank was always a sensitive one; the Bank had the right to declare a default if the vessel was lost and the insurance representing the vessel was unpaid 3 months after the casualty. The Bank were only prepared to keep the loan in place if Mr Alireza would agree that interest was to be payable at a higher rate. Moreover, although the Bank's interest in the action against underwriters only extended to the recovery of the outstanding loan, they were anxious to discover what Somatra's leading counsel, Mr K Rokison QC, thought about the case. Underwriters had put Somatra to strict proof of their right to sue but SRT took no action to add the Bank as co-plaintiff until informing Mr Alireza and his team by fax on 21st January 1994 that the Bank would have to be joined. This came as an unpleasant surprise to Mr Alireza who had been having delicate negotiations with the Bank trying to prevent service of any notice of default. The consequence was that further difficult negotiations ensued about joining the Bank as co-plaintiff; something had again happened which reduced confidence in Mr Williams as rather poignantly shown by Mr Alireza's note on the fax of 21st January describing it as "this bombshell, a Harvey special".

(3) Failure to obtain expert evidence in relation to ship management

Underwriters obtained leave to serve evidence of an expert in ship management. Since one of the main issues in the action was whether Owners were or ought to have been aware of a crack in No 3 Port Side Ballast Tank, this was an obvious area of expertise which was canvassed at the time of the summons for directions. Somatra had been more alive to the issue than SRT and had identified a Mr Herman as suitable; SRT instructed him to prepare a report on 20th January 1994 but had not exchanged it. Expert evidence was exchanged on or about 7th February 1994 and included a ship management report served on behalf of underwriters. Only then did SRT appear to realise the importance of exchanging the report of their own expert in the field of ship management. They were able to obtain late leave to serve such evidence but only at the cost of (1) agreeing, in return for this indulgence, that underwriters should be permitted to make some late amendments to their Points of Defence and (2) having to swear an

affidavit explaining why the proposed report was not exchanged on 7th February 1994. Again, this was a cause of the loss of trust and confidence which Mr Alireza ought to have had in his solicitors.

(4) Failure to obtain evidence in relation to the plea that change of class without consent of underwriters discharged underwriters' liability

This is a similar point. Underwriters served expert evidence on this topic on 7th February and Somatra were caught short. The judge in holding that SRT's failure to be in a position to exchange evidence on this topic was a breach of duty said:- *again the clients could see their team struggling at the last minute over an issue which should have been settled long before the exchange of reports took place* (para. 252).

(5) Failure to explain (and obtain the consent of the clients to) the unavailability, before early March 1994, of their chosen leader, Mr Rokison QC, to study the papers and prepare the case for a trial beginning in April 1994

Mr Rokison, as one would expect, made plain his personal position which was that he would not be able to devote time to the case until early March. Mr Williams had, however, told Somatra in December 1993 that he was trying to get time from Mr Rokison; that implied that he knew of no reason to suppose he would not be available, at a time when Mr Alireza was telling Mr Williams how anxious he was that Mr Rokison should be fully familiar with the case well before pressure mounted for the final preparation of the case in March 1994. This was itself a breach of duty to Somatra and also caused the Bank to become so concerned that they decided to take the advice of Mr David Steel QC in a consultation arranged for 10th March. When Somatra discovered, at the consultation with Mr Rokison which occurred on 23rd March, that he had only been able to consider the papers during the previous two weeks, that was another blow to their confidence (judgment para. 239).

(6) Failure to inform the clients about the Bank's decision to consult Mr David Steel QC and the Bank's invitation to Somatra to be present

Mr Williams did not take kindly to the Bank's decision to consult counsel who had not been chosen by him. He decided not to tell his clients in advance that this was to happen despite an express invitation from the Bank that Somatra should attend. On Friday 11th March Mr Alireza had a meeting with Mr Williams but Mr Williams did not mention that this consultation had been held. Later that day SRT sent Mr Alireza a written account of the consultation at which Mr Dunne and Mr Smallwood of Watson Farley Williams had attended with representatives of the Bank, together with Somatra's junior counsel Mr Gruder, Mr Atkinson and, for part of the time, Mr Williams himself. SRT said they "had been under the impression that Mr Steel had been asked to give an advice on the merits" but that unsurprisingly he had only concentrated on certain aspects of the evidence since he had only had the papers for a week. Not unnaturally Mr Alireza was extremely upset and his concern increased when on 14th March he received the Bank's notice of default together with the Bank's (very different) account of the meeting. He later learned from a note, prepared by his assistants after they had seen the Bank in Paris, that the Bank had invited Somatra to attend and were surprised that they had not. On 17th March the Somatra team met Mr Williams who was confronted with this note. Mr Williams first denied that the Bank had invited Somatra to attend but later admitted that they had and that he had not passed the invitation on. The judge held (para. 207) that the result of these events was to destroy any remaining trust in Mr Williams. Indeed, even at the stage when Mr Alireza was aware of no more than the fact that the consultation had occurred without his knowledge, he had gone to Clifford Chance and Herbert Smith to discuss the possibility of changing solicitors. Not unnaturally, he was told that it was too late to do so.

Events of March and April 1994

11. The timing of events as they unfolded during the critical six weeks before the date fixed for trial of the original action is necessary in order to understand the parties' arguments on the appeal. By early March underwriters were thinking of a possible settlement. Mr Domingo represented Arig; he was aware of the possibility that Somatra might recover the full amount of the claim together with costs; even if they avoided that, apportionment between insured and uninsured causes of the loss might still mean that underwriters would have to pay a substantial sum; there was no money in court. He was, nevertheless,

aware that Holmans, the solicitors on the record, believed underwriters had a strong case. Mr Arditti of Ince & Co, who were advising some of the London underwriters, had said to Mr Domingo that underwriters whom he represented did not wish to go to trial. Thereafter the following events occurred.

12. 1st March WFW told SRT that the Bank had instructed Mr David Steel QC to advise about the case.

3rd March WFW asked SRT if there were any other matters they wished to put before Mr Steel.

4th March Conference which Mr Alireza, Mr Williams of SRT and Mr Gruder (among others) attended. Mr Gruder who could not stay for the full time of the conference expressed reservations about the case on the basis that a court might well hold Mr Nord ought to have been aware of the crack and leakage into No 3 Port Ballast Tank from the neighbouring cargo tank. The case should be settled. Mr Williams, after Mr Gruder's departure, said that Somatra could, in any event, not expect to recover more than 50% as a result of points recently taken by underwriters relating to the amount of freight insurance and change of the vessel's class. (It later became apparent that these issues could be resolved.)

7th March Mr Alireza wrote to SRT explaining that he did not agree with their (and Mr Gruder's) assessment of the case. He expressed particular confidence in Mr Harold Nord, his superintendent, whom underwriters were saying should have been aware of the existence of the relevant crack.

10th March Consultation with Mr Steel.

11th March (1) Bank sent Notice of Default, received 14th March. (2) SRT write to Mr Alireza to say that they had attended the consultation with David Steel but did not know why the Bank thought it worthwhile to instruct their own counsel.

14th March Somatra discovered, on receipt of the covering letter to the Notice of Default, that the reason why the Bank went to Mr Steel was that they had not been given access to Mr Rokison (to whom Mr Alireza had had no access either).

16th March (1) Mr Alireza's assistants Mr Berg and Mr Jennings went to Paris to see the Bank and discovered that the Bank had specifically invited owners to attend the consultation with Mr David Steel and that the Bank were surprised they had not done so. Somatra's instructions to SRT had been that Mr Hamilton of White & Case was to attend any meeting with the Bank's lawyers and that Somatra's own representatives were to attend if the Bank's own representatives did. They also discovered that Mr Williams and Mr Dunne had "agreed" that the case should not go to court.

(2) Mr Alireza asked Clifford Chance and Herbert Smith whether they could take over the claim and was told that they could not do so at such a late stage.

17th March Somatra's representatives met SRT. Mr Williams denied that Somatra's representatives were invited to the consultation but later admitted that they were.

18th March The Bank agreed to be joined as co-plaintiff but wanted to be assured that meaningful discussions had begun about settlement.

23rd March Consultation with Mr Rokison.

27th March Mr Mustafa, Mr Alireza's assistant, lunched with Mr Domingo at the Kai restaurant. Mr Domingo sought a 50% settlement which Mr Mustafa said was too low. Mr Domingo said underwriters would pay 100% if that was justified and agreed that Holmans should prepare a list of questions for Somatra to consider.

28th March Mr Arditti gave Mr Domingo authority to obtain the best settlement possible on behalf of the Ince underwriters. Mr Domingo passed that on to Mr Alireza and repeated that he would settle in full if satisfied on certain issues. Mr Alireza made it clear that he was prepared to go to trial.

29th March Date of meeting of the opposing parties including the Bank. Mr Williams was the leading participant for Somatra. Before the meeting Mr Mustafa and Mr Domingo agreed that no "public offer" of 50% should be made at the meeting in front of the Bank. The meeting did not go well. After the meeting, Mr Williams said to Somatra that they would be lucky to get 30% but that was not meant to be taken seriously. The judge held that the way in which Mr Williams conducted this meeting was a further breach of duty on the part of SRT. This conclusion is challenged.

Evening Mr Domingo had a further meeting with Mr Alireza and Mr Mustafa. Mr Domingo said that, in the light of the answers given earlier in the day to the list of questions, he could not offer more than 50%. Mr Alireza said that the minimum Somatra would take was 75%. Mr Domingo agreed to put that to the market and revert by 7th April. (It is disputed whether he said he would recommend an offer at that level.) Mr Alireza repeated to Mr Domingo that he was prepared to take the case to trial. Although Mr Berg and Mr Hamilton were present at Mr Alireza's house, they were not invited to attend this discussion and were invited to leave before the discussions were concluded.

30th March Further consultation with Mr Rokison attended by WFW and representatives of the Bank. Mr Alireza did not attend, although he knew it was taking place. Mr Rokison advised that Somatra should take 60% if offered.

31st March Internal meeting of Somatra representatives, Mr Alireza, Mr Mustafa, Mr Berg, Mr Jennings and Mr Hamilton to discuss, among other matters, Somatra's position:- when expected settlement offer of $31 million is presented on 7th April.

The conclusion was:- *an offer in excess of the $31 million figure expected on 7th April should be sought, and that a figure of $35 million or slightly more might be possible. However it was agreed that the figure of $31 million itself should be seriously considered if it could not be improved.*

On the figures being discussed $31 million would be about 50% of the claim; $35 million would be close to the 60% advised by Mr Rokison. Two-thirds of the claim would be in the region of $40 million while 75% would be in the region of $45 million.

1st April Mr Hamilton told Mr Alireza that he thought $31 million could be improved as trial approaches.

4th April Mr Domingo, having had what he called discussions with opinion formers (including Mr Philip Searle and Mr Steve Hunter of London insurers), circulated the market saying that owners will not take less than 75% of the claim viz. $45 million inclusive of costs and pointing out that underwriters might have to pay up to $60 million plus costs on both sides.

5th April Conversation between Mr Mustafa and Mr Domingo recording Mr Domingo as saying that underwriters are reluctant to go above 50%.

6th April Mr Hamilton prepared a lengthy memorandum recommending settlement at 65%.

7th April (1) Mr Alireza and Mr Arditti of Ince's (with the knowledge of Mr Domingo) meet and, by handshake, agreed a settlement in principle at two-thirds of claim viz. $40 million.

(2) In the light of this agreement in principle, Mr Wilson of Holmans circulated the market for authority for a settlement at two-thirds of the claim. His memorandum recorded that there had been unanimity that a settlement level of 75% was unacceptable with the exception of one insurer (Saudi Arabian Insurance Co ("SAICO")) who merely thought that the case should be settled on the best possible terms.

8th April Mr Wilson reminds the market that he is reporting at second hand but states that Mr Domingo, as well as Holmans themselves and their leading counsel (Mr John Thomas QC), felt that 50% should have been sufficient to settle the claim and two-thirds was more than underwriters should have to pay.

11th April Mr Domingo recommended the settlement to the market despite reasonable confidence which had been expressed earlier that the case would be settled for 50% or less. These last three communications have become known as "the Arditti letters" because they were produced from Ince's files by way of a compromise of an application, brought by Ince's in their capacity as SRT's solicitors in the current action, against the hull and machinery insurers for disclosure of their files.

13. The judge concluded after his analysis of the documents and the oral evidence given before him that, despite indications to the contrary in the Arditti letters, Mr Domingo had authority to settle the case at 75% if he had to, that but for SRT's breaches of duty, any offer of two-thirds would have been rejected, and the case would have continued until an offer of 75% had been forthcoming from underwriters when the case would have settled. He held that the breaches of duty which he had found were an effective cause of the lower settlement and he, accordingly, awarded Somatra the difference between the two-thirds settlement

they obtained and the three-quarters settlement which they would have obtained in the absence of any breach of duty.

14. SRT considered that the judgment delivered on 30th July 2002 contained inadequate reasoning in various respects and on 15th October 2002 the judge decided to expand his reasons in four respects only, three of which related to issues of causation and Mr Domingo's evidence with which we shall have to deal in due course.

Breach of duty in relation to meeting of 29th March?

15. On any view this was an important meeting since one of its main purposes was for Somatra to display the strength of its case to underwriters and respond to points which underwriters thought required an answer. It was not a negotiating meeting as such or even a meeting at which any final conclusions on settlement (or anything else for that matter) were expected to be resolved. But it was an important element in the run-up to the trial. The judge decided that during the meeting Mr Williams behaved in a way which was odd and damaging to his clients' interest. He accepted the account given by Mr Hamilton in the course of his cross-examination which included the following features:-
    (1) Mr Williams was not as familiar with the details of the case as his assistant, Mr Atkinson, was;
    (2) when Mr Atkinson tried to deal with specific points, with which Mr Williams himself could not deal, he stopped Mr Atkinson from speaking;
    (3) when Mr Stang Lund was debating issues of Norwegian law with the underwriters' expert Professor Brackhus, Mr Williams interrupted and when the interruption was ineffective sat in his seat making faces (grimaces) and fiddling with his pencils, distracting attention from what Mr Stang Lund had to say;
    (4) underwriters' representatives derived comfort from the evident distress displayed by Mr Williams;
    (5) Mr Williams was himself disappointed, demoralised and chagrined by his performance at the meeting and, after the meeting, said Somatra would be lucky to get 30% from underwriters without intending the remark to be treated as a serious prediction.

16. Mr Fenwick QC for SRT submitted that these findings were insufficient to justify a conclusion of breach of duty in relation to Mr Williams' conduct at the meeting, even though he was the leader of the team. He said further that just because a meeting with the opposite side in a case goes badly does not mean that the meeting is negligently conducted.

17. We agree with the second of the above submissions. But that does not conclude the matter. The meeting has to be considered in the context of the events we have rehearsed in the time table above. That context shows how important the meeting was and that one of the most important things was to answer underwriters' questions about the possibly weak points in Somatra's case. Underwriters had what they saw as legitimate queries about aspects of the case which did require an answer. It would not usually be negligent for a solicitor in these circumstances not to know the answers to all such queries himself. But it is, in our judgment, a breach of duty to prevent those who do have the answers from giving those answers or publicly to undermine the answers that they are able to give.

18. We consider that the judge's conclusion in relation to breach of duty at this meeting was justified by the underlying findings of fact he expressly made in his judgment. We also bear in mind that, in a lengthy case, a judge cannot be expected to itemise every factual consideration which has contributed to his conclusion in respect of each one of a number of alleged breaches of duty.

19. We would add that even if we had been persuaded to reverse the judge on this breach of duty, that would not in our judgment have been sufficient to reverse the global finding that, as a result of such breaches as there were, Somatra lost trust and confidence in SRT. It is noteworthy that Mr Alireza had explored the possibility of other solicitors taking over the case well before 29th March. In our judgment the now unchallenged breaches of duty together relevantly contributed to the loss of trust and confidence.

Overview of and approach to the rest of the appeal

20. SRT attack the judge's findings of causation, foreseeability and loss. These issues are closely linked but largely dependant upon two of the judge's findings of fact. First, that, but for SRT's breach of duty, Somatra

would not have settled for two thirds; and second that Mr Domingo had underwriters authority to settle for up to 75% which he would have offered and Somatra would have accepted.

21. SRT argue, as a question of causation, that the judge should have concluded that Somatra would have settled for two thirds in any event. Mr. Alireza was always prepared to accept a realistic offer and all the advice which he had received showed that this was such an offer. SRT's breach of duty did not therefore cause any loss. If SRT are right about this the appeal must be allowed. No question of what, if any, increased offer might have been made arises.

22. If however the breach of duty caused Somatra to accept two thirds SRT argue, as a question of loss, that the second of the judge's findings was wrong. The judge should have found that Mr Domingo did not have authority to offer 75% and no such offer would have been made.

23. The appeal therefore focussed on the following passages in the judgment so far as Mr Domingo's evidence was concerned:

> *223 I have had the benefit of being able to assess Mr Domingo's credibility as a witness. He was convincing and plausible. I readily accept what he told me. In my view it is clear, on his evidence that he had authority from his principals to settle at 75%, and he had received approval to do so from the following market. That did not mean that he would immediately offer 75% but it was a figure that underwriters would rather pay than fight the action and take the risk they would have to pay in full.*

In his supplemental judgment he added: *I was sceptical about this aspect of the case until Mr Domingo came to court. He was a most impressive witness, and, right or wrong, I believed him and was of the view that the attempts to undermine his evidence through the Arditti letters misfired, because Mr Domingo dealt with the points put to him in cross examination.*

24. And then on causation:

> *259 had Somatra retained trust and confidence in their lawyers, then either at the door of the court or before, Mr Domingo would have come up with an offer of 75% of the full claim plus interest on behalf of all insurers. And if that offer had been made, I am of the view that it is more likely than not that Mr Alireza would have considered it to be a substantial and acceptable offer.*
>
> *263 It seems to me that if a solicitor behaves as Mr Williams has done over a longish period and reduced the client to shop around to see if he can be replaced he is not in a position to criticise the client for trying to extricate himself from a mess. This was not a settlement that Mr Alireza wanted; he did not think he had achieved what he had set out to achieve; he felt that he had been forced into a position where he had to cut his losses. This part of the case is the most difficult but I have come to the clear conclusion that had SRT not been negligent the case would have proceeded until the insurers themselves made the offer that Mr Domingo had authority to make. That was the sequence of events which Somatra had contemplated: a realistic offer from the other side.*

In the supplementary judgment the judge said: *Mr Alireza was carefully questioned about the reasons why he entered into the settlement. It was the thrust of the defendants case that he achieved at least as much as his advisors, including Mr Hamilton and Mr Stang Lund were recommending. I had the advantage of listening to the evidence of Mr Alireza and what he said appears from the following passages of his cross examination.*

The judge then quoted a long passage from this cross examination and continued: *I accepted that evidence. It seemed to me obvious that the breaches which I had found were capable of being regarded as an effective cause of the settlement at less than 75%, even if there were other matters which would or might have influenced Mr Alireza's actions which did not amount to a breach of duty. It will be a rare case where a client has sound reason to distrust his legal advisors.*

This was reinforced by Mr Alireza's witness statement in which he said: *There is no doubt in my mind that I would have achieved a higher recovery if it had not been for SRT. Here I was with a total lack of support and I managed to negotiate a 66.6% settlement. Imagine what I could have done with my lawyers behind me. I salvaged what I could, but I was convinced and am still convinced that we could have achieved much more.*

If I had not lost confidence in SRT and so knew that I could take the case to trial if the underwriters did not settle at my level, there is no way I would have agreed to a settlement at 66.6%. I would have been happy to take the case to

court, and would have done so unless a very high settlement could have been agreed. I would not have been desperate to do a deal with underwriters.

25. Essentially SRT's submission is that the judge should not have accepted Mr Domingo's evidence because it could not be properly tested other than by reference to the Arditti letters which contradicted it. Nor should he have accepted Mr Alireza's evidence that he would not have settled for two thirds in the light of the advice he received and the minutes of the internal meeting of 31st March. A further complaint is made that the judge did not give adequate reasons for the findings he made in the passages which we have quoted.

26. It is convenient to consider the judge's two central findings of fact first. In doing so we bear in mind that they are findings of primary fact. It is not necessary to restate this court's approach to such a case. It has recently been elaborated in the judgment of Clarke L.J. in **Assicurazioni Generali SpA v Arab Insurance Group** [2002] EWCA Civ. 1642; (2003) 1 WLR 577 paras. 12, 14, 15, 19 and 22. Mr Fenwick Q.C. for SRT argued that the "plainly wrong" test does not apply where the judge has failed to test the oral evidence against the contemporaneous documents or where relevant evidence is particularly within the knowledge of only one party. We do not think that either of these considerations affect the test we have to apply. If a judge has obviously failed to test the evidence of a witness against contemporaneous documents which contradict it, this court may be persuaded that his acceptance of the evidence was plainly wrong. Likewise, if the judge does not approach with caution the evidence of a witness which cannot be tested. But there is no reason why this court should apply a different test to its evaluation of the judge's findings of primary facts in such circumstances.

27. SRT have also argued that Somatra's decision to settle was caused by matters which the judge held not to be breaches and/or that it was not a foreseeable consequence or reasonable response to the breaches which were found. We consider these points to be peripheral and will deal with them later in the judgment. Finally we will deal with SRT's criticism of the way in which the judge dealt with Somatra's prospects of success in the original action and explain why we did not think it was necessary to hear argument about his conclusion that Somatra would have won.

Mr Domingo's evidence

28. We deal with this issue first because that is how the appeal has been argued and because some of SRT's submissions on causation were premised on a rejection of Mr Domingo's evidence.

29. Mr Domingo is a British citizen who trained but did not qualify as an English solicitor. In 1994 he was employed as Arig's general counsel and senior claims manager. He had experience of dealing as leader with hull claims of the present kind. He said that following a discussion with Mr Mustafa about the circumstances surrounding the settlement he was asked to make a statement confirming what he had said. He had felt a moral obligation to do so and some time before he left Arig at the end of 1998, with his settlement file in front of him, he prepared a statement which formed the basis of his first statement in these proceedings which is dated December 1999. He had obtained the permission of his superior to make this statement but, as he admitted in cross examination he had not specifically sought or considered seeking permission to waive Arig's privilege and had not obtained any permission from the following market.

30. Mr Domingo's statement confirmed the events of 27th, 28th and 29th March and 4th April which we have outlined in para. 12. He referred to his contemporaneous note of the meeting with Mr Alireza and Mr Mustafa during the evening of 29th March which said: *Owners not prepared to go for 50:50. Owners say 75% including interest. U.S. $45m. acceptable. (Domingo) to put to market. Revert to (Alireza) no later than 7/4.*

He said that when he circulated the market on 4th April, he was confident from his discussions with the opinion formers that he would obtain authority to settle for up to 75%. He described his five page fax, which he had disclosed to Mr Mustafa, as a recommendation for settlement up to this amount. The fax did not contain a recommendation in terms but under the heading "Summary of Leaders Views" it said: *In all the circumstances this is a case which has too many uncertainties and therefore the risk that the court might find substantially in favour of the assured is high. In such an event underwriters may have to pay up to $60m. plus costs on both sides of about $10m.*

Mr Domingo invited underwriters or their representatives to whom the fax was addressed to contact him to advise whether in all the circumstances they would agree to a U.S. $45m. settlement by close of business on 6th April.

31. In his statement Mr Domingo said that he knew that there were uncertainties and risks in the underwriters' case. At the meeting on 29th March underwriters' expert on Norwegian law had told him that the best result they could hope for under Norwegian law was 50% on apportionment. He therefore wanted to avoid a trial if there was a chance of settlement. But he saw the question of settlement as a matter which was not based purely on legal opinions. He approached the matter as a form of risk management and risk assessment.

32. Mr Domingo said that by the time the case settled on 7th April he was confident that he had obtained a mandate from the market to settle for up to 75%. In his statement he quoted from a fax of 4th April which he had received from underwriters' representative on the Chapman slip (Mr Searle) (with about 25% of the risk) saying: *We fully support you in your present actions both in terms of settlement negotiations and in the possibility of continuing the trial as necessary.*

Mr Domingo also said that on 7th April SAICO (with 10% of the risk) told him that they favoured settlement at $45m.

33. Between 4th and 7th April he had many conversations with underwriters. He also spoke to Mr Mustafa, which included a conversation on 5th April in which he accepted he must have told Mr Mustafa that underwriters were reluctant to go above 50%. He said that despite his mandate it had always been his intention to try and persuade Somatra to settle for less than 75% although he believed that he would be unable to do so. It was he who arranged for Mr Arditti to meet Mr Alireza on 7th April. He did so on the understanding that Mr Arditti just wanted to meet Mr Alireza and would not be negotiating with him. He was surprised to learn of the settlement.

34. In the course of these proceedings attempts were made to obtain the entire files of Holmans, Arig and the Lloyds claims office in relation to the original action. Hull underwriters claimed privilege for these documents but said that they were prepared to produce what became known as the Arditti letters to which we have already referred. SRT's summons to produce documents was compromised by the production of these three documents on terms that no further claims for documents would be made. So the only privileged documents before the judge were Mr Wilson's reports to the market of 7th and 8th April and Mr Domingo's faxes of 4th and 11th April. Mr Domingo was extensively cross examined about these documents. Later in the trial the judge allowed SRT to put in a statement from Mr Wilson to the effect that he honestly believed the contents of his two reports. Because his former clients maintained privilege he was not able to say anything more than this and his statement was not challenged by Somatra.

35. Mr Wilson's report of 7th April was made to obtain the market's instructions about settlement at two thirds. But the report records that:

Both Mr Domingo and ourselves were available to discuss relevant aspects of his (fax) and various discussions duly took place. By the middle of today, everyone except Inces (for their clients) had kindly communicated their views. Whilst there were variations in the strength of the view about various aspects, there has been unanimity that the 75% settlement level is unacceptable - excepting SAICO who do not expressly reject 75% considering that the case should be settled on the best possible terms. We should mention that we also obtained leading counsel's opinion on whether the market should accept or reject the plaintiffs offer to take 75%. His clear advice was that it should be rejected.

Mr Domingo said that the report did not accurately reflect his discussions with underwriters. He explained that the misunderstanding may have arisen because no one wanted to pay 75%. The idea was to negotiate between 50% to 75%. He was not seeking approval for one number. He clearly recalled that when he received the report he was minded to get back to Mr Wilson and say it was inaccurate but did not do so because by then they had a settlement.

36. Mr Wilson's report of 8th April records a telephone call with Mr Domingo that day in which he says he is to discuss the case with his management "this Sunday". It continued: *We understand that, in the meantime, it is open which way you/your management decides. You, (as well as HFW and leading counsel) feel that a settlement at*

two thirds is more than underwriters should have had to pay to satisfy this claim whether by settlement or judgment. Giving the fullest weight to any preference for settlement, 50% should have been sufficient.

Mr Domingo said that again this report did not represent his view. Although he would have had to get formal management approval for the settlement he already had their authority to go to 75% so there would be no problem. He had been upset about the way the settlement had been reached and he did not correct the report because by that stage he just wanted to get shot of the claim. He and Mr Wilson had always disagreed about whether the claim had been settled for too much.

37. Mr Domingo's fax of 11th April recommended the settlement to the following market. He said that Arig were agreeable to the settlement bearing in mind the uncertainties to which he had referred in his fax of 4th April. He continued: *Whilst reasonable confidence had been expressed that this claim, at trial, would have been settled at between 25 – 50% (plus interest), given the uncertainties and the nervousness about a trial by at least part of the market, settlement at the level indicated is not an unreasonable settlement.*

In his evidence he denied that this showed that he was reluctant to settle for two thirds. He said that his fax was expressed in this way because he was dealing on the one hand with solicitors who thought the case should not be settled and on the other with underwriters who were saying it was best to try and get a settlement so they knew where they stood.

38. The judge dealt with the Arditti letters in the first part of para. 223 of his judgment before the passage which we have quoted in para. 23. The documents had first been produced by Mr Arditti writing "Dear Sirs" to his own firm who were by then acting for SRT in these proceedings. The judge referred to this as an "extraordinary development". He continued: *…. the letters … purported to show that Mr Wilson of HFW was saying at the time that the underwriters were not willing to pay 75% and the settlement at that level was "unacceptable". Mr Domingo was then questioned about this and asked to explain how he was saying that he had obtained the consent of the following market. Mr Domingo said that the information which he had received had come to him first hand from senior figures in the insurance world who represented the following market. He had received a positive response. To that extent the Arditti letters were wrong. Mr Wilson was required to attend but was greatly circumscribed in what he felt able to say, other than when he wrote the letters he believed their contents to be true. It is not for the court to speculate about how the letters came to be written, nor how they came to be produced to the court.*

39. Mr Fenwick submits that the judge could not and should not have accepted Mr Domingo's evidence that he had authority to settle for up to 75% in the face of Mr Wilson's reports. He contends that the judge appears to have doubted the authenticity of the documents because of the way they came to be produced. There was no justification for this. Mr Wilson confirmed their authenticity. The judge should have engaged with their contents so as to test Mr Domingo's evidence, but failed to do so or at least to explain properly why, if he had done so, he nevertheless accepted his evidence. At the very least the judge should have taken the view that he could not rely on either Mr Domingo's evidence or the contents of the reports. Neither could be properly tested against all the contemporaneous documents for which the claim to privilege was maintained. Mr Domingo's statement which breached privilege and made a few selected references to documents in the file was not to be preferred to the documents selected by Mr Arditti and produced by Mr Wilson, neither of whom could be expected to produce documents which painted a false picture. Underlying the judge's conclusion about this was his belief that Somatra would have won if their claim had gone to trial. This was irrelevant to the issue of fact he had to decide.

40. Standing back from the detail for the moment we do not think it is at all improbable that Hull underwriters agreed to settle for up to 75%, although this was more than their legal advisers said they should have to pay. This was a very large claim and there was an obvious risk that they might lose altogether. As Mr Domingo said underwriters will be concerned with risk management. In other words they will be concerned to settle within their reserves. The certainty of being able to do so is often preferable to the hazards of litigation however confident the legal advice. If proof was needed of this, the market readily agreed to settle at two thirds despite legal advice that this also was too much.

41. Secondly there obviously was scope for misunderstanding between Mr Domingo, others in the market and Holmans. There were many discussions between the interested parties between the 4th and 7th April which Mr Domingo had invited the market to have with him and which he said had taken place with a

number of people at various levels within the organisations concerned. It is not clear from Mr Wilson's report of 7th April how much, if at all, Holmans were directly involved in these discussions or whether they were relying on Mr Domingo to report on what would obviously be a rapidly changing scene. In answer to the point that he had claimed that no one refused to go above 50% Mr Domingo explained that the market was not antiseptic (by which he meant static). There were lots of discussions. He might have spoken to someone junior who would say they did not want to go above a certain level but then he would escalate it up to somebody who was more senior within the organisation and so on until he got a decision.

42. Thirdly SRT's case was that Mr Domingo was lying, although this was not put to him fairly and squarely by leading counsel (not Mr Fenwick) at the trial. No such inhibition was shown by SRT in their skeleton argument for the purpose of this appeal where it is alleged that he had "minted" his story to help Somatra. But there is nothing to suggest that Mr Domingo had any motive to lie under oath. He had no interest in the litigation. He was an independent witness now employed and living in England as the President and Chief Executive Officer of a Bahraini Leisure Company.

43. Turning to the detail, we do not think that Mr Domingo's faxes of 4th and 11th April are inconsistent with his evidence. In the fax of 4th April, although he did not use the word "recommendation", he was clearly seeking approval from the following market for authority to settle at a figure of up $45m. We also think his explanation for the fax of 11th April is plausible.

44. Mr Wilson's reports of 7th and 8th April cannot be fully squared with Mr Domingo's evidence although they may partly be explained by a misunderstanding of where the market had got to by the 7th April. Whilst we think the judge might have dealt with the difficulties which these documents created in greater detail he obviously did not overlook them when he came to evaluate Mr Domingo's evidence about which he said he had been sceptical until Mr Domingo came to court.

45. We do not read the judge's judgment as saying any more than that the way in which the Arditti letters were produced, and because they were a selection, was unsatisfactory because it prevented him from seeing the full picture. At the end of the day he had to reach a conclusion on such evidence as was before him. Judges often have to do this. They must do their best with what they have. They may feel unable to reach any conclusion, but if they think they can they must do so. This is what the judge did here. Having heard Mr Domingo cross examined for most of a day he decided that he could accept his evidence. Mr Wilson's reports did not compel him to reject it; nor did they compel the conclusion that he could not decide.

46. We do not accept that the judge's decision was driven by his belief that Somatra would have won the action. SRT would have had to demonstrate clearly that the judge had taken such an extraordinary approach. They have not done so.

47. At the end of the day the question is whether it has been shown that the judge's conclusion was plainly wrong. We do not think it has been for the reasons we have given. In a case such as this where a finding of primary fact is challenged, an appellate court might say that it would not or probably would not have reached the same conclusion itself, but nevertheless the finding was one which was open to the judge. But that is not this case. We are quite unable to say whether we would or might have reached a different conclusion for the simple reason we have not seen or heard Mr Domingo giving the evidence which so clearly impressed and persuaded the judge.

Causation

48. The attack on the judge's finding that but for SRT's breaches of duty Somatra would not have settled for two thirds is premised on the fact that Mr Alireza was always prepared to settle at a discount from the full value of his claim provided the discount could be justified. In other words he would not have taken the claim to trial come what may. Without reviewing the evidence in detail we think this premise is justified, but we do not think it sheds much light on what was in Mr Alireza's mind in the week or so before the 7th April when he accepted Mr Arditti's offer.

49. By the time of the meeting on the 29th March Mr Williams, "the captain of the team" as the judge described him, had disobeyed Mr Alireza's instructions, lied to him and caused him to doubt SRT's competence to take the case to trial. Mr Alireza had discovered that it was now too late to change solicitors. The loan from

the Bank had been called in the wake of the consultation with Mr Steel and was due to be repaid on the 8th April. The trial was due to start three days later. The first meeting on 29th March at which Somatra had been expected to persuade underwriters of the strength of their case had been a disaster due as the judge found, rightly we think, to a further breach of duty by Mr Williams. He had not helped matters either by saying TO Mr Hamilton and Mr Mustafa after the meeting that Somatra would be lucky to get 30%.

50. Later that day Mr Alireza and Mr Mustafa had a private meeting with Mr Domingo from which other members of the team were excluded which lasted the whole evening. There can be no doubt that at this meeting Mr Alireza said he would accept 75% and Mr Domingo said he would put this to the market. Mr Alireza's evidence was that he was left with the impression that Mr Domingo would recommend and would be able to deliver an offer of 75% when he came back on 7th April. Mr Mustafa went further and said that Mr Domingo had actually agreed to recommend 75%. SRT say that this evidence was untrue. Neither man had any expectation of receiving an offer of 75% as the later contemporaneous documents show and, to the extent that Mr Domingo's evidence lent colour to what they said, it was also untrue.

51. We have outlined the relevant events in para. 12. On 30th March Mr Rokison advised that Somatra should take 60% if offered and give serious consideration to an offer of 50%. The consultation had been held at the request of the Bank and Mr Alireza did not attend although he was told what had happened by Mr Hamilton.

52. SRT rely heavily on Mr Hamilton's note of the internal meeting which took place the following day. A number of issues were discussed at the meeting including settlement. It was agreed that Mr Williams should play no further part in settlement discussions or in the relationship with the Bank, but would be directed to devote his entire attention to the preparation of the case for trial. We have already quoted in para. 12 the relevant parts of the note which reported that an offer of $31m. (about 50%) was expected on 7th April, that a higher offer should be sought which might possibly be $35m. or slightly more (about 60%), but that if the figure of $31m. could not be improved serious consideration should be given to accepting it. This therefore accorded with the advice given by Somatra's English lawyers.

53. Mr Alireza and Mr Mustafa's evidence was that they did not tell those present at this meeting that the previous evening Mr Domingo had agreed to put 75% to the market. Their evidence was that they wanted to keep this secret and Mr Hamilton and Mr Berg said they were not told anything about it. Mr Alireza said they did not want this information to get back to Mr Williams because they had lost all confidence in his handling of the case, including any settlement negotiations. He said in cross examination: *The situation was extremely sensitive. I knew the bank was on our necks. We were basically led to the slaughter house, with that route. The 30% figure was running along the corridors. I felt it was best that I preserve that with Mr Domingo and Mr Mustafa.*

He also said in answer to the judge that he did not entirely trust Mr Jennings who was present at the meeting. Mr Mustafa's evidence was to the same effect. He said: *We wanted to keep it secret because we did not know where this whole thing was heading. People were talking to each other and we were scared. We were scared of our own shadow at that time you know.*

54. It was of course suggested to Mr Alireza and Mr Mustafa that the true explanation for the note of the meeting was that they had no expectation of receiving an offer of 75%. They were also asked what was the point of the discussion and decision to settle at 50 – 60%. Mr Alireza said that the meeting was largely cosmetic so far as he was concerned. He had to protect his position at that time in terms of confidentiality.

55. On 1st April Mr Hamilton wrote to Mr Alireza advising that he and Mr Mustafa should follow up with Mr Domingo although it appeared unlikely to him that Mr Domingo would propose a figure in excess of $31m. He believed however that there was a reasonable chance that this figure could be improved upon as the trial approached. On the same day Mr Alireza received Mr Williams' advice on the merits which concluded by advising that any offer which produced $31m. or more should be considered very seriously.

56. Further Somatra internal meetings took place on 4th and 5th April. At the earlier of these meetings Mr Hamilton's note shows that factors to be considered in evaluating any settlement proposal were discussed.

57. On 6th April Mr Stang Lund advised that Somatra would most likely have succeeded in full before a Norwegian court, but if the case went to apportionment they would be awarded 75% of their claim. He

had earlier advised that an English court, applying Norwegian law, might apportion anything between 25 – 75% to owners and so he recommended settlement at 50% or more.

58. On 6th April Mr Hamilton prepared a memorandum of advice for Mr Alireza in which he concluded that any settlement of 50% or higher could be justified, but on a legal analysis alone he would recommend settlement at 65% or higher. The document has manuscript amendments to it and Mr Hamilton's unchallenged evidence at trial was that it "was never sent or given to the clients and never went beyond a marked draft" because it was overtaken by the settlement. Mr Alireza confirmed that he had not received a copy of the memorandum at the time and could not recall having any detailed discussion of the merits of the claim with Mr Hamilton on the 6th or 7th April. On 21st March Mr Hamilton had said that his best judgment was that a reasonable settlement figure would lie somewhere between 65% and 85%.

59. In para. 24 we have quoted what Mr Alireza said in his statement about why he agreed to settle for two thirds on 7th April. In the passage from his cross examination about this quoted by the judge in his supplementary judgment he said that he felt that Mr Arditti was Mr Domingo's emissary and was there to talk on behalf of the market. He was asked why he had not taken time to consult with Mr Domingo or anyone else before accepting Mr Arditti's offer and replied: *In hindsight …. We have all perfect vision but at that moment I had to think on my feet and as I said, I had great fears what further damage could be done to my case and I wanted to close the deal then and there. My options were limited …..*

The cross examination continued:

Q The reality Mr Alireza I suggest is this: that as the result of all the advice that you had received you would have taken a figure a lot less than sixty six and two thirds and this was a magnificent and unexpected bonus for you and you leapt at it?

A That is not true.

Q It is far more than you were expecting?

A That is not true, absolutely not. In fact Mr Domingo was genuine at 75%. He was working it and I had a clock that was running against me. …

Q You never suggested to anyone did you that you thought that you could have got more if you had gone to trial or held out for a settlement?

A I think it was obvious, … that if one had a team captain that was of assistance to him during his difficult moments one would have achieved a much higher settlement.

60. We have already quoted the passages in which the judge dealt with causation in para. 24. In his main judgment the judge simply recited as part of the chronology the advice which Somatra received from Mr Stang Lund and Mr Rokison and the relevant part of Mr Hamilton's note of the internal meeting on 31st March. In his supplemental judgment he dealt with the meeting as follows: [Counsel for SRT] *says that the note made of this meeting shows that Mr Alireza and his team were quite prepared to settle for what they achieved. Again, the circumstances in which this meeting took place and was recorded was dealt with in evidence by Mr Mustafa. He made it clear that the conversations which had been held with Mr Domingo were regarded by him and Mr Alireza as confidential and that it was not commercially sensible to mention them to other members of the team.*

The judge then quoted part of Mr Mustafa's evidence about this which we have quoted in para. 51 and continued: *This was a quite understandable position for him to take. As Mr Domingo explained there were various levels at which talks were going on. I was not prepared to conclude that this meeting threw doubt upon the evidence in relation to Mr Domingo and his discussions with Mr Mustafa and Mr Alireza. I can well understand the need for confidentiality at what must have been seen as a "delicate moment" in the negotiation process. Revealing in advance what Mr Domingo's position was going to be might well have had serious adverse consequences.*

61. Mr Fenwick submits that the judge should not have accepted Mr Alireza's evidence on causation. He had no expectation of receiving an offer of 75% as the note of the meeting of 31st March shows. His reasons for saying that he wanted to keep his expectation secret do not withstand scrutiny. There was no good reason for keeping this information from his own team and what harm would it have done if the pessimistic Mr Williams discovered what had happened? Why should Mr Alireza, Somatra's principal, engage in anything other than a serious discussion about settlement? The explanation that the meeting was cosmetic

is incredible. The minute shows that he was only expecting an offer of 50% and that he would settle for a good deal less than two thirds. But even if Mr Alireza did expect an offer of 75%, during his meeting with Mr Arditti, who he thought was Mr Domingo's emissary, he realised that he would not get it. The evidence shows Mr Alireza gathering in all the advice available to him in the days before April 7th to enable him to decide what was a justified discount from the full value of his claim and what would be a realistic offer. This advice pointed unequivocally to the fact that the best he could hope for was 65%. The offer of two thirds was more than realistic. It was generous and that is why Mr Alireza accepted it. His acceptance had nothing to do with his loss of trust and confidence in SRT and there is nothing in the contemporaneous documents to suggest that it did. The judge did not deal at all with these arguments in his main judgment. The fact that he only did so in his supplemental judgment does not inspire confidence in the conclusion which he reached.

62. The starting point for our consideration of these submissions is the judge's unchallenged conclusions in para. 257 of his judgment that:
(1). SRT's breaches of duty caused "a fundamental loss of trust and confidence in SRT to conduct the case properly and in accordance with the clients wishes"
(2). Mr Williams was no longer to be trusted by Somatra.
(3). Alternative solicitors were not available which put Mr Alireza in an awkward if not impossible position and
(4). Mr Alireza felt unable to continue with SRT with or without Mr Williams and it was unrealistic to think that he and his team could continue to work only with counsel.

In these circumstances, as the judge said when refusing permission to appeal, it would be surprising if SRT's breaches had not caused some loss to Somatra.

63. Turning however to the detail, as we have already said there is no doubt that at the meeting on 29th March Mr Domingo did say he would put 75% to the market. Whether he said or gave the impression that he would recommend it does not matter. The mere fact that he was going to put it to the market shows that he thought it was worthy of consideration. And yet there is no mention of this in the minute of the meeting on 31st March and none of those who attended said they were aware of it at any material time. This strongly supports Mr Alireza and Mr Mustafa's evidence that there was something they were keeping secret from other members of their team. Mr Hamilton and Mr Stang Lund had been deliberately excluded from the meeting with Mr Domingo. The expectation that $31m. would be offered may have come from Mr Hamilton whose letter the following day showed that it was his belief that this is what would be offered. This does not explain why Mr Alireza allowed the discussion about settlement to proceed although perhaps if he had said he did not want to discuss it, he might have been asked why and so put the confidentiality of what had been said at his meeting with Mr Domingo at risk.

64. So we think the judge was perfectly entitled to accept Mr Alireza and Mr Mustafa's evidence that they chose to keep what had happened at the meeting with Mr Domingo secret. It is the fact that they did so that matters rather than their reasons for doing so which with hindsight may not seem very compelling. But they were aware of the fact that Mr Williams regarded the conduct of settlement negotiations as his prerogative – at an earlier stage he asked for but was not given authority to conduct such negotiations on his own. Although they were hands-on clients they had no previous experience of English litigation.

65. These conclusions take away the main plank of SRT's argument but they do not deal with the impact of the advice which Somatra was receiving in the days before the settlement.

66. Mr Symons Q.C. for Somatra submitted that this advice could have had little or no impact on Mr Alireza after the meeting with Mr Domingo on 29th March because he was expecting a better offer than he was being advised to accept.

67. It was in response to this argument that Mr Fenwick made the point that any belief that he could expect an offer of 75% must have been dispelled once Mr Alireza had met Mr Arditti, and so by the time he accepted Mr Arditti's offer he was only acting in accordance with his advice. This is not how the case was put before the judge or in the skeleton argument prepared by trial counsel for the purposes of this appeal which asserted that Mr Alireza's evidence that he believed Mr Arditti to be Mr Domingo's emissary was

incredible and submitted that this showed that Mr Alireza could not have been expecting an offer of 75% from Mr Domingo.

68. Mr Symons is obviously right that if Mr Alireza was expecting a better offer than he was being advised to accept, this would have diminished the effect of the advice. Of course Mr Alireza must have realised when he met Mr Arditti that he was not going to get an offer at that stage of 75%, but it does not follow that he would have accepted an offer of two thirds in any event because of the advice he had previously received. In the passages from his cross examination which we have quoted he explained why he accepted the offer: he feared further damage to his case; his options were limited; he had to think on his feet and opted to close a deal then and there.

69. There is also another aspect of this. The history of this dispute shows that Mr Alireza was very much his own man. When Mr Williams and Mr Gruder advised him to settle for 50% in early March he wrote back (what the judge described as a long and perceptive letter) saying he disagreed with this advice. His assessment of the underwriters' evidence which had recently been disclosed led him to believe that Somatra should not significantly discount the claim. He did not accept Mr Rokison's advice either. Mr Rokison had not met any of the experts and Mr Alireza felt he had not done enough preparation. He found Mr Williams's advice illogical because it remained his advice to settle at 50%, although by April one of his major reasons for discounting the claim had disappeared. It seems to us therefore that SRT have overstated the impact of the advice upon Mr Alireza.

70. Although it can be said to be unfortunate that the judge did not deal with the arguments based upon the note of 31st March meeting and the advice in his main judgment, it is entirely understandable since he had to resolve many issues arising from nearly 850 pages of closing written submissions put in at the end of a thirty six day trial.

71. But as with the first central issue on this appeal the question for us at the end of the day is whether the judge's conclusion that Mr Alireza would not have settled for two thirds but for the breaches was plainly wrong. We do not think it was. Given the position Mr Alireza was put in by the breaches one can readily understand why he felt forced to settle for less than he would have done if he had not lost trust and confidence in SRT. That is what he said had happened and the judge accepted it after hearing Mr Alireza being cross examined for five days.

Peripheral points

72. In their skeleton argument SRT submitted that non-breach matters were the real cause of the loss of trust and confidence: the fear that Mr Williams was trying to settle the case without instructions, the continued presence of Mr Smallwood in the WFW team acting for the Bank although he had originally been acting for Somatra in the original action and Mr Alireza's fear that Mr Williams' 30% assessment would be disclosed.

73. There is nothing in these submissions, which it is fair to say Mr Fenwick did not press strongly. In the passage from his supplemental judgment which we have quoted in para. 22. the judge found that the breaches were the effective cause of the settlement at less than 75%, even if there were other matters which would or might have influenced Mr Alireza's actions which did not amount to breach of duty. Given the nature of the breaches which the judge found, this conclusion cannot be faulted.

74. Next, it was submitted that it was not foreseeable that the breaches might cause Mr Alireza to settle for less than he would otherwise have done. It was only foreseeable that Mr Williams would be removed from the case and that Somatra would take advice as to the best way forward from other lawyers involved in the case (particularly leading and junior counsel) and other solicitors which might have resulted in an adjournment. It was not foreseeable that Mr Alireza would be panicked into making unreasonable decisions. The same points are made to support an argument that settlement at an undervalue was not a reasonable response to the breaches and so broke the chain of causation.

75. These arguments depend, as Mr Fenwick accepted, on whether in truth Mr Alireza panicked in the sense that this word is normally used. He accepted that it was foreseeable that a client who has lost trust and confidence in his solicitors shortly before trial might settle for less than he would otherwise have got, but submitted that it was not foreseeable that he would panic. Mr Alireza did not say he was panicked. We have already referred to his evidence about why he settled. "Panicked" was the judge's word. Whether it

aptly described Mr Alireza's state of mind or not, in the predicament in which he had been placed by SRT's breaches it was obviously foreseeable that Mr Alireza might settle for less than he would otherwise have done. For these reasons we think the judge's conclusion that "Mr Alireza's decision to settle the case as he did was both a foreseeable response to the breaches and a reasonable response" (para 258) is unassailable.

Prospects of success in the original action

76. The judge prefaced his findings about the original action which he delivered after but as an appendix to his main judgment by saying: *Because I do not consider that the underlying action brought by Somatra against the underwriters would have gone to court but would have been compromised, this part of the judgment is unnecessary to my decision.*

77. The issues which he had resolved and we have already considered were:
(1) Were there breaches?
(2) Did these breaches cause loss of trust and confidence?
(3) Was the loss of trust and confidence an effective cause of the decision to settle at two thirds?

The fourth question was what if any loss flowed from the judge's findings in favour of Somatra on issues (1) to (3)? He introduced this question by saying (para. 259):

Somatra are therefore entitled to be put into the position, as far as money may do it, that they would have been in had there been no breach. What Somatra have been deprived of is the opportunity or chance of winning their case at trial or being offered a satisfactory compromise.

He then went on to reach the conclusion which we have already quoted in para. 22. Here the judge concluded that had Somatra retained trust and confidence in their lawyers Mr Domingo "would" have come up with an offer of 75% whether at the door of the court or before, which Mr Alireza would more likely than not have accepted.

78. We were referred to the cases on loss of a chance from which Mr Fenwick extracted the following propositions:
(1) The court's task is to assess the value of the chance which has been lost.
(2) It is for the claimant to show on a balance of probability that he would have taken the action necessary to obtain the benefit which he claims to have lost.
(3) Where the assessment involves the actions of a third party or other uncertain future event, the court must assess the probability in percentage terms of any particular outcome and, except where that uncertainty was speculative on the one hand or virtually certain on the other, the court should award that percentage.
(4) The task of the judge in such a case is to assess the probabilities and not to try the original action.

Mr Symons did not dispute these propositions.

79. Mr Fenwick submitted that the judge did try the original action as the appendix to his judgment shows. We are not persuaded that he did, but for present purposes it is not necessary to decide whether he did or not or what a judge should do when assessing prospects of success in a case like this which was effectively ready for trial at the time it settled and much of the evidence which would have been called at trial was available.

80. In para. 259 of his judgment the judge said in terms that his task was to assess the value of the chance which Somatra had lost as a result of the breaches (proposition (1)). The relevant chance was that of being offered a satisfactory compromise. He decided on a balance of probability that if 75% had been offered Mr Alireza would have accepted it (proposition (2)). Finally he decided that Mr Domingo would have offered 75% (proposition (3)). This conclusion was unqualified as one would expect in a case where the judge accepted the evidence of the offeror that this is what he would have done. Normally in such a case there will be no evidence as to whether the original defendant would have made an offer and if so how much. This is therefore an unusual case and one in which, given the judge's clear, and in our view correct, finding that Mr Domingo had the authority of the market to offer 75% of the claim and would have made that offer to settle the claim, it would not be right to discount the value of the prospective offer on the basis that it might not have been made. Whether one labels this a certainty or a virtual certainty does not really matter.

What matters is the clear finding that such an offer would have been made. It therefore must follow that Somatra were entitled to recover the difference between two thirds and 75% of the claim.

81. In these circumstances no question of valuing the loss of the chance of winning the original action arises and that is why we decided not to hear any argument about this. Had there been less than a 100% chance of settlement at 75% it would have been necessary to go on to consider the value of the loss of the chance of winning the action which, even on the most pessimistic view of Somatra's prospects, would have been substantial and might well have been worth more than the amount awarded.

Indemnity costs

82. At the end of the case the Judge made the following order in relation to costs:- *The Defendant pay the costs of the action (including all costs of the counterclaim) and the post-judgment applications to the Claimant and the Second and Third Defendants to Counterclaim, such costs to be subject to detailed assessment if not agreed and thereafter paid within 28 days. The said detailed assessment shall be on the indemnity basis save in respect of:*
(i) that portion of the action dealing with the assessment of the merits of the underlying action; and
(ii) the post-judgment applications;
both of which shall be on the standard basis.

83. The appellants appeal against the basis of taxation specified in this order. That appeal is of course maintained even if, as has proved to be the case, the appellants lose the substantive appeal. In the context of the present case we proceed on the basis that the different approach adopted by the Court when taxing on the indemnity basis from that which it would adopt on the standard basis may well result in the appellants being held liable to pay a significantly higher sum to the respondents. No doubt this, coupled with the fact that this Court would have to hear the substantive appeal in any case, was a feature which led to this Court giving permission to appeal on this point.

84. The relevant provisions in the Civil Procedure Rules are to be found in Rule 44.3 and 44.4. The following in particular are relevant:-

44.3(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including-
(a) the conduct of all the parties; …

44.3(5) The conduct of the parties includes-
(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; …

44.4(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs-
(a) on the standard basis; or
(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will-
(a) only allow costs which are proportionate to the matters in issue; and
(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

85. What can be seen from the foregoing is that the beneficiary of an order for costs to be paid on the indemnity basis will still only be paid costs which he has incurred reasonably. However, there is no requirement of proportionality and in cases of doubt it is for the payer to show that costs were <u>not</u> incurred reasonably. This contrasts with the standard basis where there is a requirement of proportionality and it is

for the beneficiary to show that the costs ***were*** incurred reasonably – see **Lownds v Home Office** [2002] EWCA Civ 365, [2002] 1 WLR 2450.

86. Extensive case law was referred to in submissions before the Judge and yet more before us. As this Court pointed out in **ABCI v Banque Franco-Tunisienne** [2003] EWCA Civ 205:- *The thinking behind the CPR was that they would speak for themselves and that courts would not have to refer to an ever increasing body of authority in order to apply them.*

87. For this reason, we do not propose to embark upon an exhaustive analysis of the cases.

88. The position of this Court in relation to an appeal against the basis of taxation is that it will only interfere with the way the Judge exercised his discretion if it is satisfied that he misdirected himself or was otherwise plainly wrong.

The Judgment

89. The Judge said this:-

7. In relation to costs, Mr Symons QC asked for indemnity costs on the issue of liability [that is, not including the portion of the trial dealing with what was called the original action to which the appendix relates]. The basis of his application was that the way SRT chose to conduct their case was not simply to defend their case on negligence but to go much further: ridiculing their former clients in their opening and thereafter, accusing Mr Alireza and Mr Domingo of dishonesty and the former of being childish, accusing Mr Hamilton of improper conduct, running a case which his own clients must have known to be false in relation to the instructions to Professor Bull and the invitation to the meeting with Mr Steel QC; seeking to blame their former clients for what happened and more generally arguing every point ad nauseam. Mr Cran QC submits that he was entitled to challenge the good faith of both Mr Alireza and Mr Domingo since that was an important part of his clients' defence on the issue of causation and loss; he also points out that SRT succeeded on a number of the allegations made against them.

8. The principles on which an order for indemnity costs may be made are well known [see CPR 44.3 & 4]. There is, I think, a difference between fighting a case firmly and properly and fighting a case on the basis of a wholesale attack on the integrity of the defendants' former clients, without justification. It is a feature of this case that two people in a well known and respected firm of solicitors gave unreliable evidence to support their firm's defence. Indeed, in part their evidence was incredible and I draw attention in particular to paragraphs 95,97-99,206,227-8,238,257 of the judgment. This is a case where during their retainer and thereafter during this litigation the solicitors have made a wholesale attack on their former clients' integrity, and the integrity of their US attorney, without justification. Their position is that the Court of Appeal will inevitably conclude that Mr Alireza has been mendacious in his evidence. This method of fighting the case [the conduct of the case] was unreasonable, I think, and totally uncalled for, and makes it one where an order for indemnity costs is appropriate. The case could have been contested on a quite different basis, which maintained proper respect for their former clients. It seems to me that I cannot separate out the issues on which SRT succeeded: the whole case was part of a piece and the order for costs should reflect that, and for this reason, and because of the very nature of the defence, I refuse to split the liability issue and award costs to SRT of those issues on which they won. In truth, they lost the action comprehensively. I therefore direct that Somatra's costs of the liability issues as between SRT and Somatra should be on an indemnity basis. I reject Mr Cran's suggestion that Somatra conducted themselves deplorably after the settlement or that that should cause me to reject an indemnity basis.

9. Although it was SRT who indicated, in interlocutory proceedings, that there would have to be a virtual re-run of the whole original action, I think that there was nothing in particular about the way the re-run was dealt with on both sides which would justify any other order for costs than a standard basis.

90. It is clear that significant influences on the Judge's decisions were the following findings which he made in the course of his judgment:-

97. [Mr Williams] accepted that he had been dishonest in trying to cover the matter up, and accepted that if he treated his clients in that way, and he was found out, then his clients would lose trust and confidence in him. This was a serious matter and was viewed as such by Mr Alireza. He was entitled to expect better from his own lawyers. Mr Williams accepts that it was as a direct result of this incident that Mr Hamilton … was retained by Mr Alireza …

> *206. [Mr Williams'] various different accounts in his witness statements and his manner and demeanour when cross-examined made his denials in the witness box both painful to observe and unconvincing.*
>
> *227. Mr Williams was not truthful with his clients and was not prepared to deal with them with the respect they deserved. He greatly misjudged them and distrusted them without any reason at all. …*
>
> *228. It is not pleasant to have to conclude that a solicitor has deceived his clients; but that is the conclusion I have reached… Another unattractive feature of his evidence was a tendency to blame others for what he knew were his own shortcomings.*
>
> *229. Mr Atkinson was also … an unsatisfactory witness. … His suggestion that he made mental notes was unconvincing. … He accepted that he was almost wholly responsible for the report prepared by SRT on the conference with Mr Steel Q.C. … [He] sought to pretend that SRT did not know why BIS thought it worthwhile instructing their own counsel. Mr Atkinson knew quite well why Mr Steel had been instructed by the Bank. … it was no doubt thought that the truth would be inconvenient. … Mr Atkinson's suggestion … represented an attempt to damage the case against Somatra without regard to the truth.*
>
> *238. [Mr Williams] wrote to Mr Rokison asking for a conference and saying that he understood that he had virtually no time free until early March 1994. Mr Williams … lied to his clients about the availability at a meeting with them on 22 December 1993 when he said that he was "endeavouring to schedule the necessary time after the first of the year." The plain impression created was that he was trying to get time from the leader and that he knew nothing to suggest that time would not be available. … In a fax to Mr Hamilton towards the end of January 1994 he revealed that Mr Rokison's involvement was transitory but implied that he was going to start preparing for trial "from now". The brief fee was structured in tranches but the clients were not told that 2 tranches would have become due and payable before Mr Rokison was actually available to do any work on the case.*

The appellants' submissions

91. The appellants' written submissions run to some 27 paragraphs. It is convenient to deal first with two submissions of principle.

The defence is directed by our insurers through Ince & Co

92. The appellants draw attention to what they say is a fact, and we have no reason to doubt, that the Defence case is financed and run by SRT's professional indemnity underwriters, not by SRT or its partners and that in those circumstances "the directing mind of the litigation" was not Mr Williams. They say, and again we have no reason to doubt, that "the representatives of those underwriters, and counsel and their instructing solicitors, *bona fide* ran SRT's defence on the issue of liability on the strength of the witness statements and their instructions from their insured/clients".

93. In our judgment this submission of principle is misconceived. The order for costs was not made against the legal representatives of the appellants. Power to do so exists under CPR 44.14 but this was not the power which the judge was exercising. It was SRT who were a party to the action and it was against them that the order was made. The reason for making the order was the behaviour of Mr Williams who was one of their partners at the time and (perhaps) of Mr Atkinson. SRT are responsible for what they did, both whilst the retainer was still in existence and during the course of the action. If those two gentlemen misled not only their erstwhile client but also their own legal advisers when they were sued for breach of contract by the client then SRT must still bear the consequence. If SRT had acted for themselves in defending this litigation they would have been liable to such an order as was made. They cannot now shrug off the consequences of their actions because someone else is financing the defence and they have instructed another firm of solicitors to act on SRT's behalf.

Appellants' conduct before the case started

94. The appellants submit that it is not legitimate for an award of costs to reflect the Court's disapproval of Mr Williams' conduct of his retainer before the case started. They accept that the opening words of CPR 44.3(5)(a) indicate that some pre-action conduct – such as failure to follow pre-action protocols - may be relevant but submit that the conduct in question must be related to the action in which the order for costs is made.

95. We do not accept that the words of the Rule should be confined in the way suggested although we would accept that there must be a link between the pre-action conduct and the matters which are the subject of the action. We regard it as permissible, for instance, for a judge whom has found against defendants in an action based on their fraud practiced on the Claimants, to take that fraud into account when deciding the basis of taxation. We are however far from saying that a successful fraud action should usually be accompanied by a special order as to costs. These are matters for the judge's discretion and before he exercises it in such a way as to order a departure from the standard basis of taxation there must be something to take the case out of the usual run of cases.

96. Conduct of the type found in the present case is fortunately highly unusual. It does not appear that the Judge's order for costs was based largely on the defendants' conduct prior to the litigation. It was primarily based on the fact, as the Judge found, that Mr Williams had repeatedly lied to the Court and repeatedly made, and instigated the making by those acting for the defendants in this action, unfounded allegations against the integrity of his own client. While he did refer to conduct during the retainer we do not regard those references as vitiating the order which he made.

Remaining matters

97. In relation to a number of matters, the appellants while accepting that Mr Williams had indeed lied to his own clients, submitted that the lies were "told to cover up a mistake", "attempts to lessen his culpability", "were relatively innocuous" and so on. How significant lies are is a matter for the trial Judge and we are not persuaded that his assessment involved him in any error of law.

98. The appellants submit that the main issue in the case was one of causation and that, although they lost on this issue their conduct in relation to this issue was not such as to justify an unusual order as to costs. In those circumstances, it is submitted, the judge ought to have made the indemnity costs basis applicable to only part of the costs of the litigation. The judge expressly considered this possibility and rejected it. He was entitled so to do in the exercise of his discretion. It might have been different if the relevant allegations of breach had been admitted but they were not.

Conclusion on the Costs Issue

99. We consider that in making the order which he did make the Judge acted within the scope of his discretion and we dismiss the appeal on this ground.

Overall Conclusion

100. The final result is that this appeal will be dismissed.

LORD JUSTICE SCHIEMANN: For the reasons set out in the judgment, which has been handed down, this appeal is dismissed. There is, I think, no need to made any order on the costs appeal.

We have already indicated the result in relation to the application to produce documents and we have handed down our judgments in relation to that as well.

So what remains, as I understand it, is a discussion, if that is the right word, in relation to (a) largely costs and (b) permission to appeal perhaps, I do not know.

MR SYMONS: Yes, and interest on the costs.

LORD JUSTICE SCHIEMANN: Yes. Our position is this today: we have to finish by 10.45, in short 35 minutes. Is there any serious prospect of doing that?

MR SYMONS: Yes. Your Lordships are all very familiar with the Rules and your discretion, and I am not going to address you for hours and hours. Either you are going to be with me or not and, no doubt, I shall get the flavour of that at a fairly early stage.

LORD JUSTICE SCHIEMANN: That is your position.

What is your position, Mr Fenwick?

MR FENWICK: My Lord, we have managed to move on a little bit. I apologise for the fact we were not able to deal substantively with matters, but unfortunately my learned friend's skeleton application only reached us just after 3 o'clock yesterday. I do not criticise him; there was a mix up and these things happen.

LORD JUSTICE TUCKEY: We put you under some pressure too.

MR FENWICK: So, my Lord, we think we can probably deal with most things. There are essentially two issues which are going to take a little bit longer, which are in relation to indemnity costs and interest. I do not propose to address you for more than 15 minutes on those to the extent that I need to do so. The other matters can, I hope, be dealt with relatively swiftly. My Lord, it is certainly worth doing as much as we can today.

LORD JUSTICE SCHIEMANN: Let us start then.

MR SYMONS: My Lord, if your Lordship has the draft order in front of you --

LORD JUSTICE SCHIEMANN: Yes.

MR SYMONS: Paragraph 1 is not controversial. The appeal should be dismissed, as your Lordship has just said.

Paragraphs 2 and 3 ask for payment out of various monies that were paid into court.

LORD JUSTICE SCHIEMANN: Yes.

MR SYMONS: We seek payment out forthwith. The position on the dollars, definitely, is that they are on a month's deposit so they will not be out for a month anyway. On the sterling side, my learned friend thinks they are also on a month's deposit. We are not quite sure about that. None of that matters unless your Lordship is impressed by an application that my learned friend is going to make for permission to go to the House of Lords, together with a stay in the meantime.

Can I deal with it quickly? Never was there a less suitable case for the Lords. The two points that your Lordships decided were on the facts. Your Lordships have decided that the judge below got it right and it is a hopeless application, so we seek payment out of those sums.

LORD JUSTICE SCHIEMANN: Yes.

MR SYMONS: Obviously it goes back now to 1991. It is high time Somatra got their money.

So far as paragraph 4 is concerned, there is no issue that we should have our costs of the appeal. There is an issue as to whether or not we should have indemnity from 17th September.

LORD JUSTICE SCHIEMANN: Yes.

MR SYMONS: That arises out of the correspondence.

LORD JUSTICE SCHIEMANN: We have seen that, of course, and we have read it. We understand the arguments on each side. As I understand it, the first question that arises is as a jolly factual one, namely whether your costs are likely to exceed the shortfall; that is to say, the costs of the trial, is that right?

MR SYMONS: There is an argument as to whether we have beaten £2 million.

LORD JUSTICE SCHIEMANN: That is right.

LORD JUSTICE TUCKEY: Can we just get the maths?

MR SYMONS: Yes.

LORD JUSTICE TUCKEY: On the money judgment, that is the set-off and everything else, am I right in thinking in round terms that you are still due $1.5 million?

MR SYMONS: Correct. There is no dispute about that.

LORD JUSTICE TUCKEY: That is 6 plus 8 -- 6 something plus 8 something. How much is that in pounds?

MR SYMONS: 1 million.

LORD JUSTICE TUCKEY: 1 million, let us say. So you say you beat the 2 million because you anticipate recovering at least £1 million on the taxation of the costs of the trial, adding, if you like, the costs of the appeal, if necessary.

LORD JUSTICE SCHIEMANN: Apart from what has been paid in already. Some has already been paid in relation to the costs of the trial.

MR SYMONS: 3.1 of 6.3 -- 3 million --

LORD JUSTICE SCHIEMANN: So you say it is certain that you will exceed 4.1, or whatever?

MR SYMONS: Exactly. I do not need to go that far because the costs of this appeal, by the time we made that offer, were already half a million or even if you cut that down to 300,000, you are way over the top on any basis. That is the way we put it and we invite your Lordships to remember --

LORD JUSTICE SCHIEMANN: I understand that is the way you put it. Is there anything in principle to prevent this Court saying, when the costs are taxed of the trial below, if they exceed what we call the 1 million, then everything thereafter is on an indemnity basis? I can see the manoeuvre in relation to the initial costs of the appeal, I see that, but is there anything to stop us making a conditional order of that kind and then we can certainty rather than speculation as to --

MR SYMONS: My Lord, that would require the costs judge to tax the original action first, which I would have thought he would probably do anyway, and, provided he was content to do that, which I cannot imagine he would not be, I do not see a problem. My Lord, we think we would be content with that, if your Lordship was not satisfied by that rather brief argument that we are bound to do it anyway.

LORD JUSTICE SCHIEMANN: You feel you do not need to rely on the initial stages of the appeal costs?

MR SYMONS: No, because probably over half the costs below are going to be taxed on an indemnity basis which will make, in a case of this sort, quite a difference. That is why we are so confident that we are going to get up to two-thirds of our costs. Normally you have a good chance of getting to two-thirds without an indemnity order. Then you add in the costs of the first part of this appeal. Then we have interest on the trial costs as well which the judge has ordered to be paid, and so we think that any suggestion we have not beaten this is actually fanciful.

LORD JUSTICE LONGMORE: Yes. But it is not going to be agreed that you beat it is the likelihood.

MR SYMONS: Unless I have been very persuasive and my learned friend says so, I suspect that is right.

LORD JUSTICE LONGMORE: That is why the conditional order sounds quite attractive.

MR SYMONS: Yes. If your Lordships are with us that in the light of that letter, and you will see from our letter we were invited to say what we would receive and then absolutely nothing. It is only in later conversation between counsel that -- your Lordship has the point.

LORD JUSTICE SCHIEMANN: Our current position is that we think Mr Fenwick has a point to answer on that.

MR SYMONS: My Lord, I am obliged.

Can I then turn and, only very briefly, deal with the application which only arises, as I think we say in our skeleton, if you were not with us on the indemnity cost from 17th September. Your Lordships have very much in mind the points that we make on the application.

LORD JUSTICE SCHIEMANN: Yes.

MR SYMONS: There was delay; it was too late, right before the trial; there was misleading correspondence; it was premature because you could not make the order.

LORD JUSTICE SCHIEMANN: Yes.

MR SYMONS: It would have been disruptive, et cetera, so we say even if you are against us on from 17th September, we should have our indemnity costs for that.

Interest on costs: can I deal, first of all, with the principle that we should have those? Your Lordships may recall that the judge below ordered that the defendant pay interest on the costs at 1 per cent over Bank rate, and so my learned friends were very well aware -- SRT were very well aware that was the order that was made there. We say that there is no reason why, since Somatra have been paying costs ever since, that order should not be made again so that on the dates that the money has been paid, from that date we should get interest at 1 per cent over base as an ordinary commercial rate.

So we submit that that is what should happen here, save that we say, for the same reasons as we should get indemnity costs from 17th September, there should be some enhancement of that interest rate on the costs made after that date. We have put forward 5 per cent which is half the extra rate that is mentioned in Part 36, but there is no particular magic in that and obviously that is a matter for your Lordships.

LORD JUSTICE SCHIEMANN: Yes.

MR SYMONS: As far as an interim payment on account of costs, I do not think there is any issue on the principle of that. We have given some evidence that it is £750,000 and we say that 450 would be an appropriate interim payment. It is a matter entirely for your Lordships whether you think that is or is not and I do not need to say anything more about that.

I do not think there is any issue that the bank guarantee should now be released and that requires an order from this Court and then the mechanics can work thereafter.

Paragraph 9, this is really to avoid having to make an application to the costs judge. The assessment --

LORD JUSTICE LONGMORE: Is this contested?

LORD JUSTICE SCHIEMANN: The six months, as I understand it, is not contested in principle?

MR SYMONS: No.

LORD JUSTICE SCHIEMANN: Subject to any appeal.

MR SYMONS: It is Judgment Act interest running anyway. Obviously my clients are very keen to get on with this so that they can get their money and if there is any question of any interest not being due, that is really a matter for the costs judge rather than for this Court. So all we ask is for the extension to six months.

Item 10 is as a result of a slip and we have now had a letter from Inces agreeing to that. It was a mistake and they are content for an order in those terms to be part of the order of this Court.

LORD JUSTICE SCHIEMANN: That is agreed, is it?

MR SYMONS: Really we are arguing about the matters I have identified.

LORD JUSTICE SCHIEMANN: Yes. Thank you. Would it be convenient to deal first with the application for permission to appeal?

MR FENWICK: My Lord, certainly. My Lord, I will make the application very briefly. This is a case in which matters have been decided on the judges' findings. Nevertheless, it is clear from reading your Lordships' judgment that at the root of the end result comes the approach of the trial judge to the issue of the evidence of Mr Domingo which, in itself, raises the question of the weight to be given to evidence where the cloak of privilege hangs half over the material, thus preventing the Court from having any clear picture of it.

If I may say, with respect, it is abundantly clear that your Lordships have been driven to answer the final question on causation as to what Mr Alireza would have done at the meeting with Mr Arditti on 7th April, once the offer of 75 per cent had gone, on the basis which implicitly left open the fact that he would have acted differently and because the Court had already found, or accepted the judge's finding that Mr Domingo would have offered 75 per cent, it is a very short run from there to the answer that Mr Alireza would at least have held on until that offer came.

Therefore, the entire result is predicated on Mr Domingo's evidence and the approach which a court should have to evidence where there has been a failure to disclose material which is privileged so that the Court does not have a view. It is matter which arises not just in this sort of case, but also in cases where a claimant or defendant asserts that it would or would not have done certain things, but then says, "Yes, we did take legal advice, but that legal advice is privileged" and the Court has to take a view. There is a question there of general public importance which goes beyond the factual matter.

My Lord, that is the matter which distinguishes it. Other than that, I would merely invite your Lordships to consider whether we should have leave or whether any application which on mature consideration we want to make should be left to their Lordships' House.

LORD JUSTICE SCHIEMANN: Thank you. No, we are not going to give permission. We are not persuaded that such a great point of principle arises. It seems to us a very fact specific case. So application for permission to appeal refused.

The next matter?

MR FENWICK: My Lord, the next issue, which I hope is not an issue, is in relation to the payments of money out. My Lord, the position, as we have been able to discover it from Miss Sharon Springer of the Court Funds Office, the two amounts of money which are in court are held in a one-month call account. Our understanding is that the next rollover date is 24th November which would mean that instructions to take it off that would have to come between 17th and 19th November.

I say that because I have not been able to ascertain for myself or directly -- those responsible for conduct being all away at Ince & Co this week, so we have been doing our best -- whether there is in fact some way that if we hammered on the door we could

get it out in the next 24 hours, because plainly, today not being quite 24th October, there must be some theoretical possibility. Knowing the way the Court Funds Office works, it seems to me unlikely that could be done. I do not seek any stay beyond 24th November.

What I would invite your Lordships to order, to short-circuit it, that the amount should be paid out of court and paid to the claimant by 25th November which is immediately following that rollover date.

LORD JUSTICE SCHIEMANN: I see the force of that, yes.

MR FENWICK: My Lord, I do not know whether you want me to deal with everything else or whether -- I am not sure there is much in it and whether my learned friend wants to --

LORD JUSTICE SCHIEMANN: Shall we deal with them one by one? It might be convenient.

Are you content with 25th November?

MR SYMONS: My Lord, we want this money out as soon as we can. If my friend is right, then he has the month. If he is wrong, then we will get it before and we should get it before.

LORD JUSTICE SCHIEMANN: When you say, "The month", the rollover date, as I understand it, comes at a specific day each month and --

MR SYMONS: If that is right, then he has his protection for a month, but --

LORD JUSTICE SCHIEMANN: He says that there is a theoretical possibility that in the next 18 hours, or something, if something is done, it could be prevented from rolling over. You would be in favour of that. He says --

MR SYMONS: My Lord, yes. If there was the slightest prospect of him getting permission to go to the House of Lords, one might be sympathetic.

LORD JUSTICE TUCKEY: He is not asking for that here. I think he is not asking for the stay on that. He is simply saying, "You make an order by 25th November and we will get it to you when we can".

MR SYMONS: It is in court so it is just a question of when we can get it out of court. It may be that it will be 25th November, but what my friend is asking for is that we do not do anything to get it out before that date so that he can either go to the House of Lords, or whatever.

LORD JUSTICE SCHIEMANN: Is that right? I understood you to take the view that as soon as it can be got out, you are content, but you just in practice do not think it can be done until 25th November?

MR FENWICK: No, my Lord, I probably did not make myself clear. Because of the difficulty I have in taking instructions at the moment fully, if the money could have come out today I would have been asking for a short period of time to consider our position to make such applications we thought appropriate.

LORD JUSTICE SCHIEMANN: I see, yes.

MR FENWICK: I cannot take such instructions today. I suspect that even if it could be taken out today, it would be at the penalty of the last month's interest, which is a significant account of money, because that is what tends to happen if you take things out suddenly. In my submission, the monies are protected. They are in court. They are protected by the rate of interest to which they are entitled and justice would -- in circumstances where it is quite plain that, perfectly understandably, once these monies are released they will go and they will be released to the shareholders of ABT, but that period of time is proportionate and reasonable.

LORD JUSTICE SCHIEMANN: We are content to order that the payments out be made by 25th November.

MR FENWICK: My Lord, I am very grateful.

My Lord, the next issue is the question of the costs. I obviously do not resist costs on the standard basis of either the appeal or the application. I do resist the ordering of indemnity costs on either.

My Lord, the position so far as the Part 36 letter is concerned is that it is, in substance, an offer to compromise the costs which have not yet been -- and, as your Lordships have heard, my learned friend wants a further six months before putting in his bill of costs --

LORD JUSTICE SCHIEMANN: What do you say to our suggestion of, as it were, a condition -- assuming that we take the view, which you may want to argue against, and I think you do argue against, but if we feel that in principle, if they can show that their existing costs, if taxed on an indemnity basis, the costs of the trial will exceed the 1 million which we have adopted

for the purpose of this discussion, which would need to be more finely formulated, if we take the view that that in principle is a fair order to make in these circumstances, is that mechanism not a sensible one to adopt?

MR FENWICK: My Lord, that deals with the second point. My understanding is that we do not accept they have unnecessarily beat it. I have not been involved in any way in that process of assessment, but, my Lord, it would seem to us reasonable that if you are against me in principle, the order should be essentially on the lines that in the event that the costs judge makes an order, the combined effect of which is that the sums receivable by them as at 17th September would be greater than whatever the number is, 9.8 million, then they should have their costs on an indemnity basis from that date.

LORD JUSTICE SCHIEMANN: Right.

MR FENWICK: Costs of the appeal. My Lord, that deals with the question of practicality.

LORD JUSTICE SCHIEMANN: Yes.

MR FENWICK: The issue of a principle: my Lord, there are two Court of Appeal authorities which we have referred to.

LORD JUSTICE SCHIEMANN: You have passed them down, but it would be right to say I am afraid I have not had a chance to work my way through more than one of them.

LORD JUSTICE TUCKEY: They establish that -- without having considered the particular situation we have here -- an offer which includes costs is not a Part 36 offer because Part 36.14 says -- this is one of the reasons anyway -- that if you accept an offer, you are entitled to tax your costs and that does not square with an offer which includes costs. Therefore, if you are right about that, we are still into 44.3, are we not?

MR FENWICK: We are still into 44.3, yes. My Lord, the Court of Appeal have said on two separate occasions that an offer which includes costs is for good reason not intended by the draftsman and should not be construed as being a Part 36 offer, so that one has then to look at --

LORD JUSTICE SCHIEMANN: We are down to general discretion, yes.

MR FENWICK: My Lord, yes. If that is not accepted, and I can show your Lordship the two judgments which say that in terms. In both cases it is the judgment of Lord Justice Peter Gibson and if that --

LORD JUSTICE SCHIEMANN: Assume you are right on all that and we are not in 36 territory, we are in Court's discretion territory --

MR FENWICK: Then we are in the position where the Master of the Rolls -- Lord Woolf, I think, actually post-Master of the Rolls days. Lord Woolf, in any event, indicated there must be something more. Your Lordships will have recollected the way the cases went from Lord Justice Simon Brown's some kind of moral condemnation through to simply being something more. I have rehearsed all those arguments, albeit on paper, in relation to the application on indemnity costs.

My Lord, something has to be identified here which is something more. Nothing has been identified and nothing, in my submission, could be identified in circumstances where an appeal has been brought, with leave of this Court, after a very full hearing of the application for leave. This is not an appeal which it has been suggested, nor could be suggested, has been brought in some way unreasonably or --

LORD JUSTICE TUCKEY: Otherwise you would have faced an application on indemnity costs throughout.

MR FENWICK: Exactly.

LORD JUSTICE TUCKEY: The argument is about the offer.

MR FENWICK: The argument is about the offer.

LORD JUSTICE LONGMORE: It is an appeal really that cried out really for being settled on reasonable terms.

MR FENWICK: My Lord, yes. The question is whether it can be settled on reasonable terms and prospects.

LORD JUSTICE SCHIEMANN: If the position be that the indemnity costs of the first action exceed the 1 million shortfall, leave aside the costs of the appeal, should the appeal not have been settled on that basis?

MR FENWICK: My Lord, no, for two reasons. First of all, the courts should not be looking at cases where the parties, or certainly the paying party, cannot be clear as to the extent to which there is going to be a surplus. These are very, very large sums of money spent in costs, in circumstances where we know that Mr Alireza had a hands-on attitude to litigation which may not necessarily reflect itself in an order for the recovery of costs inter partes, their costs being, I think, something like near to twice those of the defendants.

In those circumstances, where all the knowledge of the size of the costs is within the receiving party, to force a party to settle on the terms of that offer, because all your Lordship is concerned with is not whether some other deal could have been made but whether there was something wrong, something out of the ordinary in declining this offer which is an offer which may be one which would have resulted in a reduction of 5 or 10 per cent on the ultimate sums payable, as against, if the appeal had been successful, a rather different outcome, because not only would nothing have been payable, but, in addition, of course, all our costs would have been recoverable.

My Lord, to say that for 5 or 10 per cent a party should settle, what your Lordship would then be finding is that in any case where a non-compliant offer is made, if in fact that offer would have been an offer which would have succeeded, or it would have been favourable, then they should not merely pay the costs but they should pay it on the indemnity basis. Therefore, what your Lordships would be doing would be giving a Part 36 effect to something which does not have a Part 36 effect by deliberate intention of the draftsman.

My Lord, it cannot be right, as a matter of principle, that this Court should say that even where Part 36 does not apply, just because this is a case which for pragmatic reasons cried out for settlement, should have been settled at a figure which is, we would say, above, but certainly on any view pretty close to what the ultimate recovery will be in circumstances where the actual answer is dependent upon what has been spent in costs which we are, by definition, not in a position to know.

For those reasons your Lordships would be making an error and may I put this into context: we are talking here about a period between 17th September and the end of this appeal a week ago. My Lord, it would be wholly wrong, in my submission, to make a finding which gave rise to the conclusion that this Court was prepared to endorse indemnity cost offers for offers which were not accepted but which would have been marginally more favourable for the amount at stake in this case. It is wrong in principle and certainly making such a change, and it would be a change -- it would be a novel departure for this Court -- would not be justified by the effect. Effectively what your Lordships would be doing is saying, "Right, each time there is a non-compliant offer, if a party thinks that it has done marginally better, it should apply for indemnity costs anyway, say to the Court, 'Well, this cried out for settlement'" --

LORD JUSTICE SCHIEMANN: I follow. Before you sit down, Mr Symons, do you concede that strictly speaking Part 36 does not apply?

MR SYMONS: My Lord, yes. When we made the offer --

LORD JUSTICE TUCKEY: I think you made that --

LORD JUSTICE SCHIEMANN: You do concede it?

MR SYMONS: We made that concession straightaway because for the obvious reason that it is a case where you want to have a global settlement.

LORD JUSTICE SCHIEMANN: We can proceed on the basis which you have been proceeding on.

MR FENWICK: My Lord, I do not know whether your Lordships want me to deal with the application at the same time so you can deal with all aspects of indemnity costs, or whether you would like to do it step-by-step?

LORD JUSTICE SCHIEMANN: I think probably step-by-step.

Tell us what you say to those arguments, Mr Symons?

MR SYMONS: My Lord, the real argument here is it was far too difficulty for us to know whether that was an appropriate figure of settlement because it all depended on costs, but unfortunately, from my learned friend's point of view, that is not what was said.

LORD JUSTICE SCHIEMANN: That was the second point he made and, if you like, you can deal with it now, but the first one was that the rules or the practice is that there needs to be something unusual about the conduct in going on with the appeal. Here you accept that the appeal as such -- it failed, but it was a sensible appeal as such. What is the something more which brings you into the indemnity costs bracket?

MR SYMONS: My Lord, may I just, first of all, slightly dodge that. What the rules say is that the Court must have regard to any offers that have been made in considering what orders they make in relation to costs. My Lord, what happened here, as your Lordship will have seen, there was a suggestion made by my learned friend's clients following Lord Justice Waller's remarks at the permission stage that it obviously be sensible for a settlement to be considered. We were invited to put forward a figure. We did exactly that and far from actually responding within the time permitted by the rules and as suggested in that letter, they made absolutely no response at all. Had they come back and said, "We would be keen to settle this case on the right

terms, but at the moment it is quite impossible for us to know what the costs position is and maybe we can talk about that", but absolutely no response at all.

LORD JUSTICE SCHIEMANN: Are you saying there is in a way a parallel to the type of situation where the Court suggests mediation and a party simply refuses to go anywhere near it?

MR SYMONS: If the courts are going to take any notice at all of offers, then it is open to a litigant to say, "I am just not interested", but there is a price to be paid for that and the courts, in my respectful submission, should look upon that sort of attitude, which was the attitude we had here, badly and they should as a result of that be penalised in costs.

LORD JUSTICE SCHIEMANN: That is your answer to the first point?

MR SYMONS: Yes.

LORD JUSTICE SCHIEMANN: The second point, when I rather stopped you, namely that they were not to know what you are going to get on the indemnity taxation of your costs below because all the cards are in your hands.

MR SYMONS: My Lord, that would be an immensely attractive submission if they had come back with request to clarify the position or to say, "We do not accept your figures. We do not accept that that is right. We are prepared to enter into negotiations, but it will have to be on this basis or that basis". It is no good my learned friend coming here now and saying, "It was all too difficult for this reason". The fact is they decided not to enter into settlement discussions of any sort.

LORD JUSTICE LONGMORE: The same point again really in answer to both points?

MR SYMONS: I am afraid it is, yes.

LORD JUSTICE LONGMORE: A wall of silence is the answer, gives you both the special feature which justifies the order and also disposes of the fact that the answer is you cannot know what the figures are.

MR SYMONS: That is right. If one just glances at the letters, it is made perfectly apparent that they have made absolutely no response and then say, "We have nothing to say. We have no counsel present at all". My Lord, we just say that is not good enough.

LORD JUSTICE SCHIEMANN: Those are your points on that. I think we ought to retire for a moment.

(Short break)

LORD JUSTICE SCHIEMANN: We have come to the view, bearing in mind that permission had been granted for the bringing of this appeal, that it would be right to order that costs be ordered on a standard basis, rather than an indemnity basis, notwithstanding the lack of response to an offer which had been made by the other side. It is rather sad there was no response, even if a negative response, but we take the view that you would be entitled to say, "I am sorry, we want to have our day in court".

Costs will be on a standard basis, the costs of the appeal. That makes it necessary to consider the next matter which is the application. You say that ought to be on an indemnity basis?

MR SYMONS: Yes. On the basis we have set out in our skeleton. It was made at the last moment, completely hopeless we would say. It was premature and we rely on the unreasonableness and the manner in which that was made. It disrupted the preparation for the trial. The way the matter was dealt with was misleading for the reasons Lord Justice Tuckey or I think the Court made in their judgment and, as I say, for all the reasons that we have set out in our skeleton, we say this is an appropriate matter for indemnity costs.

LORD JUSTICE SCHIEMANN: Thank you. No, we take the view that this too should be taxed on a standard basis.

MR SYMONS: I am obliged.

MR FENWICK: My Lord, I think I have to carry on a little longer?

LORD JUSTICE SCHIEMANN: Yes.

MR FENWICK: My Lord, the next question is the question of interest on costs. My Lord, there is a tension between what are now three decisions at first instance and the approach taken by this Court to questions of interest on costs. If I can summarise it in this way: starting with Mr Justice Jacob, followed by Mr Justice Laddie and by Mr Justice Morrison in this case, it was decided on the facts, costs and duration of the relevant cases that it would be appropriate to use the new power which had been introduced into the rules at 44.3(6)(g), "Interest on costs from or until a certain date, including a date before judgment", to make an order for costs from effectively the date of payment of individual invoices.

My Lord, that --

LORD JUSTICE LONGMORE: The judge made that order here.

MR FENWICK: Yes.

LORD JUSTICE LONGMORE: Are you appealing that?

MR FENWICK: No, my Lord, I am not. I am bound to say it was not something which came to my attention until quite recently.

LORD JUSTICE TUCKEY: You have cited three decisions, but I bet every day nowadays in the Commercial Court interest is being awarded on costs. After all, the parties have to fund their litigation and litigation of this kind -- not of this kind in particular, but litigation in the Commercial Court is about money and why should they not have interest on it?

MR FENWICK: My Lord, I understand the point, of course, because it is a point which was struck any practitioner over a period of time.

LORD JUSTICE TUCKEY: That was why it was no doubt introduced into the rules.

MR FENWICK: No, my Lord, with respect, that is not what this Court has said. The position was that under Section 17 of the Judgments Act 1883, I think, from recollection, interest on costs run at judgment rate from judgment and not before. The amendment was made and the rules were included at the time of the introduction of Part 36 which, of course, specifically allows a court to give it.

My Lord, the important thing is this: what Lord Justice Chadwick said in McPhilemy, which your Lordship had -- I do not know whether you did bring bundle 14 as invited. It is bundle 14, tab 28, a very short paragraph which I can read out if your Lordship does not have it, page 129 of the bundle, McPhilemy of course being one of the core Part 36 cases, paragraph 23, Lord Justice Chadwick says there:

"Nor do I see any injustice, in principle, in an order under paragraph (3)(b) of rule 36.21 for the payment of interest on the costs which are the subject of the order which I would make under paragraph (3)(a). The purpose for which the power to order interest on cost under that paragraph is conferred is, I think, plain. It is to redress, in a case to which rule 36.21 applies, the element of perceived unfairness which arises from the general rule that interest is not allowed on costs paid before judgment: see Hunt v RM Douglas (Roofing) Ltd. So, in the ordinary case, the successful claimant who has made payments to his own solicitor on account of costs in advance of the trial will be out of pocket even if he obtains, at the trial, an order for costs on an indemnity basis. He will get interest on his costs from the date of the order (whether he has actually paid them or not); but he will get nothing to compensate him for the cost of money (or the loss of the use of money) which he has had to bear before trial in relation to payments which he has made on account of costs. An order under paragraph (3)(b) of rule 36.21 enables the court to achieve a fairer result in that respect. But, having regard to the point which, as it seems to me, paragraph (3)(b) is intended to meet, I would order payment of interest at a rate which reflects (albeit generously) the cost of money, say, 4 per cent over base rate; and I would direct that interest runs, on the costs to which the order applies, from the date upon which the work was done or liability for disbursements was incurred."

My Lord, it is important to read that --

LORD JUSTICE SCHIEMANN: That is concerned with order 36. We are not in order 36 territory, are we?

MR FENWICK: No, my Lord, but that is the basis. What Lord Justice Chadwick is there doing in this judgment is drawing attention to the difference between the ordinary case which applies the old rules under Hunt v Douglas (Roofing) and Part 36 where this provision is intended to redress the case which my Lord, Lord Justice Tuckey, has illustrated.

LORD JUSTICE LONGMORE: So it is in Part 44.

MR FENWICK: Yes, but if your Lordships look at page 874 which is 36.21 of the White Book --

LORD JUSTICE SCHIEMANN: I am just trying to see whether Lord Justice Chadwick had in mind the provisions of 44.3(6)(g) when he made those comments. There is no particular reason he should have.

MR FENWICK: My Lord, the irony, in a sense, is that it is not clear whether McPhilemy -- I do not think McPhilemy was referred to before either Mr Justice Laddie or Mr Justice Morrison for this purpose, but 36.21, at page 874, says this, at 36.21(3): "The court may also order that the claimant is entitled to (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer...; and (b) interest on those costs at a rate not exceeding 10 per cent above base rate."

LORD JUSTICE SCHIEMANN: That is a penal rate, is it not?

MR FENWICK: That is the penal rate, but it is interest on those costs so it is particularly refers to costs post the offer, not the generality of what a case is.

My Lord, what we say is this: certainly Lord Justice Chadwick and this court had in mind that the purpose of that is not a penal rate; it is the cost of money, and Lord Justice Chadwick has explained it as being to redress the injustice which my Lord, Lord Justice Tuckey, has referred to which arises in the ordinary case.

My Lord, I do not rule out, because I do not need to argue it here and there is no appeal on the point, that where you have a very long and expensive case and it is appropriate to order payment of costs for an earlier date, and I have in mind also what would have happened in this case if the claimants had lost at first instance in this court and won in the House of Lords. It might well have been said they should get interest on their costs from at least the date of the first hearing, rather than from the date of the final judgment which awarded them their costs. That could have been done under Part 44.3(5)(g), but, my Lord, what we say is, even if it is possible in an exceptional case, it should not have become the general rule because as soon as it does become the general rule, first of all it impinges on Part 36, but, secondly, it creates a much more complicated and novel situation. Courts will be asked on every occasion and it will, indeed, probably be a breach of duty not to ask for interest on costs. What the taxing master will then have to do is this: he will not only have to assess the amount which is recoverable under the bill with interest to run from one specific date, but in respect of each bill he will have to assess the amount claimed as against the amount found to be due and order interest on that amount. So if there is an interim bill delivered and paid, and there may be a whole series of them during the course of the trial, it will be necessary to assess each set of costs separately in order to allow the interest to be paid.

LORD JUSTICE SCHIEMANN: He has to do that anyhow, has he not, simply as part of the taxing exercise or assessment?

MR FENWICK: My Lord, you do not have to break it down necessarily in that way, particularly when you are looking at applying uplift to hourly rates. I know my Lord, Lord Justice Longmore, will have it in mind in relation to another matter. When one is looking at the assessment of costs, it is necessary to look at the costs globally at the end of the assessment. If one then has to go back to each period and say, "Right, in that period the bill delivered £100,000, how much are we allowing, not overall but in respect of that period? £85,000", and then calculate the interest.

So we say this should not be the norm and, in particular, in an appeal which has been of relatively short duration of time, this is not an appropriate case for it to be the exception.

My Lord, if your Lordships are against us, we say there are two rates knocking about, so to speak. Probably the one which is most prevalent is the one found by Lord Justice Chadwick in McPhilemy of 4 per cent. There are others at 2 per cent.

LORD JUSTICE TUCKEY: I think you are giving it away there because those are 36 rates. You are not into that territory because you won that point.

MR FENWICK: I do not have to argue because I won it.

LORD JUSTICE SCHIEMANN: I suspect it is 1 per cent above base rate which is what they got below.

MR FENWICK: I do not argue 1 per cent above base rate. Your Lordship is quite right, I am trying to go too quickly.

LORD JUSTICE LONGMORE: Yes.

LORD JUSTICE SCHIEMANN: What is being asked for is interest from the dates of the client paying the solicitor?

MR SYMONS: Exactly, and exactly what the learned judge did below.

LORD JUSTICE SCHIEMANN: Yes. We think it right that interest should be payable, but at the rate of 1 per cent above base rate of the Bank of England from the date of payment of the invoices rendered to the respondent.

I think the rest of the draft of 6 now goes, does it not?

MR SYMONS: That is right.

LORD JUSTICE SCHIEMANN: I think it does, does it not?

MR SYMONS: It will be Judgment Act rate thereafter in the normal way.

LORD JUSTICE SCHIEMANN: After today's judgment?

MR SYMONS: Yes, so that will have to go, but obviously the 5 per cent goes, yes.

MR FENWICK: My Lord, may I ask, because no doubt others will ask this question, whether your Lordships make that finding simpliciter without adding anything to it or on the facts of this case or on the general principle? It may be your Lordships wish to say nothing about it.

LORD JUSTICE SCHIEMANN: You are concerned to produce guidance for the profession, it is a bit difficult for us to do that in the circumstances under which we are operating.

LORD JUSTICE TUCKEY: The order is simply made under the provisions of 44.3(6)(g).

MR FENWICK: My Lord, I am grateful.

LORD JUSTICE TUCKEY: Which gives that power.

MR FENWICK: My Lord, I think the last question which is therefore contentious is the further interim payment on account of costs: where an order for indemnity costs on part of the hearing was made, the amount ordered by way of interim payment was a little under 50 per cent.

LORD JUSTICE SCHIEMANN: Which part of the draft is this?

MR FENWICK: Paragraph 7.

LORD JUSTICE SCHIEMANN: Yes.

MR FENWICK: My Lord, we say that a conservative figure of a little under 50 per cent would again be appropriate here and we invite you to order, say, £350,000. There is no objection in principle. Matters of amount are matters for this Court, but they are fairly large sums.

LORD JUSTICE SCHIEMANN: Any counter-offer?

MR SYMONS: You can see the two figures and I shall leave it to your Lordships.

LORD JUSTICE SCHIEMANN: Thank you. I think that is an invitation. 400,000.

Is there anything else outstanding?

MR SYMONS: My Lord, I think that is all. Thank you.

LORD JUSTICE SCHIEMANN: Could you draw up an order for us to sign, or your juniors?

MR SYMONS: We will certainly do that.

My Lord, may we just say, this side of the Bar, how much we appreciate the fact that you produced this judgment so quickly.

LORD JUSTICE SCHIEMANN: Thank you very much indeed.

MR FENWICK: My Lord, and allowing us to finish the argument this morning, despite keeping you too late.

JUSTIN FENWICK Esq QC, STEPHEN MALES Esq QC, Miss REBECCA SABBEN-CLARE and DANIEL SHAPIRO Esq (instructed by Ince & Co) for the Appellant

CHRISTOPHER SYMONS Esq QC, SIMON RAINEY Esq QC and MARK CANNON Esq (instructed by Herbert Smith) for the Respondent