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Case No: B50MA033
Case No: D50MA041

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
Date: 15 February 2019

Before:

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

Between:

ZAGORA MANAGEMENT LIMITED & OTHERS	**Claimants**
- and –	
(1) ZURICH INSURANCE PLC **(2) ZURICH BUILDING CONTROL SERVICES LIMITED** **(3) EAST WEST INSURANCE COMPANY LIMITED**	**Defendants**

Jonathan Selby QC & Charlie Thompson (instructed by **Walker Morris, Leeds**) for the **Claimants**
Nicholas Baatz QC & Nicholas Maciolek (instructed by **Kennedys, Birmingham**) for the **First & Third Defendant**
Tom Asquith (instructed by **DAC Beachcroft, London**) for the **Second Defendant**

Hearing date: 7 February 2019

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APPROVED JUDGMENT NO. 3
CONCERNING 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.

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His Honour Judge Stephen Davies:

1. In this judgment I determine the appropriate costs orders to be made following the handing down of my principal judgment on 30 January 2019 [2019] EWHC 140 (TCC) and of my supplemental judgment in relation to interest on 7 February 2019 [2019] EWHC 205 (TCC).

2. In very brief summary of those decisions, all of the claimants ("**the ZBC claimants**") who sued the Second Defendant ("**ZBC**") lost their claims against it. As against the First Defendant and Third Defendant (collectively "**ZIP**") the first claimant freeholder ("**Zagora**") lost its claim whereas the remaining individual leaseholder claimants ("**the leaseholder claimants**") succeeded in securing a substantial judgment amounting in total to £3,634,074.65 together with interest of £699,559.30, grand total £4,333,633.95.

3. The starting point, therefore, in terms of success is that ZBC was the successful party against all of the ZBC claimants, whereas the leaseholder claimants were the successful parties as against ZIP and ZIP was the successful party as against Zagora.

4. As CPR part 44.2 provides: (i) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order; (ii) the court will have regard to all the circumstances, including conduct, success or failure on part or parts of the case and admissible settlement offers. I have received detailed, wide-ranging and skilfully presented submissions from all of the parties in relation to conduct, relative success and offers in order to justify or rebut arguments as to why I should not simply award each of the successful parties all of their costs. I have taken all of those arguments into account in producing this judgment but have not mentioned each and every specific matter adverted to so as not to over-lengthen and hence delay the production of this judgment, given that I shall still need to deal on 13 February 2019 with outstanding issues in relation to interest on costs, interim payments on account of costs and stay of enforcement pending appeals.

5. I shall address the arguments relating to ZBC first before turning to those relating to ZIP.

A. <u>Costs in relation to the claims against ZBC</u>

6. Mr Asquith submits that costs should follow the event. Mr Selby QC and Mr Thompson for the ZBC claimants submit that to award ZBC all of its costs would be to ignore the fact that the ZBC claimants succeeded in proving that ZBC had been guilty of deceit in issuing the Building Regulations final certificates the subject of the claim. (Whilst they also succeeded in proving certain other elements of their claim those issues are in my view of far less significance, both in themselves and as drivers of costs.) The reasons why the ZBC claimants failed despite this finding in their favour are that: (a) Zagora as subsequent freeholder failed to establish that ZBC intended that Zagora should rely on the final certificates; (b) all of the leaseholder ZBC claimants failed to establish that they relied on the final certificates.

7. I am satisfied that in general terms the costs of the deceit and the reliance issues were roughly equal to each other and also far more significant than were the costs of the remaining issues. The costs in relation to limitation and quantum were however not insignificant and I should also record that ZBC failed to make much progress on either issue, since (save in relation to one of the leaseholder claimants) they failed to defeat the claims on limitation grounds and they failed to make much inroad into the quantum of the claims.

8. Mr Asquith for ZBC realistically acknowledges that if there was nothing else of relevance to set against its loss on the issue of deceit the court would be likely to depart at least to some extent from the general rule in order to reflect this significant finding on a major element of the case. However, ZBC relies upon two countervailing factors. The first is that on 29 May 2018 it made an admissible offer to settle the claim, inclusive of costs, for £250,000. The second is what it submits was the unreasonable conduct of the ZBC claimants in relation to the reliance issue. I shall address each point separately.

9. As regards the offer the starting point is that it is apparent that the ZBC claimants, having obtained nothing, failed to better that offer by proceeding to trial. Mr Selby's two principal ripostes were that the offer should be disregarded because: (a) in the context of the case overall, it offered only a trifling amount; (b) it failed either to contain an admission or an apology for ZBC's deceit.

10. Before addressing these arguments I should record that this offer was made shortly after there at been a tripartite mediation earlier that month and at a time when ZBC had served: (a) a draft detailed case, following disclosure, on reliance which set out what transpired to be successful arguments as to why the ZBC claimants would be unable to establish reliance on the final certificates; (b) a draft application to strike out the claim on reliance (which ultimately, sensibly in my view given the fact sensitive nature of the issue, was not proceeded with). I should also make clear that I accept, as I said in my principal judgment, that in my view the ZBC claimants never really grappled in a convincing way with the difficulties in their case on reliance which were pointed out by ZBC in its detailed case. They failed to appreciate that, with the exception of Zagora, they never personally relied on the final certificates and they also failed to appreciate that, given the particular terms of the sale contracts employed in this case, without evidence from the conveyancing solicitors retained on the flat purchases they had no realistic prospect of establishing that their solicitors had relied on the final certificates issued by ZBC (as opposed to the completion certificates issued by ZIP). Their witness statements were, as I found, a confused and confusing attempt to ride two horses on reliance (i.e. personal reliance and solicitor reliance) which were convincingly demolished in cross-examination by Mr Asquith.

11. As to whether or not the offer was trifling, I should record that whilst both parties addressed me as to whether or not the £250,000 offered would, if accepted, have produced a net recovery for the ZBC claimants after deduction of their costs as incurred as against ZBC it is simply not possible in my judgment to reach any firm conclusion on that point because: (a) according to the claimants' solicitors the total costs incurred by the claimants overall are significantly in excess of the budgeted costs; (b) the claimants' approved costs budget was not sub-divided as between ZIP and ZBC. What I can say with some confidence is that, if accepted, it would have provided the ZBC claimants with at least a significant proportion of the costs incurred as against ZBC up to that point and insofar as they had any realistic prospect of recovering them against ZBC. I do however accept that it was unlikely to have provided the ZBC claimants with any substantial net recovery for their claim as advanced against ZBC, which was that they should be refunded their purchase prices together with interest. The offer was clearly intended, as I am satisfied the ZBC claimants through their advisers must have appreciated at the time, as an attempt by ZBC to settle the case, on the basis that the claim would ultimately fail on reliance even if deceit was proved, by offering a generous dose of sugar, in the form of a significant contribution towards costs, to sweeten the pill of being compelled to abandon the claim.

12. As a matter of fact it is true that the offer contained no apology or made no admission as regards what I have found was the fraudulent issuing of the Building Regulations final certificates. Ought it to have done? Mr Selby referred me to and relied upon the decision of the Court of Appeal in *Yentob v MGN Limited* [2015] EWCA Civ 1292, in which the court upheld the decision of Mann J at first instance in a "telephone hacking" case that the claimant should not suffer the normal consequences of not accepting a Part 36 offer which he had failed to beat at trial because the defendant had made only a limited admission in which it had failed to admit the full extent of its wrongdoing and because the defendant would have failed to make a full joint statement had it been invited to do so. Mr Selby accepted, and in any event I agree with Mr Asquith, that in normal commercial cases a desire on a part of a claimant to have a public judgment exposing wrongdoing cannot be a good reason for justifying a refusal to accept a reasonable offer and proceeding to trial: see the judgment of the Court of Appeal in *Ashdown v Griffin* [2018] EWCA Civ 1793 at [35]. Mr Selby submitted that there was a public interest in knowing about the fraudulent issuing of public documents such as Building Regulations final certificates, which were intended for the protection not only of purchasers but also of occupants of or visitors to newly constructed buildings, so that this case fell within the category of case where it would have been reasonable for the ZBC claimants to regard the offer as inadequate from a broader perspective than the purely financial.

13. Forcefully though the point was put I am unable to accept it. This was a commercial case where the ZBC claimants' overwhelming interest was – and in any event ought - in my judgment to have been in obtaining a financial recovery from ZBC. It is clearly not the case in general terms that a claimant who makes a claim in fraud against a defendant can justify a failure to accept a good offer which did not contain an admission or apology by arguing that it was entitled to proceed to trial to obtain a public exposure of the fraud. I do not consider that the public interest nature of the Building Regulations certification regime makes any significant difference to the position. Indeed I am satisfied that this was not the ZBC claimants' intention in any event, since: (a) the claim had originally been pleaded in negligence and the claim in fraud was only made by amendment once ZBC had made the point that any claim in negligence alone was bound to fail as a result of the decision of the House of Lords in *Murphy v Brentwood DC* [1991] 1 AC 398; (b) the ZBC claimants had never sought (at least in any open or admissible correspondence) any admission or an apology, whether prior to or in response to ZBC's offer.

14. As to the way in which I should analyse the impact of the offer, Mr Asquith referred me to the decision of Mann J in *Fulham Leisure Holdings v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch), a case where a claimant had established liability against the defendant firm of solicitors but failed to establish causation in relation to the main claim of £7.75M, although it did obtain a modest award of £6,750 for professional fees incurred in sorting out the consequences of the defendant's negligence. For present purposes the relevant part of the decision relates to the claimant's failure to accept a "drop hands" offer made by the defendant. Mann J considered that but for the offer he would have applied what he acknowledged [10] was the more exceptional course of requiring the defendant to bear the claimant's costs of fighting liability even though the defendant had not in his view acted unreasonably in so doing. He therefore concluded that the claimant had not in substance done better than the offer in fighting the case to trial and as a result at [12] ordered the claimant to pay the defendant's costs from the date when the offer ought to have been accepted.

15. The ZBC claimants' primary argument was that I should ignore the offer and – adopting a similar approach to that of Mann J in *Fulham Leisure* - order that each party should bear their

own costs throughout. ZBC's primary argument is that it should have its costs in full but argues as a fall-back position that that if there is to be any departure from the general rule it should be limited to a modest percentage discount from its costs prior to 12 June 2018 when its offer expired. Mr Asquith submitted that on any view the ZBC claimants could not, disregarding the offer, have hoped to do better than obtaining no order as to costs prior to the offer so that by parity of reasoning on any view ZBC should have all of its costs post offer.

16. As to the period prior to the offer it would plainly be wrong in my judgment not to direct that there should be some percentage discount against ZBC to reflect the fact that it elected vigorously to contest the issue of deceit from start to finish notwithstanding: (a) the damning conclusions of its own building inspector expert witness that Mr Mather had issued final certificates despite the presence of manifest non-compliances with Building Regulations; (b) that a proper analysis of the limited documentary evidence which ZBC had been able to provide clearly demonstrated that neither Mr Mather as the building inspector nor the building surveyors undertaking warranty inspections (on whom he claimed to have relied) had undertaken anything like the number of inspections of this development which ought to have been performed during the course of construction. Whilst I do not find that ZBC was unreasonable in defending the case on liability, in circumstances where of course the ultimate question was the state of Mr Mather's mind and where he insisted that he was genuinely unaware of the deficiencies in the development and in the inspections undertaken, I am satisfied that ZBC ought to have known of the serious obstacles to successfully defending liability and ought, therefore, to be responsible both for their own costs of the issue of deceit and for the costs of the ZBC claimants of the issue of deceit in relation to the period prior to the offer. The end result is that since, as I stated in paragraph 7 above, the costs of the deceit and the reliance issues were by the far the most significant of the costs incurred and roughly equal to each other, I consider that there should be no order as to costs as between the parties for the period up to and including 12 June 2018, being the last date for acceptance of the offer.

17. However, for the reasons I have already given, I do not accept Mr Selby's argument that I should ignore the offer. I am satisfied that by this point the ZBC claimants ought to have begun to realise, even if they had not done so before, the real extent of the problems with their case on reliance. As I held, they never really grappled with these difficulties in their response to ZBC's detailed case and only belatedly at trial attempted to address the difficulties, but unconvincingly and without supporting evidence either from the conveyancing files or from the conveyancing solicitors. They ought therefore in my judgment to have appreciated at around the time of the offer that it was likely that the leaseholder claimants at least would fail on reliance and that Zagora faced real problems on intention and that they ought, therefore, to have realised that the offer represented the best way of extricating themselves from a claim which they were likely to lose. It ought to be borne in mind that they all, of course, still had their primary claims against ZIP which, being claims for the cost of repairs as opposed to diminution in value, must clearly have appeared to be a far more substantial claim in money terms than was the claim against ZBC.

18. In the circumstances I am satisfied that the ZBC claimants ought to pay all of ZBC's costs from the date when the offer was stated to expire which, given the background leading up to the offer, I consider to have given the ZBC claimants sufficient time to decide whether or not to accept or to reject the offer. I therefore order that this order should take effect from 13 June 2018, being the day after the last day for acceptance of the offer.

19. Whilst there might otherwise have been some attraction in ordering the ZBC claimants to pay something towards ZBC's costs prior to the offer to reflect ZBC's overall success and in ordering some reduction of ZBC's costs after the offer to reflect its persistence in fighting the case on liability it seems to me that the better course is to make a time-based order. This is because as well as being in my view the right order in principle for the reasons already given it also has the advantage of reducing the cost and complexity of any detailed assessment as well as producing what I am satisfied would be the same or a similar overall result to that which would have been produced by my making a percentage based order throughout but applying differing percentages to the periods before and after the offer.

B. The claims against ZIP

20. The two complicating factors so far as ZIP is concerned are: (1) the difference between Zagora's failure and the leaseholder claimants' success; (2) the complications relating to the offer made by ZIP. Relative success and conduct are also relied upon by both the claimant and ZIP. I will address each of these points in turn.

21. To recap, using round figures the leaseholder claimants each made claims under the building warranty insurance policies issued to them by ZIP. They pleaded their claim as totalling £10.7M plus VAT. They recovered £3.6M due to the operation of the maximum liability ("**ML**") provision, which capped their claims to their declared purchase prices, together with interest of around £0.7M, total £4.3M. But for the ML cap they would have recovered a sum which the claimants say would have been in excess of £9.7M plus VAT if applicable. Whilst there may be room for argument as to the precise amount which the claimants would have recovered but for the ML cap, what is undeniable is that at trial they fought off by far the greater number of the arguments advanced by ZIP in relation to the terms of the policies, in relation to the existence of the defects and the nature and cost of the remedial works reasonably necessary and in relation to the arguments advanced by ZIP as regards the involvement of the Bank of Ireland ("**Bank**") as funder and the wider funding agreements involving Walker Morris as the claimants' solicitors and subsequently including the Bank being replaced as funder by a company known as 123 Pay Limited ("**123 Pay**"). In short, but for ZIP's success on the ML cap it would have been facing a judgment of something over twice that which has in fact been awarded against it, if one includes interest but discounts VAT.

The costs of the claim by Zagora

22. Zagora made a claim against ZIP under the agreement to rectify which failed because ZIP successfully contended that it was not in fact a contractually binding agreement. It also made a claim against ZIP on the basis that it was an insured which failed primarily because I held that on a proper construction of the policy documentation Zagora as a successor freeholder to the original developer freeholder were not covered. It is however very important to emphasise that although as a matter of law Zagora was a separate claimant, making separate claims under separate alleged contracts with ZIP from those relied upon by the leaseholder claimants, from a commercial perspective the principal driver for Zagora making these claims and in particular the claim under the agreement to rectify was not in order to recover anything additional to that which the leaseholder claimants would have recovered had they succeeded in full. Instead, it was an attempt to sidestep the plethora of defences taken by ZIP against the leaseholder claimants based on the terms of the insurance policies and, in particular and most significantly in financial terms, the defences based upon the fact that around two thirds of the flats in the development were owned by CJS Investments LLP ("**CJS**"), which was connected with the

original developer and, hence, was unable to make any claim under the building warranties with the result, so contended ZIP, that any claim in relation to defects in and remedial works to the common parts ought to be reduced by two thirds.

23. It is this factor which, so submits Mr Selby for the claimants, ought to lead to a departure from the starting point that Zagora as the unsuccessful party should pay ZIP's costs of the claim made by Zagora. The claimants' starting point is that given the overall success of the claim as a whole there should be no adverse order against Zagora and no discount from the costs which should be ordered to be paid by ZIP in favour of the claimants overall. The claimants' fall-back position is that to avoid what they assert to be the manifest disadvantages of making separate costs orders relating to Zagora and the leaseholder claimants the court should simply reflect Zagora's failure by making a percentage discount from the costs which they should otherwise recover to reflect what they contend were the relatively modest costs of the agreement to rectify issue. Alternatively, they suggest an issue-based order depriving the claimants overall of the costs of the agreement to rectify (although they contend that this has the usual disadvantages of two detailed assessments as opposed to one and is therefore, taking into account the "steer" in CPR 44.2(7), a second best to a proportionate order). They are particularly concerned to avoid what they contend would be the difficulties faced by a costs judge at a detailed assessment in having to ascertain what costs ZIP should recover against Zagora which are common to the costs which the leaseholder claimants should recover against ZIP in circumstances where, they suggest, there is a risk that ZIP might recover the costs of defending the quantum case against Zagora even though that was effectively a mirror of the costs which the leaseholder claimants incurred in putting forward their successful quantum case against ZIP.

24. ZIP does not accept that these considerations should result in a departure from the general rule. Mr Baatz submits that a separate claimant making a separate claim which fails should pay the costs of that claim and that the court should not be dragged into considering what he submits are irrelevant broader commercial considerations. He submits that the court does not have the material to make a fair assessment of the relative costs attributable to Zagora's claims so as to make a fair proportionate order. He submits that making an issue-based order is no different in practice from making a separate costs order. He submits that the court can rely on the good sense of the costs judge in dealing fairly between the parties in relation to the complexities of common costs by following the guidance given by Keene J in the recently reported case of *Lavery v Ewing* [2015] 3 Costs LR 443.

25. Given the wide discretion conferred on the court by Part 44.2(1) I have no doubt that a court may make an order dealing with the costs payable as between the claimants as a group (and thus including Zagora) on the one hand and ZIP on the other notwithstanding that the claimants and their claims are legally separate and distinct from one other. My attention was drawn to and I have read the decision of the Court of Appeal in *Atlasjet v Kupeli* [2018] EWCA Civ 1264 referred to in the note to the current 2018 White Book at 44.2.13. At [60] Hickinbottom LJ observed that in a case where there are a number of individual claimants the starting point under Part 44.2(2) is that the successful defendant should have its costs from the unsuccessful claimants. That is not a controversial proposition in this case and there is nothing else in the judgments which is of immediate relevance to the issues I am now considering.

26. In my view the facts of this case amply justify a departure from the general rule. Zagora was never litigating this case for its own commercial benefit as a separate and distinct exercise. It was litigating in order to enable the claimants as a group to obtain a substantial recovery from

ZIP on the basis that under the agreement to rectify ZIP had agreed to fund the necessary repairs on a pragmatic and commercial basis and without standing on its strict rights under the building warranties. Although it failed in that claim that does not detract from the fact that in reality there was no difference in commercial terms between the claims being advanced by the leaseholder claimants and the claims being advanced by Zagora. It follows in my judgment that it is appropriate to consider the costs position as between the claimants as a group, including Zagora, on the one hand and ZIP on the other.

27. Nor do I accept ZIP's argument that the court should not make a proportionate order given the absence of detailed information about the costs applicable to Zagora's claim. Such an argument was expressly rejected by the Court of Appeal in *Budgen v Andrew Garden Partnership* [2002] EWCA Civ 1125 where the court noted that so long as it was "practicable" to make a proportionate costs order a court could do so even if it only had the material to make a "very broad brush assessment". Here I have no doubt that as the allocated case and cost managing judge and as the trial judge I have more than sufficient knowledge of the case to enable me to make such an order. Any assessments provided by one party would, I have no doubt given my experience of this case, have been fiercely contested by the other. Without conducting what would effectively have been a detailed assessment in advance my analysis would necessarily have been broad brush even on that basis.

28. In my judgment it is clearly both practicable and more appropriate to make a proportionate order in relation to Zagora's costs. Although there was, as I have said, a separate claim made by Zagora on the basis that it was, or was to be treated as, an insured it is quite clear that the agreement to rectify was the issue on which the involvement of Zagora generated costs which would not otherwise have been incurred to anything like the same extent. It was the agreement to rectify which generated the close attention to the events of April 2013 to July 2013 and the legal consequences of what was said and done over that period and, to a limited extent, beyond. Mr Selby was, however, right to say that: (a) the total volume of documents directed to that issue was extremely modest in comparison with the overall volume of documentation; (b) the same may be said of the witness statements (at least insofar as they were limited to statements of fact as opposed to comment and argument); (c) no expert evidence on the liability issues was relevant to the agreement to rectify; (d) limited time was taken at trial in investigating the factual issues relevant to the agreement to rectify in comparison with the overall time taken at trial; (e) the cross-examination of Zagora's principal witnesses Mr Broadhurst and Mr Robinson went far beyond the narrow scope of the agreement to rectify. Although there was some consideration by the QS experts as to the valuation of the agreement to rectify that was modest in comparison with the work done in relation to the leaseholder claimants' claims and did not occupy any real attention at trial.

29. I am satisfied that there is no basis for finding that the agreement to rectify was unreasonably pursued. Whilst in the end I reached a clear conclusion that it could not succeed I do not think that it was a hopeless claim, let alone one which the claimants ought to have appreciated was always hopeless. I do not consider that the circumstances in which it was advanced and pursued justify an order that ZIP ought to have its costs of defending the claim as well as the claimants being deprived of the costs of bringing it. In the circumstances I am satisfied that by itself this point would justify a discount of no more than 7.5% from the costs which the claimants would otherwise obtain and that this would be a fair and proportionate way of addressing this issue.

ZIP's offer

30. ZIP also made a without prejudice save as to costs offer on 29 June 2018. Its terms are detailed and important and I shall have to refer to them in some detail. However, by way of summary, it was an offer made "subject to contract" which, subject to various conditions, proposed that ZIP would pay the claimants the sum of £3.8 million in settlement of their claims together with, but subject to one qualification, their legal costs as incurred against ZIP.

31. The letter which accompanied the offer made it clear that the amount offered was based on the impact of the ML cap, i.e. the defence that the claims were limited to the declared purchase prices of the flats on which ZIP has ultimately succeeded in substantially reducing the leaseholder claimants' claim. It referred to the purchase prices as being pleaded in the Amended Particulars of Claim which, totalled, came to £3,799,369.20. It was, therefore, an offer which was more advantageous to the leaseholder claimants than the total judgment sum awarded taking no account of interest. However, it was not as advantageous as the total judgment sum inclusive of interest. The complication in this case is that, as explained in my judgment on interest: (i) although a claim for interest had been pleaded, contrary to the requirements of CPR Part 16.4(2) no details of that claim had been pleaded as to the rate and period of any interest claimed, in circumstances where – as I found - the claimants never intended to claim interest on the remedial costs because the amount claimed already included an allowance for inflation; (ii) the claimants only sought and obtained interest after the principal judgment had been produced in draft once they appreciated that they had been held to the ML cap in respect of which – as they asserted and I agreed - different considerations applied as regards the basis of a claim for interest.

32. In those circumstances Mr Baatz submitted that the claimants should be regarded as not having obtained a judgment which was as advantageous to them as the offer, given that the claimants had not asserted and could not have obtained an award of interest as matters stood either at the time of the offer or at any time thereafter until I permitted them to advance a claim for interest after production of the draft judgment. Mr Selby submitted that it was inappropriate to conduct this analysis and that it was simply a question of comparing the sum offered with the sum awarded.

33. I agree with Mr Selby that the starting point is simply to compare the offer with the ultimate judgment, making allowance where the point arises as to any increase in the amount of interest from the date of offer to the date of judgment so as to compare like with like. It is of course not uncommon for parties to amend their claim so as to increase its value after the date of a relevant offer and Mr Baatz was unable to point me to a decided case in which it has been held in terms that as a matter of principle an offer should only be compared with the judgment which the claimant might have obtained on the basis of the pleaded case and evidence which had been served at the time of the offer. He did refer me to the decision of Ramsey J in relation to costs in *Hammersmatch v Saint-Gobain* [2013] EWHC 2227 (TCC). In that case one of the reasons given by Ramsey J for not penalising the claimant for failing to negotiate following its rejection of a "near miss" Part 36 offer was that at the time the offer was made the defendant had failed to articulate its case on important matters in issue as between the parties: see [37]. Other than to illustrate that the way in which the parties had put their case as at the time of a relevant offer is a material consideration I do not consider that this observation is support for the wider principle for which Mr Baatz contended. In short, parties to litigation take the risk of subsequent developments which might render their offer far better placed or conversely far worse placed than it might have appeared at the time it was made.

34. However, I also agree with Mr Baatz that this starting point is not necessarily the end point as well and that the court should if invited have regard to the circumstances which pertained at the time of the offer and to decide whether they should lead to a different result. Here, as he submitted, the evidence demonstrates - as I found in my judgment on interest - that the claimants had simply not considered, let alone pleaded, a claim for interest on the sum awarded if it transpired that, contrary to their case, it was limited to the ML cap. It is apparent from the terms of the offer letter that ZIP had not included any allowance for interest in their offer. The claim for interest on the ML capped amount was first advanced by the claimants only extremely late in the litigation.

35. If the claimants had, upon receipt of the offer, considered that in principle it was acceptable but also that, on reflection, if the claim was limited to the ML cap it ought to carry interest, they could perfectly well have written to ZIP to make this point and to seek interest and, in default of agreement, issued an application there and then to re-amend the Particulars of Claim to claim interest on that alternative basis. The fact that they did not do so in open or admissible correspondence may indicate that they did not have any wish to settle on the basis of a ML capped valuation of the claims, as indeed may be the fact that they did not make any relevant admissible offer or counter offer in response to that offer. Whether that is a conclusion I should draw and, if so, what the consequences should be is a matter to consider once I have considered the reasons why Mr Selby submits that the claimants were justified in not accepting the offer in any event.

36. Mr Selby submitted that the offer was unacceptable because it was not open for unqualified acceptance and because it required the claimants to bear their own costs of drafting the settlement agreement. I do not accept either of these two points. As Mr Baatz submitted it must be a corollary of the need to adopt a commercial approach to compromise that there will be many cases where some final agreement is required once agreement is reached in principle and, contrary to Mr Selby's submission, I do not think that a concern that the negotiation and drafting process might become protracted and expensive would of itself justify a refusal to engage with the offer if otherwise reasonable.

37. However, there is more force in my view in the objection that ZIP unreasonably required, as a term of the offer, that the claimants should agree to indemnify it against any future claim by two remaining individual leaseholders who had not joined in the litigation and also to provide acceptable security to back up such indemnity. There was no proper justification for this stipulation in my view. Mr Baatz explained that the problem ZIP faced was the risk that it might pay up amounts which included allowances for remedial works to the common parts but, because each insured leaseholder could advance such claims separately, later be faced with a subsequent claim by these leaseholders. Even if that was a genuine risk (as to which there is no evidence) I am unable to agree that it was a risk which the claimants were obliged to take in place of ZIP. The difficulties with the insurance policies were not of the claimants' making and were plainly a matter for ZIP to address. As Mr Selby submitted, whilst ZIP was perfectly entitled to seek to secure this concession in its own commercial interests it cannot then seek to rely on this offer as a reasonable one which the claimants ought reasonably to have accepted if it sought to insert an unreasonable stipulation as the price for acceptance.

38. The same is true in my view of the objection that ZIP also unreasonably required, as a term of the offer, that the Bank should release any claims it might have as mortgagee of CJS' flats against ZIP and that the claimants should indemnify ZIP against any future claims which might be brought by the Bank or any other non-party to the litigation. Notwithstanding the

commercial relationship between the claimants and the Bank pursuant to the funding agreements there was no proper basis in my view for requiring the claimants to ensure that the Bank joined in the settlement, let alone indemnified ZIP against any future claims by the Bank or other non-parties. ZIP was perfectly capable of defending itself against any claim by the Bank (which, frankly, was inherently unlikely given that it could only have done so by stepping into the shoes of CJS, in circumstances where neither CJS – which was in administration on appointment by the Bank - nor the Bank itself had persisted with any claims). Again, it may have been commercially reasonable for ZIP to seek such clauses in its own interests, but it was not reasonable to insist on such a clause as a part of the offer.

39. The same is also true of ZIP's requirement, again with no proper justification in my view so far as the claimants were concerned, that the claimants should not bring any future proceedings against ZIP in relation to the subject matter of the claims, whether known or unknown, or against any other parties relating to such subject matter and to indemnify ZIP against any such claims. Again, such wide releases were perfectly commercially reasonable for ZIP to seek but not for the claimants to be obliged to accept. In particular to require the claimants to abandon any claims which they might have against any third party was in my view obviously unreasonable in the context of an admissible offer which was intended to give ZIP costs protection if refused.

40. Finally, and most significantly in my view, was the stipulation that the claimants would only be entitled to be paid their costs "if any of the claimants can demonstrate to ZIP's reasonable satisfaction that they are liable to pay costs". This was a most remarkable qualification to the otherwise admitted liability to pay the claimants' costs. It appears to have been aimed at the question as to whether or not the claimants were under any obligation to pay the costs of the litigation given the terms of the funding agreements entered into with the Bank and, hence, whether the indemnity principle was engaged. In my view there are two powerful objections to this stipulation. The first that any significant limitation on any claimant's entitlement to costs which could not clearly be justified on proper grounds would entitle that claimant reasonably to refuse that offer since, if accepted, the claimants would be bound by it in the event of any later dispute as to costs. The second is that despite Mr Baatz's valiant attempt to argue that the reference to "reasonable satisfaction" meant that in practice the ultimate decision-maker would be the court I remain of the firm view that a clause which gave ZIP the decision-making authority was completely unreasonable. It was not for the claimants to take the risk that a court might subsequently conclude that although it might not have reached the same decision as ZIP nonetheless ZIP's decision was within a range of reasonable responses. The overriding objection to this clause in my judgment is that it was wholly unnecessary if all that was required was to allow ZIP to raise the indemnity principle as a defence in any detailed assessment of costs.

41. Perhaps anticipating that these stipulations might be viewed as going too far, in the letter accompanying the offer ZIP said that "we do not anticipate that any of these four matters need necessarily prevent a settlement" although they continued by saying that they expected that the parties could "co-operate" in obtaining the necessary releases from the Bank and the other leaseholders. I do not consider that ZIP can place any reliance upon this indication that it might not insist on these terms in subsequent negotiations. It is striking in my view that it was the very existence of these matters which ZIP contended in the letter as explaining why it was justified in not simply making a Part 36 compliant offer. Taking that statement at face value it follows that it cannot now be said by ZIP that these were simply negotiating proposals which, even if rejected, would not have prevented a settlement. Indeed, the very fact is that even after

the claimants made no open or admissible response at all to this offer ZIP did not proceed to protect itself against these very arguments by either making a Part 36 offer or indeed a further admissible offer without including these proposals. The only sensible conclusion to draw is either that ZIP was simply not prepared to conclude an agreement without these stipulations or it considered that it could stand on this offer and justify it as reasonable without the need for a fall-back position.

42. In those circumstances I am satisfied that ZIP cannot say that the claimants acted unreasonably in refusing to accept this offer on the terms in which it was expressed.

Other matters

43. I should at this stage address the "near miss" argument, i.e. that even though the offer was not, for the reasons stated above, either an offer which the claimant did not better at trial nor an offer which the claimant unreasonably rejected given its terms, nonetheless it was still sufficiently close to the eventual outcome at trial that the claimant ought to be penalised for rejecting it outright without any attempt to negotiate. In this respect I have been referred to the decision of Ramsey J in *Hammersmatch* (paragraph 33 above) in which he explained that by virtue of changes to Part 36 since Jackson J decided *Multiplex Construction v Cleveland Bridge* [2008] EWHC 2280 (TCC) it was not appropriate in the Part 36 context to treat a near miss as relevant conduct under Part 44. He explained the potential dangers of reaching conclusions about a party's behaviour where the court could not necessarily be confident that it had the full picture since it could not be referred to genuinely without prejudice correspondence which might shed a light on the reasonableness or otherwise of the parties' respective subsequent conduct.

44. I have also been referred to the subsequent decision of the Court of Appeal in *Coward v Phaestos* [2014] EWCA Civ 1256 which confirmed that this analysis, whilst applicable to Part 36 offers, was not applicable to admissible offers to settle. David Richards J, giving the only reasoned judgment with which the other members agreed, held at [100] that in such cases the statement made by Jackson J in *Multiplex* that "if (a) one party makes … an admissible offer within rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs" was entirely correct. However, he added that "in the circumstances there stated it *might* be appropriate to penalise the offeree in costs. Whether it would be appropriate to do so would of course depend entirely on the facts of the particular case".

45. This is a case where there are powerful arguments either way. As against the claimants it can be said that had they appreciated – as with the benefit of hindsight they should – that their claims were limited to the ML cap they ought to have given serious consideration to the offer and, appreciating that subject to a reasonable offer in relation to interest and a removal of the objectionable terms it ought to be accepted, set out that position in admissible correspondence. Their failure to do so must in my view be seen as at least one reason why the case did not settle at that stage and instead proceeded to a full trial.

46. As against those arguments, however, are the facts that the offer was not one which was nearly but not quite sufficient. A claim for interest was pleaded and in my view ZIP ought to have appreciated that there was at least a risk that if it succeeded on the ML cap argument the claimants might seek to advance a claim for interest on the capped judgment. Furthermore, the offer introduced terms which in my view were completely unreasonable and in respect of which

there was no proper basis for ZIP to seek to insist upon including in its offer. Although ZIP intimated an ostensible willingness to be flexible in fact there was nothing in the terms of the offer or the accompanying letter (or, for that matter, the previous history of correspondence or conduct as between the parties) which could have given the claimants any comfort that ZIP would be willing to withdraw these conditions. In my view once ZIP had been met with a simple lack of a reply from the claimants it ought to have considered whether or not it wished to make a more straightforward offer to the claimants without these unreasonable conditions. In argument I suggested that there was in fact no good reason why ZIP could not have made a straightforward Part 36 offer in the sum of £3.8M. Mr Baatz submitted that this would not have worked because there were multiple claimants each with their own individual claims. I am far from convinced that this would have been a sufficient reason; it was not a reason given at the time nor was seen as an obstacle to making the admissible offer as a global offer. Be that as it may there was plainly no impediment to making a revised admissible offer without the unreasonable conditions included.

47. ZIP chose not to do either and, doubtless for what it perceived to be good negotiating or commercial reasons, it chose to stand on its one offer and proceed to a trial at which it lost on all of the arguments which, if successful, would have resulted either in a complete defence or a reduction to below the ML cap. It took that risk and, in my assessment of matters, that was the wrong decision for it to take. Any well-advised commercial organisation such as ZIP will know that it is critical that any offer intended to give costs protection is able to be defended at the stage of costs submissions as one which ought reasonably to have been accepted at the time it was made. ZIP ought to have known that these attempts to lever additional protection for itself would be open to challenge in an eventuality such as the present. In my view ZIP was seeking to ride two horses, ultimately unsuccessfully in my view, and it has only itself to blame for not making a simple effective offer.

48. I appreciate that it may be argued that this rewards the claimants for a stubborn refusal to accept the risk inherent in fighting the case to trial and losing on the ML cap. However: (a) for the reasons expressed by Ramsey J in *Hammersmatch* I cannot be sure that its position was equally as obdurate in any without prejudice discussions; (b) this was a hard fought case where both parties instructed solicitors who adopted an equally aggressive approach to the litigation and, in the circumstances, ZIP cannot complain over-much if its hard-line approach has blown up in its face.

49. In the result, therefore, I do not consider that this offer advances ZIP's position much beyond the point which it can make anyway, which is that the leaseholder claimants did not obtain a judgment for anything like as much as they had claimed, falling short by a substantial margin from £10.7M plus VAT down to £4.3M inclusive of interest.

50. For the reasons given above when addressing ZBC's position, it is clearly right in principle that the court should take into account the claimants' relative lack of success. However, in my judgment the following points are of significance when assessing the impact of that relative lack of success.

51. First, this was really the only substantial success which ZIP had in defending the leaseholder claimants' claims. In particular, all of the other significant policy based defences failed, as did the defences based on the funding agreements. Moreover, although ZIP was successful in reducing the total remedial works costs from around £10.7M to something in the region of £9.7M, that was in the context of ZIP disputing the majority of the individual claims for one or

more reasons, whether on the basis of the policy terms or on the basis of the absence of relevant defects or on the basis of the need for remedial works or the extent of such works or their cost and thereby forcing the claimants to undertake the time-consuming and expensive task, involving a multiplicity of experts, of proving the existence of significant defects requiring significant remedial works at reasonable costs significantly in excess of the ML cap. Furthermore, ZIP was also unsuccessful in running arguments based on prior knowledge of defects and delay in notifying defects. Still further, the resolution of the ML cap defence incurred minimal cost, in circumstances where it was an argument based solely upon the proper construction of the insurance policies and where, in the absence of a concession by ZIP that the claimants were entitled to claim in excess of the ML capped amounts, the remaining issues were always going to have to be litigated anyway.

52. Perhaps in an attempt to avoid this difficulty Mr Baatz submitted that the real reason why these costs were incurred was because the claimants successfully and, he submitted, unreasonably opposed ZIP's application for a trial of the ML cap defence as a preliminary issue. It is of course tempting with hindsight to agree that this was a proposal which ought to have been accepted. However, having had my memory refreshed as to the arguments advanced and the reasons I gave for refusing the application for the trial of preliminary issues, I am satisfied that the claimants did not act unreasonably in that respect. The critical point was that ZIP was not accepting any liability limited to the ML capped amount. Therefore, even if the ML cap defence had been tried as a preliminary issue and answered in ZIP's favour it would not have avoided the need for a trial of all of the other issues anyway. Furthermore, it was capable of being wasteful of time and cost had I found against the claimants on the ML cap and there had then been an appeal and in the meantime either the case would have needed to proceed to trial on what might have been a false premise or the further progress of the case would have had to await the outcome of any appeal. Finally, it is important to recall that ZIP was not proposing this as a sole preliminary issue but was also seeking the trial of other preliminary issues, such as the agreement to rectify issue, which would have required disclosure and oral evidence and thus a trial of some length, which was clearly less attractive than a limited trial of one point of construction of an insurance policy.

53. Mr Baatz also submitted that in any event the claimant's opposition was unreasonable given that the resolution of this issue as a preliminary issue would have promoted the prospects of settlement. Whilst that is true as a general statement, given the history of this case and noting, as I do, that not only are the claimants to appeal my finding on the ML provision issue but also that ZIP is to appeal my findings on the policy and lease interpretation issues, that can only be viewed as a forlorn hope in this case. In any event I do not consider that it was unreasonable for the claimants to oppose the preliminary issue on this basis given the disadvantages to the resolution of the claim overall.

54. In my view, therefore, the proper way to look at this case is to see it as a claim for the full cost of remedial works which has succeeded in a very substantial sum, albeit not in anything like the amount claimed because of the operation of the ML cap and Zagora's failure to establish the agreement to rectify.

55. Thus, there ought to be a percentage reduction to reflect this lack of success with some additional allowance to reflect the claimants' failure to take a more realistic approach to the claim, particularly once ZIP had made the offer. The reduction should however be relatively modest to reflect my conclusions that: (a) the claimants still obtained a substantial judgment, in excess of the offer when interest is added; (b) ZIP has the greater responsibility for its failure

to make a reasonable offer which it can say that the claimants unreasonably refused; (c) the costs associated with litigating the ML cap defence were extremely modest in comparison with the overall costs incurred. Taking everything into account a further reduction of 12.5%, in addition to the 7.5% I have already allowed for the failure of the agreement to rectify claim is appropriate, leading to a total reduction of 20% from the claimants' costs against ZIP. Given my conclusions I do not consider it appropriate to make a different percentage reduction as between the periods before or after the offer.

56. Finally, as I have said, various points about conduct have been raised. At this stage it is worth standing back and reminding myself of the criticism made by Jackson LJ in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 of "a growing and unwelcome tendency" by first instance courts and by the Court of Appeal to depart from the "starting point" of the general rule "too far and too often". I have already departed from the general rule for a number of reasons as explained above. I do not consider that I should engage in a further process of considering and comparing and contrasting the rival conduct related arguments advanced by the parties with a view to yet further modifying my decision.

57. My reasons for declining to do so were perfectly illustrated by the exercise which Mr Baatz conducted of taking me through some of the pre-action correspondence between the respective solicitors for the claimants and ZIP with a view to pointing out the unreasonable approach of the claimants. In fact, what this exercise demonstrated far more clearly in my judgment was the hard-fought no compromise approach which both firms of solicitors took, and have largely continued to take, to this litigation. I do not think that either party is entirely free from criticism, if criticism be deserved. I am satisfied that it would be wrong to discount one side's costs for conduct without making an equivalent discount against the other side. There is nothing to be gained from saying anything further, other than to confirm that in such circumstances I do not propose to revise the conclusion which I have already reached.