HIS HONOUR HUGH JONES:

1. In this case I am concerned with a dispute over premises known as 20 College Street, Ammanford. The Claimant is Mr Alan Tait and the Defendants are Mrs Jane John and Mr Gareth John Brindley Edwards. Mrs Christine Tait has been brought into the case as a Part 20 Defendant because Mr Tait's interest in the premises was at some stage transferred to her and, I believe, Mr and Mrs Tait's son but to all intents and purposes this is a dispute between Mr Tait and Mrs John and Mr Edwards. I shall refer throughout to Mr Tait. If there are subsequent consequences which should be reflected in any order that I make, no doubt counsel will alert me to them.

2. Mr Tait and Mrs John and Mr Edwards are what is commonly referred to, as flying freeholders. In other words the premises have been divided and in this case consist of a shop fronting College Street which is in the ownership of the Defendants, Mrs John and Mr Edwards and residential premises which are situated above and to the rear of the shop owned by Mr Tait. Mrs John and Mr Edwards' family were the original owners of the whole, the premises being divided in 1973.

3. In 2007 a fire broke out on the first floor of the premises which caused damage to the roof mainly, above the shop premises. The residential premises were purchased by Mr Tait following the fire. So when he bought the premises they were already damaged. He bought it at auction, the previous owner proving to be untraceable and the premises presumably sold by mortgagees.

4. The position now is that there are a number of areas of dispute which have arisen between Mr Tait and the Defendants since Mr Tait purchased the premises. It is perhaps right to say that it is Mrs John who has taken the primary role in this case. Mr Edwards and she are now, as I understand it, joint owners and Mr Edwards gave evidence in the case but any communication which took place between Mr Tait and the Defendants, took place between him and Mrs John because when he purchased the premises, Mrs John was acting under a power of attorney on behalf of her father. The evidence on behalf of the Defendants comes mainly from Mrs John.

5. The areas of dispute are these:-

    1) Whether Mrs John and Mr Edwards should contribute to the cost repairs to the roof carried out by Mr Tait.
    2) Whether Mr Tait had interfered with a right of way along a path to the right hand side of the shop looking at it from College Street which then turned at right angles at the rear of the premises. I say there was a dispute because at some stage Mr Tait built a wall of breeze blocks at the end of the path and Mrs John and Mr Edwards say that that prevented them from using their right of way which extended into the adjoining premises. The precise nature of their rights over the adjoining premises is unclear but nevertheless the parties have reached agreement as to that and have agreed that Mr Tait will remove the wall and replace it with a

gate and that the parties will bear the cost equally.

3) As to another right of way, which is in part along the same path to the right of the premises but continuing in a straight line to a spot where previously there existed an outside lavatory. That lavatory was demolished by Mr Tait apparently in spite of objections by Mrs John. Mr Tait's case is he demolished the lavatory because it was simply not used and in any case was unfit to be used. Nevertheless Mrs John asserts that that is an interference with her rights over the property.
4) Over the removal of an advertising board which related to the shop but which was attached to the front of the residential premises.
5) Finally, over responsibility for the breaking of a window in the shop following the fire.

6. Clearly the significant dispute in this case is over responsibility for and cost of repair of the roof. Mr Tait when he gave evidence said that he took into account there would have to be money spent on the roof when he purchased the property. He did say that he expected to be able to get a contribution towards the cost of the repair from the shop owners. Indeed he goes further than that and alleges that Mrs John acting on her father's behalf, as I understand it at the time, agreed to pay one half of the cost of repair. Mrs John denies that and indeed denies any liability to pay any contribution towards the cost of the repair.

7. So the first question I have to address is whether there was any agreement between Mr Tait and Mrs John. Mr Tait says the cost of repair came to £18,200 and when no contribution was forthcoming, he issued proceedings seeking payment of one half of that amount, in other words £9,100. His present position, after the evidence was given, was that he accepts that he can only seek one half of the cost of repairs to that section of the building which lay above the shop. His case, based on the evidence of surveyors, is that that cost was between £7,500 and £9,000 and he seeks one half of that by way of contribution from Mrs John and Mr Edwards.

8. Mr Tait says that, although he intended originally that the work should be carried out by a single contractor who had given him a quotation, he in fact subsequently arranged for it to be carried out by a number of subcontractors and he himself purchased the materials. That apparently was because the original contractor submitted such a high figure that he clearly thought he could do better on his own. He says that the various subcontractors and builders' merchants were paid in cash as they went along.

9. As I understand it Mr Tait is a businessman. I think he is a property dealer. No doubt he has his own reasons for dealing on a cash-in-hand basis. In this case no plans were drawn up for the work to be carried out. No estimate was obtained prior to the work being carried out and although he says that there were discussions between him and Mrs John about the work and about her contribution to it, there is no evidence (and I so find) that no plan and no estimate was ever submitted to Mrs John for her prior approval.

10. Mr Tait's way of dealing with the matter was, as I said, to proceed without an estimate, without plans and on an ad hoc basis. Ultimately he did produce a bare estimate totally

devoid of detail and prepared on the notepaper of a company of which he was a director. Incidentally, at one stage in one of his statements he said that he had written to Mrs John saying he had received an invoice. Well of course, at best that was disingenuous. He did not receive the invoice at all. He prepared it. He has been quite unable to produce invoices to support the figure which he claims was the full cost of repairs. He has produced some invoices. Some are illegible and they certainly do not correspond with the figure claimed.

11. Nor can he prove that he paid the amounts involved. Some bank statements were produced which showed that he made cash withdrawals largely, if not entirely, in round figures but with no evidence as to where they went or who was paid as a result, if indeed they were paid. Ultimately, as I have said, he produced the bare invoice without detail and subsequently he sought to support that by obtaining a report from somebody called "An estimator" or who described himself as an estimator. This person proved to be a friend of Mr Tait's, who Mr Tait said was an engineer but without disclosing his qualifications. The estimate did appear to tie in with the bare estimate that Mr Tait had produced.

12. Such a method of working was at least, in my judgement, inept and no basis on which to formulate an agreement with Mrs John. It is clear that there were some conversations between them. There is a dispute as to what those conversations were about. I think Mrs John said that she was first involved when the gate was erected which she regarded as obstructing her right of way. In correspondence Mr Tait referred to previous meetings with Mrs John and Mrs John does not deny, although I am not sure she entirely accepted it, but she did not deny that there may have been a conversation in which the figure of £20,000 for the work was mentioned.

13. Throughout her evidence Mrs John insisted that she did not regard the roof as her responsibility. She did, I think, make some enquiries of her insurance company as to whether they had any responsibility. She insisted that it was nothing to do with her. Someone would do the work, either the insurance company or perhaps the local authority but it is not sufficient, as Mr Tait suggested, simply to say that Mrs John was aware of the work that was going on. She inevitably saw workmen at the premises because at one time attending almost on a daily basis to open up the shop premises and to lock them up at the end of the day. Certainly she must have seen people and seen work going on but that is no basis on which to suggest that she was part of an agreement to carry out the work.

14. It is perhaps fair to say, I think, that she and Mr Edwards were unnecessarily evasive on the point of whether they would benefit from the work that was being carried out. It is quite clear that they did benefit. They were bound to. They could not have re-let the shop until the work had been carried on or at least the roof of the shop made secure and weatherproofed. They strike me as being sensible people. Mrs John said that if she had received proper plans and estimates, she would have considered a contribution. She already had solicitors and no doubt if proper plans and estimates had been produced, she would have taken advice.

15. Neither she nor Mr Edwards, struck me as being so gullible as to enter into the sort of open

ended agreement that Mr Tait said she did. I have no hesitation, in spite of Mr Spakman's reminder that there was evidence from Mrs Tait and Mr Connington in support of Mr Tait's assertion as to the agreement, in saying that I do not accept that there was any agreement between Mr Tait and Mrs John along the lines that he suggests.

16. However that is not the end of the matter. At the outset I gave leave to Mr Spakman to amend the Particulars of Claim and that enabled him to plead that as a matter of law, Mr Tait was obliged to carry out repairs to the roof in order to abate a nuisance to the premises owned by Mrs John and Mr Edwards or alternatively, in pursuance of the duty of care which he owed to Mrs John and Mr Edwards and on the basis that Mrs John and Mr Edwards had obtained a benefit from the work carried out he was entitled to such a contribution.

17. That claim by Mr Tait made on his behalf by Mr Spakman is supported Mr Spakman's submission by the Court of Appeal case of *Abbahall Limited v Smee*. Mr Craven, counsel for the Defendants, makes a straightforward and succinct submissions that Abbahall Limited is not applicable. He says that this was work carried out voluntarily by Mr Tait and it is a fundamental principle of English Law that the cost of work done on that basis cannot be recouped. Of course that is the principle but I have to say that I do not read Abbahall Limited in the same way as Mr Craven does.

18. The head note in Abbahall reads, "An occupier of the property is under a duty to do what it was reasonable in the circumstances to prevent or minimise the known risk of damage or injury to his neighbours or their property." Then it goes on to say "In deciding where the burden of meeting the cost was to lie, the court should strive for a result which was fair, just and reasonable."

19. The Judgment of Mr Justice Munby, as he then was, refers to the speech of Lord Wilberforce in *Goldman v Hargrave* as authority for what he described as *"An existence of a general duty upon occupiers in relation to hazards occurring on their land whether natural or man made."* Mr Justice Munby accepted that in the case that he was dealing with it was unusual in that it was the first case that the court had dealt with involving flying freeholders. In that sense this case is similar to that.

20. Mr Craven, of course, rightly points out that that was a case in which damage had occurred, freeholders of the lower portion of the premises were fearful of further damage and they obtained an injunction which allowed them to enter the premises above theirs to carry out repairs. They then sought to recoup the full cost from the lady who occupied the premises above them. The Court of Appeal held that they were entitled to a contribution but which they assessed at one half.

21. As I have said, Mr Craven submits that Abbahall does not apply because Mr Tait was under no obligation to repair the roof. I have to say that I disagree with that. It seems to me that Mr Tait had an obligation both in nuisance and negligence. He had an obligation to abate the nuisance and I will return to that in a moment, caused by the damage to the

roof. Alternatively he had a duty of care to Mrs John and Mr Edwards to ensure that their premises were not damaged by the ingress of water perhaps or anything else which occurred as a result of the fire and the damage to the roof.

22. Mr Craven further submits that it cannot be said that this was a nuisance. Again, I respectfully disagree. It seems to me a clear nuisance if these premises were open to the elements and insecure then there was a clear risk of damage to the shop premises. Now I do accept that for the purpose of this argument at least that Mr Tait perhaps was under no obligation to carry out repairs to the roof. I suppose if he had chosen to he could simply have removed any damage or dangerous structure and simply made the floor of the residential premises, in other words the ceiling of the shop, secure so that the shop itself would not be liable to damage and not of risk to further damage. He did not choose to do that. The way he chose to do it was to repair the roof and that, it seems to me, was something he was entitled to do. He did have a duty to abate the nuisance or to fulfil his duty of care and he chose to do it in what, in my judgment was a perfectly reasonable way, by restoring the roof.

23. In *Abbahall v Smee* the problem was no so much the legal principle involved. A good deal of the judgment concerns itself with the measure of contribution. Reference was made to the judgment of Lord Justice Megaw in Leakey's case when he said "*A duty is a duty to do that which is reasonable in all the circumstances and no more. What, if anything, is reasonable to prevent or minimise the known risk of damage or injury to one's neighbour or his property.*" Lord Justice Megaw went on to consider the extent of the risk and what is to be foreseen as the possible extent of the damage if the risk becomes a reality. All that suggests that Lord Justice Megaw was dealing with a situation where further damage had not occurred. It was not a pre-requisite that damage should occur before one flying freeholder could make a claim which would then have to be dealt with by the other flying freeholder. There is clearly an emphasise on a reference to foreseeing risk and preventing further damage.

24. Nor can I find in the report of Abbahall which I have been given any suggestion that Mr Tait or a person in his position would have to be requested to carry out the work before any liability is incurred. The references throughout are to the duty of neighbours to one another and what is required in terms of good neighbourliness. In the head note to *Abbahall v Smee* it is put this way. "In determining how the burden of meeting the cost was to be borne, the court should strive for a result which was fair, just and reasonable applying the concept of reasonableness between neighbours. In the case of a flying freehold where the roof served to protect more than one premises, common sense, common justice and reasonableness as between neighbours suggested that the owners should share the burden of paying for its repair. It was reasonable to apportion the benefit to be derived from the repair of the common roof between the owners on a broad basis."

25. I can see no reason for saying that the principle set out in Abbahall does not apply to this case. If it did not apply the curious situation would arise that if Mrs John and Mr Edwards, seeking to protect their interest in the property, had indicated to Mr Tait that they proposed

to take court proceedings if he did not repair the roof and protect their property, then they would have to pay a contribution. On the other hand, if Mr Tait on his own initiative repairs the roof having exactly the same effect of protecting Mrs John and Mr Edwards' property then they would not have to pay any contribution. That does not seem to me to be a result which is fair, just and reasonable.

26. So I have come to the conclusion that Mrs John and Mr Edwards should pay a contribution towards the cost of repairs. The decided cases suggest that that contribution should be assessed on a broad brush basis without going in to the party's financial means. So I have to consider the question of the extent of the contribution and the amount of the contribution.

27. The surveyors in the case, as I have already mentioned, gave us their opinion that the cost of repairing the roof so far as it related to the area above the shop would be between £7,500 and £9,000. There were two slight difficulties over that. First of all it was not entirely clear at one stage whether Mr Tait was claiming the cost of repairs to the roof and to the floor. It was not entirely clear whether the £18,200 included those costs. I think the situation is that it is not open to Mr Tait to claim any amount relating to the floor because his Particulars of Claim simply refer to the cost of the roof.

28. The other slight complication was that it was unclear whether the surveyors were including or excluding VAT when they came to their figure. At one stage they say specifically VAT was included but subsequently appeared to be slightly ambivalent about it. The fact of the matter is that in this case no VAT was paid. Mr Tait was paying, as he said, by cash and this really is the only solid evidence, I think, that Mr Tait has as to what his expenditure was. There is no way that we can arrive at a calculation which is in any way accurate from the documents, such documents as Mr Tait has.

29. It seems to me that I have to decide this case on the basis of the surveyor's estimate. Mr Spakman suggests that it is open to me to decide on a figure anywhere within the bracket given by the surveyor on the basis that Mr Tait's estimator arrived at a figure of some £9,500. I think Mr Craven is right about that. That was a figure which the surveyor was saying was not outrageous or not untoward in any way, but their own view was, that it was on the high side and that a proper figure would be £7,500 to £9,000.

30. In those circumstances I conclude that it is only open to me to adopt the figure of £7,500. There is no evidence on which I can decide on any other figure. That is the minimum figure which the surveyor said would be appropriate. That is, bearing in mind the burden of proof, the only figure that Mr Tait can rely upon. Therefore I conclude that Mrs John and Mr Edwards must pay half that amount towards the cost of repairing the roof that is a figure of £3,750.

31. So far as the right of way is concerned, I described the one as following a path to the right of the premises as one looks from College Street and which then turns at right angles, somewhere at the rear of the premises and about half way between the shop and the further

parts of the residential premises. As I said, there is apparently no dispute over that. To erect a wall was an interference with the right of way erecting of the wall but the parties are now agreed on the way that should be dealt with.

32. The right of way to the lavatory clearly is an express grant and it still exists. The defendants apparently do not object to the gate which has been erected providing they have a key. The lavatory was not, apparently, in their ownership so far as one can tell and must, I think, have been in the ownership of Mr Tait and his predecessors.

33. Mr Tait's evidence was that the lavatory clearly had not been used for a long time. He would not have known that from his own observation because he had only just acquired the premises but clearly he bases that on the state of the lavatory. Mrs John in her evidence referred to a photograph which she showed me and she said that it was in that condition before the fire occurred. If that is right and that is the only evidence I have then it is perfectly obvious that that lavatory was not being used and had not been used for some time. One is strengthened in that conclusion by the evidence again of Mrs John who told me that the shop premises now contain its own lavatory inside the shop. It seems unlikely that if there was a lavatory in the premises that the outside lavatory would be used.

34. She says, however, that the outside lavatory would be used by customers when the shop re-opens. I understood her to say that the proposed use of the premises is as a nail bar. I have no experience of nail bars but I understand that probably customers remain within the premises for some time, an hour or perhaps two hours. It may be not unfair to compare it to a ladies hairdressers where ladies spend far more time then men do. Perhaps it is right that customers would need a lavatory. I do not accept, however, that ladies attending a nail bar would be enamoured of going to an outside lavatory at the rear of the premises and it seems to me to be fairly obvious that what would happen is that the internal lavatory would be used by staff and customers alike.

35. What Mr Craven asks me to do, however, is to order Mr Tait to re-instate the lavatory. Of course if he does so, he is reinstating a working lavatory much more hygienic and altogether more acceptable than the lavatory which existed previously. Mr Craven says that that is inevitable because having interfered with the exercise of their rights by the removal of the lavatory, there is no other way that Mr Tait can restore those rights to the defendants other than the payment of damages and since this would be a perpetual loss or a loss of their rights in maturity, those damages should be substantial.

36. I do not accept those submissions. It seems to me that to all intents and purposes this lavatory was no longer in use. The remedy that I have to apply is a discretionary remedy and I come to the conclusion that it would be disproportionate if I were to order a restoration of a lavatory which was out of use for practical purposes and which is unlikely to be of much consequence in the future. As for the question of damages, again, it seems to me in effect the defendants have suffered little or no loss by the inability to go to a lavatory which could not be used and which was unlikely to be used in the future. So in my judgment the only proper way of dealing with that is to award nominal damages of one

penny in respect of Mr Tait's removal of the lavatory.

37. The third matter which I have to deal with is the question of the broken window. I accept Mrs John's evidence about that. It seems likely that it was damaged by one of Mr Tait's men and she says that Mr Tait told her that it was. He accepted that it was his responsibility. I think that is probably right. I accept that evidence but I also think it probably accords with a realistic view of what happened. It was probably one of the workmen engaged at the property who did it. On the other hand, the surveyor's report refers to it as "Fire damaged". I have no doubt that it had formed part of Mrs John's insurance claim although I accept, as both counsel have said, that is not a reason for not compensating Mrs John now. I do accept the submission made by Mr Spakman that the breaking of the window was not in the result causative of the loss to Mrs John and Mr Edwards. It seems clear that any loss attributable to the breaking of the window was a result of the fire. I would not award damages under that head.

38. The question of the advertising board is, surprisingly and late in the day, a difficult one. I said at the outset when I was giving Mr Spakman permission to amend the Particulars of Claim that the court should always and does always try to deal with all issues before the parties at one time. Yet, late in the day, I find myself quite unable to deal with the question of the board. There is evidence that the board was there for some time. Certainly for 13 years because that is the time the previous tenants were in occupation. There might have been evidence, had I allowed it to be introduced, that there was a board there in the 1930s. No doubt it would not be particularly unusual. After all these premises were one at the time and if the shop owner wished to put a board higher up on the residential part of the premises, well so be it. So there is nothing unusual about it to suggest that it was unlikely that the board had been there for many, many years. Nevertheless I do not have sufficient evidence to enable me to say that this board had been in position for such a time as to establish a right, so far as the shop owners' are concerned, to exhibit a board attached to the residential premises. That is unfortunate, but there it is.

39. The question of damages which would have arisen had I been dealing with a claim in respect of the board, of course, would in itself in part depend on whether there was a right to erect the board in the first place. Not entirely, because part of the claim was for damage to the claimant's premises. The amended defence and counter claim did not seek any relief in respect of the board itself or the right to exhibit a board. So as far as the damages are concerned, it does seem to me that if I were to allow the defendants to introduce further evidence on the question of the board then I would have to allow the claimants the opportunity to introduce evidence in terms of damages, damage to the his property and so on. So I have concluded that I simply am not in a position to deal with the counter claim so far as it relates to the advertising board.

HH Hugh Jones Apart from the question of costs and interest I think that deals with the issues that I have to concern myself. Mr Craven?

Mr Craven In relation to the, as it were Brown right of way, perhaps in some way or other it should be formerly recorded that ...

HH Hugh Jones I entirely agree.

Mr Craven ... the locks be removed.

HH Hugh Jones I think it should be recorded in the Order on the basis that the parties are having ...

Mr Craven Yes.

HH Hugh Jones Something of that sort.

Mr Craven Yes. So that leaves the question of costs.

HH Hugh Jones And interest.

Mr Craven And interest. I assume there is a claim for interest.

Mr Spakman There is.

HH Hugh Jones I think there is, yes.

Mr Craven Part of what I say to that will relate to costs so perhaps I should wait for Mr Spakman to mention costs first.

HH Hugh Jones Yes let Mr Spakman deal with it first.

Mr Spakman Can I deal with costs?

HH Hugh Jones Let him tell us what he wants.

Mr Spakman Let me deal with both. There is a claim for interest. It was pleaded by Mr Tait acting in person and says that the date payment was due the date hereof and continuing. The invoice whatever it is purport, was dated 7th July 2008. My submissions will be a reasonable time for payment not of that sum, admittedly, but a reasonable time for them to have made contribution was by the end of July. So I would invite the court to say that interest should run at eight per cent from the 1st August 2008. Interest is, of course, a discretionary matter.

HH Hugh Jones Yes and costs?

Mr Spakman So far as costs are concerned, I have an application for costs. The primary rule is, of course, follow the event. I appreciate that Mr Tait has not secured the sum of money that he was seeking but can I hand a small bundle of correspondence into the court. I am not going to be suggesting that there is a Part 36 offer here but Part 36 consequences should apply but my submission will be in relation to the conduct of the parties in this case. Quite apart from the general rule that costs should follow the event. The starting point in my submission is, I have asked to look at those documents first, the first document is simply a request by Mr Tait in February for a meeting to try and discuss the issues which arose in the case. This is a case which the court may feel cried out for the parties to get together and settle it. It was ripe for that. I certainly considered it was ripe for that the very moment that I saw these papers. This was a matter which needed to be settled rather than to end up forcing the court to make a decision on these issues. It might be said, well the Claimant has succeeded on a point for which he only obtained leave to amend on the day of trial.

HH Hugh Jones I am sure it will be said.

Mr Spakman I am sure that will be said so if your Honour would look at the bundle for a moment, Volume 2. Page 162, this has to be put into its context. The Claimant for a long time in these proceedings was un represented. The

Defendants throughout have been, contrary to your Honour's initial understanding in the case, have been represented by solicitors throughout. So my primary submission is that those legal representatives should have always been aware of the possibility and indeed would have had an obligation to draw to the court if Mr Tait had still be acting in person, the authority of *Abbahall v Smee*. On 10th February Mr Tait is still acting in person to the Defendants' solicitors. The last line "The Claimant will also rely on the case of Abbahall v Smee and other authorities." So even if it wasn't uppermost in the Defendants' minds before then, it should certainly be uppermost in their minds then that this question was going to be raised. Then, of course, one has the letter dated 12th April which is an offer letter, offering to settle on the basis of payment of the sum of money, £7,500. Admittedly more than Mr Tait has recovered but an offer also to reinstate the toilet. Apart from a query then as to how that sum was made out, there was never any response as far as I am aware to that offer. Then there was an offer, as your Honour will see, to meet a roundtable meeting in counsel's chambers to try and resolve this matter. That too was not responded to. There has always been open in a case like this and incumbent, in my submission, on the Defendants to make some steps to try and settle it before it came to court. The parties are enjoined by the Civil Procedure Rules to try and settle without coming to court but there has not been one single offer from the Defendants of any kind whether to go to mediation or offers by way of setting. Notwithstanding a massive no that this was a point which was coming whether it was formally pleaded or not. It is not, in my submission, these days as it might once have been when Mr Craven and I were younger to say "We'll stand on the technical point of what's contained in the pleading." One of the purposes of the Civil Procedure Rules is as your Honour has already observed when giving both sides' permission to amend is that all the relevant disputes are before the court. It must have been known certainly to the Defendants from February onwards that the issue of Abbahall was likely to be raised. As I say if Mr Tait had been acting in person the Defendants themselves and legal representatives would have been under an obligation, a professional obligation to draw that authority to the court. After the Claimant had seen me in conference the letter of 12th April was written again put on notice and I accept a formal application to amend was not made. In those circumstances it must have been plain if it had not been to the Defendants before that they were at serious risk of being ordered to make a contribution to the cost of repairs. They still failed to make any offers. Failed to make any payment into court of any kind. In those circumstances going back to the principle of costs following the event, my application is for the costs of the claim and counter claim. So far as the counter claim is concerned, they were largely matters which either the Defendants had been ruled against or matters of insignificance. Those are my submissions.

HH Hugh Jones Thank you.

Mr Craven

May I deal with costs first because I think some of what I say about costs will be relevant to interest. The Defendants' position is and has been they say throughout that they would have considered making a contribution to the cost of the roof if the matter had been properly presented and explained to them. Their problem throughout this dispute has been getting first of all proper explanations from and figure from Mr Tait and secondly, instead of getting proper ones, getting highly suspicious and unconvincing ones instead. It wasn't just a case of not getting information, they were getting information which was questionable. The claim was put on the basis purely of an agreement which they denied and you've upheld that denial, you found in their favour on that point. If that had been the only basis then the claim would have failed. Secondly the claim was put in the sum of £9,100 based on one of these questionable pieces of evidence. That resulted in having, that was one of the main reasons for having to instruct experts and before long the result was the claim in effect halved. That was only as a result of the expert evidence obtained from the Defendant's expert. But then agreed with by the Claimant's expert. In fact, of course, now the amount you have awarded the Claimant is within the small claims limit and did not justify a multi track trial if that had remained in issue. So as you know from the correspondence quite apart from the oral evidence from as early as 18th June 2008 the Defendants' solicitors were writing to the Claimant's then solicitors that they might consider a contribution to the works exclusively to the roof, on receipt of proper invoices. But as it were what little evidence we now have obtained, as had to be squeezed out of the Claimant. First there were the virtually invented invoices which were for more than double the amount he has recovered. Then there were failures to reply to Part 18 requests in any pertinent way. Then there was the delay in replying to and the Order for the disclosure of evidence as to payment. Then eventually the evidence which was produced partly days ago and partly yesterday which, in effect, your Honour has found to be unconvincing. So this was what the Defendants had to deal with throughout. In my submission although had the matter been properly presented in one go at the beginning although it may be a valid point that they ought to have contribute something. That can't be said in view of the way the Claimant has been represented erratically and piece meal and in unconvincing ways. And in my submission this is a case in which the Claimant should therefore not get his costs at all. It is the Defendants who have been put to considerable expense trying to establish what this claim is about. The offers made fairly recently which Mr Spakman has referred to are in my submission, not supported by his claim for costs, first of all the letter of 12th April purporting to be a Part 36 offer seeking £7,500. Of course that is more than the Claimant has recovered. That was, of course, replied to by a request for an explanation of how it was calculated and no proper explanation was given because, of course, that figure didn't accord with what the experts appeared to have agreed. And in fact until the last minute,

the Claimant appeared to be proceeding on the basis of a claim first of all costs of the whole roof and then possible for other costs again. It is rather late in the day that the claim was narrowed down considerably to half the costs of effectively half the roof which is not the way it was being presented until very recently. Then, of course, there is the last minute amendment. It is true that in the letter you've just been referred to of 10th February the Claimant referred to the case of Abbahall. Although of course, that's been analysed in some detail in argument today and obviously we are now all very well aware of it, it is a somewhat obscure point dealing only applicable to flying freeholds and the Claimant if he has discovered it himself has to congratulated on finding it on 10th April. It is not, at first sight, a point that would have occurred to everybody representing a party in a case like this. But the main point although it was mentioned, and although I accept it was mentioned sometime ago by Mr Spakman as being a matter he might raise, a natural application was made to amend until yesterday. The exact details of the amendment were received by me on Sunday and this, as I said yesterday, was in contrast to the Defendants having made quite clear their comparatively minor amendment before the original date of the trial in March and having. in the end, being forced to make a formal application to amend by the Claimant's refusal to agree. So it was not until really the last minute that it was known quite how the Claimant would put his case and in particular whether there would be reliance on (inaudible). Up until that point the Defendants faced a claim which, in effect, you had dismissed. So for all these reasons and I am probably going too far if I applied for the Claimant to pay the Defendants' costs, that's not in my submission a matter which is out of the question. So coming to an overall decision that in all the circumstances there should be no order as to costs. In other words the Claimant should certainly not get his costs is, in my submission, a fair exercise of your discretion in all these circumstances. It might be said in the abstract and objectively that this was a claim that ought to be settled. But if that is true (inaudible) on the basis that all the Claimant's cards and evidence were put on the table long ago instead, as I said, having to b e squeezed out of him during the lengthy progress of this case. Similar arguments therefore apply to his claim for interest because of the conduct of this case, because of the way it has been presented. And secondly because of course of questions over how the Claimant has in fact paid for it. In his Particulars of Claim he has claimed interest on an interest he says he appeared to have paid to a company called Orchid Management a long time ago. That, of course, never happened. In so far as it might be said he nevertheless still paid out sums of money for the construction of the roof, it was done in such a different way and of course he still, in one sense entirely for his benefit, may incidentally have benefitted the Defendants but he was going to construct that roof anyway, in my submission there is no justification in exercising the discretion award of interest either. So in my submission, there should be no order as to costs at all and no award of

interest.

HH Hugh Jones What about the cost of the counter claim?

Mr Craven When I said one should take an overall view of it ...

HH Hugh Jones You were including it?

Mr Craven I was including that. But as to looking at it in more detail, of course, you can make an issue based order, in my submission, on one part of the counter claim the parties have, at the very last minute, reached agreement implicitly accepting there was a right of way. On the another part the lavatory you have decided against, on the merits you have effectively decided against the Defendants. You have awarded nominal damages. It still recognises there was a breach of their rights and that they had rights and then on the other matter, on the basis of lack of evidence you made no order in their favour in respect of the advertising board. Obviously it might be said that this is a matter of assessment but in practice it wouldn't appear that any significant costs were incurred on those counterclaims in any event and therefore although the Claimant may say they have largely gone in his favour, in my submission there is no reason to award him separate costs on those.

HH Hugh Jones Yes thank you.

Mr Spakman Can I just hand in two further letters. One is to deal with Mr Craven's point about what the response was to the request for a breakdown that is a letter of 27th April. That was the response to the letter of 22nd I actually thought that was in the bundle that I handed to your Honour, but may be not. And then the following letter is a letter in May in the Defendants' solicitors ...

Mr Craven These are not in the bundle?

Mr Spakman They are not. 27th May to my solicitors saying "Liability is in issue relying on the assertion in the expert's report that there was no documentary evidence to support a ground for contribution." But I repeat times have changed and Civil Procedure Rules expressly require parties to try and settle their differences. As your Honour can see we endeavoured to make offers to settle. We've asked Mr Tait when acting in person asked for a meeting with the Defendants to try and settle this matter. We asked for a round table meeting in order to settle this matter. All of these suggestions have been rebuffed and as a result two days of court time have been taken up. The result has been that the Claimants have succeeded, costs should follow the event and I make my application for costs.

HH Hugh Jones Yes thank you. I agree with Mr Spakman that this was a case that cried out for a settlement rather without there being two days of court hearing. Sometimes court hearings are inevitable and in this case the claimant put forward a claim which had it remained as it was, before yesterday, would have failed. It succeeded only because Mr Spakman yesterday persuaded me to allow him to amend the Particulars of Claim. I did it on the basis as he rightly reminds me that it is right that all issues should be before the court and that each party should be able to present its case fairly and fully. That does not mean to say that they escape all responsibility for bringing a case in one form and succeeding on another. The Defendants were not

required to defend this claim on the basis on which it has succeeded until yesterday. Of course Mr Spakman says his side made efforts to settle and the other did not. Perhaps they did not but they made it clear, I think, at an early stage that they wanted proper documentation. At no time was any documentation forthcoming to support the claim which Mr Tait made. And then of course the claim which he did make was much reduced. So in all those circumstances I agree with Mr Craven that there should be no order as to costs upon the claim. Similar considerations apply to the award of interest. Had Mr Tait's claim, had it been heard today as it stood yesterday, he would have failed. And of course there is the, perhaps less important point, that we do not know even now at what stage Mr Tait paid the bills which he had to pay in connection with this work. But principally since the case changed its nature entirely yesterday it would not be right, in my judgement, to award interest. So far as the costs of the counterclaim are concerned I do not entirely agree with Mr Craven's analysis. It seems to me the Defendants can claim a greater degree of success than he is suggesting. I have ruled against them on the question of the window not because I did not accept Mrs John's evidence about how it was done but because it seemed to me the window was damaged anyway and she was not at a loss as a result. But she has succeeded in terms of the right of way because she has come to an agreement with Mr Tait for removal of the wall. She has also succeeded although entirely technically on the question of the right of way to the lavatory. It is simply as a matter of the exercise of my discretion that I decided not to order Mr Tait to rebuild and of course as Mr Craven has pointed out the other matter, the advertising board I unfortunately feel that I cannot deal with. But I certainly do not regard Mrs John and Mr Edwards as having failed in their counterclaim. And so the Order that I will make is that there be no Order as to costs either on the claim or the counterclaim. It may be sensible Mr Craven and Mr Spakman if I ask you to draw an Order because I want you to include the agreement as to the right of way and the removal of the wall.

Mr Craven Yes.

Mr Spakman Yes.

Mr Craven Other than that it seems fairly straightforward.

HH Hugh Jones Yes.

Mr Craven But obviously we can do that, yes.

HH Hugh Jones I do not mind whether you do it by way of undertakings or preamble or what as long as it is recorded in some way.

Mr Craven Yes. Would you like us to do that this afternoon or can we fax or email to the court?

HH Hugh Jones I do not mind, you can fax it, if you like. I am not here tomorrow but a bit later in the week?

Mr Craven Yes. Thank you.

HH Hugh Jones Yes very well. I might say and I hope this is not unduly waspish Mr Spakman, but had I awarded costs I might well have disallowed the costs of

preparation of the bundles.

Mr Spakman I think they have been (inaudible) and strained during the course of the hearing. The difficulty was that Mr Tait when acting in person prepared the bundles, the problem started there. Not his fault perhaps but the problems continued.

HH Hugh Jones Right.

COURT ADJOURNS