JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC: TCC. 22nd November 2006

A. Introduction

1. This is an application dated the 27th September 2006 in which the Claimants, Mr and Mrs Duncan Sinclair, seek permission to appeal on two questions of law arising out of an Arbitrator's Award number 3, published on the 6th July 2006. The Defendants in both this application and in the underlying arbitration are Woods of Winchester Limited, building contractors, who are in voluntary liquidation. The arbitration is concerned with defects in a swimming pool complex designed by a Mr Shipp and built by the Defendants for the Claimants.

2. Following the publication of Award 3 the Arbitrator answered certain questions and points of clarification raised with him by way of a further document published on the 31st August 2006. I shall refer to that document as the "clarification document". It is necessary to consider both Award 3 and the clarification document of the 31st August for the purposes of this application.

3. The first alleged question of law raised by the Claimants concerns what are described as "concurrent causes of damage to flat roofs". The second alleged question of law concerns the Defendants' liability for the "defective specialist design" of the boiler and associated pipe work, which design work was carried out by nominated sub-contractors, Penguin Pools Limited.

4. These parties have already been to this Court in July of last year when the Claimants sought to remove the Arbitrator, or to set aside an earlier Award in which he found that the Defendants had no design liability under the terms of the main contract. The application was unsuccessful. The background to that application and to the contract generally is set out in my Judgment at **[2005] EWHC 1631 (QB)**, and I do not repeat it here. Following my Judgment I understand that the Arbitrator offered his resignation, but both parties asked him to continue with the reference, which is what he did. That led to Award 3, the focus of this application for permission to appeal.

B. Principles

5. The application is made pursuant to s.69 of the Arbitration Act 1996. The relevant part is sub section 3 which provides as follows:

> *"(3) Leave to appeal shall be given only if the court is satisfied:*
> *(a) that the determination of the question will substantially affect the rights of one or more of the parties,*
> *(b) that the question is one which the tribunal was asked to determine,*
> *(c) that, on the basis of the findings of fact in the award-*
> *(i) the decision of the tribunal on the question is obviously wrong, or*
> *(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
> *(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."*

6. Broadly speaking, there are four ingredients necessary to a successful application under s.69. They are:

a) The identification of a true question of law, not a complaint about the Arbitrator's findings of fact dressed up as a point of law;

b) Which point of law substantially affects the rights of the parties;

c) On which point of law the Arbitrator was obviously wrong or, if it is a point of general or public importance, where the Arbitrator's decision was at least open to serious doubt;

d) Which it is just and proper for the Court to determine.

The principal arguments in the present case have centred on the points at sub-paragraphs a) and c) above.

7. Although I deal with each of those ingredients briefly the first point to make is that the Court has limited power to intervene in an arbitration. That is one of the principal purposes of the Arbitration Act 1996: see ***Lesotho Highlands Development Authority v. Impregilo SpA & Ors*** [2005] UKHL 43, 101 Con LR 1.) However, that does not mean that the Court will routinely reject any attempts to appeal questions of law in arbitral awards. In my judgment, the proper approach to the Court's power to intervene is that set out in paragraphs 50 and 57 of the judgment of Jackson J., in ***Kershaw Mechanical Services Ltd v Kendrick Construction Ltd*** [2006] EWHC 727 (TCC) as follows:

> "50...The court must decide any questions of law raised by the appeal, however difficult or finely balanced they may be. There is no philosophy or ethos of the 1996 Act which should deter the court from answering those questions correctly, in the event that the arbitrator has erred. I reach this conclusion for five reasons:
>
> 1. Party autonomy is one of the three general principles upon which Part 1 of the 1996 Act is founded (see section 1(b) of the 1996 Act).
>
> 2. The parties in the present case, in the exercise of their autonomy, have agreed that an appeal shall lie to the courts on any questions of law.
>
> 3. The principle of non-intervention stated in section 1(c) of the 1996 Act is qualified by the important words, "except as provided by this Part". Section 69(2)(a) of the 1996 Act is a provision falling within that exception. It expressly permits an appeal on questions of law to be brought by agreement between the parties.

4. ***Lesotho Highlands*** should be distinguished because it concerned proceedings under section 68 of the 1996 Act. In ***Lesotho Highlands*** the general principles set out in section 1(b) and section 1(c) of the 1996 Act pointed strongly in favour of non-intervention. The consequence in ***Lesotho Highlands*** was that the House of Lords refused to set aside or remit an arbitral decision, which was wrong in law. The present case, which is brought under section 69(2)(a), is at the other end of the spectrum.

5. The above conclusions are consistent with the observations of Judge Humphrey Lloyd Q.C. in ***Vascroft (Contractors) Ltd v Seeboard plc*** [1996] 78 BLR 132 at 163 - 164.

57...i. The court should read an arbitral award as a whole in a fair and reasonable way. The court should not engage in minute textual analysis.

ii. Where the arbitrator's experience assists him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court will accord some deference to the arbitrator's decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer."

Although they are specifically concerned with a case where leave to appeal was not required, I respectfully agree with and adopt those general principles in my consideration of this application.

(a) Question of Law

8. It is not always easy for the applicant to identify a pure point of law. Many issues which come before the Court pursuant to applications under s.69 of the 1996 Act are in reality questions of mixed law and fact. In those circumstances, provided that the decision reached by the Arbitrator was within the permissible range of solutions open to him no error of law arise: see ***The Matthew*** [1992] Lloyd's Rep 323 and ***Benaim (UK) Ltd. v Davies Middleton & Davies Ltd*** [2005] EWHC 1370 (TCC).

9. For the avoidance of doubt it is simply not possible for a party to seek permission to appeal on Arbitrator's findings of fact no matter how wrong they might seem to be: see ***The Baleares*** [1993] 1 Lloyd's Report 215 and ***Demco Investments & Commercial SA & Ors v SE Banken Forsakring Holding Aktiebolag*** [2005] EWHC 1398 (Comm).

(b) A Substantial Effect

10. The issue on which permission to appeal is sought must have a substantial effect and impact on the rights of the parties at issue in the arbitration: see ***The Northern Pioneer*** [2003] 1 Lloyd's Rep 212 and ***Lesotho Highlands*** . I am satisfied that here both of the two questions raised would have the necessary substantial effect and therefore this part of the test is met in this case.

(c) Obviously Wrong/Public Importance

11. In construction disputes, unless the point at issue arises on the interpretation of a Statute or the proper meaning of a term within a standard form of building or engineering contract, it is usually not possible to say that a point of public importance arises. Accordingly, in most construction disputes, and certainly in this one, it is necessary for the Claimant to show that the Arbitrator was obviously wrong in reaching the conclusion he did. That is, of course, a difficult burden to discharge. Moreover, it has to be discharged by reference to the award itself and, in certain circumstances, the documents referred to in the award, but not other extraneous material: see ***Hok Sport Ltd v Aintree Racecourse Ltd*** [2003] BLR 155 and ***Kershaw Mechanical Services Ltd*** .

(d) Just and Proper

12. It must always be shown that if the other criteria above are made out it is still just and proper for the Court to intervene bearing in mind the parties' original decision to arbitrate rather than litigate: see ***Reliance Industries Ltd v. Enron Oil & Gas India Ltd*** [2002] 1 All E.R.Com.59.

13. Again, I am satisfied that, in the present case, if there is a point of law on which the Arbitrator was obviously wrong, it would be just and proper for the Court to intervene. Accordingly, the two issues to which I now turn, relating to questions 1 and 2 raised by the Claimants, are whether they are properly described as questions of law, and if so, whether the Arbitrator was obviously wrong in reaching the conclusions he did.

C. Question 1: Concurrent Causes of Damage to the Flat Roofs.

14. The first alleged question of law raised by the Claimants is:

" (i) Concurrent causes of damage to flat roofs

The Arbitrator found that the failure of the flat roofs in the Claimants' swimming pool building was caused both by defective design by the architect and by the Respondent's breaches of contract in

a) Failing to warn the architect of aspects of the defective design; and

b) Executing the specified works defectively.

Nevertheless he only awarded the Claimants £728 in relation to the cost of the remedial works which the Claimants have carried out. Their claim was £82,868.71. The sums awarded were described as "notional" and were expressly unrelated to the actual cost of the remedial works. The Claimants contend:

a) That the Arbitrator in making the said award failed to apply correct principles of law as to liability in contract for damage caused concurrently by some factors which are not and other factors which are breaches of contract by the Defendant; and

b) That application of the correct principles results in a finding that the Respondent is liable for the whole cost of the remedial work."

15. It is not feasible to set out all the relevant paragraphs of Award 3 in relation to this issue, given that the Award itself runs to 380 paragraphs. I set out below, therefore, simply some of the paragraphs which I consider to be of particular relevance:

"30 The Respondents' Defence to many of the heads of claim was that the unacceptable work was the consequence of the architect's design. I held as a preliminary issue in Award number 1 that under the FSA building contract a building contractor does not have a design liability to the employer…

36 I hold, therefore, that following the basic principle that the architect is totally responsible for the design, the architect is also liable for the design of the works complying with the law. See RIBA Stage D, scheme design and Stage E, detail design, which are incorporated in the fee agreement with the Claimant as file 3A folio 3 and also CE/95 Schedule of Services stages D and E as file 3A folio 10.)

37 This design obligation on the part of the architect includes ensuring that the design of the works complies with the Building Regulation requirements. This principle applies regardless of whether or not the building contractor should or should not have been aware of any deficiency in the architect's design and the contractor's implied obligation to warn the architect of such deficiencies. See the extract from Emdens Construction Law as Part 2 paragraph 192 of this award…

39 Conversely, the architect is liable for all the defects in the design…

Item 1 - timber flat roof design

51 Based on the evidence put before me I find as a fact that three timber flat roofs to the swimming pool areas as designed by the architect were doomed to fail from their inception…

Failure to install any vapour barrier

55 I find as a fact the Respondent was in breach of contract in that a vapour barrier should have been installed. I find the failure to do so was not the initial cause of the failure of the cold deck roof as the roof was doomed to fail from its design inception…

One layer of Visqueen

61 I find that the Respondent was in breach of contract by not installing a second layer of vapour barrier.

62 I find that the failure of the Respondent to provide a second layer vapour barrier was not the initial cause of the failure of the timber cold deck roof. The roof was deemed to fail from its design inception…

Failure to seal

69 I accept the experts' opinions that the failure of a seal around the light fittings would have contributed towards the failure of the roof, but not that it was the initial cause of failure. The timber flat roofs as designed over the swimming pool arrears were doomed to fail…

Incorrect installation of Visqueen

74 I find as a fact that the failure of the Respondent to properly lap and seal the edges of the vapour barrier was not the initial reason for the cold deck roof failure, but would have contributed towards the speed of the failure of the roof. The timber flat roofs as designed over the swimming pool areas were doomed to fail…

Air gap

79 I hold that it was the architect's design responsibility to instruct the Respondent how the timber cold deck flat roof was to be ventilated. Architect's instruction number 6.11 required the 50mm minimum void for ventilation to be completely filled with insulation therefore making the provision of any ventilation ineffective.

80 I find the failure of the architect to design an adequately ventilated roof was a major contribution to the speed of the failure of the roof. The timber flat roofs as designed over the swimming pool areas were doomed to fail.

81 I find that the Respondent has no liability for a design defect and that the Claimant has no entitlement for damages…

The architect's liability for design

185 I held under my decisions on preliminary issues that the FAS contract does pass an implied obligation on to the contractor for checking the architect's design and a consequential duty to warn of a defective design.

186 There is also a general implied obligation on the building contractor to warn the architect that the building works required by the architect's design do not comply with the Building Regulations...

188 Where the works are found not to comply with the Building Regulations the works required to comply with the Building Regulations are treated as a variation to the contract. (See FAS contract clauses 1.3 and 1.3.1) The architect is liable therefore for the works complying with the Building Regulations and not the building contractor...

Reasons for the Abritrator's decisions

*[15] The first in time rule (**Performance Cars Limited v Abraham [1962] 1 QB 33**)*

201 I find that the failure of Nick Shipp, architect, to properly design the flat roofs was chronologically the initial causation of the flat roof failure.

[16] The timber flat roofs being doomed to fail

202 There are five main reasons for my finding that the timber flat roofs were 'doomed to fail'.

.01 The warning contained in BRE Digest 336:1988 that cold deck roofs are unsuitable for swimming pool enclosures.

.02 The specification by the architect of Visqueen 1200 as a vapour barrier in the cold deck flat roof construction which was unsuitable for its purpose. Mr Miers, the Claimants' expert architect was of the heavily qualified opinion that Visqueen 1200 could have performed had the roofs been adequately ventilated.

.03 The failure of the architect to fully show on the contract drawings or to otherwise specify how the cold deck flat roofs were to be ventilated in accordance with the requirements of the Building Regulations 1991/1995 issue.

.04 The increase in thickness of insulation from 150 mm to 300 mm as per the Architect's Instruction number 6. This instruction required the ventilation cavity to be completely filled with insulation thereby making its function useless.

.05 The architect specifying recessed lights which penetrated into the flat roof construction without specifying how the integrity of the vapour barrier was to be maintained…

206 While I find that the design was the initial cause of the failure of the cold deck flat roofs I also find as a fact that the Respondent subsequently compounded the speed of those failures by:

.01 Failing to properly tape and seal the edges with the Visqueen 1200 vapour barrier.

.02 Failing to install the specified vapour barrier.

.03 Failing as an implied obligation to question the architect's design insofar as it related to Building Regulation approval particularly with regard to the requirements for ventilating a cold deck flat roof.

207 Neither party has pleaded contributory liability and I have therefore not distinguished any such costs.

208 Under the building contract the architect did not have a role as inspector of the works in progress, but he did have a general supervisory role. If the architect had been aware of the special requirements for a roof over a swimming pool it is anticipated that he would have taken more care than normal in inspecting this aspect of the works."

16. Further, to the extent that any of this needed clarification, the Arbitrator's clarification document of the 31st August contained the following relevant paragraph:

"7 The timber flat roofs to the north east and west of the pool were designed by the architect as cold deck flat roofs...For the benefit of the parties I have coloured in the extracts of drawings in the appendices to this clarification which together with annotations was all information submitted to me in this arbitration. I have not used any other information..."

The Arbitrator then set out the details of the design of the flat roofs and what he finds as deficiencies in that design. He concluded at paragraph 7.10 and following: *"I therefore found that the architect's design of the roof compounded by the variation in the thickness of the insulation was the inevitable cause of the failure of these roofs.*

8 My analysis of the facts as shown that the timber flat roofs as designed by the architect would, in Mr Miers' words "not perform satisfactorily for long. Condensation occurs followed by progressive deterioration of decks and supporting structure."

9 For absolute clarity as well as stating the obvious the design of the roof by the architect has to be carried out before that roof can be built. I find therefore that the design of the roof is the cause of the inevitable roof failures."

The Arbitrator was asked as to the cause of the failure of the flat roofs. Three possible interpretations were proffered to him, namely that:

"i) The roof failed because it was doomed to fail;

ii) The roof failed because of the Item 1(b), 1(c) and 1(e) breaches together with the failure to seal around the light fittings (Item 1(d)) and the failure to allow an air gap (Item 1(f)).

iii) The roof failed because of a combination of i) and ii).

Please could you state which of these three is your finding or if none of these what your finding as to the cause of failure is. "

The Arbitrator's answer was unequivocal:

"Item i) above [the roof failed because it was doomed to fail]

Reason

The design of the timber flat roofs as a cold deck roof, compounded by architect's instruction number 6.3, meant that these roofs were doomed to fail. (Refer to paragraph 7 and appendices of this clarification.)…"

I have also read and refer to paragraph 23 of the clarification document which explains how the Arbitrator calculated the sums that he found due from the Defendants to the Claimant in respect of this aspect of the dispute.

17. In summary, I conclude that the Arbitrator's decision on this issue was entirely clear. He decided that the operative cause of the problem with the flat roofs was their design, for which the Defendants were not liable. He found that such errors as were attributable to the Defendants (and there were some) did not cause the underlying problem with the flat roofs. The most that they did, as he put it, was to "compound the speed of the failures". He arrived at a small sum that should be paid by the Defendants to the Claimants in consequence of their breaches.

18. In my judgment the Claimants' application for permission to appeal in respect of these findings does not meet the necessary requirements of s.69 of the 1996 Act. My reasons for this conclusion are as follows.

19. First, I do not believe that the alleged question of law, set out at paragraph 14 above, is, on a proper analysis, any such thing. A question of law should be capable of being expressed in a sentence. This point - and I do not believe it is really a question at all – is set out in a lengthy paragraph of submission and any issue of pure law is very difficult to discern.

20. Secondly, and more importantly, it seems to me that the point raised in the Claimants' application under question 1 is entirely a matter of causation. Causation disputes are rarely pure questions of law. In most cases, and certainly in this case, questions of causation are mixed questions of fact and law. In this regard I have been referred to and adopt the well-known passage in **Chitty on Contracts 29th Edition 2004** volume 1 paragraph 26-029: *"The Courts have avoided laying down any formal test for causation. They have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the Claimants' loss. The answer to whether the breach is the cause of the loss, or merely the occasion for loss must 'in the end' depend on 'the court's common sense' in interpreting the facts."*

I note that this passage was cited with approval at paragraph 313 of the judgment of His Honour Judge Wilcox in ***Great Eastern Hotel Co Ltd v John Laing Construction Ltd & Anor*** [2005] EWHC 181. In the present case, the Arbitrator's answer on the causation point was a mixed finding of fact and law. It was plainly within the range open to him. Thus, it is not appropriate for me to grant permission to appeal on question 1.

21. Thirdly, I considered that the Claimants' submissions are based on a misconception of Award 3 and the clarification document. Mr McCue put his helpful submissions on the basis of the Arbitrator's finding of concurrent causes of the failure of the flat roofs, but I do not consider that the Arbitrator found that there were any such concurrent causes. He found that the cause of the problem was the design. Mr McCue fairly accepted that there was no part of Award 3, or the clarification document, in which the Arbitrator had used the word "concurrent". In my judgment he deliberately avoided that expression because he had not found that there were concurrent causes of the problem with the roofs. He had instead found that their design was the sole operative cause of the problem. If there was any doubt about that, we can see from the unequivocal answer to the question in the clarification document (paragraph 16 above) that the Arbitrator had concluded that there was just one operative cause of the failure of the flat roofs.

22. The Arbitrator's finding that the problem with flat roofs was caused by the design was clearly stated in Award 3 and the clarification document. Given that the Arbitrator had decided in his earlier Award that the Defendants had no design liability, it was inevitable that, once the Arbitrator had concluded as a matter of fact that the cause of the problem with the roofs was a matter of design, the Defendants would not be found liable for the costs of replacing or repairing those roofs.

23. In all the circumstances I consider that the Arbitrator was far from obviously wrong in reaching the conclusions that he did. Indeed, on the material I have, I conclude that, given his findings in his earlier Award that the Defendants were not liable for design, he was plainly right to reach the conclusion that he did. In those circumstances therefore I reject the application for permission to appeal on question 1.

D. Question 2: Liability for Defective Specialist Design

24. The second alleged question of law raised by the Claimants is:

"Liability for defective specialist design

The boiler installed to heat the swimming pool and pool hall was under-sized. The Claimants claimed the cost of replacing it with a boiler of the correct size. The Claimants also made claims in respect of inadequate size of pipework, incorrectly positioned pipework and failure to insulate the plant room pipework. The Claimants claimed a total of £70,850.64 in respect of these items. The items were all installed in accordance with the design of the heating system which was part of the specialist design work carried out by the Respondent's nominated sub-contractor Penguin Pools Ltd. The Arbitrator found that the Respondent had no liability to the Claimants in respect of defects in the said specialist design work because being design work the architect was solely liable for defects therein. The Claimants contend that the said finding was wrong in law and that the Arbitrator should have found that the Respondent was liable to the Claimants in respect of the cost of rectifying defects in the said design work."

25. In my judgment the passages within Award 3 relevant to this issue include some of the paragraphs dealing with design which I have already set out above. In addition, I should refer specifically to paragraphs 83 to 98, which set out the Arbitrator's conclusions to the effect that the architect was responsible for the design of the boiler and the pipework, and not the Defendants. The Arbitrator also makes the point that the Claimant had not, in his words, "proved causation". In addition to those paragraphs, I should also refer to paragraphs 240 and 245 of the

Award, which deal with the architect's responsibility for design, including design carried out by nominated sub-contractors. These passages were linked to paragraph 351 of the Award and the reference there to the decision in ***Moresk Cleaners v Hicks*** [1966] Lloyds LR 338 which was a case dealing with the architect's ability (or otherwise) to delegate design responsibility to others.

26. In my judgment, the case of ***Moresk Cleaners v Hicks*** is largely irrelevant to the principal point at issue between the Claimants and the Defendants concerning the boiler and the associated pipework. It appears that the Arbitrator found that the architect was responsible to the Claimants for the design of the boiler and the pipework and that, although Penguin Pools were a sub-contractor engaged by the Defendants and carried out certain design work, that did not mean that the Defendants were liable to the Claimants for the design work carried out by Penguin Pools.

27. Looking at question 2 as formulated by the Claimants (see paragraph 24 above), I am again not persuaded that it is a question of law. It may be that the issue that the Claimants were endeavouring to raise is this: If a main contractor sub-contracts work to a nominated sub-contractor, and that nominated sub-contractor carries out design work as well, is the main contractor, without more, liable to the employer for that design work?

28. Assuming for the moment that that is the question, the answer to it is emphatically in the negative. The reasons for that are set out below. They relate both to this particular case, and the law on nominated sub-contractors generally.

29. First, in his earlier Award, which is obviously not the subject of this application, the Arbitrator found that the Defendants had no design liability to the Claimants under the terms of the main contract. It seems to me that that is a complete answer to the Claimants' current application in respect of question 2.

30. Secondly, even without that finding, I consider that the Claimants' case is wrong in law. Where an employer nominates a specialist sub-contractor to carry out work, it will often be because that sub-contractor will be performing a specialist design function, in addition to the actual carrying out of the works on site. In those circumstances:

    a) The design work performed by the specialist sub-contractor ought to be the subject of a direct warranty from the specialist sub-contractor to the employer;

    b) The carrying out of the work on site may be sub-contracted by the main contractor to the nominated sub-contractor, but the extent to which the main contractor is liable even for defects in the workmanship of the nominated sub-contractor will depend on the precise terms of the various contracts; see ***Percy Bilton v The GLC*** [1982] 1 WLR 794 (House of Lords) and ***Fairclough Building & Rutland Borough Council*** [1985] 30 BLR 26 (Court of Appeal).

31. Mr McCue accepts that the main contract documents did not include any obligation on the part of the Defendants to perform any design work at all. There was not even a reference to that possibility. Design was simply not part of the Defendants' workscope. There was, therefore, no main contract design work for the Defendants to sub-contract to Penguin Pools.

32. As I said in argument, as far as I am aware, there is no reported case in which it has been held that a main contractor, whose work scope excluded any design, somehow acquired a design liability simply because it entered into a sub-contract with a nominated sub-contractor who was in fact carrying out design work. In my judgment such a finding would be contrary to common sense. Indeed, as far as the authorities go, I should note that in ***Holland Hannen & Cubitts v WHTSO*** [1981] BLR 80 the nominated sub-contractor's design of the windows was defective and the Court found that the employer, through the architect, should have issued an instruction to the main contractor requiring a variation of the design, so that the main contractor could complete the windows properly and be paid for the extra work required to rectify the defective design.

33. In my judgment, if a main contractor, as here, has no design liability under the terms of the main contract, he cannot mysteriously acquire that liability merely because he is instructed to enter into a sub-contract with a nominated sub-contractor who is going to do some design work on behalf of the employer. The design work performed by the sub-contractor should either be the subject of a direct warranty or remain part of the architect's non-delegable obligations. Either way it is emphatically not the responsibility of the main contractor.

34. For these reasons therefore I consider that the Arbitrator was correct to conclude that the Defendants were not liable for the design work of Penguin Pools. I therefore reject the application for permission to appeal in relation to question 2.

E. Summary

35. For the reasons set out above, I dismiss the Claimants' application for permission to appeal.

F. Costs

36. In the light of this decision, it is plainly appropriate for the Claimants to pay the Defendants' costs. I am asked to summarily assess those costs. There is very little debate about the skeleton bill of costs provided by the Defendants' solicitors. I have made a reduction to reflect the fact that this hearing has taken considerably less time than was anticipated by the Defendants' solicitors. In round terms, therefore, that reduction produces figures of £5,000 in respect of the work done by the Defendants' solicitors, and £5,000 for the work done by Mr

Kennedy. It seems to me that those figures are modest in the circumstances and I am happy to proceed on the basis of those two amounts making a total of £10,000.

37. However, an interesting point then arises, because both Mr Kennedy and his instructing solicitors are on a Conditional Fee Agreement ("CFA"). Those CFA's with the Defendants' liquidators entitled them both to a 100% mark-up on their fees. The question becomes the extent to which that mark-up should be reflected in my summary assessment of costs.

38. These written CFA's are in similar terms. Both set out the reasons for setting the up-lift at the rate of 100%. Those reasons are almost exactly the same in both documents. Citing from the CFA in respect of Mr Kennedy, they are said to be:
i) The risk to Counsel that the claim will not succeed;
ii) The deferment of payment of Counsel's base rate until the conclusion of the action;
iii) The level of basic rate fees incurred in the consideration of the claim before the action is commenced;
iv) The complexity of the facts;
v) The size of the claim;
vi) The urgency of the matter;
vii) The importance of the case to the client and to the insolvency state of the company;
viii) The public benefit in recovering for creditors.

39. I am also told, and have absolutely no reason to doubt, that when Mr Kennedy was advising as to the prospects of success he put the Defendants' prospects on the merits of this application at 60%. He very properly said that, in all the circumstances, that figure (not the 100%) should be used for the summary assessment. That would give rise to an up-lift of 67% in accordance with the tables at paragraphs 42.137 and 42.128 of **Cook on Costs 2006**, published by Butterworths.

40. The relevant guidance to the Court in dealing with success fees on a summary assessment is to be found at paragraph 28 of the Guide to the Summary Assessment of Costs 2005 edition. That states:
"*The factors to be taken into account when deciding whether a percentage increase is reasonable may include:-*
a) The risk that the circumstance in which the costs fees or expenses would be payable might or might not occur;
b) The legal representative's liability for any disbursements;
c) What other methods of financing the costs were available to the receiving party."

41. Mr Kennedy has of course dealt with the point at sub-paragraph 28(a) because he says that, with a risk of 60%, there should be a 67% up-lift in accordance with the tables. The point at sub-paragraph (b) does not really arise here. As to the point at sub-paragraph (c), he makes the point (and it is not disputed) that in all the circumstances the CFA was the best method of financing the costs as far as the liquidator was concerned.

42. Mr McCue accepts that there should be an up-lift but argues for an uplift at less than 50%. He says, and again I accept, that there is no question of these costs not actually being paid and, therefore, there is no real deferment element and no real risk of delay. In essence, he says that the real point is the risk of failure on the application itself, which is the point referred to at sub-paragraph 28 (a) of the Guide. I agree with him that is the principal issue for me to decide.

43. Accordingly, I find that an up-lift is payable in this case. Whilst I am reluctant to tinker with the percentages and the careful work that has obviously been done on the Defendants' side relating to the advice given as to the prospects of success, I was and remain of the view that at the time that this application was made the Defendants' prospects of success could fairly be put at 66.66% (ie. that it was two-thirds likely that they would win and one-third possible that they would lose). I say that because this was an application for permission to appeal from an Arbitrator's Award. The authorities that I have set out earlier in this Judgment make clear that it could not be a straightforward application. Indeed, most of those authorities explain, in one way or another, how and why the particular application being made for permission must fail. Therefore, it seems to me that, trying to avoid the temptation of hindsight, a 66/33 per cent split was the appropriate assessment of the risk, and should form the basis of my summary assessment of costs in accordance with paragraph 28 of the Guide (paragraph 40 above).

44. If I take the 66.66%, it is agreed, by reference to the tables in **Cook on Costs** that this would give rise to a 50% up-lift on the fees charged by the Defendants' solicitors and counsel. It seems to me that that is a fair, reasonable and proportional uplift. That would give rise to a figure of £7500 in respect of both the Defendants' solicitors and their Counsel. I should say, for the avoidance of doubt, that I consider those figures to be entirely proportionate, reasonable and appropriate.

45. Therefore, I summarily assess the costs in the total sum of £15,000 which should be paid within 14 days.

Mr Donald McCue (instructed by Ross & Craig) for the Claimant
Mr Stuart Kennedy (instructed by Blake Lapthorn Linnell) for the Defendant