INTERIM AWARDS OF EXPENSES IN THE COURT OF SESSION AND THE SHERIFF COURT: A SIGNIFICANT DECISION THAT AFFECTS ALL PRACTITIONERS

Note by Andrew Smith QC[1]

Summary

It is competent for the court to make an interim order for payment of a fixed sum in respect of expenses against the party who is ordered to pay those expenses, pending preparation of and taxation of judicial accounts.

A simple procedure can be adopted which is inexpensive and quick. This can materially improve cash flow for solicitors, allowing them to be paid a reasonable proportion of their likely fees at an early point in time; and to recover funds to meet outlays incurred during the conduct of the process.

Equally, it allows clients who have been funding litigation to be reimbursed at an early opportunity without reducing the amount of damages (if any) which they have obtained.

The ability to obtain such awards should apply in all kinds of litigation, whether commercial, personal injury or otherwise.

Interim Awards of Expenses

The attention of solicitors is drawn to a recent decision of Lord Bannatyne on 30th June 2017 (regrettably as yet unpublished and doubt as to whether it will be) regarding interim awards of expenses. Although the decision was made in a commercial action, as were the other cases in which such awards have been made, there is no reason in principle as to why the decision should not apply in all cases – including personal injury and medical negligence claims. The decision in Higherdelta v Covea Insurance, but only on the merits, is to be found at https://www.scotcourts.gov.uk/search-judgments/judgment?id=c20836a7-8980-69d2-b500-ff0000d74aa7.

The problem

All those who litigate are aware that - in reality – each party has to fund a claim as it progresses. That funding continues even after an award of expenses is obtained, whilst

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With proposed changes to the law in Scotland regarding Expenses, in particular relating to QOCS (one way costs shifting) and DBAs (Damages Based Agreements), Andrew has already had significant experience of such concepts in his English practice which will hopefully allow him to speak with some degree of authority on the subjects when introduced in Scotland.

the account of expenses is made up and taxed if necessary. If the parties do not do so, or are unable to do so, often the solicitors meet the outlays during the litigation. Some experts will be prepared to wait until conclusion of the case; counsel are often prepared to defer payment of fees. But, when the case is concluded, it can take several months for the account of expenses to be made up; months to obtain a date for taxation; and months for the result of the taxation to be made known by the Auditor. During this time, it is habitual that the paying party (usually of course the defender) pays nothing towards the expenses even though something is plainly due. It is convenient (and logical) to adopt English terminology of "the paying party" and "the receiving party" for the purposes of this note. The terminology is so obvious that no definition is required.

The solicitor and counsel can of course be firm with the client, and demand that he makes payment of the outlays and fees - perhaps from the damages he has obtained if it is a damages action. This is of course good for the solicitor and counsel, but less than fair to the client who is in essence funding a debt due by the paying party who is almost by definition a "wrongdoer" (otherwise he would not have lost). The receiving party is not entitled to interest on the sum due to him until the Auditor has reported (see Phee v Gordon, Extra Division [2014] CSIH 50). On the other hand, counsel and solicitors are obliged to pay tax and VAT upon the fee as rendered, thus carrying the outlay of that sum without having been paid.

Counsel and solicitors would in theory be entitled to defray the cost of that outlay by charging it to the client in terms of the Late Payment of Commercial Debts (Interest) Act 1998 – which applies interest at 8% over base per annum. But once again, to do so to a client who has been either wronged by fault or perhaps breach of contract at the instance of the paying party simply adds insult to injury. Equally, someone who has been been "wrongly" sued by the pursuer faces an unfair delay in being put back to the financial position that he has entitlement to. Accordingly it is unlikely that the solicitors and counsel will do otherwise (unless the client is wealthy) than wait for the many months until the Auditor reports. Of course, in commercial actions it may well be that the clients are less troubled by being kept out of the money than in personal injury actions. That is not always so: in Higherdelta, although the pursuer company was a limited company, the entire shareholding was owned by one individual. The main asset of the company (a commercial property) was lost in a fire. The defenders refused to pay out under the policy arguing that there was material non disclosure in many respects. The owner of the company had to fund the litigation personally as without the main income generating asset, the company was struggling to survive. Fortunately the defence was rejected and the matter is now proceeding to have quantum assessed as necessary.

The Solution

In the normal way, an order for expenses will make the finding of liability by one party to pay the other the expenses (and of course the decerniture for payment). Occasionally a party will obtain a substantial interim order for expenses, such as an order for the expenses to date, or even for the discharge of a proof. The practical problem and indeed the solution were described in the English case of Mars UK Ltd v Teknowledge Limited, reported in [1999] 2 Costs LR 44 a copy of which is attached.

The Mars UK v Teknowledge Case

This decision, in the Chancery Division and by the then Jacob, J[2]., followed the introduction of the Civil Procedure Rules in England (commonly referred to as the CPR), which had been introduced consequent to the Woolf reforms of the Rules of the Supreme Court of England and Wales and associated County Court Rules. Although apology might be necessary for quoting the decision at such length, as this case has been referred to in most of the recent cases in Scotland which determined that interim payments should be made, it is justified to look at the case in some detail.

His Lordship said this:

> "I now turn to the second issue, whether or not there should be an order for interim payment [of costs]. The first thing to do is to consider what the general rule should be, interim payment or not. There is no guidance given in the Rules other than that the court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount.
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> This is likely to have practical advantages in another way. The motive for trying to prolong a detailed assessment, namely putting off the evil day when payment has to be made, will be considerably reduced when he who has to pay can only put off the evil day in respect of a considerably reduced sum. Moreover the whole point of the detailed assessment as a commercial matter may become less important with the result that there will be less detailed assessments than there used to be of taxations of costs. Thus I start from the proposition that there should be an interim payment in general. However, the court has a discretion. In exercising that discretion the court must take into account all the circumstances of the particular case. One of those is that the Defendant may wish to appeal. Another is dealing with the case in a way which is proportionate to the financial position of each party, one of the matters which one must consider in allowing the overriding objective of enabling the court to deal with the cases justly."

The important points to be taken from this case are as follows:

- Although the CPR makes provision for an interim payment to be made, that rule merely determines competency. As will be seen below, in Scotland the competency of such orders is beyond question.

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[2] Now Professor Sir Robin Jacob, retired judge of the Court of Appeal in England and Wales.

- The driving force behind this decision is the interests of justice. It is this principle that was specifically founded upon by Lord Bannatyne in Higherdelta. Although this principle is enshrined in CPR 1[3], a provision that is not specifically mirrored in the Rules of the Court of Session or Sheriff Court. It hardly requires a rule in Scotland to state that the courts should act "justly".

- Care should be taken when considering the observations about appeals. Costs orders from the lower court are not automatically suspended in England when a party seeks to appeal. It requires an application to the superior court to stay the order pending the appeal (if permission to appeal is allowed).

- That said, it is clear from this case (as it is in Scotland) that the making of an interim order is a matter of discretion. One powerful factor in exercising that discretion is the injustice of making a party wait for sums to which he is entitled.

The Scottish Cases

As far as is known, on just four occasions in recent times have orders for interim payments been made in the way discussed in this note.[4] It may well be that the shortage of decisions is based upon a lack of knowledge that such applications can be made.

For what it is worth, the making of interim orders of this kind is not only routine, but where a detailed assessment (i.e. a taxation) is required, it is virtually unheard of for an application for a substantial sum *not* to be made. The practice has gathered momentum since the decision in Mars referred to above.

Martin & Co Petitioners

The first such case, Martin & Co (UK) Limited, was a case in which the Petitioners in an action of interdict in respect of a franchise agreement were fearful that the Respondents would be unable to or unwilling to meet the award of expenses which had been pronounced against them. Diligence could not be effected without a money amount

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1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost. (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable – (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate –(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and; (f) enforcing compliance with rules, practice directions and orders.

[4] Martin & Co, Petitioners (Outer House); Lord Drummond Young Martin & Co (UK) Limited, Unreported [2013] CSOH 25; Martin & Co., (Inner House, Extra Division. The decision on expenses was not reported, but the decision on the merits is reported at [2015] SCIH 86; Tods Murray WS v Arakin Ltd [Lord Woolman, [2013] CSOH 134; and Higherdelta v Covea. Andrew Smith QC was lead counsel in all but the decision in Tods Murray. It is understood that at least two further applications are pending in commercial actions sought to follow upon the reasoning in Higherdelta.

specified in the interlocutor. The very real fear (which proved justified) was that the paying party would declare himself bankrupt.

The Respondent did not appear at the hearing (no doubt on account of his pending impecuniosity).

Lord Drummond Young granted the motion and issued the opinion referred to. However, he added a "rider" which was that "special circumstances" were required to justify such an order (and held that there were indeed such special circumstances). This additional requirement was not raised by him in the course of argument, and as will be seen below, it appears that this requirement is at least controversial; and it is suggested that it is simply wrong. It was certainly not discussed in court, but in Higherdelta a full argument was presented to Lord Bannatyne who considered on full argument that no special circumstances were in fact required.

As was anticipated, the paying party did declare himself bankrupt almost immediately upon the order being made. What the Petitioners avoided was a lengthy period of time passing before the Auditor reported; and then the Respondent declaring himself bankrupt. Significant further expense would have been incurred (such as the audit fee at 5% of the account and the costs of a law accountant making up the account). And, for what it was worth, an inhibition could be registered against the Respondent's heritable property to try to obtain an advance on other ordinary creditors.

Martin & Co: Inner House

In an associated part of the process, which was heard by the Inner House (not reported on this point) against another of the Respondents, the Division ordered an interim payment against one of the other respondents. No submission was made on behalf of that respondent that it was incompetent to make such orders; and that particular Respondent was represented by senior counsel. In the light of Lord Drummond Young's decision, it was advanced for the Petitioners that there continued to be "special circumstances" which were easily demonstrated. That requirement was therefore not a matter of discussion before the Inner House and the motion was granted for an interim payment.

Tods Murray

Subsequent to the Martin & Co. cases, Lord Woolman made an order for interim payment (see Tods Murray WS v Arakin Ltd) finding that there were "special reasons". No argument had to be or was presented that special circumstances were or were not required. Lord Woolman essentially followed the decision of Lord Drummond Young.

Higherdelta v Covea

In Higherdelta, the argument was presented[5] on behalf of the Pursuers that Lord Drummond Young was incorrect to hold that "special circumstances" were required, largely because of the manifest injustice of the result should no order be made.

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5 By Andrew Smith QC. It should be noted that the defenders conceded that such an award was competent, but submitted that this would be what is in effect a change in practice which the Rules Council

A secondary argument was presented for the pursuers to the effect that even if special circumstances were required, they were present in the case for a number of reasons.

Lord Bannatyne ruled (after considering the position overnight) that no special circumstances were required (that so especially after considering the English jurisprudence which is referred to above). He also found that if special circumstances were required, then they existed. He ordered that the sum of £100,000 plus VAT be paid within fourteen days as payment to account of expenses.

The importance of the decision in Higherdelta

It is understood that at least two other motions are awaiting hearing in the commercial court for interim payments in the light of the Higherdelta decision. As observed above, there is no reason why such motions should be restricted to commercial actions and there is an argument that in commercial actions they should be less common than in - for example - personal injury claims where the outlays are being carried by either a non commercial individual, or counsel and solicitors.

As is explained above, it is absolutely routine for interim orders on costs to be made in England following judgment. This is the practice, now specifically in the CPR, as a consequence of the observations in the Mars case referred to in the text of the submissions to Lord Bannatyne.

It is difficult to understand why this approach should not be the norm in Scotland too: in cases in which (for example) a pursuer is successful, at the by order hearing to discuss expenses why is a motion not being made for a specific sum to be paid immediately in the name of expenses? It is clear that such motions should indeed be made and generally in the interests of justice they should be granted.

Procedure

At least in the Martin & Co cases, and in Higherdelta, the judges were provided with a short letter from a law accountant giving a "ball park" estimate of what in their experience the Auditor may allow at taxation. Such letters should be short, and a broad estimate. A reasonable proportion of that sum can then be sought and it is suggested 75% to 90% be sought, plus VAT, and that a specific period of time is specified for payment in the interlocutor. Such applications are of course similar to interim damages motions and some use may, if necessary, be made of the authorities referred to regarding interim damages.

The motion in Higherdelta was "for payment by the defenders of the sum of £100,000 plus VAT by way of payment to account of the expenses awarded against them, within a period of fourteen days failing which interest shall accrue at the judicial rate."

It is also helpful to have in that letter an estimate of the time scale that would be involved were the matter to be sent to taxation. Plainly if a taxation can be obtained in a

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should regulate – a submission rejected by Lord Bannatyne. A summary of his reasoning provided appears at the end of this note.

few weeks, the urgency may not be acute: but arguably even then there is no reason why the receiving party should be kept "out of the money".

Lord Bannatyne has stated in a subsequent application to him yet to be heard at the time of writing this note that he does NOT wish to see a long and detailed letter, or a draft account of expenses. The whole point of this procedure is to avoid detailed accounts being obtained prematurely.

It may also be prudent to offer the undertaking recorded by Lord Drummond Young in Martin & Co: that should the interim amount be higher than ultimately assessed by the auditor, the excess will be refunded to the paying party with judicial interest. Lord Drummond Young in Martin & Co. considered that such an obligation would arise at common law in any event. However, it is thought right that this undertaking should assist with having confidence in persuading the court as to the quantum of the order.

Conclusion

It is suggested that this important decision ought to have profound beneficial effects upon those who carry out large quantities of litigation, and even those who are not major players, in easing cash flow in all kinds of cases. There is no reason why the Scottish courts should not be on an even keel with England on this matter; and be seen as a sensible and commercial place to litigate.

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SOLICITOR'S NOTE OF DECISION BY LORD BANNATYNE

COURT ATTENDANCE NOTE

Date: 30 June 2017

Re: HIGHERDELTA LIMITED v COVEA INSURANCE PLC

Lord Bannatyne read his judgement which was noted as follows:-

The only controversial matter before me is in relation to a motion for interim order of expenses.

It is not in dispute that such an order is competent. The question is in the circumstances, should such an order be made.

Generally speaking, expenses are a matter for judicial discretion. (Holt v Alexander & Sons). To put it another way, the overriding objective in terms of expenses is to deal with the matter fairly and this was the approach described by Jacob, J. in the Mars case.

Applying that logic, substantive justice would be done in this case should such an order be made. I accept the submissions made by Mr Smith QC on page 6 of his note of argument. Those points are in three parts:-

i. The client is obliged to pay his own side's costs, which amount to approximately £140,000 plus VAT. This sum is a substantial part of the income of the pursuer company, which has been deprived of income during the period from the fire to date. Accordingly, on account of the wrongful withholding of payment to permit the premises to be renovated and operated, thus generating an income, the company has to fund payment of legal fees and expenses to establish that right. This, it is submitted, is manifestly unfair.

ii. It is likely that it will take until January or February of next year to obtain a taxed account from the Auditor. Accordingly, there will be six months wait until the pursuer obtains an enforceable order regarding expenses.

iii. The pursuer is obliged to make payment of interest at the commercial rate (under the Late Payment of Commercial Debts (Interest) Act 1998) to his own account. His legal advisors are entitled to that payment to defray the outlay being withheld, and upon which income tax must be paid on render of the fee. However, the pursuers are not entitled to interest on that sum until the auditor has produced the taxed account (see Phee v Gordon, Extra Division [2014] CSIH 50). The net result of this position is that although the pursuer is liable for interest if the debt is not paid, that cannot be recouped by him. The defenders thus retain the benefit of keeping the pursuer "out of the money" for a period of six months or so. That, it is submitted, is not in the interests of justice. It should be noted that a number of fees have already been paid by the pursuers, but the vast majority are outstanding.

Each of these factors alone likely suggests that such an order should be made in the interest of justice. When they are taken together, it is clear that such an order should be made. There were no material factors brought to my attention or that I could see that would mean that making such an order would be unfair. There are no countervailing facts which outlay against the position adopted by the pursuer.

The decision of the Outer House in Martin & Co (UK) Limited, Unreported [2013] CSOH 25 and in Tods Murray WS v Arakin Ltd [2013] CSOH 134 recognised that there the respondent was at least reluctant to make payment of expenses, and perhaps lacked the liquidity to do so.

I recognise that those factors do not exist in the present case. This has not caused me concern or to reject the motion. For this reason, the motion should be granted in the interests of fairness and substantive justice and I would go beyond the test as laid down by Lord Drummond Young in Martin & Co and Tods. No special reasons require to be shown.

All of the circumstances should be looked at.

I do not accept that I am innovating on the law here, merely applying it as it has always been.

I consider that the sum sought of £100,000 is conservative in terms of the letter I was shown from the law accountants and reasonable in the circumstances. I therefore grant the order for interim expenses made on the basis of the points I have put forward. It should be noted that if I am wrong in departing from the test as laid down by Lord Drummond Young that special reasons are required, the matter would still regardless have been awarded as I do consider that special circumstances as applied by the test in Martin & Co were present in this case.

Mars UK Limited

v

Teknowledge Limited

High Court of Justice
Chancery Division
11 June 1999

Before:
Mr Justice Jacob

Headnote

The court considered the circumstances in which an order for an interim payment of costs should be made. When considering the entitlement of a party to costs the question of that party's conduct should be taken into account and, when necessary, the entitlement should be adjusted to reflect the party's behaviour. Mars Ltd. had commenced proceedings when the potential Defendants were attempting to negotiate a settlement. The court held that they were premature in commencing proceedings and were entitled only to 40% of their costs when, had this conduct not been taken into account, they would have been entitled to 66.6% of their costs.

Judgment

MR JUSTICE JACOB: I have, following judgment in the action, a considerable dispute about the costs. All the other remaining matters, save for one to be considered next, have been agreed.

What happened in the action was that the Claimants succeeded in their claims for infringement of copyright and like rights but failed in

their action for breach of confidence. They accept that so far as the latter is concerned they should not recover any costs. They do not accept that they should pay the costs of the Defendant who won on that issue. Both sides have agreed that, whatever else I do, there should be an apportionment if (which is disputed) there is to be a payment of costs by the Defendant at all. So the first issue I have to decide is what should be done about the Defendant's claim for their costs for the breach of confidence issue.

The next issue is whether or not there should be an amount payable on account before the costs are assessed pursuant to the provisions of CPR 44.3(8). This in part raises a general question and in part a question specific to this case. The general question is what the normal rule should be after a full trial. Before the CPR, if costs were sent off to taxation there was no power to order interim payment. But now there is such a power. Should the court normally order an interim payment? The question peculiar to this case is this: if the general rule is that there should be an interim amount ordered, should that rule be departed from here? The final issue relates to quantum. I have an affidavit from Miss Marsland, a partner in Clifford Chance, the Claimant's solicitors, who indicated that Mars' costs of this action had been over £550,000 on a full solicitor/client basis. That to my mind is an extraordinarily large amount.

Under CPR 44.4(1) when the court is assessing costs the court will not allow costs "which have been unreasonably incurred or are unreasonable in amount". So if I order an amount paid on account, I have to form a rough view as to the ultimate amount of assessed costs in respect of which an interim payment is to be made.

I turn to the first question, whether or not the Defendants should get their costs of the issue of breach of confidence. Mr Silverleaf says that the test must be whether or not the claim was unreasonably advanced. He points to CPR Part 44.3(4) and (5).(4) reads:

> 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 (whether or not made in accordance with Part 36).

(5) requires the court in assessing the conduct of the parties to consider things which it did not do under the previous rules. Necessarily applications about costs are likely to take more time. Nonetheless that may achieve more overall justice. The conduct of the parties under rule (5) includes the following:

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed 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;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

What Mr Silverleaf says is that I should take into account the fact that the Claimants won and got an order stopping the Defendant doing what it was doing. The fact that one of the reasons he advanced for getting that order failed does not mean that they did not basically win. So I should say that it was reasonable for them to raise, pursue or contest the particular allegation or issue, namely the action for breach of confidence. I take that into account, but I think the claim was only barely reasonable. Yes, it was to some extent arguable, but I cannot see how the Claimants could have thought they could have won the action under the law of confidence if they had lost on their copyright claim. It was an unnecessary allegation and I think it should not have been run for that reason too. I think accordingly the Defendants should be given credit for their costs of that issue.

I now turn to the second issue, whether or not there should be an order for interim payment. The first thing to do is to consider what the general rule should be, interim payment or not. There is no guidance given in the Rules other than that the court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has

got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount.

This is likely to have practical advantages in another way. The motive for trying to prolong a detailed assessment, namely putting off the evil day when payment has to be made, will be considerably reduced when he who has to pay can only put off the evil day in respect of a considerably reduced sum. Moreover the whole point of the detailed assessment as a commercial matter may become less important with the result that there will be less detailed assessments than there used to be of taxations of costs. Thus I start from the proposition that there should be an interim payment in general. However, the court has a discretion. In exercising that discretion the court must take into account all the circumstances of the particular case. One of those is that the Defendant may wish to appeal. Another is dealing with the case in a way which is proportionate to the financial position of each party, one of the matters which one must consider in allowing the overriding objective of enabling the court to deal with the cases justly. The overriding objective applies as much to the exercise of the costs discretion as to any other discretion given under the Rules. This is a case, for example, where there is a wealthy successful party and a financially weak unsuccessful party. That is one thing that should be taken into account. Other things that might be taken into account are the likelihood of an appeal or possibly successful appeal. For example, there may be a case in which a claimant is financially weak. Even if it succeeds there might be an appeal by the defendant and the claimant needs the money to respond to the appeal. That would be a particularly good reason for ordering a payment on account.

I turn now specifically therefore to this case. As I said, the Defendant is financially not strong. Mr Silverleaf for the Claimant said the onus

lay on the Defendant to put forward its financial details in full detail, not only in respect of its own money but in respect of the moneys of the two principal directors. I was told by Mr Vanhegan on instructions that the Defendants' turnover is about £360,000 a year. I was also incidentally told there had been numbers of Mars devices which have been reprogrammed by them, about 200 of the one in dispute and 200 of another one which may or may not also be affected by the order, on the figures I was given at trial about £9 a machine or £8 a machine. I conclude that we are not talking big money. It would be disproportionate to require the Defendants to go to the expense of putting in detailed evidence as to their position. Is that sufficient reason for putting off the day when the Defendants must pay costs, as I think they must? I do not think it is, although I am minded to order payment of costs on an instalment basis. What I do not want to see is the Defendants put in a position where they are unable to appeal if that is what they intend.

I turn then to the question of how much. First, I have to order a detailed assessment. The parties have agreed that it should be done on the basis of apportioning the costs of the Claimants. The rival views are the Claimants suggestion of somewhere between 80% and 90% of their costs and the Defendants 2 to 25% The figure is in no way easy to come to. I do not have detailed figures and indeed if one went into that exercise it would probably not be appropriate. I can say this, that I think probably a day of the trial was spent on the confidence issue with legal argument and some technical materials. I think the appropriate figure is that the Claimants should have two-thirds of their costs.

I now turn to the amount of the interim payment on the basis that they are going to get two-thirds of their assessed costs. The interim payment asked for in Miss Marsland's affidavit is £200,000. That is on the basis that she confidently indicates that the recovery would be between 60% and 80% of the £550,000 bill submitted to the Claimant. She has taken into account a reduction in respect of the confidential information point, but only on the basis of no credit towards the Defendant's costs of that issue. It is assumed in that that there should be no reduction in respect of the conduct of the parties. Mr Vanhegan says there should be a very considerable reduction on the overall figure. He says that the court should have regard to the conduct before the proceedings as well as during and that the Claimants

behaved unreasonably, particularly before the proceedings. Mr Silverleaf says the Defendants behaved unreasonably, particularly in relation to the issues of copyright and other rights subsistence and the issue of infringement.

I turn therefore to the pre-action conduct. I think that there is some truth in what Mr Vanhegan submits. As I indicated in my judgment, the letter before action began by putting this dispute in the field of criminal law, which it manifestly was not, whatever the technicalities of the Copyright Act. Secondly, there was the threat of personal liability in respect of the directors and finally and extremely oddly there was the offer to enter into a commercial relationship with the Defendants, all in the same letter. It is a long and detailed letter but required an answer in three days only. No one could possibly have suggested that this little company doing this little bit of work was threatening the position of Mars to the extent that it needed resolution in three days. The letter set the whole thing off on the wrong foot.

The pre-action correspondence included reference to matters which Mars had alleged in respect of the Classic to customers of the Defendants, namely BT. There were also plainly going to be, if the matter proceeded to litigation, issues as to what the Defendants had actually done. The Defendants were requested to offer access to an independent expert who would be subject to confidentiality requirements. Mars named the individual, Mr Roy Durrant, in their letter of 24th July 1997 and indicated what jobs he wanted to do. By way of reply the Defendant's solicitors asked whether Mr Durrant was independent. To my mind oddly, a full explanation (e.g. by way of a CV) was not supplied. All the Defendants were told was that Mr Durrant is a self-employed consultant. What they were not told, as I am told was the fact, was that Mr Durrant had - to the extent I know not what even now - been previously engaged as a self-employed consultant to Mars. That, I think, should have been said. The result in the end was that there was no independent inspection. Instead the Defendants offered a without prejudice meeting to resolve the dispute. They contemplated in their letter of 18th September technical or other information being disclosed and they contemplated that two senior people from Mars would attend. They were at that time, it is fair to say, maintaining they had not infringed copyright. The response to that letter was firstly, an indication that more time was required to consider it, and then these proceedings.

I have to say I think that, given the circumstances of this large company, given the circumstances that the Defendants were trying to co-operate, trying to negotiate, that it was heavy handed to start these proceedings. Of course once proceedings start, positions polarise. I think in the detailed assessment of costs which I have to consider broadly here in the context of the amount to be paid on account that conduct should be taken into account to reduce Mars' claim.

On the other hand Mars say that the Defendants too were unreasonable. First of all, they simply denied infringement right until the last minute and, secondly, they put Mars to considerable expense in relation to proof of subsistence of the copyright works. I think there is quite a lot to be said for that. To that extent I think the Defendants were not terribly helpful. I bear in mind also, however, that Mars adjusted their case from time to time, particularly in relation to the coin set data and the late addition of the algorithms claim. Mars say that they spent a lot of money on these issues because they were technically very complicated and a lot of discovery was involved. In the way they did things I am sure that is probably so, but the question which has to be considered is whether the way they did things was the most reasonable way of dealing with it. And even if it was the most reasonable way of dealing with it, whether before going ahead and spending all that money, it would not have been better to write to the Defendants saying, "this is going to cost a lot of money, why do you not make an admission." Mr Silverleaf says it was self-evident it was going to cost a lot of money, that every defendant in a copyright case knows that if he puts subsistence in issue the story of the creation of the copyright work will have to be gone into with all the necessary discovery. In a case such as this all the necessary technical complication would be expensive.

In general I think it is right that in any copyright case defendants who decide to put subsistence in issue are putting into the litigation what may be a significant amount of costs. They may or may not have cause to do so. All they can be expected to expect, however, is what reasonable costs are likely to be involved. If a party who has to prove subsistence has to go through a wholly unexpected exercise or an exercise of wholly unexpected costs it seems to me that defendant should be given an opportunity of considering his position before those costs are expended. Take this case. Mars claimed copyright in the coin set data. The way that Mars generate that data is in fact quite

complicated. Before going through the exercise of discovery and the like it would in my judgment have been sensible to point out that this was going to be an expensive exercise and perhaps also to indicate briefly what was involved. The same goes for the algorithms and for the other rights relied upon. For one party to run up unforeseeably large bills without warning the other side seems to me to be a matter to be taken into account in a detailed assessment, that is part of the "manner in which a party has pursued or defended his case" under 44.3.5.

I therefore expect that in the assessment of Mars' costs they will not recover the 60 per cent that they have in mind. I believe that the sort of figure they will be more likely to be getting is something of the order of 40 per cent. It follows that of the £550,000 they are likely to be given only 40 per cent as assessed costs. It is against that background that I now come to work out what the interim payment should be. 40 per cent is about £200,000 or just over. I have ordered 60 per cent of that figure which brings it down further. I think the appropriate figure that I should be ordering by way of interim payment, particularly having regard to what I am going to do next by way of how that is to be paid, in the special circumstances of this case, is £80,000, namely two-thirds of the costs which, on a rough estimate, Mars will be awarded. I am quite conscious it is a somewhat arbitrary figure. I think it has got to be paid in instalments. Subject to what might be said by Mr Vanhegan as to the ability of his clients to pay, what I am going to propose is that they pay £30,000 within the first month and thereafter £10,000 per month. Meanwhile the matter can go for detailed assessment.

(Liberty to apply, leave to appeal on costs and substantive issues.)

Mr Silverleaf QC and *Mr R Arnold* (instructed by Messrs Clifford Chance, London, EC1A 4JJ) appeared for the Claimants.

Mr Mark Vanhegan (instructed by Messrs. Blakesley Rice MacDonald, Chesterfield) appeared for the Defendants.