



Neutral Citation Number: [2019] EWHC 526 (TCC)

Case No: HT-2016-000101

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2019

Before :

SIR ANTONY EDWARDS-STUART

Between :

HAMAD M. ALDREES & PARTNERS
- and -
ROTEX EUROPE LIMITED
(COMPANY NUMBER 04307924)

Claimant

Defendant

Mr Graham Chapman QC & Mr Tim Chelmick (instructed by **Pinsent Mason LLP**) for the
Claimant
Mr Piers Stansfield QC and Mr Nicholas Bacon QC (instructed by **DTM Legal LLP**) for the
Defendant

Hearing dates: 15th February 2019

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.

.....
SIR ANTONY EDWARDS-STUART

Insert Judge title and name here :

The matters covered by this judgment

1. This is a judgment on costs and other consequential matters arising out of a judgment that was circulated in draft on 11 February 2019.
2. This case, and particularly the production of this judgment, has had a chequered history. The trial took place in February/March 2018, but unfortunately following the service of written final submissions, leading Counsel for Rotex was taken ill and was unable to take any further part in the case. Consequently Rotex had to instruct fresh leading Counsel for the purposes of presenting Rotex's oral closing submissions.
3. As a result of this, the oral closing submissions did not take place until Friday, 22 June 2018. The first draft of the judgment was circulated to the parties, on the usual terms, on 16 October 2018. In that judgment I concluded that, whilst Aldrees had failed to prove its claim for some £38 million, it did suffer losses as a result of the breach of contract by Rotex that were far, far smaller than the loss claimed. I concluded that these actual losses were subsumed in the claim as advanced in the pleadings and at the trial.
4. However, since this was not the way that the case had been put by Aldrees, even in the alternative, I considered that Rotex was entitled to be heard, not only on the new way of formulating the claim, but also whether it would be fair to Rotex to permit Aldrees to recover damages on this basis at such a late stage in the proceedings.
5. Unfortunately, it was not possible to arrange a further hearing until 11 January 2019. I heard counsel for the parties on that day, following exchanges of written submissions by both parties, and then circulated a revised draft judgment on 11 February 2019. In that judgment, I concluded that it would not be unfair to Rotex to permit Aldrees to recover damages on the reduced basis but I decided that it would not be fair, or practicable having regard to the state of the evidence, to permit Aldrees to recover any damages in respect of the additional costs of having to use synthetic 170 µm meshes for the bottom decks (which formed part of the new way of putting the claim).
6. However, at the hearing on 11 January Aldrees raised a further point in relation to the application of a 15% uplift to certain production figures that I had adopted for the purposes of the claim. I felt that this point had not been properly explored at the hearing on 11 January and so I reserved it for further argument at the hearing that had been provisionally fixed for 15 February 2019 for the determination of questions relating to interest and costs.
7. This judgment therefore concerns:
 - (1) The 15% uplift;
 - (2) Interest;
 - (3) Costs; and
 - (4) An application by Aldrees for permission to appeal.

The 15% uplift

8. The point arises in this way. I found that the effect of the off-centre feed to the machines and the need to fit 170 µm meshes to the bottom decks resulted in a 15% loss of product during production. I held that Aldrees was entitled to recover damages for

this loss from the date when each machine was brought into commercial production until November 2014.

9. However, Mr Chapman, who appeared as before with Mr Tim Chelmick for Aldrees, submits that a similar uplift should be added in respect of the period of delay before each machine was brought into production because, if there had been no breach of contract, the machines would have produced a higher yield during that period.
10. Mr Stansfield, who appeared with Mr Nicholas Bacon QC, for Rotex, submitted that it was inappropriate to make any further changes to the draft judgment that went beyond the way in which the claim had been formulated in my first draft of the judgment. The purpose of the further hearing had been to give Rotex an opportunity to address the new way of putting the claim and to make any submissions about whether or not it would be fair to allow it. It was not the intention, submitted Mr Stansfield, to give Aldrees a yet further opportunity to embellish the claim or to advance a new one.
11. Mr Chapman submitted that this was no more than a variant of the way in which the claim had been formulated and that Aldrees was doing nothing more than achieving logical consistency.
12. On this point, I prefer the submissions of Mr Stansfield. The court has already shown considerable indulgence to Aldrees by reformulating part of its claim in a way that it considered to be fair: the exercise was not intended to be a springboard for subsequent development of that new way of formulating a claim.
13. However, Mr Stansfield also had a further point on the merits. He submitted (correctly) that the loss had been assessed by the court on the basis of the figures that had been put forward by Mr Turk, namely that during 2014 each machine had been capable of producing 30-40 tph of product, which corresponded to a maximum throughput of about 50 tph. 50 tph was the figure that Rotex had given in its quotation as the throughput that the machines could achieve.
14. However, to increase the figures taken by Mr Turk by 15% would mean that the upper end of the range, in terms of assessed throughput, would become significantly greater than 50 tph - the level of throughput promised by Rotex. Accordingly, submitted Mr Stansfield, this would have the effect of compensating Aldrees by reference to a higher figure for throughput than the figure which Rotex had promised.
15. Mr Chapman submitted that Mr Stansfield was simply re-presenting the argument that I had rejected at paragraph 400 of the draft judgment. Whilst there is some force in this submission, I consider that it does not really dispose of Mr Stansfield's point. I consider that, if the matter was being approached afresh, it might be possible to adjust the figures so as to remove the anomaly identified by Mr Stansfield: but in my view this is neither the time nor the place to do it. The conclusions that I reached in the draft judgment should not now be the subject of a minute analysis and possible consequent recalculation (for which neither party is contending – beyond the straight 15% uplift sought by Aldrees). It may be that the approach which I have adopted has slightly underestimated the loss sustained by Aldrees; but I am quite satisfied that to adopt the proposal suggested by Mr Chapman would result in an overestimate of the loss. In these circumstances, I consider that I should accept Mr Stansfield's submissions and leave the figures as they are.

Interest

16. The rival contentions of the parties are some way apart. Aldrees contends that it should have interest at an overall rate of 5%, whereas Rotex contends that the rate should be 3%.
17. I was referred to the decision of Marcus Smith J in *Britned Developments v ABB* [2018] EWHC all 2913 (Ch). At paragraphs 16 and 17 he said this (omitting the references in the footnotes):
- “16. Section 35A of the Senior Courts Act 1981 provides that this court may include in any sum for which judgment is given "simple interest, at such rate as the court thinks fit...on all or any part of the debt or damages in respect of which judgment is given...for all or any part of the period between the date when the cause of action arose and...the date of the judgment".
17. Section 35A thus confers a broad discretion on the court. This discretion has been considered in a number of cases, and the following propositions emerge:
- (1) An award of interest is not punitive and the use to which the party paying interest would have put the funds (and the returns that such party may or may not have made) is irrelevant.
 - (2) There is a convention that at least the starting point for the award of simple interest (at least where the award is in £ sterling) is Bank of England base rate plus 1%. However, where the award is in another currency, like US\$, the US\$ Prime Rate plus 1% will be used as the starting point.
 - (3) This conventional rate will, usually, be less than what a claimant would have to pay as a borrower, but more than a claimant could earn as a lender. The appropriate benchmark, however, is not to regard the claimant as the lender of monies (inferentially, to the defendant), but rather as having had to borrow money in order to fund the loss that has been vindicated by the award of damages in the judgment. It is this that informs the court's departure from the conventional starting point: the overall aim is to determine a fair rate to compensate the claimant.
 - (4) When considering the departure from the conventional starting point, a broad brush approach must be taken. In *Fiona Trust*, Andrew Smith J put the point as follows:

"A "broad brush" is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate...The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional."
 - (5) Specific evidence (eg as to the claimant's borrowing rates) may be adduced to support a particular departure from the conventional rate or as regards the particular circumstances of the claimant.”

18. At paragraph 19, he observed that the contentions which had been made to him were, in his view, “substantially inconsistent with the broad-brush approach that the courts adopt when assessing interest”. He then went on to say this:

“Using that broad brush, I must seek to determine a "fair rate". I should point out that a "fair rate" is (whatever the rate) going to be very far removed from the commercial rate at which a claimant will borrow. That is because a claimant will borrow at a certain rate compounded, whereas section 35A explicitly only allows an award of simple interest. If a compounded rate is sought by a claimant, then the claim is one of damages which must be pleaded and proved. The exercise under section 35A is very different.”
19. Neither party suggested that this was not a fair summary of the authorities, and so I gratefully adopt it.
20. Mr Chapman, whilst accepting that the starting point was base rate plus 1%, submitted that the courts have regularly departed from this starting point and that in this case it would be fair to award interest at a rate of 5%, being 3% above the base rate of Saudi Arabia for the majority of the period.
21. Mr Stansfield submitted that, following the approach taken in *Britned*, it would be appropriate to award interest at the 12 month Saudi interbank rate plus 1%. Calculations produced by Rotex showed that the average 12 month figure during the relevant period based on that rate was 2.29% pa. Thus he submitted that the court should not award interest at more than 3.29%.
22. During the hearing Mr Chapman referred the court to a letter dated 1 November 2011 from the Saudi Industrial Development Fund (“SIDF”), which set out the terms of a loan to Aldrees of SAR 26 million. This included “expenses” of SAR 2 million. Mr Chapman submitted that the latter figure essentially represented interest, which he submitted equated to a rate of 7.69% of the facility.
23. In addition, Mr Chapman also referred to Aldrees’ statutory accounts for 2015, which included a figure in respect of “funding expenses” of SAR 1,062,335. This was in respect of a “murabaha” loan (murabaha is a form of Islamic funding structure), of which the average total amount for 2014 and 2015 was about SAR 16.3 million. This, submitted Mr Chapman, represented a funding cost of about 6.5%. Accordingly, he submitted that this supported his contention that 5% would be a fair rate of interest in the context of this case.
24. Mr Stansfield protested that he had been given no notice of Mr Chapman’s intention to rely upon these documents and so he asked for permission to make written submissions in response. This seemed to me to be a reasonable request, and so I granted it. Rotex subsequently produced a five page written submission on these documents, to which Aldrees put in a brief note in reply.
25. In relation to the SIDF loan, Mr Stansfield pointed out that the repayment programme provided for instalment payments over a period of 5.75 years. He therefore submitted that Mr Chapman’s figure of 7.69% was not realistic: he said that a calculation of simple interest for the entire period of the loan produced a figure of 1.33%. However, he accepted that this simple calculation would underestimate the true equivalent interest

rate, because it would not take account of the gradual reduction in the capital balance during the period of the loan. Taking this into account, he suggested that the expenses of SAR 2 million equated to an annual interest rate of about 2.5%.

26. In relation to the murabaha loan, Mr Stansfield produced calculations to show that the average rate over the four years, 2013 to 2016, was 4.8%. This, he submitted, did not support Aldrees's submission that interest should be at the rate of 5%. Further, Mr Stansfield submitted that this "funding expense" was likely to include other charges, which cannot be regarded as equivalent to interest as a reduction should be applied to take this into account.
27. Mr Stansfield submitted that an arithmetical average of the rate of about 2.5% for the SIDF facility and the 5.8% for the murabaha loan, produced a figure of 3.6%. Taking a broad view, after making an appropriate reduction for arrangement fees and other charges, would indicate that the rate of 3% proposed by Rotex was reasonable.
28. Mr Chapman responded by submitting that the SIDF funding was long-term project financing which was likely to materially understate the interest cost in respect of the day-to-day financing of Aldrees' business. Accordingly, he submitted that to adopt the 3% contended for by Rotex would not be fair. As to the murabaha loan, he pointed out that the average funding costs for the years 2014, 2015 and 2016 was 5.5%, but even at the average of 4.8% taken by Rotex, he submitted that to take a rate of 3% would not produce a fair result.
29. I consider that to award interest at 5%, as Aldrees contends, would be to award interest at a rate which is probably higher than that which Aldrees had to pay for the murabaha loan which, I find, as Mr Stansfield contended, would have included charges such as arrangement fees. A rate of 5% would certainly be greater than the true rate of interest payable under the SIDF facility.
30. In the light of the submissions and the material deployed by Aldrees, I consider that there are grounds for departing from the conventional base plus 1% approach, but I regard a rate of 5% as overgenerous. Taking into account the fact that interest rates were much lower in 2013, which is before the period during which I consider interest should be awarded, and somewhat lower during 2014, I propose to take a rate of 3.25%, up to 31 December 2014, and thereafter to take a rate of 4% up to date of payment.
31. I consider that the appropriate starting point for the running of interest is 1 January 2014, given the different dates on which individual machines should have been and were brought into production.
32. I will leave the parties to agree the precise amount.

Costs

33. The position of the parties in relation to costs is way apart. Aldrees submits that Rotex was the unsuccessful party and should therefore pay Aldrees' costs of the action. Rotex, by contrast, submits that there is no proper basis to treat Aldrees as the successful party and that Rotex should have a substantial part of its costs of the action. It accepts that in its order for costs the court will want to reflect the outcome of certain issues (such as the terms of the representations, the timing of the agreement and the incorporation of Rotex's standard terms) and the failure of Rotex's counterclaim, with

the result that there should be some reduction in Rotex's legal costs, but it submits that this should be no more than about 40%.

34. I think that it I should begin with a consideration of the litigation overall.

An overview of the litigation

35. From start to finish Aldrees contended that this was a straightforward case. As I observed in the principal judgment, I consider that it was nothing of the sort. Indeed, I have found it to have been one of the more difficult cases that I have had to decide. The difficulty has come about owing to a variety of factors: the complex issues arising out of the original tests carried out by Rotex; the misunderstanding about the configuration of the machines when the experts carried out their visit (and the consequent difficulty in deciding what conclusions are to be drawn from Professor Lieberwirth's tests); the paucity of information relating to Aldrees' production during 2014; and, by contrast, the plethora of data about the quality and nature of the feedstock that was used (particularly from 2015 onwards).
36. Standing back from the detail, it is quite clear that the machines as delivered were never capable of meeting the contractual specification. This was for at least two reasons: first, because the machines had been fitted with the wrong bottom meshes and, second, because the feedstock was not fed evenly onto the screens of the machines. It seems that so far as Rotex was concerned, each of these points emerged for the first time when the report of Professor Lieberwirth was served in November 2017, about three months before the trial. Matters were compounded by the fact that the same (incorrect) meshes were fitted to one of the machines in preparation for Professor Lieberwirth's tests in the belief that they were the meshes identified in the original specification. Unfortunately, no one appreciated this at the time and it was only afterwards - when he was preparing his report - that Professor Lieberwirth spotted a discrepancy between the part numbers of the relevant meshes and realised what had happened.
37. Even though Rotex knew before the trial that incorrect bottom meshes had been fitted to the machines when they were first delivered, it never appeared to have appreciated the significance of this error. In fact, Rotex asserted that "the claims in contract must fail", and on two separate occasions in the summary in its opening submissions Rotex asserted that there had been "no breach" of contract on its part (see paragraph 12). The additional problem caused by the off-centre feed noted by Professor Lieberwirth was never mentioned at all.
38. A factor which contributed to this erroneous view of its position was Rotex's belief (asserted until early in the trial) that the machines had been put into use by Aldrees before they had been "wet commissioned" by Rotex. This was not correct. This mistaken belief was the result of a failure by Rotex to appreciate that its engineer, Mr Smith, had visited Aldrees during June 2013 in order to commission the machines and had commissioned at least one of them (a fact that was recorded in Rotex's own internal documents). This was demonstrated conclusively during the evidence of Mr Turk, Aldrees' Production Manager, by the production of a photograph of Mr Smith taken at the factory in June 2013, which in turn led to subsequent disclosure by Rotex of travel documents showing that Mr Smith had visited the Aldrees factory at that time.
39. I found as a fact that the machines as delivered were not capable of achieving the contractual throughput, and that they needed significant modification before being able

to do so. This inevitably resulted in a delay in putting the machines into commercial production, which was further aggravated by the fact that in early 2014 Aldrees had insufficient meshes (the replacements for the meshes incorrectly installed on delivery) in order to be able to use all four machines. The result was that two of the four initial machines were not brought into commercial production until May 2014.

40. All this was a direct result of breaches of contract by Rotex as set out in the principal judgment. The problems that occurred following the first attempt to commission the machines in June 2013 should have led Rotex to appreciate that the machines as delivered were not capable of achieving the promised throughput. However, it seems that Rotex was not prepared to accept this and that its mindset throughout was that there was nothing wrong with the machines and that the only reasons why the contractual throughput was not achieved from the outset were factors external to the machines, such as changes in specification or the quality of the feedstock. As Mr Chapman put it during his submissions, Rotex ran every available point and fought the claim tooth and nail.
41. In these circumstances I view with some scepticism the assertion by Mr Dieckman that Rotex would have taken a materially different approach if the claim presented had been limited to £1-2 million, rather than, say, £10 million (as first intimated in March 2016) or £26 million (as originally pleaded). Having heard all the evidence I was left with the very strong feeling that Rotex regarded this claim as a challenge to its products and commercial reputation which had to be defended.
42. Leaving that aside, I consider that there is considerable force in the submission made by Mr Chapman for Aldrees that the court should be very wary of accepting evidence of this sort unless there has been a full waiver of privilege by the party putting it forward. There has been no such waiver in this case.
43. Having said that, I would say also that the approach to the case adopted by Aldrees was hardly any better. It maintained an untenable position in relation to what it said had been represented by Rotex in relation to the throughput of the machines, and it simply brushed aside the obvious difficulties presented by its own contemporaneous documents relating to levels of production, such as they were. In spite of obvious difficulties, it just pressed on regardless in the pursuit of a very substantial claim.
44. It is also relevant to note that the basis on which Aldrees recovered damages, admittedly with some input from the court, was encompassed by its original claim. This is not a case where Aldrees recovered on a head of claim advanced for the first time very late in the day or made in the alternative such that it could only succeed if its primary claim failed - as in *Rotam v GAT* [2018] EWHC 3006 (Comm). Nor is it a case where liability had been admitted and what was in issue was causation and/or the quantum of damages (as in the leg amputation cases).
45. In addition, it is not a case where the sum recovered was derisory; even though it was only about 2% of the sum claimed. There is, in my view, a significant difference between recovering, say, £500,000 and recovering £5,000 or £10,000, even if in each case the sum recovered is only 1-2% of the claim. Not only is the former sum intrinsically larger, and therefore a more worthwhile recovery, it is likely to bear a more realistic relationship to the expenditure of costs necessary to recover it. I do not suggest that these matters are decisive; rather they merely go to show that every case is

different and fact specific and that observations made in other cases must be considered in their context.

The authorities

46. In *Oksuzoglu v Kay* [1998] 2 All ER 631, the claimant, a five year old boy, had his leg amputated in order to save him from certain death. He claimed damages from two general practitioners for failing to refer him to hospital earlier, which would, it was claimed, have saved his leg. The claim in respect of the amputation failed on the ground of causation.
47. At paragraph 58, Brooke LJ, with whom Hirst and Millett LJ agreed, said this:
- “In this line of cases, where the plaintiff only recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the court is entitled to ask itself: “Who was essentially the winning party?” It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted . . . or where the defendants did not have a proper opportunity to make a payment into court which obviously would not have been accepted . . . Although all these cases are different, in the present case the substantive *lis* between the parties on the trial of the preliminary issues related to the big claim on which the plaintiff wholly failed.”
48. In *Kastor Navigation v Axa Global Risks* [2004] EWCA Civ 277, Rix LJ, giving the judgment of the court, said, at paragraphs 143-146:
- “143. It is trite to state but important to bear in mind that the rules prescribe the way in which the court’s discretion as to costs should be exercised rather than any decision of this court on the facts of any particular case. The general rule is that the “unsuccessful party will be ordered to pay the costs of the successful party” (CPR 44.3 (2) (a)). Does this mean successful party on any particular issue or successful party in the litigation? As a matter of construction it must mean the latter. Where the rule refers to part of a case or a particular allegation or issue it says so.
144. Mr Berry suggested that in *Summit Property Ltd.v Pitmans* [2001] EWCA Civ 2020 Chadwick LJ had, as he put it, “redefined who has won”. In that case the judge had ordered the successful defendant to pay 65% of the unsuccessful claimant’s costs. This court confirmed that under the CPR it was no longer necessary for a party to have acted unreasonably or improperly before he could be required to pay the costs of the other party of a particular issue on which he had failed. In the course of his judgment Chadwick LJ said:
- “An issue based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the cost of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue by issue based approach to costs.”

Longmore LJ who gave the leading judgment in this case (with which Tuckey LJ agreed) did not put it in this way, but Chadwick LJ’s general approach has

subsequently been approved by this court in *Stena v Irish Ferries Ltd* [2003] EWCA Civ 214.

145. We do not read Chadwick LJ's judgment in the way Mr Berry suggests. He does not refer to the terms of CPR 44.3 (2) (a). All he is saying is that if in carrying out the exercise required by CPR 44.3 (4) the court is considering the question of costs on an issue by issue basis and decides that costs should follow the event on a particular issue then "the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded . . .". This was said in a case where it had been submitted (based on *Elgindata* principles) that before the judge could make an order which not only deprived the successful party of his costs on an issue, but also required him to pay the costs of the other side, he had to be satisfied that there had been some element of unreasonableness or impropriety.

146. So we do not therefore think that Chadwick LJ said anything to cast doubt on what we think is the plain meaning of CPR 44.3 (2) (a). The owners were undoubtedly the successful party in this case. They had recovered the full amount of their claim plus interest. In *A.L. Barnes Ltd. v Time Talk (UK) Ltd.* [2003] EWCA Civ 402 Barnes had obtained judgment for a substantial part of their claim but were ordered to pay 50% of the other side's costs because the judge had made a finding that one of its directors was dishonest, an issue which had taken up "the great bulk of court time". This had led the judge to conclude that the defendant was the successful party. In allowing the appeal Longmore LJ (with whom Clarke and Ward LJJ agreed) said:

"It does seem to me that the judge has, with the greatest respect, fallen into an error of principle. In what may generally be called commercial litigation . . . the disputes are ultimately about money. In deciding who was the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure."

49. In *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750, the claimant alleged that the negligence of the defendants had caused the amputation of his leg. Primary liability was not in issue, but the defendants argued that even if they had made the correct diagnosis, amputation of the Claimant's leg would have been necessary in any event. On that issue, they were successful. Thus the claimant recovered only £2,000 in a case where the agreed value was about £500,000. The President of the Queen's Bench Division, giving the principal judgment of the court, observed that no rational person would issue proceedings in the case of that kind if the recovery was only £2,000, and that no rational person would contest such proceedings if they were issued (at paragraph 16).

50. At paragraph 17, the President said this:

"In my judgment, the deputy judge was wrong in principle to conclude that the respondent was the successful party. The award of £2,000 was insignificant in the context of the claim and the action as a whole, and, although it was technically within the pleaded claim, it was in truth a last minute addition to salvage something (0.25%) from an action which the respondent lost. The whole action was about the cause of the need for the respondent to undergo a leg amputation, and, for all that the first defendants did not admit breach until a late stage, the second defendant's early admission would have carried the entire claim, if the respondent had succeeded on causation. The causation issue was squarely advanced in the original defences."

51. In *Magical Marking v Ware & Kay* [2013] EWHC 636 (Ch), Briggs J gave a judgment on costs following a trial in which the claimant advanced a claim for damages exceeding £10 million but recovered only £28,000. He found that a modest proportion of the claimant's many allegations of negligence against the defendant had been proved, following a three week trial involving over 50 lever arch files of documentation.

52. At paragraph 5 of this judgment, Briggs J said:

“Consistent with CPR 44.3 (2) (a), the first stage is to decide who is the successful party. In *Procter & Gamble v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 2839, Hildyard J said, at paragraphs 6-7 that in a money claim a simple mechanical test of identifying which of the parties is compelled at the end of the day to pay money to the other has much to commend it. Nonetheless, as he acknowledged, a more nuanced approach to the process of identifying the successful party has emerged from a series of Court of Appeal authorities, beginning with *Roache v News group Newspapers Ltd* [1998] EMLR 161 in which, at page 168-9, Sir Thomas Bingham MR said:

”The Judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to finish? Has the defendant substantially denied the plaintiff of the prize which the plaintiff fought the action to win?”

53. Briggs J referred also to the decision of the Court of Appeal in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, a judgment which followed closely after that in *Medway Primary Care Trust v Marcus*, and in which Jackson LJ was also a member of court. He said, at paragraph 11:

“In the *Fox* case, the Court of Appeal (Ward, Moore-Bick and Jackson LJJ) were faced with an outcome where a claimant for personal injuries in the sum of some £280,000 obtained judgment for a net £31,700 odd, beating a Part 36 offer by the defendant of £23,500 odd. It became common ground during the appeal that the claimant ought to be regarded as the successful party. In giving the leading judgment, Jackson LJ included among the principles which are derived from a lengthy summary of the authorities, the following, at paragraph 48:

“In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v Bennett UK Ltd* [2008] EWCA Civ 1658. For example, the claimant may succeed on some of the pleaded particulars of negligence, but not on others.”

At paragraph 63 he concluded:

“In the context of personal injury litigation where the claimant has a strong case on liability but quantum is inflated, the defendant's remedy is to make a modest Part 36 offer. If the defendant fails to make a sufficient Part 36 offer at the first opportunity, it cannot expect to secure cost protection. Different considerations may arise in cases where the claimant is proved to have been dishonest, but (on the Judge's findings) that is not this case.”

54. At paragraph 14, Briggs J said:

“In my judgment the critical distinction between the *Medway* and *Fox* cases is that the former was, but the latter was not, about the question who ought to be regarded in the substance as the successful party. In deciding that question in the *Medway* case, the Court of Appeal followed the *Roache* case, as well as the closely analogous decision of the Court of Appeal in *Oksuzoglu v Kay* [1998] 2 All ER 631.”

Briggs J then quoted the passage from the judgment of Brooke LJ that I have set out above.

55. Directing himself in accordance with the principles in the *Roache* line of authorities, he went on to reach the “clear conclusion” that Ware & Kay ought to be regarded, in substance, as the successful party (at paragraph 16).

56. In *Fox v Foundation Piling Ltd*, Jackson LJ said this, at paragraph 62:

“There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3(2(a) [that the “unsuccessful party will be ordered to pay the costs of the successful party”] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in (a) numerous first instance hearings in which the issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example.”

57. In *Atlasjet Havacilik Anonim Sirketi v Kupelli* [2018] EWCA Civ 1264, the Court of Appeal (Davis and Hickinbottom LJJ) was concerned with an appeal on the question of costs. After setting out the relevant provisions of CPR 44.2, which appear under the heading “Courts discretion as to costs”, Hickinbottom LJ, with whom Davis LJ agreed, said (at paragraph 5) that, in relation to that rule, several points were worthy of note. He set out the following:

“i). In considering orders for costs, the court is of course bound to pursue the overriding objective as set out in CPR rule 1.1, i.e. it must make an order that deals justly with the issue of costs as between the parties. Therefore, when considering whether to make a costs order - and, if so, the order it makes - the court has to make an evaluative judgment as to where justice lies on the facts and circumstances as it has found them to be.

...

6. Although, as CPR rule 44.3(2)(b), (4), (5) and (6) demonstrate, there may be all sorts of reasons for departing from the principle, in providing that, if the court decides to make an order for costs, the general rule is that the “the unsuccessful party will be ordered to pay the costs of the successful party”, CPR rule 44.2(2)(a) represents the *prima facie* or starting position . . .

7. . . .

8. It is well-established that the question of who is the “successful party” for CPR purposes requires a fact-specific evaluation by reference to the litigation as a whole . . .
9. In the context of private law claims, in *Bank of Credit and Commerce International SA (In Liquidation) v Ali* (No 4) (1999) 149 NLJ 1734 (“BCCI”), Lightman J said that:

“For the purposes of the CPR, success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense.”

58. Hickinbottom LJ then went on to refer to two decisions in which the Court of Appeal had said that the question of who is the successful party can usually be determined by deciding who has to write a cheque at the end of the case: *Day v Day* [2006] EWCA Civ 415; *A.L. Barnes Ltd. v Time Talk (UK) Ltd.* [2003] EWCA Civ 402.
59. However, at paragraphs 14 and 15 he went on to say this:
 - “14. There are, however, limits to which the “the payer of the cheque” must be considered the unsuccessful party in the litigation. In *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750 . . . the claimant claimed that he had had his left leg amputated as a result of the clinical negligence of the defendant. The defendant admitted breach of duty, but denied causation. On the basis of the claimant’s case, quantum was agreed £500,000. However, the defendant succeeded on the causation issue, and the claimant was awarded only £2,000 for pain and suffering. There had been no offer on quantum by the defendant, either in Part 36 form or otherwise. The trial judge ordered the defendant to pay 50% of the claimant’s costs. The majority of the Court of Appeal (Sir John Thomas PQBD and Tomlinson LJ) considered that no rational person would have pursued proceedings to recover only £2,000, and the real claim had failed. The defendant was therefore the successful party. Nevertheless, although the absence of a Part 36 offer was not a reason for reducing the costs, it was relevant defendant had not made a Calderbank offer of a small amount, together with costs proportionate to the recovery. In the circumstances, the claimant was ordered to pay 75% of the defendant’s costs.
 15. However, as an illustration of how strong the direction of money transfer may be taken to reflect success for these purposes, it is noteworthy that Jackson LJ, in a dissenting judgment in that case, found that the defendant ought to have made a Part 36 offer, and, in its absence, the claimant has succeeded in the action, so that the starting point should be that he was entitled to his costs - albeit with some considerable discount, the award of 50% made by the judge below being (in Jackson LJ’s view) “generous”.”
60. Finally, I was referred to a judgment on costs by Butcher J in *Rotam Agrochemical Company v GAT* [2018] EWHC 3006 (Comm). Although this case was argued about six months after the decision in *Atlasjet*, the Judge does not appear to have been referred to that case. However, he was referred to the other decisions which I have cited above.
61. At paragraphs 18 and 19 of his judgment, Butcher J said this:

- “18. Consistently with this, I consider that if a party, though ordered to pay a sum of money, has in reality and in substance won, it should be regarded as the successful party. In my judgment, in the present case it cannot be said, with any degree of plausibility, that Rotam won, or that they were, in the terms used in *Oksuloglu v Kay*, “essentially the winning party”. By contrast it can be said that GAT, substantially and in reality won, and in particular that GAT substantially denied Rotam the prize which Rotam fought the action to win. Rotam recovered an amount of only some 2% of their claim as initially put forward, and some 3% of their subsequently reduced claim. Their recovery was very significantly exceeded by the costs which they occurred in the action, which were over £1.5 million. In reality, Rotam would not have incurred costs of that magnitude had the price which they were seeking to win been the recovery which they ultimately made.
19. Further, the claim in enrichment on which Rotam prevailed was an alternative claim, which only succeeded on the basis that Rotam’s primary claim failed. Rotam’s evidence and argument in the trial were very largely directed to seeking to establish that a binding collaboration agreement or data transfer agreement had been concluded. To only a minor extent were they directed to establishing a right to restitution on the basis of a failure of consideration, because success on that claim could only arise if Rotam’s principal claims in contract failed. As Mr Cuddigan QC for GAT put it, the claim in unjust enrichment was one which Rotam wanted to lose. This emphasises that it was not the prize which Rotam fought the action to win.
20. I do not consider that the absence of a Part 36 or Calderbank offer from GAT alters the conclusion that it was GAT which was the successful party. I consider that the correct date to judge when any offer might reasonably be expected to have been made was at the point that the claim in unjust enrichment was added to the Particulars of Claim in January 2017. While there had been reference to the sum paid to GAT in the original Particulars of Claim, it was not pleaded as a claim in unjust enrichment. By January 2017 significant costs had already been incurred by the parties in dealing with Rotam’s originally pleaded causes of action, which, as I have decided, were unfounded. A Part 36 offer would have meant that GAT could not recover those costs. A Calderbank offer made by GAT at or after the time of the amendment to pay the amount of the enrichment plus the costs of that issue, but on the basis that Rotam should pay it the costs incurred in relation to the other causes of action, would undoubtedly have been rejected, and the making of such an offer would have been “mere matter of ritual”, as it was put in *Medway*.”

62. Before deciding to apply these authorities to the facts of the present case, I think it is necessary to consider the issues and how they were resolved.

The issues in the case

63. The principal issues raised by the Statements of Case and explored at the trial can be summarised as follows:
- (1) What Rotex said to Aldrees about the performance of the machines and the extent to which such representations were justified.
 - (2) Whether or not the contract incorporated Rotex’s terms and conditions.
 - (3) Whether the machines as delivered were capable of achieving the promised throughput.

- (4) If not, whether and to what extent the loss caused by any initial breach of contract was successfully mitigated by subsequent modifications to the machines, including the fitting of different bottom meshes, by Rotex.
 - (5) What level of throughput the machines were capable of achieving once put into commercial production.
 - (6) Rotex's counterclaim for the balance of the price (due on commissioning).
 - (7) Whether or not Aldrees suffered a continuing loss of production, and hence loss of profit, because the machines were not capable of achieving in service the promised throughput, or whether the reduction in throughput from 2014 onwards was attributable to factors for which Rotex was not responsible.
 - (8) The extent to which there was a continuing market for the product for which the machines had been designed.
64. Taking these issues discretely, without regard for their impact on the eventual outcome, Aldrees prevailed on issues (2), (3) and (6) and in part on (1). Rotex prevailed on (7), in part on (1) and – for want of proof by Aldrees – on (4) and (5). Issue (8) did not really occupy much of the evidence or time at the trial.
65. In terms of issue-based results, therefore, each side had a roughly equal measure of success. However, the analysis cannot stop there because that would ignore the overall outcome, which was that Aldrees achieved, at best, a Pyrrhic victory. Its recovery of about £700,000 was not, of itself, nominal, but it was a tiny fraction (about 2%) of the sum claimed and less than the costs that it incurred in recovering it. To adopt an expression used in the authorities, whilst Aldrees was substantially denied the prize which it fought the action to win, it did achieve something of value which I consider that it probably would not have achieved without fighting the case.
66. However, looking at the outcome from the other end of the telescope, if Rotex fought the action to defend its products, its testing regime and commercial reputation, then it fell short of achieving those aims.

The application of the authorities to the facts of this case

67. I do not find it easy to apply the principles set out in the authorities to the facts of this case. The answer to the question who has to write the cheque at the end of the day, in this case Rotex, does not in my view provide a reliable test for identifying the unsuccessful party.
68. Conversely, I do not consider that the fact that Aldrees recovered only a very modest sum in comparison with the amount claimed provides a conclusive answer either. Rotex lost on many points also, including its counterclaim. If Aldrees had thought that its claim was only worth, say, £1 to £2 million, because it had sustained no loss beyond the end of 2014, it would still have justified the bringing of proceedings, albeit at substantially lower cost. So I do not categorise this as a case where it can be said that no rational person would have pursued the much reduced claim if that had been the sole objective.

69. If Rotex had accepted from an early stage in the litigation (as I consider it should have done) that it had been in breach of contract, not least because it had fitted the machines with the wrong bottom meshes, as a result of which Aldrees would almost certainly recover some damages in respect of the delay in putting the machines into production, it could have made a Part 36 offer or an appropriate Calderbank offer. That, in my view, would have been the appropriate way in which to protect itself against an exposure to costs.
70. Further, for the reasons I have already given I am quite satisfied that Rotex's approach to the case was significantly affected by its erroneous belief that Mr Smith had not visited the Aldrees factory in June 2013 - with the result that it contended that Aldrees had put the machines into production before Rotex had commissioned them and that the initial problems stemmed from that. In addition, as I have already indicated, I consider that Rotex saw this litigation as an unjustified attack on its commercial reputation which had to be defended. In that, it fell far short of being successful.
71. An application of an issue based approach, as set out above, might lead to the conclusion that each party should bear its own costs. However, that would take no account of the facts that Aldrees did recover a sum of money that was significantly more than nominal and that Rotex made no appropriate offer.
72. I should add that after I issued my judgment in draft both parties then made offers to the other. By a letter dated 14 November 2018, Rotex offered to pay Aldrees £700,000, plus interest, with costs to be determined by the court. By letter dated 3 January 2019, Aldrees offered to accept a sum of £2.5 million, plus its costs, together with a supply of 170 µm meshes on the same terms as they were supplied to other customers. Of the two offers, Rotex's was the more realistic, but I do not consider that I should attach a very much weight to either of them since they were not made until after all the major findings of fact were known to the parties.
73. I consider that this case, unlike some of the other cases to which I have referred, is one where the paramount consideration is the absence of any early and admissible offer to pay some compensation for Rotex's breach of contract. I quite accept that there must be a considerable degree of uncertainty as to whether any relatively modest offer - which is all it could have been - would have been accepted. However, it is not for the court to speculate upon whether or not a hypothetical offer would have been accepted; rather, it is for a defendant to make a reasonable offer and then rely on its refusal (if that is what happens). If this was one of those cases in which it would have been impossible to make a Part 36 offer at an appropriate level without incurring a disproportionate liability in respect of costs, then I do not consider that it would not have been possible to write an effective Calderbank letter in appropriate terms.
74. The fact that Rotex was unaware of two significant facts until the trial, or shortly before it, is not in my view a ground which should be permitted to work to its advantage in relation to costs. Both facts (the incorrectly fitted bottom meshes and Mr Smith's visit to Aldrees in June 2013) were ones which ought to have been known to Rotex before any claim was made. It is a matter of speculation what Rotex would have done if they had been aware of these facts and had appreciated their significance. To give Rotex the benefit of the doubt in this situation is to put a premium on unjustified ignorance.

75. I have already indicated that a broad brush conclusion that could be drawn from an issue-based approach is that there should be no order for costs. However, I consider that a more nuanced approach is possible and should be adopted if it leads to a different result.
76. On the basis of the figures in relation to costs put forward by Rotex's solicitor, Mr James Morris, in his witness statement dated 12 February 2019, and my own assessment, I consider that about 40% of Rotex's costs were attributable to the claim for lost production (particularly beyond 2014). There would, in my view, be nothing unjust in ordering Aldrees to pay Rotex's costs to that extent.
77. Looking at the matter from Aldrees' point of view, I consider that no more than about 30% of its costs was spent on that aspect of the case. Accordingly, any recovery in respect of its own costs should be limited to about 70%.
78. The total costs incurred by Rotex were £2,273,306, and the total costs incurred by Aldrees were about £1,839,220 (after converting the expenditure of €253,307 into sterling). Thus Rotex's costs were about 23.5% higher than those of Aldrees.
79. Having regard to the provisions of CPR 44.2(7), and the higher level of costs incurred by Rotex, I consider that the appropriate order is that Rotex should pay 20% of Aldrees' costs: in that way Aldrees will not recover its costs of the issues on which it lost (which I have assessed at 30% of its total costs), and it will in effect forego costs (on issues on which it succeeded) to the extent of Rotex's costs of those issues on which Rotex was successful (that is, 40% of Rotex's costs - which is about the same as about 50% of Aldrees costs).

Permission to appeal

80. Aldrees seeks permission to appeal on two grounds. First, the refusal to award damages for the continuing losses over the lifetime of the machines. Second, that since the court has found that the level of production of which the machines were capable was 15% less than it ought to have been, this loss will continue for the lifetime of the machines and damages awarded accordingly.
81. The first ground raises questions of pure fact. In a case of this sort, primary findings of fact are the province of the trial judge and an appellate court is not in the same position to assess the quality of the evidence of the witnesses judged in the context of the contemporaneous documents.
82. So far as the second ground concerns a loss during the lifetime of the machines, it fails for the same reason. Insofar as it concerns the more limited period in respect of which an award of damages has been made, I have already explained why I consider that it would not be right to add 15% to the figures for lost production prior to the date when each machine was brought into commercial operation.
83. I do not consider that an appeal has any real prospect of success and I can see no other cogent or compelling reason for giving permission to appeal. Permission to appeal is therefore refused.

