



**Case No: HT-2017-000148**

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (OBD)**  
**[2019] EWHC 3028 (TCC)**

The Rolls Building,  
Fetter Lane, London, EC4A 1NL

Date: 11/11/2019

**Before:**

**MRS JUSTICE O'FARRELL**

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**Between:**

**(1) HOCHTIEF (UK) CONSTRUCTION LIMITED**  
**(2) VOLKERFITZPATRICK LIMITED**

**Claimants**

**- and -**

**ATKINS LIMITED**

**Defendant**

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**Suzanne Chalmers** (instructed by **Clyde & Co LLP**) for the **Claimants**  
**Luke Wygas** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the  
**Defendants**

Hearing date: 22 October 2019  
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**CONSEQUENTIALS JUDGMENT**

**Mrs Justice O’Farrell:**

1. On 31 July 2019 the Court handed down judgment for the claimants (“the JV”) against the defendant (“Atkins”), published at [2019] EWHC 2109 (TCC). The Court found that the JV had established its claim in respect of the Bridge, entitling it to damages and interest in the sum of £802,475.35, but dismissed its claim in respect of the Underpass.
2. This hearing was fixed to determine all consequential matters, including interest, costs and Atkins’ application for permission to appeal.
3. Shortly before the hearing, the parties agreed the figure for interest due on the damages awarded, at a rate of 2% above base, up to 9 June 2017, in the sum of £77,372.41.
4. At the oral hearing on 22 October 2019, the Court heard and refused Atkins’ application for permission to appeal.
5. There was insufficient time available at the hearing to deal with the other issues. The Court adjourned the hearing and allowed time for the parties to file further submissions. The parties agreed that the outstanding consequential issues could be determined on paper.
6. The issues for determination are:
  - i) consequences of the JV’s Part 36 offer;
  - ii) basis on which costs should be ordered; and
  - iii) the JV’s application for a payment on account of costs.

*Consequences of the JV’s Part 36 offer*

7. On 19 May 2017 the JV made a Claimant’s Part 36 offer to settle the claim, including interest, in the sum of £875,000.
8. The last date for acceptance of the offer was 9 June 2017.
9. The JV has succeeded in obtaining judgment on its claim for £879,847.76, including interest, beating its Part 36 offer by £4,847.
10. The JV seeks an order for:
  - a) interest on the damages awarded at an enhanced rate of 6% above base rate from 10 June 2017 to 31 July 2019;
  - b) costs on the indemnity basis from 10 June 2017;
  - c) interest on those costs at an enhanced rate of 6% above base rate from 10 June 2017; and
  - d) an additional sum of £65,123.77.

11. It is not disputed that the JV has achieved a judgment sum that is at least as advantageous to the JV as its Part 36 offer (albeit by a small margin). Therefore, in principle, the provisions of CPR 36.17 are engaged.
12. CPR 36.17(4) provides that in such circumstances, the court must, unless it considers it unjust to do so, order that the JV is entitled to:
  - a) enhanced interest on the damages awarded at a rate not exceeding 10% above base rate;
  - b) costs on the indemnity basis from the date on which the relevant period expired;
  - c) enhanced interest on those costs at a rate not exceeding 10% above base rate; and
  - d) an additional sum not exceeding £75,000, calculated by applying the prescribed percentage to the sum awarded as damages by the court (10% of the first £500,000 awarded and 5% of the amount above that figure).
13. In considering whether it would be unjust to make the orders referred to above, CPR 36.17(5) provides that 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;
  - 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.
14. In *McPhelmy v The Times Newspapers Ltd (No.2)* [2001] EWCA Civ 933, the underlying purpose of the provisions was explained by Chadwick LJ:

“[19] It is plain, as Lord Woolf, Master of the Rolls, pointed out in the *Petrotrade* case, that [the provisions of CPR 36.17] are intended to provide an incentive to a claimant to make a Part 36 offer. The incentive is that a claimant who has made a Part 36 offer (which is not accepted) and who succeeds at trial in beating his own offer stands to receive more than he would have received if he had not made the offer. Conversely, a defendant who refuses a Part 36 offer made by a claimant and who fails to beat that offer at trial is at risk of being ordered to pay more than he would have been ordered to pay if the offer had not been made ... subject to the limitation that the powers are intended to be used in order to achieve a fairer result for the claimant and not to

punish the defendant, it is plain that they are to be used in order to redress elements, otherwise inherent in the legal process, which can properly be regarded as unfair.

[20] Two of those elements, which many would regard as obviously unfair, were identified by Lord Woolf, Master of the Rolls, in the *Petrotrade* case. First, an award of costs on the standard basis will, almost invariably, lead to the successful claimant recovering less than the costs which he has to pay to his solicitor. So, although he has been successful, he is out of pocket. Costs on an indemnity basis should avoid that element of unfairness. Second, neither costs on an indemnity basis nor interest awarded under section 35A of the Supreme Court Act 1981 will compensate the successful claimant for the inconvenience, anxiety and distress of proceedings or (where the claimant is a corporation) the disruption caused by the diversion of senior management from their normal duties. Interest at an enhanced rate – that is to say at a rate which is higher than the rate which would otherwise be ordered, under section 35A of the 1981 Act – may redress that element of unfairness...

[23] The purpose for which the power to order interest on costs under that paragraph is conferred is, I think, plain. It is to redress, in a case to which [CPR 36.17] applies, the element of perceived unfairness which arises from the general rule that interest is not allowed on costs paid before judgment ...”

15. In that case the Court of Appeal explained that the provisions were not limited to cases where there was unreasonable conduct on the part of the defendant – see Chadwick LJ at [9]:

“It is, to my mind, clear from the structure and language of [CPR 36.17] ... that an order for the payment of costs on an indemnity basis (from the latest date when the defendant could have accepted the offer without needing the permission of the court) is the order which the court can be expected to make in a case where a claimant who has made a Part 36 offer is, nevertheless, obliged to proceed to trial - because the defendant does not accept the offer - and then beats his own offer at trial. In those circumstances, it is only where the court considers that such an order would be unjust that it is permitted to refuse an order for the payment of costs on an indemnity basis. To make the order carries no implied disapproval of the defendant's conduct; nor any stigma. Properly understood, the making of such an order in a case to which [CPR 36.17] applies indicates only that the court, when addressing the task which it is set by that rule, has not considered it unjust to make the order for indemnity costs for which the rule provides.”

And Simon Brown LJ at [28]:

“It is not designed to punish unreasonable conduct but rather as an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement. That incentive plainly cannot work unless the non-acceptance of what ultimately proves to have been a sufficient offer ordinarily advantages the claimant in the respects set out in the rule.”

16. In *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, Sir Geoffrey Vos, Chancellor, identified the factors that could be considered when determining the appropriate rate of enhanced interest, if any, to award:

“[38] The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer. But there will be many factors that may be relevant. All cases will be different. Just as the court is required to have regard to "all the circumstances of the case" in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a). As Lord Woolf said in the *Petrotrade* case, and Chadwick LJ repeated in the *McPhilemy* case, this power is one intended to achieve a fairer result for the claimant. That does not, however, imply that the rate of interest can only be compensatory. In some cases, a proportionate rate will have to be greater than purely compensatory to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable level and at a reasonable time, and to mark the court's disapproval of any unreasonable or improper conduct, as Briggs LJ put the matter, *pour encourager les autres*.”

17. Subject to the issue of costs addressed below, it would not be unjust to apply the provisions of CPR 36.17 in this case. The terms of the offer were clear. The Part 36 offer was made at a very early stage in the proceedings, after the letter of claim but before the issue of the formal claim. By that time, extensive investigations and remedial works had been concluded. The parties had sufficient information to make an informed judgment as to the merits of the case. The offer was at a level that indicated it was a genuine attempt to settle the dispute.
18. Having regard to those matters, the JV is entitled to an enhanced rate of interest on damages and costs from the date of expiry of the offer. Atkins' conduct was not

unreasonable so as to attract the maximum rate as applied in *OMV*. I consider that 6% above base rate (the mid-point between the 2% agreed on damages and the maximum of 10%) is appropriate in all the circumstances. The JV is entitled to the additional sum of £65,123.77. The JV is also entitled to have such costs as are ordered assessed on an indemnity basis.

### *Costs*

19. The JV's position is that it has beaten its Part 36 offer and therefore is entitled to recover all its costs on the more favourable terms set out above.
20. Atkins submits that the court should make an issues-based or proportional costs award to reflect the following:
  - i) the JV beat the Part 36 offer by a very small margin (less than £5,000); and
  - ii) Atkins was the successful party in respect of the Underpass claim.
21. The fact that the JV beat the Part 36 offer by a very small margin does not displace the Part 36.17 regime: CPR 36.17(1)(b).
22. The general provisions of CPR 44 do not apply where the costs consequences of a Part 36 offer apply: CPR 44.2(4)(c).
23. In *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365 (CA) Sir Stanley Burnton set out the relevant principles and the approach to be applied in such cases:

“[37] In deciding what costs order to make under [36.17], the Court does not first exercise its discretion under Part 44. Its only discretion is that conferred by Part 36 itself ...

“[38] It follows from the above, and in particular that Part 36 is a self-contained code, that the discretion under [36.17] 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. The principles were aptly summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch):

"13. ... 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.

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.""

24. I consider that in the circumstances of this case it would be unjust to require Atkins to pay the JV's costs of the Underpass claim. This case comprised two separate claims. Physically, they were separate structures. The factual, technical and expert issues on each claim were different. The defects and physical damage to each structure were different. There were separate financial damages in relation to each claim. The length of the trial would have been shorter and the costs of the trial would have been reduced had the claim been limited to the Bridge claim. The JV was the successful party on the Bridge claim but Atkins was the successful party on the Underpass claim.
25. I have considered whether an issues-based order should be made. It would be possible to apportion the costs as between the two claims. However, that would not give sufficient weight to the fact that the JV's offer, which was an offer to settle both claims, was one that should have been accepted. A proportional costs order would be the fairest way of reflecting the relative success and failure of each party at trial, including the consequences of the JV's Part 36 offer.

26. For those reasons I conclude that Atkins should pay 85% of the JV's costs, such costs to be subject to a detailed assessment on the indemnity basis.

#### *Costs budgets*

27. At the CCMC on 23 January 2018, the JV's costs budget dated 5 December 2017, indicating a sum of £353,331 in respect of future costs, was approved by the court (subject to revision in respect of disclosure). The total costs in the approved JV budget were £650,998.74.
28. The JV's total costs are significantly higher, in the sum of £1,075,441.71.
29. It is too late for the Court to consider any amendments to the costs budgets at this stage for the reasons set out by Coulson J (as he then was) in *Elvanite Full Circle Ltd v Amec Earth and Environmental (UK) Ltd* [2013] EWHC 1643 (TCC) at [37]; *Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd* [2013] EWHC 3025 (TCC) per Akenhead J at [40].
30. However, it would be appropriate for this Court to observe that the trial was adjourned part heard for reasons beyond the control of the JV and the costs of the adjournment, including counsel's fees, were reasonably incurred in principle. That would be an appropriate reason to depart from the costs budget.
31. The costs associated with the production of the second experts' joint statement could not have been reasonably anticipated in the costs budget and are also an appropriate reason to depart from the costs budget.
32. All other costs issues are matters for the costs judge.

#### *Payment on account of costs*

33. The JV seeks a payment on account of its costs.
34. CPR 44.2(8) provides that 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.
35. Where the amount of costs is to be assessed on the indemnity basis:
  - i) the court will only allow costs which have been reasonably incurred and are reasonable in amount: 44.3(1); but
  - ii) the court will resolve any doubt as to whether costs were reasonably incurred or reasonable in amount in favour of the receiving party: CPR 44.3(3).
36. In assessing the reasonableness of the incidence and amount of the costs incurred, the court will have regard to all the circumstances, including the conduct of the parties, the value of the claim, the importance of the matter to the parties, the complexity of the issue, and the receiving party's last approved or agreed budget: CPR 44.4.
37. In the absence of an approved revised costs budget, for the purpose of a payment on account, I use the original approved budget but take into account the Court's



observations as to the reasonableness of additional costs incurred. Having regard to the proportional costs order made, and taking the above matters into account, I consider that a reasonable sum on account of costs is £500,000.

*Order*

38. For the reasons above, the following order is made:

- i) The Defendant shall pay to the Claimants interest upon damages for the period up to and including 9 June 2017 in the agreed sum of £77,372.41 by 4.00 pm on 9 December 2019.
- ii) The Defendant shall pay to the Claimants interest upon damages at a rate of 6% above the Bank of England base rate from time to time for the period from 10 June 2017 until Judgment on 31 July 2019, in the sum of £112,812.20, such sum to be paid by 4.00 pm on 9 December 2019.
- iii) The Defendant shall pay to the Claimants an additional amount of £65,123.77, such sum to be paid by 4 pm on 25 November 2019.
- iv) The Defendant shall pay 85% of the Claimants' costs of the action, such costs to be subject to detailed assessment if not agreed on the standard basis up to and including 9 June 2017 and on the indemnity basis from 10 June 2017.
- v) The Defendant shall pay interest on the Claimants' recoverable costs at a rate of 6% above the Bank of England base rate from time to time from 10 June 2017.
- vi) The Defendant shall pay to the Claimants the sum of £500,000 on account of such costs, such sum to be paid by 4.00 pm on 25 November 2019.