Case No: HT-04-314

Neutral Citation Number: [2008] EWHC 2280 (TCC)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURTS

Royal Courts of Justice

The Strand

London WC2A 2LL

Date: 29th September 2008

Before:

MR JUSTICE JACKSON

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BETWEEN:

MULTIPLEX CONSTRUCTIONS (UK) LIMITED	**Claimant/P**
-v-	**Defe**
CLEVELAND BRIDGE UK LIMITED	**First Defe**
	Part 20 Cla
CLEVELAND BRIDGE DORMAN LONG ENGINEERING LIMITED	**Second Defe**

(No7)

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MR R STEWART QC and **MR P BUCKINGHAM** (instructed by Clifford Chance LLP)) appeared on behalf of the **Claimant**.

MR A WILLIAMSON QC and **MS L GARRETT** (instructed by Reid Minty LLP) appeared on behalf of the **First and Second Defendant**.

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Judgment

1.

MR JUSTICE JACKSON: This judgment is in six parts, namely: part 1, introduction; part 2, the course of events since 5 June 2006; part 3, the law; part 4, what costs order should be made in the present case; part 5, the costs of preliminary issue 11; part 6, conclusion.

PART 1. INTRODUCTION

2.

I have this morning handed down judgment in the long-running action between Multiplex and Cleveland Bridge. I shall now deal with the question of costs. In this costs judgment I shall use the same abbreviations as were adopted in the main judgment.

3.

On 18 September 2008 the parties, having read the main judgment in draft, exchanged their respective proposals in respect of costs (other than the costs of preliminary issues 1-10 which have already been dealt with).

4.
Multiplex proposed that Cleveland Bridge should pay all outstanding costs of the action, including the costs of preliminary issue 11. Cleveland Bridge, on the other hand, proposed that Multiplex should pay all Cleveland Bridge's costs in relation to Scott Schedules 1 and 4 and that Cleveland Bridge should pay 30 per cent of Multiplex's costs in relation to Scott Schedule 2. Cleveland Bridge also proposed that Multiplex should pay Cleveland Bridge's costs of preliminary issue 11.

5.
So, on this issue, as on so many other issues, the parties are poles apart.

6.
The question of costs was argued at a two-day hearing last week. For the purposes of that hearing the parties lodged a bundle of correspondence, which was without prejudice save as to costs. This bundle of correspondence has given me an insight into what has been going on behind the scenes over the last two and a half years. Before I consider the legal principles which apply to both parties' applications, I must first review the course of events since 5 June 2006.

PART 2. THE COURSE OF EVENTS SINCE 5 JUNE 2006

7.
On 5 June 2006 I delivered judgment on preliminary issues 1-10. On the following day there was a hearing to deal with the costs of those preliminary issues and permission to appeal.

8.
At the hearing on 6 June there was the following exchange between Mr Tomlinson QC (then leading counsel for CB) and myself:

"Judge: Tell me this: can I be confident that one consequence of the decisions on the preliminary issues is that, given the present financial position between the parties, at the end of the day Cleveland is going to be paying some money to Multiplex and what falls to be determined in January 2007 is how much?

"Mr Tomlinson: My Lord, I think it is fair to say that your Lordship can be confident of that."

A little later there was the following exchange:

"Judge: But we know that at the end of the day you will be paying some cash to Multiplex, although we do not know how much.

"Mr Tomlinson: My Lord, that is highly likely, I have to concede that."

9.
Mr Tomlinson went on to make the point that Multiplex's pleadings on damages were in an unsatisfactory state.

10.
The impression which I, and I suspect others, gained by the end of preliminary issues 1-10 was that CB would be liable to repay a modest sum to Multiplex, bearing in mind the awards previously made

by the adjudicator in CB's favour. By "a modest sum" I mean a few million pounds. It remained to be determined precisely what that modest sum would be.

11.
The first opportunity to settle arose in June 2006. CB and Multiplex could have immediately embarked upon sensible negotiations and rapidly resolved the entire litigation. If one party refused to co-operate, the other party could have made a realistic offer under part 36 in order to protect its position.

12.
In the event, neither party made a part 36 offer during the summer of 2006. Instead, on 25 August 2006 Multiplex served Scott Schedule 4. That schedule increased Multiplex's claim for damages for repudiation from £3 million to £25 million. Multiplex's objective, as stated on several occasions in open court, was to establish that one way or another damages for repudiation would comfortably reach the contractual limit of £6 million.

13.
Multiplex's introduction of Scott Schedule 4 has been the source of immense difficulties in this litigation. The schedule and its appendices run to considerable length. The schedule is not well constructed and I suspect that it has not been drafted by either solicitors or counsel. The more closely one studies schedule 4, the more difficult it becomes to deal with the claims.

14.
Schedule 4A, although on its face a claim for damages, is in truth the calculation of a credit item.

15.
Schedule 4B is flawed because it is based upon an erroneous interpretation of the Supplemental Agreement.

16.
Schedule 4C presents a number of challenges to the reader, as noted in earlier judgments.

17.
Schedule 4D comprises a mass of detailed claims concerning the erection engineering and temporary works, but gives rise to formidable issues on causation.

18.
Schedule 4E is on any view a somewhat odd way to present a multi-million-pound prolongation claim.

19.
Schedule 4F is a highly convoluted claim for a modest amount of damages for repudiation of the purchase order. As Mr Stewart realistically accepted during the costs hearing, schedule 4F was always unlikely to yield any substantial damages. Its main function, apparently, was to assist in the computation of the credit due under schedule 4A.

20.
The introduction of schedule 4 effectively blew this litigation off course. It gave rise to the need for a second preliminary issues trial, followed by a second trip to the Court of Appeal. CB faced the unenviable task of pleading to schedule 4. Thereafter, the pleadings ran on, with replies and further information. Substantial further disclosure was required in relation to schedule 4.

21.

I now turn to the negotiations between the parties. Despite the concession made by counsel for CB at the hearing on 6 June 2006, it is a remarkable fact that CB made no part 36 offer during 2006. Indeed, CB made no such offer during the first 11 months of 2007. By failing to make any offer in the aftermath of the trial of preliminary issues 1-10, CB threw away a golden opportunity to settle or, alternatively, to protect their position on costs.

22.
I turn now to the offers made by Multiplex. The first offer made after the trial of preliminary issues 1-10 was dated 13 November 2006. Multiplex offered to accept £8.6 million in settlement of Scott Schedule 1, Scott Schedule 2 and CB's counterclaims. When one takes into account interest and the position on retention, it can be seen that Multiplex's proposed settlement figure was substantially higher than Multiplex's eventual recovery on schedules 1 and 2. Accordingly CB cannot be criticised for failing to accept that offer. However, CB can be criticised for failing to make any form of counter-offer. CB had previously (and correctly) acknowledged that ultimately a sum would be due to Multiplex. CB allowed huge costs to be run up in 2006 and 2007 without putting any offer of their own on to the table.

23.
On 30 July 2007 Multiplex offered to accept £8.5 million in full and final settlement of the entire proceedings. When one takes into account the position on interest up to July 2007, it can be seen that Multiplex's proposed settlement figure was approximately £1.25 million higher than Multiplex's eventual recovery at trial. Furthermore, if CB had accepted that offer, they would have been exposed to the costs consequences flowing from part 36. CB would probably have had to bear their own costs referable to schedule 4 and to pay Multiplex's costs referable to schedule 4. These were substantial sums.

24.
Having regard to the judgment which was eventually given, I do not think that CB can be criticised for rejecting Multiplex's offer of 30 July 2007. However, CB can be criticised for failing to make any counter-offer. Costs were mounting at an alarming rate. Neither CB nor Multiplex had taken any effective steps to secure costs protection. Both parties were freewheeling downhill towards the precipice.

25.
On 14 December 2007 CB made two offers to Multiplex. CB offered to settle Scott Schedule 1 for £500,000 and Scott Schedule 4 for £1 million. These offers were not made pursuant to part 36. Costs were left to be dealt with by the court in due course.

26.
Although CB expressed optimism about their prospects on schedule 2, I am quite satisfied that these offers should not be construed as depending upon schedule 2 having any particular outcome. I am satisfied that these were genuine offers. They were substantially more favourable to Multiplex than the judgment of this court in relation to those two schedules.

27.
Multiplex ought to have accepted those two offers, but Multiplex did not do so. Multiplex thereby threw away a golden opportunity for settlement. If Multiplex had accepted CB's offers of 14 December, all that would have remained would have been schedule 2. The trial would have been made much shorter. Furthermore, the prospects of settling schedule 2 in isolation would have been much better once schedules 1 and 4 were swept away. Regardless of whether schedule 2 was settled or

fought out, at the end of the day Multiplex would have been in an extremely powerful position on costs. They would have emerged as victors on each of the Scott Schedules.

28.
On 18 January 2008 Multiplex offered to settle schedule 1 for £650,000 and schedule 4 for £4.5 million. These offers were not realistic and they were not accepted.

29.
On 29 January 2008 CB offered (not under part 36) to settle schedule 4 for £2.25 million. This generous offer remained open for 21 days, ie until 19 February.

30.
On 7 February 2008 the parties travelled to Chester, where I was then sitting, in order to deal with a number of interlocutory issues. By now we were all a month away from trial and costs were rapidly escalating. The parties were approaching the edge of the precipice.

31.
In the course of the hearing on 7 February I drew attention to the massive costs which were being run up and to the desirability of settlement. I did not, of course, know about CB's offer which was then on the table. However, Multiplex knew about that offer and it is highly regrettable that they did not accept it.

32.
There was further correspondence between the parties in February about schedule 1. They came quite close to settling schedule 1 for £500,000 but could not agree about the costs consequences.

33.
On 18 February CB renewed their schedule 1 offer of 14 December for a further seven days, but Multiplex did not accept.

34.
On 19 February, Multiplex were almost at the edge of the precipice. Highly generous offers from CB were available in respect of schedule 1 and schedule 4. If Multiplex had accepted those offers, they would have emerged from this litigation with considerable financial benefit and with favourable costs orders in respect of each Scott Schedule. However, Multiplex did not accept those offers. They chose to press on forwards.

35.
On Monday 3 March the parties exchanged opening notes. On Thursday 6 March, just two working days before the start of the trial, Multiplex sent a part 36 offer to CB offering to accept £6.5 million in settlement of the entire proceedings.

36.
On Monday 10 March the trial commenced. In the course of his opening submissions Mr Williamson made a devastating attack on schedule 4. Multiplex, it would appear, began to appreciate their difficulties in relation to that schedule. On 14 March Multiplex hastily sought, out of time, to accept CB's offer of 29 January in relation to schedule 4. Multiplex also offered to pay CB's costs of schedule 4 since the date when that offer had expired. But, alas, it was too late. By then CB had become far more bullish about their prospects on schedule 4. For reasons which I can understand, CB declined to revive their previous offer.

37.
On 20 March Multiplex offered to accept £5 million (exclusive of interest) in settlement of schedules 1 and 2, leaving all questions of interest and costs to the court. In the course of this letter Multiplex set out candidly their assessment of the respective parties' cases on schedule 2.

38.
Paragraph 7 of the letter reads as follows:

"You will see that Multiplex has endeavoured to share with you its assessment of the most important sub-issues arising from schedule 2, leading to an overall proposal in relation to schedule 2. The purpose of this is twofold: (i) to identify the analysis underpinning the overall proposal; and (ii) to set the agenda for further discussions. As to this second point, Multiplex invites your clients to engage with it in relation to the sub-issues in the hope and expectation that such dialogue might at least narrow the issues before the court if, for whatever reason, your clients are not minded to accept the overall proposal. Since many of Multiplex's previous settlement proposals have been completely ignored, we emphasise that Multiplex is ready, willing and able to explore with your clients the possibility of reaching agreement on any aspect of this action, however modest in the context of the action as a whole."

39.
Multiplex's offer was not made under part 36. Furthermore, in comparison with the final judgment of this court, Multiplex's offer was pitched at slightly too high a level. It was, however, an extremely constructive letter. CB should have responded by engaging in a dialogue as invited. If CB had done so, they would probably have been able to settle schedules 1 and 2 on sensible terms, thereby avoiding most of the trial costs. All that would have been left was schedule 4. By late March CB were in a powerful position on schedule 4, as they (and possibly Multiplex) now appreciated. If all that was left in the litigation was schedule 4, CB would have been in an extremely strong position on costs, regardless of whether schedule 4 was fought out or Multiplex capitulated.

40.
Unfortunately CB did not respond constructively to Multiplex's letter of 20 March. Instead they pressed on forwards.

41.
At the end of March both parties bicycled over the edge of the precipice and plunged into the abyss. Costs were escalating. Huge amounts of management time were being deployed to no useful purpose. Neither party was going to escape from the abyss with any financial benefit.

42.
Having reviewed the course of events over the last two and a half years, I must now turn to the law.

PART 3. THE LAW

43.
It is the policy of the law that litigants are encouraged to settle their differences upon reasonable terms. Where one party makes a sufficient offer of settlement which the other party rejects, part 36 of the Civil Procedure Rules rewards the offeror and penalises the offeree.

44.
The occasion for such reward or penalty is described as follows in rule 36.14(1) (following amendment in April 2007):

"This rule applies where upon judgment being entered:

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

"(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer."

45.
Rule 44.3 of the Civil Procedure Rules provides:

"(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 must have regard to all the circumstances, including:

"(a) the conduct of all the parties;

"(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

"(c) any payment into court or 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 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 his case or a particular allegation or issue;

"(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

"(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) interests on costs from or until a certain date, including a date before judgment.

"(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

46.
The individual provisions of rule 44.3 tend to pull in different directions. I therefore turn to the authorities cited by counsel for guidance as to how these rules should be applied.

47.
In **AEI Rediffusion Music Limitedv Phonographic Performance Limited[1999] 1 WLR 1507**, Lord Woolf MR gave guidance as to how the new rule 44.3 should be applied when it came into force. At pages 1522 to 1523 he said:

"I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From 26 April 1999 the 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this, the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are engaged to leave no stone unturned in your effort to do so."

48.
The Civil Procedure Rules duly came into force in April 1999. Later that year, in **Liverpool City Council v Rosemary Chavasse Limited(18 August 1999)**, Neuberger J considered the application of rule 44.3 in circumstances where the claimant council was overall winner, having succeeded on some issues but failed on others. The judge did not award the costs of each issue to the party which won that issue. Instead he made a proportional order for costs in favour of the council. In reaching this decision the judge heeded rule 44.3(7). He also stated a further justification for his decision in these terms:

"Where evidence, be it documentary or oral, was reasonably appropriate both for a point on which the council won and for a point on which Walton won, then it seems to me that the costs relating to that evidence should at least **prima facie** be those of the council because that evidence would have been reasonably necessary for the council's case and the council was the overall winner. It is perhaps in this connection that it is most important to bear in mind that the council was the overall winner."

49.
Johnsey Estates(1990) Limited v Secretary of State for the Environment, Transport and the Regions[2001] All ER(D) 135, were proceedings between landlord and tenant for dilapidations. The tenant made two payments into court. The first payment into court was slightly too low but the second was more than sufficient. The Court of Appeal held that the landlord was entitled to its costs up to the date of the second payment in. Chadwick LJ (with whom Arden and Schiemann LJJ agreed) gave a helpful summary of the principles upon which the court should act. At paragraph 21 he said:

50.
"The principles applicable in the present case may, I think, be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs -- and, if, so what order -- is a matter entrusted to the discretion of the trial judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues -- and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue ... "

51.
At paragraphs 31 and 32 Chadwick LJ said that the court should not speculate about what course any negotiations might have taken after the first payment into court.

52.
Summit Property Limited v Pitmans[2001] EWCA Civ 2020 was a professional negligence action in which the claimant succeeded on breach and the defendant succeeded on causation. The judge ordered the claimant to pay 30 per cent of the defendants' costs and the defendants to pay 65 per cent of the claimant's costs. The Court of Appeal noted that most of the trial had been taken up with the issue of breach and went on to uphold the judge's order.

53.
Longmore LJ, who gave the principal judgment, cited **AEI Rediffusion**. Then he said this at paragraphs 16 to 17:

"16. In my judgment, it is also no longer necessary for a party to have acted unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which he (the first party) has failed. That is the substance of what the Master of the Rolls was there saying. That that must be so is shown partly by the earlier citation at pages 1522H to 1523B but, more importantly, by the only other case to which, for my part, I would have thought it was necessary for this court to be referred, namely the case of **Johnsey Estates (1990) Limited v Secretary of State for the Environment** ...

"17. It is thus a matter of ordinary common sense that if it is appropriate to consider costs on an issue basis at all, it may be appropriate, in a suitably exceptional case, to make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably."

54.
In **Quorum v Schramm(No 2)** **[2002] 2 Lloyd's Law Reports 72**, a property owner claimed monies due under an insurance policy. In comparison with the court's final judgment it could be seen that the claimant's part 36 offer was too high and the defendant's part 36 offer was too low. Thomas J, following the Court of Appeal's decision in **Johnsey**, held that neither party could be regarded as unreasonable for failing to negotiate about the other's offer. Each party's offer should be treated as its final position.

55.

In **AL Barnes Limited v Time Talk (UK) Limited[2003] EWCA Civ 402** the claimant contractor claimed payment on a quantum meruit basis for shopfitting works carried out. The defendant counterclaimed for the repayment of project management fees, which it had wrongly paid as the result of a dishonest private arrangement made between a director of the claimant and a director of the defendant. Both claim and counterclaim succeeded. The claimant recovered £216,968 on its claim. The defendant recovered £87,003 on its counterclaim. The consequence was that the defendant had to pay the balance of approximately £130,000 to the claimant. However, the dishonesty issue, on which the defendant had succeeded, occupied most of the time at trial. In relation to costs the Court of Appeal, reversing the trial judge, held that the claimant should recover 25 per cent of its costs of the action.

56.
In relation to the costs issue Longmore LJ said:

"29. It does seem to me that the judge has, with the greatest respect, fallen into an error of principle. In what may generally be called commercial litigation (and this case, like Dyson's was proceeding in the Leeds Mercantile Court) the disputes are ultimately about money. In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure. It is not irrelevant that it was Time Talk who felt the need to appeal the judge's judgment. It is not normally right to segregate a large element of the costs and thereafter to decide who the successful party is. It needs to be decided at the outset.

"30. I do not, moreover, consider that the judge was right to segregate the costs associated with instructing experts and thus most of the costs of proving the claim. Litigants are entitled to make contracts and leave the fee payable for the costs of services rendered to be fixed by the court. It is not a justifiable exercise of discretion to castigate this as 'highly unorthodox' and refuse to make any order as to costs. The judge's task was, of course, made more difficult by reason of the fact that the parties had not agreed a price for the claimant's services, but difficulty for the judge is not, of itself, a reason for making no order on the costs. Nor is the fact, if it be true, that once relations break down when no price is fixed, a dispute is inevitable. It is, after all, a judge's job to resolve disputes whether they are inevitable or not.

"31. For these two reasons the exercise of discretion by the judge was vitiated by an error of principle. If he had asked himself who was the successful party, before segregation of the effective costs of proving the quantum meruit claim, he would in my judgment have had to answer that it was the claimants who recovered more than the defendants had ever offered and thus it must be the claimants who were the successful party. The question would then be what proportion, if any, of their costs should they recover. That question is now for this court. The judge was, of course, correct to be influenced by the fact that most of the time spent in court was spent on an issue on which the claimants failed and that that issue was whether one of the claimants' employees had acted dishonestly, albeit at 'the least serious end of the spectrum'. Bearing that matter in mind, I would hold that the claimants' success should be reflected by the recovery of a small proportion of their costs. I would fix that proportion at 25 per cent and would according allow the cross-appeal to that extent."

57.
Clarke and Ward LJJ agreed with that judgment.

58.
Painting v University of Oxford[2005] EWCA Civ 161 was a personal injuries action in which liability was admitted, subject to a 20 per cent deduction for contributory negligence. The case was

fought out on quantum. The defendant succeeded in its defence that the claimant was exaggerating her claim, but nevertheless the claimant recovered more than the payment into court. The Court of Appeal held that the claimant should pay the defendant's costs after the payment into court. Maurice Kay LJ, giving the principal judgment, said this:

"21. ... The two-day hearing was concerned overwhelmingly with the issue of exaggeration, and the University won on that issue. Mr Farmer's submission that that was only one issue, the other being the quantification of the claim, is not persuasive. Quite simply, that second issue was hardly an issue at all once the Recorder had found the exaggeration and the cut-off date. It is true that that cut-off date was later than the one advanced on behalf of the University, but, viewed objectively, the totality of the judgment was overwhelmingly favourable to the University. It was in real terms the winner. Moreover, the costs incurred after the reduction of the money in court were expended almost entirely on the preparation for and conduct of a trial in which the central issue was that of exaggeration.

"22. There are two additional points which seem to me to have called for the affording of considerable weight by the Recorder, whereas the transcript does not suggest that he afforded them any weight at all. The first is the strong likelihood that, but for exaggeration, the claim would have been settled at an early stage and with modest costs. The second is that at no stage did Mrs Painting manifest any willingness to negotiate or to put forward a counter-proposal to the Part 36 payment. No one can compel a claimant to take such steps. However, to contest and lose an issue of exaggeration without having made ever a counter-proposal is a matter of some significance in this kind of litigation. It must not be assumed that beating a Part 36 payment is conclusive. It is a factor, and will often be conclusive, but one has to have regard to all the circumstances of the case."

59.

Burchell v Bullard[2005] EWCA Civ 358 was a building case. The claimant claimed payment for constructing two extensions to the defendant's home. The defendant counterclaimed for defects in the roof. The claimant joined the subcontractor, who had been responsible for the roof, as part 20 defendant. The claimant succeeded on his claim and the defendants had some limited success on their counterclaim, with the result that a balance was payable to the claimant. The judge awarded the costs of the claim to the claimant and the costs of the counterclaim to the defendants. The Court of Appeal reversed that decision and held that the proper order was that the claimant should recover 60 per cent of the costs of the entire proceedings. Ward LJ, giving the principal judgment, said this:

"29. The modern tendency is at least to consider the award of costs on an issue-by-issue basis. The Recorder addressed that but dismissed it because of the difficulty in the preparation of a bill of costs and the enormous complication of the process of detailed assessment. I agree with that. I also agree with him that it is better, if possible, to deal with the matter another way. His judgment shows, however, that he did not find another way: he resorted to costs following the event. In doing so I fear he fell into error.

"30. His error in my judgment was to fetter his discretion and not to go on to consider, as he should have considered, what alternatives were available to him. The most obvious and frequently most desirable option is that signposted in CPR 44.3 paragraph (6)(a), namely to order a proportion of the party's costs to be paid. The Recorder had directed his mind to paragraph (6)(f), namely ordering costs relating only to a distinct part of the proceedings, but he seems to have overlooked paragraph (7) which required him, where he would otherwise have considered confining costs to part of the proceedings only, to make instead, where practicable, an order under (6)(a) for a proportion of the costs. Ordering a proportion of costs obviates all the difficulties he acknowledged in an assessment of

how much is properly to be allocated to each and every issue considered in isolation. Better by far to decide, despite the difficulty and imprecision of the calculation, that the relevant issue or issues should bear a percentage of the costs taken overall. As the Recorder erred in principle, the appeal on this aspect must be allowed ...

"33. I take as my starting point the Recorder's decision, which I would honour, to exercise his discretion to give separate judgments on claim and counterclaim on the basis that it would make no difference as to the costs. The order as drawn did in fact allow the set-off because paragraph 3 of the judgment ordered the defendants to pay the claimant the difference between the sum awarded to the claimant on his claim and the sum awarded against him on the defendants' counterclaim. How, in circumstances like that, does one decide who the unsuccessful party is? This was, after all, a form of commercial litigation where each side was claiming money from the other. Costs following the event is the general rule and in this kind of litigation the event is determined by establishing who writes the cheque at the end of the case. Here the defendants do. They were the unsuccessful parties and my starting point is that the claimant is entitled to the costs of the proceedings, claim and counter-claim taken together ...

"44. Balancing all those factors how then is justice to be done? The claimants cannot have the whole of their costs which follow the event that they were successful to the tune of £5,000-odd. Some recognition has to be paid to the fact that a large part of the trial was taken up with the counterclaim on which the defendants did have some, albeit limited, success. The object of the exercise is to make a just and fair award of costs. Standing back and looking at the matter in the round it seems to me that the claimant enjoyed the greater share of the spoils of victory. In my judgment justice is achieved by awarding the claimant 60 per cent of the costs of the proceedings, claim and counterclaim, lumping them together. The district judge assessing these costs will still be able to decide to what extent Mr Rougier's fees must be disallowed."

60.
In **National Westminster Bank Plc v Kotonou**[2007] EWCA Civ 223, K contended that a guarantee which he had give to the bank should be set aside on five separate grounds. K failed on the first four grounds, but succeeded on the fifth and the guarantee was duly set aside. The judge ordered each party to pay 50 per cent of the other party's costs.

61.
The Court of Appeal upheld that order. The Court of Appeal held that the case called for an issue-based approach to costs. It should be noted that in this case one of the grounds upon which K failed was an allegation of fraud. That issue had given rise to substantial costs.

62.
Aspin v Metric Group Limited [2007] EWCA Civ 922was a claim for damages and outstanding remuneration brought by a sales director against his former employers. Both parties had a measure of success. The details of the costs order made by the judge and the revised costs order made by the Court of Appeal are not material. In relation to the correct approach Chadwick LJ, after quoting passages from **Summit and Johnsey**, said this:

"22. ... The passages point out that, in deciding what order to make on an issue-based approach, the court may decide that, in relation to an issue which the party successful overall has lost, that party should be deprived of his costs of that issue; or even, in a suitable case, that that party should pay the costs of the otherwise unsuccessful party on that issue."

63.
Chadwick LJ went on to criticise the judge's approach in these terms:

"25. HHJ Wyn Williams clearly did have in mind the need to consider whether this was a case in which to depart from the 'follow the event principle' in respect of the overall result. But his reasoning was not that he should make separate orders in respect of discrete or distinct issues; not even that, if there were discrete issues, he should make an order of a proportionate nature which reflected the success on one issue and failure on another. The order which he made was not, on analysis, an issue-based order at all. It was a global order which deprived the claimant of any costs, because as the judge saw it he had obtained so much less by way of damages than he had originally been claiming. The judge did not explain why he did not choose to adopt a conventional issue-based approach. The possibility of such an approach had been canvassed in the skeleton arguments that were before him; although, in fairness to him, it should be said that it is less than clear that either party was urging him to approach the matter on an issue basis. Nevertheless, that was what the rules required."

64.
Both Wall LJ and Blackburne J agreed with that judgment.

65.
Straker v Tudor Rose[2007] EWCA Civ 368 was a solicitors' negligence action in which the claimant recovered damages exceeding the defendant's part 36 offer. The judge awarded only limited costs to the claimant. The Court of Appeal, following **Barnes**, increased the claimant's costs recovery by awarding 60 per cent of the costs incurred after the date of the part 36 offer. The court cited with approval the passages from the judgments in **Johnsey** and **Quorum** which I have referred to above.

66.
Hall v Stone[2007] EWCA Civ 1354 was a personal injuries action. The claimants recovered substantially less than they claimed. On the other hand, the defendant failed in his defence alleging that the claimants were dishonest and that nothing was due. The Court of Appeal held that the claimants were entitled to recover their costs. The key factor in this decision was the characterisation of the claimants as winners because they had defeated the defendant's blanket defence. In the course of her judgment Smith LJ made this observation:

"82. ... I am not for a moment saying that it is not open to a judge to take account of the fact that a party has failed to beat an offer by a small margin. In these days where both sides are expected to conduct themselves in a reasonable way and to seek agreement where possible, it may be right to penalise a party to some degree for failing to accept a reasonable offer or for failing to come back with a counter-offer."

67.
Carver v BAA Plc[2008] EWCA Civ 412 was another personal injuries claim. The claimant beat the defendant's part 36 offer, but only by a small amount. The judge deplored the claimant's failure to negotiate after receiving that offer. The judge noted that the claimant in practice gained nothing from pressing on with the action, because of the irrecoverable costs which she incurred. The judge ordered the claimant to pay the defendant's costs in respect of the period after the part 36 offer.

68.
The Court of Appeal upheld that order. The principal judgment was give by Ward LJ, with whom Rix and Keene LJJ agreed. In the course of his judgment Ward LJ said this:

"28. The primary question for us is whether the change in the language of Part 36 results in a change of approach. Under the old rule the claimant would have recovered her costs (subject to any derogation from the rule that costs follow the event under CPR 44). All one can glean from the change is that the purpose of the amendment was to replace the old system of payment in with offers to settle and to apply the same costs consequences irrespective of whether the offer was for the payment of a sum of money in a money claim or an offer of terms and conditions on which to settle non-money claims. The previous practice for the latter -- the 'more advantageous' approach -- became the uniform approach for both. For money claims as well as for non-money claims the same questions arise under CPR 14(1) namely, under (a) whether the judgment is 'more advantageous' than the offer and under (b) whether the judgment is 'at least as advantageous' as the offer.

"29. It is clear that in non-money claims where there is no yardstick of pounds and pence by which to make the comparison, all the consequences of the case have to be taken into account. Why, therefore, should the rule be different where a money claim is involved? Mr Coughlan proffers a compelling answer, namely that a pure monetary comparison produces clarity and avoids placing value upon subjective elements such as the stress and anxiety involved in protracted, risky litigation. I see the force of that argument. In this case, as in so many, the amount of the costs exceeds the amount in dispute by a significant margin and any rule which reduces the scope of argument over costs is a salutary one.

"30. Nonetheless, the Court must give effect to the new rule and if that has introduced a change in practice, so be it. Are the concepts of bettering a Part 36 payment and obtaining a judgment more advantageous than the Part 36 offer synonymous? Posed in that way, perhaps they are, but in the context of the new Part 36, where money claims and non-money claims are to be treated in the same way, 'more advantageous' is, as Rix LJ observed in the course of argument, 'an open-textured' phrase. It permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight.

"31. The answer must, in my judgment, take account of the modern approach to litigation. The Civil Procedure Rules, and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion, for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time-consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion.

"32. It follows that Judge Knight was correct in looking at the case broadly. He was entitled to take into account that the extra £51 gained was more than offset by the irrecoverable costs incurred by the claimant in continuing to contest the case for as long as she did. He was entitled to take into account the added stress to her as she waited for the trial and the stress of the trial process itself. No reasonable litigant would have embarked upon this campaign for a gain of £51."

69.
It is clear that the Court of Appeal's approach in **Carver** is very different from the earlier approach of the courts towards offers which were not quite sufficient.

70.
Mr Williamson submits that the Court of Appeal's approach in **Carver** should be confined to personal injury cases. Mr Stewart, on the other hand, submits that the Court of Appeal's approach in **Carver** is of general application, following the amendments made to part 36 of the Civil Procedure Rules in April 2007.

71.
On this issue I consider that Mr Stewart is correct. Paragraphs 28 to 32 of the Court of Appeal's decision in **Carver** set out how the court ought to approach the matter in circumstances where: (a) one party has made an offer which was nearly but not quite sufficient; and (b) the other party has rejected that offer outright without any attempt to negotiate.

72.
From this review of authority I derive the following eight principles.

(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.

(ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.

(iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.

(iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7).

(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.

(vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.

(vii) If (a) one party makes an order offer under part 36 or an admissible offer within rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs. [1]

(viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs.

73.
Having reviewed the authorities, I must now apply those principles to the present case.

PART 4. WHAT COSTS ORDER SHOULD BE MADE IN THE PRESENTCASE?

74.
In this part of the judgment I shall leave on one side the costs of the preliminary issues. The costs of issues 1-10 have already been dealt with. The costs of issue 11 will be addressed in part 5.

75.
The first question which I must consider is which party has won the action. This is commercial litigation in which each party has been advancing claims. It is obvious that there must be a set-off of the sums awarded on both sides. Each party has been contending that the overall result is a payment in its own favour.

76.
The final result of the action is an order that CB do pay to Multiplex the sum of £6,154,246.79. CB have never offered to pay that sum, or anything like it, to Multiplex. Indeed, CB have never accepted that any overall balance is due to Multiplex. Accordingly, I conclude that Multiplex have won the action and that Multiplex must be characterised as the successful party. Therefore I take as my starting point the proposition that Multiplex are entitled to an order for costs.

77.
The next question which I must consider is what departures are required from that starting point, having regard to all the circumstances of the case.

78.
Two important factors which require consideration at this stage are as follows: first, Multiplex's case on Scott Schedule 4 was comprehensively defeated; secondly, Multiplex failed by a wide margin to beat CB's offer of 14 December 2007 in relation to Scott Schedule 1. In my view, CB's success and Multiplex's lack of success on these matters must be reflected in the costs order.

79.
It is therefore necessary to consider what costs are attributable to each element of the case. Over the last few days the solicitors on both sides have furnished to me a great deal of costs information from their records. I have also had the advantage of managing this litigation for the last three years. Drawing upon the recent information from the solicitors, as well as my own experience of the case, I consider that the following is a reasonable apportionment of the costs which have been incurred: schedule 1, 10 per cent; schedule 2, 30 per cent; schedule 4, 40 per cent; common costs, 20 per cent. The principal discrepancy between the costs information supplied by solicitors concerned schedule 4. It appears that CB devoted a rather higher percentage of costs to schedule 4 than did Multiplex. I take 40 per cent as a reasonable average figure.

80.
I must next consider whether the circumstances of this case require an issues-based costs order. Having regard to rule 44.3(7) and the guidance given by the Court of Appeal in the authorities cited above, I conclude that the circumstances of this case do not require an issues-based costs order. It is perfectly practicable to make a proportionate costs order which will do justice between the parties.

81.
Let me now consider what proportion of their costs Multiplex should receive. In relation to schedule 1 Multiplex had a claim for defects on which they recovered damages of £151,305.39 plus interest. CB made no offer in respect of schedule 1 until December 2007. On 14 December 2007 CB offered £500,000. That was not an offer made under part 36, but it was an admissible offer within rule 44.3(4)(c). That offer remained open for 21 days. Multiplex ought to have accepted that offer. Multiplex acted unreasonably in rejecting it.

82.
According to the information supplied to me by solicitors, CB incurred 50 per cent of their costs referable to schedule 1 before 21 December 2007 and the other 50 per cent subsequently. Multiplex are not able to be quite so precise. However, it appears that Multiplex incurred about 40 per cent of their schedule 1 costs before 21 December 2007 and about 60 per cent after that date.

83.

In making my preliminary assessment I shall pencil in a nil recovery for Multiplex in respect of the 10 per cent costs attributable to schedule 1.

84.
I now come to schedule 2 and the common costs. 50 per cent of the costs of the action are either attributable to schedule 2 or are common costs. Since Multiplex are the winners of schedule 2 and Multiplex are the winners of the action, I shall pencil in that Multiplex recovers all of those costs.

85.
Mr Williamson makes the point that although Multiplex are the victors in respect of schedule 2, they lost a large number of schedule 2 points along the way.

86.
There are in my view two answers to that submission. First, I am treating CB as the victors in respect of schedule 4, even though CB lost quite a few schedule 4 issues along the way: See chapters 29, 30 and 33 of the main judgment. Secondly, Multiplex made it clear in March 2008 that schedule 2 involved a range of issues, some of which they were likely to lose. Multiplex were perfectly willing to compromise schedule 2 on a basis similar to the eventual judgment of this court. CB acted unreasonably in refusing to enter into any form of dialogue about schedule 2.

87.
I now come to schedule 4. Even though Multiplex won a number of individual issues along the way, the overall result of schedule 4 was that Multiplex recovered nothing other than nominal damages. I shall therefore pencil in that the costs order should allow CB to recover the costs referable to schedule 4, namely 40 per cent of the costs of the action.

88.
If the figures which I have so far pencilled in are applied mechanistically, the overall result is that Multiplex recover about 10 per cent of the costs of the action. However, I must not stop at this point. I must now look at the entirety of the parties' conduct since June 2006 and consider whether any adjustment is required to that 10 per cent figure.

89.
For the reasons set out in part 2 above, the conduct of both parties is open to criticism. Nevertheless, I have come to the conclusion that the greater share of blame rests with CB. I reach this conclusion for the following reason. Having conceded on 6 June 2006 that some overall payment was due to Multiplex, CB never followed up that concession by making an offer. At no point between 6 June 2006 and today, the day of judgment, have CB ever offered to make any payment in settlement of the entire proceedings.

90.
I consider that this failure on the part of CB is the overriding reason why this litigation has not settled. There is a heavier onus on the debtor to make a defendant's offer than there is on the creditor to make a claimant's offer. The manner in which Multiplex pursued schedule 4 is a matter for criticism, but it is less culpable than CB's obstinate refusal to make any offer of settlement.

91.
In respect of the period December 2007 to March 2008 both parties at different times threw away golden opportunities to achieve favourable settlement. I consider that Multiplex are more to blame than CB during that period.

92.
Taking into account the conduct of the parties and all the circumstances of the case, I shall increase the initial figure of 10 per cent in favour of Multiplex to 20 per cent. In the result, therefore, CB must pay to Multiplex 20 per cent of the costs of the action.

PART 5. PRELIMINARY ISSUE 11

93.
Preliminary issue 11 was principally relevant to schedule 4, but it also had a material impact upon schedule 2. See the figures agreed between junior counsel as set out in their email dated 26 September 2008.

94.
Multiplex contend that Multiplex should have all of their costs of preliminary issue 11, because Multiplex are the winners of the action. CB contend, on the other hand, that CB should be awarded all of the costs of preliminary issue 11, because CB are the victors on schedule 4. In the usual way, the parties are poles apart on this particular point.

95.
I do not accept the submissions of either party in this regard. Preliminary issue 11, like preliminary issues 1-10, was a discrete phase of the litigation. It generated a separate round of pleadings and a separate disclosure exercise. The court should make a costs order in respect of preliminary issue 11, reflecting the outcome of preliminary issue 11, in the same way that the court previously made a costs order in respect of preliminary issues 1-10, reflecting the outcome of those ten preliminary issues.

96.
In considering the outcome of preliminary issue 11, I shall use the same abbreviations as were adopted by the Court of Appeal in paragraph 8 of its costs judgment dated 6 February 2008. The final outcome of preliminary issue 11 was that Multiplex won the design issue and CB won the fabrication issue.

97.
I have refreshed my memory of the evidence which was called and the submissions which were made in respect of preliminary issue 11. I still have a clear recollection of the trial of that matter, which took place in January of last year.

98.
I reject Mr Stewart's submission that a greater proportion of the time at that trial was devoted to the design issue than to the fabrication issue. The apportionment of trial time between design and fabrication was about equal. I also consider that the preparation costs should be apportioned equally between design and fabrication.

99.
It is true that there were shortcomings in CB's disclosure leading up to the January 2007 trial. However, CB's late disclosure in relation to issue 11 is offset by Multiplex's late disclosure in relation to the main trial. So no adjustment to the appropriate costs order for preliminary issue 11 should be made on that ground.

100.
Having regard to all the circumstances, I consider that the proper order is that each party should bear its own costs in relation to preliminary issue 11.

PART 6. CONCLUSION

101.
For the reasons set out in part 5 above, each party will bear its own costs of preliminary issue 11. For the reasons set out in part 4 above, CB must pay to Multiplex 20 per cent of Multiplex's costs of the action to be assessed on the standard basis.

102.
Finally, I should like to thank the solicitors and counsel on both sides for their industry over the last seven months and for the considerable assistance which they have given to this court both during the trial and during the post-trial hearings. I request that counsel agree a form of order which will give effect to this court's decision on the main action and in respect of costs.

103.
That, I believe, concludes all costs issues except for Multiplex's application for an interim payment. Counsel may possibly welcome a few minutes for discussion before counsel make submissions about that matter.

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[1] **NOTE: Sub-paragraph 72 (vii) of the Multiplex judgment has been superseded by a subsequent rule change. That sub-paragraph should now be disregarded: see Dufoo v Tolaini[2014] EWCA Civ 1536 at [39].**