Neutral Citation Number: [2009] EWHC 1696 (Ch)

Case No: HC03C02596

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2009

Before :
MR JUSTICE BRIGGS

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Between:

(1) THE BANK OF TOKYO-MITSUBISHI UFJ, LTD
(2) KBC BANK N.V.

Claimants

- and -

(1) BAŞKAN GIDA SANAYI VE PAZARLAMA A.S.
(2) AHMET BAŞKAN
(3) CEVAT BAŞKAN
(4) ISMET BAŞKAN
(5) MELIH BAŞKAN
(6) AKSU GIDA SANAYI VE TICARET LIMITED
(7) INDO MEDITERRANEAN COMMODITIES LIMITED
(8) FERRERO INDUSTRIAL SERVICES G.E.I.E.
(9) FERRERO S.p.A
(10) FERRERO OHGMBH
(11) FERRERO FRANCE S.A.
(12) SHABBIR ABIDALI
(13) ALANVAR ESTABLISHMENT
(an Establishment founded under Liechtenstein law)
(14) RIDGEBEACH LIMITED

Defendants

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Mr John Wardell QC and Mr Alexander Winter (instructed by **Forsters LLP, 31 Hill Street, London W1J 5LS**) for the Claimants
Mr Nicholas Strauss QC, Mr James Goldsmith and Mr Alexander Polley (instructed by **Barlow Lyde & Gilbert LLP, Beaufort House, 15 St Botolph Street, London EC3A 7NJ**) for the Ferrero Defendants
Mr Raymond Werbicki (instructed by **Steptoe & Johnson, 99 Gresham Street, London EC2V 7NG)** for the 12th Defendant
Hearing dates: 29th June – 1st July 2009

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Judgment

Mr Justice Briggs:

1. On 11th June 2009 I handed down the judgment ("the main judgment") following the trial of this case. Matters arising from that judgment were adjourned for a further hearing, which took place over three days from 29th June 2009. This is my judgment in relation to one of those matters arising, namely costs. It is written on the assumption that the reader will already have acquired a working understanding of the case from the main judgment, including the definitions therein contained.

Costs

The law

2. The court's discretion in relation to costs is now regulated by CPR Part 44.3, the relevant provisions of which for present purposes are as follows:

> "(1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
> (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
> (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
> (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
>
> (6) The orders which the court may make under this rule include an order that a party must pay –
> (a) a proportion of another party's costs;
> (b) a stated amount in respect of another party's costs;
> (c) costs from or until a certain date only;
> (d) costs incurred before proceedings have begun;
> (e) costs relating to particular steps taken in the proceedings;
> (f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

3. In addition, Part 44.4 provides as follows in relation to the basis of assessment:

"(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.
…

(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.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where –
(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis."

4. Besides taking due account of the specific provisions of Part 44, the court must in framing an appropriate order for costs bear constantly in mind the need to comply with the overriding objective, that is to deal with cases justly. That objective informs both the interpretation of Part 44 and the exercise of the court's powers which that Part confers: see CPR Part 1.2.

5. An important explanation of the thinking behind the new costs regime in the CPR was provided by Lord Woolf himself in Phonographic Performance Ltd v. AEI Rediffusion Music Ltd [1999] 1 WLR 1507 at 1522-3 as follows:

"The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the

> new Rules are reflecting a change of practice which has already started. It is now clear that a too robust application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

6. The particular issues of principle to which sustained argument has been addressed in relation to costs arising from this extremely heavy litigation may be summarised as follows:

   i) What are the principles by reference to which conduct consisting of the deliberate pursuit of a case known to be false about a central issue in the litigation should be reflected in an order for costs?

   ii) In particular, is the general rule in Part 44.3(2) that the unsuccessful party will be ordered to pay the costs of the successful party displaced in a case where conduct of that kind by the successful party is proved?

   iii) Is conduct before the commencement of proceedings relevant to costs only if causative either of the bringing of an unsuccessful claim, or of increased cost in the litigation?

   iv) Is the imposition of the indemnity basis of assessment (in a case where allegations of the utmost seriousness have been pursued unsuccessfully) nonetheless dependant upon a conclusion that those allegations were pursued unreasonably?

7. These issues of principle arise because, in a nutshell:

   i) the Ferrero Defendants have been entirely successful in defending the Banks' claims against them;

   ii) nonetheless Ferrero decided to advance a case in relation to important aspects of the claim which it knew to be false, and supported that case by deliberately untruthful evidence from its three main witnesses, who had been its three most senior employees responsible for the conduct of its relationship with the Başkans at the material time;

   iii) Ferrero claims that large parts of the case advanced by the Banks, including allegations of fraudulent conspiracy, were unreasonably brought and pursued, so that Ferrero should obtain an order for costs on an indemnity basis; but

   iv) the Banks claim that it was reasonable for them to pursue those claims because of the misconduct, including lies, of Ferrero both prior to the commencement of, and during, this litigation. By contrast, Ferrero maintains that its pre-action conduct had no causative effect on the bringing of the Banks' claim, and that its conduct during the litigation had limited causative effect in terms of increased cost.

8. I shall take the first two issues of principle together. It is common ground that the deliberate pursuit of a case known to be false is relevant to be taken into account as conduct of the parties within the meaning of Part 44.3(4)(a) and (5)(a). It is also common ground that an otherwise successful party should not normally obtain costs incurred in advancing that false case, and that the otherwise unsuccessful party should normally obtain an order for payment of its costs in revealing the falsity of that case, subject to the requirement in Part 44.3(7) to avoid costs orders relating to distinct parts of the proceedings if the same objective can be achieved by proportionate or time-based costs orders.

9. It was also common ground that the deliberate pursuit of a case known to be false by an otherwise successful party is, at least potentially, conduct of sufficient gravity to justify, in an appropriate case, the imposition of a penalty on that party going beyond the purely remedial consequences of orders of the type which I have just described. The point at issue between the Banks and Ferrero is whether the deliberate pursuit of a case known to be false about issues going to the heart of the dispute is conduct of such gravity that it altogether displaces the general rule in Part 44.3(2)(a) that costs should follow the event.

10. For the Banks Mr Wardell QC relied upon two authorities on this specific issue. The first is Molloy v. Shell UK Limited [2001] EWCA Civ 1272, a personal injuries case in which the claimant falsely maintained that an injury at work disabled him from continuing his work as a (highly paid) oil rig scaffolder, whereas in truth he had returned to that type of work shortly after his injury. The defendant employers discovered the truth just before the trial, and as a result the claimant recovered only some £18,000 odd, out of a claim in excess of £300,000. The judge considered that this narrowly beat the defendant's payment in, but nonetheless awarded the defendant 75% of its costs after the payment in, on account of the claimant's fraud. On the defendant's appeal (which the claimant did not attend) the Court of Appeal decided (for reasons which do not matter for present purposes) that the claimant had not beaten the defendant's payment in, and for that reason ordered the claimant to pay 100% of the defendant's costs thereafter. Nonetheless, Laws LJ added this, at paragraph 18:

> "At least since the particulars of claim were filed on 20 September 1999 and until he was found out the respondent's approach to this action has been nothing short of a cynical and dishonest abuse of the court's process. For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should once it knows the facts entertain the case at all save to make the dishonest claimant pay the defendant's costs."

11. In Molloy the dishonest litigant was the claimant, and the Court of Appeal's response was to suggest that in such cases the entire claim might properly be struck out as an abuse of process. The equivalent in a case where the dishonest litigant is a defendant would I suppose be an order striking out the defence and prohibiting the defendant from any further participation in the proceedings, leaving the claimant to recover such judgment (if any) on his claim as was justified by his unchallenged evidence.

12. The second case is A L Barnes Limited v. Time Talk (UK) Limited [2003] EWCA Civ 402, where there was a claim by contractors in *quantum meruit*, challenged by a cross-claim by the defendant based upon an allegation of dishonest assistance by the claimant in a breach of duty by fiduciaries of the defendant. The claim succeeded as to £216,000 odd and the counterclaim also succeeded, but only as to £87,000 odd. Most of the trial was taken up with litigation of the counterclaim, in which the trial judge found that the claimant's director, a Mr Gibson, had indeed been dishonest (within the meaning attributed to that word in Royal Brunei Airlines v. Tan [1995] 2 AC 378) but that it was dishonesty "very much at what might be called the least serious end of the spectrum" (paragraph 25). The trial judge ordered the claimant to pay 50% of the defendant's costs, mainly on the basis that, on the issue which had occupied most of the trial, the defendant had been successful.

13. The main point of the Court of Appeal's judgment on the costs issue was that the judge had been wrong in principle to treat the case as one in which the defendant had been successful, since the claimant had obtained judgment of a substantial net balance against the defendant. Nonetheless in the final paragraph of his judgment (with which the other members of the court agreed) Longmore LJ said this:

> "If he (*the trial judge*) had asked himself who was the successful party, before segregation of the effective costs of proving the quantum meruit claim, he would in my judgment have had to answer that it was the claimants who recovered more than the defendants had ever offered and thus it must be the claimants who were the successful party. The question would then be what proportion, if any, of their costs should they recover. That question is now for this court. The judge was, of course, correct to be influenced by the fact that most of the time spent in court was spent on an issue on which the claimants failed and that that issue was whether one of the claimants' employees had acted dishonestly, albeit at "the least serious end of the spectrum". Bearing that matter in mind, I would hold that the claimants success should be reflected by the recovery of a small proportion of their costs. I would fix that proportion at 25% and would accordingly allow the cross-appeal to that extent."

14. Mr Wardell sought to derive from that paragraph first, that the Court of Appeal had imposed a 75% disallowance on the successful party's costs by reason of their director's dishonesty, and secondly, the proposition that dishonesty at the more serious end of the spectrum might well qualify for a complete disallowance of the successful party's costs. In my judgment, all that Longmore LJ's concluding paragraph implies is first, that the 75% disallowance in that case arose from a combination of the fact that most of the trial was taken up with an issue on which the claimant lost, and the fact that the issue which occupied most of the trial related to dishonesty on the part of one of the claimant's employees. It is impossible to discern what separate weight the Court of Appeal placed on the dishonesty issue in disallowing part of the successful claimant's costs. It was not even a case of the dishonest conduct of proceedings, but rather of dishonesty in relation to the events the subject matter of the dispute. The point of principle decided on the appeal (relevant

for present purposes) is that even in a case where dishonest conduct is properly to be taken into account in relation to costs, the starting point remains a requirement to decide who is the successful party, at least in cases where the relevant dishonesty falls short of a cynical abuse of the court's process.

15. Greater assistance in identifying the principles applicable to the bringing of a dishonest case on a particular issue by an otherwise successful party is to be found in the judgments of Lewison J and the Court of Appeal in Ultraframe (UK) Limited & others v. Fielding and others [2006] EWCA Civ 1660. In that case the claimants incurred costs of some £2.5 million (over 50% of their total costs) in proving a dishonest conspiracy involving the defendants from which the claimants had suffered no loss, but which was of relevance only to the incidence of reserved costs of earlier proceedings in the amount of approximately £250,000, something which Lewison J regarded as a disproportionate expenditure on costs for that limited result. The defendants were, more generally, successful in the litigation.

16. The dishonesty consisted of pursuing, right through the litigation, a denial that they had been party to a fraudulent conspiracy. In so doing they dishonestly continued to assert the genuineness of documents which the judge found had been fabricated by them in the course of the conspiracy. He described it as dishonest conduct of which the court should take a "serious view" although falling short of a cynical abuse of process by the advance of a false case going to the heart of the litigation, of the Molloy type. He reflected the court's disapprobation of that conduct by a 25% disallowance of the defendants' costs, which he calculated as amounting to a penalty in excess of £1 million.

17. Lewison J did not say in express terms whether that penalty was inclusive or additional to specific disallowances of costs incurred in advancing the dishonest case, of a type which would ordinarily fall to be made on detailed assessment by the costs judge. The Court of Appeal decided that, by implication, it was additional to such disallowances: see per Waller LJ at paragraph 35. Nonetheless, the Court of Appeal dismissed the claimants' costs appeal, having previously given permission to appeal on the basis that:

> "It is well worthy of consideration by the Court of Appeal whether, where an ultimately successful party has, on the way to success, lied and sought to maintain forgeries and in other ways been thoroughly dishonest and moreover has greatly lengthened the trial in having these matters exposed, the usual rules as to costs are displaced – that given those circumstances the general rule ought to be no order for costs."

18. I was also referred, by written submission after the hearing, to the unreported decision on costs of Mance LJ (sitting at first instance) in Grupo Torras v. Al-Sabah (5th July 1999) in which he made costs deductions of between one half and two thirds from costs orders in favour of successful defendants to a conspiracy claim, whose dishonesty before action, continued during the trial, had fuelled the claimants' suspicions that they had been participants in the conspiracy.

19. The principles which I derive from the cases to which I have referred are as follows:

i) There is no general principle that where an otherwise successful party has put forward a dishonest case in relation to an issue in the litigation, the general rule that costs follow the event is thereby wholly displaced. I leave on one side cases such as Molloy and Arrow Nominees Inc v. Blackledge [2000] 2 BCLC 167, where the conduct in question is so grave that the entire case of the party can properly be described as amounting to an abuse of process. In such cases it is difficult to conceive how that party would ever be the successful party in the litigation. For reasons which will be apparent from the main judgment, and to which I will return, this is not one of those cases.

ii) The court's powers in relation to the putting forward of a dishonest case include (a) disallowance of that party's costs in advancing that case, (b) an order that he pay the other party's costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an appropriate case extend to a disallowance of the whole of the successful party's costs, or an order that he pay all or part of the unsuccessful party's costs.

iii) In framing an appropriate response to such misconduct, the trial judge must constantly bear in mind the effect of his order upon the process of detailed assessment which will follow, in the absence of agreement, in particular to avoid unintended double jeopardy: see per Waller LJ in Ultraframe at paragraphs 33 to 34.

iv) "There is no general rule that a losing party who can establish dishonesty must receive all his costs of establishing that dishonesty, however disproportionate they may be.": per Waller LJ in Ultraframe at paragraph 36.

20. I turn to the question whether pre-action conduct is only to be reflected in a costs order if causative either of the bringing of an unsuccessful claim, or of some increased expenditure in the course of a claim. Mr Strauss QC for Ferrero submitted that this limitation was sanctified by House of Lords authority which has been held to have survived the introduction of the CPR. His starting point was the decision of the Court of Appeal in Ritter v. Godfrey [1920] 2 KB 47, a case in which the ultimately successful defendant to a medical negligence action wrote an insulting and offensive response to the plaintiff's letter before action which led to the trial judge disallowing him his costs. Allowing the appeal, and awarding the defendant his costs, the Court of Appeal held that a wholly successful defendant must be given his costs unless there is evidence that the defendant (1) has brought about the litigation, (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.

21. In Donald Campbell and Company Limited v. Pollak [1927] AC 732 the House of Lords rejected Ritter v. Godfrey as being too prescriptive a rule in relation to the exercise of a judge's discretion, but there are passages, particularly in the speech of Lord Atkinson, at pages 813 to 815 and 821 to 823 which suggest approval of the underlying thrust of the Court of Appeal's decision, to the effect that it is conduct which causes the bringing of an unsuccessful claim, or increased expenditure in connection with a claim, which attracts costs consequences, but not otherwise.

22. In Groupama Insurance Company Limited v. Overseas Partners Re Limited [2003] EWCA Civ 1846, Brooke LJ said, by reference to Campbell v. Pollak:

> "32. Nothing in the language of CPR 44.3(4)(a) and 44.3(5)(a) or in Lord Woolf's Interim and Final Reports which preceded the introduction of the Civil Procedure Rules suggests that there was any intention to alter the ground rules established by the House of Lords in 1927. Chapter 7 of Lord Woolf's Final Report (July 1996) merely suggested that the court should be more willing to identify areas where it considered that costs had been unnecessarily incurred, both before and after proceedings were commenced. This observation no doubt gave rise to the present wording of CPR 44.3(4)(a) ("The conduct of the parties includes conduct before, as well as during the proceedings")."

It is apparent from paragraph 29 of Brooke LJ's judgment that in confirming the continuing validity of Campbell v. Pollak after the introduction of the CPR, he had in mind not any restrictions or limitations in the types of pre-action conduct which could properly have costs consequences, but rather the generality of the conduct of which the court could take account. It appears also from paragraphs 33 and 38 of his judgment that Brooke LJ's main reason for referring to Campbell v. Pollak was to dispose of the notion (which had apparently been common ground in the earlier (post CPR) decision of the Court of Appeal in Hall v. Rover Financial Services Limited [2002] EWCA Civ 1514) to the effect that conduct was relevant only if it was conduct in relation to the litigation. At paragraph 39 he said:

> "The philosophy of the Woolf Reforms is that the parties should lay their cards on the table as fully as possible and as early as possible, so that they can assess the desirability of a negotiated settlement (as against the risks of contested litigation) in a well-informed way. If they then decide to litigate (and to burden other parties with the costs of litigation), and to pursue the litigation to trial they must expect, as a general rule, to have to pay the costs of parties necessarily joined to the litigation if they lose."

23. In my judgment it would be wrong to conclude, if (which I doubt) there ever was a strict rule that pre-action conduct was relevant to costs only if causative of the bringing of an unsuccessful claim, or of increased expense in the subsequent litigation, that such a rule survives the introduction of the CPR. The language of Part 44 requires the court to have regard to the conduct of all the parties, both before as well as during the proceedings, and is otherwise wholly unqualified. Furthermore, Lord Woolf's own commentary, in the passage in the Phonographic Performance case which I have quoted at paragraph 5 above makes it clear that the court's new powers to depart from what he calls the "follow the event principle" are designed, at least in part, *pour encourager les autres*, so as to discourage other litigants from behaviour likely to increase the costs of litigation. It would for example clearly be wrong to ignore a flagrant disregard of an applicable pre-action protocol merely because the court concluded that the litigation would have ensued in much the way that it did, even if the protocol had been complied with.

24. That said, the question whether a particular piece of undesirable pre-action conduct has in fact caused the bringing of an unsuccessful claim, or increased expense in the subsequent litigation, is plainly of primary relevance in the court's decision to what extent, if at all, to penalise a party for inappropriate pre-action conduct when making, or refusing, an order for costs. As will appear, the question whether any relevant pre-action misconduct of Ferrero caused the Banks to bring their wholly unsuccessful claims against Ferrero is, on any view, highly material to the costs order which I have decided to make.

25. The final issue of principle is whether, in a case such as the present where allegations of the utmost gravity have been pursued wholly unsuccessfully, an award of indemnity costs depends upon a conclusion that those allegations were pursued unreasonably. In this context I was referred to three first instance cases: Three Rivers District Council v. Bank of Credit and Commerce International SA [2006] EWHC 816 (Com); National Westminster Bank Plc v. Rabobank Nederland [2007] EWHC 1742 (Com) and JP Morgan Chase Bank v. Springwell Navigation Corporation [2008] EWHC 2848 (Com).

26. In my judgment those cases, together with the others summarised in the notes to CPR 44.4(3) on pages 1194 and following of Volume 1 of the 2009 White Book establish the following principles:

    i) The court's discretion to grant indemnity costs is not limited by any hard rules of exclusion.

    ii) Nonetheless the primary considerations relevant to the award of indemnity costs are first, whether the conduct of the party against whom the order is sought is such as to take the case out of the norm, and secondly, whether that party's conduct can properly be categorised as either deliberate misconduct, or conduct which is unreasonable to a serious degree.

    iii) The bringing of a case alleging serious dishonesty may qualify for indemnity costs if on the material it can properly be categorised as speculative, weak, opportunistic or thin, if it is advanced on the basis of a constantly changing case, and if it is pursued on a very large scale without apology to the bitter end, including by hostile cross-examination, without constant regard to its merits. Some combination of those factors may justify the view that the litigation has been unreasonably pursued.

27. It follows in my judgment that it is not enough for a party to assert simply that it has successfully fought allegations of the utmost gravity, regardless of the circumstances in which those allegations came to be made. Although a case in which such allegations are made may for that reason alone be out of the norm, especially a case of the present size and complexity, that is unlikely in itself to constitute a good reason for the award of indemnity costs.

28. To those conclusions on the issues of principle separating the parties I would add this. Whenever the court is asked to make some out-of-the-ordinary costs order in consequence of the alleged misconduct of the party against whom the application is made, the court must bear constantly in mind the conduct of the party making the application. I consider this to be so for two main reasons. The first is that the conduct

of the party making the application may have been, in some respect, a contributory cause of the conduct complained about. It may even lead to the conclusion that the conduct complained about, although unsuccessful, was nonetheless not unreasonable in the circumstances.

29. The second reason is one of common sense and justice. Penal costs orders (like all costs orders) lead to a financial adjustment between the parties, not to penalties in the nature of fines payable into the Consolidated Fund. Although there may be cases where the conduct criticised is such that a public example needs to be made of the guilty party, to an extent which overrides the practical justice of the matter between the litigants before the court, they are in my judgment likely to be the exception rather than the rule.

Costs as between the Banks and Ferrero

30. The gulf between these parties on this issue is reflected in the fact that Ferrero seek an order that the Banks pay 90% of its costs of these proceedings on the indemnity basis, while the Banks seek an order that Ferrero pays 40% of its costs of the proceedings, also on the indemnity basis.

31. I concluded in the main judgment that Ferrero made a corporate decision, to which it adhered throughout these proceedings, dishonestly to deny that (as was the fact) it knew that Aksu Gida and Başkan Yuksel were both front companies for the Başkans. Pursuant to that decision, all Ferrero's main witnesses (Mr Do, Mr Rosa Brunet and Mr Casale) steadfastly lied about that matter in their evidence, and that false case was pursued to the end of the trial, including in closing submissions. I will call this the first lie.

32. Mr Casale and Mr Rosa Brunet also lied about the time when they first came to believe that the Başkans had been engaged in a fraud (the second lie), and Mr Casale lied about his understanding of the meaning of the word "assignment" (the third lie). The first lie was directly relevant to the Banks' conspiracy claim against Ferrero. I described it in the main judgment as "one of the central questions of fact in the case". The second lie was about an important but less central issue of fact, pursued at some length in cross-examination. The third lie was about a matter of greater relevance to the Italian proceedings than to the issues in these proceedings (once the claim based on the assignment had been stayed pursuant to the Judgments Regulation).

33. The combined effect of these three lies, and in particular the first of them, was to reveal that Ferrero had taken a corporate decision at a high level (bearing in mind the seniority of Mr Do) to present and pursue in evidence a false case about important aspects of the underlying facts, and about one central issue of fact. It was made in the context of Ferrero's trenchant presentation of its defence as being one designed not merely to resist a substantial financial claim, but also to preserve its treasured good name and business reputation from unwarranted allegations of dishonest conspiracy. Against that background, the cynicism inherent in that misconduct is plain. It is also properly to be described as an abuse of process. It was conduct which significantly added to the length and complexity of the trial. It was also conduct which, once plain to the Banks, tended to increase their suspicion that Ferrero had indeed been guilty of the conspiracy alleged. It undoubtedly increased the already substantial difficulties faced by the court in deciding the case. It was for all those reasons, and by any

standards, serious misconduct, meriting substantial costs consequences, both in remedial terms, so as to ensure that the Banks are not out of pocket in respect of the trouble and expense to which they were put in demonstrating the truth, and in terms of penalty.

34. Notwithstanding Mr Wardell's submissions to the contrary however, this misconduct cannot properly be characterised as sufficient for it to be proper to describe the whole of Ferrero's defence, or even its defence to the conspiracy claims, as an abuse, in the sense that the claim in Molloy was so described by the Court of Appeal. First and foremost, Ferrero simply was not guilty of the fraudulent conspiracy to injure the Banks of which it was accused. For the reasons given in detail in the main judgment, these lies were not told by reason of a desire to cover up any such conspiracy. Rather, the primary motivation, at least for the first two lies, was to maintain the fiction that, when continuing to trade with the Başkans' front companies after the time when it believed that they had previously been guilty of a fraud (i.e. after about mid-March 2002 until trading ceased in December) Ferrero was dealing with persons whose previously established reputation for integrity in their business affairs had not yet been destroyed. As Ferrero's Turkish lawyer Mr Gun had warned, trading with known fraudsters might cause serious reputational damage, so Ferrero pretended both that they did not believe that the Baskans were fraudsters, and that trading with their front companies was not trading with them.

35. Further, and again notwithstanding the Banks' lengthy submissions to the contrary, I have concluded that Ferrero's conduct of its disclosure obligations, although leaving a great deal to be desired, did not involve the deliberate destruction or withholding of documents known to be relevant. Similarly, the Banks' various attempts to suggest that certain important documents were fabrications by Ferrero or its employees also failed.

36. Mr Wardell tried hard to persuade me both that Ferrero had in its dealings with the Banks already embarked upon a course of dishonesty in relation to its belief about the Başkans' fraud and their control of Aksu Gida and Başkan Yuksel before the Banks instituted the present claim, and that these falsehoods contributed significantly to the Banks' decision to allege conspiracy and fraudulent misrepresentation against Ferrero. Separately and distinctly he submitted that even if not dishonest, Ferrero's pre-action conduct towards the Banks was sufficiently objectionable to warrant adverse costs consequences, regardless of their causative effect if any.

37. I do not consider that the evidence warrants a finding that Ferrero behaved dishonestly towards the Banks before the commencement of this claim. I have described the conduct of Ferrero towards the Banks during the period March to December 2002 in considerable detail in the main judgment, and those findings do not themselves identify any respect in which Ferrero acted dishonestly in its dealings with the Banks. Mr Wardell submitted however that two events, not dealt with in detail in the main judgment, justified that conclusion. The first consisted of a meeting between Mr Casale and Mr Byles at the Istanbul Hilton on 26th July 2002, to which Mr Byles referred in a second witness statement made on 10th November 2008. Nothing in that witness statement persuades me that Mr Casale presented a false case to Mr Byles either about whether Ferrero believed that the Başkans had been fraudulent, or about the ownership and control of the front companies. On the contrary, Mr Byles' impression at the end of that meeting was that Ferrero had not decided to end its

relationship with the Başkans. The fact that Mr Casale gave a rather different account in his evidence about that meeting makes no difference to my conclusion. The second event consists of passages in Ferrero's complaint to the Italian criminal court, which was served upon the Banks before the commencement of these proceedings, in which Mr Wardell submitted that Ferrero had painted a false picture that it believed that the front companies were independent from the Başkans. In my judgment the relevant part of that criminal complaint is, in its express terms, studiously neutral as to the identity of the persons owning or controlling those two companies, and conveyed no dishonest misrepresentation to the Banks when it was served upon them.

38. The Banks called no evidence as to the actual thought processes which led their respective senior managements to decide to institute proceedings alleging fraud and conspiracy against Ferrero, and maintained privilege as to the advice which they received in that regard. Mr Wardell submitted that I could nonetheless conclude that dishonesty or, at least, a lack of frankness on the part of Ferrero had been an important contributory cause in that decision, by way of inference.

39. Since I have concluded that there was no relevant dishonesty, the basis for any such inference is lacking. As to lack of frankness, there is no doubt (as described in the main judgment) that Ferrero kept its cards very close to its chest during the whole of the period ending with the Banks' letter before action in December 2002 (which did not in any event allege fraudulent misrepresentation or conspiracy). I consider that the evidence does enable me to infer that a significant factor in the Banks' decision to allege fraud and conspiracy against Ferrero was the suspicion as to Ferrero's *bona fides* generated by the combination of its continued trading with companies believed by the Banks to be front companies for the Başkans, coupled with Ferrero's comprehensive lack of cooperation in response to the Banks' inquiries from late February 2002 onwards. Although that suspicion has been proved to have been misplaced, I consider that it was, at the time, understandable.

40. It follows from the above analysis that the serious misconduct of Ferrero in pursuing a dishonest case in relation to its dealings with and suspicion about the Başkans during the pre-action period did not of itself contribute to the bringing of the Banks' unsuccessful claims of fraudulent misrepresentation and conspiracy. Nonetheless, I am satisfied that the emergence of that false case in response to the Banks' claims (both in Ferrero's pleadings and evidence) was a significant factor in confirming the Banks' mistaken assumption that those claims had sufficient merit to be worth persisting in through to trial. I do not by that mean that Ferrero's false case was decisive in that respect. For what it is worth, (but this is largely a matter for speculation), I consider that the Banks would probably have pursued their misrepresentation and conspiracy claims against Ferrero even if it had, from start to finish, pleaded and asserted in evidence a wholly honest case about its dealings with the Başkans. In short, the Banks would simply not have believed it.

41. Ferrero's uncooperative and aggressive pre-action behaviour is however relevant to another important aspect of the costs issues, because of Mr Wardell's reliance upon it as excusing conduct by the Banks which Ferrero submits justifies an order for indemnity costs. Ferrero's case, from the start to the end of the trial, has always been that, with two exceptions, the Banks' claims have been so extravagant and far-fetched as to be properly categorised as unreasonable. The exceptions are the claim in misrepresentation arising from the December Trade Reference and the narrower

conspiracy claim based on events commencing with the meeting between Melih Başkan, Mr Casale and Mr Rosa Brunet on 25th January 2002.

42. In particular, Ferrero criticises the Banks' case that there was an earlier conspiracy to injure them as wholly unsound, in particular because of the absence of any discernible motive either for Ferrero or for the individual employees specifically accused, and the compendious claims of fraudulent misrepresentation by reference to other documents as hopelessly overblown and, in many respects, having the quality of an intellectual parlour game. As for the proprietary claims, Mr Strauss submits that they were always doomed to fail, both because of the impossibility of proving any sufficient identity between hazelnuts pledged to the Banks and those sold by Aksu Gida or Başkan Yuksel to Ferrero, and because of the absence of any credible basis for the assertion that Ferrero knew anything about the Banks' proprietary interests.

43. Ignoring for the moment the effect on the Banks of Ferrero's pre-action conduct and its subsequent presentation of a false case, there is in my judgment considerable force in those criticisms for the following reasons.

44. First, as Lawrence Collins J presciently observed when giving judgment on Ferrero's jurisdiction challenge at an early stage in this litigation, success in the fraud and conspiracy claims was always likely to be dependent not merely upon an adverse conclusion as to Mr Casale's credibility, but upon the identification of some motive for Mr Casale and his alleged conspirators to pursue a course which would on the face of it unnecessarily expose Ferrero to grave and damaging risks. Recognising this, the Banks constantly sought to identify private corrupt motivation for Mr Casale and Mr Rosa Brunet's conduct, suggesting for example that the explanation for the absence of numerous documents was not a corporate decision by Ferrero to destroy them, but a private decision by Mr Casale to destroy them, so as to avoid his misconduct coming to the attention of his superiors. In reality there never was any evidence of any private corrupt motive on the part of Mr Casale, Mr Rosa Brunet or (until the fraud allegations were abandoned against him) Mr Bolowich for conduct which would have amounted to the gravest possible breach of their duties to Ferrero, and the Banks' persistent attempts to find one, by the immensely energetic pursuit of disclosure applications and inquiries as to monies passing through Safe Holdings, represented a speculative attempt, pursued at enormous expense, to find something that was never there. On the contrary, Messrs Casale, Rosa Brunet and Bolowich demonstrated from start to finish their absolute loyalty to Ferrero, even to the point (save for Mr Bolowich) of lying in what they mistakenly conceived to be Ferrero's best interests. Secondly, numerous allegations pursued by the Banks represented speculative attempts to plug obvious holes in their case, rather than allegations for which there was any evidence or realistic prospect of success. Thus for example, whenever Mr Casale produced (albeit often late) documents apparently corroborative of his evidence, they were characterised by the Banks as suspicious, in the sense of having been contrived or (until computer metadata proved otherwise) manufactured after the event.

45. In the end, I have been persuaded that the whole of the Banks' case in conspiracy against Ferrero, to the extent that it related to anything done prior to 25th January 2002, was an overblown contrivance which never had any serious basis in the evidence, which was irreconcilable with the absence of any credible motive on the part of Ferrero or the individual alleged conspirators, and which was in reality

constructed so as to afford the Banks a case for recovery of the whole rather than merely part of their loss.

46. Further examples of the contrived nature of this part of the Banks' conspiracy claim are to be found in the strenuous but ultimately hopeless attempts to portray the November Re-grade Contracts and the December Forward Contracts as motivated by the pursuit of a conspiracy to injure the Banks, rather than by proper commercial objectives, and in the attempt to portray Mr Casale's attempts to negotiate a semblance of order out of the chaotic and poorly drafted assignment documentation in early December as a Machiavellian attempt to put in place, in advance, a plausible excuse for Ferrero's participation in the Başkans' invoicing fraud.

47. Similar excesses and contrivances appeared in the Banks' multifaceted case in fraudulent misrepresentation. For example, the whole of the case that the July Trade Reference constituted a misrepresentation was based upon a contrived suggestion arising from the negotiation of the FKB contracts that Ferrero knew from April 2001 that Başkan Gida was in such terminal financial difficulty as to be unable to supply 30,000mt of hazelnuts to Ferrero during the 2001/02 season. Enormous cost and expert evidence was devoted to this ultimately hopeless task. Even if it had been made good, it added nothing of substance to the Banks' case based on the December Trade Reference, since that also preceded the Banks' decision to grant the Facility.

48. Another example consisted of the frequently repeated attempts to conjure fraudulent misrepresentations out of the numerous contracts renumbered or re-dated and then countersigned by Ferrero following the grant of the Facility. In my judgment they were, in substance, nothing than more than an attempt to reconstruct individual little torts out of the feared collapse of the umbrella pre-January 2002 conspiracy claim, which relied upon all of them as supposed overt acts.

49. Mr Wardell made no secret of the fact that, from start to finish, the Banks regarded their wider (that is pre-January 2002) conspiracy claim as their main claim, and the narrower conspiracy claim (starting on 25th January 2002) as very much an alternative fallback. In my judgment Mr Strauss' criticism of the wider conspiracy claim as transgressing the boundaries of reasonableness is, ignoring for the moment Ferrero's misconduct, well made. The same is also true in relation to the wider fraudulent misrepresentation claims, excepting those arising from the December 2001 Trade Reference. In relation to that document, I do not regard the claims in negligence or in fraudulent misrepresentation as inherently unreasonable, albeit that, for differing reasons, they both failed.

50. It will be apparent from the main judgment that the pursuit of the wider conspiracy claim had an enormous effect upon the duration and cost of these proceedings. The same is true of the pursuit of a misrepresentation claim in relation to the July Trade Reference, although the other misrepresentation claims added nothing much more than legal argument to the litigation of the relevant facts as part of the conspiracy claim. Leaving aside therefore the consequences of Ferrero's misconduct, these unreasonable aspects of the Banks' conduct would have justified an order for assessment on the indemnity basis in relation to a proportion of Ferrero's costs. Although a similar proportionate order was made by Gloster J in the Springwell case, it creates the difficulty that, on assessment, a proportionate indemnity outcome can only be achieved by a full assessment on both bases, followed by a proportionate

adjustment. The alternative, of an indemnity basis for assessment in relation to specific issues, would be an even less attractive solution, and *prima facie* contrary to the desideratum in Part 44.3(7).

51. A further disadvantage of an indemnity costs order is that it disables the costs judge from applying the proportionality test: see Part 44.4(2)(a), contrasted with Part 44.4(3). This is a case in which the parties tell me that each of the Banks and Ferrero have expended approximately £12 million in litigating a case which, between them, is about €21.4 million odd (ignoring interest). A trial in excess of 80 days, at that cost, of a claim in that (relatively but not absolutely) modest amount inevitably raises the most serious questions of proportionality. The inability to take proportionality into account on an indemnity assessment is therefore in my judgment a factor which goes into the balance against such an order, if the requirements of justice which would ordinarily lead to the making of such an order can satisfactorily be met by some other means.

52. I return to consider the consequences of Ferrero's misconduct, and also to address the Banks' case that, even if not dishonest, Ferrero's pre-action conduct was sufficiently unreasonable to merit adverse costs consequences. Three aspects of Ferrero's pre-action conduct have been subjected to critical analysis. The first was its continued trading with the Başkans, after a time when it believed that they had previously been engaged in an invoicing fraud on the Banks. In my judgment that conduct, whatever its commercial wisdom or effect in increasing the Banks' suspicions, must lie at the outer edge of conduct capable of having a significant consequence in terms of costs. It was a commercial decision taken by Ferrero without litigation then in mind, and persisted in for purely commercial reasons, even after the growing dispute about the assigned invoices must have led to an appreciation that litigation might follow.

53. Secondly, Ferrero's almost complete lack of cooperation with the Banks' inquiries, in relation to a matter obviously having the potential to give rise to a serious dispute, did run entirely counter to English notions, inspired by the Woolf Report and the CPR, as to the appropriate way for parties to address a growing dispute between each other, so as to minimise the likelihood or expense of litigation.

54. Nonetheless, its effect in terms of costs is in my judgment significantly mitigated by two considerations. The first is that the dispute then anticipated related entirely to what became the Banks' contractual claim based on the Assignments, which has in the event been excised from this litigation pursuant to the Judgments Regulation, and is pending in Italy. The second is that, at least until the Banks' letter before action in December 2002, Ferrero had in my judgment no reason to suppose that the dispute would come to be litigated in England. The temptation of the English court to visit costs consequences upon litigants who fail to comply with its own notions of propriety and common sense in their pre-litigation conduct needs to be tempered at least to some extent in relation to litigants carrying on business in countries which, for all I know, tolerate a different pre-litigation culture.

55. Furthermore, it needs to be borne in mind that, at the time when Ferrero embarked upon a policy of non-cooperation with the Banks in relation to their inquiries, it was not apparent which of Ferrero or the Banks would ultimately prove to be victims of the Başkans' fraud. Indeed, for as long as the Italian proceedings remain extant, that remains an open question to this day. In that respect, it is to be noted that, at an early

stage following their discovery of the fraud, the Banks were little more forthcoming with Ferrero than Ferrero was with them.

56. Nonetheless, this second aspect for which Ferrero has been criticised is of some weight in relation to costs, albeit limited for the reasons which I have described.

57. Finally, the Banks roundly criticise, and Ferrero has found it impossible even to attempt to justify, the commencement of the Italian criminal complaint. It was as it appears from the main judgment, a deeply misguided application of the outdated principle that aggressive attack is the best means of defence. Furthermore, it made allegations against individuals within the Banks and their solicitors which it is difficult to believe that the Ferrero officers subscribing to those complaints by their signatures can seriously have thought to have been true.

58. Nonetheless, the conduct in question consisted of the instigation of a legal process in a foreign country. To the extent that it was an abuse of process, the normal response of a court in a different country should be to leave any adverse consequences to be imposed by the courts of the country in which those proceedings were instituted. Furthermore, it was conduct directed specifically at the threatened contractual claim, rather than the conspiracy and misrepresentation claims which had not then been identified or threatened, and the claim against which it was directed is still proceeding in the Italian courts. It may therefore be that the appropriate forum in which adverse costs consequences might need to be visited on Ferrero by reference to its institution of the Italian criminal complaint is Italy, and that an element of double jeopardy might be imposed upon Ferrero by the conduct in question being visited with costs consequences in this court.

59. Nonetheless, as with Ferrero's non-cooperation, the institution of the Italian criminal complaint is conduct to be weighed in the balance when considering costs, although its effect may need to be limited for the reasons which I have given.

60. Looking at the conduct of the Banks and Ferrero in the round, I have come to the following conclusions. First, Ferrero's cynical abuse of process in deliberately putting forward and seeking to prove a case known to be false in relation to an important issue clearly outweighs the unreasonableness inherent in those aspects of the Banks' conduct of the case which, as set out above, I have concluded would otherwise justify an order that part of Ferrero's costs be assessed on the indemnity basis. Dishonesty and abuse of process are by their nature more serious than the conduct of which the Banks have fairly been criticised.

61. Secondly, while Ferrero's false case may have encouraged the Banks in the pursuit of their claims (in the sense of both increasing their suspicions and encouraging them to think that discrediting Ferrero's witnesses might significantly, if not decisively, improve their prospects of success), I am not persuaded that Ferrero's dishonest case led to bringing of the misrepresentation and conspiracy claims, still less that they might have been discontinued if Ferrero had put forward nothing more than the truth.

62. Thirdly, although aspects of Ferrero's pre-action conduct do fall to be taken into account on the question of costs, I am not persuaded that they significantly increased the cost and duration of the proceedings, still less that they had any real causative effect in relation to the bringing of the Banks' unsuccessful claims.

63. Fourthly, while Ferrero's misconduct, taken in the round, may have encouraged the Banks to persist in claims and make allegations of the type which I have identified as unreasonable, it would not be right to say that the Banks should be wholly absolved from that conduct merely because Ferrero's conduct fuelled the Banks' suspicions. A party may by his conduct bring serious claims upon his head, but that does not give the claimant *carte blanche* to include, still less pursue, allegations to an extent that go beyond the reasonable compass of that which is fairly justified by the available evidence.

64. Finally, there is to be added to the list of relevant factors Ferrero's wholly inadequate performance of its disclosure obligations, even though that did not amount to the deliberate withholding or destruction of documents. Happily, when Ferrero and the Banks realised that it would be virtually impossible to reflect that aspect of the matter otherwise than by some form of issue based costs order, they promptly agreed that I should deal with it in accordance with a bespoke formula worked out between them in the following terms, namely that: (1) Ferrero was not to be allowed its costs of establishing deliveries of hazelnuts to the extent that they had been increased by the late disclosure during the trial of the shipping database and shipping situation documents; and (2) Ferrero was to give credit of £100,000 towards the Banks' forensic accountancy costs.

65. In framing a suitable costs order to take account of the matters which I have described at length, I bear in mind the following information provided to me:

    i) Ferrero's estimated costs amount to some £12 million.

    ii) The Banks' estimated costs amount to approximately the same sum, but they claim that 25% of that amount was expended on their claim against Mr Abidali. That was an estimate put forward for the purposes of pursuing an order for an interim payment of costs by Mr Abidali, rather than a precisely calculated amount, but it is the best estimate presently available. It follows that the Banks have expended approximately £9 million in pursuing their unsuccessful claims against Ferrero.

    iii) Ferrero and the Banks broadly agree that approximately 6% of the volume of the transcript of the evidence of all witnesses for Ferrero and the Banks at the trial was taken up with the three matters about which, as I have described, Ferrero advanced a deliberately false case. That exercise was originally undertaken by Ferrero, and criticised by the Banks as an unreliable basis for estimating the amount of cost incurred by the parties in relation to those issues. To an extent that is a fair criticism, since there is no inevitable correlation between preparation time and hearing time in relation to any particular issue. Nonetheless, the Banks offered no other basis of estimation, save that I should apply some loading to the transcript-based percentage by reference to the relative importance of those issues, to reflect the probability that their litigation commanded a higher than average proportion of the parties' preparation time.

    iv) The parties were also broadly agreed that the effect of an order for assessment on the indemnity basis would lead to a recovery of approximately 80% of the costs actually incurred, and that an assessment on the standard basis would

yield approximately 65% of the costs incurred. Thus, the penal effect of depriving a party of indemnity costs to which it would otherwise have been entitled would amount to approximately 15% of the gross costs to which that deduction related.

v) Finally, both the Banks and Ferrero encouraged me to follow Part 44.3(7), and make a proportional order rather than issue-based orders or cross-orders if possible.

66. I have constructed what I conceive to be an appropriate costs order as between Ferrero and the Banks on the following basis. Starting with the undoubted fact that Ferrero has been wholly successful in the proceedings, I consider first that it should be disallowed the whole of its costs referable to the pursuit of its false case. Since I accept that there is some force in the Banks' submission that the importance of the issues about which that false case was put forward was high, I consider it appropriate to increase the 6% figure derived from a linear analysis of the transcripts of those parties' evidence by a modest amount, namely to 8%.

67. Next, there is to be deducted (in effect by way of set-off) from Ferrero's costs an amount referable to the Banks' costs incurred in proving the matters about which Ferrero pursued a false case. Since the Banks incurred costs in its claim against Ferrero at 75% of Ferrero's rate, that amounts to a further 6% deduction from Ferrero's costs. The deduction of an aggregate 14% will I consider be a fair recompense to the Banks in relation to those matters, before considering any additional penalty. To avoid double counting, I direct that upon assessment the costs judge should make no further deductions or disallowance in respect of Ferrero's costs of advancing its false case.

68. I consider this to be a clear case for the imposition of an additional penalty upon Ferrero. But for its misconduct (both in advancing a false case and, to a much more limited extent its pre-action conduct) I would have considered this to be an appropriate case for an order for indemnity assessment of half Ferrero's costs, on account of the unreasonable conduct of the Banks to which I have referred. In my judgment the first element in an appropriate penalty is to deprive Ferrero of the benefit of an indemnity, rather than standard, basis of assessment. I do so both because of the manifest injustice of awarding indemnity costs to a party which has conducted itself more reprehensibly than its opponent, and secondly because, having regard to the grand scale upon which this litigation has been conducted, I am reluctant to disable the costs judge from applying the proportionality test to the detailed assessment.

69. I have calculated the financial consequence of that penalty as approximately £765,000, as follows. To the 14% disallowance must be added a notional amount to represent what will in fact be deducted by reference to Ferrero's costs of proving its case on deliveries which has been agreed. Mr Strauss tentatively estimated that amount at 1%, which I accept for present broad-brush purposes. A 15% reduction (80%-65%) on a standard rather than indemnity assessment of half £12 million is £900,000. That effect is reduced to £765,000 by the 15% disallowance (14% plus 1%) to which I have referred.

70. In my judgment a penalty of £765,000 is inadequate to reflect the gravity of Ferrero's conduct. Although I bear in mind the possibility that my findings of misconduct may have their own consequences in terms of reputational damage to Ferrero, I consider nonetheless that a substantially higher penalty is required as a sufficient mark of the court's disapprobation of the cynical abuse of process which I have described. In my judgment a just penalty would be arrived at by increasing the disallowance of Ferrero's costs from 14% to 30%, and directing therefore that the Banks should pay 70% of Ferrero's costs, to be assessed on the standard basis, with no further deduction on account of Ferrero's conduct, save for the agreed specific disallowance in relation to late disclosure. Assuming a 65% recovery on standard assessment of actual costs of £12 million, that would produce a net costs recovery £5.46 million (subject to the disallowance in relation to late disclosure and the related agreed credit of £100,000). I consider that to be a just outcome, viewed overall. While the percentage disallowed may be less than awarded in some other cases, the effect in absolute monetary terms is substantial, due to the exceptionally large amount of costs expended. By comparison, a recovery based on an indemnity assessment of half its costs, and a standard assessment of the remainder, would have yielded for Ferrero approximately £8.7 million, so that the combined effect of all the adverse costs consequences of Ferrero's misconduct is approximately £3.24 million, a sum approaching 20% of the amount in dispute in the case.

Costs as between the Banks and Mr Abidali

71. The first question under this heading is whether I should deal with those costs now, or reserve them, having regard to my decision that the question of quantum as between these parties should be deferred to a further hearing. The relevant test in that regard is that laid down by Lightman J, sitting in the Court of Appeal, in Weill v. Mean Fiddler Holdings Limited [2003] EWCA Civ 1058 at paragraph 33, namely that wherever the judge considers that there is a real possibility that the outcome of the assessment of damages may affect the merits of the parties' entitlement to the costs of the issue of liability, the costs should be reserved.

72. I have decided that the question of costs as between the Banks and Mr Abidali should be reserved, for the following reasons. Although this is most unlikely to be a case in which the Banks recovers only nominal damages and it is not a case (notwithstanding Mr Werbicki's submission to the contrary) in which there has been a relevant offer which could realistically affect the outcome in relation to costs, there are nonetheless relevant uncertainties in the outcome of the assessment. The first is the possible effect of the fact that the Banks have an outstanding claim against Ferrero in the Italian courts which may lead to a substantial or even total recovery against Ferrero, albeit not in the near future: see paragraph 954 of the main judgment.

73. Secondly, the aspect of Mr Abidali's involvement in the conspiracy against the Banks which took up most of the time in the trial as between those parties was his participation in the transfer of Başkan Gida's business and assets to Aksu Gida under a dishonest semblance of creditor pressure. This may or may not have caused the Banks any significant loss: see paragraph 951 of the main judgment.

74. In circumstances (which are by no means fanciful) that the only substantial loss suffered by the Banks arose from Mr Abidali's complicity in the Başkans' fraudulent trading, real questions might arise as to whether the Banks should recover the whole

of their costs, or have some amount disallowed on an issue-based analysis, and if so upon what basis of assessment.

75. Finally, no significant prejudice would be caused to the Banks by waiting until the outcome of the assessment of damages since the directions which have been given will enable it to be determined by me (subject to any overriding listing imperatives) early next term, and since the Banks are fully protected by freezing orders in the meantime.

Other Matters arising

76. I have dealt with all other matters arising in extempore judgments and directions given during the hearing.