



Neutral citation: [2022] EWHC 1918 (Comm)

Claim No: CL-2021-000561

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

Royal Courts of Justice

Rolls Building, London, EC4A 1NL

Date: 25 July 2022

Before

Philip Marshall QC (sitting as a Deputy Judge of the High Court)

Between:

EULER HERMES SA (NV)

acting through its registered branch EULER HERMES UK

Claimant

-and-

(1) MACKAYS STORES GROUP LIMITED

(2) MACKAYS STORES (HOLDINGS) LIMITED

(3) M.E.G. RENEWABLES LIMITED

(4) M.E.G. GLENKILN LIMITED

(5) MACKAYS GROUP TRUSTEES LIMITED

(6) LAROQUE LIMITED

(7) WILLIAM MCILROY SWINDON LIMITED

(8) JANPRO LIMITED

(9) G.E. WORTHINGTON LIMITED

Defendants

JUDGMENT

Rebecca Drake (instructed by Gateley Plc) for the Claimants
Iain Quirk QC (instructed by Harper McLeod LLP) on behalf of the First to Third, Fifth to Sixth
and Eighth to Ninth Defendants

The Fourth and Seventh Defendants did not appear and were unrepresented

Hearing date: 5 July 2022

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date for hand-down is deemed to be 25 July 2022.

PHILIP MARSHALL QC:

Introduction

1. This is the trial of a claim issued under Part 8 of the Civil Procedure Rules in which the Claimant (“**Euler**”) seeks sums alleged to be due under a contract of indemnity or damages for breach of that contract along with declarations as to its entitlement.
2. No witnesses were called and the matter stands to be determined by reference to an agreed statement of facts, written evidence and the parties' respective submissions.

The Facts

3. The following factual summary is largely derived from the agreed statement of facts and key documents which both parties have referred to.
4. Euler carries on the business of providing insurance, bonds, guarantees and other financial instruments.
5. The Defendant companies are all members of the Mackay Stores Group, the principal business of which is or was high street clothing and homeware retail.
6. Mackays Stores Limited (“**MSL**”) was a wholly owned subsidiary of the Second Defendant, Mackay Stores Holdings Limited. MSL was formerly the principal trading company of the Mackay Stores group. MSL went into administration on 4 August 2020, and ceased trading the same day.

7. Euler provided a guarantee and bond facility dated 9 December 2013 to the First Defendant, Mackay Stores Group Limited, and *"approved subsidiary companies"* (which in the proceedings have been treated as MSL and the Defendants) ("**the Facility**"). The scope of the Facility was the provision of bonds and guarantees *"relating to the contractual obligation of [MSL and the Defendants] as required by parties contracting with [MSL and the Defendants]"*.
8. The period of the Facility was *"until terminated by [Euler] by notice in writing or as and when [Euler] have been released from all liabilities and obligations under any Bonds issued under the Facility"*.
9. The Facility provided for a counter-indemnity to be provided by MSL and the Defendants: *"The counter-indemnity of [MSL and the Defendants] in the form of the Agreement of Indemnity attached, is to be provided as a condition of the provision of the Facility"*.
10. A week later, on 16 December 2013, Euler and the Defendants together with MSL entered into the counter-indemnity ("**the Indemnity**"). This provided in material part as follows:
 - 10.1 *"[the Defendants and MSL] will at all times indemnify and save harmless [Euler] against and from Ultimate Liability"* (see clause (1)). *"Ultimate Liability"* was defined as *"Any liability (actual, prospective or contingent) and also any claim and every other loss expense damage or cost of whatsoever nature and howsoever arising which at any time may be incurred by [Euler] in any way in connection with the Facility"* (see first recital);
 - 10.2 *"any payment made by [Euler] in respect of Ultimate Liability shall be made at its sole discretion without the need for the authority of [the Defendants and MSL] or any of them and in the event of any such payment being made by [Euler] [the Defendants and MSL] shall pay to [Euler] on demand any amount so paid"* (see clause (4));
 - 10.3 in the event of, among other things, the appointment of an administrator in respect of any of the Defendants, or MSL, the Defendants and MSL *"shall forthwith upon receipt of a demand in writing deposit with [Euler] such sum or*

sums as [Euler] shall specify" and "such sum or sums deposited in accordance with Clause 5(a) above shall not in the aggregate exceed the amount of Ultimate Liability and shall be placed and held by and in the name of [Euler] on deposit with a bank of standing to be used, together with any interest earned or accruing thereon, to pay Ultimate Liability. Any surplus remaining after such payment or payments have been made together with any surplus of accrued interest shall be refunded to [the Defendants and MSL] who contributed to the deposit in the shares that those contributions were made" (see clauses 5(a) and (b)); and

10.4 "a demand in writing by the Company pursuant to the provisions of either Clause (4) or Clause (5)(a) above shall constitute conclusive evidence of the fact and the aggregate amount of the liability of the Indemnitors to the Company at the time of such demand" (see clause (6)).

11 The only bond or guarantee entered into pursuant to the Facility was a guarantee provided by Euler to the Commissioners of HM Revenue and Customs ("**HMRC**") dated 18 December 2013 and commencing on 1 January 2014 in respect of deferred tax owed by MSL to HMRC ("**the Guarantee**"). This was an HMRC standard form document that contained the following material provisions:

11.1 "In consideration of [HMRC] allowing payment of duties, taxes, levies, charges, amounts and deposits in respect of the same to be deferred to prescribed payment days by [MSL] [Euler] guarantees to pay [HMRC] IMMEDIATELY ON DEMAND each and every sum for which deferment is allowed during the continuance of this guarantee" (see clause 2a));

11.2 "The liability of [Euler] shall be limited as follows: (a) in any one calendar month liability in respect of sums for which deferment is allowed in that month shall not exceed the amount of [£250,000] (b) the overall liability of [Euler] shall not exceed twice the amount set out in sub-paragraph (3a) above always provided that where payment of a deferred amount is sought by direct debit, advice of any default payment shall be received by HMRC's bank not later than seven days after the default occurred" (clauses 3a) and b)); and

- 11.3"*If not less than seven days written notice of termination of this guarantee is given by [Euler] to the Commissioners by delivering such notice to HM Revenue & Customs at the address provided above then all further liability shall cease as from the date of expiry of this notice or such earlier date within the period of such notice as the Commissioners may allow except for any liability arising hereunder before that date*" (see clause 4).
- 12 The Guarantee replaced an earlier guarantee provided by the Clydesdale Bank Plc in the amount of £250,000 and as to this clause 6 provided: "*Such sums as were deferred during the continuance of the [earlier guarantee] and which remain unpaid upon completion of this guarantee shall be treated as sums for which deferment is allowed immediately after the commencement of this guarantee. The provisions limiting [Euler's] liability contained in paragraph 3(a) shall not apply to such sums*".
- 13 The Guarantee was varied twice, with each variation increasing the limit of Euler's liability. On 5 July 2017 it was increased to £300,000 in any one calendar month and £600,000 overall. On 4 October 2017 there was a further increase in these figures to £450,000 and £900,000 respectively.
- 14 A termination notice under clause 4 of the Guarantee was given by Euler and delivered to HMRC on or around 4 May 2020, expiring on 30 June 2020 (the "**Termination Notice**"). It stated: "*Please take this letter as notice of our wish to terminate the above guarantee with effect from 30th June 2020*".
- 15 HMRC replied two days later, on 6 May 2020, acknowledging receipt of the notice of termination and stating, "*I acknowledge receipt of the notice of termination you have given for the C1201 guarantee for your above named customer, ... The guarantee should be returned to yourselves at the end of 31/08/2020, although I am unable to return it until I am sure that all liabilities covered by it have been paid.*"
- 16 On 8 September 2020 HMRC made a demand on Euler under the Guarantee. That demand was headed "Claims Against Deferment Guarantee" and said that HMRC had sought to

debit a deferred sum of £641,594.01 on 15 April 2020 from MSL's account, but it was returned unpaid. That was a sum deferred in the period 1 to 31 March 2020. HMRC went on to say *"In the circumstances, under the terms of the guarantee given by yourselves in respect of [MSL], I must now ask for payment of the sum of £450,000"*. On 15 July 2020 HMRC had sought to debit a further sum of £101,147.36, that had been deferred in the period 1st to 30th June 2020, from MSL's account but that too was returned unpaid. HMRC asked for a further payment from Euler in that amount also.

- 17 On 21 September 2020, Euler initially disputed the second part of HMRC's demand of 8 September 2020 on the basis that it *"relates to sums deferred significantly after the date of our cancellation notice, and subsequent acknowledgment thereof by your office in correspondence dated 6th May 2020"*.
- 18 Two days later, on 23 September 2020, HMRC replied to Euler in a short email referring to their letter of 6 May and said *"Therefore, payment of £101,147.36 incurred during the period 1 to 30 June is due under the terms of guarantee"*. HMRC maintained their claim to both sums.
- 19 On 29 September 2020, Euler made payment to HMRC in the full amount requested, namely a total of £551,147.36.
- 20 On 12 October 2020, Euler reserved its rights against the Defendants and then made a claim against the Defendants under the Indemnity.
- 21 On 3 June 2021, Euler wrote to HMRC pointing out that the Defendants had asserted that no liability existed given no demand was made by HMRC prior to 30 June 2020 and that the Guarantee had thereafter terminated. Euler asked HMRC: *"Please may we request; a) You review your file and confirm that the liability did exist and a demand was therefore appropriate. b) Confirm the terms of the guarantee, and your understanding of the validity of the demand made after the expiry of the cancellation notice on 30th June"*.
- 22 HMRC replied the same day stating that *"The guarantee expired with effect from 30 June 2020, therefore all liabilities up to and including this date were covered by it"*.

- 23 Also on the same day Euler explained that the Defendants were disputing liability on the basis that a demand had not been made prior to the expiry of the Guarantee on 30 June 2020 and asked HMRC *"Has this position ever been tested with yourselves, and would you have any situations where you have legal confirmation that indeed the liabilities are valid notwithstanding the expiry date of the guarantee having passed?"*
- 24 On the next day, 4 June 2021 HMRC replied stating *"The legal position is that your guarantee covered all liabilities accrued by your client during the period your guarantee was active i.e. 01.01.2014 to 30.06.2020", and "This has not been tested as it's covered within various Acts. Should you so wish, I will find out where in law it states this".*
- 25 Euler took up this invitation and requested an explanation of the legal position from HMRC's perspective. Further to this request, on 7 June 2021, HMRC stated in an email: *"Once notice is given, there are still 7 days when liabilities will be covered by the guarantee - and, all liabilities which arise before "notice+7" will still be covered by the guarantee...The critical point is "did the debt arise during the period covered by the guarantee" – not "did we try to claim against the guarantee during the period covered. Future liability is extinguished on cancellation, not past liability".* The email then referred to various pieces of legislation which were said to provide the statutory context to the standard form wording of the Guarantee.
- 26 Various exchanges of pre-action correspondence then followed in which Euler sought payment from the Defendants under clauses 5(a) and 5(b) of the Indemnity. When no payment was forthcoming the present claim was issued on 28 September 2021.

The Issues

- 27 In their written submissions both parties addressed first the question of whether Euler had a liability to pay the sums demanded under the Guarantee notwithstanding the notice of termination that had been received by HMRC on or around 4 May 2020.
- 28 In the event that, on the true construction of the Guarantee, there was in fact no liability a second issue arose as to whether Euler was nevertheless entitled to payment of the sums claimed from the Defendants under the Indemnity.

- 29 A third form of claim was referred to very briefly in the skeleton argument of Ms. Drake, counsel for Euler, namely restitution. This claim was said to be founded on section 5 of the Mercantile Law Amendment Act 1856. However, this claim was not mentioned in either the claim form or particulars of claim. The only mention of such an argument, prior to the exchange of skeleton arguments, was in a short paragraph in the evidence of Emlyn Hudson dated 7 December 2021, served in reply on behalf of Euler. On seeing this passage the solicitors for the Defendants raised objection in correspondence of 20 January 2020 to the argument on the basis that it had not been raised in the claim form or the particulars of claim and could not be advanced in this way in reply evidence.
- 30 In my judgment, it is not permissible for this restitution claim to be made by Euler. Under rule 8.2 of the Civil Procedure Rules, in a Part 8 claim such as this, the claimant must state in the claim form what question the claimant wants the court to try or the remedy which the claimant is seeking and the legal basis for the claim to that remedy. The claim form here did not refer to any question of whether restitution was available nor did it refer to a restitutionary remedy or to the 1856 legislation, mentioned above, as the basis for it. In these circumstances, it is not open to Euler to rely on this alternative basis of claim without seeking to amend its claim form. No such application to amend has been made.
- 31 One final issue appeared to arise as regards to the correct approach to the recovery of legal costs by Euler if it succeeded on its claim under the Indemnity. In the event, the parties are agreed that in such an event such costs will fall to be recoverable by Euler and they will be subject to detailed assessment on the indemnity basis. In the light of that agreement there do not now appear to be any distinct issues for determination regarding the contractual recoverability of legal costs.

Analysis

- 32 Central to the Defendants' case on the validity of the demand of HMRC under the Guarantee is the contention that liability under the Guarantee arose where a demand was made by HMRC upon Euler for payment. They contend that, since Euler had no liability until such time as demand was made and since notice had been given terminating exposure under the Guarantee as from 30 June 2020, the demand for payment of HMRC sent on 8 September 2020 was not valid.

- 33 In support of this Mr Quirk QC, counsel for the Defendants, placed particular reliance upon the the decisions of the Court of Appeal in National Westminster Bank v Hardman [1988] FLR 302 and Bank of Credit and Commerce Internatioal S.A. v Simjee [1997] CLC 135.
- 34 In Hardman the court was concerned with a guarantee under which the guarantor was liable to pay on demand but which was determinable on three months notice. It was common ground that no cause of action arose against the guarantor until a demand was made. It was also the case that the termination provision stated ‘*This guarantee shall be a continuing security and shall remain in force ...until determined by three months’ notice in writing*’. The relevant guarantee also expressly provided for what was to be preserved from the effect of termination: “...[B]ut such determination shall not affect the liability of the guarantor for the amount due hereunder at the date of expiration of the notice with interest as herein provided until payment in full”. The Court of Appeal placed reliance on this express wording in concluding that there could be no continuing exposure to contingent debts after termination had taken effect. Unless demand had been made at the date of termination there was nothing due that could be the subject of continuing liability. The court also took account of the commercial consideration of the guarantor remaining contingently liable without limitation of time, with demand potentially being made many years later and proceedings being issued 6 years after the demand.
- 35 It seems to me that the Hardman decision is specific to the wording of the guarantee in that particular case. There, in contrast to the Guarantee in this case, there was express provision for the nature of the liability that was to persist after termination. In Hardman that express wording required a demand to have been made for any exposure to persist. There is no such equivalent wording in this case.
- 36 In Simjee, the principal judgment was given by Hobhouse LJ who distinguished the Hardman decision having regard to the different wording of the form of the guarantee in that case and who observed that “*decisions on differently worded documents are of limited assistance*”. He then went on to consider the operation and effect of demand guarantees and continuing guarantees in the following passage at 137-139:

“The simplest form of guarantee of a monetary liability of a principal debtor is one which identifies an obligation of the principal and simply states that the surety guarantees that that obligation will be discharged. The subject matter of the guarantee is thus the payment of an identified debt or the discharge of the principal's liability in respect of an identified transaction. The liability of the surety is not, as such, qualified in amount or time; a further term is necessary to do that. The liability of the surety to the creditor accrues and becomes actionable as soon as there is a default by the principal. Any repayments by the principal will reduce or extinguish the obligation the subject of the guarantee and therefore the liability of the surety. If there is a running account, prima facie, the rule in Clayton's Case (1816) 1 Mer 572 will apply (Re Quest CAE (1985) 1 BCC 99 , 389 at pp. 99,392–99,393). The liability of the surety is exhausted once the relevant obligation has been performed and does not cover further advances.

This simple situation is capable of being varied or elaborated in many ways. But still the two elements will be identifiable—the obligation or obligations of the principal the subject matter of the guarantee and the accrual of the liability of the surety to the creditor. Where the creditor and principal have a running account and the creditor, the bank, is from time to time providing the principal debtor with finance, whether by granting him overdrafts or loan facilities or issuing paper on his behalf or discounting negotiable and other instruments or debts for him or in any of the other many ways a banker may provide finance to a business, the only satisfactory form of guarantee will be what is called a continuing guarantee. This has the effect of making the subject matter of the guarantee whatever may be the discharge of the indebtedness (and other monetary obligations) of the principal to the bank at any given time. It is in essence a security with a floating subject matter. Ordinarily such a guarantee will not prudently be given unless the surety has a measure of control over the affairs of the principal.

For the guarantee contract to work satisfactorily it is necessary to have some mechanism whereby the accrual of any liability of the surety under the guarantee can be identified and quantified. In its absence, problems can also arise under the Limitation Acts (Parr's Banking Co Ltd v Yates [1898] 2 QB 460). The mechanism ordinarily adopted is to express the guarantee as a demand guarantee. Thus, as does the present document, the guarantee will provide that the obligation of the surety arises when a demand is made upon him by the creditor. That demand provides the moment at which a line is drawn under the account

between the principal and the creditor and the surety becomes immediately liable for the discharge of whatever are at that time the obligations of the principal to the creditor.

A continuing guarantee is prima facie open-ended. The surety will normally require some mechanism whereby he can bring this state of affairs to an end. Commercially, there is more than one way in which he can do this. One is by including in the guarantee a provision which enables the surety to give notice of termination of the guarantee contract so that the creditor is given a period of time within which he may if he chooses make a demand upon the surety; if he does not do so, the contract then wholly comes to an end. This was held to be the effect of the guarantee in the Hardman case. Another is by having a provision which enables the surety by the service of a notice to bring to an end the continuing character of the guarantee so that from the expiry of the notice its subject matter becomes the obligations of the principal to the creditor at that time. The judge has held that this is the effect of cl. 3 of the guarantee in the present case.

If the provisions of the guarantee are of the latter kind, the guarantee remains in force but only as a guarantee of the performance of identified obligations. It remains a demand guarantee so that, although the notice crystallises the subject matter of the guarantee, it leaves open whether there will be any liability of the surety under the guarantee. No cause of action against the surety will arise until a demand is made upon him. But the demand can only relate to such of the obligations of the principal at the time of the expiry of the notice as still remain unperformed at the time of the demand on the surety.

As Parker LJ pointed out in the Hardman case, there are advantages and disadvantages in either type of notice provision. What is important is that the parties should know at the time when the guarantee is executed and at the time when notice has been given what is the effect of their contract. They can then protect their position. What is unacceptable is that there should be the kind of uncertainty that existed in the Hardman case and, it is suggested, in the present case”.

- 37 In Simjee the Court of Appeal concluded that the guarantee in issue was a continuing guarantee falling into the second category of the type described in the judgment of Hobhouse LJ and it was the continuing nature of the guarantee that was determined by notice. Liability remained in respect of contingent liabilities in existence as at that date, the notice effectively crystallised their extent. In that case the court was able to rely on express wording referring to the guarantee being determined and “the liability hereunder crystallised”.

- 38 Once again the wording of the guarantee in Simjee is different from that adopted in the Guarantee here, where there is no equivalent reference to liability being crystallised after notice of termination. In this case the central question is what is meant by the term “liability” as used in the proviso to the termination provisions in clause 4 which provide for liability to cease “except for any liability arising hereunder before that date”.
- 39 In my judgment construction of the term “liability” is informed by other provisions of the Guarantee such as that setting a limitation on liability in clause 3 and the additional provisions regarding deferred sums that were unpaid during the continuance of earlier guarantees. Such provisions strongly support the conclusion that “liability” encompasses contingent liability in respect of sums regarding which payment has been deferred and which could be the subject of a demand by HMRC if not paid by MSL. Thus, for example, clause 3(b) states that the overall liability of Euler is subject to a proviso that the advice of any default in payment has been received by HMRC’s bank not later than 7 days after default occurred. The “overall liability” figure may thus increase because of a delay in bank notification which suggests “liability” is concerned with exposure to a potential demand by HMRC as a result of such bank notification of default. See also the provisions of clause 6 which also provide for Euler’s “overall liability” to be increased in respect of sums deferred and not yet paid and which therefore amount to a contingent or potential liability for a guarantor.
- 40 The Defendants rely (as the guarantor did in Hardman) upon the possible length of time that Euler might be exposed to a demand under the Guarantee under such a construction. But such a commercial consideration is not in any way decisive – it did not deter the Court of Appeal from reaching its conclusion in Simjee. Moreover, in this instance we are concerned with the deferral of the payment of taxes for which there is a statutory framework and obligation to collect. It would therefore seem unrealistic to conclude that a default by MSL, for example by its bank failing to meet a direct debit, would not result in a demand within a relatively short timescale by HMRC under the Guarantee, as has in fact happened.
- 41 By contrast the Defendants’ construction could well have uncommercial results. HMRC could afford more than a 7 days period of deferral (from the time periods referred to in

the letter of demand it would appear 15 days deferral was in fact afforded to MSL). If the exposure of Euler could end within 7 days save in respect of sums demanded then HMRC might arguably have no recourse to the guarantor for sums for which payment was deferred during its validity but which had not yet fallen due. This would mean that in cases where this standard form of guarantee was used HMRC could only safely allow 7 days as a period of deferral. That would be an odd conclusion given that relevant statutory provisions governing deferral of payment to HMRC at the time envisaged longer periods of deferral (see the Customs Duties (Deferred Payment) Regulations 1976 SI 1976 1223, the Customs Duties (Deferred Payment) (Amendment) Regulations 1978 SI 1978 No.1725 and Excise Duties (Deferred Payment) Regulations 1992 SI 1992 No.3152, and EU Regulation No.952/2013 on the Union Customs Code (recast)).

- 42 Having regard to the above, in my judgment, the demand made by HMRC on 8 September 2020 was not affected by the prior termination notice. As I understand it there is no other ground on which it is contended that the demand was invalid. I also understand there to be no question over the sum paid by Euler to HMRC being recoverable in these circumstances from the Defendants under the terms of the Indemnity.
- 43 This renders it strictly unnecessary to consider the further argument that the sums claimed are payable under the Indemnity in any event, even if it had not been concluded that they were properly payable under the Guarantee. However, even if I had not decided that the demand of HMRC under the Guarantee was valid I would still have concluded that the sums claimed were properly payable under the Indemnity for the reasons briefly set out below.
- 44 Whilst accepting for present purposes that the terms of the Indemnity only permitted recovery in respect of “Ultimate Liability” that was incurred in connection with the Facility and that this meant that there had to be a causal connection (as advocated by the Defendants) there remain the provisions in clause 6 of the Indemnity to consider. Under clause 6 a demand in writing is to constitute conclusive evidence of the fact and amount of liability of the Defendants.

- 45 The Defendants submit that such a clause ought to be construed as referring to a demand which is not the subject of manifest error or is properly subject to an implied term to that effect. In my judgment there is force in the contention that such an interpretation is correct and that manifest error or fraud will prevent a demand of Euler being definitive (see, for example, Bache v Banques Vernes [1973] 2 Lloyd's Rep. 437, at 439).
- 46 Even accepting that manifest error in this context encompasses "obvious" error (as described in AXA Sun Life Services Plc v Campbell Martin Ltd. [2011] EWCA Civ 133), I would not regard the demand in this instance to be obviously wrong. In my judgment, even absent my earlier conclusions, it would be well open to argument and by no means obvious that the demand by HMRC under the Guarantee was invalid. In this respect I regard the guidance in Veba Oil Supply & Trading GmbH v Petrotrade Inc. [2001] EWCA Civ 1832, at [33] as to the meaning of obvious error to be equally applicable in this context (as seems to me to be supported by the further analysis in Flowgroup Plc v Co-operative Energy Ltd. [2021] EWHC 344 (Comm)). If the point is seriously arguable then it cannot be said to be obviously wrong.
- 47 For these reasons the demand under clause 6 would be conclusive and payment was properly due in respect of it under the terms of the Indemnity.
- 48 I should add for completeness that Mr Quirk raised the argument that clause 6 of the Indemnity was invalid under the provisions of the Unfair Contract Terms Act 1977. However, this was premised on there being no express or implied manifest error proviso to that clause. As I would have concluded that such a proviso did exist I do not understand this argument to be one that has any application.

Conclusion

- 49 For the reasons set out above the claim succeeds in respect of the principal amount sought of £551,146.36. Unless these points can be agreed in light of this judgment I shall hear submissions on consequential matters such as the award and quantification of interest and any remaining issues on costs.