

Neutral Citation Number: [2020] EWHC 1285 (TCC)

Case No: HT-2019-000123

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 20 May 2020

BEFORE JOANNA SMITH QC SITTING AS A DEPUTY OF THE HIGH COURT

Between :

DBE ENERGY LIMITED

Claimant

- and -

BIOGAS PRODUCTS LIMITED

Defendant

Mr Mathias Cheung (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Miss Nicola Atkins (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing date: 18 May 2020

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.

Covid-19 Protocol: This Judgment was handed down by the Deputy Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 20 May 2020 at 14:00.

1. Further to my judgment following the trial of this matter (“**the main judgment**”) ([2020] EWHC 1232 (TCC)), I must now address a number of consequential matters relating to interest and costs. These matters were argued before me on 18 May 2020 by

Mr Cheung, on behalf of the Claimant (“**DBE**”) and by Miss Atkins on behalf of the Defendant (“**Biogas**”).

2. This judgment should be read together with the facts and findings in the main judgment, details of which are not repeated here. I use the same abbreviations in this judgment as I have used in the main judgment.
3. During the hearing, I decided that interest would be paid by Biogas at a rate of 1% over base, that Biogas would pay interest on costs awarded at the same rate and that Biogas would have 28 days in which to make payment of the judgment debt. There was no dispute between the parties that from the date of judgment (18 May 2020) to the date of payment, interest should run at the statutory judgment rate of 8%.
4. The remaining matters to which I now turn in this judgment are (i) the period from which interest should run on the judgment debt; (ii) the payment of costs; (iii) the scope of the costs order and (iv) DBE’s application for a payment on account of costs.

The Period from which interest should run

5. In my main judgment, I have awarded **£224,303.77** by way of damages to DBE. This figure is made up of (i) costs which have already been incurred in installing temporary Landia Tanks, (ii) costs which are yet to be incurred in relation to the replacement and reinstallation of the Pasteuriser Tanks and (iii) future loss of revenue that will be suffered once the AD Facility is fully operational.
6. DBE submits that in respect of each of these three forms of loss, it is fair and just to exercise the court’s discretion pursuant to section 35A of the Senior Courts Act 1981 by awarding interest from the end of January 2019 (when the Pasteuriser Tanks failed and the cause of action accrued) to the date on which the Judgment debt is satisfied. However Biogas contends that the court should not treat each of these different forms of loss in the same way for the purposes of interest; Biogas submits that interest on costs already incurred should run from the date on which they were incurred, but that there should be no interest in respect of future costs of replacement and loss of revenue because these are damages which are yet to be incurred.

7. The court's jurisdiction to award interest under the 1981 Act is discretionary. The purpose of an award of interest is fairly to compensate the recipient of interest for being deprived of money which he should have had.

(i) Costs incurred prior to judgment

8. In my judgment there is little difficulty with the costs that have already been incurred by DBE in relation to the temporary Landia Tanks. The conventional approach to economic loss of this type, suffered between the date of accrual of the cause of action and the date of judgment, is to award interest from the date on which the loss occurred (see *B.P. Exploration Co v Hunt (No. 2)* [1979] 1 WLR 783 per Robert Goff J at 846D, upheld on this point in the House of Lords, and the approach taken by this court in *West v Ian Finlay* [2013] EWHC 868 (TCC) per Edwards-Stuart at [389]). Miss Atkins provided a table in her skeleton argument setting out the various dates of loss in relation to incurred costs and, absent any submissions from Mr Cheung to the contrary, I accept the dates set out there together with her calculation of the days to judgment in respect of each head of loss. Interest on all costs incurred is to run from the date when each item of expenditure was incurred.

(ii) Costs to be incurred after judgment in respect of the replacement of the Pasteuriser Tanks

9. In support of his submissions that interest should run from the date of failure of the Pasteuriser Tanks (i.e. the date on which the cause of action accrued), Mr Cheung relied on *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3. In that case, the Court of Appeal, carrying out a re-hearing on quantum, held that Aerospace was entitled to recover damages for the loss and destruction of a private archive on a diminution in value basis by reference to the cost of reinstatement of the archive. In circumstances where the archive had not yet been restored, it was argued that no interest was recoverable. The Court of Appeal rejected this argument:

“In my view there is a fallacy at the heart of Mr Rainey’s argument. It jumps from the true proposition that no remedial costs have yet been incurred to the false proposition that no loss has yet been incurred. The loss was incurred on 3 July 2001 and the fact that in the end the Judge – correctly so we are holding – favoured a computation of most of the loss by reference to the cost of a restoration not yet conducted does not alter

the date of the loss. Informing therefore the Judge's exercise of discretion to award interest under s. 35A of the Act of 1981 should have been "the basic principle that interest will be awarded from the date of loss". So said Robert Goff J in a passage undisturbed on appeal in BP Exploration Co (Libya) Ltd v Hunt (No. 2) [1982] 1 ALL ER 925 at 975j; and he proceeded to add that "the mere fact that it is impossible for the defendant to quantify the sum due until judgment has been given will not generally preclude such an award" (per Longmore LJ at [93]).

10. In *Woodlands Oak Ltd v Conwell* [2011] EWCA Civ 254, the Court of Appeal followed the approach taken in *Aerospace* and rejected an argument that the Recorder had been wrong to award interest on a counterclaim in circumstances where, at the date of judgment, the sums claimed by way of counterclaim had not been incurred (per Sir Anthony May at [35]-[36]).
11. In light of these authorities, I accept Mr Cheung's submission that, insofar as the cost of the replacement and reinstallation of the Pasteuriser Tanks is concerned (together also with management fees and the costs of a programmer (which have been invoiced but not yet paid), I should award interest from the date of accrual of the cause of action.
12. Miss Atkins argues that this approach would result in overcompensation because, if one takes the loss as arising on the date of accrual of the cause of action, it would not have been necessary for DBE to carry out the temporary replacement. I do not, however, follow that argument. The evidence was clear in this case that it was not possible to obtain a permanent replacement for the Biogas Pasteuriser Tanks sufficiently quickly after their destruction to ensure that the seed already in the Digester Tanks would not start to deteriorate and die. That is why it was necessary to source a temporary solution.
13. In summary, therefore, I award interest on the costs of replacement and reinstallation of the Pasteuriser Tanks, together with management fees and the costs of a programmer from the 29 January 2019.

(iii) Loss of Revenue

14. In my judgment, the loss of revenue claim cannot be treated in the same way as the claim in respect of future remedial costs.

15. The loss of revenue claim was argued at trial on the basis that a loss would be incurred once the AD Facility had ramped up to full capacity (which, as at the date of trial it had not yet done). DBE argued that the delay caused by the failure of the Pasteuriser Tanks was critical in that it affected the ultimate date of commencement of operations at the AD Facility, pushing that date back by (as I have found) a period of two weeks.
16. During the course of the hearing on consequentialia, Mr Cheung sought to argue, by reference to a Facility Agreement and an Amended Facility Agreement, that DBE had been forced to borrow at high rates of interest in circumstances where it had suffered loss by reason of the failure of the Pasteuriser Tanks. However, this evidence was not before the court at trial and there is no evidence whatever from DBE to link its borrowing at varying times between April 2019 and February 2020 with the failure of the Pasteuriser Tanks in January 2019. Indeed, the evidence at trial showed that the AD Facility encountered other problems in commissioning and ramping up which caused delay but which had nothing whatever to do with the Pasteuriser Tanks' failure. Accordingly, I fail to see how this point has any relevance to the question of the date from which interest should run in respect of the loss of revenue claim.
17. There is no evidence before the court that the AD Facility has yet reached full capacity.
18. Doing the best I can to ensure a just result which reflects the fact that the loss of revenue claim did not crystallise in January 2019, was not an inevitable claim for loss and was expressly claimed at trial as a loss that would only be incurred upon the AD Facility finally reaching full capacity, I am not going to award any interest in relation to this head of loss.

Costs

19. DBE's submissions on costs are straightforward. It says that, as the winning party, it is entitled to recover all of its costs of these proceedings to be assessed on a standard basis, if not agreed. In its skeleton argument for the consequentialia hearing, DBE made these submissions both by reference to the provisions of clause 16.9 of the DBE Terms and by reference to the provisions of CPR r. 44.2, but in the face of objection from Biogas (based, with some justification, on the failure to establish on the evidence a breach of clause 16.9 of the DBE Terms at trial), Mr Cheung confirmed that he only pursued this submission by reference to CPR r. 44.2. Accordingly, I say no more about

clause 16.9 of the DBE Terms, save to note that Mr Cheung nevertheless relies on Biogas' alleged unreasonable failure to mediate in the context of his general submissions on costs.

20. Biogas accepts that it is inevitable that, as the losing party, it will have to pay a substantial proportion of DBE's costs on the standard basis. However, it contends that in circumstances where DBE has been unsuccessful in relation to two distinct elements of its claim (namely the claim for damages in relation to the Tank Heaters ("**the Tank Heaters Claim**") and the claim for damages amounting to 15 weeks of lost revenue ("**the Delay Claim**")) this is an appropriate case for the court to make an issues-based costs order (in particular an order for payment of Biogas' costs on the Tank Heaters Claim and an order for a reduction in DBE's costs of the Delay claim by 50%), alternatively to reduce the costs payable by reference to the approach in CPR r. 44.2(7) by a fixed percentage. If the latter approach is to be adopted, Biogas argues that it should be ordered to pay only 75% of DBE's costs of the action.

21. The relevant legal principles are set out in detail in the judgment of O'Farrell J in *Triumph Controls – UK Ltd v Primus International Holding Company [2019] Costs LR 1571* at paragraphs [7]-[15] and there is no need to repeat them here. Suffice to say that I have regard to those paragraphs, to the provisions of CPR r. 44.2 and to the guidance given in the authorities cited by O'Farrell J in that case in giving this judgment. I have also read and considered the decision of Yip J in *Amanda Jayne Welsh v Walsall Healthcare NHS Trust [2018] EWHC 2491 (QB)*, to which I was also referred by Miss Atkins. This case appears to me to set out the same principles as appear in *Triumph Controls*.

22. In light of the positions of the parties, I must decide whether there is any good reason to depart from the general rule that DBE should, as winning party, have all of its costs.

23. In support of its contention that I should not so depart, DBE makes the following main points:

- a. First, that it has "*resoundingly succeeded*" on the issues of liability and made a substantial financial recovery.
- b. Second, that Biogas has been wholly unsuccessful on its counterclaim.

- c. Third, that Biogas has persistently failed to make or entertain realistic settlement offers, which demonstrates that DBE could not have obtained the same level of recovery without fighting through to the end.
- d. Fourth, that Biogas has generally engaged in various forms of unreasonable conduct, including unreasonable pre-action conduct, unreasonable failure to mediate, the late introduction of documents and a supplemental bundle at trial and yet the limited deployment of those documents, the unreasonable denial of various aspects of the claim, the unreasonable and biased conduct of Mr Marshall (its technical expert), the unreasonable failure to cooperate on redactions to the Technical Experts' Joint Statement, the unreasonable application to expunge DBE's reply witness statements, the unreasonable dilatoriness in consenting to extensions of time and the unreasonable and disproportionate objections to ongoing disclosure.

24. In arguing to the contrary, Biogas argues that the majority of the points raised by DBE by way of unreasonable conduct on the part of Biogas will be compensated in costs in any event, but submits that DBE's own conduct engages the provisions of CPR r. 44.2(5) in every respect, namely the manner in which the claim was pursued, the reasonableness of bringing particular claims and the extent to which a claim has been exaggerated. In particular, Biogas relies upon:

- a. DBE's pre-action conduct in effectively "bouncing" Biogas into a claim under the Shorter Trials Scheme without properly notifying Biogas of its intention to do so and affording Biogas no time for a Letter of Response.
- b. DBE's failure during the proceedings themselves adequately to particularise its claim and, in particular, its alleged loss of revenue claim.
- c. DBE's failure to provide any details on causation in respect of the Tank Heaters Claim in its statements of case or in its evidence, a failure which it is said led directly to the loss of that claim at trial. In particular, Biogas points to the fact that the main judgment finds that DBE's technical expert did not provide an opinion on the cause of the failure of the Tank Heaters in his expert report.

- d. DBE's failure to provide a detailed breakdown of its loss claim, its failure to plead the method by which its Delay Claim had been calculated and its failure to serve either factual or expert evidence which assisted on the question of the Delay Claim. In this regard, Biogas points in particular to the confused evidence of Mr Sharratt (see the main judgment at paragraph 211) and to the court's rejection of DBE's attempts to try to supplement that evidence by way of a schematic served with its written closing submissions (main judgment paragraph 213).
25. By reference to these main points (and a few others set forth in its skeleton), Biogas contends (i) that DBE's decision to pursue the Tank Heaters Claim absent any reliable evidence in respect of causation was unreasonable and caused the parties to incur unnecessary costs; and (ii) that DBE's pursuit of the Delay Claim quantified by reference to a 15 week period was also unreasonable and exaggerated and itself created an impediment to settlement negotiations.
 26. Both parties referred me to various Without Prejudice Save as to Costs offers that have been made by each side at differing times during the proceedings, but none of these offers seemed to me to take matters much further.
 27. Having regard to the parties' submissions and applying the relevant principles referred to above, I have concluded that it would not be appropriate in this case to make an issues-based costs order, but that a proportional costs order would be appropriate to reflect Biogas' success in defending the Tank Heaters Claim and in reducing the Delay Claim from 15 weeks to 2 weeks. My reasons are as follows:
 - a. First, the central issue (and the issue that took up far and away the most time at trial and in the main judgment) was the issue of liability. DBE won on this central issue.
 - b. Second, the issues arising in relation to liability were substantially the same in relation to both the Tank Heaters Claim and the claim in respect of the Pasteuriser Tanks. The length and cost of the trial would not have been significantly different if the claim had been limited to the claim in respect of the Pasteuriser Tanks. As is clear from the main judgment, there is a substantial amount of common background and the scope of the investigation at trial would

have been very similar. The Technical experts would still have been required to produce their reports and give evidence on issues concerning liability, causation in relation to the Pasteuriser Tanks and mitigation of loss. The factual witnesses each covered issues arising in respect of both the Tank Heaters Claim and the claim in respect of the Pasteuriser Tanks. The evidence as to quantum in respect of the Tank Heaters claim (which had a relatively low value) was comparatively brief.

- c. Third, the length and cost of the trial would not have been significantly different if the Delay Claim had been limited to a 2 week, rather than a 15 week, period. There was no expert evidence on the issue of delay and Mr Sharratt dealt with the point in only two paragraphs out of three statements provided for the trial. The Quantum experts would always have been required to provide evidence as to the daily/weekly loss of revenue that would be sustained by DBE by reason of the delay alleged to have been caused by the failure of the Pasteuriser Tanks.
- d. Fourth, each party can be criticised (with some justification) for its conduct at differing times in the proceedings and Biogas is right to say that insofar as its own unreasonable conduct has caused DBE to incur additional costs, those will be recovered as part of my order. However, in my judgment, Biogas' criticisms of DBE's approach to the Tank Heaters Claim and the Delay Claim have considerable force. In short, the Tank Heaters Claim was doomed to failure by reason of the lack of any adequate evidence on causation (see paragraphs 156-166 of the main judgment). It should not have been pursued and it was unreasonable of DBE to pursue it absent appropriate evidence. The Delay Claim of 15 weeks was, on any proper analysis of the evidence, over-stated. It was not supported by Mr Sharratt's evidence and (as became plain during closing submissions) it was ultimately necessary for DBE to seek to explain that evidence by reference to a schematic which bore no relation to it (see paragraphs 207-214 of the main judgment). Again, this was, in my judgment, unreasonable and resulted in an exaggeration of the amount of DBE's claim.

28. In the circumstances, I accept Biogas' submission that DBE's conduct, as set forth in 27(d) above, should be reflected in costs. However, in circumstances where an issues-based costs order invariably creates practical difficulties (not least because of the

difficulties involved in seeking to dissect the issues and the costs incurred in relation to each issue) and given the terms of CPR r. 44.3(7), it seems to me that the factors I have identified in 27(a)-(c) above militate in favour of a proportional order for costs.

29. Standing back, as I am required to do, and considering the extent to which it is just to deprive DBE of any of its costs, I accept that there were discrete areas of evidence arising out of the Tank Heaters Claim and the 15 week Delay Claim which took up time during the trial and would have caused Biogas to incur costs in successfully defending those claims which would not otherwise have been incurred. That can be reflected in a proportional costs order.
30. Doing the best I can and having regard to the points I have made above as to the likelihood of the trial (both in cost and length) being largely unaffected had the Tank Heaters Claim and the Delay Claim for 15 weeks not been pursued, I conclude that Biogas should pay 90% of DBE's costs to be assessed on the standard basis if not agreed.
31. I should add that, in arriving at this conclusion, I have not had access to any costs budgets (as occurred in *Welsh v Walsall Healthcare NHS Trust*), owing to the fact that this case was heard under the Shorter Trials Scheme and no costs budgets were therefore required. Accordingly, I have had to apply a broad brush with a view to trying to achieve justice between the parties having regard to my own impression of the amount of time that the Tank Heaters Claim and the 15 week argument in respect of the Delay Claim will have taken up in comparison to the other issues before me at trial. This is obviously not an exact science and does not reflect any precise mathematical analysis, but it is the only way that I can try to achieve a just and fair outcome as between the parties.
32. One final point arises by reason of this case having been pursued under the Shorter Trials Scheme. Pursuant to PD 57AB, for cases heard on the Shorter Trials Scheme the court will summarily assess the costs save in "exceptional circumstances". Given that the parties are now in agreement that this case was not, in fact, suitable for the Shorter Trials Scheme in the first place (a point to which I have drawn attention in the main judgment at paragraph 12), it is now common ground between the parties that costs should be subject to detailed assessment.

The Scope of the Costs Order

33. DBE contends that the costs order in its favour should cover not only the costs of these proceedings generally, including the costs of the CMC and the PTR (at which orders were made that costs should be in the case), but also (i) DBE's costs incidental to these proceedings including the costs of compliance with the Pre-Action Protocol and the costs of a failed mediation; (ii) DBE's costs of successfully opposing Biogas' application at the CMC to transfer the case out of the Shorter Trials Scheme, which were ordered by the court to be borne by Biogas in any event; and (iii) the costs of DBE's application to redact the Technical Experts' Joint Statement, which were reserved on Day 2 of the trial.

Costs of the Pre-action Protocol and Mediation

34. Section 51 of the Senior Courts Act 1981 provides that the court has the discretion to award "the costs of and incidental to all proceedings". Mr Cheung relied on the decision in *Vellacott v The Convergence Group Plc* [2007] EWHC 1774 per Rimer J at [226]-[227] for the proposition that these words give the court a broad discretion to award costs for compliance with the Pre-Action Protocol and for a failed mediation.

35. I did not understand Miss Atkins to argue that I had no jurisdiction to make such costs orders. Instead, Miss Atkins argued that, in the circumstances of this case, it would not be just for DBE to recover its costs in relation to either matter. In relation to the Pre-Action Protocol, this was because she submitted that in fact DBE had not complied with the Protocol; in relation to the mediation, she submitted that the court would need to have a great deal more information as to what had taken place at the mediation than was currently available to it, before it could make an order for costs.

36. Having considered the submissions made by both parties, I am not satisfied that it would be just to order that Biogas should pay DBE's costs of either its compliance with the Pre-Action Protocol or its costs of mediation. I say that for the following reasons:

- a. In relation to the pre-action protocol, I am not content that DBE did in fact comply satisfactorily with the Protocol. The key pre-action events concerning the claim in respect of the failure of the Pasteuriser Tanks appear to me to be as follows:

- i. within a day or so of the failure of the Pasteuriser Tanks, DBE wrote to Biogas intimating a claim. However, the letter was not expressed to be a letter of claim, it did not provide detailed particulars of DBE's alleged loss and damage and it did not inform Biogas that it had any particular time in which to reply. Furthermore, it made no suggestion that DBE was considering making use of the Shorter Trials Scheme.
- ii. There then followed some email exchanges between the parties which are somewhat ambiguous as to Biogas' precise position on the potential for mediation, but which make it quite clear that Biogas intended robustly to defend any proceedings which might be commenced against it.
- iii. On 11 February 2019, RPC, on behalf of DBE, wrote to Biogas for the first time asking for its confirmation that it would agree to mediate the dispute. Absent much in the way of a positive response, RPC chased again by letter of 1 March 2019 and then by email on 6 March 2019, making it clear that proceedings would be issued if a positive response was not received.
- iv. On 7 March 2019 (some 5 weeks or so after the failure of the Pasteuriser Tanks), Mr Newey responded to RPC to say that DBE's claims were now being investigated by Biogas' insurers "who will contact you in due course".
- v. On 15 March 2019, Mr Newey emailed RPC pointing out that their reference to proceedings was premature in circumstances where Biogas had not received a protocol compliant letter yet and stating that once this had been received then Biogas' position would be made clear.
- vi. This email appears to have hit home, because on 27 March 2019, RPC wrote a formal letter of claim pursuant to the Pre-Action Protocol for Construction and Engineering Disputes to Biogas. Whether or not this letter was adequate in the particulars that it provided is neither here nor there, because importantly its final paragraph gave Biogas only 7 days

in which to respond (as opposed to the 14 days for acknowledgment and 28 days for reply provided for in the Protocol).

- vii. By email dated 3 April 2019, Biogas said that it would respond but that it needed more time and it expressly referred to its email as constituting an acknowledgment under the Protocol. It confirmed that it would respond on or before 24 April 2019 – i.e. within the 28 day Protocol period.
 - viii. Instead of waiting for a response, DBE commenced proceedings on 9 April 2019.
 - ix. In my judgment, this chain of events does not evidence proper compliance with the Pre-Action Protocol by DBE. This was not a case in which Biogas had been dragging its feet for a significant period of time after first receiving notification of a potential claim. Whilst there had been a few weeks' delay, as at 3 April 2019, there is no reason to suppose that Biogas would not have provided a detailed letter of response to the letter of claim by 24 April 2019 or that it would have refused thereafter to mediate.
- b. In relation to the costs of the failed mediation, DBE's skeleton argument for the consequential hearing contained no details as to what had taken place at that mediation. Mr Cheung took me to a Without Prejudice Save as to Costs letter dated 1 November 2019 written by RPC following the mediation (which asserted that Biogas had not put forward any viable defence on liability and pointed out that the focus of the mediation on the part of Biogas on alternative remedial solutions had been misguided) but I do not consider that this letter is sufficient on its own to enable me to judge the rights and wrongs of what took place. I understand that the parties both made global offers to settle and that those offers came relatively close to each other, but I have no further information about what occurred. I note in this regard that in *Vellacott* the parties agreed that the court could be given information about what had been going on behind the "without prejudice" curtain that would ordinarily be drawn across a failed mediation – a stance that was not adopted in this case. In the

circumstances I am not in a position to conclude that justice requires DBE to recover its costs of the mediation. The parties will each bear their own costs.

DBE's Costs of successfully opposing Biogas' application to transfer the case out of the Shorter Trials Scheme

37. DBE's costs in this regard are already the subject of a costs order in its favour and I did not understand Miss Atkins to seek to contest that order or to suggest that it should be revisited. Accordingly, I need say nothing further on this issue.

DBE's costs of applying to redact the Technical Expert's Joint Statement

38. DBE seeks a summary assessment of these costs as per its statement of costs of 24 February 2020 in the sum of **£2,497.80**. In short, it says that it is entitled to these costs in circumstances where the majority of the redactions proposed by DBE were conceded by Biogas.

39. Biogas opposes such an order. Miss Atkins argues that DBE failed to raise the issue of these redactions at the PTR (when Waksman J was required to consider submissions as to redactions to Mr Marshall's report) and that the redactions that DBE ultimately proposed to the Joint Statement did not follow the order made by Waksman J at the PTR. She also points out that the scope of the necessary redactions was agreed between the parties at trial and that, in the circumstances, it was not unreasonable for Biogas to refuse to consent to DBE's application, particularly where it was made less than a week before the start of trial.

40. I reject Miss Atkins' submissions. Waksman J required substantial redactions to be made to Mr Marshall's expert report at the PTR and it should have been obvious to Biogas that similar redactions would need to be made to the Technical Experts' Joint Statement as a consequence. It ought not to have been necessary for DBE to issue an application for the necessary redactions to be made and it ought not to have taken intervention from the court at the start of the trial before Biogas was prepared to entertain the possibility that redactions were required. Biogas ought to have appreciated that the Technical Experts' Joint Statement contained evidence from Mr Marshall which was inadmissible in light of the decision made by Waksman J at the PTR and it

ought to have taken appropriate steps to remove that evidence long before the start of trial.

41. In the circumstances (and given that Miss Atkins did not address me on the proposed level of the summary assessment that DBE is inviting me to make) I assess DBE's costs of this application in the sum of **£2,497.80**.

Payment on Account of Costs

42. DBE seeks a payment on account of costs pursuant to CPR r. 44.2(8). It is now well established that a payment on account should be 'a reasonable sum'. Mr Cheung drew my attention to the principles summarised at paragraph 44.2.12 of Volume 1 of the White Book 2020, including, in particular,

- a. that a reasonable sum should reflect an estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of a compromise of those proceedings; and
- b. that a reasonable sum would often be one that is an estimate of the likely level of recovery, subject to an appropriate margin to allow for error in the estimation.

43. Owing to the fact that these proceedings are within the Shorter Trials Scheme, there are no costs budgets available. However, in order to assist the court, RPC has produced a signed summary breakdown of DBE's costs to date showing (i) the approximate allocation of the costs to the phases typically shown in a Precedent H cost budget and (ii) a breakdown of the approximate costs allocated to each fee earner. DBE points out that these costs do not include wasted costs occasioned by Biogas' unreasonable conduct in respect of the preparation of the trial bundle and that DBE has kept its costs at a reasonable level by proceeding under the Shorter Trials Scheme and prioritising the use of junior fee earners and/or junior counsel wherever possible for the majority of the work items. DBE accordingly submits that the costs represented in the detailed breakdown (which amount to a total of **£425,187.44** to the end of trial, together with further estimated costs of the consequential hearing of **£32,428**) are within the realistic and reasonable range of costs of recovery in detailed assessment proceedings.

44. DBE submits that a payment on account of approximately 70% of these costs would be a reasonable sum.
45. Biogas does not dispute DBE's entitlement to a payment on account of costs but it points out that any such payment will need to reflect the court's decision in relation to the overall costs of the action (i.e. my decision that Biogas should pay to DBE 90% of its costs). Further, insofar as RPC's summary breakdown of DBE's costs is concerned, Biogas notes that the rate claimed for the partner of £495 per hour exceeds the recoverable rate for London Grade 1 by quite some considerable margin (the applicable rate being £409).
46. My attention was drawn again to the judgment of O'Farrell J in *Triumph Controls* at paragraphs [27]-[36] on the issue of payment on account of costs and I have regard to the principals set out there in paragraphs [29]-[31]. In particular I note that that was also a case in which there had been no detailed bill of costs prepared and RPC (also solicitors for the winning party in that case) had prepared a high level breakdown of the costs incurred, to which the court had regard.
47. The recoverable costs in this case, limited to 90% of DBE's costs following detailed assessment, seem likely to result in a payment of a reasonably substantial sum to DBE. However, given that I have held that the damages recoverable are £224,303.77, it would appear that there is (at least) scope for argument over whether the costs set forth in the RPC summary breakdown of costs are disproportionate to the claims. In that regard, I can very well see that the point advanced before me as to the rate claimed by the partner at RPC may gain traction on assessment.
48. In the circumstances (and doing the best I can on the information available to me) I am of the view that a reasonable sum on account of costs is £200,000, which is just shy of 50% of the total costs bill put forward by DBE after a 10% reduction to account for the decision I have made in this judgment.