Case No: HC07C01917

Neutral Citation Number: [2010] EWHC 888 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2010

Before :

MR JUSTICE MORGAN

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Between :

1) Digicel (St. Lucia) Limited (a company registered under the laws of St. Lucia)
2) Digicel (SVG) Limited (a company registered under the laws of St. Vincent & the Grenadines)
3) Digicel Grenada Limited (a company registered under the laws of Grenada)
4) Digicel (Barbados) Limited (a company registered under the laws of Barbados)
5) Digicel Cayman Limited (a company registered under the laws of the Cayman Islands)
6) Digicel (Trinidad & Tobago) Limited (a company registered under the laws of Trinidad & Tobago)
7) Digicel (Turks & Caicos) Limited (a company registered under the laws of Turks & Caicos)
8) Digicel Limited (a company registered under the laws of Bermuda) **Claimants**

- and -

1) Cable & Wireless Plc
2) Cable & Wireless (West Indies) Limited
3) Cable & Wireless Grenada Limited (a company registered under the laws of Grenada)
4) Cable & Wireless (Barbados) Limited (a company registered under the laws of Barbados)
5) Cable & Wireless (Cayman Islands) Limited (a company registered under the laws of the Cayman Islands)
6) Telecommunications Services of Trinidad & Tobago Limited (a company registered under the laws of Trinidad & Tobago)

Defendants

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Mr Stephen Rubin QC, Mr Huw Davies QC, Mr Stephen Houseman & Mr Rupert Allen (instructed by **Jones Day**) for the **Claimants**
Lord Grabiner QC, Mr Edmund Nourse & Mr Conall Patton (instructed by **Slaughter and May**) for the **Defendants**

Hearing dates: 20th April 2010

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Judgment

Mr Justice Morgan :

INTRODUCTION

1. This judgment deals with various matters which have arisen following the judgment I gave in this action on 15th April 2010: [2010] EWHC 774 (Ch). That judgment describes the parties, the issues in the action, my conclusions of law and my findings of fact. I will not attempt to summarise those matters again and I will proceed on the basis that the reader of this present judgment has access to my earlier judgment.

THE ORDER (APART FROM ISSUES AS TO COSTS)

2. In accordance with my earlier judgment, I order that the Second Defendant do pay to the Seventh Claimant the sum of £2 by way of nominal damages for breach of contract, to be paid by way of set off against the sums payable to the Defendants, in relation to the Defendants' costs, which will be the subject of an order in accordance with this judgment. In all other respects, I order that the claims by all the Claimants be dismissed.

COSTS

3. The principal matters which remain to be determined are as to the costs of the action. The Defendants say that the Claimants should be ordered to pay 100% of the Defendants' costs of the action, to be the subject of a detailed assessment on the indemnity basis. The Defendants also say that I should order an assessment on the indemnity basis in relation to two heads of costs which were the subject of an order on Day 44 of the trial, which order left over for further consideration the basis of assessment of those costs. The Defendants have prepared a summary of their costs to 28th February 2010 which shows a total of some £15.5m. The Defendants say that there may have been further costs which have not been picked up in this summary but which may be put forward at the stage of a detailed assessment.

4. The Claimants do not ask for any order for costs in their favour. They accept that they will be ordered to pay a substantial part of the Defendants' costs. The Claimants say that the right order for costs is that the Claimants should be ordered to pay 80% of the Defendants' costs of the action, to be assessed on the standard basis. In relation to the two heads of costs which were the subject of the order on Day 44 of the trial, the Claimants say that those costs should also be assessed on the standard basis.

5. There are therefore two matters which need attention in relation to costs. First, should the Defendants receive an order for payment of 100% of their costs, or something less than that? Secondly, should the costs which are to be paid by the Claimants to the Defendants be assessed on the standard or on the indemnity basis?

6. For the purpose of considering the points which arise, I find it convenient to address matters in the following order. I will first consider the position in relation to the claims in respect of SLU, SVG, Grenada, Barbados and Cayman and the arguments as to whether the costs in relation to those claims should be on the standard basis or the indemnity basis. I will then consider the points arising in relation to the claims in

respect of T&T. I will then consider the points arising in relation to the claims in respect of TCI. At that stage I will stand back and consider what order or orders for costs I should make having regard to all the considerations which have emerged in my discussion of the earlier topics.

SLU, SVG, GRENADA, BARBADOS AND CAYMAN: COSTS

7. The provisions of the CPR which are relevant are those contained in Rules 44.3, 44.4 and 44.5, which are in these terms:

> ***Court's discretion and circumstances to be taken into account when exercising its discretion as to costs***
> ***44.3***
> *(1) The court has discretion as to –*
> *(a) whether costs are payable by one party to another;*
> *(b) the amount of those costs; and*
> *(c) when they are to be paid.*
> *(2) If the court decides to make an order about costs –*
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
> *(b) the court may make a different order.*
> *(3) The general rule does not apply to the following proceedings –*
> *(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or*
> *(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.*
> *(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –*
> *(a) the conduct of all the parties;*
> *(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and*
> *(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*
> *(5) The conduct of the parties includes –*
> *(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;*
> *(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
> *(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and*
> *(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.*
> *(6) The orders which the court may make under this rule include an order that a party must pay –*
> *(a) a proportion of another party's costs;*
> *(b) a stated amount in respect of another party's costs;*
> *(c) costs from or until a certain date only;*
> *(d) costs incurred before proceedings have begun;*
> *(e) costs relating to particular steps taken in the proceedings;*
> *(f) costs relating only to a distinct part of the proceedings; and*
> *(g) interest on costs from or until a certain date, including a date before judgment.*
> *(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).*
> *(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.*
> *(9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either –*

(a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
(b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

Basis of assessment
44.4
(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
(a) on the standard basis; or
(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
(Rule 48.3 sets out how the court decides the amount of costs payable under a contract)
(2) Where the amount of costs is to be assessed on the standard basis, the court will –
(a) only allow costs which are proportionate to the matters in issue; and
(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.
(Factors which the court may take into account are set out in rule 44.5)
(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
(4) Where –
(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.
(5) Omitted
(6) Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974[1], the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.5.

Factors to be taken into account in deciding the amount of costs
44.5
(1) The court is to have regard to all the circumstances in deciding whether costs were –
(a) if it is assessing costs on the standard basis –
(i) proportionately and reasonably incurred; or
(ii) were proportionate and reasonable in amount, or
(b) if it is assessing costs on the indemnity basis –
(i) unreasonably incurred; or
(ii) unreasonable in amount.
(2) In particular the court must give effect to any orders which have already been made.
(3) The court must also have regard to –
(a) the conduct of all the parties, including in particular –
(i) conduct before, as well as during, the proceedings; and
(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(b) the amount or value of any money or property involved;
(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialised knowledge and responsibility involved;
(f) the time spent on the case; and
(g) the place where and the circumstances in which work or any part of it was done.
(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert)

8. If the action had been confined to the claims in respect of SLU, SVG, Grenada, Barbados and the Cayman, the only issue which would arise in relation to costs would

be as to the basis of assessment. That is to say, the Claimants accept that they were the unsuccessful party in all respects in relation to those claims and that costs should follow the event. The Claimants say that these costs should be assessed on the standard basis; the Defendants say these costs should be on the indemnity basis.

9. As rules 44.4 and 44.5 make clear, there are two differences between the two bases of assessment. The first difference is as to the party who bears the relevant burden of persuasion in a case of doubt as to whether costs were reasonably incurred or reasonable in amount. The second difference is that with the standard basis of assessment the paying party has the benefit of the limitation that only costs which were proportionate to the matters in issue are recoverable and this limitation is reinforced by the direction that any doubt on that score is resolved in favour of the paying party.

10. On the question as to the basis of assessment of costs, the choice for the court appears to be between either the standard basis or the indemnity basis. First of all, neither party asked me to adopt a position half way between the two bases, for example, by removing one of the differences between the two bases whilst leaving the other in force. Further, the provisions of rule 44.4(4) appear to prevent the court from saying, for example, that the costs should be assessed on a basis where the burden of persuasion in a case of doubt is on the paying party but that the paying party should retain the benefit of the requirement of proportionality; but see the note in Civil Procedure at paragraph 44.4.4.

11. There was little between the parties as to the principles to be applied in making the choice between the two bases of assessment. However, in order to explain my approach, I will refer to the essential principles which I will attempt to apply.

12. First, on either basis, the receiving party is only entitled to receive costs which it has actually incurred and, further, is only entitled to receive costs which were reasonably incurred and reasonable in amount.

13. Secondly, the standard basis, as the name suggests, is the normal basis of assessment: see Reid Minty v Taylor [2002] 1 WLR 2800 at [28] and Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson [2002] EWCA Civ 879 at [32]. This proposition has the result that there has to be something about the present action which takes it outside the norm before it would be appropriate for the court to award costs on the indemnity basis.

14. Thirdly, cases vary considerably and the Court of Appeal has declined to lay down guidelines on the subject: see the Excelsior case at [32].

15. There are cases which are outside the norm where the receiving party does not criticise the behaviour of the paying party. An example given in Excelsior was of a test case. However, in most of the cases where the court has to consider an application for indemnity costs, the receiving party is critical of the behaviour of the paying party in some way. The present is such a case.

16. Where the application for indemnity costs is put on the basis that the behaviour of the paying party justifies that response, it may be helpful to refer to how the matter was described by Colman J in National Westminster Bank plc v Rabobank Nederland (No

2) [2008] 1 All ER (Comm) 243. The learned judge set out the relevant rules of the CPR and referred to a number of decisions of the Court of Appeal. He then collected a number of statements of judges at first instance which had "attempted to develop more coherent objective criteria for indemnity costs orders". He then said at [26] – [30]:

> **[26]** Against that background one comes to the notorious and, on its facts, extreme, case of *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm), [2006] All ER (D) 175 (Apr) in which Tomlinson J made an indemnity costs order against the claimant and in doing so, set out (at [25]) a helpful summary of what he considered to be matters relevant to be taken into account in deciding whether to make an indemnity costs order in the following words:
>
> '(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.
>
> (2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.
>
> (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.
>
> (4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.
>
> (5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.
>
> (6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross-examination.
>
> (7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.
>
> (8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings: (a) where the claimant advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time; (b) where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end; (c) where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media; (d) where the claimant, by its conduct, turns a case into an unprecedented factual inquiry by the pursuit of an unjustified case; (e) where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched; (f) where the claimant pursues a claim which is irreconcilable with the contemporaneous documents; (g) where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.'

[27] I would, however, make the following comments on this summary.

[28] Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself. It is important to distinguish in Tomlinson J's formulation of relevant considerations between that underlying concept and his identification of examples of more specific patterns of conduct capable of rendering a party's overall conduct relevantly unreasonable or inappropriate. Grounds (4) to (8) inclusive are specific examples of conduct which, taken alone, or in combination, may in all the surrounding circumstances often be capable of giving rise to a conclusion that the losing party's conduct has been so unreasonable or inappropriate overall as to justify an order which gives him a more effective costs indemnity than would be the case under the standard order. But in each case in which the costs of the whole litigation are under consideration, the conduct adversely criticised must be looked at in the context of the entire litigation and a view taken as to whether the level of unreasonableness or inappropriateness is in all the circumstances high enough to engage such an order. This approach leaves entirely intact the approach to indemnity costs orders envisaged by Lord Woolf CJ in the *Excelsior Commercial and Industrial Holdings* case [2002] CP Rep 67 at [31], such as the case of a losing party involved in a test case with no other interest than resolution of the issue or, I would add, in the context of commercial litigation, the case of banks not parties to proceedings or other non-parties who are obliged to incur expenses in giving effect to freezing injunctions for in such cases it is not the character of the loser's conduct that engages the court's discretion but the justice of the circumstances in which the receiving party has become involved in the proceedings.

[29] Finally, I would refer to observations of Christopher Clarke J in *Balmoral Group Ltd v Borealis* (*UK*) *Ltd* [2006] EWHC 2531 (Comm) at [1], [2006] All ER (D) 183 (Oct) at [1], in which, having adopted Tomlinson J's summary, he said this:

'The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something--whether it be the conduct of the claimant or the circumstances of the case--which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs.'

[30] Here again, it is important not to lose sight of the essential requirement of unreasonable or inappropriate conduct overall and not to treat examples of such which may amount to such conduct as necessarily constituting it.

17. It should be noted that the comments made by Tomlinson J at paragraph (8) of his summary in the Three Rivers case were very much directed at the facts of that case which, as Colman J pointed out, was an extreme case.

18. I also bear in mind that the fact that a case is complex and involves a long trial does not of itself take the case out of the norm, for the purposes of the present discussion. No doubt, long cases are not as common as short cases and complex cases are not as common as more straightforward cases. But they are not on that account to be considered to be “out of the norm” in the present context. The point may go further.

Long and complex cases may have other features which distinguish them from shorter, more straightforward cases. For example, the long complex case may give rise to more amendments of the pleadings, more opportunities for further disclosure as the case develops during the trial, a refocusing of the allegations during the trial as witnesses fail to come up to proof or add unexpectedly to their evidence, further refinements of the legal or factual analysis as the parties deepen their understanding of the issues and the adoption of new positions in the light of indications, direct or indirect, actual or guessed at, of how the judge appears to be approaching the matter. Those features of some long and complex cases may mean that it would be wrong to regard those features as taking the case outside the norm when they are not particularly unusual in long and complex cases.

19. Finally, I have found it useful, when asking myself whether the conduct of the paying party was at a sufficiently high level of unreasonableness or inappropriateness to make it appropriate to order indemnity costs, to remind myself of why precisely I am asking that question. The purpose behind the question is whether the relevant conduct makes it just as between the parties to remove from the paying party the twofold benefit of an order on the standard basis, as compared with an order on the indemnity basis, that is to say, to enable the receiving party to recover its costs, reasonably incurred and reasonable in amount, with the benefit of the doubt being given to the receiving party and without the receiving party having to address (and persuade the court upon) the subject of proportionality. In this regard, I need to give proper weight to the significance which the CPR attach to this question of proportionality. The policy considerations behind the requirement of proportionality and the weight to be attached to the requirement are emphasised in Lownds v Home Office [2002] 1 WLR 2450, in particular, at [8] – [10]. The matters which will be relevant to any dispute about proportionality include those set out at CPR rule 44.5(3), which I have set out above, and also the similar provisions in rule 1.1(2)(c).

20. I can now address the detailed matters on which the Defendants rely in the present case to justify an order for indemnity costs. The Defendants rely on seven matters, as follows:

    i) The Claimants did not comply with the Pre-Action Practice Direction and made no attempt to send a letter before action;

    ii) The Claimants courted widespread publicity for their allegations;

    iii) The Claimants made serious allegations, which were unwarranted and pursued them to the bitter end;

    iv) The claims were speculative, weak, opportunistic and/or thin;

    v) The Claimants' case was constantly changing;

    vi) The Claimants' disclosure and evidence were unsatisfactory;

    vii) The quantum of the claim was grossly exaggerated and publicised at an exaggerated level.

The Claimants did not comply with the Pre-Action Practice Direction and made no attempt to send a letter before action

21. There is no dispute that the Claimants did not comply with the relevant Practice Direction and did not send a letter before action.

22. The claim related to events which took place between 2002 and 2006. Prior to early July 2007, the Claimants prepared a very detailed draft Particulars of Claim and a lengthy witness statement in support of an application for permission to serve the Third to Sixth Defendants out of the jurisdiction. They obtained that permission by an order made on 11th July 2007. The Claim Form was issued on 18th July 2007. On 19th July 2007, out of the blue, the Claimants served the proceedings on the First Defendant, C&W plc, by leaving them at its registered office in London. That was the day before the AGM of C&W plc.

23. Before 19th July 2007, the Claimants had instructed public relations consultants. They prepared a press release. The press release was dated 19th July 2007 and it was released not later than that date. The press release stated that the Claimants had issued proceedings in the English High Court against C&W plc and its subsidiaries seeking "multi-million pound damages". The press release referred to the Defendants' "illegal behaviour". It stated that the Claimants were seeking "several hundreds of millions of pounds" in damages.

24. On 19th July 2007, the Guardian newspaper in the United Kingdom referred to the claim having been brought. It reported that the claim was for "in excess of £300m" or "well over £300m". It referred to the claim being brought on the eve of the AGM of C&W plc and stated that the management could expect "a grilling" in relation to the company's remuneration policy. The newspaper quoted spokesmen for the Claimants. The newspaper also contacted C&W plc who said that the claim was without foundation and would be vigorously defended and that the claim was "a deliberate spoiling tactic".

25. On 20th July 2007, the Guardian ran a further piece on the subject and quoted a spokesman for the Claimants who had spoken to the newspaper on 19th July 2007.

26. I was taken to the Practice Direction on Pre-Action Protocols in the form in which it appeared in 2007. It has since been revised. There was no specific protocol dealing with the present type of claim. The Practice Direction states that the court expects an intending claimant to comply with the Practice Direction in certain respects where there is no specific protocol which is relevant: see paragraph 4. It is not necessary to set out the requirements of the Practice Direction because nothing whatever was done in an attempt to comply with them. The Practice Direction described the various objectives of these requirements. The objectives included the giving of detailed information about the intended claim. The 2007 edition of Civil Procedure stated (at paragraph C1A-008) that it was still good practice to send a detailed letter of claim, even where the case was not covered by a specific protocol. It cited Phoenix Finance v Federation International D'Automobile [2002] EWHC 1028 (Ch) for the proposition that failure to send a letter of claim was unreasonable conduct which would invariably attract a sanction. In that case, indemnity costs in relation to a claim for interlocutory relief were awarded against a claimant, when that claim was dismissed, because the claimant had failed to send a letter before action before issuing its proceedings. The

learned judge in that case said that it did not matter whether the failure had or had not increased the costs.

27. The Claimants have not attempted to explain why they did not comply with the Practice Direction and/or send a letter before action. It is not said that any relevant period of limitation was about to expire in July 2007. The Claimants do not offer any apology or attempt to put forward any mitigating circumstances save to say that no purpose would have been served by sending a letter before action.

28. I find that if the Claimants had sent a letter before action before issuing and serving proceedings and/or had provided the further information required by the Practice Direction, the Defendants would have been able to put together a considered and more detailed response as to why, it would have said, the claim was without foundation. I am not able to find that a letter before action would have led to a saving of costs. If there had been a letter before action, the solicitors for the Defendants would, no doubt, have answered it in detail. The Claimants would not have been persuaded by that answer and would then have issued and served proceedings and the action would have taken the course which it did in the event take.

29. More might be said on the subject of non-compliance with the Practice Direction but further comment can be more usefully made under the next heading.

The Claimants courted widespread publicity for their allegations

30. I have referred above to the Claimants' press release and the statements made to the Guardian. I find that the Claimants were well aware that they were making these statements on the eve of C&W plc's AGM. It is not possible to know how long in advance of that AGM the Claimants had been planning to launch their proceedings so that they would have an impact on the AGM. At any rate, at some point before that AGM, the Claimants must have decided that they would issue and serve their proceedings and make statements to the press so that those matters would be potentially damaging to C&W plc at its AGM. I also find that the Claimants must have decided that the impact of their actions would be more favourable to them and less favourable to C&W plc if the Claimants did not tell C&W plc or the other Defendants, in advance, of what was afoot. An early warning of the Claimants' intentions would have allowed the Defendants to counter the adverse publicity generated by the Claimants. I am entitled to assume that the experienced solicitors acting for the Claimants were well aware of the usual procedure of a letter before action and the reasons for that procedure. That means that the Claimants and their legal advisers decided that they would not follow that usual procedure so as to gain the advantage which they foresaw would result from a surprise attack. The Claimants deliberately did not comply with the Practice Direction, for that unreasonable motive. The Claimants must expect to be criticised for a deliberate non-compliance with the Practice Direction. I should therefore consider imposing an appropriate sanction for that deliberate breach.

31. The Defendants do not say that the Claimants continued to court publicity for this litigation after the events of July 2007. Although I saw, in the course of the evidence in the case, that the Claimants regularly ran advertising campaigns, in the relevant Caribbean countries, in the period from 2002 to 2006, which were highly critical of the Defendants and although some at least of that advertising was not fair and

accurate, it is not said that the Claimants tried anything similar in relation to this litigation beyond the events of July 2007.

32. I do not think that I can find that the publicity which was sought in July 2007 directly added to the costs of these proceedings. Perhaps, indirectly, that publicity coloured the approach of the Defendants to this litigation. The Defendants could be forgiven for thinking that the Claimants would fight very hard to push their case and that the Defendants would have to leave no stone unturned to fight back. Further, when it comes to issues of proportionality, the Defendants are entitled to say to me that the Claimants were puffing up the size of the claim and cannot now be heard to say that it was obvious from the outset that the claim was much more modest than their own figures.

33. The question of courting publicity was of course mentioned in the Three Rivers case. However, the publicity in that case was of a radically different order. It should also be remembered that, when large public companies are involved in litigation, it is not improper for a party to disclose to the press the allegations it is making in that litigation.

34. Lord Grabiner QC on behalf of the Defendants told me that the share price of C&W plc was badly affected by the publicity in July 2007. The Claimants did not specifically dispute that statement. I was not taken to any specific evidence on that subject. I do not know the extent of the effect nor its duration nor the consequences of that effect. I am not, of course, asked to award damages to C&W plc on that account.

35. The Defendants also referred to the press statement made by the Claimants after I gave judgment in this case dismissing all of the claims apart from an award of nominal damages in favour of one claimant. I find that the Claimants were seeking to put the best spin possible on a very bad result. It has no bearing on the present argument about the basis of assessment of the costs.

The Claimants made serious allegations, which were unwarranted and pursued them to the bitter end

36. The first matter I will address under this heading is whether the allegations were "serious". In the present context, what is meant by "serious" is an allegation of serious wrongdoing. Not all behaviour which is characterised as unlawful is serious in this sense. Fraud and dishonesty are serious. So too, is conduct which is in bad faith.

37. In this part of my judgment, I am, as explained above, considering the claims in relation to SLU, SVG, Grenada, Barbados and Cayman and, more specifically, I am not considering the case in relation to T&T.

38. When I dealt with the matter in my earlier judgment, I started by considering whether the various Defendants had acted in breach of a duty owed to a Claimant. Generally speaking, the relevant duties were imposed by statutes or by regulations. On one reading of those statutes or regulations the duty was to act in a timely fashion. So read, the duties did not directly involve an obligation to act in good faith. However, some of the duties so imposed were expressed by reference to good faith. In my assessment of the evidence, I asked myself whether a defendant had crossed the line in its behaviour so as to place itself in breach of duty. I did not focus upon the

question of whether a defendant conducted itself in good faith but rather I focused on the precise content of the statutory duty.

39. However, the Claimants put their case against the Defendants in a different way. They argued that the duties were essentially duties to act in good faith. They contended that the Defendants had not acted in good faith. Following judgment, at the hearing in relation to costs, Mr Rubin QC drew my attention to certain statutory provisions which defined what was, and what was not, conduct in good faith. He submitted that an allegation that a defendant had not acted in good faith as so defined did not amount to an allegation of bad faith.

40. In my judgment, the correct way to describe the case which the Claimants made at the trial was that the Claimants alleged that the various Defendants, who were subject to duties under the statutes or regulations, had acted in bad faith. Further, it was said that the conduct in bad faith went all the way through the dealings between the parties.

41. In addition to the allegations of bad faith, the Claimants asserted the existence of a pan-Caribbean conspiracy which went right to the top of C&W plc. The Claimants put their claim in conspiracy right at the forefront of their presentation. When I came to give judgment on the claims, I regarded the claim in conspiracy as something to be dealt with much lower down in the logical order of analysing the legal position.

42. At the hearing as to costs, Mr Rubin QC submitted that the allegation of conspiracy which was made in the present case was not an allegation of serious wrongdoing. He said that his case was essentially that the local Defendant committed a breach of a statute and that C&W plc had combined to commit that breach and that in law was an economic tort, to which the law has given the name "conspiracy". I find that the emphasis of the case as to conspiracy which was run all the way to the end of the trial was really quite different to how Mr Rubin tried to describe matters at the hearing as to costs. My assessment is that the claim in conspiracy which was run at the trial involved an allegation of serious wrongdoing.

43. I also find that the claim to exemplary damages also tended to emphasise the seriousness of the wrongdoing which was alleged against the Defendants.

44. My conclusion is that the Claimants made allegations of serious wrongdoing against the Defendants.

45. As to whether the claims which were made were "unwarranted", I have held that all of those claims have failed. Whether the claims were thin or weak is something I will address under the next heading. One topic I should address here is the width of the allegations made against the Defendants.

46. The claims made against the Defendants were very wide. The Claimants made an allegation of deliberate delay by the Defendants in relation to virtually every step which had to be taken in relation to physical and contractual interconnection. Mr Rubin sought to justify this approach. He pointed out that I had found, at any rate in relation to SLU and SVG, that the relevant defendants were probably guilty of some delay on their part even though that delay on their part did not actually hold up the time when interconnection was completed. He submitted that if, as the Claimants always suspected, some of the Defendants were guilty of delay some of the time, then

it was appropriate for the Claimants to allege that they were guilty of delay virtually all of the time. That way every step would be examined and the Claimants would be sure they had not missed any occasion on which the evidence might turn out to justify an allegation of delay.

47. I can understand the approach adopted by the Claimants. However, the consequence of their approach was that the Defendants had to face allegations that virtually everything they did was unlawful. That significantly widened the scope of the trial. The Defendants were therefore justified in covering in great detail every step they took in relation to interconnection. The point goes further. Because so many steps were being examined, there had to be an examination of the extent of any possible consequential delay which might have been caused by every such step. Further, attention had to be given to the possibility that delay might have occurred by reason of things which were not unlawful acts on the part of the Defendants, for example, the way in which the Claimants themselves conducted the negotiations. The court had to grapple with the possibility that the Defendants might have acted unlawfully but such unlawful acts did not in the final analysis matter because they were overtaken by other causes of delay which were not unlawful acts by the Defendants.

The claims were speculative, weak, opportunistic and/or thin

48. I will distinguish between the legal basis and the factual basis for the claims.

49. As to the legal basis, I held that there was no cause of action in SLU, SVG and Grenada. It was agreed that there was a cause of action in Barbados. There was only a cause of action in Cayman, if the Claimants established a conspiracy to commit a criminal offence, which they failed to do.

50. Although I dismissed the claim based on allegedly actionable breaches of statutory duty, on the law, and I similarly held, on the law, that breaches of non-actionable, non-criminal statutes were not unlawful acts for the tort of conspiracy, I do not think it would be right to say that the Claimants' legal arguments were so weak that they should result in an award of indemnity costs.

51. I now turn to the factual basis of the claim. As regards many of the allegations of delay and breach of duty, I find that the Claimants massively over claimed. They claimed that virtually everything the Defendants did was unlawful. That fact, and the consequential matters to which it gave rise, significantly widened the scope of the dispute. I cannot think that the Claimants ever thought that they would get home on all of the allegations they were making. They may have persuaded themselves that they would get home on some of them and then decided that they would allege everything which was even remotely arguable.

52. Some of the pleaded allegations, such as a statutory duty to negotiate before a relevant claimant obtained a relevant licence were unarguable (with the exception of the claim in Barbados) and, in the event, were not argued. Although I had to deal in detail with the effect of the competition clauses in the licences, that matter was very nearly given up by the Claimants in the course of their argument and that was not the justification for the Claimants running at any time the case that the Defendants were in breach of a statutory duty before a relevant claimant had a licence.

53. The claim in conspiracy was not confined to the claim against C&W plc but I find that the claim against C&W plc was the most important part of the conspiracy claim. For some reason, the Claimants were determined to make a case against C&W plc. I suspect that the Claimants were motivated by considerations which were not confined to establishing a right to recover compensation from a defendant with the ability to pay. It is, of course, proper to put forward an allegation of conspiracy which is based on inference from provable facts. However, I find that the claim in conspiracy against C&W plc was always improbable. It involved a finding that the plc was concerned with the matters of detail involved in the very detailed process of interconnection. I find that it is right to describe the conspiracy claim against C&W plc as "speculative" and as "weak". I do not have to discuss other possible adjectives. This conclusion is further supported by the obvious inability of the Claimants to give proper particulars of the conspiracy claim.

54. I also find that the Claimants never faced up to the enormity of their difficulties in relation to causation. They did not lay the evidential base which would have enabled a court to make findings in their favour in relation to causation. They relied heavily on generalised statements. The patent inadequacy of their pleading in relation to causation of loss, in particular, as to delay to interconnection, and to the Claimants' launches, should have brought home to them their difficulties in those respects.

The Claimants' case was constantly changing

55. I can deal with this point more briefly. I am not now dealing with T&T where there were significant changes in the way the Claimants put their case.

56. In relation to SLU, SVG, Grenada, Barbados and Cayman, I would not add this further criticism to the criticisms I have already made of the allegations which were put forward, either in the original or in an amended pleading.

57. It is right that the Claimants did repeatedly seek to cross-examine on matters which were not directly pleaded as breaches of duty. However, many of those matters were not persisted in. When they were persisted in, it was said that they were relevant indirectly to matters which were pleaded and they could, on that account, be pursued in cross-examination. I do not need to explore the detail of those matters.

The Claimants' disclosure and evidence was unsatisfactory

58. It is said that the Claimants disclosed an excessive number of documents and that added significantly to the burden on the Defendants of preparing for trial. I suspect there is something in this allegation but I do not believe that I can make a reliable assessment of this point. Nor can I assess whether the Claimants' conduct in this respect takes the present case out of the norm. It is unfortunately true that in many cases, and not only long and complex cases, far too many documents are disclosed. I am not able to reach a conclusion adverse to the Claimants merely because the Defendants disclosed far fewer documents than the Claimants did. The Claimants had documents which the Defendants did not have, or did not disclose, in particular as to matters of delay to the Claimants' launch and as to quantum. I also think it is likely that the Defendants subjected their disclosure to a particularly searching examination, not because they wanted to avoid burdening the Claimants and the court, but because

they wanted to exercise very great care not to give away anything to which the Claimants were not strictly entitled.

59. As to the Claimants' witness statements, I am prepared to say that they did not conform to the ideal in that they did not confine themselves, as they should have done, to evidence of fact which was within the witness' own knowledge but contained passages of commentary on the behaviour of others.

The quantum of the claim was grossly exaggerated and publicised at an exaggerated level

60. I have already referred to the fact that the Claimants put forward an excessive number of allegations of unlawful acts and that the Claimants could never reasonably have thought that they could get home on many of the matters claimed.

61. I have also referred to the press release and the press statements in July 2007 which alleged that the claim was worth well over £300m. The original Particulars of Claim did not seek to quantify the damages claimed but claimed under the three heads of compensatory, restitutionary and exemplary damages. By March 2008, the Particulars of Claim were amended to include a quantification of the compensatory damages amounting to some $102m. There was never any explanation put forward as to where the earlier figure of £300m had come from. It seems to me to have been a grossly exaggerated figure.

62. Following the amendment to the Particulars of Claim, when the Claimants pleaded that the compensatory damages should be $102m, I think that it would have been possible for the Defendants to have done an assessment of the amount of the claim and to have been reasonably reassured that the figure of $102m for compensatory damages could not possibly be right. Nonetheless, it was the claim that was made and was persisted in. Further, the Defendants would have had to take seriously the claims to the other heads of damage.

63. Because the Claimants failed on liability, the quantum claim has not had to be examined to its full extent. However, I am able to compare the periods of delay in completing interconnection and launching the Claimants' networks, as pleaded by the Claimants, with the periods of delay contended for by the Claimants in their closing submissions. That comparison shows that the pleaded case of delay was significantly over-stated.

My assessment at this stage

64. I have now considered the seven matters which were advanced by the Defendants in support of their application for indemnity costs. I now need to stand back and consider the essential question: are my conclusions on those matters such that the present is a case for indemnity costs. Having regard to my earlier explanation of the purpose of assessing these various matters, the question can be reformulated as follows: are my conclusions on those matters such that this is a case where the paying party's conduct makes it just for the paying party to forfeit the two benefits of an assessment on the standard basis?

65. Before I answer that question, it is helpful to reflect on the significance in the present case of the requirement of proportionality on a standard basis assessment. Of course,

because this is not the detailed assessment I will not be able to know the detailed answer to that question. However, I can consider the significance of the matters referred to in rule 44.5(3) in the present case.

66. Rule 44.5(3) refers, amongst other things, to the amount or value of the claim, the importance of the matter to the parties, the complexity or difficulty of the matter, the novelty of the questions raised, the skills, effort, specialised knowledge and responsibility involved and the time spent on the case. In relation to all those matters, my view is that each one, and certainly the combination of all of them, means that this is not an obvious case where considerations of proportionality are likely to operate as a significant curb on the recovery of costs, which were otherwise reasonably incurred and reasonable in amount.

67. There are two possible reactions to my comment in the last paragraph. The first is that if I order an assessment on the standard basis, allowing proportionality to be taken into account, I will not be depriving the receiving party of quite as much in terms of its recovery as compared with some other cases. The other reaction is that if I order an assessment on the indemnity basis, so that proportionality is not taken into account, I am not thereby depriving the paying party of quite so significant a benefit as compared with some other cases. My reaction is the second one.

68. My conclusion is that the Defendants have established enough of their criticisms to a sufficient extent to show that this is a case where the Claimants have forfeited the benefit of an assessment on a proportionate basis, pursuant to a standard basis assessment. In view of all of those criticisms, to the extent which I have upheld them, it seems to me to be just that the Defendants should recover their costs, providing they were reasonably incurred and reasonable in amount, without being subject to the possibility that some part of those costs should be disallowed on the grounds of proportionality. There is no injustice to the Claimants in denying them the benefit of an assessment on a proportionate basis when the Claimants showed no interest in proportionality when their claim was cast disproportionately widely and they required the Defendants to meet such a claim.

69. Similarly, my conclusion is that the circumstances of this case are such that the Claimants have forfeited the right to have the benefit of the doubt on reasonableness.

70. Accordingly, in relation to the costs incurred in connection with the claims in SLU, SVG, Grenada, Barbados and Cayman, I would wish to see that the ultimate order for costs, which I will make, reflects an entitlement on the Defendants' part to have their costs assessed on the indemnity basis.

T&T: COSTS

71. Before I consider whether anyone's costs in T&T should be assessed on the standard or the indemnity basis, there is the prior question whether (as they claim) the Defendants should be entitled to 100% of their costs of the claim in T&T.

72. I can say straightaway, that in view of my findings in T&T that TSTT were guilty of conduct contrary to honest practices in breach of section 4 of PAUCA, I do not regard it as a just result to make the Claimants pay costs, including the costs of TSTT, so that TSTT would recover 100% of its costs of the claim in T&T.

73. The claim in relation to T&T was for the benefit of Digicel T&T alone in the sense that it was the only claimant who could recover damages for the events in T&T. Nonetheless, the Defendants asked for the costs in relation to T&T to be paid by all the Claimants and the Claimants did not criticise the suggestion on that account. I dare say that the reality is that all the Claimants are treated internally as one entity for the purposes of costs. For this reason, I will discuss the question of costs in T&T on the basis that they may be ordered against the Claimants and not just against Digicel T&T.

74. The Defendants who were the subject of the claim in T&T were, principally, TSTT and, as conspirators, CWWI and C&W plc. All three of these parties claim their costs against the Claimants. In my earlier judgment, I made adverse findings about TSTT but I did not make adverse findings about the other two. Should I treat TSTT differently from CWWI and C&W plc in relation to T&T? The Defendants' opening position was that I should award all of the costs to all of the Defendants on an indemnity basis. That meant that I should treat these three parties in the same way. When I indicated to the Defendants that I might disallow some costs in T&T because of the behaviour of TSTT, the Defendants then suggested that I should treat TSTT separately from the other two. The Claimants suggested that I should not treat TSTT separately. I do not have any information as to the arrangements which the Defendants have made between themselves as to who is liable to pay a contribution to the legal costs. I would not want to make an order which adversely affects TSTT only and then to find that the Defendants' internal arrangements as to payment produce a result different from that which I intended. In the end, the decisive consideration is that although CWWI and C&W plc were not personally at fault, they ran a defence (perhaps inevitably) which relied upon the defence put forward by TSTT, as well as all the additional points as to why there was no conspiracy implicating CWWI and C&W plc. In the circumstances, I will treat CWWI and C&W plc in the same way as I will treat TSTT in relation to the costs in T&T.

75. The Claimants say that my adverse findings in relation to TSTT should be reflected by reducing the amount recovered by the Claimants in relation to the claim in T&T. The Defendants say that there should be no reduction.

76. The Claimants rely on the decision of Briggs J in Bank of Tokyo-Mitsubishi v Ferrero & others [2009] EWHC 1696 (Ch). That decision establishes or re-states a number of matters which are relevant in the present case. From it I derive the following propositions:

    i) even though the claim in T&T was dismissed in its entirety, it is open to the court to "disallow" part of the Defendants' costs to reflect the fact that the Defendants lost on certain issues;

    ii) the disallowance of costs for this reason can reflect three distinct matters;

    iii) the first matter is that the Defendants incurred costs on the issue which they lost; if they had not fought that issue, they would not have incurred those costs;

iv) the second matter is that the Claimants incurred costs on the issue which they won; if the Defendants had not fought that issue, the Claimants would not have incurred those costs;

v) the third matter is that where the Defendants were guilty of misconduct in a relevant respect, it is open to the court to impose a penalty in relation to their ability to recover costs; in the present case, the penalty might be the disallowance of a part of their costs and/or the denial to the Defendants of an assessment on the indemnity basis to which they might otherwise have been entitled.

77. The court must exercise care in relation to the "first matter" referred to in the last paragraph. It was made clear in Ultraframe (UK) Ltd v Fielding [2006] EWCA Civ 1660, that when the court comes to carry out a detailed assessment of the costs which were reasonably incurred and reasonable in amount, it would not allow to a party, who had an order for costs in its favour, the costs of putting forward a case which the trial judge had found was a dishonest case. Those costs would not have been reasonably incurred. This means that in relation to the first matter, I could leave it to the costs judge to disallow the costs which were incurred by the Defendants in relation to the matters where I found, rejecting the Defendants' case on those matters, that the Defendants were guilty of conduct contrary to honest practices. That would have the merit of greater accuracy as compared with my selecting a figure, expressed as a percentage of the whole of the costs in T&T, and disallowing that percentage. The disadvantage of leaving it to the costs judge is that there will be considerable room for debate as to whether particular costs went exclusively to the issue where the Defendants were found to have been dishonest or whether those costs should be considered in a different way and allowed either in whole or in part. My preference would be to identify at this stage some part of the Defendants' costs which should be disallowed for the first matter and to avoid double counting by making it clear that when the costs judge comes to consider what costs were reasonably incurred, he will not disallow an item of costs just because it went to the case on dishonesty which the Defendants lost, because the costs judge knows that the necessary disallowance is being provided for by the percentage reduction ordered at this stage.

78. I will therefore try to quantify appropriate discounts to address the three matters referred to above. The immediate problem is that the parties did not make any effort to provide the court with material to assist it in this task. I note in passing that the court in the Bank of Tokyo-Mitsubishi appears to have been given more assistance in this respect.

79. How much of the Defendants' costs in T&T were spent on advancing its case that they were not guilty of conduct contrary to honest practices, in the respects on which the Defendants ultimately failed? A similar question arises in relation to the Claimants' costs of those matters.

80. In order to form a view on the two questions in the last paragraph, I have considered the pleadings, the various amendments made by the Claimants, the time at which those amendments were made, the other allegations on which the Claimants failed, an overview of the evidence (documentary and oral) which went to the issues on which the Claimants succeeded as compared with those on which they failed and a similar overview in relation to the parties' submissions. Doing the best I can on what I accept

is inadequate material, my view is that some 5% to 10% of the Defendants' costs in relation to T&T and some 5% to 10% of the Claimants' costs in relation to T&T were taken up with the Claimants pursuing and the Defendants denying an allegation of conduct contrary to honest practices on which I found against the Defendants.

81. Although I have allocated some 5% to 10% to both the Claimants' and the Defendants' costs, the two sides' costs are very different in amount. The Claimants spent some £9.5m and the Defendants spent some £15.5m. Both of these figures relate to the costs of the entire action. I am not given any breakdown of those figures which would enable me to calculate what was spent on the claim in T&T. I do not know if the disparity in T&T mirrored the disparity overall. I have to proceed on the assumption that it did. If therefore I want to disallow a part of the Defendants' costs to compensate the Claimants for having unnecessarily had to incur 5% to 10% of the Claimants' costs, I should disallow about two-thirds of 5% to 10%.

82. I then turn to the third relevant matter. Should I impose a sanction on the Defendants for running the case that they were not guilty of conduct contrary to honest practices? I treat this matter as very serious. The full details are spelt out in my earlier judgment and I need not repeat them here. I think it is appropriate to mark my disapproval of the Defendants' behaviour in this respect by an appropriate sanction. The two sanctions which come to mind are to disallow a further percentage of the Defendants' costs or to deny the Defendants the assessment of their costs in T&T on an indemnity basis, if that is something to which they would otherwise have been entitled. This comment means that I should now form a view on whether the Defendants would have persuaded me to give them their costs in T&T on the indemnity basis, leaving out of account the present point about the allegations against them, which I have upheld. Leaving that out of account, I would have regarded the case in T&T as one where the Defendants should have their costs on the indemnity basis. The general considerations I have already referred to in relation to the other jurisdictions also applied in T&T. In addition, in relation to T&T, it can be said that the Claimants kept changing their case. During the trial, having made an order for costs in favour of the Defendants, in relation to an application by the Claimants to amend and in relation to a part of the claim which the Claimants abandoned mid-trial, I left open whether those costs should be on the standard basis or the indemnity basis. I now have to express my view on that point. My view is that, if I leave out of account the allegations which I have upheld against the Defendants, those costs should be on the indemnity basis. My principal reason for forming this view is that the allegations were of dishonesty on the part of the Defendants and the Claimants had no proper basis for making those allegations, as they themselves came to recognise.

83. I now return to the question of what should be done in relation to T&T. The result of the above discussion is that I would wish to see that the order for costs which I ultimately make in this case will reflect a disallowance of a percentage of the Defendants' costs for the first two matters referred to in paragraph 76 above, together with a further sanction imposed on the Defendants. As to the disallowance, I would wish to see a disallowance of some 5% to 10% of the Defendants' costs plus two-thirds of 5% to 10% of those costs. Taking the mid-position between 5% and 10% gives an overall position of 7.5% plus 5%, that is, 12.5%. As to the sanction, it seems to me to be wrong to give the Defendants their costs in T&T on an indemnity basis when I have found that they were guilty of conduct contrary to honest practices

although they denied it and they called untruthful evidence to support their denial. I would therefore wish to withhold an award of their costs on an indemnity basis in relation to T&T. The order which I will ultimately make should give the Defendants 87.5% of their costs in T&T on the standard basis. For the avoidance of doubt, the costs which were dealt with on Day 44 of the trial, where the basis of assessment was left open, should also be on the standard basis.

TCI: COSTS

84. The point which needs separate consideration in relation to TCI arises from the fact that I found that CWWI was in breach of contract in TCI and I have awarded Digicel TCI £2 nominal damages. That does not alter the conclusion that the Defendants were the successful party in TCI. It does, however, raise the question whether I should disallow any part of the Defendants' costs in relation to TCI.

85. I have considered the whole of the claim in relation to TCI. I have considered the pleadings, the amendments, when the allegation of breaches of contract was made, the character of the breaches of contract, the evidence (documentary and oral) and the submissions. My overall view is that the decision in the Claimants' favour on the breaches of contract, which caused no loss, is not of enough significance to lead me to disallow any part of the Defendants' costs. They should recover the full amount of their costs in relation to TCI.

86. The costs in TCI should be assessed on the indemnity basis, for the reasons I have given above in relation to that subject.

THE APPROPRIATE ORDER FOR COSTS

87. I have now held that the ultimate order for costs in this case should reflect an entitlement on the part of the Defendants to: (1) 87.5% of their costs in relation to T&T, assessed on the standard basis; and (2) all of their costs in relation to the other jurisdictions, assessed on the indemnity basis.

88. The immediate difficulty about an order in the terms of the last paragraph is that there will have to be a separate assessment of the costs in relation to T&T. The Defendants' submissions avoided that difficulty by claiming 100% of their costs on the indemnity basis throughout but I am not persuaded that that is a just result. The Claimants' submissions avoided that difficulty by saying they should be ordered to pay 80% of the costs on the standard basis throughout. The 80% was not arrived at by any assessment of what percentage of the total costs was spent on the claim in T&T and I am not persuaded that that is the right result.

89. I asked both parties to offer their views as to the percentage of the total costs which were incurred in relation to T&T. They were not in a position to provide the figures. Further, because I favour a different basis of assessment in T&T, i.e. standard and not indemnity, the figures might not have been that much help to me.

90. When I indicated to the parties in the course of argument that I was minded to view the claim in T&T differently from the other jurisdictions and I invited their proposals as to the form of order I might make, all of their proposals involved a separate assessment for T&T.

91. In these circumstances, although I am very mindful of the difficulty this order might cause for the costs judge and I have tried but failed to come up with a different order to ease the task of assessment, the order which I make is that the Claimants should pay to the Defendants: (1) 87.5% of the Defendants' costs in relation to T&T, assessed on the standard basis; and (2) all of the Defendants' costs in relation to the other jurisdictions, assessed on the indemnity basis.

PAYMENT ON ACCOUNT

92. It is accepted that I should make an order pursuant to rule 44.3(8) that the Claimants should make a payment on account of costs.

93. I have taken into account the summary of the Defendants' costs, the amount of the Claimants' costs and, of course, the order for costs which I have made. In my judgment, the right sum to be paid on account is £8m. That sum is to be paid within 28 days.

INTEREST ON COSTS

94. The Defendants have already paid their solicitors a substantial sum on account of their fees and disbursements. It is agreed that I should order that the Claimants should pay the Defendants interest at the rate of 1% over base rate from the date on which the Defendants made those payments until the date when such costs become subject to interest at the Judgments Act rate.

AN EXTENSION OF TIME

95. The Claimants have asked for an extension of 14 days for the purposes of rule 52.4(2)(a) and have explained the reasons for requesting that extension. Although there are contrary arguments, I am persuaded that in view of the length of the judgment and the number of issues that arose and in the light of the particular difficulties outlined to me, it is right to grant this extension.

THE COSTS OF THE HEARING ON COSTS

96. The costs of the hearing on costs should be paid by the Claimants to the Defendants. Apart from anything else, the Defendants made an opposed application for indemnity costs, which has succeeded.

97. I see no reason why the costs of the hearing should be assessed on the indemnity basis and so they will be on the standard basis. I do not foresee any difficulty for the costs judge in assessing these costs on that basis, notwithstanding that the costs of the action will, for the most part, be assessed on the indemnity basis.