Neutral Citation Number: [2023] EWHC 1756 (Ch)

Case No: HC-2017-002125

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

The Rolls Building
7 Rolls Buildings,
London, EC4A 1NL

Date: 14/07/2023

Before :

MASTER KAYE

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Between :

(1) INEOS UPSTREAM LIMITED **(2) INEOS 120 EXPLORATION LIMITED** **(3) INEOS PROPERTIES LIMITED** **(4) INEOS INDUSTRIES LIMITED** **(5) JOHN BARRIE PALFREYMAN** **(6) ALAN JOHN SKEPPER** **(7) JANETTE MARY SKEPPER** **(8) STEVE JOHN SKEPPER** **(9) JOHN AMBROSE HOLLINGWORTH** **(10) LINDA KATHARINA HOLLINGWORTH**	**Claimants**
- and -	
(6) JOSEPH BOYD **(7) JOSEPH CORRÉ**	**Defendants**

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ALAN MACLEAN KC (instructed by **Fieldfisher**) for the Claimants
BLINNE NÍ GHRÁLAIGH KC AND JENNIFER ROBINSON (instructed by **Leigh Day**) for the **Sixth Defendant**
STEPHEN SIMBLET KC (instructed by **Bhatt Murphy**) for the **Seventh Defendant**

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Approved Judgment

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MASTER KAYE

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10 am on Friday 14 July 2023.

Master Kaye :

1. This is my written determination of the outstanding consequential matters arising out of my judgment dated 8 February 2023 ("**the Judgment**"). The background to these proceedings can be found in the Judgment at **[2023] EWHC 214 (Ch)** which itself refers to (i) the judgment of Morgan J of 23 November 2017 at **[2017] EWHC 2945 (Ch)** and his subsequent costs judgment of 21 December 2017 at **[2017] EWHC 3427 (Ch)**, (ii) the judgment of the Court of Appeal on 3 April 2019 at **[2019] EWCA Civ 515**, and (iii) the decision of HHJ Klein sitting as a High Court Judge on 25 March 2022 at **[2022] EWHC 684 (Ch)** ("**the Klein Judgment**").

2. I shall use the definitions used in the Judgment for consistency.

3. The parties were able to reach agreement on some of the consequential matters but not all. The consequential order dated 10 February 2023 recorded that the remitted costs ("the Remitted Costs") were to be paid by the claimants on a standard basis subject to detailed assessment if not agreed. The parties agreed that the costs of the proceedings other than those covered by the existing costs orders or those related to the costs of the Remitted Costs ("the Cost of the Remitted Costs") should be paid by the claimants on a standard basis subject to detailed assessment if not agreed.

4. The following matters were outstanding: (i) the incidence and basis of costs in relation to the Costs of the Remitted Costs; (ii) the quantum of any interim payments on account; (iii) the date from which post-judgment interest should run; (iv) what pre-judgment rate of interest to apply, and (v) the date from which any pre-judgment interest should run on costs.

5. The parties agreed a timetable for the filing and service of submissions and asked that the court then determine those outstanding consequential matters on paper.

6. D6 and D7 filed written submissions and supporting documents. This was followed by responsive submissions from the claimants and further supporting documents. D6 and D7 then filed reply submissions and further documents. At my request a consolidated bundle of documents, including costs information was filed. This process concluded by 14 April 2023.

7. Following that exchange of submissions the issues in dispute had narrowed.

    i) The claimants had agreed that they should pay the Costs of the Remitted Costs but on the standard basis subject to detailed assessment. The remaining issue between the parties was whether the costs should be paid on an indemnity basis.

    ii) D6 no longer sought pre-judgment interest on its costs.

    iii) The claimants agreed in principle that they would pay pre-judgment interest on D7's costs but the date from which that interest was to be paid, the costs to which it should be applied, and the rate of interest remained in dispute.

    iv) The position in relation to the amount of the interim payments on account of costs was as follows:

a) D6 said his overall costs were a total of £699,243.70 and sought an interim payment on account of 50%, £349,621.70. The claimants offered nothing.

b) D7 said his overall costs were a total of approximately £330,000. He sought an interim payment on account of £220,000, approximately two thirds. The claimants offered approximately 50% or £167,500.

8. I have considered the submissions and the supporting documents carefully and have taken them into account when reaching this decision.

9. I have also had regard to my Judgment and the findings made by HHJ Klein in the Klein Judgment.

10. HHJ Klein heard submissions on and made findings about the claimants' conduct and the delay in progressing the matters remitted for reconsideration by the Court of Appeal in April 2019. He intended that his judgment be taken into account to the extent it was appropriate to do so in any subsequent determination and weighed in the balance [56].

11. In particular he has already found at [49] and [50] that the course of conduct adopted by the claimants after April 2019 and prior to August 2021 amounted to "inexcusable delay" but was not an abuse of process. He considered that the claimants' conduct in failing to progress or resolve the claim after August 2021 was improper [51]. That improper conduct at the time of the Klein Judgment had been continuing for a period of 7 months since August 2021 and not almost 3 years as argued by D7 [53]. Importantly he noted at [56] that despite this conduct there had been little, if any, prejudice to D7 since it had only delayed the determination of the Remitted Costs for 7 months. That of course is a separate issue to whether costs were incurred in relation to the claim overall during that period, whether as a result of that delay or otherwise, which would fall to be assessed as part of the costs to which the orders now sought relate.

Conclusions

12. I have reached the following determinations in relation to the outstanding costs matters in the exercise of my broad discretion consistent with the overriding objective.

i) The claimants shall pay the defendants' Costs of the Remitted Costs on a standard basis to be assessed if not agreed, save for the period August 2021 to 25 March 2022, during which period the costs should be assessed on an indemnity basis;

ii) The claimants shall pay an interim payment on account of D6's costs of £200,000;

iii) The claimants shall pay an interim payment on account of D7's costs of £167,500;

iv) Judgment rate interest at 8% will run post-judgment from the dates on which the relevant costs orders were made in the usual way; and

v) Pre-judgment interest in relation to D7's costs will accrue at 2% over base from the date on which the liability to pay the costs accrued.

13. I set out my reasons for those decisions in this judgment. As set out in the Judgment the court has a very broad discretion when it comes to any aspect of costs, including interest on costs, and that includes all the issues that are outstanding between the parties and to which this decision relates.

Indemnity Basis

14. As set out in the Judgment, an order for indemnity costs is one that is made where the court is satisfied that a party's conduct falls outside the norm, see in particular *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm) at [25] and the general comments made at [98] – [111] of the Judgment.

15. A difference between the position in the Judgment and the position now is that I am considering the broader conduct of the parties in relation to the Costs of the Remitted Costs, not the question of what the appropriate Remitted Costs order was.

16. Although I consider the position of D6 and D7 separately, the core arguments made by both of them relate to matters of conduct in relation to delay and the approach to settlement offers. In relation to the former I have regard to the Klein Judgment and in relation to the latter it appears to be common ground that none of the offers made were ones which could have mandatory costs consequences in the sense, for example, of Part 36. Consideration of those offers and the questions of delay are all simply factors or circumstances for the court to take into account when considering the claimants' conduct and whether it falls outside the norm as part of the exercise of its broad discretion when determining whether in this case it should award indemnity costs for some or all of the period covered by the Costs of the Remitted Costs.

D6

17. D6 relies in particular on the following factors to support an order for indemnity costs in relation to the Costs of the Remitted Costs for the entire period:

    i) The claimants' unreasonable negotiating position and overall approach to settlement (including not replying to an offer to participate in a costs mediation) and in particular their rejection of D6's offers to settle before the CMC in July 2022 and in September 2022;

    ii) Generally, the claimants' unreasonable conduct and in particular their refusal to agree to the claim being struck out earlier; and

    iii) The length of the claimants' submissions and the size of the bundle.

D6 Negotiations/Settlement

18. Following the Klein Judgment a CMC was listed on 6 July 2022. On 4 July 2022 D6 offered to accept 60% of the Remitted Costs and all of his further costs, both to be assessed on the standard basis and with the claim against D6 to be withdrawn. The offer was sent by email at around 2.30pm on 4 July and was said to remain open for acceptance until 5.30pm on 5 July. The claimants responded on the same day raising issues in relation to the contents of the offer and noting that there was insufficient time

to either consider the offer or for it to provide any costs protection. The claimants say this was unreasonable conduct on the part of D6.

19. On 12 August 2022 the claimants sought further information about the nature of D6's funding arrangements and the total amount of costs that D6 was seeking from the claimants. They indicated that they were considering whether it might be possible to reach a global settlement of all D6's costs. The claimants chased a response on 13 September 2022.

20. The questions raised about D6's funding arrangements and whether D6 had any liability for costs at all had been outstanding since about 2020. In due course those will no doubt be explored and resolved as part of the detailed assessment process, either as part of the Court of Appeal detailed assessment, which remains outstanding, or any detailed assessment of the Remitted Costs, the costs of the proceedings and the Costs of the Remitted Costs.

21. On Friday 16 September 2022 D6 offered to engage in a costs mediation in October 2022 in relation to D6's costs. As part of that mediation process D6 offered to produce his CFA together with a summary schedule of costs but not otherwise. D6 required a response by no later than Tuesday 20 September 2022, at best 3 working days later. That approach itself puts into perspective the offer of a costs mediation. The claimants' failure to agree to it is relied on by D6 as a basis for seeking indemnity costs. A refusal to mediate should be taken into account and weighed in the balance when the court exercises its discretion but has to be considered in the context in which it was made.

22. On 9 November 2022, the claimants emailed D6 saying they could not proceed on a bilateral basis, and they would need to agree terms with D7 as well. They wanted to discuss settlement urgently and asked that D6 confirm the overall level of his costs.

23. On 9 November after further chasing by the claimants D6 finally provided a global estimate of his costs of £800,000 to £850,000 including his Court of Appeal costs which were by then known to be £335,171.30. As a consequence of what the claimants said were their continuing concerns about D6's funding and retainer arrangements and the indemnity principle, the claimants were only prepared to pay £75,000 in total. From this sum they intended to net off the interim payment made in respect of the Court of Appeal costs. The claimants argue that the offer reflected the lack of information provided by D6, limiting their ability to make an informed settlement offer.

24. To put that in context, on 20 June 2019 the Court of Appeal ordered the claimants to pay D6 and D7's costs to be assessed if not agreed. It awarded interim payments on account of £60,000. Rather than serving a detailed bill of costs, D6 served a preliminary schedule in about May 2020, a year later. Whilst a preliminary schedule or breakdown is not an unusual way in which to commence a discussion about costs to avoid the costs of a full detailed bill of costs, in this case even the preliminary schedule was not provided until a year later. I note that CPR 47.7 provides a period of three months from the order giving rise to the right to assessment to commence detailed assessment proceedings.

25. In 2020, the claimants raised concerns about D6's funding arrangements and whether he had any liability to pay the costs. They asked that the preliminary schedule be

endorsed to confirm that it did not breach the indemnity principle. The claimants' concerns and queries in relation to funding remained unanswered.

26. D6's Court of Appeal bill of costs was not served until 3 March 2022. He sought £335,171.30. Points of dispute were served in April 2022 which again appear to have raised the funding issues previously raised in 2020. Notably, when D6 made his offers to settle in 2022 he did so without addressing the outstanding queries in relation to funding.

27. The only proposal to answer any of those queries was included within the proposal for a costs mediation in September 2022. The queries remain unanswered.

28. As at November 2022, the Court of Appeal costs assessment had not been commenced nearly three and a half years after the original costs order had been made.

29. The claimants argue that D6's resistance to their reasonable requests for information about his funding and retainer position given the unusual nature of his funding arrangements (which included crowdfunding) was itself unreasonable. They say that their position is reinforced by the failure to provide a Court of Appeal bill of costs until March 2022 and the overall figures put forward now compared to November 2022.

30. It is notable that D6's proposed global figure on 9 November 2022 of £800,000 to £850,000 sits uncomfortably with the £335,171.30 claimed in the Court of Appeal bill of costs, coupled with the £699,243.40 which is now claimed for the rest of the costs, giving a total of £1,034,414.70. No explanation has been provided for the difference/increase of approximately 25% or in excess of £200,000.

D7

31. D7 focusses his submissions on unreasonable conduct in relation to settlement discussions between the parties and on the general conduct of the claimants in continuing to pursue the Remitted Costs and not agreeing to resolve the proceedings earlier.

D7 Negotiations/Settlement

32. On 20 November 2019, shortly after the imposition of the government moratorium on hydraulic fracturing, D7 made an open offer to accept 75% of his High Court costs. No progress was made.

33. Thereafter there was a general election in December 2019, Covid-19 from 2020 and various planning matters which the Klein Judgment records as being some of the reasons given by the claimants as to why no further progress was made generally.

34. However, unlike D6, and although still a year after the Court of Appeal order, D7 served his court of appeal bill of costs in July 2020 in the sum of £201,470.42. Points of dispute were served in October 2020 which included queries about D7's funding and retainer. Like D6, however those queries remained unanswered as at November 2022, and like D6, D7 had not commenced the assessment of his costs nearly three and a half years after the original costs order was made.

35. Although D7 says that he made repeated and genuine attempts to engage with the claimants, on the basis of the submissions and documents provided it does not appear that it was until June 2022 after the Klein Judgment that D7 and the claimants re-engaged about possible settlement.

36. On 16 June 2022 D7 offered to settle on the basis that the claimants pay 60% of the Remitted Costs and all the Costs of the Remitted Costs. The offer remained open for acceptance until 4pm on 5 July the day before the 6 July CMC. The claimants raised queries in relation to the offer including suggesting that an offer of 60% implicitly accepted that D7 should pay 40% of the claimants' costs which appeared to suggest a fundamental misunderstanding of the offer and indeed costs. D7 clarified their position on 23 June 2022.

37. On 12 August 2022 the claimants sought further information about D7's funding and retainer arrangements having been provided with only heavily redacted copies of some documents in October 2020 and no response to the queries subsequently raised in November 2020. At the same time they indicated that they were considering whether it might be possible to reach a global settlement of all D7's costs subject to being satisfied about D7's liability to pay costs and asked for confirmation of the level of D7's costs. As with D6, the claimants chased for a response on 13 September 2022, but none was received.

38. On 14 October 2022, in response to the 12 August 2022 letter D7 repeated his June 2022 offer, leaving it open for acceptance until the day before the November hearing. D7 said that he would be interested in considering a global settlement but only after the claimants have accepted liability for costs on the basis set out in D7's June 2022 offer. D7 did not provide any global figures or any further information in relation to the quantum of his costs, or the funding and retainer issues that had been raised.

39. As with D6 the claimants say that in the absence of the information they had sought in relation to funding, retainers and the total amount of costs they were unable to make an informed decision about a global offer based on the information available. On 9 November 2022, the claimants offered £75,000 in total for all of D7's costs, including his Court of Appeal costs, from which they intended to deduct the payment on account from the Court of Appeal of £60,000 thus offering to pay an additional sum of only £15,000. D7 did not accept the offer.

40. Again to put that in context the claimants say that it is necessary to consider the claimants' position by reference to the failure by D7 to progress the Court of Appeal costs assessment or provide responses to the queries that had been raised in relation to funding arrangements.

41. The defendants say that the claimants' conduct and approach to settlement negotiations as well as the negotiations themselves should be taken into account when determining the basis for the Costs of the Remitted Costs. They both consider that the claimants' conduct in delaying and obfuscating about settlement proposals until the day before the November 2022 hearing and then only making a derisory offer to settle costs globally was clearly unreasonable.

42. D7 says that he has beaten his offers to accept 60% of the Remitted Costs and all his other costs.

43. The defendants were seeking to persuade the claimants to simply accept liability for the defendants' costs without any visibility on what the consequences of that acceptance might be and without addressing any of their concerns. There is no evidence of any "negotiation", merely offers with nothing much in between. It appears to me that there is limited value in the process that was undertaken and that none of the parties appear to me to have meaningfully engaged in an attempt to reach a resolution.

44. The claimants argue that the mere fact that there were offers and a proposal for a costs mediation by D6 do not of themselves justify an award of indemnity costs, see for example Coulson J as he then was in *Barr v Biffa Waste Services Ltd (No 4)* [2011] EWHC 1107 (TCC) at [30]: "*But it should not be thought that it is generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers*".

Other Conduct

45. Both the defendants rely on the Klein Judgment in respect of the overall arguments about delay. They also rely on the Judgment in terms of conduct generally and in particular the claimants' continued resistance to discontinuing or abandoning the claims against D6 and D7 at both the July CMC and the November hearing.

46. The claimants argue (i) that their position in relation to the Remitted Costs was arguable including their points on the discontinuance; (ii) their conduct at the CMC did not justify indemnity costs; (iii) it would be wrong to rely on the events considered and taken into account in the Klein Judgment which were in any event distant in time.

47. In addition to these matters D6 particularly highlights and relies on the length of the claimants' submissions and the size of the bundle for the hearing which ran to some 2000 pages.

Discussion

48. As set out in the Judgment and above, whether to exercise my discretion to award indemnity costs for some or all of the period in relation to the Costs of the Remitted Costs requires me to consider the various factors and circumstances which the parties have relied on and consider whether in the exercise of my broad discretion I am satisfied that the claimants' conduct fell outside the norm and indemnity costs should be awarded.

49. Although the parties have directed me to specific authorities that support their contentions, ultimately the exercise I have to undertake is a broad based one having regard to the circumstances or factors of this particular case. Although I have considered those authorities where they are case and fact specific they provide limited assistance.

50. As I set out in the Judgment, just because a party pursues a claim or application that is unsuccessful does not of itself justify an award of indemnity costs. Further the failure to accept what turns out to be a reasonable or well pitched offer to settle does not of itself justify an award of indemnity costs. The court has to consider the cumulative effect of the conduct overall. I need to consider whether the factors or circumstances

relied on by the defendants individually or cumulatively justify an award of indemnity costs for all or part of the period from April 2019 to date.

51. None of the offers made could or did have any automatic or mandatory costs consequences; they are just part of the wider consideration of whether the conduct of any party falls outside the norm.

52. I have set out what I have been told about the settlement discussions on which and negotiations between the parties. What it demonstrates is a failure on the part of all the parties to engage in a manner consistent with the overriding objective.

53. I am simply not persuaded that the defendants' limited engagement in attempts to settle after the Klein Judgment and immediately before the July CMC and again just before the November hearing can be said to provide any proper basis on which it might be said that the claimants should pay indemnity costs for that period.

54. Indeed the defendants' apparent resistance to engaging with the claimants over a number of years in relation to the questions about their funding and retainers, and the indemnity principle and their apparent inability or resistance to providing even basic costs information militates against such an order. Even now at a time when the defendants are seeking interim payments on account, the costs information provided is noticeably lacking.

55. This is against the background where both defendants, whatever their personal circumstances, have been fully represented throughout, including by leading counsel. They both retained specialist costs lawyers to prepare breakdowns and bills of costs in respect of Court of Appeal costs.

56. The defendants therefore had ready access to costs specialists to assist them in providing at least some costs information from it appears at least 2020 if not earlier. They were both specifically asked for information about their global costs on 12 August 2022. Neither was in a position to or willing to provide that information even by 9 November 2022. The figure provided by D6 appears to be woefully inaccurate.

57. This is particularly surprising in circumstances where if it had been possible to give judgment on an ex tempore basis on 11 November 2022, any application for a payment on account and any application for indemnity costs would have to have been made and determined then.

58. It is notable that the first settlement proposal from D6 was after the Klein Judgment and just before the CMC in July 2022. This was after their costs specialists had finally produced a Court of Appeal bill of costs in March 2022.

59. Although D7 did make an offer to settle earlier in 2019 that was not pursued by either party perhaps in part due to the circumstances identified in the Klein Judgment. D7 did not re-engage until June 2022 again after the Klein Judgment.

60. It appears that the claimants' first real attempt to engage in settlement discussions was the proposal to seek to reach a global settlement in August 2022.

61. I accept that D6 did offer a costs mediation in September 2022 to take place in October which I take that into account. No response was received to that proposal but given the context in which the offer was made and the 3 working days it was open for acceptance and without any advance information about the overall costs figures it carries very limited additional weight.

62. Although the claimants rely on the delay in progressing the Court of Appeal costs assessments on the part of D6 and D7 as a factor to be weighed against the defendants, had the claimants wanted to progress matters they could have forced D6 and D7 to commence the costs assessment under CPR47.14. They can still do so if those costs assessments have not yet been commenced. This may give rise to costs or interest consequences adverse to the defendants. It will remain open to the claimants in due course to argue that interest on those costs should be disallowed in whole or in part as a consequence of the delay in progressing the costs assessment in any event.

63. Ultimately the delays in progressing the Court of Appeal costs assessment are a matter for the costs judge. Had the claimants caused the Court of Appeal costs assessment to be commenced earlier (CPR 47.8 or CPR 47.14) they may have been able to resolve some or all of their concerns about retainers, CFAs and funding at an earlier stage. The only relevance it has to this determination is to put in context the delay in providing the funding information which the claimants say they required to enable them to assess what offers to make.

64. I am not persuaded that the limited attempts to resolve the costs issues just before hearings in 2022 provide any proper basis to say that one party's conduct was so much more culpable than another that it falls outside the norm and justifies an award of indemnity costs. The engagement with settlement offers is just a factor and its weight in determining if conduct falls outside the norm forms part of the court's overall assessment.

65. However, the defendants rely in addition on the conduct of the claimants more generally. The Klein Judgment is focussed on the period from the Court of Appeal Order in 2019 to the date of the Klein Judgment in March 2022. In his careful judgment HHJ Klein reviewed that history of the claims and made findings about the claimants' conduct and delay when considering both D7's application to strike out and what to do about the remaining injunctions and the claim. As set out above he found that the delay in progressing the remittal was merely inexcusable before August 2021 but thereafter improper and abusive.

66. HHJ Klein intended that his judgment be taken into account at the subsequent hearings. I repeat paragraphs 10 and 11 above. Indeed were I to have to reconsider matters already considered by HHJ Klein in order to determine the Costs of the Remitted Costs that would risk the need for a further hearing to revisit them and the possibility of inconsistent findings.

67. The claimants submits that it would be wrong to rely on the events considered and taken into account in the Klein Judgment and that in any event they were all a long time ago. However, it seems to me that I can and should take into account the Klein Judgment when considering the conduct of the claimants and the defendants in the period from April 2019 to March 2022 and the appropriate order to make in relation to the Costs of

the Remitted Costs. Indeed to do otherwise would be inconsistent with the overriding objective and good case management.

68. I therefore take into account in particular HHJ Klein's findings that the claimants' conduct before August 2021 demonstrated inexcusable delay but was not abusive and that the conduct after August 2021 in not progressing the remittal or otherwise resolving the claim was improper and an abuse. I consider that I should take into account the Klein Judgment overall and in particular the findings in relation to delay and conduct as part of my overall consideration of how to exercise my discretion.

69. The Klein Judgment resulted in a costs order in favour of D7 said to be in part a sanction against the claimants. The effect of that costs order was that D7 obtained an order for costs in his favour notwithstanding that he was unsuccessful in his application to strike out. No part of the Klein Judgment or the costs orders made as a consequence touch or concern the Costs of the Remitted Costs themselves in respect of which no costs order has yet been made. I do not consider that the Klein Judgment itself limits my jurisdiction in respect of what order to be made in respect of the Costs of the Remitted Costs.

70. When considering how to approach the question of conduct and delay for the period covered by the Klein Judgment, I also need to take into account that it would have been open to the defendants to take matters into their own hands and press for the remittal. They did not do so. Indeed HHJ Klein made that very point at [53].

71. D6 sought to suggest that he has been put off doing anything because of the risk of adverse costs, a point I addressed in my Judgment. He also seeks to rely on his financial position more generally. I understand that he was unemployed and of no fixed abode in 2017 but I do not know his current position. That latter point in particular has substantially less force when one considers the substantial costs those funding him were willing to incur in relation to the claim more generally.

72. D6's complaint about the size of the bundle and the size of the claimants' submissions did not appear to me to add anything. Both the defendants took full advantage of the opportunity to file submissions of considerable length themselves. I considered all parties' submissions to lack concision and to be longer than necessary. I do not therefore consider that the claimants' submissions in responding to both defendants' to be any more excessive or unreasonable than the defendants.

73. The bundle was 2000 pages included transcripts from earlier hearings which took up a considerable number of pages. The fact that none of the parties referred to a large number of the documents in the bundles is sadly far from unusual.

74. Parties are expected to co-operate to ensure that bundles contain only those documents or authorities which are necessary for a hearing. That was always the position but is now clearly set out in the Chancery Guide 2022 Appendix X. Where the parties are represented a higher level of co-operation is to be expected to ensure that there is adequate compliance with the requirements of the Chancery Guide 2022. A failure to comply with Appendix X might result in sanctions of a type that might disallow part of all of the costs of the bundle for example. However, the mere fact that the bundle was 2000 pages is not of itself a reason to make an indemnity costs order.

75. I have reflected on the written submissions and the various factors identified by the parties and considered those factors both individually and cumulatively.

76. In the exercise of my broad discretion I do not consider that the factors relied on either individually or cumulatively justify an order for indemnity costs for the entire period. However, I consider that there are three separate periods and that the court needs to approach them separately.

77. From April 2019 to August 2021 HHJ Klein found that the delay in progressing the Remittal was improper but not abusive. In that same period there was only one settlement offer – an offer from D7 in 2019. As set out in the Klein Judgment a number of intervening events occurred during the period after the offer and I do not consider the fact that that offer was not accepted or ran into the ground to be sufficient to justify any order for indemnity costs. No offers to settle were made by either defendant after D7's offer in 2019 until June 2022.

78. However, during the same period the defendants engaged costs lawyers and began the process of seeking to recover their Court of Appeal costs. This highlighted issues between the parties about funding arrangements, retainers and the indemnity principle. Although D7 appears to have provided redacted copies of some of his funding documents in about 2020 nothing was provided by D6.

79. Ultimately the position is that in this hostile litigation neither the claimants nor the defendants took any active steps to progress the remittal for 2 years and did not co-operate in the provision of information which the claimants considered relevant to any costs issues. Even allowing for Covid-19 this reflects poorly on all parties. Understandably the Klein Judgment considers the delay on the claimants' part to be inexcusable during this period, but he also rightly notes that it was open to the defendants to take action to bring on the remittal in that same period. Whilst the claimants' behaviour was inexcusable, I do not consider that the inactivity by all the parties during that period justifies an award of indemnity costs against the claimants.

80. The Klein Judgment considers that during the period August 2021 until the date of the Klein Judgment on 25 March 2022 the claimants' conduct in not progressing the remittal had moved from inexcusable to improper and abusive. As I have already set out, I do not consider that the sanction in the Klein Judgment in relation D7's costs of the strike out application precludes me from considering that delay in the context of the Costs of the Remitted Costs.

81. The general inactivity appears to have continued until about December 2021 and thereafter D7 and the claimants were focussed on the March hearing. It is clear from the Klein Judgment that at least by March 2022 the claimants' position had changed in relation to the claim as a whole. HHJ Klein was rightly critical of the claimants' approach, but it was not just the claimants. No offers were made in this period by any party to seek to resolve the claim and the outstanding queries about funding arrangements were not progressed.

82. Nonetheless having considered the Klein Judgment and all the circumstances, although the defendants may not have incurred any significant costs between August 2021 and 25 March 2022 which relate to the Costs of the Remitted Costs, I am satisfied that in circumstances where HHJ Klein has described the delay in this period for the reasons

he gave as improper it is appropriate for the court to take that into account. It seems to me that the nature and quality of the delay from August 2021 to 25 March 2022 as described by HHJ Klein changes the overall balance between the parties and tips in favour of the defendants.

83. It seems to me that the improper conduct is outside the norm and that it is appropriate to award costs against the claimants on an indemnity basis for the period from August 2021 to the date of the Klein Judgment on 25 March 2022.

84. Thereafter although this claim continued to be hotly contested it was progressed to a final hearing with reasonable diligence. I do not consider there was any particular delay after March 2022.

85. The July CMC was always going to take place and was not going to be a final hearing so although the defendants criticise the claimants' conduct in relation to that hearing it is insufficient to justify an award of indemnity costs.

86. I have set out in this judgment the position more generally in relation to the offers, the size of the bundle and submissions. I am not persuaded that the position in relation to offers, settlement and negotiations, the size of the bundle or submissions are individually or cumulatively sufficient to justify an order for indemnity costs against the claimants after March 2022.

87. I am satisfied that the appropriate order which meets the balance between the parties and fairly reflects on the conduct of the parties as identified in the Judgment, the Klein Judgment and this judgment is to direct that the claimants pay the Costs of the Remitted Costs on a standard basis save for the period from August 2021 to 25 March 2022 during which period the costs should be paid on an indemnity basis.

Interim Payments

88. Both D6 and D7 ask the court to direct that the claimants as the paying party should make substantial interim payments on account of costs pending the final determination of their costs on a detailed assessment.

89. CPR 44.2(8) provides that the court will order the paying party to pay a reasonable sum on account of costs, unless there is a good reason not to do so. Thus it is a mandatory requirement for the court to order a payment on account unless there is a good reason not to do so.

90. In cases where there has been costs budgeting the determination of what a reasonable sum has become simpler although a slightly different approach is needed for incurred costs and budgeted costs. First the court and the paying party will have the benefit of a detailed costs budget with the costs broken down between incurred and budgeted costs and into phases. Secondly the costs budget will have been certified as representing a reasonable and proportionate sum for both incurred and budgeted costs and, thirdly the to be incurred costs will have been considered by the court at a CCMC and the court will have determined what it considers to be a reasonable and proportionate sum for those budgeted costs.

91. Here there had been no costs budgeting. In such cases the court still has to determine a reasonable sum to allow for an interim payment and in doing so must take into account all the circumstances particularly where the paying party is arguing that there is a good reason not to order any payment on account.

92. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) Christopher Clarke LJ explained that a reasonable sum on account will be an estimate dependent on the circumstances and involve an element of uncertainty. He identified some factors that might be relevant to that consideration and made it clear that the assessment was not based on an irreducible minimum.

93. For costs that have not been part of a costs budgeting process at all there is no set format for the provision of information to enable the court or the paying party to assess the proposed interim payment and to determine what is reasonable or on what to base the estimate of an interim payment.

94. In cases which do not fall within costs budgeting the court will therefore have regard to the quality and nature of the information provided to support the proposed interim payment. In some cases very little information may be needed for the court and/or the paying party to be satisfied as to what is a reasonable sum to award as an interim payment on account.

95. In other cases it may be less clear – particularly those where the costs claimed are apparently large compared to the nature of the claim as it might be understood by the court or the paying party. In such cases it is for the receiving party to provide sufficient information to enable the court to be satisfied that it can safely make an interim costs award of the amount sought by the receiving party and or of any other amount it considers reasonable.

96. The amount sought, the quality of the information provided, and all the circumstances will determine whether and in what amount such an interim payment should be.

97. Given the importance of an interim payment on account one would expect parties to be prepared to put in some effort to provide some proper basis for a determination of a reasonable sum.

98. There is no agreement as to the amount that the claimants should pay to either D6 or D7 as an interim payment on account of costs.

99. It is notable that there is very little evidence in support of the figures sought by the defendants. Given the leisurely timetable the parties set themselves for submissions on costs and interest and the apparent importance of interim payments to the defendants the lack of information about the overall quantum of their costs and any even basic breakdown is very surprising. However, there was also very little by way of evidence or even submissions from the claimants against which to assess the reasonableness of the interim payments proposed or any factors that might militate against making an order for an interim payment at all.

100. The defendants had retained costs lawyers to assist them in relation to the Court of Appeal costs from about 2022. In those circumstances and in any event where there had been earlier substantial costs awards one might have expected the defendants to have

been in a position to provide at least some basic information about the total sum sought and confirmation that (i) the costs being sought did not breach the indemnity principle and (ii) any costs related to those other orders had been excluded.

101. I therefore have considerable sympathy with the claimants' criticisms of the defendants in relation to the information provided to support their claims for large interim payments on account and treat the figures with considerable caution.

102. D7 seeks an interim payment on account of £220,000 said to be about two thirds of his costs whilst the claimants offer £167,500 being about 50%.

103. The evidence in support of D7's figure is limited. It is clear from the without prejudice correspondence in relation to costs that a lack of clarity about the likely quantum of costs (and issues around funding arrangements) has been an ongoing live issue between the parties since the Court of Appeal costs orders were made in 2019. That makes the lack of any detail at this stage even more surprising.

104. Despite the considerable time D7 had had to prepare any costs information the only evidence is the schedule set out below and the two supporting summary assessment schedules for the Costs of the Remitted Costs.

105. Although a full bill of costs with a full certification is not necessary in order to consider the amount to order by way of an interim payment on account, in a long running complex and/or substantial non cost budgeted case, parties should consider carefully the nature of the information provided both to the court and the other party when seeking an interim payment on account of their costs.

106. D7's main schedule sets out a single total figure of £246,028.47 which appears to relate to the Remitted Costs and the costs of the proceedings. There is no breakdown between solicitor costs, counsels' fees and disbursements. It appears to be VAT inclusive since the Summary Assessment figures are VAT inclusive. The schedule is undated, unsigned, and does not include a statement of truth or certification of any description – not even one that simply confirms that D7's schedule excludes those costs relating to the Court of Appeal costs and/or the Klein Judgment costs.

107. The schedule includes the total figures set out in the summary assessment schedules relating to the Costs of the Remitted Costs as follows: (i) the figure for the costs of the CMC on 6 July 2022 in a total of £35,466 inc VAT and (ii) a figure for the costs of the hearing on 11 November 2022 in a total of £52,176 inc VAT. Those summary assessment schedules are not only more detailed but also certified and although the figures themselves are not agreed, no criticism is made by the claimants about the quality of the information provided.

108. In saying that I do not say that a summary assessment schedule is required. In each case the party seeking the interim costs order will need to consider in the context of the case the extent of the detail that might be necessary to support any interim payment award versus the costs and time of doing so at that early stage in the costs process.

109. D7's figures in total come to about £333,000 inc VAT. Two thirds of that total is, rounded down, £220,000.

INEOS & others v Persons unknown & others			
Without prejudice except as to the costs of detailed assessment			
Costs schedule of 7th Defendant (all figures include VAT)			
High Court Costs (i.e. those subject of Morgan J's Judgment of 21.12.17)			£246,028.47
Costs of the costs issue			
	6 July 2022 hearing (as per schedule)		£35,466.00
	11 November 2022 hearing		£53,520.00

110. The test for what is a reasonable sum is not the irreducible minimum but should be an estimate of the likely level of recovery allowing for a margin for error. The quality of the costs information provided by the receiving party and the reliance that the court considers can be placed on it for the purpose of determining the estimate of the level of recovery and the margin of error will be a significant factor in determining the caution with which the court should treat any proposed costs figure or payment on account figure.

111. Here, it is clear that there are issues that would significantly affect the outcome of any costs assessment in relation to for example funding. The main costs figure provided is said to be without prejudice. It is a single sum covering 6 years of costs. I have considerable doubts about its reliability in the absence of any form of breakdown or certification.

112. The conduct of the parties in this case has been excessive at all stages and it appears to me that any costs are likely to be significantly reduced to reflect what is a reasonable and proportionate sum on a detailed assessment.

113. Although I have awarded indemnity costs for a period of 7 months that is a period of limited activity other than the costs already catered for by the costs order made pursuant to the Klein Judgment. Consequently the vast majority of the costs and certainly those incurred during the period of intense activity in 2017 will be assessed on a standard basis.

114. When costs are assessed on a standard basis the court is determining a reasonable and proportionate sum and it is important to remember that proportionality trumps reasonableness. It is not a solicitor client assessment. What the paying party has to pay is the sum the court determines to be a reasonable and proportionate sum with the element of doubt weighing against the receiving party and in favour of the paying party.

115. Having taken all those matters into account it appears to me that the court should take a particularly cautious approach to the sums sought by D7. The claimants has proposed an interim payment limited to 50% of the sums set out in the schedule.

116. I am prepared to direct an interim on account payment of that sum but no more and am satisfied that it represents a reasonable sum in the circumstances.

117. D6 seeks an interim payment of £349,621.70 said to be 50% of the estimated total costs. The claimants offer nothing.

118. I repeat the general points I have made about interim payments and the basis of assessment which apply at least equally to the determination of the interim payment in relation to D6.

119. The evidence in support of the £349,621.70 is provided in a single schedule provided with D6's costs submissions dated 20 February 2023 as set out below which provides a total figure of £699,243.40. That figure covers 6 years but with considerable periods of inactivity either because the parties were focussed on the Court of Appeal or otherwise simply inactive. There is no breakdown of the solicitor costs although those pale into insignificance compared to the total of nearly £550,000 for counsels' fees since 2017. When this figure is added to the £335,171.30 sought in relation to the Court of Appeal costs it produces a total of £1,034,414.70. That is over £200,000 higher than the global estimate of £800,000 to £850,000 provided in a telephone call and recorded in an email on 9 November 2022. It would mean that in November 2022, two days before the hearing D6 was estimating their total costs for the Remitted Costs, the Costs of the Remitted Costs and the costs of the proceedings at between £465,000 and £515,000 rather than the £699,243.40 now advanced.

INEOS AND OTHERS v PERSONS UNKNOWN AND OTHERS

SCHEDULE OF COSTS OF SIXTH DEFENDANT

This a schedule of the costs of Joseph Boyd in the proceedings before Morgan J and the proceedings to determine such costs before Master Kaye. It is a reasonable estimate provided for the purposes of determining an appropriate payment on account of costs only. A certified costs figure will be provided in a bill of costs.

	Category	Amount
1.	Heather Williams KC (25.08.2017 to 14.12.2017)	£140,687.00
2.	Blinne Ní Ghrálaigh (13.08.2017 to 11.11.2022)	£248,834.50
3.	Jennifer Robinson (19.09.2017 to 11.11.2022)	£153,851.50
4.	Leigh Day (02.08.2017 to 11.11.2022)	£155,870.40
5.	Disbursements	Negligible
	Total	£699,243.40

120. D6's schedule is said to be a reasonable estimate for determining a payment on account only and that the certified figure will be provided in a bill of costs. It is undated, unsigned, and does not include a statement of truth or certification of any description. I have no explanation of how the figure has been calculated or where it has come from or why it has increased so substantially. The claimants understandably criticise D6.

121. The sums claimed by D6 are excessive and in my view unreasonable and disproportionate for the work that has been undertaken. I repeat my comments above about standard basis and remind myself that the costs are to be assessed on a standard basis for all but 7 months.

122. D6's schedule provides a figure that is more than double the sum sought in total by D7 and whilst comparison provides only limited assistance it cannot be ignored.

123. D6 seeks to justify the difference by arguing that D6 took the lead in these proceedings, setting out some of the matters on which he relies including reference to extensive written submissions. That may be right but that does not mean that D6's costs at more than double D7's, are reasonable and proportionate on a standard basis for the purposes of an interim payment on account given the costs order that I have made.

124. I take into account that D6 was actively involved in the hearings in 2017 and submitted substantial evidence and documents for the purposes of the hearings before Morgan J. It is clear that he will have reasonably incurred substantial costs in doing so. D6 sets out in his written submissions details of the length of the submissions and skeletons and the points that he led on.

125. Whilst D6 was clearly very active in the Court of Appeal, that work, and those costs orders are separate to this exercise. It is less clear what engagement he had with the claimants that was separate to the debate about his funding or the Court of Appeal costs between 2019 and 25 March 2022 but I am prepared to accept that some costs may have been incurred.

126. D6 was actively involved in these proceedings after March 2022.

127. Nonetheless it appears to me that the quality of the information provided by D6 to justify a payment of £349,621.70 is inadequate and the substantial change in the figures between November 2022 and February 2023 with no explanation adds an additional further element of significant caution to the approach to be taken.

128. Although the caution with which I approach D6's costs is greater than that which I consider appropriate in relation to D7 I am not persuaded that no interim payment should be ordered. The funding risks to which the claimants are exposed, and the absence of any certification do not appear to me to place the claimants at a significantly greater risk in relation to D6.

129. There is always a risk when an interim costs order is made and paid that in the event that the eventual costs are less the receiving party is not in a position to recover them back. I can see no proper basis on the information provided in support of these submissions to differentiate between the defendants such that D6 should either not receive an interim payment at all or it should be paid into court.

130. However, as I have already indicated I do consider that D6's costs should be treated with considerable caution. They appear to me to be unreasonable and disproportionate and there is, as I say no explanation for the substantial increase of in excess of £200,000 from 2 days before the hearing until now. There has been no further hearing since 11 November and the submissions on costs were constrained by my directions so whilst some additional costs may have been incurred it is impossible to conceive that they might have increased by £200,000. That suggests that something has gone wrong with the figures be it in November or now, but I have been provided with no explanation at all.

131. I need to set an interim payment on account that reflects my considerable concerns and caution about quantum whilst recognising that D6 is entitled to an interim payment on account.

132. Having reflected on the lack of information and the difficulties with such information as has been provided I consider that the interim on account payment that meets the balance between the parties is £200,000. This is a substantial sum on any basis and reflects both my recognition that considerable work was undertaken in 2017 and further work has been undertaken since but balances it against my considerable concerns about the limitations and accuracy of costs information provided, my assessment that on the

basis of the information available the costs claimed appear to be excessive and disproportionate and the significant outstanding and unanswered concerns raised by the claimants.

Interest

133. There are three issues in relation to interest on costs: (i) the date from which interest should run post judgment/costs order; (ii) the rate of interest to be applied pre-judgment; and (iii) the date from or the costs to which that interest rate should be applied.

Post-Judgment Interest

134. The claimants accept that the judgment rate of 8% applies in principle from the date of judgment/costs order but argue that the lack of clarity about the costs information provided by D6 and D7 is such that the court should defer the date on which judgment rate interest should run on the Remitted Costs, the costs of the claim or the Costs of the Remitted Costs until service of a detailed bill of costs.

135. The entitlement to interest on a costs order is derived from section 17 and section 18 of the Judgments Act 1838, CPR 40.8 and in relation to costs CPR 44.2(6)(g). For these purposes the receiving party is treated as the judgment creditor and the paying party the judgment debtor.

136. The entitlement to interest on costs runs from the date on which the order for costs was made and not from the date on which the quantum of the costs was eventually determined unless the court makes a different order (the incipitur rule).

137. At least part of the logic for this rule is that if the court had the time and resources to determine the quantum of the costs and/or carry out the detailed assessment at the time at which the order was made it would.

138. Pursuant to CPR 40.8(2) and CPR 44.2(6)(g) the court may order that interest on costs starts to run from a date earlier than the date of any costs order or may defer the date on which the liability for interest starts to accrue.

139. However, interest will only ever accrue on the sum that is eventually found due not the sum sought. Consequently the absence of clarity on the precise figure claimed at the time the costs order is made is nothing to the point in respect of interest from the date of the order onwards in the majority of cases.

140. For that reason there will rarely be a good reason to delay the date on which the judgment rate starts to run. The claimants rely on *Involnert Management Inc v Aprilgrange Limited & Ors* [2015] EWHC 2834 (Comm), in which Leggatt LJ stated at [27]: *"I do not think it just in these circumstances that interest on whatever further sums the claimant is ultimately found liable to pay to the defendants and OAMPS should begin to run at the rate applicable to judgment debts before the claimant has been provided with a detailed statement of the costs claimed so that it can take an informed view of the amount its liability."*

141. It is clear that Leggatt LJ was exercising his discretion based on the circumstances in that case. It provides no general principle applicable to all cases. Nonetheless the

claimants argue that they are in a similar position and should not be required to pay interest on the costs until the claimants are in a position to take an informed view of the amount of their liability.

142. The claimants point to the limited information provided and the lack of any certification by D6 for the purposes of seeking an interim payment. They also rely on the delay in pursuing the Court of Appeal costs. In relation to D7 the claimants argue that whilst they accept that interest should run in relation to the Costs of the Remitted Costs because they have summary assessment schedules that in relation to the Remitted Costs and the costs of the claim the same issues arise.

143. When the court comes to consider whether to exercise its broad discretion to make an order to postpone or defer an award of interest it would have to be satisfied that it was an appropriate exercise of its discretion having regard to the particular circumstances of any particular case and that doing so was consistent with the overriding objective of dealing with cases justly and fairly as between the parties. This would of course include being satisfied that there was a good reason for doing so. Using it as a way of seeking to adjust the effect of the judgment rate is not a good reason.

144. I remind myself that the claimants are in a position where they can force the defendants to produce a bill of costs and commence a detailed assessment pursuant to CPR 47.8. They have not done so in relation to the Court of Appeal costs so any complaint about the delay in relation to the crystallisation and progress of those costs should be viewed in that context. Further they will only ever pay interest on the sums eventually found due. If they are right that there may be no liability at all or that the costs are too high that will affect any interest they may have to pay in due course.

145. Although the lack of clarity now may be frustrating none of these various factors seem to me point in favour of departing from the usual approach to post-judgment interest. At best the arguments made by the claimants seem to me to be neutral.

146. As I have set out, the claimants are not without the necessary tools should they wish to use them to accelerate the process so as to obtain clarity to enable them to make a more informed decision.

147. It is clear that all parties have incurred substantial costs in relation to this claim and that it was an important case for all of them, but I agree with the claimants that the information provided by the defendants to date is far from adequate. It is for that reason that I have directed more limited interim payments.

148. The interim payments when made will themselves reduce the risks in relation to ongoing interest although the lower interim payments may have the consequence that the claimants will have a greater liability for interest at a later date. If the claimants considers that they are in difficulties in making a payment on account pitched at a level which enables the claimants to reduce their exposure to interest and/or to make offers to settle the costs and interest those are not arguments for delaying the date on which statutory interest starts to run but may give rise to different arguments as part of an assessment process itself.

149. However, it seems to me in this case the protections and tools available to the claimants in relation to costs are adequate to address their concerns about the lack of clarity which they say means they are unable to make an informed decision now.

150. I do not consider that in the exercise of my broad discretion there is any proper basis to adjust the position in relation to post judgment interest. Interest should run at 8% in the usual way from the date of the costs orders relating to the Remitted Costs, the Costs of the Remitted Costs and the proceedings (that is the orders made following the Judgment and this judgment) on the sums eventually found due to D6 and D7.

Pre-Judgment interest

151. D7 seeks interest on the pre-judgment incurred Remitted Costs at the rate of 2% over base rate from a date in 2017. The claimants accept the principle that interest should run from a date earlier than the judgment but say (i) it should be at a rate of 1% over base and (ii) it should only apply to costs actually paid by D7 not on those incurred but not yet paid.

152. D6 no longer pursues a claim for pre-judgment interest only interest at the statutory rate from the date of judgment.

153. D7 submits that an order that the claimants should pay interest from an earlier date should not be limited, as suggested by the claimants, to the date on which D7 actually paid his lawyers. They argue that the appropriate date should be the date on which the costs were incurred to take into account any indulgence of D7's lawyers.

154. Again there is a lack of clarity about what costs this applies to. In broad terms D7 wants interest from the date when any costs were incurred throughout the period up to the date of Morgan J's Costs Judgment in 2017 but suggests that for simplicity the date from which interest should accrue should be the date of that judgment.

155. D7 also submits that interest should not just run from the date on which the costs were paid but from when they were incurred even if they were relying on the indulgence of their lawyers. This raises a question about what was incurred or paid when.

156. It is accepted by the claimants that where D7 has actually paid his legal costs that they are liable to pay interest on those costs. D7 seeks to argue that because CPR 44.2(6)(g) is intended to reflect the indulgence extended to D7 by his lawyers that interest should run from when the costs were incurred. That of itself may raise questions about the nature of D7's retainer and the manner in which those lawyers may have extended that indulgence to him.

157. However, in this case there is an additional complication in that D7 appears to have a funding arrangement the details of which are not clear. In so far as D7 has not had to borrow money or been deprived of the use of his money the claimants should not have to pay interest on the earlier costs.

158. It seems to me therefore that the balance between D7 and the claimants is that the claimants are liable to pay interest on D7's costs from when the liability to pay the costs to his lawyers accrued or as proposed by D7 the date of Morgan J's Costs Judgment whichever is the later. That may be when an invoice was raised or paid, or it may be a

different date depending on the arrangement with D7's lawyers either by way of indulgence or funding arrangement.

159. The parties should seek to agree the position in due course but if they cannot then it appears to me that it will have to be resolved as part of the detailed assessment process when the costs judge will have visibility on the entirety of the costs, the funding arrangements and the bills raised if any. The costs judge will be in the best position to assess the date from which interest should run and on what costs in relation to pre-judgment costs in light of this decision should any doubts remain.

Pre-judgment interest rate

160. D7 rejects the claimants' proposed rate of 1% over base arguing that it would not be possible for an individual such as D7 to borrow money on an unsecured basis at 1% over base.

161. In terms of rate it appears to me that the rate of 1% over base for the period 2017 to date is too low and the claimants have provided no basis for suggesting that it was a rate at which D7 would have been able to borrow money had he needed to. D7 reminds me that the 2% he seeks was the same rate allowed by Leggatt LJ in *Involnert*.

162. The rate of interest is in the discretion of the court. It appears to me that 2% over base is a modest commercial rate and not inappropriate in these circumstances where interest rates generally had been at an historic low for the entire period in which the costs were incurred on any basis. In consider that 2% over base is the rate that should apply to D7's costs.

163. I invite the parties to prepare a final order to reflect this determination.