Neutral Citation Number: [2014] EWHC 2886 (TCC)

IN THE HIGH COURT OF JUSTICE Claim No: 0BS90655

QUEEN'S BENCH DIVISION

CARDIFF DISTRICT REGISTRY

TECHNOLOGY AND CONSTRUCTION COURT

Cardiff Civil Justice Centre
2 Park Street
Cardiff, CF10 1ET

Date: 27 August 2014

Before:

His Honour Judge Keyser QC
sitting as a Judge of the High Court

- -

Between:

(1) PETER KELLIE

(2) KELLY KELLIE

Claimants

- and –

WHEATLEY & LLOYD ARCHITECTS LIMITED

Defendant

- -

Alex Troup (instructed by **Foot Anstey LLP**) for the **Claimants**

Marc Lixenberg (instructed by **Beale and Co Solicitors LLP**) for the **Defendant**

Hearing date: 11 August 2014

- -

Judgment

H.H. Judge Keyser Q.C.:

1. On 3 July 2014 I gave judgment dismissing the claim of the claimants, Mr and Mrs Kellie, for damages for professional negligence against the defendant, Wheatley & Lloyd Architects Limited. For reasons set out at length in the judgment, [2014] EWHC 2212 (TCC), I held that the claimants had not established that the defendant had breached the duty of care that it owed to them. I also explained why, if I had reached a different conclusion on breach of duty, I would have held that the claimants had failed to establish that they had suffered any loss as a result.

2. At a hearing on 11 August 2014 Mr Lixenberg for the defendant and Mr Troup for the claimants made detailed submissions concerning the orders in respect of costs that ought to be made in consequence of my judgment. As the claimants conceded that they must pay at least 90% of the assessed costs of the defendant, at the end of the hearing I ordered that they pay £70,000 on account of costs within twenty-eight days. I also made an order for the payment of interest on the costs, both before and after judgment. However, I reserved three issues for further consideration.

    1) Whether the claimants should pay more than 90% of the defendant's assessed costs;

    2) Whether the assessment of the defendant's costs should be on the indemnity basis;

    3) Whether, in the light of my decision on the first two issues, the claimants should pay any further amount by way of interim payment.

3. This is my judgment on the reserved issues.

<u>The extent of the costs liability</u>

4. For the claimants, Mr Troup contended that the defendant should recover only 90% to 95% of its costs, on the ground that it raised, pursued to trial and lost on two discrete issues: (1) the no-loss defence [judgment, paras 103-4]; (2) the limitation defence [judgment, paras 105-110].

5. The power to make an order for only a proportion of the successful party's costs ("a proportionate costs order") is recognised in r. 44.2(6)(a). In deciding what order to make about costs, the court is required to have regard to all the circumstances, including those mentioned expressly in r. 44.2(4) and (5); the following provisions of those paragraphs are particularly relevant:

    "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

        (a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful …

(5) The conduct of the parties includes –

…

(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 … a particular allegation or issue; …"

6. In *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC), at [72], Jackson J derived a number of principles from the authorities; Mr Troup relied on the following principles in particular:

> "(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
>
> (vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
>
> …
>
> (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

7. In *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2010] EWHC 1506 (TCC), Akenhead J said at [10]:

> "A number of general observations can properly be made in the context of this case in relation to the fixing of the relevant percentage in the proportionate costs approach:
>
> (a) The first step is obviously to determine which of the parties has been successful in overall terms; if one can not determine that, it may be that one needs to consider the issues-based approach.
>
> (b) One needs to consider the overall context of the litigation, including the reasons which led to its genesis; that involves considering the conduct of the parties which led to the need for the litigation in the first place.

(c) The reasonableness, or unreasonableness, of each party taking the various points or issues upon which it lost, should be considered by the Court. The more unreasonable the position of the losing party, the more likely that, even if the court orders only standard, as opposed to indemnity, based costs, it will attach weight to this factor.

(d) Whilst one needs to have regard to the issues upon which each party has succeeded, a simple mathematical approach on the basis of the number of issues 'won' by each party will often not be an appropriate basis for fixing the percentage; thus, simply because the overall successful party has won 3 out of 5 issues, should not mean automatically that it should recover 60% of its costs. One needs to have regard to the likely amount of resources applied as well as to the impact overall of the success or failure on the various issues.

(e) Similarly, the Court should be cautious about fixing a proportion by reference to the amount of time or space applied by the judge in his or her judgement to the issues upon which each party has been successful or unsuccessful. The judge may simply have had to take up more time and space in the written judgement to address what may be more complex issues. The fact that 80% of the judgement addresses a legal issue upon which the overall successful party lost should not, at least generally, mean that it can only recover 20% of its costs.

(f) The Court needs also to have regard to the fact that the overall unsuccessful party will have incurred cost in dealing with the issues upon which it has 'won'.

(g) Where the parties have put before the court summary costs bills for assessment, the Court can have regard to the likely cost and resource which each party will have applied in relation to the issues upon which they have won or lost.

(h) Where the parties cannot put such information before the Court, and in any event, the Court must do the best that it can in fixing a proportion."

8. Mr Troup submitted that the no-loss defence and the limitation defence were discrete and freestanding points; neither of them was simply a way of putting a point that succeeded by virtue of a different line of reasoning. He accepted that, although time at trial was taken in submissions on the two defences, they did not have the effect of materially lengthening the trial; the number of days was not increased, and it cannot even be said that the time taken on any one day was significantly increased because of the need to address the points. However, he submitted that the points had caused additional work to be undertaken, both because he had needed to deal with the legal arguments and because, as H.H. Judge Havelock-Allan QC had observed at the pre-trial review, it was necessary to examine closely the facts and evidence concerning

events six years before the issue of the proceedings. The two defences failed for reasons that ought to have been apparent and well understood considerably in advance of the trial, yet they were pursued and never abandoned, even though Mr Lixenberg did not make any oral submissions in support of them. Mr Troup submitted that the defendant had unreasonably failed to be selective in the points it had taken; he referred to the observations of Ramsey J in *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 862 (TCC), at [13]:

> "In my judgment a proportionate costs order may be appropriate to reflect the extent to which a successful party has not been selective in the points they have taken and so should not recover all of their costs. An example of this situation is a case where an issues based approach might otherwise be appropriate. It is clear that in such a case the Court should avoid ordering, for instance, that each party should have the costs of certain issues, but if practicable should make a proportionate costs order or, alternatively, one which gives one party the costs from or until a particular date."

9. Mr Lixenberg submits, to the contrary, that these are not truly discrete issues; they are merely arguments on the issues "no loss" and "no liability" and should be seen as such, in accordance with the judgment of Coulson J in *J Murphy & Sons Ltd v Johnston Precast Ltd (No. 2—Costs)* [2008] EWHC 3104 (TCC). He also submits that the issues did not materially lengthen the trial; they may have added a few minutes, but they did not take it into a further day or even a further session on a particular day. They did not increase Mr Lixenberg's fee for the trial and can hardly have done so for Mr Troup. They are properly *de minimis.*

10. I agree with Mr Lixenberg's submissions. It is probably futile to engage in a semantic discussion of whether the no-loss defence and the limitation defence were distinct issues or merely arguments on wider issues. Each of them gave rise to specific legal submissions. It is possible that they necessitated some further evidential enquiry, but I should think that, if they did, it was probably minimal. The circumstances in which the claimants came to the Property and invested money in it were part of the background to the case, and the detail with which the parties investigated the course of events makes it unlikely that they would have pruned the evidence if the two defences had not been raised. No additional time of any significance for costs was taken with the points at trial. Counsel's fees for conducting the trial are unlikely to have been affected by these points, and I have no information to justify a conclusion that pre-trial costs will have been increased by the need to consider them; any such increase is, again, likely to have been negligible. I do not think that Mr Lixenberg's decision not to make oral submissions on the defences is a matter that should be reflected in costs. There is a proper interest in counsel exercising judgment on what does and does not need to be pursued at trial and in sensible decisions being taken to abandon or at least, as in the present case, not to press lines of argument. Such decisions should not too readily be discouraged by the fear of adverse costs consequences. In summary, these two defences did not affect the outcome of the case and made no identifiable difference to the costs

incurred by either party. They should not in my judgment affect the basic outcome, which is that the unsuccessful party must pay the costs of the successful party.

Basis of Assessment

11. The next question is whether the defendant's costs ought to be assessed on the standard basis or on the indemnity basis. Before I consider the principles relevant to a determination of that question and the arguments that have been raised before me, I should set the issue in context.

Indemnity costs: general principles

12. The two bases of assessment are provided for in r. 44.3 as follows:

> "(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
> (a) on the standard basis; or
> (b) on the indemnity basis,
> but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will –
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
>
> (3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party."

13. It used sometimes to be suggested that there was little practical difference between the two bases of assessment; cf. *Fourie v Le Roux* [2007] UKHL 1, [2007] Bus. L.R. 925, *per* Lord Scott of Foscote at [39]. If that was ever true, it probably long since ceased to be so. In *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 1 W.L.R. 2450, Lord Woolf C.J., speaking for the Court of Appeal, said at [6] – [7]:

> "6. The fact that when costs are to be assessed on an indemnity basis there is no requirement of proportionality and, in addition, that where there is any doubt, the court will resolve that doubt (as to whether costs were unreasonably incurred or were reasonable in amount) in favour of the receiving party, means that the indemnity basis of costs is considerably more favourable to the receiving party than the standard basis of costs.
>
> 7. Prior to the CPR coming into force it was already possible for a court to make an indemnity order for costs. This did no more, however, than to reverse the burden of proof in respect of disputed items of costs. The advantages of an indemnity order over a standard order are now far more significant."

See too the more extended dictum of Lord Woolf CJ, with whose judgment Waller and Laws LJJ agreed, in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (a firm)* [2002] EWCA Civ 879 at [15], cited with approval by Rix LJ, with whose judgment Tomlinson LJ and Sir Mark Waller agreed, in *Epsom College v Pierse Contracting Southern Ltd (in liquidation)* [2011] EWCA Civ 1449 at [73].

14. This distinction, if not made more important, is at least highlighted by the provisions for costs management in Section II of Part 3 of the CPR. Practice Direction 3E—Costs Management, which supplements that Section, states at paragraph 7.3:

> "When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs."

Rule 3.18 provides:

> "In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –
> (a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and
> (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so."

In *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19, Moore-Bick LJ referred to the costs management provisions and said of them at [28]:

> "Read as a whole they lay greater emphasis on the importance of the approved or agreed budget as providing a prima facie limit on the amount of recoverable costs. In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so, and may for that purpose take into consideration all the circumstances of the case, I should expect it to place particular emphasis on the function of the budget as imposing a limit on

> recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake."

15. The present proceedings were commenced before the CPR were amended to provide for costs management. But the case was nevertheless subject to costs management under the broadly similar Pilot Scheme that was then operating in the TCC. H.H. Judge Havelock-Allan QC approved the defendant's costs budget in a sum of £91,700. In oral submissions Mr Lixenberg and Mr Troup proceeded on the basis that this is the figure that would be allowed on a standard assessment unless the court departed from the costs budget; this suggests that the approved figure was a total to include both incurred and estimated costs. What is clear is that the judge refused to approve a budget in a much larger amount—as I understand it, in excess of £140,000 for incurred and estimated costs—on the ground of proportionality. Before me, the defendant submitted a schedule showing its total costs incurred in this litigation at £166,469 and sought a payment on account of costs in the sum of £120,000. In short, what is at stake in the defendant's application for an award of costs on the indemnity basis is the opportunity to recover costs significantly greater than those likely to be considered proportionate on a standard assessment.

16. In this connection, counsel referred me to *obiter dicta* of Coulson J in *Elvanite Full Circle Ltd v AMEC Earth & Environment (UK) Ltd* [2012] EWHC 1643 (TCC), [2013] BLR 473. In that case, as in this, costs management had taken place under the TCC Pilot Scheme. The applicable Practice Direction contained a provision to the same effect as the present r. 3.18. Coulson J refused an application for indemnity costs. However, he went on to consider the relevance of costs management orders to the assessment of costs on an indemnity basis.

> "28. Prima facie, whether under PD 51G paragraph 8, or CPR 3.18, the costs management order (with its approval of the costs budget) is expressed to be relevant only to an assessment of costs on a standard basis. However, as a matter of logical analysis, it seems to me that the costs management order should also be the starting point of an assessment of costs on an indemnity basis, even if the 'good reasons' to depart from it are likely to be more numerous and extensive if the indemnity basis is applied.
>
> 29. The first reason for this is that, as set out in paragraphs 2 and 3.2 of PD 51G (paragraph 10 above), the costs budgets represent the parties' estimate of all the costs that they think that they will incur. It is not an estimate based on any particular form of costs assessment; it is just an estimate of likely costs. If it is an accurate estimate of all the costs that will be incurred, then it seems to me that it should be the relevant starting point for an assessment of

> costs on an indemnity basis as well as for an assessment on the standard basis.
>
> 30. Secondly, this would provide the benefits of both consistency and certainty. There is a concern that, if an order for indemnity costs allows a receiving party to ignore the costs management order, then that will encourage successful parties to argue for indemnity costs every time. That would be unfortunate, and would leave an unacceptable doubt hanging over even approved costs budgets, all the way through to judgment and beyond. A paying party will have fought the trial assuming that, even if it loses, its opponent will be unlikely to recover more than the amount recorded in the costs management order, unless there is good reason for any departure. That is the certainty that the new regime provides. Even if the paying party has to pay costs on an indemnity basis, that does not seem to me automatically to justify an abandonment of that certainty, and the encouragement of a costs free-for-all.
>
> 31. Of course, in any given case, it might be said that an award of indemnity costs – which does not require any assessment of proportionality – might be a 'good reason' to depart from the costs budget approved by the court pursuant to paragraph 8 of PD 51G. I can well see that, in particular factual circumstances, an award of indemnity costs might be a good reason to permit such a departure. But that would be fact-specific, and it would not detract from the principle of at least starting the costs assessment by reference to the approved budget."

17. Although the proliferation of *obiter dicta* at first instance is no doubt to be avoided, I would wish to express my respectful disagreement with that approach. As the passages set out in paragraph 14 above make clear, costs management orders are designed to set out the probable limits of the costs that will be proportionately incurred. It is for that reason, and not because of any quirk of drafting, that r. 3.18 refers specifically to standard assessment and not to indemnity assessment. Proportionality is central to assessment on the standard basis and it trumps reasonableness; cf. *Motto v Trafigura Ltd* [2011] EWCA Civ 1150, *per* Lord Neuberger of Abbotsbury at [49]. However, proportionality is not in issue if costs are to be assessed on the indemnity basis; see r. 44.3(3). I therefore find it difficult to see why logical analysis requires importing the approach in r. 3.18 into assessment on the indemnity basis. The first reason given by Coulson J, at [29], has force if at all only if an approved or agreed budget does indeed reflect the costs that the receiving party says it expects to incur. However, the present case is an example precisely of the proper use of costs management in approving a budget at a lower figure than that proposed by the receiving party, on the very ground of proportionality. To suppose that the imposition of a budget under Part 3 would create some sort of presumption as to the limits of reasonable costs would be to ignore the fact that the approval of costs budgets is done on the basis of proportionality, not mere reasonableness. The matters referred to in

connection with the first reason may, accordingly, justify having regard to the amount of costs the receiving party expected to incur, but they do not justify applying the r. 3.18 analogously to assessment of costs on the indemnity basis. Similarly, the second reason, stated at [30], seems to me, with respect, to go further than is justified by the costs management regime. When a costs management order is made, the parties know that costs within the approved budget are likely to be considered proportionate, and costs in excess of the approved budget are likely to be considered disproportionate; in either case, the burden of justification lies on the party seeking a departure from the approved budget. But the costs management regime is not intended to give litigants an expectation that they will not incur a liability for disproportionate costs pursuant to an order for costs on the indemnity basis; any such expectation must rest on a party's own reasonable and proper conduct of litigation. It is no objection to an order for costs on the indemnity basis that it is likely to permit the recovery of significantly larger costs than would be recoverable on an assessment on the standard basis having regard to the approved costs budget; that possibility is inherent in the different bases of assessment, and costs on the indemnity basis are intended to provide more nearly complete compensation for the costs of litigation. I accept, of course, that a party seeking to recover disproportionate costs on an assessment on the indemnity basis is required to show that those costs were reasonably incurred; though that requirement is subject to the provisions of r. 44.3(3). That does not, however, justify the analogous use of r. 3.18, which has three disadvantages. First, it is both unnecessary and contrary to the rationale of that rule. Second, it tends to obscure the fact that the nature of the justification required of a receiving party is quite different under the two bases of assessment. Third, and consequently, it risks the assimilation of the indemnity basis of assessment to the standard basis, which is not justified by the costs management regime in the CPR. In my judgment, the proper way of addressing the concern identified by Coulson J in *Elvanite* at [30] is, first, by ensuring that applications for indemnity costs are carefully scrutinised and, second, by the proper application of the well understood criteria of assessment in r. 44.3(3) to the facts of the particular case. It might also be remembered that, even if there exist grounds on which an award of indemnity costs could properly be made, such an award always remains in the discretion of the court.

18. In general terms, an award of costs on the indemnity basis is justified only if the paying party's conduct is morally reprehensible or unreasonable to a high degree, so that the case falls outside the norm. The applicable principles were set out at length by Tomlinson J in *Three Rivers District Council v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm), at [25], in a passage on which Mr Lixenberg relied (omitting the eighth point, which was formulated with particular regard to the *Three Rivers* litigation):

> "(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.
>
> (2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must

be some conduct or some circumstance which takes the case out of the norm.

(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground."

19. More recently, in *Courtwell Properties Ltd v Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC), Akenhead J said this:

> "22. So far as indemnity costs are concerned, there are numerous authorities which address the circumstances in which these may be ordered. A helpful if not absolutely exhaustive summary was given by Mr Justice Coulson in *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC (TCC):
>
> > '16. The principles relating to indemnity costs are rather better known. They can be summarised as follows:
> >
> > (a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable "to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight": see Simon Brown LJ (as he then was) in *Kiam v MGN Ltd* [2002] 1 WLR 2810.
> >
> > (b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in *Excelsior*

Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879.

(c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, *Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd* [2006] BLR 45.

(d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness: see *Digicel (St Lucia) Ltd v Cable and Wireless PLC* [2010] EWHC 888 (Ch).'

To this can be added a number of other specific and general points:

(i) The discretion to award indemnity costs is a wide one and must be exercised taking into account all the circumstances and considering the matters complained of in the context of the overall litigation (see *Three Rivers DC v the Governor of the Bank of England* [2006] EWHC 816 (Comm) and *Digicel* (as above)).

(ii) Dishonesty or moral blame does not have to be established to justify indemnity costs (*Reid Minty v Taylor* [2002] 1 WLR 2800).

(iii) The conduct of experts can justify an order for indemnity costs in respect of costs generated by them (see *Williams v Jervis* [2009] EWHC 1837 (QB)).

(iv) A failure to comply with Pre-Action Protocol requirements could result in indemnity costs being awarded.

(v) A refusal to mediate or engage in mediation or some other alternative dispute resolution process could justify an award of indemnity costs."

Indemnity costs: the application

20. In support of its application for an award of indemnity costs, the defendant relied on four matters, each of which was said by itself to justify such an award. I shall do no more than summarise the arguments stated in more detail in Mr Lixenberg's written and oral submissions and in correspondence from the defendant's solicitors.

21. The first matter relied on is the "speculative, weak [and] thin" nature of the claim (cf. Tomlinson J's principle (5), above), resulting from its lack of

support in the expert evidence. The letter of claim dated 11 October 2007 dealt primarily with a range of issues not ultimately raised in the proceedings [judgment, para 28]. When proceedings were eventually served in November 2010, they were supported by a letter that did not make allegations of negligence against the defendant and was not written by a qualified architect. This deficiency had still not been addressed by November 2011, when the defendant's insurers drew specific attention to the importance attached to relevant expert evidence of professional negligence by Coulson J in *Pantelli Associates Ltd v Corporate City Developments Number Two Limited* [2010] EWHC 3189. Thereafter the claimants did indeed obtain expert evidence from Mr Bate, whose report was disclosed on 20 June 2012. But, as explained in paragraphs 66, 67 and 92 of the judgment, that evidence suffered from a number of serious problems; in particular, it only unclearly supported an allegation of negligence, and Mr Bate had neither investigated the planning history of precedents he relied on nor stated any clear case as to precisely what the defendant ought to have done in respect of design. The expert evidence on quantum of damages was similarly deficient. Mr Alcock had not performed a proper costing exercise and accepted that he was not competent to perform such an exercise; insofar as he relied on a specific BODCL solution, his reasoning was manifestly faulty [judgment, paras 85, 100 and 101]. His valuation evidence was subjective and supported by plainly unconvincing reasoning [judgment, para 97]. These problems were or ought to have been manifest from the outset. The claimants, having pursued their claim without taking the elementary step of ensuring that it was backed up by apparently probative expert evidence, were acting unreasonably and bore the risk of an order for indemnity costs. Mr Lixenberg relied on the approach taken by Akenhead J in *Igloo Regeneration (GP) Ltd v Powell Williams Partnership* [2013] EWHC 1859 (TCC), where indemnity costs were awarded from shortly after the date when it ought to have been apparent to the losing party's legal team that its case faced serious difficulties.

22. The second matter relied on by the defendant is the claimants' use of a witness statement from Mr Thomas, the planning officer, that was calculated to give a misleading impression of the evidence he was likely to give. Mr Thomas's witness statement was served under cover of a letter dated 16 November 2012. Almost immediately, the defendant's solicitor responded, suggesting that the statement did not give a full and accurate account of Mr Thomas's evidence and asking whether the claimants' solicitors were satisfied that it "fully and accurately record[ed] all of his relevant evidence". The claimants' solicitors replied that the statement addressed the facts alleged in the defence and was not selective simply because, in doing so, it undermined those alleged facts. In the event, the defendant's solicitors proved correct. Mr Thomas's oral evidence was largely consistent with the factual case of the defendant and tended to support the defendant's case on planning merits, while tending to undermine both the reliance placed on the witness statement by Mr Bate in forming his expert evidence and the claimants' case on causation [judgment, paras 67, 92 and 95]. The inescapable inference (said Mr Lixenberg) was that the claimants either deliberately put forward a selective version of the evidence that Mr Thomas would give or failed adequately to explore the true

nature of his evidence despite being asked to do so. Either way, the reliance placed on Mr Thomas's evidence was unreasonable in a high degree.

23. The third matter relied on was the suggestion that the claim, despite its obvious lack of merit, had been pursued—and can only have been pursued—in the hope of pressuring the defendant and its insurers to avoid the stress, time and irrecoverable expense of prolonged proceedings and a lengthy trial by making an offer of settlement. Mr Lixenberg referred to the remarks of Langley J in the case of *Amoco (UK) Exploration Co v British American Offshore Ltd (No. 2)* [2001] EWHC 484 (Comm), where, albeit in a very different context from the present case, he said at [6]:

> "There is in my judgment a sound basis for concluding that Amoco conducted itself throughout the relevant events on the basis that its commercial interests took precedence over the rights and wrongs of the situation and that it was prepared to risk the outcome of litigation should BAO resist the pressures upon it and take on the challenge. BAO did take it on. It was then met with a constantly changing case as Amoco sought unsuccessfully to find a basis on which it could justify what it had done. If a party embarks on or brings upon itself and pursues litigation of the magnitude of this litigation in such circumstances and suffers a resounding defeat, involving the rejection of much of the evidence adduced in support of its case, in my judgment that provides a proper basis on which it is appropriate to award costs on an indemnity basis."

24. The fourth matter relied on was the claimants' failure or refusal to accept two reasonable offers of settlement. On 21 September 2012 the defendant offered settlement on a "drop hands" basis, that is, that the claim be dismissed with no order for costs. The period for acceptance of the offer was extended until 31 October 2012, but it was not accepted. On 20 February 2014 the defendant offered to pay £60,000, inclusive of interest and costs, in "one final attempt to resolve the dispute without needing to proceed to trial". Again, the offer was not accepted. The first offer was made about three months after the claimants had produced Mr Bate's report and about two months after they had served draft amended particulars of claim. The second offer was made about two months after the pre-trial review, at which (whether or not with an allusion to the unsatisfactory nature of the claimants' evidence: there is some contention about the tenor of Judge Havelock-Allan QC's remarks, which I cannot resolve) an order was made for a list of issues to be filed and if possible agreed. The defendant submits that by that stage, if not before, the claimants' mind ought to have been properly focused on the difficulties in its case.

25. I was referred to a number of cases in which the relevance of the rejection of reasonable offers has been considered in the context of applications for indemnity costs. In *Kiam II v MGN Ltd (No.2)* [2002] EWCA Civ 66, [2002] 1 WLR 2810, Simon Brown LJ, with whom Waller and Sedley LJJ agreed, referred to the Court of Appeal's decision in *Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723, [2002] 1 WLR 2800, and said:

> "12. I, for my part, understand the Court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. …
>
> 13. It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Rule 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis. Take this very case. No encouragement in the way of an expectation of indemnity costs was required for him to make his offer to accept £75,000: its object was to protect the respondent against a standard costs order were the Court, say, to reduce the damages to that level. Where, as here, one member of the Court considered the jury's award 'wholly excessive', and thought that £60,000 would have been the highest sustainable award, it seems to me quite impossible to regard the appellant's refusal to accept the £75,000 offer as unreasonable, let alone unreasonable to so pronounced a degree as to merit an award of indemnity costs. It is very important that *Reid Minty* should not be understood and applied for all the world as if under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers."

In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (a firm)* [2002] EWCA Civ 879, Lord Woolf CJ referred to that passage and continued:

> "31. In the context of that case I see that those paragraphs set out the need for there to be something more than merely a non-acceptance of a payment into court, or an offer of payment, by a defendant before it is appropriate to make an indemnity order for costs. Insofar as that is the intent of those paragraphs, I have no difficulty with them. However, I would point out the obvious fact that the circumstances with which the courts may be concerned where there is a payment into court may vary considerably. An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again

> the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.
>
> 32. I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

Waller LJ, with whom Laws LJ agreed, referred to the facts in *Kiam II* and said:

> "38. … [T]he point made by the judgment of Simon Brown LJ was that hindsight may show that it was unreasonable not to accept a better offer but that will not normally be sufficient for an award of costs on an indemnity basis. Simon Brown LJ was concerned to stress that where all that was relied upon is the failure to accept a reasonable offer, it will be to a high degree of unreasonableness before an award of indemnity costs should be made. But his language is not apposite to all circumstances, as my Lord has pointed out. … Certain principles have to be adhered to, as indicated by the rules. So far as relevant to this case, the first principle is that expressed by May LJ in paragraph 28 in *Reid Minty* (which I have read). "As the very word 'standard' implies, this would be the normal basis". From that first principle it is also possible to say that in the context of Part 36.20, or under Part 44.3 the mere fact that an offer of settlement or a Part 36 offer has been made by a defendant and then been bettered, will not necessarily lead to an order for costs on an indemnity basis.
>
> 39. The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

Finally, in *Epsom College v Pierse Contracting Southern Ltd (in liquidation)* [2011] EWCA Civ 1449 Rix LJ said:

> "71. I would merely briefly state that I would allow the possibility that the general requirements before indemnity costs are imposed,

> namely that the case in question falls outside the norm, and that conduct must be unreasonable to a high degree (*Reid Minty (a firm) v. Taylor* [2001] EWCA Civ 1723, [2002] 1 WLR 2800, *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] CP Rep 67) can be met where there has been an unreasonable failure to accept offers of settlement, or a party has unreasonably resisted a sensible approach to finding a solution to the proceedings; even if such a case deserving of indemnity costs has been described as 'a rare case indeed' (*Kiam v. MGN Ltd (No 2)* [2002] 2 All ER 242, per Simon Brown LJ at [13]).
>
> 72. In this connection, the notes to Civil Procedure 2011, Vol 1, at para 44.4.3, cite *Franks v. Sinclair (Costs)* [2006] EWHC 3656 (Ch), [2007] WTLR 785 (David Richards J) as an example of a case where the 'claimant's refusal of two reasonable offers to settle would have been enough in itself to warrant an order on the indemnity basis'. However, that was a case where the unsuccessful claimant had indemnity costs awarded against him because he had known from the start that he had been putting forward a false case. The two offers which he had refused were the icing on the cake: they were mentioned, but it was not said that they would have been enough in themselves to have justified indemnity costs, see at [28]. On the other hand, indemnity costs have been awarded from a certain date in special circumstances where an offer which ought to have been accepted was not: see *Southwark LBC v. IBM UK Ltd (Costs)* [2011] EWHC 653 (TCC), [2011] NLJ 474 (Akenhead J) and *Barr v. Biffa Waste Services Ltd (Costs)* [2011] EWHC 1107 (TCC), [2011] 137 Con LR 268 (Coulson J)."

Those remarks were cited with approval in *F & C Alternative Investments (Holdings) Ltd v Barthelemy* [2012] EWCA Civ 843, [2013] 1 WLR 548, *per* Davis LJ, with whose judgment Tomlinson and Arden LJJ agreed, at [70].

Indemnity costs: conclusion

26. Despite the force of Mr Lixenberg's submissions, I have come to the view that the appropriate order is that costs be assessed on the standard basis.

27. It is true that the claim was not a strong one; this appears sufficiently from my judgment after trial. However, I do not regard it as having been so weak as to be especially remarkable. Although the claimants were slow in obtaining expert evidence to support their case, they did in due course produce such evidence. It provided a basis on which the allegations of professional negligence could properly be taken to trial. It also gave a proper basis for considering that the recoverable damages would be £30,000 or more. That evidence was not greatly impressive on paper, and its weakness was starkly exposed at trial. But that is a different matter from saying that the pursuit of the case in reliance on it was unreasonable to a high degree and ought to be marked by an award of indemnity costs. The matter must not be viewed with

hindsight. The defendant did, of course, make strong observations on the quality of the evidence, but it did not pursue the matter with an application to strike the claim out or for some other direction of last resort to ensure that the claimants either produced adequate evidence or faced a strike-out application. The experts on liability and quantum engaged in discussions and the production of a detailed and lengthy joint statement, and although the decision of the claimants and their advisers to prefer the opinions of their own experts now appears unwise I do not think that it was remarkably unreasonable.

28. The other matters relied on by the defendant do not affect my conclusion, either singly or when taken together. I see no reason to believe that the proceedings were pursued with a view to pressuring insurers and a professional insured to settle an unmeritorious case. The claimants' conduct is nothing like that of Amoco in *Amoco (UK) Exploration Co v British American Offshore Ltd (No. 2)*, and Langley J's remarks in that case, cited in paragraph 23 above, have no application in this case. The offers relied on by the defendant were reasonable offers; hindsight shows that they were generous and ought to have been accepted. But the claimants had grounds for believing that they could beat the offers, and their rejection of them was not so unreasonable as to be in that rare category of case justifying an award of indemnity costs. As for the use of Mr Thomas's witness statement, this may be seen as unfortunate but not, I think, as improper or unreasonable to a high degree. It is important to remember that Mr Thomas did not have any specific recollection of the Property or his communications with the defendant. This meant that the contents of the witness statement depended, to a greater degree than might normally be the case, on the angle of approach and the focus of the enquiry. The statement also was in the nature of a response to the factual case of Mr Wheatley, whose oral evidence added materially to the account of how Mr Thomas's advice was elicited in the relevant conversation. The result of all of this was that a statement that responded in perhaps a rather literal way to the defendant's evidence proved not to have explored avenues of enquiry which, when followed at trial, were damaging to the claimants' case. As mentioned above, the defendant's solicitors expressly raised concerns about Mr Thomas's statement. But I am not told that they produced a statement of their own from him or specifically challenged particular matters of fact or assertion. I do not at all think that the statement obtained from Mr Thomas by the claimants' solicitors was drafted with a view to being misleading, and it seems to me that it was not unreasonable of them to rely on it, although the loss of the case at trial might possibly have been avoided if they had explored the issues more widely and intensively with Mr Thomas.

29. In the circumstances, the claimants must pay (all of) the defendant's costs, to be subject of a detailed assessment on the standard basis if not agreed.

Payment on account of costs

30. Should there be a further payment on account of costs? Mr Lixenberg submits that there should, and that it should be in the full amount of the approved costs budget (£91,700) together with an additional amount to reflect the fact that the

trial was not concluded within the anticipated four days but went into a fifth day. There is not (he submits) any reason to suppose that the costs will be assessed at less than the amount of the approved budget, and the unforeseen extension of the trial is a good reason for permitting recovery of costs in a greater amount. Mr Troup, in response, submits that the interim payment of £70,000, already ordered, is perfectly sufficient, representing more than 75% of the approved budget.

31. In *Gollop v Pryke* (November 29, 2011; unreported), Warren J suggested that, in deciding on the appropriate amount of a payment on account of costs, the court should make a reasonable assessment of what is likely to be awarded on assessment. Having regard to the defendant's approved budget and to the length of the trial, I do not think it at all likely that less than £90,000 will be awarded on a standard assessment of the defendant's costs. Indeed, the greater likelihood is that the increased length of the trial will result in a modest uplift above the amount of the approved budget. The only matter raised by Mr Troup as indicating a likely reduction of the costs to be allowed was what he said were excessive charges by the defendant's solicitors. However, that observation was made with reference to the summary of total costs in the sum of £166,469; objections to a bill in that amount are not in point.

32. In circumstances where there is an approved costs budget in the sum of £91,700 and where the only material considerations raised before me tend to indicate the probability of a modest increase to the approved amount, but no reduction from it, I see no good reason why the claimants ought not to pay £90,000 on account of the costs awarded to the defendant. That is the amount originally sought by the defendant's solicitors in correspondence. I resist, however, Mr Lixenberg's invitation to pre-empt entirely the assessment process by ordering a payment in excess of £91,700 on account of the lengthened trial.

33. As it has not been possible for the parties to agree the terms of the order consequent upon this judgment, I shall deal with matters arising on paper; for that purpose, counsel should please file short submissions (not exceeding 2 pages) not later than 5 September 2014.
