Neutral Citation Number: [2020] EWHC 2387 (TCC)

Case No: HT-2017-000110

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

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 11 September 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

ESSEX COUNTY COUNCIL

Claimant

- and -

UBB WASTE (ESSEX) LIMITED

Defendant

- -

Judgment No. 3

- -

Marcus Taverner QC, Piers Stansfield QC and **Daniel Churcher** (instructed by **Slaughter and May**) for the **Claimant**
Roger Stewart QC and **George McDonald** (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing dates: 13-14 July 2020

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE PEPPERALL:

1. On 31 May 2012, Essex County Council entered into a 25-year contract with UBB Waste (Essex) Limited for the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant in Basildon to process the county's household waste. The facility was built and on 25 November 2014 it was certified as having passed the Readiness Tests. The facility then entered the Commissioning Period but failed to pass the Acceptance Tests by the extended Planned Services Commencement Date of 12 July 2015, the Acceptance Longstop Date of 12 January 2017 or indeed at any point before the close of evidence in the 2019 trial between the parties.

2. By my principal judgment in this litigation, *Essex County Council v. UBB Waste (Essex) Ltd (No. 2)* [2020] EWHC 1581 (TCC), I granted declarations that:

   2.1 UBB had failed, in breach of contract, to achieve Service Commencement by the Acceptance Longstop Date under the contract;

   2.2 UBB was not entitled to operate the modifications made to the facility for the production of so-called QSRF; and

   2.3 the Authority was entitled to terminate the contract as at 13 June 2019 by giving notice pursuant to clause 67.

3. In addition, I:

   3.1 awarded damages to the Authority in the sum of £9,038,428 to the end of February 2019 with continuing losses thereafter at £99,563 per month;

   3.2 dismissed UBB's claim for declaratory relief and its counterclaim for damages, pleaded at some £77 million; but

   3.3 found that UBB was entitled to compensation of £745,234 pursuant to clause 39 of the contract.

4. The parties are agreed that, taking matters in the round, the Authority was the successful party in this litigation and that it is entitled to a costs order in its favour and a substantial interim payment of £8 million on account of such costs. There the agreement ends and the following issues are in dispute:

   4.1 At what rate should the court award interest upon damages?

   4.2 Did the offer made by the Authority in March 2019 comply with the requirements of Part 36?

4.3 If not, should the court nevertheless treat the offer as a valid Part 36 offer either on the basis that any non-compliance was *de minimis* or because UBB is estopped from challenging the validity of the offer?

4.4 Has the Authority achieved a judgment that is at least as advantageous as its offer?

4.5 If the offer was compliant with Part 36, or is to be treated as having been a valid Part 36 offer, and the judgment is at least as advantageous as the offer, what orders should be made pursuant to r.36.17 of the *Civil Procedure Rules 1998*?

4.6 Irrespective of the position under Part 36, should the Authority be awarded its costs on the indemnity basis?

4.7 Should the court recognise UBB's partial success in this litigation and, if so, how?

4.8 On what terms should the court defer the running of interest under the *Judgments Act 1838* on costs?

4.9 Should the court extend time to pay the judgment sum?

1. INTEREST

5. The Authority has filed evidence that its cost of borrowing over the relevant period was 2.396% per annum, and it seeks interest on damages at that rate. Roger Stewart QC, who again appears for UBB with George McDonald, argues that interest should instead be awarded at 1% over the Bank of England base rate from time to time and contends that such rate accords with general practice as recognised by Langley J in *Kuwait Airways Corp. v. Kuwait Insurance Co. SAK* [2000] 1 All E.R. (Comm) 972, at page 992. Further, he submits that there is no evidence that the Authority in fact had to borrow monies in order to fund its additional costs incurred by reason of the operation of the QSRF Line. Marcus Taverner QC, who again appears for Essex together with Piers Stansfield QC and Daniel Churcher, contends that there is no longer any presumption in favour of 1% over base and that there is no requirement that the Authority should have to prove any specific borrowing.

6. The applicable principles are clear:

6.1 There is ample authority for the proposition that in exercising the court's discretion as to the rate of interest to be awarded under s.35A of the *Senior Courts Act 1981* the court is seeking to estimate the claimant's further loss in being kept out of the money that, but for the breach of contract or other wrong, it should have had.

6.2 In exercising that discretion, the court should not embark on an enquiry as to the actual further loss, but should rather seek to award a commercial rate of interest at which somebody in the position of the claimant would have had to borrow the money. Such assessment should be fairly broad brush and there is no need for evidence that the particular claimant did in fact have to borrow funds.

6.3 In the current era of historically low interest rates, the conventional rate of 1% over base adopted by Langley J in *Kuwait Airways* might well not fairly reflect the true cost of borrowing. Indeed, the *Commercial Court Guide* provides the following guidance at paragraph J14.1:

> "Historically the Commercial Court has generally awarded interest at base rate plus one percent unless that was shown to be unfair to one party or the other or to be otherwise inappropriate. In the light of recent interest rate

> developments there is no presumption that base rate plus one percent is the appropriate measure of a commercial rate of interest."
>
> [See generally *Tate & Lyle Food & Distribution Ltd v. Greater London Council* [1992] 1 W.L.R. 149, *Banque Keyser Ullman SA v. Skandia (UK) Insurance Co. Ltd* (unreported, 11 December 1987), *Kuwait Airways, Lindsay v. O'Loughnane* [2010] EWHC 529 (QB) and *Kitcatt v. MMS UK Holdings Ltd* [2017] EWHC 786 (Comm).]

7. In my judgment, interest should be awarded on the claim at 2.4% per annum, being the approximate cost of borrowing of a local authority such as Essex during the relevant period. Further, interest should run at the same rate on the counterclaim since it will in practice be set-off against the larger award in the Authority's favour.

2. WAS THE OFFER A COMPLIANT PART 36 OFFER?

8. Rule 36.5(1)(c) provides that a Part 36 offer must, among other matters, "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 36.20 if the offer is accepted." The Authority's offer in this case was dated 7 March 2019. It stated, in apparent compliance with r.36.5(1)(c):

> "If the Defendant accepts the offer within 21 days of the date of this letter (the 'Relevant Period'), the Defendant will be liable for the Claimant's costs of the Proceedings (including pre-action costs) up to the date on which written notice of acceptance of this Offer is received by the Claimant, in accordance with CPR 36.13."

9. The offer was not, however, "made" for the purposes of Part 36 until 8 March 2019:

   9.1 Rule 36.7(2) provides that Part 36 offers are made when they are served.

   9.2 The Authority's offer was sent by email at 4.54pm on 7 March 2019. Given that the email was sent after 4.30pm, it was deemed by r.6.26 to have been served on the following day.

10. Mr Stewart argues that the only proper construction of the letter is that the 21 days ran from 7 March and, because the offer was not made until the following day, the offer therefore failed to specify a relevant period of not less than 21 days. Mr Taverner responds that the court should construe the offer such that the 21 days ran from the date of deemed service. Citing *C v. D* [2011] EWCA Civ 646, [2012] 1 W.L.R. 1962, he submits that faced with two reasonable interpretations of the offer, the court should favour the construction that is compliant with Part 36.

DISCUSSION

11. In *C v. D*, the claimant purported to make Part 36 offers that contained the words: "… the offer will be open for 21 days from the date of this letter (the 'relevant period')." The defendant purported to accept one of the offers after the expiry of the 21-day period. Warren J granted the claimant a declaration that its offer was no longer open for acceptance. The Court of Appeal allowed the appeal and construed the offer letter not as meaning that the offer was "only open" for 21 days, but as indicating that the relevant period (namely the period within which the defendant would be liable for the claimant's

costs upon acceptance in accordance with what is now r.36.13) was a period of 21 days and that thereafter it might be withdrawn.

12. Rix LJ first concluded that, under the then applicable rules, parties could not make time-limited Part 36 offers. Since 2015, such difficulty has been removed by a new provision at r.36.9(4)(b). Nevertheless, the court's ruling upon the possibility of making a time-limited offer was important since Rix LJ approached the question of construction of the offer on the basis that:

    12.1 both parties' solicitors would know such legal context; and

    12.2 it was common ground that the offer was intended to be made and understood as a Part 36 offer.

13. Rix LJ then relied, at [49], on the principle of construction that the court should read a document as a whole and seek to bring rational sense and consistency to that whole. Further, he relied on the statement of principle in *Lewison on The Interpretation of Contracts* that:

> "The court is reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises such clauses."

14. In addition, Rix LJ relied on the rule of construction (traditionally expressed by the Latin maxim *verba ita sunt intelligenda ut res magis valeat quam pereat*) that the court should prefer a construction that allows an instrument to be effective over one which would render it void, ineffective or meaningless. The judge concluded that both constructions of the offer letter were feasible and reasonable, but favoured the construction that was consistent with the clear intention to make a Part 36 offer and which ensured that such offer was effective rather than ineffective.

15. In his own judgment, Rimer LJ powerfully explained why it is of no utility to consider the meaning of the critical passage in isolation from the context in which it was made. As Lord Hoffmann cautioned in *Charter Reinsurance Co. Ltd v. Fagan* [1997] A.C. 313, at 392A:

> "It is artificial to start with an acontextual preconception about the meaning of words used and then see whether that meaning is somehow displaced."

16. That is, of course, because as Lord Hoffmann subsequently explained in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896, at page 913:

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter for dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax …"

17. In *C v. D*, Stanley Burnton LJ added simply, at [84]:

> "Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36. Once it is accepted that a time-limited offer does not comply with Part 36, one must approach the interpretation of the offer in this case on the basis that the party making the offer, and the party receiving it, appreciated that fact."

18. Lewison LJ pithily summarised the resulting principle as "validate if possible" in the subsequent case of *Dutton v. Minards* [2015] EWCA Civ 984, [2015] 6 Costs L.R. 1047. Further, the principles in *C v. D* were recently restated by Coulson LJ in *Hertel v. Saunders* [2018] EWCA Civ 1831, [2018] 1 W.L.R. 5852, at [22]. There are, however, limits to what can be achieved purely through construction:

    18.1 In *Thewlis v. Groupama Insurance Co. Ltd* [2012] EWHC 3 (TCC), [2012] 5 Costs L.O. 560, the offer did not comply with the then mandatory requirement in r.36.2(2)(b) that it "state on its face that it is intended to have the consequences of Section I of Part 36." His Honour Judge Behrens held that it would not in any event have been a valid Part 36 offer because the offer letter stated that it could only be accepted after 21 days if the parties agreed the liability for costs or the court gave permission. Distinguishing the case from *C v. D*, Judge Behrens held that such wording was inconsistent with Part 36 and could not be ignored as mere surplusage.

    18.2 The same issues arose in *Shaw v. Merthyr Tydfil County Borough* [2014] EWCA Civ 1678, [2015] P.I.Q.R. P8. The Court of Appeal endorsed Judge Behrens' reasoning on both points. Maurice Kay LJ did not doubt the authority of *C v. D* but observed, at [20]:

> "Here the offer was not a Part 36 offer because it failed to comply with the mandatory and highly prescriptive requirements of the current 'self-contained code.' In these circumstances it is not necessary to engage in the construction exercise invited by Mr Rivers. No process of construction, however liberal, can bring satisfaction of procedural requirements which were not fulfilled."

    18.3 Pitchford LJ added, at [27]:

> "In the present case we are not concerned with a Part 36 offer presented as such and 'otherwise complying with its form' … We are concerned with an offer that purports to be made under Part 36, but whose terms are completely inconsistent with Part 36 and that fails otherwise to comply with its form."

19. Turning to the present case, I decline to construe the offer letter divorced from its proper context. Since there can be no doubt that Slaughter & May's letter was intended to be a Part 36 offer, I consider that a reasonable person having all the background knowledge available to the parties would know that:

    19.1 the letter was intended to be a Part 36 offer;

    19.2 r.36.5(1)(c) requires Part 36 offers to specify a "relevant period" of not less than 21 days (being the period during which the defendant will be liable for the claimant's costs upon acceptance under r.36.13);

19.3 the statement in the letter set out at paragraph 8 above was intended to be the statement of a relevant period in compliance with r.36.5(1)(c);

19.4 r.36.7(2) provides that Part 36 offers are made when they are served; and

19.5 since this offer was sent by email at 4.54pm on 7 March 2019, it was not "made" for the purposes of Part 36 until 8 March 2019.

20. Approached in this way, I consider that the statement that the relevant period ran for "21 days of the date of this letter" could feasibly and reasonably be construed in one of two ways:

20.1 First, it could mean that the 21 days ran from the date stated on the face of the letter, i.e. 7 March. If so, a mistake was made and the offer did not comply with r.36.5(1)(c).

20.2 Alternatively, it could mean that the 21 days ran from the date when the offer was made, i.e. 8 March. It is not, in my judgment, a forced construction to describe the date of the making of an offer contained in a letter as the date of the letter.

21. In accordance with the reasoning in *C v. D*, I prefer the latter construction since it is consistent with the clear intention to make a Part 36 offer and ensures that the offer is effective rather than ineffective. Accordingly, I reject UBB's argument that the offer letter was not compliant with Part 36.

3. THE POSITION IF THE OFFER WAS NOT COMPLIANT WITH PART 36

22. In view of my finding above, it is not strictly necessary to consider Mr Taverner's fallback arguments that (1) any non-compliance was *de minimis* and that the court should, in any event, treat the offer as a Part 36 offer; and (2) UBB is estopped from now relying upon any defect in the offer. I have, however, heard full argument and, lest I am wrong upon the construction point, it is appropriate that I briefly consider the consequences of a finding that the offer was not compliant.

DE MINIMIS ERRORS

23. Mr Taverner submits that the court can properly overlook minor defects in a Part 36 offer that mislead no one. Mr Stewart responds that Part 36 is a self-contained code and that parties must strictly adhere to its requirements in order to obtain the benefits of the regime. Substantial compliance, he contends, is not sufficient.

24. In *Hertsmere Primary Care Trust v. The Administrators of Balasubramanian's Estate* [2005] EWHC 320 (Ch), [2005] 3 All E.R. 274, Lightman J upheld a master's award of additional interest and indemnity costs under what is now r.36.17 even though the claimant's offer did not comply with the requirements of Part 36. Old cases such as *Hertsmere* need, however, to be treated with caution since the then applicable rules provided that non-compliant offers might still have the consequences of a Part 36 offer "if the court so orders." By contrast, r.36.2(2) now provides:

> "Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section."

25. If I am wrong in my construction of the offer in this case then it was not made in accordance with r.36.5 and therefore, subject to Mr Taverner's estoppel argument, rule 36.2(2) prevents there being any question of treating the offer as if it were a valid Part 36 offer. If that is right, then the court's discretion as to costs would fall under Part 44 and not Part 36.

26. There is some authority that supports the proposition that the court might be able to treat a failure to comply with Part 36 as *de minimis,* especially where no one is misled, in order to provide like benefits under Part 44:

    26.1 In *Huntley v. Simmonds* [2009] EWHC 406 (QB), Underhill J (as he then was) found that a purported Part 36 offer did not comply with the formal requirements of Part 36. The judge observed that the errors were "purely technical failures." While not a Part 36 offer, Underhill J held that in such circumstances the court could give effect to a non-compliant offer by the exercise of its discretion pursuant to Part 44.

    26.2 In *Fitzroy Robinson Ltd v. Mentmore Towers Ltd* [2010] EWHC 98 (TCC), Coulson J (as he then was) found that in considering the appropriate costs order the court could take into account that if two offers had been made in accordance with Part 36 then indemnity costs would have been payable as a matter of course under what is now r.36.17.

27. Of course, a number of orders are ordinarily made in favour of claimants who achieve a judgment at least as advantageous as their Part 36 offers under r.36.17 that are simply not open to the court (viz. the additional amount of up to £75,000 and additional interest on costs and damages) or which are not routinely ordered (viz. indemnity costs) under Part 44. In *PHI Group Ltd v. Robert West Consulting Ltd* [2012] EWCA Civ 588, [2012] 4 Costs L.O. 523, Lloyd LJ observed, at [48]:

> "Those consequences are not sought in the present case, even though PHI's offer was a claimant's offer. The point therefore does not arise for decision, but for my part I do not see how the court could award the additional interest unless the offer was a Part 36 offer properly so-called. Even a minor formal or technical defect would be fatal to that entitlement. So far as indemnity costs are concerned, they can of course be awarded under the general provisions as to costs, but absent a true Part 36 offer a claimant's claim for indemnity costs would have to be justified on the relevant general principles, not just by arguing that the offer only just failed to comply with Part 36."

28. In *F&C Alternative Investments (Holdings) Ltd v. Barthelemy (No. 3)* [2012] EWCA Civ 843, [2013] 1 W.L.R. 548, Davis LJ, doubting the decisions in *Huntley* and *Fitzroy Robinson,* said at [63]:

> "Given the facts there can be no quarrel at all with the overall result in the *Fitzroy Robinson* case; nor can there be any quarrel with the judge having regard to the without prejudice save as to costs offers as part of the relevant material in deciding

> overall whether to order indemnity costs. But in my respectful view, it goes altogether too far to take into account as a factor that, had only those offers been made as Part 36 offers, then indemnity costs would have been payable as a matter of course. That is a course neither mandated nor permitted either under Part 36 or under r.44.3. Similarly, while the result in the *Huntley* case may be capable of being justified on the special facts, in my view it is not permissible wholly to discount a number of failures to comply with the requirements of Part 36 as the merest technicality. Perhaps there can be *de minimis* errors or obvious slips which mislead no one: but the general rule, in my opinion, is that for an offer to be a Part 36 offer it must strictly comply with the requirements."

29. Mr Taverner seizes on Davis LJ's acknowledgment that there might be scope to accommodate *"de minimis* errors or obvious slips which mislead no one." That is, however, a slim foundation upon which to build his argument.

30. In my judgment, where the non-compliance is a failure to comply with one of the mandatory requirements set out in r.36.5, the position is as follows:

    30.1 Rule 36.2(2) is clear and there is no possibility of such an offer being treated as a Part 36 offer.

    30.2 Like any other settlement offer, the non-compliant offer must be taken into account when exercising the general discretion as to costs under Part 44: see r.44.2(4)(c).

    30.3 In exercising the court's discretion under Part 44, the court cannot, however, treat an offer that is a "near miss" as if it were a compliant Part 36 offer.

ESTOPPEL

31. The offer letter in this case concluded with these words:

> "Should the Defendant require any clarification as to the terms of this Offer, or should the Defendant consider this Offer to be in any way defective or non-compliant with Part 36 of the CPR, please notify us by return and in any event within seven days of the date of this letter. Any failure to do so will be relied on by the Claimant to preclude the Defendant from attempting to avoid the adverse costs consequences of Part 36."

32. UBB's solicitors replied to the offer on 25 March 2019. The reply expressly referred to the Authority's Part 36 offer and made plain that its terms were unacceptable to UBB. Norton Rose Fulbright did not point out that there was an issue as to compliance with Part 36. I accept Mr Stewart's submission that that was simply because the service point had not yet been identified.

33. Relying on obiter dicta in *Seeff v. Ho* [2011] EWCA Civ 401, [2011] 4 Costs L.O. 443 and *Ali v. Channel 5 Broadcast Ltd* [2018] EWHC 840 (Ch), [2018] 2 Costs L.R. 373, Mr Taverner contends that UBB represented by its letter of 25 March that the offer was a Part 36 offer and that the Authority having acted to its detriment by relying on such representation, UBB is now estopped from taking the technical point under r.36.5(1)(c).

34. *Seeff* was not a fully argued Part 36 appeal. Rather, the Court of Appeal was dealing with written costs submissions following its decision upon a substantive appeal. Thomas LJ, as he then was, found that the offer was compliant but added, at [12]:

> "… in any event the letter of 14 May 2010 made it clear that if the offer was in any way defective or non-compliant with Part 36, Mr and Mrs Ho's solicitors were asked to let them know as soon as possible. It seems to us clear that, not only did the solicitors treat the offer as a Part 36 offer in the light of the hearing of the appeal, but they also accepted it as a Part 36 offer in their letter of 21 September 2010."

35. In *Ali,* Arnold J (as he then was) rejected the claimants' argument that the defendant's offer was not a valid Part 36 offer because it offered a single sum to settle their claims. Mr Ali and Mrs Aslam argued that they had distinct individual claims. In rejecting their argument, Arnold J observed that the case involved parallel claims made by a married couple arising out of the same events in which they had throughout presented a united front. He then added that in any event it was not open to the claimants to raise the objection. The offer in that case had again contained a clause purporting to require the recipients to let the offeror know promptly if they thought that the offer was defective or not compliant with Part 36. Not only had the claimants not done so but their response to the offer appeared to treat it as being a valid Part 36 offer. Citing Thomas LJ's judgment in *Seeff*, Arnold J added, at [44]:

> "Although Thomas LJ did not express himself in this way, it appears to me that his reasoning was that Mr and Mrs Ho were estopped from challenging the validity of the Part 36 offer made by Mr and Mrs Seeff. In my judgment, this reasoning is equally applicable to the present case."

36. One can well see that on the facts of *Ali* there might have been proper grounds for concluding that the claimants were estopped from denying that they were acting together such that the offer was invalid. I acknowledge, however, that in the passage cited above Arnold J appears to go further and suggest that there might be a general proposition of law that offerees who fail to take a point at the time about some defect in a purported Part 36 offer, despite a clear instruction in the offer that they should do so promptly, might subsequently be estopped from taking the point.

37. I recognise that there may be little purpose in cluttering the law reports with a further obiter dictum from a puisne judge upon this issue. That said, unlike Thomas LJ and Arnold J, I have had full argument from experienced leading counsel and am clear in my own conclusion that estoppel should play no part in the Part 36 regime:

    37.1 First, one must keep in mind that Part 36 is a self-contained procedural code. It has become something of a tradition in Part 36 cases to attribute that observation to Moore-Bick LJ in the important case of *Gibbon v. Manchester City Council* [2010] EWCA Civ 726, [2010] 1 W.L.R. 2081, but since 2015 it has been hardwired into Part 36 by the new r.36.1(1). Introducing the rules of estoppel would breach this core principle.

    37.2 Secondly, Moore-Bick LJ added in *Gibbon* that Part 36 is a "carefully structured and highly prescriptive set of rules." He explained that parties were not bound to follow

those rules but that, if they wanted the substantial benefits which flow from Part 36, they had to follow them in every respect. As Coulson LJ observed in *King v. City of London Corporation* [2019] EWCA Civ 2266, [2020] 1 W.L.R. 1517 at [59], that warning is as relevant today as when it was made by Moore-Bick LJ in respect of an earlier incarnation of Part 36. Indeed, this simple point is made by r.36.2(2), which reads:

> "Nothing in this Section precludes a party making an offer to settle in whatever way the party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section.
>
> (Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)"

In my judgment, r.36.2(2) is a complete answer to the estoppel argument.

37.3 Thirdly, Moore-Bick LJ also explained, at [6]:

> "Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

For much the same reasons, I consider that Part 36 should not be construed so as to incorporate the rules of estoppel which would only be apt to introduce yet further uncertainty and complexity into the operation of the Part 36 regime.

37.4 Fourthly, I respectfully agree with the observation of Coulson LJ in *Hertel v. Saunders* [2018] EWCA Civ 1831, [2018] 1 W.L.R. 5852, at [23], that the parties cannot agree that an offer is in accordance with Part 36 if, on analysis, it is not. If they cannot agree that a non-compliant offer is a Part 36 offer then, in my judgment, still less can one party be estopped from taking the point about the defect.

37.5 Fifthly, I consider that, as a matter of policy, the responsibility for ensuring that an offer is compliant with Part 36 should lie squarely upon the offeror and his lawyers. There are two very simple answers to the unrelenting stream of cases which, as Coulson LJ observed in *King*, litter the law reports in which parties seek to obtain the benefits of Part 36 despite making non-compliant offers:

a) As has been repeatedly stressed by the Court of Appeal and as the rules clearly explain, there is no problem with a party making an offer outside Part 36. Such offers will be taken into consideration under Part 44 but will not gain the special advantages of Part 36.

b) As the commentary in *Civil Procedure* (the White Book) makes clear at paragraph 36.5.2, much of the difficulty would be avoided if parties would only use form N242A to make their offers.

CONCLUSIONS

38. Accordingly, the critical issue in this case is that of construction. If I am wrong in my construction of the offer in this case then the Authority cannot in any event obtain the advantages of Part 36 because the defect was *de minimis* or by a plea that UBB is estopped from now taking the point about such defect.

4. WAS THE JUDGMENT AT LEAST AS ADVANTAGEOUS AS THE OFFER?

39. Before the Authority can access the benefits under the Part 36 regime, the court must first consider the question of whether it has obtained a judgment that is "at least as advantageous" as its Part 36 offer: r.36.17(1)(b). In money claims, and following the introduction of what is now r.36.17(2), this causes no difficulty. The assessment of the relative values of offers and judgments in non-monetary cases is, of course, more subjective. There may be, as in this case, a mismatch between the precise non-monetary terms of the offer and the judgment, but that cannot of itself be fatal. The threshold question is not whether the judgment was at least as advantageous as the offer in each and every respect, but rather whether the overall terms of the judgment are at least as advantageous as the offer. While subjective, this requires a value judgment that the trial judge will usually be in a good position to make.

40. Here, the offer did not seek any monetary award, but proposed the following declarations in settlement:

> "(i) The Defendant has failed, in breach of contract, to achieve Service Commencement by the Acceptance Longstop Date under the Contract.
>
> (ii) The Defendant's design for the Facility once executed was at all material times incapable of passing the contractual Acceptance Tests, and has not passed the contractual Acceptance Tests as at the date of the Defendant's acceptance of this Offer.
>
> (iii) The Defendant is not entitled to operate the modifications made to the Facility for the production of QSRF.
>
> (iv) The Authority is entitled to terminate the Contract under clause 67.
>
> (v) The composition tests carried out by UBB between Q1 2016 and Q3 2018 were not valid Composition Tests as defined by the Contract, and the results of such tests are of no contractual effect and did not engage Clause 21.9A.2 of the Contract.
>
> (vi) The Composition Test results are to be determined during the Commissioning Period on a rolling annual average basis using the average results from the four most recent Composition Tests (or, where there are less than four Composition Tests, the average of the available Composition Tests).
>
> (vii) The requirements for an Impact and Remedy Report (Clause 21.9A.2 of the Contract) is only engaged if the results of the four most recent Composition Tests (or where there are less than four Composition Tests, the average of the available Composition Tests) confirm, on a rolling annual average basis, that the composition of the input Contract Waste does not fall within Composition Band A."

41. Plainly the Authority did better in monetary terms in that it has obtained a net judgment, after setting off UBB's modest success on its counterclaim, worth over £8 million at the time of the offer. Further, a number of the proposed settlement terms can be directly equated to the declaratory relief achieved by the Authority after trial:

    41.1 Paragraphs (i) and (iii) of the offer were in the same terms as the declarations granted at paragraph 391 of my principal judgment.

    41.2 The declaration obtained, at paragraph 423 of my judgment, that the Authority was entitled to terminate the contract as at 13 June 2019 by giving notice pursuant to clause 67 equates to the proposal at paragraph (iv) of the offer. The possibility that such right of termination might thereafter be lost is not in point since it applies equally to the proposed offer and the declaration actually obtained.

42. I did not grant declarations in the terms proposed by paragraphs (ii), (vi) and (vii) of the offer, but I plainly made findings to such effect:

    42.1 As to (ii), see paragraphs 169-211 and 392 of my judgment.

    42.2 As to (vi), see paragraphs 328-334.

    42.3 As to (vii), see paragraph 334.3.

43. The Authority did not obtain a declaration that corresponds to paragraph (v) of its offer. Indeed, I found that it was not necessary to determine the merits of the Authority's challenge to the composition tests because, upon my construction of the contract and other findings, nothing turned on the validity of the tests: see paragraphs 354-364 & 428.

44. Weighing the failure to obtain a declaration that had no bearing upon the outcome of this litigation against the additional benefit not sought in the offer of a judgment worth over £8 million at the time of the offer, I have no hesitation in concluding that the Authority obtained a judgment that was at least as advantageous as its Part 36 offer.

5. THE ORDER UNDER PART 36

45. If the offer was a valid Part 36 offer, UBB rightly does not argue that it would be unjust to make the usual orders under r.36.17(4). Accordingly, the Authority is entitled to:

    45.1 r.36.17(4)(a): interest on the judgment sum at a rate not exceeding 10% above the Bank of England base rate from 29 March 2019;

    45.2 r.36.17(4)(b): costs on the indemnity basis from such date;

    45.3 r.36.17(4)(c): interest on the costs awarded under r.36.17(4)(b) at a rate not exceeding 10% over base; and

    45.4 r.36.17(4)(d): the additional amount of £75,000.

46. It therefore falls to me to set the appropriate rates of interest under paragraphs (a) and (c) of r.37.17(4).

INTEREST ON THE JUDGMENT SUM

47. Sir Geoffrey Vos C explained the proper approach to r.36.17(4)(a) in *OMV Petrom SA v. Glencore International AG* [2017] EWCA Civ 195, [2017] 1 W.L.R. 3465, at [31]-[39]:

47.1 The rate of 10% over base is not the starting point but rather the maximum possible enhancement.

47.2 The award of additional interest is not purely compensatory, but rather the objective of the rule is in large measure to encourage good practice.

47.3 The enhanced award of interest must be proportionate to the circumstances of the case. The Chancellor added that those circumstances may include (a) the length of time between the offer and judgment; (b) whether the defendant took entirely bad points or whether it behaved reasonably, despite the offer, in pursuing its defence; and (c) the general level of disruption caused by the defendant's refusal to negotiate or accept the offer. He stressed, however, that all cases will be different and the judge's duty is to have regard to all the circumstances of the individual case.

47.4 The purpose of the award of enhanced interest is to achieve a result that is fairer for the claimant. In some cases, a proportionate rate will have to be greater than a purely compensatory rate in order to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and to mark the court's disapproval of any unreasonable or improper conduct *pour encourager les autres*.

47.5 Parties are no longer entitled to litigate forever simply because they can afford to do so. The rights of other court users must be taken into account and parties are obliged to make reasonable efforts to settle and respond properly to Part 36 offers made by the other side.

47.6 The Part 36 regime of sanctions and rewards was introduced to incentivise parties to behave reasonably and, if they do not, they can expect the court to exercise such powers to their disadvantage.

48. In *OMV*, the Court of Appeal substituted the full 10% enhancement for the trial judge's own lower award. That was, however, an extreme case in which the defendant's case "rested in large measure on the evidence of witnesses who were liars and Glencore put Petrom through the hoops of having to establish liability, in a very flagrant case of fraud, in a manner which was wholly unreasonable."

49. Applying the principles in this case, I am, for the reasons explained more fully when considering the application for indemnity costs below, satisfied that UBB acted unreasonably by failing to engage with the Part 36 offer and in pursuing a defence and a very considerable counterclaim upon wholly unwarranted allegations of lack of good faith, demonstrably false allegations that the facility had failed to pass the Acceptance Tests solely because of the low level of putrescibles in the contract waste and an obviously compromised expert witness. Such conduct led directly to a very expensive and protracted trial which must have caused substantial disruption to the business of the Authority and significant concern to those accused of having acted in a commercially unacceptable way. I accept therefore that a merely compensatory rate of interest would not be proportionate in this case and I award the Authority interest pursuant to r.36.17(4)(a) on the net damages recovered at the maximum rate of 10% over base from 29 March 2019. In accordance with

r.36.17(6), there will be no further award of interest upon the damages pursuant to the *Senior Courts Act 1981* in respect of that period.

INTEREST ON COSTS

50. In *McPhilemy v. Times Newspapers Ltd (No. 2)* [2001] EWCA Civ 933, [2002] 1 W.L.R. 934, Chadwick LJ explained that the power to award costs under what is now r.36.17(4)(c) was designed to redress the unfairness that arises from the rule that interest is not ordinarily awarded on costs before judgment. In fact, the court has power to award pre-judgment interest on costs in any event pursuant to r.44.2(6)(g). Indeed, this is a subject to which I will return in respect of the eighth issue between the parties.

51. In *McPhilemy,* interest on costs was awarded at 4% over base; a rate that Chadwick LJ described, at [23], as reflecting "albeit generously" the cost of money. For some years, such rate became the conventional award. In *OMV,* the Chancellor held, at [26], that the Court of Appeal was bound by *McPhilemy* to award interest on costs so as to achieve a fairer result for the claimant. Referring to his earlier discussion as to the proper approach to r.36.17(4)(a) (which I have already summarised), he added, at [43]:

> "That does not, however, indicate that some of the factors I have already mentioned may not be relevant. Moreover, once again I do not regard the award as purely compensatory. As I have also said, different factors may in practice apply to the enhanced interest under [rules 36.17(4)(a)/(c)]. That is because account may need to be taken of how the costs, on which an enhanced rate of interest is claimed, were incurred. It could have been, for example, that despite the fact that it was unreasonable to refuse the Part 36 offer, the conduct of the litigation was itself reasonable, so that the costs on which enhanced interest was sought were not incurred in contesting bad points or dishonesty by the defendants."

52. As again I explain more fully below, I do not accept that UBB acted reasonably in this litigation. These costs were incurred in denying what it knew well before the date of the offer - namely that this facility could not pass the Acceptance Tests with or without the QSRF modifications because of a fundamental design error as to density and an equally fundamental error in its bid for BMW reduction. Further, the costs were incurred in seeking to make this case about composition notwithstanding that the facility could not pass the Acceptance Tests even with Band A waste, in pursuing wholly unwarranted allegations against the Authority, in seeking substantial damages to which it was plainly not entitled and in the instruction of an obviously compromised expert witness. I therefore award interest upon costs pursuant to r.36.17(c) at the full rate of 10% over base from 29 March 2019.

6. THE BASIS OF ASSESSMENT

53. While the conclusions set out above deal with the basis for the assessment of costs from 29 March 2019, the Authority seeks its costs throughout on the indemnity basis.

THE LAW

54. Rules 44.2(4)-(5) of the *Civil Procedure Rules 1998* provide:

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

55. The proper approach to applications for indemnity costs is not in dispute. In *Elvanite Full Circle Ltd v. AMEC Earth & Environmental (UK) Ltd* [2012] EWHC 1643 (TCC), [2013] 4 All E.R. 765, Coulson J summarised the applicable principles at [16]:

> "(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable 'to a high degree.' 'Unreasonable in this context does not mean merely wrong or misguided in hindsight': see Simon Brown LJ (as he then was) in *Kiam v. MGN Ltd (No. 2)* [2002] 1 W.L.R. 2810.
>
> (b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in *Excelsior Commercial & Industrial Holdings Ltd v. Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879.
>
> (c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, *Wates Construction Ltd v. HGP Greentree Allchurch Evans Ltd* [2006] B.L.R. 45.
>
> (d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness: see *Digicel (St Lucia) Ltd v. Cable & Wireless plc* [2010] EWHC 888 (Ch)."

56. To that analysis, Akenhead J added five further observations in *Courtwell Properties Ltd v. Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC), at [23]:

> "(i) The discretion to award indemnity costs is a wide one and must be exercised taking into account all the circumstances and considering the matters complained of in the context of the overall litigation (see *Three Rivers DC v. The Governor of the Bank of England* [2006] EWHC 816 (Comm) and *Digicel*.
>
> (ii) Dishonesty or moral blame does not have to be established to justify indemnity costs (see *Reid Minty v. Taylor* [2002] 1 W.L.R. 2800).
>
> (iii) The conduct of experts can justify an order for indemnity costs in respect of costs generated by them (see *Williams v. Jervis* [2009] EWHC 1837 (QB).
>
> (iv) A failure to comply with Pre-Action Protocol requirements could result in indemnity costs being awarded.
>
> (v) A refusal to mediate or engage in mediation or some other alternative dispute resolution procedure could justify an award of indemnity costs."

ARGUMENT

57. In seeking indemnity costs, Mr Taverner takes five points:

57.1 First, UBB advanced a case that was not just speculative, weak, opportunistic and thin, but which it knew or ought to have known was speculative, weak, opportunistic and thin.

57.2 Secondly, UBB made serious allegations of a lack of good faith against both the Authority and the Department for the Environment, Food and Rural Affairs without any proper foundation.

57.3 Thirdly, UBB cynically sought to embarrass the Authority and bully it into settling or abandoning its claims.

57.4 Fourthly, UBB adopted a strategy designed to frustrate the Authority's ability to obtain disclosure of obviously relevant and damaging documents.

57.5 Fifthly, he relies upon UBB's conduct in instructing Dr Weatherby despite an obvious conflict of interest and its delay in disclosing such conflict.

58. Mr Stewart resists indemnity costs. He contends that this was simply hard-fought commercial litigation and responds:

58.1 While largely unsuccessful in its Defence and Counterclaim, he asserts that UBB acted reasonably in putting forward its case. He points to the fact that much turned on a question of contractual construction on which UBB had the comfort of having succeeded in an earlier adjudication.

58.2 While I dismissed many of the good faith allegations, Mr Stewart points out that other such allegations did not need to be considered in view of the court's findings. Further, he argues that the allegations added by re-amendment in March 2019 did not substantially add to the costs of this litigation.

58.3 He denied any attempt to embarrass or bully the Authority.

58.4 He defended UBB's approach to disclosure, pointing out that its initial resistance to standard disclosure was a perfectly proper attempt to control the costs of what

turned out to be a very expensive disclosure process costing, between both parties, some £10 million. Further, disclosure was complicated by the fact that many of the relevant documents were held by the EPC company and not by UBB itself and by difficult questions of privilege given the extent of the parties' commercial negotiations.

58.5 He argues that it would be rare and exceptional to order indemnity costs on the basis that an expert witness was conflicted. Further, he contends that Dr Weatherby's evidence did not form the foundation for UBB's case, that he was cooperative with his fellow expert witnesses, that the expert costs were exacerbated by the Authority's conduct in adducing immaterial expert evidence as to design issues and, in any event, UBB denied expert shopping or pursuing a technical case that it knew to be flawed.

DISCUSSION

59. The costs submissions in this case were detailed. That was because the Authority has spent some £15 million in pursuing this claim and defending itself against UBB's counterclaims. Such expenditure is enormous, but needs to be seen against the legal and factual complexity of this case and the fact that it concerned fundamental questions as to the future of a 25-year contract valued at some £800 million.

The good faith allegations

60. It is no answer to the claim for indemnity costs to argue that the issue of good faith was not central to the court's determination of the case, or to assert that only limited costs were directly incurred by the Authority in responding to the new allegations introduced by re-amendment of the Defence and Counterclaim shortly before trial. Indeed, the latter submission overlooks the fact that UBB had already pleaded allegations of a lack of good faith before its re-amendments.

61. Whatever the basis for my judgment, a core plank of UBB's case at trial was that the Authority had not acted in good faith. I acknowledge that Mr Stewart was careful to make clear that UBB's case was that the Authority's officers had failed to act in good faith, and not positively to assert that they had acted in bad faith. Nevertheless, allegations of a lack of good faith involve the serious imputation that one or more individuals engaged in conduct that would be regarded as "commercially unacceptable" by reasonable and honest people. Put more colloquially, these were allegations of sharp practice rather than necessarily dishonest conduct.

62. I am sure that this distinction was not of any great comfort to those accused by UBB. As professional men and women employed at a senior level by a public authority, I readily accept that these officers have a deep understanding of the importance of integrity in their dealings on behalf of their employer. I have little doubt that they will have been distressed by allegations that their professional conduct might be regarded as commercially unacceptable by reasonable and honest people. Indeed, such a finding might have put their future employment, or at least their prospects of advancement in the public sector, at risk.

63. Since questions of good faith are likely to be fact sensitive, it is difficult for a court to weed out hopeless allegations before trial. I am pleased to say that the making of allegations of commercially unacceptable conduct without any proper evidential foundation – as happened in this case - is "out of the norm." In my judgment, it is important that it should remain so and that parties realise that they cannot make unjustifiable allegations of a lack of good faith with impunity. While I do not equate the allegations in this case with fraud, I nevertheless conclude that UBB's conduct in making widespread allegations of a lack of good faith against the Authority and its officers without any proper foundation was "out of the norm" and, of itself, justifies an order for costs on the indemnity basis.

Speculative, weak, opportunistic or thin claims

64. In *Three Rivers*, Tomlinson J said, at [25(5)]:

> "Where a claim is speculative, weak, opportunistic or thin, a claimant who pursues it is taking a high risk and can expect to pay indemnity costs if it fails."

65. *Three Rivers* was of course a particularly egregious example of such conduct. Coulson J awarded indemnity costs on this basis in *Wates*. More recently, as Coulson LJ in *Burgess v Lejonvarn* [2020] EWCA Civ 114, [2020] 4 W.L.R. 43, he clarified at [45] that, in his statement of this principle in *Elvanite,* he used "hopeless" as shorthand for the conventional formulation of the test as identified by Tomlinson J.

66. It will be noted that the authorities refer to speculative, weak, opportunistic or thin *claims* rather than *cases* or *defences*. There is good reason to take a particularly serious view in respect of weak claims since claimants choose to initiate proceedings. Maintaining a speculative, weak, opportunistic or thin defence is, like any other relevant circumstance, a matter to be taken into account in determining the costs order but is unlikely of itself to justify ordering indemnity costs against a defendant. Here, however, UBB did not simply defend but it brought a substantial counterclaim that dwarfed the Authority's own financial claims. By making such a counterclaim, UBB was itself pursuing a claim.

67. In this case, I am satisfied that UBB's attempt to build a very substantial counterclaim on the foundation of composition was opportunistic:

    67.1 The fundamental problem with this project was that the design density for the waste on arrival at the biohalls was 0.55 t/m^3 whereas the true density was 0.3 t/m^3, meaning that the volume of waste was as much as 83% higher than the design volume and the biohalls were seriously undersized: see paragraphs 156-163 of my principal judgment.

    67.2 UBB had identified the design problem by January 2015: see paragraphs 165-168.

    67.3 Furthermore, UBB bid an unattainable level of BMW reduction without any proper understanding of:

        a) the contractual BMc test;

        b) the guaranteed but unproven performance measured by the AT4 test of a Spanish plant that was then still in construction;

c) any differences in composition between the waste assumed in the Spanish plant and that likely to be processed in Essex;

d) any differences in the processing methods in the two plants; and

e) the correlation, if any, between test results reported as AT4 and BMc.

[See paragraphs 172-185.]

67.4 UBB realised that a mistake had been made as early as September 2010 and, by February 2016, accepted that its BMW reduction bid was unattainable: see paragraphs 185-191.

67.5 As a result of these errors, UBB knew that the facility as designed was not capable of passing either the Throughput or the BMW reduction Tests: see paragraphs 169 and 172-199.

67.6 Despite attempting to buy down the Acceptance Tests in 2015, UBB's position changed significantly as soon as the composition data started to show a reduction in the putrescible content of the waste: see paragraphs 280-295 and 324-327. It was quickly seized on as the answer to UBB's problems. Indeed, I observed at paragraph 326 of my judgment:

> "Plainly, Mr Faraldo was contemplating that UBB might be able to seize upon the latest composition data to blame the waste for all ills and propose the acceptance of the QSRF Line and other modifications as part of the necessary solution, all at the Authority's cost. It was an audacious plan given that the true causes of the facility's inability to pass the tests were the serious density design error and the unrealistic BMW reduction bid."

68. Further, the counterclaim was also built on an obviously flawed construction of clause 21.9A.2 (see paragraphs 328-334) and the Throughput Test (see paragraphs 297-299), unfounded allegations of lack of good faith and in circumstances where there was no prospect of establishing causation (see paragraphs 297-300, 303-306, 309 and 444-446).

69. In my judgment, such counterclaim can properly be described as speculative, weak, opportunistic and thin. I infer that its determined prosecution by UBB combined with its unfounded allegations of a lack of good faith were designed to bring commercial and political pressure to bear on the Authority not to press its own claims to trial. Such conduct was "out of the norm" and, of itself, justifies an order for costs on the indemnity basis.

70. I should, however, make plain that I reject the suggestion that counsel who then appeared for UBB might have been party to any impropriety in comments made about costs in an earlier hearing before Waksman J which were subsequently reported by the press.

Disclosure

71. Despite enormous expenditure, the Authority can properly argue that its insistence on standard disclosure and its subsequent applications to enforce UBB's disclosure obligations were vindicated by the eventual disclosure of highly damaging documents clearly showing UBB's internal recognition of the serious design problems with this

facility, its setting up of the red team and the circumstances surrounding the potential claim against Fichtner. These documents were very damaging to UBB's case.

72. Against that, and although its argument was rejected, UBB's suggestion of an alternative to standard disclosure obviously chimes with current thinking as to the need to control the costs of disclosure. I cannot, on the material before me, fairly reach a view upon the Authority's submission that UBB's approach was driven not by any concern to control costs but by a cynical attempt to prevent obviously damaging documents from being disclosed. I therefore read nothing into UBB's original promotion of request-based disclosure. In any event, while disclosure was ordered in this case before the start of the *Disclosure Pilot for the Business & Property Courts*, I note that if the court had adopted an approach similar to what is now Model C under Practice Direction 51U then the parties would still have been under an obligation to disclose known adverse documents.

73. The subsequent conduct of UBB's disclosure does raise questions. In particular, I share the evident bemusement of Waksman J in his 3 December 2018 decision, [2018] EWHC 3168 (TCC), as to UBB's then argument that it did not have control of obviously relevant documents held by it in circumstances where the relevant custodians in fact worked for UBB's sister company. It is also troubling that when UBB was ordered to procure junior counsel to review its disclosure, counsel overturned some 87% of the earlier privilege claims.

74. It is not, however, appropriate to allow argument as to the proper basis for the assessment of costs to degenerate into a detailed review of earlier disputes in respect of disclosure. It is, in any event, unnecessary to determine this issue given my conclusions that I should, on other grounds, order indemnity costs in this case.

The expert evidence

75. At paragraphs 54-55 of my principal judgment, I concluded that both Dr Weatherby and UBB should have recognised that he had obvious and serious conflicts of interest, that his instruction should either have been withdrawn or refused and that there was no excuse for failing properly to disclose the conflict. In *ICI Ltd v. Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC), Fraser J rightly observed, at [237], that partisan expert evidence is not the norm in this court. It is very important to the proper administration of justice that that should remain so. In my judgment, where a party knowingly calls an expert who is obviously and seriously conflicted without declaring such conflict, as happened in this case, it cannot complain if an order for indemnity costs is made against it.

76. Here, a proportionate response to such conduct taken alone might well be to order that the costs of the technical evidence and an appropriate proportion of the legal costs incurred in respect of the technical issues be paid on the indemnity basis.

Conclusions

77. Taking these matters in the round, the proper and fair order for costs in this case is to award the Authority its costs throughout on the indemnity basis.

7. SHOULD THE COURT RECOGNISE UBB'S PARTIAL SUCCESS?

78. Mr Stewart argues that the court should recognise UBB's success in recovering compensation for the cessation of delivery of waste in 2017 by reducing the award of costs in the Authority's favour to 90%. He supports his argument by pointing to the time taken at trial upon the issue and reminding me that the percentage reduction should reflect not just some credit for UBB's costs but also the disallowance of the Authority's costs upon the issue.

79. Mr Taverner argues that any costs order should simply be an issue-based costs order, alternatively that the percentage reduction in the Authority's costs should be less than 10%. He points to the fact that UBB's success on this issue meant that it recovered 0.8% of the sums sought by its counterclaim.

DISCUSSION

80. Of course, the simple fact that the Authority was not successful on every issue does not of itself mean that the court should deprive it of some proportion of its costs. Nevertheless, I accept that the cessation of deliveries was a discrete issue that involved its own disclosure and a number of witnesses who had no relevant evidence to give in respect of the main issues between the parties. Accordingly, I consider that in principle UBB should have its costs of this issue.

81. I accept Mr Stewart's argument that the most appropriate way to give effect to UBB's partial success on its counterclaim is not, however, to make an issue-based costs order, but instead to make some proportionate reduction in the costs recovered by the Authority. Indeed, the court is sensibly enjoined by r.44.2(7) to prefer a percentage order over an issue-based costs order. As Pumfrey LJ observed in *Monsanto Technology LLC v. Cargill International SA* [2007] EWHC 3113 (Pat), [2008] F.S.R. 16, such approach will necessarily lack any degree of mathematical precision. It does, however, have the significant benefit of avoiding the cost and complexity of seeking to untangle costs on an issue-by-issue basis in detailed assessment proceedings.

82. In fixing the appropriate percentage, I take into account the following factors:

    82.1 These proceedings were principally about the failure of the facility to pass the Acceptance Tests and whether such failure entitled the Authority to terminate this long-term and valuable contract, or whether the true problem was the composition of the waste and the Authority was itself in breach of contract in failing properly to engage in the Options Review process with a view to remedying the composition issue.

    82.2 Although its monetary claim was of secondary importance, the Authority also sought damages of around £9 million in respect of UBB's unauthorised operation of the QSRF Line.

    82.3 Against that, UBB pursued a counterclaim pleaded at £77 million but in fact worth over £100 million by trial.

82.4 The Authority was successful both in its claims for declaratory relief and its monetary claim. While UBB's principal counterclaim was dismissed, its success on the asbestos issue meant that it recovered around 0.8% of the sums originally sought.

82.5 I accept Mr Stewart's analysis that the factual evidence occupied a little over one court day at trial. This is helpful in making a broad assessment of the overall importance of the issue, although irrelevant in the sense that, as I explain at paragraph 83 below, I am here dealing only with pre-trial costs.

82.6 Some disclosure was relevant only to the asbestos issue, but it concerned a short period of time in early 2017 and the documents were relatively modest compared to the vast size of the disclosure given upon the main issues.

82.7 While the parties chose to instruct major city law firms, five leading silks and three experienced juniors to litigate the very important issues concerning the future of this £800 million contract, the reasonable and proportionate costs of pursuing a discrete £800,000 counterclaim would have called for a very different approach.

82.8 I am awarding the Authority's costs on the indemnity basis whereas in fixing the percentage reduction in its recovery I am seeking to identify the appropriate set-off for the costs that would have been recovered on the standard basis had the court instead made an issue-based order. Accordingly, Mr Taverner's observation that the proposed 10% reduction would, in rough terms, equate to a costs order in UBB's favour of £1.5 million in respect of its success in recovering compensation of about half that amount is pertinent.

82.9 Further, my order should not just reflect UBB's reasonable and proportionate costs of litigating the asbestos issue but also the disallowance of the Authority's own costs on the issue: *Monsanto.*

83. Taking all of these matters into account, in my judgment the fair reduction in the Authority's costs is 5%. Accordingly, I make the following orders:

83.1 UBB will pay 95% of the Authority's costs incurred to 29 March 2019, such costs to be assessed on the indemnity basis.

83.2 Thereafter, the Authority will recover its costs on the indemnity basis pursuant to r.36.17 without any proportionate deduction. (The Part 36 offer sought to settle both the claim and counterclaim. Since the Authority achieved a judgment that was at least as advantageous as its offer, it should recover costs without deduction from the end of the relevant period.)

8. INTEREST ON COSTS

84. The parties agree that interest on costs should run from the date of payment of the costs rather than from the date of my costs order. As I have already observed, such order is of course made pursuant to r.44.2(6)(g). Unless the court makes a contrary order, interest on the award of costs would, however, run at 8% per annum pursuant to s.17 of the *Judgments Act 1838*. Given the disparity between that rate and the Authority's true cost of borrowing, the parties are agreed that the court should make an order pursuant to r.40.8(1) delaying the running of interest on costs under the 1838 Act until 14 September 2020 and setting a more commercial rate until that date. I agree that such course is appropriate for the reasons explained by Leggatt J, as he then was, in *Involnert Management Inc. v. Aprilgrange Ltd*

[2015] EWHC 2834 (Comm), [2015] 5 Costs L.R. 813 in circumstances where a significant interim payment has been ordered and it is not reasonable to expect the paying party to pay the balance of the costs liability until it has had a fair opportunity to determine what sum it accepts is properly payable. I therefore order that, subject to the order already made under r.36.17(4)(c), interest on costs shall run at the rate of 2.4% per annum from the date when the costs were incurred until 14 September 2020 and thereafter at the rate specified by s.17.

9. DATE FOR PAYMENT

85. When handing down judgment in June, I was told that there might be an application for a stay pending any appeal. In fact, no such application was made. Rather, Mr Stewart sought an extended period for payment of the judgment sum. There was, however, no evidence before the court to justify such application and UBB has already had the benefit of an additional month between the date when I handed down judgment and the hearing in July. Accordingly, I explained at the conclusion of the argument on 14 July that the judgment sum and agreed interim payment on account of costs would be payable within the usual 14 days from that date.