[2020] EWHC 2128 (TCC)

Case No: E50MA036

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ
Draft judgment circulated 20 July 2020
Date handed down: 3 August 2020

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

BLACKPOOL BOROUGH COUNCIL

Claimant

-and-
VOLKERFITZPATRICK LIMITED

Defendant

-and-
RANGE ROOFING & CLADDING LTD

Third Party

-and-
RPS PLANNING & DEVELOPMENT LTD

Fourth Party

-and-
CAUNTON ENGINEERING LTD

Fifth Party

Martin Bowdery QC & Robert Clay
(instructed by **Squire Patton Boggs (UK) LLP, Birmingham B3**) for the **Claimant**

Anneliese Day QC and Christopher Knowles
(instructed by **Fieldfisher LLP, London EC4**) for the **Defendant**

Simon Hale
(instructed by **Clyde & Co LLP, London EC3**) for the **Fifth Party**

Hearing date: 14 July 2020

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APPROVED SUPPLEMENTARY JUDGMENT IN RELATION TO COSTS

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

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10:00am on 3 August 2020

His Honour Judge Stephen Davies:

1. I handed down my principal judgment on 15 June 2020 (neutral citation [2020] EWHC 1523 (TCC)) and now deal with costs following a further hearing on 14 July 2020.

2. I summarised what the case was about and what the outcome of my judgment was in the introduction to my substantive judgment which, as relevant to costs, I reproduce below (with the table in paragraph 13 expanded to compare the recovery with the pleaded claim):

    1. ... In 2007 Blackpool Borough Council, the claimant, secured central government funding for … the construction of a new tram depot at Starr Gate. The tram depot was designed and constructed to be a landmark building at the principal southern approach for those visiting Blackpool by car. It has a striking modern design, with a curved aluminium roof with deep cantilevered soffits, an aluminium wall looking west out to sea, long bands of 3-dimensionally curved "wave-formed" decorative blue cladding features along the south and east elevations and fully glazed double bi-folding tram doors to the north. The tram depot was procured by a design and build main contract made between the claimant and Volkerfitzpatrick Limited, the defendant, in 2009, completed in 2011 and brought into operation in 2012.

    2. In these proceedings the claimant, as the owner of the tram depot, complains that significant parts of the tram depot as designed and constructed do not meet their intended design life of 50 years and nor are they suitable for the exposed coastal marine environment where the tram depot is located and where it suffers from regular exposure to the elements.

    3. The complaints are set out in more detail in the Scott schedule attached to the Particulars of Claim. The claimant contends that substantial remedial works are required at a total cost said to be in excess of £6M.

    4. The claims fall into 7 principal categories, namely:

        a. The galvanised steel cold formed components connecting the wall and roof sections to the portal frame, namely the purlins, the cladding rails and the connecting brackets (items 1-3 of the Scott schedule).

        b. The galvanised steel internal components of the roof, namely rails, clips and spacers (item 4 of the Scott schedule).

        c. The wall cladding panels to the north, east and south elevations (items 5 and 6 of the Scott schedule).

        d. The soffit panels to the underside of the roof overhangs on the north, east and part south elevations (item 7 of the Scott schedule).

        e. The decorative wave form cladding panels affixed to the wall cladding panels to the east and part north and south elevations (item 8 of the Scott schedule).

        f. The tram access doors, glazed side panels and supports and operating mechanisms in the north elevation ("the tram doors") (items 9 and 10 of the Scott schedule).

        g. Other general defects in and associated with the depot building (items 11 – 80 of the Scott schedule).

5. Against each item in the Scott schedule an amount is stated for the "estimated quantum", without particulars being given as to what works are said to be required or how the amount was calculated. At the end of the Scott schedule there is added to the sub-total of the individual items (£5,765,736.45) claims for five additional items, again without particulars being given: (a) design of remedial scheme (£333,000); (b) procurement of remedial works (£100,000); (c) legal advice in connection with remedial works programme (£25,000); (d) project management time estimate for remedial works (£287,500); and (e) project management time to date dealing with defects (£187,500).

6. By its defence the defendant disputes that the contract required the individual elements of the tram depot in respect of which complaint is made to have a design life of 50 years, contending that the contractual design life is either 25 years or 20 years depending upon the element in question.

7. Save for some limited admissions the defendant disputes that the elements do not meet their specified design life or are otherwise unsuitable. It contends that such corrosion as has been experienced has been caused by the claimant's failure to maintain the tram depot appropriately, in particular to clean the exterior of the tram depot with sufficient frequency. It complains that the claimant has unreasonably refused to accept its offers to undertake remedial works in relation to some elements which it admits require attention. It disputes the remedial works proposed and the costs claimed, contending that the claimant is unreasonably seeking to obtain a full-scale replacement of the relevant elements when that is wholly unnecessary and when the costs claimed are wholly excessive.

8. The defendant brought additional proceedings against the third party ("Range") as the specialist roofing and cladding subcontractor engaged to carry out design and construction works in relation to the roof and external cladding. Those proceedings related to the design and construction of the roof and wall cladding. Shortly before trial they were compromised.

9. The defendant also brought additional proceedings against the fourth party ("RPS"), which was the lead multi-disciplinary design consultant engaged by the defendant in relation to the main contract works. The claims made against RPS related to the design and specification of the structural and secondary steelwork, the roof steel components, wall cladding panels, cantilever roof soffit panels, wave form cladding panels, tram doors and other general defects. Those claims were compromised on the first day of trial, so that Ms Cheng QC only appeared on that day before withdrawing.

10. Finally, the defendant also brought additional proceedings against the fifth party, Caunton Engineering Limited ("Caunton"), which was the specialist steelwork subcontractor engaged by the defendant to carry out steelwork design and construction works. The claims made against Caunton relate to the cold formed components and four specified items in the Scott schedule. Those claims have not been compromised and remain for determination, as do the contribution proceedings brought by Caunton against RPS in respect of which, as part of its settlement with RPS, the defendant took over conduct on its behalf.

11. The case was listed at the first case management conference in February 2019 for a 4-week trial commencing 24 February 2020. The trial took place as scheduled. ….

12. ...

13. In summary, I award the claimant the total sum of £1,110,781.80 broken down in the table below. This, whilst a substantial sum, is significantly less than was claimed. The principal

reasons why the claimant has failed to recover a more substantial award are because: (a) I am satisfied that the design life obligation period is either 20 or 25 years rather than 50 years; (b) I do not accept the claimant's case that the cold formed components are inadequate for their design life or otherwise unsuitable (nor in any event that they need replacement); (c) in a number of cases I am satisfied that limited replacement or repair rather than full replacement is required.

Section	**Item**	**Amount pleaded (£)**	**Amount awarded (£)**
H	The cold formed components	£2,765,000	Nil
K	The roof components	£1,010,000	£150,304.88
L	The wall cladding panels	£1,037,000	£67,342.23
M	The roof overhang soffit panels	£154,000	£107,525
N	The wave form cladding panels	£122,000	£122,000
O	The tram doors	£449,239.95	£311,729.91
P	The other Scott schedule items	£228,496.5	£246,330.68
	Sub-total		£1,005,232.70
Q	The add-on claims at 10.5%	£933,000	£105,549.40
	Total claim / award	**£6,698,736.45**	**£1,110,782.10**

3. It will be seen that the discrepancy between the claim and the recovery is a significant issue, as is the complete failure in relation to the most substantial value claim and the modest recoveries in relation to the second and third largest claims.

4. As is all too often the case at this stage in litigation of this kind, the parties are very far apart in their respective primary cases.

5. The claimant contends that it is the successful party and that it should recover all of its costs against the defendant. It accepts that Caunton was successful and that its costs should be borne by the claimant and by the defendant, but submits that the defendant should bear the larger share of such costs.

6. In contrast, the defendant contends that it is the successful party and that the claimant failed to do better than the defendant's Part 36 offer so that the claimant should: (a) receive no costs; (b) pay the defendant 85% of its costs of the main action; (c) pay the defendant all of the costs incurred in relation to the additional claim against Caunton, including Caunton's own costs in full; (d) pay the defendant its costs of the cold formed components claim as against RPS.

7. Caunton contends that it should recover its costs of defending the additional claim (including any costs relating to its contribution claim against RPS) in full. Whilst it does not seek indemnity costs against the defendant, since it does not identify any conduct on the defendant's part such as would justify such an order, it does seeks an order for costs against the claimant on the indemnity basis from 3 September 2019 onwards, by reference to the claimant's conduct of the cold formed components claim, on the basis either that the claimant should pay such costs directly or that it should fully indemnify the defendant against such costs. The defendant accepts that it will have to pay Caunton's costs but seeks an order that they are paid, whether on a standard or an indemnity basis, directly by the claimant. The claimant opposes any award of costs on the indemnity basis.

8. In addition, all parties seek orders for interim payments on account of such costs as they may be awarded.

9. They also seek interest on costs although it is agreed that the quantification of such interest and the resolution of other ancillary matters should be left over until after this judgment.

The relevant legal principles

10. The relevant general legal principles are to be found in Part 44.2 of the CPR. They are well known and have been considered and applied in many cases at first instance and at appellate level. I do not need to rehearse them in this judgment. It is sufficient in this case to refer to particular points which require emphasis or closer analysis because of the particular circumstances in issue in this case.

11. The first question is who is the successful party. It appears from the authorities and the submissions that this apparently simple question can sometimes be more complicated than might at first appear, at least in cases where whilst it is party B who will have to make a payment to party A once all substantive claims are taken into account, nonetheless that payment is very modest in comparison with the total amount claimed by party A on its primary case on which it failed. In that context the task of ascertaining who is the successful party was memorably described by Sir Thomas Bingham MR as a "surprisingly elusive process" and has produced what appear to be differing strands of authority in the Court of Appeal.

12. Fortunately for me, this issue was considered by Butcher J in *Rotam Agrochemical Company Limited v GAT Microencapulsation GMBH* [2018] EWHC 3006 (Comm). This was a case where the claimant claimed £8.9 million on a breach of contract claim at trial but recovered only £258,000 on a fallback unjust enrichment claim. Having referred to CPR 44.2 and the authorities Butcher J concluded at [17] that the question is always who "as a matter of substance and reality" has won. That is often, but not always, the party who ends up receiving the cheque.

13. The second question is whether the court should indeed be cautious about departing from the starting point (that the successful party should recover its costs) "too far and too often", as suggested by Jackson LJ in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, who described such departures as a "growing and unwelcome tendency … [which] … may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates".

14. In my view, when deciding whether or not to depart from the starting point by reference to matters such as relative lack of success, the reasonableness of pursuing particular allegations or issues, the manner of pursuit and allegations of exaggeration, a trial judge should be careful to avoid applying the considerable benefit of hindsight which comes from having reached a firm decision at the end of the litigation. It is very often the case, in a dispute of any complexity, that the issues and the evidence both become more focussed and more clear both at trial and particularly by the time of delivery of judgment in a way which they were not from the outset. Whilst each party who has won on a particular issue will often have been convinced from the outset that victory on that point was inevitable, that does not necessarily mean that this result would have been apparent, whether to the other party or to the judge when case managing the case or reading in to the case pre-trial. Another judge may well have reached a different conclusion on a factual issue or on a disagreement between experts or on the proper construction of a complex contract. It is well known that a relatively small number of conclusions on key issues which may be finely balanced can make all the difference between success and failure, both overall and on significant individual elements of the claim.

15. It is the risk of applying too much hindsight, I respectfully suggest, which will frequently properly justify a judicial reluctance to depart too readily from the general rule under CPR Part 42.2(2)(a) that

the successful party should recover its costs, save in cases where the successful party has plainly acted unreasonably or where the unsuccessful party has put its money where its mouth is by making a well-judged Part 36 offer or without prejudice save as to costs (**WPSATC**) offer.

16. The third point is the costs consequence of withdrawing a Part 36 offer. Part 36.9 permits a party making a Part 36 offer to withdraw it if not accepted. In the case of a Part 36 offer made by a defendant which is withdrawn the automatic costs consequences under Part 36.17(1)(a) and (3) cannot apply (see 36.17(7)(a)). It may still, however, properly be taken into account as a relevant circumstance under CPR 44.2(4)(c).

17. The editors of the current 2020 edition of *Civil Procedure* (the White Book) include a commentary on this in the notes at 36.10.4 and 44.2.19, to which I have been referred and which I have read. For present purposes it suffices to note that:

    (a) The Court of Appeal has explained that, following a change to the wording of the rule in 2007, there should be no presumption, as may have been understood was the effect of the earlier decision of that court in *Trustees of Stokes Pension Fund v Western Power Distribution (Southwest) Plc* [2005] EWCA (Civ) 854, that a claimant who should have accepted a Part 36 offer within the 21 day period should have to pay the subsequent costs incurred by the defendant even after the Part 36 offer is withdrawn.

    (b) As Jackson LJ observed in *Thakkar v Patel* [2017] EWCA Civ 117 at paragraph 23: "The effect of [*Trustees of Stokes Pension Fund v Western Power Distribution (Southwest) Plc [2005] EWCA (Civ) 854; [2005] 1 WLR 3595,* and *Owners and/or Bareboat Charterers and/or Sub Bareboat Charterers of Samco Europe v Owners of MSC Prestige [2011] EWHC 1656 (Admlty)*] is that where a purported Part 36 offer under the pre-April 2015 CPR is withdrawn, the crucial question is whether the offeree acted reasonably or unreasonably in failing to accept the offer while it was on the table. In both of those cases, the claimants acted unreasonably. Accordingly, the court made costs orders favourable to the defendants".

    (There is an important issue as to what is meant by acting reasonably or unreasonably in this context which I address further below.)

    (c) However, it would be wrong to treat that as the only relevant question. Each case will inevitably turn on its own particular facts.

18. The fourth point is not controversial. It is that in a number of cases it has been recognised that: (a) where a claimant sues a defendant who, acting reasonably, joins in an additional party then, if the claimant fails against the defendant, so that the defendant fails against the additional party, the court will usually order the claimant to pay the costs which the defendant is liable to pay the additional party; (b) the court has a discretion as to whether or not to order the claimant to indemnify the defendant or to order the claimant to pay the additional party direct. See at appellate level *Sarpd Oil International Limited v Addax Energy* [2016] EWCA Civ 120 at [23] – [30] and *Arkin v Borchard Lines Ltd* [2005] 1 W.L.R. 3055 at [75]. It follows from this and from the wide jurisdiction given to the court under CPR Parts 1 and 44 that it is open to the court in an appropriate case to award the additional party its costs directly against the claimant and on the indemnity basis by reference to the claimant's pursuit of the main claim, even though the additional party is unable to point to any conduct on the part of the defendant in its pursuit of the additional claim which would justify such an order.

19. The fifth concerns the principles on which indemnity costs are to be awarded. It is not in dispute that the jurisdiction to award indemnity costs arises where the court is satisfied that there has been some conduct or some circumstance which takes the case out of the norm: see *Excelsior Commercial &*

Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879, where the Lord Chief Justice declined to give more detailed guidance given the "infinite variety of situations which can come before the courts and which justify the making of an indemnity order".

20. However, as Mr Hale submits, the recent decision of the Court of Appeal in *Burgess v Lejonvarn* [2020] EWCA Civ 114 gives useful further guidance on the general principles which are applicable in cases where a defendant does better than his Part 36 offer and where a claimant pursues a "speculative, weak, opportunistic or thin claim".

21. As to the former, having reviewed the authorities, Coulson LJ said at [43] that: "In short, therefore, taking the CPR and these authorities together, the position is that, in contrast to the position of a claimant, a defendant (such as the appellant in the present case) who beats his or her own Part 36 offer, is not automatically entitled to indemnity costs. But a defendant can seek an order for indemnity costs if he or she can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be "out of the norm". Moreover, if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made. That is what happened in *Excelsior*".

22. As to the latter, Coulson LJ said at [44] that: "There is a separate strand of authority concerned with speculative, weak, opportunistic or thin claims. It has long been the position that a defendant's eventual defeat of such claims can give rise to an order for indemnity costs. In *Three Rivers District Council v Governor & Company of the Bank of England* [2006] EWHC 816 (Comm); [2006] 5 Costs LR 714, Tomlinson J (as he then was) summarised the position at para 25(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."

23. The Court of Appeal also held that: (a) it did not need to be demonstrated that the claim was "hopeless" [45]; (b) the essential question is "whether, at any time following the commencement of the proceedings, a reasonable claimant would have concluded that the claims were so speculative or weak or thin that they should no longer be pursued" [54] so that it "did not need a long and expensive trial for it to have been apparent to the respondents and their advisors that they were, at the very least, speculative/weak claims" [63]; (c) that may be demonstrated by the claimant's own conduct, such as – in that case – the making of a significantly reduced Part 36 offer which bore "eloquent testimony to the fact that the respondents must have known that … their claims were speculative/weak" [65]; and (d) where the defendant has beaten its Part 36 offer, the question is "At any stage from the date of the offer to the date of the outcome, was there a point when the reasonable claimant would have concluded that the offer represented a better outcome than the likely outcome at trial?" [80].

24. Sixthly, and finally, it is common ground that if an order for indemnity costs is made that means that the receiving party is not constrained by its approved budget, which is relevant not only to the position on a detailed assessment but also on the approach to an interim order for a payment on account: see *Burgess* at [93].

Issues for determination

25. It follows that the following principal issues arise for determination:

    (1) As between the claimant and the defendant who is the successful party.

    (2) The Part 36 and WPSATC offers.

    (3) The claimant's relative lack of success and its conduct.

(4) What costs orders ought to be made having regard to all of the circumstances.

(5) Interim payment on account of costs.

(6) Other matters.

(1) As between the claimant and the defendant who is the successful party?

26. The claimant submits that since it is has recovered more than £1 million it is the successful party, so that the general rule or starting point under 44.2(2)(a), namely that the unsuccessful party will be ordered to pay the costs of the successful party, will apply.

27. In contrast the defendant submits that the claimant is the unsuccessful party in that (in summary) it had claimed a total (including add-ons) of £6,698,736.45 but had obtained only 16% of that claim, losing completely on the largest claim – the cold formed components claim – which was valued at £2.765 million plus add-on costs and failing to recover anything like as much as what was claimed in relation to the second and third largest claims, the roof components (£1.010 million, excluding add-on costs) and wall cladding (£1.037 million, excluding add-on costs).

28. I have no doubt that the claimant is properly to be regarded as the successful party. Whilst it is always a question of fact and degree, in my view the claimant has been successful, both in substance and in reality. In the context of a defects claim with 7 heads of claim it has succeeded on 6 and recovered a substantial amount, both objectively and by reference to the claim as asserted, even if significantly less successful than hoped. Whilst it is true that its primary case was that assuming a 50-year contractual design life its claim was valued at almost £6.7 million, its pleaded alternative case was that assuming a 20 or 25-year contractual design life its claim was worth around £3.6 million, so that it recovered some 30% of the claim on that basis. This is nothing like the *Rotam* case, where the claimant lost on its multi-million pound claim A, which was the real prize, but succeeded only on a modest alternative fallback claim, or the personal injury cases, where the claimant succeeded on liability but recovered only a few thousand pounds, on the basis of a trivial injury with no lasting consequences, as compared with a six or seven figure claim based on a hugely exaggerated case as regards the severity and impact of those injuries.

29. Thus, the real question for me is whether under the power conferred by 44.2(2)(b) the court should make a different order and, if so, what different order.

(2) The Part 36 and WPSATC offers

30. On 15 August 2019, some weeks before a mediation took place, which had been delayed due to a delay in arranging the initial testing by the independent testing house Socotec, the defendant made a formal Part 36 offer whereby it offered to pay the claimant £750,000 in settlement of all of the claim items save for the tram doors claim and the wave form cladding panels claim and 8 of the other Scott Schedule items which were all expressly excluded from the offer. As to the tram doors, nothing was offered. No explanation was given as to why. As to the wave form cladding panels and the 8 other Scott schedule items (in respect of which the defendant had previously admitted liability and quantum) the defendant referred to its earlier open offer of payment of £137,682.50 made on 30 January 2019, without expressly stating whether that was still on the table or withdrawn and, if still on the table, what the costs consequences would be of its acceptance if the Part 36 offer was also accepted. It was clear, at least by implication, that if the offer was accepted within the relevant 21-day period the claimant

would be entitled to its costs of those issues. The claimant did not accept the offer or make any admissible counter-offer at this stage.

31. A comparison of the offer of £750,000 compared with the judgment on those items (inclusive of add-on) shows that the claimant only recovered £631,510.25, so that the defendant did better at trial than its Part 36 offer.

32. The claimant submits that if one adds on the earlier open offer of payment of £137,682.50 made on 30 January 2019 and the recovery under the tram doors claim the total recovery of £1,110,781.80 is greater than the "true" offer of £887,682.50. Whilst that is true it does not in my view detract from the simple point that the defendant still did better than its offer in respect of the subject matter of its offer. The fact that its offer excluded items on which the claimant succeeded at trial is something to which I shall have to return. However, on its face the claimant would have been entitled and indeed obliged - unless it discontinued or settled them - to pursue the excluded claims down to trial even if it had accepted the Part 36 offer in which case it would, on my findings, have succeeded.

33. I should also note that, as I held in the principal judgment at paragraph 559, the open offer to pay the claimed and admitted amounts in relation to the wave form cladding panels did not take into account the on-costs claimed on all items including, therefore, the wall cladding panels and, hence, is irrelevant to my decision in relation to costs. The same applies to the open offer made at the same time in relation to 8 of the other Scott schedule items.

34. The mediation took place in September 2019, attended by all parties, which reflected the sensible desire of all parties to explore settlement, but which did not result in a settlement. It did, however, result in a WPSATC request by the defendant to the additional parties to provide proposals for a "robust Part 36 offer" to be made to the claimant. That led to Caunton indicating WPSATC that it would be willing to contribute £250,000 to a £2.5 million Part 36 offer and to pay 10% of the claimant's costs (but nothing towards the defendant's costs). Despite Mr Hale's submission that this was made purely on a commercial basis, I have no doubt that it reflected an appreciation by Caunton that although it considered the claimant's cold formed components claim for a full replacement basis on a 50-year contractual design life basis to be weak it did not consider it to be wholly without substance. The same is true of Caunton's subsequent formalisation of a similar proposal when on 3 October 2019 it made a Part 36 offer to the defendant to pay £250,000 in relation to the additional claim and acknowledged that if accepted it would be liable for the defendant's costs of the additional claim (but was silent as to the claimant's costs). By way of clarification I should explain that it is common ground that under Part 36 Caunton is not entitled to indemnity costs simply because it did better than its Part 36 offer and, as Ms Day observed, the defendant can scarcely be criticised for not accepting the offer when it was silent as to the claimant's costs of the cold formed components claim.

35. On 12 November 2019 the defendant made a WPSATC offer. It was an unorthodox offer in that it was an offer made to the claimant, to Range, to RPS and to Caunton and comprised both a global offer and a series of separate offers. In summary, the defendant identified what it considered a suitable settlement sum for each of the individual claims, namely for the cold formed components (£250,000), the roof components (£210,000), the wall cladding panels (£500,000), the wall soffits (£110,000) and the tram doors (£550,000), totalling £1,620,000, However, the proposal was subject to each of the additional parties identified in relation to each claim making an offer to pay each sum to the claimant, together with the costs of the claimant and the defendant referable to such claim (save in relation to the wall cladding claim, in relation to which the defendant offered to pay £170,000 of the £500,000, and two thirds of the claimant's costs), and to the claimant accepting such offer. Although unorthodox, it was not in any way unclear. It was an attempt by the defendant to extricate itself from this litigation on the basis that it could (save in relation to part of the wall cladding claim, as set out above) pass

every claim and its associated costs down the line to the additional parties and, thus, recover its own costs as well.

36. As regards the cold formed components claim it was in substance a counter-offer to Caunton (although addressed to RPS as well) requiring them to accept a liability to pay the claimant's costs of that claim as well as the £250,000 and the defendant's own costs.

37. As regards the tram doors claim that was addressed solely to RPS.

38. There was no admissible response from the claimant or from any of the additional parties.

39. There was however a response from the claimant in the form of a Part 36 offer made on 21 November 2019. It did not formally reject the defendant's WPSATC offer, although it set out reasons why in its view it was ineffective. It adopted the same global and individual approach as the defendant's WPSATC offer, although it was made only to the defendant. As regards the cold formed components claim it offered to accept £280,000, thus only £30,000 more than the defendant's valuation. As regards the tram doors claim it offered to accept the very same amount as the defendant's valuation. As Ms Day observed, the total of £2,384,000 was double what the claimant in fact recovered and the claimant failed to beat any of the individual offers.

40. As both Mr Bowdery and Mr Hale submitted, the difference between the £250,000 and the £280,000 offers for the cold formed components was minimal in the context of the full value cold formed components claim and the costs incurred in relation to the cold formed components claim. However, they sought to draw very different conclusions from this fact.

41. Mr Bowdery submitted that the gap was so modest that it was inconceivable that the defendant did not pass on the offer to Caunton or why, if it did, Caunton did not counter-propose to bridge the gap. It appears that the defendant did communicate the offer to Caunton once it had received the claimant's permission to do so but that nothing further happened, at least in admissible form. I agree that it is surprising that no further admissible offer was made to bridge the gap or, indeed, that the claimant was not made aware that Caunton had made a Part 36 offer of £250,000. I agree that the defendant and Caunton must bear the blame for the failure to advise the claimant that Caunton had made the Part 36 offer. It is true, as Ms Day submitted, that the gap between the two was not just £30,000 but also whether Caunton was willing to pay the claimant's costs of the cold formed components claim. However, it is also to be noted that in September 2019 Caunton had been willing to pay 10% of the claimant's costs, so that this was not self-evidently a deal-breaker. Nonetheless, the claimant cannot get around the fact that, instead of simply stating that it would accept the £250,000, it attempted, no doubt for tactical reasons, to squeeze a further £30,000 from the defendant. In short, I reject Mr Bowdery's submission that the defendant and/or Caunton must bear all of the blame for the cold formed components claim going to trial. In my view all of the parties must bear some of the blame for the failure to reach a deal on this item in November 2019, but this point would never have arisen anyway had the claimant accepted, as with hindsight it should, the August Part 36 offer.

42. Mr Hale submitted that what the claimant's Part 36 offer revealed was that by this time the claimant had also realised that the cold formed components claim was in real difficulties. As I explain below when dealing with conduct I agree in part with this submission. However, what it also revealed in my judgment, as had the willingness of Caunton and the defendant to offer £250,000 from September 2019 onwards, is that the parties still perceived that there remained at least some reasonable prospect of success on this claim on the claimant's alternative pleaded localised corrosion case. This prospect may be analysed either on the basis of an appreciation that there was still a small chance that the court would accept on the basis of a 50-year design life that the cold formed components would require a full replacement (i.e. a small chance of a big recovery) or, on the basis of a 25-year design life, that

they would require limited but not insignificant remedial works: see the principal judgment at [361] in relation to the purlins, from which it is apparent that the remedial costs on this basis are in this ballpark figure. I do not accept that the cold formed components claim was always known to be an all or nothing claim which would either succeed as to £2.765 million or be completely dismissed. There was a rational basis for all parties to consider that there was a reasonable possibility of a relatively low six figure award. But even if that is wrong there was a rational basis for all parties to consider that the claimant had a prospect, albeit not a very strong one, of complete success. I do not accept a submission that the only basis for the offer was to seek to avoid irrecoverable costs or the time and disruption of a trial. If that was the only reason there would have been no reason not to try to bridge the gap.

43. Finally, the defendant withdrew the Part 36 offer on 27 January 2020. The letter did not explain why. Mr Bowdery invited me to infer that the reason was connected to the defendant's application, made on the same day, to exclude the claimant's liability expert evidence from the trial and thus to strike out the claim, which was vigorously pursued and which failed: see my judgment on that application at [2020] EWHC 387 (TCC). Ms Day submitted that there was no basis to draw any such inference. In the absence of any contemporaneous explanation and any other rational basis I have no hesitation in drawing that inference. The defendant was confident of success in the application and it would not, understandably, have wanted to take the risk that the claimant would – if it shared that assessment – try to salvage something from the forthcoming disaster by giving late notice of acceptance of its Part 36 offer. However, it is also fair to record that the claimant did not in fact seek to do so and nor did it make any revised Part 36 offer of its own going into trial. I can reasonably in such circumstances infer that the claimant would not have accepted the Part 36 offer even if it had remained open for acceptance.

44. That concludes the chronology of the admissible correspondence. I will consider its significance once I have referred to the criticisms made by both the defendant and Caunton of the claimant's conduct, particularly by reference to the complete failure of the cold formed components claim and Caunton's submission that it merits an award of indemnity costs against the claimant from 3 September 2019 onwards.

(3) The claimant's relative lack of success and its conduct

45. As I have already said, the claimant failed to achieve anything like the amount it was inviting the court to award on its primary case and it failed completely on the cold formed components claim, which was the largest claim in money terms and which took the largest amount of time and effort both in relation to the expert evidence and at the trial itself, including the argument as to whether or not the contractual design life was 50 years or 25 years. It also failed substantially in money terms on the two other big-ticket items, the roof components claim and the wall cladding claim. Significant amounts of court time and overall cost were taken up on these issues. This is clearly a factor to be taken into account against the claimant regardless of the issue of its conduct, and that relative lack of success would in itself justify a departure from a full costs recovery order.

46. However as against that I must still bear in mind, as Mr Bowdery submits, that the recovery was still substantial both in itself and in the context of success on six of the seven claims and on the add-on claim. If I departed substantially from the starting point on the basis solely of the relative lack of success I would be going too far.

47. Thus, it is necessary to focus on the criticisms of the claimant's conduct. It would be disproportionate to go over the ground in the detail presented in written and oral submissions, especially where so much

of it repeats evidence referred to and conclusions drawn in my principal judgment. However, there is a risk of cherry-picking from a lengthy judgment and it is important that I set the relevant findings in their proper context of my findings for the purposes of costs.

48. I adopt the chronological approach taken by Mr Hale and, thus, begin with the pre-action stage.

49. It is submitted by Caunton that the cold formed components claim was, from the outset, a weak, thin and to some degree speculative claim, primarily on the basis of the claimant's failure properly to investigate the nature of the corrosion of the cold formed steel at the tram depot prior to bringing its claim.

50. I did indeed find that the claimant had undertaken only limited investigations before issuing the claim and, importantly, as I said at [107], "had not undertaken a detailed staged condition survey (i.e. one which tested a sufficient number of representative locations on a repeat basis over a sufficient period) before issuing these proceedings, apparently in the misplaced expectation that it was unnecessary given the claimant's confidence that the minimum design life requirement was 50 years". As I said at [80], its rejection of the defendant's proposal to similar effect in November 2016 "as it transpires, was an unwise decision because I have no doubt that it would have revealed that there was no zinc coating loss of any significance which might have led the claimant to think again about whether, and if so on what basis, it could pursue a claim in relation to those items".

51. These are significant criticisms. However, they must be seen in the context that: (a) the defendant had indeed conceded in the prior adjudication that the design life of the cold formed components was 50 years "unless and until a court decides otherwise" [79]; (b) there is no evidence or basis for finding that the claimant was acting contrary to the advice of the two reputable experts it had already instructed to address the cold formed components claim in proceeding in this way; (c) the claimant pleaded its case on the twin basis of (i) Dr Clarke's theoretical projection of the design life of the cold formed components by reference to the corrosivity category of the particular parts of the tram depot within which they were situated and (ii) by reference to evidence of existing signs of corrosion, for example white rust pustules and some areas of red rust, indicating excessive levels of corrosion or degradation in the galvanized coatings to the components beyond that to be expected after only 6 years of operational life since completion [275-276].

52. In the absence of any evidence or reason to believe that the claimant was ignoring the recommendations of its own experts or knew or ought to have known that the views being expressed by its experts were wrong and could not safely be relied upon without further investigation, I am unable to accept that it knew or ought to have known, before issuing the claim, that the claim in relation to the cold formed components was weak, thin and to some degree speculative as contended. Moreover, as Mr Bowdery submitted, the claim had always been advanced as based on a 25-year design life requirement in the alternative to the 50-year claim and, although the evidence is not as complete as it might be, there is clear evidence in the form of the claimant's solicitors' email to Dr Clarke dated 5 January 2018 that he was being asked to consider the claim on the basis both of a 50-year and a 25-year design life. Whatever the reason why he had only addressed the case based on a 25-year design life in an appendix to his main report [318], the fact remains that when he did so it did support the claimant's case.

53. Mr Hale's next submission was that the expert investigation during the course of the litigation confirmed that the pleaded cold formed components claim was (and always had been) weak, and that it could not succeed at trial. This is founded on the results of the Socotec court-directed and expert testing regime [92] and [301]-[313]. In my principal judgment I said this:

> "[108] … The claimant attempted to hedge its bets by backing two horses (uniform corrosion loss and localised corrosion) until receipt of the Socotec results (which only became available in dribs and drabs from August 2019 through to December 2019) made it apparent that the claimant could not credibly advance a case based on uniform loss of corrosion, whether internally or externally. From that point the claimant was driven to advance a case based solely on the existence of widespread localised corrosion. However at that point the absence of a suitably detailed staged survey and the lack of time or opportunity to obtain one meant that all that Dr Clarke had to go on was his own limited observations, coupled with such other limited evidence as was also made available to him, including the additional evidence belatedly obtained from the additional Socotec testing.
>
> [109] The consequence of all this was that in January 2020 Dr Clarke finally produced a report which was lengthy, discursive and full of scientific detail but short on hard material to back it up ..."

54. Mr Hale submitted that by August 2019, when the corrosion experts met to discuss the Socotec data, it was, or should have been becoming, apparent to the claimant that its pleaded case on uniform corrosion could not succeed and, as I said in my judgment, the revised case based on localised corrosion simply never had a proper evidential basis. He submitted that it was plainly out of the norm for the claimant to have pursued a case of such technical complexity all the way to trial without detailed and careful data and opinion from which to prove it and in circumstances where the agreed testing process had so comprehensively undermined its case.

55. It is indeed clear that the receipt and analysis of the Socotec evidence was a pivotal point in the case. It is also clear, I accept, that it must have been apparent to the claimant and its advisers by November 2019 at the latest that: (a) the case based on uniform loss of corrosion was no longer reasonably likely to succeed; (b) the only case which could still be advanced with any degree of confidence was based on localised corrosion. I am reasonably confident that the claimant and its advisers must have known that a case based solely on localised corrosion was far from straightforward, based as it was on relatively limited evidence of micro-pitting at one point in time only and Dr Clarke's limited observations and conclusions based on that limited data. I am reasonably confident that this explains the claimant's willingness to settle the cold formed components claim for only £280,000 (and the roof components claim for only £250,000) based – as I have said above – either on a percentage assessment that the claim, whilst difficult, still had a prospect of success of recovery in full or on an assessment that the court might reasonably be persuaded to accept the complaints as justifying a more modest limited remedial scheme.

56. Again, it must in my judgment be borne in mind that this was a case which was still supported by a detailed and technically impressive report from Dr Clarke as an extremely well-qualified expert. It was also, as became clear at trial, one which was supported – or at least not dissented from - by Mr Davis and Prof. Lambert as two other extremely well-qualified experts. Whilst it was a case which ultimately failed to persuade me at trial I am unable to accept the submission that from September 2019 it was known to the claimant and its advisers, or ought to have been known to them, that it was so speculative or weak or thin that it should no longer be pursued.

57. It is at this stage that the benefit of having been the trial judge is also apparent. Whilst Mr Hale reminds me that I described Dr Clarke's report as "lengthy, discursive and full of scientific detail but short on hard material to back it up" [109] it was not immediately apparent to me, as the trial judge when pre-reading into the case, that the cold formed components claim could never succeed because of the serial flaws in the claimant's case, particularly in Dr Clarke's evidence. Whilst one cannot necessarily equate the time taken to cross-examine Dr Clarke in relation to the cold formed components claim or the length of the closing submissions or judgment devoted to that issue,

including the question of the appropriate contractual design life, it can readily be seen from the length and the detail of my judgment on these points that neither the issues nor the resolution of them were straightforward or always pre-ordained.

58. In short, this is a case, unlike *Burgess v Lejonvarn*, where in my judgment it did need a trial with a careful consideration of the issues for it to become apparent to all that the expert evidence and submissions advanced by the defendant and Caunton in relation to the cold formed components claim should be preferred to the expert evidence and submissions advanced by the claimant. The defendant and Caunton would doubtless say that they knew that this would be the consequence from the outset but that is not, with respect to them, the relevant question.

59. I must also consider whether the decision to push on to trial when there was the option to accept the August 2019 Part 36 offer at any stage up to 26 January 2020 tips the balance. In my judgment it is difficult to characterise the decision as so unreasonable as to justify an award of indemnity costs in the light of the facts and matters which were reasonably known to the claimant and its advisers at the time. As I have said, by autumn 2019 the claimant and its advisers knew that the cold formed components claim (and, by extension, the primary case in relation to the roof components) was no longer as strong as had been assumed, but it was still in my judgment a viable case which, if it succeeded, would result in substantial awards, as was also the case in relation to the wall cladding. A Part 36 offer of £750,000 for all of these items and more was not to be rejected out of hand, but it was not unreasonable to a high degree in my view for the claimant to decide that it had a reasonable prospect of obtaining more by pushing on. If the defendant's offer of £250,000 and costs for the cold formed components had been subscribed to by Caunton and/or RPS then I would accept that it would have been unreasonable to have refused such an offer. Whether or not that would have tipped the balance so as to justify an award of indemnity costs is a moot question. On balance I would be inclined to say not. However, since no firm offer of £250,000 capable of acceptance was ever made, and since the claimant did offer to accept £280,000 plus costs which offer was never taken up, I do not think that this really matters.

60. I must also consider the issues in relation to conduct more broadly and not solely in relation to the question of indemnity costs. I have already referred to the significant criticisms I made in my principal judgment as to the way in which the claimant had prepared the case in relation to the cold formed components claim and the lack of testing and sensibly structured and focussed expert evidence in that regard. I have already noted that the costs of this element of the claim were substantial. As regards the roof components claim, that was clearly tagged on to the cold formed components claim and failed as a substantial claim for similar reasons, succeeding only to a more limited extent due to separate and more localised defects. The quantification of the remedial costs for these two items was, I found, significantly inflated because the claimant had pursued a claim for very substantial temporary protective works without undertaking a properly detailed assessment of their justification. The claimant obtained far less than it had claimed in relation to the wall cladding panels claim, primarily in my view because it had taken the unrealistic approach of assuming that it was entitled to a complete replacement even though the evidence was of relatively localised and relatively minor defects. The claimant achieved a reasonable recovery in relation to the other 4 substantive heads of claim, and achieved a reasonable recovery in relation to the add-on claim although it had also included a number of claims which were inflated or unsupported by hard or detailed evidence although, it should be said, supported in general terms by the claimant's quantum expert.

61. Thus, there are some valid criticisms to be made. However, I should guard against the temptation of being too wise after the event. I make clear that notwithstanding these findings I do not regard the claimant's conduct of the case overall as significantly unreasonable or deliberately exaggerated. It is clear that the claimant genuinely believed that the defendant had contracted to provide a 50-year

design life and that, on the evidence, it had not done so. I have no doubt that Mr Grocott, in particular, saw this as a good opportunity for the claimant to secure a very substantial cash recovery which it could then decide how to use and what remedial scheme to undertake, but equally I have no doubt that it was a claim put forward in good faith by the claimant, supported by reputable expert evidence and legal advisers.

62. Whilst ultimately I was not persuaded by Dr Clarke's views in relation to the cold formed components and roof components, I accepted his evidence on other issues and I did not form the view that he, like the other experts, was anything other than genuine [104]. As I observed, much like Dr Callow, the defendant's corrosion expert, he appeared to have adopted an entrenched view from which it was difficult for him to be moved [111].

63. Whilst I was also critical of Mr Grocott as a witness and of the style and content of his witness statements [98], that was not a very material consideration and nor was I wholly uncritical of one of the defendant's witnesses [101].

64. Nor do I regard the claimant's failure to establish its case on the 50-year design life issue as worthy of criticism. As I have already said, the defendant had conceded the point in the earlier adjudication in relation to the cold formed components, so that the point was obviously arguable, and its complexity is demonstrated by the detail devoted to it in the submissions and in the judgment. Finally, the costs of arguing this legal issue were - I have no doubt - relatively modest, especially discounting the cost of the defendant's failed fallback estoppel argument and the need to investigate the contractual position down the line.

65. I have not dealt with each and every issue of conduct alleged, but nor do I need to. I have dealt with those which seem to me to be important.

(4) What costs orders ought to be made having regard to all of the circumstances

66. As between the claimant and the defendant, the claimant is the successful party. As between the defendant and Caunton, Caunton is the successful party, but only because the claimant failed against the defendant on the cold formed components issue, since otherwise the defendant would have established its right to an indemnity. Caunton was also the successful party in its contribution claim against RPS, which the defendant had taken over as part of its settlement with RPS.

67. For the reasons given above in section (3) I am satisfied that Caunton has not made out its case for indemnity costs. In the same section I have concluded that the claimant's lack of success and its conduct are sufficiently significant that they ought to be given some, but not very great, effect in isolation.

68. In my view the most significant issue is the impact of the defendant's Part 36 offer.

69. If I ask myself the question, following *Thakkar v Patel*, whether the claimant acted reasonably or unreasonably in failing to accept the offer while it was on the table, the answer may be different dependent on the investigation mandated by the exercise. In oral submissions I raised the question whether or not the question of reasonableness is to be considered by reference to the claimant's reasonable perception of its own interests or by reference simply to the eventual outcome of the case.

70. On the facts of this case that is potentially an important distinction. It can now be seen from the principal judgment that with the benefit of hindsight the offer was extremely well judged because, in the context of a multi-million pound case, the offer was just under £120,000 more generous than the judgment for these items. I do not think it unfair to conclude, given the many decisions I had to make

along the way to reaching my individual awards for these items, that the defendant's solicitors could not possibly have anticipated my decision on each of those issues so as to reach their offer figure by the same or even a similar approach. Instead the offer must have been made on the basis of a broad-brush gut instinct which proved to be an extremely impressive prediction of the eventual outcome. If the Part 36 offer had not been withdrawn the question of the reasonableness of the claimant's decision not to accept it would not normally be relevant because the defendant would automatically be entitled to its costs from the expiry of the relevant 21 day period for acceptance.

71. Mr Bowdery submitted that the claimant's approach was reasonable in the light of the circumstances then known or reasonably discoverable by the claimant. He submitted that the claimant was sensible not to accept what he contended was plainly an opening shot made in advance of the mediation. He submitted that this was demonstrated by the fact that post mediation the defendant made a proposal which, had all parties accepted it, would have resulted in the claimant obtaining £250,000 for the cold formed components alone and £1,620,000 in total. The claimant was reasonably entitled to conclude that the prospects of pushing on to trial and succeeding on any one of the big ticket items radically outweighed the advantages of accepting a very modest offer for all bar the tram door and wave form cladding panels claims.

72. If this was the right approach to take then I would have considerable sympathy with the argument. If not, then it is all irrelevant and, whatever the commercial rationale for adopting that strategy, it is irrelevant if it subsequently transpires that the Part 36 offer is a good one.

73. So far as I can tell the question is not addressed head on either in *Thakkar v Patel* itself or in the two authorities referred to by Jackson LJ in paragraph 23 of his judgment in that case. In *Stokes* it was plain that the claimant had rejected the offer on the basis of an exaggerated claim for which it ought to have known there was no proper basis. In the *Samco Europe* case Teare J found at [29] that the claimant was able to assess whether the offer of apportionment of liability should be accepted because they had already made their own offer. In *Thakkar* itself (where the impact of the defendant's counterclaim meant that the defendant did better than their withdrawn Part 36 offer) the Court of Appeal upheld the trial judge's finding that because there had been no disclosure or exchange of evidence relating to the counterclaim it was not an offer which was easy for the claimant to accept [24]-[26].

74. On the basis of these authorities and by reference to my assessment of the underlying principle behind this approach it does seem to me that: (a) the court must put itself into the position of the claimant at the time and not simply decide the case by reference to hindsight; but (b) the focus must be on the reasonableness of the refusal by reference to the facts and matters relevant to the merits of the claim as they ought reasonably to have appeared to the claimant at that time, not by reference to wider commercial factors.

75. On that basis the claimant was in a position to undertake its own assessment and valuation of the case. It had the benefit of its own investigations, of the Socotec results (the first set being provided on 9 August 2019 and the draft report on 3 September 2019), of its own experts' views (including those which Dr Clarke must have formed in advance of the meeting of experts to discuss the reports which was held on 15 August 2019) and of advice from its legal team. There was nothing which the defendant had which the claimant did not. True it was that by this stage there had been no disclosure or exchange of other evidence. However, this was not a case where the claimant needed evidence from the defendant to assess the strength of its own case and nor was there a counterclaim. It follows in my judgment that it knew or, at least, was in a position to know that in the light of the Socotec testing results its case had become significantly weakened on all three of its big ticket claim items and that as a result there were real risks that if it went to trial it would not recover more than was on offer.

76. It follows that I must and do conclude that the claimant acted unreasonably in the sense in which that term should be used for these purposes in rejecting the offer. It was taking a commercial risk in the knowledge that it could end up recovering less than the amount of the offer.

77. This is plainly a significant finding. It follows that the starting point is that the claimant ought to pay the defendant's costs of all issues save for the tram doors and the wave form cladding panels from 21 days after service of the Part 36 offer, which I assume would be from 6 September 2019 onwards. There was some discussion about the defendant's costs of the additional claims as against RPS in relation to the cold formed components and against Caunton (the defendant does not seek such costs as regards Range). I am satisfied that these should be included because they were incurred after this date principally as a result of the claimant's failure to accept the Part 36 offer. They are also, I have no doubt, relatively modest insofar as separate from the costs of the main action so that it would be unhelpful to seek to separate them out.

78. Are there any other factors which should lead to a different conclusion? The only obvious factor is the fact that the Part 36 offer was withdrawn for what were – I have concluded – tactical reasons connected with the application to render the claimant's liability expert evidence inadmissible. However, that has no particular significance since – as I have also found – there is no basis for thinking that it would have been accepted after that date even if not withdrawn. The subsequent Part 36 offers and WPSATC exchanges are of no relevance in my view. Whilst as I have said I sympathise to some extent with the claimant's frustration that it was not made aware of Caunton's Part 36 offer or that no-one attempted to bridge the gap on receipt of its counter-offer of £280,000, the fact remains that all this would have been irrelevant had the claimant accepted the initial offer, and the claimant is as much itself to blame as the other parties for attempting to squeeze another £30,000 rather than simply informing all parties that it would accept £250,000 and costs.

79. What about the non-included claims? Ms Day submits that they should not impact on the costs assessment since if the Part 36 offer had been accepted it is inconceivable that these items would not also have been settled. Whilst I accept that this is so as regards the wave form cladding panels claim, which was always agreed save as to on-costs, I do not accept that submission in relation to the tram doors. The defendant has provided no explanation as to why this claim was excluded from the Part 36 offer. It is apparent from the subsequent admissible offers that, whilst the defendant and the claimant were agreed that the claim could be compromised for £550,000, there was no settlement. That, it is reasonable to infer, was because the defendant required RPS to accept the liability in full whereas RPS was unwilling to do so. No concessions were made in relation to the claim which was fought in full on the basis that the tram doors met their design life and the corrosion was due to lack of maintenance. In those circumstances I consider that it would be impermissible speculation for me to conclude that this claim would have settled had the Part 36 offer been accepted. It might or, given the intransigence displayed on both sides throughout this case, it might not. Much would have depended on the view taken by RPS, about which I know nothing other than that they entered into a confidential settlement agreement with the defendant on day one of the trial.

80. In the circumstances, it seems to me that I must assume that this claim would have fought to trial so that the claimant would have been entitled to its costs of that claim.

81. Whilst it would be possible to make an issue based costs order after 6 September 2019, this is a paradigm case for the court to make a percentage order if practicable under CPR Part 44.2(7), because an order awarding the claimant the costs of the tram doors issue alone would not reflect the fact that there are two reasons why the case went to trial, the first being the claimant's failure to accept the defendant's Part 36 offer and the second being the defendant's unexplained (and, frankly, rationally inexplicable) decision to exclude that claim from its Part 36 offer.

82. The trial itself was scheduled to take 20 days but in fact took only 15 days. If the tram doors claim had been the only matter tried it would have taken no more than 4 days, allowing for some examination of the contractual requirements (there was no design life issue), some factual evidence about the first failure and replacement of the first set of tram doors, maintenance and some expert evidence about liability, remedial works and remedial costs. On a straight-line basis that would represent 20% of the costs of a 20-day trial. However, whilst it is a matter of impression, speaking as a costs budgeting judge I have no doubt that I would not have approved more than 10% of the claimant's approved £2 million costs budget. Since the defendant's approved costs budget was £2.3 million, which included claims against additional parties other than RPS, the comparative approved[1] spend would have been around £400,000 total compared with around £4 million, thus around 10% of the total.

83. Since on this basis the claimant ought to have its notional 10% and the defendant ought not to recover its notional 10%, given the broad equivalence as between approved costs the end result is that if this was the only relevant consideration the defendant should receive 80% of its costs from the claimant from 6 September 2019.

84. So far as the position before 6 September 2019 is concerned, the position is that the claimant is entitled in principle to its costs against the defendant subject to such reduction as is appropriate to reflect my findings in relation to partial lack of success and conduct. Given that I have already awarded the defendant its costs in relation to the claims the subject of the Part 36 offer from that date it would be wrong in my view to make any further reduction by reference to matters which relate to that subsequent period. Having regard to all of the relevant circumstances identified above my conclusion is that if this was the only relevant consideration the claimant should receive 80% of its costs from the defendant up to 6 September 2019.

85. Before reaching any final conclusions I must address the position of Caunton. There can be no doubt in my judgment that the claimant must also pay Caunton's costs as from 6 September 2019, by an application of the same reasoning as justifies ordering it to pay the defendant's costs from that date. The question is whether the claimant or the defendant ought to pay Caunton's costs before that date. In favour of the claimant paying these costs is the fact that this was a discrete claim, which was the most substantial claim as well as effectively the only claim which involved Caunton, and upon which the claimant failed. In favour of the defendant paying them is the fact that so far as the main action is concerned this was just one item of a seven item defects claim where the claimant has been the successful party overall and where no relevant offers were made before the Part 36 offer of 15 August 2020. In my judgment there is no sufficient basis for ordering the claimant to be responsible for these costs. It is preferable to adopt a consistent approach which recognises the fact that ultimately this was a multi-defects claim where the defendant, in order to obtain protection against its costs liability for the main action and the costs of its additional claims, was obliged to make an early and an effective protective offer unless it was confident of defeating the whole claim. Whilst it is the case that Caunton was (aside from RPS) the only additional party in respect of the cold formed components, as between the claimant and the defendant there was a close connection between the cold formed components claim and the roof components claim and, indeed, a considerable overlap between the issues and evidence generally in relation to all of the corrosion related claims. In my view it follows that there is no obvious reason why the claimant should have to pay Caunton's costs in isolation pre-offer simply due to the fortuity that Caunton's only involvement in the project was as sub-contractor in relation to this particular cold formed components works package. I am also influenced by the point that there

[1] I am aware that the approved budgets did not in fact approve incurred costs, but that does not matter for present purposes, especially since there is little difference between the respective amounts for incurred costs.

were contractual issues as between the defendant and Caunton as well as the contribution claim against RPS which were not the claimant's responsibility which also makes it unjust to order the claimant to pay all of Caunton's costs over the whole period. Finally, it is preferable for the defendant and the claimant to be responsible for Caunton's costs over distinct time periods, since that seems to me to be likely to make less complex the task of the parties and the costs judge in any detailed assessment.

86. Having regard to all of the relevant considerations and to totality I am satisfied that there is no need for any further adjustment so that:

    (1) The defendant should pay 80% of the claimant's costs of the action up to and including 5 September 2019.

    (2) The claimant should pay 80% of the defendant's costs of the action, including the additional claims against Caunton and RPS in relation to the cold formed components claim, thereafter.

    (3) The defendant should pay Caunton's costs of the additional claim up to and including 5 September 2019 and the claimant should pay Caunton's costs of the additional claim thereafter.

(5) Interim payment on account of costs

87. As between the claimant and the defendant, by reference to the approved costs budgets it is difficult if not impossible to assess with any precision what would be a reasonable interim payment on account of costs since the incurred costs are not approved and since the approved costs will at least in part straddle the period before and after the 6 September 2019. In the circumstances I consider that the fairest approach is to make no order for an interim payment. However, since the probability is that the claimant will end up being the net paying party, and since there is outstanding the question of payment of the summarily assessed costs of the expert strike out application and the assessment of the costs of the claimant's unsuccessful specific disclosure application, the fairest course is to order that the costs of the former should not become payable until all costs have been determined as between these parties, including the costs of the specific disclosure application which should also be subject to detailed assessment. I appreciate that the defendant will still have to pay the judgment sum in the meantime but the impact on cashflow is unlikely to be too significant.

88. In relation to Caunton the position is that its approved budget amounts to £1,272,046,48 of which all save £128,746.48 is estimated and thus approved.

89. The principles are well known. Again, however I must be cautious because the incurred costs are not approved and the approved costs will at least in part straddle the period before and after the 6 September 2019. On that basis and on the basis of the figures provided at the hearing I order the claimant, who will pay the lion's share, to make an interim payment on account in the sum of £675,000 and the defendant to make an interim payment on account in the sum of £300,000.

(6) Other matters

90. I have already said that it is agreed that interest on costs is in principle allowable to each receiving party and that now that it is known that all parties will in part be in such a position this can be agreed.

91. The question arose at the hearing whether or not it is necessary for me to order disclosure of the settlement agreement with RPS. I am satisfied that it is not.

92. Finally, it would appear to make sense for all detailed assessments to be managed and determined by the same costs judge at the same time so that there is no inconsistency or risk of one bill being determined before another but since I am no expert I leave that for further consideration.