Case No: HQ06X03370
SCCO Ref: PTH 1002160 & 1002161
Application No: 10.A.3914

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SENIOR COURTS COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 15 February 2011

Before :
THE SENIOR COSTS JUDGE

- -

Between :

YAO ESSAIE MOTTO & ORS	**Claimants**
- and -	
(1) TRAFIGURA LTD	
(2) TRAFIGURA BEHEER BV	**Defendants**

- -

Mr Richard Hermer QC, Mr Joe Smouha QC and **Mr Benjamin Williams**
(instructed by **Leigh Day & Co**) for the **Claimants**
Mr Charles Gibson QC, Mr Sean Wilken QC and Mr Nicholas Bacon QC
(instructed by **Macfarlanes LLP**) for the **Defendants**

- -

Hearing dates: 6 – 10 December 2010
and 13 - 17 December 2010

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Chief Master Hurst:

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BACKGROUND

1. This judgment deals with 22 preliminary issues known as "Key Issues" which have arisen in the course of the detailed assessment of the Claimants' costs against the Defendants.

2. I take the background facts from the decision of the Amsterdam Court, dated 23 July 2010, after the trial of Trafigura Beheer BV, which resulted in the company being sentenced to a fine of €1 million for exporting waste to Ivory Coast and for delivering goods harmful to the health in Amsterdam, with concealment of the noxious character. That decision is under appeal, but the underlying facts do not appear to be in dispute. The facts below are taken directly from the judgment.

3. The motor tanker *Probo Koala* belonged to Prime Marine Management in Athens, and in 2006 sailed on charter for Trafigura. Trafigura is one of the largest independent oil traders in the world, and a world player in the extraction and trading of raw material such as ores and minerals. From September 2005 Trafigura had been buying crude naptha. This naptha, which was contaminated with a high content of sulphur compounds (mercaptans), could be made suitable as a blendstock petrol by treating it with caustic soda. Trafigura looked at suitable locations to wash the naptha with caustic soda, and investigations showed that the washing could take place in La Skhirra (Tunisia) at a refinery there. Investigations showed, among other things:

> "Caustic washes are banned by most countries due to the hazardous nature of the waste (mercaptans, phenols, smell) and suppliers of caustic are unwilling to dispose of the waste since there are not many facilities remaining in the market."

4. Two washing operations were carried out in La Skhirra, but it was reported that an odour nuisance had occurred at the second washing operation, and the refinery was no longer prepared to carry out the washing. Accordingly, the cargo of naptha that the *Probo Koala* carried to the refinery in early April 2006 was not discharged there. Since the *Probo Koala* had the necessary tank and pumping systems, Trafigura decided to carry out the washing operations on board ship by a process known as the "merox" process, a process which had not been carried out on a ship before.

5. The first washing on board the *Probo Koala* took place off Malta in April 2006. The naptha and caustic soda were allowed to separate/settle, and the used caustic soda was drained to the slop tanks.

6. Between April and the end of July 2006, 150 tonnes of caustic soda were used for the washings.

7. On 26 June 2006 the ship received instructions to sail to Amsterdam. In the washings that took place from 12 April 2006 approximately 544 cubic metres of slops in total were produced on board the *Probo Koala*. The slops consisted of a complex mixture of water with an extreme acidity and an oily liquid, both contaminated with very specific components, including phenols, disulphides and mercaptans. The water

layer of the slops comes under European Waste Code 050111* (waste from fuel treated with alkali), and the oily layer comes under European Waste Code 130703* (other fuels including mixtures).

8. Trafigura looked for businesses that could process the slops. Malta shipyards were not prepared to accept the slops "due to chemical content". The slops could not be off-loaded in Augusta (Italy), nor in Gibraltar. At the end of July 2006 *Probo Koala* received instructions from Trafigura to sail to Paldiski (Estonia) to discharge a petrol cargo and to take on board petrol for the Nigerian market. Because Amsterdam was on the way to this port, Trafigura decided to enter the port to bunker, to change crew and to discharge the slops in the tanks.

9. The *Probo Koala* arrived in Amsterdam in the afternoon of 2 July 2006. A barge went alongside to take on board the slops. The Port Authority subsequently took samples of the contents of the tank, which were analysed, and an indicative measurement showed that the COD (chemical oxygen demand) content of the slop was much too high for the Port Authority to be able to process the wastes. The barge was instructed to re-deliver the slop washings back to the *Probo Koala*. The police and fire brigade came to the port site as a result of reports of odour. Further samples were taken from the slops on the barge, and on 4 July 2006 the IMT (Inter-regional Environmental Team) having been alerted by an anonymous fax, took samples from the slop tanks of the *Probo Koala*.

10. After considerable discussions between various Dutch environmental supervisory services and the Port Authority, the slops were re-delivered to the *Probo Koala* on 5 July. The ship left Amsterdam for Paldiski on that day. The slops were still on board when the vessel reached Estonia. From there the *Probo Koala* sailed to Lomé (Togo) where it arrived on 30 July 2006. On 4 August 2006 it arrived in Lagos (Nigeria) where two unsuccessful attempts were made to off-load the slops. On 17 August 2006 the *Probo Koala* set sail for Abidjan (Ivory Coast), where it arrived on 19 August 2006. The slops were discharged there into tanker trucks, which left their loads at various sites in and around Abidjan.

11. The factual background set out in the judgment of the Amsterdam Court stops at that point.

12. The story is taken up by the narrative to the Claimants' generic bill:

> "Trafigura appointed a local contractor to dispose of the waste, Solomon Ugburogbu, the owner of a company called Compagnie Tommy, even though the contractor had no facilities to handle hazardous waste.
>
> In August 2006 528 tonnes of chemical waste from the *Probo Koala* was illegally fly-tipped by Compagnie Tommy at locations around Abidjan in the Ivory Coast. In the weeks afterwards tens of thousands of people in Abidjan reported suffering from a range of similar symptoms, including breathing problems, headaches, vomiting and diarrhoea.

> Subsequent expert evidence revealed that the waste was a mixture of naptha and sulphur enriched caustic which contained a number of unstable potentially toxic chemicals including mercaptans and hydrogen sulphide, which had the capacity to injure people who inhaled the gases caused by their evaporation and release into the atmosphere. Potential health problems resulting from such chemicals included headaches, eye, throat and skin irritation or damage, respiratory distress, nausea, vomiting, diarrhoea or even death at higher concentrations."

13. As will appear below in the agreed joint statement the Claimants now acknowledge that the slops could, at worst, have caused a range of short term low level flu like symptoms and anxiety:

> "October 2006 Leigh Day was asked by Greenpeace International to provide assistance to the victim groups who had been in touch with them. Greenpeace had been asked to be part of an international commission of inquiry into the events of August 2006, and as a result their name has become well known in the Ivory Coast. A number of victim groups had made contact through Greenpeace and they had passed those contact details to Leigh Day. One of the involved individuals, Mory Cisse, was part of an NGO involved with one of the affected communities.
>
> Mory Cisse was keen for Leigh Day to travel out to Abidjan to meet with potential claimants and to bring a claim, and as a result Leigh Day's lawyers started to investigate both the case and the circumstances surrounding the incident and the logistics of travelling to the Ivory Coast …
>
> The Ivory Coast was listed by the Foreign Office, along with Somalia, as one of two countries in the world not to visit on any account. ie, it was listed as an even higher security risk than countries like Iraq and Afghanistan. Albeit this security rating has been downgraded a little over the following three years, Abidjan has been throughout a dangerous city to work in, and one where both legal teams have had to take extreme care in relation to security issues.
>
> Leigh Day was approached by additional groups within the Ivory Coast asking for assistance; including Chief Motto, Chief of Djibi Village, who also wanted Leigh Day to travel to the Ivory Coast. Another interested agency with whom early contact was made was Sherpa, a French Civil Rights Group, who specialised in the issue of corruption in former French Colonies and who were investigating the events in Abidjan."

14. Trafigura had paid $200 million to the Abidjan Government in respect of the incident in circumstances where Trafigura's Chief Executive, and the Director of Trafigura's African operation had been imprisoned without trial in Abidjan when they flew into

Abidjan in order to try and help with the situation. Trafigura blamed Compagnie Tommy, which had actually carried out the dumping of the slops. Trafigura took responsibility nonetheless, and paid the $200 million, the purpose of which was to try and assist the population in dealing with the effects of the slops. The two Directors were subsequently released, but this was not as a result of the payment of money by Trafigura. Before the payment of the $200 million some 100,000 people had visited hospitals in Abidjan in order to receive some free medical treatment. There was, as Mr Day stated, a real danger of "band-wagon jumping".

15. There were allegations in this litigation that Trafigura were negligent in allowing Compagnie Tommy to carry out the task, although that issue has never been argued since the litigation was settled. The Director of Tommy was detained, tried and sentenced to a term of 20 years imprisonment.

16. Leigh Day first wrote to Trafigura on 25 October 2006. Proceedings were commenced against Trafigura in November 2006, and in December Leigh Day drafted a GLO application, which was heard on 29 January 2007, the GLO being granted on 16 February 2007. At first Leigh Day had only 12 clients, but at the time of the application for the GLO they were forecasting that there would be between 3,000 to 5,000 cases by the summer of 2007. Those numbers continued to increase. In the end there were 29,614 Claimants. Once the register of Claimants had closed, and the limitation period had expired, there were negotiations between Leading Counsel, as a result of which a draft settlement agreement was drawn up. One term of the agreement was that Leigh Day were required to notify the Defendants that a minimum of 75% of the Claimants were willing to accept the terms of settlement. The Defendants had the option of proceeding at a lower percentage should the need arise.

17. The Defendants agreed to pay damages of £30 million, and the terms of the Tomlin Order were approved by MacDuff J, in respect of claims by children, on 23 September 2009. The Order continues:

> "6. Save for the purpose of enforcing the agreement, or for applications for the court to replace or appoint a Litigation Friend or to substitute a claimant in the event that the original claimant has subsequently died, and for the purposes of costs as set out below, the claims of the accepting Claimants are stayed pending further order of the court on the terms set out in the agreement. Liberty to apply for the purpose of carrying such terms into effect.
>
> 7. The Defendants shall pay the costs of the Claimants identified in Schedule 1 Part A of the Abidjan Personal Injury Group Litigation on the standard basis, to be subject to detailed assessment if not agreed.
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> 8. On any such assessment:
>
> (i) the Defendants may not raise any issue as to the indemnity principle;

(ii) the Claimants are entitled to recover the reasonable and proportionate costs of obtaining after the event legal expenses insurance; and

(iii) there should be no recovery of individual costs of Claimants who are not settling Claimants (being costs exclusively referable to such Claimants). For the avoidance of doubt this does not affect the right of recovery of the rateable share of generic costs referable to Claimants who are not settling Claimants.

9. The Defendant shall make an interim payment on account of the Claimants' costs in the amount of £20 million to be paid to the Claimants' solicitors (into an account nominated by the Claimants' solicitors in writing) by 30 September 2009 and a further £10 million to be paid to the Claimants' solicitors 90 days thereafter provided that the Claimants' solicitors will provide at least 21 days prior to the second interim payment an outline bill in such detail as the Defendant shall specify by 22 September 2009."

18. The Defendants paid the £30 million damages into a designated account at the Societé Generale in Abidjan on 23 September 2009. The interim payment in respect of costs was also paid in accordance with the Order.

19. Trafigura have also incurred a further £14 million in respect of their own lawyers' costs, in addition to whatever costs have been incurred internally by the company.

20. Schedule 2 to the final Order included the agreed final joint statement of the parties. The most important element of the statement is:

"● The parties have since August 2006 expended considerable time and money investigating in detail the events in Abidjan in 2006. As part of that process, in excess of 20 independent experts in shipping, chemistry, modelling, toxicology, tropical medicine, veterinary science and psychiatry have been appointed to consider all the issues relating to those events.

● These independent experts are unable to identify a link between exposure to the chemicals released from the slops and deaths miscarriages, still births, birth defects, loss of visual acuity or other serious and chronic injuries. Leigh Day & Co in the light of the expert evidence, now acknowledge that the slops could at worst have caused a range of short term low level flu like symptoms and anxiety.

- From these investigations it is also clear that there are many claims which have been made for symptoms, in some cases perhaps understandably, which are unconnected with any exposure to the slops."

THE DETAILED ASSESSMENT

21. When the Claimants' bills of costs were served the Defendants were dismayed to find that they totalled £104,707,772.72. That figure includes success fees for both solicitors and counsel of 100%, and an ATE premium of £9 million.

22. The incident in Abidjan has been the subject of wide coverage in the media which continues to this day. The Defendants have become extremely sensitive about the damage done to their commercial reputation by the incident, and by negative coverage in the media. This led to them issuing libel proceedings against Leigh Day & Co in respect of an ill advised posting on their website. The size of the Claimants' bill incensed the Defendants still more, and, although they stop short of suggesting that any of the claims are fraudulent, they do assert that Leigh Day & Co have used these proceedings to generate costs for themselves, and have abused the group litigation process by ignoring group litigation principles and also by failing to comply with the pre-action protocol.

23. The Claimants for their part assert that a large measure of the costs is directly due to the way in which the Defendants have defended these proceedings.

24. The Defendants, not surprisingly, have launched an extremely vigorous attack on both the generic and individual bills. I have been given electronic copies of the bills, which I am told run to some 55,000 items, all of which are challenged in the Points of Dispute. For the purpose of these key issues I was presented with in excess of 60 ring-binders of documents, and in spite of the remarks of the President of the Queen's Bench Division, Sir Anthony May, in *Khader v Aziz* [2010] EWCA Civ 716; [2010] 1 WLR 2673, being drawn to the attention of the parties, the Defendants' skeleton argument, including supporting schedules, ran to over 1,000 pages, this being in addition to a witness statement of Mr Nurney dealing with the key issues, which, with exhibits, ran to over 3,000 pages. The Claimants' skeleton runs to 73 pages, and their supporting witness statements, including exhibits, run to 923 pages. Mr Gibson explained, and I accept, that there had throughout been proper co-operation between both counsel and solicitors, save perhaps in relation to what is known as the Bou incident. From what I have seen both sides have acted professionally throughout in the best interests of their clients.

25. The Claimants lodged with me two ringbinders of privileged material, all of which I have read. This has enabled me to understand the decision to issue proceedings, and especially the speed with which that decision was reached. I have also seen correspondence between solicitors and counsel relating to the setting up of the GLO, and also correspondence with counsel relating to the obtaining of evidence and the strengths and weaknesses of the case. Most helpfully from my point of view are the internal reviews undertaken regarding the case as it developed, the work to be done and the taking of instructions. In addition I have seen material relating to the Solicitors Regulatory Authority and the waiver which was granted; correspondence with local representatives; regarding the vetting process; sample attendance notes;

correspondence with local doctors regarding medical reports; and correspondence with claimants, including client care letters and update letters. I have also seen the opinion of Mr Jay QC, in support of the application for approval of the settlements.

26. Although the Defendants do not accept the level of the core costs of dealing with the actual litigation, which they put at some £8.2 million base costs, the main thrust of their argument relates to base costs of £36 million, which they argue relate to the signing-up, registration and vetting of the Claimants, and the costs of settlement and distribution of the damages.

Mr Justice MacDuff

27. Mr Justice MacDuff was the assigned Judge in these proceedings. The Defendants initially wanted him to hear and decide the key issues, this he declined to do, but indicated that he would be willing to give me whatever assistance might be required. This led to the Claimants making an application that some form of formal protocol should be devised defining the Judge's role, that application was resisted by the Defendants. On 29 November 2010 I dismissed the Claimants' application, and stated:

> "82. For the reasons given above I dismiss this application, and propose to proceed in accordance with the judgment of Tomlinson J in *BCCI* [2006] EWHC 816 (comm) at [132], so that MacDuff J will be asked to assist where necessary, and any such assistance will have to be given in a manner which is compliant both with the overriding objective, and with Article 6 of the European Convention on Human Rights, which requires that any process adopted must be transparent. The Judge may be requested to provide written answers to questions formulated by the Costs Judge having heard submissions by the parties, and it may be that consideration will have to be given to MacDuff J, sitting with the Costs Judge, should such assistance appear to be appropriate and helpful."

28. In the event MacDuff J sat in court to hear submissions on the morning of 7 December 2010, and for a short period in the afternoon, on the afternoon of 8 December, and the afternoon of 10 December.

29. Having heard ten days of detailed argument from three Leading Counsel on behalf of the Defendants, and from two Leading Counsel and one Junior Counsel on behalf of the Claimants, I have not found it necessary to refer to MacDuff J in respect of any of the key issues. I am very grateful to him for his willingness to assist, and I have also derived assistance from the transcripts of the various decisions which he has made in his capacity as assigned Judge in the course of these proceedings.

THE LAW

30. The hearing of these key issues takes place within the context of detailed assessment proceedings. CPR 44.3 deals with the court's discretion and circumstances to be taken into account when exercising its discretion as to costs.

31. That rule has no direct relevance to these detailed assessment proceedings, since the parties have agreed that the Defendants will pay the Claimants' costs on the standard basis. The basis of assessment is set out at rule 44.4:

> "(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
>
> (a) on the standard basis; or
>
> (b) on the indemnity basis,
>
> but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
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> …
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.
>
> (Factors which the court may take into account are set out in rule 44.5)"

32. Rule 44.5 has direct relevance to the proceedings before me:

> "(1) The court is to have regard to all the circumstances in deciding whether costs were –
>
> (a) if it is assessing costs on the standard basis –
>
> (i) proportionately and reasonably incurred; or
>
> (ii) were proportionate and reasonable in amount, or
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> …

(2) In particular the court must give effect to any orders which have already been made.

(3) The court must also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert)"

33. I include for the sake of completeness rule 44.14, the court's powers in relation to misconduct, since at one point the Defendants argued that I should make an order under this provision:

"(1) The court may make an order under this rule where –

(a) a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or

(b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may –

> (a) disallow all or part of the costs which are being assessed; or
>
> (b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.
>
> (3) Where –
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> (a) the court makes an order under paragraph (2) against a legally represented party; and
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> (b) the party is not present when the order is made,
>
> the party's solicitor must notify his client in writing of the order no later than 7 days after the solicitor received notice of the order."

34. A major part of the Defendants' case is that the Claimants have failed to adhere to Group Litigation principles. CPR Part 19 III deals with Group Litigation Procedures, Practice Direction 19B paragraphs 16.1 and 16.2 deal with costs in Group Litigation. Rule 48.6A deals with costs where the court has made a Group Litigation Order. There is no need for me to set them out here.

35. The way in which proportionality is to be dealt with was set out by the Court of Appeal in *Home Office v Lownds* [2002] EWCA Civ 365. Although that decision is well known, it is extremely important, and I set out below relevant parts of the judgment:

> "3. The requirement of proportionality now applies to decisions as to whether an order for costs should be made and to the assessment of the costs which should be paid when an order has been made. Part 44.3 which deals with the making of an order for costs does not specifically use the word proportionate but the considerations which should be taken into account when making an order for costs are redolent of proportionality. …
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> …
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> 8. The new requirement of proportionality, which is in mandatory and unqualified terms in Part 44.4(2), is important in itself, since it should discourage parties from incurring disproportionate costs as those costs will not be recoverable unless an indemnity order is made. This restriction on costs should encourage parties to conduct litigation in a proportionate manner, which is an important objective of the CPR. …
>
> …

10. Because of the central role that proportionality should have in the resolution of civil litigation, it is essential that courts attach the appropriate significance to the requirement of proportionality when making orders for costs and when assessing the amount of costs. …

…

23. In our judgment what cases of this sort call out for is a recognition at the outset that the case could easily result in disproportionate costs being incurred. The nature of the claims required the parties conducting the litigation to plan how it should be carried out so as to minimise expense. Here for example there were about eight visits to the prison which proved to be very expensive. Four visits should have been ample. We would repeat the approach of Judge Alton, which was approved in *Jefferson v National Freight Carriers Ltd* [2001] 2 Costs L.R. 313. The judge said, in particular:

> "In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality."

…

31. In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary,

that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This is turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.

32. The fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately.

…

36. Based on their experience costs judges will be well equipped to assess which approach a particular case requires. In a case where proportionality is likely to be an issue, a preliminary judgment as to the proportionality of the costs as a whole must be made at the outset. This will ensure that the Costs Judge applies the correct approach to the detailed assessment. In considering that question the costs judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether unnecessary experts had been instructed and the other matters set out in Part 44.5(3). Once a decision is reached as to proportionality of costs as a whole, the judge will be able to proceed to consider the costs, item by item, applying the appropriate test to each item.

37. Although we emphasise the need, when costs are disproportionate, to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able

to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary, he may be able to recover his fees and disbursements from his client, but extra expense which results from conducting litigation in a disproportionate manner cannot be recovered from the other party.

38. In deciding what is necessary the conduct of the other party is highly relevant. The other party by co-operation can reduce costs, by being uncooperative he can increase costs. If he is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary.

39. Turning to the specific points of principle raised by May LJ (paragraph 11 above), where a claimant recovers significantly less than he has claimed, the following approach should be followed:-

Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered. Thus

(i) The proportionality of the costs incurred by the claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim.

…

40. The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim and a defendant should not be prejudiced if he assumes the claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption."

36. It is common ground between the parties that the use of hindsight is not appropriate when dealing with issues which arise on detailed assessment. The position was stated succinctly by Lord Justice Brooke V-P in *KU v Liverpool City Council* [2005] EWCA Civ 475:

> "When a court has to assess the reasonableness of a success fee it must have regard to the facts and circumstances as they reasonably appeared to the solicitor at the time when the CFA was entered into (see para 11.7 of the Costs Practice Direction and *Atack v Lee* [2004] EWCA Civ 1712 at [51]). The principle that the use of hindsight is not permitted when costs are being assessed is an old one: see *Francis v Francis and Dickerson* [1956] P 1887, 95; and compare, in a different context, *Argyll (Duchess) v Beuselink* [1972] 2 Lloyd's Rep 172, per Megarry J at p 184:
>
> > "In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone [of negligence]… The standard of care to be expected of a professional man must be based on events as they occur, in prospect and not in retrospect.""

37. Finally, in respect of detailed assessment generally, it is worth bearing in mind the words of Lord Justice Russell in *Re: Eastwood: Lloyds Bank Ltd v Eastwood* [1975] Ch 112:

> "In our view the system of direct application of the approach to taxation of an independent solicitor's bill to a case such as this has relative simplicity greatly to recommend it, and it seems to have worked without it being thought for many years to lead to significant injustice in the field of taxation where justice is in any event rough justice, in the sense of being compounded of much sensible approximation."

Hunter v The Chief Constable

38. Mr Gibson relied on the judgment of Lord Diplock in *Hunter v Chief Constable* [1982] AC 529, in support of his contention that it is open to me to make a finding that, in relation to the GLO, there has been an abuse of process.

39. Mr Gibson argues that there may be situations where litigation is being conducted in a way which is not inconsistent with the literal application of the rules, but which would nevertheless be manifestly unfair to a party in the litigation, or would otherwise bring the administration of justice into dispute among right thinking people. He submits that the GLO in this case has been used in a way which is manifestly unfair, and in that sense the GLO procedures have been abused. That judgment, Mr Gibson says, had been relied upon by the Court of Appeal in at least two cases: the Benzodiazepine

Litigation and the Organo Phosphate Litigation, where the entire group action had been struck out on the basis that the action itself was simply not viable, and was being conducted in a way that was manifestly unjust to the defendants. Lord Justice Stuart-Smith explained the situation in the Benzodiazepine Litigation: *AB & Ors v John Wyeth & Brother Ltd; AB & Ors v Roche Products Ltd* [1997] PIQR p385:

> "In recent years there have been substantial developments in the law relating to the court's inherent powers to strike out actions as an abuse of process of the court. I can start with the statement in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536:
>
> > "This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although no insistent with the literal application of its procedural rules would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view be most unwise if this House were to use this occasion to say anything that may be taken as limiting to fixed categories the kinds of circumstances in which the court as a duty (I disavow the word discretion) to exercise the salutary power."
>
> Access to the courts is a fundamental right of everyone and a litigant cannot be driven from the judgment seat without good reason. But the right is not an unfettered one. As I pointed out in *Ashmore v British Coal Corporation* [1990] 2 All ER 981 at 984G:
>
> > "The litigant has a right to have his claim litigated, provided it is not frivolous, vexation [sic] or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material.""

40. Having briefly described the case of *Ashmore*, Stuart-Smith LJ continued:

> "The case illustrates how in group litigation the court may have to apply the principles of abuse of process to avoid injustice in circumstances which differ materially from those where one or only a few persons are litigating. These principles were applied in this court in this litigation when we upheld the striking out of the actions against the health authorities and the

> general practitioners prescribers in the "prescribers case". In my judgment, with which Balcombe and Peter Gibson LJJ agreed at page 152, I said:
>
> > "The court is concerned to see that its proceedings are not used in a way that is oppressive and vexatious to the other part [y] or which involves serious injustice to him. If the court is satisfied that the proceedings do have that effect, it has power to strike out on the grounds that they are vexatious and an abuse of process.""

41. The Defendants assert that the GLO was entered into on a number of false premises, as a result of failure to comply with the pre-action protocol, and the principles underpinning it, and was then conducted in a way which was so contrary to group litigation principles, and so unfair and inefficient that the court can, and should, properly ask itself: what should the GLO have been directed to? To which the Defendants say the answer is, at worst, flu like symptoms. Reasonableness and proportionality should be approached through that prism, and the *Hunter* line of authority is said to be relevant to that approach. Mr Gibson was not asserting that there should not have been a GLO, the Defendants' concern is how this one was structured and operated.

42. Mr Hermer points out that the case of *Hunter* was the Birmingham 6 case, and the matter in issue was whether or not one could go behind criminal convictions in a subsequent civil action. He argues that, on the basis of Lord Diplock's judgment, it is difficult to see how one can say that, on a detailed assessment, that principle can be applied to go behind the GLO. The Claimants' position is that I do not have such a power, and, even if I did, it is not possible to see how it could be exercised in this case. He submits that the Defendants' case does not amount to abuse of process.

Conclusion

43. In my judgment the Defendants' submission is misconceived. As I have previously stated (at paragraph 17), my authority to assess the Claimants' bills is contained in the Tomlin Order of 23 September 2009. Without that Order I would have no powers whatsoever in relation to these proceedings. Megaw J, in *Cope v United Dairies (London) Ltd* [1963] 2 QB 33, made it clear that neither a Costs Judge, nor the court on appeal can properly refuse to carry out an order for detailed assessment because it is considered to be wrong or ultra vires; the only remedy if the order be wrong, is an appeal from the order. It is thus, not open to the Costs Judge to go behind the Tomlin Order, still less is it open to the Costs Judge to go behind the GLO, which governs the conduct of the entire action. It is perhaps worth mentioning an unreported decision of the Court of Appeal: *Skinner v Thames Valley & Aldershot Co Ltd*, 7 July 1995, where it was held that a defendant who consented to judgment with costs, could not appeal on the grounds of mistake as to the terms of the claimant's solicitor's retainer, a separate action was necessary. The position was more recently confirmed by Mann J in *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2009] EWHC 2014 (Ch), when he held that it was the duty of the assessing

tribunal to carry out the assessment which the previous court had directed it to carry out.

44. The Supreme Court recently had to deal with the extent of a Costs Officer's jurisdiction in *Re (Edwards & Anor) v Environment Agency & Ors* [2010] UKSC 57. Lord Hope giving the judgment of the panel stated:

> "21. … Where section 11 of the 1999 Act applies the statute itself gives to the Costs Judge the authority to depart from the ordinary basis of assessment by setting a limit on the amount which it is reasonable for the paying party to pay. In this case a statutory direction of that kind is absent, and there has been no direction by the Court that any basis of assessment other than the standard basis is to be applied. So the costs officers must confine the exercise which they carry out to that which they are directed to perform under the rules. It is not enough for them to refrain from deciding in advance of their assessment that the respondents will receive only a part of the assessed costs, which they have no jurisdiction to do for the reasons explained in *Lahey v Pirelli Tyres Ltd*. [[2007] EWCA Civ 91; [2007] 1 WLR 998] They must refrain from introducing a different basis than that prescribed by the rules when they are carrying out their assessment. The test of reasonableness which they must apply is directed to their assessment of the costs incurred by the *receiving* party: see CPR 44.5 as to the factors to be taken into account by the Costs Judge when exercising his discretion as to costs. It is not directed to the entirely different question whether the cost to the *paying* party would be prohibitively expensive, which is what the Aarhus test is concerned with."

45. The fact that I have decided I do not have the power to strike out or go behind the GLO does not in any way limit the powers which I have on detailed assessment to disallow costs which have been unreasonably or disproportionately incurred, or, should there be a decision that the costs are, or have the appearance of being disproportionate, have been incurred unnecessarily.

46. Even if I had decided that I had the power, urged upon me by Mr Gibson, I should not have been persuaded that the case of abuse had been made out. The first time this point was raised was in Mr Nurney's eighth witness statement dated 1 November 2010. As I commented during the course of argument, and at previous hearings, this witness statement is couched in intemperate language, is extremely repetitive, and, to use the Claimants' word, diffuse. Mr Gibson nobly accepts responsibility for the contents of the statement, stating that it was a team effort between himself and Mr Bacon. They had wanted to put their case fairly and honestly. It was an attempt, on the Defendants' part, to draw together in one document all their arguments. Whilst I am grateful to Mr Gibson for his explanation, which of course I accept, I am left with the distinct impression that there has been, and may continue to be, a degree of over-

excitement in the Defendants' camp, and it is only Mr Gibson's restraint and skill as an advocate which have prevented matters from descending into an unseemly spectacle.

THE KEY ISSUES

1. Proportionality

1.1 Do the Claimants' costs have the appearance of being disproportionate?

1.2 Are the Claimants' costs proportionate?

The Defendants' Submissions

47. Given the overlapping nature of many of the key issues Mr Gibson dealt with proportionality at what he called "a global level", but at the same time he dealt with GLO principles, pro-action protocol, medical reports, vetting, data entry, settlement distribution and circular letters. I accordingly set out the main points of the argument under this key issue, but those arguments are also relevant to the topics which I have mentioned.

48. Mr Gibson argues that there was a major issue as to whether there were going to be genuine claimants, or people coming forward in order to claim damages at no risk to themselves, which would be of massive import to them, and thus the incentive on those people in their desperate straits was intense. He argues, therefore, that Leigh Day should have proceeded with extreme caution before commencing proceedings, and should have complied with the pre-action protocol, and also obtained a firm scientific basis for any claim before commencing proceedings.

49. Having identified the location of the 18 dump sites, what both the Claimants' and Defendants' Solicitors needed to know was the location of each of the Claimants in relation to the dump sites, and also scientific evidence as to the dose required to cause the injuries complained of. Mr Gibson complains that the action was launched at a point when none of this had been done. Further concerns were expressed on behalf of the Defendants, because the Claimants were gathered through prominent local people, such as village head men and professionals. Leigh Day paid these local representatives their out of pocket expenses, but subsequently learnt that some were seeking to charge individual Claimants for their services. In the end it was agreed that the local representatives would receive 3% of any damages recovered by individual Claimants. That commission was to be paid out of the Claimants' damages, and has not been sought from the Defendants. Nonetheless, the Defendants are concerned at the obvious incentive to gather in Claimants, and are further concerned because some, if not all, of the representatives are themselves Claimants. These concerns have been exacerbated, since it now appears that of the 29,000 or so Claimants, several thousand have yet to receive their damages.

50. The way in which Leigh Day sought to obtain details of each Claimant was by devising a questionnaire, and also requesting a medical report from local doctors. Many Claimants were illiterate, and the questionnaires therefore had to be filled in with the assistance of the local representatives, or literate members of the family or friends. The Defendants criticise the questionnaires for asking leading questions in

relation to the symptoms suffered by the Claimants, and also criticise the medical reports which were produced, on the basis that these are no more than the information set out in the questionnaires transferred into pro forma medical reports. I shall return to this topic in due course.

51. Mr Gibson argues that GLO's require the co-operation of the parties and a "cards on the table" approach, see *Barr v Biffa Waste Services* [2009] EWHC 2444. The Claimants' solicitors should identify Claimants, administer the group and deploy efficient procedures which achieve the GLO objectives. This requires very careful planning, and open and proper disclosure to the court and the Defendants. It is the Defendants' case that none of this occurred, and that something must have gone badly wrong, thereby giving rise to the level of costs now claimed.

52. Mr Gibson argues that a reasonable solicitor considering the requirements of the GLO in respect of registration and updating would have put in place structures which would have led to levels of costs of a completely different order. He argues that normally, in a case such as this, there would be a period of gestation lasting some months, unless there was a limitation problem, and during that period important information would be obtained as to the layout of Abidjan, the likely population of the group, how cost effective and economical procedures could be put in place and the scientific evidence, particularly in regard to dosage and consequent injuries. He says that the court should approach the case on the basis that the solicitor should be treated as representing a person of moderate means, and the solicitor would be anticipating the trial of lead cases from the outset. This would require a cards on the table approach to ensure that the systems in place had integrity and accuracy.

53. Mr Gibson accepts that using the leaders of the community as local representatives was a cost saving device. He accepts that using the local representatives to ensure that the questionnaire was filled in accurately was sensible, because the representatives knew the people within the population and could communicate in the various dialects. He argues that what was necessary was to ensure that the representatives were able to provide easily and cheaply the key information as to how far from the dump site the Claimants allege they were when they were exposed, either at home or at work. Giving the representatives a GPS at a cost of approximately £50 each would have cost approximately £5,700 across the cohort. This was actually done later in respect of some 186 Claimants, whose cases were being looked at in more detail.

54. In respect of the pre-action protocol, which was not followed, the Defendants argue that the group action was issued prematurely on the basis of exaggerated claims with an inadequate understanding of what injuries the slops could have caused. Mr Gibson also complains that the Defendants were not kept informed when the number of Claimants started to increase beyond the 3,000 to 4,000 originally predicted, although this is disputed by the Claimants.

55. With regard to the Medico Legal Reports which had been obtained in respect of each Claimant at a cost of £10, the Defendants now complain that the reports were constructed by the use of questionnaires which asked Claimants to tick boxes. The Defendants rely heavily on the statement made in a skeleton argument on behalf of the Claimants before Mr Justice MacDuff:

> "The Claimants have never suggested they will be seeking to rely on these reports other than in order to comply with paragraph 18.1 of the GLO. They will not be calling any of the doctors and not one of their experts has relied upon a single recording or finding contained in their reports in reaching their own conclusions. Thus the evidence has never played any part at all in how the Claimants seek to prove their cases. It has been obtained and served as part of an administrative formality, no more, no less."

56. The Defendants argue that these Medico Legal Reports are of no utility, and complain that they gave rise to very large additional costs in relation to data entry. The quality of the Medico Legal Reports is also the basis of the Defendants' assertion that the Claimants have exaggerated their claims. It is argued that if these claims had not been exaggerated there would have been no need for Medico Legal Reports or any medical investigatory recording of symptoms. It is said that the requirement for Medico Legal Reports flowed entirely from the way in which Leigh Day & Co initially presented the claims, and continued so to present them throughout.

57. The Defendants argue that Leigh Day & Co created a vehicle through which information that the Claimants and local representatives had recorded in what they term "highly suggestible questionnaires" was checked and re-checked against lists of Medico Legal Reports in Abidjan and London before being finally entered on a database as part of the registration process. They argue that the registration process and procedures elicited and processed information which was not necessary for registration because it was unreliable and of no probative value. They submit that the registration process should have been used simply to register information to enable the Defendants to know where the Claimants lived and where exposed. This information should then have been processed as an administrative exercise on a generic basis.

58. The Defendants complain further, in relation to so called mission trips, of which there were 25, that, although the cost of these trips is claimed in the individual bills, it is apparently not possible for Leigh Day & Co to provide information as to who did what and when. The trips have been claimed at merged hourly rates, which is a topic dealt with below. The Defendants suggest that these trips were hugely disproportionate. They argue that, insofar as costs were incurred in ensuring that only genuine Claimants joined the group and were paid out, those costs should not be paid by the Defendants, particularly because Leigh Day & Co instituted procedures which created the problems over identification, and which necessitated vetting.

59. Bound up with vetting and the Medico Legal Reports is the topic of data entry. The complaint in respect of this work is that it is charged as fee earners' work, rather than administrative/secretarial work for which no charge would normally be made. In addition, it is asserted that much of the information put onto the database was of no value. Although the Defendants accept that it is necessary to register some data for the purpose of the GLO, they object to the levels and degree in this case. In addition they argue that they should not have to pay for updating, or settlement and distribution costs, which, they argue, appear to be related to the identity of the Claimants and involved taking photographs, handing out ID cards and pin numbers.

It also involved sending the Claimants what they call "pointless information", which they neither needed nor could understand.

60. This last point relates to circular letters. The Defendants express surprise that circular letters were being sent to people with no postal addresses, many of whom were illiterate. The letters were apparently given to the local representatives to hand out. The topic of settlement and distribution is the subject of a separate key issue, but the costs claimed in respect of it is referred to by the Defendants as demonstrating the overall disproportionality of the costs claimed. Costs have also been claimed for recruitment and training staff, doctors and local representatives. The Defendants argue that none of this was necessary, or, if it was necessary, it should all be treated as part of Leigh Day's overheads.

61. The Defendants say that by 20 October 2008 Leigh Day had sent client care letters to over 30,000 Claimants. The cohort of Claimants had been formed, but even by March 2009 6,000 individuals were still not registered. By October 2008 all the client care letters had been sent out, but Leigh Day had only registered 15,000 Claimants. Update letters were also sent out, so that by 15 April 2008 16,911 individuals had received client care letters, but 34,332 update letters had been sent out. It is suggested that mission letters were sent out to people who had not been identified, even as potential clients, so that by 18 October 2007, 12,112 mission letters were sent out, when there were only 9,935 individuals who had received client care letters. Leigh Day have claimed client care letters, update letters and mission advice letters, all of which are charged for in both the generic and the individual bills.

62. In respect of hourly rates, which again is a separate issue, the global argument is that they are too high, and that certain paralegals had been promoted to "legal officers".

63. The Defendants assert that instead of obtaining the necessary basic information Leigh Day registered Claimants with an extremely wide range of allegedly serious and persistent illnesses throughout the litigation. At Annex 13 to their skeleton the Defendants set out the various symptoms claimed, ie, headaches, sore eyes, skin problems, stomach ache, cold and fever, under the headings: Severe, Ongoing and Severe and Ongoing. The number of Claimants under each symptom and category has been set out. This is said by the Defendants to demonstrate that Leigh Day continued to register Claimants with severe and exaggerated symptoms throughout the litigation.

64. On 14 March 2008 Leigh Day asserted in correspondence that the 20 cases they had already pleaded were sufficiently representative of all issues. On 25 July 2008, an order was made at the case management conference for additional information to be served for a total of 150 potential lead Claimants. In the event additional information was served in respect of 144. On 13 January 2009 Master Leslie ordered the trial of 52 Claimants from the cohort of 144 potential lead Claimants. On 13 May 2009, at a case management conference before MacDuff J, he ordered each party to select 12 cases from the lead actions for trial. That figure reduced to 22 lead actions for trial.

65. Against that background the Defendants assert that base costs of £49 million in respect of an overall settlement of £30 million (ie, £1,000 per Claimant) in a case with 22 lead Claimants are wholly disproportionate.

Claimants' Submissions

66. Although Mr Hermer and Mr Williams on behalf of the Claimants dealt with each of the key issues, their underlying submission is that the Defendants compromised this case prior to the commencement of the trial, on the basis that they would compensate every Claimant whose name had been entered onto the Group Register. The Defendants also agreed to pay the Claimants' legal costs, to be assessed if not agreed on the standard basis. This agreement was reached at a time when the Defendants were aware of the potential scale of the Claimants' costs, and when they had in their possession all of the relevant facts upon which they now seek to rely.

67. The Defendants settled with a denial of liability, and the Claimants assert that they now seek to have the Claimants' bill disallowed in large measure, on the basis that the case would have failed if it had proceeded to trial, and that it should never have proceeded at all.

68. Mr Hermer has four underlying themes which he says were of significance to nearly all the issues, these are: the GLO; the agreed joint statement; the local representatives; and lastly, how I should deal with submissions based upon excerpts from the Claimants' bill.

69. Mr Hermer submits that the GLO was lawfully promulgated, and was never appealed or materially varied at any stage during the litigation. The Defendants did not make any application to alter the GLO, in spite of the information which they had in their possession.

70. Dealing with the agreed joint statement, Mr Hermer suggests that the Defendants want to rely on it as demonstrating that the Claimants could not ever have proved that the injuries were any more than flu like symptoms. In his submission the statement was an agreed text for a public statement that was the result of a long and hard fought negotiation. It was not a judgment, nor any form of determination. It has no freestanding legal status, and is not capable of going behind the Claimants' expert evidence, which the expert witnesses were prepared to give at trial as to what was probably caused by exposure to the waste, and what was not. The Claimants did not agree that the symptoms described in the joint statement were the limit of their viable claims. They merely subscribed to a form of words as part of the consideration for the settlement agreement. Although the Claimants' experts had accepted that serious injuries such as miscarriages could not be proved to the civil standard, that did not mean they did not think they were a credible possibility.

71. With regard to the local representatives, although the Defendants had suggested that it was unlawful to enter into the agreement with the representatives, Mr Hermer suggests that this is a flawed argument. As to the Defendants' suggestion that the role of the representatives was somehow tied up with fraud, exaggeration, improper conduct, or the advancement of claims that were not genuine, and that some of them were themselves clients, witnesses, including doctors, Mr Hermer questions what relevance any of that has to any of the key issues. He points out that the representatives did not increase the costs, but kept them down, because it was, from the Defendants' perspective, free labour.

72. Finally, Mr Hermer argues that the key issues fall to be determined by principle, a determination which is unlikely to be helped by reliance upon excerpts from what is a vast bill of costs. The Claimants have always been willing to correct any errors contained in their bill, and he suggests that had the Defendants put a number of their points to the Claimants, they could have been given an explanation of the figures claimed, and if mistakes were identified these would be, and had been, corrected.

73. Turning to proportionality, Mr Hermer, whilst accepting the test laid down by Lord Woolf in *Lownds*, submits that the words "the global approach will indicate whether the total sum claimed is or appears to be disproportionate …" indicate that in some cases it will be impossible to apply a truly impressionistic approach, whilst in others it will not. He submits that this is a case in which the test of an impression of proportionality, as opposed to a finding of proportionality or disproportionality, is not actually going to take matters much further. He bases this argument on the fact that there are no ready comparators to this case involving 30,000 claimants. Further he argues the court must consider the question of proportionality through the "prism" of the seven pillars, ie, the factors set out in CPR 44.5, an exercise which he suggests cannot be undertaken on a superficial level. Any global impression needs to be informed by understanding the complexities of the litigation. Finally, he argues that the majority of the costs were expended in pursuance of the GLO. Thus, he argues that what is required is a level of analysis that does not readily accord with the notion of an impression. In his submission no conclusion as to proportionality can be reached without consideration of all the issues.

74. The Claimants' case is that the majority of the costs stem from compliance with the GLO, and dealing with the defence. Mr Hermer points out that the GLO, as it had to be, was approved by the Senior Master, and also by the Lord Chief Justice. He also points out that the use of the GLO worked, in that it permitted this claim by 30,000 claimants to proceed to trial within three years of the incident; settlement being achieved shortly before trial. He asserts that the GLO is not the creature, nor the property, of the Claimants, and that the Defendants cannot sit idly by and let the GLO take whatever form the Claimants want, and then complain about the costs at a later date. In his submission both parties have a responsibility to ensure that the litigation proceeds in the most appropriate manner. Although the Defendants assert that they did not have the necessary information at the time when the GLO was made, Mr Hermer points out that when they agreed to settle the case they were in possession of all the facts, which they now put forward in an effort to have the GLO struck down, and the individual costs disallowed.

75. The Defendants had themselves requested further information (see for example the letter of 18 January 2007). The Defendants, of course, say that they thought they were facing a different case, ie, a case with relatively few claimants, and involving long term serious injuries. The Defendants also say that each side is under a duty to keep the other, and the court, informed of the current situation. Mr Hermer argues that it was open to the Defendants to seek to have the GLO amended. In his submission the Defendants never complained about the GLO being too onerous or too costly. They in fact complained that the Claimants had been guilty of "widespread non compliance". These complaints were contained in an extensive schedule to the defence. He says that the Defendants were requiring absolute compliance with the GLO, and absolute accuracy in the information provided.

76. When the schedule to the GLO was being discussed with Macfarlanes, the Defendants requested still further information (Macfarlanes letter 1 February 2007). It was therefore necessary to spend vast amounts of time complying with the requirements of the GLO.

77. Leigh Day were providing the Defendants with as much information as they could. They were striving to ensure that there was accuracy in the information provided, but were pointing out the difficulties of obtaining information in Abidjan. All this work would have been necessary in any event.

78. With regard to the types of injuries sustained, and the number of claimants, Mr Hermer refers to Mr Day's first two witness statements, both of which were made before the GLO. In the Claimants' reply to the Defendants' request for further information, dated 21 January 2007 the information provided is that the Claimants' solicitors best estimate following two visits to Abidjan is "that there were likely to be about 4,000 claims …" In subsequent correspondence Leigh Day stated that "in the great majority of cases, Claimants suffered acute symptoms that flared up on their exposure in late August last year …" Mr Hermer says that notwithstanding the information which had been provided to the Defendants, the requirements in the GLO remained the same, and the Defendants must have known that the work required was going to take many hours.

79. At a hearing before Master Leslie in November 2007, Mr Day stated that he considered the claims to be worth between £2,000 to £6,000. There was, therefore, in Mr Hermer's submission, never any suggestion that the case was about serious injury.

80. On 23 April 2007 Leigh Day wrote confirming that no death claims would be brought. One of the reasons being that the Ivorian Government had paid the family of each deceased person the equivalent of £100,000. Mr Hermer's case is that Mr Day was being entirely candid with the Defendants, and that although the Defendants knew that the vast majority of the cases were short term minor injuries, they did not modify their demands for information or limit them to the more serious cases.

81. With regard to the Defendants' assertion that whilst the GLO might have been suitable for 4,000 to 8,000 claimants, it clearly was not suitable for 30,000 claimants, Mr Hermer seeks to demonstrate, from the correspondence, that Leigh Day were keeping the Defendants informed of the growing number of clients. Mr Hermer identifies 35 letters between 26 January 2007 and 4 March 2009 in which Leigh Day informed Macfarlanes of the current claimant numbers. By way of example, on 10 April 2008 Leigh Day wrote to Macfarlanes stating that by the CMC on 21 April they would have served some 5,700 cases:

> "At that point we will turn our attention to the follow-on cases that have instructed to us after the cut-off date last year. That group currently contains around 6,600 cases. We anticipate this will grow to a final figure of around 22,000 cases."

82. Leigh Day suggested that the new cases could be issued and be added to the first group, or an application for a second GLO could be made, or Macfarlanes could simply be supplied with schedules of the additional claims. Macfarlanes' response,

dated 15 April 2008 was that when the Claimants were added, they should be added to the existing GLO:

> "and they must abide by its terms, any decisions made by the court and the results of the lead cases;
>
> 2. All current and future cases must all be properly prepared and contain sufficient information (a) for a proper decision to be made on lead cases, and (b) once lead cases are determined, to enable the consequences of that position to apply across the cohort."

The letter also suggests that 200 lead cases had been based on a cohort of 8,029 claimants, but that number was not adequate for the new cohort.

83. Mr Hermer argues that at this stage, April 2008, the Defendants could be in no doubt at all about what the Claimants were saying about Claimant numbers, the value of their cases, and the nature of the injuries underlying that valuation. They had received thousands of medical reports, and yet they elected to add the additional 22,000 claimants to the existing GLO. Even as late as June 2009 the Defendants were still complaining about non-compliance with the GLO.

84. In support of the Claimants' argument that the work done by Leigh Day was proportionate, Mr Hermer argues that, by their calculation, the individual costs were approximately £850 per case. He extrapolated from a table of six sample cases that the average time spent in relation to compliance with the GLO was 3.42 hours. This includes registration and issue. The average time spent in client contact, that is both meetings and letters to the client, amounts to 0.62 of an hour, and in connection with settlement, which includes meetings in September and October 2009 with the clients, 0.57 of an hour, making a total of slightly less than 4.60 hours per case. Mr Hermer related this work to paragraphs 16 to 19 of the GLO, and argues that it is work which Leigh Day had to undertake in order to comply with the GLO.

The Procedure in Abidjan

85. The narrative to the individual bills sets out in detail the work done by Leigh Day and the local representatives in Abidjan. Prior to potential Claimants being seen by Leigh Day fee earners in Abidjan, an evidence check was carried out. Initially this was done in Abidjan, but was increasingly carried out in London before the mission trips took place. Leigh Day arranged for the local representatives to send lists of potential Claimants who had received treatment to be checked against the Government list, SAMU and clinic registers, and a list of checked and accepted Claimants was then returned to the local representatives to arrange for them to attend the relevant interview. On the next trip the Claimant would be interviewed by a Leigh Day fee earner.

86. Trips where all clients were seen took place in September 2007, August/October 2008, April/May 2009. There were additional trips to see particular clients where additional evidence was needed, and to see clients who had been missed on major trips. There were also trips to meet the Claimants in September 2009 to obtain instructions with regard to the settlement, to provide them with pin numbers in 2007

and February/March 2008. For some Claimants the evidence obtained at the initial meeting was not sufficient to accept the case onto the Group Register. This was where there was little or no evidence available to support the file, or where the evidence required additional clarification.

87. The Leigh Day team visited Abidjan between 28 November and 12 December 2007, and 26 February to 4 March 2008. There were further trips between 15 August to 28 August 2008 where the team met with 20,500 Claimants, all of whom were photographed and the individual photograph number was saved to a database. There was a further trip on 1 October to 20 October 2007, and another from 27 February to 13 March 2009 in order to meet Claimants who had been unable to attend the August 2008 visit where the exercise of collecting photographs and taking details of ongoing symptoms was completed. It was essential for the team to be able to identify the Claimants accurately, which was the purpose of photographing them.

88. There was a further visit between 15 April to 4 May 2009, by which time it had become clear to Leigh Day that it was essential to have unique way of identifying each Claimant who might be compensated, in addition to having a photograph of each of them. The Claimants were to be provided with a unique claim card. Prior to this trip the Claimants were sent a letter, which was delivered by DHL because it was considered to be important. It was distributed by the local representatives. Each letter was individual to the Claimant, and was separately mail merged with their personal details. Leigh Day say that this was crucial, as it enabled the team to identify Claimants on the ground. It informed the Claimant of the need for a claim card, and the formal identification process which the Claimant would have to undergo before receiving a card.

89. A further trip took place between 3 June and 16 June 2009. There were at that time approximately 6,000 Claimants without sufficient evidence for their claims to be registered. Each of them was written to, to advise them as to the reason why their evidence was insufficient. During the trip the team met with those Claimants and completed a questionnaire to provide additional evidence where necessary. They also met with litigation friends, and arranged for certificates to be signed in order to issue a child's claim. The team also met with personal representatives of potential Claimants who had died. The CFA advice was given, and the representatives signed up.

90. Once the questionnaire prepared by Leigh Day was filled in, the individual Claimant would meet one of the Leigh Day team, a paralegal. That person, during the course of the interview, would go through the questionnaire with the Claimant to ensure that it was clear and properly filled in. The client was also asked to identify on a map where he or she lived, or where they were exposed to the waste. Obtaining this information proved difficult in many cases, but it was essential to obtain the information. The paralegals would also answer any questions which the Claimants had.

91. Before the clients were seen individually there would have been a meeting at which the CFA and how it worked would have been explained. This public meeting was then followed by the individual meetings. Every new client was given a client care letter, subsequent updating letters were given to the local representative for distribution. Some nine or ten letters were sent out during the course of the litigation.

92. Once the questionnaires and medical reports had been completed they were sent back to London, where each Claimant was given a code, and the details were entered onto the database. What Mr Hermer describes as "some very important cross-checking" then took place to see whether or not the Claimant could be identified on official lists of victims. These lists consisted of a Government list of all those who had received compensation. There was also a fiche d'enquete consisting of triage reports of those who had been seen by the emergency services in Abidjan when health care was being provided. Finally there were registers from private clinics in respect of those who had sought private healthcare during the period. Leigh Day cross-checked these to see on which list the clients name appeared. This was necessary, since by the time Leigh Day were in contact with the clients, their symptoms had waned. This cross-checking was not straightforward, because there were 108,000 names on the Government list, and on the fiche d'enquete, names were recorded at speed, and individuals did not always spell their names in the same way.

93. Another part of the cross-checking was the reviewing and translation of the medical report. All this, argues Mr Hermer, was done to comply with the GLO.

94. In respect of client contact, this covers three trips during the lifetime of the litigation, and also includes a figure for updating letters. The Claimants concede that mail-merge letters should be charged at one third of a unit, rather than one half. The figure of 0.7 of a hour average per individual is said to be about one half in respect of trips, and the remainder in respect of letters. The topic of settlement covers a trip to obtain acceptance of the offer, and another trip in order to give the clients their pin numbers to enable them to obtain payment of damages.

95. Mr Hermer referred me to the judgment of the Amsterdam Court dated 23 July 2010, from which I extracted the background facts with which I commence this judgment. Trafigura apparently commenced proceedings in Holland against the Dutch Public Prosecutor, who was alleged to have provided documents from the Dutch criminal prosecution file to Leigh Day. On 4 September 2009 the District Court of the Hague ruled that the documents had been unlawfully provided to Leigh Day & Co by the prosecutor, and that the prosecutor had an obligation to have them returned and/or destroyed. Mr Hermer states that the Appeal Court in Holland overturned the finding of the District Court, and ordered Trafigura to pay the costs of those proceedings. Mr Gibson states that that decision is itself under appeal.

96. In their defence the Defendants denied all aspects of liability (liability is still denied in the final settlement agreement), and asserted that it knew nothing about the toxicity or dangerousness of the waste. They also asserted that it was entirely appropriate to send it to Ivory Coast. Causation was also put in issue. The defence was accompanied by extensive Part 18 requests, which, among other things, requested:

> "In respect of each element, elements or components as identified state its volatility, its half life in conditions analogous to those in Abidjan, identify the conditions which are said to be analogous state by reference to both concentration and period and exposure the LD50 of the elemental compound etc."

97. The Claimants' experts could not, in Mr Hermer's submission, get to grips with the analysis of the waste until they had had disclosure from the Defendants of the

materials that would enable them to carry out a proper analysis. This response, says Mr Hermer, foreshadowed fairly accurately the conclusions of the Claimants' experts once they had had the opportunity to consider the materials in detail. Disclosure took place from late 2007 to the summer of 2008.

98. Mr Hermer deals with Leigh Day's efforts to settle the case, and refers to correspondence between Leigh Day and Macfarlanes, in which Leigh Day did seek discussions. Mr Hermer argues that there was nothing from the Defendants even hinting at the merits of the parties talking about settlement until 24 hours after the limitation period had expired. In his submission Trafigura were fighting the case to counter allegations being made in the media against Trafigura.

99. Mr Hermer argues that the Defendants' suggestion that the cases were incapable of settlement, because Leigh Day were making false and inaccurate claims cannot be sustained.

100. Dealing with the value of the claims, Mr Hermer urged that I should not look at the actual amounts recovered, but at the figure that it was reasonable to expect as the figure for damages. He accepts that the values were modest, but that the figures quoted by Mr Day were of life changing proportions for some of the clients. The claims were of the utmost importance to the client, and the nature of the underlying cause of the Claimants' injuries added to that importance. The fact that the dumping of the waste took place in Abidjan should not undermine that importance. Mr Day deals with complexity in his 17th witness statement. He suggests that he had never been in a case where there have been so many twists and turns, and where he has needed to have been quite so on the ball all the time. The action changed on a monthly if not daily basis, and was a case that absorbed almost 100% of his time over three years. Mr Day goes into considerable detail, and among other things deals with liability, generic causation, the witness statements, individual causation and the Defendants' behaviour.

101. The Defendants, through Mr Gibson, acknowledged that Mr Day and Leigh Day are pre-eminent in the field of group actions. There is therefore ample evidence of the scale and specialised knowledge involved.

102. In summary, therefore, Mr Hermer argues that the majority of the bill represents the work that the Claimants were required to undertake by the GLO, an order to which the Defendants had both contributed and consented. He therefore argues that it cannot be disproportionate to comply with the court order, his underlying argument being that it is not appropriate to arrive at a decision on proportionality on what he calls "an impressionistic basis", ie, using the global approach.

Conclusion

103. Those representing the Defendants have spent considerable time and effort in analysing the generic and sample individual bills, and have translated that analysis into a myriad polychromatic graphs, pie charts and spreadsheets, an exercise which has served to heighten still further their sense of affront at the level of costs being claimed. Although these analyses were no doubt helpful to the Defendants in marshalling their arguments, they are of little assistance (other than as illustrative examples) to the court dealing with the issues of principle which are before it.

104. A great deal of time and paper has been used up by the parties accusing each other of being responsible for the level of costs now claimed. The Claimants suggest that the costs were generated by the Defendants requesting more and more information. In his 18th witness statement Mr Day asserts (at paragraph 42):

> "It was the Defendants who pressed us into obtaining far more information for each individual case than I had anticipated with all the cost consequences this entailed."

105. The Defendants point out that in the costs estimate provided by Leigh Day to their clients at the outset, Mr Day put the individual cost estimate per case at £1,250 base cost. In the event the individual base costs are in the region of £850 per case.

106. The Claimants suggest that the Defendants could have settled earlier, and thereby saved a significant amount of costs. The Defendants' position is that they had no choice but to demonstrate that the serious allegations being made were false. Had Leigh Day suggested that the claims advanced were at worst of a low level and short term transient nature, no doubt settlement would have come about. In fact settlement was impossible until the necessary scientific evidence had been obtained by both sides.

107. Mr Gibson argues that although the Defendants do not agree the core costs of pursuing the group action, they do accept that significant costs in this respect would have to be incurred.

108. In my judgment Mr Gibson's argument is a good one. Although the Defendants fought this case vigorously, and continue to do so in the detailed assessment proceedings, I am not persuaded that their actions had any significant impact on the level of costs claimed by Leigh Day for work done outside the core litigation costs.

109. I accept Mr Hermer's submission that the Defendants have settled this case on the basis that every Claimant on the register would be compensated, and that they would pay the Claimants' costs on the standard basis. The agreement was reached at a time when the Defendants were aware of the potential scale of the Claimants' costs, and had in their possession all of the relevant facts upon which they now seek to rely. I further accept Mr Hermer's submission in relation to the agreed joint statement. It was not a judgment, nor any form of determination, but an agreed text for a public statement that was the result of a long and hard fought negotiation.

110. I do not, however, accept Mr Hermer's submission that this case is so large and complex that it is impossible to apply a truly impressionistic approach. In my judgment, I am bound by the Court of Appeal's decision in *Lownds*, particularly paragraph 31:

> "There has to be a global approach and an item by item approach."

111. Having now assimilated a large amount of information from both parties in connection with this litigation, I have no hesitation in saying that the base costs, excluding additional liabilities, have the appearance of being disproportionate.

112. Having said that, there are clearly many issues and areas which will have to be examined in far greater detail than has been possible during the hearing of these key issues. It may well be that during the course of that more detailed examination, I will form the view that the particular costs in question are not in fact disproportionate. In *Giambrone & Ors v JMC Holidays* [2002] EWHC 2932 (QB), Morland J stated:

> "For my part I do not accept that if a Costs Judge has ruled at the outset of a detailed assessment that the bill as a whole is not disproportionate he is precluded from deciding that an item or a number of items are or appear disproportionate having regard to the "matters in issue"."

113. Therefore, in my view, there is no reason why a Costs Judge, having found at the outset on a global view, that the costs have the appearance of being disproportionate, should be precluded from deciding that an item or number of items are in fact proportionate, and thus that the test of necessity should not apply to them.

114. I answer the questions raised in Key Issue 1 as follows:

i) 1.1 Yes

ii) 1.2 This will have to await more detailed examination of the individual items of costs.

2. Vetting Costs

2.1 Are the Claimants entitled to recover the costs associated with the collection, assessment and management of each of the claims during the period prior to (1) the signing of the CFA for each Claimant and (2) each Claimants' admission to the Group Register?

2.2 Are the Claimants entitled to recover any costs associated with those individuals who did not subsequently become Claimants?

2.3 Are the Claimants entitled to recover the costs of liaising with and supervising the 3% representatives used to (1) collect prospective Claimants (2) assist prospective Claimants with making their claims (3) communicate with Claimants on behalf of Leigh Day & Co during the proceedings and (4) distribute the Settlement Sums to the Claimants following September 2009?

2.4 Do the costs associated with the collection, assessment and management of each of the claims have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

115. The vetting costs are the costs associated with the collection, assessment and management of claims prior to the signing of the CFA, and each Claimant's admission to the group register. Also included are the costs of liaising with and supervising the local representatives who collected the Claimants, and were the main channel of communication with them. The costs associated with individuals who did

not subsequently become a claimant are not recoverable, and this is accepted by the Claimants. Mr Bacon's main contention is that no costs are recoverable unless and until a claimant becomes a client of Leigh Day by signing the conditional fee agreement, since, prior to that point, there is no valid retainer between solicitor and client. Mr Bacon identified eleven different forms of CFA, which incorporated slightly different wording. CFA number 1 reads:

> "What is covered by this agreement … your claim for damages … from the date you first instructed us in this matter until the date of this agreement and from the date of this agreement until the conclusion of proceedings."

116. CFA number 2 states:

> "What is covered by this agreement … your claim for damages … from the date of this agreement until the conclusion of proceedings …"

In respect of lead claimants this CFA imposes a liability to share generic costs once the CFA has been entered into. The agreement provides that the share for each lead claimant is to be calculated by dividing the charges by the number of people "for whom we are acting … during the calendar month in which the work is done".

117. CFA number 3 and number 5 do not contain a clause headed "what is covered by this agreement". On that basis Mr Bacon argues that those agreements apply to costs incurred from the date of the agreement only. Under Clause 6A of these agreements, if a claimant became a lead claimant, that person would be liable for a share of the generic costs from 1 September 2006 onwards. Mr Bacon argues that this retrospectivity does not apply to individual costs.

118. CFA number 4 states:

> "This agreement covers … your claim for damages from the date of the present agreement to the conclusion of the proceedings covered by this agreement."

The agreement also contains similar costs sharing provisions for lead claimants, except that the starting date is 1 August 2007.

119. CFA number 6 is similar to CFAs numbers 3 and 5, except that the costs sharing provisions provide that if the claim is a lead claim, the share is to be calculated by the number of names on the group register at the beginning of the month in which the work was done. The start date under this agreement is 1 September 2006.

120. CFA number 7: Mr Bacon makes no mention of this agreement, and I have no information about it.

121. CFAs numbers 8, 9, 10 and 11 are all amending CFAs to be used as fallback positions should any of the earlier CFAs be found to be unenforceable. Given that there has been no challenge to the enforceability of the earlier CFAs, they continue to apply, and these later CFAs do not affect the issue. Mr Bacon argues that apart from the

specific retrospective provisions in relation to lead Claimants, the CFAs are not retrospective for individual costs.

122. With regard to the CFA, Mr Gibson accepts that it had to be explained to the Claimants, and the fact that this was done at meetings should have been a cost effective method of carrying out that task. He points out, however, that the Claimants have no real interest in the contents of the CFA, because they were reassured that they were not at any risk.

123. With regard to the local representatives, Mr Bacon argues that the Defendants should not be required to pay the costs incurred by the Claimants in instructing, through Leigh Day, the local representatives. He therefore argues that all the costs of the structure which relied on the local representatives should be irrecoverable. He identifies the tasks undertaken by the local representatives as:

i) identification of local doctors;

ii) providing lists of potential clients to Leigh Day and distributing claimant questionnaires, Medico Legal Reports and client care letters;

iii) acting as liaison for Leigh Day, keeping in touch with the Claimant cohort;

iv) making telephone calls to clients;

v) assisting in the preparation of signing up missions, itineraries and organising client meetings;

vi) attending Leigh Day team meetings;

vii) obtaining medical records;

viii) assisting Leigh Day in the preparation of chronologies of events in specific areas;

ix) being briefed by Leigh Day as to health problems to be alert to;

x) assisting Claimants in the completion of the client questionnaires; and

xi) sending completed questionnaires back to Leigh Day & Co.

None of this, he says, is recoverable. He argues that if the system of local representatives were valid, the reasonable approach would have been to delegate the entire operation to those representatives.

124. Mr Bacon submits that the local representatives, in addition to receiving the 3% of successful Claimants' damages, were also paid further sums, namely 250 FCFA for each potential client contacted by the representative, and a further 250 FCFA once the client had attended. Mr Hermer made it clear that these payments were in respect of Claimants who were already clients, and referred to the distribution of letters by the local representatives to pre-existing clients.

125. Mr Bacon refers to Rule 9 of the Solicitors Code of Conduct, which provides that when making or receiving referrals of clients to or from third parties, the solicitor must do nothing which would compromise his or her independence, or ability to act and advise in the best interests of the clients. The Defendants' position is that Leigh Day have acted in breach of this rule. This point is put forward subject to the Solicitors Regulation Authority not having approved the arrangements.

126. Mr Bacon argues that under Ivorian law Leigh Day are in breach of a provision under the Act of 27 July 1981 relating to the Profession of Lawyers, and the Internal Rules of the Bar of the Cote d'Ivoire, Section 78 of which provides that a lawyer is not allowed to advertise, except to the extent strictly necessary to give the public essential information, and a lawyer is prohibited from carrying out any act of canvassing or solicitation. Section 89 of the Internal Rules of the Bar of the Cote d'Ivoire provide that a lawyer is formally prohibited from soliciting clients, canvassing or advertising, either for himself or by third parties on his behalf. Accordingly it is argued Leigh Day were acting in breach of Ivorian law.

127. In support of his argument, Mr Bacon referred to *Mohamed v Alaga & Co* [2000] 1 WLR 1815, *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 and *Rees v De Bernardy* [1896] 2 Ch 437, dealing with champertous and otherwise unlawful agreements. The case of *Mohamed* involved an agreement between the claimant and a firm of solicitors to share the profits made from the introduction of clients. The Court of Appeal found that the profit sharing agreement was illegal, but permitted the Claimant to amend the claim to enable him to claim a quantum meruit for professional services which he had carried out, which were not any part of the profit sharing agreement.

128. Mr Bacon points out that the work in Abidjan appears to have been recorded on pre-prepared attendance notes, which do not appear to reflect accurately the time spent. The Claimants certainly appear to have drawn their bills on the basis of 6 minute units, which may not in the circumstances be appropriate.

129. Once the questionnaire had been completed in Abidjan, it needed to be sent back to London, ideally with the GPS co-ordinates, and there the documents could have been translated (at a cost of £500,000 for questionnaires, and £300,000 for medical reports). No checking on an individual case basis should have been required, because the information obtained at that stage would be subject to the findings of the experts in due course. In his submission, no one in London was in a position to vet, in any meaningful way, the medical findings of the doctors. If the local representatives were doing their job well, there should be no question of vetting the simple information as to where the Claimants lived.

130. Mr Bacon further submits that once a case was registered and stayed, it was not reasonable or necessary for there to be any further updating letters, or any further meetings in respect of the cases which are stayed. There was certainly no GLO requirement to that end. Had Leigh Day thought it necessary to have a photograph or identification card for each Claimant, he submits that this should have been done at the first meeting when the CFA was signed. He suggests that since the CFA letter would contain the relevant information, there was no need for separate client care letters.

131. Mr Gibson does accept that once the data had been entered there would be some added time for a fee earner to oversee the procedures.

132. Mr Gibson argues that trying to work out whether a potential Claimant is honest and genuine is not a proper cost for which the Defendants should pay. This was not a GLO requirement, but rather a duty upon the solicitors to ensure they were not putting forward improper claims. If they had concerns one would have expected them to share those concerns.

133. Because of the way in which the questionnaires had been drafted, Mr Gibson submits that no realistic vetting could be carried out. There was no significant evidence of the vetting resulting in people being turned away, although Leigh Day had stated that some 4.4% of potential Claimants did not make it onto the register.

134. In relation to locating the whereabouts of individual Claimants the Defendants' solicitors suggested to Leigh Day that they might use a GPS at a cost of £50 each, which would enable the user to stand at a relevant point and press the button, which would then give the necessary reading. The Defendants suggest that since there were 88 local representatives, and given the large number of Claimants, it would have been a cost effective and sensible proposal.

135. The information as to where the Claimants lived, and how far they were from each dump site, which was necessary in order to ascertain the likely doses, ended up by Leigh Day indicating the whereabouts of each Claimant by reference to one kilometre squares, which Leigh Day said in correspondence "was somewhat approximate in nature" (letter 11 June 2007).

136. After the GLO was made Leigh Day carried on registering Claimants, and must have known, because of the structures they had put in place, that the costs being generated would be enormous. Leigh Day had refused Macfarlanes request for GPS to be used to indicate the location of the Claimants, although it was apparently used by a local representative when the lead cases had been selected, and was very effective.

137. The Defendants also challenge the missions to Abidjan in October 2008 and April/May 2009. The first of these, including taking photographs of clients for ID purposes "to assist bank with compensation payout", and "taking information as to ongoing symptoms, noting change in contact". The April/May 2009 mission included "identifying the client by checking photographic ID given out on earlier missions and providing the client with a unique claim card". Mr Gibson argues that this work is not costs of the proceedings, but solicitor and client work. The process of client identification is not claimable between the parties. In any event the work should have been undertaken at the initial meeting. These two mission trips took place after the Defendants had conceded that there was no need for the Claimants to establish breach of duty.

Claimants' Submissions

138. The vetting process is set out in detail in Mr Day's 12th witness statement, his 17th witness statement, the narrative to the bill of costs and in the appendix to the Claimants' skeleton argument. No purpose would be served by setting out the process yet again in this judgment, but I accept that Mr Day's description is accurate.

139. Since the Defendants particularly complain about the possibility of fraud, I quote the Claimants' explanation from their skeleton argument:

> "4. As a part of ensuring that fraud did not take place, from August 2008, to February 2009 just short of 20,000 of the Claimant cohort were photographed for ID purposes during the Claimant meetings that were taking place. Prior to the team travelling to Abidjan, each Claimant was sent an individual letter with some of their ID details to advise them of the purpose of the trip. The letters were an essential step in verifying they were genuine Claimants and the team were under strict instructions not to accept anyone without a letter.
>
> 5. The date of birth of the Claimant was missing from the letter to the Claimant to advise them of the photograph trip, to ensure the team would carry out an additional check as to the Claimants' ID."

140. In his 12th witness statement, dated 22 April 2009, Mr Day deals with the Defendants' assertion that the Claimant cohort was suffused with bogus claims. At the time the witness statement was written there were something more than 24,000 Claimants registered, each of whom had been able to provide the legal team with evidence which fell into one or more of the categories required to support their claims, namely:

> "(a) a Government list entry;
>
> (b) contemporaneous prescriptions for injuries consistent with exposure to the waste;
>
> (c) a copy of a SAMU fiche d'enquete;
>
> (d) a recording in the register of a private clinic;
>
> (e) relevant employers' health records;
>
> (f) verification that the person lived during the relevant period within one of the key "zones of exposure" identified by the Swiss Research Centre of the Cote d'Ivoire (CSRS) in their epidemiological and environment study on the effects of exposure to the toxic waste in Abidjan, Ivory Coast undertaken from October to December 2006."

141. Mr Day then goes on to describe in more detail the situation with regard to the Government list, prescriptions, the SAMU list, private clinics, company records and the Swiss study. He suggests that there was very little evidence to suggest that, despite the systems put in place, a large proportion of the Claimants were bogus. He describes the systems put in place for cross-checking for fraud, and he also describes the difficult situation in Abidjan, a situation which the Defendants' representatives had also experienced.

142. In the summer of 2009 Leigh Day decided to issue all Claimants with a new form of card, which was so designed as to make it extremely difficult to forge. These cards were handed to all Claimants who could prove their identity in accordance with the criteria laid down by Leigh Day. Between April and June 2009 Leigh Day provided the new Claimant card to 28,377 Claimants.

143. Mr Hermer explains the role of the local representatives, and submits that from the Claimants' point of view they did an excellent job. They were the main point of contact for Leigh Day in respect of contacting clients, setting up meetings, and helping to follow up any gaps in the questionnaires which had been filled out. They were also the main conduit for information, such as letters, or information as to where meetings were to take place. In addition they helped to find local doctors. There were nearly 100 of them. The Claimants' case is that they greatly reduced the costs bill. It is accepted that there was "at least one real rogue", and some others who had acted inappropriately. This was said to be part of the way of life in Abidjan.

144. With regard to the Defendants' suggestion that Leigh Day should have used Ivorian lawyers, this would, in Mr Hermer's submission, have added millions to the cost. The 3% paid to the local representatives came from the Claimants' damages, although Leigh Day paid their out of pocket expenses incurred in texting by mobile phone and photocopying. It was not up to the local representatives to decide whether or not a potential claimant would be accepted, that decision was taken by one of the Leigh Day team.

145. Turning to the Defendants' assertion that Leigh Day's activities in Abidjan were contrary to Ivorian law, Mr Hermer points out that this is not part of the key issues, but in any event he relies on chapter 9 of *Dicey, Morris & Collins on the Conflict of Laws, 14th Edition*:

> "Rule 18-(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the Judge by expert evidence or sometimes by certain other means.
>
> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

146. The chapter goes on to indicate that English courts take judicial notice of the Law of England, and of notorious facts, but not of foreign law. Foreign law must in general be proved by expert evidence, not merely by putting the text of a foreign enactment before the court. The burden of proving foreign law lies on the party who bases his case on it. On that basis, Mr Hermer submits, that no evidence has been put before me which would enable me to decide in the Defendants' favour. In any event, he points out that the claim was operated by an English firm in the courts of England and Wales.

147. Mr Hermer points out that Leigh Day had a waiver from the SRA, which I have referred to at paragraph 228 below, and MacDuff J in July 2009 had refused the Defendants' application for disclosure of the waiver, on the basis that it did not appear to him to be relevant to the issues, or to be of any great assistance.

148. Dealing with the Defendant's suggestion that the location of each Claimant should be ascertained by using GPS, Mr Hermer states that in Abidjan it was extremely difficult to get any decent quality maps, and most of the Claimants did not live anywhere with an address, there are few street names, so that Leigh Day had to do the best they could, in one of the worlds most under-developed countries. The Defendants complained about the vagueness of the information provided regarding the locations and alleged exposure. They required further information, and complained that the information provided to date was too vague.

149. Mr Day wrote to Macfarlanes on 9 April 2008 pointing out his estimate, that if GPS were to be used, this would take approximately 12,000 hours to deal with the 8,000 Claimants then in the cohort. He also set out the many thousands of hours which he thought the Defendants other requests for detailed information would require.

Conclusion

150. With regard to Mr Bacon's argument that no costs are recoverable in respect of work done for a Claimant prior to the signing of the CFA, the basic principle is that costs between the parties are intended to compensate the winning party, in this case the Claimant, for the costs which that party is liable to pay to his or her solicitors. If there is no retainer between solicitor and client, the solicitor is not entitled to make any charge.

151. In respect of the various CFAs mentioned by Mr Bacon, CFA number 1 does appear to refer back to a date prior to the signing of the CFA, namely "the date you first instructed us in this matter". Agreements numbers 2 and 4 specifically state that the agreement runs "from the date of this agreement". CFAs numbers 3, 5 and 6 are silent, and I accept Mr Bacon's argument that they should in principle apply to costs incurred from the date of the agreement only.

152. As to retrospectivity in respect of lead Claimants, this is specifically dealt with in the agreements, which will be retrospective from 1 September 2006 or 1 August 2007, depending upon which agreement is relevant.

153. Mr Bacon argues by reference to Annex 14 that various items, which are common to all the individual bills, should be disallowed for various reasons. In my view these are matters which will have to be dealt with at detailed assessment, to which the decisions in principle made in relation to these key issues will be applied.

154. Mr Bacon argued that the Defendant should not be required to pay any of the costs incurred by the Claimants in instructing the local representatives. I have set out the tasks which he identified at paragraph 123 above. To suggest, as he does, that the entire operation should have been delegated to the representatives is simply unsustainable. In my judgment, using local representatives to carry out these tasks, saved the Defendants a very considerable amount of money, and it follows from that, that the Claimants must be able to recover the reasonable and proportionate costs of instructing and supervising the local representatives.

155. The Law Society had granted a waiver to Leigh Day. In any event I am not persuaded that the agreement between Leigh Day and the local representatives was a profit sharing agreement, but was a sensible way of collecting and keeping in touch with the

Claimants. In *Garbutt v Edwards* [2005] EWCA Civ 1206, Arden LJ examined the Rules and Code of Conduct, and stated:

> "31. … The inference I would draw is that the Code is there to protect the legitimate interests of the client, and the administration of justice, rather than to relieve paying parties of their obligations to pay costs which have been reasonably incurred."

I am not persuaded that there is any substance in Mr Bacon's argument.

156. With regard to the costs of translation of the questionnaires and medical reports, on the face of it a disbursement of £500,000 for questionnaires, and £300,000 for translating medical reports, would have been cheaper than having the Leigh Day employees carry out the translation. However, to those costs would have to be added the correspondence with, and instructions to, the translators. It is a matter for argument in the future as to which of these two processes was the more reasonable and proportionate.

157. I do not accept Mr Bacon's submission that once a case was registered and stayed, it was not reasonable or necessary for there to be any further updating letters, or any further meetings in respect of the cases which were stayed. Solicitors acting in group actions are clearly under a duty to keep all the Claimants informed of what is happening. In my judgment this could best be done by informing the local representatives of the up to date position, and leaving them to disseminate the information to the Claimants. An exercise which would cost the Defendants nothing.

158. I deal here with the questionnaires and medical reports, as well as the mission trips, since they are covered under a number of topics, which, to a greater or lesser extent, come under the heading of vetting costs. I have described the trips which took place at paragraphs 85 to 89 above, and I have set out the procedure with regard to checking the questionnaires at paragraphs 90 to 93 above. Both these topics will require further detailed argument if they cannot be agreed.

159. It was clearly sensible for Leigh Day, in association with Professor Bridges, to devise a pro forma questionnaire and a template for medical reports. The Defendants' criticism that the questionnaires could have been better devised, particularly by not asking leading questions, is a valid one. But their depiction of the questionnaires as tick boxes, which caused the Claimants to claim for non existent or insignificant symptoms, is not in my judgment made out on the evidence. Although Professor Hotoff suggests that using questionnaires in this way evoked a very much heavier reporting of symptoms than neutral questions, that does not, in my view, demonstrate that those who complained of the various symptoms were not actually suffering from them.

160. Once the questionnaire had been filled in, the client was seen by a Leigh Day para-legal. That fee earner went through the questionnaire with the Claimant to ensure that it was clear and properly filled in. The client was also asked to identify on a map where he or she lived, or where they were exposed to the waste. Prior to that, all work with the Claimant would have been carried out by the local representative, that is clearly a sensible arrangement. The question does arise whether Leigh Day,

realising that they were going to be representing several thousand people (even if they did not anticipate having 30,000 clients) should have put in place some mechanism, such as photographs and ID cards, right at the outset, rather than having to go back at a later date to carry out this work. Had it been done at the outset, each individual interview would have lasted longer, and thus the length of the mission trips might have been longer, but it is arguable that it would have saved time in the long run.

161. The completed questionnaires were sent back to London where each Claimant was given a code, and details entered onto the database. My provisional view is that that work is non fee earner work, since it is merely transferring information from one format into another.

162. The cross-checking which took place to see whether or not the Claimant could be identified on official lists of victims, was, in my view, necessary, but, had the initial interview ascertained what if any medical attention the Claimant had, the task of cross-checking would, it seems to me, have been a great deal easier and straightforward, and therefore less time consuming. In any event, this work would be carried out at paralegal level. My impression is that the amount of cross checking and vetting was excessive, but that is not a concluded view.

163. As I have already said, the translation of the medical reports is a matter which will have to be argued further. Quite why they should require cross-checking and reviewing is not clear.

164. I reject the Defendants' argument that the medical reports are of no probative value, and a waste of time. They were clearly extremely basic, and of themselves not expensive. The Defendants had ample opportunity during the course of the litigation, as they received more and more of these reports, to apply to the court had they thought the reports defective. The Defendants' reliance on the statement in the Claimants' skeleton argument, that the reports were no more than an administrative formality, does not take the matter any further forward. Mr Hermer now argues that the Claimants were referring only to the lead Claimants. Whatever they were referring to, the fact is that the GLO required certain basic medical information to be given, and that is what was done.

165. I reject the Defendants' submission that had the Defendants and the court known that the Claimants' symptoms were low level and flu-like, there would not have been a requirement for medical reports. In my judgment both the court and the Defendants would have insisted that each Claimant should establish, prima facie, that he or she had suffered from symptoms which were likely to have been caused by the waste. I am strengthened in this view by the fact that, when the Defendants were aware of the extent of the Claimants' injuries, they continued, and still continue, to deny any liability.

166. I answer the questions raised in Key Issue 2 as follows:

i) 2.1 The Claimants are entitled to recover the reasonable and proportionate costs associated with collection, assessment and management of each of the claims. With regard to the period prior to the signing of the CFA for each Claimant, this depends on the particular wording of the CFA in use. Those CFAs which run "from the date you first instructed us" cover the cost

from the first meeting. Agreements which state that they run "from the date of this agreement" would, in my judgment, include the meeting with the client immediately prior to the signing of the CFA, during which the CFA explanation was given, and the client finally signed the agreement. The Claimants are similarly entitled to recover their reasonable and proportionate costs prior to each Claimant's admission to the Group Register.

ii) 2.2 The Claimants do not seek to recover any costs associated with those individuals who did not subsequently become Claimants.

iii) 2.3 (i), (ii) and (iii) yes. (iv) This will have to be dealt with in connection with Issue 11.

iv) 2.4 It is not possible at this stage to deal with the proportionality of the costs claimed associated with the collection, assessment and management of each of the claims, other than the global view, which I have already expressed as to the proportionality of the costs of these proceedings.

3. Pre-Action Protocol

3.1 Was it reasonable for the Claimants not to follow either a Pre-Action Protocol or the principles underlying the Pre-Action Protocols?

3.2 To what extent is it open to the Defendants to challenge the way in which the Claimants issued and subsequently pursued Court proceedings in the circumstances where the Defendants have agreed to pay the costs of those proceedings on the standard basis, subject to detailed assessment if not agreed?

Defendants' Submissions

167. It is common ground between the parties that the pre-action protocol was not followed. The Claimants put forward two reasons for this. Firstly, it was necessary, and in the Claimants' interests, to establish jurisdiction in England and Wales quickly, and particularly before a small Dutch firm commenced proceedings in Holland, which would effectively, under EU Regulations, have prevented Leigh Day from proceeding in this jurisdiction. Secondly, Leigh Day felt that by instituting proceedings quickly they would bring the Defendants to the settlement table.

168. Although there is no group action protocol, both parties referred to the Pre-Action Protocol Practice Direction:

> "**6. Overview of Principles**
>
> 6.1 The principles that should govern the conduct of the parties are that, unless the circumstances make it inappropriate, before starting proceedings the parties should –
>
> (1) exchange sufficient information about the matter to allow them to understand each other's position and make informed decisions about settlement and how to proceed;

> (2) make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so.
>
> 6.2 The parties should act in a reasonable and proportionate manner in all dealings with one another. In particular, the costs incurred in complying should be proportionate to the complexity of the matter and any money at stake. The parties must not use this Practice Direction as a tactical device to secure an unfair advantage for one party or to generate unnecessary costs."

169. Paragraph 2.4 of the Personal Injury Pre-Action Protocol states:

> "2.4 However, the 'cards on the table' approach advocated by the protocol is equally appropriate to higher value claims. The spirit, if not the letter of the protocol, should still be followed for multi-track type claims. In accordance with the sense of the civil justice reforms, the court will expect to see the spirit of reasonable pre-action behaviour applied in all cases, regardless of the existence of a specific protocol. In particular with regard to personal injury cases with a value of more than the fast track limit, to avoid the necessity of proceedings parties are expected to comply with the protocol as far as possible e.g. in respect of letters before action, exchanging information and documents and agreeing experts."

170. Paragraph 3.1 of the Pre-Action Protocol for Disease and Illness provides:

> "3.1 The general aims of the protocol are –
>
> - to resolve as many disputes as possible without litigation;
>
> - where a claim cannot be resolved to identify the relevant issues which remain in dispute."

171. It is the Defendants' case that none of these objectives were met by Leigh Day & Co. They were either ignored or by-passed.

172. Mr Gibson argues that the action was commenced precipitately, Leigh Day having taken no time to put in place carefully considered procedures, or to do adequate research into precisely where the dump sites were, nor were any steps taken to ensure that the range of injuries, which it was obvious that the Claimants would allege, were circumscribed in any way. In short the process adopted was not reasonable.

173. Mr Gibson also submits that the conduct of Trafigura in relation to the underlying claim had no impact on the costs now being claimed, and is therefore not relevant. In the context of the litigation itself, there had been good co-operation between the lawyers on both sides. Mr Wilken submits that the Defendants' request for further information was largely confined to small numbers of the cohort, the largest items was a request for a searchable version of the register, and a request for GPS co-ordinates for all Claimants (a request which was refused).

174. Mr Gibson argues that since Leigh Day had refused to use GPS co-ordinates, they should have identified the location of the individual Claimants by a cheap and simple method, since in the end all they were able to provide was information to the nearest kilometre square.

175. The Defendants argue that Leigh Day & Co did not know what the case was, since they lacked numerous critical forms of evidence, eg, location, composition of the slops and dosage. The Defendants say that Leigh Day could and should have known all this information before issuing proceedings. They argue that at the time these initial claims were issued none of the necessary fact finding, or taking of proper instructions, had taken place.

176. The first claims were issued in respect of people whom the local doctor in Djibi, Dr N'Tamon, was satisfied had become ill in the immediate aftermath of the waste being dumped. She lived in the village and knew each of the Claimants personally. The Defendants assert that since Dr N'Tamon was an anaesthesiologist she was not qualified for that task. Dr N'Tamon identified a number of symptoms which the Defendants now assert, in accordance with the agreed final joint statement, were not attributable to exposure to the slops. They rely on this in support of their argument that claims were exaggerated, a situation which would not have occurred if Leigh Day had carried out a proper investigation. The Defendants also point out that these reports appear to have been produced by at least 12 different individuals, a conclusion they draw from the appearance of the handwriting.

177. The letter before action of 25 October, which was sent jointly on behalf of Leigh Day and the Paris legal team Sherpa, stated that the dumping of the waste had killed ten and injured many thousands. This was a message also given to the media. In response Trafigura expressed the wish to co-operate in a sensible co-ordinated manner, but suggested that a meeting was premature at that stage.

178. Once Leigh Day had indicated they were making an application for a GLO the Defendants' solicitors responded on 4 December 2006, pointing out that they had failed to comply with the pre-action protocol for personal injury claims. This was repeated on numerous occasions in subsequent correspondence.

179. On 27 December 2006 Macfarlanes wrote to Leigh Day indicating that they required further time to investigate, and pointed out in their letter that if the pre-action protocol had been complied with they, Macfarlanes, would have had 7½ months from the date of letters of claim to investigate the claims. The information being requested by Macfarlanes was information which they would normally have expected to receive in accordance with the pre-action protocol as soon as possible.

180. In their letter of 20 August 2009 to Leigh Day & Co, Macfarlanes stated:

> "You are incorrect to suggest that Trafigura has never been interested in resolving the claims. The simple fact is that Trafigura has been forced to demonstrate that the alleged injuries are not supported by the evidence and that, in particular, no deaths, miscarriages, still births, serious injuries or chronic conditions were caused as a result of the Claimants' exposure to the slops and then to defend its position and its reputation against a number of wholly false and/or exaggerated statements."

181. That letter set out the basis of the complaints which the Defendants now make about the size of the Claimants' bill. It was important, from the Defendants point of view, that the limitation period should have expired, so that they could be certain that the group had closed. This was an action which had commenced with a relatively small number of Claimants, numbers which grew over time. Mr Gibson argues that if Leigh Day had complied with the pre-action protocol, this would have raised greatly the prospects of a swift and economic settlement, particularly since Dr Bound, the Defendants' expert and others, expressed opinions at the outset which were borne out in the ultimate settlement, and the final joint statement.

Business Claims

182. The Claimants' bill in respect of business claims amounts to £703,783 including success fee. On 16 February 2007 Leigh Day wrote indicating that they had been approached by a number of businesses to advise on the bringing of claims. On 22 February a claim form was issued before the Defendants had time for a response. The claims are for business losses on behalf of 12 businesses, both corporate and individuals. On the same day Leigh Day served a proposed GLO and a witness statement of Mr Day. On 30 March Particulars of Claim were served. In April 2007 Master Turner made a GLO, but the parties agreed that the business claims should be stayed. The Defendants complain that they face a claim for costs of £703,000 on claims which have been issued without compliance with the pre-action protocol, without giving the Defendants an opportunity to respond to the claim, and with minimal work being done. Mr Wilken also refers, by way of example, to an individual business claim bill where a meeting had taken place on 13 March 2007, ie, after the claim had been issued: "in order to obtain full details of the claims and methods of funding." These claims settled for £320,000, the total costs being twice the damages, which is said to be disproportionate. There are apparently 143 other business Claimants, although only 12 have issued, and of those only four have served Particulars of Claim.

Claimants' Submissions

183. Mr Hermer describes Mr Gibson's submissions as wholly unrealistic and unhelpful in determination of the issues before me. Among other things, he suggests that it would have been extremely expensive.

184. As Mr Day explains in his 17th witness statement, his intention was to try to keep the case as proportionate as possible. He was anticipating that the costs would be low at the outset, he hoped to reach some form of generic agreement and estimated that those cases that went forward would be likely to cost £1,000 each. In fact what happened

was the reverse, because of the Defendants' insistence on more and more detail, which meant that the costs were frontloaded.

185. Mr Hermer acknowledges that had circumstances been different the Claimants would have wanted to comply with the pre-action protocol, but points out that no specific protocol applies to this case. The Personal Injury Protocol deals with low level personal injury, and the Disease and Illness Protocol is not designed to deal with cases of this nature.

186. The Claimants' case is that Leigh Day acted in the clients' best interests, and in large degree did comply with the pre-action protocol. It was Mr Day's view that it was in the clients' best interests to issue proceedings in England and Wales. This was possible because the first Defendant is based within the jurisdiction. If other Claimants had commenced proceedings in other jurisdictions (there was a Dutch firm which had indicated that proceedings might be commenced in their jurisdiction – Mr Day had had correspondence with those lawyers), proceedings in this jurisdiction would quite simply not have been possible. On that basis, Leigh Day honestly and reasonably believed that, in the interests of their clients, the pre-action protocol, although desirable, could be dispensed with.

187. Mr Hermer refers to the Pre-Action Conduct Practice Direction at paragraph 4.3, which provides:

> "When considering compliance the court will –
>
> (1) be concerned about whether the parties have complied in substance with the relevant principles and requirements, and is not likely to be concerned with minor or technical shortcomings;
>
> (2) consider the proportionality of the steps taken, compared to the size and importance of the matter;
>
> (3) take account of the urgency of the matter.
>
> Where a matter is urgent … the court will expect the parties to comply only to the extent that it is reasonable to do so ..."

188. Mr Hermer refers to the Commercial Court Practice, which provides at paragraph B3.1:

> "The Practice Direction – Protocols, applies to actions in the Commercial Court and usually it should be observed, although it is sometimes necessary or proper to start proceedings without following the procedures there contemplated: for example, where delays in starting proceedings might prompt forum shopping in other jurisdictions."

189. In Mr Hermer's submission Leigh Day acted in the spirit of the pre-action protocol. They tried to give the Defendants as clear a picture as possible of the Claimants' case. The evidence obtained on the ground was provided almost immediately to the

Defendants. A period of eight months elapsed before the defence was actually served. After notification of the case, and during that period, the Claimants sought to comply with as many of the pre-action protocol principles as possible. The original cases were stayed by consent prior to consideration of the GLO. The date of that order is 20 December 2006. The Claimants provided numerous documents (set out in Mr Day's second witness statement) in response to the Defendants' request for information of 21 January 2007. The Claimants agreed to any request for extension of time prior to the making of the GLO, and the Defendants did not seek an order that the stay should be extended.

190. The Claimants' position was that although the great majority of Claimants had suffered minor injuries, others required investigation. That situation was known to the court and to the Defendants. The Defendants consented to the GLO.

191. Mr Hermer makes the point that during this period, although the Claimants were providing documents to the Defendants, no document was provided by Trafigura. Nothing had been disclosed. The Defendants pointed out that their Dr Bound had been able to come to a view as to the nature of the waste and the exposure and the causation that would flow from it, without having to go through any disclosure process. He was able to do it by reference to the Dutch NFI Report, and from his own extrapolations of what he thought the process was on board the boat. The Claimants took the view that they needed disclosure in order that they could understand exactly what had happened to the cargo on board the *Probo Koala*. The Claimants' experts formed the view that the NFI Report overlooked the fact that there were substantial quantities of sedimentary material which had been missed during sampling in Amsterdam of the slop tanks of the vessel. The Claimants' experts reconstructed the waste by tracing the cargo from the point at which it was purchased, the amount of caustic soda which had been used and the amount of oil off-loaded. The ultimate view of the Claimants' experts was markedly different from that of the Defendants', and from that contained in the NFI Report.

192. As the Claimants' experts' work progressed, it became apparent that some of the more serious injuries could not be demonstrated to have been caused by exposure to the required civil standard of proof. Mr Hermer states that when those points were reached in respect of any of the injuries, this was identified to the Defendants. The Claimants' case is that it was reasonable for them to carry out this work of investigation, and that it could not be done until the experts' reports had been received, and those reports could not be completed until they had had access to the Defendants' disclosure material.

193. On 17 December 2008 the Claimants obtained an order that the Defendants should respond to their request for further information "regarding full particulars of the gasoline blending and caustic washing operations conducted on board the vessel prior to the arrival in Abidjan …" Once the Defendants had provided the information, Leigh Day wrote again, on 30 January 2009, with further questions regarding the process. An Order of 26 February 2009 required the Defendants to provide answers to the questions raised.

194. As late as 30 July 2009, in the Defendants' replies to the Claimants' request for further information, the Defendants' stance was that none of the lead Claimants had been exposed to concentrations of chemicals released from the slops at sufficient

levels, for sufficient periods to have had a toxicological or physiological effect, or to cause any harm or injury. The document went on to deny that there were any underlying injuries, and the symptoms did not amount to "personal injury recoverable under English law". The document concluded:

> "Further in any event the Defendants' case is that any of the injuries or symptoms suffered by the lead Claimants were caused and/or exacerbated by all of the following: media reporting, Government statements about the nature of the slops or the illnesses the slops may have caused or political events in Abidjan and/or perceived Government inaction, and/or iatrogenesis."

195. In order to establish that the Claimants' claims were not wild accusations, with regard to long term consequences or serious injuries, Mr Hermer refers to the expert evidence obtained by the Claimants, and particularly the reports of Professor Bridges, the toxicologist, Professor Buttler, Dr Wilkenson the epidemiology, Dr Jackson and Professor Harrison to demonstrate that it was possible for the experts, working closely together, to piece together gradually sufficient information to arrive at plausible estimates for the composition and quantity materials dumped at each site, the release rates of toxic substances and the airborne concentrations. Professor Harrison stated:

> "We were constantly hampered by the shortage of factual information and, in certain areas, were working at the forefront of scientific knowledge, for example in the field of atmospheric dispersion. In short, this was a highly complex case which took up a very large amount of my time in 2008 and 2009 and where, because of the lack of hard evidence, I needed to look widely at what was being said about events to try and piece together for the court as accurate a summary as I could, in the light of events following the dumping of the waste in August 2006."

Conclusions

196. Leigh Day & Co were contacted by Greenpeace International in early October 2006. On 23 October 2006 three conferences took place between members of Leigh Day & Co and Mr Hermer to discuss the strength of the UK case. On 25 October 2006 a letter before action was written to Trafigura. A reply was received on 3 October 2006, in which Trafigura declined the suggestion of a meeting to discuss the matter. Following a further conference with Mr Hermer to discuss strategy, proceedings were commenced on behalf of one Claimant, Ms Sabuja on 7 November 2006. The following day a further ten claims were issued on behalf of Mr Yao Motto and others. Particulars of Claim were served on 20 and 21 November. On 4 December 2006 the Defendants were notified that the Claimants had signed CFA agreements, and that Leigh Day & Co were in the process of securing ATE insurance. Notice of funding was served on 14 December 2006.

197. The Defendants' experts never tested the waste. One of the difficulties being that once the waste had been deposited in Abidjan it could and did become contaminated

by surrounding elements, and its nature was also changed because of rainfall and chemical reaction.

198. The Defendants query why commencing proceedings in this jurisdiction was significantly better than either the Netherlands or the Cote d'Ivoire. In respect of this point I have to deal with the facts of what actually occurred, rather than speculate about what might have happened had proceedings been commenced in the Netherlands. I am required by the Tomlin Order to carry out a detailed assessment of the costs of these proceedings. I cannot go behind that Order, see *Cope v United Dairies (London) Ltd* [1963] 2 QB 33. If it is the Defendants' case that proceedings should not have been commenced in this jurisdiction, application should have been made to the court to strike out the proceedings.

199. I am satisfied that it was legitimate for Leigh Day to commence proceedings in this jurisdiction. It is true that they had to move quickly in order to do so. They did not have to consider why commencing proceedings in this jurisdiction was significantly better than either the Netherlands or the Cote d'Ivoire. I cannot say what the outcome of the proceedings in the Netherlands would have been, nor how long those proceedings would have lasted. I am, however, satisfied that by bringing proceedings in this jurisdiction, the Claimants have been well served by Leigh Day. It is worth remembering that when the MV Sea Empress went aground off Milford Haven, in February 1996, causing extensive damage to the coastline and associated businesses, American lawyers appeared on the scene overnight, and all the related proceedings took place in the United States, to the dismay of the local lawyers.

200. The Defendants also assert that proceedings could have been commenced in the Cote d'Ivoire where legal aid is available. When this incident occurred Abidjan was already known to be extremely dangerous and unstable. A decision to commence proceedings in that jurisdiction would not, in my judgment, have been a sensible one. Subsequent events lend support to my view. Following a disputed Presidential election the Country now appears to be on the verge of civil war. The Defendants' argument therefore comes down to this, that Leigh Day failed to address the requirement that they should investigate and understand their case, and then inform the Defendants of that case, and that as a result of their failure to follow the pre-action protocol, the GLO was entered into on an incorrect basis, and the information provided lacked any probative value. The result of this is a claim for excessive costs.

201. With regard to the Defendants' point about Dr N'Tamon being an anaesthesiologist, and therefore not qualified to give medical reports, I do not accept that submission. Although there is no evidence of Dr N'Tamon's training, she must have had basic medical training in order to qualify in the field of anaesthetics. Given the level of injuries, there seems to be no reason at all to suppose that she was not qualified to complete the medical reports. The fact that she identified a number of symptoms, which were apparently not attributable to exposure to the slops, is not surprising, since she had no information as to the composition of the slops.

202. With regard to the fact that some reports appear to have been produced by a number of different individuals, that is a matter for further argument and evidence.

203. Under the heading "Business Claims", the Defendants complain that they are being asked to pay £320,000, plus success fees in respect of 12 business claims which were issued and then stayed after the making of the GLO, with minimal work being done. Further argument will be necessary on detailed assessment to ascertain the extent to which these costs are reasonable and proportionate.

204. The Defendants assert that had the pre-action protocol been complied with, they would have had seven and a half months in which to consider the position. As it was, a period of eight months elapsed, with the consent of the Claimants, before the defence was served. It is the Defendants' case that had the pre-action protocol been followed, both sides would have realised that the claims were in respect of low level injuries, and that damages would be modest. The inference being, that had the Defendants been aware of this, they would have settled at an early stage, and the costs would have been significantly smaller. In my judgment, that submission is not made out. I am satisfied, from the documents which Mr Hermer took me to, that Leigh Day did keep the Defendants informed, both of the numbers of Claimants being signed up, and that the majority of the injuries complained of were short term and low level. Mr Gibson's argument, that the majority of 30,000 could still leave a balance of many of thousands of Claimants, does not in my view advance the matter.

205. What is clear is that the Defendants have vigorously defended this action throughout, and even when the register was closed, and the full extent of the injuries was known, they chose to settle the case with a denial of liability. There is no reason to suppose, therefore, had they had that information at the outset, that they would have defended any less vigorously, or settled any earlier. In those circumstances, I am not persuaded that the failure to follow the pre-action protocol had any significant effect on the level of the Claimants' costs.

206. I answer the questions in Key Issue 3 as follows:

i) 3.1 Yes.

ii) 3.2 The Defendants may challenge the way in which the Claimants issued and subsequently pursued court proceedings in whatever way they choose. The fact that the Defendants have settled the litigation on the basis that every Claimant is to be compensated, and that they will pay the costs of those proceedings on the standard basis, effectively prevents any argument that the proceedings should never have been brought, because they would be bound to fail. In addition, for the reasons I have given, I cannot go behind the Tomlin Order.

4. Cost of Witness Evidence

4.1 Are the Claimants entitled to recover the costs associated with the preparation of witness evidence which was either:

(a) obtained but not served; or

(b) served but for which there was no leave to serve.

4.2 Were the 60 "generic" witness statements and the 45 "family and friends" witness statements (1) admissible and/or (2) of any probative value in relation to any of the issues in the case?

4.3 Do the costs associated with the preparation and service of the 60 "generic" and the 45 "family and friends" witness statements have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

4.4 Are the Claimants entitled to recover the costs associated with the preparation of the 60 "generic" and the 45 "family and friends" witness statements which were served but not subsequently relied upon by the Claimants?

4.5 Were the 19 witness statements relied upon by the Claimants (1) admissible and/or (2) of any probative value in relation to any of the issues in the case?

4.6 Are Claimants entitled to recover the costs associated with the preparation of the 19 witness statements relied upon by the Claimants – including the costs of redacting the witness statements and the associated applications to the Court?

4.7 If the answer to 4.6 is "yes", do the costs associated with the preparation of the 19 witness statements relied upon by the Claimants have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

207. Mr Wilken points out that 58 generic witness statements were served, none of which gave evidence which dealt specifically with any of the lead Claimants. Of those 58 permission was obtained from MacDuff J to rely on 19. When giving that permission he gave a warning as to the costs consequences should those witnesses prove to have been called unreasonably. Mr Wilken argues that the Defendants should not have to pay for any of the witnesses for whom permission was not obtained. Some of the witnesses were local representatives who received payment, which, since the Defendants did not know of it, Mr Wilken called the "hidden vice". The witness statements contained evidence regarding events in Amsterdam, Tunisia and Norway which Leigh Day suggested was "key to the case". The Defendants, however, argue that this was incorrect, and what was required was evidence of the chemistry and toxicology issues. A relevant witness statement would have referred to a particular lead claimant or claimants, and demonstrated that that person had been exposed to particular chemicals at specific levels which were capable of causing the injuries of which the Claimant complained. The fact that Claimants' experts attach some weight to those statements is not the correct test, the test being whether the costs incurred were reasonable and necessary. Mr Wilken argues that it cannot be right that statements which are not relied on, and for which no permission has been given, are reasonable and necessary. In respect of the 19 statements for which permission has been given, these he says are not necessary, because they are not probative, even

the 19 witness statements did not deal with a single lead Claimant. With regard to the statements of family and friends, these were simply not necessary.

Claimants' Submissions

208. Mr Hermer's position is that the statements taken were an appropriate part of the investigation, and probative of many aspects of their case, and even if not deployed at trial, the Claimants' experts found them to be extremely valuable in coming to their conclusions. There were several categories of generic witnesses, namely: doctors, emergency workers, and a small number of journalists. There were statements from people who were injured in Amsterdam, in Norway and in Tunisia. There were also statements from family and friends. Although the statements contained a significant amount of hearsay, Mr Hermer points out that experts are entitled to rely on hearsay in reaching their conclusions, and in academic papers much reliance has to be placed on what people say has occurred in particular situations. The fact that the Judge in a case management hearing had only allowed 19 witness statements, does not, in Mr Hermer's submission, mean that Leigh Day were not acting reasonably in obtaining the statements which they did. Mr Hermer refers to statements by three of the Claimants' experts: Professor Harrison, Professor Wessely and Dr Weir, all of whom indicate that they found the individual witness statements of use. In the joint experts' statements of Dr Weir, instructed by the Claimants, and Professor Rousseau, instructed by the Defendants, it was agreed that they were reliant upon the descriptions of the symptoms and signs of illness given by the Claimants.

Conclusion

209. The Defendants base their complaints about the cost of witness evidence on Leigh Day's failure to comply with the pre-action protocol, the suggestion being that they did not know the case which they had to bring. In addition to the 58 generic witness statements, there were 45 supporting statements from family and friends. Of the 58 generic witness statements, none related to any of the lead Claimants. One would have expected there to be evidence relating directly to the lead Claimants, but apparently this was not the case. In addition, there were statements from people injured in Amsterdam, Norway and Tunisia. Those statements might be relevant, and allowable to the extent that the cost incurred in investigating those events are recoverable. This is dealt with under Issue 9.

210. MacDuff J gave permission for the Claimants to rely on 19 witness statements. The Defendants argue that even these should be disallowed, since they were neither necessary nor probative. 45 statements from family and friends were again not necessary.

211. The Claimants point out that the experts relied, to a significant extent, on the witness statements to tell them what had actually happened at the time. They also assert that the Defendants had requested permission to interview friends and family of the lead Claimants. This request was declined, but the Claimants decided to proffer statements from family and friends instead.

212. In my judgment MacDuff J, having given permission for 19 witness statements which he had read (albeit by speed reading), it is not open to me now to say that the costs of those witness statements should not be recovered. The witnesses' evidence has not

been tested, and although the Judge gave a warning as to the cost of the witness statements, if they proved to be valueless, he did not, in the event, have to give judgment. As to the witness statements relating to extra territorial issues, they should, in principle, be recoverable in accordance with the decision in Key Issue 9. As to the remaining witness statements, it is a matter for argument whether all, or any of them, are recoverable. MacDuff J did observe that they contained a great deal of hearsay.

213. Even in respect of those witness statements which are allowable, the Defendants will not be precluded from arguing that the time spent in preparation of the witness statements was excessive.

214. I answer the questions set out in Key Issue 4 as follows:

i) 4.1 I have heard no argument in respect of witness evidence which was obtained but not served, that issue will, therefore, have to be argued further if it remains live. With regard to those witness statements which were served, but for which there was no leave to serve, I will hear argument concerning the generic witness statements, and the family and friends witness statements. The witness statements relating to extra territorial matters will, in principle, be recoverable, in accordance with the decision under Key Issue 9.

ii) 4.2 This question refers to 58 generic witness statements, and 45 family and friends witness statements, it is not open to me to decide whether those witness statements were (i) admissible; and/or (ii) of any probative value in relation to any of the issues in the case, since there has never been a trial. I may, however, decide whether the witness statements were reasonably or necessarily obtained.

iii) 4.3 The question whether the costs associated with the preparation and service of the witness statements have the appearance of being disproportionate, will have to wait until there has been further detailed argument.

iv) 4.4 As to whether the costs of witness statements, which were served but not subsequently relied on, are recoverable, depends on the future argument relating to the witness statements.

v) 4.5 It is not open to me to decide whether the 19 witness statements relied upon by the Claimants were (i) admissible; and/or (ii) of any probative value, since permission had been given by MacDuff J to rely on them, and no trial ever took place.

vi) 4.6 Yes, in principle.

vii) 4.7 As to the proportionality of the costs relating to the 19 witness statements, it is not possible at this stage to deal with this question, until I have heard further argument, nor can I form any view other than the global view which I have already expressed as to the proportionality of the costs of these proceedings.

5. Costs of Medico Legal Reports

5.1 In light of Clause 18 of the GLO, are the Claimants entitled to recover the costs of and associated with the Medico-Legal Reports, including but not limited to:

5.1.1 administration costs;

5.1.2 instructing and training the doctors;

5.1.3 drafting the pro-forma Medico-Legal Reports;

5.1.4 amending defective Medico-Legal Reports; and

5.1.5 amending defective translations of Medico Legal Reports?

5.2 Do the costs associated with the Medico-Legal Reports have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

215. Clause 18 of the Group Litigation Order, dated 7 February 2007, provides:

> "18. Within 28 days of entering the Group Register, the Claimants' solicitors shall provide to the Defendants' solicitors for each new Claimant the following:
>
> 18.1 a medical report confirming the injuries sustained resulting from the alleged exposure to the materials, together with a copy of the Claimants' medical records (if available) and appropriate translations (where available); and
>
> 18.2 a schedule of special damages (if any) with supporting documentation (where available)."

216. This issue overlaps with other issues including data entry and vetting. The Defendants' position is that the medical reports were not in compliance with Clause 18 of the GLO, because they were not probative of the symptoms alleged, they were pro forma and pointless, and were not all prepared by qualified medics, but were based on answers provided by the Claimants through the questionnaires which contained leading questions and were inherently unreliable, in that they sought confirmation of symptoms which were prevalent in the wide population in any event. In addition to that, the Defendants object to paying for paralegals checking whether the information in the questionnaire tallied with the information in the medical report, and checking that the medical reports had been completed properly. A great deal of the checking and cross-checking was, it is submitted, in respect of symptoms which were based on subjective reportage, and were not based on proper scientifically founded evidence.

217. It is the Defendants' case that the gateway to the group was fatally compromised by the medical reports. They argue that the reports are of no probative value, and base this argument on the Claimants' statement which I have quoted at paragraph 55 above.

218. In respect of the medical evidence Mr Gibson suggests that this very rarely happens in group actions. Under the terms of the GLO, however, the Defendants were entitled to a medical report. In his submission that report had to be a report of integrity, otherwise there was no point whatever in having it. Obtaining a £10 report from local doctors would appear to be a good way of giving the registration some integrity, even though at that point the contents of the slops had not been analysed. Mr Gibson takes issue with the medical report having been based on the questionnaire. It was, he says, a simple transposition of the information on the questionnaire, so that the cross-checking which subsequently took place in London was, in some measure, directed to checking that what was in the questionnaire was reflected in the medical reports. This system has led, in his submission, to exaggeration and mis-attribution.

219. The system of obtaining medical reports did not alter throughout the litigation, but, the Defendants argue, given the costs which the exercise was generating, Leigh Day should have taken steps to alter the system in order to keep the costs proportionate. The Defendants further argue that had Leigh Day properly investigated the claims, and complied with the pre-action protocol, they would have concluded that in respect of low level flu like symptoms there was no need to obtain the reports.

220. Although Clause 18 of the GLO required a report in each case, the Defendants solicitors had made clear that these would be necessary in order to establish prima facie evidence of injury. In correspondence Macfarlanes had specifically stated that if questionnaires were to be used leading questions should be avoided. Mr Gibson points out that in Mr Day's witness statement of 4 December 2006, in support of the application for the GLO, he indicates that the precise chemical composition of the waste had yet to be definitively determined, although the available evidence suggested that it contained hydrogen sulphide and mercaptans, two substances capable of causing significant damage to the public health. It was apparent from the witness statement that the dump sites were known. Mr Gibson argues that it was always going to be essential for Claimants joining the group to be able to say where they lived or where they were exposed. The reported injuries were said to range from very serious to minor, and the expected number of Claimants was between 3,000 and 5,000.

221. In his second witness statement of 22 January 2007 Mr Day indicated that the great majority of Claimants suffered serious but acute short term symptoms, such as respiratory difficulty, sickness, diarrhoea, vomiting and skin complaints. The statement continues:

> "We are obtaining short medical reports from local doctors who largely know the Claimant where they are producing a report and knew of the injuries at the time. We are pursing the many clinics and hospitals which treated those complaining of illness at the time to see what access we can obtain to their records. We will certainly be looking to supplement the reports with records wherever we can."

222. Mr Gibson asserts that this statement gave a clear message to the court and to the Defendants that the medical reports would be probative, and have integrity. Mr Day continued:

> "In addition to the short reports we are looking to obtain more detailed reports in a number of cases to enable the Claimants to have clarity as to exactly what the causative root is that is alleged. We intend serving those in some of the cases to be pleaded."

223. Mr Gibson argues that this litigation was entirely lawyer led, and that Leigh Day, without following the pre-action protocol, put in place structures which governed the entire litigation right through to distribution. It was, he says, the structures put in place by Leigh Day which were the font of the symptoms which drove the litigation forward. He argues that when it became apparent that serious and chronic injuries were going to be impossible to prove, Leigh Day should have come to the court and indicated that the structures put in place at the outset were not apt and had given rise to problems.

224. With regard to local representatives Mr Gibson suggests that the vetting was not satisfactory, and that Leigh Day did not do enough to satisfy themselves that the representatives were people of probity. Most of those appointed were in fact leaders of the community, or people who had standing in the community. The Defendants' complaint is that the representatives did not have a full and proper understanding of their roles. He points out that whatever one's standing in the community, if one is told that there is the prospect, at no risk at all, of recovering significant sums of money for that community, where people are suffering from symptoms which are prevalent in the area, it raises foreseeable problems, and the possibility that the standards of probity required by the court would not be adhered to. One such problem was the report of Dr Ahipo. Dr Weir for the Claimants and Professor Rousseau agreed that Dr Ahipo's reports were of no use and should not be taken into any account. The experts also agreed that leading questions should not have been used in the questionnaires.

225. The Defendants' epidemiologist, Professor Hotoff, expressed the view that such leading questions were actively unhelpful, and also notes that in a survey of symptoms following the incident, some symptoms were reported ten times more frequently when prompted for in a questionnaire than when reported spontaneously.

226. In discussions about the form of the GLO Macfarlanes suggested a schedule setting out all the information to be provided in relation to each Claimant. It was important that potential Claimants should have prima facie evidence of illness or injury arising out of their exposure to the materials. They accordingly suggested that each Claimant should provide some medical evidence relating to the period when any symptoms were visible, or at a time when the symptoms could still be determined by medical examination. That proposal was rejected by Leigh Day, who stated that they were not prepared to make it a condition of joining the register, although they agreed that they would try to obtain the information requested.

227. The Defendants argue that they were led to believe that they were dealing with serious long term cases. The Claimants for their part argue that, on a number of occasions,

Leigh Day indicated that the great majority of Claimants suffered acute symptoms which flared up on their exposure in August 2006, and resolved within a matter of weeks. The Defendants complain that, in the context of 30,000 Claimants, the "great majority" could still leave them facing several thousand serious injury claims.

The Bou Incident

228. Mr Bou was one of the Claimants who apparently approached Macfarlanes because he was concerned that the process of signing up claimants and obtaining medical reports lacked integrity. Macfarlanes already had concerns as to the way in which the GLO was functioning. Mr Bou was seen by two partners of Macfarlanes to see what he would say as part of the investigation of their concerns. He told Macfarlanes about the way in which medical reports were being prepared, and about the local representatives and the 3% arrangement. The contact with Mr Bou led to applications by the Defendants for sight of medical records, and for more information about the 3% arrangement. The Defendants sought information about the way in which the doctors were paid, and disclosure of the letter of instruction to Ivorian doctors who had prepared causation and prognosis reports. Mr Day in a witness statement accepted that there was a 3% arrangement with the local representatives, but pointed out that the arrangement had SRA approval. Leigh Day refused to produce the waiver. The correspondence with the SRA, and the waiver which was granted, had been produced to me in Leigh Day's privileged materials. The first letter seeking the waiver is dated 23 May 2008, the waiver itself being dated 22 September 2008.

229. MacDuff J heard the Defendant's application for disclosure on 10 July 2009. He handed down a judgment on 3 August 2009. In that judgment he dealt with the Claimants' submission that the medical reports had been served solely as part of an administrative formality:

> "30. I cannot accept that argument. What is the report if it is not "*evidence for the purpose of court proceedings*"? If it is a mere administrative formality, what was its purpose? Why was there such a requirement in the GLO? Why go to the trouble and expense of requiring a report from a qualified medical practitioner as a mere administrative formality, if the report was not intended to inform. The provision of a medical report can never be regarded as an "administrative formality". There has to be some integrity in the report.
>
> 31. There is only one answer. Evidence was required in the form of a medical report asserting symptoms and causation, backed by the opinion of a qualified doctor in order to enable the person reported upon to bring a claim within the GLO. That, in my judgment, was the giving or preparing of evidence for the purpose of court proceedings. The court proceedings extend beyond the trial itself. This evidence was required as a step along the route towards the trial, and it was part

> of a very important step. Self evidently, the instructions were an important ingredient – as they are in every instruction to an expert. That is the reason for the requirement of CPR 35. If it is an important requirement to an expert who is familiar with the importance of independent expression of opinion within the English legal system, it is perhaps of even more importance to an expert who does not have that familiarity. It cannot be a mere administrative formality, or why was it incorporated into the GLO?"

230. I was taken to a copy of the questionnaire which includes a tick box indicating possible symptoms, viz: headaches, breathing, cold, vomiting, stomach ache, diarrhoea, swelling, eye problems, sore skin and burning throat. Under each symptom the Claimant is asked to state the start, duration, severity, persistence and description, whether that person had suffered from all or any of the symptoms before, whether there had been exposure to the slops and whether there were any other health problems. The Claimant was also asked about any financial loss suffered. The Defendants argue that those questions were seeking to elicit a medical report that was not just an administrative formality. It is the Defendants' case that, given the questionnaires, and the speed at which the reports were produced, it was impossible for any proper medical assessment to have taken place.

231. Mr Gibson argues that the administrative costs of dealing with the medical reports are not recoverable from the Defendants. These are the costs of identifying and employing the local doctors, dealing with the administration exercise, handling payments and dealing with complaints. There are also charges for gathering the information in the questionnaires, a process which the Defendants describe as pointless. There are claims for instructing and training doctors, for drafting the pro forma medical reports, amending defective medical reports and amending defective translations. The Defendants' case is that all these costs should be disallowed.

232. Mr Gibson submits that the Claimants have changed their stance in relation to medical reports, having informed MacDuff J that the reports were no more than an administrative formality, the Claimants now argue that that statement was in relation to the lead cases in respect of which fully detailed reports were to be obtained. Whatever the true position, Mr Gibson argues that the underlying flaws in the reports remain.

233. With regard to the fact that the Defendants did not object to the quality of the reports when they were served, Mr Gibson says that the Defendants did not know what was going on, on the ground, they did not know about the questionnaires, nor that some of the doctors were Claimants, including Dr N'Tamon whose reports were served with the initial claims. Nor did the Defendants know that the doctors had been introduced by the local representatives, nor had they any knowledge of the problems and difficulties which arose in respect to the reports.

Claimants' Submissions

234. Mr Hermer argues that paragraph 18.1 of the GLO required every Claimant to have a medical report confirming the injuries sustained, resulting from the alleged exposure

to the materials, together with any available medical records. Had Ivorian doctors not been used, the logistics of instructing English or European doctors would have been immense, as would the cost. The major difficulty with using Ivorian doctors, was that they had no real experience of Medico Legal reporting, still less of the requirements of CPR Part 35. In any event, by the time the medical reports were being requested, the Claimants' symptoms, in the great majority of cases, had resolved. The doctors, therefore, had to rely on the Claimants' own account of the injuries. This position was, says Mr Hermer, clearly before the court when the GLO was made. The Defendants at no time objected to the form of the medical reports, and in April 2008, when informed that a further 22,000 Claimants were likely to be signed up, did not indicate that they did not require further medical reports, rather they demanded absolute compliance with the requirements of the GLO.

235. Mr Hermer took me to an example of the instruction letter to the doctors. The doctor was told:

> "It is very important to ensure that all persons we represent have suffered genuine personal injury as a result of their exposure to waste. Therefore, your medical report is crucial in establishing the truthfulness of the Claimants' symptoms, as well as the likely cause of those symptoms.
>
> …
>
> In the report, you must carefully note down all the person's symptoms and assess the likelihood of exposure to the toxic waste being the cause of the reported symptoms. To carry out this assessment, you will have to study the person's medical history as well as his or her age, lifestyle, date the symptoms begun (sic) and the severity and duration of those symptoms."

236. The doctor was also told that it would be necessary to sign a statement of truth at the end of the medical report, and that:

> "It is crucial that any report you make is a fair and accurate reflection of your professional opinion."

237. That letter was accompanied by a pro forma medical report prepared by Leigh Day, to ensure that all the reports covered the basic requirements, such as the date and circumstances of the alleged contamination, the medical damage, treatment given, and current symptoms. The doctor was also asked to indicate the current physical condition, and give an opinion, prognosis and evaluation; namely: (1) cause of injury; (2) handicap; (3) medical costs in future; (4) incapacity/handicap in future; (5) other limitations in future. Since these doctors had no experience of English courts, and no experience of Medico Legal reporting, Mr Hermer argues there was nothing inappropriate in providing the doctors with guidance as to the starting point for their reports.

238. Mr Hermer accepts that some of the doctors had assistance, and that on occasion an assistant may have inserted some of the factual information onto the pro forma, but the Claimants' position is that the reports and the opinions are all those of the doctors.

239. As to the Defendants' assertion that the Claimants never intended to rely on the reports, and that they were purely an administrative formality, Mr Hermer says that that comment did not relate to the 30,000 Claimants, but to the 22 lead Claimants who had been identified for the trial, which was then only eight weeks away. These 22 lead Claimants had been seen in Abidjan by the Claimants' clinical toxicologist, their expert in tropical medicine, and their expert psychiatrist, each of whom had taken their own medical histories from each of the lead Claimants.

240. Dealing with the questionnaires, Mr Hermer refers to Dr Jackson's report, where he states:

> "In my opinion this questionnaire is both a practical and appropriate way to collect information in a case of this kind."

241. With regard to the preparation of the questionnaire, this had been carried out in consultation with Professor Bridges, and although Macfarlanes had requested that no leading questions should be asked, Leigh Day took a different view. Notwithstanding that, however, Mr Hermer asserts that the questionnaires were not simply tick boxes, and that the Claimants did not tick all the boxes. There are open questions about the duration of contamination, whilst others require a yes or no answer. Claimants did not tick all the boxes and categorise all their symptoms as severe and persistent.

242. Dr Wilkenson in his report commented that although the data used in his analysis had important limitations, the results allowed reasonably clear conclusions on a number of points. He found that the Claimants were not spread out equally in Abidjan, but clustered round the various dump sites. The basis of his findings was, submits Mr Hermer, the information in the questionnaires. Dr Wilkenson rejected the hypothesis that the Claimants were self selected samples of people who happened to have illnesses for other reasons; mass hysteria; or fabrication of stories by people seeking compensation or other reward. Professor Bridges and Dr Jackson also relied on the information in the questionnaires for their reports.

The Bou Incident

243. In respect of conduct, Mr Hermer relies on the so called Bou incident, which arose when the Defendants were in contact with some of the Claimants during the lifetime of the litigation. The Claimants suggest that the Defendants made contact with Mr Bou, whereas the Defendants say that he contacted them. I do not have sufficient evidence to enable me to decide what actually happened, nor would it be appropriate for me to do so. It is, however, common ground that there was contact between the Defendants and Mr Bou.

244. Mr Hermer refers to the eighth witness statement of Mr Day, dated 22 March 2009, in which he describes Mr Bou's contact with the Defendants' representatives, and he refers to Mr Bou's statement of 20 March 2009 where he described his experiences. Mr Hermer also refers to the transcript of the hearing before Jack J on 23 March 2009, at which an injunction was granted. In his ninth witness statement, dated 27 March 2009, Mr Day described his meeting with 36 of the lead Claimants, some of whom suggested that they had been approached. Mr Nurney, in his statement of 1 April 2009, set out his version of events.

245. Mr Hermer accepts that there is a significant dispute as to the extent and nature of the contact between the Defendants and the Claimants. He also accepts that it is not a matter for me to determine. The agreed final joint statement states:

> "Leigh Day withdraw any allegation that there has been any impropriety on the part of Trafigura, or any of its legal advisors (including Macfarlanes) in investigating the claims".

Conclusion

246. I have had produced to me the instructions to the doctors in Abidjan, and also the pro forma medical report. The instructions were accompanied by an example medical report. The doctors were told:

> "In the report you must carefully note down all the person's symptoms and assess the likelihood of exposure to the toxic waste being the cause of the reported symptoms. To carry out this assessment, you will have to study the person's medical history as well as his or her age, lifestyle, date the symptoms begun and the severity and duration of those symptoms.
>
> Please note that you have to sign a statement of truth at the end of the medical report. You must read this statement carefully. It is crucial that any report you make is a fair and accurate reflection of your professional opinion."

247. The statement of truth attached to the pro forma medical report read:

> "I understand my obligation to the court and I have complied with this obligation and will continue to comply with this obligation.
>
> I confirm that the facts set out in this report come from my own knowledge and I believe them to be true, and where I have provided an opinion, this opinion represents my professional opinion."

248. The doctors were also given "Guidelines for Doctors Preparing Medical Reports". The doctors were informed that each report had to be made using the precedent report provided by Leigh Day. Each section had to be thoroughly filled out, and no sections left blank. Each report had to be filled out by the doctor personally, with a single pen. Should the doctor feel that he or she did not have adequate expertise to deal with a given problem, this must be noted. Further guidance was given in relation to: the circumstances of contamination; clinical symptoms following exposure to waste; treatment given; current symptoms; Claimants' medical condition prior to exposure to waste; cause of symptoms; and, future prognosis. Finally the doctors were given the completed questionnaires for each Claimant.

249. It is clear from the judgment of MacDuff J, following the hearing in July 2009 when the Defendants sought an order for disclosure of the letters of instruction to the doctors, that the Judge took the view that the individual medical reports were

necessary under Clause 18.1 of the GLO. He did not accept the submission that the reports were "an administrative formality" (see paragraph 55 above).

250. Although the questionnaires might have been better designed, without using leading questions, I am satisfied that the system adopted, even with its faults, was a sensible attempt to obtain the required information at a basic level. This would have been required in any event, regardless of the GLO. In my judgment the instruction to the doctors, taken together with the precedent medical report, guidelines and pro forma reports, attempted, so far as possible, to ensure that the reports which were produced fulfilled the basic requirement of the GLO. I accordingly reject the Defendants' submissions to the effect that no costs should be paid in respect of the reports.

251. There is an argument about the actual cost of each report, whether this should be £10 or £13.33. The agreement with the Ivorian doctors would be for a fixed amount in their own currency. The actual amount (if any) which would be recoverable is the sterling equivalent at the point of payment.

252. I answer the questions raised in Key Issue 5 as follows:

i) 5.1 The Claimants are entitled to recover the reasonable and proportionate costs of, and associated with, the Medico Legal Reports.

ii) 5.1.1 With regard to administration costs, it is clear that both the local representatives and doctors would need supervision and monitoring. To the extent that administration involved non fee earner work, that cost is not recoverable. If the work was properly fee earner work, it is recoverable, to the extent that it is reasonable and proportionate.

iii) 5.1.2 The reasonable and proportionate cost of instructing the doctors is recoverable. Training doctors (as opposed to supervising them) is not recoverable.

iv) 5.1.3 The costs of drafting the pro forma medical reports, are, in principle, recoverable, to the extent that they are reasonable and proportionate.

v) 5.1.4 The costs of amending defective reports are, in principle, not recoverable.

vi) 5.1.5 Similarly, the cost of amending defective translations of Medico Legal Reports, are, in principle, not recoverable.

vii) 5.2 It is not possible at this stage to deal with the proportionality of the costs associated with the Medico Legal Reports, other than the global view, which I have already expressed, as to the proportionality of the costs of these proceedings.

6. Experts' Reports

6.1 Are the Claimants entitled to recover experts' costs where the Claimants (1) did not have leave to serve experts' reports and (2) did not serve experts' reports?

6.2 Are the Claimants entitled to recover Leigh Day & Co's and counsels' costs associated with experts where the Claimants (1) did not have leave to serve experts' reports and (2) did not serve experts' reports?

6.3 Are the Claimants entitled to recover Leigh Day & Co's and counsels' costs in respect of amending/re-drafting experts' reports and/or joint meeting statements?

6.4 Do the costs associated with the preparation of the experts' reports have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

253. Mr Wilken says, that having spent only 2.8 hours with experts before issuing the claims, Leigh Day did not know what the case was, or which claims could be legitimately advanced. They did not know what had to be pleaded, which witnesses were relevant, or which experts should be instructed.

254. With regard to the Claimants' reliance on *Francis v Francis & Dickerson*, he argues that in the current litigation regime, where claimants are effectively enabled to litigate at no risk, it is necessary to focus on what the reasonable solicitor would do in any given circumstances. He says that *Francis* cannot be used to excuse the failure to deal with the pre-action protocol, nor to avoid the consequences of not putting one's cards on the table, and not exercising control over costs.

255. As to expert evidence, the Defendants do not object to the use of certain experts, and do not consider that the time and costs incurred by those experts is disproportionate, ie: Nancy Isarin environmental; Dr Denis d'Auria toxicology; Professor Jim Bridges toxicology; Graeme Bowles shipping; Dr Thomas Butler chemistry; Bill Edwards oil industry, Professor Simon Wessely psychiatry, Dr John Jackson toxicology; Dr Paul Wilkenson epidemiology; Professor Roy Harrison modelling; Professor David Taylor veterinary; Dr Willie Weir tropical medicine. The Defendants do not object to the costs associated with Professor Ouraga. They do object to paying for expert evidence which was not exchanged, which they say they only became aware of once the Claimants' bill was received. They identify some 40 experts whose reports were not exchanged. The Defendants argue that, if Leigh Day had followed the pre-action protocol they would have known that these experts were not needed, and the Defendants should not have to pay for them.

256. The Defendants object to paying for more than one expert in the same field as being duplication, and they suggest that it is disproportionate to charge for the costs of Professor Bogui and Paul Dargan who were unwilling to act as experts, and did not respond to requests from the Claimants. The Defendants object to paying for

statements of experts which were never used, those experts who were consulted about whom the Defendants did not know.

Claimants' Submissions

257. The Claimants argue that the fact that leave was, or was not, granted to serve experts' reports is not conclusive when it comes to recovery of costs. The Claimants had to explore various areas of evidence, in order to exclude that area from further consideration. Where a report was received, which made it plain that that area should not be pursued, leave to serve the report would not be sought, nor would the report be served. In other instances a report might have been superseded by a development, such as an admission.

258. So far as work done by Leigh Day, and Counsel proposing amendments to experts' reports and statements, this is a question of reasonableness. The Claimants submit that in heavy litigation, the lawyers inevitably test and challenge the experts, and sometimes suggest changes to their reports. This is neither unusual, nor improper. The Claimants assert that this issue is a matter for detailed assessment, at which they will seek to demonstrate that the work done was reasonable.

259. Approximately 47% of the cohort complained of skin problems. Professor Bridges, the Claimants' toxicologist, supported the idea that the skin conditions could have been caused by the waste, but thought this was an unusual reaction. Leigh Day therefore sought advice from dermatologists in both London and Abidjan. Ultimately, they relied on the evidence of the clinical toxicologist, Dr Jackson, who did support causal link. Dr Jackson expressed the view that of the 22 lead Claimants 15 had skin complaints and of these 12 could have been due to exposure to the waste.

Conclusion

260. The Defendants accept that the fees of certain experts, and the work done in connection with them, is properly recoverable. On the information before me, at the moment, I am not in a position to say whether all or any of the work done in connection with the other experts, or their fees, would be recoverable on detailed assessment. I do, however, accept in principle the submissions made on behalf of the Claimants.

261. I answer the questions in Key Issue 6 as follows:

i) 6.1 The question whether the Claimants are entitled to recover experts' costs, where the Claimants did not have leave to serve experts' reports, and did not serve those reports, will have to wait until the facts can be examined on detailed assessment.

ii) 6.2 As 6.1.

iii) 6.3 The extent to which the Claimants may be entitled to recover Leigh Day's costs in respect of amending/redrafting experts' reports and/or joint meeting statements is a matter of degree, which will have to await detailed assessment.

iv) 6.4 It is not possible, at this stage, to deal with the proportionality of the costs associated with the preparation of the experts' reports, other than the global view, which I have already expressed as to the proportionality of the cost of these proceedings.

7. Abandoned Claims

7.1 Are the Claimants entitled to recover the costs associated with claims that were abandoned, namely:

7.1.1 human deaths;

7.1.2 animal deaths;

7.1.3 loss of visual acuity;

7.1.4 skin complaints;

7.1.5 miscarriages;

7.1.6 childbirth deformities;

7.1.7 mental retardation;

7.1.8 gynaecological symptoms;

7.1.9 uterine mynoma;

7.1.10 haematuria;

7.1.11 anaemia;

7.1.12 fibrinemia;

7.1.13 memory problems;

7.1.14 tinnitus;

7.1.15 swelling of limbs/oedema;

7.1.16 rheumatism;

7.1.17 arthritis; and

7.1.18 any symptoms caused by routes of exposure to the slops other than "airborne" (eg: ingestion or dermal contact etc).

7.2 Are the Claimants entitled to recover the costs associated with claims that could not be supported by the Claimants' experts for each of the Lead Claimants (as set out in attached Schedule)?

7.3 Are the Claimants entitled to recover any costs (including experts' costs) associated with the investigation, analysis and pleading of alleged death claims?

Defendants' Submissions

262. The Defendants' case is that the Claimants are not entitled to recover the costs of and occasioned by the claims which they abandoned/discontinued, including those claims in respect of the symptoms listed in the key issue. These are claims, they say, which should not have been made. Leigh Day had no reasonable grounds to launch the claims when they did, or at all. The Defendants assert that the Claimants are not entitled to recover the costs associated with claims that could not be supported by the Claimants' experts for each of the lead Claimants, nor are they entitled to recover any costs associated with the investigation, analysis and pleading of the alleged death claims.

263. Mr Wilken refers to the table at Annex 13 to the skeleton argument, to which I have already referred at paragraph 63. It shows the number of Claimants listed as suffering from severe and ongoing types of symptoms. Mr Wilken suggests that, when the first Claimant was registered as having severe and ongoing headaches in October 2006, that indicated a period of three months. He argues that, for a Claimant registered at the latter end of 2009, the symptoms must have been in existence for three years. In my view there is nothing to support that argument. There seems to be no reason why a Claimant registered in 2009 should not complain of severe and ongoing symptoms, which lasted for three months, following the incident. If Mr Wilken's theory is correct, he argues that it shows lack of control over the Claimant cohort, and is also relevant to exaggeration.

264. In January 2009 Leigh Day produced, at the Defendants' request, a schedule setting out the full range of symptoms being alleged. These were set out under the following headings: General/Neurological, ENT/Pulmonary, Ocular, Digestive, Cutaneous, Gynaecological, Urinary and Circulatory. Under each heading the schedule set out the type of injury, the mechanism of exposure alleged to have caused the injury (which is airborne in every case), the medical cause of injury, the chemical (type) and necessary minimum concentration (PPM), duration of symptoms, percentage of potential lead Claimants suffering from symptom, the percentage of Claimants suffering from the symptom, and the discipline of the experts to be called on the issue of causation.

265. It was not until December 2008 that Leigh Day confirmed that certain symptoms were no longer being pursued. In their letter of 12 December 2008 they stated:

> "Swelling of the limbs/oedema; anaemia, uterine mynoma; tinnitus; childbirth deformities; mental retardation; fibrinemia – we confirm that these are not being pursued as being causally connected by exposure to the toxic waste."

266. On 1 May 2009, responding to the Defendant's suggested redactions to the generic witness statements, Leigh Day stated:

> "In relation to reference to deaths and miscarriages in the statements, we have not accepted the proposed redactions as those sections reflect the beliefs of the witnesses at the time. As we have previously made clear however, we do not advance a positive case or a causal link in relation to either issue."

267. On 8 May 2009, when the updated schedule was served, this recorded that 149 of the Claimants had suffered from miscarriages. Given that there was no evidence to connect the miscarriages with exposure to the slops, the Defendants now say that the Claimants should not be entitled to recover the costs in relation to such claims. The point is also made that no individual Claimant was removed from the cohort as a result of any of the symptoms being abandoned.

268. Mr Wilken refers to a schedule dated 8 May 2009 prepared by Leigh Day setting out the percentage of Claimants with various conditions. 0.6% had burns, 0.58% miscarriages, 3.9% with gynaecological problems. The point about miscarriages is that they significantly help the quantum. The schedule was produced within three months of the agreed joint final statement. Mr Wilken argues that certain claims had been abandoned. He relies on the joint final statement, and therefore the costs associated with them cannot be reasonable or necessary. He argues that this refers back to the GLO, and flows from the failure to have proper objective parameters for admission to the cohort, and from Leigh Day's failure to follow the Pre-Action Protocol.

Claimants' Submissions

269. Mr Hermer repeats that Leigh Day had made it clear from the outset that the majority of Claimants had suffered minor injuries, which had since resolved. He argues that it was, however, reasonable for Leigh Day to investigate whether more serious injuries had been caused by the waste. The question of miscarriage was the one which mainly occupied Leigh Day, because 149 people complained of it. Thus, if a client came to Leigh Day, having been exposed to the waste, and complaining of having suffered a miscarriage in addition to other symptoms, that condition had to be investigated.

270. Mr Hermer refers to a privileged document which had come into the possession of Leigh Day, which was a report of a Mr Minton to the Defendants in September 2006. The provisional views expressed indicated that the effect of the waste could include causing severe human health effects. Mr Hermer pointed out that, at about the same time, Trafigura issued their press release indicating that their investigations showed no link between the waste and the injuries. His point was that Leigh Day had acted reasonably in investigating the complaints of the more serious injuries.

271. Mr Hermer refers to the experts' witness statements of Professor Harrison, Dr Buttler and Professor Bridges, and in respect of miscarriages Dr Jackson, who expressed the view that there might be a causative link between gynaecological problems and exposure to waste, but given the numerous and complex reasons for miscarriage and premature birth, and the lack of definitive contemporaneous evidence, he was unable to reach a conclusion that met the required standard for civil evidence. That report is dated 19 June 2009. Other experts in their fields had met with similar difficulties, for example Professor Bridges and Dr Wilkenson the epidemiologist. Mr Hermer's

underlying point was that Leigh Day were not running a case without any basis, and that they had proper reasons for carrying out the investigations which they did.

272. With regard to the Defendants' assertion that the claims included death claims, Mr Hermer states that the Ivorian Government, and certain reports both international and national, stated that a number of people did die as a result of exposure to the waste, but he says that was never formally part of this case, and never part of the GLO. There can, therefore, be no costs in respect of those claims payable by the Defendants. The Defendants make the point that death claims were issued, but never served.

Conclusion

273. The Defendants assert that certain claims were abandoned, or discontinued. Another of their complaints is that none of the Claimants dropped out of the cohort. There was certainly no formal abandonment or discontinuance during the proceedings; had there been, there would have been a presumption that costs would be payable in the Defendants' favour, under Rule 38.6 and Rule 44.12(1)(d). This never happened.

274. The fact is that the Defendants have elected to settle this case by making a payment to each Claimant in the cohort, and agreeing to pay the Claimants' costs on the standard basis. That means all the costs which have been properly incurred.

275. In December 2008 and May 2009 Leigh Day, having completed their investigations, indicated to the Defendants that certain symptoms were no longer being pursued. It is, however, very common for claimants generally to complain of a range of symptoms alleged to have been caused by a defendant, but, following negotiation or trial, only to recover damages in respect of certain of those symptoms. If there has been deliberate exaggeration, the court has the power to make an order for costs which reflects that situation, see *Painting v University of Oxford* [2005] EWCA Civ 161.

276. The dumping of the waste in Abidjan led to widespread unrest and political upheaval, some 100,000 people sought medical treatment. Against that background the Claimants argue, and I accept, that it was far from improbable that a small proportion would suffer serious symptoms.

277. The Claimants argue that they were acting reasonably in investigating the full range of symptoms contained in their schedules. With regard to animal deaths, some livestock had been condemned and slaughtered by the Ivorian authorities on public health grounds, apparently as a result of its exposure to the slops. Both sides explored animal deaths in consequence, and although Leigh Day proposed in December 2008 that veterinary evidence should not be relied on, the Defendants refused, because they hoped to show at trial that lack of deaths among rodents tended to show that the waste was not toxic. A joint report was subsequently produced, in which the experts agreed that the evidence was inconclusive.

278. None of the symptoms set out in Annex 13 to the Defendants' skeleton could ever be regarded as conditions likely to result in large damages payments. It is quite possible that the Claimants regarded them as severe, ongoing or severe and ongoing. On the information which I have received to date there is no evidence that these claims are exaggerated. It may be that, in the case of certain Claimants, claims were

made in respect of symptoms which could not have resulted from exposure to the slops, this however would not amount to exaggeration, but rather misattribution of the symptoms complained of.

279. In my judgment, given the terms of settlement, the Claimants are entitled to recover the reasonable and proportionate costs of investigating the claims. It is a matter for argument whether it was appropriate to investigate particular claims, for example gynaecological problems. But with regard to miscarriages, given that 149 Claimants had suffered miscarriages, it was clearly possible that these had been caused by the waste, and the Claimants' expert was still of the view that this was possible, even though it could not be proved to the required standard of proof.

280. As I stated during the course of argument, if a claimant complains to a solicitor of certain symptoms, it is normally not open to the solicitor to say whether or not the condition complained of has been caused by the particular incident. The solicitor will need a report from a relevant expert. That is what appears to have happened here.

281. With regard to the Defendants' assertion that had the Claimants followed the pre-action protocol, and obtained scientific evidence at the outset, things would have been different, it is clear that the Claimants' experts could not reach a concluded view on the science until after the Defendants had given disclosure.

282. I accordingly answer the questions in the Key Issue 7 as follows:

i) 7.1 The Claimants neither abandoned nor discontinued any claims. To the extent that certain symptoms were not pursued following investigation, the Claimants are entitled to recover their reasonable and proportionate costs of investigating those symptoms.

ii) 7.1.1 to 7.1.18 See 7.1 above.

iii) 7.2 See 7.1 above.

iv) 7.3 The death claims were never part of this litigation under the GLO, and no costs in respect of those claims are payable by the Defendants.

8. Amendments to Schedules and Pleadings

8.1 *Are the Claimants entitled to recover the costs associated with amendments to the pleadings resulting from (1) amendments to the method of causation of the alleged injuries, (2) amendments to the nature of the alleged injuries (3) a failure to follow the Pre-Action Protocol and (4) errors and discrepancies in and between the Claimants' questionnaires, the Group Register Schedule, the Medico-Legal Reports, the Part 20 Responses, the witness statements and/or the expert reports?*

8.2 *Are the Claimants entitled to recover the costs associated with amendments to the Group Register Schedules where the original Schedules were defective?*

8.3 Do the costs associated with the collation and amendments of the pleadings and schedules have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

283. The Defendants complain that there were in excess of 19 amendments to the Claimants' case, not all of which were formal amendments to the pleadings. The Defendants in fact produced a document incorporating all the amendments, whether formal or by letter, so that they could see exactly what the Claimants' case was. The Defendants object to paying for the process of amendment, whether done formally or informally.

Claimants' Submissions

284. Mr Hermer does not accept that there had been 19 amendments. The amendments relied on by the Defendants included answers to Part 18 requests, correspondence and a draft pleading. The amendments reflected the development of the evidence in the case, and resulted from detailed consideration by the experts as the case progressed. Mr Hermer argues that there is a remarkable similarity between the basis on which the case was compromised, and the way in which it was pleaded at the outset.

285. Where an order was required for an amendment, on only one occasion was the costs section in the usual form, ie, that the costs of and occasioned by the amendment be borne by the Claimants. On all other occasions the order was for costs in the case.

Conclusion

286. To the extent that the court has already made orders in respect of pleadings which were formally amended, those orders will govern the recoverability, or otherwise, of the costs of the amendment. So far as amendment as a result of answers to Part 18 requests and in correspondence are concerned, those costs are, in principle, recoverable, the Defendants having agreed to pay the Claimants' costs to the extent that they are reasonable and proportionate. I answer the questions in Key Issue 8 as follows:

i) 8.1 To the extent that the court has made orders dealing with formal amendments to the pleadings, those orders will govern the way in which costs are, or are not, recovered. Other costs of amendment informally made during the course of proceedings are, to the extent that they are reasonable and proportionate, in principle, recoverable. It is a matter for argument whether amendments resulting from (i) amendments to the method of causation of alleged injuries; (ii) amendments to the nature of the alleged injuries, are properly recoverable. (iii) Given my finding in respect of Key Issue 3, the Pre-Action Protocol, this issue is not relevant. As to (iv) errors and discrepancies in and between the Claimants' questionnaires, the Group Register Schedule, the Medico Legal Reports, the Part 20 responses, the witness statements and/or the expert reports, this must be a matter for argument. The Defendants are not liable for errors and mistakes which may have occurred on the Claimants' side.

ii) 8.2 If the Group Register Schedules were defective, the cost of amending those schedules will only be recoverable to the extent that the defects were not as a result of mistakes or errors on the part of the Claimants.

iii) 8.3 It is not possible at this stage to deal with the proportionality of the costs associated with the collation and amendment of the pleadings and schedules, other than the global view which I have already expressed as to proportionality of the costs of these proceedings.

9. Extra Territorial Issues

9.1 Are the Claimants entitled to recover the costs associated with investigation and consideration and pleading of alleged events in:

9.1.1 Fujairah;

9.1.2 Malta;

9.1.3 La Skhirra;

9.1.4 Amsterdam;

9.1.5 Lagos;

9.1.6 Norway;

9.1.7 Estonia;

9.2 Are the Claimants entitled to recover the costs associated with investigation and consideration and pleading of the alleged events surrounding the Aristos II?

9.3 Was the evidence relied upon by the Claimants in relation to the extra territorial issues and the Aristos II (1) admissible and/or (2) of any probative value in relation to any of the issues in the case?

9.4 Do the costs associated with the investigation and consideration and pleading of the extra territorial issues and the Aristos II have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

287. By a Consent Order dated 25 October 2007 the Defendants were ordered to disclose a range of documents, including all documents relating to chemical analysis carried out in Amsterdam, all documents generated within Trafigura and between Trafigura the *Probo Koala* APS, the Port Authorities, the local police, the Environmental Authorities leading up to and during the stay of the *Probo Koala* in the Port of Amsterdam. There was a similar requirement in respect of the Estonian Port, and in respect of Abidjan, and in respect of the testing of the contents of the waste on board the ship in Amsterdam, Estonia, Lagos and Abidjan.

288. The Defendants point out that they had to disclose documents relating to extra territorial matters because the Claimants, in their Particulars of Claim, had asserted that they had not put into the public domain information concerning the movement of the *Probo Koala* in the twelve months preceding arrival in Abidjan, nor had they given details of the purpose of the movements of the vessel, or the precise materials which were loaded and off-loaded. The Claimants' position was that all such information was relevant to the composition of the chemicals off-loaded at Abidjan, and they requested that all that information be provided with the defence. The Defendants say that therefore they had no option but to plead to the matters put in issue by the Claimants, and to disclose all documents relating to the vessel's stay in Amsterdam, and its visits to Estonia and Lagos. Extra territorial work was done in connection with Fujairah, Malta, La Skhirra, Amsterdam, Lagos, Norway and Estonia. In respect of all these different locations Mr Wilken argues that they relate to different incidents, in different places, with different combinations of chemicals and therefore cannot be used to assist in these particular proceedings.

Fujairah

289. Mr Wilken states that the Defendants undertook a caustic washing of gasoline cargo in Fujairah in 2005, and disposed of the waste from the process without incident. He submits that the alleged events in Fujairah were of little relevance to issues of duty of care, and of no relevance at all to causation. The processes and the chemicals, and the resulting slops in Fujairah would all necessarily have been different to the processes, chemicals and resulting slops from the *Probo Koala*, as would any exposure to any individuals in Fujairah. Mr Wilken argues that it was not reasonable for Leigh Day to insist on disclosure relating to Fujairah, and suggests that the request resulted from lack of any expert evidence at the outset of proceedings, and Leigh Day's lack of understanding of the nature of the claims, and their alleged causation. This process was of no probative value to the proceedings.

La Skhirra Tunisia

290. Mr Wilken states that a cargo of naptha was treated at the land based tank farm facility in La Skhirra in early 2006. There was an accidental spillage of some waste material from the washing process, which resulted in the Defendants being prevented from undertaking similar washing operations at that facility. Mr Wilken argues that this incident was materially different from, and totally unrelated to, that in Abidjan, given the nature of the process, the release and the exposure of individuals. The Defendants object to paying the cost of obtaining a witness statement from Mr Monghi (Technical Director TRAPSA), in relation to an incident in 2005 relating to a different caustic washing operation, involving the co-mingling of slops with a large volume of other hydro-carbon products. The slops had been released accidentally into an existing tank containing other fluids. The Defendants dispute that this incident could ever have assisted Leigh Day in demonstrating a causal link between the slops dumped in Abidjan, and the injuries alleged by the lead Claimants.

Amsterdam

291. Mr Wilken states that although a number of people were reported to have fallen ill in Amsterdam, as a result of the alleged release of fumes from the APS facility following delivery of the slops, the nature of the release and the location and duration

of exposure in Amsterdam could not simply be translated to the Abidjan proceedings. In Amsterdam there was a small release from a treatment facility, as opposed to the dumping of slops in public spaces in Abidjan. The Defendants complain that by pleading these events, and subsequently insisting upon disclosure, and liaising with the Dutch Public Prosecutor, Leigh Day incurred costs in reviewing the disclosed documents in a line of enquiry which had little, if any, relevance to the claims in Abidjan. It was never reasonable for extensive enquiries to be made, and witness statements to be taken by Leigh Day, it being accepted by the Defendants that documents relating to the discharge and reloading of the slops in Amsterdam were relevant, as was the NFI Report.

Lagos Nigeria

292. The *Probo Koala* called at Lagos to discharge cargo from Paldiski. It was on the return voyage from Lagos to Paldiski that the vessel called in at Abidjan. The Defendants had sought to determine whether the slops could be off-loaded and treated in Lagos. The Defendants accept that the documents relating to the vessels' stay in Lagos were relevant, and that Leigh Day were entitled to seek copies of them. They object to the extensive enquiries being made by Leigh Day in the area.

Norway

293. Vest Tank Sloevaag Norway is a land based oil facility which had accepted slops from the *Probo Emu*. In addition, various cargos of the same PMI naptha as were on board the *Probo Koala* were also delivered to the facility. In May 2007 an explosion occurred at the facility, resulting in the release of chemicals into the air. The explosion occurred in a tank containing slops, and various other chemicals, to which hydrochloric acid had been added. People in the local community were reported to have complained of illnesses following the explosion. In the Defendants' submission the nature of the slops, the acidification process, and the pattern of release were all markedly different from the events and the slops in Abidjan in August 2006. The Defendants argue that the events in Norway were of little relevance to issues of duty of care, and of no relevance at all to causation.

Paldiski Estonia

294. *Probo Koala* called at Paldiski to collect a cargo on route to Lagos Nigeria. This was pleaded in the defence as part of the voyage leading up to Lagos and then Abidjan. Little, if any, relevant information was likely to be gained from Paldiski that was not disclosed by the Defendants as part of the overall shipping documents. There was no allegation that the slops had been discharged at Paldiski.

295. With regard to Mr Hermer's argument that the extra territorial work flowed from disclosure, Mr Wilken points out that nothing relating to Norway is pleaded, and there is no justification for the statements from Norwegians.

296. The Amsterdam witness statements complain of incidents on 7 July 2006, but the *Probo Koala* left Amsterdam on 5 July. Drs Bound and Buttler agreed that the NFI analysis represents the best data available on the slops carried by the *Probo Koala* as sampled in Amsterdam. Bound, Holdaway, Edwards and Bowles agreed that the sampling techniques used in Amsterdam would not have sampled hard sediments on

the bottom of tanks. Bound, Holdaway and Edwards agreed that if internationally accepted standards and codes of practice had been followed, large quantities of sediments would have been detected. They also agreed that if sediments were present in the form of a disbursed slurry, then regarding the sampling techniques used in Amsterdam:

i) Claimants' experts say that the sampling techniques could possibly have collected some of "solid" materials, whilst;

ii) Defendants' experts say that the sampling techniques would have collected some of the "solid" materials dispersed as a slurry.

297. Mr Wilken's point was that if there was hard sediment on the bottom of the tanks in Amsterdam, it is not credible that such sediment should have become mobile and been pumped out in Abidjan.

Aristos II

298. Another topic under this head was the vessel Aristos II. The Defendants had explained in their defence that they had used Abidjan on a number of previous occasions for de-slopping operations without incident. In or around July 2006 they had unloaded slops from the Aristos II. This led the Claimants to carry out lengthy investigations into previous cargos discharged by the Defendants. They obtained information from Salomon Ugborugbo. He was the person in control of Compagnie Tommy. He suggested that the Aristos II incident was important, because it suggested a pattern of bad behaviour on behalf of Trafigura which led Leigh Day to assert that the Defendants should not have sent the waste to Abidjan at all, since it was all part of a pattern of behaviour. Mr Wilken points out, however, that this is not pleaded in terms, nor is the Aristos II mentioned in Mr Ugborugbo's statement which was served. Mr Wilken argues that this work was unnecessary and wasted, since it was not relevant to causation.

299. The allegation in respect of the Aristos II is based solely on the evidence of Mr Ugborugbo. That statement has never been put into a witness statement with a statement of truth, the witness's credibility is irreparably damaged. Mr Wilken asserts that the allegation should not have been made.

Claimants' Submissions

300. Mr Day in his 17th witness statement indicates that large numbers of documents were disclosed in relation to Fujairah, La Skhirra, Amsterdam, Lagos, Estonia and Malta. Mr Hermer argues that these documents were very important in relation to causation, since the Claimants' experts needed to reconstruct the chemistry from the outset. One of the questions was whether there had been reactions by humans to similar waste in other countries. There was relatively little by way of published material as to the effect of exposure to mercaptans and other compounds.

301. When the *Probo Koala* was at La Skhirra, on 15 April 2006, Trafigura's agent sent an email to the captain of the vessel, which reads:

> "Glad to advise you that the caustic soda washing was successful, and pls immediately cable ETA notice to agents at La Skhirra and tender NOR on arrival, thus enabling us to seek berthing prospects but looks likely berthing will be on arrival.
>
> Pls ensure that any remainings of caustic soda in the tanks' interface are pumped into the slop tank to the best of your ability and kindly do not, repeat do not disclose the presence of the material to anyone at La Skhirra and merely declare it as tank washings.
>
> Pls acknoledge receipt and compliance and kindly call the undersigned for any clarification, if any."

302. The Claimants rely on this, and the fact that their experts say that the oil record books may have been doctored to hide their contents.

303. In a press release dated 4 October 2006, Trafigura stated that it was Compagnie Tommy which had dumped the slops around Abidjan, and that Trafigura had commenced proceedings against that company. The press release also stated that the slops discharged were not toxic waste "they were a mix of gasoline blend slops, spent caustic soda and water, as used routinely to clean gasoline cargo".

304. Mr Hermer submits that the behaviour of the Defendant in respect of the underlying cause of action may be taken into account under rule 44.5. He suggests that he Defendants' conduct is relevant, particularly to the issue of extra territorial work, since the Defendants' position was that they had done nothing wrong, that they had no idea that the waste was toxic, and, in respect of costs, that the work done by the Claimants investigating extra territorial matters was unnecessary, unreasonable and disproportionate.

305. Mr Hermer dealt with each country by turn.

Fujairah

306. This was first place in which Trafigura tested caustic washing. The work done by Leigh Day related solely to reviewing the documents. The Claimants say this was important, because it helped to indicate the Defendants' appreciation of the difficulties connected with the waste.

Malta

307. The first washing of the naptha on board the *Probo Koala* took place off Malta in April 2006. Malta ship yards were not prepared to accept the slops "due to chemical content". Malta, said Mr Hermer, formed an important starting base for Dr Buttler's analysis. No visits were made, nor witness statements taken, the documents were seen and considered by Dr Buttler, and Leigh Day reviewed the documents in order to discuss them with the expert.

La Skhirra

308. This was one of the locations at which Trafigura investigated the possibility of washing the naptha at a refinery belonging to Tankmed. Between January and March 2006 two washing operations were carried out at this refinery on cargos carried by other vessels. Because an odour nuisance had occurred at the second washing, and an investigation having been launched by the authorities, Tankmed were no longer prepared to carry out the washing operation, and the *Probo Koala* was not permitted to discharge the slops there in April 2006. Nobody from Leigh Day visited La Skhirra, but a statement was taken from a Mr Monghi. He described an escape of what was said to be similar waste, which resulted in some workers being hospitalised. Mr Monghi's statement was relied on by Professor Bridges, the toxicologist.

Amsterdam

309. Mr Hermer says this was critical in order to prove liability, because it showed the Defendants' knowledge of the potential harm the waste could cause, and, he suggests, showed the use of subterfuge by the Defendants, which resulted in the conviction in the Amsterdam Court. Amsterdam was also important as to causation, it was therefore reasonable to obtain evidence as to the health effects of the waste in Amsterdam. The Defendants denied that there were any adverse reactions in Amsterdam. Leigh Day obtained three witness statements from local people in which they described how they became ill following the events of early July 2006. The documents disclosed by the Defendants in relation to the ship's time in the Netherlands was also reviewed.

Lagos

310. The vessel had travelled from Amsterdam via Paldiski in Estonia, and then on to Lagos. This was, says Mr Hermer, very important for liability, in order to demonstrate the Defendants' knowledge as to the potential harmful effects of the waste. Again, there is the suggestion of subterfuge on the part of the Defendants, in that emails disclose that inappropriate means of disposal of the waste appeared to be under consideration. He points out that Nigeria is pleaded in the defence, and that accordingly the Claimants were entitled to disclosure. There was an issue between the parties as to exactly what had happened in Nigeria, which was never resolved, because the Defendants conceded that breach of duty did not have to be proved. In any event there were no visits to Nigeria, the work done was purely on the documents.

Norway

311. Mr Hermer submits that Norway was extremely important, both for assisting the experts as to the likely composition of the waste on the *Probo Koala*, and also for causation. The Defendants' expert, Dr Bound, did not think that Norway was particularly relevant. It is not clear whether Dr Bound and Dr Berry, the other experts, were shown the Norwegian statements. The Claimants' expert, Dr Buttler, did think it relevant and it formed a chapter in his report in its own right. The processes carried out were very similar to those carried out on the *Probo Koala*. This information was extremely helpful, because there were no records of what was happening on board the *Probo Koala*, and the Defendants had not tested the waste.

312. Professor Bridges in his report dealt with the Vest Tank incident, and identified as relevant the injuries that were sustained in Norway by people who were exposed to waste there.

Estonia

313. The vessel had been to Estonia before visiting Abidjan, and returned there immediately afterwards. Tests were conducted in Estonia on the remaining contents of the tanks, and the Claimants wished to see those results. There were no visits to Estonia, nor were any witness statements taken. Both Leigh Day and the experts considered the documents which were disclosed.

The Aristos II

314. The Defendants, in their defence, had pleaded that Abidjan had been receiving slops for some 12 years without incident. This included the Aristos II in July 2004. The Claimants' investigations identified evidence which strongly suggested that the Aristos had not in fact off-loaded its waste, but rather that it had been dumped unlawfully at sea. The company involved in the disposal of the waste was Compagnie Tommy. The Claimants' position was that Mr Ugborugbo had given a false certificate to the effect that the tanks were empty, when they were full, and the waste was subsequently disposed of at sea. These facts were brought to the attention of the Defendants in August 2007. The Defendants' reaction was to put the Claimants to strict proof of these allegations, and to warn them that if the allegations were not made out at trial an order for indemnity costs would be sought.

315. Mr Hermer argues that the overwhelming majority of the costs relating to extra territorial issues were incurred when liability was still in issue. The Claimants' expert, Mr Bowles of BMT Marine and Off-Shore Surveys, prefaced his conclusions by a number of lengthy reservations concerning the reliability of many of the documents provided by the Defendants, and the apparent absence of other documents which he would have expected to see.

Conclusions

Fujairah

316. In my judgment the recoverable costs in relation to Fujairah should be limited to review of the documents disclosed by the Defendants.

Malta

317. The work done in connection with Malta is, in principle, recoverable.

La Skhirra

318. Given the history of events at La Skhirra, it was in my judgment reasonable for the Claimants to investigate events there.

319. I am not persuaded of the relevance of the incident in 2005, in respect of which a statement was obtained from Mr Monghi.

Amsterdam

320. Given the events which occurred in Amsterdam surrounding the *Probo Koala*, I am satisfied that it was reasonable for the Claimants to investigate the situation fully, including taking statements from those who subsequently complained of illness.

Lagos

321. The *Probo Koala* called at Lagos to discharge cargo from Paldiski. It was on the return voyage from Lagos to Paldiski that the vessel called in at Abidjan. The Defendants had sought to determine whether the slops could be off-loaded and treated in Lagos. The Defendants accept that the documents relating to the vessels' stay in Lagos were relevant, and that Leigh Day were entitled to seek copies of them. They object to the extensive enquiries being made by Leigh Day in the area.

322. Under this heading the Claimants are entitled to recover the reasonable and proportionate costs of reviewing the documents which have been disclosed. It is a matter for argument the extent, if any, to which costs are recoverable in relation to allegations about events which may, or may not, have taken place in Lagos.

Norway

323. Although Mr Hermer argues that Norway was extremely important, and that it was considered by both Dr Buttler and Professor Bridges, I can see no relevance in relation to this incident, to what happened in Abidjan, namely an explosion at an oil refinery, as opposed to dumping of waste in Abidjan.

Estonia

324. The Claimants are entitled to recover the costs of considering the disclosed documents relating to the tests conducted in Estonia.

The Aristos II

325. Although the evidence of Mr Ugborugbo has never been tested, his credibility is certainly suspect, but, given the involvement of Compagnie Tommy in the dumping of the waste from the *Probo Koala*, the Claimants were, in my judgment, acting reasonably in investigating the facts surrounding the Aristos II.

326. I answer the questions set out in Key Issue 9 as follows:

i) 9.1 The Claimants are entitled to recover the costs associated with investigation, consideration and pleading of alleged events in the locations below, to the extent set out below.

ii) 9.1.1 Fujairah – The recoverable costs in relation to Fujairah should be limited to review of the documents disclosed by the Defendants

iii) 9.1.2 Malta – The work done in connection with Malta is, in principle, recoverable.

iv) 9.1.3 La Skhirra – Given the history of events at La Skhirra, it was in my judgment reasonable for the Claimants to investigate events there.

I am not persuaded of the relevance of the incident in 2005, in respect of which a statement was obtained from Mr Monghi.

v) 9.1.4 Amsterdam – I am satisfied that it was reasonable for the Claimants to investigate the situation fully, including taking statements from those who subsequently complained of illness.

vi) 9.1.5 Lagos – The Claimants are entitled to recover the reasonable and proportionate costs of reviewing the documents which have been disclosed.

vii) 9.1.6 Norway – I can see no relevance in relation to this incident, to what happened in Abidjan, namely an explosion at an oil refinery, as opposed to dumping of waste in Abidjan.

viii) 9.1.7 Estonia – The Claimants are entitled to recover the costs of considering the disclosed documents relating to the tests conducted in Estonia.

ix) 9.2 Aristos II - The Claimants are entitled to recover the costs associated with investigation, consideration and pleading of the alleged events surrounding the Aristos II.

x) 9.3 It is impossible to say whether the evidence relied on by the Claimants in relation to the extra territorial issues and the Aristos II was admissible, and/or of any probative value in relation to any of the issues of the case, those issues never having come to trial.

xi) 9.4 It is not possible at this stage to deal with the proportionality of the costs associated with the investigation, consideration and pleading of the extra territorial issues and the Aristos II, other than the global view, which I have already expressed, as to the proportionality of the costs of these proceedings.

10. Media and Associated Work

10.1 Are the Claimants entitled to recover the costs associated with any media-related work, including contacts and discussions with the BBC and national and international media organisations, including the BBC, The Guardian, The Independent, The Times, The Financial Times, Al Jazeera, NRK, der Volkskrant?

10.2 Do the costs associated with such media-related work have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

327. On the sixth day of the hearing Mr Hermer informed me that the Claimants were prepared to amend their bill to remove the claim for costs for work undertaken dealing with the media, ie, time spent either liaising with the media, or preparing press releases. That concession does not include time spent carrying out analysis of

materials published by, or provided by the media. Mr Hermer put the concession in writing:

> "The Claimants limit the media costs claimed to those directly incurred in the investigation of the issues of liability, causation and quantum, for example, in analysing newspaper articles concerning the dumping of the waste in Abidjan. The Claimants do not seek to recover the costs relating to media enquiries, press releases, or of the provision of information to the media."

11. Settlement Agreement, Distribution and Payment Costs

11.1 Generally and/or specifically under the terms of the Settlement Agreement, are the Claimants entitled to recover any costs subsequent to the date of the Settlement Agreement associated with the distribution of the Settlement Sums, specifically:

11.1.1 Leigh Day & Co's and counsel's travel to and accommodation in Côte d'Ivoire;

11.1.2 verification, overseeing and general administrative costs relating to the distribution process;

11.1.3 costs in defending legal claims made by Claude Gohourou/CNVDT-CI and others in Côte d'Ivoire;

11.1.4 costs in negotiating and drafting agreements with Claude Gohourou/CNVDT-CI and others;

11.1.5 Leigh Day & Co employees', counsel's and Claimants' security costs; and

11.1.6 banking costs.

11.2 Do the costs associated with the distribution of the Settlement Sums have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

328. Under this head the Defendants assert that the Claimants are not entitled to recovery of any costs associated with the distribution and settlement exercise, or any connected costs and expenses relating to travel to, and accommodation in, the Cote d'Ivoire. It is further asserted that the Claimants are not entitled to recover the verification, overseeing and general administrative costs relating to the distribution process, nor are they entitled to recover the costs of defending claims made against them by Claude Gohourou CNVDT-CI in the Cote d'Ivorie. Mr Gohourou was one of the local representatives. Similarly, it is asserted that the Claimants are not entitled to recover the Claimants' security costs and banking costs relating to the settlement and distribution process.

329. Mr Wilken set out the background facts, suggesting that between 27% and 34% of Claimants had not been paid. During the course of the proceedings a company called CNVDT (Co-ordination Nationale des Victimes de Dechets Toxiques de Cote d'Ivoire), of which the President is Mr Claude Gohourou, came on the scene claiming the right to distribute the settlement money, and a dispute arose between Leigh Day, on behalf of the Claimants, and CNVDT. That dispute was resolved by means of an agreement, dated 11 February 2010. That agreement, having recited the settlement between the Claimants and Trafigura, continues:

> "Considering that the process for distributing the cards and paying the compensation lacked clarity and believing, at any rate, that it was the body who should take charge, the CNVDT made two (2) requests to the President of Abidjan/Plateau Court of First Instance (the "court"), in response to which the latter issued two orders namely an attachment order appointing the Societé Generale as receiver of the settlement money and the second order dated 26 October 2009 authorising CNVDT to serve a writ at an hour's notice on Leigh Day and the bank for the purpose of ordering the bank to surrender to it the settlement money, and ordering Leigh Day to surrender to it a copy of the settlement agreement concluded with Trafigura "on pain of a penalty of one million (1,000,000) francs CFA for each day of delay."

330. Leigh Day applied to the court to retract the order, but that application was dismissed on 6 November 2009. Leigh Day then appealed to the Abidjan Court of Appeal, and on 22 January 2010 the Court of Appeal found in favour of CNVDT, again ordered the settlement money to be paid over to that company, and ordered Leigh Day to surrender the settlement agreement on penalty of 2 million francs CFA for each day of delay as from the issue of the judgment. Costs were also awarded against Leigh Day. Leigh Day sought to appeal further against that judgment to the President of the Supreme Court, who, on 28 January 2010, ordered a hearing to take place, and suspended execution pending that hearing. At that point CNVDT:

> "aware of the delays of the proceedings in progress, whoever were to win, would cause to the payment of the compensation to the victims and wishing to ensure they were compensated quickly, asked Maître Tella to try to reconcile the parties".

The agreement was the result of that mediation.

331. Paragraph 3.2.3.3.3 of the agreement provided for the transfer to CNVDT of any unclaimed sums. By a subsequent amendment to the settlement agreement, dated 20 March 2010, the parties agreed to undertake to continue the joint process of verification and payment of victims for the period necessary to allow Leigh Day to achieve 23,000 cheques issued and delivered to the verified victims. Once that had been done, the parties were to end the joint execution of the task.

332. In the light of this agreement the Defendants assert that Mr Gohourou and CNVDT had a financial interest in the monies not being paid out, since any surplus would revert to the company.

333. During the course of the proceedings between Leigh Day and CNVDT, Leigh Day applied to MacDuff J for a declaration in respect of the money. That declaration was given on 4 November 2009, when the Judge declared that the money was held on trust for the Claimants, some of whom were minors.

334. In September 2010, in response to enquiries from Macfarlanes, Leigh Day indicated that they were satisfied that the Claimants named in a list served on Macfarlanes on 6 August had all received their compensation. The letter continues:

> "We continue to press for the remaining 6,000 odd Claimants to also be paid and as a result of that pressure there will be a meeting between CNVDT, our local lawyers and the Facilitator this weekend to work out the way ahead."

335. According to the Defendants (and I am not able to verify these figures) 288 Claimants did not appear on the list of settling clients, 992 had been paid more than once, and 7,223 had not been paid at all. It was not possible to tell whether 1,741 had been paid or not. On the Defendants' figures 19,658 had been paid. According to the Defendants, therefore, some 10,000 Claimants have not been paid. The Defendants' position is that, in accordance with the settlement agreement in this action, they paid the settlement money into The Societé Generale in Abidjan, at which point their liability for costs ceased. The resulting problems and difficulties with CNVDT are nothing to do with Trafigura.

336. Around 9 September 2009 Leigh Day wrote a letter to the Claimants recommending the Defendants' offer for acceptance. This letter was given to the local representatives for distribution. It indicates that there would be a meeting at some stage in the future when more details would be given, and the clients would be given the opportunity to ask questions.

337. On 23 September 2009 Leigh Day wrote to Macfarlanes to inform them of the manner of the payment process to their clients. This was just prior to the approval hearing before MacDuff J. The letter states:

> "We will be including the costs of the payment process within the Claimant's (sic) bill for the action as a necessary, if unusual, part of the action."

338. The reply, dated 2 October 2009, predictably states:

> "Your letter constituted the first indication that you would be seeking to include the costs of the payment process as part of your recoverable costs. Prior to your letter, we had understood from you that the only costs of distribution of the settlement sums were to be the banking charges in respect of operating bank accounts.
>
> Your letter was also the first indication we have been given that distribution will be undertaken by way of using payment cards for use at ATM's.

…

> For the avoidance of doubt, we do not agree that the costs incurred, or to be incurred, in Abidjan, are either appropriate or recoverable as part of the costs of this action. Nor are we clear on why English legal staff need to be present for such distribution."

339. The last paragraph was repeated in a letter of 20 October 2009, stating that no reply had been received to the earlier letter of 2 October. Leigh Day replied on 22 October 2009, explaining the payment system and pointing out that Societé Generale had refused to have anything to do with the exercise, beyond providing Leigh Day with the accounts and the pin numbers and cards. The bank would have nothing to do with the individual Claimants, and Leigh Day were required to notify the bank if anything went wrong. The bank also refused to allow the local representatives to be in touch with local bank officials. That letter does not, however, address the question of the costs of distribution.

340. It was at about this point that the application by CNVDT had been made to the court in Abidjan.

341. Leigh Day had intended to distribute the settlement monies by using pin numbers and ATM machines. According to Mr Wilken that system was totally abortive.

342. The Defendants' position is that Trafigura's liability for costs stops at a cut-off date, which, in their submission, is the date on which Trafigura paid the settlement monies into the nominated bank account. There is a dispute between the parties as to the meaning of Clause 18 of the settlement agreement. I expressed the view that I was bound by the Tomlin Order, and therefore not in a position to construe the meaning of the settlement agreement. I was, however, prepared to hear argument and express a view, in the hope that that might assist the parties.

343. The issue as to whether any costs should be payable in respect of those Claimants who have not received their compensation has not been argued before me, and accordingly I express no view about the issue.

344. The settlement agreement is dated 8 September 2009, and provides at paragraph 16 that:

> "The receipt of the settlement sum into the settlement account, together with the agreement to pay assessed costs as provided herein shall be in full and final satisfaction and settlement of all claims of the settling Claimants in the litigation of whatsoever nature or howsoever arising …"

345. The contentious clause is Clause 18:

> "Subject to Clauses 19 to 23 the Claimants' solicitors agree to hold the settlement sum on trust for the benefit of the settling Claimants and to apportion it between the settling Claimants as they think fit. For the avoidance of doubt, the Claimants'

> solicitors may pay from the settlement sum any amount necessary by way of banking or administrative charges or other costs incurred in effecting the distribution of the settlement sums between the settlement Claimants (but not in relation to any costs of the Claimants' solicitors themselves in relation to that distribution) ("the Distribution Charges")."

346. The Defendants' position is that the distribution charges are a defined term, and refer only to banking charges, or other costs incurred in effecting the distribution of the settlement sum between the settling Claimants. Those charges are to be taken out of the settlement sum. As a result of that, Mr Wilken submits that the cut-off point must be the payment into the bank account. He argues that the parties intended that the settlement should bring about finality, and that no further costs should be payable. He also says that it was clear that there was to be a detailed assessment, since Clause 28 of the agreement makes that clear.

347. In summary, therefore, Mr Wilken argues that the Tomlin Order does not extend to covering the costs of the distribution process, a process which was: (a) out of the Defendants' control; (b) managed and handled in a way that led to significant disruption in the process, for which the Defendants have no blame or responsibility; (c) was interrupted by a freezing order obtained by one of the Claimants own legal representatives; (d) riddled with potential fraud; (e) largely consisted of Leigh Day trying to work out and identify who their clients were; (f) checking and cross-checking of identities of persons attending to receive settlement sums; and (g) a process which failed. Once the Defendants had paid the settlement monies into the Societé Generale account, they had no control over what Leigh Day was doing or why.

348. The Defendants do accept that, in the normal damages case, all that is required is a letter and cheque or electronic transfer, but they suggest that even then the costs of the electronic transfer would rarely feature in a bill of costs between the parties.

349. Mr Bacon refers to *Krehl v Park* [1875] 10 Ch App 334 at 337, where James LJ stated:

> "According to the well established practice of this court, the costs of suit when given to a party are not confined to the cost of suit up to the hearing, but include the costs of all accounts and enquiries requisite for carrying out the decree: nor are these latter costs costs for subsequent consideration. That is the general rule, and it is very important that the general rule should not be interfered with. But there is also another general principle which is of no less importance to suitors, namely, that this court has jurisdiction over every order and every decree that it makes, whether with regard to costs or otherwise, and will see that an order is not abused so as to be the cause of oppression to the adverse litigant."

He makes the point that this case does not involve an account or enquiry, but he submits that it is open to the Defendants to argue that the costs order is being abused,

in that the Claimants now seek to claim costs which are outwith the terms of settlement.

350. Mr Bacon also refers to *Wallace & Wallace v Brian Gale & Associates* [1997] 2 Costs LR 15 HHJ Humphrey Lloyd QC, at 25. The Judge stated:

> "In my judgment therefore, as a matter of plain English, the term "the costs of the action" when used in a Tomlin Order (such as that in this action) are capable of including costs incurred after the date of any order staying the action where that order also envisages that the action may be revived for the purpose of carrying the terms into effect and, as a result, costs will have been incurred for that purpose and by the events which gave rise to the need to make that application.
>
> However the agreement and order has to be read as a whole and such an interpretation might of course be displaced by other terms. The parties' intention must be derived from the document in its entirety. …"

351. The judgment makes it clear that the manifest intention of the parties was that the Plaintiffs were not going to have to foot any bills thereafter, and, on the basis of that manifest intention, he found in favour of the Plaintiffs. Mr Bacon argues that in this case the manifest intention was that the Defendants should not be liable for anything other than what was agreed, namely that the administrative costs should come out of the Claimants' damages, and that the settlement agreement would bring about finality.

352. Mr Bacon referred to *Wallace & Wallace v Brian Gale & Associates* in the Court of Appeal [1998] 2 Costs LR 53 at 56, in which Sir Christopher Staughton, with whom the other two members of the Court agreed, stated:

> "It is suggested that since Mr and Mrs Wallace could recover from the Legal Aid Fund the costs of giving effect to a compromise it would therefore be good sense that an order for costs in their favour against Mr Gale should also cover costs of giving effect to the compromise. There may be some force in that point, but I do not think that it is conclusive. After all we are trying to determine the meaning of the agreement which these parties made. It is notable that express provision was made for some costs in paragraphs 1, 2, 3 and 4 of the schedule; and that express provision did not cover what we are dealing with today. In my judgment, the fees of Mr and Mrs Wallace's solicitors reasonably incurred in procuring that the settlement be carried out can fairly be described as being part of the costs of the action. It seems to me an unnecessary complication to say that they would have to be recovered, if at all, as damages or costs in some other action. But I do not see that that should cover disbursements, such as hiring the additional expert to grant a certificate. That does not in my judgment form part of the costs of the action in the context of

> this order. I say that particularly because the other paragraphs of the schedule to the consent order expressly deal with those matters. For my part, I would leave the Judge's order to stand but I would convey to the Taxing Master my view that disbursements, including in particular the expert's additional report are not part of the costs of the action."

353. Relying on that passage Mr Bacon argues that, in so far as the settlement agreement did not deal with the difficulties which were not foreseen in this case, it would be unfair to draw the line beyond what is said in the agreement, and beyond the payment of the settlement money by the Defendants to Societé Generale. Mr Bacon relies on Clause 17 of the settlement agreement:

> "The parties and the settling Claimants acknowledge that there are claims or causes of action which are not contemplated by any of them, whether based on facts known or unknown to them or on the law as it currently stands or may develop, but nevertheless it is their intention to settle all such claims and causes of action by this agreement."

354. He argues that, in so far as Leigh Day have found themselves in a situation which has developed subsequent to the Tomlin Order, it is caught by Clause 17, and it is not open to them now to claim an additional level of distribution costs beyond those dealt with in Clause 18. His position is that the additional costs which have been generated in the distribution process are not costs of the action, and the Defendants should not have to pay them. Furthermore, if the Claimants' argument is correct, given that the settlement monies have still not been distributed, yet more costs may be incurred which the Defendants could be called upon to pay.

355. Mr Gibson accepts that the circumstances in Abidjan demonstrated the wholly unpredictable, unforeseen and unknowable nature of what would happen on the ground in Abidjan when Leigh Day embarked on distribution. What the agreement was seeking to achieve was that the Defendants were handing over a lump sum to Leigh Day, because they wanted finality, they would not have any say in how the money was to be distributed, or how it was to be policed, what they wanted was finality. He suggests that in reality the Claimants had no choice but to accept the proposed agreement, and points out that in their letter to the Claimants, Leigh Day stated that if they did not communicate with Leigh Day on or before a certain date they would deem that the Claimant had accepted. This reflected the reality of the situation.

356. Mr Gibson accepts that it was necessary for Leigh Day to go to Abidjan in order to communicate with the Claimants and obtain the acceptance of at least 75% of them, but this would have to take place before the effective date of the agreement. The Tomlin Order was made on 13 September 2009, the effective date of the agreement was 19 September 2009, and the date of payment of the money 23 September 2009. The agreement gave Leigh Day an unfettered discretion as to how to apportion the settlement monies between the Claimants. This, he argues, was because the Defendants recognised that Leigh Day might encounter all sorts of difficulties and issues with the Claimants, not least in identifying them. He argues that Clause 18 expressly carved out all costs of effecting the distribution of the settlement monies.

He argues that Leigh Day were not to receive any costs of distribution because those costs were provided for by the parties in the £30 million settlement sum. Clause 18 of the agreement effectively meant that the costs of distribution would be provided for by the £30 million. It was known that there would be a surplus, because there were in fact fewer than 30,000 Claimants, and he suggests that the surplus would have been at least £300,000. It was Mr Gibson's case that that surplus could be used for distribution, but not for Leigh Day's costs. He says they are entitled to nothing from the Defendants, but post-payment and post the effective date the only costs provided for are those set out in Clause 18.

357. There are no other clauses in the agreement which deal with distribution, nor is there any provision for a cut-off date, since after payment there was to be no further cost to the Defendants.

358. Mr Gibson suggests that five further letters were going to be sent out in respect of distribution, and a further three meetings were contemplated. That is an exercise generating a significant amount of costs, and he suggests if this was such a major issue, it ought to have been expressly addressed in the settlement agreement. The reason it was not so addressed was because it had been carved out and dealt with by Clause 18. He suggests that had it been part of the agreement that the Defendants would pay those costs, agreement would not have been reached.

Claimants' Submissions

359. Mr Smouha made submissions on behalf of the Claimants on points of construction of the settlement agreement and the Tomlin Order. He submitted that there is a distinction between distribution costs and the defined term in the settlement agreement of "distribution charges". He suggests that the Defendants' construction of Clause 18 is wrong, and argues that Clause 18 is not a costs provision, but about the creation of a trust in relation to the settlement sum once paid. The first part of the clause, which is quoted at paragraph 345 above, is clear and is the operative part of it. He argues that the words "for the avoidance of doubt" indicate that the following sentence operates as clarification of something already stated in the clause, and that it would be most unlikely that one would find within such a clause an agreement that certain kinds of costs are not recoverable. The clause defines "distribution charges" as "bank or administrative charges or other costs incurred in effecting the distribution or the settlement sum between the settling Claimants". The words "but not in relation to any costs of the Claimants' solicitors themselves in relation to that distribution" merely mean that distribution charges do not include the Claimants' solicitor's costs, so the parties had agreed that part of the settlement money could be used to pay the banking charges, but could not be used to pay the solicitor's costs. The form of words of the agreement preserves for detailed assessment the costs of the Claimants' solicitors.

360. Mr Smouha argues that there is nothing in the agreement which excludes recoverability of the solicitors' distribution costs. Clause 28 of the agreement sets out the defendants' agreement to pay the Claimants' costs on the standard basis subject to detailed assessment if not agreed, subject to certain agreed restraints. There is no exclusion in Clause 28 of the costs of distribution, nor did the parties agree any such exclusion. Mr Smouha also points out that Clause 28(3) provides that there should be no recovery of individual costs for Claimants who are not settling

Claimants, thus the parties had reached agreement on that aspect, but there is nothing in the settlement agreement in respect of the costs of those Claimants who have settled but not received their settlement money. This is the issue which has, by agreement, been "parked", since I formed the view that I have no jurisdiction to deal with it, and that it would have to form the subject of a separate application.

361. With regard to the Defendants' assertion that there should be a cut-off date, Mr Smouha argues that there is no principle which says that in relation to an assessment there is a date after which any costs incurred are not recoverable. The proper question is: what are the costs of the action? Referring to the decision of HHJ Humphrey Lloyd and the Court of Appeal in *Wallace*, he submits that the correct question is: what is meant by the term "the costs of the action?" a question which is repeated by Sir Christopher Staughton in the Court of Appeal. In that decision, Sir Christopher Staughton stated:

> "There are a number of authorities which have some bearing on the question, but for myself I find them of very little help. What we are required to do is interpret the words "costs of the action" as used by these parties in the order to which they agreed …"

362. Relying on those decisions Mr Smouha submits that it is necessary to look at the settlement agreement, and to look at what was in the contemplation of the parties as to what would need to happen and when, and to determine whether the resultant costs are costs of the action.

363. Mr Smouha argues that the costs of working out the order in this case differ from a run of the mill case involving one claimant. In this case there is a large number of claimants, it has what he calls "complexity of mechanisms", and it is an agreement under which the parties contemplated that a great deal would need to happen after the Tomlin Order and after payment, which would undoubtedly involve extensive costs being incurred by the Claimants' solicitors.

364. Mr Smouha points out that at the time when the settlement agreement was drawn up the legal representatives did not know whether the Claimants would accept the proposed agreement. The proposal was that the Defendants would pay the settlement sum, and agree to pay the costs as assessed. This, he submits, indicates that a cut-off date in respect of costs immediately following payment would be entirely artificial. Referring to other clauses in the agreement, Mr Smouha argues that it is clear that after the making of the agreement Leigh Day would have to go out to the Ivory Coast and propose and recommend to each Claimant that they accept the proposed settlement. This was clearly in the contemplation of both parties, and would cause substantial costs to be incurred. The agreement provides that if less than 75% of the Claimants failed to accept, the agreement was not to take effect unless the Defendants agreed that they would accept a lower percentage. The effective date of the agreement is provided by Clause 10 to be either the date of service of notice that 75% have accepted, or the Defendants' notice agreeing to go ahead at a lesser percentage.

365. Clause 13 provides:

> "The settling Claimants and the Defendants agree that, with effect from the date of receipt of the settlement sum into the settlement account, the claims to the settling Claimants in the litigation should be stayed on the terms herein save for the purposes of enforcing this agreement and for the purposes of assessing and enforcing the Defendants' liability for costs and agree that a joint application be made to the court to make an order in the form attached. …"

366. Clause 14 provides that any Claimants who have not previously agreed, but who do agree after the effective date and are permitted by the Claimants' solicitors to become settling Claimants after the effective date, are to be bound by the terms of the agreement. The clause also provides that the Claimants' solicitors may not permit any Claimant to become a settling Claimant after 31 December 2009 without the prior written permission of the Defendants' solicitors. That date was extended in the Tomlin Order to 31 January 2010. On that basis Mr Smouha submits that it is clear from that, that the costs of action cannot stop at the date of payment. He argues that as of the date of payment the settlement agreement is only partly performed on both sides. On the Claimants' side they are permitted to get more Claimants into the agreement, and there is work to do in relation to distribution. On the Defendants' side, the obligation remains to pay the assessed costs in due course.

367. Clause 37 of the agreement requires the Claimants' solicitors to undertake to return to the Defendants' solicitors or destroy various documents and material disclosed by the Defendants in the litigation, thereby indicating that the parties contemplated further work in that respect as well.

368. Mr Williams submitted that "costs of the action" (now more properly called costs of the claim), must be construed in the context of the matrix of the particular case, the settlement agreement and whether the costs of distributing the settlement money remain costs of the action. He accepts that Leigh Day's involvement with CNVDT-C1 are not part of the costs of the action, but he submits that the costs of conveying the compensation from the account controlled by the solicitors to the Claimants themselves are costs of action. He argues that these costs are costs of and incidental to the action, and relies on *In Re Gibson Settlement Trusts* [1981] Ch 179; [1981] 2 WLR 1. Furthermore the cost of policing a settlement is, in principle, recoverable without an additional costs order, as explained in *Wallace*. In his submission the distribution costs are part of the costs of working out the order, they are not enforcement costs caused by the Defendants.

369. Mr Williams argues that, in principle, the costs of distribution are recoverable, provided they are reasonable and proportionate, and the reason that the costs are higher in this case than in most other cases is a direct result of fact that the incident took place on the Ivory Coast. The majority of the Claimants do not have bank accounts, it would neither be sensible nor safe to attempt to distribute settlement monies in cash, and so special measures needed to be taken in order to transfer the money to the litigants themselves.

Conclusion

370. Whatever the relative merits of the Claimants' and Defendants' cases, it is not open to me to decide what the outcome of a trial would have been. I am quite simply bound by the terms of the Tomlin Order. Mr Nurney in his eighth witness statement argues that the work undertaken by the Claimants representatives was valueless, that the GLO was in essence an abuse of the process of the court, that the claims were exaggerated and that thousands of the claims were perhaps not even genuine. Mr Hermer argues that true or not, all these points were in the possession of the Defendants in September 2009 when they chose to settle the case. A settlement on the basis that each Claimant would recover damages, and that the Defendants would pay the costs of the action on the standard basis. There is no limitation in the agreement or Tomlin Order.

371. When the costs of action are awarded to a party they are not necessarily confined to those costs of the action up to the hearing, but may include the costs of working out (ie, putting into effect) the order, see *Krehl v Park* [1875] 10 Ch App 334. The court allowed costs of drawing a conveyance in pursuance of terms agreed between the parties in *Re: Trusts Affecting 26 Clarendon Villas, Hove, Copeland v Houlton* [1955] 1 WLR 1072; [1955] 3 All ER 178. Where an action on a negligent survey of a house was compromised under a Tomlin Order, in which the defendant agreed to carry out remedial works and pay the claimants' costs. The fees of the claimants' solicitors reasonably incurred in procuring the settlement be carried out could fairly be described as part of the action, but the hire of a structural expert to oversee the work was held not to be "costs of the action", which were the words used in the Tomlin Order. Once the parties have agreed a consent order, which includes provisions relating to costs, the court has no jurisdiction to revisit the consent order, because it represents the contract between the parties, and, in the absence of fraud, misrepresentation or mistake may only be set aside or amended in the most exceptional circumstances, see *Centrehigh Ltd v Amen*, 18 July 2001 (unreported) Neuberger J.

372. There is a difference between the costs which the Claimants' solicitors are obliged to incur in working out the order, and costs which might be incurred if it were necessary for the Claimants' solicitors to take steps to enforce the order. The costs recoverable in this case are only the costs of working out the order, which are costs of the action. The real question is at what point do the costs of working out the order cease to be costs of the action.

373. Between 8 September and 22 September 2009 there was a further trip to put the Defendants' settlement offer to the Claimants. The team met with the local representatives over the course of the first two days. They then met the lead Claimants, and thereafter the remaining cohort of Claimants at group meetings. Claimants were invited to meet individually with a team member, and invited to sign a form stating whether they accepted or rejected the offer. They were only able to do this if they had their claim card.

374. On the trip between 9 October to 24 October 2009 the Leigh Day team tried to meet the entire Claimant cohort in two stages. The Bank had proposed that each Claimant

should receive a bank card in addition to a pin number. Once the Claimant had the bank card and the pin they would be able to withdraw their compensation from cash machines across Abidjan. During the first trip in October pin numbers were to be handed to each Claimant, and it was intended that, at a second trip in November, the bank cards would be handed out. The trip scheduled to take place in November 2009 never in fact took place, because of the freezing order which had been put on the bank account at Societé Generale.

375. I accept Mr Smoutha's interpretation of the settlement agreement, to the effect that there is a distinction between distribution costs and the defined term of "distribution charges". I further accept that there is nothing in the agreement which excludes the recoverability of the solicitors' distribution costs. I do not accept Mr Bacon's submission that Clause 17 of the agreement prevents the Claimants recovering their costs, beyond those dealt with in Clause 18.

376. It follows, therefore, that the Claimants are entitled to recover their reasonable and proportionate costs in relation to settlement and distribution, to the extent that that work is part and parcel of working out the order.

377. The Claimants concede that work connected with the application by CNVDT is not recoverable from the Defendants.

378. The starting point is the extent to which costs of settlement and distribution would be recoverable in a normal case, whether unitary or a group action. Those costs would, in my judgment, cover either a letter and cheque to the successful Claimant, or a letter and electronic transfer into a designated bank account. Should the client wish to have advice as to investment, or other matters connected with the settlement money, that would not be recoverable from the paying party.

379. In these proceedings, as was known to both parties at the time of the settlement, the vast majority of the Claimants were extremely poor, had no bank accounts, some were illiterate and many had no formal address. Until this point communication with the Claimants had essentially been through the local representatives, a system which had worked tolerably well.

380. The Societé Generale, which held the settlement money, was not particularly co-operative when it came to distributing the money, beyond indicating that it would pay out through ATM machines to Claimants who had been assigned a pin number. The bank's charges, and other associated costs, were payable under the agreement out of the settlement money. Had that system worked, Leigh day would, in my judgment, have been acting reasonably in setting it up. There is an argument, which I cannot resolve at the moment, that the preparation for distribution should have taken place at an earlier point in the proceedings.

381. I accept Mr Smouha's argument that the Defendants' liability for costs does not cease upon payment of the settlement money. There were still matters to be dealt with once the settlement agreement had been concluded.

382. There is, at the moment, a great deal of disagreement as to the extent to which Claimants have received their money. The intervention of CNVDT has in fact disrupted the whole process. The date beyond which Claimants may not agree to

settle, without the written permission of the Defendants, 31 January 2010, has only just passed. I have no information as to the number of Claimants who finally agreed to settle, nor have I any accurate information as to the numbers who have been paid, nor what, if any, money has been distributed by CNVDT.

383. The Defendants clearly cannot be held responsible for an open ended liability for costs; equally the Claimants are entitled to recover reasonable and proportionate costs relating to distribution. The Defendants paid the settlement money on 23 September 2009, CNVDT obtained their first order from the court on 26 October 2009. In my judgment the intervening month should have provided Leigh Day with sufficient time to distribute the settlement monies, had adequate preparations been made. It will be a matter for further argument what costs may properly be recoverable during that period.

384. I answer the questions raised in Key Issue 11 as follows:

i) 11.1 Under the terms of the settlement agreement the Claimants are entitled to recover the costs of working out the order subsequent to the date of the settlement agreement.

ii) 11.1.1 The cost of Leigh Day & Co's travel to, and accommodation in, the Cote d'Ivoire for the purpose of distribution is, in principle, recoverable. Counsel's travel and accommodation is, in principle, not recoverable. It is not clear why counsel's attendance was required.

iii) 11.1.2 The costs of verification, over-seeing and general administrative costs relating to the distribution process is only recoverable to the extent that it is properly fee earner's work, and reasonable and proportionate.

iv) 11.1.3 The costs of defending legal claims by CNVDT are not recoverable.

v) 11.1.4 The costs of negotiating and drafting agreements with CNVDT are not recoverable.

vi) 11.1.5 The question of security costs for Leigh & Co employees, counsel and Claimants is a matter which will have to be argued further.

vii) 11.1.6 Any bank costs are payable out of the settlement sum, in accordance with the settlement agreement.

viii) 11.2 It is not possible at this stage to deal with the proportionality of the costs associated with the distribution of the settlement sums, other than the global view, which I have already expressed, as to the proportionality of the costs of these proceedings.

385. I answer question 2.3.4 of Key Issue 2 Vetting Costs: subject to the answers given above, the Claimants are entitled to recover the costs of liaising with, and supervising, the local representatives to assist in the distribution of the settlement sums to the Claimants during September and October 2009.

12. Security, safety and associated costs while abroad

12.1 Are the Claimants entitled to recover the costs associated with (1) Leigh Day & Co's employees' and (2) counsel's security and safety abroad?

12.2 Are the Claimants entitled to recover the costs of Leigh Day & Co's employees' and counsel's travel and vaccinations?

12.2.1 Do the security costs have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

386. Mr Gibson and Mr Bacon addressed the issues of (12) Security, (17) Recruitment and (18) File Destruction in one compendious argument which I set out here. The Defendants' case is that the costs claimed under each of these heads are overhead expenses, not costs of the action, and the Defendants should not have to pay them.

Security

387. The cost of the safety of Leigh Day personnel abroad is an overhead cost included within the hourly rates, and is not a separately recoverable cost, any more than a firm of solicitors could charge separately for security staff monitoring its building on a daily basis. It was Leigh Day's choice to accept retainers from clients in Abidjan, and the costs that they now claim are part of their business expense in securing the conduct of this action. Similarly the cost of security issues arising out of the relationship with the local representatives cannot, in Mr Bacon's submission, be laid at the Defendant's door.

388. Mr Bacon argues that Leigh Day professes itself to be expert, and regularly involved in multi national global litigation. It has a formidable reputation in that area, and thus Mr Bacon argues it must have the resources and overhead capacity to accommodate that type of work, and to bear the attendant expenses of security and the like. The fact that the firm chooses, for commercial reasons, to undertake this type of work in difficult parts of the world, does not mean that those costs and expenses become recoverable legal costs against the paying party.

389. Although the Defendants argue that Leigh Day's hourly rates should be reduced, Mr Bacon argues that, nonetheless, the reduced rates would include the cost of security. Mr Bacon explains that the claim for costs covers such additional security as vaccinations and drivers, and if necessary armed guards. The Defendants' concern is about the mobility of Leigh Day's personnel around Abidjan, and the additional expense that has been caused.

390. The Defendants have argued that Leigh Day's hourly rate should be no more than the Central London Guideline Rates, but argue that Leigh Day's business model amply accommodates the potential additional expense of security. There is no justification for them forming an additional charge in the bill.

Recruitment

391. With regard to recruitment, training and education, Mr Bacon submits that the Claimants seek the costs of interviewing staff, arranging for potential interviews with paralegals, supervising and discussing recruitment details, all of which he says are internal overhead costs of the firm.

File Destruction

392. He uses similar arguments in respect of file destruction. With regard to the fact that it was a requirement of the settlement agreement that all documents disclosed by the Defendants should be returned or destroyed, he argues that the fact that one party is required to destroy files does not mean that the costs of doing so becomes recoverable. Solicitors do eventually destroy their files, and that is part of their overhead expense. There was no agreement by the Defendants that the cost of file destruction would be paid for as part of the costs of the action because they are not usually recoverable costs. It was open to Leigh Day to return the documents to the Defendants, but they chose to carry out the destruction themselves.

Claimants' Submissions

Security

393. In respect of security Mr Williams argues that the Ivory Coast is, and was, an unsafe environment, considered at the relevant time to be one of the most dangerous countries in the world. Thus security was clearly essential. Leigh Day, being a firm based in Clerkenwell, its ordinary overheads do not include hiring armed guards and the like. He submits that the additional costs of working under close protection in a foreign country is simply a special expense of that type of work, and it is recoverable on the same basis as the fees of translators or the cost of accommodation. If Mr Bacon's argument is correct that these costs and expenses are an overhead expense, Leigh Day's hourly rates would have risen accordingly. If this course were taken, the cost to the Defendants would be higher, as the increased hourly rates would themselves attract an element of profit and success fee.

Recruitment

394. The Claimants accept that the cost of recruiting staff is an overhead expense, as is pure training, ie, training staff generally in respect of systems where, in the course of training, the staff do no work which progresses the case. In Mr Williams' submission where staff perform work which does progress the case, even if there is a training element, the work is recoverable, as is the reasonable cost of supervising junior staff.

File Destruction

395. With regard to file destruction, Mr Williams argues that solicitors normally retain their documents for a period of at least six years. At the end of that period the entire file is destroyed with no need to analyse or index the contents. The Claimants accept that this would be a normal overhead expense. In this case, however, because of the requirement of Clause 37 of the settlement agreement, Leigh Day were required either to destroy or yield up all of the Defendants' disclosure, other than that which Leigh

Day needed to retain for professional record keeping obligations. Whether the material was to be destroyed or yielded up, it was necessary for Leigh Day to conduct an audit of its files and identify the material to which the order was directed. This involved an examination of over 2,300 files. It was not possible for Leigh Day simply to deliver up files to Macfarlanes, since the disclosed documents had been copied and spread through the files in instructions to counsel and to experts, and the alternative would have been to allow Macfarlanes to go through Leigh Day's privileged papers in order to remove the relevant material. The exercise which Leigh Day was required to undertake was not, in his submission, an exercise which would be covered by overheads. This was work done for the Defendants at their insistence, and was a mandatory part of the settlement agreement embodied in the Tomlin Order. It forms part of the costs of working out the order.

Conclusion

396. The decision which I have reached in relation to hourly rates does not reflect an additional element for the cost of security in the Ivory Coast, but rather, as Mr Williams submits, the overheads of a firm based in Clarkenwell. Had the hourly rates included an element for overseas security, I should have had to hear argument and details before arriving at a final figure. In the event, therefore, to the extent that it is reasonable and proportionate, the cost of security is recoverable.

397. I answer the questions in Key Issue 12 as follows:

i) 12.1 The Claimants are, in principle, entitled to recover the costs associated with the security and safety of Leigh Day & Co's employees and counsel whilst abroad.

ii) 12.2 Subject to the number of trips finally allowed, the Claimants are entitled to recover the cost of Leigh Day & Co's employees and counsel's travel and vaccinations.

iii) 12.2.1 It is not possible at this stage to deal with the proportionality of the costs of security and safety, other than the global view already expressed as to the proportionality of the costs of these proceedings.

13. Success Fee

13.1 Were Leigh Day & Co obliged to reconsider their risk assessment and success fee when (1) the CFAs were superseded or new CFAs were entered into and/or (2) after certain stages in the litigation?

13.2 Did the risk assessment(s) undertaken by Leigh Day & Co justify the success fee claimed?

13.3 What are the appropriate success fee(s) to apply in this case?

Defendants' Submissions

398. Both Solicitors and Counsel seek 100% success fees throughout. Of the eleven forms of CFAs identified by Mr Bacon only the first six are relevant to this issue. I

take the following information from paragraph 41 of the Defendants' skeleton argument dealing with success fees.

399. CFA1 was used in November 2006, ten Claimants were signed up.

400. CFA 2 was used in January 2007, 2030 Claimants signed.

401. CFA3 was used in February 2007, which is about the time when the settlement agreement between the Defendants and the Ivorian Government was reached, 500 Claimants signed.

i) in March 2007 a further 490 signed;

ii) in April 2007 a further 1,730 signed;

iii) in May 2007 a further 1,880 signed;

iv) in July 2007 a further 3,070 signed;

402. CFA 4 was used in October/November 2007, 2030 Claimants signed.

i) December 2007 a further 2,130 signed;

ii) March 2008 a further 2,350 Claimants signed;

iii) April/May 2008 a further 2,480 signed.

403. CFA 5 May/June 2008, 2,340 signed.

404. CFA 6, September 2008, this is about the time when agreement with the Defendants regarding duty of care/liability was reached, 2,380 signed.

i) October 2008, 2,409 signed;

ii) November 2008, 1,739;

iii) December 2008, 2,940;

iv) January 2009, 2,246.

405. The definition of "win", which was the same in every agreement, is:

> "You win your claim if you become finally entitled (whether by agreement, judgment or otherwise) to be paid any damages (including provisional damages) and/or all or part of the legal costs of your substantive claim."

406. Mr Bacon argues that the use of the phrase "entitlement to damages" is rather less than the usual definition, which refers to receipt of damages. Thus, he argues, that the risk has to be assessed on the chance of a Claimant becoming entitled to damages for minor injury, what the calls the lowest common denominator. He points out that once the Defendants had conceded that there was no need for the Claimants to prove breach of duty (see Consent Order 24 October 2008) Leigh Day claimed an

entitlement to costs, but in spite of that continued to enter into CFAs with 100% success fee.

407. Mr Bacon submits that there is a duty upon the Solicitors to consider the risk assessment afresh when a new CFA is entered into, and that the Solicitors must take into account changes of circumstance which affect the level of risk whenever any significant event occurs, such as the settlement between the Defendants and Ivorian Government in February 2007 (the Claimants were notified of this on 21 March 2007) and the Defendants' concession regarding breach of duty in October 2008. In fact the risk assessments remained the same throughout.

408. Mr Bacon also relies on Leigh Day's and Mr Day's expressions of confidence in the strength of the case throughout, including his expressions to potential ATE insurers that the case was "pretty straightforward", and that the firm was "pretty confident" that the claim would succeed, and that the case was "cracking" with an "excellent chance of succeeding". Mr Day was quoted in The Times on 4 June 2008, stating:

> "We would not be bringing the claims under the "no win no fee" scheme if we did not think we had a strong chance of winning."

409. All this, says Mr Bacon points to a case which had a far better than 50/50 chance of success.

410. Mr Bacon refers to an example of the risk assessment form, dated 22 November 2006. The assessment form sets out a summary of merits of the claim (positive and negative):

> "Positive:
>
> (a) The evidence we have suggests when the ship was stopped in Amsterdam waste was heavily toxic/combined with the reaction of the APS in increasing its fees dramatically;
>
> (b) this is supported by evidence we have re: the waste in Abidjan both from CIAPOL and the UNDAC Team;
>
> (c) we know that Tommy was only recently set up;
>
> (d) the deaths and injuries start pretty quickly afterwards;
>
> (e) the injuries seem to tie in to the type of injuries to be expected from this type of waste;
>
> (f) the London office of Trafigura seems to have been much involved in the whole process;
>
> Negative:
>
> (a) the company says its toxicology reports were negative;

(b) why was the ship not stopped in Amsterdam under Basel Convention;

(c) contractually the responsibility may have transferred to Tommy;

(d) it may be another part of Trafigura is the appropriate Defendant;

(e) could get into a forum battle – fact they have not served an acknowledgment of service is important – may be tied to their case re: Tommy in IC;

(f) difficulty of getting the evidence we need in a war-torn country where travel is very dangerous;

(g) number of cases of real concern – seems highly likely a lot of bandwagon jumping;

(h) criminal prosecutions are ongoing, which may slow down and hamper the civil litigation."

411. The assessment form then sets out the relevant risk factors as follows:

"(a) limitation 100%;

(b) breach of duty 80%;

(c) contributory negligence 100%;

(d) causation – medical 90%;

(e) causation – other 85%;

(f) failing to beat P36 %

(g) enforcement %

(h) other ? %

(i) forum 82.5%

(j) %

Total (a) x (b) x (c) x (d) …. = 50% = chance of winning."

412. Mr Hermer explains that a 100% risk factor meant a 0% chance of losing, so for breach of duty the risk of losing was 20%, medical causation 10%, other causation 15% and forum 17.5%. On this basis the success fee was set at 100%.

413. In connection with Mr Day's correspondence with First Assist, the ATE insurer, there is mention of Leigh Day "re-doing the risk assessment". It appears that neither side have a copy of that risk assessment. Mr Williams confirms that all risk assessments

have been disclosed. There are three risk assessments: the one I have referred to in November 2006; a second, which did not differ materially, in February 2007; and a third in April 2009 which referred only to the later CFAs which are not in issue.

414. By a letter of 29 September 2008, MarFarlanes made proposals "for the just and fair disposal of the real issues", stating:

> "2. Causation and quantum are the key issues which will determine whether the individual Claimants did suffer personal injury as alleged;
>
> 3. Without any admission of liability, and on the basis that the interests of the Claimant are not prejudiced; the issues of causation and quantum should, therefore, be the **only** issues which the court should ever be required to determine (without unnecessary time and cost being incurred on the duty of care, breach of foreseeability issues);"

415. Leigh Day's response dated 2 October 2008 was to ask the Defendants to concede that they were responsible for the Claimants' costs in respect of those issues, and to seek an interim payment on account of those costs of £2.5 million. Mr Bacon argues that this indicates that Leigh Day had formed the view that a win had been achieved under the terms of their CFAs.

416. Also by October 2008 Leigh Day were taking photographs of their clients for ID purposes, in order to assist the bank with compensation payout. Mr Bacon submits that by that time Leigh Day must have been confident that damages would be recovered for their clients. The risk assessment, however, had not altered. Mr Bacon submits that from the outset, and at the time when the first CFAs were entered into, Leigh Day viewed the case as having very good prospects of success, which he puts at 80% or more. On that basis the success fee should be no more than 25%.

417. Turning to Counsels' fees, Mr Bacon and Mr Gibson specifically withdrew the suggestion in Mr Nurney's witness statement that Counsel had grossly overstated and manipulated the risks.

418. Each one of the Counsel team claims a success fee of 100%. Their reasons are set out as part of the narrative to the generic bill. There are risk assessments from Lord Brennan QC, Robert Jay QC, Joe Smouha QC, Richard Hermer QC, David Goldstone QC and Alison Gerry. Most of these risk assessments are in general terms, for example:

> "novel environmental claim for toxic waste by a British ship in West Africa. Involves many issues of liability, applicable law, causation and individual cases."
>
> "… fabulously complex, both factually and legally … there is no doubt but that the Claimants will face a massive struggle to prove their claims in the face of powerful resourced and fearless opponents."

> "[The factors] identified in the schedule to instructing solicitors' conditional fee agreement."
>
> "This is a complicated legal and factual multi jurisdictional case … it will engage many of the difficulties of multi party litigation and concerns matters that arose in the Ivory Coast. Notwithstanding that the underlying merits of this case are strong and that the Claimant has a good case in respect of both primary liability and causation, the Defendants have denied every aspect of the claim in a detailed defence running into 90 pages. The Defendants have given every indication that they intend to fight every issue to trial."

419. Mr Bacon argues that, since Counsel, when instructed, would have little knowledge of the underlying factors, it was up to the Solicitors to inform them of the positive and negative aspects of the case. As I have quoted, one Counsel referred directly to Leigh Day's risk assessment. In Mr Bacon's submission whatever success fee is allowed to the Solicitors, should also be allowed in respect of Counsel.

420. Mr Bacon also makes the point that Leigh Day did not apply for legal aid, either in this jurisdiction or on the Ivory Coast. As I have indicated elsewhere, the decision not to proceed in the Ivory Coast was a reasonable one to have taken, and it follows from that, that deciding not to apply for legal aid on the Ivory Coast was also reasonable.

421. So far as applying for legal aid in this jurisdiction is concerned, Mr Day dismissed this on the basis that life was too short, but given that legal aid is not available for personal injury, it seems to me that such an application would have been doomed to failure. In any event it is difficult to see how, in the circumstances, the Solicitors could have satisfied the LSC's criteria for granting legal aid. In my judgment it was not a viable option.

Claimants' Submissions

422. Mr Hermer argues that it is essential to look at all the circumstances at the time when the risk assessment was actually made. In his submission, if, during the course of the litigation, risks and risk assessment change, then there is no need to carry out a formal additional risk assessment if one's overall assessment of the risk remains the same. Thus, if some factors appear to be less risky, others, eg, causation, may become more problematic, but it is not necessary to carry out a further risk assessment. This would only be necessary if the overall risks were significantly less. The Claimants' case is that although individual risks may have altered, the overall assessment of 50/50 remained appropriate.

423. At the time the original risk assessment was carried out, the Solicitors had to bear in mind that this case arose not only in a foreign country, but one of the world's most dangerous countries; it was obvious that conducting litigation in that country where the clients were situated, and also where the factual investigations would have to be carried out, was likely to be difficult and complicated. Mr Day had set out in his 17th witness statement the numerous problems which he foresaw, and which were likely to be thrown up during the course of the litigation. At the outset there was no accurate information as to the contents of the waste in the public domain, except in the most general terms.

The precise location of the waste was not known at the outset because it had been illicitly dumped. The Defendants were publicly asserting that the waste was no more than the usual waste created from tank washing. Another factor was the vigour with which the proceedings were likely to be defended. On 13 November 2006, Mr Day was served with proceedings for libel in respect of a press release. The final factor was that it was possible that a large number of Claimants might fail on the facts, a judgment which was, in Mr Hermer's submission, correct, since on 20 August 2009 Macfarlanes wrote:

> "We consider, simply based upon a detailed analysis of the lead Claimants' evidence and the Claimants' expert evidence that a substantial number of the lead Claimants will be unsuccessful in trial … We should make it absolutely clear that we consider the group has been inflated by a large number of Claimants who have no arguable basis for claiming, and by claiming in respect of symptoms which are exaggerated and misattributed to the slops."

424. In Mr Hermer's submission, as the action progressed the risks increased rather than deceased.

425. The defence which was served on 27 July 2007 ran to 90 pages, and was served together with hundreds of pages of annexes and requests. Both liability and causation were denied, and every aspect of the claim was put in issue. Various matters were said to be improperly pleaded, various passages in the Particulars of Claim needed to be struck out, and there had been various failures to comply with the GLO. The defence asserted that Abidjan had advanced port facilities, and that the unloading of the slops had been conducted properly and in accordance with the usual procedures. The local contractors, Compagnie Tommy were properly authorised and vouched for, and there was no reason for the Defendants to suspect that they would improperly dispose of the slops; breach of duty was denied. The Claimants were required to prove that all the symptoms were caused by exposure to the slops, were reasonably foreseeable and did not result from false reporting or pre-existing environmental/health conditions. The Defendants asserted that no test on the slops to date was sufficiently accurate and meaningful as to chemical composition, and that the samples taken to date could not be relied on. The release of mercaptans was not admitted, and the toxicity was denied. Even if the mercaptans were released at all, they would not have been released in volumes sufficient to injure human health. The defence continued denying breach of duty of care in nuisance and in negligence, and asserted that no proper case was established for causation. The general health of the population in Abidjan was relied on, and the area around the city was said to be already heavily polluted by agricultural and industrial effluent, pesticides and fertilizers. The defence asserted that any claims were extinguished by the compensation from the Government of the Ivory Coast which Trafigura had funded.

426. Mr Hermer argues that in spite of the Defendants' concession in respect of breach of duty, this did not result in the Claimants re-assessing their prospects at greater than 50% because of the issue of causation at both generic and individual levels, ie, was the waste capable of causing injuries to human beings? and secondly, if so, was the waste capable of causing injury to the particular individual? The Defendants did not give an inch in respect of these issues, and indeed settled on the basis of a denial of liability. Mr

Hermer states that causation was an extremely complicated and extremely difficult issue. He argues that the Defendants maintained their stance on causation to the very end, and that there was no hint of settlement until the letter of 20 August 2008 from Mr Nurney.

427. In the Defendants' response to the Claimants' request for further information, dated 30 July 2009, the Defendants maintained their position, that none of the lead Claimants had been exposed to concentrations of chemicals at sufficient levels, or for sufficient periods to have any detrimental effect, or cause any injury. The response denied that various symptoms could have been caused by exposure to the slops, even at higher rates of exposure, and for longer periods. The response also asserted that the symptoms did not occur, of if they did occur, they were mis-attributed or exaggerated. Finally, it is asserted that none of the lead Claimants were primary or secondary victims under any English law. The document also dealt individually with each lead Claimant, and denied every allegation of injury. On this basis Mr Hermer asserts that the risk assessment of a 50% chance of success was fully justified.

428. Mr Hermer also relies on the complexity of the expert evidence, and points out the stark dispute between the toxicologists on each side. The Claimants were at risk if their stance on the chemistry failed, and also at risk if their case on toxicology failed, even apart from having to prove causation at an individual level in respect of each lead Claimant.

429. With regard to Leigh Day obtaining photographs of Claimants, and issuing them with cards, this was not, says Mr Hermer, because they were confident of success, it was merely sensible forward thinking, applying their experience of group litigation, particularly in an under-developed country. It was sensible to have in place some preliminary steps for dealing with a potential settlement. Had these steps not been taken, it would have added months before the final agreement could have taken effect.

430. Mr Williams dealt with the meaning of "win", starting with the definition which I have quoted at paragraph 405 above. He suggests that Mr Bacon's point about the difference between entitlement to damages and receipt of damages is a distinction without a difference – I agree.

431. The CFA is so worded that, save in relation to disbursements, costs under the CFA are payable by the client only to the extent that they are recovered from the paying party. The provision with regard to disbursements provides an insurable interest for the ATE policy to bite on, but, so far as the Solicitors and Counsel are concerned, they only get paid to the extent that costs are recovered. The provision in the CFA which defines a win as including legal costs is so that Leigh Day would not be prevented, if the case was lost, from recovering costs, eg, of an interim application awarded in their favour. An additional risk run by Leigh Day was that even if they were successful in obtaining an award of damages for the Claimants, the trial Judge might well reduce the level of costs entitlement if one or more issues were lost, or, eg, some of the claims were found to have been exaggerated. A further risk was that of a successful Part 36 offer. In the event the Defendants did not make a Part 36 offer, but at the outset Leigh Day would not know whether such an offer would be made.

Conclusion

432. With regard to the suggestion that legal aid might have been available for this case, the Legal Services Commission's budget was severely limited in 2006/2007 (it is even more so now). No legal aid would have been granted unless the Claimants could meet the LSC's criteria, including the costs/benefit analysis. Given that the seat of this litigation was in Abidjan, and the Defendants' vigorous defence, I find it unlikely that legal aid would have been granted at all, or, if it had been, it would have been strictly controlled, and as the litigation progressed and the costs mounted, would ultimately have been withdrawn as the risks became too high for the Legal Aid Fund to bear. In my judgment, therefore, the suggestion that legal aid would have been available for these Claimants is not realistic, and Leigh Day acted properly in proceeding to represent the Claimants on CFAs with ATE insurance.

433. Mr Bacon accepts that the Claimants' assessment of 20% risk of losing breach of duty is accurate and entirely consistent with Mr Day's view at the time. Similarly, with the 10% risk in respect of medical causation, and 15% risk in respect of other causation. Mr Bacon suggests that the correct approach would be to take the 20%, 10% and 15% risks, add the three up, and divide by three, to get what he calls the "mean" risk. That cannot, in my view, be right and appears to ignore probability theory.

434. Mr Bacon produced the Defendants' experts' report relating to the ATE premium, which I have read. The Claimants indicated that their expert's report was not relevant to the issue of success fee. I have not derived any particular assistance from the Defendants' report in connection with this issue.

435. It is common ground between the parties that the correct starting point is the solicitors state of knowledge at the time the risk assessment was prepared. The appropriate test is what view would a reasonably careful solicitor have taken of the circumstances as they appeared to him at the time.

436. Mr Bacon accepts that the risk assessment of November 2006 is accurate. As to the assessed risk factors, he does not however accept that this leads to a 50.49% chance of winning, rather he seeks to average the risk factors (ignoring the forum risk altogether).

437. I accept both that the assessed risk factors are accurate as at November 2006, and that the way in which the 50% chance of winning has been arrived at is also a proper calculation. But I am not persuaded that it is correct to value the risk in cases in which the CFA is made at the outset of the dispute, without giving some discount for the possibility that the case might reach early settlement, whether or not the actual risks altered.

438. I do, however, accept Mr Bacon's argument that the risk assessment should have been re-appraised with each new version of the CFA used, and arguably with each new batch of Claimants signed up.

439. I do not accept Mr Hermer's submission that there was no need to carry out a re-appraisal, but accept his argument that the risk factors may move up and down.

440. Applying those decisions to the chronology of the case: the first CFA in November 2006 correctly indicated a 50% chance of winning. Once the acknowledgment of service had been served on 4 December 2006, the risk in respect of forum would have

gone. The chance of winning therefore increased to 61.2%. On 21 March 2007 the Defendants informed the Claimants of the settlement agreement between Trafigura and the Ivorian Government. This would, in my judgment, have reduced the breach of duty risk by 5%, increasing the chance of winning to 65%.

441. When the defence was served on 27 July 2007, it would have been apparent to Leigh Day that the Defendants were going all out to defend all aspects of the claim. In those circumstances the risks in respect of medical and other causation would, in my judgment, increase by 5% under each head, giving a 57.8% chance of winning. In April 2008 Leigh Day indicated to Macfarlanes that they expected to sign up a further 22,000 cases.

442. On 24 October 2008 a consent order was made which recorded that the court would not be required to determine the issues of existence of duty, breach and foreseeability, and that if any Claimant proved that he or she had sustained any personal injury of a type which would entitle to him or her to an award of damages under English law, and the injury was caused by exposure to the slops which were discharged from the *Probo Koala*, the Defendants (without admission of liability) would pay any damages recoverable under English law, subject to credit being given for payments made to the Claimant from the compensation fund established in the Cote d'Ivoire. This order removed the breach of duty risk factor, thus the chance of winning became 68%. It will thus be seen that during the course of the litigation the Claimants chance of winning gradually improved from 50% to 68%. This gives a range of success fees between 100% and 47%. It is clearly not possible in the context of group litigation to have salami slicing of success fees. For guidance as to the correct approach, it is necessary to turn to the judgment of the Court of Appeal (Lord Justice Brooke VP presiding) in *KU v Liverpool City Council* [2005] EWCA Civ 475. That case concerned the reasonableness of the success fee in a CFA, the case was a relatively low value tripping case, and the success fee claimed 100%. At first instance the District Judge had allowed the success fee at 100% initially, but 5% once the Defendant had filed its defence. On appeal His Honour Judge Stewart QC held that the District Judge had no power to do what he had done. Lord Justice Brooke, having referred to the requirement not to use hindsight, stated:

> "21. In October 2001 the claimant's solicitor would not have had access to the post-2001 evidence or other material cited in paragraphs 12-16 above. [Evidence from APIL and Liverpool City Council Litigation Unit.] When deciding upon a success fee he had two choices. He could have taken the view that this claim would probably settle without fuss at a reasonably early stage, but he wished to protect himself against the risk that the claim might go the full distance and might eventually fail. In those circumstances he could select the two-stage success fee discussed by this court in *Callery v Gray* [2001] EWCA 1117 at [106] – [112], [2001] 1 WLR 2112. In this situation he would be willing to restrict himself to a low success fee if the case settled within the protocol period – or within such other period, perhaps until the service of the defence,

> as he might choose – and to have the benefit of a high success fee for the cases that did not settle early. As things turned out, he would have benefited on the facts of this case if he had adopted this course: a high two-stage success fee would have been more readily defensible in a case which did not settle until proceedings were quite far advanced.
>
> 22. Alternatively, he could have selected, as he did in fact, a single-stage success fee, being a fee which he would seek to recover at the same level however quickly or slowly the claim was resolved. In those circumstances it would not be possible to justify so high a success fee.
>
> …
>
> 25. In our judgment an appropriate single-stage success fee [on the particular facts of the case] would have been 50% in this case. On the hypothesis that winning and losing claims are of equal weight, this would reflect a 2:1 chance of success. This, incidentally, represents a figure that is closer to the chances of success shown in the Pascoe Pleasance study … and is not inconsistent with the recent figures produced by the council's litigation unit, for what they are worth. ... We must stress that we do not yet possess sufficient empirical data to be sure that we are not understating the prospect of success. This is clearly an area in which the Civil Justice Council might have a valuable input to make, following consultation with interested parties and a fuller study of actual outcomes than has been available to us."

443. The third issue which the Court of Appeal had to decide was:

> "Given that differential rates are not permissible under the contract, does the court have the power, through para 11.8 (2) of the Costs Practice Direction or otherwise, to direct that a success fee is recoverable at different rates for different periods of the proceedings (including a detailed assessment of costs)?"

444. The court agreed with His Honour Judge Stewart that the District Judge did not have the power to do what he had done. Brooke LJ then referred to Section 58 of the Courts and Legal Services Act 1990, and concluded:

> "38. This language does not envisage a conditional fee agreement which contains two or more success fees, or a success fee which may subsequently waver upwards or downwards as the risks of the proceedings increase or are diminished.

…

> 49. It follows that the answer to the third issue is that the court has no power to direct that a success fee is recoverable at different rates for different periods of the proceedings. In so far as para 11.8(2) of the Costs Practice Direction suggests otherwise, it is wrong. [It has since been removed from the Practice Direction.]
>
> 50. We must add that the District Judge fell into error not only because he believed that the claimant's solicitor had the power and the duty to renegotiate the level of the success fee once the risks inherent in the proceedings had diminished, but also because he misunderstood what this court said about a two-stage success fee in *Callery v Gray*. In that case Lord Woolf CJ encouraged lawyers to take seriously the possibility of agreeing an initial success fee of, say 100%, on the basis that if the claim settled within the protocol period (or some other period identified by the parties to the CFA) a lower success fee would be recoverable under the CFA. At the assessment of costs attention would then be paid to the reasonableness of the success fee which was recoverable as things turned out, and as we have observed … this type of arrangement would lead to a greater chance of establishing the reasonableness of a higher success fee given that the claim did not settle within the agreed period."

445. Brooke LJ concluded:

> "57. … We end by reiterating that Costs Judges should be more willing to approve what appear to be high success fees in cases which have gone a long distance towards trial if the maker of the CFA has agreed that a much lower success fee should be payable if the claim settles at an early stage: see *Re Claims Direct Test Cases* [2003] EWCA Civ 136 at [101], [2003] 4 All ER 508 for an earlier exposition of this principle."

446. In this case the 100% success fee has been sought throughout. Mr Hermer's argument that the case became progressively more difficult is not borne out when the various influencing factors are applied to the initial risk assessment. In my judgment Leigh Day should have carried out further risk assessments as the case had progressed, and, had they done so, might have added further relevant risk factors. It seems to me, however, that I have to rely on the risk factors which were used in fact, and which are accepted as accurate by Mr Bacon. Had a staged success fee been used, it may well be that 100% could have been justified as the case approached trial, since although the Defendants conceded breach of duty in October 2008, they clearly intended to fight all aspects of causation very vigorously, and even when it came to settlement this was with a denial of liability.

447. In all the circumstances, what I have to do is arrive at a single success fee, as explained in *KU v Liverpool City Council*. That success fee will apply to all cases no matter when the CFA was signed, and will also apply to all Counsel.

448. In arriving at a figure for success fee I bear in mind the points in the litigation at which the various factors changed, and which I have set out above, and the fact that the majority of the Claimants were signed up after the halfway point of January 2008. In my judgment the correct single success fee for these proceedings is 58%.

449. The answers to the questions posed in Key Issue 13 are as follows:

i) 13.1(1) yes (2) yes

ii) 13.2 no

iii) 13.3 58% throughout in respect of both Solicitors and Counsel.

14. ATE Premium

14.1 Should Leigh Day & Co have obtained a staged policy, to reflect the change in risk over the course of the litigation?

14.2 What is the reasonable and proportionate premium to have paid for ATE insurance for the claims?

450. This issue is being argued separately, and will form the subject of a supplementary judgment.

15. Funding Costs and Liaising with Costs Draftsmen

15.1 Is the work undertaken by Leigh Day & Co, counsel, costs draftsmen and insurers in establishing and setting up (1) the conditional fee arrangements and (2) the insurance policy recoverable in principle?

15.2 If so, do the costs claimed in establishing and setting up (1) the conditional fee arrangements and (2) the insurance policy have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

451. The Defendants, relying on the Court of Appeal decision in *Hunt v Douglas Roofing* dated 18 November 1987, assert that funding costs are not recoverable from the Defendants. This work is described as work undertaken by Leigh Day & Co, counsel, costs draftsmen and insurers in establishing and setting up the CFAs and the ATE policy.

452. The actual issue which the Court of Appeal decided in *Hunt* was whether:

> "the on cost of funding disbursements during the currency of the action, based on (a) overdraft rates at the National

> Westminster Bank; (b) loss of interest based on interest rates at the National Westminster Bank deposit accounts"

was recoverable. Lord Justice Purchas stated (page 1C):

> "The concept is both simple and novel in the sense that although it could have been an item claimed in almost every bill of costs for over a century, so far as the court knows, such an item has never been claimed before. It is simple in that it depends upon an established item of disbursement cost or expense, to which I shall refer as "the base cost" , within the meaning of RSC O.62, r.28(2) but takes into account the cost of funding the expense between the time the expense was incurred and the date when the order for costs becomes effective. For the purposes of the appeal it matters not whether this represents the cost of raising the money if the money is not in hand, or the loss of the use of the money if the money is in hand but has to be diverted to meeting the disbursement, cost or expense involved. For the sake of brevity I propose to use the expression "funding cost" to cover both aspects."

453. Having indicated that he would find in favour of the Respondent, Purchas J stated at page 21G:

> "Also much that was said in the judgments in the *London Scottish* case supports this view. [ie, rejecting the Appellant's case] In this case a strong court delivered closely reasoned judgments which still have great relevance and force today. Furthermore, I am impressed by the argument that the right to recover costs only arises when in the exercise of its discretion the court makes an order under its statutory powers. In exercising that discretion there is no duty imposed upon the court to award party and party costs on an indemnity basis and by established practice and custom funding costs have never been included in the category of expenses, costs or disbursements envisaged by the statute and RSC O.62. To include them would constitute an extension of the existing category of "legal costs" which is not, under the prevailing circumstances, warranted. Accordingly I would dismiss this appeal."

454. Lord Justice Croom-Johnson, agreeing with the decision, stated (page 23E):

> "I do not find that either of the suggested methods of addition to the bill is "costs" or "expenses" within the Order."

455. Lord Justice Nourse, who also agreed, stated (page 23F):

> "Counsel's citation of numerous authorities which do not touch the question in issue has confirmed my opinion that our decision must be governed by elementary principles of

> substantive and procedural law. I am in no doubt that the appellant's case, however desirable its ends may be, could only have succeeded if legislative intervention in this area had been more extensive than it has.
>
> …
>
> There can be no obligation to pay costs, and therefore no obligation to pay interest, properly so-called, before an order to pay them has been made. That means that the claim can only be one for quasi-interest extending over the period between the date on which the costs are incurred by the claimant and the date of the order for their reimbursement, a species of claim against which the common law has often reluctantly, but almost always consistently, set its face; see *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429.
>
> Alternatively, I would agree that the sums claimed are not "legal costs" within the authorities to which Purchas LJ has referred."

456. Mr Bacon's argument is that the decision in *Hunt* applies to what he calls the set-up costs of the funding arrangements, and covers the dialogue between the solicitor and client about funding, in other words the group meetings where the CFAs were explained, and also arranging the funding and the ATE insurance. What he calls the CFA briefing is not, he says, a recoverable cost, but a funding cost. He also objects to the fact that there is a generic cost claim for giving a CFA briefing to some 40 clients, and at the same time in 40 individual bills there is another claim for what is assumed to be the same briefing. He also says that preparation of the risk assessment is not recoverable.

457. With regard to *Hunt*, Mr Bacon acknowledges that it was a claim for the costs of interest on funding to support and finance the case. He argues that the principle is the same in the context of the costs of a client putting in place arrangements to fund his action. Mr Bacon also refers to my decision in *Re: Claims Direct Cases*, where I stated at [171]:

> "It has long been held that the cost of funding litigation is not a recoverable cost as between the parties:"

and then quoted Lord Justice Purchas in *Hunt*. The issue I was considering at that point was:

> "Is the sum payable by a claimant properly to be regarded as a premium within the meaning of Section 29 of the Access to Justice Act 1999?"

458. It is not clear to me how it is suggested that my agreement with, and quoting of, Purchas LJ in *Hunt* advances the argument in this case. Mr Bacon took me to a

number of decisions at Circuit Judge, Costs Judge and District Judge level, which had decided matters in differing ways, and, in the case of one Judge, in opposite ways.

459. Mr Bacon argues that the costs associated with setting up the CFAs and ATE insurance are akin to legal aid only costs when a solicitor is representing an assisted person, such costs are not payable by a paying party.

Claimants' Submissions

460. Mr Williams seeks to start from first principles, namely that Parliament has said that success fees and after the event insurance premiums are recoverable. The success fees and premiums are themselves the cost of funding the claim, the success fee being the price or surcharge payable to the solicitor for taking the financial risk that the litigation may be lost. He argues that, since Parliament has made these elements recoverable, they fall outside the principle enunciated in *Hunt*. Mr Williams argues that the purpose of allowing the recovery of success fees and ATE premiums was explicitly to increase access to justice by the impecunious, and it would, in his submission, be surprising if such people, having been provided with access to justice, should run the risk of having their damages eroded by being unable to recover the reasonable costs of putting their CFAs and after the event insurance in place. Mr Williams argues that the cost of setting up and explaining the CFAs, and arranging the ATE insurance, are costs, in that they are charges for the solicitor's time, and thus fall within the ordinary definition of costs. The Claimants do not seek to charge the cost of the various CFAs being drafted by counsel, since it is accepted that the solicitor cannot charge his client for drafting his own terms of business. This is not part of the solicitor's overheads, nor is it part of the client's cost of funding.

461. In relation to *Hunt v Douglas Roofing*, Mr Williams argues that what was being claimed was not the costs of the solicitor, it was the cost to the client, and it did not form a recognised head of legal costs. In addition, Mr Williams argues that Parliament has amended the Judgments Act to enable the court to award interest on costs from the point at which they were expended, so that now interest on costs is recoverable, usually at 1% above base rate from the point at which the particular disbursement was paid.

462. Not only is the amount claimed an item of costs, since it relates to work being done by the solicitor, but it is also costs of the claim incurred by the Claimants because they needed to bring the litigation.

Conclusion

463. It seems to me that Mr Williams' arguments are good ones, and I accept them. *Hunt v Douglas Roofing* was, as is clear from the extracts from the judgment which I have already quoted, to do with the on-cost of funding disbursements, that is the actual cost to the client of funding the litigation, either by raising money from the bank, and therefore having to pay interest on it, or by using available money and being unable to utilise that money elsewhere to earn interest. The costs of litigation belong to the client, not to the solicitor, thus in *Hunt* it was not the solicitor who had done work for which he was not to be paid, but the client who was losing interest on the money paid to the solicitors. In this case the clients are not standing out of any money, but Leigh Day have quite properly had to explain the workings of conditional fee agreements

and after the event insurance. In my judgment that is work properly undertaken by the solicitors, for which they are entitled to charge. Under the key issue of vetting, I have dealt with the retrospectivity of the various CFAs. There would appear to be no difficulty with an agreement which runs "from the date you first instructed us", but in respect of an agreement which states that it runs "from the date of this agreement", that would include the meeting with the client immediately prior to the signing of the CFA during which the CFA explanation was given, and the client finally signed the agreement.

464. With regard to Mr Bacon's suggestion that the costs associated with setting up the CFAs and ATE insurance are akin to legal aid only costs, I do not accept that argument, since in a legal aid case the costs actually belong to the legal representative, not to the client, thus the work done by the solicitor is done to ensure that the requirements of the LSC are complied with. That is clearly not something which a paying party should have to pay for.

465. In a case run on a CFA with ATE insurance, the paying party becomes liable to pay not only the base costs, but also the success fee and ATE premium, items of costs which, without the intervention of statute, would themselves be irrecoverable.

466. I accordingly answer the questions in Key Issue 15 as follows:

i) 15.1 (1) yes (2) yes.

ii) 15.2 It is not possible at this stage to deal with the proportionality of the costs claimed in establishing and setting up the CFA agreements and the ATE insurance policy, other than the global view which I have already expressed as to the proportionality of the costs of these proceedings.

16. Hourly Rates

16.1 What hourly rates are reasonable and proportionate for all levels of Leigh Day & Co's fee earners – partners, solicitors, "legal officers" and para-legals?

16.2 Do (1) the allocation of tasks between para-legals, legal officers and solicitors and (2) the resulting costs of investigating and managing the claims have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submissions

467. The hourly rates sought by the Claimants are a follows:

Status of fee earner	Hourly rate up to 30.9.07	Hourly rate 1.10.07 – 30.9.08	Hourly rate 1.10.08 onwards
Grade A partner	395	420	450

Grade B solicitor	230	240/295	255/310
Grade C Legal officer	230	240	255
Grade D Para-legal	145	145	150

468. The Defendants' case is that the rates claimed are in excess of the Guideline Hourly Rates for the City of London, and should not exceed the rates for Central London.

469. Another aspect of the Defendants' case is in respect of what Leigh Day & Co refer to as legal officers, that is employees who are charged at the grade C rate. Mr Bacon asserts that the legal officers undertook some 51% of the work. There were apparently 14 such legal officers.

470. Mr Bacon also takes exception to the type of work being undertaken by these fee earners, which he typifies as being either grade D work or non fee earner work.

471. The Claimants have charged for the work done by their costs draftsmen at the rate of £255 per hour. Mr Bacon argues that the costs draftsmen should be paid at no more than the grade D rate.

Claimants' Submissions

472. Relying on the acceptance by Mr Bacon that it was reasonable for the Claimants to have instructed Leigh Day, Mr Williams' argument centres on why, given the particular circumstances and difficulties of this case, it should not be reasonable for Leigh Day to seek enhanced hourly rates for the work which they have done. He points to Mr Day's expertise and experience in all forms of group litigation, particularly group litigation with an international flavour. In this case there were peculiar difficulties because of the location of the incident, and the nature of the people that Leigh Day were having to deal with. In his submission this was a complex group action, and it was entirely reasonable for Leigh Day to be instructed.

473. Although Leigh Day's office is in EC1, Mr Williams does not attempt to compare the firm with the large commercial firms of the City, and makes the point that those firms would not have undertaken the case for the rates which Leigh Day now seek. He points out that the rate agreed with Trafigura by Macfarlanes for 2008 was £480 per hour for a grade A partner, £280 per hour for a grade C and £160 per hour for a grade D trainee.

474. Mr Williams does not argue that the type of work being undertaken by Leigh Day was City work, in the sense of being high value company or commercial work. He does, however, make the point that this case is not straightforward personal injury work, but group litigation with an international dimension. He likens the action to a dispute in the TCC or Commercial Court. He suggests that the fact that the work had to be undertaken in the Ivory Coast was an exceptional feature which commands a premium. Staff were working away from their families for prolonged periods, they had heavy work patterns, their leisure time was highly curtailed, and they were having to work in a very unsafe environment.

475. Mr Williams points out that in the Points of Dispute the Defendants refer to the Guideline Hourly Rates, but accept that they are no more than guidelines, and suggest:

> "this is not a case where the guideline rates deserve to be substantially increased, at least not for the more junior fee earners".

476. Mr Williams suggests, in relation to legal officers, that if some grade D staff are singled out for "truly exceptional responsibility", their rates call for an uplift above other grade D staff who do not have those special responsibilities.

477. Both in Mr Nurney's witness statement, and in Mr Bacon's submission, the Defendants have referred, on a number of occasions, to a quotation from a Leigh Day attendance note:

> "GPS recorded excessive distance to site so informed villagers that they must attend other sites if they cannot prove serious illness."

The inference being that potential Claimants were being urged to put forward claims which could not be substantiated. Mr Williams produces the actual attendance note, from which it is clear that the Defendants have quite simply mis-quoted, the relevant passage reads "… if they can prove serious illness". The "site" referred to is the site where Leigh Day are going to hold a meeting.

Conclusion

478. Mr Bacon accepts that it was reasonable for Leigh Day & Co to be instructed, but takes issue with the claim for hourly rates, which is, for the most part, higher that the guideline hourly rates for the City of London. His argument is that no more than the Central London guideline rates should be allowed.

479. The four grades of fee earner recognised in the Guide to the Summary Assessment of Costs are as follows:

> "A. Solicitors with over 8 years post qualification experience including at least 8 years litigation experience.
>
> B. Solicitors and legal executives with over 4 years post qualification experience including at least 4 years litigation experience.
>
> C. Other solicitors and legal executives and fee earners of equivalent experience.
>
> D. Trainee Solicitors, para legals and fee earners of equivalent experience."

The Guide notes that:

> "legal executive" means a Fellow of the Institute of Legal Executives."

The Guide also notes:

> "An hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners in substantial and complex litigation where other factors, including the value of the litigation, the level of complexity, the urgency or importance of the matter as well as any international element would justify a significantly higher rate to reflect higher average costs."

480. I have no doubt in this case that Mr Day has taken responsibility for this litigation at great personal financial risk to himself, and financial risk to his firm generally. In my view it is also necessary to take into account the inevitable increase in overheads that will be incurred by having to employ people to work in dangerous conditions overseas.

481. In arriving at the appropriate hourly rate, I also bear in mind that the Defendants' rates charged to their own clients are significantly higher than the rates sought by Leigh Day & Co. Having said that, I also recognise that Macfarlanes' overheads will be significantly greater than those of Leigh Day & Co.

482. Taking those factors into account, I allow the grade A partner rate as claimed; in respect of the grade B solicitors I allow up to 30 September 2007 - £230, 30 September - £260, 1 October 2008 onwards £280; grade C - £200, £220, £240; grade D - £125, £135, £135.

483. Mr Bacon spent some time discussing the particular grade of the legal officers, and the nature of the work which they had undertaken. The grade of the legal officers will be grade C or grade D, depending on their "equivalent experience". As to the work undertaken by the legal officers, this is only chargeable if it is fee earners work. Fee earners work is work done in respect of which a charge would normally be made to the client. Non fee earners work is not payable by the Defendants.

484. Work done which did not warrant the attention of a higher grade fee earner will only be allowed at the rate appropriate for the work being done. Although Mr Bacon went into some detail as to the nature of the work being undertaken by the legal officers, I indicated during the hearing that I would not descend into the detail of the case, which is a matter for the detailed assessment hearing itself.

485. The final matter raised by Mr Bacon was the rate payable to the costs draftsmen. He suggested this should be the grade D rate, and criticised the various mistakes which had been thrown up in the way in which the bill had been drawn. I have no details of the number of costs draftsmen involved, but am aware that Mr Ellis, who is a very experienced costs draftsman, has been in court throughout the hearing. I would expect Mr Ellis to be charged at the grade C rate, and for other more junior costs draftsmen to be charged at the grade D rate. This is a matter which may have to be argued further when the details of the costs draftsmen's involvement are known.

486. The answer to the questions in Key Issue 16 are:

i) 16.1 The hourly rates which are reasonable and proportionate for all levels of Leigh Day & Co's fee earners are as follows: grade A partner rate as claimed; grade B solicitors up to 30 September 2007 - £230, 30 September 2008 - £260, 1 October 2008 onwards £280; grade C - £200, £220, £240; grade D - £125, £135, 135.

ii) 16.2 For the reasons I have given it is not possible at this stage to deal with the allocation of tasks between the various grades of fee earner, or to form any view, other than the global view which I have already expressed, as to the proportionality of the costs of investigating and managing the claims.

17. Recruitment, Training and Education

17.1 Are the Claimants entitled to recover the costs associated with:

17.1.1 recruitment;

17.1.2 training; and

17.1.3 education of any Leigh Day & Co's employees or individuals for whom they have claimed costs (whether in the UK and/or the Ivory Coast, and/or elsewhere)?

17.1.4 Do the costs associated with such recruitment, training and education have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

487. The Defendants' and Claimants' submissions relating to this topic are set out at paragraph 386 and following.

Conclusion

488. The Claimants have accepted that the cost of recruiting and training staff is an overhead expense not recoverable from the Defendants. With regard to Mr Williams' submission that the staff may have performed work progressing the case which contains a training element, that is a matter which will have to be argued further. I answer the questions raised in Key Issue 17 as follows:

i) 17.1 The Claimants are not entitled to recover the costs associated with recruitment and training of staff, nor the education of Leigh Day's employees. To the extent that trainees may have undertaken work which progressed the action, the issue will have to be argued further.

ii) 17.1.4 It is not possible at this stage to deal with the proportionality of the costs associated with recruitment, training and education, other than the global view, which I have already expressed, as to the proportionality of the costs of these proceedings.

18. File Destruction

18.1 Are the Claimants entitled to recover the costs associated with the destruction and/or filing of (1) Leigh Day & Co's and (2) experts' documents and material relating to the case?

18.2 Do the costs associated with destruction and/or filing have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

489. The Defendants' and Claimants' submissions relating to this topic are set out at paragraph 386 and following.

Conclusion

490. Although it would be normal for solicitors to destroy their papers after six years, in this case I accept Mr Williams' submission that, in order to comply with Clause 37 of the settlement agreement, Leigh Day was required either to destroy, or hand back to the Defendants, their documents. This involved an examination of over 2,300 files. Mr Bacon's suggestion, that the files would have to be destroyed eventually in any event, is, in my judgment, too simplistic, and the Claimants are accordingly entitled to their reasonable costs of carrying out this work.

491. I answer the questions set out in Key Issue 18 as follows:

i) 18.1 The Claimants are entitled to recover the costs associated with the destruction and/or filing of Leigh Day & Co's and experts' documents and material relating to the case.

ii) 18.2 It is not possible at this stage to deal with the proportionality of the costs associated with destruction and/or filing, save the global view, which I have already expressed, as to the proportionality of the costs of these proceedings.

19. Data Entry

19.1 Are the Claimants entitled to recover the costs associated with the inputting of Claimant data into the data management system (including training costs)?

19.2 Do the costs associated with data entry have the appearance of being disproportionate in the light of the nature of the claims and the quantum of the claims?

Defendants' Submission

492. The Defendants' position is that the Claimants are not entitled to recover the costs of and associated with the inputting of data into the management system, because it was not fee earners' work. The fact that fee earners were employed to do it being irrelevant. In any event the data lacked integrity and value, being the results of the questionnaires which had been drafted by Leigh Day and completed by the Claimants with the assistance of local representatives, or members of their families and friends.

The same criticisms are made of the Medico Legal Reports. In addition, the checking and cross-checking of this data, against other data, is said to be unnecessary and not recoverable. The costs claimed in respect of data entry also cover data entry relating to settlement and distribution, which is the subject of a separate issue, but similar arguments apply.

Claimants' Submissions

493. The narrative to the individual bills sets out the work of data entry in some detail. The work done in London included basic entering of details, matching litigation friend certificates, evidence checking (there were three categories of evidence: category 1 where the Claimant was said to be on the Government list; category 2 where the Claimant was said to have consulted a mobile medical unit; and category 3 where the Claimant was said to have visited a private clinic). Evidence checking involved a considerable amount of work. A further topic was "problematic evidence caused by administrative errors and inaccurate spelling of names, ages and districts". This involved reviewing the first and second group problematic evidence, reviewing files and considering supplementary information provided by the Claimant, mapping and problematic mapping, data entry, calling Claimants, emailing representatives, checking and registration. Mr Williams submits that it is not possible to resolve the issues which arise under this head, other than by way of detailed assessment. He says that "data entry" is a convenient label, but actually refers to important work being carried out by fee earners, which could not properly be carried out by non fee earners.

494. The Claimants had to comply with clauses 15 to 18 of the GLO, and claims could only be entered on the register if they fulfilled the criteria set out in the GLO. Once the claim was entered on the register there was a requirement to serve a schedule containing 18 different items of information. The original information was in French, and it therefore had to be translated and assessed before the Claimant could properly be added to the register.

495. Mr Williams submits that the person who was conducting the collation of the medical evidence for data entry needed to be able to read and render from French to English the documents, which included documents involving medical terminology, the names of drugs and prescriptions. He also submits that the cost of following up medical reports to clarify points is more than off-set by the much lower headline costs of obtaining the reports from the doctors in Abidjan.

Conclusion

496. The topic of data entry is bound up with the Defendants' arguments in relation to proportionality, vetting costs and the pre-action protocol, and this conclusion should be read in conjunction with my decisions under those issues. I agree with Mr Williams' submission that it is not possible to resolve the issue, other than by way of detailed assessment. In principle, to the extent that the work done is not fee earner's work, it is not recoverable.

497. I answer the questions raised in Key Issue 19 as follows:

i) 19.1 The Claimants are only entitled to recover the costs associated with inputting Claimant data into the data management system (including training costs), to the extent that it is properly fee earner's work.

ii) 19.2 It is not possible at this stage to deal with the proportionality of the costs associated with data entry, other than the global view I have already expressed as to the proportionality of the costs of the proceedings.

20. Sampling of the bills

20.1 Is the basis on which Leigh Day & Co selected their sample individual cases appropriate?

20.2 If not, on what basis should the sample cases be selected?

498. It was agreed between the parties during the course of the hearing that it was not appropriate to attempt to argue this issue. Mr Hermer suggested, and Mr Bacon agreed, that if mediation is not successful the parties could come back before me to seek further directions, including directing the costs draftsman to sit down together and try to work out a sensible way forward.

21. Circular / Generic Letters / Mail merge

21.1 What is the appropriate sum to allow for generic/circular letters including client care letters, update letters and mission advice letters?

Defendants' Submissions

499. The Defendants rely on the submissions which they have made under other key issues relating to circular letters. They calculate that 29,614 client care letters, 115,495 Claimant update letters and 150,735 Claimant mission advice letters were sent. These figures have been extrapolated from the 392 sample individual bills provided by the Claimants. The Defendants' case is that circular letters should be disallowed as being unnecessary and unreasonable, because Leigh Day were communicating effectively through the personal representatives. All the information that the Claimants required in the first instance was the CFA letter, but thereafter it was pointless sending them large numbers of letters; many were illiterate and the Claimants spoke many different dialects. Mr Bacon submits that enough is claimed in the generic bill to cover whatever costs are allowable in respect of circular letters, and there should be no need for any further separate charge in individual bills.

Claimants' Submissions

500. Mr Hermer submits that Leigh Day felt it important to keep the clients informed throughout, and they treated their clients with the same respect as if they had been clients in this jurisdiction.

501. He confirms the concession that the appropriate rate for circular letters should be one third of a unit, rather than one half.

Conclusion

502. Given the nature of the Claimants, in my judgment it was not reasonable for Leigh Day to send individual letters to every Claimant on every occasion. I take the view that it would be appropriate to send the initial client care letter to each Claimant, and also the letter explaining the proposed terms of settlement. Letters which were purely updating the Claimants did not need to be sent to every individual.

503. The client care letter, and the settlement explanatory letter, would be handed personally to each Claimant at meetings with Leigh Day paralegals in Abidjan. All other letters should, in my view, have been sent only to the local representatives, who could then have had them photocopied to the extent necessary to give the letters to those who could read. The updating information could sensibly be transmitted at meetings held by the local representatives.

504. The costs involved in circular letters, would therefore be the original cost of drafting the particular letter, plus copies at one third of a unit for each local representative, and to the extent that local representatives had those letters photocopied, the cost of photocopying. I answer the question raised in Key Issue 21 as follows:

i) 21.1 The appropriate sum to allow for generic/circular letters, including client care letters, update letters and mission advice letters is the original cost of drafting each letter, plus one third of a unit for each Claimant in respect of client care letters and settlement letters; one third of a unit in respect of all other letters for each of the local representatives, plus the cost of photocopying in Abidjan where necessary.

22. Merged hourly Rates

22.1 Is the merged hourly rate claimed in respect of "Mission Trips" on individual bills a reasonable and proportionate rate?

Defendants' Submissions

505. Leigh Day have claimed merged hourly rates in respect of their mission trips, whilst in the narrative to the bills it is stated that all work was carried out by para-legals unless otherwise stated. Mr Bacon asserts that because Leigh Day do not know which of the fee earners did what work, and who attended upon whom on the mission trips, they have merged the hourly rates and charged a single rate for the mission trips. The Defendants' case is that all the work of the mission trips on the individual bills should be at the para-legal rate. The fact that Mr Day was present on the mission trip should not, in Mr Bacon's submission, mean that a merged rate should be payable. Mr Day's time is claimed in the generic bills. Mr Bacon submits that the time allowed in respect of individual bills should be based on the time actually spent by the fee earner. He accepted that the time spent could be treated as a generic cost, rather than being divided up between all the individual bills. The result of using merged rates is that it effectively increases the rate charged for para-legals by a significant factor.

Claimants' Submissions

506. Mr Williams argues that the question is whether the rate claimed is reasonable and proportionate. The rate claimed as a merged hourly rate is a mean, thus if five para-legals and one solicitor were on a mission trip, the rate claimed was not the average of the two rates, but a rate composed of five parts para-legal rate and one part solicitor rate. He submits that supervision of the para-legals was necessary, both professionally and because of the location where the work was being carried out. Cases, particularly group litigation cases, constantly throw up complex issues, such as having to appoint litigation friends, or having to find out whether there is a successor to a claim, should, for any reason, a Claimant have died. Mr Williams submits that the partner time claimed is limited, and it was only in respect of the September 2009 trip, to take instructions about settlement, that Mr Day played a large part. That trip is also charged at merged rates.

507. Mr Williams denies that Mr Day's, or any other partner's time, is charged additionally in the generic bill.

Conclusion

508. It seems to me that the use of merged hourly rates has come about because those drawing the individual and generic bills have not found it possible to allocate specific fee earner times to specific clients. I raised with both Mr Bacon and Mr Williams during the course of argument whether the sensible approach would be to ascertain the actual number and grade of fee earners who were on the mission trip, to calculate the time they spent working, and to charge that time at their respective hourly rates in the generic bill. Both agreed that this was a possibility, and neither raised any objection to that proposition.

509. It would, of course, be possible then to divide the time spent by each fee earner between all the individual bills, but this would seem to me to be an enormously time consuming task, which would not actually achieve greater clarity.

510. In my judgment, therefore, the mission trips should be claimed in the generic bill in respect of each fee earner attending at his or her respective rate. This still leaves open the opportunity to the Defendants to argue that the number of fee earners involved, or the time spent, was unreasonable.

511. I answer the question in Key Issue 22 as follows:

i) 22.1 It is not possible to decide whether the hourly rate claimed in respect of mission trips on individual bills is a reasonable and proportionate rate. The cost of mission trips should be claimed in the generic bill, indicating the grade of fee earner who attended, the particular rate claimed for that fee earner and the time spent.