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Case No: CL-2017-000325

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 November 2019

Before :

The Honourable Mr Justice Bryan

Between :

NATIXIS S.A.

Claimant

-and-

MAREX FINANCIAL LIMITED

First Defendant/Part 20 Claimant

-and-

ACCESS WORLD LOGISTICS (SINGAPORE) PTE LTD

Second Defendant/Part 20 Defendant

Susannah Jones (instructed by **Stephenson Harwood LLP**) for the **Claimant**

Robert Weekes (instructed by **Memery Crystal LLP**) for the **First Defendant**

Robert Thomas QC (instructed by **Hill Dickinson**)
for the **Second Defendant/Part 20 Defendant**

Hearing date 8th November 2019

APPROVED JUDGMENT

MR JUSTICE BRYAN:

INTRODUCTION

1. The parties appear before me today on the ancillaries hearing following my judgment handed down on 2 October 2019 in *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm).

ACCESS WORLD'S COSTS OF NATIXIS' CLAIM AGAINST ACCESS WORLD

2. It is convenient to address the issues between Natixis and Marex first, followed by those between Marex and Access World, although in fact as I was coming into Court, a number of the issues have resolved as between Natixis and Marex. One issue however remains and that relates to Access World's costs of Natixis' claim against Access World, which failed.
3. Ms Jones, who appears for Natixis, submits that Natixis acted reasonably in making claims against both Marex and Access World, that Natixis claimed against Access World at Marex's request, with Marex's express sanction, and that it brought claims which were "parasitical" on Marex's own claim, which share a nexus with Natixis' claim against Marex.
4. It is submitted that the paradigm case for a co-defendant order is a case like this in which the defendants blame one another. I am referred to the case of *King v Zurich Insurance Co* [2002] EWCA Civ 598 at [33]:

"Where a plaintiff had behaved reasonably in suing both defendants, he should not normally end up paying costs to either party even though he succeeded only against one of the defendants."

5. In this regard, it is noted that it is, or at least was at some point, common ground between Marex and Natixis that some sort of co-defendant order would be appropriate and there were different proposals.
6. Natixis asked the Court to exercise its discretion under CPR44.2 to order Marex to make a direct payment for costs to Access World on *Sanderson* principles, alternatively to make Marex and Natixis jointly and severally liable for Access World's costs of Natixis's claims against Access World. Marex is neutral as to what order should be made as, ultimately, Marex will be picking up the bill in any event.
7. Ms Jones refers me to the applicable principles under CPR44.2, it being established that there is jurisdiction to make an order of the sort that she is seeking.
8. She also draws to my attention the case of *Moon v Garrett* [2007] 1 Costs L.R. 41, at [38] where Waller LJ said:

"It seems to me that the above citation demonstrates that there are no hard and fast rules as to when it is appropriate to make a Bullock or Sanderson order. The court takes into account the fact that if a claimant has behaved reasonably in suing two defendants, it will be harsh if he ends up paying the costs for the defendant against whom he has not succeeded. Equally, if it was not reasonable to join one defendant because the cause of action was practically unsustainable, it would be unjust to make a co-defendant pay those defendant's costs. Those costs should be paid by a claimant and it will always be a factor whether one defendant has sought to blame another."

He continued at [39]: "The fact that cases are in the alternative, so far as they are made against two defendants, will be material, but the fact the claims were not truly alternative does not mean that the court does not have the power to order one defendant to pay the costs of another. The question of who should pay whose costs is peculiarly one for the discretion of the trial judge."

9. Essentially two submissions are made as to why the order that is sought by Natixis should be made. The first is that it would be disproportionate to order them to pay the costs because there

would be a need to separate matters out on the assessment, which will lead to additional costs and may cause delay. Secondly, it is said there is no costs risk to Access World because the evidence - although I am not sure it is formally in evidence but certainly the material in the trial bundle - suggests that Marex is good for the money. In addition, Marex has paid orders in relation to the principal to Natixis and it is submitted there is no reason why a similar approach to compliance will not be made by Marex in due course.

10. Therefore, it is suggested that the risk to Access World of a failure to pay by Marex is limited and is not an overwhelming factor in that regard.
11. Mr Weekes, who appears for Marex, points out that the reality is that on a detailed assessment all the factors will have to be gone into looking at individual costs as to whether they were reasonably incurred and are reasonable amount, and that applies both to Marex and to Natixis.
12. Mr Thomas, who appears for Access World, says that he is the successful party, that the claim of Natixis failed, and that costs should follow the event in the normal way, and that he should have a costs order in his favour from Natixis. He says, however, and recognises, that in fact, because of the reality that ultimately Marex will be picking up the bill and, no doubt because such an order would also benefit him, he is content that with an order of joint and several liability of Natixis and Marex, but he resists any order whereby the paying party is simply Marex. He says it would be inappropriate for such an order to be made because Access World would then have a costs exposure if Marex did not pay.

13. He also supports the point made by Mr Weekes, that in reality, if there is a detailed assessment, then individual costs will have to be considered and broken out in any event, and therefore the suggestion that this will all be disproportionate or result in substantial additional costs or cause delay is overplayed.
14. Ultimately, as is recognised both in CPR44.2 and indeed in the passage from *Moon v Garrett* to which I have referred, the matter is one for the exercise of judicial discretion in relation to costs.
15. I consider that the one scenario that should not arise is one where Access World faces a credit risk in circumstances where there would not be a credit risk in relation to Marex, if a standard order following the event was made.
16. In circumstances where Natixis essentially sued Access World at the instigation of Marex, Natixis' claim is parasitical on Marex's claim and Marex is the ultimate paying party, I consider that the just and appropriate Order to make is that Marex and Natixis are jointly and severally liable for Access World's costs, and I so order.

SUMS DUE TO MAREX BY WAY OF DAMAGES

17. The next issue that arises between Marex and Access World is in relation to the sums due to Marex by way of damages.
18. I found Access World liable in negligence to Marex in respect of the 14 PC4 and PC5 warehouse receipts. I also found that Access World's duty was limited by reference to the limitation of liability provision in the terms and conditions, limiting liability to €100,000 per event or series of

events, and I held that the damages recoverable by Marex from Access World fell to be reduced by 25% by reason of Marex's contributory negligence.

19. An issue has arisen as to the order in which one considers such matters. Mr Thomas accepts, as he must, that the €100,000 limit applies to each authenticated warehouse receipt. However, he says -- and I will come on to what I said in my judgment -- that the Court found that this provision had the effect of qualifying the extent to which Access World assumed responsibility to Marex. He refers to paragraphs 504 to 505 of the judgment. He says the effect of this finding is that Access World only ever owed a duty to Marex up to €100,000 per warehouse receipt.

20. It is then submitted that, in accordance with the Court's findings, that Marex's recoverable loss arising from breach of that qualified duty falls to be reduced by 25% by reason of Marex's contributory negligence.

21. The conclusion he then urges upon me, therefore, is that the sum payable by Access World in damages, there being 14 relevant receipts, is no more than €1,050,000 and not €1,400,000 as contended for by Marex.

22. Mr Weekes, who appears for Marex, says that such an approach is wrong in principle in relation to the operation of section 1(1) of the 1945 Act. Before turning to his submissions, I will quote what I said in my judgment. At [505], I said as follows:

"In the present case, and as already noted, emails sent by Access World to Marex (including the 22 December and 9 January emails but extending to many before that) referred to the application of the Terms and Conditions to "...all offers made by..., all agreements concluded... and any other work carried out" (emphasis added). A reasonable person in the position of Marex would have understood that the Terms and Conditions applied to "any other work carried out" including work gratuitously performed such as the authentication of the warehouse receipts the subject matter of PC4 and PC5, and I so find. In such circumstances,

Access World's assumption of responsibility was on the basis that any statements made by it were subject to its Terms and Conditions including the limitation clause therein. It is neither necessary nor appropriate to construe the Terms and Conditions like a contract."

23. The first point therefore is that the finding I made, and intended to make, was that there was an assumption of responsibility, ie a *Hedley Byrne* type assumption of responsibility, but that was made on the basis that Access World's monetary liability should not exceed the amount set out in the limitation clause.
24. That is not the same as what Mr Thomas was saying, which was that the duty was limited to a certain amount. What I found was there was a duty in the context of the fact that the amount was limited as to what could be recovered in due course.
25. Set against that backdrop I turn, then, to section 1(1) of the 1945 Act. Mr Weekes makes three propositions in that regard, each of which I consider to be correct.
26. Firstly, the only power to reduce an amount of damages for contributory negligence is the provision set out in section 1(1) of the 1945 Act. It must be, therefore, that section 1(1) is the starting point. His second proposition is that under section 1(1) you first have to identify the damage that has been incurred and that, he says, is the total amount of damage suffered. The third question is: has that damage been caused partly by reason of the fault of the person suffering that damage and also by the fault of another person? If it has, then there is then to be such reduction to such extent as the court thinks just and equitable.
27. The starting point is to look at the language of section 1(1) of the 1945 Act itself. Section 1(1) of the 1945 Act provides:

“(1) Where any person suffers **damage** as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that—

- (a) this subsection shall not operate to defeat any defence arising under a contract;
 - (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.”
- (emphasis added)

28. I consider that, as a matter of construction, the starting point is to look at what in the first line of section 1(1) of the 1945 Act the word "damage" means. I consider that, as matter of ordinary language, in the words: "*... where any person suffers damage as a result partly of his own fault and partly of the fault of any other person ...*" the word "damage" is looking at the basic loss, ie the total amount of damage suffered, in this case the liability of Marex to pay Natixis. That is the total amount of the loss in relation to each of the warehouse receipts which were wrongly authenticated.

29. I consider, therefore, that that means that the starting point is the basic loss. I am fortified in that conclusion by a consideration of the decision in *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190 to which I was referred by Mr Weekes. Thus, in the judgment of Lord Hobhouse at page 210G, he says as follows:

"Section 1(1) of the Act of 1945 can be divided into three parts. The first part identifies a situation: where a claimant suffers damage as the result partly of his own fault and partly of the fault of another. The second part provides that that fact shall not defeat the claim of the former against the latter. The third part provides that the damages recoverable by the claimant in respect his damage shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

30. In that passage, Lord Hobhouse is clearly identifying that the first part, that is the first line, is directed at the damage that is suffered by the person suffering the damage. In contrast, Mr Thomas

is forced to say that in that first line the damage refers not to that, but to the capped amount of €100,000. He has to say that because his argument is that that sum of €100,000 then has applied to it the 25% reduction.

31. However, I consider the *Platform Home Loans* case goes beyond the significance of identifying the structure and is in fact an application of the very principle relied upon by Mr Weekes and shows that the correct approach is as Mr Weekes suggests. That can be seen by a consideration of the judgment of Lord Millett. That case was involved with what is known as the SAAMCO cap, which is itself a scope of duty point, just as the cap in the present case is a tortious cap, as I have found.

32. It is clear that, as the trial judge did in that case, one starts with the basic loss, which in that case was £611,748, and then reduced that basic loss by the contributory negligence. It is only after that that one then applies whether or not there is any reduction as a result of a maximum liability figure. That can be seen in particular on page 214 at 214C to D and the eventual conclusion on page 215D, Lord Millett having first explained the three-stage process under the applicable principles on page 213B-E.

33. I consider, therefore, that the decision of the House of Lords in *Platform Home Loans* not only identifies the structure of section 1(1) but is also an application of the very approach which is advocated for by Mr Weekes on behalf of Marex.

34. There is an additional point, which is that it will be recalled that section 1(1)(b) of the Act provides that where any contract or enactment providing for limitation of liability is applicable to the claim,

the amount of damages recovered by the claimant by virtue of the subsection shall not exceed the maximum limit so applicable.

35. If Mr Thomas was right in his construction and the cap were applied before any discount for contributory negligence, then section 1(1)(b) would have no application. That weighs heavily against Mr Thomas' construction. Mr Thomas said, well, every case has to be determined on its own facts and there could be other scenarios where it would apply, but no scenarios were identified in which that would be the case.

36. I was also referred to the decision of Proudman J in *Newcastle International Airport Limited v Eversheds LLP* [2012] EWHC 2648 (Ch). That decision, at [135] to [137], considered a question of contributory negligence and the application of a contractual cap in *obiter* terms. The point was *obiter* because at [134], and on the facts before her, she had found that there was not any scope for contributory fault. However, at [135] and [136], she identified the contractual cap provisions and then (albeit *obiter*) at [137] she addressed the very question that is before me today:

“Eversheds accept that the Liability Cap falls to be applied after the Net Contribution Clause. Thus, on the hypothesis of a loss of £10m and contributory negligence of 50% the liability is £3m. The Liability Cap is not applied first so that in such circumstances the liability is limited to £1.5m.”

37. I bear well in mind that it would appear that Eversheds accepted that that was the right approach and therefore the Learned Judge may have not received full argument on the point. I also accept that the Learned Judge's observations were *obiter*. Nevertheless, that finding is entirely consistent with the approach which I consider follows from the language of section 1(1) of the 1945 Act, and the application of that Act in what I consider to be an analogous situation, and such an approach is also consistent with that adopted in relation to another common law cap in the *Platform Home Loans* case to which I have referred.

38. I consider that the interpretation that Mr Thomas places upon section 1(1) of the 1945 Act, which is the only route by which contributory negligence can arise, is not consistent with the express language of section 1(1) and, in particular, the reference to damage (which is to the total loss in the first line), is not consistent with high authority as to how the parts of section 1(1) are to be construed and understood, and is contrary to the approach of the House of Lords in the *Platform Home Loans* case in the analogous situation. It also jars with the very existence of section 1(1)(b) because, on Mr Thomas' construction, there would be no scope on the facts for the application of section 1(1)(b).

39. Therefore, in those circumstances, and for the reasons that I have given, I am satisfied that Mr Weekes' construction of section 1(1) is correct, both as a matter of interpretation of section 1(1) of the 1945 Act, and having regard to the applicable authorities cited.

40. Accordingly, one starts from the proposition of the total loss, the damage in the first line, which is the overall damage, that is the liability of Marex to pay Natixis. One then reduces that by 25% for contributory negligence, as I have found, and then one applies the cap.

41. The consequence of that is that in the present case, in all but one instance where the amount at stake was less than €100,000, the amount recoverable in each case is caught by the cap because the cap is a lower figure than the amount after the basic loss has been reduced by 25%.

42. It follows, therefore, that the correct construction is that the amounts recoverable are not €1,050,000 but an amount of €1.4 million less the adjustment that needs to be made in the context of the fact that one of the parcels was of a lesser value, and I will hear the parties as to what the

correct and final figure is. Therefore, for the reasons that I have given, I find that the construction adopted by Marex is the correct construction.

COSTS OF MAREX'S FRAUD CLAIM

43. The next question that arises is the basis on which costs should be awarded in relation to Marex's fraud claim. That was a fraud claim essentially that the checker, Mr Png, was involved and acting fraudulently when he wrongly identified the warehouse receipts as authentic.

44. As soon as that plea was made, it was asserted in the correspondence that that was a weak plea that should not have been made, and that in due course, if it was pursued to the end and was unsuccessful, there would be an application for indemnity costs. That situation has come to pass due to the allegation not having been pursued at the time of oral closing submissions.

45. There is a degree of common ground as to some of the applicable principles in circumstances where Mr Weekes, who acts for Marex, recognises at paragraph 17(d) of his Skeleton Argument that:

"It has been held that the general provision in relation to cases in which allegations of fraud are made is that if they proceed to trial and the case fails, then in the ordinary course of events the claimants would be ordered to pay costs on an indemnity basis. It has been held appropriate for the court to approach the discontinuance of fraud proceedings in the same way (see eg *Clutterbuck v HSBC Plc* [2015] EWHC 3233 (Ch) per David Richards J at [16] and [18]). The underlying rationale of that approach is that where they fail they should be marked with an order for indemnity costs because in effect the defendant has no choice but to come to court to defend his position (ibid at [17])."

46. It is said, rightly, that the court retains a complete discretion in the matter and it is submitted there may well be factors which indicate that notwithstanding the failure of a fraud claim indemnity costs are not appropriate. The passage that is being referred to in *Clutterbuck* is at [15] to [18]:

"15. Mr Ramsden draws attention also to the sequence of events yesterday; the attempt to take this application out of the list having failed, within a very short period indeed the notice of discontinuance was served. It has all the appearance (and it has not been denied) that a

decision had already been taken to discontinue proceedings if the attempt to take the applications out of the list failed.

16. Mr Ilyas on behalf of the claimants submits that an allegation of fraud being made in the proceedings which are then discontinued is not of itself reason to order indemnity costs. The general provision in relation to cases in which allegations of fraud are made is that, if they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course the court retains a complete discretion in the matter and there may well be factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.

17. The underlying rationale of that approach is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because, in effect, the defendant has no choice but to come to court to defend his position.

18. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is in my judgment appropriate for the court to approach the question of costs in the same way.”

47. Reference is made by Mr Weekes to the decision of the Court of Appeal in *Kiam v MGN* [2002]

EWCA Civ 66; [2002] 1 WLR 2810. In particular, reference is made to what was said by Simon Brown LJ, as he then was, at [12]:

" I for my part understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, *can* be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44 (unlike one made under Part 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory.”

48. Other relevant lines of authority include the decision of Tomlinson J (as he then was) in *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm); [2006] 5 Costs L.R. 714, and the decision of Andrew Smith J in *Fiona Trust v Privalov* [2011] EWHC 664 (Comm), which address along with other authorities, conduct which takes matters “out of the norm”.

49. It is accepted by Mr Weekes that, because of cases such as *Clutterbuck*, the starting point, at least, is that if you make a fraud claim and pursue it and then either withdraw it or lose at trial, the

starting point is that an order for indemnity costs is the appropriate order. Nevertheless he points out, rightly, as I have already foreshadowed, that the court retains a complete discretion as to what the appropriate order as to costs is in all the circumstances.

50. He submits that in the present circumstances an order for indemnity costs is not appropriate. He says that the claim that was advanced was narrow, circumscribed and parasitical upon a negligence case which succeeded (in part). He says that Marex's decision to bring the fraud claim was not unreasonable, let alone unreasonable to a high degree and certainly not deserving of moral condemnation. He says it was narrow and circumscribed, concerning the conduct of one employee, Mr Png, and it was said that the basis for that was clearly pleaded, i.e. the absence of any other explanation as to the series of failures to identify the obvious differences between the forged and genuine receipts. It is also said that the point was addressed carefully and in a non-hostile cross-examination.

51. He also submitted that there is nothing *per se* unreasonable, let alone unreasonable to a high degree, in Marex's abandoning its claim in fraud once Mr Png had been cross-examined. Further, without disagreeing with the approach in *Clutterbuck*, that case, it is said, provides no assistance. It is submitted that, on the facts, it was an extreme case and it is also said that in any event regardless of the fraud plea, Access World would always have attended court in order to defend its position on the negligence claim. It is also said that it would be unjust for Marex to pay indemnity costs where the conduct of Access World in defending Marex's claim was, put at its lowest, highly unreasonable and deserving of condemnation.

52. In this regard what is relied upon is a suggestion that Access World and Mr Png were, it is said, grossly negligent, and that in those circumstances one should bear that in mind, and the pursuit by

Access World of a plea that it was not negligent through to the end, and though Marex does not invite the court to order that Access World pay Marex's costs on indemnity basis, the conduct on the part of Access World should be taken into account.

53. I consider that the starting point is indeed that costs should be on an indemnity basis.

54. Turning to the factual background to the fraud plea. It was made from the start and in a way which was purely inferential. I accept that fraud cases are often inferential, but in this case there was not one shred of actual evidence. There was no "smoking gun". All that there was, was an individual in relation to whom it was submitted that his negligence was so great that an inference of fraud by one individual within an organisation should be visited upon that organisation – in short a plea of deceit, which is by its very nature a very serious allegation to make.

55. The reason why such an allegation was made is not difficult to discern, as Mr Thomas has pointed out, because Marex was being met, in relation to a very substantial claim, with terms and conditions which, of course, might potentially apply, and indeed I found did apply. The result was that even if Marex was successful on its negligence claim it would only recover a very small part of its losses.

56. I consider that are features of this case which are comparable to other cases such as *Three Rivers*. As Mr Thomas reminds me, there was publicity in relation to this serious allegation. The start of the trial had many members of the Press present and matters were reported in the Trade Press. I consider that it is questionable whether it was appropriate to plead fraud in the first place. Certainly it appeared from the start to be a weak inferential claim of fraud. It was pursued through to trial.

It was pursued not only through to trial but through cross-examination of the witness concerned. It was then pursued in the written closing submissions.

57. It was only abandoned when Mr Choo Choy QC stood up to address the Court in oral closings. If, as has been submitted to me, the case in negligence was so strong, that would surely be all the more reason to pursue that claim for fraud because it would be more fuel to the fire that there was no innocent explanation for the actions of Mr Png. That clearly was not the case and the lie to that is told by the fact that having incurred all the cost and expense on both sides of pleading and running a case of fraud it was abandoned after Mr Png had given evidence and at a time when Marex was saying that the claim in negligence was very, very strong. If it had any real faith in the claim of fraud it would surely have carried it through to the end at that point, not least with a view to circumventing the standard terms and conditions.

58. I do not regard it as a strong case of fraud that was advanced. I consider that a very serious allegation was made in circumstances where it was questionable whether it should have been made and thereafter pursued, certainly pursued through to the bitter end in written closing submissions. I have considered carefully the factors identified by Mr Weekes, and as they are developed in his skeleton argument at paragraph 18, but I consider that this is a classic case where Marex's conduct in pleading and pursuing the claim in fraud takes matters out of the norm, and where the starting point is also the end point.

59. It was a case in relation to which, ultimately there was no, or no sufficient, evidence to support or justify the claim for fraud. It was rightly withdrawn. The only pity is that it was not withdrawn at an earlier stage. In those circumstances, on established principles, and in the exercise of my discretion, I consider the appropriate order in relation to those costs is that they be on indemnity

basis, and I so order. I would only add that I do not consider that the points made about the conduct of Access World in its defence of the negligence claim tells upon the application of Marex's fraud claim (or indeed are made out on the facts of this case).

COSTS OF MAREX'S CLAIM AGAINST ACCESS WORLD

60. The next matter that arises is in relation to the cost of Marex's claim against Access World. Mr Thomas for Access World says that this is a case where the Court should consider making a percentage-based order given the overlap between the issues in the proceedings and, secondly, the fact that Marex did not wholly succeed in relation to any one issue. He draws attention to rule 44.2(7) of the CPR, which provides that:

"Before the court considers making an order under paragraph 6(f) [an order relating only to a distinct part of the proceedings] it shall consider whether it is practical to make an order under paragraph 6(a) [an order to pay a proportional amount of the party's costs] or 6(c) [an order for costs from or until a certain date only instead]"

61. It is submitted that this is not a case where an issue-based costs order would work in practice. It is suggested by Access World that the appropriate percentage is one of 15%, i.e. that Marex should recover only 15% of its costs, there being no order in relation to Access World's costs.

62. I bear those principles well in mind, and there are many cases where it would be appropriate to make a percentage order. The difficulty in the present case is that I do not consider that on the material presently before me I can identify a percentage which would amount to a proper exercise of my judicial discretion rather than being merely an exercise in speculation. I consider that on the facts of this case, and although I recognise that it will be a difficult assessment exercise in due course, that the right approach is indeed to be an issue-based approach to reflect the relative success and failures of Marex and Access World.

63. In those circumstances, I consider the appropriate order to make is that Marex should be entitled to its costs up to and including 18 December, in respect of the negligence claims in respect of PC4 and PC5, and that all other costs up to that date shall be Access World's costs (on the standard basis save that its costs in relation to the fraud claim are on the indemnity basis).

64. I have considered, as Mr Thomas urged me to do, whether I should make any percentage reduction in relation to the costs recovered by Marex in respect of those claims. However, I do not consider it is appropriate to make such a reduction. Marex was successful on those negligence claims in relation to PC4 and PC5 and I do not consider that circumstances arise which would render it appropriate for them to recover less than 100% of those costs. Where that will leave the overall costs on a detailed assessment will be a matter for that assessment. I consider, however, that that will be a far more structured and appropriate basis on which costs are assessed than for me to carry out a very broad-brush percentage approach today, and therefore for the reasons I have given that is the order that I make.

WHEN PAYMENT IS TO BE MADE/PAYMENT ON ACCOUNT

65. The next issue that arises is when payment should be made of the sum of €1.3 million and the dollar figure and, secondly, whether there should be a payment on account and, if so, how much, for Access World's costs. Access World submit that essentially the two should be set off against each other or the time for payment should be deferred until a future date such as after assessment or the like.

66. Mr Weekes for Marex submits that he is entitled to his money now and indeed, subject to the issue that has been resolved, would have been entitled to it a little earlier, and there is no reason not to order that. So far as the payment on account is concerned, he says that the information I have to go on is limited because all I have is a solicitor's letter that costs of £1.6 million have been incurred. He does not go behind that but he says I am lacking detail in relation to costs.

67. He also says that the difficulty that arises is that it is hard to ascertain exactly how the costs order will shake out ultimately given the various costs orders that have been made. However, by way of riposte to that on instructions, Mr Thomas informs me that of those costs of £1.6 million, some £1.24 million post-date 19 December when Access World is entitled to its costs and some of those it is entitled to on an indemnity basis.

68. I consider that by a combination of the solicitor's letter, and that further information on instructions, I am in a position to take a view in relation to what would be an appropriate payment on account, being an amount not exceeding what would be the reasonable amount due in due course.

69. Set against that background, I consider that I should “grasp the nettle” and should not simply defer matters off to a future date. I therefore order the sums of €1.3 million and the dollars figure should be paid within 14 days, but I also order that there should be a payment on account to Access World in respect of their costs of some £850,000.

INTEREST

70. Mr Thomas seeks interest of 2.5% above Base, relying upon dicta in *Royal Bank of Scotland Plc v Highland Financial Partners LP (Costs)* [2013] EWCA Civ 472. Mr Weekes suggests that the usual approach in the Commercial Court is 1% or 2% above Base which would produce lower figures. It is also pointed out that the *Highlands* case was a case in 2013 when Base rates were at 0.5%, which would have produced a rate of 3%.

71. Mr Thomas' rate produces 3.25% and the two propositions of Mr Weekes produces either 1.75% or 2.75%. Taking judicial notice of other cases in the Commercial Court, and my own experience, I consider an appropriate rate is 2% above Base from time to time, and I so Order.