



Neutral Citation Number: [2021] EWHC 107 (Pat)

**Claim No: HP-2019-000012**

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
INTELLECTUAL PROPERTY LIST (ChD)  
PATENTS COURT**

The Rolls Building  
7 Rolls Buildings  
London  
EC4A 1NL

Date: 26 January 2021

**Before:**  
**NICHOLAS CADDICK Q.C.**  
**(sitting as a Deputy High Court Judge):**

**B E T W E E N:**

**COLOPLAST A/S**

Claimant

**– and –**

**SALTS HEALTHCARE LIMITED**

Defendant

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**ANDREW LYKIARDOPOULOS Q.C. and MAXWELL KEAY**  
(instructed by **Powell Gilbert LLP**) for the Claimant

**DOUGLAS CAMPBELL Q.C. and TIM AUSTEN**  
(instructed by **Shakespeare Martineau LLP**) for the Defendant

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Hearing date 18<sup>th</sup> January 2021  
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## JUDGMENT

**Nicholas Caddick Q.C. (sitting as a Deputy High Court Judge):**

1. In my main judgment, which is at [2021] EWHC 3 (Pat), I found that the Claimant's ("Coloplast's") patent, EP (UK) 2 854 723 ("the Patent"), was invalid and on that basis, I dismissed Coloplast's infringement action against the Defendant, Salts Healthcare Limited ("Salts").
2. In this judgment I will deal with the form of order. The matters in dispute are:
  - a. Whether to make an issue-based costs order;
  - b. The level of interim payment to award on account of costs;
  - c. Whether to award an interim payment in respect of interest on costs; and
  - d. Whether to grant Coloplast permission to appeal.

### Issue-based costs

3. It is common ground that Salts was the overall winner of the proceedings. Accordingly, the starting point as regards costs is the general rule that Salts is entitled to its costs (see CPR r.44.2(2)(a)). However, CPR r.44.2(2)(b) recognises that the court may make a different order and an instance of this is where it is appropriate to make an issue-based costs order pursuant to CPR r.44.2(4)(b) and CPR r.44.2(6)(f). Such orders can be appropriate where, despite being the overall winner, a party has lost on certain issues.

### The law

4. With regard to issue-based costs orders, Douglas Campbell QC, who appeared for Salts, referred me to *Pigot v Environment Agency* [2020] EWHC 144 (Ch) at [6] (a case involving a claim in nuisance), where Stephen Jourdan Q.C. provided the following guidance:

*“(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.*

*(2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.*

(3) *Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.*

(4) *Where an issue-based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.*

(5) *An issue-based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.*

(6) *Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR rule 44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case."*

5. I found that passage from *Pigot* to be a helpful summary. However, I would make the following additional points:

- a. The approach to issue-based costs orders in patent litigation does not differ from the approach in other types of litigation (see *Hospira UK Ltd v Cubist Pharmaceuticals, LLC* [2016] 5 Costs LR 1011, per Henry Carr J. at [9]). However, patent cases lend themselves to issue-based costs orders because they often involve a large number of issues and a party can (as in the present case) lose on a number of issues but still be the overall winner. See *SmithKline Beecham Plc v Apotex Europe Limited* [2004] EWCA Civ 1703, per Jacob LJ at [25]-[26]. Further, as Henry Carr J said in *Cubist* at [9]:

*"Patent litigation is very expensive, and it is important that parties should be encouraged only to pursue their best points, and to be aware of the cost implications of failing to do so."*

A similar point was made by Birss J in *Unwired Planet International Limited v Huawei Technologies Co. Limited* [2016] EWHC 410 (Pat) at [13] although Birss J went on, (at [18]), to note that courts must be careful because:

*"If the court unduly penalises a party for dropping issues before trial, that may encourage parties to continue to run up issues all the way to trial, which will in turn increase the costs even further."*

- b. What constitutes a discrete or distinct issue (or, as it is often called in patent cases, a "suitably circumscribed" issue) will vary from case to case. In the patent context, it may involve the consideration of an individual piece of prior art but may equally be an issue arising within a broader issue, such as an issue as regards experiments arising in relation to the broader issue of infringement. See *Unwired Planet* at [6].

- c. Where the overall winner has lost on a discrete issue, it is likely to be deprived of its costs of that issue even if it acted reasonably. However, that is not inevitable. It must still be appropriate to make such an order.
- d. Where the overall winner has lost on a discrete issue, it may also be ordered to pay the losing party's costs of that issue. As appears from *Pigot*, such an order is likely to be made where the overall winner had acted unreasonably in relation to that issue. However, such an order can be made even where the overall winner had not acted unreasonably. It has been said that to make such an order requires "suitably exceptional" circumstances. However, in reality, the test is simply whether it would be appropriate and just in all the circumstances to make such an order. It is not intended that such orders should be extremely rare. See *Unwired Planet* at [6]-[8] and *Cubist* at [6]-[10].
- e. Where an issue-based costs order is appropriate, the proportion of the winning party's costs to be paid is often expressed in terms of a percentage of its total costs. This percentage reflects the deduction necessary to reflect the winning party's costs in relation to an issue on which it lost and also, where appropriate, the losing party's costs in relation to that issue. Such percentages orders "*can usually be made in patent cases and should be made if they can be*". See *Unwired Planet* at [10].
- f. In determining the level of reduction, the court is not expected to undertake a detailed assessment. Indeed, it is unlikely to have the benefit of a detailed bill of costs. See *Cubist* at [3]-[4]. In this regard, Pumfrey J in *Monsanto Technology LLC v Cargill International SA* [2008] FSR 417 at [5] commented that:

*"This brings me to the next problem confronting the judge who has to make an order for costs of the kind the parties want in this case. That problem is the doubts which their respective solicitors entertain as to the accuracy of the other side's estimate of the costs expended on the client's behalf upon the various issues .... I wish it to be clearly understood that parties cannot have it both ways. Either the case goes to detailed assessment, in which case issues of this description will fall by the wayside, or it is dealt with by the trial judge, who cannot resolve them. If the parties wish to take advantage of the benefits flowing from a comparatively rough-and-ready assessment by the judge, they cannot expect a detailed assessment of the correctness of each of the sums which they specify. This is a matter for the parties and not for the court. If neither seeks a detailed assessment, then the court will do its best with the material which is made available, and can only adjust figures deposed to by the solicitors concerned if there is a really good reason for doing so."*

Birss J, having quoted that passage in *Unwired Planet* (at [11]), went on (at [12]) to conclude that:

*“In my judgment what the learned judge there said about the comparatively rough and ready assessment which these percentage orders represent remains true. It cannot be overemphasised that this exercise is very approximate.”*

The issues on which Salts lost

6. Coloplast argues that there are six issues on which Salts lost and in respect of which issue-based costs orders are appropriate. The issues were:
  - a. Infringement;
  - b. Fischer – a piece of prior art that was pleaded but later dropped by Salts;
  - c. Novelty;
  - d. Insufficiency;
  - e. *AgrEvo* obviousness; and
  - f. Added matter.

In each case, Coloplast seeks a deduction to reflect Salts’ costs of the issue. In some cases, it also seeks a deduction to reflect its own costs.

Infringement

7. Coloplast’s infringement claim failed because the Patent was held to be invalid. On this basis, Salts argued that it won on infringement and, therefore, that there should be no deduction in respect of any infringement argument. I do not agree because, in addition to arguing that it did not infringe because the Patent was invalid, Salts also argued that it did not infringe because its products did not fall within the claims of the Patent. This further argument involved factual issues as to whether Salts’ products fell within the integers of claims 1, 2 and 6 of the Patent and issues (largely but not entirely of construction) as to whether those products fell within claims 3 and 4. Given that these issues were either abandoned, not pursued or failed at trial, I cannot see any reason why there should not be a deduction in respect of Salts’ costs in relation to them. The factual issues involved were clearly discrete issues and, to the extent that the construction issues overlapped with any other issue, it was the issue of sufficiency on which Salts also lost.
8. The next question is whether there should also be a deduction to reflect Coloplast’s costs in relation to these issues. Coloplast argues that it would have been perfectly possible for Salts to have made admissions as to some or all of the factual issues raised. Instead, as set out in the judgment, insofar as the integers of claims 1, 2 and 6 were concerned, Salts initially made minimal admissions which meant that Coloplast was put to the expense of conducting experiments (including optical microscopy, peel strength tests and SEM imaging). As a result, Salts made some further admissions and/or elected not to pursue the issues at trial. On balance, whilst it may not have been unreasonable to raise these issues initially, they were issues that did end up causing Coloplast to incur expense and they were not always abandoned as early as they might have been. In my judgment, it is wholly appropriate to make a deduction to reflect Coloplast’s costs in this respect.

9. The position as regards Coloplast's costs of the construction issues in respect of claims 3 and 4 seems to me to be different as it does not seem to me to have been unreasonable for Salts to raise these construction issues, particularly given that claims 3 and 4 had been added by amendment. In the circumstances, I am not satisfied that there is sufficient reason to order a deduction to reflect Coloplast's costs with regard to these issues.
10. Turning to the level of deduction. Coloplast suggested a deduction of 7% to reflect Salts' costs of the infringement issues on which Salts lost and a deduction of 10% to reflect Coloplast's costs of those issues. Mr Campbell criticised those figures on the basis that no breakdown had been provided. However, as set out above, the approach to determining percentages for the purpose of an issue-based costs order is necessarily "comparatively rough and ready". Mr Damerell's evidence was that Coloplast's figure of 10% was based on his review of his firm's files and on his belief that a figure of 7% for Salts would be appropriate. By way of cross-check (albeit not a particularly scientific one), he noted that the paragraphs of the judgment which dealt with these issues constituted around 7.4% of the judgment as a whole. For Salts, Mr Briggs did not provide any evidence as to the proper figures, save to say that the 7.4% figure was "the best estimate".
11. On this basis, it seems to me that there should be a deduction of 7.4% to reflect Salts' costs of the infringement issue and a further deduction of 8% to reflect Coloplast's costs. I have reduced the deduction claimed to reflect Coloplast's costs (from 10% to 8%) in part to reflect the fact that I do not think that Salts was wholly unreasonable in raising (initially at least) the factual issues and because I am not satisfied that there is a good reason to order a deduction in respect of Coloplast's costs of the construction issue raised by Salts in relation to claims 3 and 4 of the Patent.

Fischer

12. Fischer (a US patent no.5 800 928) was a piece of prior art relied on by Salts in its Grounds of Invalidity (and in its Re-Amended Grounds) but later dropped. As such, Fischer was clearly a discrete issue and it is clearly appropriate to make a deduction in respect of Salts' costs in relation to this issue.
13. Coloplast argues that a deduction should also be made to reflect the costs that it incurred in relation to Fischer. It points out that Fischer was a relatively complex US Patent and that, although Salts had decided to drop Fischer before the first expert reports were exchanged, it did not inform Coloplast of that decision until after that exchange. As a result, Coloplast and its expert, Ms Becke, had to consider and address the issue of Fischer. In response, Mr Campbell noted that there had been no "double discount" in respect of the prior art that was dropped in the *Unwired Plant* and *Cubist* cases. He also submitted that Salts should get the credit for dropping this piece of prior art and he pointed to the passage from *Unwired Planet* to which I have referred in paragraph 5(a) above. However, it seems to me that the circumstances in *Unwired*

*Planet* were very different because of the plethora of claims involved in that case and because, in one case at least, the prior art remained relevant to the issue of common general knowledge (see Birss J at [35]-[45]). In my judgment, in the present case, it is entirely appropriate that a deduction should be made in respect of Coloplast's costs in respect of Fischer and I do not regard such an order as "unduly penalising" Salts.

14. As to the level of deduction, Mr Damerell estimated that some 3% of Coloplast's costs related to Fischer and he suggested that Salts' costs were likely to have been similar. Mr Briggs criticised Mr Damerell's estimate because no basis for the estimation had been provided and he suggested that "a calculation using total costs cannot be right". In my judgment, the estimate of 3% of the total costs is somewhat high given that Fischer was primarily a matter for the experts and given that the expert evidence (which also dealt with issues of common general knowledge, with the identity of the skilled person, with the various other pieces of prior art and with infringement) constituted only 20% of the total costs. As regards Salts' costs in relation to Fischer, Mr Briggs, in his third witness statement, suggested that any costs would be *de minimis*. However, that seems improbable. Coloplast clearly incurred more than *de minimis* costs on this issue and Salts must have carried out investigations relating to Fischer which resulted in its being pleaded in the first place and then in its being dropped. In his fourth witness statement, Ms Briggs put forward a figure of 0.44% based on the fact that 2.2% of the experts reports related to Fischer and that the costs of the experts made up 20% of the total costs ( $2.2 \times 20\% = 0.44\%$ ). I cannot see how this figure can be an accurate estimate of Salts' costs given that its expert reports did not address the issue of Fischer at all.
15. Doing the best I can, it seems to me that it is appropriate to make a deduction of 1.5% to reflect Salts' costs of this issue and of a further 2% to reflect Coloplast's costs.

#### Novelty

16. Another issue on which Salts failed at trial was novelty. In its pleadings Salts raised novelty as an issue based on each of the pieces of pleaded prior art. Accordingly, the issue of novelty was addressed by the experts in some detail and Salts itself carried out experiments on bags (the D1 and D1(B) bags) said to be made in accordance with Dircks in support of its novelty argument. The issue having been raised was never formally abandoned by Salts. However, in Salts' opening submissions, it was referred to only in relation to the Watkins, Dircks and Willis prior art. In its written closing, it was not referred to at all. Orally, Mr Campbell indicated that he was not pushing the issue but had no instructions to withdraw it.
17. Although the prior art relied on in relation to the novelty argument was the same prior art that was relied on in relation to obviousness, the issue of novelty was clearly a discrete issue. Moreover, it was an issue which gave rise to its own costs. On this basis, it is appropriate to make a deduction to reflect Salts' costs of this issue.

18. Turning to whether it would be appropriate in all the circumstances to make a deduction to reflect Coloplast's costs of this issue. On balance, I have concluded that it would not be appropriate. Whilst I dismissed the novelty argument, I do not think that Salts were unreasonable in raising it, particularly as it was based only on the same prior art that was in issue in relation to obviousness. In effect, the only basis for making an order in this regard would be that Salts lost on the issue. In my judgment that does not make it appropriate.
19. As to the appropriate figure to be deducted, it is common ground that 2% is a reasonable estimation of Salts' costs in relation to the novelty issue and I will order a deduction of that figure.

### Insufficiency

20. Another issue on which Salts lost was that of insufficiency. Originally in its Grounds of Invalidity, Salts argued that the Patent was insufficient on 5 grounds (set out in paragraphs 3(a) to 3(e)). It appears that, on the back of this insufficiency claim, disclosure was ordered on 3 July 2019. Subsequently, by order of 19 March 2020, two further grounds of insufficiency were added (paragraphs 3(f) and 3(g)).
21. As to paragraphs 3(a) to 3(d), it seems to be common ground (based on Coloplast's opening skeleton) that these were squeezes which, given the way in which Coloplast put its case, did not arise. On this basis, I do not think that they can be treated as discrete issues. It is not even clear to me that Salts can be said to have lost in respect of them. Coloplast's main argument was that it had had to provide disclosure because of these insufficiency claims. However, I am not sure that this would make these discrete issues. Moreover, I do not think that I can conclude that the disclosure was pointless simply because Salts did not rely on the disclosed documents. It is possible that the disclosure exercise served (as suggested by Mr Campbell) to constrain the way in which Coloplast was able to put its case. Given this, in my judgment it would not be appropriate to make any deduction with regard to these issues.
22. As regards paragraph 3(e), this related to the Patent's technical contribution. As Coloplast asserted in its opening skeleton, it seems unlikely that it would have added much to paragraphs 3(a) to (d) or to the issue of *AgrEvo* obviousness which is considered below.
23. Paragraph 3(f) raised a construction issue which also arose in relation to infringement and a legal issue as to whether claims 3 and 4 were insufficient for uncertainty. Although Salts lost in both respects, the costs of the construction issue are really part of the costs of infringement with which I have already dealt and it is difficult to discern any separate costs which can be ascribed to the legal argument as to uncertainty. Accordingly, in my judgment, it is not appropriate to make any deduction with regard to this issue.



24. Paragraph 3(g) was essentially a squeeze over the common general knowledge on a point on which Salts succeeded (i.e. that the means of achieving claims 3 and 4 were common general knowledge). In my judgment this was not a discrete issue on which it would be appropriate to make any deduction from Salts' costs.

*AgrEvo obviousness and added matter*

25. In the parties' submissions, the issues of *AgrEvo* obviousness and added matter were dealt with together, although there was no legal or factual link between them. In both cases, Coloplast seeks a deduction in respect of Salts' costs but not in respect of its own costs.
26. As set out in the main judgment, the *AgrEvo* argument was, in part, linked to the issue of obviousness and inventive step on which Salts succeeded. Clearly no discount would be appropriate in that regard.
27. However, Salts also ran a rather different *AgrEvo* argument as explained in paragraphs 184 to 186 of the main judgment. It seems to me that this was a discrete legal issue on which Salts lost. Much the same point arises with regard to the added matter issue on which Salts also lost at trial and it is common ground that this was a discrete issue.
28. Whilst I do not think that Salts acted unreasonably in raising these issues, they were discrete issues that were pleaded and argued unsuccessfully at trial. Accordingly, it seems to me to be appropriate that some deduction be made with regard to Salts' costs in respect of these issues. The difficulty is in determining what that deduction should be. Mr Damerell points out that the issues took up, respectively, 4.9% and 3.9% of the judgment, Salts' opening and Salts' closing taken collectively. However, he recognises that this is an overstatement and so suggests a figure of 5%. Mr Briggs simply asserts that the figures are de minimis. In my judgment, as the issues were simply legal issues and took up very little time, I will direct that a deduction be made of 1%.

*Conclusions on issue-based costs*

29. My conclusions as regards issue-based costs are summarised in the table below:

<b>ISSUE</b>	<b>Deduction from Salts</b>	<b>Account for Coloplast</b>	<b>Total Deduction</b>
Infringement	7.4%	8%	15.4%
Fischer	1.5%	2%	3.5%
Novelty	2%	0	2%

Insufficiency	0	0	0
AgrEvo/ Added Matter	1%	0	1%
<b>TOTAL:</b>			<b>21.9%</b>

30. I should mention that Salts made a number of general points regarding the commercial significance of the litigation, the fact that Coloplast had not agreed to the stay of these proceedings pending the result in the appeal in the EPO proceedings and the fact that Coloplast's formulation of its claim had changed and differs from that being put before the EPO. I do not see that these are of any assistance to the issue of the issue-based costs.
31. Ultimately, Salts chose to raise and, in many cases, to maintain these issues and, in doing so, added considerably and unnecessarily to the time, expense and complexity of the litigation. In the circumstances (and bearing in mind the comments of Henry Carr J quoted at paragraph 5(a) of this judgment), it seems to me that the making of issue-based costs orders as set out above is fair and appropriate and in accordance with the principles set out in CPR r.44.2.

### **Interim payment**

32. It is common ground that, pursuant to CPR r.44.2(8), Salts is entitled to a "reasonable sum" by way of an interim payment on account of its costs. There is, however, a dispute as to what that sum should be.
33. In this case, unusually for a patent case, cost budgets were agreed and approved by a case and costs management order made on 3 July 2019. The total sum under Salts' cost budget was £1,035,195.35 (which was comparable with Coloplast's figure of £1,005,323.65). After stripping out budgeted items where costs were not in fact incurred (ADR and certain statements of case), the approved budget figure comes down to £1,011,717.00 (which is less than the total costs £1,081,006.00 that Salts estimates it has actually incurred). On this basis, Salts submits that a reasonable sum by way of interim payment would be 90% of those approved budgeted costs which, it calculates, is £910,545.30.
34. As I have indicated, Coloplast does not oppose the making of an order for an interim payment in respect of costs in principle. Nor does it take issue with the budgeted figures. Its point is that Salts' estimated figure for costs actually incurred has not been broken down into the various phases identified in the cost budget. It is therefore, impossible to know whether the costs Salts actually incurred in respect of any particular phase were in line with the budget for that phase. Coloplast identifies (by way of example) three particular phases where, it believes, Salts' actual costs were likely to have been less than the budgeted sum. On this basis, it argues that to make an interim payment of 90% of Salts approved budgeted costs would mean that Salts

would receive more than the approved budgeted sum for some other phase or phases. To avoid this, Coloplast submits that a reasonable sum by way of interim costs would be 70% of Salts' approved budgeted costs.

Interim payments where there are agreed or approved cost budgets

35. The starting point is CPR r.3.18 which provides that:

*In any case where a costs management order has been made, when assessing costs on the standard basis, the court will—*

*(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;*

*(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and*

*(c) take into account any comments made pursuant to rule 3.15(4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order.*

36. These principles have been applied in relation to interim payments under CPR r.44.2(8). For example, in *Thomas Pink v Victoria's Secret* [2015] 3 Costs LR 463, Birss J held at [60] that:

*"The sum sought by the claimants is essentially the budgeted sum at the time they asked for it. It seems to me that the impact of costs budgeting on the determination of a sum for a payment on account of costs is very significant although I am not persuaded that it is so significant that I should simply award the budgeted sum."*

37. In the event, Birss J found that there was no good reason to depart from the budgeted sum, and ordered an interim payment of 90% of the budgeted figure. Later, in *MacInnes v Gross* [2017] 2 Costs LR 243 at [25], Coulson J held that the defendant's approved cost budget was:

*"the appropriate starting point for the calculation of any interim payment on account of costs. CPR 3.18 makes plain that, where there is an approved or agreed costs budget, when costs are assessed on a standard basis at the end of the case, "the court will not depart from such approved or agreed budget unless satisfied that there is good reason to do so". The significance of this rule cannot be understated. It means that, when costs are assessed, the costs judge will start with the figure in the approved costs budget. If there is no good reason to depart from that figure, he or she is likely to conclude the assessment at the same figure: see *Silvia Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19."*

38. It is clear from this passage that it is feasible for a court to make an interim award of 100% of the approved costs budget, although in *MacInnes* (as in *Thomas Pink*) that figure was reduced by 10% which Coulson J regarded "as a maximum deduction that is appropriate in a case where there is an approved costs budget". In effect, as Coulson J commented, when there is an approved cost budget, the days of the 'educated guesswork' identified by Jacob J in *Mars UK v Teknowledge Ltd* [1999] 2 Costs LR 44 "are now gone".

39. By reason of CPR r.3.18(a) and (b), when determining what is a “reasonable sum” to award by way of interim payment, the court has regard to the agreed or approved budgeted costs for each phase of the proceedings. Accordingly, where a party has overspent on a particular phase, the starting point as regards that phase (for the purposes of the interim payment) remains the budgeted figure even if that party has underspent on other phases. Whether that party will ultimately recover the overspend is a matter for the costs judge hearing the detailed assessment and not for the judge determining the issue of the interim payment. See *Ramsden v HMRC* [2020] EWHC 357 (QB) at [8], [9], [15(1)] and [16(1)].

*The present case*

40. On the basis of these principles, I think that there is force in the points that Coloplast makes with regard to the level of interim payment. It has identified phases where Salts’ costs were probably less than the approved budgeted figure. Accordingly, there is a risk that an order for an interim payment based on a high percentage of the total approved budget costs would result in Salts receiving more than was budgeted for another phase or phases. Given the lack of evidence from Salts (even in reply) to assist with regard to a breakdown of its estimated incurred costs, the extent of this risk cannot be determined. Accordingly, any assessment of what a reasonable sum would be by way of interim payment must inevitably be somewhat rough and ready and it seems to me that, in the circumstances, I should err on the side of caution in favour of Coloplast.
41. The three examples of underspend identified by Coloplast were in respect of (a) witness statements, where Coloplast argued that the costs associated with the six short statements served by Salts were unlikely to have used the full £50,000 approved under the budget, (b) the RFI, where £19,800 was allowed but no RFIs were served, and (c) experiments, where the approved figure of £117,600 included provision for repeat experiments that were not in fact necessary. In my judgment, in the absence of evidence from Salts, it seems reasonable to assume that the total underspend in these regards is unlikely to be more than £100,000 (i.e. roughly 10% of the total approved budget figure for costs).
42. Looking at the rest of the approved cost budget, it is hard to see where else there may have been an underspend by Salts (and hence the risk of an over-recovery in respect of another phase or phases). However, erring on the side of caution in favour of Coloplast, I propose to direct an interim payment on account of costs based on a deduction of 15% from the total approved budget costs figure (which figure should be adjusted to take into account the 21.9% deduction referred to above). On this basis, I will order an interim payment of £671,628 (i.e. 85% of 78.1% of £1,011,717.00, rounded down). In my judgment, this represents a reasonable sum in accordance with CPR r.44.2(8) and I will direct that Coloplast should have 28 days in which to pay it.

43. I should note that, originally, I had thought that it would be appropriate to order an interim payment based of a deduction of 20%. In choosing that figure, I was influenced by the fact that Salts had itself suggested a deduction of 10% and I took the view that this, taken with the roughly 10% needed to reflect the underspend point, justified a deduction of 20%. On reflection, I have concluded that this was mistaken. First, it cannot be assumed that Salts' proposed 10% deduction related to any particular point, let alone to one that was supplemental to the underspend point. Moreover, Salts' proposed deduction of 10% (like my original figure of 20%) was in respect of the total approved budget cost figure of £1,011,717 and not of the reduced figure of 78.1% of that sum. In my judgment, a deduction to 20% of that reduced figure was not justified by Salts' suggestion and it would result in an interim payment of a sum that would be less than a reasonable sum for Coloplast to pay on account of Salts' recoverable costs.

#### **Interim payment on interest on costs**

44. The next issue is as to Salts' claim to an interim payment to reflect interest on Salts' costs. I reject this claim as Salts has not adduced any evidence as to the dates when bills were rendered in respect of those costs or as to the date(s) of any payment(s) made by Salts in respect of such costs. It is, therefore, impossible to make any assessment of the sort of sums that might be due by way of interest.

#### **Permission to appeal**

45. The final issue is whether I should give Coloplast permission to appeal. In this regard, Coloplast has filed draft Grounds of Appeal and it seems to me that these do raise issues of law or of principle and do not constitute attempts to re-argue issues of fact. In my judgment, Coloplast has a real prospect of success on an appeal and I will grant permission to appeal on the basis of the draft Grounds.