Neutral Citation Number: [2021] EWHC 2043 (Ch)

Case No: BL-2019-CDF-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
BUSINESS LIST (ChD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 23 July 2021

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

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Between:

MDW HOLDINGS LIMITED	**Claimant**
- and -	
(1) JAMES ROBERT NORVILL	
(2) JANE ROSEMARY NORVILL	
(3) STEPHEN JOHN NORVILL	**Defendants**

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Andrew Ayres QC and Laurie Scher (instructed by **Morgan LaRoche Ltd**) for the **Claimant**
Hugh Sims QC and Jay Jagasia (instructed by **Blake Morgan LLP**) for the **Defendants**

Written Submissions: 4 and 18 June 2021

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Approved Judgment

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

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2 p.m. on Friday 23 July 2021.

JUDGE KEYSER QC:

1. I handed down judgment in this case on 4 May 2021 with the citation [2021] EWHC 1135 (Ch). The judgment sum of £382,600 for damages has been paid. This is my judgment on the consequential matters arising. Having decided to overcome listing difficulties by dealing with those matters on paper, I have received 79 pages of written submissions together with substantial annexes and a large bundle of authorities; for all of which, I am grateful. I have taken the submissions fully into account, but in the interests of avoiding further delay I do not intend to recite the competing arguments in any detail and shall state my decisions as shortly as possible.

The incidence of costs

2. The claimant seeks an order that the defendants pay all its costs of the case. The defendants seek an issue-based (or a percentage-based) order for costs or no order for costs between the parties.

3. The incidence of costs is a different issue from the basis on which any costs ordered to be paid are to be assessed. I deal with them separately. Nevertheless, matters of conduct are capable of being relevant to both issues, and I bear this in mind. The order to be made in each regard is a matter of the court's discretion, and it seems to me that one ought to have an eye to the overall justice of the matter when making a decision on either issue.

4. The court has a discretion whether to make any order for costs at all. If the court decides to make any order for costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; however, the court may decide to make a different order. In deciding what, if any, order to make as to costs, the court will have regard to all the circumstances, including conduct, any partial success, and any admissible offers outside Part 36: r. 44.2.

5. The claimant was the successful party, because an award of damages was made in its favour. This indicates that the primary issue is whether there are sufficient reasons to justify a departure from the general rule, according to which the defendants would be expected to pay the claimant's costs. I would make this general comment. The court's discretion, to be exercised in accordance with Part 44, is unfettered. But this does not, in my judgment, mean that the general rule of winner gets the costs is a mere starting place, as though it were a fulcrum on which the seesaw might tip freely as pressures were exerted first on this side and then on that. The fact of success, bringing the general rule into operation, is a weighty factor in its own right and its weight must be respected.

6. In brief summary, the defendants contend for a departure from the general rule on the following basis. The claim as a whole was considerably exaggerated, the claimant recovering only about one-third of the amount it sought. On two of the three big issues concerning waste-disposal malpractice (cess waste and tank bottom waste) its case failed; only in respect of leachate / trade effluent did it succeed at all, and then to a modest extent. The claimant's approach to identification, explanation and quantification of loss, as regards the claim as a whole and the specific headline issues, was "amorphic and dysfunctional" and its response, when this was pointed out and when Mr Mesher demonstrated that its case did not stack up, was not to acknowledge the truth but to double-down on its contentions and engage in "shenanigans" including

a groundless attempt to recategorize certain kinds of waste as tank bottom waste. Detailed analyses of the time and effort consumed by dealing with the issues on which the claimant was unsuccessful are set out in two annexes to the defendants' submissions and in paragraphs 20 and 21 of those submissions. In the circumstances, it is said that the claimant's conduct in presenting an exaggerated claim and unreasonably pursuing aspects of it that ought to have been abandoned must be reflected in costs, and that the defendants were successful on discrete issues for which they ought to recover costs; and that the appropriate order is that each party bear its own costs, or alternatively that costs be apportioned by issue or by percentage (such apportionment being, it is suggested, likely to result in at most a modest recovery by the claimants).

7. Several familiar authorities were cited and I have regard to them. I single out one passage that seems to me to be helpful in this and other cases, though it concerns only part of the argument before me. In *Hospira UK Ltd v Novartis AG* [2013] EWHC 886 (Pat), Arnold J dealt with a dispute about costs in circumstances where the claimants were the successful party but the defendants had succeeded on some aspects of the case. He said:

> "2. The principles to be applied in these circumstances are familiar subject to one small qualification. The court generally approaches the matter by asking itself three questions: first, who has won; secondly, has the winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of that issue; and thirdly, are the circumstances (as it is sometimes put) suitably exceptional to justify the making of a costs order on that issue against the party that has won overall.
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> 3. I say sometimes put because I think a review of decisions of the Patents Court on costs issues over the past five years would show that that particular phraseology is often, but not always, employed. Sometimes it has put been put in slightly different ways, notably by myself.
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> 4. The origin of the phrase 'suitably exceptional' is the judgment of Longmore LJ in *Summit Property v Pitmans (A Firm)* [2001] EWCA Civ 2020. As has been pointed out recently by Davis LJ in *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2012] EWCA Civ 843 at [46]-[49], it is apparent that Longmore LJ was not intending when using the words 'suitably exceptional' in the particular circumstances in which he did to impose a specific requirement of exceptionality. The question rather is one of whether it is appropriate in all the circumstances of the individual case not merely to deprive the winning party of its costs on an issue in relation to which it has lost, but also to require it to pay the other side's costs."

8. Although the claimant was the successful party in the case as a whole, the defendants succeeded on two main waste-disposal issues, namely cess waste and tank bottom waste. Those issues were, in my judgment, sufficiently circumscribed to be capable of justifying an issues-based order. Although they were not substantive heads of claim as such (this was not a claim for damages for improper waste-disposal but for deceit and

breach of warranty), they were not merely part of the argument in the case, where a claimant might lose the battle but win the war; they were specific factual issues relating to allegedly unlawful practices and forming the bases of allegations of deceit and breach of warranty, in respect of which discrete factual and expert evidence was given and, far from being parasitic on other such matters, had their own vitality. Having regard to the different "metrics" offered to me by the parties and also to my sense of the case, having heard it at length and considered it at greater length thereafter, I should assess the proportion of the case as a whole that was attributable to those two issues as about 25 per cent. This suggests to me, as a preliminary conclusion, that the claimant should not recover that proportion of its costs. (Because the evidence was not neatly packaged and several witnesses dealt with more than one issue, a percentage order would be a more convenient way to deal with the matter than a strictly issue-based order.)

9. It is then necessary to consider whether other relevant factors make it appropriate to award to the claimant some greater or lesser proportion of its costs or to make an order for costs in favour of the defendants, or indeed both.

10. I do not consider that admissible offers of settlement take the matter further. The defendants point to a Part 36 offer which they made and point out that it would have given them costs protection if I had decided a particular issue on quantification differently. That, however, is always the case with ineffectual Part 36 offers: if the court had reached a sufficiently different decision, the offer would have afforded protection.

11. The defendants complain that the manner in which the claimant presented its claim rendered them less able to form a proper assessment of the case and therefore to protect their position. I do not agree. In my judgment, this is just the sort of case where, despite protestations about "the distorting effect caused by MDW's approach" (defendants' submissions in reply, paragraph 6), the defendants were perfectly able to form their own judgement as to the appropriate offers to be made. The defendants formed the view, which they articulated forcefully both before and during the trial, that the issues relating to cess waste and tank bottom waste had no relevance to or impact on the quantum of any award of damages that might be made. They assessed the potential value of the claim, if it were successful, as relating to the leachate claim, and they made offers accordingly. Those offers did not protect them.

12. The heart of the defendants' further case on costs seems to me to lie in allegations that the claimant was unreasonable in raising, and even more unreasonable in pursuing (especially after a letter of 21 October 2020 inviting them to abandon), the contentions concerning cess waste and tank bottom waste; that the claim as a whole, and especially in respect of those contentions, was greatly exaggerated; and that the exaggerated claim was pursued aggressively. I make the following observations.

    1) Although I have held that the claimant's claim was exaggerated, I am not persuaded that it was so in the sense that the claimant advanced such a large claim or any part of it in bad faith.

    2) Perhaps the strongest point in favour of the defendants is my conclusion, expressed in paragraph 191(2)(f) of the judgment, that the claimant's case on tank bottom waste had been advanced at the outset without a sound evidential basis. I take this into account. However, there was in fact a basis for the

underlying allegation; the problem concerned the analysis regarding quantum, which was lacking. The claimant's pursuit of the cess waste claim and the tank bottom waste claim was in large part the result of evidence from persons whose involvement in the work at the Site pre-dated the claimant's purchase, and while the evidence was sought out by the claimant I do not consider that it was manufactured by it.

3) The attempt by the claimant to bolster the case in respect of tank bottom waste after exchange of expert evidence was unconvincing, as the judgment makes clear. I stop short, however, of regarding it as deserving of censure in the exercise of my discretion as to costs. Two points might be mentioned. First, issues regarding both cess waste and tank bottom waste had the potential to affect the quantum of the claim, if not in respect of the multiplicand then in respect of the multiplier. This meant that it was not unreasonable of the claimant to pursue them on the basis of the available evidence. Second, it is well to bear in mind the context of the proceedings as a whole, which involved deception worked by the first defendant on the claimant after he had been actively deceiving the industry regulators. This meant that the claimant started from a position in which it regarded itself (rightly) as being the victim of a fraud relating to waste-disposal practices, and in the light of what it was told by employees it understandably acted on the basis that deception relating to cess waste and tank bottom waste had been practised in order to increase the purchase price.

4) It is said that the claimant pursued its (exaggerated) claim with undue aggressiveness. It is true that there was perhaps a surfeit of emotive language in the course of the trial and the pre-trial review. I also was unimpressed by the efforts made at the pre-trial review to obtain an order for live-streaming of the trial: the matter was presented as though it were a public enquiry, and it seems to me that this was probably an effort to impose pressure on the defendants. However, I am not persuaded that these matters, despite my criticisms, merit reflection in the order for costs.

13. I do regard as significant two matters of conduct on the part of the defendants. (The conduct is that of the first defendant, into whose hands his parents committed the conduct of the case. Although it is submitted that their personal innocence ought to be taken into account—as it is—it has not been submitted that any distinction ought to be drawn among the defendants for the purposes of the order to be made.) The two matters of conduct are the following:

1) The first defendant knew that Mr O'Connor was to be a hostile witness and would so far as lay within his power sabotage the claimant's case. I make this finding on the balance of probabilities in the light of the circumstances described in the judgment. I emphasise that this finding in no way implies any criticism at all of the defendants' legal representatives; there is no basis for criticism of them. I also am not making a finding that the first defendant knowingly procured the giving of false evidence by Mr O'Connor. However, it strains credulity to accept that Mr O'Connor's appearance as a hostile witness was the surprise to him that it was to others. This fact is relevant, in my judgment, when considering the defendants' current complaint that the claimant

failed to make a reasonable assessment of its case. Such a complaint lies ill in the mouth of these defendants.

2) For reasons appearing sufficiently in the detailed analysis in my judgment upon the claim and set out at length in the written submissions of Mr Ayres QC and Mr Scher concerning consequential matters, the first defendant, having misled the regulators and practised deceit on the claimant, maintained a defence that he knew to be false and gave false evidence at trial in support of that defence. This is not merely to say that his evidence was rejected. His evidence as to his state of knowledge was untrue and I find that it was deliberately untrue. Unhappily, that is not an unusual state of affairs. But that does not make it any the more acceptable.

3) The submissions of Mr Sims QC and Mr Jagasia appeared to suggest that the fact that some of the allegations of fraud against the first defendant did not succeed constituted a positive reason to make an adverse costs order against the claimant. I do not agree. No allegations of fraud were raised without proper grounds, and the fact that the first defendant was not fraudulent in every respect alleged does not detract from the fact that he was in fact fraudulent in his dealings and dishonest in his evidence.

14. The first of these matters of conduct (Mr O'Connor) appears to me to constitute a factor weighing against making a costs order more adverse to the claimant than depriving it of the costs of the two waste-disposal issues. The second matter (dishonesty) is, as Mr Ayres and Mr Scher submitted, a factor tending to support a costs order more favourable to the claimant. However, the same factor forms the basis of my reasoning regarding the basis of assessment. Having considered the matter in the round, I consider that at this stage of the analysis this second factor is best reflected by declining to award to the defendants any of their costs of the two waste-disposal issues on which they were successful.

15. Accordingly, the defendants must pay to the claimant 75 per cent of its costs of the case.

The basis of assessment

16. If the court makes an order for costs, they will be assessed either on the standard basis or on the indemnity basis: r. 44.3(1). Assessment on the indemnity basis may be ordered if there is some conduct or circumstance that takes the case out of the norm. This may be dishonesty or misconduct, but it may be conduct that is unreasonable to a high degree. The applicable principles have been discussed in many cases, including by Tomlinson J in *Three Rivers District Council v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm) at [25], and by Akenhead J in *Courtwell Properties Ltd v Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC) at [22]. The question must always be considered with reference to the facts of the particular case.

17. One matter can sometimes be overlooked. Conduct may be "out of the norm" even if it is regrettably commonplace. So dishonesty in the conduct of a case is not prevented from being "out of the norm" by the fact that such dishonest conduct often occurs in litigation. The word "norm" here has a normative, not merely a descriptive, import.

18. As I have already made clear, in my judgment the first defendant advanced and then maintained in evidence a dishonest denial of his deliberate misleading of the regulators and his deceit practised on the claimant. I regard it as quite wrong to permit that conduct to be brushed off as though it were merely the rough and tumble of litigation. The costs that the defendants have been ordered to pay must be assessed on the indemnity basis.

Reserved costs

19. The following costs have been reserved by previous orders:

    1) The costs of and occasioned by the amendment of the particulars of claim, for which permission was granted at the case and costs management conference;

    2) The costs of the claimant's application, heard at the pre-trial review, for permission to rely on the fourth witness statement of Oliver Hazell;

    3) The costs of the fourth witness statement of Oliver Hazell and of any evidence in response;

    4) The costs of the pre-trial review;

    5) The costs of the defendants' application, heard at the commencement of the trial, to strike out parts of the claimant's evidence.

20. As to the costs of and occasioned by the amendment of the particulars of claim, I shall order that the claimant pay the defendants' costs. The amendments included matters of merit but also the reworked allegations concerning tank bottom waste, which were unsuccessful. I see no reason to depart from the usual rule that a party which amends its statements of case bears the costs of and occasioned by the amendment. (The costs of the application for permission to amend are a different matter and were dealt with separately in the order granting permission.)

21. As to the costs of the claimant's application for permission to rely on the further witness statement, I shall make no order. The application was successful, because I gave permission for the witness statement to be adduced in evidence. The application was also timeously made; no criticism falls to be made of it on procedural grounds. However, it was an application for permission to adduce a piece of additional evidence that, in the event, I did not deem to be useful. In my judgment, this is a sufficient reason to depart from the usual position that the successful party on an application recovers its costs. However, I do not consider that it justifies a costs order in favour of the defendants.

22. As to the costs of and occasioned by Mr Hazell's fourth witness statement, I shall order that the claimant pay the defendants' costs. The grant of permission for a further statement was a concession, but the statement was ultimately not helpful; there is no good reason why the claimant should recover the costs of that statement. Insofar as the defendants incurred costs responding to that statement, they ought to recover them.

23. As to the costs of the pre-trial review, I see no sufficient reason why these should not be costs in the case.

24. As to the costs of the defendants' application, I shall make no order. The application was in large part successful, but it was also late and disrupted the commencement of the trial. Neither party ought to recover any costs in respect of it.

Payment on account of costs

25. In my judgment, there is no good reason why the defendants ought not to make a payment on account of the claimant's costs of the case; therefore, they must do so: r. 44.2(8).

26. The submissions for the claimant say that the total costs incurred by the claimant are £1,119,873 net of VAT. Some specific items of costs have been disallowed and some adverse orders for costs have been made. It is reasonable to work on the basis that the total costs in play are about £1,000,000.

27. I have ordered that the defendants pay 75 per cent of the costs. That would indicate a claim of the order of £750,000.

28. I note that at the time of the case and costs management conference the claimant's incurred costs were said to be £207,000 and its estimated costs were approved in a sum of £497,000: a total of just over £700,000. Of course, on a detailed assessment, the costs will not be limited by proportionality, as they are in an approved budget, but only by reasonableness.

29. I note also that, on the premise that I ought to award the claimant the entirety of its costs, counsel's submission was that the payment on account ought to be of the order of 70 per cent of the total costs: £700,000 out of total costs of about £1,000,000. The same approach, applied to an award of only 75 per cent of costs, would produce a figure of £525,000 (which is also, of course, approximately 75 per cent of the total costs, including incurred costs, in the costs budget; the limited relevance of a budget to indemnity costs being again noted).

30. Despite the order for costs on an indemnity basis, I consider that the relation that the total costs sought bears to the judgment sum gives ground for caution. I shall order a payment on account of costs of £425,000, which is very unlikely to exceed the figure allowed on assessment.

Interest on damages

31. Interest on damages should appropriately run from 14 October 2015 (the date of the SPA) until 21 May 2021 (when the judgment debt was paid).

32. Interest in the period from 14 October 2015 until 4 May 2021 is at the discretion of the court. The claimant seeks interest at the rate of 5 per cent above the base rate of Barclays Bank, because that is the rate that was specified in the SPA as applying when one party failed to make a contractual payment by the due date. The claimant contends that the rate of 1 per cent above the base rate, offered by the defendants, does not reflect any rate at which it could have borrowed to fund the purchase price under the SPA; the evidence shows that at least part of the purchase price was borrowed.

33. The claimant acknowledges that the contractual interest rate does not directly apply; it is sought to apply it by analogy. The purpose of interest on damages is to compensate the judgment creditor for being kept out of money to which it was entitled; this is typically achieved by reference to the cost of borrowing an equivalent amount. The position before me is that the claimant has adduced evidence that it borrowed at least some part of the purchase price, but it has not adduced evidence as to how much it borrowed or as to the terms on which it borrowed. However, in a commercial case the court will generally apply a broad brush, determining the appropriate interest rate by consideration of the probable cost of borrowing to borrowers with the general attributes of the claimant. The old presumption that the rate would be 1 per cent over the base rate has lost traction, as the spread between base rates and lending rates has become greater. I am satisfied both that 1 per cent above base rate is too low and that 5 per cent over base rate is significantly too high. Having regard to the claimant's nature as a substantial commercial concern, which is nevertheless a private family company, I award interest at the rate of 2 per cent per annum above the base rate of Barclays Bank.

34. Interest on damages after 4 May 2021 and until 21 May 2021 will be at the rate of 8 per cent.

Interest on costs

35. The court has power to order that a party must pay interest on costs from or until a certain date, including a date before judgment: r. 44.2(6)(g). From the time when a costs order is made, the costs for which the paying party is liable are a judgment debt and carry interest accordingly. The power mentioned in r. 44.2(6)(g) enables the court to compensate a party that is out of pocket by reason of having paid its own legal costs as the litigation has progressed.

36. The claimant seeks interest on costs in respect of the period before judgment. It says, correctly, that such orders are routinely made. The defendants submit that such an order "would not … be consistent with the justice that this case demands, having regard to the various aggravating factors emanating from MDW's corner." That submission is not amplified; the "aggravating factors" are presumably those relied on in respect of the issues as to payment of costs.

37. In my judgment, an order for costs having been made, it is appropriate that the claimant be compensated for being out of its money after it has paid in respect of its costs of conducting the proceedings. The relevant times will be when the invoices were actually paid. I do not have any information as to when invoices were paid; the wording of the order can be general, as it is in the draft provided by counsel, and any issue can be referred to the district judge.

38. The end date for such interest will be the date of this judgment, which is when the liability for costs becomes a judgment debt and carries interest as such.

39. The rate of interest will be the commercial rate, which I have assessed as 2 per cent above the base rate of Barclays Bank.

Permission to appeal

40. The defendants seek permission to appeal on several grounds concerning the approach to and calculation of damages: first, that my approach to "the hindsight principle" was wrong; second, that my adjustment to the multiplier was grossly excessive, unreasoned and unprincipled and failed to have regard to relevant factors; third, that damages ought to have been capped at "cost of cure"; fourth, that when the matter is looked at in the round I overcompensated the claimant. The grounds taken as a whole are said to point to the conclusion that the Part 36 offer made by the defendants was for more than the claimant could properly recover.

41. I refuse permission to appeal. I cannot see any reason to suppose that I misapplied any principle or rule of law regarding the use of hindsight. The adjustment to the multiplier was permissible in principle and was the sort of issue on which the trial judge must do the best he can; its consequences might appear objectionable if they make the difference between protection and no protection under Part 36, but I respectfully see no basis on which the Court of Appeal should interfere with the decision. The rejection of the "cap" argument was explained and justified in the judgment; for my part, I can see no merit in the proposed ground of appeal. As for overcompensation, this appears to be a way of saying that, regardless of analysis, the award of damages looks too high. To the defendants, it might do so; but on this as on the other grounds I do not consider that there is a realistic prospect of the Court of Appeal interfering with the award, even if the appellate judges were to think that they might have reached a different decision if they had been the trial judges.

42. I should add that I do not accept the contention in paragraph 91 of the defendants' submissions that permission to appeal is justified by any supposed need to give guidance to trial judges as to how to deal with reduction of multipliers.

43. Of course, the application for permission to appeal may be renewed to the Court of Appeal.

Conclusion

44. In summary:

1) The defendants shall pay to the claimant 75 per cent of its costs of the case.

2) Those costs shall be subject of a detailed assessment on the indemnity basis if not agreed.

3) The claimant shall pay to the defendants the costs of and occasioned by (a) the amendment of the particulars of claim and (b) the fourth witness statement of Oliver Hazell; those costs to be subject of a detailed assessment on the standard basis if not agreed.

4) The costs of the pre-trial review shall be costs in the case.

5) There shall be no order as to the costs of (a) the claimant's application for permission to rely on the fourth witness statement of Oliver Hazell and (b) the defendants' application to strike out parts of the claimant's evidence.

6) The defendants shall pay to the claimant £425,000 on account of costs.

7) The defendants shall pay interest on the damages at the rate of 2 per cent per annum above the base rate of Barclays Bank from 14 October 2015 (the date of the SPA) until 4 May 2021 (the date of judgment); thereafter the rate of interest applicable to judgment debts applies until 21 May 2021 (the date of payment).

8) The defendants shall pay interest on the costs at the rate of 2 per cent per annum above the base rate of Barclays Bank from the dates when payments were made in respect of those costs until the date of this judgment; thereafter the rate of judgment applicable to judgment debts shall apply to the costs until they are paid.

9) The defendants' application for permission to appeal against the decision in the judgment handed down after trial is refused.

45. Since this judgment was provided to the parties in draft, counsel have very helpfully provided me with a draft order. The one point on which there is no agreement is the time for the payment on account of costs: for the claimant, it is said that the usual position ought to apply and the money be payable in 14 days; for the defendants, it is said that the defendants are as yet unable to confirm their ability to pay the entire amount within 14 days; therefore provision is sought for the filing of evidence and submissions within a short period, if need be, and the determination of the matter on the papers. In my view, there is no sufficient reason to depart from the usual position, that where money is ordered to be paid it is payable in 14 days. It is now 11 weeks since the judgment after trial was handed down and five weeks since the parties exchanged their second round of written submissions on consequential matters. The defendants have known that there was a real prospect that they would be ordered to pay costs and to make a payment on account of those costs, and they have also known that the claimant was seeking a payment on account in a significantly higher amount than I have ordered to be paid. Evidence and submissions to justify a longer period than 14 days for payment could have been provided by now. I shall simply make an order for payment, to which the default period of 14 days in CPR r. 40.11 will apply.