Mr Justice Thomas : 9th July 2003

Introduction

1. There is before the Court an application to consider and adjust the fees charged by the Board of Appeal of the Second Defendants (GAFTA) under s.28(2) and (3) of the Arbitration Act 1996 on the grounds that they were excessive and disproportionate. The application arose in the following circumstances.

2. In December 1998 a dispute arose over demurrage in connection with a sale to the Defendants (the buyers) by the Claimants (the sellers); the demurrage had been incurred when a cargo of grain was loaded on the *Vancouver* at Ilychevsk in the Ukraine. The claim by the buyers was for $53,762.50. The dispute was referred to arbitration under the rules of GAFTA. At the first tier arbitration the sellers succeeded. An appeal was brought by the buyers before the Appeal Board of GAFTA. By an award dated 11th September 2002, the Appeal Board held that the buyers' claim succeeded and that the sellers should pay the buyers the sum of $53,762.50 together with interest and the costs of the sellers. They also awarded that the sellers should pay the costs of the Appeal Board which amounted to £19,364.25.

3. The costs of the Appeal Board comprised:
   (1) Association fees … £2,359.30
   (2) Legal fees … £9,336.20
   (3) Board of Appeal fees … £7,688.75

4. The sellers were concerned at the size of the costs of the Appeal Board and in particular at the size of the legal fees of over £9,000. After enquiry, it transpired that the legal fees were the costs of a solicitor employed to attend the hearing and draft the award. In the hearing before the Court the sole issue related to the size of the fee of over £9,000 charged for drafting the award.

5. As the point raised by the sellers raised an issue relating to the duties of arbitrators in drafting awards and the proportionality of the fees charged, I afforded to GAFTA an opportunity to submit further evidence and reserved the point for my decision.

The scheme of GAFTA Arbitration

6. GAFTA provides a well known and respected scheme for arbitration in London of international disputes in the grain trade. The Regulations published by GAFTA set out, as the object of arbitration, the terms of s.1 (a) of the Act – "the fair resolution of disputes by an impartial tribunal, without unnecessary delay or expense".

7. The procedure in a normal case is for an award to be made by a single arbitrator or panel of arbitrators usually on documents; then there is a right of appeal to the Appeal Board which normally comprises of five qualified arbitrators. About 20% of cases go on appeal. An appeal usually is dealt with by way of oral hearing, with representatives for each party putting in written submissions and then appearing before the Board. At the Board of Appeal lawyers do not usually represent the parties.

8. Those appointed as arbitrators by GAFTA are required to undergo training, unless they are legally qualified; most are commercial people, as parties prefer to have their disputes decided by those who have knowledge of the trade. At the material time there were about 70 qualified arbitrators; the majority were based in the UK with the others coming from about 15 different nations, reflecting the international standing of GAFTA.

9. The training at GAFTA relates to the understanding of contractual terms, the arbitration rules, the Arbitration Act 1996 and arbitral procedure. The training is conducted by those knowledgeable in the trade and in the law; examinations are set by London Guildhall University. There is also a continuing professional development programme; a person cannot sit as an arbitrator unless he participates in that programme.

10. The relevant GAFTA Arbitration Rules provided that arbitrators have power to assess the fees and expenses incurred by the tribunal. The Council of GAFTA are empowered to determine the charges to be made for its costs incurred in arbitration and the fees charged for the arbitrators; the table of fees for the Appeal Board current at the time of the arbitration with which this application is concerned set out the rate per member of the Board of Appeal as £35 per hour, except for hearings at which representatives were present when the fee was £60 per hour. The table also specified under the heading of Appeal Board Members Fees: *"Award drafting £35 per hour"*

11. The evidence from GAFTA was that the total fee for a first tier arbitration was between £2,500 and £5,000 and for an appeal was between £5,000 and £10,000.

12. It is important to emphasise that the Claimant sellers made no complaint about the procedures of GAFTA or the fees charged by GAFTA for its services or the fees of the arbitrators; their complaint was directed at the charge of over £9000 by a solicitor for the drafting of the award.

The way in which the dispute arose

13. Although there was a parallel dispute between the buyers and the sellers involving substantially greater sums of money, the arbitration with which this application is concerned involved a fairly simple dispute where the sum in issue was just over $50,000. It is not necessary for me to recite the facts, but as is not uncommon in such trade disputes, there were the common and straightforward issues relating to the terms of the contract, as to whether there had been an oral variation, as to what had passed between the parties in respect of the nomination and the arrival of the lifting vessel, as to whether contractual notice was given and on one or two matters relating to laytime. This was not a case of any complexity, particularly for those experienced in the grain trade, as the disputes were of the type that commonly arise.

14. The Chairman of the Board of Appeal was Professor Rainer Karstaedt, Professor in International Commercial Law at Luneberg, Germany; he was an arbitrator of some 20 years' experience and had sat on the Appeal Committee of GAFTA for 15 years. The evidence before the Court was that when he was appointed Chairman of the Board of Appeal, he reviewed the papers and considered the matters in issue both legally and evidentially to be somewhat complicated. He therefore sent an e-mail to GAFTA stating that he required the appointment of a legal draftsman; the e-mail was not available, but he explained that he needed a legal draftsman: *"to ensure as far as possible that the reward reflected the opinions of the Board members, produced an appropriate and clear legal explanation for the award and provided justice to the parties."*

15. When Professor Karstaedt arrived in London for the hearing on 27 November 2001, it became clear that his request for a legal draftsman had gone astray and no one had been appointed. He nonetheless wished that a draftsman be appointed for the hearing that day. GAFTA telephoned solicitors that they normally retained, Middleton Potts, and an assistant solicitor in that firm, Mr Andrew Meads, was appointed as a draftsman.

16. When the hearing commenced on 27 November 2001, Professor Karstaedt introduced the members of the Board to the parties and their representatives, and introduced Mr Meads and explained that he would be the draftsman employed to draft the award.

17. The hearing of the arbitration began on the 27 November 2001. The case of each party was presented by the parties' representatives, not lawyers; there were lengthy written submissions. The hearing did not conclude that day. The sellers contended that it did not conclude because of the commitments of members of the tribunal; that was not pursued. After the provision of further written submissions, a further hearing was held on the 25 January 2002 and a yet further hearing was held on the 28 February. A relatively simple and straightforward arbitration scheduled to last one day in fact lasted three days.

18. On 12 July 2002 GAFTA notified the parties that the award was available upon receipt of the costs, fees and expenses of the Association and of the Board of Appeal in the sum of £19,364.25.

19. It was the evidence of the Claimant sellers that they were surprised at the level of fees incurred; the Claimant sellers instructed their solicitors to ask for a detailed breakdown of the fees; their letter stated that neither they nor their clients could recall levels of fees of this size whether from the ICC, GAFTA, FOSFA or LMAA tribunals. On 19 July 2002 GAFTA replied, setting out the breakdown of the fees I have set out above; their letter stated that: *"In both of these cases the Board of Appeal chose to appoint a legal advisor to assist with regard to the matters raised in these cases."*

20. In response the solicitors to the Claimant sellers, although accepting that the fees of GAFTA itself and the Board of Appeal were within their expectations, expressed surprise at the size of the fee of the legal adviser and pointed out that the parties had not been consulted as to whether it was appropriate that a legal adviser should be appointed; they sought Mr Meads' terms of reference. GAFTA responded on 26 July 2002: *"With regards to the appointment of the legal assessor, Mr Karstaedt emailed the Association prior to the first hearing of these matters requesting the appointment of a legal assessor in this matter. This email was not received by the Association so Mr Meads was appointed by telephone on the day of the hearing. For good orders sake please note that a legal assessor was appointed to assist the Board on technical matters as provided for under Section 37(a)(ii) of the Arbitration Act 1996 not a legal advisor."*

21. After further correspondence, GAFTA clarified the position of Mr Meads on 13 August 2002. They stated that he did not attend as an adviser to give advice information or opinions, but to help to draft and prepare the award of the Board under the direction of the Board.

22. After payment of the fees by the Defendant buyers, the Award was published on 11 September 2002. The Claimant sellers commenced these proceedings on 9 October 2002, seeking:

    i) an order pursuant to s. 68 of the Arbitration Act on the grounds that there had been a serious irregularity in that the Board of Appeal had appointed a legal adviser to report to it without giving the parties a reasonable opportunity to comment on any of the information or opinion or advice offered contrary to s.37 of the Act;

    ii) an order under s.28(2) that the Court should consider and adjust the fees on the grounds that they were disproportionate and excessive.

    Prior to the hearing the claim that the award should be set aside under s.68 for irregularity was abandoned and the only issue that arose was that relating to the charge made for drafting the award.

The work carried out by the assistant solicitor

23. The complaint made was directed at the fees charged for the drafting of the award by an assistant solicitor, Mr Meads. Mr Meads qualified as a solicitor in 1998 and was made a partner in Middleton Potts in November 2002. His evidence was that his practice was primarily in international trade and shipping and he had experience of arbitration including arbitration before GAFTA; at the time he drafted the award of the Board of Appeal he was an assistant solicitor with three years post qualification experience.

24. For reasons which I have explained, he was appointed on the morning of the hearing and attended at GAFTA straightaway. His evidence was that it was made clear to him that his role was to be restricted to that of a draftsman and he was not instructed to advise the Board on any legal issues. He understood his instructions to be

to consider the documentation, attend the appeal hearings, write such notes as were necessary and prepare an award that reflected the findings of the Board of Appeal.

25. His evidence was that he was instructed by GAFTA to listen to the hearings during which he took notes and listened to the proceedings as they unfolded. He was also present when the Board deliberated on the issues at the end of the hearings on the three days over which the hearings were spread. Subsequent to the hearings, according to his evidence, he was provided with the further views of the Board members and produced a draft award. The views were communicated to him by the Board members in discussions and in correspondence subsequent to the hearings. He did not comment on any findings but simply did his best to reproduce the findings made by the Board in the draft award that he prepared. The draft award was then subject to some amendment by various members of the Board but the award was settled and finalised by 8 July 2002. He produced a breakdown of the time he had spent on the work as follows:

Andrew Meads, solicitor: £190 per hour:
Perusal of documents and drafting: 33 hours and 30 minutes
Attending hearings and deliberations: 13 hours
Meetings: 54 minutes
Letters, e-mails and faxes: 18 minutes
Telephone attendances: 2 hours and 48 minutes
Travel time: 2 hours and 6 minutes
Sub total: 52 hours 36 minutes
@ £190 = **£9,994**
Julie Cheshire, trainee solicitor: £70 per hour:
Proof reading: 2 hours 30 minutes
Sub total 2 hours 30 minutes
@ £70 **= £175**
TOTAL: £10,169
[**Fees charged: £9,300 plus disbursements of £36.20**]

The scope of the arbitration agreement

26. As s.1 of the Arbitration Act makes clear, the parties are free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. As I have set out above, GAFTA specifies the rates charged for its fees, the members of arbitral tribunals and the rates for a draftsman. However, nothing is published as to the rates charged for the employment of lawyers asked by arbitral tribunals to assist.

27. If there had been some published guidance on the cost of the obtaining of legal assistance by the arbitral tribunals so that the parties were aware of the likely cost, then that would have been of central importance to this application. There was none.

The practice at GAFTA at the material time

28. The evidence as to the practice at GAFTA was very helpfully and clearly provided by the Director General. It can be summarised:

i) As the need for reasoned awards developed, GAFTA's experience was that many commercial people were not skilled in writing awards; the most difficult area in which to train arbitrators was drafting awards; although some might be legally qualified, their experience was in trade and they would not have experience in drafting awards.

ii) The biggest challenge they therefore faced was providing training in award writing; there was a greater need for those skills than in any other aspect of arbitration. The need for reasoned awards coincided with the more frequent use of lawyers; it was their experience that many solicitors approached arbitration as if it were litigation in court.

iii) Boards of Appeal rarely engaged legal assessors; draftsmen were only appointed in 10% of cases and legal assessors/draftsmen in 2% of cases.

iv) In the period November 2001 to April 2002, GAFTA had five cases remitted back to them from the courts as a result of successful challenges under s.68; GAFTA were concerned to address the issues and the Council of GAFTA alerted Boards of Appeal to the importance of drafting their awards carefully.

v) As a result, GAFTA tried a pilot scheme under which the Chairman of the Board of Appeal in complex cases could ask for an experienced draftsman to sit with the Board of Appeal to draft the award or ask for a legal assessor to draft the award. Although a draftsman was only used on four occasions, the Boards became more aware of a need to take care in drafting awards and the presence of an experienced draftsman helped in cases where complex legal arguments had to be addressed.

vi) In consequence, GAFTA considered that the awards it produced were better drafted; they had received very little criticism.

vii) GAFTA left the decision to the Chairman of each Board of Appeal as to whether a draftsman was appointed.

29. I am very grateful for such a clear exposition of the position by the Director General of GAFTA; not only did it set out the background in which the decision was made to appoint a draftsman in this case, but also explained the admirable steps being taken by GAFTA to ensure that for the future the problem that has arisen in this

application is unlikely to arise again. I would anticipate that such training would ensure that in a dispute such as the underlying dispute between the parties, an arbitral tribunal would consist of those sufficiently trained so that not only could they draft their own award, but also exercise that necessary degree of control over the way in which the submissions are made to them so as to ensure that the submissions made and the length of a hearing were proportionate to what was in issue.

The duties of the arbitral tribunal and the drafting of awards

30. It was submitted by counsel appearing on behalf of GAFTA that it was well established that an arbitrator may appoint a legally qualified draftsman to assist him in drafting an award. In support he referred me to two decisions; the first was a decision of Coleridge J on 5 May 1850, ***Threlfall v Fanshawe*** (1850) 19 LJQB 329; the case concerned a dispute about the entitlement of a lay arbitrator (who had been appointed by order of the Court to determine a boundary dispute between two estates) to charge for the attorney he had employed. The Judge said: *"Where parties appoint a lay arbitrator, if the reference is to be brought to a safe conclusion, it is almost of necessity he should have professional assistance in the conduct of it and in framing the award"*

The second case to which I was referred was a decision of the Court of Appeal in **Re *Collyer-Bristow & Co*** [1901] 2 KB 839 where the issue was whether a bill of the solicitors employed to advise the Umpire was taxable (assessable in modern terms) and, if so, in which Division of the High Court; that provided no assistance.

31. The law of arbitration has undergone a profound change in the last 150 years; it was of no assistance to be referred by counsel for GAFTA to a decision made in 1850 as to what was to be expected of arbitrators 150 years ago as guidance as to what was to be expected of arbitrators today. Reliance on that decision showed little understanding of modern commercial arbitration. In contrast, the evidence of the Director General of GAFTA showed how completely different the position is today and how modern lay arbitrators have been trained so that they indeed can bring awards to an entirely satisfactory conclusion without needing to employ a lawyer to help them.

32. For sometime and certainly since the enactment of the Arbitration Act 1996, it has been part of the skill ordinarily to be expected of a competent arbitrator that he should produce his own reasoned award. It is common place for decision makers to explain the reasoning for their decision; it is commonly acknowledged that the quality of decisions is improved by requiring the decision maker to go through the process of expressing those reasons himself. There is no reason why in general a person who takes on the responsibility and duty of an arbitrator should not be able to discharge the function of providing a reasoned explanation for the decision he has reached; for example, awards made by arbitrators of the London Maritime Arbitrators Association who are not legally qualified set out in clear terms their reasoning in disputes that are often far more complex than the matters in this award. It is also clear from the evidence of GAFTA that they recognise that if a person is to sit as an arbitrator, he should be capable of drafting an award; that is one of the objectives of their training.

33. In any event, if an arbitrator employs a draftsman, the function of that draftsman is limited; it is the function of the tribunal itself to decide on the findings of fact, to evaluate and analyse the submissions of law and to arrive at their own reasons for their decisions. The arbitral tribunal must reach its own decision on these matters and must communicate those decisions in sufficient detail to the draftsman bearing in mind his function is limited to setting out what he has been told. It is not the draftsman's function to provide or refine the analysis or legal reasoning; if he does, then the provision of s.37 comes into effect and the parties are entitled to be given a reasonable opportunity to comment on any information, opinion or advice offered.

34. However, there may be rare circumstances where a tribunal feels it ought to consider the use of a draftsman for the limited purpose I have described and who is not acting under s. 37. In such circumstances it must be for the arbitral tribunal to decide whether they need such assistance but they must have regard to the general considerations, including the following:

    i) The amounts of the sums in issue; if a relatively small sum is in issue, then the use of a draftsman can rarely be justified.

    ii) The complexity of the legal arguments, but it is much more likely that in such a case, an appointment of an assessor under s.37 would be appropriate.

    iii) The attitude of the parties; Professor Karstaedt referred to parties reading out submissions in GAFTA arbitrations and being antagonistic. Although the matters to which he points can only be deplored, they cannot be factors requiring the use of a draftsman. It is the tribunal's duty under s. 33 to adopt procedures to avoid unnecessary delay and expense; it is for them to make sure that submissions are made economically and in a manner proportionate to the issues and sums at stake. Such considerations cannot justify the appointment of a draftsman.

35. If a tribunal decides it needs the assistance of a draftsman, then the tribunal must then consider whether they need the assistance of a lay draftsman (such as those which GAFTA employ who charge a rate of £35 per hour) or the vastly more expensive services of a lawyer. If they decide on a lawyer, they need to decide whether he needs to attend the hearing. That will usually be unnecessary as his function is as limited as I have described.

36. If a lay or legal draftsman is employed, then it is the duty of the tribunal to satisfy themselves that the fee he charges is fair and reasonable; the extent of the work required of the tribunal in examining the fees charged by the lawyer must depend on the size of the fees: see the decision of Staughton J in ***Kurkjian v Marketing Exchange No 2*** [1986] 2 Lloyd's Rep 618.

37. There is a further factor; I do not wish to add to the observations that the courts have made about the way in which GAFTA awards are made, particularly in the light of the work being done by GAFTA as set out in the evidence of the Director General. The judgment of Mance J in ***Transcatalana de Commercio SA v Incobrassa Industrial e Commercial Brazileira SA*** [1995] 1 Lloyd's Rep 215 refers to many of the previous decisions of this Court. However, GAFTA may wish, as part of their admirable training programme and other reforms, to consider whether it might be easier to produce awards if they were far less formalistic than the award produced by Mr Meads in this arbitration. That, of course, is a matter entirely for them.

My conclusion on the facts of this application

38. In the special circumstances of this case, particularly taking into account the pilot scheme that GAFTA were running, I do not consider that in the exercise of the Court's power under s 28, it would be fair or just to say that the Board of Appeal should not have been entitled to have appointed a draftsman. In reaching that decision, I do so only in the very special circumstances of this case.

39. However, the fact that I consider that they were entitled to appoint a draftsman does not of course mean that the Court should not examine whether it was correct to appoint a lawyer or inquire into the fee charged by that lawyer. There are a number of considerations:

    i) It was the evidence of Professor Karstaedt that during his long experience as an arbitrator he had drafted five to ten awards a year and was quite prepared to draft an award where the issues of law had similarities to German law; he was reluctant to tackle complex issues of English legal principles on his own; in civil law systems, many answers could be found in codified statutes; dealing with precedents often required the special skills of a UK qualified lawyer; in that respect, he was in no better position than a lay arbitrator.

    ii) He knew that GAFTA was running a pilot scheme and that the objective was to speed up the production of awards, improve them and reduce the risk of arbitrators committing irregularities. He also considered that this arbitration and its parallel arbitration were cases where they might be presented with general contract law, shipping law and a number of precedents; the complexity of the matter could only be taken by looking at the two arbitrations together. An examination of the submissions led him to conclude that the lawyers to the parties had put everything in issue.

    iii) I have considered the appointment of Mr Meads on the basis made clear in the statements of Professor Karstaedt and Mr Meads, that his role was limited to that of a draftsman. It was made very clear, after the initial description of him as a legal advisor, that his role was not that of an advisor.

    iv) I see no reason why a lay draftsman could not have been appointed in a relatively straightforward case such as this. If such a person had been, then even if the number of hours spent had been the same as those spent by Mr Meads, the cost at the rate of £35 per hour as opposed to £190 per hour would have been a fraction of what Mr Meads charged.

    v) It was not clear to me what Professor Karstaedt meant in the passage I have quoted at paragraph 14; if he thought that the function of a draftsman was to provide the legal analysis, he was mistaken. That was the function of the tribunal. The draftsman was meant solely to set out the analysis provided by the tribunal in a clear form. If they had wanted legal advice, then they should have appointed a legal assessor, not a draftsman and made that clear to the parties. Indeed it was Mr Meads' evidence that the members of the Board commented to each other that they would have to rely on their own analysis of the legal issues as they could not ask him to advise.

    vi) Professor Karstaedt expressed the view that the fees charged by Mr Meads were proportionate and reasonable; however his statement does not disclose any real attempt to examine in a detailed and critical manner the fees charged or to question their proportionality; the extent of any examination appears to have been limited to a general comparison to other cases. In my view that was inadequate, given the size of the fee in relation to the sum in issue and the nature of the bill. Furthermore, as set out below, the inclusion of an item of £175 for proof reading was a pointer to the need for the most careful scrutiny of the fees charged.

    vii) I see no reason for the draftsman to have attended the hearing; he was not an adviser; he could have read the written submissions. It was the Board's duty to tell him of their findings and the reasoning by which they had reached the conclusions. Mr Meads should have pointed out to the tribunal that it was not necessary for costs to be incurred by him being present, bearing in mind the small sums in issue and the very limited nature of his role.

    viii) I can see no reason why any competent lawyer could have spent the time Mr Meads spent on drafting the award, given the very limited function with which he had been entrusted. He had been supplied with all the findings, the analysis and the reasoning. Indeed he stated that the findings and views of the Board were communicated to him and he "simply did his best to reproduce them in the award". He merely had to set it out. I have carefully considered the various explanations given by Mr Meads in his witness statements. I have taken particularly into account the fact that there was a related arbitration; however, a separate fee of £12,450 was charged for that. I conclude that the time spent by him was grossly excessive and cannot be justified given his limited function. I agree with the submission made by Mr Akka, junior counsel experienced in this field, that a competent lawyer should have been able to peruse the papers, draft the award and deal with the discussions with the Board in no more than two days and not the four days spent by Mr Meads. The time spent must be attributable either to Mr Meads' then inexperience or by doing more than he was employed to do as a draftsman. That is not something for which others should have to pay.

ix) Any competent lawyer should have had regard to the principle of proportionality; it is clear from his various statements that Mr Meads paid virtually no regard to this principle. He failed to stand back and ask whether what he was doing and charging was proportionate.

x) It was a feature of the charging that there was included an item of £175 for 2½ hours' proof reading of the 50 page award by a trainee solicitor; I can see no justification for such a charge or for employing a legally qualified person to do that as opposed to a clerk or secretary. Indeed the inclusion of such a charge and such a charge for such a long period was a pointer to the need for the most careful scrutiny of the bill put forward by Mr Meads to ensure that what he was entitled to be paid for accorded with his limited role and was proportionate to the amount at stake and the relatively straightforward nature of the dispute.

xi) Such criticism of Mr Meads is not a criticism of him for improper over-charging, but criticism for charging an amount which was disproportionate to his function and to the sums and issues involved. The amount charged did not reflect the time that a competent lawyer should have taken to do the work which was of a very limited nature, as I have described. The time cost incurred because what he had been asked to do took him longer than it should have done is not something he was entitled to pass on to others; it is a cost that his firm should have borne itself.

40. It was accepted by the Claimant sellers that a fee of £5,000 for legal drafting was reasonable; although that is in my judgment on the high side, as that has been put forward by the Claimant sellers, I will not exercise my powers to adjust the fee below that amount.

41. In the light of the conclusions, particularly that in paragraph 39.vi) to which I have come, I am entirely satisfied that it is entirely reasonable and indeed just that GAFTA repay the amount. Whether Middleton Potts repay that amount to GAFTA is a matter between Middleton Potts and GAFTA. I therefore exercise my powers under s.28 to reduce the fees charged by GAFTA accordingly.

42. It is a matter of regret that this matter could not have been resolved amicably. However, it is right to emphasise that GAFTA are plainly doing all they can to ensure that the important arbitration service they provide to the international grain trade can continue to be provided in London with accuracy of decision and economy in cost. I very much hope that to the extent that lawyers continue to become more involved in such arbitrations, they will also have full regard to the principle of proportionality both as regards cost and economy in the conduct of arbitrations and in the submissions they make. As this application (and the matter to which I refer below) amply demonstrates, much more attention must be given by lawyers engaged in such arbitrations to the principle of proportionality between on the one hand what they do and seek to charge and on the other hand to what is in issue in the arbitration.

The costs of the sellers

43. The Defendant buyers played no real part in the hearing; their only interest was to recover the costs of the s 68 application that had been abandoned by the Claimant sellers. Although some initial confusion was caused by GAFTA, it was clear before proceedings were issued that the only real complaint that the claimants had was under s.28. There was no basis for the s.68 claim being made by the Claimants. In those circumstances, the Claimants must pay the costs of the First Defendant of the s.68 proceedings. However, the circumstances are not such that they should be awarded on an indemnity basis.

44. The costs claimed on summary assessment are very high - £11,862. The First Defendant has engaged in this matter: (1) a partner (£350 per hour), (2) an assistant solicitor (£185 per hour), (3) a cost draftsman (£145 per hour), (4) a trainee (£145 per hour) and (5) counsel (£1,625). The time spent by the assistant solicitor was just under 40 hours; taking his productive working day to be 8 hours, that is one week's work. The trainee spent 5 hours at a cost of £754. The statement of costs which was 2½ pages long was charged at £595, made up as to £420 of the charges of the costs draftsman and £175 of the partner perusing and approving. The only evidence submitted by the First Defendant was a 3½ page witness statement made by the partner, though there was a vast amount of wholly unnecessary correspondence between the solicitors.

45. In my judgment, the size of the team employed and the time spent was wholly excessive and disproportionate to the issues involved. The Claimants had been prepared to pay, prior to the hearing, the sum of £6,500; that was in my view a generous amount in all the circumstances, but I will not go below it. I summarily assess the costs at £6,500.

Lawrence Akka (instructed by Holman Fenwick &Willan) for the Claimant
Henry Byam-Cook (instructed by Richards Butler) for the first Defendant
Michael Tennet (instructed by Berrymans Lace Mawer) for the second to seventh Defendants