Case No: HT-2020-000165

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Neutral Citation Number: [2024] EWHC 1686 (TCC)

Royal Courts of Justice
Strand,
London,
WC2A 2LL

Date: 20 May 2024
Start Time: **10.46** Finish Time: **11.52**

Before:

THE HONOURABLE MRS JUSTICE JEFFORD DBE

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Between:

(1) BRENDA VAINKER
(2) FRANCOIS VAINKER **Claimants**
- and -
(1) MARBANK CONSTRUCTION LTD
(2) MERCER & MILLER (A FIRM)
(3) SCD ARCHITECTS LTD **Defendants**

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DANIEL CROWLEY for the **Claimants**
ROBERT CLAY for the **First Defendant**
The **Second Defendant** was not present or represented
BENJAMIN FOWLER for the **Third Defendant**

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APPROVED COSTS JUDGMENT

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MRS JUSTICE JEFFORD:

1. I turn now to the matter of costs. The claimants sought an order that the two remaining defendants, Marbank and SCd, pay the entirety of their costs of the action and seek an interim payment in respect of costs. That position changed slightly in respect of SCd in the course of the hearing last week on 15th May 2024.

2. The starting point for the claimants' position on costs is that they are the net winners as against both of these defendants. The normal rule, as set out in the Civil Procedure Rules Part 44.2(2), is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. Part 42.2(4) provides that, in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including (a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply. Sub-paragraph (5) provides that the conduct of the parties includes their conduct at all stages of the proceedings, and in particular sub-paragraph (b) provides that conduct includes whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim. Sub-paragraph (6)(a) provides that the orders which the court may make under this Rule include an order that a party must pay a proportion of another party's costs and at (f) costs relating only to a distinct part of the proceedings. Sub-paragraph (7) then provides that before the court considers making an order under paragraph 6(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

3. The claimants submit in this case that there is no reason for the court to make a different order from the general order that the unsuccessful party will be ordered to pay the costs of the successful party.

4. Amongst other things, Mr Crowley makes the following points:

    i) As pleaded in the Particulars of Claim, the claimants' claim was for a total of £889,000 against all three defendants, that is including M&M, the second defendant. They have recovered approximately £435,000 before the addition of interest. That does not immediately suggest a case in which the claim was exaggerated and the recovery is so disproportionate to the amount claimed that the court ought to regard the claim as an exaggerated one and hesitate to award the claimants their costs.

    ii) In fact, if the recovery on the counterclaim of £81,000 odd is taken into account, the figure is in the region of the sum of £350,000 for which the claimants, by letter dated 1st August 2022, offered to settle against all three defendants. That is not suggested to have been a Part 36 offer and/or one which the claimants have bettered, but Mr Crowley relies on it as relevant both to the proportionality of recovery and the claimants' conduct.

    iii) The claimants are individuals who have privately funded the claim and ultimately succeeded. There has been, Mr Crowley submits, nothing

unreasonable in their conduct which should be penalised in costs. They have been unsuccessful on some issues but not to an extent where it can be said that they have unreasonably pursued a claim, issue or allegation. There is no reason for the court to make an issue based costs order or to order payment of a portion only of the claimants' costs.

iv) The defendants' principal means of protecting their position on costs was to make effective Part 36 offers. No such offers were made.

5. Those are, in summary, the points made by Mr Crowley. He further referred to the notes to the White Book at Note 44.2.10 and the cases referred to therein. The relevant passages are as follows:

"The fact that the judge has such a wide discretion under Rule 44.2 means that predicting the outcome of an issue-based approach is extremely difficult. Different judges may take strongly diverging approaches in similar cases without falling into error and their decisions being amenable to appeal. Criticism has been made 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'."

The citation given for that is *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 at paragraph 62 as per Jackson LJ. Continuing the quote:

"That criticism applies principally to departures from the general rule by the adoption of an issue-based approach.

Propositions that may be derived from the authorities and which may be stated with a degree of confidence are as follows:

1. The rules themselves impose no requirement to the effect that an issue-based costs order should be made only 'in a suitably exceptional case', and none is to be implied, although 'there needs to be a reason based on justice' for departing from the general rule, and that the question of the extent to which costs of a particular issue are to be disallowed should be left to the evaluation and discretion of the judge, 'by reference to the justice and circumstances of the particular case' (*F&C Alternative Investments (Holdings) Ltd v Barthelemy No 3* [2012] EWCA Civ 843, [2013] 1 WLR 548 CA at [47] and [49] per Davis LJ) (a case where a proportionate costs order, made in relation to two issues on which the parties who had succeeded overall had not succeeded, was upheld.))

2. The reasonableness of taking failed points can be taken into account and the extra costs associated with them should be considered". [Two references are given for that proposition which I do not intend to recite.]

"3. Where the circumstances of the case require an issue-based order in the form of an order expressed by reference to the costs of the issue, that is what the judge should make; however, generally because of the practical difficulties which this causes, the judge should hesitate before doing so and, where practicable, the order should be expressed as a percentage or with reference to a distinct period of time. (Rule 44.2(7)) (*Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC), Jackson J at [72(iv)].

4. There is no automatic rule requiring an issue-based costs order in the form of a reduction of a successful party's costs if he loses on one or more issues. *HLB Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm), Gloster J at [10]. "The mere fact that the successful party was not successful on every last issue cannot of itself justify an issue-based costs order (*J Murphy & Sons Ltd v Johnston Precast Ltd (No 2)* [2008] EWHC 3104 (TCC), Coulson J at [10].).

5. The courts recognise that in any litigation, especially complex commercial litigation but including personal injury litigation, any winning party is likely to fail on one or more issues in the case (possibly issues on which the losing party could have taken steps to protect himself, at least to an extent, to costs liability). That point is frequently made…." [A number of authorities are cited in support of that proposition, which again I do not intend to recite].

6. The claimants therefore submit, firstly, that the principal way in which the defendants ought to have protected themselves from a costs order would have been to make well-judged Part 36 offers. Such offers can be in respect of the whole of the claim or part of the claim. The defendants did not do so. That cannot, in my view, be a complete answer to the defendants' submissions, which I shall come to in a moment, as that would be inconsistent with the court's discretion to make an issue-based costs order. It is a factor to be borne in mind and particularly in a case such as this where there is an overarching case that there are defects in the property but, in a sense, each individual defect gives rise to a distinct claim, and, so far as Marbank at least is concerned, there is a similar position in relation to the Final Account claim.

7. It seems to me important, and this is the second point which the claimants particularly urge upon the court, that the court does not lose sight of the answer to the question who is the overall winner and of the protection offered to a defendant by making effective offers.

Marbank

8. So far as Marbank is concerned, almost the entirety of the claim, as itemised in the Scott Schedule, was made against them. Only item 11 (the Bauder green roof) was advanced against SCd only and the stairwell rooflight was primarily a design claim against SCd. Marbank advanced a counterclaim. The claimants were clearly the net winners.

9. Summarising, and I hope I do no injustice to Mr Clay's submissions, it is submitted on behalf of Marbank that some account needs to be taken of the extent to which the claimants were successful on individual claims and issues.

    i) So far as claims are concerned Mr Clay relies firstly on the fact that the claimants' claim failed on item 10 (Accoya) item 11 (the Bauder green roof), item 12 (the stairwell rooflight) and item 28 (Brise Soleil), and that, as opened, the claimants' claims in respect of these items totalled approximately £160,000. In respect of these claims he submitted that they featured prominently in the evidence for trial and occupied considerable time at trial.

    ii) The claim for alternative accommodation included two years' of alternative accommodation for Mrs Vainker. I found that period to be unreasonable for

the carrying out of remedial works to the glass balustrades. There was a claim for £110,000 for lost rental income because the rental property was used as accommodation for Mrs Vainker's son and his family. I found this claim to be too remote. Mr Clay also pointed to the claim for lost liquidated damages which was made and could only be made against M&M.

iii) As to these two latter points, the alternative accommodation and lost liquidated damages, they did not occupy any or any significant time at trial and I take the submission to be that they are relevant to the extent to which the claimant succeeded against Marbank.

iv) Mrs Vainker's contract with Marbank was under seal and there were no limitation issues so far as Marbank was concerned. The position was entirely different so far as SCd was concerned and, as I said in giving judgment, that was why the claimants' focus in respect of some of the larger claims was on the Defective Premises Act 1972. Mr Clay submitted that the only reason for the DPA claim was the fact that the claimants wished to pursue SCd and could only realistically do so under the Defective Premises Act because of the limitation defences available to SCd in contract and tort. He argued that that had a significant impact on the brickwork claims in particular, because the evidence was expanded to advance the case that the property at completion was unfit for habitation. The claim for breach of the DPA failed because I found the discolouration or staining of the brickwork to be an aesthetic defect only.

10. Before I turn to the relevance of the counterclaim, I address these points, and I do so in reverse order.

11. The submission that the DPA claim had any significant impact on scope of the evidence and conduct of the trial is one I reject. The claimants' position was that the discolouration evidenced not only an aesthetic defect but had a consequential impact on the structural stability of the brickwork, which it was alleged was at risk of early failure. It is inconceivable that the claimants would have advanced their case differently if there had been no limitation issue so far as SCd was concerned and no reason or no need to rely on the Defective Premises Act. Further, although the claimants lost on the risk of early failure point, almost all of the evidence given would have been given in any event. The issue formed an element of the brickwork claim but not one which should drive any discrete costs order.

12. So far as the general points as to the extent of success are concerned, although the claimants' recovery against Marbank was far less than 100% of the claim, it was not so disproportionately small, when compared with the sums claimed against Marbank, that it merits a reduction in the claimants' recovery of costs.

13. So far as the particular claims on which the claimants failed are concerned, it is not, in my view, the case that any of these claims can be said to have been unreasonably advanced at trial. I do not intend to repeat my lengthy judgment, but in respect of each of these claims there was a complex factual background and there were significant issues of expert evidence. The resolution of these issues may have been in the defendant's favour but it did not make the pursuit of the claims unreasonable and, as I have said already, overall the claimants were the winners.

14. As Mr Crowley submitted, this was in essence a defects claim which comprised some major alleged defects (to which the bulk of the financial claim attached), and a much larger number of claims to which the sums attached varied from less than £200 to over £35,000. It is the sort of claim which should properly be looked at as a whole and, when looked at as a whole, the claimants have won. I accept that submission made by Mr Crowley, as indeed I have already indicated, and I do not consider that there is anything in the claimants' conduct in relation to individual claims on which they did not succeed that merits a percentage reduction in the costs recoverable against Marbank.

15. So far as the counterclaim is concerned, Mr Clay submits that there should be a reduction to reflect the claimants' conduct in relation to the counterclaim.

16. In this context I refer to paragraphs 675 to 677 of my judgment. As at December 2014, Mr Bowler appears to have valued Marbank's works at just over £1.3 million. M&M appears to have certified a sum of £1,250,470 as due to Marbank. On any view there was, therefore, a certified sum outstanding. However, it was not in dispute that there was a Pay Less Notice for £50,000 for liquidated damages and, at all times, the claimants had a claim for damages which they could set off against the outstanding amount. Marbank took no steps to recover any amount until the provision, in October 2017, of what I have referred to as the Final Account, which formed the basis of the counterclaim and was in the sum of £1.365 million.

17. Mr Clay makes the following points:

    i) Firstly, the Particulars of Claim gave no credit for any sum outstanding. When the Counterclaim was pleaded the claimants' response was to deny any liability.

    ii) Secondly, the claimants' quantum expert, Mr Finn, was not instructed to and did not address the Counterclaim at all in his report, although Marbank's expert did. I note in that context that Mr Crowley drew attention to the fact that in their first joint statement the quantum experts agreed at paragraph 1.8 that: "The experts have not been provided with information on this counterclaim to make an assessment in this QS 1st JS".

    iii) Thirdly, Mr Finn only addressed the counterclaim at the last minute. One reason given was that he had not had relevant substantiating documents, such documents did not exist and this was not the product of a failure in disclosure. As a result, he gave figures as figures for some items (not all items) and expressed a view on reasonableness. He could have done so earlier. The other reason given for the timing of his second report was a lack of funds.

18. I cannot see how any of these matters would lead to the conclusion that there should be any reduction in the claimants' recovery of costs to reflect conduct. They did, of course, in one sense lose on the Counterclaim, but that was always subject to the set-off of the claim for damages. The total value of the Final Account was almost in accordance with Mr Bowler's valuation in December 2014, which could have been agreed by Marbank, and after deduction of liquidated damages the total was less than certified in December 2014.

19. In terms of conduct, the Final Account claim was not submitted until over three years after practical completion. Even when pleaded as part of this action, there was no detail of the basis on which variations, not the subject of written instructions, were claimed. Marbank's factual evidence on the Counterclaim was perfunctory. Mr McGee's report was superficial. Most of the detail on which my judgment was based was provided in closing submissions. Criticism of the claimants and Mr Finn for failing to grapple with the counterclaim is therefore in my view misplaced.

20. Overall, therefore, my view is that the proper order is that Marbank should pay the claimants' costs of the action, and I will so order. I will say something more about the costs related to the second defendant, M&M, in due course.

SCd

21. So far as SCd is concerned, the position is somewhat different. Firstly, the counterclaim never concerned SCd. In the course of argument Mr Crowley accepted that any order in respect of the counterclaim could be the subject of a separate order against Marbank only. It would seem to me that the effect would be that an order against SCd would, at most, be that SCd should pay the costs of the claim which, for the avoidance of doubt, would not include the costs of the counterclaim, even though those were set off against the claim as a whole.

22. But it is also the case that much of the claim never concerned SCd at all, only the brickwork and glass claims, item 10 (Accoya), item 11 the (Bauder Green roof), item 12 (the stairwell rooflight) and item 44 (the defective kitchen floor) were pleaded against SCd. The other numerous and often smaller claims did not feature in the case against SCd. If I have overlooked a small claim that was made against SCd or which featured SCd it is not material.

23. Mr Crowley submits that this is simply the product of a defects claim against more than one defendant and that the appropriate order should still be that SCd pays the claimants' costs of the claim, with any issues as to whether the costs associated with individual claims should be recoverable from SCd being addressed as part of the process of assessment.

24. For SCd Mr Fowler advances a number of arguments as to how the court could and should address the issue of costs recoverable, if any, from SCd. As I indicated above in relation to Marbank, I leave aside for the moment the issues relating to M&M. Mr Fowler relies on the helpful summary of the authorities in *Pigot v The Environment Agency* [2020] EWHC 1444 Ch, a decision of Mr Stephen Jourdan QC sitting as a Judge of the High Court.

25. At paragraph 5 the Deputy High Court Judge said this:

> "The principles which guide the court in applying those rules where one party has succeeded overall but has lost on one or more issues and the unsuccessful party seeks an issue-based costs order have been considered in many cases." He then set out the multiple cases that he had been referred to which wholly or largely reflect the cases referred to in the White Book note which Mr Crowley relies upon. He then said this at paragraph 6:

"I would summarise those principles as follows:

(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based costs order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts and where it is therefore difficult to untangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.

(2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.

(3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.

(4) Where an issue-based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.

(5) An issue-based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.

(6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR Rule 44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case."

26. The summary differs slightly from the White Book note which I have quoted. In my view, paragraph 3 is slightly overstated, but it may be that it is moderated by sub-paragraph (6) and the exhortation to stand back and consider the justice of the case. I say that it is slightly overstated because there may be many cases where a party is deprived of its costs on an issue on which it was unsuccessful and which can be regarded as a discrete issue, but it is a matter of discretion, and to say that a party may be deprived of its costs, rather than is likely to be deprived of its costs, is a principle of more general application. As I have said in dealing with Marbank, a case which comprises a list of discrete defects and discrete claims under a final account is more likely to be looked at as a whole rather than as a series of distinct claims and counterclaims. Also, as Mr Crowley submitted, the defendant's primary means of providing costs protection is to make an appropriate Part 36 offer on the whole of the claim or making discrete offers on parts of the claim. Those latter two points are ones which should clearly be borne in mind in considering all the circumstances of the case and the just result.

27. Against the background of the principles summarised in *Pigot,* Mr Fowler's starting point is to identify, on his case, that the claimants have recovered less than 10% of the claim against SCd. In making that submission, he relies on the schedule of loss at Appendix 3 to the Particulars of Claim which put the claimants' claim at £767,913 before the addition of VAT and interest and which claimed the entirety of that sum from SCd, even though not all defects formed part of the case against SCd. As against SCd the claimants have recovered £93,644.50. Mr Fowler submits that if the sum of £35,000 from the M&M settlement is credited against this amount the claimants have recovered less than 10%, in fact 7.5% of the total claimed, and 12% of the total if no credit is given. His high level submission is that it would be surprising if the claimants then recovered more than 10% of their costs against SCd. This is not simply a pleading point on the schedule of loss but, on Mr Fowler's submission, reflects the fact that the costs of the claim in its entirety are sought against SCd rather than the costs of the claims in fact made against SCd.

28. In reality, the sums claimed against SCd by the time of the closing submissions were in the region of £250,000 in respect of remedial works and around £200,000 for alternative accommodation and general damages. The amounts set out in the Scott Schedule for remedial works were greater, but, in any case, the claimants' recovery against SCd compared with the claims made was more in the region of 20 - 25%.

29. I also observe that, although the claims for alternative accommodation and general damages made up a significant part of the total claim, they were not costs heavy issues. There was a modest amount of factual evidence, obviously no expert evidence, and the issues were mostly dealt with as part of legal argument.

30. Mr Fowler's more particular submission is that some of the claims made against SCd, and on which the claimants failed, were made unreasonably. That submission is not made in respect of the brickwork claim; it is made in respect of Accoya, the Bauder green roof and the staircase rooflight. I have already indicated that I do not consider any of these claims to have been made unreasonably and I repeat what I have already said about the complexity of the factual and expert evidence.

31. Without repeating the whole of the relevant parts of the judgment again, so far as the Accoya was concerned, there was, for example, undoubtedly black mould on some of the wood, expert evidence that the design was defective/incomplete, albeit I did not accept that evidence, and an arguable case that SCd had acted negligently in not sufficiently taking account of Mrs Vainker's maintenance requirements. The claim for 50 years of maintenance costs was unsustainable, but that did not make the claim as a whole unreasonable. There was an obvious limitation defence, but the claimants relied on the condition of the Accoya as part of their case that the property was unfit for habitation because of the maintenance required.

32. So far as the green roof was concerned, no limitation defence was taken. There was a measure of agreement amongst the experts that better provision should have been made for the water supply. The fact that I concluded that the provision was adequate for professional maintenance does not make the claim one that was unreasonably brought.

33. Similar points can be made about the claim in respect of the stairwell rooflight which was not at optimum pitch for self-cleaning glass.

34. Mr Fowler submits that on these "unreasonable" claims, not only should SCd not pay the claimants' costs but the claimants should, in effect, pay SCd's costs. I say "in effect" because he submits that the court should take a percentage of the claimants' costs, and he suggests that should be 25%, and then disallow 50% of the claimants' costs to reflect the claimants paying the defendant's costs. He makes similar submissions about the claims under the DPA generally, albeit on the basis that the claimants should not recover their costs, rather than pay the defendant's costs. He says that those are claims on which the claimants failed and they should be deprived of their costs and he seeks to make a deduction for the recovery from M&M. Suffice to say that that results in SCd, on his submission, making no payment to the claimants in respect of costs.

35. I do not accept that submission, not least because I do not find that the claims on which the claimants were unsuccessful were brought unreasonably, and so I would never get to zero recovery.

36. I do, however, consider that this is a case where the claimants should recover against SCd only the costs of the claims or issues on which they succeeded and that they should be deprived of the costs of the claims on which they failed. SCd's position is very different from that of Marbank. Only a limited number of claims, albeit two of the largest, were made against SCd. With one exception there was a potential limitation defence and, although I would not characterise the claimants' conduct as unreasonable, there was little engagement with the provisions of section 14A. This was why the claims were framed as claims for breach of section 1 of the DPA, even though, even on a cumulative basis, it was difficult to see how these alleged defects could render the property unfit for habitation. The DPA claims added little or nothing to the claims against Marbank in contract but were the principal basis for the claims against SCd.

37. It would be open to me to order SCd to pay the costs of items 8 and 9 and the associated claims for damages only, but the clear preference is for an order that awards a percentage of costs. There are no figures before me which would enable me to make an assessment of costs of these matters as a percentage. I have regard to the submissions as to the percentage level of recovery.

38. I note that Mr Fowler also submitted that the glass claims did not involve significant costs because the issues were largely agreed by the experts. I cannot accept that submission, and a brief consideration of my judgment would show the scope of the evidence on design and the breadth of the issues explored before and during the trial.

39. Having said that, I have come to the view that the figure of 15% of the total of the claimants' costs is an appropriate reflection of the level of success on the whole of the claim against SCd and, therefore, an appropriate percentage of the whole which SCd should be ordered to pay, subject to the further argument in respect of the without prejudice save as to costs offer made by SCd. In coming to that percentage I have taken account of the percentage success on the whole of the claim but I have uplifted the percentage to reflect that the weighting of the costs was on the claim for the costs of remedial works.

40. That leaves the without prejudice save as to costs offer made on 9 August 2022. SCd offered to pay the claimants £145,000, inclusive of VAT interest and costs, in

settlement of the whole of the claim. The offer was open for acceptance for 14 days. The offer was not accepted, but there appears to have been a conversation about it between solicitors for the claimants and SCd. As a result, on 9 September 2022, SCd's solicitors wrote further:

"In light, though, of your observation that a costs plus offer may be of interest to your clients and your express view that it would be possible to hive off costs attributable to your pursuit of our client, perhaps you could give us an indication of the level of costs you say are so attributable."

There was no response to this email.

41. Mr Fowler relies on the decision of the Court of Appeal in *Walker Construction (UK) Ltd v Quayside Homes* [2014] EWCA Civ 93. In that case the defendant recovered judgment on its counterclaim of £10,885, with costs estimated at £345,000. The recovery amounted to less than 6% of the original counterclaim. On the facts, the claim was not relevant by the time of judgment. The claimants had made a *Calderbank* offer on 5 January 2011 to pay the defendants £30,000 plus VAT in full and final settlement inclusive of costs. The claimants argued that the judge should have assessed that offer as representing a reasonable offer on costs, given the ultimate recovery of approximately £11,000. Gloster LJ essentially agreed. From paragraph 85 she said this:

"Third, I accept Lord Marks' submission that, in those circumstances, the judge should have approached the question of costs on the basis that the very best Quayside could do - on the basis of an application of the general rule and before he came to consider the *Calderbank* offers - was to secure an order that Walker pay a proportion of its costs; and that that approach should then have governed the judge's approach to the *Calderbank* offers when he came to consider them.

86. Fourth, the judge, when considering Walker's *Calderbank* offer dated 5 January 2011 does not appear to have given appropriate weight to the fact that Walker could not realistically have made a Part 36 offer in January 2011, because that would have had the automatic consequence that, if the offer were accepted, Quayside would have been entitled to all its costs of the proceedings to date; see CPR 36.10(1)…

87. However the judge does appear to have recognised at paragraph 18 of his costs judgment that, if Walker had accepted Quayside's Part 36 offer made on 3 May 2011, that would have involved Walker in:

'having to pay costs assessed on the basis of the counterclaims that then stood at £169,000, producing a wholly disproportionate sum of costs'.

But, as Lord Marks pointed out, exactly the same consideration would have applied to the making of a Part 36 offer instead of a *Calderbank* offer in January 2011…

91. In other words the judge appears to have accepted that a figure in the region of, or possibly in excess of, £30,000 had been incurred by 5 January 2011 in respect of costs on the indemnity basis. As Lord Marks submitted, the judge should then have asked himself whether the allowance of about £19,000 for costs, in Walker's *Calderbank* offer, given Quayside's ultimate recovery of about £11,000, represented a reasonable

offer on costs. I accept Lord Marks' submission that such an offer was indeed a reasonable and proportionate one. The judge was entitled to look at the matter with the benefit of hindsight and in the knowledge that Quayside had made a very small recovery on its counterclaim. Whether or not he went into the detailed arithmetic, there were certainly grounds for calculating on a rough and ready basis that, against a figure of £30,000 plus of costs on the indemnity basis, substantial deductions would have needed to have been made to reflect…"

Her Ladyship then set out a number of reasons why that figure would have been reduced.

42. At [92] Gloster LJ concluded:

"In my judgment, on any realistic appraisal of the position as at 5 January 2011, the judge should have come to the conclusion that, given the ultimate outcome, an offer to pay costs in a net sum of £19,000 as at 5 January 2011 was in fact generous and that Quayside had not beaten that offer. He should consequently have found that Walker's *Calderbank* offer of £30,000 inclusive was an offer which Quayside should have accepted. Moreover a reality crosscheck would have demonstrated that a recovery of £19,000 in respect of costs at the early stages of this case was proportionate. There was therefore no reason for Walker to have accepted Quayside's subsequent *Calderbank* offer dated 8 March which invited Walker to pay £40,000 inclusive of costs."

43. What is said by SCd in light of that judgment is that, following the approach taken by the Court of Appeal, the court should consider with the benefit of hindsight whether the offer made was bettered by the claimants. The hindsight relates not only to the actual recovery of damages but the costs that follow that recovery.

44. In the present case the recovery of damages, including VAT, is roughly £93,000 before the addition of interest. It is argued that I might have regard to a lower figure for two reasons.

45. One is that, prior to this offer being made, the claimants' solicitors had said in correspondence that the claimants would claim the cost of glass remedial works in the PFG tender and not the slightly higher cost actually incurred. At trial the claim was put on the basis of the cost actually incurred. No objection was taken to this and I awarded the costs actually incurred. There is no reason now to have regard to a different figure.

46. The second reason is the credit for the M&M settlement. That had not been reached at the time of the offer by SCd but was reached within the time for acceptance. The relevant sum of £35,000 was agreed with M&M in respect of remedial works, alternative accommodation and expenses, and general damages for distress and inconvenience. That sum will be credited against the total claim (including the claims on the items where the claim was against Marbank and M&M and not SCd) and it seems to me both unrealistic and unfair to the claimants, for the purposes of considering the relevance of the without prejudice save as to costs offer, to say, in effect, that they ought to have considered their position as against SCd on the basis that the whole of that sum was credited against the claim against SCd.

47. The net total awarded against SCd which I take into account is therefore £93,000, to which interest is to be added, and by Mr Crowley's calculation the total is then £108,000. The costs offer was in effect therefore £37,000; even without interest the figure would be £52,000. A necessary part of SCd's case therefore is that the costs it would have been, at that date, liable to pay would have been no more than those figures, assuming those costs to be assessed either by reference to discrete issues or on a percentage basis.

48. The claimants' approved costs budget for the various stages was in excess of £900,000 before the addition of VAT and I am told that the claimants have in fact expended over £1 million. Mr Crowley submits that it is inconceivable that at the time SCd's offer was made, some two months before trial, the claimants would have expended so little that the costs offer, in effect made by SCd, would have been more than that expended on the issues on which the claimants succeeded.

49. I have said that I will order SCd to pay 15% of the claimants' costs of the claim. If I take the total of the costs budget net of VAT, 15% would be £135,000, for which SCd is now liable. The figure is necessarily overstated as an amount payable on costs at the time the offer was made: at the time the offer was made there had not yet been a trial; in any case, the total budget includes the costs of the counterclaim; and SCd would doubtless also say that it is overstated because it includes costs of the claim against M&M. But however many adjustments one makes, I cannot see that the figure would come down to a point where the £145,000 offer had not been beaten. In any event, it would provide an unsatisfactory basis on which to make a costs order against the claimants as SCd ask. A Part 36 offer could have been made on a part of the claim which would have avoided these difficulties of calculation and it was not. Accordingly, I do not make the order sought by SCd to the effect that the claimants should pay SCd's costs after the date of the making of the offer and the order that I make will be that SCd should pay 15% of the claimants' costs of the claim.

Interim payment on account of costs

50. The next matter is the interim payment on account of costs. The claimants seek such an interim payment. The draft order provided by the claimants in advance of the hearing indeed sought an interim payment, from Marbank and SCd jointly, of over £1 million.

51. With the addition of costs of budgeting and VAT, the claimants' approved costs budget is £1,118,763. The claimants ask for an interim payment of £1,007,000, being 90% of that total.

52. Mr Crowley referred me to the decisions in *MacInnes v Gross* [2017] EWHC 127 (QB) and *Thomas Pink Ltd v Victoria's Secret* [2014] EWHC 3258. The short point is that these cases are authority for the proposition that the court can now safely start from the approved costs budget and take that as a realistic figure that will be recovered on assessment. No major deduction needs to be made for reductions on assessment because the budget is approved. 90% is then an appropriate figure, giving some margin, on which basis an interim costs order may be made.

53. Mr Clay points to the fact that the budget included around £347,000 of incurred costs which formed a substantial part of the total and the reasonableness of which would

not have been considered on budgeting because there were costs already incurred. I do not consider that this provides any reason to anticipate that the claimants' recovery might be substantially less than 90% of the total budget. It is not unusual, and is often necessary, for the claimants' costs to be front end loaded, particularly where claims involve complex technical evidence and allegations of professional negligence. It is open to defendants to invite the court to comment on a claimant's incurred costs and/or take account of incurred costs in approving the estimated costs. I have not been told that any such issues were raised on cost budgeting in this case.

54. There are two factors in this case, however, which to my mind may make it different from what might now be regarded as the normal position, and both relate to the involvement of the second defendant up until 22 August 2022, a little less than six weeks before the start of the trial.

55. Both the remaining defendants have argued that I should make some percentage reduction to the costs recoverable against them by the claimants to reflect the fact that the total costs of the action include discrete costs incurred in pursuing M&M. Although all the defects claims advanced against M&M were also advanced against another defendant, the nature of the claim against M&M, as project managers, was different and there was discrete evidence on their role and alleged negligence. Further, there was a claim against M&M for liquidated damages which the claimants were unable to recover from Marbank because, put simply, M&M had negligently certified practical completion when they ought not to have, on the claimants' case, done so. That claim could not have been advanced against Marbank or SCd. I accept the submission that the claimants must have incurred costs that relate to the claim against the second defendant only and which ought not to be recoverable from either Marbank or SCd.

56. In the case of SCd my order that SCd should pay 15% of the claimants' costs only is intended to take account of that position in relation to M&M. So far as Marbank is concerned, it seems to me that this should be a matter for detailed assessment. There is no informed basis upon which I could make any assessment of the relevant percentage. Because the claim against the second defendant had settled before trial it was not explored at trial and I have no basis on which to assess its impact on pre-trial costs. It does seem to me, however, that there is likely to be, on assessment, some reduction from the approved budget figure and that I should make some allowance for that in ordering an interim payment.

57. The second issue is the length of the trial. Mr Clay submitted that the budget was based on a 12 day trial for a trial involving three defendants, and that once one defendant had gone there ought to have been some adjustment of the trial length and that would also affect the amount recoverable on assessment. There is some immediate attraction in that argument. There were, as I have said, discrete issues that related to M&M, But, having heard the trial and knowing how much was shoehorned into the trial period and how much was left to be addressed by the court on the papers, I find it difficult to see that much, if any, of the 12 day estimate could be attributed to the expected presence of a further defendant. Having considered this second issue, I am not persuaded that it should make any difference to the interim payment on account.

58. I, therefore, order Marbank to pay 80% of the budgeted costs as an interim payment on account of costs. By my calculation that is £895,010.82, but counsel will no doubt provide the correct figure for the order. I order SCd to pay 90% of 15% of the budgeted costs as an interim payment on account. Again, by my calculation, that is £151,033, but I stand to be corrected and counsel will include the correct figure in the order. I give both defendants 28 days to pay and not the even longer period asked for by Mr Clay.

Interest

59. The claimants seek an order for interest on costs incurred at 3% above base rate from the date upon which work was done or the liability for disbursements incurred. I have no doubt that there should be an order for the payment of interest, and at the said rate, but that should be from the date of payment of costs not the date when the liability was incurred. The payment of interest is to compensate the claimants for being out of pocket or for having to pay interest on monies borrowed to finance the litigation. The order that the interest should be payable from the date of payment of costs and at a rate of 3% above base rate is intended to reflect that position of compensating the claimants. For the avoidance of doubt, so far as the rate is concerned, I have dealt with the appropriate rate in the course of the hearing on 15th May and apply the same rate.

The reserved costs

60. On 26 July 2022, a little over two months before the trial was due to commence, I heard an application by the claimants to strike out a multitude of passages from Marbank's witness statements, on the basis that they did not comply with PD 57AD. Save in the case of Mr Haffenden, I made no order in the claimants' favour.

61. As I observed in giving judgment on that occasion, it was not an exaggeration to say that virtually every page of the witness statements served on behalf of Marbank had a passage or more struck through as allegedly non-compliant. There were a number of themes to the complaints about the statements, but this was not a case in which, in my judgment, passages could be excised from the statements on the basis of some generalised non-compliance. It was at this stage of the proceedings impractical and disproportionate to go through every passage. In many cases, whether the passages were compliant or not was a question of fact and degree. It seemed to me that the appropriate course was to leave these matters to the trial judge who would be well-placed to give the weight he or she saw fit to the evidence.

62. I reserved the costs to the trial judge who would have a better understanding of the extent to which the passages complained of were relevant or compliant with the Practice Direction.

63. A broad theme was criticism of Mrs Vainker and the suggestion that Marbank had done things, including things that might be regarded as an admission of liability, in order to appease her. A lot of this evidence was designed to portray her as a difficult and demanding client and was no doubt intended to influence the court's view of the seriousness of any defect and the approach taken to remedial works, on which a number of issues as to mitigation were raised.

64. This sort of evidence carries very little weight. Very little was said about it at trial and it will be apparent from my judgment that I derived little or nothing from it. On a broad brush approach it seems to me that, with the benefit of hindsight, what one might call trial hindsight, this was an application which was properly made by the claimants and which could have been avoided if greater attention had been paid by Marbank to compliance with the Practice Direction. However, I still regard the application as having been made too late to have been of any utility and having been over elaborate. Taking a proportionate approach, I award the claimants 50% of their costs of the application, to be assessed if not agreed, and to be paid by Marbank. For the avoidance of doubt, the aspect of the application on which I reserved the costs did not involve SCd to any extent.

65. That concludes my judgment on the costs matter.

(This Judgment has been approved by the Judge.)

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