

Neutral Citation Number: [2011] EWHC 3373 (TCC)

Case No: HT-11-299

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2011

Before :

THE HON. MR. JUSTICE RAMSEY

Between :

ASTRAZENECA UK LIMITED

- and -

INTERNATIONAL BUSINESS MACHINES CORPORATION

Mark Hapgood QC and Alan Roxburgh (instructed by **Milbank Tweed Hadley and M^cCloy LLP**)
for the **Claimant**

Jeffery Onions QC and Simon Henderson (instructed by **Herbert Smith LLP**) for the **Defendant**

Hearing date: 1st December 2011

Judgment No 2

Mr Justice Ramsey :

Introduction

1.

On 22 November 2011 I handed down judgment determining a number of issues arising from the termination of a Master Services Agreement (“the MSA”) entered into between the Claimant (“AstraZeneca”) and the Defendant (“IBM”). I now deal with the costs of these proceedings commenced under Part 8.

2.

In summary Mark Hapgood QC, who appears with Alan Roxburgh, on behalf of AstraZeneca submits that the appropriate order is that AstraZeneca should have 80% of their costs. He submits that they were substantially successful but that there were issues on which they did not succeed which, he submits, gives rise to an appropriate proportional costs order.

3.

On behalf of IBM Mr Jeffery Onions QC, who appears with Simon Henderson, submits that the way in which AstraZeneca conducted these proceedings up to 24 October 2011 means that AstraZeneca

should pay IBM 75% of its costs up to that date. Otherwise he submits that each party should have 50% of the costs and therefore the appropriate order is “no order as to costs”.

Submissions on behalf of AstraZeneca

4.

AstraZeneca relies on Clause 89.4 of the MSA which provides as follows:

“[IBM] shall indemnify AstraZeneca ... on demand from and against all Defence Costs incurred by AstraZeneca in connection with any Dispute in which judgment is given in AstraZeneca's favour.”

5.

There is a similar provision in clause 89.5 requiring AstraZeneca to indemnify IBM in respect of Defence Costs incurred by IBM in connection with any Dispute in which judgment is given in IBM's favour.

6.

In Clause 1 of the MSA the phrase “Defence Costs” is defined as follows:

“reasonable attorney's fees and disbursements (calculated on a solicitor-own client basis) including fees and disbursements charged by counsel and other legal advisers (including solicitors and counsel from other jurisdictions), fees levied by any court, arbitrator or mediator and the fees and disbursements charged by expert witnesses.”

7.

Mr Hapgood submits that the word “Defence” in the definition has to be read in the light of Clause 2.2 of the MSA which provides that: “The headings in this Agreement and the names given to defined terms are for convenience only, and do not affect the interpretation of this Agreement.” He submits that, as the word “Defence” does not appear within the definition, it should not affect the interpretation of Clauses 89.4 or 89.5 and, in particular, the meaning of the term “Defence Costs” so as to limit those costs to costs spent in defence of a claim.

8.

He also relies on the definition of “Dispute” in Clause 1 as meaning: “any question or difference which may arise between the Parties concerning the construction, meaning or effect of this Agreement.”

9.

As a result he submits that IBM has to indemnify AstraZeneca against the costs incurred by AstraZeneca in connection with these proceedings to the extent to which judgment has been given in AstraZeneca's favour in relation to any of the issues. He accepts that, similarly, AstraZeneca has to indemnify IBM in respect of the costs of the proceedings in relation to those issues where judgment was given in IBM's favour. He submits that 90% of the costs of the proceedings were incurred on the issues where judgment was given in favour of AstraZeneca, with 10% of the costs being incurred in relation to the issues where judgment was given in IBM's favour. On that basis he submits that the court should, overall, award AstraZeneca 80% of their costs, thereby deducting the 10% which would be due from AstraZeneca to IBM from the 90% which would be due from IBM to AstraZeneca.

10.

He submits that the reference in the definition of “Defence Costs” to “reasonable attorney's fees and disbursements (calculated on a solicitor-own client basis)” is a reference, properly construed, to costs being assessed on an indemnity basis, as now provided for under CPR 44.4(1)(b) and 44.4 (3). He

relies on the description of “solicitor and own client basis” and “the indemnity basis” in the judgment of Sir Robert Megarry VC in EMI Records Limited v Ian Cameron Wallace Ltd[1983] Ch 59 at 64 E-G.

11.

In relation to the exercise of the court’s discretion as to costs under [section 51](#) of the [Senior Courts Act 1981](#) and CPR 44.3 he submits that where there is a contractual right to costs, the discretion should ordinarily be exercised so as to reflect that contractual right. He relies on the decision of the Court of Appeal in Gomba Holdings (UK) Limited v. Minorities Finance Limited[1993] Ch 171 and in particular, the judgment of the court given by Scott LJ at 194 B. He submits that this principle should be followed in this case and there should be an order for costs to be assessed on an indemnity basis.

12.

He also relies on CPR 48.3 which deals with the amount of costs where costs are payable pursuant to a contract and which provides that, unless the contract expressly provides otherwise, the costs payable under the terms of the contract are to be presumed to be costs which have been reasonably incurred and are reasonable in amount.

13.

Mr Hapgood also relies on paragraph 50.1 of the Costs Practice Direction to CPR Part 48 which provides as follows: “Where the court is assessing costs payable under a contract, it may make an order that all or part of the costs payable under the contract shall be disallowed if it is satisfied by the paying party that costs have been unreasonably incurred or are unreasonable in amount.”

14.

He submits that the overall effect of those provisions is the same or substantially the same as an assessment on an indemnity basis. He refers to the decision of the Court of Appeal in Venture Finance Plc v Mead [2006] 3 Costs LR 389 where Chadwick LJ said at [22] :

“The relevance of CPR 48.3, as it seems to me, is that CPR 44.3(4) requires that when deciding what order (if any) to make about costs the court must have regard to all the circumstances; and those circumstances will include the fact, if it be the case, that there is a contractual obligation to pay costs — as there is under clause 9 of the guarantees. So, it is said, in order to be consistent with the requirement in CPR 48.3 at the assessment stage, the court ought (unless there is good reason to the contrary) [to] exercise discretion under CPR 44.3(4) so as to reflect contractual rights.”

15.

In relation to the proportion of costs that AstraZeneca should recover, Mr Hapgood accepts that AstraZeneca is not entitled to 100% of its costs because IBM was successful on two issues. He submits that the appropriate way to reflect this is for IBM to pay an appropriate proportion of the costs of AstraZeneca as provided for in CPR 44.3(4)(b) which states that one of the circumstances to which the Court must have regard is whether a party has succeeded on part of his case, even if he has not been wholly successful. He also refers to CPR 44.3(6)(a) which provides that one of the orders a court may make is that a party must pay a proportion of another party’s costs and CPR 44.3(7) which provides that where the court would otherwise consider making an order relating to a distinct part of the proceedings, it must instead, if practicable, make an order for a proportion of that other party’s costs.

16.

He refers to the reasoning behind CPR 44.3(6)(f) and (7) set out in National Westminster Bank PLC v Kotonou (Costs)[2007] EWCA Civ 223 at [22] and submits that, as stated by Chadwick LJ in Venture Finance Plc v Mead at [23], the court may decide on a percentage of the overall costs of the action

where it has to give effect to a contractual right. In those circumstances he seeks an order that IBM should pay 80% of AstraZeneca's costs, to be assessed on an indemnity basis.

Submissions by IBM

17.

Mr Onions submits that the court should disregard the claim made by AstraZeneca which relies on Clause 89.4 of the MSA because that claim is unpleaded and has been raised at a late stage. He submits that the interpretation of Clauses 89.4 and 89.5 should not be dealt with in the context of this application because they have potentially far reaching effects on both parties. He submits, although with less force in his oral submissions, that in the event that the court does consider the proper construction of Clauses 89.4 and 89.5, those clauses are concerned only with the question of costs incurred in defending a claim.

18.

He further submits that all that Clauses 89.4 and 89.5 do is to give effect to the ordinary principle that the winning party would be entitled to its costs. He submits that the definition of "Defence Costs" can be summarized as a reference to reasonable costs. He submits that the reference to "reasonable attorney's fees and disbursements" should govern the provision and that the reference to "solicitor-own client basis" does not give rise to costs assessed on an indemnity basis.

19.

Mr Onions submits that an appropriate costs Order is that IBM should be paid 75% of their costs up to and including the Case Management Conference on 24 October 2011. In relation to that period he submits that the approach taken by AstraZeneca meant that the stage the proceedings had reached by that Case Management Conference was the position they should have started from had AstraZeneca properly formulated its claim from the beginning.

20.

He states that the action was commenced on 1 August 2011 seeking two declarations set out in paragraph 1 of the Part 8 Claim Form. Paragraph 3 stated that the legal basis for the Claim was the true construction of the provisions of the MSA in the context of the MSA as a whole and the factual matters set out in AstraZeneca's evidence filed in support of the Claim. That evidence consisted of a 78 page witness statement served in support of the Part 8 Claim.

21.

He refers to a letter sent by IBM to the court on 10 August 2011 in which they identified that there were other relevant issues and contends that the Part 8 proceedings were inappropriate. The court then ordered the service of further evidence and directed that a Case Management Conference should be held on 8 September 2011, with a provisional hearing listed for 24 October 2011. IBM then served witness statements on 26 August 2011 and, in response, AstraZeneca served a further witness statement on 3 September 2011.

22.

At the hearing on 8 September 2011 he refers to the fact that Coulson J was critical of the witness statement served by AstraZeneca. He said that it contained "a kaleidoscope of fact, opinion, matters relating to events after termination and a whole host of other things which, on the face of it, appear to have little or nothing to do with the application for declarations." Equally in relation to the statements by IBM he said that they "similarly deal with a whole host of matters, which, on the face of it, are simply not admissible."

23.

As a result Coulson J said that it was not easy to identify the precise issues which arose from the parties' evidence and he therefore ordered case summaries to be served by AstraZeneca on 16 September 2011, by IBM in response on 30 September 2011 and with a further case summary by AstraZeneca in reply.

24.

At a Case Management Conference on 14 October 2011, Akenhead J ordered that AstraZeneca should set out a list of proposed agreed facts, confined to the factual matrix within which the MSA was agreed and an explanation of relevant technical matters. IBM was ordered to respond and a further Case Management Conference was then ordered to take place on 24 October 2011. At that Case Management Conference the List of Agreed Facts was virtually agreed, with the assistance of the court.

25.

Mr Onions submits that AstraZeneca's approach to the preparation of the case was unsatisfactory in that the Court had to order case summaries because AstraZeneca had failed to plead its case at the outset. He submits that AstraZeneca's approach to the evidence meant that the scope of matters before the court remained obscure. He contends that AstraZeneca should have pleaded its case properly at the outset so that the proper scope of the issues could have been identified from the start.

26.

He submits that AstraZeneca's approach to the evidence was inappropriate for Part 8 proceedings. He says that AstraZeneca's failure to deal properly with issues of evidence at the hearing on 14 October 2011 meant that further work was necessary during the following week and this led to the hearing on 24 October 2011 which should not have been necessary at all.

27.

As a result he submits that, if AstraZeneca had taken an appropriate approach to the proceedings, the parties would and could have been in a position at the outset that the proceedings eventually reached on 24 October 2011. As a result Mr Onions submits that AstraZeneca should pay a percentage of IBM's costs of the proceedings up to and including the hearing on 24 October 2011. He contends that the appropriate order is therefore for AstraZeneca to pay 75% of IBM's costs up to 24 October 2011.

28.

He submits that these costs should be assessed on the standard basis even if it is appropriate to have regard to clauses 89.4 and 89.5 as, on IBM's construction of those provisions, they do not anticipate costs being assessed on an indemnity basis. If, however, the court does find that costs are to be assessed on an indemnity basis then he submits that IBM should also be entitled to be paid its costs on an indemnity basis.

29.

In relation to costs after 24 October 2011 Mr Onions submits that the appropriate order is one for each party to bear its own costs on the basis that an appropriate proportion of costs for each party to pay the other is 50%. He refers to a table which analyses the outcome, highlighting in yellow the issues on which AstraZeneca has succeeded and in green the issues on which IBM has succeeded. On this basis he submits that each party succeeded to the extent of about 50%.

AstraZeneca's submissions in reply

30.

Mr Hapgood submits, in reply, that there should be no special order in relation to the costs up to 24 October 2011. Rather, he submits that AstraZeneca properly brought Part 8 proceedings. He says that the proceedings then took account of IBM's issues and, with appropriate case management, this led to the List of Issues and the List of Agreed Facts on which the court was able to proceed to determine the Issues. He submits that it was necessary for AstraZeneca to support the Part 8 Claim with a Witness Statement which properly dealt with both the background to the MSA and the background to the dispute between the parties arising out of the termination. He submits that IBM took a similar position in terms of the evidence they submitted and, to the extent that there was any criticism to be made, it applied as much to IBM's witness statements as it did to those of AstraZeneca.

31.

In relation to the appropriate proportional costs order he submits that the table prepared by IBM included matters which it was alleged had been "conceded" when, in fact, those matters were accepted by AstraZeneca in reply to IBM's case summary and had not previously been raised. The only issue which differed from that position was, he accepts, that AstraZeneca conceded on 7 October 2011 that the Extended Termination Date was 8 April 2012 although it had originally said that it was 8 June 2012. He submits that analyzing the Issues which were in dispute, AstraZeneca succeeded on Issues 1, 2, 5 and 8C and IBM succeeded on Issue 8B. On that analysis of the table Mr Hapgood submits that it justifies his submission that the proper assessment is 90% success to AstraZeneca and 10% success to IBM, leading to the appropriate order being for AstraZeneca to recover 80% of its costs.

Decision

32.

I deal, first, with the proper construction of Clauses 89.4 and 89.5 of the MSA. I do not consider that a claim under Clause 89.4 should be excluded because it is not pleaded or that AstraZeneca cannot pursue that claim. As Ferris J observed in *John v Price Waterhouse* [2002] 1 WLR 953 at [22] to [23], the cause of action for costs under the indemnity would only be complete when judgment was given and whilst, in principle, there might need to be an amendment or new proceedings, under the overriding objective in CPR 1.1 the Court can properly deal with the contractual indemnity claim in the present proceedings and, as has been shown, IBM have been able to deal with those provisions. There are a number of issues raised by Clauses 89.4 and 89.5.

33.

First there is the definition of "Defence Costs". I consider that, as submitted on behalf of AstraZeneca, the word "Defence" should not affect the interpretation of the phrase "Defence Costs" as defined in Clause 1 of the MSA and which evidently covers fees and disbursements whether those are incurred in pursuance of or in defence of a claim. Therefore if, instead of the phrase "Defence Costs" in Clause 89.4, there were to be substituted the definition of that term, then the clause would read:

"[IBM] shall indemnify AstraZeneca ... on demand from and against all [reasonable attorney's fees and disbursements (calculated on a solicitor-own client basis) including fees and disbursements charged by counsel and other legal advisers (including solicitors and counsel from other jurisdictions), fees levied by any court, arbitrator or mediator and the fees and disbursements charged by expert witnesses] incurred by AstraZeneca in connection with any Dispute in which judgment is given in AstraZeneca's favour."

34.

On this basis the costs are not limited to “defence” costs and the indemnity therefore applies both to the costs of pursuing a claim and the costs of defending a claim.

35.

The second issue arises from the definition of “Dispute” in Clause 1. This evidently covers the questions or differences in this case which arose “between the Parties concerning the construction, meaning or effect of [the MSA]”. Therefore there were relevant disputes for the purpose of Clauses 89.4 and 89.5.

36.

The third aspect concerns whether, in this case, it can be said that “judgment is given in AstraZeneca’s favour”. In this case the dispute covered a number of questions or differences about the construction of the MSA. In that context, I consider that the indemnity in Clauses 89.4 and 89.5 would apply to costs incurred in connection with any question concerning the construction of the MSA in which it could be said that judgment was given in favour of one or other of the parties.

37.

The fourth question concerns the basis on which the costs are to be assessed under Clauses 89.4 and 89.5. Whilst it is clear that the underlying basis of recovery is “reasonable attorney’s fees and disbursements”, the basis of calculation or assessment of those costs is stated to be on a “solicitor-own client basis”. It is clear that the clause contains a mixture of cost cultures of different legal jurisdictions but it is equally clear that the basis of assessment was to be calculated on a “solicitor-own client basis”.

38.

Under the CPR the two bases of assessment are now the standard basis and the indemnity basis. However, as explained by Sir Robert Megarry in *EMI Records* at 63E to 65E, under the former Rules of the Supreme Court Ord. 62 there were five main bases of assessment or “taxation” of costs. One of those was the solicitor and own client basis under Ord. 62 Rule 29 which provided that, on such a basis of taxation, “all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred”. There were also certain presumptions made under the sub rules in Rule 29.

39.

In addition Sir Robert Megarry mentioned orders for costs made on the indemnity basis. He referred to the fact that, although the RSC contained no mention of that basis, the practice of making such orders had a long history and that “often such orders have been more or less equated with orders for costs as between solicitor and own client” and he referred at 65B to 65E to a number of decisions where indemnity costs had been equated to costs as between solicitor and own client. At 74G Sir Robert Megarry summarised his conclusions by stating:

“The effect of an order on an indemnity basis is, unless otherwise provided, that the rule laid down in Ord. 62, r. 29 (1) applies, but not the presumptions set out in rule 29 (2) and (3). In brief, the result is that all the costs incurred will be allowed except any which have been unreasonably incurred or are of an unreasonable amount; and in applying these exceptions the receiving party will be given the benefit of any doubt.”

40.

The provisions in Clauses 89.4 and 89.5 of the MSA apply so that each party has to indemnify the other party against all reasonable attorney’s fees and disbursements incurred by that other party in

connection with any question or difference concerning the construction meaning or effect of the MSA in which judgment is given in favour of that other party. The basis upon which those reasonable attorney's fees and disbursements is to be calculated is stated to be a "solicitor-own client" basis which, in my judgment, is properly equated to the basis described by Sir Robert Megarry as the indemnity basis under which costs incurred will be allowed except any which have been unreasonably incurred or are of an unreasonable amount and that in applying those exceptions the receiving party will be given the benefit of any doubt. Under the CPR that is equivalent to an order for costs to be assessed on an indemnity basis.

41.

That, I consider, is the basis upon which the parties have agreed an indemnity for costs under the terms of Clauses 89.4 and 89.5 of the MSA. In principle, a party might seek to recover costs either under the terms of an express contractual indemnity or by the exercise of the court's discretion under [section 51](#) of the [Senior Courts Act 1981](#) and the rules of the CPR. Those are two alternative remedies and as Ferris J said in [John v Price Waterhouse](#) [2002] 1 WLR 953 at [22] to [23], the fact that the court makes an order under its jurisdiction under [section 51](#) of the [Senior Courts Act 1981](#) does not detract from any contractual right to claim indemnity costs.

42.

Whilst, in principle, there might be two alternative bases for obtaining costs, it is clear that in exercising its discretion under CPR 44.3, the court should ordinarily exercise that discretion so as to reflect the contractual right: see [Gomba Holdings](#) at 194 B.

43.

Equally, if the court were giving effect to the contractual right to costs in this case then the provisions of CPR 48.3 and paragraph 50.1 of the Costs Practice Direction to CPR Part 48 would provide, first, that the costs recoverable are those which have been reasonably incurred and are reasonable in amount and, secondly, that the costs payable should be disallowed if the court is satisfied by the paying party that costs have been unreasonably incurred or are unreasonable in amount.

44.

As stated by Chadwick LJ in [Venture Finance](#) at [22] the fact that there is a contractual obligation to pay costs, as in this case, means that the court ought to exercise its discretion so as to reflect those contractual rights and also be consistent with the requirements of CPR 48.3.

45.

As a result, my conclusion as to the basis on which costs are to be assessed in this case derives, first, from the fact that the parties have agreed, by Clauses 89.4 and 89.5 of the MSA, to indemnify the other party for costs incurred by that party in connection with any Dispute in which judgment is given in favour of that other party and have agreed that the basis of assessment should be the equivalent of an indemnity basis under the provisions of CPR 44.4(3). Secondly, that basis would, in any event, be the same or substantially the same as the default basis for a contractual claim to costs as set out in CPR 48.3 and paragraph 50.1 of the Costs Practice Direction.

46.

Accordingly, in exercising my discretion as to costs, I consider that where the parties have agreed the basis upon which costs are to be assessed, the court should ordinarily exercise its discretion so as to reflect those contractual rights and, in this case, should award costs on an indemnity basis.

The appropriate costs order

47.

There are two aspects of costs to be considered. The first being the effect of conduct on the appropriate order for costs up to 24 October 2011 and the second being the effect of success and failure of the two parties on the Issues on the appropriate order in relation to the overall costs of the proceedings.

48.

In relation to the costs up to 24 October 2011, AstraZeneca commenced this Part 8 Claim and raised declarations concerning paragraph 12.1 of Schedule 22 and paragraph 8 of Schedule 22A to the MSA. The response by IBM raised further issues. By a process of case management the parties were able to identify a List of Agreed Issues, following the exchange of case summaries. With the assistance of the court the parties were then able to narrow the factual evidence to the List of Agreed Facts. I consider that the process by which the Issues were identified and the Agreed Facts were formulated has demonstrated that, in essence, these were Part 8 proceedings in that there were disputed issues of construction of the MSA where the essential facts were not in dispute. This was therefore an appropriate case for the use of the Part 8 Procedure, supplemented by the use of case management at the Case Management Conferences.

49.

Whilst the evidence exchanged by each party might not have been the most efficient way of reaching the agreed issues and agreed facts I do not consider that either party can be said to have acted unreasonably or in a manner where their conduct should lead to a different costs order from normal for costs incurred in the period leading up to 24 October 2011. That evidence formed the foundation for both the issues and the agreed facts but they needed refining to take account of the position of both parties and the extent to which facts were admissible or relevant to the determination of the Issues.

50.

In those circumstances I do not accept the submissions made on behalf of IBM that IBM should be entitled to 75% or any proportion of its costs of the proceedings up to 24 October 2011. I do not consider that such an order would either be an appropriate order in the circumstances or would properly reflect the relevant conduct of the parties leading up to the Case Management Conference on 24 October 2011. Rather, I consider that those costs should be part of the costs of the proceedings and the appropriate order for those costs is something which I now consider.

51.

In assessing the success and failure of the parties on the Issues it is necessary to bear in mind not just the number of issues but also the importance of the issues which is, itself, normally reflected in the time and costs which have been expended in dealing with the particular Issues.

52.

In this case AstraZeneca was successful on Issues 1 to 5 which related to paragraph 12 of Schedule 22. Those issues were of central importance and much of the time and costs of the proceedings was spent in dealing with them. IBM succeeded on Issues 6 and 7 which related to IBM's obligation to provide Termination Assistance. AstraZeneca was unsuccessful in relation to Issue 8B which related to their obligation to provide an IT Transfer Plan under the MSA but was successful on the issue relating to whether IBM's obligations to provide Termination Assistance were conditional on the provision of an IT Transfer Plan. Taken together issues 6, 7, 8B and 8C were of importance and the majority of these led to success by IBM. Whilst significant time and costs were spent on those issues, I consider

that it was substantially less than on Issues 1 to 5 and there was an element where IBM was not successful. On the final issue, Issue 8D, the parties did not incur much time or cost. The issue was resolved against IBM in that the fixed fee was not conditional upon AstraZeneca producing an IT Transfer Plan but this was subject to the issue of how the fixed fee might change.

53.

Taking into account the issues on which AstraZeneca succeeded and the issues on which IBM succeeded together with an assessment of the time and costs which were spent for the relevant issues, I have come to the overall conclusion that the appropriate proportion of costs should be 75% to AstraZeneca and 25% to IBM. Given what I have said above I consider that whether I apply the provisions of Clauses 89.4 and 89.5 or I exercise my discretion taking account of the contractual principles agreed between the parties the appropriate way of expressing the overall costs award is that instead of stating that AstraZeneca should be entitled to 75% of their costs and IBM should be entitled to 25% of their costs it is appropriate in this case to make an award overall to AstraZeneca of 50% of their costs. Such costs are to be assessed on an indemnity basis, in accordance with the principles of Clause 89.4 of the MSA and giving effect to those contractual provisions in exercising my discretion as to costs.

Payment on account

54.

I consider that this is an appropriate case for a payment on account of costs to AstraZeneca under CPR 44.3(8), adopting the principle set out by Jacob J in Mars UK Ltd v Teknowledge Ltd [1999] 2 Costs LR 44 at 46 to 47. The total of AstraZeneca's costs as set out in the statement of costs is just over £1,000,000. Taking into account the order I have made for AstraZeneca to have 50% of its costs assessed on an indemnity basis I consider that the appropriate payment on account should be £300,000.

The costs of the hearing.

55.

At the hearing on 1 December 2011 two matters were dealt with: the terms of the order arising from the judgment handed down on 22 November 2011 and the question of costs. Some time and cost was spent on the terms of the order, mostly before the hearing, with little time being spent at the hearing. Most of the time at the hearing was spent dealing with costs. AstraZeneca succeeded in obtaining a costs order in their favour but one which was less than they sought. IBM did not succeed in having a costs order in their favour in relation to the costs up to 24 October 2011.

56.

Overall, I consider that the costs order in relation to the preparation for and attendance at the hearing on 1 December 2011 should follow the general order for costs so that AstraZeneca should have 50% of their costs to be assessed on an indemnity basis.