Neutral Citation Number: [2022] EWHC 629 (Ch)

Case No: BL-2018-002369

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (LONDON)
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2022

Before:

MR JUSTICE FREEDMAN

- -

Between:

MUSST HOLDINGS LIMITED

Claimant

- and –

(1) ASTRA ASSET MANAGEMENT UK LIMITED

(2) ASTRA ASSET MANAGEMENT LLP

Defendants

- and –

Claim No. BL-2019-001483

(1) ASTRA ASSET MANAGEMENT UK LIMITED
(2) ASTRA ASSET MANAGEMENT LLP

Claimants

- and –

(1) MUSST INVESTMENTS LLP
~~(2) MUSST HOLDINGS LIMITED~~
(3) MR SALEEM ANWAR SIDDIQI

Defendants

- -

Peter Knox QC and Kirsten Sjøvoll, (instructed by **Taylor Wessing LLP**) for the **Claimant in the Contract Claim/Defendants in the Defamation Claim**

Christopher Boardman QC, Tom Beasley and David Glen, (instructed by Payne Hicks Beach) for the **Defendants in the Contract Claim/Claimants in the Defamation Claim**

Hearing dates: 17 December 2021 & 21 January 2022

- -

Approved Consequentials Judgment

Covid-19 Protocol: This judgment was handed down by the 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 Friday 18 March 2022 at 2.00pm.

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MR JUSTICE FREEDMAN:

1. Judgment was handed down in this matter on 17 December 2021, having been handed down in draft in October 2021. This judgment is following consequential submissions in this matter heard on 17 December 2021 and again on 21 January 2022. This judgment will consider the following matters, namely

    (1) A determination as to whether the costs of the Defamation Claim (claim number BL-2018-002369) are to be assessed on the indemnity basis or the standard basis;

    (2) Whether the ATE premium may be recovered;

    (3) A determination as to whether the costs of the Contract Claim (claim number BL-2019-001483) are to be assessed on the indemnity or the standard basis;

    (4) The costs of the claim and deductions;

    (5) Payment on account of costs;

    (6) Release of security for costs;

    (7) Interim payment;

    (8) Directions on the Astra Parties' application to strike out the claim BL-2021-00680;

    (9) Musst's Parties' claim to a right to inspect the books and records relating to Crown II and Crown III.

II The costs in the Defamation Claim

2. By the Court's judgment dated 17 December 2021, the Court, among other things, dismissed the claim in defamation and the counterclaim relating to disparaging statements. There was no issue between the parties that the costs of the Defamation Claim should be paid by the unsuccessful Claimants to the Defendants. There remained an issue as to whether those costs should be assessed on the standard or indemnity basis. The Court has had the benefit of full skeleton arguments in respect of this issue from Ms Sjøvoll counsel on behalf of the Defendants in the Defamation Claim, and Mr Glen counsel on behalf of the Claimants in the Defamation Claim. It has also been addressed orally by both counsel.

(a) The legal principles

3. There is no issue between the parties as regards the legal issues. CPR 44.3 permits the assessment of costs to be carried out on either the standard or the indemnity basis. If costs are assessed on the indemnity basis, any doubt as to whether costs were reasonably

incurred will be resolved in favour of the receiving party: see CPR 44.3(3). Further, in respect of indemnity costs, there is no proportionality requirement.

4. It follows that the difference between indemnity and standard costs can be a matter of real significance for the receiving party. The Court has a wide discretion when considering what order should be made as to costs. CPR 44.2 includes:

> *"(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—*
> *(a) the conduct of all the parties;*
> *(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
> *(c) any 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 its case or a particular allegation or issue; and*
> *(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."*

5. The starting point is the rules themselves, and the way in which the court in previous cases has exercised the discretion. There is *"an infinite variety of situations which can come before the court and which justify the making of an indemnity order"*: see *Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden and Johnson* [2002] EWCA Civ 879 at para. 32. The making of such an order is not limited to unreasonable conduct by the parties. The central question for the court is whether there is something in the conduct of the action or the circumstances of the case, which takes the case out of the norm in a way which justifies an order for indemnity costs: see *Excelsior* at para. 19.

6. Whilst it is not necessary that a party was guilty of conduct evidencing dishonesty or moral blame, it has been repeatedly emphasised that where it is said that the party's conduct was unreasonable, it must be unreasonable to a "high degree" before an order for indemnity costs will be justified: see *Kiam v MGN (Costs)* [2002] 1 WLR 2002. One reason for this high threshold is that it is a necessary corollary of the CPR, and particularly the fundamental importance placed in modern litigation on the principle of proportionality: see *Suez Fortune Investments v Talbot Underwriting* [2019] Costs LR. 2019.

7. The Court's determination should not be infected by hindsight or in the light of the outcome of the case and the knowledge of how a particular issue was ultimately resolved: see *Williams v Jervis* [2009] EWHC 1837 (QB). The weakness of a legal argument should not without more justify indemnity costs, but it might be different if a

case was not only plainly hopeless but motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real merit: see *Arcadia Group Brands Ltd v Visa Inc* [2015] Bus LR 1362 per Sir Terence Etherton C. at [83-84].

8. In the case of *Dixon v Radley House Partnership* [2016] EWHC 2485 (QB) Stuart-Smith J (as he then was) set out examples of circumstances which may lead to an indemnity costs order, namely (i) where the losing party has pursued a hopeless claim which the party knew or ought to have known was hopeless, and (ii) where there is something that takes the situation away from the norm be it in the nature of the application or the issue raised or the manner in which it has been raised. In that case, indemnity costs were awarded based on the conduct of the parties because the point taken on the application was thoroughly bad. Whilst the conduct was not improper, it was beyond the norm. It included a significant level of unreasonableness or otherwise inappropriate conduct.

9. In the instant case, the Defendants' argument for indemnity costs was based on (1) without prejudice correspondence and offers, and (2) the conduct of the Defamation Claim.

(1) Without prejudice correspondence and offers

10. There has not been any effective Part 36 offer or Calderbank offer. The letter of Bird & Bird dated 18 July 2019 was not effective in that it tied the settlement of the Defamation Claim to a process under which the Contract Claim may be settled. There was an offer of the Astra Parties of 24 March 2021 but it did not provide for the costs of the Defamation Claim. There was a letter from Collyer Bristow then acting for the Musst Parties of 14 April 2021 in which deficiencies in the defamation claim were pointed out including the absence of evidence from Mr Plotke and the absence of a contemporaneous note evidencing the conversation. The letter said that if the claim was pursued, the Musst Parties would seek indemnity costs in the light of the fundamental defects in the Defamation Claim.

11. None of the above forms the basis of an adjustment of costs of the kind which arises consequential upon Part 36 offers or Calderbank offers. However, the correspondence, in particular, the letter of 14 April 2021 can be reconsidered as a conduct matter with the other conduct matters to which I now turn.

(2) Conduct of the Defamation Claim

12. Attention is drawn to the evidence of Mr Murray for the first time at the trial about a note which he said he had taken, and which was now lost: the note was said to have corroborated his evidence. The judgment neutral citation number [2021] EWHC 3432 (Ch) was critical both of Mr Murray's evidence and of Mr Mathur in this regard, finding at [567] that the story of the disappearance of the note was far-fetched. The Musst Parties also rely on the absence of Mr Plotke, how his absence was not explained, and the absence of any document produced to the Court to corroborate the account. These deficiencies are to be read alongside the letter of 14 April 2021, and the Astra Parties being put on notice about indemnity costs.

13. There were other matters relied upon by the Musst Parties. They included the conclusions in the judgment as to the absence of serious harm, the delay between the statements of June 2016 and the first intimation about the same in October 2016.

14. I have come to a judgment that it is inappropriate to make an award of indemnity costs. The reasons are as follows:

    (1) I do not regard this case as out of the norm in a way which justifies an order for indemnity costs.

    (2) The Court has not gone so far as to find that there was an abuse of process on the part of the Astra Parties in running the defamation action. Having made no such finding, it is not appropriate at this stage for costs alone to consider whether that was the case.

    (3) The Court was mindful that even without Mr Plotke, the alleged statements were related by Mr Rigter, albeit that the Court did not consider that his evidence was sufficient to discharge the burden. It was not impossible that the Court would have taken a different view depending on how the evidence came out. There was also the evidence about related disparaging statements which might have provided some indirect corroboration.

    (4) The weakness of a case on the merits by itself is rarely sufficient to merit an award of costs on the indemnity basis.

    (5) Whilst critical of the evidence in respect of the alleged note of the conversation, the Court did not go so far as to find that the evidence of Mr Murray and Mr Mathur had been knowingly made up. If in every case where a witness who gave evidence which was not accepted led to a finding of indemnity costs, then such orders would become the norm. They are not.

15. I should add that I have not accepted the submission of the Astra Parties that Musst Parties' own conduct was unreasonable. I do not accept that the caution of Mr Siddiqi when the statements were first alleged was unreasonable conduct. I was not critical of this in my judgment, and there is no reason now to be critical about it. The Musst Parties were entitled to rely upon defences other than denying the statements and denying damage. It has not been necessary to make findings about these matters, and it is not appropriate at this stage to consider the defences for the purpose of costs alone. The reasonableness or otherwise of the ATE insurance policy is for the assessment of costs. There is no material to say at this stage summarily and without a more detailed inquiry that having such a policy was conduct for the purpose of costs.

16. My conclusion is that the costs of the Defamation Claim should be paid by the Astra Parties to the Musst Parties and be assessed on the standard basis forthwith if not agreed. If indemnity costs had been ordered, there would have been a change of circumstances in which event the Court would have been able to consider there should be an increase in the payment on account of costs in the Defamation Claim. This does not arise because of the decision to award costs on the standard basis.

III The recoverability of the Musst Parties' ATE premium

17. It is premature at this stage to decide whether or not the premium is recoverable. That will be for the Costs Judge in due course. It is not appropriate to say summarily that the policy and the amount of the premium were or were not reasonable. Much more information will be available to the Costs Judge, and it will be at that stage alone that the issue of the reasonableness of the premium will be capable of being determined. By their note of 4 February 2022, the Musst Parties accept that position.

IV Basis of assessment of the costs of the Contract Claim

18. The same principles apply as set out above in respect of the Defamation Claim. Here too, the submissions of Musst are broadly by reference to settlement offers and to conduct of the claim generally.

(a) Settlement Offers

19. Musst say that they have beaten the offer sent on their behalf by a Calderbank letter of Bird & Bird dated 18 July 2019. Applying contractual principles, this was not an offer capable of acceptance, but it triggered a process of negotiation. More had to occur in order for the parties to enter an agreement. The summary at para. 21 of the skeleton argument of Musst for the hearing of 21 January 2022 did not tell the entirety of the story. It was not simply subject to the information being satisfactory in Musst's view acting reasonably, but it was in Musst's absolute discretion, acting reasonably. That appears to trigger Wednesbury style unreasonableness (applied to contracts in cases like *Braganza v BP Shipping* [2015] UKSC 17) before Musst could be challenged on their view, a high hurdle indeed. It also did not have to be tested because there would then be an offer made by Musst to the Astra Parties which Astra could accept or reject including by seeking to negotiate some other deal. It all has the flavour of a mechanism which could not be enforced, but which at its highest provided a basis for the possibility of a settlement. In my judgment, this was not a Calderbank offer, because it was not capable of acceptance leading to a binding agreement. It can be considered as an offer to negotiate and, in other cases, it might be unreasonable not to engage. The important point is that a failure to engage with this mechanism does not in my judgment amount to conduct which takes this case away from the norm such as to trigger indemnity costs.

(b) Conduct generally

20. Musst submit that the defence of the November arrangement was reprehensible because it was contradicted by admissions of Mr Mathur. It was also submitted that the novation defences were meritless: Astra's defence was said to be *"in reality just an attempt to take every technical point going, regardless of common sense and reality, and Mr Mathur's recorded admissions, in the hope that "something would turn up"*. Reference is made to the criticisms of Mr Mathur's evidence in the judgment and the note referred to in the discussion about the Defamation Claim above. Reliance is also placed on extracts from judgments of the Chief Master about a defence on a *"no holds*

barred" basis. The Chief Master formed the view that it was possible that the approach to disclosure was tactical, but he made no finding to that effect.

21. I have applied the above-mentioned case law which applies a high bar before an indemnity costs order is made. I reviewed the case of *Dixon v Radley House Partnership* above, which may have appeared promising for Musst . However, it is to be noted that that case was simply about a discrete interim application, which failed comprehensively. That is a very different complexion from a case which has got to trial and where there has been a lot to argue about on both sides. The Court has to be careful about not assessing the merits of the case by reference to hindsight which comes after a lengthy trial and judgment. Whilst I have been critical of Mr Mathur's evidence and other witnesses for the Astra Parties, the criticisms of their evidence do not take the case outside the norm.

22. I have also considered awarding some of the costs on the indemnity basis. An example might be the costs of the November arrangement. However, here too I am not prepared to award some of the costs on the indemnity basis. Even that part of the claim is not out of the norm. There was no application for partial summary judgment. It was a difficult claim to sustain because the alleged arrangement was undocumented in the face of a heavily documented case and a heavily negotiated Octave arrangement. However, that does not mean that it would have been known to be hopeless. I did not find that it was fought in bad faith. Although there were criticisms about the evidence particularly of Mr Mathur in this regard, this was not a case which satisfied the high threshold required to make an indemnity costs order appropriate.

23. The arguments on behalf of Musst as regards the basis of costs merit serious consideration and have some weight both individually and collectively. The question is whether by themselves or as a whole, they take this case into one where an entire or partial order for indemnity costs is appropriate, applying the CPR and with the benefit of the above case law. In my judgment, there is not sufficient in this case to order indemnity costs in whole or in part. The orders for costs will all be on the standard basis.

(c) Should deductions be made from the costs of the claim?

24. If, as the Astra Parties suggest, there was a time when Musst wanted to postpone this determination, that moment seems to have passed. In any event, whatever is to come, it is appropriate following the trial to have this determination at this stage. Costs must follow the event in this case and the successful party was Musst: see CPR 44.2(2). The question is whether there should be carved various costs.

25. By way of preliminary observation, there is a danger, noted in some of the authorities, that proportionate orders end up undermining the general rule that costs follow the event. In *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, the Court of Appeal per Jackson LJ at para. 62 observed that there had been *"a growing and unwelcome tendency…to depart from the starting point set out in rule [44.2(2)(a)] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates."*

26. To like effect is a recent judgment of Cockerill J in the Commercial Court in *Deutsche Bank AG London v Comune di Busto Arsizio* [2022] EWHC 219 (Comm) where she said at [65]: "There is a danger, noted in some of the authorities, that proportionate orders end up undermining the general rule that costs follow the event. As noted in many of the authorities, in any litigation - especially complex commercial litigation such as the present case - any winning party is likely to fail on some issues – *HLB Kidsons* [2007] EWHC 2699 (Comm) at [11]; and see also *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch) at [11]-[12]."

27. These statements are important, but they do not exclude such proportionate orders in an appropriate case. It just injects significant caution, and such orders are not made without proper consideration.

28. The Astra Parties submit that there should be various deductions to reflect the following:

    (1) unreasonable claims and in particular a claim for unjust enrichment ("Unreasonable Claims");

    (2) Musst overreaching in negotiations and in particular in seeking to contend that what are termed Crown II and Crown III formed a part of the current Contract Claim ("Overreaching in negotiations");

    (3) the abortive amendment application; and

    (4) the application to exclude without prejudice material.

(1) Unreasonable Claims

29. As regards allegedly unreasonable claims, the Astra Parties have not made out that it was unreasonable for Musst to have been considering claims of procuring a breach of contract, conspiracy and section 423 of the Insolvency Act 1986. There were concerns that in the event that the novation claim did not work that their claims had been frustrated by the transfer of the business in particular from Astra LLP to Astra UK. The fact that the Court has found in favour of Musst does not mean that such concerns were unreasonable. The Astra Parties did not seek to do anything to indicate that any business transfer would not affect any legitimate claims, but rather used the same as one of their defences.

30. It was this that also gave rise to the unjust enrichment claim. I noted that it was a conceptually difficult claim but did not need to rule on it. The claim was unlike the claims considered in the cases to which reference has been made by the Astra Parties, namely *Sharp v Blank* [2020] Costs LR 835 at 7(g) or *R (Viridor) Waste Management Ltd and others v Revenue and Customs Commissioners* [2016] EWHC 2502 (Admin). In those cases, the alternative claims were decided and rejected. The Court then had to decide how that affected the costs order. In the instant case, the Astra Parties say that there should be a 5% deduction to reflect the fact that either the claims were brought unreasonably or that Musst has failed to show that it was reasonably brought.

31. I shall not make a reduction for the following reasons. First, without deciding the issue, I am not in a position to say that the unjust enrichment claim was unreasonably made. The argument has a complexity, whether it is a good argument or a bad argument, and it would require significant court resources which the Court ought not to dedicate to such a costs issue. There is an inexact analogy with cases which settle save in respect of costs: where it is not apparent to the Court from the terms of the settlement or otherwise which party would have succeeded, a common default position is no order as to costs.

32. Second, there is a particular resonance in the context of this case about the preliminary observation above about being cautious in respect of making deductions against an overall successful party. The context is the consequences of the transfer of the business referred to above. As with other claims (but in this instance pursued and not abandoned by Musst), the Astra Parties could have indicated that any business transfer would not affect any legitimate claims, but they chose to rely on the same as defeating the claims. In these circumstances, the costs of Musst bringing other bases for challenging an adverse consequence of the business transfer arose more from a transfer the consequences of which could have been avoided by the Astra Parties conceding that it had no effect on Musst's claims rather than any additional claim to protect Musst's position. In my judgment, it was not unreasonable for Musst to seek to protect their position. It follows that in my judgment, it was not appropriate for Musst to have their costs reduced. I therefore rule that the costs of the unjust enrichment claim follow the event.

(2) Overreaching in negotiations

33. I have found that Musst has not made out that the offers made should be reflected in an order for indemnity costs either by reference to Part 36 offers/Calderbank offers or conduct in general. This part of the case is that there should be a deduction in favour of Astra, claimed to be 30%, to mark unreasonable conduct which has increased costs and a lost chance of settlement.

34. It is said by the Astra Parties that there were arguments about the scope of the claim. If Musst had not sought repeatedly to introduce Crown II/III into the claim or complicated matters in negotiations to include Crown II/III, then the costs would have been reduced and the scope for negotiation would have been greater. In my judgment, these points are not made out for the following reasons:

(1) They are to be seen as part of a wider picture of the Musst Parties wanting to have fuller information from the Astra Parties. In that context, Crown II/III was said to be a part of the entitlement. It was therefore not unreasonable to seek to have those matters considered as part of the claim or in the context of any negotiation. It is not known what will happen about that part of the claim. If it is accepted, it is unlikely that it will appear that these matters were unreasonable. If it is not accepted, it does not necessarily follow that it will have been unreasonable to include the Crown II/III claim because it may all have stemmed from a perceived withholding of information.

(2) I am not impressed by the argument that if Crown II/III had not been insisted upon as part of the negotiations that a settlement would have ensued. The letter upon which the Astra Parties relied of 24 March 2021 was about a month prior to trial. It was referred to as an "opening shot": if it was intended as such, it was rather late in the day, at a time when the parties were preparing for trial and just prior to the Easter break. The offer of Astra, although significant, was still low relative to the costs involved in the case. In my judgment, it is speculative that if Crown II/III had not been put on the table that the trial could have been avoided. From the information of such correspondence as there has been, this seems an unlikely scenario.

35. In these circumstances, the case that Musst has acted unreasonably in this regard is not made out, nor that any such conduct had a profound effect on the amount of costs incurred or the likelihood of settlement. I therefore reject the reduction sought under this head.

(3) The abortive amendment application

36. I expressed above that in the context of the absence of a statement by the Astra Parties saying that no legitimate claim would be defeated as a consequence of the transfers that Musst did not act unreasonably in looking for alternative secondary arguments to the case that the contracts were novated. In the event, the application was brought, and it was abandoned. The usual costs of an amendment application are that the costs of and occasioned by the amendment should be paid by the party amending. A fortiori in a case where the amendment has been abandoned.

37. The amendments were late in the day with the first draft provided on 12 November 2020 (which in the context of a trial within less than 6 months thereafter is characterised as a late application) and with three further drafts in March 2021 and one on 9 April 2021. There was a detailed skeleton argument identifying prejudice. It led to a decision not to pursue the application.

38. I reject the submissions of Musst that the costs adjudication in respect of the amendments should await Astra's application to strike out the Crown II/III proceedings. Musst chose to make the application in these proceedings and then abandoned the same. I shall make an order that the costs of and occasioned by the amendment shall be paid by Musst . It will be up to the Costs Judge to assess those costs.

39. However, the suggestion that it might amount up to 5% of the costs of this action or a sum of at least £42,421 must be examined carefully. A question will be simply the extent to which the costs already being incurred have been increased by discrete costs referable simply to considering and contesting the amendment, and more generally whether they were reasonable and proportionate in respect of an application which was in the end abandoned, and which was due to be heard alongside the trial, that is without a separate hearing fixed for it. In an email in response, the Astra Parties have confirmed that they have incurred these costs with a statement of truth and believe that they are reasonable and proportionate.

40. Since the matter has been raised, I shall deal with the costs of the hearings of 17 December 2021 and 21 January 2022 as a consequential matter to this judgment. The starting point is that such costs usually follow the event, but that is not to prevent a different order.

(4) The application to exclude the without prejudice material

41. The Astra Parties say that they have been partially successful on this application in particular, in excluding the material from August 2016. They therefore submit that they should have 50% of the costs of the application. In my judgment, Musst enjoyed greater success than the Astra Parties in that they resisted the application successfully as regards the recordings of meetings up to the end of July 2016. Much less time was devoted to the email of Mr Murray of 3 August 2016. In terms of practical benefit, Musst was, in my judgment, the overall successful party on this application. The best order which the Astra Parties could hope to have would be costs in the case or no order as to costs. In my judgment, if the costs were not those of Musst , an order for costs in the case would be more appropriate because these were costs incurred in respect of a matter directly affecting the conduct of the trial, concerning the admissibility of important conversations. On either approach, the costs of this application ought to be paid by the Astra Parties to Musst whether as part of an outright order, or consequent upon the costs of the case being in favour of Musst in any event.

42. The Astra Parties say that there is to be a deduction for the costs of copying the confidentiality club documents of £10,000. In my judgment, this precautionary step does not require a separate costs order. I do not regard the desire to have these in non-electronic form as unreasonable, despite the fact that in the event they were not referred to at trial. It does not justify a departure from the starting point about the overall successful party having their costs.

43. It follows that there should not be an overall costs deduction, but the costs of and occasioned by the amendment application should be paid by Musst to the Astra Parties. Such costs should be the subject of an assessment at the same time as the overall assessment of the costs of the Contract Claim which are to be paid by the Astra Parties to Musst to be paid on the standard basis and assessed forthwith if there is no agreement.

V Payment on account of costs

44. There has already been ordered a payment on account of costs of £718,520 on the basis of a payment based on 80%. Musst is entitled to seek a variation in the event that there is a change of circumstances. There is now a change of circumstances in that the Court has ordered that they may have the entirety of their costs on the standard basis subject to the costs of and occasioned by the abortive amendment. If there had simply been an order for payment of 100% of the costs instead of 80% of the costs, the sum would have been £898,150.

45. The Astra Parties say that this attempt to obtain an increase was far too late, made on 20 January 2022, that is the day before the hearing. They say that the sum of £718,520

does not mean that this is agreed for all purposes as 80% of the costs such that this can be extrapolated upwards.

46. In my judgment, the Astra Parties have not suffered prejudice. They would know in the event that there was an order for indemnity costs (which there was not) or an increase above 80% of the costs (which there has been), they would be on risk for this increase. For the purpose of interim costs, an extrapolation upwards is a reasonable approach. It is likely that in assessing the figures for the purpose of the acceptance of a payment on account of £718,520 that a careful calculation was done on behalf of both the Astra Parties and Musst respectively. It follows that there is nothing wrong with the extrapolation as a starting point. There is no evidence from the Astra Parties to show that the extrapolation would not be fair.

47. Applying the approach of the Court as to the quantum of any interim payment, in *Excalibur Ventures LLC v Texas Keystone Inc and others* [2015] EWHC 566 the Court found that "*a reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.*"

48. Thus, here the Court has to make an estimate as to the costs of and occasioned by the application and make an allowance for the lowest figure in a likely range and make deduction accordingly. The figure which we know is £42,421 for the costs of the Astra Parties. Despite the fact that the figure provided by the Astra Parties may turn out to be too high I shall, consistently with the approach in *Excalibur*, for the purpose of a payment on account of costs assume that the entirety of the figure might be allowed on final assessment. I shall therefore set off the entirety of that figure against the costs sought by Musst, despite the costs in favour of the Musst parties having been the subject of percentage deductions.

49. Making a deduction for costs payable by Musst would ordinarily have to take into account the costs which must be borne by Musst both of the costs of the application to amend and the costs of preparing the various drafts of the abortive amendment. The court has been informed that these costs, comprising a sum of £28,757, have not been allowed for in the Budgeted Costs and therefore have not been claimed against the Astra Parties. It was therefore submitted, that it is inappropriate to make a deduction of those costs. The Astra Parties have been critical of those costs, saying that they have not been the subject of a statement of truth and that it might be that they are greater. That might be relevant to assist with the defence of the reasonableness of the Astra sum of £42,421. The inquiry might go further, namely to test the assertion that no part of the costs incurred by Musst and ascribed to the Budgeted Costs are in fact costs incurred in connection with the amendment which must be borne by Musst . Out of an abundance of caution, I shall make an allowance of a half of the costs of £28,757 comprising a further sum of £14,379 (to the nearest pound) in case there is any possibility of some part of the costs having an overlap with the Budgeted Costs. I shall therefore make a deduction of a sum of £56,700 from the rounded-up sum of £898,150, giving rise to a balance of a sum of £842,550. That therefore involves an additional sum to pay of £124,030 over and above the sum of £718,520 paid so far. This sum is to be paid into court pending any application on the part of the Astra Parties for any renewal of

permission to appeal before the Court of Appeal. I dealt separately with an application for permission to appeal on 21 January 2022.

VI Release of Security for costs

50. Musst submits that the costs ordered by way of security should be released. At the moment, the Astra Parties have made an application for permission to appeal to the High Court which has been rejected. They now have the opportunity to renew the application for permission to appeal to the Court of Appeal. If they do not obtain permission, then the application for the release of the security is well made. If they do obtain permission, then I should be addressed as to what is more appropriate, namely to order that security cease by a certain date giving enough time for the application to be renewed before the Court of Appeal or that I allow the security to remain in place. In the meantime, pending the decision of the Court of Appeal, it is premature to release the security. It is no answer that costs orders have been paid into court or that there will be an interim payment in court: if there were a successful appeal, then those sums might have to be returned depending on the order made by the appeal court.

VII Interim payment

51. A question arises as to the sum to be ordered by way of an interim payment. Although Musst had made points that they were not being provided with adequate information, for the purpose of an interim payment, the position has become easier to decide because of the figures provided by the Astra Parties. Astra's position as put forward in a letter from Payne Hicks Beach ("PHB"), solicitors on their behalf, of 14 January 2022 is that "*the construction of "investment" within clause 3.1 of the Octave Contract means the subscriptions paid into Crown I and 2B for the purposes of acquiring underlying bonds and swaps (as opposed to the underlying bonds and swaps themselves)".* If this is calculated without any temporal limitation, to which I shall return, the Astra Parties have calculated the sum due as US $3,826,952.20, being 20% of US $19,134,764.81 in performance and management fees, this being the amount shown according to the invoices disclosed by the Astra Parties ("the Current Figure"). In a schedule at paragraph 6 of the submissions of the Astra Parties, this sum of US$19,134,764.81 has been broken down as follows:

(1) Crown I
   (a) Management fees: total invoiced: US$1,065,894.25
   (b) Performance fees: total invoiced: US$7,264,600.14

(2) 2B
   (a) Management fees: total invoiced: US$1,054,223.35
   (b) Performance fees: total invoiced: US$9,750,047.07

52. In PHB's letter of 14 January 2022, there was a qualification on this that Musst's entitlement to management and performance fees was *"subject to a temporal limitation, namely that it ceased upon ASSCF's restructuring on 31 December 2015 on the basis that Crown I and 2B no longer constituted Funds (as defined in clause 1.1) from that*

date". With this temporal limitation, the Astra Parties have calculated the sum due as the sum of US $2,293,014.86, being 20% of US$11,465,074.30 in performance fees (there being no management fees unpaid to 31 December 2015). In a schedule at paragraph 5 of the submissions of the Astra Parties, this sum of US$11,465,074.30 (referred to as "the 2015 Figure") has been broken down as follows:

(1) Crown I: total performance fee that would have been invoiced: US$4,601,117.85

(2) 2B: total performance fee that would have been invoiced: US$6,863,956.45

53. At paragraph 5 of the submissions of the Astra Parties, the 2015 Figure has been explained as follows:

> *"The 2015 Figure calculates performance fees (all management fees have been paid) as if all investments had been redeemed in full at that date, based upon the value of the assets at that time. As such, there are no invoices that reflect these sums, because they are hypothetical fees that never actually fell due. One must therefore look at the value of the assets as at 31.12.15."*

54. The problem about the 2015 Figure is that the Octave Contract does not say that Musst was entitled to receive payments from Octave or Astra based on accrued performance fees. On the contrary, Clause 3.1 provides that:

> "The Introducer shall be entitled to share in all management and performance fees (howsoever described) *earned and received by Octave* (or any of Octave's affiliates, provided that there shall be no double counting of revenues earned by one affiliate and paid on to another affiliate by whatever means) in respect of each Prospective Investor who makes (directly or indirectly) an investment in a Fund managed or advised by Octave … for the Current Strategy on or before the Cut-Off Date, each such investment being an **Eligible Investment**. …." [Emphasis in italics added.]

55. Clause 3.2 then goes on to provide that Musst's "revenue share" is to be 20% of all fees earned by Octave.

56. Clause 3.7 then provides:

> *"The parties hereby agree that a) any new investments made by an investor in a fund under the management off Octave or the Investment Manager following a strategy other than the Current Strategy (a "New Fund") and deriving from the redemption of investments originally made in a Fund following the Current Strategy will not be treated as Eligible Investments under this agreement and this includes a restructuring of ASSCF to turn into a liquid open ended fund following [sic]; and b) should*

> *amounts deriving from an Eligible Investment be reinvested in a New Fund by an investor, performance fees are currently expected to become crystallised no later than the date such performance fees as may become payable with respect to the period during which the investment remained an Eligible Investment would remain payable under this agreement as set out in paragraph 4."* [Emphasis in italics added.]

57. I accept the submission of Musst that the effect of the foregoing is that Musst's entitlement to fees accrues only when Astra *"receives"* the sums in question, as set out in clause 3. The submission to the contrary fails because it seeks to override the very clear words in Clause 3.1. It is very easy to understand commercially why the share was dependent upon the sum being not only earned, but also paid. Otherwise, it would have been very onerous to Octave/Astra having to pay to Musst in circumstances where it might not receive anything. The oddity of calculating the 2015 Figure, in the words of the submissions for the Astra Parties, *"as if all investments had been redeemed in full at that date, based upon the value of the assets at that time"* only shows the artificiality of the submission that the entitlement accrues without receipt.

58. If it had been the case that there were to be paid fees referable to a notional redemption, then one would expect that the Octave Contract would have provided for a method to assess the accrued performance fees. Instead, the language of Clause 3 is to contrary effect. The entitlement is in respect of "all management and performance fees...earned and received by Octave". It is not notionally earned, and nor is that sufficient, but it has to be received as well. Clause 4.1.2 provides for Octave's statement to show *"the fees due and payable to Octave"*, not some notional amount. Clause 4.5 refers to amounts payable to be paid *"within 10 days of first receipt of fees by Octave ..."*.

59. The wording of Clause 3.7 does not alter the position. This refers to performance fees becoming *"crystallised"* no later than the date there referred to, in the event that an Eligible Investment is sold, and the proceeds are reinvested in a new fund. The premise of that is that until they became *"crystallised"*, nothing would be due to Musst: hence the need to reassure it as to when it was expected that they would become crystallised. Further, Clause 3.7 refers to restructuring if ASSCFL's assets are sold and the new investments are made in a "New Fund", but this does not have application to a mere restructuring of ASSCFL on its own.

60. A part of the argument of the Astra Parties is that having regard to the definition of the Fund in the Octave Agreement, in the event of the Fund ceasing to exist as such, then the entitlement to performance fees would cease. The Astra Parties rely on the definition of Funds in Clause 1.1 which reads as follows:

> *"Funds" The Astra Special Situations Credit Fund Limited and other funds and managed accounts designed to substantially replicate the investment securities and risk profile of The Astra Special Situations Credit Fund Limited and following substantially the same strategy as set out under the Current Strategy below ... to which Octave or Manager acts as investment manager. It is understood for the purposes of*

> *interpretation of the definition of a Fund that the strategy remains substantially the similar to the Current Strategy."*

61. The Astra Parties therefore submit that in the event that the investment ceases to be in a Fund, then there is no longer an Eligible Investment from that point in time. Thus, the submission is that the 2015 Figure is the operative figure, based on a notional redemption as set out above.

62. I reject that construction for the reason that the moneys payable from Octave/Astra to Musst depends upon money being earned and received by Astra, and not moneys notionally earned. Further or in the alternative, I reject the construction consistently with the reasoning in the Judgment. That is that once an investment had been made on the basis of the Current Strategy, a change in strategy before redemption giving rise to a fee did not bring Musst's entitlement to an end. The wording in Clause 3.1 is about the point of the making of the original investment and any additional investments and there are no words that in the event that the investments cease to be managed according to the Current Strategy or ceased to be invested in a Fund that the entitlement would come to an end. Just as a change in Current Strategy would not bring the entitlement to an end, so too the entitlement to fees does not cease because of a change in the ASSCFL strategy or because the ASSCFL fund ceased to exist. The critical time is the point when the investment was made. Just as the Judgment expressed this conclusion using a textual approach (paras. 417-425) and then using a contextual approach and an iterative approach (para. 426-435), so for similar reasoning, this applies in respect of the argument about the Fund.

63. I reject the submission of the Astra Parties that Musst's construction is *"inconsistent with the wider working of the contract or that it jars with commercial sense and leads to an absurd outcome."* Musst's construction is consistent with that which has been held in respect of the Current Strategy issue. Astra's argument about its construction making commercial sense is in particular by reference to its argument that the fees can accrue even before they are received by Octave/Astra: that argument is in contradiction to the words of the Octave Contract. The arguments now run by the Astra Parties in their note of 28 January 2022 by reference to Clause 3.7 are inconsistent with the plain words of Clause 3.1 and the Octave Contract as a whole: see here also the reasoning in the Judgment at paras. 417 – 422.

64. I should add that it has also been submitted that it is now too late to argue this point. I have not found it necessary to consider that argument. I have considered the point, and in my judgment, it is not a good point. It therefore follows that the Current Figure applies. Accordingly, I order an interim payment of a sum of US$3,826,952.20.

65. In submissions made by Musst on 18 January 2022, there were a number of matters of dissatisfaction about the disclosure provided by the Astra Parties: see paras. 47-71. These matters seemed to have been overtaken by the figures provided by the Astra Parties. This changed the focus of the interim hearing.

66. Musst had submitted that the Court ought to make an order replicating Clause 11 of the Octave Contract providing for a right of entry to the premises to inspect the books of account. The Astra Parties submitted that this was unnecessary, and the problem

was that Musst was simply not understanding the documents and the information provided by the Astra Parties. To that end, the Court ordered on 21 January 2022 that Musst should ask for further information and the Astra Parties should provide information to the extent that it considered Musst was entitled to such information. To this end, a request was made by Musst on 31 January 2022 and an answer was provided by the Astra Parties on 14 February 2022. It is not apparent what is the effect of the answers given by the Astra Parties to the criticisms and the figures which have been provided by the Astra Parties. Do they as per Astra bring to an end the need for further inquiry as regards Crown I and 2B? Does Musst accept this or does Musst contend that the payment thus far ordered is an interim payment and that there are other directions still required? If there is any issue here, this may have to be added to the hearing of the application to strike out the claim BL-2021-00680, to which this judgment now turns.

VIII What directions should be given on the defendants' application to strike out the claim BL-2021-00680?

67. Musst had in mind a reply by 25 February 2022. I shall allow extra time since that time has now lapsed and Musst may wish to consider this judgment. The Astra Parties should be allowed time for a reply if any. It may be that a hearing could take place before the end of term depending on diaries and the commitments of the Court.

68. There is discussion in an argument of Musst about the possibility of an amendment by reference to the Judgment in this case. Having regard to the history of the abortive amendment application, the Court will not permit an amendment until it has seen the proposed amendment and heard any comment on it by the other side, even if it is said to be simply a tidying up exercise.

IX Whether the Claimant has a right to inspect the books and records relating to Crown II and Crown III

69. There is an issue between the parties about access to the books of the Astra Parties in relation to Crown II and Crown III. Musst submits that the Court should not deal with these matters on paper for the following reasons:

(1) as set out at paras. 20 - 41 of the arguments of Musst on consequential matters of 4 February 2022, the points in issue are too intricate to be dealt with satisfactorily on paper, and would require a hearing;

(2) they are also connected with the matters which are to be the subject of the strike out application;

(3) they would conveniently be heard at the time of the strike out application.

70. The Astra Parties submit that there is no need for the inspection of the books for the reasons which it has set out at paras. 12-16 of their Contract Claim submissions under para. 6 of the order served on 4 February 2022 (in error dated 4 January 2022). They

submit that the novations were in respect of Crown I and 2B alone, and that the original contract continued to the extent that it was not novated. The Astra Parties submit that the findings of the Court were by reference to the matters before it, namely the novation of Octave Contract relating to Crown I and 2B.

71. There is therefore no basis for a claim that there was a novation in respect of any other contracts. The Astra Parties relied upon paras. 148-151 of their skeleton argument for trial. There is a concern that under the umbrella of consequential findings, Musst is trying to avoid an adverse finding for costs in respect of the Crown II and Crown III contentions.

72. In my judgment, there are still arguments in respect of Crown II and Crown III where the parties have very different positions as is foreshadowed in the Judgment at paras. 660-674. The matter is not susceptible to a summary determination. The warning of the Astra Parties about the costs impact of the argument in respect of Crown II and Crown III is well made. The Court ought to be astute, if it turns out to be appropriate, to make issue-based costs awards in respect of Crown II and Crown III and not necessarily find that they are simply consequential matters arising out of the main judgment. That is for another day.

73. Thus, the access to books issue will be considered as part of the strike out application. The parties should attempt to agree directions in that regard to dovetail with the directions relating to the strike out application.

74. Musst has estimated that a hearing length of 1.5 days. I estimate it would be 2 days to consider both the strike out application and the right to inspect issue (and to take into account any argument, if there is one, about alleged shortcomings in respect of disclosure relating to Crown I and 2B).

75. The parties are to seek to finalise a draft order in respect of these matters and to consider any further directions which may be required.

X Final word

76. The consequential issues have grown in successive notes and submissions. If it is believed that any consequential matter has not yet been considered, that should be identified whilst attending to typographical corrections.