Before Mr Stewart Hunter (Chairman), Mrs Linda Elliot, Mr Jeff Cohen Sitting at the Allesley Hotel, Coventry on 17th May 2005.

DECISION

An application by the Respondents for a Costs Order against the Appellants pursuant to Regulation 24 of the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002 ("The Regulations").

REPRESENTATION

The Commission were represented by Mr Michael Curtis of Counsel, instructed by Messrs Bevan Brittan, of 35 Colston Avenue, Bristol, BS1 4TL.

The Applicants were represented by Mr Paul Spencer of Counsel, instructed by Messrs Alsters Kelley, of 1 Manor Terrace, Friars Road, Coventry, CV1 2NU.

BACKGROUND

1. The Applicants were joint proprietors of 2 small care homes situated at 1-3 Canberra Road and 359 Aldermans Green Road, Coventry and Mrs L Gibson was the registered manager of 1-3 Canberra Road.

2. On the 15th January 2004 the Commission issued notices cancelling the Applicants registrations, on the grounds set out in Section 14 (1) (c) of the Care Standards Act 2000, indicating that Regulations 4,5,12,13,14,15,16,17 and 19 of the Care Homes Regulations 2001 had not been complied with.

3. On the 4th February 2004 the Applicants appealed against their cancellations. Their appeals were heard between the 20th September 2004 and 1st October 2004. At the appeal hearing the Applicants were represented by Dr Richard Fairburn a Director of Care Professional Consultancy Limited.

4. During the course of the appeal hearing, Mrs Gibson withdrew her appeal against the cancellation of her registration as the registered manager of the care home at 1-3 Canberra Road.

5. The Tribunal dismissed the Applicants' appeals in respect of their registration as joint proprietors of the two care homes. In paragraph 64 of their decisions, dated 25th October 2004, the Tribunal stated as follows:-

   "In summary we do not consider that either Mr or Mrs Gibson presents the necessary competence and skills needed to carry on as registered proprietors of a care home in accordance with the Regulations, nor for the reasons set out do we have any confidence that the deficiencies that we have identified could be put right within a reasonable time, if at all".

6. The Respondents now make an application for costs, their application being dated 5th November 2004. The president of the Tribunal gave directions on 11th November 2004 requiring the Respondents to file a Statement in support of its application and the Applicants to file representations in accordance with Regulation 24 (2) (a).

   The Respondents filed their Statement of Reasons, together with a Schedule of Costs totally some £115,003.71. The Applicants filed outline submissions and a response, plus providing details of the Applicants financial standing, with some supporting documentation.

THE LAW

7. Regulation 24 (1) states as follows:-

   "Subject to Regulation 31 and to paragraph (2) below, if in the opinion of the Tribunal a party has acted unreasonably in bringing of conducting the proceedings, it may make an order (a Costs Order) requiring that party (the paying party) to make a payment to the other party (the receiving party) to cover costs incurred by the receiving party."

   Section (2) of Regulation 24 goes on to say:-

   "Before making a Costs Order against a party, the Tribunal must:-

   (a) Invite the receiving party to provide the Tribunal with a Schedule of Costs incurred by him in respect of the proceedings; and

   (b) Invite representations from the paying party and consider any representations he makes, consider whether he is able to comply with such an order and consider any relevant information he has provided".

8. It is also relevant in the context of these proceedings to consider Regulation 33(1).
"If the Applicant at any time notifies the secretary in writing or states at a hearing that he no longer wishes to pursue the proceedings, the president, the nominated chairman (or at the hearing the Tribunal) must dismiss the proceedings and may subject to Regulation 24 make a Costs Order".

9. It appears to the Tribunal that these Regulations effectively create a three part process., Firstly the Tribunal has to determine whether a party has acted unreasonably in bringing or conducting the proceedings, If it concludes that it has so acted, then the Tribunal must give consideration as to whether or not to make a Costs Order, but before doing so consider any written representations from the paying party including whether he is able to comply with the Costs Order".

10. What does the term "proceedings" mean in Regulation 24 (1)? As the section refers to the bringing or conducting "of the proceedings", it clearly covers more than just the hearing itself and we accept Mr Curtis's submission that "the proceedings begin when the appeal is initiated.

In **Funcamps Limited v Ofsted** [2003] 124.EY, the President, in looking at the meaning of Regulation 24 (1) stated "Costs can only be awarded in my view from the date when the proceedings start" and we intend to follow that approach.

However, in order to determine whether a party has acted unreasonably in bringing the proceedings it may be necessary to look at their conduct before the start of the proceedings.

11. What is the appropriate test when determining whether a party has acted unreasonably or not? This is not a jurisdiction where costs follow the event, as already stated Regulation 24 sets out the conditions that needs to be met before a Costs Order can be made. It now seems well established as a result of earlier CST decisions, **Dr R A Fairburn v NCSC** [2202] 78NC and the Funcamps case, that the test is "a high one" with the burden being on the receiving party.

THE APPLICATION

12. In this case the Respondent effectively puts forward their application under four headings and we propose to consider each such heading individually. In so doing, whilst noting that Mr and Mrs Gibson were joint Applicants, it must be right when considering conduct in the context of a costs application to look at their individual actions.

13 (1) *"The Appellants raised and pursued irrelevant issues concerned with procedure and statistics, shut their eyes to the substance of the case against them and brought and conducted their appeal in a way that meant that they had no realistic prospect of success".*

The Respondents in their costs application made reference to the appeals having "no realistic prospect of success" (this is set out for example at paragraph 76.3 and 82 of the Respondent's submission) and therefore by implication had acted unreasonably in bringing the proceedings. The Respondents submission being largely based on the contention that had the Applicants read the evidence earlier and more carefully, they would have realised that their appeals were unlikely to succeed. Whereas, they had maintained from the outset, that they were not in breach of any of the regulations.

14. It is clearly important that any party embarking on an appeal understands and considers carefully the reasons for the action taken by the regulator. Then, as part of their appeal set out their response, bearing in mind the issues to be determined by the Tribunal.

However, in our view the fact that in this case the Applicants were clearly in breach of the regulations, did not by itself automatically mean that their appeals could not succeed. It would we consider have been possible, given the improvements that had been made in the running of the homes, for the Applicants to have presented a coherent, workable and realistic action plan to the Tribunal, so that the appeals might have been successful, at least to the point where the Applicants registrations were allowed to continue subject to conditions. Therefore we do not consider it unreasonable for the Applicants to have brought these appeals.

15. We now turn to the conduct of the appeals. The Respondents in their application make a number of submissions, which can perhaps for convenience be summarised as follows:-

- The taking of irrelevant procedures and technical points.

- The production of unnecessary statistical analysis.
- Failure to acknowledge breaches of the regulations and indicating what parts of the Respondent's factual case was in dispute.
- Failure of the Applicants to have read the Respondent's Witness Statements.
- Failure to submit a realistic action plan.

16. What can amount to unreasonable conduct?

Whilst the matter has been considered in other cases there does not appear to be a "one fits all" definition. In our view that is inevitable and appropriate, as each case will be different, and unreasonable conduct must relate to the facts and circumstances of each particular case.

17. In looking in more detail at the points raised by the Respondents:-

It is correct to say that in response to the Respondents' Notice of Proposal to Cancel the Applicants registration, Dr Fairburn wrote a lengthy response dated 24th November 2003, containing passages on "The Convention Rights" and the significance of the National Minimum Standards as against the Regulations. This may have been indicative of certain misunderstandings by Dr Fairburn and indeed he made similar points later in the proceedings, for example in his letter of 25th May 2004. Nevertheless we do not consider that the making of irrelevant submissions in the overall context of this case amounts to unreasonable conduct.

18. Similarly "the production of unnecessary statistical analysis" whilst undoubtedly causing the Respondents some additional work in deciding how to respond, it did not in our view play a significant part in the proceedings and again we come to the conclusion that this issue by itself, is not one that can be categorised as unreasonable conduct.

19. What did cause considerable extra work and delay, both in terms of the Respondents' preparation of their own case, but also in relation to the hearing itself, was the failure of the Applicants from the outset, to indicate what part of the case against them they disputed. The Tribunal are aware that in many cases Applicants are unrepresented and do not always have the resources available to Respondents. Therefore in every case a detailed response to every point raised against an Applicant is perhaps an unreasonable expectation and in some situations may even be unnecessary. However, in this case the Applicants, who were represented, simply denied that they were in breach of any of the regulations. In their grounds of appeal the Applicants stated:-
"That on a proper construction of the Care Home Regulations 2001, the Appellants were not and are not in any breach of the regulations and that there were not and are not any or sufficient grounds for cancellation of their registrations".

And
"that the evidence presented by the Respondent does not amount to sustainable evidence of such breaches …."

20. On the basis of this assertion it is perhaps not surprising that the Respondents filed several lengthy detailed witness statements, particularly from their inspection officers dealing with all the breaches of the regulations that were alleged against the Applicants. In addition the inspection reports themselves and the notes on which they were prepared were also produced. The Tribunal bundle was in excess of 3,000 pages.

21. The burden of proof in this case lay with the Respondents and was is for them to substantiate the allegations made against the Applicants. Nevertheless despite several requests to Dr Fairburn to set out which parts of the case were in dispute, no indication was forthcoming. The Respondents were not helped by the witness statements from the Applicants themselves, at least in relation to whether breaches of the regulations were acknowledged or not. Although it is fair to say, that the statements did give some indication of the improvements said to have been made by the Applicants, in the running of the homes.

22. Notwithstanding the lack of details in the grounds of appeal and the Applicants witness statements, the Tribunal would not have sought to prevent the Applicants challenging the Respondents' evidence, by cross examination of the Applicants witnesses to try and establish that the Applicants had not breached the regulations. This did not happen, and it quickly became apparent at the hearing that

there was little if anything of the Respondents factual case that the Applicants disputed. The Applicants must have been aware of this from the outset, the inspection reports having been sent to them, and yet they not only denied breaches of the regulations in their grounds of appeal, but refused to indicate in answer to questions from the Respondents, what they disputed. The result was that the Respondents were forced to spend considerable time and resources in preparing their case, a significant amount of which was ultimately unnecessary. In addition the Respondents called more witnesses than would probably have been the case, had the Applicants been straight forward from the outset. As a result the hearing took a great deal longer than it needed to have done. In those circumstances we consider that this aspect of the Appellants conduct of the proceedings was unreasonable.

23. The Applicants failed to provide an action plan prior to the start of the hearing, . when an action plan was eventually produced involving a Mr Robertson, it was quickly shown to be unworkable. The lack of a credible action plan clearly weakened the Applicants case and presented some difficulties for the Respondent and the Tribunal, but in itself we do not consider this to be unreasonable conduct.

24. The final component under this heading was the failure of the Applicants to have read the Respondent's witness statements prior to the hearing. It is unclear why this was the case and no explanation was put forward in the Applicants in their response to this application. It is difficult to see how Dr Fairburn could be in a position to cross examine and challenge the Respondents' evidence, without the Applicants having understood what was being alleged against them. Whilst in the case of the Respondents' inspectors' evidence it could be said that this was contained in their inspection reports, this was certainly not true of other witnesses. The witness statements in question consisted of over 200 pages. When it was discovered that the Applicants had not read them, the Tribunal had little option but to adjourn the hearing for a day to enable this to happen. We conclude that this was unreasonable conduct on behalf of both Applicants in the conduct of their appeal.

25. In relation to the points raised by the Respondent under this heading the Applicants submitted, that in the Tribunal decision dated 25th October 2004 the Tribunal made no findings of "unreasonableness" against the Applicants.

    There a number of references in the decision to some of the conduct referred to by the Respondents, for example in paragraph 62 the Tribunal commented on the fact that neither Mr nor Mrs Gibson had read the witness statements and the truthfulness of some of Mrs Gibson's evidence was also referred to at paragraph 62 of the decision. However, we do not consider that it is necessary for a Tribunal to make findings of unreasonable conduct in relation to the actions of any party. The issues that the Tribunal had to determine in this case were those pertinent to the decision the Tribunal was required to make under Section 21 of the Care Standards Act 2000.

    The question of unreasonable conduct in the context of a costs application falls to be determined under paragraph 24 of the regulations. Whilst what happened during the proceedings and at the Tribunal hearing are clearly relevant, is not in our view necessary for there to have been a specific reference to this in the Tribunal order, for unreasonable conduct to be established. Moreover Section 24 envisaged a situation where "the paying party" can make representations after the substantive hearing and before a costs order is made.

26. We should also deal at this point with Mrs Gibson's withdrawal of her appeal against the cancellation of her registration as the manager of 1- 3 Canberra Road, partway through the hearing. Section 33(1) of the regulations states that:-
    "If the Applicant at any time notifies the secretary in writing or states at a hearing that he no longer wishes to pursue the proceedings, the President or the nominated Chairman (or at the hearing the Tribunal) must dismiss the proceedings and may subject to Regulation 24 make a costs order".

    The reference to Regulation 24, must logically and we accept Mr Curtis's submissions on this point, be construed in accordance with the whole of Regulation 24 not just those parts of Regulation 24 which are expressly referred to in Regulation 33 itself. Accordingly the test must still be whether that party has acted unreasonably in bringing or conducting the proceedings.

The withdrawal by Mrs Gibson of this part of her appeal was in essence because she was unable to challenge the Respondents' evidence concerning the breach of the relevant regulations. We do not consider this to be additional unreasonable conduct on Mrs Gibson's part, but rather that it forms part of the unreasonable conduct we have already identified in relation to the failure to indicate which part of the Respondents' evidence was disputed, together with a failure to read the witness statements, thereby understanding what was being said against her.

27. The second ground put forward by the Respondents was that *"the Applicants were dishonest in their pursuit of the appeal. Their dishonesty was central in the issues in this appeal".*

28. The Tribunal found Mrs Gibson to be an unreliable witness, the reasons for which are set out in some detail at paragraph 62 of the Tribunal's decision. In the case of Lisa Gibson working at ASDA this was particularly blatant, given the conflict between the evidence Mrs Gibson gave at the hearing as against that contained in her witness statement and also the fact that she was looking after Lisa's child at the time Lisa was working at ASDA.

There will always be circumstances where witnesses interpret a set of facts differently and the Tribunal prefers one version of events to another. We would not wish parties to be inhibited in conducting their case, or challenging the other party's evidence, even if their own version of events was ultimately not accepted. However, in the circumstances of this case we are satisfied that Mrs Gibson deliberately set out to deceive the Tribunal by lying about her knowledge of Lisa working. This in turn cast doubts as to the truthfulness of other parts of her evidence as the Tribunal set out in paragraph 62 of its decision.

29. Again Mrs Gibson's response to this application gave no indication as to why or how this happened. We conclude that Mrs Gibson did act unreasonably in conducting the proceedings in this regard.

30. As far as Mr Gibson is concerned, whilst we found at paragraph 61 that he did administer medication without receiving appropriate training and did assist service users to bath/shower, we do not regard his evidence in these matters as being as blatantly dishonest as Mrs Gibson's, and to that extent we do not consider on this issue that he can be said to have acted unreasonably in the context of regulation 24.

31. The Respondents allege that*" the Applicants failed to respond constructively to the Respondents attempts to resolve this appeal in a manner that accorded with the interest of the existing service users and with the general public interest".*

32. This submission is effectively based on the failure of the Applicants to accept offers to settle the appeal made by the Respondents and also to attend a meeting.

33. On the 18th May 2004 the solicitors acting for the Respondents wrote to Dr Fairburn proposing an adjournment of the Applicants appeal for 6 months, to see if improvements could be maintained in the running of the homes. This was on the basis that care would only be provided for the service users in situ at the time. This was rejected by Dr Fairburn in a letter of 20th May 2004.

34. Another offer was made by the Respondents via their solicitors on 15th July 2004 following the withdrawal of Ms Lisa Gibson's appeal. This offer provided for the resolution of the appeal subject to certain conditions. This was rejected by Dr Fairburn in a letter dated 22nd July 2004. That letter included the phrase:-
"I confess that on present information I would have some difficulty in advising my clients to withdraw their appeals in favour of a regime of weekly raids of their premises which would bound to cause upset to all including the residents whether they are justified or not".

The Applicants indicated in their response to this application that they were advised by Dr Fairburn that they had good grounds of appeal and that they should reject the offers and pursue their appeals.

35. It is right to say that within the jurisdiction of this Tribunal there is no regime akin to Part 36 of the Civil Procedure Rules in terms of settling cases. Therefore the fact that if the Applicants had accepted either of the offers, they would ultimately have done better than they did at the hearing, is perhaps not relevant in relation to costs orders. However, we accept that in certain cases the rejection of offers

could be deemed unreasonable conduct and we were referred to the Employment Appeals Tribunal case of **Kopel v Safeway Stores Plc** [2003]1LR753, where the Appellant's case was described as "frankly ludicrous".

That is not the case here and whilst with hindsight the Applicants might have been better advised to accept one of the offers, we do not consider their conduct in refusing them to be unreasonable, particularly as both offers contain conditions which the Applicants appear to have believed would have impacted on the future viability of the care homes.

36. However, the Respondents solicitors letter of 5th July 2004 in addition to making an offer of settlement, also suggested a round table meeting to try and take matters forward. This was at a time before a great deal of the Respondents preparatory work for the appeal hearing had been completed. Dr Fairburn in his letter of 27th July stated:-

"For the sake of clarity I would see no merit in considering a meeting at this present point in time".

Again there is no mediation built into this appeal process nor is there any requirement that either party has to attend the meeting. Indeed in some cases there may be good reasons why a meeting might be inappropriate. However, in this particular case, in circumstances where the Applicants challenge to the Respondents case was still unclear and where proposals to settle were on the table, it does appear to have been unreasonable on the part of the Applicants simply to refuse to attend the meeting. Even if the meeting had not resulted in a settlement, at the very least it could have served to narrow the issues, thereby reducing the length of the hearing and saving substantial time and costs.

37. The Respondents final submission was that "**Dr Fairburn was incompetent and conducted the appeals unreasonably. The Applicants are responsible for his conduct**"

38. The substance of this ground relates to the apparent failure of Dr Fairburn to take the Applicants instructions on the Respondents witness statements and then to cross examine witnesses in those circumstances. Further that he raised "*a host of procedural points which the Respondents were forced to address*".

39. The letterhead used by Dr Fairburn was that of Care Professional Consultancy Limited, he is described on that letterhead as being a Director of that company. He places the following letters after his name:- "*LLB, LLM, BSc, MB, Bs, DMS, MCMI*".

In his opening letter to the Respondent dated the 3rd November 2003 he states:-
"As well as being a consultant and legal advisor to care providers, I am a registered provider of a domiciliary care agency in Suffolk".

40. It would appear that Dr Fairburn may have a law degree, but is not a qualified solicitor or barrister. At the hearing of this application the Tribunal were told by the Mr Spencer that the Applicants had first become aware of Dr Fairburn as a result of a leaflet being received by them.

41. We have already determined that the conduct of the Appellants in not having read the Respondents' witness statements was unreasonable. As far as the technical points taken by Dr Fairburn are concerned, we already expressed the view that those by themselves on balance did not amount to unreasonable conduct of the proceedings by the Applicants.

42. There is no provision in this jurisdiction for wasted cost orders against representatives. The Applicants in response to this application give no indication of the circumstances surrounding their failure to read the witness statements. Dr Fairburn has not had an opportunity to set out his version of events. Therefore we consider it inappropriate to make a finding against him, in addition to the comments we have already made regarding the witness statements.

43. There is also the connected question relating to the basis on which the appeals were presented and the denial until a very late stage, that the Applicants were in breach of any regulations, we have found this conduct to be unreasonable.

The Applicants in their response to this application stated:-
"Dr Fairburn inspected the Appellants' premises prior to this appeal and informed them that they satisfied the requirements of the Regulations and the Standards".

If that is correct, then the Tribunal's Decision of 25th October 2004 clearly indicated that Dr Fairburn was wrong to have reached that conclusion. However, Dr Fairburn has not had an opportunity to respond and in those circumstances and for the reasons already stated, we do not propose to make an additional findings on this point.

44. The point was also made in the Applicants' submissions, that given Dr Fairburn's view of the Applicants' compliance with the Regulations and Standards:-
"The Appellants properly formed the view that they had good prospect of success in pursuing their appeal".

The Tribunal were not privy to any written advice given by Dr Fairburn to his clients on the merits of their appeal or how it should be conducted, in the event that the advice he gave was negligent then there may be other avenues open to the Applicants.

45. The Applicants take the point, in response to this particular ground of the Respondents' submissions and effectively in relation to all the Respondents grounds, that they relied upon Dr Fairburn, he having held himself out as having expertise in this particular area and in those circumstances the Applicants themselves should not be liable for a costs order.

46. The Applicants provided no authority for the proposition that a party can avoid a cost order in this or indeed any jurisdiction, by simply saying it was "not my fault it was my representative". It is true that in other jurisdictions powers exist to make "wasted costs orders" but that does not apply here. In our view it cannot be correct that a receiving party is left with no effective remedy where there has been unreasonable conduct to the proceedings by a party's representative. It should also be borne in mind, that it has already been established that the test in making costs order pursuant to Regulation 24 is a "high one". Therefore parties who behave reasonably have nothing to fear. This is not a jurisdiction where costs follow the event.

It may be that there are only a limited number of representatives, lawyers or others who have expertise in the area covered by this Tribunal. It is important therefore that Applicants make appropriate enquiries before instructing a particular representative.

In this case having considered the Tribunal's original findings and the advice that they were or were not given by Dr Fairburn the Applicants may decide to seek advice as to whether or not they have any claim against Dr Fairburn. However, for the purposes of this costs application we are of the view that the Applicants cannot, where there has been a finding of unreasonable conduct "hide behind" Dr Fairburn.

47. The Respondents raise in this application the costs of the applications dealt with at the telephone hearing on Friday 3rd September 2004.

The hearing was to deal with applications by the Applicants dated 23rd and 24th August 2004 requesting disclosure of various documentation from the Respondent. The Respondents themselves also made an application dated 1st September 2004 in which they sought disclosure from the Applicants. In the event the nominated chairman gave directions requiring the Applicants to supply the documents the Respondents were seeking, but also that the Respondents should supply some but not all of the documents being sought by the Applicants. In those circumstances we do not find any unreasonable conduct on behalf of the Applicants.

48. We have however determined that there was unreasonable conduct in a number of areas. In particular the failure of the Applicants to indicate what part of the Respondents' case was in dispute, the failure of the Applicants to attend a meeting with the Respondents, the Applicants failure to have read the Respondents' Witness Statements prior to the hearing and Mrs Gibson's untruthful evidence at the hearing.

That being the case, consideration needs to be given as to whether a costs order should be made, Regulation 24 (1) given the Tribunal a discretion.

49. In the employment case of **McPherson v BNP Paribas** [2004] 3ALLER266 Mummery LJ said in the Court of Appeal:-

"In my judgement rule 14(1) does not impose any such casual requirement in the exercise of the discretion. The principal of relevance means that the Tribunal must have regards to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion……."

The nature of the unreasonable conduct in this case we have already set out in some detail. The gravity in relation to the way the appeal was conducted was that the Applicants persisted in denying any breach to the regulations until almost the end of the proceedings and the fact that they had not read the Respondents' witness statements was a serious omission. The effect of this conduct, as well as not attending the proposed meeting with the Respondents, was that the hearing lasted considerably longer than it should have done and the Respondents were put to unnecessary time and expense. As for Mrs Gibson misleading the Tribunal that speaks for itself, and brought into question the truthfulness of other crucial parts of her evidence. Therefore having considered all the relevant factors we are minded to make a costs order.

50. However before doing so we are required to consider, pursuant to Regulation 24(2), whether the Applicants will be able to comply with such an order and any relevant information they have provided. In this case we have a schedule from the Applicants giving details of their income from trading, Mr Gibson's pension and a schedule of properties and the income derived from those properties

In the written submissions to this application it was stated on behalf of the Applicants that *"they have no more that a modest income and savings and the only assets they have are property, and a sale would have to be effected to meet any costs order imposed"*

At the hearing it was said by Mr Spencer, that the Applicants could have difficulty in complying with an order of £100,000, but £25,000 could be managed. The schedule of assets indicated that the Applicants own 7 properties. We accept that they need somewhere to live and that the service users remain in some of the accommodation, nevertheless there is an overall net equity of sum £187,082. It is not for the Tribunal to say how money should or could be raised, but we are satisfied that the Applicants could comply with a costs order.

51. Regulation 24 (3) indicates the different costs orders that can be made. We proposed to make an award under Regulation 24 (3) (c). In the McPherson case the Court of Appeal decided that it was not impermissible for a Tribunal to order costs without confining them to the costs attributable to the unreasonable conduct.

In this case given the type of unreasonable conduct that we have identified, we do propose to take into account how that conduct may have impacted on the Respondents' costs, without attempting to precisely align each and every element of those costs.

52. The Respondents provided a schedule of their costs, helpfully breaking it down into a number of different time periods. We have taken sections 1-4 of their schedule as being work carried out by the Respondents in responding to the appeal and preparing for the hearing. We consider that a considerable amount of this work would have been necessary in any event, despite the Applicants conduct. It would for example have been necessary to set out the nature of the breaches of the regulations even if they had been admitted to by the Applicants, so that the Tribunal were aware of the history and seriousness of those breaches. We consider that 10% of these costs should be paid by the Applicants.

We also considered Section 5 of the Schedule which concerned the work undertaken and the costs incurred by the Respondents during the hearing of the appeals themselves. Clearly time was wasted, by the Applicants needing to read the Respondent's witness statements, amounting to one day. The hearing in total lasted some 9 days taking into account the day wasted in reading the statements. We consider that this was a case capable of being dealt with in 5 days had it been conducted reasonable by the Applicants. Some of the Respondents' witnesses might still have needed to have been called, the Applicants would probably have given evidence themselves, and therefore we propose that the Applicants should be responsible for 4/9th's of the costs set out in Section 5 of the Respondents' schedule.

53. In terms of the work carried out by the Respondent since the hearing, in particular the costs relating to this costs application in our view the same test of reasonableness must apply. It cannot be the case that the Applicants were unreasonable in contesting the Respondents application, we propose to make no order in relation to this element of the Respondents' bill.

54. We have considered the position of both Mr and Mrs Gibson separately, particularly in view of Mrs Gibson's untruthfulness in giving part of her evidence. Nevertheless that was only one factor in our reaching an overall conclusion that the Applicants had acted unreasonably in conducting these proceedings. Therefore the costs order will be made against both Applicants.

55. As to how the costs are to be assessed, given that it will be necessary to look at the totality of the Bill of Costs in order to determine the proportions to be paid by the Applicants, we consider that the assessments should be carried out in the County Court where there is considerable expertise in these matters. That does not mean that this should happen in all cases, where perhaps the sums involved are relatively small or the case is less complicated than in this particular matter, a Tribunal may well decide that it is appropriate that an assessment should be conducted by the Tribunal itself.

ORDER

The Applicants are to pay 10% of the Respondents' costs incurred between 19th January 2004 and 20th September 2004, in addition the Applicants are to pay 4/9th of the Respondents' costs incurred between 20th September 2004 and 1st October 2004, such costs to be the subject of a detailed assessment in the County Court on the standard basis, if not agreed.

This was the unanimous decision of the Tribunal.