JUDGMENT : His Honour Judge Peter Coulson QC : TCC. 4th November 2005.

A. INTRODUCTION

This Judgment is concerned with the parties' liability for certain elements of the costs incurred in the action. A number of issues are agreed. However, the matters which remain in dispute throw up a point of some interest. Can a claimant be said to be a successful party when he seeks to accept a payment into court after the expiry of the 21 days, which payment has been made in respect of some (but not all) of his claims, many of which have been subsequently dismissed by the court?

4. In **Section B** below I set out a summary of the facts, and at **Section C** I identify the relevant principles from the CPR and the cases. At **Section D** I outline the elements of costs for which liability has been agreed by the parties, and those elements of costs which remain in dispute. At **Section E** I go on to consider, in relation to those disputed costs, who was the successful party, before, at **Section F**, addressing the particular arguments that arise out of the payment into court. After dealing briefly with a specific point that arose in relation to a percentage assessment of one element of the costs (**Section G**), I set out my conclusions in **Section H** below.

B. SUMMARY OF FACTS

5. There are two strands of the narrative relevant to my consideration of the parties' respective liabilities for costs. They are the result of the Preliminary Issues and the sequence relating to the payment into court.

(a) The Preliminary Issues

6. On 4 and 11 July 2005, there was a two day hearing before me during which the parties argued about the effect of the contractual terms on the nine Heads of Claim advanced by Decoma. The total value of those nine claims was about £18 million.

7. My Judgment on the Preliminary Issues was provided in draft on 26 July and handed down on 27 July 2005. The consequence of that Judgment was that Decoma's Heads of Claim 4, 5, 6, 8 and 9, totalling about £10.5 million, were dismissed altogether. In addition, the remaining claims, namely Heads 1, 2, 3 and 7, said to be worth in total about £7.5 million, together with a claim for liquidated damages, were found to be valid, but subject to the contractual cap of £436,939.

8. It should be noted that, of the four Heads of Claim which survived in principle but which were the subject of the contractual cap, the largest was the claim for the future cost of remedial work. This was Head of Claim 3, which was valued at between £5.5 and £6 million. Some of my findings in respect of that Head of Claim are the only matters on which Decoma now seek permission to appeal from the Court of Appeal.

(b) Payment Into Court

9. On 22 June 2005, Haden made a payment into court of £350,000. This was expressly stated to relate to part of Decoma's claims only. The part was defined as*: "The whole of the claim made by the Claimant Decoma UK Ltd under claim No: HT-04-267 excluding those claims contained within the Particulars of Claim at paragraphs 33.3 and 34 that relate to remedial works still to be carried out as set out in Annexure 2 Part 3 of the Particulars of Claim … The Part 36 payment into court takes into account the entire counterclaim of the Defendant Haden Drysys International Ltd."*

10. Before me now, the parties are agreed that this meant that the payment into court covered all of Decoma's claims, and Haden's entire counterclaim, except for Decoma's Head of Claim 3, to the extent that that Head of Claim was pursued by Decoma under Article 11.3 of the Contract.

11. Decoma did not seek clarification of the payment in within the seven days prescribed by the CPR 36.9. However, on 8 July 2005, which fell between the two days of the Preliminary Issues hearing, they requested confirmation that their Head of Claim 3, to the extent that it was pursued as a claim for damages for breach of contract and/or warranty, was also excluded from the payment in.

12. On 15 July 2005, namely after the second day of the Preliminary Issues hearing, the solicitors for Haden wrote back saying that the payment into court related to the whole of the claim excluding that in paragraphs 33.3 and 34 of the Particulars of Claim and that therefore: *"We do not understand the basis*

of your presumption that your client's claim in relation to Part 3 for damages for breach of contract and/or warranty is likewise excluded. It is not excluded."

13. This prompted a longer letter from Decoma's solicitors which set out in detail their concerns about the terms of the payment into court and which concluded that Decoma was "unable fairly to consider whether or not to accept the payment in."

14. Haden's solicitors wrote again on 21 July 2005 making the point that: *"The way our client's offer is framed is a direct result of how your client has decided to plead its claim."*

This letter reiterated the point that the claim for future remedial costs pursuant to Article 11.3 was excluded from the payment in.

15. On 22 July Decoma's solicitors wrote again. They contended that Haden's solicitors had not properly answered their letter of 19 July 2005. The letter concluded: *"In the meantime, Decoma remains unable fairly to consider whether or not to accept the payment in; and if necessary will refer to this letter as well as our letter of 19 July 2005 when asking the court to disapply the usual rule pursuant to Rule 36.20(2)."*

16. On the morning of 26 July 2005, the parties were provided with a copy of the draft Judgment on the Preliminary Issues. In the afternoon of that same day, Decoma's solicitors wrote to Haden's solicitors to indicate that Decoma now wished to accept the payment into court. The letter gave no explanation as to how or why Decoma's position had changed from 22 July (when they said they could not fairly consider the payment in) to 26 July (when they indicated that they urgently wished to accept it). Likewise, no explanation for this change of position was provided in the evidence available to the court for the hearing on costs.

17. On 27 July Decoma issued a formal application to accept the payment into court out of time. There had not been sufficient notice of that application for it to be considered when Judgment was handed down on 27 July. On 5 August 2005 Haden's solicitors wrote to Decoma's solicitors to say: *"We have now had an opportunity to seek our client's instructions. Our client agrees to let your client accept the Part 36 payment into court made by our client. However, our client does not agree with the costs consequences proposed by your client in your letter dated 26 July 2005."*

18. The parties are agreed that the court should give permission to Decoma to take the payment into court pursuant to CPR 36.11(2)(b)(ii). However, whilst both parties are happy for the court to give such permission, they have very different views as to the cost consequences that should follow.

C. RELEVANT PRINCIPLES

19. Both parties referred to the overriding objective at CPR 1.1 and urged that the costs of the action should be dealt with justly. They also referred to CPR 44.3 which sets out, amongst other things, the court's discretion in deciding costs; the general rule that the unsuccessful party will be ordered to pay the successful party's costs; and the matters relevant under CPR 44.3(4) including the conduct of the parties, partial success and the relevance of any payments into court.

20. CPR 44.3(6) provides as follows:

"The orders which the court may make under this rule include an order that a party must pay –
(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment."

21. The parties are agreed that, in this case, it would be appropriate for the court to consider liability for costs on the basis of particular issues, and/or by reference to Decoma's Heads of Claim. Such an approach has become much more common in recent years. In ***Phonographic Performance Ltd v AIE Rediffusion Music Ltd*** [1999] 1 WLR 1507, Lord Woolf said about the CPR: *"From 26 April 1999 the **'follow the event principle'** will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new rules coming into force. The most significant change*

of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started."

22. In ***Johnsey Estates (1990) Ltd v Secretary of State for the Environment*** [2001] EWCA Civ 6535, Chadwick LJ said*: "… The Judge may make different orders for costs in relation to discrete issues – and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation …"*

23. Perhaps the best known case in which this approach was adopted is ***Summit Property Ltd v Pitmans (A Firm)*** [2001] EWCA Civ 2020 in which the Court of Appeal upheld the decision of Park J who had approached costs on an issue basis. Chadwick LJ said: *"In my view, it has not been shown on this appeal that the Judge erred in principle. An issue based approach requires a Judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue by issue based approach to costs."*

24. As I have already noted, particular points arise in this case as a consequence of the payment into court. It is therefore necessary to analyse certain elements of CPR Part 36. However, it is convenient to do that in **Section F** below.

D. COSTS LIABILITIES: THOSE AGREED AND THOSE DISPUTED

(a) Elements of Costs Agreed

25. As I have previously noted, the parties are agreed that I should approach costs on an issue by issue basis.

26. The parties are agreed that Decoma should pay Haden's costs of Head of Claim 3. As I understand it, this is because Head of Claim 3 was essentially unaffected by the payment into court (Head of Claim 3, by reference to Article 11.3, being excluded from the payment: see paragraph 8 above) and because the Judgment on the Preliminary Issues found that the £5.5 million odd claimed under Head of Claim 3 could not be recovered by Decoma and that this Head, along with three other Heads of Claim in this group, was subject to the contractual cap of £436,939.

27. The parties are also agreed that Haden should pay Decoma's costs of the counterclaim. That is because the payment into court, which has been accepted by Decoma with Haden's consent, made due allowance for the counterclaim.

28. The parties are also agreed that Haden should pay at least an element of Decoma's costs in respect of Heads of Claim 1, 2 and 7. That is because it is agreed that Heads of Claim 1, 2 and 7 were, and remain, covered by the payment into court.

29. The remaining point at issue in relation to Heads of Claim 1, 2 and 7 is this. Mr Taverner QC, on behalf of Haden, contends that his client's liability to pay Decoma's costs in respect of those three Heads of Claim should somehow be limited to the costs incurred in pursuing those claims up to the contractual cap, but not beyond, because the Judgment on the Preliminary Issues found that Decoma had no entitlement under those Heads beyond the contractual cap. Whilst I understand this argument as a matter of theory, I consider that it is wholly unworkable in practice. I put this to Mr Taverner QC during the course of argument and he was unable to explain how his preferred course could actually work. I have concluded that it could not. It seems to me that, in those circumstances, given both the Judgment on the Preliminary Issues and, more importantly, the inclusion of Heads of Claim 1, 2 and 7 within the payment into court, it would be fair to order that Haden pay all of Decoma's costs of Heads of Claim 1, 2 and 7, to be assessed on the standard basis if not agreed. There can be no qualification or reduction in those costs to reflect the fact that these three Heads of Claim were limited to the cap, because such a qualification or reduction would simply not be workable.

30. One other point should be made about Heads of Claim 1, 2 and 7. They were not the subject of any real debate during the Preliminary Issues hearing, because Haden accepted that, up to the contractual cap, these Heads of Claim were valid. Therefore, I find that Decoma's entitlement to their costs of Heads of Claim 1, 2 and 7 must exclude any costs associated with the Preliminary Issues, which is a separate subject, dealt with below.

(b) Elements of Costs Disputed

31. For the purposes of this Judgment, I shall call Decoma's Heads of Claim 4, 5, 6, 8 and 9 "the dismissed Heads of Claim". Mr Taverner QC contends that, because the result of the Judgment on the Preliminary Issues was to dismiss these five Heads of Claim in their entirety, Haden should be entitled to their costs of the dismissed Heads of Claim. Mr Sears QC, on behalf of Decoma, submits that they should have their costs of those claims, at least up until 13 July 2005, because they were included in the payment into court and Decoma could have accepted that payment into court up until 13 July 2005 and thereby recovered their costs of the dismissed Heads of Claim.

32. The other disputed element of costs concerns the cost of the Preliminary Issues themselves. Mr Taverner QC contends that, since Haden was successful on the Preliminary Issues, they should be entitled to their costs of the Preliminary Issues. On the other hand Mr Sears QC submits that, again, if Decoma had accepted the payment into court on 13 July 2005, then all of the costs of the Preliminary Issues would have been incurred by that date and, save in respect of Head of Claim 3, Decoma would have been automatically entitled to those costs on their acceptance of the payment into court.

33. I deal in **Sections E and F** below with the parties' competing arguments. I approach them first by reference to the criteria of success (**Section E**) and, secondly, by reference to the payment into court (**Section F**).

E. WHO WAS THE SUCCESSFUL PARTY?

34. In respect of both the dismissed Heads of Claim, and the Preliminary Issues, the first question I have to decide is: who is the successful party? In my judgment, there can be no doubt that the successful party in respect of both these elements of this litigation was Haden.

35. The dismissed Heads of Claim were said by Decoma to be worth £10.5 million. They were maintained in full by Decoma both before and during the Preliminary Issues hearing. Following the arguments on the Preliminary Issues, they were dismissed in their entirety. No appeal is sought to be raised in respect of the dismissed Heads of Claim, a point helpfully confirmed by Mr Sears QC during the costs hearing. In such circumstances, it is hard to imagine a more comprehensive success for Haden than the complete dismissal of these five Heads of Claim as a result of the Judgment on the Preliminary Issues.

36. It seems to me that the same conclusion must also be true of the Preliminary Issues themselves. Obviously, one of the principal areas of contention during the two day hearing was the five Heads of Claim, totalling £10.5 million, which were rejected in their entirety. But the other main area of debate was the question of the contractual cap and whether it applied to Head of Claim 3. Decoma lost on that point as well. Thus, not only was the first group of claims dismissed completely, but the second group (including Head of Claim 3) said to be worth £7.5 million, was found to be capped at £436,939. Accordingly, there can again be no question but that Haden were the successful party in respect of the Preliminary Issues.

37. Accordingly, the operation of CPR 44.3 points unequivocally to an order that Decoma should pay Haden's costs of the dismissed Heads of Claim, namely Heads of Claim 4, 5, 6, 8 and 9, and that Decoma should also pay Haden's costs of the Preliminary Issues, with both those elements of costs to be assessed on the standard basis if not agreed. The remaining question then becomes whether or not the payment into court, and its acceptance by Decoma, makes any difference to that analysis.

F. THE EFFECT OF THE PAYMENT INTO COURT AND ITS ACCEPTANCE

(a) The Relevant Parts of Part 36

38. Mr Sears QC, on behalf of Decoma, relied on CPR 36.11 which provides that a claimant may accept a payment into court without the court's permission if he gives the defendant written notice of

acceptance not later than 21 days after the offer or payment in. Of course, that did not happen here. The part of CPR 36.11 relevant to the present situation provides:

"(2) If –

(a) …

(b) The claimant does not accept it within [21 days] –

…

(ii) if the parties do not agree the liability for costs the claimant may only accept the offer or payment with the permission of the court;

(3) Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs."

39. CPR 36.13(1) provides that, where *a* payment in is accepted without requiring the permission of the court, the claimant will be entitled to his costs of the proceedings up to the date of acceptance. Again, that is not the case here.

40. Mr Sears QC also relied on CPR 36.13(2), which provides:

"Where –

(a) a Part 36 offer or a Part 36 payment relates to part only of the claim; and

(b) at the time of serving notice of acceptance the claimant abandons the balance of the claim,

the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance, unless the court orders otherwise."

41. However, it should be noted that, in the present case, Decoma have not abandoned 'the balance of the claim'. On the contrary, the remaining 'balance of the claim', being Head of Claim 3 pursued under Article 11.3 for an amount in excess of the contractual cap, is the subject of Decoma's application for permission to appeal.

42. CPR 36.15 is, in my judgment, the most important part of Part 36 for present purposes. This provides:

"(1) If a Part 36 offer or Part 36 payment relates to the whole claim and is accepted, the claim will be stayed.

…

(3) If a Part 36 offer or a Part 36 payment which relates to part only of the claim is accepted –

(a) the claim will be stayed as to that part; and

(b) unless the parties have agreed costs, the liability for costs shall be decided by the court."

(b) Decoma's Contentions

43. Mr Sears QC contends that Decoma could have accepted the payment into court within 21 days (namely up to 13 July 2005) and that, had they done so, Haden would have been bound to pay their costs, which would have included the costs of the dismissed Heads of Claim (because those claims were included within the payment into court) and the costs of the Preliminary Issues (because those costs had all been incurred during the relevant period prior to 13th July). He argued, by reference to the decision of the Court of Appeal in ***Factortame Ltd & Ors v Secretary of State for the Environment*** [2002] EWCA Civ 22, that it was well established that a claimant who failed to beat the payment in was to be regarded as the unsuccessful party from the last date on which he could have accepted that payment in and that, by analogy, up until that date, such a claimant was to be regarded as the successful party.

44. Mr Sears QC also argued that it would be wrong to portray the acceptance of the payment into court as a poor result for Decoma in circumstances where they had not only accepted £350,000 against all their claims except Head of Claim 3, but had also accepted that sum to take into account Haden's counterclaim, which had been pleaded in the sum of £1.2 million.

45. For these reasons, therefore, Mr Sears QC submitted that it is both just, and in accordance with the rules, for Decoma to recover their costs in respect of the dismissed Heads of Claim and the costs of the Preliminary Issues. He says that any difficulties for Haden created by the payment into court were the result of the fact that the payment into court was made late, particularly when measured against the forthcoming date of the hearing of the Preliminary Issues.

46. In my judgment, whilst Mr Sears QC's submissions have a certain internal logic, they fail to address the realities of the situation in which Decoma now find themselves. I have already dealt in **Section E** above with the reasons why Haden was the successful party in respect of both the dismissed Heads of Claim and the Preliminary Issues. Mr Sears QC's original submissions did not address those matters at all. In reply to Mr Taverner QC, he was obliged to argue that the Judgment on the Preliminary Issues was of no real relevance to the dispute on costs. I cannot accept such an approach; I regard it as unrealistic and unreasonable to ask the court to dispose of costs by ignoring the clear result of the only substantive hearing between the parties. Since Haden was the successful party in respect of both the dismissed Heads of Claim and the Preliminary Issues, I consider that there would have to be some clear principle or rule, either within the CPR or the authorities, which could deprive them of one or both of these elements of the costs. On a consideration of the component parts of Mr Sears QC's submissions, I conclude there is no such principle or rule.

(c) Analysis

47. First, I consider that Mr Sears QC is wrong to argue that Decoma had an automatic entitlement to accept the payment into court up to and including 13 July 2005 and that, if they had accepted the payment in up until that date, Haden would have been bound to pay their costs. Such a submission is incorrect. The payment into court was in respect of part of the claim only. Accordingly, up to 13th July 2005, the relevant part of the CPR would have been r 36.15(3), which provides that, if a Part 36 payment relating to part only of the claim had been accepted, the claim would be stayed as to that part and, in the absence of agreement as to costs, the liability for costs would be decided by the court. The balance of the claim then either had to be abandoned (CPR 36.13(2)(b)) or continued. There was, therefore, no automatic entitlement to costs, even if the payment in had been accepted by Decoma before or on 13th July 2005.

48. Secondly, given that Decoma did not in fact accept the payment in within the 21 days, then, pursuant to 36.11(2)(b)(ii), the permission of the court was required to allow Decoma to accept the payment into court in any event. It seems to me that, in granting that permission (which both parties urged me to do) I must have regard to the realities of the final result in the litigation when I consider the related question of costs. Those realities are set out in **Section E** above, where I have explained why, as a matter of general principle, I consider that Haden are entitled to the two disputed elements of costs.

49. Thirdly, I do not consider that the authority of ***Factortame*** is of any real relevance to the dispute before me. In that case, the Court of Appeal was concerned with a very different set of facts. In his judgment, Waller LJ, at paragraph 21, was simply reiterating the point that a payment into court usually brings with it an offer to pay costs. The payment into court in that case was in relation to the whole claim, not just part of it. That Waller LJ's judgment was specifically concerned with the facts of that case is also clear from paragraph 23 where he said*: "If a payment in has not been accepted there is a further starting point accepted by the Judge and by both sides in this case, that if the claimant fails to beat the payment in, prima facie the claimant will be considered the unsuccessful party as from the date when the payment in should have been accepted."*

Again, I regard that as an expression of the law in relation to payments into court in straightforward cases. It by no means follows from that judgment that, in this case, Decoma can be regarded as the successful party, even up to the 13th July 2005. Indeed, for the reasons I have set out at some length, they cannot be regarded as the successful party.

50. Fourthly, I consider that the result contended for by Decoma would be unfair and unjust, and therefore contrary to the over-riding objective in CPR 1.1. After all, at the outset of the Preliminary Issues hearing, Decoma were seeking in excess of £18 million from Haden. I know from the figures which have been provided to the court that Decoma spent £550,000 by way of legal costs in pursuing that claim. All they have recovered for that substantial outlay is £350,000, and the dismissal of a counterclaim, pleaded in the sum of £1.2 million. Such a result cannot realistically be presented in any terms other than those of failure. It would be contrary to common sense to conclude that, overall, Decoma had been the successful party and should recover the two disputed elements of costs.

51. Finally, whilst I appreciate that Mr Sears QC sets much store by the fact that the payment in, when it was originally made, included those five Heads of Claim which have subsequently been dismissed, I do not ultimately see any great significance in that. Those Heads of Claim were formally dismissed on 27 July. At that stage Decoma had simply applied (on the very same day) to take the money out of court out of time. Haden had not confirmed that they would consent to such a course and, more importantly, neither side had sought the court's permission for the money to be paid out. Furthermore, since the parties had plainly not agreed their respective liabilities for costs, it would have been clear to everyone that, when costs came to be considered by the court, it was going to be a relevant consideration that five of the Heads of Claim had been dismissed altogether.

(d) Conclusions

52. Accordingly, it seems to me that I should give the necessary permission to Decoma to take the money out of court, but on the basis that such payment relates only to those claims which, following the Judgment on the Preliminary Issues, are still in existence, namely Heads of Claim 1, 2, and 7 (up to the contractual cap). It seems to me that I cannot and should not give permission for the money to be taken in respect of the five Heads of Claim which I dismissed on 27th July 2005. They are no longer in existence.

53. Alternatively, if I could give permission to Decoma to take the money in court in respect of the dismissed Heads of Claim, I am still bound to deal with the costs consequences under CPR 36.11(3) or CPR 36.15(3)(b). I am obliged to decide all questions relating to costs pursuant to the principles set out in **Section C** above. Accordingly, for the reasons which I have given, I do so by ordering that the costs of the five Heads of Claim which I have dismissed, namely Heads of Claim 4, 5, 6, 8 and 9, should be paid by Decoma to Haden.

54. The same reasoning explains why I do not consider that the payment into court should make any difference to my view, as set out in paragraph 35 above, that Decoma should pay Haden their costs of the Preliminary Issues.

55. For the avoidance of doubt, I do not accept Mr Sears QC's argument that Haden should pay the costs of the Preliminary Issues, because the payment in was somehow late, and made too close to the hearing. This was a payment into court made almost a year before the start of the scheduled trial.

56. In any event, Mr Sears QC's argument as to timing would have had rather more force if Decoma had notified their acceptance of the payment into court prior to, rather than after, the handing down of the draft Judgment on the morning of 26th July 2005. On the evidence before me it is not possible to say which came first: the sudden desire on the part of Decoma to take the money (despite the repeated statement that they could not even consider it), or the provision of the draft Judgment itself. However, as Mr Sears QC fairly accepted, I certainly cannot infer from the evidence that Decoma would have accepted the money in court in any event.

57. For all these reasons, therefore, I conclude that the existence of the payment into court, and the events which have led both parties, for different reasons, to ask me to give Decoma permission to take the money out of court, make no difference to my findings in **Section E** above that Haden, as the successful party, should have their costs of both the dismissed Heads of Claim, and the Preliminary Issues.

G. COSTS ATTRIBUTABLE TO HEAD OF CLAIM 3

58. As part of the costs order that they sought, Decoma asked me to attribute a percentage of their costs to Head of Claim 3. This was so that I could order that Haden pay all of Decoma's costs of the action up to 13th July, less whatever percentage I attributed to Head of Claim 3. Since, for the reasons I have set out, I am not going to be making such an order in any event, it may very well be that attributing a percentage of the costs to Head of Claim 3 is a redundant exercise.

59. However, even if it was not, I would be reluctant to identify such a percentage on the basis of the material before me. Mr Maynard, Decoma's solicitor, attributes a percentage of just 2.8% (of the £550,000 odd spent by Decoma) to Head of Claim 3, but he makes plain that that is simply the percentage that could be directly linked to Head of Claim 3. He appears to accept that there would be

other costs incurred in respect of Head of Claim 3 which are not included in the 2.8%. However, he makes no attempt to identify either the additional sums or the final percentage that would result. It seems to me, given that Decoma's own solicitor has avoided undertaking the task of identifying an overall figure or percentage attributable to Head of Claim 3, that it would not be sensible for me to attempt that same exercise.

60. In addition, I note that Haden's solicitor, Mr Lloyd Jones, expresses the view that 40% of Haden's costs relate to Head of Claim 3. He appears to accept that this is simply a very rough and ready guesstimate of the likely percentage, but it demonstrates the potentially significant effect of any ruling from the court on this point, and highlights the need for better information before such a ruling is made.

61. In all those circumstances, it seems to me that it is both unnecessary and impractical for me to endeavour to identify a percentage of either side's costs that are attributable to Head of Claim 3. There is simply not the material available to allow me to do that in a fair or just way. I therefore decline to do so.

H. CONCLUSIONS

62. The parties are agreed that I should give Decoma permission to accept the payment in. I do so, on condition that the parties' respective costs liabilities will be as set out below.

63. I order that:

a) Decoma pay Haden's costs of Head of Claim 3.

b) Haden pay Decoma's costs of the counterclaim.

c) Haden pay Decoma's costs of Heads of Claim 1, 2 and 7. It is impossible to limit this liability to the costs incurred in pursuing the claims up to the contractual cap. Haden must therefore pay Decoma's costs of the Heads of Claim 1, 2 and 7 without such qualification. However, such costs will not include any costs incurred in respect of the Preliminary Issues, since my Judgment on those Issues only confirmed Haden's position at the outset, to the effect that the three Heads of Claim were valid, but only up to the contractual cap.

d) Decoma pay Haden's costs of the dismissed Heads of Claim, namely Heads of Claim 4, 5, 6, 8 and 9.

e) Decoma pay Haden's costs of the Preliminary Issues.

64. All the costs set out above should be assessed on a standard basis if they cannot be agreed.

64. I decline to apportion a percentage to Head of Claim 3 on the basis of the information that is presently available. However, if the parties would be assisted by the court's apportionment or percentage evaluation of the costs in relation to all or any of the Heads of Claim 1 to 9, and/or the counterclaim then, provided that proper material is made available, I would be happy to undertake such an exercise.

64. The conclusions set out above are broadly favourable to Haden. I have rejected Decoma's principal argument on costs liability by reference to the payment into court. Therefore, it seems to me that Decoma should pay Haden's costs of the hearing on 28th October 2005. Not for the first time in this case, I express my thanks to Leading Counsel for their considerable assistance in resolving the various points in issue between the parties.

Mr David Sears QC and Mr James Leabeater (instructed by Berwin Leighton) for the Claimant
Mr Marcus Taverner QC (instructed by Gateley Wareing) for the Defendant