JUDGMENT : Mr Justice Warren : Chancery Division. 8th March 2007

1. Following the handing down of my judgment, I now have to deal with a number of issues:
   a. Damages
   b. Costs
   c. Permission to appeal.

   Applications to discharge interim orders, and the costs consequences of that, are for another occasion.

Damages

2. There was no order for a split trial. Nor was it suggested during the hearing that the question of damages should be left over or that an enquiry might be necessary. The damages sought by DGI included the amounts of the various arbitration awards; but that claim could succeed only on the basis of the lifting of the corporate veil, something which I have declined to allow. But the damages sought also included damages for deceit.

3. The pleadings were relevantly as follows:
   a. The Re-re-Amended Particulars of Claim sought damages for deceit. They were specified in paragraph 32 as (a) loss of profits from being deprived of entering into a sale agreement with some other purchaser (b) its legal and other incidental costs and expenses incurred in and about defending Charlton's claims in the New York action (c) its legal and other incidental costs and expenses incurred in and about defending Charlton's claims in the Arbitration (d) its legal and other incidental costs and expenses incurred in and about prosecuting its counterclaim against Charlton in the Arbitration (e) its legal and other incidental costs and expenses incurred in and about resisting Charlton's aborted application under section 24 Arbitration Act 1996 to remove the Arbitrator.
   b. Paragraph 35 of the Re-re-Amended Particulars of Claim appears under the heading "Procuring breach of contract" a claim which I have dismissed. In that paragraph, the sum of some $83,000 odd was claimed "by way of incidental expenses including legal expenses and storage costs for warehousing the equipment the subject of the Option Agreement in Connecticut". DGI seeks the storage costs element as damages for misrepresentation, Mr Freedman saying that the claim appeared in the wrong place in the pleading.
   c. Further information was given of paragraphs 32(c), (d) and (e) specifying sums of money in respect of fees and disbursements of various professionals, the Arbitrator's fees and some travelling expenses of Haig. There was also a figure for financing costs, that is to say interest incurred by DGI on loans by Alex and Haig to fund the arbitration.
   d. Further information was given of paragraph 35

4. Other material before me concerning these damages on which reliance is placed was contained in the Arbitrator's Final Award Parts III and VI and in witness statements of Alex, Haig and Michael Clarke. The Final Award does not take one, in terms of quantum, beyond the evidence which supported the Award as to which the witness statements mentioned are relevant. The Award is relied on in a different way as will become apparent later.

5. In his fourth witness statement dated 28 October 2006, Alex confirmed that the losses suffered as a result of "the wrongdoings of Simms, Rahman, Jack and Helga" were as set out in the Re-Amended Particulars of Claim (which so far as material were the same as the Re-re-Amended Particulars) and the Further Information supplied. In his witness statement dated 26 September 2003 used at the arbitration (admitted for the purposes of these proceedings pursuant to an earlier order made by me), Haig deals with the financing costs. He refers to the quantification, attached as HD1, of the financing costs. He states that the percentage of 8% used is the default percentage set out in an Agreement concerning the financing of the litigation entered into by DGI with Alex and himself on 21 January 1999. He attaches the Agreement, marked HD2. The exhibits HD1 and HD2 do not appear in the Court bundles although they were disclosed in these proceedings. They did not, accordingly, form part of the evidence before me.

6. These financing costs were the subject matter of the arbitrator's Final Award Part VI dated 11 March 2003. His award was based on a revised submission from Gallo & Darmanian dated 10 February 2004. Charlton was invited to comment but did not do so. Unsurprisingly, therefore, the Arbitrator made his award in the amount claimed.

7. Mr Clarke was, at the times of his witness statements, the solicitor at Clarke Willmott acting for DGI, Alex and Haig. His evidence goes no further, however, than to set out what the arbitrator awarded and so far as proof of loss is concerned, takes matters no further.

8. Mr Freedman did not identify, at the recent hearing, any further evidence on which he sought to rely to establish the damages claimed.

9. While denying the pleading of damage set out above, Mr Simms' defence did not go into details about whether particular expenses had in fact been incurred or whether they were properly or proportionately incurred. Jack and Helga made no admissions as to the alleged loss and damage and put the Claimants to proof. It was, however, expressly denied that the loss and damage pleaded at paragraph 32 flowed directly from the alleged Conspiracy II although no similar plea is made in relation to deceit or Conspiracy I with which paragraph 32 was also concerned.

10. None of the witnesses for the Claimants were cross-examined about the level of fees paid or other expenditure incurred in the course of the earlier litigation and arbitration nor about the appropriateness of incurring any particular cost which it is now sought to recover.

11. Mr Freedman did not focus particularly in his opening or closing addresses (written and oral) on the quantum of damage. However, Alex's and Haig's evidence was put before the court. It may be that he did not consider that there was any issue on quantum (save to the extent expressly raised by any of the Defendants) once liability was established.

12. In his opening, Mr Simms made a number of submissions on costs. In relation to paragraph 32 his contentions included the following:

    a. The costs and expenses incurred in the New York action were costs and expenses incurred by reason of the Claimants' improper attempt to allege that the arbitration clause in the Option Agreement was ambiguous. The Claimants lost the New York litigation and should be entitled to no costs arising in that litigation.

    b. The legal and other incidental costs and expenses in the arbitration appear to have been "rubber stamped" by the arbitrator without any process of assessment and made subject to a rate of interest, with quarterly rests, which is wholly abnormal and for which there is no justification. Costs of investigators, researchers and other substantial extraneous activity not relevant to the arbitration were simply allowed by the arbitrator on an indemnity basis. The arbitrator has simply assessed costs on a global basis without any detailed examination of the work carried out.

    c. Legal and other incidental costs in respect of the counterclaim and the application under Section 24 of the Arbitration Act 1996 were subject to the same considerations.

    d. The arbitrator had included, in the costs, items which are no longer sought to be recovered, such as the costs of the investigators. Mr Simms therefore said that there is obviously a whole raft of costs which should not have been recoverable including the work of the lawyers in New York and in London relative to the investigations if the investigators costs are not to be recovered. Further, there were, he said, a significant number of company searches made against companies which have no relevance whatsoever for the arbitration where, therefore, the Claimants appear to have been "fishing" and are not entitled to their costs. No proper scrutiny whatsoever has occurred in respect of the costs and the narrative of the costs particularly of Gallo & Darmanian and those bills which have been disclosed show that most of the time was spent on tactics and "behind the scenes" investigation rather than the substance of the litigation or arbitration.

13. In his closing, Mr Simms said very little about the actual quantum of damage once liability was established, really adding nothing to what he had already said in opening. Accordingly, Mr Simms put his case on the basis that, assuming the costs were in principle recoverable as damages (something which he of course disputed and continues to dispute), there were a number of items in DGI's bill which should not have been recoverable (*ie* as costs of the arbitration), namely investigation costs and legal costs relative thereto, and costs of company searches. He also suggested that there had been no proper scrutiny by the arbitrator of the costs. He did not, however, identify any costs actually incurred which ought not to be recoverable as damages (assuming liability) on the basis that they were unreasonably or disproportionately incurred.

14. Mr Ashe and Mr Cakebread in their outline submissions in opening said that the costs of the legal action (recoverable as damages) could not include any costs incurred by unreasonable action on the part of the Claimants. In their closing submissions, they dealt with loss and damage at far greater length, dealing with causation, remoteness and mitigation, citing at length from *Smith New Court Securities* (a decision which I have considered in my earlier judgment). They addressed each head of loss claimed in paragraph 32 of the Re-re-Amended Particulars of Claim. The same points are made in relation to each head of what I may call the litigation/arbitration costs.

15. In essence, these points were directed at the big picture. They noted that there are limitations of causation, remoteness and mitigation. In particular, they submitted that even if DGI could establish a sufficient causal link "*it must still be shown that the entire loss suffered by* [DGI] *is a direct consequence of the fraudulently induced transaction*". They submitted that in fact this head of loss was very indirect and was dependent upon subsequent and quite separate decisions by DGI and Charlton to engage in a contractual dispute.

16. There is no hint in the submissions of Mr Ashe and Mr Cakebread that, if their arguments in relation to the big picture were incorrect, there was any issue over quantum.

17. Accordingly, at the time when I reserved judgment, the position was (i) that Mr Simms had submitted that certain items should have been disallowed by the arbitrator and that there had been no proper scrutiny of the costs in the arbitration at all and (ii) that Mr Ashe and Mr Cakebread had made no submissions on quantum on the basis that I might be against them on liability. It seems to me, therefore, that the parties ought not to have been surprised had I dealt with quantum in my judgment and made an order for payment accordingly.

18. However, when I came to complete my judgment, I was unclear about precisely what it was that the Claimants sought on the basis of my limited decision in their favour on liability. I did, nonetheless, deal with the submissions which had been made in relation to causation and remoteness and, rightly or wrongly, reached the decision which I did in paragraphs 747 to 761 of my judgment.

19. After considering the principles set out in *Smith New Court*, I turned to the various heads of damage set out in paragraph 32 of the Re-re-Amended Particulars of Claim. I rejected the claim for loss of profit. I then took all the litigation/arbitration costs together.

20. I rejected the submissions of Mr Ashe and Mr Cakebread that those costs, or any of them, were not a direct result of the misrepresentation. For completeness, I will set out here the critical paragraph of my judgment:

> *"760. The relevant costs have been incurred by DGI as a direct result of being embroiled in a dispute which would never have arisen if DGI had not acted in reliance on the misrepresentation. Leaving aside for the moment the costs of the application in the New York litigation to prevent an arbitration in London, all of the costs of DGI in the litigation and the arbitration were incurred in fighting claims (either as claimant or defendant) on which it was wholly successful before the arbitrator. DGI was faced with a claim against it: it had no option but to defend it and quite properly made its counterclaim. I say quite properly because it was successful which, retrospectively, shows that DGI's case was a proper one to defend and bring. DGI had no option but to defend the claim against it since to have capitulated would have resulted in a large damages claim against it. The counterclaim was really the other side of the coin of the defence. Further, as DGI claims, the counterclaim was a reasonable attempt to recover from Charlton and would, had Charlton had any assets, have been an effective mitigation of any loss flowing from the misrepresentations. In those circumstances, the costs, in my judgment, are in principle recoverable as damages. The same goes for the costs of the unsuccessful attempt to remove the arbitrator."*

21. I deliberately used the words "in principle" and invited further submission on the actual figures because I did not feel that I had the full picture about the parties' positions on precisely what costs and expenses actually incurred were properly to be treated as damages. As the parties will remember, the last part of the hearing was time-limited and everyone was under some pressure. I considered, on the resumed hearing following judgment, that the parties should be allowed to make to me the same submissions which they could have made, given more time and opportunity for debate with me, at the trial itself. That is not to say that an entirely new case could be made out or that the case could be treated as if an order for a split trial had been made in the first place.

22. As a result of the opportunity afforded, both Mr Simms and Mr Cakebread produced helpful written submissions which they elaborated at a further hearing. Their positions largely overlap. There are two main submissions made by Mr Simms:

    a. First, although ***Smith New Court*** shows that the test of foreseeability is not relevant in a case of deceit, nonetheless the three aspects of causation, remoteness and mitigation must be considered. He submits that the chain of causation was broken by DGI's action in breaching the terms of the Option Agreement. It was that breach, not the actions of Charlton, which led to the arbitration.

    b. Secondly, he says that the authorities show that where the costs of previous litigation are claimed as damages, the claim is restricted to such costs as, in the absence of agreement, are ascertained in accordance with an assessment on the standard basis.

23. As to the first of those submissions, I have already decided the point against him in paragraph 760 of my judgment quoted above. Even if I considered it were open to me to revisit that part of my decision, I would come to the same conclusion. The foundation of the submission is that it was DGI's actions which led to the arbitration and that if it had not been in breach of contract, Charlton would have been able to complete the contract and the arbitration would never have been necessary. That foundation is, of course, entirely contrary to what the arbitrator determined as between DGI and Charlton. Further, it is not something which, with the greatest of respect to Mr Simms, I have decided in his favour. As I reminded him in the course of argument, Alex's misrepresentation concerning the ownership of the General Equipment was known to Charlton (and to Mr Simms himself) by the time the option was exercised. DGI may have remained in breach of contract in failing to procure the General Equipment expeditiously or at all; but it does not follow that, had it complied with its contract, Charlton would have been able to put in place a letter of credit. I have not decided that issue. So the foundation of the argument is not established.

24. But that is not the complete answer. The real point is that, as between DGI and Charlton, the decision of the arbitrator establishes conclusively that DGI was correct in its defence and counterclaim. Whether or not Mr Simms, Jack and Helga are privies to the arbitration and bound by the arbitrator's findings (a matter I have expressly left open), they are bound to accept that the arbitrator's findings bind Charlton *vis a vis* DGI. Accordingly, so it seemed to me when I wrote my judgment and seems to me now, it is not open to them to say that the chain of causation was broken by DGI's breach of contract when that contract has been held, as between the contracting parties, not to have been broken by DGI. In saying that, I do not consider that I am deciding the privy argument against them; I consider that there is a material difference between Mr Simms, Jack and Helga themselves being bound by the findings of the arbitrator (in particular in relation to Mr Simms' own alleged fraud) and being bound to accept those findings as between DGI and Charlton. It is the latter which is important, in my judgment, in addressing the chain of causation. Accordingly, I reject the first submission.

25. As to the second submission, Mr Simms and Mr Cakebread rely on ***Redbus LMDS Ltd v Jeffrey Green Russell*** [2006] EWHC 2938, where HH Judge Behrens QC looks at the state of the authorities. He starts with the decision of Hart J in ***Pearce v European Reinsurance*** [2005] EWHC 1493, [2005] 2 BCLC 366 at paragraphs 22 to 29, which itself contains a review of the authorities up to that time and where Hart J refers to a number of cases including ***The***

Tiburon (1992) 2 Lloyds Rep 26, ***Lonrho v Fayed (No 5)*** [1993] 1 WLR 1489, ***British Racing Drivers Club Ltd v Hextall Erskine*** (1996) 3 All ER 667; ***Mahme Trust Reg v Lloyds TSB Bank plc*** [2006] EWHC 1321 and ***Yudt v Leonard Ross & Craig (a firm)*** **Independent**, 5 October 1998 (I have not been provided with a copy of this last case and have not myself obtained it but relevant passages are set out in ***Mahme Trust Reg***).

26. I would like to go back in time before those decisions. After a period of uncertainty, it was decided by the Court of Appeal in ***Hammond v Bussey*** (1888) 20 QBD 79 that costs in third party proceedings can be recovered as damages subject to ordinary rules of remoteness of damage. As Hart J puts it in *Pearce*, the rule at one time was clearly that where costs incurred by a claimant in other proceedings are recoverable as damages, the amount recoverable would be his costs taxed as between solicitor and client less his costs taxed as between party and party. Taxation was what the judge, Channell J, ordered in ***Agius v Great Western Colliery*** as one can see from the report of the appeal at [1899] 1 QB 413, where the court affirmed the judge's decision.

27. Hart J also refers to ***Penn v Bristol & West Building Society*** [1997] 1 WLR 1336 where, as he notes, it was held that, in a case where the court was obliged to deal with the claim through the mechanism of an order for costs, the mere fact that the claim could have been advanced as a claim for damages had a separate action been brought did not by itself justify the award being made on the indemnity basis. It seems to me that the judges in *Penn* were proceeding on the assumption that where there is a claim to recover costs as damages, damages would not be restricted to costs on the standard basis, thus reflecting the old law.

28. ***The Tiburon*** was not a case which actually decided that costs recoverable as damages would be restricted to an amount equal to costs assessed on a standard basis or, indeed, that there had to be an actual assessment through the formal mechanism of taxation/assessment (in the absence of agreement) before they could be recovered. But the court, certainly Scott LJ, seem to have considered that in a separate action, the claimant would only recover costs assessed on the standard basis. Moreover, Scott LJ thought that the assessment of the recoverable costs would in all likelihood be referred to the Taxing Master (now the Costs Judge).

29. At first instance, Steyn J had rejected the argument that costs (effectively claimed as damages) in that case should be ascertained on a solicitor and own client basis or at least on an indemnity basis, saying that, because of the introduction of the new bases of costs in 1986, "*very many of the older case which have been cited to me are not of any great assistance*". He identified the standard basis as the appropriate measure since it included all reasonable costs; he rejected the solicitor and own client basis as potentially including many extravagant costs and he rejected the indemnity basis as a reversal of the ordinary burden of proof in a damages claim, the burden being on the claimant to establish his loss.

30. *Lonrho v Fayed (No 5)* was a complicated case. For present purposes, the relevant statement (again *obiter*) comes from Evans LJ where he says this *"Now that the fiction [ie that taxed costs are the same as costs reasonably incurred] has become largely fact -- although the difference between costs actually charged and those recoverable on taxation, even on an indemnity basis, may still remain large in certain types of litigation -- it is questionable whether the right to recover so-called extra costs is still justified, even when the claim is made against a third party to the original action."*

31. The first modern case which actually deals with costs as damages against a non-party to the original action is the decision of Carnwath J in *British Racing Drivers Club Ltd*. He reviewed in considerable detail the decision in *The Tiburon* and *Lonrho v Fayed (No 5)*. He concluded, nonetheless, that the ordinary rule should be that litigation costs recoverable as damages, even against a third party not involved in the original litigation, should be restricted to costs on the standard basis. He perceived as anomalous the difference between the treatment of expenditure on professional fees in third party proceedings and litigation costs as between the parties where special rules applied for policy reasons. He considered that this anomaly could be resolved in the light of modern changes to the assessment rules, saying that taxation on the standard basis is to be regarded as equivalent to the solicitor and client basis on which the old approach was based. In relation to costs the amount of which needed to be established, the Judge merely said that there should be an inquiry to establish the appropriate amount. He does not, in his judgment, say that there must be an actual assessment before a Costs Judge.

32. That decision is subject to criticism in the current (17th) edition of *McGregor on Damages* at paragraph 17-018. The law, it is said, has held a claimant entitled to be made whole in respect of the entire range of reasonable costs. The old law showed that the excess of these costs over the assessed costs recovered from a third party could be recovered; the fact that the shortfall has been narrowed, but not, it is said, eliminated by a more generous approach to the assessment of costs should not deprive the claimant of the remaining shortfall. Carnwath J is guilty, it is said, of a misconception in considering the distinction between the costs incurred between the same parties and costs in proceedings with third parties as anomalous; this flies in the face of over a century of authority. Other criticisms are also made. Ferris J expressed himself in *Yudt* as impressed by these criticisms but held that the correct course was for him to follow Carnwath J.

33. As Hart J points out in Pearce, Carnwath J's decision pre-dated the introduction of the CPR and was based on a provision which, in relation to standard costs, did not contain a proportionality threshold, let alone the two-stage approach to proportionality laid down by the Court of Appeal in ***Lownds v Home Office*** [2002] 1 WLR 2450. However, the matter was again considered by Evans-Lombe J post-CPR in ***Mahme Trust Reg***. After citing passages from ***British Racing Drivers Club*** and ***Yudt***, he, concluded as follows: *"Just as Mr Justice Ferris in the **Yudt** case felt constrained to follow the judgment of Mr Justice Carnwath in the **British Racing Drivers Club** case, so do I. However I*

do so willingly. It seems to me that where the costs of litigation are sought to be recovered as damages the appropriate method of assessment is the amount which would be awarded on assessment by a costs judge on the standard basis. I see no reason why a claimant should recover as damages costs referable to every step that he took in the proceedings in question however unreasonable. In my view it is at least arguable that costs in excess of those which a costs judge would award on the standard basis do not constitute foreseeable damage when sought to be recovered as damages."

34. It seems therefore that, had the Judge not simply been following Carnwath J, he would have regarded as significant the fact that costs in excess of those assessed on a standard basis might not be foreseeable and thus not recoverable. That is certainly arguable. But the contrary is also well arguable. The presence of the proportionality test in relation to standard costs means that in some cases costs will not be recovered even though they are reasonable. Further, it is arguably not the case that the test of reasonableness under CPR 44.4 – at least as applied by Costs Judges – is the same as the test of reasonableness which applies when assessing damages at common law especially when one is considering damages for deceit where no foreseeability test applies. Even where foreseeability is relevant, it is therefore arguable that it is indeed foreseeable that a party may incur costs which exceed the standard basis costs and which ought in principle to be recoverable as damages.

35. It is also to be noted that Evans-Lombe J did not expressly address the effect, if any, of the introduction into the standard basis of the criterion of proportionality. However, HH Judge Behrens, in ***Rebus LMDS Ltd***, addressed this aspect, saying that he found it difficult to accept that Evans-Lombe J was not aware of the point, it being inconceivable to him that such an experienced judge was not aware of the requirement. That is a fair observation.

36. In a sense, the argument on foreseeability is circular in two respects. The first is this. None of the dicta or decisions expressly state that the previously established common law measure of damage has been disturbed by the change in the assessment provisions. What they seem to say is that, since a standard basis now provides for the payment of all reasonable costs (albeit subject to proportionality and with the onus on the receiving party to establish reasonableness), the standard basis gives, as a matter of fact, the same result as the common law measure.

37. The second is this. The previously established common law measure must, while it applied, have been regarded by the courts as reflecting the claimant's costs on some objectively reasonable basis. It must, therefore, have been foreseeable (in cases where foreseeability was relevant) that costs in excess of those within the then current basis of assessment (party and party, common fund or indemnity costs) would be recoverable as damages. The change in the assessment rules cannot have altered what was and was not foreseeable. Accordingly, if the court were, as a matter of principle, to continue to allow the pre-existing measure to continue to apply, it would remain foreseeable that the claimant might incur costs in excess of those allowed on a standard basis but which would nonetheless be recoverable.

38. Like Ferris J, I see considerable force in some, at least, of the criticism of *British Racing Drivers Club Ltd* in *McGregor*. There are serious policy issues here which would benefit from consideration by a higher court. For my part, were this a case on the ordinary measure of damages where foreseeability was in issue, I would follow Carnwath J, and the other judges who have felt constrained to follow him. I would not do so, however, with the same enthusiasm as did Evans-Lombe J.

39. This case, however, is one of deceit where issues of foreseeability do not arise but where DGI is entitled to recover all of the damages directly flowing from the fraudulent misrepresentation. Mr Freedman submits that this makes all the difference and that DGI should be entitled to its costs at least on the indemnity basis - I will come later to the submission that all of the costs ordered to be paid by the arbitrator should be recovered. He also submits that I should make an indemnity costs order in the present action. It would then be odd, it is said, that DGI should have the benefit of an indemnity costs order in this action and in the arbitration (in the latter case only against Charlton) and yet be restricted in its recovery of damages to costs on the standard basis in the arbitration. That has strong forensic attraction. But, on the other hand, were I to make only a standard costs order in favour of DGI in the present case (or indeed no order at all) the result would not seem so odd. And if I were to order costs (whether on a standard basis or an indemnity basis) but only allowed a percentage of them to be recovered (rather than making an issue-based order), DGI would obtain 100% of its arbitration costs by way of damages but a lesser percentage of its costs in this action which might be thought to be equally odd. Further, foreseeability goes to the type of loss which can be recovered, not to its amount.

40. It is the case, as much as with deceit as with any other tort, that the claimant must prove his loss. In principle, therefore, he must, so far as costs to be recovered as damages are concerned, satisfy the court that they are reasonable.

41. In all of these circumstances, it seems to me that the factors which led Carnwath J to decide as he did in ***British Racing Drivers Club Ltd*** apply equally to the costs sought to be recovered as damages in an action for deceit. There is, in my judgment, no material distinction and I could not decide as Mr Freedman would have me decide without at the same time saying that Carnwath J was wrong. I decline to do so.

42. In principle, therefore, DGI is entitled to recover only the amount equivalent to its costs of the arbitration assessed on the standard basis. I would, however, comment that the differences between indemnity costs and standard costs are not, or ought not to be, as great as they are sometimes portrayed. The House of Lords has recently made some observations on this in ***Fourie v Le Roux*** [2007] UKHL 1. As Lord Scott puts it: *"…I think it needs to be*

understood that the difference between costs at the standard rate and costs on an indemnity basis is, according to the language of the relevant rules, not very great. According to CPR 44.5(1). Where costs are assessed on the standard basis the payee can expect to recover costs "proportionately and reasonably incurred" or "proportionate and reasonable in amount"; and where costs are assessed on the indemnity basis the payee can expect to recover all his costs except those that were "unreasonably incurred" or were "unreasonable in amount". It is difficult to see much difference between the two sets of criteria, save that where an indemnity basis has been ordered the onus must lie on the payer to show any unreasonableness. The criterion of proportionality, which applies only to standard basis costs, seems to me to add very little to the reasonableness criterion. The concept of costs that were unreasonably but proportionately incurred or are unreasonable but proportionate in amount, or vice versa, is one that I find difficult to comprehend."

43. Mr Freedman then submits (a) that it is (and was at the time of closing submissions last year) too late for the point to be taken that the arbitration/litigation costs should be subject to assessment and (b) that there having been no challenge to any items of the bills submitted in evidence, all of the costs claimed should be allowed and that the matter should not be referred to any enquiry.

44. These two points are closely connected. The correct measure of damage is a matter of law and is a point, which ordinarily, a defendant ought to be able to raise in his submissions in the light of the evidence as it has been revealed. However, if a claimant is not forewarned of a point of law, he may be prejudiced in that he may not then adduce certain evidence which he would otherwise have produced. Further, if the point of law is only raised at the very end of submissions (and in the present case after judgment had been handed down) - perhaps because only appreciated as a relevant point at that late stage – then a party may have failed to cross-examine on matters which he ought to have put to a witness.

45. Thus, in the present case, Mr Freedman submits that DGI will be prejudiced if the matter now goes off to an enquiry. First he says that there was no order for a split trial and that DGI is therefore entitled to an order for payment of damages in the amount claimed without any assessment, there being no material to justify going behind the bills justifying the amounts claimed. Having failed to raise any issue that the costs claimed (and proved as having been paid) were unreasonable, and having failed to put any particular elements of unreasonableness to Alex, Haig or the witnesses for them, it would be unjust, in terms of trial management and delay, for Mr Simms, Jack and Helga now to be allowed to go behind the material which was before the court and which is sufficient to allow a determination of the amount of damages to be made. In effect, it is said that, because no challenge had been made to any item of the bills as being unreasonable, the entirety of the bills should be assumed to be reasonable. In support of that he says that these costs have already undergone a level of scrutiny by the arbitrator who, indeed, disallowed some of them. Although he was conducting an assessment on the indemnity basis, and perhaps did so with a broader-brush approach than would a Costs Judge, the fact that he has allowed them is, it is said, good evidence of their reasonableness.

46. Secondly, he says that the evidence of witnesses who have previously been called would be relevant and to call them again would be onerous and incur further unnecessary cost. One example is Mr Gallo. If the costs of his attendance for many days at the arbitration are to be challenged (either as disproportionate or unreasonable) he, and possibly his clients, Alex and Haig, would need to give evidence to justify his attendance. That is something which, according to Mr Freedman, should have been dealt with at the trial. It is then pointed out that Haig has now died and it is suggested that Alex should not be put under the additional stress and strain that further evidence would entail.

47. Thirdly, he says that the costs of an assessment would themselves be significant and expresses concern about recovery of those costs (assuming that DGI is entitled to recover any). This is a factor, he submits, which militates against ordering an enquiry.

48. It is, I am sure, within my powers to order an assessment of DGI's costs of the arbitration on the standard basis whether by referring the matter to a Costs Judge or adopting some other mechanism including retaining the matter myself. In deciding how to exercise my discretion, I find it helpful to consider what I might have done if it had been said to me, at the commencement of the trial, that the quantum of damages, if liability was established, should reflect the standard basis and that the entirety of the costs claimed might not fall within that basis. I venture to think that I would not have welcomed what would effectively have required an assessment of costs by me within the purview of a complex and hotly contested trial, an assessment which would not be necessary if the Claimants' claims had all failed. My strong inclination would have been to put off any assessment to a later occasion. That inclination would have been reinforced in the light of the submissions which I have now received (and would then have received) about the correct approach to costs in third party litigation as damages. Jumping ahead, this is an aspect of this litigation in relation to which I consider that permission to appeal should clearly be given. I would have been all the more reluctant to undertake an assessment myself within the trial when it might turn out to have been conducted on an incorrect basis.

49. I am not persuaded by Mr Freedman that the prejudice which he suggests will be suffered by DGI is sufficient to prevent Mr Simms, Jack and Helga from challenging items on the bills which form the basis of the damages claim; I consider that the costs should be subject to an assessment. It will be for the person conducting the assessment to decide how he or she wishes matters to proceed, but if this were a conventional assessment before a Costs Judge, specific objections would be made to items on the bills provided for the assessment. If further evidence is required to justify any amount which is challenged, it would conventionally be provided by a witness statement. It is unlikely

to my mind that any cross-examination would, assuming an assessment before a Costs Judge or indeed myself, be required. It is very difficult to see in what respect the evidence of Alex or Haig would be needed but, even if it is, no area has, as yet, been identified where the evidence of Haig would be necessary rather than that of Alex. I take account of Mr Freedman's other submissions that the matter should have been raised expressly at a much earlier stage and that further evidence may be needed and of his concerns about the recovery of costs of any assessment. Taking all of these into account I nonetheless decide that the damages representing the costs of the arbitration are restricted to costs on the standard basis and that those costs should be subject to an assessment in default of agreement. I will hear further argument about the appropriate mechanism for dealing with such an assessment.

50. I should say something about the claim for financing costs. If I were to adopt Mr Freedman's submission in relation to Mr Simms, Jack and Helga being fixed with their case on damages as it stood after closing submissions, so that they are prevented from raising the issue concerning the recovery of standard costs only, then it seems to me that DGI too would be fixed with the evidence before me which does not include exhibits HD1 and HD2 mentioned above. Moreover, I do not know if Gallo & Darmanian's revised calculation dated 10 February 2004 is in evidence – I have not had it drawn to my attention – and even if it is, its evidential status is not clear. I do not think it would be fair to allow into evidence at this stage the material which would fill the gap without at the same time allowing Mr Simms, Jack and Helga to challenge items of the overall bill as they would be entitled to on an assessment of costs.

51. I should also add that, if I am correct in my approach to the recovery of costs in other proceedings as damages, then the financing costs will be recoverable only if they are allowed as an item of costs on a standard basis assessment. Further, interest on such financing costs should not be allowed (until it can be claimed as interest on a judgment debt) since that would be to award compound interest. I would only add that it ought to follow logically that, if an item of the bill is disallowed as being unreasonable, then the finance charge in relation to any borrowing used to discharge that item ought also to be disallowed.

52. However, if the financing costs are not to be allowed, DGI would say that interest on the costs which it recovers as damages should be recovered as from the date when those costs were incurred whereas, at present, the claim is only made from 11 March 2004, the date of the Final Award Part VI, interest having been claimed from that date only on the basis that the financing costs would be recoverable. Lest Mr Simms and Mr Cakebread consider that I am unfairly taking account of a submission made by Mr Samek in an email in response to a request by me for assistance in tracking down some information in the trial bundles, this is an aspect which I had already appreciated and would, in any case, have wished to deal with. There is some force in the argument, save that I would say that the relevant date is the date of payment rather than the date when the cost was incurred. As to that, I do not know if the relevant material is in the bundles. I have certainly not had any submissions on that sort of detail which would enable me to ascertain what sums should carry interest before 11 March 2004 and over what period. Those issues are more fitted to detailed consideration on an assessment. However, if there is to be an assessment, the point does not arise since DGI should be entitled to make good such deficiency as I have detected in its evidence in support of the financing costs.

53. That leaves the question of the storage costs claimed. The basis of this claim is that DGI had to retain the Tooling in storage pending the outcome of the arbitration. I did not deal with this head of claim in my judgment because I had not understood it to be made other than in relation to the claim for procuring breach of contract, a claim which I dismissed. I do not, in any case consider that it is a good claim. Storage costs are sought for the period September 1997 to July 2003 (*ie* the period from the date of the Option Agreement to the conclusion of the arbitration). The foundation for this claim has to be that, if the Option Agreement had not been entered into, these costs would not have been incurred. That in turn entails the proposition that, absent the Option Agreement, DGI would either have sold the Tooling elsewhere or it would have sent it for scrap (as eventually happened). As to sale, there is, as I said in my judgment, no evidence that an alternative buyer could have been found in the period up to the termination of the contract and it is, I think, fanciful to think that the Tooling would have been scrapped prior to the date of termination in September 1998. After that time, DGI could have sold the Tooling elsewhere (if a buyer could be found) or sent it for scrap. Certainly, on its own case, it could do so since it had validly terminated the contract and that view was vindicated by the arbitrator. Further, Charlton sought only damages in the arbitration and itself appears to have accepted that the contract was at an end: it is nowhere asserted that Charlton still wished to acquire the Tooling. For that reason, Mr Simms, Jack and Helga cannot be held liable for the storage costs.

54. Further, even if it was right for DGI to retain the Tooling out of an abundance of caution until its dispute with Charlton was resolved, there is no evidence about when the Tooling would, absent the Option Agreement, have been sold or scrapped. I am unwilling to conclude that the Tooling could or would have been sold at any particular point of time within the period in question; nor has my attention been drawn to any evidence which would support the proposition that the Tooling would have been scrapped, absent the Option Agreement, at any time before the date when it actually was scrapped. The onus is on DGI to establish its loss. I do not consider that it has established that the storage costs form part of its loss.

55. The Claimants seek interest on their damages under section 35A Supreme Court Act 1981 from 11 March 2004, the date of the arbitrator's Final Award Part VI. I award such interest from that date to the date of this order. Interest under section 35A is simple, not compound. The rate should, in the circumstances of the case, be a

commercial rate which I fix at 1% pa above base rate from time to time. So far as financing costs are concerned, it will be a matter for the assessment to determine whether they are recoverable under a standard basis assessment. If they are, then the damages will reflect those costs up to 11 March 2004, after which the underlying costs bear interest pursuant to my order. If they are not recoverable, then interest should run from the date when such costs were actually paid.

56. The Claimants seek an interim payment on account of damages. It is clear that, even on a standard basis assessment, Mr Simms, Jack and Helga will be liable for a substantial sum. The claim, ignoring financing costs and interest, is for just under £1,100,000 but that does not pretend to be a figure ascertained as costs of the arbitration on a standard basis. I propose to allow £650,000 as a payment on account of damages and interest. I have not heard submissions on the time for payment but, subject to any further submissions when I hand down this judgment, I propose to order payment within 28 days from such hand-down. See also paragraph 94 below concerning stay.

Costs of this litigation

57. Mr Freedman seeks DGI's costs of this action. If one stands back, it can be seen, he says, that DGI is the real winner in the action notwithstanding that it has succeeded in only one of its several claims. He seeks costs on the indemnity basis principally on the basis that the behaviour of Mr Simms, Jack and Helga in relation to disclosure (with, as he puts it, a drip feed of documents reluctantly disclosed throughout the trial process) was deplorable amounting almost to an abuse of process justifying a strike-out. He says that there should be no order against Alex and Haig.

58. Mr Simms and Mr Cakebread, however, point out that Alex and Haig lost all of their claims, and that DGI lost all but one. Further, had DGI limited its claims to the one claim on which it was successful, the trial itself would have been significantly shorter, much of the evidence would have been unnecessary and pre-trial activities in disclosure and preparation would have been shorter. They seek variously orders against Alex and Haig, an issue-based costs approach (resulting in orders in each direction) or in the alternative a significant reduction in the percentage of the costs which DGI would otherwise be entitled to recover. On any footing, they say, this is not a case for indemnity costs.

59. It is certainly the case that the courts must be more ready than in the days before the CPR to make issue-based costs orders where the outcome of separate issues is different. That will most clearly be appropriate where the material relating to each issue can be easily compartmentalised. It is not so obviously apparent where a large amount of the factual material goes to more than one issue and where the claimant succeeds on some but not all of those issues. In such a case, it may be that the claimant is nonetheless clearly to be regarded as the winner and should receive all of his costs, or it may be more appropriate that there should be an across-the-board percentage reduction in what the claimant would otherwise recover. In exercising its discretion, the court must pay regard to the criteria set out in CPR44.3. I bear the entirety of the rule in mind, in particular paragraph (7) concerning the making of issue based orders. I also bear in mind the authorities cited by Mr Simms and Mr Cakebread in their respective skeletons, in particular ***Phonographic Performance Ltd v AEI Redifusion Music Ltd*** [1999] 1 WLR 1507, ***Johnsey Estates (1990) Ltd v SoS for the Environment*** [2001] EWCA Civ 535 and ***Summit Property Ltd v Pitmans (a firm)*** [2001] EWCA Civ 2002.

60. The original Particulars of Claim of February 2004 did not contain any allegation of a fraudulent misrepresentation that Jack was only an intermediary. That first appeared in the Amended Particulars of Claim dated 27 April 2005. The misrepresentations originally alleged are the ones which the arbitrator held had been made but in respect of which I have rejected DGI's claim in these proceedings *ie* the major shareholder and financial representations. However, in the original Particulars of Claim, Particulars of Fraud were listed under paragraph 11: this included the allegation that Mr Simms and Mr Rahman had failed to disclose Jack's involvement with Charlton when the Claimants had believed him to be only a go-between. And then, in paragraph 12, it is alleged that those representations caused DGI to enter into the Option Agreement when they would not otherwise have done so.

61. More importantly, perhaps, in relation to the claim against Jack and Helga in relation to piercing the corporate veil, it was pleaded at paragraph 29 of the original Particulars of Claim that Charlton was used as a device and a vehicle for fraud, concealing the liability of Jack and Helga and then it is said "Indeed had DGI known that [Jack and/or Helga] were so involved, then it would not have entered into the Option Agreement, or any agreement, with Charlton". That pleading remained unamended throughout. Mr Simms' original defence did not take the line that this pleading was only made against Jack and Helga and therefore did not concern him. Instead he pleaded why Charlton was genuinely independent and denied that there was any basis for piercing the corporate veil. Jack and Helga of course denied paragraph 29.

62. So, although the intermediary representation was not initially pleaded, it was part of the original pleading that there was a failure to disclose that Jack was not simply an intermediary and that, had DGI known the true position, it would not have entered into the Option Agreement, the relevance of that to the original claim being that, had the other representations in fact been made, then the knowledge that Jack was not merely an intermediary would make the major shareholder misrepresentation all the more dishonest. The deceit claim based on the intermediary representation was, however, a new claim. It required a positive assertion to the effect that the intermediary representation had been made in addition to the existing allegations that there had been no disclosure of Jack's involvement, there being no allegation that there was a duty to disclose it.

63. The Claimants' claim in its final form sought damages against Jack and Helga equal to the arbitrator's awards of damages and costs; against Mr Simms, the claim was for costs only, it not being sought to make him contractually liable in any way as a result of the lifting of the corporate veil of Charlton. In the event, only DGI has recovered anything, and then only the costs of the arbitration – as I have held in the first part of this judgment restricted to costs equivalent to costs assessed on the standard basis. On any footing, the costs recoverable under my judgment will be less than the arbitrator's awards of costs and a different approach to interest will be adopted, the arbitrator having awarded compound interest.

64. DGI's contractual claim, based on lifting the corporate veil, has been lost, as have the claims of all the Claimants in relation to the alleged Conspiracies I and II and malicious prosecution. A considerable amount of the trial time and of the evidence was devoted to matters which were principally relevant to those claims, in particular in relation to the contractual position under the Option Agreement and the letter of credit. I have taken a rather different view from the arbitrator of the contractual position and the position in relation to the letter of credit. It might therefore be thought that this evidence was essentially unhelpful in relation to the deceit claim based on the intermediary representation. That is not, however, correct. DGI had to prove its loss and damage. It was met with the defence that the costs of the arbitration were not caused by the misrepresentation but were caused by DGI's own breach of contract. I have rejected that argument for the reasons given in paragraph 760 of my judgment as further elaborated in the first section of this judgment on damages, essentially because Mr Simms, Jack and Helga cannot go behind the arbitrator's decision as between DGI and Charlton in order to show that DGI's position in that arbitration was not reasonable. The contractual position could well have been relevant if I had taken a different view on that aspect. In the end, DGI won on the issue and I do not consider it appropriate to separate out the costs of the examination of the contractual position from the costs of that issue.

65. It is correctly said by Mr Simms and Mr Cakebread that the contractual claims (*ie* that they were directly liable on the awards against Charlton made by the arbitrator) against Jack and Helga failed in their entirety. They say that it would be unjust for any part of the costs of this part of the proceedings to be visited on Jack and Helga. The problem with that approach is again that the evidence and time at trial which went to that issue was also relevant to Jack's status and whether he was only an intermediary. His position (and that of Helga also) was that Jack had no influence or control over Charlton, not even being a discretionary beneficiary under the trust structure in which he and Helga maintained Ancon and Charlton sat. The same evidence on the basis of which it was sought to establish that Jack and Helga's involvement was such that the corporate veil of Charlton should be lifted also went to the question whether or not Jack was more than an intermediary.

66. Mr Cakebread suggests that the question whether the intermediary representation was untrue was one of control of Charlton within or without a trust structure, a question of who "called the shots". Actual ownership, he says, is not the necessary test. Whether or not it was necessary, it was clearly an important part of DGI's case to establish that Jack and Helga did control Charlton; I do not think that the question of control in sense of "calling the shots" could have been dealt with in this case without an examination of legal and beneficial ownership of Ancon/Charlton. Had the intermediary representation been the only issue in this case, I do not consider that DGI could have been criticised for adducing the evidence which it did concerning legal and beneficial ownership and the defects in the alleged trust structure.

67. In similar vein, Mr Simms says that the time spent on the intermediary representation was comparatively small. It is true that comparatively little time was spent on the question whether the intermediary representation was made: the emails spoke for themselves and there was not a great deal of other pre-contract evidence which was of relevant to that question. But a considerable amount of time was spent on the issue whether the intermediary representation gave rise to liability because part of the defence was that the intermediary representation, if it had been made, was true, Jack having no interest in Ancon at all and having no control over Charlton at all. I accordingly also reject Mr Simms' approach which has always been that the ownership of Ancon was not something which needed to be gone into.

68. Further, and contrary to another submission of Mr Cakebread, I do not consider that the lengthy cross-examination of Jack and Helga – simply an attempt to discredit them, he says – was inappropriate to the issues on which DGI succeeded.

69. Mr Cakebread also submits that the conspiracies were hopeless allegations and took up a significant amount of time and energy at the trial and were parasitic on the contractual issues (*ie* the contractual issues between Charlton and DGI in contrast with Jack and Helga's alleged liability on the arbitrator's awards). I do not think that that is a way of stating what happened which properly reflects the reality. It is true that a significant amount of time was spent examining factual issues (principally in relation to the contract and the letter of credit) which were relevant to the conspiracies and the contractual issues. But if a claim in deceit based on the intermediary representation had been the only claim brought by DGI, the contractual issues between Charlton and GGI would still have featured. This is because Mr Simms, Jack and Helga all assert that the arbitration costs were not the direct result of the misrepresentation, part of their case being that it was not Charlton's breach which brought about the arbitration but DGI's breach. Further, in relation to that aspect, it would have remained necessary to consider the ability or otherwise of Charlton to open the letter of credit. I accept that less time would probably have been spent on these issues than was spent but the contractual issues would still have needed to be aired at some length.

70. Mr Cakebread invites me to disallow the costs of preparation of the evidence of Mr Gallo and Alex. In relation to Mr Gallo, it is said that his witness statement was largely irrelevant and inadmissible and I have found that Alex's evidence in relation to the representations (other than the intermediary representation) was untrue. So far as concerns Alex, much of his evidence in his witness statements was both relevant and true: I do not propose to attempt any sort of reduction in the costs of preparation to reflect Mr Cakebread's submission. Nor do I consider it appropriate to disallow the costs of Mr Gallo's witness statement much of which was of assistance.

71. Mr Cakebread also says that I should disallow the costs of a great deal of expert evidence other than from Gallo & Darmanian which was put before the court but "which proved to be irrelevant, peripheral or was not in the end relied on". These are aspects which should be dealt with on assessment, not by me in the absence of detailed reference to precisely what it is I am asked to disallow.

72. Finally Mr Cakebread submits that the conduct of this litigation by the Claimants has been disproportionate to the limited success which DGI alone eventually achieved. He says that the trial could easily have been achieved in a fraction of the time actually taken (perhaps a reflection, although he is too polite to say so, of my management of it). He notes in particular the short time taken up by Jack and Helga in evidence, and by Mr Ashe and himself in cross-examination and written and oral submissions (a matter on which he is clearly correct). But when he says that this no doubt reflects the fact that so much of the Claimants' efforts were directed towards the "largely irrelevant" trust and contractual issues, I have to disagree that they were "largely irrelevant". They were, on the contrary, important in establishing Jack's actual involvement and rebutting the case that Jack was only an intermediary (something maintained throughout the trial) and in dealing with the issue of causation. In any event, so far as the time spent by Mr Ashe on submissions and cross-examination is concerned, it must be remembered that Mr Simms covered huge amounts of ground which it was unnecessary for Mr Ashe to go over again.

73. There is more force in Mr Simms' submission (supported by Mr Cakebread) in relation to the costs attributable to the alleged misrepresentations other than the intermediary representation and that these should be reflected, favourably to the Defendants, in the overall costs order. Although the arbitrator held that those misrepresentations were made out, I have reached a contrary conclusion at least to the extend of deciding that, if they were made at all, that they were not made before the Option Agreement was entered into. The Claimants' pleaded case was, and should have been known to be, unsustainable insofar as the allegation that these representations were made to Haig as well as to Alex. Haig's evidence in the arbitration, as it was before me, was to the effect that he heard of the representations only from Alex. The pleaded case should never have been made with the width that it was. There is no doubt in my mind that a significant amount of time was spent at the trial in relation to these representations and considerable work must have been done on it by the parties. It was a time-consuming part of my judgment to resolve. DGI's failure on these issues must be reflected in the costs order which I make.

74. Next, I must take into account the time spent on the privy argument. Long parts of Mr Simms' written submissions dwelt on this aspect of the case, Mr Freedman and Mr Samek also devoted much time and thought to it in their written submissions. It is a very difficult question whether any of Mr Simms, Jack and Helga were privies of Charlton. I avoided giving an answer to it because, as it seemed to me, the question, was, ultimately beside the point. It is true that I have not made a finding against DGI on this question, but I have rejected the claim based on a privy relationship. This, too, must be reflected in my costs order.

75. Mr Simms has made some lengthy submissions in relation to the costs of Conspiracies I and II which I do not propose to consider in detail. It is enough for me to say that, the Claimants having lost their claims, the costs order should reflect that loss in some way. But it needs to be remembered, again, that much of the evidence (and time spent at trial) on the facts relevant to the conspiracy allegations was evidence about how DGI and Charlton were (or were not) complying with their contractual obligations and which was evidence relevant to causation in relation to the intermediary representation.

76. Both Mr Simms and Mr Cakebread say that DGI's costs prior to 25 April 2005 should not be allowed since before then the intermediary representation had not been alleged and the Claimants have failed on all the claims which were pleaded. There would be some force in that submission if, on receipt of the amended pleading, Mr Simms, Jack and Helga had conceded defeat on the new claim (on which I have in fact held in favour of the Claimants). But it must surely be the case that a considerable amount (if not all) of the work which had been done by each side up to that time was highly relevant to the new claim as well: if the work had not been done prior to the amendment, it would have to be done after it. It does not seem just that DGI should be deprived of its costs in relation, for instance, to work on factual issues which were relevant to the claim on which it succeeded simply because those costs were incurred at a time when the claim was formulated in a different way.

77. What I conclude from all of this is that the issues and the evidence which went to them were so inextricably intertwined that it is inappropriate to make any issue-based costs order as between DGI on the one hand and Mr Simms, Jack and Helga on the other. It might be possible to separate out the costs of the major shareholder and financial representation claims, but in the context of the costs issues as a whole, and bearing in mind CPR 44.3(7), I do not think that this is the right course. I think that an issue based costs order would (contrary to Mr Simms' submissions) be impracticable of implementation. Mr Simms submits that it would be simple for the costs attributable to the intermediary issue to be separated out and for those alone to be the subject of an order in favour of DGI, with the costs in relation to everything else being the subject of an order against all of the Claimants. But this ignores, I consider, the fact that much of the evidence which he would wish to allocate exclusively to the issues on which he succeeded are in truth relevant to the issues which arose in relation to

establishing liability and damages flowing from the intermediary representation. In my judgment, the success of Mr Simms, Jack and Helga on certain issues should, I consider, be reflected, if at all, in a percentage reduction in the costs which DGI would otherwise recover.

78. The position in relation to Alex and Haig is different. They have lost altogether the claims which they brought. There are no costs payable to them which can be reduced to reflect the success of Mr Simms, Jack and Helga against them. It is, however, unrealistic to consider the positions of Alex and Haig separately from that of DGI. They were co-claimants in the same action and their commercial interests precisely overlapped. However, I confess to some puzzlement here. Mr Freedman tells me that DGI was responsible for all the costs of the arbitration so that all the bills which establish the damages claim were payable by DGI. On that footing, I do not understand how Alex and Haig could have had a claim in the first place. That may be another reason for having assessment of DGI's costs. But that point aside, it seems to me that, in principle, Alex and Haig should pay the costs of Mr Simms, Jack and Helga to the extent, but no further, that their costs of the litigation have been increased as a result of Alex and Haig's involvement. I would anticipate that those costs would be modest: it is difficult to see that any extra work could have been imposed on Mr Simms, Jack and Helga other than perhaps some time on the formal pleadings and a small amount of time on the preparation of legal argument. The additional cost which would be incurred in identifying this element of cost would be likely to be disproportionate. I think that the best way of dealing with this aspect is for it to be reflected in the overall percentage reduction in DGI's own costs which should be made to reflect DGI's own failure on these issues and that is the course I propose to take.

79. Before turning to the amount of the reduction, it is necessary to say something about the conduct of the parties to this litigation, conduct which must be taken into account by virtue of CPR 44.3(4)(a) and (5)(a). Mr Freedman submits that the behaviour Mr Simms, Jack and Helga has been deplorable, especially in relation to disclosure, and should be visited with an indemnity costs order. He relies in particular on the following:

a. Adverse findings about the honesty of Mr Simms, Jack and Helga in connection with their evidence. There was deliberate lying, which had to be uncovered in order, finally, for all of the layers of falsity to be revealed.

   Whilst I accept what Mr Freedman says in relation to Jack and Helga, I think that it is unfair to Mr Simms where most of my criticisms were directed not at his evidence but at what he told third parties during the course of the Bangladesh project.

b. Adverse findings about the disclosure provided (including the failure to adduce evidence to make good assertions in the evidence of Mr Simms, Jack and Helga). The fact that some of the most important documents emerged during the trial is testimony to how serious this non-disclosure of documents was.

   My judgment does indeed contain several references to the lamentable disclosure in this action as well as the arbitration. It is true also that important documents emerged during the trial. All of them (Mr Simms, Jack and Helga) must take responsibility for this.

c. The conduct of the Defendants made necessary a vast number of applications in order to unearth how limited were the assets of Brinton. Moreover, the important evidence of Dr. Marxer only came about as a result of so many applications despite every attempt of Jack and Helga to stand in the way of the provision of such information.

   Again, this criticism of Jack and Helga is justified. It is less justified in the case of Mr Simms.

d. Jack's and Helga's deliberate evasion of service of proceedings and court orders, and subsequent untrue evidence about that, the lies only emerging by way of admissions extracted during the case.

e. The lies and inaccuracies contained in detailed statements and affidavits (from Jack and Helga and from third parties such as Maitre Croisier) about the settling of assets into Brinton from the affidavits of disclosure onwards.

f. The protracted attempts on the part of the Defendants to resist the identity of Brinton being revealed. Mr Simms assisted in this, I consider, although the primary opposition may have been orchestrated by or on behalf of Jack and Helga.

g. The persistent refusal by Jack and Helga to identify where their assets really were, since they were not within Brinton. DGI was able to find out about Cooke Investments Ltd which, as I describe in my judgment, was effectively used by Helga as a bank account.

80. In contrast, Mr Freedman would say that the Claimants have behaved perfectly properly throughout. Their claim was brought in good faith including those parts of the claim where DGI did not succeed. He relies on what I said in paragraph 710-712 of my judgment (but what I said there was that the claims in the arbitration based on the financial misrepresentations were made in good faith). However, it does seem to me that the claim based on Conspiracy II ought not to have been made. And the pleading in this action alleging representations to Haig as well as Alex ought not to have been made either in the light of Haig's evidence both at the arbitration and at the trial of this action.

81. I would also comment that it is equally true that Charlton's position in the arbitration was *bona fide* and, as is clear from my judgment, I disagree with the arbitrator in some of his findings. Further, I think that the defences of Mr Simms, Jack and Helga in the present action were *bona fide*. Indeed, they were wholly successful in their defences against the claims made by Alex and Haig and successful in all but one of their defences against the claims of DGI. So far as Mr Simms and Helga are concerned, they, unlike Jack, did not themselves make express representations about Jack's status and had arguments which they were entitled to present to say that they were

not contaminated by Jack's representations. I have rejected, rightly or wrongly, those arguments, but I do not consider that they were made other than *bona fide*.

82. Mr Freedman then draws attention to the other factors to which CPR 44.3 refers:

a. CPR 44.3(4)(b): success on part of the case. Mr Freedman says that the effect of the intermediary misrepresentation claim succeeding was that DGI succeeded on the core of the case against Mr Simms, Jack and Helga. It is, he says, for all practical purposes a complete success. It is of course a very important, if not the most important, factor in favour of the order which Mr Freedman seeks. But although I do not consider that an issue-based order is appropriate, the success of the Defendants on the other issues cannot be ignored.

b. CPR 44.3(5)(b): reasonableness of raising issues other than the intermediary misrepresentation. Mr Freedman submits that the other claims were reasonably raised for the following reasons or any of them:

i. the findings of the arbitrator;

ii. they are closely linked to the intermediary misrepresentation;

iii. the dishonesty and the failures of disclosure of the Defendants inevitably led to inferences being drawn: the additional claims were therefore brought upon the Defendants by their own behaviour;

iv. they were made in good faith, as the Court has found.

In any event, they were required to be dealt with as a result of Mr Simms' Counterclaim which raised, in particular, issues concerning the option agreement and its performance. I agree that it was reasonable to raise these issues. But that is not to say that the costs order should not reflect at all the fact that the Claimants did not succeed on them.

c. CPR 44.3(5)(c): the manner in which a party has pursued a case. I do not see this as adding anything to the discussion about conduct.

d. CPR 44.3(5)(d): exaggeration of claim. Mr Freedman suggests that this arises as regards Mr Simms' Counterclaim. I am not sure that the claim was exaggerated. It failed; but if it had succeeded in principle, the level of the claim might also have succeeded. If anything, it is DGI's claim which was exaggerated by its attempt to fix Jack and Helga with contractual liability in respect of the arbitrator's award.

83. Accordingly, Mr Freedman submits that DGI should have all of its costs with the liability of Mr Simms, Jack and Helga being joint and several. He also submits that costs should be awarded on the indemnity basis.

84. In relation to indemnity costs, Mr Simms relies on ***Shania Investment Corporation v Standard Bank London Ltd*** [2001] ALL ER (D) 36 (Nov), in which Mr Michel Kallipetis QC, sitting as a deputy judge of this Division, distilled the following propositions from the cases.

"….when the Court is considering what is the appropriate basis for an award of costs under Part 44, the usual Order would be to award costs on a standard basis unless there is some element of the party's conduct of the case which deserves some mark of disapproval which is achieved by awarding costs against that party on an indemnity basis…..

Advancing a case which is difficult, unlikely to succeed or which in fact fails is not a sufficient reason for such an award."

85. That is not to say that the case must be one which is deserving of moral condemnation before an indemnity costs order can be made. Since then, the Court of Appeal has dealt with some of the issues surrounding the circumstances when it is appropriate to make an indemnity costs order in ***Kiam v MGM (No 2)*** [2002] 2 All ER 242 and ***Excelsior Commercial and Industrial Holdings Ltd. v Salisbury Ham Johnson*** [2002] EWCA Civ. 879. Those cases emphasise what has never been in doubt which is that the question of costs is a matter of discretion. As the Lord Chief Justice said: *"…there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to [the] submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances where they should not……..This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."*

86. However, where what takes an otherwise ordinary piece of litigation out of the norm is conduct on the part of the paying party, the abnormality must, I think be unreasonable to a high degree. As it is put by Simon Brown LJ in ***Kiam***,: *"I for my part understand the court there [in Reid Minty] to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Pt 44 (unlike one made under Pt 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory….."*

87. Mr Freedman says in his written submission that this case is well outside the norm by reason of the conduct of Mr Simms, Jack and Helga, and it attracts an indemnity costs order. This case, he says, would have been one for an indemnity costs order even if the threshold had been that the case was deserving of moral condemnation. *A fortiori*, this is a case for indemnity costs given the lower threshold. He submits that the exceptional nature of the case is that each of the Defendants did what they could to deprive DGI of its right to a fair trial by the lies which they told and by the suppression of documents. This then led to the difficulties for the Claimants of uncovering the five layers [*ie* the layers referred to in my Judgment]. The position of the Defendants was to deny that these alleged misrepresentations were made.

88. In contrast, Mr Ashe, as I said in my judgment, described the Claimants claims as "extravagant" and as "fairly extraordinary even by the standards of these claimants" and complained that much of the 6 weeks of the trial was been taken up with minute examination of the nature and extent of Helga's trust arrangements which he said was of only the most peripheral relevance to the issues in the case. And Mr Simms, for his part, has also complained about the time spent on trust issues and the corporate structure underneath the trust.

89. As can be seen from my judgment, these issues were in fact not peripheral to Jack's true role and thus to the intermediary representation. The reason, or at least one reason, why time was spent on these issues was because Mr Simms, Jack and Helga denied them and because relevant documents were withheld. Mr Freedman submits that "*the exercise which DGI undertook was vital to make good the central allegations in the case",* going on to submit this: "*It is a natural corollary for the Court, following such conduct, to say that if there are points about the reasonableness of costs, the onus should be on the paying party to make this assertion. Similarly, they should not be able to invoke proportionality when by their conduct they left DGI to incur considerable expense to uncover the layers. This is exactly what an order for costs to be assessed on the indemnity basis would reflect.*"

90. My conclusions on costs are as follows:

a. This is not an appropriate case for an issue-based order. Instead, a percentage reduction should be applied to the costs which the Claimants would otherwise recover to reflect the Defendants' success in resisting the claims by Alex and Haig and in resisting all but one of the claims by DGI whilst recognising that DGI's success on that claim gave it a significant part of what it claimed. That costs order will subsume the costs of Mr Simms' counterclaim (a claim which cannot, I think, have added much to the costs of the action as a whole).

b. In relation to Jack and Helga, I consider that this is an appropriate case for an award of indemnity costs against them in the light of the factors which I have set out at paragraph 79 above. I have found the position far more difficult in relation to Mr Simms. I am persuaded that an indemnity order should be made against him too but my reason for that conclusion is ultimately his failure to provide proper disclosure of material which in the end included documents which turned out to be of great importance, in particular the emails surrounding the "playing the game" email.

c. So far as the percentage reduction is concerned, I do not regard the case as anything like so clearly in DGI's favour as Mr Freedman submits, he considering that no reduction should be made. It is, unfortunately, not possible to be entirely scientific about this without carrying out what would amount to a detailed assessment on an issue-based approach, something which I have already rejected as impracticable. I must therefore, in the hallowed phrase, do the best I can in my knowledge of the case, the trial bundles and the hearing itself. On that basis, I propose to apply a blanket reduction of 25%.

d. The costs which I am here concerned with are the costs of the action. Costs or interlocutory applications need to be dealt with separately. I do not know the position here: some will have been dealt with on the hearings themselves, some may have been reserved to me, some may have been ordered to follow the event in some way. I should not, in this judgment, be taken as dealing with those costs in any way.

e. It has not been submitted to me that such costs as I decide to award against Mr Simms. Jack and Helga should be other than a joint and several liability. I propose to proceed on that basis.

91. DGI seeks interest on costs under CPR 44.3(6)(g). In my judgment, the fair result, in the light of the overall costs orders which I have made, is to award interest from the date of handing down of my judgment on 24 November 2006, at the same rate as I have awarded in relation to damages *ie* 1% pa above base rate.

92. DGI also seeks a payment on account of costs. Subject to questions of stay pending an appeal, I think that such an order should be made. I would like to see an up-to-date schedule of costs when handing down this judgment identifying the figure claimed. I would then expect to make an order for payment on account of one half of 75% of that figure.

93. The Claimants seek release of the security given for costs by them, being two sums of £15,000 each plus interest. In principle, they are entitled to an order to that effect.

94. However, jumping ahead, it will be seen that I am going to grant permission to appeal on a number of issues. It may be that Mr Simms, Jack and Helga will seek a stay of my orders for payment on account of costs and for an interim payment on account of damages; if they are successful in such an application, it might be thought that the right for the Claimants to obtain payment out of the security which they have paid into Court to be postponed until after the hearing of an appeal. I will hear submissions on what the parties have to say on this question and the question of a stay.

95. I do not deal in this decision with the various applications in relation to the freezing order which have been granted. The Claimants seek release of the security given in relation to the cross-undertakings given when obtaining freezing orders and release from undertakings given. Mr Simms, Jack and Helga say that the freezing orders were obtained on the basis of claims on each of which the Claimants failed and that the orders should be discharged. These are matters which will need to be dealt with on another occasion.

96. The Claimants also seek permission to enter judgment against the twelfth and fourteenth to sixteenth Defendants together with costs and the release of the cross undertakings and security unless they (or some of them) show cause within 28 days why there should be no such order. Notwithstanding that there may subsisting breaches of court orders by some or all of those defendants, I do not consider that it is appropriate to take the course which Mr Freedman invites me to take. The defendants were taking part in the action until the order of Sir Donald

Rattee providing for their non-attendance at trial. I do not consider that judgment should now simply be entered against them with the onus being placed on them to apply to the Court. DGI should in my judgment make an application in the ordinary way upon notice to them.

Permission to appeal

97. Mr Simms, Jack and Helga all seek permission to appeal from my decision on my findings that they are liable for fraudulent misrepresentation. They all seek to challenge my findings (a) the that Jack represented prior to the Option Agreement that he was only an intermediary (b) that, even if he did, DGI relied on such representations and (c) that, even if reliance was placed on such a misrepresentation in entering into the Option Agreement, DGI's loss did not flow from the misrepresentation but, in particular, was caused by Charlton's breach of contract.

98. As to the making of (or liability for) the intermediary representation, my finding of liability in relation to Mr Simms and Helga rests on their acting in concert with Jack and their knowledge of how he was presenting himself to DGI. Even if one takes the extreme view of their conduct generally which Mr Freedman presented, I cannot say that Mr Simms and Helga do not each have a real prospect of success in arguments that the inferences which I have drawn do, in the context of a claim in deceit, go beyond what is permissible and that there was inadequate material on which to render them liable as joint tortfeasors. I accordingly give permission for them to appeal on that aspect. It would not be sensible for them to be unable to raise, at the same time, the argument which Mr Ashe ran at trial to the effect that important email dated 1 August 1997 from Jack was not, on its true construction, and is not read as, a representation that Jack was only an intermediary. Whilst I would not give permission in relation to that point alone, it would be artificial not to allow Mr Simms and Helga to raise it in the context of the wider permission which I am prepared to grant. Given that, it seems to me that Jack, too, should have permission to appeal on that point. For the avoidance of doubt, I do not give permission to appeal in relation to my findings concerning the ownership and control of Ancon and Charlton nor in relation to my conclusion that Jack was, in fact, more than a mere intermediary and my reasons for reaching that conclusion.

99. As to reliance, I do not give permission to appeal. I do not consider that there is any real prospect of success in overturning my finding that DGI would not have entered into the Option Agreement if Alex and Haig had known that Jack was involved in the transaction other than as an intermediary. Further, I do not consider that there is any real prospect of success in establishing that the presumptions which arise in this area of the law (on which I relied) have been rebutted.

100. As to the direct result of the intermediary representation, the background is that Charlton was bound, in the absence of any appeal, by the decision of the arbitrator. I accordingly held that, whilst they themselves might not have been bound by the arbitrators findings, it was not open to Mr Simms, Jack and Helga to go behind those findings so as to assert that it was really DGI which was in breach of contract and that DGI's loss was caused by its own breaches of contract. It will be apparent from my analysis of the contractual position as between Charlton and DGI that I consider that Charlton actually had very strong arguments on the contractual issues. I did not express conclusions on those arguments since it was enough for my purposes, in dealing with Conspiracy II, to decide that Charlton had a *bona fide* case on the contractual issues. But if I had made a final determination in favour of Charlton, contrary to the arbitrator's decision, to the effect that it was DGI which was in breach of contract and that DGI was not entitled to terminate the contract as it did, then there would be considerable force in the submissions of Mr Simms and Mr Ashe that DGI's loss (*ie* principally its costs of the arbitration) was not the result of the misrepresentation but was the result of DGI's own breach of contract so that the chain of causation is broken. I consider that Mr Simms, Jack and Helga have a real prospect of success in their argument that causation should be judged against the actual facts rather than the facts as found by the arbitrator. This might require a final determination as between them and DGI of the contractual liability as between Charlton and DGI. Their argument would, however, be subject to whether they are in fact themselves bound by the arbitrator's findings as privies to his decision, a matter on which it was unnecessary and inappropriate for me to express a final view in the light of my other conclusions. I consider that I should give permission to appeal on this aspect (and, of course, DGI may raise the privy argument in response and, if it needs it, has permission to do so).

101. As already indicated, the question of the correct measure of damages where those damages represent the costs incurred in litigation by the claimant with third parties is a matter of difficulty which merits consideration by the Court of Appeal. I give permission to DGI to appeal from that aspect of this decision.

102. I will make orders accordingly in relation to damages, costs and permission to appeal.

CLIVE FREEDMAN QC and CHARLES SAMEK (instructed by Wallace LLP) for the Claimants
STUART CAKEBREAD (instructed by David Wyld & Co) for the 3rd and 4th Defendants
PA/UL SIMMS (litigant in person)