Neutral Citation Number: [2024] EWHC 2914 (TCC)

Case No: HT-2023-000006

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 15 November 2024

Before :

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

A & V BUILDING SOLUTION LIMITED
Claimant

- and –

J & B HOPKINS LIMITED

Defendant

- -
- -

Alex Paduraru (a director of the Defendant Company) for the **Claimant**.
James Frampton (instructed by **Hawkswell Kilvington**) for the **Defendant**

Decision on the papers
- -

APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 15 November 2024 at 2pm.

Mr Roger ter Haar KC :

1. In this action and an associated action, I have previously handed down seven judgments:

   (1) On 15 February 2023: [2023] EWHC 301 (TCC);

   (2) On 16 June 2023: [2023] EWHC 1483 (TCC);

   (3) On 6 October 2023: [2023] EWHC 2475 (TCC);

   (4) On 17 October 2023: [2023] EWHC 2576 (TCC);

   (5) On 18 June 2024: [2024] EWHC 1510 (TCC);

   (6) On 6 September 2024: [2024] EWHC 2295 (TCC);

   (7) On 3 October 2024: [2024] EWHC 2516 (TCC).

2. In this judgment, as in my previous judgments, I refer to J & B Hopkins Ltd as "J&BH" and to A & V Building Solution Limited as "A & V".

3. The matters with which this judgment is concerned are, firstly and principally, the orders for costs which should be made, and, secondly, what order or orders as to payment should now be made by one party to the other.

The outcome of the proceedings

4. Describing the outcome of the proceedings before the Court is somewhat complicated by the interplay between previous adjudications and the Court proceedings and between different Court proceedings.

5. In my judgment on the merits (fifth judgment of 18 June 2024) I set out in a table the rival amounts claimed:

Item	**A & V**	**J&BH**	**Difference**
Measured Works	£413,940.00	£338,683.35	£75,256.65
Variations	£67,200.00	£39,228.00	£27,972.00
A & V Breaches and Losses[1]	£645,100.45	£0.00	£645,100.45
JBH Contra Charges	£0.00	(£88,069.61)	£88,069.61
Mr Blizzard Adjudicator Fees	£17,400	£0.00	£17,400.00
Mr Smith Adjudicator Fees	(£13,962.00)	(£13,962.00)	£0.00
Enforcement proceedings costs	(£20,822.00)	(£20,822.00)	£0.00
Paid to date	(£364,909.64)	(£364,909.64)	£0.00
Total	**£743,946.81**	**(£109,851.90)**	**£853,798.71**

[1] This, of course, is shorthand for J&BH breaches and A & V losses

6. I now set out the same table updated to reflect my judgments 5, 6 and 7, but including comments:

Item	**A & V**	**J&BH**	**Difference**	**Amount Awarded**	**Comment**
Measured Works	£413,940.00	£338,683.35	£75,256.65	£407,156	A & V were substantially the winners on this head of claim.
Variations	£67,200.00	£39,228.00	£27,972.00	£53,200	A & V were substantially the winners on this head of claim
A & V Breaches and Losses[2]	£645,100.45	£0.00	£645,100.45	£6096.56	A & V had a number of claims contained within this one line item. As the figures show, A & V did not succeed on their claims save to a very minor extent. The position as to success or failure is

[2] This, of course, is shorthand for J&BH breaches and A & V losses

					somewhat complicated by the Court's conclusion on who was guilty of repudiatory breach. This is discussed further below.
JBH Contra Charges	£0.00	(£88,069.61)	£88,069.61	£0.00	A & V was the winner in respect of this claim
Mr Blizzard Adjudicator Fees	£17,400	£0.00	£17,400.00	£17,400	A & V was the winner in respect of this head of claim, but an attempt to recover a further £17,400 under this head failed.
Mr Smith Adjudicator Fees	(£13,962.00)	(£13,962.00)	£0.00	(£13,962.0)	J&BH's entitlement to this sum had previously been affirmed in earlier enforcement proceedings. A & V attempted in this action to obtain an order reversing its liability in respect of this

					sum but failed: see judgment No. 7. Thus J&BH are to be considered the winner in respect of this issue.
Enforcement proceedings costs	(£20,822.00)	(£20,822.00)	£0.00	(£20,822.0)	This sum had been awarded to J&BH in the enforcement proceedings. In these proceedings this figure is only relevant to the orders as to payment which I consider below.
Paid to date	(£364,909.64)	(£364,909.64)	£0.00	(£364,909.64)	This was an agreed figure: in judgment No. 7 I refused an attempt by A & V to introduce a different figure

7. The figures above do not include VAT. In Judgment No 7 I awarded VAT bringing the amount ordered in respect of the first two items (Measured Works and Variations) to £96,535.83 as follows:

Measured works £407,156.25

Variation account	£53,200
Less paid	-£364,909.64
Amount due	£95,466.61
VAT at 20%	£1,069.22
Total	£96,535.83

8. Judgment No. 7 also considered entitlement to interest, and set out principles to be applied.

9. In respect of the matters dealt with in this judgment, as different calculations as to interest have to be made at different dates by reason of various offers discussed below, I set out at each relevant date point what I find to be the amount held due at that date.

The approach to Offers of Settlement

10. CPR Part 36 provides what has been described as a "self-contained procedural code about offers to settle". For the purposes of this judgment, the following parts of CPR 36 are relevant:

> **36.1**
>
> (1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part ("Part 36 offers").
>
> ….
>
> Form and content of a Part 36 offer
>
> **36.5**
>
> (1) A Part 36 offer must—
>
> (a) be in writing;

(b) make clear that it is made pursuant to Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.23 if the offer is accepted;

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim.

(Rule 36.7 makes provision for when a Part 36 offer is made.)

(2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.

….

(4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—

(a) the date on which the period specified under rule 36.5(1)(c) expires; or

(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.

(5) A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4). If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted.

Costs consequences following judgment

36.17

(1) Subject to rule 36.24, this rule applies where upon judgment being entered—

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer;

….

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

> (3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—
>
> (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and
>
> (b) interest on those costs.
>
> ….
>
> (5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> (a) the terms of any Part 36 offer;
>
> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings….

11. As CPR 36.5(1) makes clear, for an offer to fall within the CPR 36 code, certain formalities must be respected. However, an offer not falling within the CPR 36 code is still a relevant factor in the Court's assessment of which party should bear the burden of costs. CPR 44.2 provides (CPR 44.2(4)(c) being relevant in respect of offers to settle):

> Court's discretion as to costs
>
> **44.2**
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
>
> (c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

….

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

(a) the conduct of all the parties;

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

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue;

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim; and

(e)whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) 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.
>
> (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

12. Thus, where a defendant makes a CPR Part 36 compliant offer which is not beaten by a claimant, there is a strong presumption that the defendant will get an order for costs in that defendant's favour (where a CPR Part 36 offer is made by a claimant which is not bettered by a defendant, different consequences follow, but that is not relevant in this case). However, where an offer is made which is not CPR compliant, whether that offer is made by a claimant or a defendant, CPR Part 44 allows the court to take that into consideration as one among a number of factors.

13. The difference between the larger discretion afforded to a judge when considering an order as to costs under CPR Rule 44 and the narrower discretion afforded to a judge considering an order as to costs under CPR Rule 36 was explained by Briggs J. in *Lilleyman v Lilleyman (No. 2)*[3]:

> It is plain that the court's discretion to depart from Part 36.14(2), constrained as it is by a precondition that its full enforcement would be unjust, is much more circumscribed than the court's broad discretion under Part 44. Furthermore, the four specific considerations identified in paragraph (4)(a) to (d) disclose a common thread which focuses the injustice analysis upon

[3] [2012] EWHC 1056 (Ch); [2012] 1 WLR 2801 at paragraph [16]

> the circumstances of the making of the offer and the provision or otherwise of relevant information in relation to it, rather than upon the general conduct of the proceedings by the parties. Nonetheless, I consider that the requirement to take into account all the circumstances of the case does enable the court to take a broader view in an appropriate case, so that it is not entirely disabled from having regard to questions of justice or injustice arising from the manner in which the offering party has made use of its costs expenditure prima facie now recoverable from the unsuccessful offeree, in the pursuit of its defence to the claim. If that were not so, then the protection of a generous Part 36 offer would enable the offering party to conduct its part in the litigation at the offeree's potential expense without regard to the obligations and constraints which the achievement of the overriding objective now place upon civil litigants. I recognise that, to a limited extent, the process of detailed assessment may be of assistance, but it seems to me to be wrong in principle to exclude the trial judge from modifying the otherwise rigorous consequences of Part 36.14(2) where satisfied that aspects of the offering party's conduct of the litigation subsequent to the making of the offer have not served the interests of justice.

14. This distinction was also made clear in the judgment of Sir Stanley Burnton in *Webb v Liverpool Women's NHS Foundation Trust*[4]:

> 36. These differences in my judgment require this Court to consider the meaning and effect of Part 36.14 untrammelled by the decision in Kastor. My view as to the meaning of Part 36.14 is supported by the substantial line of authority to the effect that Part 36 is now a self-contained code, see, e.g., Ward LJ in *Shovelar v La*ne [2011] EWCA Civ 802 [2012] 1 WLR 637 at paragraph 52:
>
> "52. … Part 36 is a separate, self-contained code. It must be applied as such. If the offer is one to which the costs consequences under Part 36 apply, then it cannot be taken into account under Part 44 because, although CPR 44.3(4)(c) requires the court to have regard to "any payment into court or admissible offer to settle", those words are qualified by the words which follow namely 'which is not an offer to which costs consequences under Part 36 apply'. Part 36 trumps Part 44."
>
> 37. In deciding what costs order to make under 36.14, the Court does not first exercise its discretion under Part 44. Its only discretion is that conferred by Part 36 itself. The alternative construction requires the Court first to exercise its discretion under Part 44, on the basis of all the circumstances of

[4] [2016] EWCA Civ 365; [2016] 1 WLR 3899 at paragraphs [36] to [38]

> the case, and then to exercise its discretion under Part 36, again having regard to all the circumstances of the case. This makes no sense.
>
> 38. It follows from the above, and in particular that Part 36 is a self-contained code, that the discretion under 36.14 relates not only to the basis of assessment of costs, but also to the determination of what costs are to be assessed. I agree with the Judge that Part 36 does not preclude the making of an issue-based or proportionate costs order. However, a successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to "all the circumstances of the case". In exercising its discretion, the court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have done.

15. Sir Stanley then cited with approval the following passage from the judgment of Briggs J. in *Smith v Trafford Housing Trust*[5]:

> I was not referred to any authority on the application of the injustice test under Part 36.14. For present purposes, the principles which I derive from the authorities are as follows:
>
> a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see *Matthews v Metal Improvements Co. Inc* [2007] EWCA Civ 215, per Stanley Burnton J (sitting as an additional judge of the Court of Appeal) at paragraph 32.
>
> b) Each case will turn on its own circumstances, but the court should be trying to assess "who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been." : see *Factortame v Secretary of State* [2002] EWCA Civ 22, per Walker LJ at paragraph 27.
>
> c) The court is not constrained by the list of potentially relevant factors in Part 36.14(4) to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part 36.14 should follow: see *Lilleyman v Lilleyman* (judgment on costs) [2012] EWHC 1056 (Ch) at paragraph 16.

[5] [2012] EWHC 3320 (Ch) at paragraph [13]

> d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined.

16. Briggs J. also emphasised[6]:

> … the essential purpose behind Part 36 is to visit consequences upon parties of whom it can properly be said that they ought to have settled by accepting the other party's offer, rather than taken the matter to trial ….

17. A little later in *Webb v Liverpool Women's NHS Foundation Trust*[7], Sir Stanley Burnton made the following comment[8] again emphasising the difference between the Court's discretion under CPR Rule 44 and under CPR Rule 36:

> Furthermore, in making his determination, the judge did not take into account, as he should have, the fact that the defendant could have avoided all the costs of the trial by accepting the claimant's favourable Part 36 offer. The considerations to which I referred apply even more strongly in relation to her costs after the effective date, when the question is not whether it is just for her to be awarded all her costs, but whether it would be unjust for that award to be made.

18. As will be seen below, J&BH made two CPR Part 36 compliant offers. However, A & V also made a number of offers, even if not formally CPR Part 36 compliant. In exercising my discretion in this matter I must keep in mind the distinction between the broader discretion under CPR Rule 44 in considering offers not complying with CPR Rule 36, and the narrower discretion under CPR Rule 36.

The Offers Made

[6] At paragraph [15]
[7] At paragraph [39]
[8] At paragraph [39]

19. As I have recorded in paragraphs 136 to 141 of Judgment No. 5, the last day upon which anybody on behalf of A & V attended site was 22 March 2021.

20. As referred to in paragraph 145 of Judgment No. 5, on 11 May 2021 a meeting was held which was partly open and partly without prejudice.

21. Following that meeting, on 8 June 2021, Mr Judd, on behalf of A & V, sent an email which attached a document headed "A&V Without Prejudice save as to costs proposals". This set out various sums said to be due to A & V totalling £513,017.42 from which was deducted £389,226.40 in respect of amounts paid to date, leaving a proposed payment by J&BH to A&V of £123,791.02.

22. The figure of £123,791.02 is more than the amount net of interest which in due course I awarded. However, it is to be noted that the amount included for the first two and largest items (measured works and variations) totalled £458,459.60, slightly less than I eventually awarded (£460,356).

23. Where the calculation was too optimistic was in a claim for uneconomical working and delays in the sum of £25,000. That claim was in substance pursued before me as a disruption claim (although in higher figures) and was dismissed by me (paragraphs 411 to 421 of Judgment No. 5).

24. In my judgment, apart from that claim for £25,000, the amount for which A & V offered to settle was in the right ball park.

25. In response, J&BH asked for further details. Eventually, on 13 August 2021 Mr Niziolek of J&BH wrote by email as follows:

> Again, on a without prejudice basis.
>
> The sums involved are significant & in an informal arena ball park numbers are often [bandied] about, I acknowledge this, however they still have to have a level of explanation so the recipient can understand why they are being presented in that [fashion].
>
> For example, I cannot see why retention is being added to the sum. I accept that retention is normally deducted however to me it appears that the revised [valuations] of works and variations are gross, so why the addition again on top of these numbers?
>
> Therefore, while I agree in an informal take it or leave it situation a figure is all that is needed & on the basis of the figure that has been presented in your email below I can confirm that we are not prepared to accept the offer. In order to close this matter I am prepared to offer a payment of £10,000 in full and final settlement of all issues regarding this project.

26. As is apparent from my Judgment No. 5, this counter-offer significantly undervalued A & V's claim. I do not accept that J&BH had inadequate information upon which to assess a more accurate offer.

27. Attempts to settle having failed, on 17 November 2021 A & V commenced the Blizzard adjudication.

28. As I have recorded in paragraph 209 of Judgment No. 5, the Court of Appeal was critical of J&BH's obstructive approach to this adjudication.

29. On 2 December 2021 J&BH issued Part 8 proceedings against A & V in which, amongst other things, J&BH sought declarations as to the invalidity of Application 14.

30. On 19 January 2021 Mr Blizzard issued his Decision, determining that J&BH owed A & V £138,010.86, net of interest costs and fees.

31. J&BH did not pay. Instead it continued with its Part 8 proceedings.

32. On 27 January 2022 J&BH's solicitors wrote a "Without Prejudice Save As to Costs" letter to A & V saying as follows:

> **Introduction**
>
> It is apparent, for the reasons set out in our Open Letter, that the Adjudicator's Decision does not in fact represent a victory for A&V. Our client is confident that it will be able to defeat the Adjudicator's Decision and would, in further proceedings, ultimately demonstrate that it has significantly overpaid your client.
>
> Nevertheless, our client is aware that if the parties continue with this dispute, they will both incur significant legal costs and time, that is particularly the case for A&V who has not yet instructed legal representatives. Our client is also conscious of A&V's precarious financial position.
>
> Our client is therefore willing to "cut its losses" on this dispute and the Sub-Contract.
>
> **The Offer**
>
> Subject to contract (the terms of a formal settlement being agreed), our client will offer to pay A&V the sum of £75,000.00 including any applicable VAT, interest and costs in full and final settlement (excluding latent defects) of any and all disputes arising out of and/or in connection with the Sub-Contract ("the Offer").
>
> For the avoidance of doubt:
>
> The Offer would cover the Adjudicator's Decision, any liability JBH has to A&V for the Adjudicator's fees, the Part 8 proceedings started by JBH, any interest on any of the above amounts and all legal/ representative costs.
>
> Latent defects refers to defects which are not known to the parties or which could not be discovered with reasonable diligence.
>
> The Offer is open for 7 days until 5pm on 3 February 2022, at which point it is automatically withdrawn.

33. In form, this offer did not comply with Part 36, mainly because it did not refer to Part 36, and also because it was inclusive of costs.

34. In amount, it significantly undervalued A & V's claim.

35. The Part 8 proceedings came before Eyre J. on 12 April 2022. He held that Application 14 was a day late and therefore invalid.

36. Shortly before that hearing, on 8 April 2022, A & V sent an offer of settlement:

> Claim Number: HT-2022-000101
>
> A&V Building Solution Limited v J&B Hopkins Limited
>
> Without Prejudice Save as to Costs
>
> We are writing to set out our settlement offer in relation to the above case, in accordance with Part 36 of the Civil Procedure Rules.
>
> We will settle this case for the payment of £150,000, including interest, plus VAT. This offer is open for acceptance for 21 days from the date of this letter, in accordance with Part 36 of the Civil Procedure Rules. If the offer is not accepted within this time period, then interest, at the rate set out in the claim, with continue to accrue.

37. Given the imminence of the hearing before Eyre J., and the result of that hearing, it is perhaps unsurprising that J&BH did not accept that offer. However, it appears to me to have been a good faith attempt by A & V to settle the disputes between the Parties.

38. I have not been referred to any counter-offer.

39. On my calculations, the amount I have awarded plus interest at the rates I have ordered would come to a little over £130,000 by 21 days after the date of that offer. Accordingly, A & V cannot claim that J&BH failed to better this offer.

40. However, it was not a large overestimate of the valuation of A & V's entitlement as at that date.

41. On 26 May 2022 Coulson LJ granted A & V permission to appeal against Eyre J.'s decision.

42. In June 2022 A & V commenced a second adjudication before Mr Smith.

43. On 27 June 2022 A & V made another offer:

> Re: CA-2022-0008481 A&V Building Solution Limited v J&B Hopkins Limited
>
> Without Prejudice Save as to Costs – Part 36, Civil Procedure Rules
>
> A&V wants to resolve this matter without both parties incurring significant costs and therefore, we are putting forward an offer, set out below, under Part 36 of the Civil Procedure Rules ('the Offer').
>
> We are prepared to settle the above claim and proceedings in the Court of Appeal for payment in the sum of £150,000 plus VAT, and plus costs in accordance with Part 36 of the Civil Procedure Rules.
>
> For the avoidance of doubt, the Offer is made pursuant to Part 36. Therefore, if the offer is accepted within 21 days of the date of this letter, the relevant costs consequences set out in Part 36 of the Civil Procedure Rules will apply …

44. That offer was not accepted, and at that stage no counter-offer was made.

45. On 6 July 2022 Mr Smith issued his Decision holding that the true value of the sub-contract works was less than A & V had already been paid. He ordered A & V to pay J&BH a net sum of £82,956.88.

46. On 25 August 2022 J&BH made another "Without Prejudice Save as to Costs" offer.

47. Again this did not comply with the formalities of Part 36.

48. The offer contained in the letter was as follows:

> In the circumstances, we are instructed to put forward the following offer with a view to bringing all ongoing disputes between the parties to a conclusion:

> The parties agree to drop hands and bear their own costs in full and final settlement of all claims arising from the Sub-Contract. The effect of this being that:
>
> - A&V agrees to discontinue the Appeal with no order as to costs;
> - A&V agrees not to pursue its alleged entitlement to Mr Blizzard's fees in the sum of £17,400;
> - JBH agrees not to pursue A&V for the outstanding Part 8 costs; and
> - JBH agrees not to pursue A&V for payment of the sum due to JBH in accordance with the Smith decision.
>
> This offer is conditional upon A&V paying the sum of £13,962 to Mr Smith forthwith in settlement of Mr Smith's fees.
>
> This offer is open for acceptance until 4 pm on 2 September 2022 after which it will be automatically withdrawn.

49. In the event, A & V has achieved a much better result than this offer as it now has a judgment for £120,000 in its favour, before allowing for interest.

50. On 8 September 2022 J&BH made another "Without Prejudice Save as to Costs" offer. Again this did not comply with Part 36. This now offered:

> In the circumstances, we are instructed to put forward the following offer in full and final settlement of the Proceedings, including the Appeal and associated claims regarding Application 14 and the Blizzard Decision as follows:
>
> 1. JBH agrees that the Order made in the Proceedings on 12 April 2022, including the declarations granted and costs awarded to JBH by Mr Justice Eyre are set aside;
> 2. The Proceedings including the Appeal are discontinued;
> 3. There is no order as to costs of the Proceedings or the Appeal (meaning the parties each bear their own costs);

> 4. JBH agrees that the sums due from A&V to JBH pursuant to the Smith decision are reduced by £17,400 (including VAT) to reflect and therefore set-off Mr Blizzard's fees (for the avoidance of doubt, liability for this sum is accepted as a set-off only and JBH will not make any payment to A&V of this sum, or any part thereof); and
>
> 5. A&V agrees that it will not pursue (a) any sums allegedly due to it under the Blizzard Decision including any interest thereon, or (b) any claim for a notified sum or any other payment in respect of Application 14. Item (a) is subject to the set-off of Mr Blizzard's fees in the amount of £17,400 including VAT at point 4.
>
> Please note:
>
> This offer is open for acceptance until 4pm on 22 September 2022 after which it will be automatically withdrawn.
>
> For the avoidance of doubt, this offer does not compromise the parties' ongoing claims as to the value of the final account or the Smith Decision.

51. In the event, A & V have achieved a much better result than this offer as it has a substantial judgment in its favour.

52. On 9 January 2023 A & V issued the present proceedings.

53. On 27 January 2023 the Court of Appeal handed down its judgment. In the course of that judgment Coulson LJ made the following comment in paragraph [23]:

> 23. The judgment given at the hearing on 12 April 2023 is at [2022] EWHC 1186 (TCC). Perhaps because of the way in which the matter had come before him, the judge did not deal with the adjudicator's decision at all, save to note at [2] that the adjudicator's findings were not binding on him. He said that he would "approach the matter on the footing of my interpretation of the documents and of the submissions before me". He did not therefore approach the hearing from the starting-point that there was an outstanding adjudication decision in AVB's favour, and that JBH were in a breach of clause 20.3 of the Sub-Contract in failing to make payment of the sum due to AVB.

54. Coulson LJ also said at paragraph [43]:

> So, as at the hearing on 12 April 2022, the position was that JBH were in breach of contract because they had not paid the first adjudicator's decision and that, in the light of the 'pay now, argue later' mantra, that should have been the first order of business. Having determined the enforcement position, the secondary question for the judge was whether AVB should lose their entitlement to enforce the decision in the first adjudication on the basis of JBH's Part 8 claim.

55. The Court of Appeal rejected A & V's submission that the Part 8 proceedings were an abuse of process. However, the Court of Appeal decided that, contrary to Eyre J.'s decision, Application 14 was valid.

56. To that extent A &V was successful, but in the final paragraph of his judgment Coulson LJ said:

> 74. Although I consider that AVB were entitled to enforce the first adjudicator's decision back in April 2022, that entitlement has long since been overtaken by events and, in particular, by the result of the second Final Account adjudication, which result JBH have applied to enforce. Moreover, as Mr Frampton correctly noted, no part of this appeal sought the payment of any sum by JBH to AVB, so this court does not have the power to award any such sum in any event. This all reflects the largely academic nature of this appeal, to which I referred at the outset of this judgment.

57. On 24 January 2023 J&BH made a "Without Prejudice Save as to Costs" offer in respect of the costs of the Part 8 proceedings and the Appeal. In the event the Court of Appeal determined that each party should bear their own costs of the Part 8 Proceedings and the Appeal.

58. On 15 February 2023 I handed down my judgment enforcing Mr Smith's decision.

59. In Judgment No. 2, amongst other issues, I considered the state of the Particulars of Claim. I struck out certain claims and allowed/required A & V to replead other parts.

60. In Judgment No. 3, amongst other issues, I considered the redrafted Particulars of Claim. I gave directions in that regard, which reflected that parts of that pleading were unsatisfactory.

61. On 9 November 2023 J&BH made a further written offer.

62. I accept that this offer complied with the formalities required by Part 36. It was in the following terms:

> We write with reference to ongoing proceedings between A&V and JBH. For the reasons made clear in previous correspondence, JBH remains confident that it will successfully defend A&V's claims and it will ultimately be determined that Mr Smith's Decision in the final account adjudication accurately reflects the true value of A&V's account and its further alleged entitlements.
>
> Nonetheless, JBH remains mindful that under the Civil Procedure Rules that litigants are expected to try to resolve their disputes whenever possible and that proceeding to trial, even if successful, is likely to lead to irrecoverable costs. We are, therefore, authorised to make A&V the following offer to settle under Part 36 (the **"Offer").**
>
> Please note the Offer takes account of any counterclaim or set-off for the following sums which are payable by A&V to JBH irrespective of the outcome of claim number HT-2023- 000006:
>
> a. Mr Smith's fees in the final account adjudication £13,962.00
>
> b. JBH costs awarded in claim number HT-2022-000444 £20,822.00
>
> **Total £34,784.00**
>
> **Terms of the Offer**
>
> This Offer is made pursuant to Part 36 of the Civil Procedure Rules **("CPR"),** and is intended to be JBH's (the Defendant's) Part 36 offer. Therefore, JBH will be liable for A&V's costs of the proceedings in accordance with CPR 36.13, if the offer is accepted within 21 days of the deemed service date of this Offer, i.e. by 4 December 2023 (the **"relevant period").**
>
> The terms of the Offer are as follows:

- JBH will pay A&V the sum of £100,000, including interest, (the **"Settlement Sum")** in full and final settlement of claim no. HT-2023-000006 and all claims either party may have against one another in respect of and/or arising out of the Mouslecoomb Campus project.

- The Settlement Sum will be paid within 14 days of acceptance of the Offer, by electronic bank transfer to A&V's bank account (the details of which JBH already has).

- For the avoidance of doubt, the Offer takes account of any counterclaims.

- The settlement sum does not include the costs of the proceedings and, as indicated above, JBH will pay A&V's costs in respect of claim number HT-2023-000006 on the standard basis to the date of notice of acceptance of this Offer, if it is accepted within the relevant period. Such costs to be assessed if not agreed. A&V's entitlement to the costs of the proceedings will need to take account of (and not include) prior costs orders already made.

- Following acceptance of the Offer, the parties will file a Consent Order staying Claim Number HT-2023-000006 upon the terms of the Offer.

Consequences of Failure to Accept

If A&V does not accept the Offer, and JBH obtains a judgment which is equal to or more advantageous than the Offer, JBH intends to rely on CPR 36.17. In other words, JBH will be seeking an order that A&V pays JBH its costs from the date when the relevant period expires and interest on those costs.

If A&V considers the Offer to be in any way defective or non-compliant, please let us know by return.

63. It is J&BH's submission that A & V failed to beat this offer. A & V submits that it did beat this offer.

64. In the Defendant's Costs Submission Bundle which accompanied its first round of Submissions on Costs, there is a helpful calculation of the state of account as at the date of this Part 36 Offer. This shows the amounts awarded in the following sums:

Contract Sum	£96,535.83
Interest on Contract Sum	£25,566.13
Damages	£6,096.64
Interest on damages	£963.34
Mr Blizzard's fees	£17,400
Interest on Mr Blizzard's fees	£2,210.87
Total	**£148,772.81**

65. Thus, stopping there, A & V comfortably beat this offer. However, there are two further factors to consider.

66. The first is that by the offer JBH offered to forego claims totalling £34,784.00 which are treated as being counterclaims in the proceedings.

67. I have held in Judgment No. 7 that J&BH is entitled to recover Mr Smith's fees in the sum of £13,962. As to the costs, I have also held in paragraph 512 of Judgment No. 5 that I have no jurisdiction to interfere with this order.

68. Accordingly, I accept that the real value of this offer should include these amounts. Accordingly the comparison is between £134,784.00 plus interest and the final result. J&BH's calculations show that when interest is taken into account on both sides of the equation the amount recovered is equivalent to £111,595.48 at the relevant date. Thus taking into account the sum of £34,784 does not on its own change the result so far as the 9 November 2023 offer is concerned.

69. There is a second point: this relates to the Construction Industry Scheme.

70. As I set out at paragraphs 28 to 36 of Judgment No. 7, J&BH contends that the amount payable to A & V should be reduced by 20% because of a requirement on J&BH to account to the HMRC for amounts which A & V might owe HMRC in respect of taxes.

71. It is J&BH's submission that in considering the amount recovered by A & V for the purposes of assessing the 9 November 2023 offer, I should take a figure after deduction of the 20% said to be payable to HMRC. The point is put as follows in paragraphs 13 and 14 of the Defendant's Cost Submissions:

> 13. The Defendant's calculation of the account following Judgments No. 5 to 7, is that the net sum due to the Claimant as at 4 December 2023 (before any CIS deduction) was £111,585.48….
>
> 14. The Judgment would be more advantageous to the Claimant (by £11,585.48), save that if the CIS Deduction is applied to the amount to be paid to A & V under the Judgment (a deduction of £19,307.17), then it is less advantageous. A & V would only have received £92,288.31 under the Judgment.

72. I reject this submission.

73. Firstly, I refer to what I said in paragraphs 32 to 34 of Judgment No 7:

> 32. On one view, this point is a point which should have been raised by J&BH before the hand down of my Fifth judgment, insofar as it goes to the amount payable by J&BH to A & V. I do not understand that to be how J&BH puts its case, and, for the avoidance of doubt, I record that my Fifth judgment stands as determining the amounts due from one Party to the other subject to the exceptions in respect of adjudicators' fees and interest, and in respect of the enforcement proceedings between the Parties (Mr Smith's fees and the Enforcement Costs).
>
> 33. If the point does not go to the state of account between J&BH and A & V, then no issue of res judicata arises.
>
> 34. In my judgment, the time at which this point will become relevant is when I decide whether there should be a stay on any part of the judgment in favour of A & V against J&BH, and, if so, upon what terms.

74. In my judgment, what J&BH now seeks to do goes directly against what I said in paragraph 32 of Judgment No. 7:

> I record that my Fifth judgment stands as determining the amounts due from one Party to the other subject to the exceptions in respect of adjudicators' fees and interest, and in respect of the enforcement proceedings between the Parties (Mr Smith's fees and the Enforcement Costs).

75. Secondly, it seems to me that J&BH's submissions miss an important point: whilst the CIS arrangement may require a payment to be made in part to HMRC rather than to A & V, it is a payment made in effect on behalf of A & V on account of A & V's liability for taxes, and thus A & V is benefitted to the extent that its account with HMRC is credited with that amount.

76. Thirdly, J&BH's liability for payment overall is not reduced: it still has to pay the amount which I have adjudged to be due, but pays part to HMRC rather than to A & V. Accordingly, J&BH is in no way advantaged.

77. Fourthly, it would be fundamentally unfair for me to hold against A & V a point of which neither party was aware when the 9 November 2023 offer was made by J&BH and considered by A & V.

78. Finally, the point, although known about by J&BH by 15 March 2024 (see paragraph 36 of J&BH's submissions recorded at paragraph 30 of Judgment No. 7) was not raised by J&BH until I was considering the consequential matters covered by Judgment No. 7: all that time both Parties were incurring costs.

79. For those reasons, when considering the effect of the 9 November 2023 offer, I hold that it was an inadequate offer. Alternatively, it would be unjust to take the CIS deduction into account when considering the 9 November 2023 offer in accordance with the terms of CPR Part 36.17(3), particularly having regard to the fourth and fifth points I have made above.

80. On 10 November 2023 A & V made a Counter-Offer:

> We are writing to respond to your Part 36 Offer dated 9 November 2023. After careful consideration, and while A&V are confident of being successful in this matter A&V are willing to make a counteroffer in an effort to reach an amicable resolution.
>
> **Details and Terms of the Counteroffer:**
>
> 1. **Amount Offered for Settlement**: £600,000, including interest+ VAT.
> 2. **Time Limit for Acceptance**: This counteroffer is valid until l51 December 2023 [21 days from the date of this letter], in accordance with Part 36 rules.
> 3. **Costs**: The settlement sum includes costs of the proceedings up to the date of acceptance.
> 4. JBH to pay A&V the sum of £600,000, including interest + VAT [the Settlement Sum] in full and final settlement of claim no. HT-2023-000006 and all claims either party may have against one another in respect of and/or arising out of the Mouslecoomb Campus project….

81. It is doubtful whether this offer complied with Part 36, but, in any event, J&BH very comfortably beat this offer.

82. On 8 February 2024 J&BH made a further offer. Again, in my judgment, as with the 9 November 2023 offer, it complied with Part 36.

83. The only difference from that offer, apart from irrelevant changes to the opening paragraphs, was that the offer was now for £160,000, rather than £100,000.

84. To return to the calculations to which I referred above, the equivalent to the £148,772.80 figure relevant for consideration of the 9 November 2023 offer is £152,380.67.

85. On the basis of this calculation, in my judgment A & V failed to beat this offer.

86. Further, by the same reasoning as in respect of the 9 November 2023 offer, this offer was worth not just £160,000, but rather £194,784.

87. Having reached those conclusions as to the efficacy of the various offers and counter-offers, I turn now to the effect of those conclusions.

Relevant time periods

88. I consider the costs issues in respect of the following time periods:

1. To 4 December 2023;
2. 4 December 2023 to 1 March 2024;
3. 1 March 2024 to 18 June 2024;
4. 18 June 2024 to the present.

Allocation of Costs up to 4 December 2023

89. In this period the allocation of responsibility for costs is governed by CPR Part 44.2 which I have set out above.

90. As always under CPR Part 44.2, the first question is, is there a successful and an unsuccessful party? If so, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.

91. In the event, my judgment awarded A & V a significant sum of money. No offer was made by J&BH which came even close to being an appropriate amount when all the relevant circumstances were taken into account as I did in judgments Nos 5 to 7.

92. The process of getting to that conclusion was complicated by J&BH's inappropriate deployment of jurisdictional objections to the Blizzard adjudication, its inappropriate commencement of Part 8 proceedings, its persuasion of Eyre J to reach an erroneous conclusion which had to be put right by the Court of Appeal, and its presentation to Mr Smith in that adjudication of what I have held to be a case ill-founded in fact and law.

93. Because of all these decisions and actions on the part of J&BH, its decisions as to offers to make or offers to reject were understandable at the time made. However, the fundamental fact is that J&BH never made an offer in this period which reflected A & V's true entitlements.

94. It is correct that A & V put forward what I have found to be a large and ill-founded claim for damages. The appropriate way for J&BH to deal with that was to make an appropriate

offer which reflected the true value of the other claims which A & V was putting forward. J&BH did not do so.

95. By contrast, A & V made offers which, although rather too high, were not far short of the amount which I found due to them.

96. In my view, the appropriate conclusion in respect of this period is that A & V was the successful party and that, in consequence, a costs order in its favour is appropriate.

97. The issue then to be considered is whether I should make some reduction from the amount otherwise payable by J&BH to reflect the only major issue on which it won: that is the very large claim for £645,100.45 for J&BH breaches.

98. Whilst J&BH won this issue with a minor exception in that all but about £6,000 of the claim was dismissed, the claims depended upon a central factual and legal issue which was at the heart of this case, and upon which J&BH's counterclaims depended, namely whether J&BH was in repudiatory breach of contract. On that issue I found firmly against J&BH.

99. In my judgment, relatively little by way of costs was incurred by J&BH in this period in respect of the damages claim put forward by A & V. This changed in later periods.

100. Taking all the above matters into consideration, I hold that A & V is entitled to an order that J&BH pays its costs in respect of the period to 4 December 2023. That order does not displace the order already made that J&BH is entitled to its costs thrown away as a result of repleading of the case by A & V (paragraph 5 of the Order dated 23 October 2023).

Allocation of Costs 4 December 2023 to 1 March 2024

101. This period covers the period between the 9 November 2023 and the date when the 8 February 2024 offer expired.

102. The differences between this period and the previous period were as follows:

1. J&BH's 9 November 2023 offer was quite close to a sufficient offer;

2. A & V's Counter-Offer on 10 November 2023 was a long way from being a realistic assessment of A & V's entitlements;

3. J&BH's expert witness, Mr Geale, presented his first invoice for his services in the sum of £5,000 plus VAT of £1,000;

4. J&BH's solicitors incurred what I have calculated as being £3,536 (net of VAT) in respect of costs relating to instructing Mr Geale.

103. The first difference between this and the previous period is that during this period J&BH made its 9 November 2023 offer, which was not far off being an effective Part 36 offer shifting the cost burden from J&BH to A & V.

104. The second difference was that A & V made a Counter-Offer on 10 November 2023, which was a very long way off being an effective Part 36 offer.

105. The third difference in this period was that J&BH incurred expenses which can be clearly attributed to the large claim for damages.

106. In my judgment the fair result in this period is that A & V as the successful party should have an order for costs in its favour during this period, but there should be a deduction or

allowance in J&BH's favour in respect of the costs clearly identifiable as relating to A & V's damages claim – i.e. a total of £8,536.

Allocation of Costs 1 March 2024 to 18 June 2024

107. This period is the period between the 8 February 2024 offer taking effect and Judgment No. 5.

108. As I have held above, the 8 February 2024 offer was an effective offer which A & V failed to beat.

109. I have no hesitation in holding that it was unreasonable for A & V to continue its pursuit of a higher recovery in the face of a reasonable offer.

110. I accept that this was a late offer in the context of the previous history of the multiple proceedings, and that it was probably driven by a belated realisation on J&BH's part of the risks it faced in this action. However, contrary to A & V's submissions, it was a reasonable and good faith attempt to settle this difficult case.

111. I have set out above guidance in the authorities as to the matters to be taken into account when considering what costs order should be made following a failure to beat an effective Part 36 offer.

112. Those authorities emphasise, firstly, the difference between the exercise carried out pursuant to CPR Rule 44 and that carried out pursuant to CPR Part 36 where a party has failed to beat a Part 36 offer. In the latter case, an important factor is that acceptance of

the offer could or would have reduced the costs incurred by both parties after the offer had been made.

113. Applying the guidance given in the authorities to which I have referred, in my judgment the usual consequences should flow from a Claimant's failure to beat a Part 36 Offer: A & V will pay J&BH's reasonable costs from 1 March 2024 to the date of Judgment No. 5.

Allocation of Costs 18 June 2024 to date

114. I have separated out this period because it seems to me that during this period the Court has been dealing with:

1. Ancillary matters as to interest;
2. Sundry issues as to such matters as Mr Smith's fees;
3. The costs consequences in respect of the period to 4 December 2023;
4. The costs consequences in respect of the period 4 December 2023 to 1 March 2024;
5. (A new matter) issues relating to A & V's application for a Third Party Debt Order.

115. I do not think it would be appropriate to simply say that, as a matter of chronology, all these costs followed the 8 February 2024 offer and that A & V should pay J&BH's costs.

116. In my view, both Parties have had successes and failures in this time period relating to matters connected with the history of these proceedings both before and after J&BH's successful 8 February 2024 offer:

1) As to interest, A & V had substantial successes as to the rates and statutory basis upon which interest should be awarded;

2) A & V failed in an attempt to go behind the previous agreement as to the amount already paid;

3) J&BH failed in an attempt to reduce the amount payable by reference to CIS deductions;

4) J&BH has failed in an attempt to persuade the Court that it should not bear the costs of this action up to 4 December 2023;

5) J&BH has mainly failed in an attempt to persuade the Court that it should not bear A & V's costs of this action between 4 December 2023 and 1 March 2024, and, on the contrary, I have decided that J&BH should pay those costs: however, a contrary allowance in A & V's favour has led to a net figure in J&BH's favour, mainly because of the very low hourly figure allowed to a litigant in person;

6) A & V has failed in an attempt to persuade the Court that it should not bear the costs of this action between 1 March 2024 and 18 June 2024, and, on the contrary, I have decided that A & V should pay those costs;

7) J&BH has brought an application for a Debt Management Order: I have not as yet dealt with that matter.

117. In my judgment, I should deal with the Third Party Debt Order as being a separate matter from the other matters which were ancillary to the proceedings in which this judgment is being given.

118. Having regard to the successes and failures of both Parties, I hold that, leaving on one side at this point the order to be made in respect of the costs relating to the Third Party Debt Order, the just order in respect of the period from 18 June 2024 to date is that there should be no order as to costs.

Summary Assessment?

119. In paragraph 65 of its Costs Submissions, J&BH submits that "given the circumstances of and to bring a close to this case, this is a case where it is appropriate for the Court to determine the amount of costs by way of summary assessment".

120. A & V does not oppose this.

121. J&BH's proposal is highly unusual in a case after a 5 day trial, but in the circumstances of this case it seems to me realistic to make a summary assessment in this case.

Cost assessment up to 4 December 2023

122. During this period, I have concluded that J&BH is liable to pay A & V's costs in this period.

123. At no time has A & V been represented in these proceedings. Accordingly CPR Part 46.5 applies:

(1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.

(2) The costs allowed under this rule will not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.

(3) The litigant in person shall be allowed –

> (a) costs for the same categories of –
>
> > (i) work; and
> >
> > (ii) disbursements,
>
> which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;
>
> (b) the payments reasonably made by the litigant in person for legal services relating to the conduct of the proceedings; and
>
> (c) the costs of obtaining expert assistance in assessing the costs claim.

(4) The amount of costs to be allowed to the litigant in person for any item of work claimed will be –

> (a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work; or
>
> (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46.

(5) A litigant who is allowed costs for attending at court to conduct the case is not entitled to a witness allowance in respect of such attendance in addition to those costs.

(6) For the purposes of this rule, a litigant in person includes –

> (a) a company or other corporation which is acting without a legal representative ….

124. CPR Part 46(4)(b) refers to "the rate set out in Practice Direction 46". This is presently, and was at all material times, £19 per hour.

125. A & V submitted in its first round of costs submissions:

> 9. A&V Building Solution Limited (A&V) represented by myself, Mr Alex Paduraru as a Litigant in Person (LIP), respectfully submits these submissions as to costs in these proceedings. There submissions are made pursuant to CPR 44.2 and CPR 46.5, and in accordance with the Court's direction in paragraph 48 of the draft judgment.
>
> 10. Mr Paduraru, acting as a litigant in person, has undertaken an extensive and burdensome level of legal and administrative work that would otherwise have been carried out by legal professionals. This work, by its nature, has involved the same level of complexity and diligence that solicitors and counsel typically perform. Despite the demanding nature of these proceedings, I, Mr. Paduraru, was compelled to act as a litigant in person due to JBH's refusal to honour Mr Blizzard's adjudication decision and pay the sum due to A&V, which caused substantial financial strain.
>
> 11. JBH's non-compliance with its obligations including the wrongful issue of Part 8 proceedings in bad faith, left A&V in a dire financial position, depriving the company of the resources to retain legal counsel. JBH's failure to pay the £150,000 awarded by Mr Blizzard in January 2022 effectively denied A&V its right to secure legal representation, thus forcing me to act as a litigant in person throughout these protracted proceedings.
>
> 12. I have had to take numerous days off work, resulting in lost income, in order to manage and deal with this case.
>
> 13. The work undertaken by me, Mr Paduraru, includes, but is not limited to:
>
> - The preparation of all legal documents, bundles, and submissions;
> - Extensive correspondence with the Court and the Defendant's legal representatives;
> - The review and analysis of complex evidence and documentation;
> - Attendance at all hearings (both in person and remotely), including the five-day trial;

- Managing the administrative aspects of the case and responding to JBH's legal strategies, which have been deliberately obstructive and in bad faith.

14. JBH's conduct throughout this litigation has been nothing short of oppressive. JBH has repeatedly refused to engage in good faith settlement discussions, rejected the reasonable efforts of A&V to resolve the dispute outside of court, and needlessly prolonged these proceedings, causing A&V to suffer financially and operationally. This has forced A&V to expend significant time, money, energy, and resources in an effort to secure the payment that JBH was obligated to provide from the outset.

15. Had A&V [had] the opportunity [of having] been represented by solicitors and counsel in these proceedings, the costs incurred by A&V would have been no less than those of JBH, which currently stand at £166,359.02 as per JBH's approved costs budget following the CCMC hearing ….

16. These figures, approved by the Court, provide a reasonable estimate of the legal fees that A&V would have incurred had it not been forced to act as a litigant in person.

17. Therefore, applying the two-thirds rule under CPR 46.5(2)(a)(i), A&V claims only £110,906.01 (and/or two-thirds of JBH final costs as they may have increased since) as recoverable Litigant in Person (LIP) costs. This figure reflects the substantial time spent and legal work undertaken by me, Mr Paduraru, and is justified by the fact that my work mirrored the scope, time and complexity of work performed by JBH's legal team in this case HT-2023-000006.

[REIMBURSEMENT] OF COURT FEE

18. A&V incurred a court fee of £10,000 in January 2023 to initiate these proceedings. This fee was an essential disbursement, necessitated by JBH's failure to comply with the Pre-Action Protocol for Construction and Engineering Disputes. JBH's refusal to pay the amounts due under the adjudicator's Mr. Blizzard decision left A&V with no option but to pursue legal action in this Court. The fee of £10,000 represents a direct financial loss to A&V, which should be fully reimbursed .

….

CONSULTANT/QUANTITY SURVEYOR COSTS

20. In addition to the Litigant in Person costs, A&V also incurred expenses for the valuable services of Mr. Judd, a construction consultant and quantity surveyor. Mr Judd's expertise was crucial to the technical aspects of this case, particularly in relation to the measured works and the variation

> account. The complexity of these matters required an expert understanding of the construction industry, contractual variations, and project valuation.
>
> 21. Mr. Judd's role extended beyond technical evaluation. He provided indispensable support in preparing evidence, advising on construction practices, and assisting with the analysis of the Defendant's submissions. His input was fundamental to presenting A&V's case more clearly and comprehensively.
>
> 22. Furthermore, Mr. Judd played a significant role in attempting to resolve the dispute without the need for adjudication or court proceedings and the Court is aware of this fact. Mr. Judd engaged in extensive correspondence with JBH in an effort to reach an amicable resolution. Regrettably, JBH consistently rejected these overtures, demonstrating a clear intention to resist payment through procedural delays and obstructions. Mr. Judd's efforts to avoid unnecessary litigation underscore the unreasonable stance adopted by JBH, forcing A&V into further litigation despite the possibility of earlier settlement back in 2021.
>
> 23. A&V claims only £10,569.12 for Mr. Judd's services, which were necessary for proper conduct of this case …

126. J&BH responded to this at length in its Responsive Submissions on Costs.

127. Firstly, J&BH submitted:

> 10. As to the amount of costs, the Claimant claims two-thirds of the total costs set out in the Defendant's costs budget.
>
> 11. The Claimant's position is incorrect. The Claimant is not entitled to, and the Court should not order, a theoretical figure by reference to the Defendant's costs.
>
> 12. CPR 46.5(2) is an overall limit or cap (see commentary to the White Book at 46.5.1), that a litigant in person's costs should not exceed, save for disbursements, two-thirds of the amount which would have been allowed if it had been represented. That does not mean the Court can or should award a litigant in person two-thirds of a represented party's costs.

128. I accept J&BH's submission in this regard: I agree that CPR Part 46.5(2) is an overall limit or cap.

129. Then J&BH submitted:

15. the Claimant has failed to provide any, or any credible, evidence to allow the Court to make an award of costs on this basis.

16. As to CPR 46.5(4)(a):

16.1 No financial loss has been proved. Paragraph 3.2 of PD 46 has not been complied with:

> "Where a self represented litigant wishes to prove that the litigant has suffered financial loss, the litigant should produce to the court any written evidence relied on to support that claim, and serve a copy of that evidence on any party against whom the litigant seeks costs at least 24 hours before the hearing at which the question may be decided."

16.2 Significantly, the loss is of the litigant, i.e. A&V, not Mr. Paduraru, A&V's financial loss was sought as a claim in these proceedings. The Court has already found that A&V had not established any financial loss at paragraphs 504 and 505 of Judgment No. 5. Costs cannot, therefore, be awarded under CPR 46.5(4)(a).

16.3 Even if Mr Paduraru's lost income could be relevant, the evidence he gave at trial as to when he was and was not working was incomplete, inconsistent and unreliable. There is no clear evidence that he had to take days off work he otherwise would have been paid for, in order to attend to this claim.

17. As to CPR 46.5(4)(b):

17.1 The Claimant has failed to provide a proper breakdown of the work done or the time spent (including, for example, for each cost budgeting phase). A basic level of information should be required before the Court considers making a cost order. An award of costs is intended to be compensatory, not a penalty to a paying or a windfall for a receiving party.

17.2 In the period up [to] 4 December 2023 (the period where the defendant accepted there should be a cost order in the Claimant's favour <u>if sufficient information had been provided</u>), time was also spent on the following matters, none of which form part of are recoverable as costs of these proceedings:

17.2.1 The Blizzard and Smith Adjudications.

17.2.2 The Part 8 proceedings and appeal.

17.2.3 The enforcement proceedings.

17.3 As a maximum, the period up to 4 December 2023, covers the pre-action and statements of case phases (which in fact extended to January 2024). The Defendant incurred total costs of £44,282.12 in those phases, which included the cost of the applications, (see the costs budget …). At an average hourly rate of £275, this equates to c. 160 hours (£44,282.12 ÷ 275 = 161.03). The time spent by Mr. Paduraru would be less because the Defendant's hours, for example at hearings, would include time for both solicitors and counsel. Per paragraph 3.4 of PD46, the amount which is to be allowed to a litigant in person under CPR 46.5(4)(b) is £19 per hour. £19 at 160 hours would be £3,040. That is the maximum figure which the Court should consider for the Claimant's costs up to 4 December 2023.

17.4 Standing back 160 hours is more than sufficient given the Claimant's main tasks in this period were:

17.4.1 A letter of claim which replicated the submissions in the Adjudication and was drafted by Mr Judd in any event (see below).

17.4.2 A very brief claim form.

17.4.3 The application hearings, where the Claimant's time and focus was mainly on its own finances which was a limited and relatively simple issue for the Claimant to address in terms of time required.

17.4.4 The Claimant's multiple attempts to amend its case, on which (i) the Court has already made a partial costs order, (ii) significant claims made by the Claimant were struck out, and (iii) otherwise the Claimant's evidence and position did not significantly develop from the adjudications.

17.5 The Defendant's time and costs were increased as a result of facing a litigant in person, including the extra administrative burden of correspondence and bundles, and the additional burden the Defendant carried in fully addressing the law. The Claimant spent minimal time researching or addressing the law. The Defendant does not criticise the Claimant in that regard, but it means the time spent by the theoretical represented party would have been less than the time spent by the Defendant.

17.6 The Claimant cannot recover for all the time spent by Mr Paduraru. Time spent acting as client or witness is not recoverable. The Claimant is only allowed, per CPR 46.5(3), to recover for categories of work which would have been done by a legal representative ("costs for the same of – (i) work; and (ii)

> disbursements, which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf").
>
> 18. In summary, the Court should order that the Defendant is to pay 30% of the Claimant's costs up to 4 December 2023 in the maximum amount of £1,000 (c.30% of £3,000) plus disbursements ….

130. The passages from both Parties' submissions which I have quoted deal with arguments as to the allocation of costs under CPR Part 44.2: I have dealt with that issue above. Here I am concerned with the assessment of those costs.

131. The first issue with which I must deal is A & V's submission in its third round submissions, namely that costs should be assessed on the indemnity basis. I do not accept that grounds for assessment on the indemnity rather than the standard basis have been made out. However, on the material before me the distinction in respect of A & V's costs is of no materiality.

132. I accept J&BH's submission that there is no evidence upon which I could base the assessment of Mr Paduraru's own time spent upon the basis of CPR 46.5(4)(a), namely as a case where "the litigant can prove financial loss". Thus I am required to assess the costs upon the basis of CPR Part 46.5(b) at an hourly rate of £19.

133. I have no evidence from A & V as to the actual number of hours spent by Mr. Paduraru. J&BH does not suggest that I should refuse to make any award of costs on that basis: instead, as seen above, it submits that I should take as a starting point the number of hours spent by J&BH's solicitors during this period.

134. I think that this is a realistic starting point.

135. J&BH then submits that A & V cannot claim for time spent by Mr Paduraru as "client or witness". I accept the general principle in theory, but think it impractical to apply in practice in respect of the time period I am presently considering.

136. Having accepted the 160 hours spent by J&BH's solicitors as a realistic starting point, should that figure be adjusted, and, if so, upwards or downwards?

137. In my judgment it should be adjusted, and adjusted upwards. It seems to me that Mr. Paduraru as a litigant in person would have needed time to familiarise himself with matters which would be or should be second nature to experienced litigation solicitors. However, in the absence of any records of time taken, such uplift must be modest: I allow 200 hours.

138. Thus I assess the amount payable in respect of Mr Paduraru's time in this period in the sum of £3,800.

139. I turn now to the sum which should be allowed for the Court Issue Fee. The amount paid by A & V was £10,000.

140. The fee payable for a Court Issue Fee is 5% of the amount claimed for a claim more than £10,000 and not more than £200,000, and £10,000 for a claim more than £200,000.

141. J&BH submits as follows in its Responsive Claim Submissions:

> 23. For the reasons set out in the Defendant's submissions on costs, the Defendant considers that it should be ordered to pay 30% of the Claimant's costs up to 4 December 2023, which includes the court issue fee. The Defendant should therefore be ordered to pay the Claimant for the court fee.
>
> 24. If the sums due under the Judgment and the Defendant's set offs (which the Claimant should have accepted) are calculated with interest up to 9 January 2023 – the date the claim was issued – the total due to A & V is £100,978.46 … The issue fee for a claim for £100,000 would have been only £5,000. On any view, the

> Defendant should not be liable for the higher court fee which the Claimant only incurred because it, wrongly, valued its claim at over £200,000.

142. As to the point raised in paragraph 23 of those submissions, I have ruled against any reduction in the percentage of costs recoverable by A & V in this period.

143. As to the point raised in paragraph 24, the logic is powerful, but in my judgment A & V is entitled to the full £10,000.

144. The problem facing a Claimant is a claim such as the present is to assess the appropriate figure between £10,000 and £199,999.99 upon which to assess the Court issue fee. Underestimate that figure, and the Claimant is liable to be criticised.

145. In most cases, the interest claim is for interest under the Senior Courts Act 1981, but here the claim was also under the Late Payment of Commercial Debts (Interest) Act 1998, which is a claim for a specific remedy with its own code.

146. I do not need to determine the issue definitively, but it seems to me at least highly arguable that a claimant seeking interest under the 1998 Act should allow for that claim in calculating the amount claimed by way of Court issue fee. That is, of course, difficult to do at the date of issue of the Claim Form as it is not then known how long the case will take to come to trial. (In this case, it may be noted, J&BH resisted the relatively early trial date fixed by the Court: had its submissions succeeded, the amount payable under the 1998 Act would have been significantly higher).

147. Thus, it seems to me, a claimant would not be acting unreasonably if it erred on the side of caution in determining upon what claim sum to calculate the Court issue fee.

148. In the event the judgments I have handed down have entitled A & V to a little over £160,000, for which the Court issue fee would be £8,050.

149. In my judgment it would have been reasonable for the A & V to assess the Court issue fee as amounting to £10,000 even if it had not put forward the claims which did not succeed which took the claim well over £200,000.

150. Accordingly I award A & V the sum of £10,000 which it seeks.

151. The final item for assessment in this period is the amount payable in respect of Mr Judd's fees.

152. The amount claimed is £10,569.12.

153. The first point raised by J&BH in paragraphs 26 and 27 of its Responsive Submissions as on Costs is as follows:

> 26. Firstly, on analysis of the invoices provided by the Claimant, the costs claimed do not relate to these proceedings. Mr Judd confirmed in his evidence at trial that he was now acting free of charge. The entries on the invoices provided all relate to the appeal, the adjudications or the enforcement proceedings. The only line item which does not do so is the final invoice (MS-1076) where £2,177.50 is claimed for:
>
> > "Pre Action protocol claim letter/Final Account spreadsheet 28/11/22 including review and incorporating adjudication evidence and commentaries."
>
> 27. That is the only figure which could be considered costs of and occasioned by these proceedings.

154. Not without regret, since Mr Judd has been of considerable assistance to the Court, I accept this submission. Accordingly the maximum recoverable in respect of Mr Judd's fees is £2,177.50.

155. J&BH take a second point:

> 31. The Defendant accepts that a more nuanced, and to some extent distinct, approach has been adopted in adjudication enforcement proceedings. *Octoesse v Trak Special* [2016] 6 Costs LR 1187 was a claim for a claim consultant's costs in adjudication enforcement proceedings. Jefford J. set out the relevant principles as follows at [29]:
>
> > "In my judgment, Agassi is not, therefore, authority for a general proposition that costs of claims consultants or other consultants who give advice and support in litigation can never be recovered. The principles I derive from that decision are these:
> >
> > > i) Where a litigant-in-person seeks to recover the costs of a consultant's assistance, the relevant question is whether, in the particular instance, the consultant's costs are recoverable as a disbursement.
> > >
> > > ii) That question is answered by posing and answering the question whether those costs would have been recoverable as a disbursement if it had been made by a solicitor.
> > >
> > > iii) Costs would be recoverable as a disbursement by solicitors if the work is such as would not normally be done by solicitors.
> > >
> > > iv) But there nonetheless may be specialist assistance the cost of which would be recoverable."
>
> 32. Applied to this case, drafting a letter of claim is work which *is* normally done by solicitors. A solicitor would not therefore normally be able to recover the disbursement incurred paying Mr Judd to draft the letter of claim.
>
> 33. The factors outlined by Jefford J at [30] to [34] as to why *"specialist assistance"* may be required in adjudication enforcement proceedings (or a Part 8 claim following an adjudication) – i.e. the abbreviated timescales and that the issues often arise from the adjudication – do not apply in this case. This was a full Part 7 proceedings.
>
> 34. Alternatively, if the Court considers an element of specialist assistance would have been recoverable, it is unlikely that a solicitor would have relied entirely on a claims consultant to prepare a letter of claim. A solicitor would only have used a claims consultant to input on particular points. As a rough assessment, a maximum of 50% of the disbursement, or 8 hours, should be recoverable (similar to the instructions and liaising with counsel at para. [47(ii)] of *Octoesse*). 50% of the relevant item is c. £1,000.

156. I accept that this correctly sets out the principles which I should apply.

157. In my judgment, the greater part of Mr Judd's input was likely to be proving technical assistance relating to the proper calculation of the final account. In my assessment an allowance of £1,500 out of £2,177.50 should be made.

158. Thus the amount due to A & V (subject to a deduction discussed below) is:

Mr Paduraru's time:	£3,800
Court Issue fee:	£10,000
Mr Judd's fees:	£1,500
Total:	£15,300

159. Against this must be set the appropriate amount due to J&BH pursuant to paragraph 5 of my Order dated 23 October 2023 that A & V shall pay J&BH's thrown away as a result of the re-pleading of the case by A & V.

160. J&BH assesses these costs in the sum of £4,479.45. This figure is explained in paragraph 36 of the Defendant's Submissions on Costs. In my judgment this is a reasonable assessment.

161. Accordingly, the net amount due to A & V in respect of the period to 4 December 2023 is £10,820.55 (£15,300 less £4,479.45).

Cost assessment 4 December 2023 to 1 March 2024

162. I have decided that during this period J&BH should pay A & V's costs subject to a credit in J&BH's favour.

163. During this period J&BH's legal team appear to have spent about 100 hours on the case.

164. For the reasons given above, I take this as a realistic starting point for assessment of a fair number of hours to allow for Mr Paduraru's involvement. I can see no basis to increase this number in this period, and therefore allow £1,900.

165. Against this is to be set the figure of £8,536 (see paragraphs 102 and 106 above).

166. Thus in respect of this period there is a net sum of £6,636 due from A & V to J&BH.

Cost assessment 1 March 2024 to 18 June 2024

167. I have determined that A & V should pay J&BH its costs in respect of this period.

168. On 26 March 2024 I made a Costs Management Order. That order was reflected in a Cost Estimate dated 3 April 2024.

169. As I understand the position, the following phases covered by the Cost Estimate were outstanding at 1st March 2024:

Work to be done	**Disbursements**	**Time Costs**	**Total**
Disclosure	£0.00	£1,050	£1,050

Witness statements	£0.00	£2,500	£2,500
Expert reports	£9,000	£1,000	£10,000
PTR	£0	£930	£930
Trial preparation	£29,500	£5,072	£34,572.50
Trial	£14,100	£12,200	£26,320
ADR	£608	£620	£1,228
Contingent cost for 5th sitting day	£3,000	£2,935	£5,935
Total	£56,208	£26,327.50	£82,535.50

170. The amount claimed by J&BH for the period since 1 March 2024 is £153,742.84, being disbursements of £80,568.84, invoiced time costs of £60,674 and work in progress of £12,500.

171. Thus the amount claimed is 86% higher than the amount estimated as late as 3 April 2024.

172. I note that the total estimated in the 3 April 2024 Cost Estimate for the whole case is £166,359.02.

173. In a case where a cost management order has been made, CPR Part 3.18 applies:

> In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –
>
> a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;
>
> b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and
>
> c) take into account any comments made pursuant to rule 3.17(3) and recorded on the fact of the order.

174. In the White Book at paragraph 3.18.3 the following guidance is given:

> In *Harrison* the Court of Appeal decided not to proffer any guidance as to what will constitute a "good reason" for departing from an agreed or approved budget, stating that this can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each approach to the need to find "good reason". Costs judges should approach this topic having in mind the three-stage test known as the Denton principles …. Accordingly, the assessing court might consider the significance of the case including in particular (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, practice directions and court orders.

175. In the case referred to in the White Book, *Harrison v University Hospitals Coventry & Warwickshire NHS Trust*[9], Davis LJ said:

> "… Where there is a proposed departure from budget be it upwards or downwards the court on a detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find "good reason": if only because to do so would tend to subvert one of the

[9] [2017] EWCA Civ 792; [2017] 1 WLR 4456 at paragraph [44]

> principal purposes of costs budgeting and thence the overriding objective. Moreover, while the context and the wording of CPR r 3.18(b) is different from that of CPR r 3.9 relating to relief from sanctions, the robustness and relative rigour of approach to be expected in that context *(see Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1 WLR 3926) can properly find at least some degree of reflection in the present context. Nevertheless, all that said, the existence of the "good reason" provision gives a valuable and important safeguard in order to prevent a real risk of injustice; and, as I see it, it goes a considerable way to meeting Mr Hutton's doom-laden predictions of detailed assessments becoming mere rubber stamps of CMOs and of injustice for paying parties if the approach is to be that adopted in this present case. As to what will constitute "good reason" in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case."

176. In my judgment, in the present case, the following matters are particularly important:

1) That a party seeking to recover more than the amount set out in its cost estimate has to establish "good reason" why it should be allowed to do so;

2) The need to enforce compliance with rules, practice directions and court orders;

3) That the cost management system can only work if those providing cost estimates to the Court exercise considerable care in formulating the costs estimates;

4) That if the Court extends parties latitude in forgiving mistakes in costs estimates, the cost management structure is liable to be undermined;

5) That parties should not be held to cost estimates in respect of costs which could not have been anticipated with the exercise of reasonable diligence;

6) That, in the language of a distinguished American politician, there are "known unknowns" and "unknown unknowns". In the context of cost estimates, the parties

presenting a cost budget to the Court have the option of informing the Court of uncertainties of which they are aware in estimates put forward in their skeleton arguments, in oral submissions or in contingencies or footnotes in the cost estimate;

7) That the closer the production of the cost estimate is to the time when the relevant costs will be incurred, the less latitude will be giving to a party which makes what turns out to be an erroneous assessment of the costs to be incurred: in this case the cost management exercise was carried out unusually close to trial;

8) That in this case, the assessment of J&BH's costs is being carried out in the context of A & V's failure to beat a Part 36 offer. In a commercial case such as this, a party deciding whether to accept a Part 36 offer (whether within the initial time period for acceptance or after that period on the usual basis as to costs) is entitled, and should be expected, to make such a decision on the basis that the cost estimate is a competently and thoroughly prepared estimate of the offering party's future costs, and an accurate statement in good faith of the costs already incurred.

177. Given the very limited scope for a party who is paying the other party's costs under the Part 36 regime to avoid the consequence of the "separate, self-contained" Part 36 code, it seems to me only just that the Part 3.18 regime should be applied somewhat carefully.

178. In this case, of the figures set out in the Cost Estimate, the following sums were not in the event incurred:

Witness statements	£2,500
PTR	£930

ADR	£1,228
Total	£3,558

179. If the figure of £3,558 is deducted from the Cost estimate total of £82,535.50, the figure is reduced to £78,977.50.

180. The starting point for my assessment is therefore the figure of £78,977.50. I can only depart from that figure (up or down) if I am satisfied that there is good reason to do so.

181. The first reason put forward in support of its submission that J&BH should be entitled to more than this minimum, J&BH submits in its Submissions on Costs:

> 57. Firstly, the Defendant's incurred costs in this period include costs incurred between 1 March 2024 and 26 March 2024, which are not therefore within the approved estimated costs. The costs incurred between 1 March 2024 and 26 March 2024 total £24,922.27 (time costs: £10,405 and disbursements: £14,517.27)…..

182. The Cost Management Order was made by me at a hearing before me on 26 March 2024. For the purposes of that hearing Mr Frampton submitted a Note which submitted as follows:

> 23. The Defendant has filed a cost budget at **[131]**. In summary:
>
> 23.1 The Defendant's incurred costs (up to 4 March 2024) are: £69,297.52.
>
> 23.2 The Defendant's estimated costs (from 4 March 2024 are: £94,941.50.
>
> 24. As at the date of the CCMC, the incurred costs will have increased (full CCMC phase and most of the expert phase), with the estimated costs for those phases reduced.
>
> 25. The estimated costs will be reduced further if there is no PTR. If there is no PTR, the Defendant estimate is for 3 hours of time costs.

183. This made clear that costs between 4 March and 26 March 2024 had been incurred but not been included in the incurred costs column. The assumption therefore was that those incurred costs were allowed for in the estimated costs column.

184. I asked J&BH for a reconciliation of the figures. This was helpfully provided as follows:

> 13. …. £24,922.27 is the costs in fact incurred between 1 March 2024 and 26 March 2024 (the date of the CCMC). That figure includes costs recorded as incurred costs in the cost budget. The breakdown to the £24,922.27 figure is as follows:
>
> > 13.1 **Costs incurred between 1 March 2024 and 3 March 2024.** These are costs that had already been included in the incurred costs set out in the 4 March 2024 costs budget. These costs are not reflected in the £14,526 adjustment to the incurred costs figure following the CCMC. These costs total £837.00. This is the total of the invoiced costs entries for 1 March 2024 – 3 March 2024 (inclusive) (see March 2024 invoice) [**Defendant's Costs Submissions Bundle p37**].
> >
> > 13.2 **The additional incurred costs between 4 March 2024 and 26 March 2024 discussed at the CCMC** and reflected in the approved budget dated 3 April 2024 of £14,526 (as above).
> >
> > 13.3 **An invoice from Matthew Geale dated 26 March 2024 for £8,951.25**. This was not received until after 5pm on 26 March 2024 and was therefore not in contemplation at the CCMC. This was not added to the incurred costs column for the 3 April 2024 budget as it had not been discussed with / approved by the Court.
>
> 14. The total of the above elements is £24,314.20. Subject to a small discrepancy (which JBH is unable to precisely identify the cause of) of £608.07, this aligns with the costs claimed by JBH for the period 1 March 2024 to 26 March 2024 per JBH's Submissions on Costs dated 27 September 2024.
>
> 15. …. the reduction in estimated costs was made by the Court during oral submissions at the CCMC to account for the increase in incurred costs of £14,526. This reflected costs incurred between 4 March 2024 and the time of the CCMC on 26 March 2024. The revised budget was filed on 3 April 2024 as that was the date by which it was to be filed, however it did not capture incurred costs after 26 March 2024 because the date of the Costs Management Order was 26 March 2024.

185. After the hearing before me on 26 March 2024 the Cost Estimate dated 3 April 2024 to which I have already referred was produced. As set out in the reconciliation above, the figure for incurred costs was increased from £69,297.52 to £83,823.52, an increase of £14,526. The Cost estimate reduced the estimated costs from £94,941.50 to £82,535.50, a reduction of £12,406. This increase in incurred costs and reduction in estimated costs reflected changes between 4 March 2024 and 3 April 2024.

186. Accordingly, if I take the figures in the 3 April 2024 Cost Estimate as my starting point in accordance with CPR Part 3.18, it allows for the costs up to 3 April 2024 subject to:

1) £837 in respect of invoiced costs between 1 and 3 March 2024;

2) An invoice from Mr Geale in the sum of £8,951.25;

3) An unexplained discrepancy of £608.07.

187. I am required by CPR Part 3.18 (b) to consider whether there was good reason to depart from the approved cost budget. In the circumstances set out above, I see no reason why the costs incurred between 1 and 3 March 2024 were not reflected in the cost budget placed before the Court on 26 March 2024, perhaps at least by a footnote, or in the 3 April 2024 Cost Estimate.

188. For these reasons I decline to increase the amount allowable by the costs said to have been incurred by J&BH between 1 and 3 March 2024.

189. A discrepancy for which there is no explanation cannot fall within the exception “for good reason”.

190. This leaves the invoice from Mr Geale.

191. In the Cost Estimate the incurred disbursement is £5,000. This can be correlated with Mr Geale's invoice of 26 February 2024.

192. In the Cost Estimate the estimated disbursement is £9,000. This can be correlated with Mr Geale's invoice of 26 March 2024 in the sum of £8,951.25, thus it is allowed for sufficiently in the Cost Estimate.

193. In the circumstances I do not consider that there is good reason to depart from the Costs Estimate in respect of costs incurred between 4 March and 26 March 2024.

194. J&BH seeks to increase the figure for future expert reports from £10,000 to £17,541.50. The reason given in paragraph 59.1 of J&BH's Submissions on Costs was as follows:

> The Defendant's estimate assumed that there would be only 1 report from Mr Geale. The Defendant did not anticipate that (i) Mr Paduraru would challenge the veracity of Mr Geale's qualifications, requiring time to be spent on correspondence and retrieving his certificates; (ii) Mr Geale would file a supplemental report in relation to a further statement from Mr Paduraru, and (iii) the Claimant would raise written questions of Mr Geale and allege that he has not responded to them. These are good reasons to depart the budget. The overall expert reports phase of £32,354.50 are reasonable and proportionate given the issues covered and the significant value of the claims they addressed.

195. Mr Geale's invoice of 22 May 2024 claims a total sum of £13,959.37. This is made up of four elements.

196. The first part is a bill of £1,979.00. Mr Geale described the work done as follows:

> Preparing our supplementary report for disclosure dated 26 April 2024
>
> Reviewing the witness statement from Alex Paduraru, dated 17 April; discussing this with HK in a Teams call on 19 April and undertaking all

> work necessary in preparing and finalising the supplementary report for disclosure dated 26 April.

197. I accept that an additional report was adduced from Mr Geale which was reasonably required and not anticipated at the time that the Cost Management Order was made. I accept that the cost estimate should be increased by the amount of £1,979.

198. The second part is a bill of £5,144.50. Mr Geale described the work done as follows:

> Preparing for trial, conference with Counsel, travelling to London and assisting at trial.
>
> All works necessary in preparing for and attending conference with Counsel on 13 May 2024; reviewing relevant sections of the Court bundles; reading Claimant and Defendant's opening submissions sent with your email on 13 May; preparing the list of questions for Counsel to ask the Claimant, as discussed in conference, in my email of 13 May; reviewing the Claimant's updated skeleton argument and the supplementary bundle; responding to your emails of 14 May; preparing my email of 14 May setting out my views of the negative creditor; research into tax treatment of DLAs; reviewing the new disclosure from the Claimant regarding sub-contractors and preparing an analysis of this; preparing detailed analysis of the Claimant's personal expenditure for inclusion in the court bundle; review of further disclosure from the Claimant of A&V tenders.

199. None of the work described is within the description given in paragraph 59.1 of J&BH's Submissions on Costs. Indeed this work all appears to be of a nature which J&BH's solicitors should have anticipated when preparing the Cost Estimate.

200. Accordingly I do not regard the charge of £5,144.50 as being a cost which can be recovered in addition to the amount in the approved Cost Estimate.

201. I return to the other two elements below.

202. J&BH seeks to increase the figure for trial preparation from £34,572.50 to £48,833.45. The reason given in paragraph 59.2 of J&BH's Submissions on Costs was as follows:

> The additional trial preparation costs related to the following unanticipated events: (i) on 30 April 2024, the Claimant sought an order that Mr Geale had not answered questions of him under CPR 35.6 and sought an order under CPR 35.6(4) that the Defendant could not rely on his evidence or recover the cost of his evidence, (ii) the Claimant sought disclosure of Mr Geale's instructions, (iii) on 10 May 2024 the Claimant sought disclosure of the Principal Contract which had to be retrieved and then was disclosed, (iv) time was spent identifying and removing duplicated documents from the prior bundles included in the trial bundle, and (iv) the Defendant's solicitors produced a schedule identifying the bundle page references for the marked up drawings at bundle pages 2208 to 2210.

203. I have seen no reflection of any significant additional time spent by Mr Geale on these matters. However, I do accept that these matters were likely to have increased the time spent by J&BH's solicitors. However, having examined the relevant invoice for the period from 30 April 2024 to the start of trial I find it difficult to accept that these matters themselves would have led to an increase of over £14,000 in solicitors' time – at £250 per hour this would be 56 additional hours. Doing the best I can on the information available, I allow an additional £5,000.

204. J&BH seeks to increase the figure for trial from £26,320 to £41,160.37. The reason given in paragraph 59.3 of J&BH's Submissions on Costs was as follows:

> The additional trial costs reflected (i) Mr Geale having to attend the trial for 2 days, as opposed to the 1 day estimated, (ii) the additional and late disclosure provided by the Claimant during the trial which required review and taking of instructions, (iii) time spent preparing the chronological bundle of key documents requested and provided to the Court following the Judgment, (iv) the unanticipated several rounds of further submissions and judgments post Judgment No. 5.

205. I return to Mr Geale's 22 May 2024 invoice. The third element of £6,000 was in respect of Mr Geale attending Court for two days at £3,000 per day. The fourth element of £835.87 relates to train travel (£250.89), a hotel for two night (£534.98) and subsistence (£50).

206. The costs on Mr Geale attending for one day is included in what J&BH accept they anticipated. As to the second day, nothing happened at the trial that could not and should not have been anticipated at the time the Cost Estimate was prepared. Accordingly I do not accept that J&BH has made out good reason in that respect to increase the amount allowed under the Cost Management Order.

207. As to the other matters raised in paragraph 59.3 of J&BH's Submissions on Costs, reason (v) relates to matters after Judgment No 5, a phase in which I have held that both parties must bear their own costs. I have dealt with reason (i) above.

208. As to the other matters, I accept that preparation of an additional bundle was an additional cause of work which appears to have generated possible £2,000 by way of additional profit costs between 20 and 30 May 2024. I accept that there was some additional disclosure during trial. It is difficult clearly to identify what time was spent on this, but I would allow £1,000 to reflect this. Thus there is an additional £3,000 to be added to the trial phase.

209. Accordingly I allow:

Cost budgeted figure	£82,535.50
Less phased work not done	£3,558
Net cost budgeted figure	£78,977.50
Additional Geale report	£1,979
Trial Preparation	£5,000
Trial	£3,000

Total	£88,956.50

Copying Costs

210. There is a separate issue which relates to copying costs in the sum of £3,130.80.

211. The facts in respect of this are set out in J&BH's Submissions on Costs:

> 82. The Defendant's solicitors further stated on 3 May 2024: *"Please confirm whether you require a hard copy of the Trial Bundle and, if so, please provide us with an undertaking by return that you will be responsible for our reasonable copying charges (which is standard practice)."* … In response, the Claimant confirmed that it required a hard copy (the Claimant in fact asked for 2 hardcopies however only 1 was provided as the Claimant failed to agree to pay for the second copy in advance as requested by the Defendant) and stated *"I acknowledge responsibility for covering the [reasonable] copying charges."* … The Defendant's solicitors explained on 7 May 2024 that the copying charges were £3,130.80 per bundle …
>
> 83. This cost has not been billed by the Defendant's solicitors to the Defendant.
>
> 84. The sum was instead billed to the Claimant …. but has not been paid.
>
> 85. A credit must also be given for this sum.

212. At paragraph 91.6 J&BH confirms that it will account for this sum to its solicitors.

213. In the circumstances set out above, I accept that it is appropriate that a credit should be given for the sum of £3,130.80. These costs were incurred during the phase of the proceedings in respect of which I have determined that A & V should not recover its costs. These costs were part of A & V's costs of the proceedings. Accordingly, the copying costs should be to A & V's account. Normally this would be dealt with between solicitors, but

in circumstances where A & V is not legally represented, the course proposed by J&BH is, in my judgment, just and appropriate.

Interest on costs

214. In the result I have determined:

1) That A & V will receive £10,820.55 in respect of the period to 4 December 2023;

2) That A & V will pay J&BH £6,636 in respect of the period from 4 December 2023 to 1 March 2024;

3) That A & V will pay J&BH £88,956.50 in respect of the period from 1 March 2024 to 18 June 2024.

4) That A & V will give a credit to J&BH for £3,130.80 in respect of copying costs.

215. It is common ground that interest can (and should be) allowed on costs.

216. Taking the above figures:

(1) In respect of the period to 4 December 2023, the biggest single element is the issue fee of £10,000. Interest on this figure should run from the date of issue of the Claim Form to this judgment at the rate of 4% over base rate until the date of this judgment. On the other, minor, figures the costs should be assessed at the same rate from the mid date of this period;

(2) In respect of the period from 4 December 2023 to 1 March 2024, there is a net sum payable from A & V to J&BH. Most of the cost element payable was billed to J&BH after 1 March 2024. In my view the fair result is for this to be treated as incurring interest from the date of due payment of J&BH's solicitors' invoice of 8 March 2024, namely 22 March 2024 until the date of this judgment. The rate will be the rate which J&BH itself contended to this Court in the enforcement proceedings for amounts due to it from A & V, namely a flat rate of 4% per annum;

(3) In respect of the period from 1 March 2024 to 18 June 2024, it seems to me that the usual approach of taking the midpoint in the period should be adopted, with the rate being 4% consistently with my decision at sub-paragraph (2) above;

(4) As to the credit for copying costs, J&BH has thus far incurred no expense.

217. The sums to be taken into account in accordance with the principles stated above were calculated by those representing J&BH following receipt of the draft judgment in this matter, and I have accepted those calculations.

Third Party Debt Order

218. In Judgment No. 5, I found that £101,543.17 was due to A & V.

219. Following this, A & V sought a Third Party Debt Order targeted at J&BH bank accounts held with the NatWest Group.

220. J&BH contended that such an order should not be made. It raised a jurisdictional argument and an argument that the Order should not be considered or made until all issues as to costs and other consequential issues had been resolved.

221. The issues as to this application have now been transferred to me.

222. By this judgment, I believe I have now resolved all matters between these Parties save for any application for permission to appeal.

223. As will be seen below, a net sum is due from J&BH to A & V, but it is much less than the £101,543.17 sought, because of my decision as to costs payable by A & V to J&BH.

224. In the circumstances, I accept that the September 2024 hearing was a premature moment at which to seek a Third Party Debt Order. However, it would not now be unreasonable for A & V to seek such an order now in a lesser sum, given that, as A & V has submitted, J&BH has gone to extraordinary lengths to avoid paying A & V sums due, which suggests that the pressure of such an order might well be necessary. Accordingly there will be such an order in the amount held due once interest has been calculated.

225. As to costs, J&BH made a jurisdictional challenge which failed and must have contributed to the amount of costs incurred. Had the issue only been as to whether an Order should be granted before issues as to Costs had been considered, then the matter could have been resolved by asking either the Master or myself to decide that on paper (the matter was referred to in emails placed before me – I indicated that I would not intervene except in

response to an application. No application was then made to me). It should not have been necessary to incur costs in excess of £10,000.

226. In my judgment, the appropriate order is that there should be no order as to costs.

Set Off

227. In paragraphs 86 to 90 of its Submissions on Costs, J&BH submits as follows:

> 86. In cases where there are different judgments in favour of both the Claimant and the Defendant, including judgments/orders on costs, the Court's practice is generally to allow those cross-judgments to be set-off against each other. In other words, only a single net balancing payment needs to be made.
>
> 87. The principle and application of this power was explained in *Fearns v Anglo-Dutch Paint & Chemical Co Limited* [2010] EWHC 2366 (Ch), [2011] 1 WLR 366 at [36] to [38]:
>
> > "36. As well as by agreement, cross-liabilities can be netted off (and thus extinguished to the extent of the other) pursuant to a judgment of the court. Before such a set-off can be effected it is of course necessary that the existence and amount of each liability has been established by agreement or judgment.
> >
> > 37. CPR r 40.13 applies where the court gives judgment for specified amounts both for the claimant on his claim and against the claimant on a counterclaim: in such circumstances the court may order the party whose judgment is for the lesser amount to pay the balance. More generally, it has long been the practice of the courts as part of their inherent jurisdiction over their own proceedings to allow cross-judgments given in the same action, or in different actions, to be set off against each other: see *Edwards v Hope* (1885) 14 QBD 922; *Reid v Cupper* [1915] 2 KB 147 and *In re A Debtor (No 21 of 1950) (No 2); Ex p The Petitioning Creditors v The Debtor* [1951] Ch 612. As these cases show, this jurisdiction encompasses judgments for damages and also orders for costs. Unlike legal or equitable set-off, such a "set-off" involves treating the judgment in favour of one party as satisfying pro tanto the judgment in favour of the other. There is accordingly an extinction of liabilities.
> >
> > 38. It is clear from the authorities mentioned, and from the word "may" in CPR r 40.13(2), that the power of the court to order such a set-off is

> discretionary. In *Edwards's* case Brett MR, at p 926, and Bowen LJ, at p 927, described the power as "an equitable jurisdiction" . By this they plainly did not mean a jurisdiction exercised by courts of equity (as they were referring to the practice of the common law courts) but a jurisdiction to order a set-off where the court considers it just and equitable to do so."
>
> [emphasis added]

88. Such a set-off, and order for a single net payment, was made in *Fearns* where the claimant had judgment in its favour for c.£36k but was ordered to pay c.£300k as an interim payment on account of the defendant's costs. The Court ordered that these cross-orders/entitlements were to be set-off at [68] to [77], explaining at [76] that:

> "Applying the test for equitable set-off or exercising the court's discretion, the connection between the two sums is such that justice plainly requires that they be set off. If one looks simply at the position of Mr Fearns and leaves aside the effect of the order on his creditors, I cannot see how it could be right for him to receive a payment of damages without giving credit against the payment for the liability in costs which he has incurred in pursuing the claim to recover those damages. The justice of the matter seems to me equally clear if one considers the effect on Mr Fearns's creditors, for whose benefit the litigation has in large part been maintained. It would in my view be manifestly unjust that they should receive a share of the damages free of the liability to make a payment on account of the defendants' costs which was part of the cost of obtaining the damages award."
>
> [emphasis added]

89. In this case too, the Court should allow a set-off or mutual extinguishing of the various Judgment debts. It would be manifestly unjust and inequitable for the Claimant to receive payment of the main judgment sum without giving credit against that payment for the liability in costs it has incurred in pursuing the claim to recover the main judgment sum.

90. Given the Claimant's financial position, any other order would undermine the intent and purpose of CPR Part 36 and be inequitable:

> 90.1 Any payment to the Claimant would likely go to its bank account with NatWest. That account is frozen/ non-operational because of debts owed by the Claimant to NatWest (see p37B of Transcript of hearing on 1 June 2023 [Trial Bundle/ p4379] and email from NatWest to the Claimant on 21 June 2023 [Trial Bundle/ p1358]), so it is unlikely that the Claimant will be able to pay any sums out of it.

90.2 As the Court has already found, the Claimant does not otherwise have any money to pay sums to the Defendant and owes in excess of £300,000 to HMRC and NatWest. The Court found in at para. 65 of its Judgment No. 2 as follows:

> "65. Here it seems to me that the "underlying realities" support the proposition that A&V as a company is highly unlikely to be able to pay the judgment debt:
>
> (1) On any view A&V is a small company;
>
> (2) It appears no longer to be actively trading;
>
> (3) It owes its banker and HMRC together sums well in excess of £300,000."

228. I accept those submissions.

229. I calculate the amount due on the account between the Parties as follows:

Sum due from J&BH to A & V other than costs		£161,144.36
Sum due to A & V for costs		£10,820.55
Sum due from A&V to J&BH	4.12.23-1.03.24	(£6,636)
Sum due from A&V to J&BH	1.03.24 to 18.06.24	(£88,956.50
Copying costs		(£3,130.80)
Interest on costs due from J&BH to A & V		£1,708.11
Interest on costs due from A & V to J&BH		(£2,171.94)
Mr Smith's fees		(£13,962.00)
JBH Costs		(£20,822.00)
Interest on the above		(£4,696.46)
		£33,298.02

Construction Industry Scheme

230. I accept J&BH's submission at paragraphs 15 and 16 of its Submissions on Costs that J&BH must remit 20% of the amount due to A & V to HMRC. As calculated above, the amount due is £33,298.02. Accordingly J&BH must remit £6,659.60 to HMRC. Accordingly the net amount due to A & V is £26,638.42.

Conclusions

231. Accordingly, I make the following orders:

1) I confirm the main judgment sum and interest awarded to A & V in the sum of £161,144.36 as set out in the Defendant's assessment of the account;

2) The stay on the Enforcement Order is released;

3) The sums due under the Enforcement Judgment in respect of Mr Smith's fees and J&BH's legal costs together with interest (£39,480.46 as at 2 October 2024) will be treated as having been set off on 2 October 2024;

4) The costs are assessed in the sums set off above;

5) Credit will be given to J&BH for the copying charges of £3,130.80;

6) The net amount due to A & V is £33,298.02.

7) Of the sum of £33,298.02, 20% will be remitted to HMRC, namely £6,659.60.

8) There will be a Third Party Debt Order in the amount of £26,638.42.

9) There will be no order as to costs in respect of the application for a Third Party Debt Order.