JUDGMENT : Mr Nicholas Davidson QC, sitting as a Deputy Judge of the Ch.Div : 19th August 2004

1. This judgment deals with the costs of this matter. Following the substantive decision ([2004] EWHC 1732 (Ch)) the appropriate course appeared to be to make orders the main effect of which would be to restore the property (85 Burdett Row, Bow, London) to Refined Properties Ltd. It was not necessary to make any order which would result in the second respondent, Mr Ippocratous, having to pay any money.

2. In the course of the hearing immediately after the handing down of the judgment it became clear that there was not in Court all the correspondence relevant to the costs decision. A hearing to deal with that and other matters was arranged. At that hearing, I said that, in order to ensure that all matters which needed to be dealt with could be argued that day, I would reserve this judgment rather than taking time delivering an oral one.

3. The foundations for decision are that the decision as to costs is a discretionary one, that the general rule where the Court decides to make an order about costs is that costs will follow the event (CPR rule 44.3 (1) and (2)), and the "overriding objective". In taking my decision I must have regard to all the circumstances, and rule 44.3 continues:

   (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;
   (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
   (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

   (Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part.)

   (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;
   (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

4. Mr Watson, for Mrs Gil, argues that she has been the successful party against the second Respondent, Mr Ippocratous, and the fifth and sixth Respondents, Messrs. Lupson, and that the circumstances do not make any order other than that they pay the costs of the proceedings appropriate. Mr Collingwood, for Mr Ippocratous, argues that his client is not to be regarded as having lost. Mr Blaker, for Messrs. Lupson, accepts that the event is defeat for his clients, but argues that there are several circumstances militating against an order for costs against his clients. Mr Blaker made his submissions under five headings, which in his words were:
   i) the findings against the Lupsons and their peripheral role in the factual scenario;
   ii) the fact that the Lupsons were only ever brought into the proceedings as mortgagees of the property;
   iii) the fact that the Lupsons made an offer to settle the claim early on in the proceedings;
   iv) the conduct of the litigation as carried out by the applicant's solicitors;
   v) the applicant's own conduct towards the Lupsons in these proceedings and also in allied Queen's Bench proceedings.

5. It is convenient to use Mr Blaker's framework. As will become apparent, when I look at the case as a whole there are three circumstances - the level of costs in comparison to the sum at stake, the approach to settlement, and fabrication of evidence - which appear to me very important. Other matters might or might not have seemed important in a different context, but with those I will deal only briefly because of my view that they should not have significant impact in the actual context.

6. As to Mr Blaker's first two points, it is correct that the Lupsons' role in the factual scenario was peripheral and that they were only brought in as mortgagees; and that my findings as to their own good faith, in paragraph 181 of the substantive judgment, were favourable to them. However, their role in the litigation was not peripheral; and they defended the case and lost. They were defending in order to defend their position as mortgagees. It is their misfortune to have lost because of the role

played by Mr Lewis. I add that, while it is true that the Application did not specifically claim costs against them, Mr Blaker fairly conceded that his clients did not litigate under any belief that costs would not be claimed against them if Mrs Gil succeeded as against them.

7. I deal next with the general conduct of this litigation.

8. The correspondence file shows Messrs. Balsara & Co. as acting for Mrs Gil for a period until she served notice of acting in person on 25 February 2003. Although they seem to have been somewhat confused as to who was acting for whom for what purposes, and this was a nuisance, this does not seem to me a matter of any significance for costs purposes.

9. While she was acting in person Mrs Gil showed no awareness of the need to communicate with solicitors for opposing parties. This did make life difficult for MacLeish Littlestone Cowan, solicitors for the Lupsons. She did not in fact reply to any of their letters in this period, writing only when on 14 July 2003 she informed them that she had appointed Goldkorn Mathias Gentle & Co. to act for her in the proceedings, which they have done ever since. I do not doubt that Mrs Gil's non-co-operation increased costs, to the extent that MacLeish LIttlestone Cowan had to do more than they would have done if she had answered letters, but the impact of this is minimal in the context of this litigation.

10. Goldkorn Mathias Gentle & Co. entered the correspondence on 16 July 2003. Criticisms are thereafter made by Mr Blaker of (I paraphrase) a lack of focus in their approach, difficulty over the instruction of the single joint expert, disclosure, approach to an application under s.151 of the Companies Act, and preparation of trial bundles, and I have read the correspondence about this. Of these, disclosure should have been dealt with earlier, and the trial bundles were late, but I do not consider that these matters should impact on the costs decision.

11. These matters of general conduct have therefore not influenced my decision. The matters of importance to the costs decision are the correspondence about settlement (which did not, contrary to Mr Blaker's headings, include an offer to settle), and conduct referred to below.

12. When Goldkorn Mathias Gentle & Co. wrote to them introducing themselves, MacLeish Littlestone Cowan replied on 23 July 2003, largely about procedural matters, and the last paragraph of this letter was as follows: *"Our clients are owed a very considerable sum of money secured over this property and are anxious and indeed entitled to realise their security. It is also, in our view, in all parties' interests - including your client's - that any sale of the property is at the best obtainable price possible. That would necessitate vacant possession. We write to enquire, therefore, whether if an up-to-date present valuation of the property (with vacant possession) can be agreed, would your client vacate to facilitate a sale by our clients as mortgagees in possession, on terms that any net proceeds of sale are paid into court to abide the outcome of your client's alleged Claim(s) against Refined/Baygreen/Mr Ippocratous etc? ..."*

As Mr Watson, for Mrs Gil, points out, this did not offer Mrs Gil anything. It would have ended a tempestuous time of occupation of the property, but provided no immediate or certain payment to Mrs Gil, and on one interpretation of "net proceeds" involved the Lupsons receiving payment and leaving the others to argue. On 25 July Goldkorn Mathias Gentle & Co. tried to make progress by writing to MacLeish Littlestone Cowan asking for the maximum possible information about the transactions which had led to the Lupsons being mortgagees of the property. They also wrote a letter to Mr Lewis (copied to MacLeish Littlestone Cowan) seeking information about such matters.

13. The correspondence continued and on 29 July Goldkorn Mathias Gentle & Co.'s letter alerted MacLeish Littlestone Cowan to the fact that Mrs Gil was now funded by the Legal Services Commission. The temperature rose somewhat, particularly when on 31 July MacLeish Littlestone Cowan described Mrs Gil as a conspiracy theorist, her allegations as absurd, and her monetary claims as ridiculous.

14. However, on 31 July they also wrote "***Without prejudice save as to costs***". They overstated the position when they said *"We have raised with you before the possibility of settlement and a sale of the property ..."*

The latter had been raised, the former not in correspondence that I have seen. But, while reserving the right to make representations to the Legal Services Commission, they did discuss the possibility of settlement: *"The purpose of this letter, however, is to explore whether there is any commercial way forward in this case, particularly now since you tell us your client is in receipt of Legal Aid..."*

I do not set out the full terms of the letter, but the theme of the following paragraphs was that, it was said, even if Mrs Gil succeeded against others she would not get the mortgage set aside. The writer continued:

"We do not know the figures, but we expect that the difference in value of this property with vacant possession and with your client remaining in occupation as a (assured) tenant is significant. Should the property be sold by our clients as mortgagees in possession with Mrs Gil "in situ" it may e.g. only be sold for £175k, whereas with vacant possession the property could, say, be worth £300k. We do not know without valuation(s) but if there would be enough to discharge our clients' mortgage and costs and to pay something to your client for her to leave the property then - with the agreement of the Liquidator of Baygreen Ltd at least and presumably with the approbation of the court - this must surely be worth exploring. It seems to us that this is the only way that there is ever going to be anything for Mrs Gil to satisfy her outstanding Judgment, but perhaps this is not what your client is after.

"Is there a sum which your client would be prepared to accept in order to vacate the property to facilitate a sale at the best possible price, with vacant possession and to give up her claims?"

15. This, despite all the emphasis of the writer's view of the strength of the Lupsons' position, was a constructive move. It recognised that commercial factors might influence a settlement; it recognised that public funding was a factor; it opened up the possibility of a settlement between the Lupsons and Mrs Gil, rather than just the possibility of the restoration of the property to Refined.

16. As against that, first, this was not an offer of settlement. There was no commitment to pay anything at all.

17. Second, Mr Watson submits that the letter was to be read, and I think he suggests that it was read, as showing an absolute and permanent refusal to settle on any terms save that the Lupsons were paid in full. I do not think that it was to be read in that way. Clearly, the Lupsons' position was that they were not at that stage prepared to offer to settle on a basis which would not see them paid in full. Although that was a strong view, the reference to the commercial aspects of the case appears to me to suggest that the Lupsons would be prepared to engage in rational discussion about settlement as an alternative to litigation: if the parties identified past and future costs of the litigation and thought about their (widely differing) views of the merits, settlement might follow.

18. Third, neither this letter nor the accompanying open letter explained the series of transactions, as distinct from asserting the Lupsons' innocence.

19. On 6th August 2003 there was a telephone discussion between solicitors. Any differences between the attendance notes seem to me unimportant for present purposes. When taken with Goldkorn Mathias Gentle & Co.'s letters of that date, one sees that Mrs Gil was not prepared to make an offer without the provision of further information, and MacLeish Littlestone Cowan were not going to be helpful about providing it. The information particularly sought was (1) "the document showing the agents' advice" (not that it had been stated that such a document existed, which it did not) and (2) "Evidence that the money was in fact advanced and in fact (to the extent that it was) repaid." The presence or absence of such information was material to evaluating the strength of the Lupsons' case. Goldkorn Mathias Gentle & Co. added that "We are puzzled by the extent of the loans provided by your clients bearing in mind the purchase price was £86,500."

20. The correspondence thereafter tended to generate heat. Goldkorn Mathias Gentle & Co. protested about the absence of information about the circumstances of the Baygreen loan. MacLeish Littlestone Cowan wrote in strong terms about the aggressive litigation from Mrs Gil, who had by August started further proceedings in the Queen's Bench Division claiming damages from the Lupsons, and they threatened that the Attorney-General might be asked to make application for a civil proceedings order against her under s.42 of the Supreme Court Act 1981. The correspondence was strong, and reflected

frustration at being faced by an opponent who was bringing more than one set of proceedings and, at least when acting in person, causing more costs and inconvenience than she may have realised.

21. The correspondence and telephone conversation around the date of 6 August 2003 represents the totality of the efforts shown to me to resolve this litigation - what may have happened on a fully "without prejudice" basis I do not know. It was not suggested to me that anything showed willingness on the part of Mrs Gil to explore settlement (even by offering to enter fully "without prejudice" discussion). Mr Watson submits that she is not to be criticised, given that he says that the letter of 31 July absolutely excluded the possibility of the Lupsons agreeing to a reasonable settlement (a submission I have rejected above) and the non-provision of the information requested.

22. That the known efforts to settle should have been so short is unfortunate. I asked for information as to how much has been spent on this litigation since August 6, 2003. I am told that the applicant's costs since that date are £135,000. The Lupsons' are £114,000. Figures from Mr Ippocratous' solicitors could not be provided in time, but his counsel's fees are £15,000. All these figures are approximate, and include VAT. Thus the known costs are about £264,000, and it is reasonable to suppose that when the costs of Mr Ippocratous' solicitors are added in the total expenditure since August 6, 2003, has been of the order of £300,000. It is striking to compare that with the judgment obtained by Mrs Gil against Refined, which was for £44,673.23 plus £750 costs. The active parties have spent an enormous sum on costs, in the year since the talk of settlement, a sum which is also, in rough terms, 6 times the amount of the value (with interest) of the judgment which Mrs Gil had obtained. It is of course well known that costs of proceedings which go to trial can frequently exceed the sum at stake. What these figures emphasise is the desirability of the parties being aware of the costs likely to be incurred if they go to trial, and of searching for an early settlement if reasonably capable of achievement. Apart from the fact that the parties under-estimated the length of trial, I am not aware that anything major incurred to make the costs after 6 August 2003 substantially higher than would have been predicted at that date. As with ***Lownds v. The Home Office (Practice Note)*** [2002] EWCA Civ 365 [2002] 1 WLR 2450, this was a case where an assessment at the outset (and in this case, at the beginning of August 2003 when fresh solicitors became involved) of the likely value of the claim and its importance and complexity would have produced (and if it was undertaken no doubt did produce) a recognition that the case could easily result in disproportionate costs being incurred: see para. 23 of that judgment at [2002] 1 W.L.R. 2455 for the desirability of that assessment.

23. In remarking on the lack of proportionality, I do not overlook the importance of the case to Mrs Gil. Even allowing for the fact that before the sale Refined would probably not have been able to pay all its creditors in full had she then had a judgment for that sum, the sum for which she recovered judgment was very large for her. Neither do I overlook that *"... the courts must set their faces against transactions which are designed to prevent plaintiffs in proceedings, creditors with unimpeachable debts, from obtaining the remedies by way of execution that the law would normally allow them ..."* (per Scott J. In ***Arbuthnot Leasing international Ltd v. Havelet Leasing Ltd (no. 2)*** [1990] B.C.C. 636 at p.645). These considerations of the importance to the applicant of obtaining a remedy still leave it appropriate to consider the likely cost of taking the proceedings to trial and what the financial objective is, and the likely disproportionality in this case was such as to be striking.

24. The Lupsons' approach was a timely one, made when contact was resumed, after a period of non-communication from Mrs Gil, on the appointment of solicitors. I do not consider that Mrs Gil responded appropriately to the Lupsons' approach, and, because of the likely future costs, the omission to respond appropriately was serious. It was entirely sensible to press for information about the circumstances of the Lupsons' loan and mortgage, but the absence of satisfactory evidence of that did not preclude either Mrs Gil stating what sum would satisfy her or embarking on negotiation - the absence of information which one would expect would be readily available if one's opponent's case were sound is often a powerful negotiating weapon. And while the Lupsons' then position was that they were not looking for a settlement which involved their being out of pocket, I do not consider that they had closed the door to that as a possibility if it could be shown that they faced a litigation risk. I consider that Mrs Gil should reasonably have said that she would in principle be willing to settle for a

payment direct to her; indicated a starting point - no doubt by reference to the judgment sum; pointed out that the absence of documentation supporting the Lupsons' lending decision and/or evidencing the making of the loan gave her a strong hand; and been willing to make some attempt to settle the case before the major costs, which could be foreseen and would be likely to make settlement more difficult as they were incurred, were incurred.

25. It is unlikely, but not wholly impossible, that a settlement would have been achieved. On the Lupsons' side, the correspondence being sent by MacLeish Littlestone Cowan was frequently very aggressive, and, whatever their views and advice to their clients were, showed no overt recognition of the risks to their clients - though their attendance note of the 6 August 2003 conversation records the writer saying that ... "Mr Lewis said that he was told by Refined's solicitors that there was a property going cheap in Burdett Road", which is an indication that perhaps it was not "ridiculous" (a word frequently used by that firm) that Mrs Gil was suggesting that the property had been sold at an undervalue. However (1) the correspondence does indicate that the commercial reality of the litigation was in the Lupsons' minds (2) the fact that Mrs Gil was publicly funded affected the commercial reality and clearly impacted on the Lupsons (3) I am entirely satisfied, having seen Mr Peter Lupson in the witness box, that he would have had a commercial approach to the litigation and would have reacted sensibly to coherent advice about it. I am also satisfied that Mr John Lupson would have gone along with Mr Peter Lupson's view.

26. On Mrs Gil's side it would initially have been difficult for Goldkorn Mathias Gentle & Co. as they were new to the case, but they would have been able to explain the costs forecast, the risks, and the duty to the Legal Services Commission. The real difficulty would have been with Mrs Gil. Her reaction to the talk of settlement, of earlier disputes, in September 1999 is not encouraging. When on 23 September 1999 Mr Antoniades was commending an approach to settle he said that he had explained that *"... if you exaggerate your claim, there is a risk that the judge will simply not believe any of the evidence given by you whatsoever."* Mrs Gil did not moderate her demands: her tactic seems to have been to claim the maximum and see what happened. She did attend the meeting with Mr Ippocratous, which is positive, but of moderation there is no sign. Her strong feelings and her lack of moderation would have been powerful factors against settlement of the present litigation, but the Lupsons might have made an offer designed to force reporting of it to the Legal Services Commission, and to create the risk of withdrawal of public funding should she refuse. That would not necessarily end the case - Mrs Gil had been prepared to act in person and was to do so in other proceedings - but might have assisted the process of developing willingness to settle.

27. There would also have been the difficulty that the parties would have wanted to try to establish sensible arrangements as to the continued occupation of, or vacant possession of, the property. Nonetheless, my assessment is as stated: it is unlikely, but not wholly impossible, that there would have been a settlement.

28. I have gone into this question at considerable length because it is one of the factors which I take into account as an important factor in considering all the circumstances of the case. I emphasise that I am not looking at it in isolation from other factors, nor do I indicate that any particular costs result would have followed if this had been the only factor argued about costs. There is another important factor: the fabrication of evidence by the party who declined the invitation to "name her price".

29. My substantive judgment refers to the difficulties of the evidence in the case, and they are not all on one side. One, however, stands out as different in quality from the others, and that is Mrs Gil's fabrication of what on its face purports to be a letter from her, dated 5 October 1999, to *"Director, Calvary Ministries, USA, P.O. Box 34741, Philadelphia, P.A. 19101, USA"*. As I said in that judgment, in concluding that this document was a much later fabrication I ignored the fact that in later proceedings against the Lupsons (Case HQ03X02527) His Honour Judge Peter Clark held, on 19 January 2004, that the Claimant had fabricated evidence ([2004] EWHC 79 (Qb)). In relation to documents produced to evidence her hospitalisation, he held (para. 11) that she had produced (1) a genuine appointment letter (2) a document purporting to be a letter from the London Chest Hospital, dated 29th October 2003, which he was not persuaded was authentic and which had "all the hallmarks of having been

manufactured", and (3) a document also purporting to be from that hospital, which was unsigned and about which the claimant told what the Judge held to be a wholly improbable story. He ended that paragraph "I reject that evidence as being fabricated", and rejected her story.

30. As I indicated in the course of argument, I would expect questions of Mrs Gil's behaviour in other proceedings to be dealt with in the costs orders made in those proceedings, not in these. However, in evaluating her conduct in fabricating a document for these proceedings, and in deciding how to respond to it, it is relevant that this is not the first time she has been held to have fabricated *"evidence"*. There is nothing to show that she herself recognises the pernicious effects of such behaviour.

31. Fabrication of "evidence" is of course part of the circumstances of the case, specifically of course part of the conduct and mentioned as part of "the manner in which a party has pursued ... [her] case …", here, her direct case that Mr Ippocratous said that: *"... he would look to a way to dispose of the Property in order to escape any liability arising from my claim."*

32. It is not in my opinion necessary or desirable in this particular case to treat either the fabrication of evidence or the failure to engage in negotiation separately for costs purposes. It is true that a core issue was what Mr Ippocratous said, and much time was given to that (and its surrounding documents). But the total extra time at trial caused by the fabrication may perhaps only have been half to a full day. My view is that it is not simply the fairly modest prolongation of the trial that matters, but Mrs Gil's conduct of the proceedings, showing itself in the fabrication and the failure to respond to constructive proposals, which are two aspects of what appears to have been a "Win at all costs" attitude on her part.

33. In reaching my decision I do have regard to all the circumstances. I do not consider that ***Halsey v. Milton Keynes General NHS Trust*** [2004] EWCA Civ 576, which was cited to me particularly to demonstrate that it is for an unsuccessful party to show that and why costs should not simply follow the event (see paras. 12 and 13), requires either any particular decision or that I approach the decision otherwise than as I have. Since the oral hearing I have read ***Reed Executive plc v. Reed Business Information Ltd*** [2004] EWCA Civ 887, and again I consider my approach to be consistent with that case.

34. So far as concerns Mr Ippocratous, he has defended proceedings in circumstances in which he has lost to the important extent that I have found (1) that he did cause Refined to sell at an undervalue and (2) that in so doing he was to a legally significant extent motivated by the wish to prevent Mrs Gil benefiting if she obtained, as she later did, a substantial judgment. His opponent, however, fabricated documentary "evidence" in order to support a claim based on direct evidence (as opposed to inference), and so far as it was based on direct evidence the claim failed and some time was taken on it. Further, although on one possible outcome Mr Ippocratous might have been required to pay money, he was in the event not so required, and that he should do so was not the outcome for which Mrs Gil appeared principally to be contending. I decided, and told the parties at the hearing, that there should be no order for costs against him save that he and the Lupsons should pay the applicant's costs of obtaining the valuation evidence.

35. So far as concerns the Lupsons, they lost. They lost in a case in which the underlying matter was a transaction whose relevant motivation included the motivation to render the obtaining of a judgment worthless. They too, were faced by the opponent who fabricated "evidence" and was not deterred from relying on it by a previous High Court decision that she had fabricated evidence. The Lupsons did show timely willingness to negotiate and seek a commercial settlement, even though they did not make an offer as such and even though much of the correspondence on their behalf was increasing rather than reducing the heat. Their opponent pressed on. They are asked by the applicant to pay not only their own costs but also a bill for costs several times the underlying sum at stake.

36. It seems to me appropriate to make an order for costs in the applicant's favour, but desirable to make an order which, taking account of all the circumstances (1) has regard to the likely financial outcome for the claimant and (2) makes a substantial impact on her by showing that fabrication of documents

will be reflected in costs, particularly in this case in which the unwillingness to negotiate, before costs escalated rapidly and by many times the sum at stake, was inappropriate.

37. I have considered whether I can order that the claimant should recover her costs save that after her costs have been assessed there should be a deduction of a specified sum. When I raised this with Counsel they suggested that I might instead make an order giving the claimant a proportion of her costs, an order of a type specifically mentioned under rule 44.3(6)(a). My view is that rules 44.3(1) and (2), particularly, paragraphs 44.3(1)(b) and 44.3(2)(b), enable me to take the course which I suggested, which enables me to relate the decision more clearly than would otherwise be the case to the value of the judgment against Refined which is close to the centre of these proceedings, as well as to the costs figures themselves. This conclusion is reinforced by the fact that rule 44.3.(6) identifies seven types of order as included among the orders which the court may make, but does not suggest that the list is exhaustive. My conclusion is that the Lupsons should pay Mrs Gil's costs of the proceedings, to be the subject of detailed assessment if not agreed, less, after assessment, the sum of £20,000.

38. Lastly, at the conclusion of the hearing I refused the Lupsons' application for permission to appeal against the substantive judgment. They may or may not renew their application to the Court of Appeal. I said, and for convenience record here that I said, that should they do so, should they be granted permission to appeal, and should the Court of Appeal draw attention to the possibility of mediation of an appeal, I for my part would encourage the parties in those circumstances to consider mediation. The costs figures that I have mentioned show what the financial consequences of the pursuit to the end of the disputes arising in connection with 85 Burdett Road can be.