Neutral Citation Number: [2018] EWHC 2185 (Comm)

Case No: CL-2016-000727

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/08/2018

Before :

MR ANDREW HENSHAW QC
(sitting as a Judge of the High Court)

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Between :

(1) THE CULTURAL FOUNDATION (doing business as American School of Dubai) **(2) ABU DHABI NATIONAL EXHIBITIONS COMPANY (a Public Joint Stock Company incorporated under the laws of the Emirate of Abu Dhabi)**	**Claimants**
- and -	
(1) BEAZLEY FURLONGE LIMITED (as managing agent for Syndicate AFB 2623/623 at Lloyd's) **(3) GREAT LAKES INSURANCE S.E.** **(4) MSI CORPORATE CAPITAL LIMITED (Syndicate 3210)** **(5) ASPEN INSURANCE UK LIMITED** **(6) QBE INSURANCE (EUROPE) LIMITED**	**Defendants**

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James Brocklebank QC and Henry Moore (instructed by **Covington & Burling LLP**) for the **First Claimant**
Andrew Neish QC (instructed by **Allen & Overy LLP**) for the **Second Claimant**
Tom Weitzman QC and Richard Coplin (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First Defendant**
Peter MacDonald Eggers QC and Marcus Mander (instructed by **Clyde & Co LLP**) for the **Third to Sixth Defendants**

Hearing date: 12 July 2018
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Approved Judgment

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

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MR ANDREW HENSHAW QC

Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. This judgment deals with matters of costs arising from the judgment I handed down on 8 May 2018 following a trial of ten preliminary issues. The hearing of matters consequential upon that judgment took place on 12 July 2018, being the earliest date on which it was possible to convene a hearing that all four parties could attend. I dealt at that hearing with two applications for permission to appeal, and gave directions for the next stages of the action. The parties also made detailed submissions on the somewhat complex costs issues which arise, and this judgment deals with those issues.

2. The case concerns a dispute between insureds, primary and excess insurers concerning certain professional indemnity insurance policies providing cover to a now insolvent architects' firm known as Robert Matthew, Johnson-Marshall & Partners ("***RMJM***").

3. The main issue in the case is whether and to what extent certain claims against RMJM by the First and Second Claimants ("***ASD***" and "***ADNEC***" respectively) arise out of circumstances notified to primary insurance policies underwritten by the First Defendant ("***Beazley***") and excess of loss policies underwritten by the Third to Sixth Defendants ("***Excess Insurers***").

4. ASD and ADNEC seek an indemnity against Beazley under, respectively, the primary layer policy written by Beazley for the year 1 May 2009 to 30 April 2010 (***the "2009/2010 Policy"***) and the primary layer policy written by Beazley for the year 30 March 2008 to 30 April 2009 ("***the 2008/2009 Policy***" or "***the 2008/09 Primary Policy***"), each insuring up to a Limit of Indemnity of US$10 million (plus defence costs) with a self-insured excess of US$250,000 any one claim. ASD alternatively seeks indemnity under the 2008/09 Policy.

5. ASD and ADNEC pursued independent claims against RMJM in separate arbitrations, resulting in an award in favour of ASD dated 31 May 2016 in the sum of AED 31,561,423 (approx. US$8.6 million) plus post-award interest ("***the ASD Award"***), and an award in favour of ADNEC dated 27 July 2016 in the sum of AED 30 million (approx. US$8.15 million) plus post-award interest ("***the ADNEC Award***").

6. Thus ASD's and ADNEC's claims individually fall within the US$ 10 million primary policy limit but together exceed it.

7. RMJM became insolvent and its estates were sequestrated by decree of the Sherriff at Edinburgh on 24 September 2015. As the sums awarded to ASD and ADNEC were not paid, they claimed an indemnity from Beazley, alternatively from Excess Insurers, pursuant to section 1 of the Third Parties (Rights against Insurers) Act 1930 ("***the 1930 Act***").

8. The Excess Insurers are parties to a number of excess policies ("***the Excess Policies***") insuring limits in excess of US$10 million (plus defence costs) for the 2008/09 year, in layers which overall provide cover of US$35 million in excess of the primary policy limit.

9. The Claimants and the Excess Insurers contended that ASD's claims attach to the 2009/2010 Policy and ADNEC's claims attach to the 2008/2009 Policy. Accordingly, on their case, neither claim impacted on the layers insured by the Excess Insurers. Beazley contended that both ASD's claim and ADNEC's claim attach to the 2008/09 policy.

10. The issues concerning the policies to which the claims attach ("***the Policy Period Issues***") formed the subject of preliminary issues (1) to (4). These issues concerned whether ASD's claims against RMJM attach to the 2008/2009 Policy or the 2009/2010 Policy. That essentially turned on whether ASD's claims arose out of a "*Circumstance*" notified to the insurers by Notification 923 given on 31 March 2009 or Notification 953 given on 10 September 2009.

11. The second main set of issues (preliminary issues (5) to (7)) involved the question of whether, if ASD's claims attach to the 2008/2009 Policy, Beazley is entitled to set off against ADNEC's and/or ASD's claims a sum representing defence costs that Beazley allegedly overpaid to RMJM in respect of RMJM's defence of ADNEC's claim, and

    i) if so, whether ASD is entitled to claim an indemnity from Excess Insurers under the 1930 Act in respect of the set-off amount;

    ii) if not, whether Beazley is entitled to claim the overpaid defence costs from the Excess Insurers under the 1930 Act;

    (together, "***the ADNEC Defence Costs Issues***").

12. The third category of preliminary issue concerned the question of whether and on what basis ASD and ADNEC are entitled to recover post-award interest in relation to their respective awards ("***the Interest Issues***") and was the subject of preliminary issues (8)-(10).

13. The outcome of the Policy Period Issues would determine whether or not the Excess Insurers bear any liability for ASD's and ADNEC's claims. If the ASD claim attaches to the 2009/2010 Policy, the claims will not impact on the layers insured by the Excess Policies. The second group of issues would arise only if the ASD Claim (or a sufficiently substantial part of it) attaches to the 2008/2009 Primary Policy.

14. Although some of the later preliminary issues might not have arisen depending on the answers to earlier issues, the parties asked the court to determine all the issues in case there should be an appeal.

15. The answers which I gave to the preliminary issues were as follows.

16. Issue 1: To the extent that the ASD Claim arises out of RMJM's defective design of the Sector A columns (being, for identification, the matter which led to the stoppage of work in 2009 and subsequent remedial works to the Sector A columns), it does not arise out of circumstances notified during the 2008/2009 policy year or fall within the period of cover provided by the 2008/2009 Primary Policy.

17. To the extent (if at all) that the ASD Claim arises out of RMJM's breach of duty in relation to acoustic works and/or RMJM's lack of detail and cross-referencing in drawings/designs, referred to in §§ 14.15.2 and 14.15.3 respectively of the ASD arbitral tribunal's award, it arises out of circumstances notified during the 2008/2009 policy year and falls within the period of cover provided by the 2008/2009 Primary Policy.

18. Issue 2: To the extent that the ASD Claim arises out of RMJM's defective design of the Sector A columns (being, for identification, the matter which led to the stoppage of work in 2009 and subsequent remedial works to the Sector A columns), it arises out of circumstances notified during the 2009/2010 policy year and falls within the period of cover provided by the 2009/2010 Primary Policy.

19. Issue 3: If and to the extent that the ASD Claim (or any part of it) arises out of circumstances notified during the 2009/2010 policy year, RMJM did not prior to its sequestration agree with Beazley that the ASD Claim fell within the 2008/2009 Primary Policy; and RMJM was (and ASD is) not estopped by RMJM's conduct from denying the same.

20. Issue 4: If and to the extent that the ASD Claim falls within the 2009/2010 Primary Policy:

    i) RMJM did not breach Claims Condition 3.2 of that policy by failing to notify Beazley of relevant matters as soon as practicable.

    ii) Had I found such a breach to have occurred, I would have concluded that Beazley did not waive it and is not estopped from contending that there had been any such breach.

21. Issue 5: (a) Yes: Beazley is entitled to set-off a pro rata share of the costs incurred in defending the ADNEC Claim against its liability under the 2008/2009 Primary Policy to ADNEC in relation to its Claim and (insofar as the pro rata share exceeds the amount available to be set off against ADNEC's Claim) against its liability under the 2008/2009 Primary Policy to ASD in relation to its Claim. (b) No: Beazley is not estopped from contending that it is entitled to do so.

22. Issue 6: To the extent that the amount recoverable by ASD and/or ADNEC under the 2008/2009 Primary Policy falls to be reduced by reason of the matters addressed by Issue 5.a., and on the assumption that the Excess Insurers consented to the incurring of the ADNEC defence costs, any shortfall in ASD's and/or ADNEC's recovery under the 2008/2009 Primary Policy or any amount set off by Beazley cannot (based on the arguments before me, i.e.

excluding the possible future argument referred to in § 447 of the judgment dated 8 May 2018) be recovered by ASD and/or ADNEC under the Excess Policies. A claim by ASD and/or ADNEC under the Excess Policies in respect of any shortfall in recovery under the 2008/2009 Primary Policy would be a claim in respect of ADNEC defence costs, and such a claim does not pass to ASD or ADNEC under the 1930 Act.

23. Issue 7: To the extent that the answer to issue 5.a. is "No" and/or the answer to issue 5.b. is "Yes", Beazley is not entitled to recover a pro rata share of the ADNEC defence costs from the Excess Insurers under the 2008/2009 Excess Policies pursuant to the Third Parties (Rights Against Insurers) Act 1930 (it being assumed for this purpose that the Excess Insurers consented to the incurring of such defence costs in accordance with clause 4 of the WNM 1989 Professional Indemnity wording as incorporated into the 2008/2009 Excess Policies).

24. Issues 8 and 9: ASD and ADNEC are not entitled to recover an indemnity in respect of post-award interest under the Policies. Such interest is not compensation and/or damages within the Policies, and any liability which RMJM has for such interest is not an insured liability falling within the cover provided by clause 1.1 of the Primary Policies.

25. Issue 10: Save in respect of any sums due to ASD or ADNEC in respect of which (a) RMJM has not made payment, (b) post-award interest was not awarded by the arbitral tribunal, and (c) RMJM was/is not liable on any other basis for post-award interest, ASD and ADNEC are entitled to interest on sums found due to them pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period or periods as the Court may hereafter determine.

26. Taking a very broad view of success and failure on these issues, the position may be summarised as follows:

    i) The Policy Period Issues (Issues 1-4) were argued essentially as between ASD, supported by ADNEC and Excess Insurers, and Beazley. The former three parties were broadly successful and Beazley was broadly unsuccessful. However, there was a material facet of these issues on which ASD, ADNEC and Excess Insurers were not successful: I found in Beazley's favour on the question of whether the court was in a position to conclude simply that ASD's claim against RMJM as a whole fell within Notification 953 on the basis that the Sector A columns issue was the dominant cause of the delays to the project (see 8 May 2018 judgment §§ 205-221).

    ii) Issue 5 was argued primarily between ASD and ADNEC on the one hand and Beazley on the other hand. Excess Insurers supported ASD and ADNEC on one facet of Issue 5 (whether RMJM had any liability to Beazley for any 'overpaid' ADNEC defence costs), but supported Beazley on another facet (whether, if RMJM did have such a liability, it would entitle Beazley to a right of set-off). Beazley was successful on all aspects of Issue 5.

iii) Issue 6 arose between ASD and ADNEC on the one hand and Excess Insurers on the other. Excess Insurers were the successful party.

iv) Issue 7 arose between Beazley and Excess Insurers. Excess Insurers were the successful party.

v) Issues 8 and 9 arose between ASD (Issue 8) and ADNEC (Issue 9) on the one hand and (in theory) Beazley and Excess Insurers on the other hand, but Excess Insurers took the lead in arguing it. The insurer parties were successful.

vi) Issue 10 arose, at least as originally formulated, between ASD and ADNEC on the one hand and (in theory) Beazley and Excess Insurers on the other hand, but Excess Insurers took the lead in arguing it. The insurer parties were successful on the one aspect of this issue that remained live by the time of the hearing.

(B) ASD/ADNEC AND BEAZLEY: GENERAL APPROACH

27. ASD and ADNEC argue that they were in substance the successful parties, and costs should follow the event, because:

i) they succeeded on the Policy Period Issues, which were the core issues in commercial terms and accounted for the majority of the costs of the preliminary issues: they were, in particular, the issues to which almost all the disclosure and witness evidence related; and

ii) the outcome on the Policy Period Issues meant that the ADNEC Defence Costs Issues would no longer arise in relation to ASD. In any event, Beazley's position on the Policy Period Issues was the reason why ASD and (arguably) ADNEC had felt it necessary to contest the ADNEC Defence Costs Issues, so they were in effect addressing them 'under protest'. The point was also made (arguably relevant in this context) that even without ASD's claim the Excess Insurers would still have run, and still do run, the ADNEC Defence Costs issues as part of their defence of the ADNEC claim.

28. ASD and ADNEC thus contend that they are entitled to their costs. They rely on the following principles established by the CPR and case law:

i) As enshrined in CPR 44.2(2)(a), the starting point in considering orders for costs is to identify the successful party. In principle, the successful party should be awarded its costs.

ii) The issue of success is considered as a matter of "*substance and reality*" (*Roache v News Group Newspapers Limited* [1998] EMLR 161, 168, *per* Sir Thomas Bingham MR), and in terms of "*a result in real life*" (*BCCI v Ali (No. 4)* (1999) WL 1953270; (1999) 149 NLJ 1734 at [7], *per* Lightman J). Success is looked at in a "*commercially sensible way*" (*Fulham Leisure Holdings v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch) at [3], *per* Mann J): "*the question as to who*

succeeded is a matter for the exercise of common sense" (*BCCI v Ali (No. 4)* at [7], *per* Lightman J). The Court looks to see whether a party has gained something "*of value which [that party] could not have won without fighting the action through to a finish*" (*Roache v Newsgroup Newspapers Limited* at 168, *per* Sir Thomas Bingham MR).

iii) The "*most important thing*" in commercial litigation is money. The present dispute is "*ultimately about money*" (*AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402 at [28], *per* Longmore LJ) rather than points of law. A helpful test can be to ask which party writes the cheque "*at the end of the day*" (*Day v Day* [2006] EWCA Civ 415 at [17], *per* Ward LJ).

iv) Defeat on certain issues does not detract from overall success: "*In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case*" (*HLB Kidsons (a Firm) v Lloyds Underwriters* [2007] EWHC 2699 (Comm) at [11], *per* Gloster J), for "*It is a fortunate litigant who wins on every point*" (*Travellers' Casualty v Sun Life* [2006] EWHC 2885 (Comm) at [11], per Clarke J). A successful party should ordinarily recover its costs even of issues on which it did not succeed "*unless the points were unreasonably taken*" (ibid.).

29. Beazley, by contrast, invites the court to adopt an issue-based approach and to make a proportion-based costs order pursuant to CPR 44.2(6)(a). It says that is implicit in the parties having agreed, and the court having ordered, the trial of preliminary issues (since such issues cannot by their nature determine who is the overall winner or loser). It is also consistent with the parties' agreement in correspondence that each should prepare issue-based schedules of their costs. Beazley says it was the overall loser in relation to the Policy Period Issues but the overall winner in relation to the ADNEC Defence Costs Issues and the Interest Issues.

30. Beazley draws attention in particular to the approach of Christopher Clarke J in *Travellers' Casualty and Surety Company of Canada v Sun Life Assurance Company of Canada (UK) Ltd* [2006] EWHC 2885 (Comm):

> "9 The willingness of the Court to order a party, even a successful party, to be deprived of his costs of a particular issue on which he has lost, and to pay those of his opponent, is not, however, dependent on establishing that that party has acted improperly or unreasonably: *Summit Property Ltd v Pitmans [2001] EWCA Civ 2020*. If a party has acted improperly or unreasonably the Court will more readily make such an order. But, even if he has not, the Courts are now much more ready to make separate orders reflecting success on different issues than once they were: see Lord Woolf in *AEI Rediffusion Music Ltd v PPL [1999] 1 WLR 1507*.

> 10 In *Fleming v The Chief Constable of the Sussex Police Force [2004] EWCA Civ 643* Potter, LJ, as he then was, described the rationale of the "issues" approach as being the necessity to "discourage *litigation in respect of inessential issues, which are either bound to fail, or are irrelevant to the central and essential issues necessary to be decided between the parties in the resolution of the dispute"*. I do not, however, regard Potter, LJ, as having intended to state that it is only in respect of issues of that description that such an approach can be taken; particularly since, in the immediately succeeding paragraph, he referred to the *AEI Rediffusion* case as an exposition of principles too well known to require to be set out in detail.
>
> 11 The Court is thus given a wide discretion and enjoined to take into account a number of factors including those specified in CPR 44.3(4). The aim must always be to make an order that reflects the overall justice of the case.
>
> 12 The cases illustrate how this may work out in practice. If the successful claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point.
>
> 13 On the other hand, if a party raises a discrete issue which involves very substantial costs, and upon which he fails, justice may require that he should bear his costs and pay those of his opponent on the issue. CPR 44.3 (4) specifically provides that:
>
> > (4) In deciding what order (if any) to make about costs the court must have regard to all the circumstances, including:
> >
> > (a) the conduct of the parties;
> >
> > (b) whether a party has been successful on part of his case, even if he has not been wholly successful."

31. In *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC); 122 Con. L.R. 88, Jackson J, after reviewing the authorities on r.44.2 generally as they then stood, extracted from them eight "*principles*" (para.72(i) to (viii)), including the following:

> "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment

> should generally be characterised as the overall winner of the entire action.
>
> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
>
> (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
>
> (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7).
>
> (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
>
> …
>
> (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

32. Notes 44.2.8 and 44.2.10 to the White Book include the following further points relating to issue-based costs orders:

    i) In two Court of Appeal judgments, given shortly after the CPR came into effect, *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] EWCA Civ 535, 11 April 2001, unrep., CA, and *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020; [2002] C.P.L.R. 97, CA, the Court of Appeal stated that:

        a) a judge (a) may make different orders for costs "*in relation to discrete issues"*, and (b) should consider doing so where a party has been successful on one issue but unsuccessful on another issue;

        b) in that event, a judge may make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue;

        c) it is no longer necessary for a party to have acted unreasonably or improperly before he can be required to pay the costs of the

other party of a particular issue on which he (the first party) has failed: a point which has been reiterated in several later cases.

ii) Where a party has been successful overall, but has not been wholly successful (having succeeded on "*part of its case*" only), and the court decides that an issue-based approach is appropriate, one of the options for the court to consider is that of making a "*different*" order in the form of an order requiring the unsuccessful party to pay costs relating "*only to a distinct part of the proceedings*" (r.44.2(6)(f)).

iii) Rule 44.2(7) states that, before considering making a "*different*" order in the form of an order requiring the unsuccessful party to pay costs relating "*only to a distinct part of the proceedings*" (r.44.2(6)(f)), the court will consider whether it is practicable instead to make an order requiring the unsuccessful party to pay a proportion of the successful party's costs (r.44.2(6)(a)), or those costs from or until a certain date only (r.44.2(6)(c)). Issues, though distinguishable, may nevertheless overlap, for example, where the same contested point of law or question of fact is relevant to two issues (and possibly is not determinative of either). It may be the position that much of the evidence, oral and documentary, could properly be said to be relevant both to issues on which the party successful overall had lost, as well as to issues on which that party had won. Further, whether there is overlap or not, it may not be possible (or at least be an extremely difficult and expensive exercise) to apportion to the several issues the discrete costs actually incurred by the parties in relation to each.

iv) Routinely, judges approach the matter by asking themselves three questions: first, who has won?; secondly, has the winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of that issue?; and thirdly, is it appropriate in all the circumstances of the individual case not merely to deprive the winning party of its costs on an issue in relation to which it has lost, but also to require it to pay the other side's costs? (*Hospira UK Ltd v Novartis AG* [2013] EWHC 886 (Pat), 12 April 2013, unrep. (Arnold J)).

v) The rules themselves impose no requirement to the effect that an issue-based costs order should be made only "*in a suitably exceptional case*", and none is to be implied, although "*there needs to be a reason based on justice*" for departing from the general rule, and that the question of the extent to which costs of a particular issue are to be disallowed should be left to the evaluation and discretion of the judge, "*by reference to the justice and circumstances of the particular case*" (*F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.3)* [2012] EWCA Civ 843; [2013] 1 W.L.R. 548, CA, at paras 47 and 49 per Davis LJ (a case where a proportionate costs order, made in relation to two issues on which the parties who had succeeded overall had not succeeded, was upheld)).

vi) The reasonableness of taking failed points can be taken into account, and the extra costs associated with them should be considered.

vii) The mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order. The courts recognise that in any litigation, especially complex commercial litigation, any winning party is likely to fail on one or more issues in the case.

33. A number of these principles were also restated and applied by Mann J in *Sycamore Bidco v Breslin and Dawson* [2013] EWHC 583 (Ch), [2013] 4 Costs LO 572, to which counsel for ADNEC took me.

34. In the present case, I consider that the costs orders made ought to take account of the fact that the Claimants (supported by Excess Insurers) have been broadly successful, and the related points they make referred to in § 27 above, but should also reflect the fact that they have been unsuccessful on certain issues and sub-issues.

35. This was a trial of preliminary issues, which all of the parties invited the court to determine, and all of which (especially Issues 1-7, on which most time and cost will have been spent) were closely contested. I agree with Beazley that an issue-based approach – by which I include the making of proportion-based costs orders – may be particularly appropriate where the parties have agreed and/or the court has ordered that certain preliminary issues be tried in an attempt to narrow the overall issues, and where it is not at present possible to be sure who will be the overall winner or loser save in the sense that (as Beazley has always accepted) it will be a paying party. For the same reason, it seems to me appropriate for common/'housekeeping' costs in relation to the preliminary issues to be treated as being pro-rated across issues rather than necessarily being awarded in full to 'the' successful party.

36. Such an approach remains appropriate in my judgment notwithstanding ASD's point that it felt it necessary to contest Issues 5 and 6 (in particular) by reason of Beazley's position on Issues 1-4. The fact remains that ASD did choose to contest those issues, including each of the sub-issues of Issue 5 (which involved considerable legal argument), and was unsuccessful.

37. There appears also be some force in Beazley's further point that – ironic as it may seem – the fact that ASD no longer needs to claim against Excess Insurers results from the combination of ASD's success on Issues 1-4 and its loss on Issues 8 and 10 (which result in Beazley being liable for interest on top of rather than within the limit of indemnity). In any event, even if the outcome on Issues 1-4 alone had made Issue 5 academic from ASD's point of view, it would not follow that ASD should necessarily be relieved of liability for the consequences of having fought and lost that issue.

38. Moreover, from ADNEC's point of view the outcome on Issue 5 remains potentially relevant (as demonstrated by its application for permission to appeal in relation to one of the facets of Issue 5).

39. In all the circumstances, the fair approach in my judgment is to make costs orders in favour of Beazley on the issues/sub-issues where it succeeded against the Claimants/Excess Insurers, but on a somewhat discounted basis in

order to reflect the Claimants/Excess Insurers' success on the core issues (Issues 1-4) and the interrelation between those issues and the ADNEC Defence Costs Issues.

40. In addition, although ASD and ADNEC were broadly successful on Issues 1-4, ASD (supported by ADNEC) did not succeed in its primary case on causation, namely that the whole of the ASD claim was attributable to Notification 953 because the Sector A columns problem was the dominant cause of the delay in the project. The judgment upheld ASD's secondary case in so far as it alleged in the alternative that the Sector B acoustic problem fell within Notification 923. However, the judgment left open as unproven at this stage the question of whether that meant that the whole delay could be attributable to events falling within either Notification 953 or Notification 923.

41. In all the circumstances, I consider that the justice of the case is best served by awarding the costs of Issues 1-4 in favour of ASD and ADNEC, less a relatively small deduction to reflect the facets of those issues referred to above on which they were not successful; and by awarding Beazley its costs of Issue 5 against ASD and ADNEC, less a discount to reflect the Claimants' overall degree of success and the related points referred to in § 27 above.

42. I have considered ADNEC's warning against double counting, and its submission that in assessing costs I should start at 100% in relation to each issue. However, I do not consider that the approach outlined above involves double counting. Instead, it involves first assessing what proportion of ASD/ADNEC's costs should be awarded against Beazley on the basis that they arose from Issues 1-4 on which ASD/ADNEC succeeded; secondly, making a modest discount to that proportion in order to reflect facets of those issues on which they did not succeed; and thirdly, making a further reduction in order notionally to award in Beazley's favour most of the costs of Issue 5 on which Beazley was successful as against ASD and ADNEC (cf the deduction applied at § 7 in *Novartis v Focus Pharmaceuticals* [2015] 4 Costs LR 767 in order notionally to award certain costs in favour of the overall losing party, Novartis, against the successful defendants).

43. Clearly Beazley should recover costs in respect of Issue 5 only once, and by the end of the hearing it was more or less common ground that the fairest approach in this event would be for ASD and ADNEC each to bear half of any such costs ordered rather than, for example, bearing the costs in proportion to the size of their respective claims.

44. I do not consider it appropriate to reduce ASD's or ADNEC's costs as against Beazley by reference to Issues 8-10. Those issues were in practice contested by Excess Insurers with Beazley playing no active part.

(C) ASD/ADNEC AND BEAZLEY: METHODOLOGY

45. As between the Claimants and Beazley, it is common ground that if I am minded not to award the Claimants all of their costs, then I should make some form of proportionate order under CPR 44.2(6)(a) rather than a pure issue-based order under CPR 44.2(6)(f).

(D) ASD AND BEAZLEY: RELATIVE PROPORTIONS OF COSTS

46. Turning to the relative proportions of costs incurred on different groups of issues, there were not surprisingly competing submissions.

47. ASD has calculated that 82% of its costs were incurred on the Policy Period Issues. That figure reflects not only time taken at the hearing, but also heavy disclosure (2915 pages by ASD and hundreds of pages by the insurers) and documentary and witness evidence which went primarily to those issues. ASD says it spent 17% of its costs on the ADNEC Defence Costs Issues (including 15% on Issue 5) and 1% on the Interest Issues. These latter groups of issues turned principally on points of law with, ASD says, no material evidence going to them. ASD's calculation is supported by a witness statement from a solicitor in the firm representing ASD, and is said to be based on analysis of the firm's billing narratives.

48. Beazley's costs draftsman, who has also provided a witness statement, has taken a different approach, allocating the costs between issues based on the relative proportions taken up by the issues in the parties' skeleton arguments, the transcript of the preliminary issues trial, and the preliminary issues judgment handed down on 8 May 2018. On this basis he allocates 60% to the Policy Period Issues, 30% to Issues 5-10, and 10% to common costs ("*Housekeeping and Background*").

49. As a comparator, Excess Insurers have prepared an allocation based on a paragraph count of the skeleton arguments, judgment, witness statements and orders. This results in an allocation of approximately 28% to generic costs, 35% to Policy Period Issues, 10% to ADNEC Defence Costs Issues, 4% to Interest Issues and 23% to the issue about Excess Insurers consent to defence costs which I consider in §§ 80 ff below.

50. Beazley makes the point that ASD's approach, based on privileged billing narratives, is unverifiable; and that some of ASD's disclosure and witness evidence (specifically parts of Mr Cave's and Mr Jones's evidence) was required in any event for the underlying issues in the case as distinct from the preliminary issues. This is not accepted by ASD, save that it appeared willing to accept that some of the disclosure had relevance beyond the preliminary issues.

51. In principle I prefer ASD's approach to that of Beazley and Excess Insurers, because I do not consider that the latter parties' approaches properly reflect the preparation time, including disclosure and witness evidence, likely to have been incurred in relation to Issues 1-4. Those were by far the most fact-intensive issues, whereas Issues 5-10 largely concerned arguments of law. Taking account of the fact that some part of the disclosure and evidence is likely to have had relevance over and above the preliminary issues, I consider it just to start from the premise that 75% of ASD's costs related to Issues 1-4, and to discount that to 70% to reflect the facets of those issues on which ASD was not successful. (Costs incurred in relation to disclosure and evidence other than in relation to the preliminary issues will remain part of the costs of

the action as a whole, and may be recoverable depending on the ultimate overall disposition of costs.)

52. Beazley did not file figures for its own actual costs in relation to any of the preliminary issues. However, it is common ground that if and in so far as I make any order in Beazley's favour against ASD, I should do so by making a proportionate adjustment to the costs awarded in favour of ASD, thus in effect using ASD's costs as a proxy for Beazley's costs of the relevant issue(s). The question is what that proportion should be.

53. ASD says its own costs of Issue 5 were 15% of its costs of the preliminary issues, whereas Beazley's calculation method has led it to the figure of 30% for Issues 5-10 as a whole. My general preference is for ASD's approach for the reasons given above. Beazley too served significant evidence on Issues 1-4, which will have resulted in preparatory costs not necessarily reflected in its costs draftsman's approach indicated above. In all the circumstances, it is just in my view to treat 15% of ASD's costs as a fair reflection of Beazley's total costs of Issue 5. However, I consider that that figure should be discounted to 10% before offsetting it against ASD's claim against Beazley, in order to reflect the Claimants' overall degree of success and the related points referred to in § 27 above.

54. Only half of that 10% discount, i.e. 5%, should be applied against ASD to avoid double recovery by Beazley in respect of Issue 5. As a result, ASD should recover from Beazley 70% less 5% = 65% of its costs of the preliminary issues.

(E) ADNEC AND BEAZLEY: RELATIVE PROPORTIONS OF COSTS

55. I consider that the same approach in principle should be adopted in relation to ADNEC.

56. I was at one point concerned that ADNEC had incurred substantial fees on Issues 1-4 despite taking a 'watching brief' approach to those issues. However, as counsel for ADNEC pointed out, it was still necessary for ADNEC to review and consider the evidence and the law; moreover, the fact that ADNEC did not argue Issues 1-4 at the hearing should already be reflected in the level of costs it incurred, and if not then that would fall to be addressed on detailed assessment.

57. ADNEC's summary of costs in section 2 part C has allocated its preliminary issue costs as to 45% to Issues 1-4, 20% to Issues 5-7 and 7% to Issues 8-10, making a total of 72%. In sections D to F ADNEC has allocated a further 10% to common preliminary issue costs, 13% to post-judgment costs and 5% to estimated costs of the consequentials hearing itself, those figures totalling 28%. Subject to detailed assessment, some of these latter costs may well also be recoverable as part of ADNEC's costs of the preliminary issues, although that will not include such of the post-judgment costs and consequentials hearing costs as related to ADNEC's application for permission to appeal.

58. Taking a broad view it seems to me reasonable, for the purposes of assessing relative proportions of costs spent on different issues, to assume that such costs from ADNEC's sections D to F as may be recoverable are attributable to the various preliminary issues in the same proportions as the costs referred to in section C. On that basis the costs attributable to Issues 1-4 are 45%/72% = 62.5% of ADNEC's recoverable costs. In relation to ASD I have discounted its corresponding figure of 75% to 70% in order to reflect the facets of Issues 1-4 on which it did not succeed. Discounting ADNEC's 62.5% in the same proportion reduces it by 4% to 58.5%.

59. ADNEC's summary section C allocates 20%/72% = approximately 28% of its preliminary issue costs to Issues 5-7. Viewing the matter broadly, it seems fair to regard 15% of its costs as having related to Issue 5 (i.e. the same percentage as for ASD), then to discount that figure to 10% (in order to reflect the Claimants' overall degree of success and the related points referred to in § 27 above), and then to offset half (5%) of that against ADNEC's claim against Beazley as I have done with ASD.

60. Deducting that 5% in respect of Issue 5 from the 58.5% referred to in § 58 above results in an award against Beazley of 53.5% of ADNEC's costs of the preliminary issues.

(F) EXCESS INSURERS

61. As between Excess Insurers and the other parties, it is proposed that any costs payable to Excess Insurers should be on an issue by issue basis. The parties consider this to be a fairer, and sufficiently practical, approach for this one set of costs.

62. I am content to follow the parties' suggested approach in this respect. I agree that it is logical in circumstances where it cannot readily be identified that Excess Insurers were the successful or unsuccessful party overall, though they did succeed against different parties on different issues, and so it is not practicable for the court simply to make a proportion-based order.

63. As regards Issues 1 and 2, Beazley contends that Excess Insurers ought to have taken a 'watching brief' approach in the way ADNEC did, and to the extent Excess Insurers took an active approach they were either duplicative of ASD's submissions or were unsuccessful. In particular, Excess Insurers made detailed submissions in support of the proposition that the whole of the ASD Claim was attributable to matters falling within Notification 953, and in any event that none of the claim was attributable to matters falling within Notification 923 (*inter alia* because any delay caused by the Sector B acoustic or steel problems or by lack of detail in drawings did not fall within either notification).

64. Excess Insurers make the point that although ASD took the lead in arguing Issues 1 and 2, it was Excess Insurers who had first raised the point that the 2009/2010 rather than the 2008/2009 policy was engaged, and it was an issue which very much concerned them: complete success would have meant that no liability could fall on Excess Insurers. Beazley had brought Excess Insurers

into the proceedings by issuing stakeholder proceedings. Further, the outcome on these issues meant that ASD no longer pursued a claim against Excess Insurers and ADNEC's claim was very much reduced.

65. The starting point in my judgment is that Excess Insurers should recover most of their costs of Issues 1 and 2 from Beazley, mainly because they were issues of direct concern to and originally raised by Excess Insurers, and on which they broadly succeeded. On the other hand, Excess Insurers argued in some detail and unsuccessfully on the aspects of Issues 1 and 2 referred to in the second sentence of § 63 above, and a slightly larger discount is appropriate than I have applied to ASD and ADNEC. Viewing the matter in the round, I consider that Excess Insurers should recover 85% of their costs of Issues 1 and 2 from Beazley.

66. Excess Insurers do not seek costs in relation to Issues 3 and 4, in which they did not take an active part.

67. On Issue 5, Excess Insurers argued against Beazley that it had/would have had no claim against RMJM for repayment of ADNEC defence costs. They argued in favour of Beazley that if Beazley did have any such claim, it would be entitled to set it off against ASD's and ADNEC's claims. Overall I do not consider that any costs award is appropriate on Issue 5 as between Excess Insurers and any other party.

68. Issue 6 was essentially an issue between ASD/ADNEC and Excess Insurers, on which Excess Insurers succeeded. ASD argues, however, that Beazley should pay the costs because Issue 6 arose only because of Beazley's erroneous case on policy period i.e. Issues 1-4. The principles as to *Bullock* and *Sanderson* orders are set out in *Moon v Garrett* [2006] EWCA Civ 1121 §§ 38-39. The court has a broad discretion, but ASD says it is relevant that it was reasonable for it to sue Excess Insurers alongside Beazley and, specifically, that Beazley positively pleaded that ASD had a claim against Excess Insurers in this respect.

69. Beazley, by contrast, seeks a *Bullock* type order from ASD/ADNEC on Issue 7 (as to which see further below), on the basis that Issue 7 was Beazley's fallback position in case it lost on Issue 5, whereas in fact it succeeded against ASD and ADNEC on Issue 5.

70. Whilst both these sets of submissions have some cogency, in all the circumstances, including those referred to in §§ 35-36 above I have come to the conclusion that *Bullock* or *Sanderson* type orders are not appropriate here. I consider that ASD and ADNEC should pay, in equal shares, Excess Insurers' costs of Issue 6.

71. Issue 7 was essentially an issue between Beazley and Excess Insurers, on which Excess Insurers succeeded. Beazley contends that Issue 7 arose only if Beazley lost on Issue 5, and more generally that Issues 5-7 (the ADNEC Defence Costs issues) should be viewed as a composite group of issues on which Beazley succeeded, and/or that a *Bullock* type order should be made against ASD/ADNEC. I consider that the issues should be viewed separately

for essentially the same reasons as those for my finding in Beazley's favour as to the overall approach: see §§ 35-36 above. Excess Insurers should recover their costs of Issue 7 from Beazley.

72. On Issue 8, Excess Insurers succeeded against ASD and should recover their costs of that issue from ASD.

73. On Issue 9, Excess Insurers succeeded against ADNEC. ADNEC accepts in principle that Excess Insurers could recover their costs, but it submits that it should be entitled to offset its costs of Issue 10. It estimates that about 10% of its costs of the Interest Issues related to Issue 10.

74. Issue 10, as formulated, was:

> "Whether, in respect of any sums due to ASD in respect of which post-award interest was not awarded by the arbitral tribunal and/or if the answer to issues 8 and/or 9 is that ASD and/or ADNEC is not entitled to recover an indemnity in respect of post-award interest under the Policies, ASD and/or ADNEC is entitled to interest on sums found due pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period or periods as the Court may hereafter determine".

75. Thus as between ADNEC and Excess Insurers, the issue was whether, if the answer to Issue 9 is that ADNEC is not entitled to recover an indemnity in respect of post-award interest under the Policies, ADNEC is entitled to interest on sums found due pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period or periods as the Court may hereafter determine.

76. By the time of the hearing, however, the only point of contention was whether ASD could claim statutory interest on sums, namely costs, awarded by the arbitrators in respect of which the tribunal did not award post-award interest and which RMJM had not paid. ADNEC submitted that Excess Insurers did not confirm until service of its skeleton argument for the preliminary issues hearing that there was no issue in relation to ADNEC's entitlement to statutory interest; and Excess Insurers did not contradict this.

77. In these circumstances, I agree with ADNEC that it should be entitled to recover its costs of Issue 10 by way of offset against Excess Insurers' costs of Issue 9. Given the small sums involved, I am inclined to take a very rough and ready approach. Based on ADNEC's costs summary, 10% of its Interest Issue costs (including a share of common preliminary costs etc as per § 58 above) appears to be of the order of £3,000 (10% x 7%/72% x £322,666), so it is fair to allow an offset in that sum.

78. As between ASD and Excess Insurers, there is no clear basis on which to assume that Excess Insurers' costs of Issue 10 were significantly greater than half of their overall costs of that issue, but they are likely to have been slightly greater as by the time of the hearing no issue remained as against ADNEC.

79. As a result, I consider the appropriate order on Issues 9 and 10 to be that:

    i) Excess Insurers should recover their costs of Issue 9 from ADNEC, minus £3,000; and

    ii) Excess Insurers should recover 60% of their costs of Issue 10 from ASD.

80. Excess Insurers also seek their costs of preparing and serving factual witness evidence establishing that the Excess Insurers had not consented to the ADNEC defence costs being incurred by RMJM, contrary to ASD's and ADNEC's case against them to the contrary. This was, they say, relevant to Issues 6 and 7, on which Excess Insurers ultimately prevailed. In the event, as a result of additional issues sought to be introduced by Beazley, the parties agreed shortly before the hearing that it should be assumed that the Excess Insurers provided such consent for the purposes of the Preliminary Issues trial; accordingly, this evidence was not adduced before the court.

81. The list of preliminary issues to be tried as ordered by Blair J did not include what later became Issues 6 and 7. Their origin was said to be a letter sent by ASD's solicitors on 7 December 2017 seeking the introduction of new issues in light of recent amendments to the parties' statements of case, including what later became Issue 6. The proposed issue included the factual question of whether the Excess Insurers consented or would have consented to the ADNEC defence costs being incurred. That issue arose from the denial in Excess Insurers' Amended Defence § 61.2 taken with § 34(2) of ASD's Amended Reply.

82. On 14 December 2017, the Excess Insurers wrote consenting to that proposal, subject to the right to serve evidence addressing the factual issue. They say no other party demurred at that stage.

83. On 21 December 2017, Beazley then wrote to the other parties seeking to amend its statements of case to advance a new claim against the Excess Insurers by a Part 20 Claim and proposed the introduction of a new preliminary issue, which was what later became Issue 7. That issue again included the question whether the Excess Insurers consented to the ADNEC defence costs being incurred. The Excess Insurers therefore sought clarification of Beazley's allegation, and on 16 January 2018 Beazley provided further information indicating that it was advancing a positive case that the Excess Insurers consented to the ADNEC defence costs being incurred, in reliance on new alleged facts arising out of what the Excess Insurers considered to be privileged correspondence passing between Excess Insurers and Beazley.

84. As at mid-January 2018, there was insufficient time to resolve the question of privilege, exchange pleadings in relation to the Part 20 claim, and prepare further factual evidence to meet Beazley's new case on consent. It was therefore agreed that the only workable way forward was that the court should assume the Excess Insurers' consent for the purposes of Issues 6 and 7.

85. The Issues were reformulated accordingly, and the Excess Insurers' factual evidence was thus never put before the Court nor their witnesses called at trial. It would still have been required in due course in the event that the Excess Insurers had not prevailed on the points of principle comprising the reformulated Issues 6 and 7.

86. Excess Insurers say the result of the court's conclusions on Issues 6 and 7 is that the question of consent no longer arises, because the Issues in question were determined against ASD, ADNEC and Beazley even on the assumption that the relevant consent was provided. The Excess Insurers seek recovery of those costs as wasted costs forming part of their costs incurred in preparing for the trial of Preliminary Issues 6 and 7. They say they needed to prepare the statements at the time they did because the deadline for serving witness statements on the preliminary issues was 12 January 2018. They add that those costs would have been recoverable even if the issue of consent had been tried and determined against the Excess Insurers, because they were the successful party overall on the issues in question. Since consent was relevant to both Issues 6 and 7, Excess Insurers propose that an appropriate apportionment of those costs is 50% to Beazley and 25% to each of ASD and ADNEC.

87. ASD and ADNEC argue that the witness statements were incurred as a result of issues between Beazley and Excess Insurers in circumstances to which ASD and ADNEC were not privy, and were then not deployed by reason of a disagreement between Beazley and Excess Insurers. Counsel for ASD indicated that the privilege issue which emerged as between Beazley and Excess Insurers, of which ASD and ADNEC had very limited knowledge, put a whole new complexion on the issue of consent. ASD legitimately advanced a case on consent based on what turned out to be partial information, but the privilege issue then very soon intervened. They also point out that the witness statements were not, in the event, relevant to any of the preliminary issues that were actually ordered or, ultimately, agreed or tried.

88. Beazley says it too prepared witness statements in relation to the question of whether Excess Insurers had consented to the ADNEC defence costs, though its statements were not served. However, it was never finally agreed that the issue of consent would be the subject of a preliminary issue: thus Excess Insurers' statements were prepared in advance of any agreement being reached as to what (if any) issues should be added to those Blair J had ordered. Moreover, so far as Beazley is concerned, the question of consent was relevant only if Beazley lost on Issue 5. In any event, the court is not in a position to assess, without considering both sets of witness statements, who was right on the issue of consent.

89. Given that Excess Insurers claimed costs in relation to their witness statements are substantial, apparently comprising some 23% of their overall costs (plus a potential share of generic costs), I am reluctant to make a specific order in relation to them based simply on the proposition that Excess Insurers, as the successful party on Issues 6 and 7, would be entitled to recover them anyway. The general approach I have taken in this judgment, for the reasons explained earlier, has been to consider issues and, to a degree, sub-issues separately to a

certain extent when considering questions of costs. I would not consider it appropriate to allocate costs on the consent issue without any regard to the question (which I cannot resolve on the material before me) of who had the better of the argument or whether the position parties adopted on it was reasonable. In addition, the consent issue was strictly speaking not one of the preliminary issues that I was asked to determine: on the contrary, it was expressly carved out from those issues.

90. Excess Insurers' fallback position was that these costs should be costs in the case, whereas the Claimants and Beazley suggested that there should be no order in respect of them. I am not inclined to take the latter course – Excess Insurers may well have acted reasonably in preparing the statements, and may well be entitled to recover them as part of their overall costs of the action in the event that they are successful. I have therefore come to conclusion that the appropriate order is that they be costs in the case.

91. For completeness, I note that there appears to be a slight possibility of the consent issue having to be resolved eventually, in the event that (a) the ADNEC defence costs issues remain relevant in the light of the conclusions reached at trial (at least as between ADNEC and Beazley) and (b) ADNEC were to seek and be permitted to advance an argument against Excess Insurers of the kind mentioned by ASD referred to in § 447 of my judgment of 8 May 2018. That is a speculative possibility, but it raises the question of whether rather than making a costs in the case order I should reserve these costs to the trial judge. I am not inclined to take that course, because unless circumstances change there is no reason to expect the consent issue to arise again, so it would be wrong to burden the trial judge with that historic issue. I therefore simply note that if by the time of the trial circumstances were to change, in particular by the consent issue becoming live again, then it may be appropriate to revisit the costs position on that issue.

92. Finally, Beazley accepts that it should in the usual way pay the costs of and caused by the amendments to its Defence for which I gave permission as part of my judgment of 8 May 2018.

(G) PAYMENTS ON ACCOUNT

93. It was common ground that:

i) the successful parties' costs should be the subject of detailed assessment;

ii) there should be payments on account;

iii) for the purpose (only) of those payments the court should have regard only to costs incurred in the period from the date when the preliminary issues were ordered up to my judgment of 8 May 2018, and should ignore costs incurred on other matters such as mediation; and

iv) payments on account should, in the usual way, be discounted to reflect the potential disallowance of costs on detailed assessment.

94. All costs should be assessed on the standard basis.

95. Counsel for ASD informed me that ASD's claimed costs relate only to the period identified in (iii) above, and exclude mediation and other costs not referable to the preliminary issues.

96. ASD's total claimed costs according to its schedule were £649,325. 65% of that figure (see § 54 above) is £422,061. I consider the appropriate figure for an interim payment by Beazley to ASD to be £260,000.

97. ADNEC's total claimed costs of the preliminary issues, including common/housekeeping costs but excluding costs incurred before 14 July 2017 or after judgment, were £263,588. 53.5% of that figure (see § 60 above) is £141,019. I consider the appropriate figure for a payment on account by Beazley to ADNEC to be £90,000.

98. Excess Insurers' total claimed costs in relation to the period from 21 July 2017 to 7 May 2018 are £524,059, though those costs appear to include some mediation costs. Excess Insurers have provided a spreadsheet allocating their costs, on a percentage basis, between the preliminary issue, those percentages totalling 49.23%. In addition, 27.8% is allocated to generic costs and 22.97% to the costs relating to the issue of whether Excess Insurers consented to the ADNEC defence costs.

99. I indicated earlier my reservations about the allocation of costs based on a paragraph count that may not take proper account of matters such as disclosure and evidence, though in the context of Excess Insurers' own costs their analysis has the benefit of splitting out as a separate item the costs of preparing witness statements on the consent issue (which I have decided should be dealt with separately). I am content to adopt Excess Insurers' breakdown for the purpose of determining a payment on account, though I shall bear in mind in applying the usual discount the need to avoid inadvertently including costs in relation to mediation or other non preliminary issue work.

100. It seems to me reasonable, for the purposes of working out payments on account, to assume that such of the 27.8% generic costs as may be recoverable are attributable to the various preliminary issues and the defence costs issue in the same proportions as the percentages allocated by Excess Insurers on an issue by issue basis (which percentages total 49.23% + 22.97% = 72.2%). This can be done by expressing each of the specific percentages as a percentage of 72.2%. I do this in the list of percentages below, rounding each figure to the nearest half a percent.

101. On that basis, the relevant percentages in relation to those issues on which it is appropriate to order a payment on account are:

    i) 30.86 % to Issues 1 and 2 (taken from Excess Insurers' spreadsheet), which as a percentage of 72.2% = 43%

    ii) 1.57% to Issue 6, which as a percentage of 72.2% = 2%

iii) 0.75% to issue 7, which as a percentage of 72.2% = 1%

iv) 0.78% to Issue 8, which as a percentage of 72.2% = 1%

v) 1.21% to Issue 9, which as a percentage of 72.2% = 1.5%

vi) 1.98% to Issue 10, which as a percentage of 72.2% = 2.5%

102. Starting from Excess Insurers' total claimed costs of £524,059 in relation to the period from 21 July 2017 to 7 May 2018, the percentage allocations listed above combined with the adjustments set out in section (F) above lead to the following figures issue by issue:

i) £225,345 for Issues 1 and 2 (against Beazley) x 85% = £191,544

ii) £10,481 for Issue 6 (against ASD and ADNEC in equal shares i.e. £5,240 each)

iii) £5,240 for issue 7 (against Beazley)

iv) £5,240 to Issue 8 (against ASD)

v) £7,860 to Issue 9 (against ADNEC) minus £3,000 = £4,860

vi) £13,101 to Issue 10 (against ASD) x 60% = £7,860.

103. Those figures add up to £196,784 against Beazley, £18,340 against ASD and £10,100 against ADNEC.

104. In all the circumstances, the appropriate figures for payments on account are £115,000 to be paid by Beazley, £10,000 by ASD and £6,000 by ADNEC.

(H) INTEREST ON COSTS

105. It was common ground that all costs should bear interest from the date the costs were paid by the recovering party to the date of payment by the paying party.

106. Beazley proposed that the interest rate should be:

i) at 2% above Bank of England base rate for the period from the date of payment of the costs by the recovering party up to the date one month after delivery of the detailed bill of costs by the recovering party to the paying party; and

ii) at the Judgment Rate thereafter.

That reflects the approach taken by Leggatt J in *Involnert Management Inc -v- Aprilgrange Limited* [2015] EWHC 2834 (Comm), and reflects the point that it is only on receipt of the detailed bill that the paying party can form an informed view about its liability.

107. ASD argued that the costs summary already provided gave Beazley sufficient information to assess its liability. However, I do not agree, and consider it inappropriate for interest to run at the Judgment Rate, which is high, pending delivery of a detailed bill of costs. I therefore adopt Beazley's proposal in this regard.

(I) TIME FOR PAYMENT

108. Beazley, as the main paying party, seeks 28 days to pay any interim payment. This was opposed by ASD. Given the fairly substantive sums involved I accede to Beazley's request. The other parties liable to make interim payments will also have 28 days to pay.