Neutral Citation Number: [2011] EWHC 1107 (TCC)

Case No: HT-09-165

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/04/2011

Before :

THE HON. MR JUSTICE COULSON

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Between :

DERRICK BARR AND OTHERS **Clai**

- and -

BIFFA WASTE SERVICES LIMITED **Defe**

[No 4]

- -

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Mr Nigel Cooksley QC (instructed by **Hugh James Solicitors**) for the **Claimants**

Mr Ian Croxford QC (instructed by **Nabarro LLP**) for the **Defendant**

Hearing dates: 19th April 2011

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Judgment

Mr Justice Coulson:

INTRODUCTION

1.
Today I handed down the principal judgment in this case, neutral citation number [2011] EWHC 1003 (TCC). In the aftermath of that judgment, there are a series of further issues between the parties which I deal with below under the following heads: appeal; liability for costs; basis of assessment of costs; and interim payment on account of costs.

APPEAL

2.
In summary, the outcome of the trial in this case was that the 30 lead claimants lost their nuisance claims on a point of principle/law, because I concluded that the operation of the Westmill 2 landfill site, in accordance with the terms of the EA permit, amounted to a reasonable user of land. In addition, save for two claims, one by Mr Hobbs and one by Mr Clark for the year 2005 only, the claims also failed on the facts, the claimants having failed to demonstrate that their experiences took them beyond the appropriate threshold or starting point for any consideration of 'give and take'/reasonable user. The claimants have indicated that they may wish to appeal the judgment, although they are not yet in a position to say either way.

3.
The claimants' first application, therefore, is for an extension of time to file an Appellant's Notice pursuant to CPR 52.4(2)(a). It is submitted that, because there are 152 claimants, the decision-making process is unwieldy, and that further time is required to arrange a meeting with the steering group and to discuss with them the ramifications of the judgment. The point is also made that the Easter holiday period is due to start later this week. An extension of time for the filing of a Notice is sought until 27th May 2011.

4.
In other circumstances, I would have been inclined to treat the claimants' application with some sympathy, but on the facts here I have concluded that any difficulties that the claimants may now face are of their own making. That is because, on 8th March 2011, my clerk provided the parties with a detailed timetable for the draft judgment and the checking process leading up to the hearing today, when the final version of the judgment would be handed down. In her email she said that the draft judgment would be provided on Monday, 11th April. In fact, it was sent out on Friday, 8th April. One of the main reasons for giving such advance warning of the draft was to allow the claimants the opportunity to arrange a meeting to discuss the judgment and its effect during the course of last week, that is to say the week starting 11th April.

5.
I understand from Mr Cooksley that, despite the notice given by my clerk, no such meeting was arranged. I am unaware of any explanation for that failure. In those circumstances, it seems to me that I ought not to allow the claimants the indulgence of further time to consider whether or not they want to appeal. The entirety of CPR 52 is based on a clear policy in favour of speed and finality and, having given the claimants the opportunity to decide what they wanted to do, it would be contrary to that policy if I were to allow them any further time, merely because they failed to take the opportunity given to them. Furthermore, I note that the time limits under discussion are essentially those of the Court of Appeal, and it is not appropriate for the judge at first instance to grant lengthy extensions of time, in circumstances where the Court of Appeal may in any event form a different view about the appeal and its prospects of success.

6.
In those circumstances, I invited Mr Cooksley to make an application for permission to appeal to me, the usual first stage in the appeal process. He declined to do so, saying that it was 'unnecessary'. It seems to me that, in those circumstances, I should explain very briefly why, had any such application been made, I would have refused it.

7.

As to the point of principle/law, the claimants' case, that the operation of the site in accordance with the permit was itself a nuisance, was and always seemed to me to be contrary to common sense, general principle, the terms of the environmental legislation, the modern nuisance cases and the terms of the permit itself. Permission to appeal, of course, may be given wherever there is a real prospect of success; in other words, where there is a realistic (as opposed to a fanciful) prospect of success: see **Swain v Hillman** [2001] 1 All ER 91. In my view, the claimants' prospects of success on the point of principle do not come anywhere near meeting that test.

8.
As to the threshold debate, I would not have granted permission in relation to that aspect of the judgment for two separate reasons. First, this part of the judgment is based on a series of findings of fact which I have made. The burden on a prospective appellant seeking to appeal such findings of fact made by a TCC Judge is hard to dislodge: see **Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd** [2005] EWCA Civ 894. May LJ said in that case:

"The reason again is obvious. The more complicated and technical the facts, the longer and more expensive would be this court's enquiry, whether by review or re-hearing, and the more disproportionate would be the whole exercise for the parties and the court alike."

9.
Secondly, as set out in my judgment, although the threshold point was clearly important in this case, the claimants expressly chose to make no submissions on it at all. I have had to identify what seemed to me to be an appropriate starting point/threshold, with assistance only from the defendant. It would neither be fair nor just to allow the claimants to complain to the Court of Appeal about a decision-making process in which they deliberately chose to play no part.

10.
Accordingly, if the Claimants had made an application for permission to appeal, I would have refused it for the reasons that I have given.

LIABILITY FOR COSTS

a) The Successful Party

11.
CPR 44.3 provides 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).

(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."

12.
It is also necessary to consider CPR Part 36(14), which provides as follows:

" **Costs consequences following judgment**

(1) This rule applies where upon judgment being entered –

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –

(a) his costs from the date on which the relevant period expired; and

(b) interest on those costs.

(3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –

…

(b) his costs on the indemnity basis from the date on which the relevant period expired …

(4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including –

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

…

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated."

13.
Accordingly, the first thing that I must do is to identify the successful party. Without any question, the successful party in this litigation was the defendant. The defendant defeated the claims of the 30 lead Claimants on the law and, with the exception of two claims that I value at £2,000 in total, defeated their claims on the facts as well. The claims of the remaining 122 claimants will fail on the law and, for the reasons explored in some detail in the judgment, those claims would almost certainly have failed on the facts too. For these reasons, the defendant was the overwhelming victor in the litigation.

b) The CPR Part 36 Position

14.
The defendant's position is further strengthened by a consideration of the Part 36 offers that were made in this case.

(i) On 16th November 2009, the claimants' solicitors made a global Part 36 offer, to the effect that the claimants would accept the sum of £549,181 plus costs.

(ii) On 7th December 2009, the defendant's solicitors responded, offering 22 of the claimants the sum of £1,000 each plus their share of the costs; offering 82 claimants a 'drop-hands' offer; and offering the remaining 52 claimants (whose claims the defendant considered to be the weakest) an offer pursuant to which those claimants paid 50% of the defendant's costs of defending their claims. Those offers were rejected on 9th February 2010.

(iii) On 15th September 2010, the claimants' solicitors made another global Part 36 offer, to the effect that the claimants would accept the sum of £2,370,000 inclusive of costs. At that stage, the negligence allegations remained in play.

(iv) On the same day, the claimants' solicitors made a Part 36 offer in respect of each individual claimant in the total sum of £432,933.41 plus costs. The individual figure for Mr Hobbs was £3,500-odd, and for Mr Clark it was put at just under £2,000.

(v) On 9th November 2010, those two offers were rejected by the defendant's solicitors, who repeated the terms of their Part 36 offer of 7th December 2009 (subparagraph (ii) above).

15.
The claimants' claims have failed in their entirety. Even if they had succeeded on the law, their success on the facts would have been limited to the recovery by Mr Hobbs and Mr Clark respectively of £1,000 each. That was exactly what they were offered by the Defendant on 7th December 2009. It was of course considerably less than the claimants' own specific Part 36 offer of 15th September 2010 (subparagraph (iv) above.

16.
Looking at the bigger picture, the Claimants have got nowhere near their various offers of £549,000-odd or £432,000-odd plus costs, or £2,370,000 inclusive of costs. On the contrary, it is plain that the claimants as a whole would have been much better off if they had accepted the defendant's Part 36 offer of 7th December 2009. It is not, I think, suggested to the contrary.

17.
Accordingly, in the light of that result and in the light of the Part 36 position, it seems to me clear that the Defendant is prima facie entitled to its costs of the action.

c) Conduct

18.
Notwithstanding the result of the trial and the Part 36 position, the claimants maintain that, by reason of the defendant's conduct, there should either be no order as to costs or, alternatively, that the defendant's entitlement to its costs should be the subject of a significant percentage reduction (although no percentage was actually identified). The claimants point to the various places in the judgment in which criticisms have been expressed about the defendant's conduct, principally before the litigation, and reliance was placed on those matters by Mr Cooksley in support of his submission that the defendant should be deprived of all or a substantial part of its costs. As part of this exercise, however, the claimants have chosen not to identify the various parts of the judgment in which criticisms are made of them or, more significantly, their advisors.

19.
It is certainly right that conduct both pre- and post-litigation is relevant for the purposes of CPR Part 44. That seems to me to be clear on the face of the rule itself, but is confirmed by the decision of the Court of Appeal in **Groupama Insurance Company Limited v Overseas Partners Re Limited & Anr** [2003] EWCA Civ 1846. However, as that and other authorities make plain, in order to have a bearing on the costs order made by the court, the conduct must be relevant in some way to the costs that have been incurred.

20.
It is the defendant's principal submission that the vast majority of the criticisms that I have made about them in the judgment relate to the dealings between the defendant and the Environmental Agency prior to the commencement of the litigation. Accordingly, it is said that those dealings, and

that conduct, were irrelevant to any question of costs between the claimants and the defendant in the litigation itself.

21.
Save in one regard, it seems to me that that submission is right. The mere fact that the defendant was difficult in its dealings with the Environment Agency does not seem to me to have any bearing at all on the costs incurred by both sides in the subsequent litigation. The matters in respect of which particular criticism has been made of the defendant are matters of background only, and were principally designed to try and make plain to both the defendant and the Environment Agency that there were other ways in which their relationship could have been progressed without the acrimony that descended in relation to Westmill 2.

22.
In any event, in order for an unsuccessful claimant to argue that a successful defendant should be deprived of all or a large part of its costs, it seems to me that the unsuccessful claimant would need to be able to point to conduct of an extraordinary type on the part of the successful defendant, which pervaded every element of the litigation (and the costs incurred in fighting it), in order to justify such a significant departure from the normal rule. On any view, that is not what happened here. My criticisms of the defendant, although a relevant part of the background, were not of sufficient importance or significance to begin to justify the sort of departure from the normal rule on costs for which the claimants now contend.

23.
As I have already indicated, there is one possible exception to that, that is to say, one part of the defendant's conduct which may be potentially relevant on costs. That arises from my view that the defendant's aggressive attitude prior to the litigation spilled over into the trial itself, in particular during the cross-examination by the defendant of the 30 claimants. I wondered, therefore, whether some reduction in the defendant's costs was appropriate to reflect that cross-examination.

24.
However, having considered the matter carefully, I accept Mr Croxford's submission that, in the round, the cross-examination of the claimants was tolerably efficient. Most of them, other than the critical half dozen claimants, were dealt with in an hour or less. Moreover, these exchanges with the claimants led to important evidence on which I rely in my judgment. And, whilst one or two of the claimants were cross-examined in an aggressive fashion which was probably not warranted, I also accept the submission that this did not add to the overall length of the trial, and thus the costs that were incurred.

25.
For these reasons, I cannot say that the trial was extended beyond reasonable limits by the length or manner of the cross-examination of the claimants, and I have therefore concluded that it would not be right to make a reduction in the defendant's recovery of their costs in consequence.

26.
There is one further factor involving conduct at the trial which I should make plain, because I regard it as significant. There were a number of aspects of the trial (and therefore of the judgment-writing process thereafter) in which I was positively assisted by the defendant's meticulous analysis of the facts and the extensive documentary records. The provision by the defendant of schedules and spreadsheets, into which this large volume of work was condensed, significantly speeded up a number of the processes both during the trial and thereafter. Those were exercises in which the claimants

wholly declined to take part. It seems to me that this is a further reason why, in the round, it would not be appropriate to make a reduction in the costs otherwise recoverable by the defendant.

d) Issues

27.
The claimants also argued that costs should be dealt with by reference to the issues, in accordance with **AEI Redifusion Music Limited v Phonographic Performance Limited** [1999] 1 WLR 1507. Their principal argument was that, because the defendant had failed in its statutory authority defence, there was at least an element of its costs which the defendant should not recover.

28.
However, on analysis, it seems to me that that approach would not be appropriate in this case. It is right that the defendant lost on its statutory authority defence. However, all of the detailed legislation that was considered by reference to that unsuccessful defence was directly relevant to the alternative defence of reasonable user, on which the defendant was entirely successful. Thus, no costs were wasted because of the failed defence of statutory authority. An approach to costs which penalised the defendant because one of the two ways in which it deployed the statutory material was unsuccessful, in circumstances where the alternative route was entirely successful, would be quite unjust and contrary to the principle that the successful party is entitled to its costs.

e) Summary on Costs Liability

29.
Accordingly, for the reasons that I have given, the defendant is entitled to an order that the claimants pay its costs of the litigation without any reduction.

BASIS FOR ASSESSMENT OF COSTS

a) Principles

30.
The defendant seeks an order that, from 1st January 2010, their costs should be assessed on an indemnity basis. The relevant principles in relation to indemnity costs to be gleaned from the authorities can perhaps be summarised as follows:

(i) Unreasonable conduct “to a high degree” is necessary for an order for indemnity costs: see **Kiam v MGN Limited [No. 2]** [2002] 2 AllER 242. In **Excelsior Commercial & Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson (A Firm)** [2002] EWCA Civ 879, the Court of Appeal said that an order for indemnity costs was appropriate only where “there was some conduct or some circumstance which took the case out of the norm”.

(ii) The pursuit of claims which could be fairly described as “speculative, weak, opportunistic or thin” gives rise to a high risk that, if the claim fails, indemnity costs will be ordered: see Tomlinson J (as he then was) in **Three Rivers District Council & Ors v The Governor & Company of the Bank of England** [2006] EWHC (Comm) 816 at paragraph 25 and Gloster J in **JP Morgan Chase Bank & Ors v Springwell Navigation Corp** [2008] EWHC 2848 (Comm) at paragraph 7.

(iii) A claimant’s refusal of a defendant’s Part 36 offer which the claimant subsequently fails to beat may, subject to the Court’s discretion, be determinative of his liability to pay indemnity costs: see **Reid Minty (A Firm) v Taylor** [2002] 2 AllER 150. But it should not be thought that it is generally

appropriate to condemn in indemnity costs those who decline reasonable settlement offers: see **Kiam** and **Excelsior**.

b) Matters Relied On

31.
The defendant relies on the following general matters in support of the submission that the claimants should pay costs from 1st January 2010 on an indemnity basis:

(a) the defendant was successful on the broad totality of the issues;

(b) the court concluded on the facts that only seven of the lead claims were even arguable;

(c) the manner in which the claimants' claims were presented meant they were doomed to fail;

(d) the claimants would have been better off if they had accepted the defendant's offer of December 2009. The claimants' offers were based on an utterly unrealistic assessment of the likely recovery;

(e) the claimants' insistence on treating the claims as arising from one homogenous group rather than treating them as separate and very different claims; and

(f) the abandonment of the negligence allegations at the pre-trial review in October 2010 and the pursuit thereafter of the general damages claim based on nuisance alone.

32.
In addition, the defendant relies on the following specific matters:

(a) the unrealistic approach adopted by the claimants to the law, specifically the permit;

(b) the advancing of wholly unarguable factual claims for the vast majority of the lead claimants as a result of the uncritical approach adopted for the merits of the individual claims;

(c) the refusal to engage with the question of threshold;

(d) the refusal of the sensible commercial offers made in December 2009 and repeated in November 2010;

(e) the unreasonable Part 36 offers made by the claimants themselves;

(f) the conduct and abandonment of the negligence case; and

(g) the unrealistic approach taken by the claimants throughout to the value of the claims.

c) Analysis

33.
At the outset of this part of the exercise, it is important to stress that, originally, this case involved allegations of both negligence and nuisance. The original negligence allegations were in a relatively general form. They were the subject of comprehensive disclosure by the defendant, and then a detailed application to amend the statement of claim which I allowed in July 2010. The new allegations were principally concerned with the alleged escape of landfill gas, rather than detailed allegations concerning the running of the site. I had always anticipated that at the trial it would be the negligence allegations (i.e., the criticisms of the defendant and how it ran the site), which would take up the bulk of the court's time.

34.
Although I am invited to do so by the defendant (in the written submissions provided in the autumn concerning the costs position created by the abandonment of the negligence allegations), I do not believe that it is appropriate to criticise the claimants too harshly for the initial pursuit of those negligence allegations. Of course, it is difficult for me to reach any sort of concluded view on these matters because they were never tried out. I can, therefore, do little better than record my impressions. However, it seems to me that the original allegations, although general, could not be described as fanciful and, whatever criticisms could be made of the claimants' expert, Dr Bond, and his belated attempt to run a new case based on landfill gas, I have to counter that with my impression, recorded in the judgment, that there were at least occasions when the defendant's conduct at the site was reactive to the odour complaints rather than proactive.

35.
By the same token, during the case management process, I regarded the nuisance allegations as something of a makeweight. In the early days of this group litigation, I found it difficult to see how, if the defendant was not negligent and operated the site in accordance with its detailed permit granted by the Environment Agency, the defendant could still be liable in nuisance. This was particularly so given the trend in modern nuisance cases towards the need for a claimant alleging nuisance to be able to prove negligence. I did not envisage that the trial of the nuisance allegations would add very much to the negligence allegations; and I always thought that, if this case had only been concerned with nuisance, it was capable of being tried out in the county court.

36.
Of course, at the case management stage, what I did not know, but the claimants did, was that the nuisance claim faced another significant hurdle on the facts, namely the lack of complaints and contemporaneous records of odour from anyone other than a tiny handful of the claimants. That absence would doubtless have emphasised to the claimants and their advisers the generically weak nature of the nuisance claims on their own; unlike the allegations of negligence, the nuisance claims were going to be judged on effect (and therefore the contemporaneous record of that effect, in the nature of complaints), rather than cause.

37.
In the round, therefore, I consider that the claimants could not be said to have acted unreasonably, at least to the necessary degree for the purposes of indemnity costs, by pursuing this claim for negligence and nuisance in 2009 and into 2010. It also follows that I would not criticise them, again to the necessary degree, for originally refusing the Part 36 offer when it was first made in December 2009. I do not believe that such conduct could be described as out of the norm, such that indemnity costs should apply. The claims were not strong and the offer should, with hindsight, have been accepted, but those matters do not, on their own, justify an order for indemnity costs. At this stage, I do not believe that the litigation could be said to be in the same category as **Franks v Sinclair** [2006] EWHC 3656 (Ch), where the claimant was ordered to pay indemnity costs principally because he was pursuing a claim which he knew to be false.

38.
But, so it seems to me, that position changed in September 2010 when the parties were getting ready for the trial due to start in November. The costs were obviously just about to increase significantly, and both sides needed to reflect on their respective positions and to review their prospects of success. It was doubtless for that reason that, in the middle of September, the claimants made a repeated Part 36 offer. Moreover, a fortnight later, the claimants also decided that, in the circumstances, they should

abandon their negligence allegations lock, stock and barrel. That decision was formally notified to the defendant on 27th September 2010 and the abandonment was formalised at the pre-trial review on 8th October.

39.
I do not of course criticise the abandonment of the negligence allegations. It is important to encourage parties who believe they have weak claims to make realistic concessions: see Steel J in **Colour Quest Ltd & Ors v Total Downstream UK Plc & Ors** [2009] EWHC 823 (Comm) and Barling J in **Catalyst Investment Group Ltd v Max Lewisohn, Maximillian and Co (a firm)** [2009] EWHC 3051 (Ch). But this event had the inevitable effect of spotlighting the nuisance allegations. It put them centre stage. Immediately, therefore, the alarm bells should have started sounding for the claimants. They knew, or certainly ought to have known, that the pursuit of an estate-wide nuisance claim would only emphasise the fact that the majority of the claimants had never made complaints about the odour at all, and that such a claim faced the various factual and legal difficulties which I have already outlined.

40.
In my view, it must have been obvious to the claimants as they prepared for the pre-trial review on 8th October that the nuisance allegations could not sustain the increased weight that they would inevitably have to bear as the claimants' only available legal remedy. The terms of the permit, the environmental legislation and the modern nuisance cases all pointed to the unanswerable proposition that the operation of the site in accordance with the permit was a reasonable user, whilst the absence of proper complaints or records for more than a few claimants made it inevitable on the facts that they would not get over the necessary threshold.

41.
In short, the claimants should have realised at that point that their remaining claim was doomed to fail. They were provided with a simple way out, because the defendant repeated its Part 36 offer just before the trial started in November 2010. Inexplicably, the claimants did not take it. Instead, they adopted what I can only describe as an unhelpful attitude at the trial, and failed to engage either in the reasonable user point of principle (insofar as it related to the legislation and the permit) and, perhaps more surprisingly, in the factual analysis of the individual claims, complaints, records and so on. They left it to the defendant to do all the work on the facts. They cannot therefore have been in the least surprised when the court's analysis of the threshold point went against them.

42.
For those reasons, I consider that, from the build-up to the pre-trial review onwards, the claimants' conduct was unreasonable to a high degree, and it crossed the line that makes indemnity costs appropriate. As from 1st October 2011, I find that the claimants knew (or should have known) that the nuisance claims alone would not lead to a successful outcome, and that the abandonment of the negligence claims meant that they were obliged to negotiate a withdrawal from the action. The claimants' failure to address the fundamental problems with the claim and the refusal of the renewed Part 36 offer in November 2010 was, I believe, highly unreasonable, out of the norm, and justifies an order for indemnity costs as from 1st October 2010.

43.
Accordingly, I order that the claimants pay 100% of the defendant's costs of the action on the standard basis, save that the defendant's costs from 1st October 2010 will be assessed on the indemnity basis.

INTERIM PAYMENT

44.
It is common for an unsuccessful party to be ordered to make an interim payment on account of the successful party's costs: see **Mars UK Limited v Teknowledge Limited** [1999] 2 Costs LR 44 and **Beech v Smirnoff** [2007] EWHC 5499. The aim is to identify a sum which the Court is confident will be payable after the assessment of costs, which means that, in practice, a sum in excess of 60% of the sum claimed by way of costs is rarely awarded.

45.
In the present case, the defendant seeks an interim payment for 60% of its total costs of £3.236 million, being £1.94 million. The claimants do not take any point on this figure, but ask for an extension of time in relation to payment.

46.
In those circumstances, therefore, I will order an interim payment in the sum of £1.9 million, just less than 60% of the defendant's costs. It seems to me that this is an amount which the defendant is very likely to recover on assessment, particularly given my ruling that the costs from 1st October will be assessed on the indemnity basis. It may well be that the defendant will not recover much more than £1.9 million, but I do not believe that the defendant will recover any less than that.

47.
The sum of £1.9 million must be paid within 28 days of today, that is to say by 17th May 2010. This extension of the usual 14 days is designed to reflect the imminent holiday period.

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