Neutral Citation Number: [2009] EWHC 274 (TCC)

Case No: HT-07-225

IN THE HIGH COURT OF JUSTICE

TECHNOLOGY AND CONSTRUCTION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 20/02/2009

Before:

MR JUSTICE COULSON

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Between:

FITZPATRICK CONTRACTORS LIMITED **Cla**

- and -

TYCO FIRE AND INTEGRATED SOLUTIONS (UK) LIMITED (FORMERLY WORMALD ANSUL (UK) LIMITED) **Defe**

(No.3)

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Mr Bernard Livesey QC and **Mr Marc Rowlands**(instructed by **Maxwell Winward LLP**) for the Claimant

Mr David Thomas QC and **Mr Jonathan Lee** (instructed by **Cobbetts LLP**) for the Defendant

Hearing date: 13th February 2009

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Judgment

Mr Justice Coulson :

A. INTRODUCTION

1. On 24th January 2008, the claimant ("Fitzpatrick") made an offer to the defendant ("Tyco") in accordance with CPR Part 36. In that letter, Fitzpatrick offered to settle this litigation for payment of the sum of £10,250,000. The relevant period for acceptance (21 days) expired on 14th February 2008. There was a trial of contractual preliminary issues in March 2008 on which Fitzpatrick were substantially successful. At the end of July 2008, I acceded to Fitzpatrick's application, which was opposed by Tyco, to adjourn the trial from November 2008 to April 2009.

2. On 14th January 2009, Tyco's solicitors wrote to Fitzpatrick's solicitors accepting the Part 36 offer. A whole series of issues then arose between the parties. A number of those issues have subsequently been resolved. The parties have agreed the amount of interest due on the £10.25million. In addition Fitzpatrick have concluded that, to the extent that they wish to pursue claims which were the subject of proposed re-amendments in December 2008, that will be done by way of separate proceedings.

3. That leaves three issues outstanding between the parties in these proceedings which were debated at the hearing on 13th February 2009. Those issues were:

a) Fitzpatrick's claim that their costs of the action from 14th February 2008 (i.e. 21 days after the Part 36 offer had been made) should be paid by Tyco and assessed on the indemnity basis. Tyco accept that they are liable to pay those costs but argue that they should be assessed on the standard basis if they cannot be agreed.

b) Fitzpatrick's claim for interest on those costs in accordance with CPR Part 44.3(6)(g).

c) Fitzpatrick's claim for an interim payment on account of costs in accordance with CPR Part 44.3(8). Tyco do not object in principle to the making of an interim payment but there is a dispute between the parties as to the appropriate amount.

4. It will be seen at once that the argument as to the proper basis for the assessment of costs is the most significant of these issues. Accordingly I set out in **Section B** below the applicable parts of the CPR and some of the authorities that were cited to me on that issue. At **Sections C and D** below I deal with the points of principle on which Mr Livesey relied in support of his contention that indemnity costs were payable in these circumstances. At **Section E** below I deal with the wider questions of conduct and justice that arise in the present case.

5. Thereafter, at **Section F** below I analysis the issue as to interest on costs. At **Sections G, H and I** below I deal with the calculation of the interim payment, a process made more complicated in this case by Tyco's submission that at least one of Fitzpatrick's earlier cost estimates was wildly inaccurate, and therefore gives rise to concerns about the reasonableness of Fitzpatrick's claimed costs. There is a short summary of my conclusions at **Section J** below. I should say that I was greatly assisted by all counsel on these issues, particularly in respect of the interesting, and not unimportant, debate about indemnity costs. It is to that issue that I now turn.

B. GENERAL PRINCIPLES

B1. The CPR

6. The parties are agreed that there has been a valid acceptance of a valid Part 36 offer. Accordingly, under the CPR, the starting point is Part 36.10 which provides as follows:

"1) Subject to paragraph (2) and paragraph (4)(a), where a Part 36 offer is accepted within the relevant period the claimant will be entitled to his costs of the proceedings up to the date on which notice of acceptance was served on the offeror.

2) Where-

a) A defendant's Part 36 offer relates to part only of the claim; and

b) At the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance unless the court orders otherwise.

3) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed.

.....

4) Where-

a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or

b) a Part 36 offer is accepted after expiry of the relevant period,

if the parties do not agree the liability for costs, the court will make an order as to costs.

5) Where paragraph (4)(b) applies, unless the court orders otherwise-

a) the claimant will be entitled to his costs of the proceedings up to the date on which the relevant period expired; and

b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."

7. The parties are agreed that rules (4) and (5) apply to the present case and they are also agreed that Tyco, as the offeree, will be liable for Fitzpatrick's costs of the action, including those costs from 14th February 2008 until 14th January 2009. What they are not agreed about is the basis on which these latter costs will be assessed if they cannot be agreed.

8. Fitzpatrick's principal submission is that an assessment of the costs from 14th February 08 to 14th January 09 on an indemnity basis is appropriate by analogy with CPR Part 36.14. That provides as follows:

"1) This rule applies where upon judgment being entered-

...

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

.....

3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to-

a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the periods starting with the date on which the relevant period expired;

b) his costs on the indemnity basis from the date on which the relevant period expired; and

c) interest on those costs at a rate not exceeding 10% above base rate.

4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including-

a) the terms of any Part 36 offer;

b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

c) the information available to the parties at the time when the Part 36 offer was made; and

d) the conduct of the parties with regard to the giving or the refusing to give information for the purposes of enabling the offer to be made or evaluated."

9. The parties are also agreed that the general rules about the exercise of the court's discretion as to costs, set out in CPR Part 44.3, are also applicable to the present situation. This part of the CPR requires the court, when making orders as to costs, to have regard to all the circumstances including, at r44.3(4)(a), "the conduct of all the parties", which conduct will expressly include the matters set out at r44.3(5), such as the conduct before, as well as during, the proceedings, the manner in which claims have been pursued and whether or not the claim has been exaggerated either in whole or in part.

B2. Authorities

10. Since CPR 36.10(4) and (5) are silent as to the basis on which costs are to be assessed, both sides referred me to a variety of cases in which, in similar circumstances, the courts approached a dispute about the effect of one part of the CPR by making (or rejecting) analogies with other parts of the CPR. A number of these focused on the earlier incarnation of CPR 36.14 which, as r36.21, was in a subtly different form. Some, at least, of the cases referred to below appear to have led to the replacement of the old r.36.21 with the existing CPR 36.14.

11. In **Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson (a firm)** [2002] EWCA Civ 879, the Court of Appeal were dealing with a case where the defendants had made a joint payment into court of £100,000 and where the claimant recovered nominal damages of £2 at trial. The defendants obtained indemnity costs and the claimant appealed.

12. The Court of Appeal dismissed the appeal on the basis that indemnity costs had been awarded, not only because the Part 36 offer had been bettered, but because of the other findings, effectively of conduct, made by the trial judge. In the course of his judgment, Lord Woolf, then the Lord Chief Justice, compared the old r36.20 (which dealt with the situation where a claimant failed to meet a defendant's Part 36 offer) with r36.21 (which dealt with the situation where the claimant made a Part 36 offer and then did better than that offer). Lord Woolf said:

"18… The significance of 36.21 is that, unlike 36.20, it refers specifically to the court being entitled to order costs on the indemnity basis from the latest date from when the defendant could have accepted the offer which had been made. Equally, it refers to interest on a higher rate than normal in the case of situations where it applies. Where Part 36.20 is compared with 36.21, light is thrown on the appropriate approach to the application of Part 36.20

19. The clear inference from the absence of any reference to an indemnity basis in 36.20 is that, in normal circumstances, an order for costs which the court is required to make under that Part to make, unless it considers it unjust to do so, is an order for costs on the standard basis. That means that if the court is going to make an order for indemnity costs, as it can in the case where Part 36.20 applies, it should do so on the assumption that there must be some circumstances which justifies such an order being made. If I may here adopt the way it was put in argument by Waller LJ, there must be some conduct or (I add) some circumstances which takes the case out of the norm."

Mr Thomas QC relied on that passage as being directly applicable to the present case, arguing that the absence of any reference to the indemnity basis in CPR 36.10(4) and (5) meant that the court should make an order for costs on the standard basis, unless it considers it unjust to do so.

13. Mr Livesey QC relied on a number of cases in which it had been argued that the old r36.21 did not, on its face, entitle a claimant to indemnity costs, but where the courts had reasoned that, by analogy, the claimant was indeed entitled to indemnity costs. Thus, in **Petrotrade Inc v Texaco Limited** [2002] 1 WLR 947 (Court of Appeal), a defendant resisted an application for indemnity costs, having been found liable for summary judgment in a sum greater than the amount offered by the claimant, on the basis that r36.21 expressly applied only "at trial". The Court of Appeal rejected that argument, unsurprisingly holding that the court had the power in those circumstances to order indemnity costs. During the course of his judgment, at paragraphs 62-65, Lord Woolf dealt generally with an order for indemnity costs, making plain that "it would be wrong to regard that rule [r36.21] as producing penal consequences… the power to order indemnity costs or higher rate interest is a means of achieving a fairer result for a claimant."

14. **Huck v Robson** [2002] 3 All ER 263 was a decision by the Court of Appeal in which they allowed an appeal against a judge's refusal to award indemnity costs under CPR 36.21, despite the fact that the claimant had been 100% successful and had, prior to the start of proceedings, made a Part 36 offer to the defendant on the basis that the defendant was 95% liable for the claim. The Court of Appeal made clear that, in such circumstances, the judge had been wrong not to give effect to the old r36.21, because the claimant had beaten the offer and "there was nothing unjust in allowing the claimant to receive the incentives to which she was entitled under the CPR". Similarly, in **Read v Edmed** [2004] EWHC 3274 (QB) Bell J noted that, although r36.21 appeared to relate only to the situation where the defendant was liable for more than the amount of the claimant's offer, indemnity costs were appropriate in a case where the claimant had recovered at trial exactly the same sum as the amount that she had put in her Part 36 offer. The rule has, of course, subsequently been changed to make it clear that, pursuant to CPR 36.14, a claimant who recovers the same as his or her Part 36 offer is entitled to indemnity costs, unless the court considers it unjust to make such an order.

15. There are a whole series of cases dealing with the proper application of CPR 44.3 and, in particular, what type of conduct might be required in order to justify an order for indemnity costs. There are two significant Court of Appeal decisions. In **Reid Minty v Taylor** [2002] 1 WLR 2800, May LJ noted that "litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation…" In **Kiam v MGN Limited (No.2)** [2002] 1WLR 2810, Simon Brown LJ (as he then was) qualified that observation by noting that "such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight." He appeared to take a slightly different view to Lord Woolf in **Petrotrade,** because he described indemnity costs as being "of its nature penal rather than exhortatory."

16. Orders for indemnity costs have been made, even in circumstances where, like here, the claim was compromised before the trial. In **Wates Construction Limited v HGP Greentree Allchurch Evans Limited** [2005] EWHC 2174 (TCC); [2006] BLR 45, a claim was abandoned on the first day of the trial. On the basis of the documents, I concluded that, at a time about two months before the trial was due to begin, the claimant should have realised that their claim was bound to fail. I therefore ordered the claimants to pay costs on an indemnity basis from that date on. I made a similar order for similar reasons in **EQ Projects v Alavi (Costs)** [2006] EWHC 29 (TCC); [2006] BLR 30.

C. DOES CPR 36.14 APPLY BY ANALOGY?

17. Mr Livesey's attractive primary submission on the indemnity costs issue came to this. He noted that it was extremely difficult for a claimant to demonstrate the sort of conduct on the part of the defendant necessary to warrant an order for indemnity costs under CPR 44.3, particularly in circumstances where there would be no trial and the judge would have no opportunity of forming the sorts of views on which such orders are habitually based. But he said, if there had been a trial, and Fitzpatrick had recovered damages in the sum of £10.25million, then Fitzpatrick would have been entitled to indemnity costs (unless the court concluded that it would have been unjust so to order), because of the express words of CPR 36.14. Accordingly, Mr Livesey maintained that there can be no difference between a claimant who has recovered a sum equivalent to his offer after a trial, and a claimant who has recovered a sum equivalent to his offer before trial because, well outside the relevant period, that offer was accepted by the defendant. He said that Fitzpatrick had been induced into making the offer because of the level of protection promised by r36.14 and that there would be no incentive to a claimant in such circumstances if he was not entitled to recover indemnity costs in circumstances such as these.

18. Although there was force in a number of these points, I have concluded that the arguments against such a result are more powerful still. For a number of reasons, therefore, I am unable to accept Mr Livesey's primary argument.

19. First, I am bound to note that there is no reference at all within CPR 36.10(4) and (5) to a presumption that, unless it is unjust to do so, the court will order a late-accepting defendant to pay the claimant's costs on an indemnity basis. The absence of such a provision is important. The usual basis for the assessment of costs is the standard basis; if there is an entitlement to seek indemnity costs, then it is expressly spelled out in the CPR, either as a rebuttable presumption (such as the presumption in r36.14) or by way of conduct (r44.3). There is no rebuttable presumption expressed here.

20. Although it is always dangerous to speculate how and why the rules say what they do, it seems to me that there is a relatively straight forward explanation for why this part of the CPR is in its present form. A claimant's entitlement to indemnity costs when it beats its own offer after a trial was first enshrined in the old r36.21 and was plainly designed to deal with the situation where a trial had taken place and costs had been wasted because the defendant should have accepted the Part 36 offer. For the reasons explained by Lord Woolf in **Excelsior**, this was more advantageous than the defendant's position under r36.20. On the words of the old r36.21 the situation argued for here could not have arisen, because r36.21 applied only where the defendant was held liable "for more" than the amount of the offer. Following the decision in **Read v Edmed** the rule was changed so that it expressly covered the situation where, after a trial, the claimant recovered the same as the amount of its unaccepted offer. But there is nothing on the face of any of the existing rules to suggest that this change was also designed to reward a claimant (whose offer under CPR 36.10 was accepted out of time and before there was any trial) with a rebuttable presumption in its favour in respect of indemnity costs.

21. Secondly, I consider that the court has to be very careful before inserting into a rule, which is silent on costs, a presumption of this kind, extracted from a different rule altogether. It seems to me that, on this point, Lord Woolf's remarks in **Excelsior** are of some relevance (although I acknowledge that he was dealing there with a contrast between the old r36.21 and the old r36.20.) He concluded that, in the absence of any reference to the indemnity basis, an order for costs which the court was required to make under the old r36.20 was an order for costs on the standard basis. It seems to me that precisely the same general reasoning would apply here to CPR 36.10(4) and (5).

22. I accept Mr Thomas's submission that the other cases relied on by Fitzpatrick, namely **Petrotrade**, **Huck** and **Read** do not offer very much assistance to the central question here, which is whether a rebuttable presumption in favour of indemnity costs, taken from a rule dealing with the situation following a trial where the offer has not been accepted, should be inferred into a rule dealing with the position prior to trial, where the offer has been accepted. I do not accept that the present situation is analogous to those cases. In all three of them, the courts were endeavouring to apply the words of the old r36.21 in a commonsense way, to achieve a just and sensible result, and to prevent injustice; they all arose after a trial on the merits (either on a summary or a full basis). In contrast, I conclude that the replacement of old r36.21 - the new CPR 36.14 - does not apply to the present case, because there has been a settlement, and it has occurred before the trial. The claimant has therefore been spared the costs, disruption and stress of the trial.

23. Thirdly, I note that r36.10(3), which deals with the situation where the claimant's offer is accepted within the relevant period, expressly provides that costs will be assessed on the standard basis. If, therefore, there was a presumption that indemnity costs would apply under r36.10(5), when an offer was accepted outside the period, it seems to me that the rule would say so. It does not, and, in my judgment, that is not an oversight or an omission; it is because either standard or indemnity costs may be applicable where an offer is accepted after the relevant period, depending on the analysis under CPR 44.3.

24. Finally, I am not persuaded that, as a matter of policy, it would be appropriate to import an indemnity costs presumption into r36.10(4) and (5). A defendant is entitled to accept an offer beyond the period of acceptance. In a complex case such as this, a defendant should be encouraged continuously to evaluate and re-evaluate the claim and its own response to that claim, so that even if the defendant had originally concluded that it was not going to accept the offer, it should always be prepared to change its mind. The CPR should be interpreted in a way that encourages such constant re-evaluation.

25. All those of us involved in civil litigation are conscious of the irony that a well-judged Part 36 offer by one party (whether claimant or defendant) at the outset of proceedings can often make a trial and a fight to the finish more, rather than less, likely, because there will often be instances where, by the time the offeree has belatedly realised that the offer was well-judged, he will have incurred considerable cost, and may feel that he has no option but to go on and fight the case through to the finish in the hope of bettering the offer. Such an outcome is not to be encouraged. There is a risk that, if a defendant belatedly changed its mind as to the acceptability of a claimant's Part 36 offer, the defendant would be discouraged from formally accepting that offer if it thought that it would have to pay indemnity costs in consequence. It would not be appropriate to construe the CPR in such a way, because that would, in my view, actively discourage late settlements and instead give rise to another reason for the offeree to push on to a trial.

26. I do not accept that a claimant is "induced" into making an offer pursuant to CPR 36 simply because of the prospect that, if it was successful at trial, it would get indemnity costs. That is simply one possible incentive, and should not be over-emphasised. Nor do I consider that it would be a disincentive to a claimant in the position of Fitzpatrick to make any such offer at all, if it thought that the offer would be accepted out of time in circumstances where it would not recover indemnity costs. A claimant makes a Part 36 offer for a whole variety of reasons, not least in the hope of forcing the defendant to an early settlement. By so doing, the claimant also buys itself costs protection for the future, whether that costs protection is measured by either the standard or the indemnity basis. In addition, a claimant with a large claim, where parts of it may be uncertain, is well advised to make a

Part 36 offer in any event because, even if the claimant does not beat the offer, if its actual recovery comes closer to the amount of its own offer than to the amount of any offer made by the defendant, the claimant will still be in a strong position to recover all its costs following the trial.

27. Accordingly, for policy reasons, it seems to me that it would be wrong to presume an entitlement on the part of a claimant to indemnity costs in these circumstances. Such a presumption would, I think, hinder rather than promote early settlements, for the reasons that I have sketched out above.

28. Furthermore, it is not as if the claimant is deprived of the remedy of indemnity costs altogether. The parties have rightly agreed that, in this case, the claimant is entitled to seek indemnity costs in the conventional way, by reference to conduct, and matters of that sort, pursuant to CPR 44.3. That is a further reason of policy why I would conclude that an indemnity costs presumption should not be imported into CPR 36.10: there is already a right to claim recovery of indemnity costs; what there is not, in my view, is a rebuttable presumption that such costs will be recovered.

29. Accordingly, for these reasons, I reject Mr Livesey's primary argument that, by analogy with CPR 36.14, there is a presumption that the claimant is entitled to indemnity costs pursuant to CPR 36.10.

D. FITZPATRICK'S SECONDARY CASE

30. Mr Livesey submitted that, even if there was no indemnity costs presumption by analogy with CPR 36.14, there was an entitlement on the part of Fitzpatrick to seek indemnity costs which did not depend on the ordinary test set out in CPR Part 44.3. Mr Livesey argued that it was very difficult for a claimant to demonstrate that the defendant's conduct was unreasonable, particularly where there was no trial; indeed, at one point he said frankly that, in the present case, Fitzpatrick "did not have a hope" of making out such a case against Tyco. However he said that, as a matter of principle, even if there was no presumption in favour of indemnity costs, the court could order indemnity costs in its discretion "where it was just and/or where the defendant gave grounds for reasonable criticism that it had not applied its mind to an appropriate evaluation of the offer." He agreed that this argument represented something of a 'halfway house' between the rebuttable presumption of an entitlement, which I have rejected in **Section C** above, and the ordinary conduct test under CPR 44.3.

31. I am unable to accept that proposition. It seems to me that there is no basis for it. As I have said, a party can seek indemnity costs in one of two ways: either because there is a presumption that such costs will apply (such as under CPR 36.14) or because it can demonstrate the necessary evidence of conduct etc. pursuant to CPR 44.3. There is no basis under the CPR, or any authority of which I am aware, which would allow the court to order indemnity costs for any other reason or on any other basis.

32. Accordingly, Fitzpatrick's claim for indemnity costs on the basis of either a rebuttable presumption, or a watered-down conduct test, must fail as a matter of principle: in these circumstances, only a case by reference to conduct etc. pursuant to CPR 44.3 could justify such an order. Both parties made detailed submissions on questions of conduct and its relevance to the application for indemnity costs. Accordingly, if I am wrong in my rejection of either Mr Livesey's primary case, or his secondary case, or if, despite its realistic understanding of the likely outcome, Fitzpatrick maintain an entitlement to indemnity costs by reference to CPR Part 44, I now set out my views as to the parties' conduct and the overall justice of the situation.

E. CONDUCT/JUSTICE

E.1. Introduction

33. The parties approached the wider issues of conduct and justice from entirely different starting-points. Fitzpatrick's approach was to summarise the history of the contract, to demonstrate that Tyco's conduct was, right from the outset of the works on site, wholly unreasonable and the clear and obvious cause of the huge time and cost overruns. Tyco, on the other hand, took a variety of points as to the underlying litigation, in order to explain why their conduct was not unreasonable and that the overall justice of the position did not and could not warrant an order for indemnity costs.

34. Addressing first the Fitzpatrick approach, I am in no doubt that Tyco signed up to this sub-contract without thinking through the technical and financial consequences of their tender, and spent much of the next few years trying to minimise these consequences. My judgment on the formation of the sub-contract at [2008] EWHC 1301 (TCC) makes plain that the differences between the parties at the very outset augured badly for the smooth progress of the project as a whole. That, of course, is precisely how it turned out.

35. That, however, is only part of the story. This was a complex project in which Fitzpatrick had a series of other sub-contractors working for them. Although Fitzpatrick's works were significantly delayed, and although Tyco's default made them a potentially significant contributor to that delay, and therefore the cost overruns that ensued, there is much more to this complicated delay claim than that. Tyco's works may or may not have been on the critical path; they may have been responsible for some delay but there may have been other sub-contractors who, on any fair analysis, were more culpable for the critical delays which occurred. On a complex project such as this, responsibility for the critical delay can be notoriously difficult to pin down; the mere fact that Tyco were "in the frame" from the outset does not mean that it was inevitable that, at the end of the trial, Tyco would have been found liable to Fitzpatrick for all of the significant consequences of the delay. I note in passing that the claimant has always been well aware of the complexities of its claim against Tyco: for the purposes of the trial, it served 18 witness statements, one of which was 400 pages long.

36. On my analysis of the documents included in the lever arch files, and on a consideration of the oral submissions that were made to me, I have concluded that, in the round, this is not a case in which it could be said that Tyco's conduct warranted an order for indemnity costs. Indeed, I am clear that it would not be just to make any such order, and that the fair and proper order on the basis of the assessment of costs is an order that Tyco pay Fitzpatrick's costs to be assessed on the standard basis if they cannot be agreed. I identify particular reasons for that conclusion below although, as I have said, it is based on a consideration of all of the relevant material.

37. First, I accept the proposition that what Tyco have done - accepting the Part 36 offer outside the 21 days period - is something which they are permitted to do by the CPR. It would be a curious result if Tyco had to pay indemnity costs as a consequence (whether automatic or not) of something permitted by the CPR. Moreover, given the delays, it was always open to Fitzpatrick to withdraw the offer. The fact that the offer had been made and had existed for a year without being taken would have been a relevant fact at the end of the trial, even if, 11 months on, Fitzpatrick had chosen to withdraw the offer because it had not been accepted.

38. Secondly, it is relevant to note that, at the time that the offer was made, Fitzpatrick's claims were in the order of £18 million odd, and by the time the offer was accepted, the claims had increased to about £21 million. Thus the claim has been settled for about half of its alleged value. If such a result had been achieved at the trial, then – absent the offer itself - it is more likely than not that the claimant would not have obtained an order entitling it to the entirety of its costs. A shortfall in a claim

of 50% would probably have been regarded by the trial judge as a matter of significance which should be reflected in the consequential costs orders made under CPR 44.3.

39. Such an order might have taken a variety of forms. There might have been a percentage reduction in the claimant's costs. Alternatively, if a particular head of claim had failed completely, the judge might have ordered that the claimant pay the defendant's costs of that head of claim in any event. In my judgment, it is unlikely that a claimant who recovered 50% of its claim would have recovered 100% of its costs. That, therefore, is another factor which I take into account in concluding that it would not be just to order indemnity costs in the present case.

40. Thirdly, I accept Tyco's submission that this was not an easy claim to evaluate. For the reasons which I have noted generally above, a delay claim advanced by a main contractor such as Fitzpatrick in these sorts of circumstances is rarely a straightforward matter, because of the involvement of a variety of different sub-contractors, and therefore a variety of different potential causes of critical delay. The documents demonstrate that, like sub-contractors always are, Tyco were very interested in the disclosure process, to see what Fitzpatrick were saying to their other sub-contractors and what delays they were blaming on those other sub-contractors. In my judgment, the sheer volume of evidence assembled by Fitzpatrick for the trial demonstrates beyond doubt that this was not an easy case to run or evaluate.

41. On this issue relating to the difficulties of evaluating this claim, I am also bound to have regard to some of the material put forward by the claimant in order to justify its application to adjourn the trial at the end of July 2008. That application was supported by letters written by Fitzpatrick's experts, such as the letter of the 22nd July 2008 from Mr Crane, Fitzpatrick's delay expert. This letter identifies that, as at the 22nd July 2008, there was a vast amount of work for the experts still to do, including the critical issue of "the determination of the correct baseline programme". On the basis of all that was outstanding and remaining to be done, Mr Crane maintained that there was no way in which he could be ready for the trial, then due to start in November, and that the difficulties and complexities of the claim meant that the trial would have to take place in 2009. As I have said, that was an application to adjourn which, in the teeth of Tyco's resistance, I allowed. But that material, so it seems to me, only goes to demonstrate that this was indeed a difficult claim which was always going to require considerable work on the part of both parties to assess and evaluate.

42. I do not consider that Fitzpatrick can say, on the one hand, that this was a very complex claim which required a 6 month adjournment of the trial, and then argue, on the other, that the claim was straightforward and should have been evaluated much earlier by Tyco. The documents before me do not demonstrate anything other than a relatively standard position: that of a defendant seeking to evaluate a complex claim and, once it was in a position to do so, concluding that, for better or worse, the claimant's Part 36 offer should be accepted.

43. For the avoidance of doubt, I should say that Tyco raised some matters on this aspect of the application with which I do not agree. I find it difficult to accept that, in a case where there had been a pre-action mediation, the absence of a pre-action protocol process in respect of all of the claimant's detailed claims was in any way significant. Similarly, I do not get the impression from the papers that Tyco were making serious or sustained efforts to bring about a settlement in the months after the determination of the preliminary issues. Although Tyco suggested mediation in December 2008, I consider that Fitzpatrick were entitled to say, after one failed mediation and an offer which was subsequently deemed by Tyco to be acceptable, but which had been made a year before, that they had done all they could to try and settle the proceedings.

44. Accordingly, I have concluded that, although this was a complex case, the parties' approach to it was generally reasonable on both sides, and that a settlement three months before trial, at a figure that represented about half of the claimant's claim, was an unexceptional result. It is impossible to say on that analysis that there is any basis on which Fitzpatrick could be entitled to have its costs assessed on an indemnity basis. Thus, even if I am wrong on the points of principle (**Sections C and D** above), I conclude that it would be unjust to make any order for costs assessment other than an order that Fitzpatrick's costs be assessed on the standard basis.

F. INTEREST ON COSTS

F1. The CPR

45. CPR Part 44(6)(g) gives the court the power to order "interest on costs from or until a separate date, including a date before judgment". The court also has power to order interest on costs pursuant to certain provisions of Part 36 including CPR 36.14(3). Tyco do not dispute that I have the power to make such an order in this case.

F2. Authorities

46. In **Amoco (UK) Exploration Company v British American Offshore Limited** [2002] BLR 135, Langley J said:

"For my part, I think it may well be appropriate, at least in substantial proceedings involving commercial interests of significant importance both in balance sheet and reputational terms, that the court should award interest on costs under the rule where substantial sums have inevitably been expended perhaps a year or more before an award of costs is made and interest begins to run on it under the general rule."

47. In **Bim Kemi AB v Blackburn Chemicals Limited** [2003] EWCA Civ 889, Waller LJ said that "in principle there seems no reason why the court should not do so [award interest on costs] where a party has had to put up money paying its solicitors and been out of the use of that money in the meanwhile." Lindsay J made a similar order in **Douglas v Hello [No 7]** [2004] EWHC 63 although he concluded that the award of interest should run "when one is seeking to measure the extent to which a party has been out of pocket, [from] the dates on which the invoices were actually paid." And in **IPC Media Limited v Highbury Leisure Publishing Limited** [2005] EWHC 283 (Ch), Laddie J said that:

"The purpose of an order of costs to compensate the winning party and to relieve him of or to reduce the financial burden of having had to conduct an action which would have been avoided had the losing party given in earlier… the purpose of a costs order is to compensate the winning party for the real cost of having conducted the litigation and the real cost is not measured simply by adding up mathematically the bills that it has paid to or agreed to pay to its lawyers. £1 paid in 1980 may be the same coin that is paid in 2005, but it is not the same in value. What the award of interest on costs allows the court to do is to ensure that the receiving party is compensated properly for the real cost to it of having conducted the litigation successfully".

48. In **Nova Production Limited v Mazooma Games Limited** [2006] EWHC 189 (Ch), Kitchin J reviewed those authorities and concluded:

"… it seems to me that the court has a broad discretion when deciding whether to award interest on costs from a date before judgment. That discretion must be exercised in accordance with the principles set out in CPR 44.3 and the court must take into account all the circumstances of the case,

including such matters as the conduct of the parties and the degree to which a party has succeeded. Further, the discretion must be exercised in accordance with the overriding objective of dealing with the case justly. I am unable to accept the submission that costs should only be awarded in a case which is in some way out of the norm. I find no basis for that in the CPR and I believe it would provide an unwarranted fetter on the court's discretion."

F3. Analysis

49. In the present case, I consider that the following matters are particularly relevant:

a) The claimant made a reasonable Part 36 offer in January of last year.

b) It took the defendant almost a year to conclude that that offer should be taken. During that period, of course, the claimant was incurring considerable further costs.

c) Although the factual background is not sufficient to warrant an order for indemnity costs under CPR 44.3, the defendant's delay in taking the Part 36 offer has undoubtedly caused Fitzpatrick to be out of pocket. The claimant has suffered a real cost because it has been deprived of the use of its money pending judgment.

50. In all the circumstances, it seems to me that this is a case where it is appropriate to order interest on costs. Moreover, I do not consider that any circumstances have been drawn to my attention that would render such a conclusion unjust. I deal briefly with the two points raised by Mr Thomas as follows:

a) It is correct that the Part 36 offer letter did not expressly refer to an entitlement to interest on costs. But it did expressly refer to CPR 36.14 which provides for interest on costs. Accordingly I consider that, on any fair reading of the letter, the claimant was making it clear that it would indeed argue for such interest.

b) The existence of an order that Fitzpatrick pay 60% of Tyco's costs of and occasioned by the adjournment cannot affect whether, as a matter of principle, Fitzpatrick should be entitled to interest on its costs. The precise detail will be a matter either for the parties or the costs judge but, in principle, the earlier order does not mean that Fitzpatrick are not entitled to such interest.

51. Accordingly, I conclude that Fitzpatrick are entitled to interest on their costs. I consider that that entitlement relates to those costs invoices paid after 14th February 2008, namely after the relevant period of 21 days from the date of the offer. I also consider that the date from which the interest is payable would be the date on which each of those post-14th February costs invoices was actually paid by Fitzpatrick.

52. Finally as to rate, there was a dispute as to whether Fitzpatrick should have interest at 1% over base or at base rates. Mr Thomas maintained that the interest claimed in the proceedings was at Bank of England base rate and that therefore that was the appropriate rate. However, that was the rate of interest claimed on damages, not the rate of interest on costs. Moreover, in the Fitzpatrick witness statements, it was said that they were borrowing at 1% over base rate.

53. The authorities to which I have previously referred identify an appropriate rate of interest as 1% over base. That was also the rate applied in **ABCI v BFT** [2003] Lloyds LR 146 and **Kidson v Lloyds Underwriters** [2007] EWHC 2699 (Comm). I consider that an order that interest should be paid at base rate plus 1% is therefore appropriate in the present circumstances.

G. PRINCIPLES IN RESPECT OF COSTS ESTIMATES AND INTERIM PAYMENTS ON ACCOUNT OF COSTS

G1. The CPR

54. Pursuant to CPR 44.3(8), a claimant in the position of Fitzpatrick is entitled to seek an interim payment in respect of costs. The general rule is that, unless there is a good reason why not, the court will order such an interim payment.

55. The leading case on this part of the CPR is the decision of Jacob J (as he then was) in **Mars UK Limited v Teknowledge Limited** [1999] 2 Costs LR 44 where he said:

"Where a party has won and has got an order for costs the only reason why he does not get the money straight away is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the money instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment for some lesser amount which you will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum that the likely full amount."

56. As noted above, the application of that approach in this case is complicated by the existence of a costs estimate from Fitzpatrick which appears to have been significantly understated. The Practice Direction in respect of CPR Part 43 provides, at paragraph 6.6:

"(1) On an assessment of the costs of a party, the court may have regard to any estimate previously filed by the other party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness and proportionality of any costs claimed.

(2) In particular where-

(a) there is a difference of 20% or more between the base costs claimed by receiving party and the costs shown in an estimate of costs filed by that party; and

(b) it appears to the court that-

(i) the receiving party has not provided a satisfactory explanation for that difference; or

(ii) the paying party reasonably relied on the estimate of costs;

the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate."

G2. Leigh v Michelin Tyre Plc [2003] EWCA Civ 1766

57. In this case, the defendant appealed a costs order on the basis that it did not appear to reflect the fact that the claimant's solicitors had previously given what proved to be a wholly inadequate estimate for their future profit costs. The appeal was dismissed. In his judgment, Dyson LJ held that:

a) The estimates made by solicitors of the overall likely costs of the litigation could usually provide a useful yardstick by which the reasonableness of the costs finally claimed may be measured. If there is

a substantial difference between the estimated costs and the costs claimed, that difference calls for an explanation. In the absence of a satisfactory explanation the court may conclude that the difference itself is evidence from which it can conclude that the costs claimed are unreasonable.

b) The court may take the estimated costs into account if the other party shows that it relied on the estimate in a certain way.

c) The court may take the estimate into account where it decides it would probably have given different case management directions if a realistic estimate had been given.

d) Paragraph 6.6 of the Practice Direction gives the court the power to take these matters into account in deciding whether, and if so how far, to reflect them in determining what costs it is reasonable to order the paying party to pay on an assessment.

e) It is wrong in principle to reduce costs claims simply because they exceed the amount of an estimate, and there is no justification for interpreting provisions in the CPR as equating cost estimates with cost budgets or caps.

58. It seems to me that, in calculating the amount of an interim payment on costs, the court should consider any argument raised in respect of an inaccurate costs estimate, in line with the principles outlined by Dyson LJ in **Leigh**. I note that Mr Rowlands, who dealt with this aspect of the application on behalf of Fitzpatrick, did not suggest to the contrary.

H. THE MATERIAL FACTS AND FIGURES

59. Fitzpatrick's total costs as at the 14th January 2009 are said to be about £3.7 million. Of this, it is now said that just under £1 million was incurred before the 14th February 2008 and the sum of £2.7 million odd was incurred between the 14th February 2008 and the 14th January 2009.

60. For the Case Management Conference on 25th July 2008, Fitzpatrick completed the questionnaire which included questions as to costs. That questionnaire indicated that Fitzpatrick had incurred £710,000 up to that date (excluding disbursements), and that the estimate for their overall costs (including the costs to date) was put at '£2 m plus'. Accordingly, Tyco complain that at the end of July 2008 Fitzpatrick were estimating total costs to the end of the case of £2 million plus, and yet they are now alleging that they have incurred £3.7 million up to a date before experts' reports were exchanged, before briefs were delivered, and before there was any lengthy TCC trial.

61. I consider that this is, on any view, a startling discrepancy. Whilst the point is made that the £2 million was based on a trial in November 08, I do not accept that, of itself, the adjournment to April 09 caused, or should have caused, any significant increase in costs. Moreover, I am afraid that the various explanations offered for the discrepancy only increase, rather than lessen, my concerns about the reasonableness or otherwise of Fitzpatrick's actual costs. I deal below with some of those explanations and the difficulties which they reveal.

62. First, Mr Rowlands showed me another, more detailed breakdown of costs, prepared by Fitzpatrick at the same time as the CMC questionnaire, with the intention that it was to be provided to Tyco and the court on 25th July. That revealed a figure of £921,000 for the costs incurred to date and an estimated overall costs figure of £3.1 million. This is obviously closer to the actual costs incurred. The difficulty with any argument based on this document is that, inadvertently, it was never provided to Tyco.

63. On the basis of this breakdown, Mr Rowlands suggested that one explanation for the £2 million plus figure in the CMC questionnaire was that it was intended to be an estimate for the future costs, and should therefore be added to the figure of £710,000 for the costs incurred to date, to produce an overall costs figure. That would have produced a figure of just under £3million which was, of course, consistent with the more detailed breakdown identified above. That explanation seems entirely plausible, but there is one major flaw with it: Mr Crossman, Fitzpatrick's solicitor, has produced a fifth statement which seeks to explain some of the discrepancies in the costs figures, and that is not an explanation that he offers. I do, however, note that Tyco's equivalent estimates in July were equally wide of the mark (if not worse) and they also themselves appear to have treated the overall costs box in the CMC questionnaire as an estimate of future costs, i.e. not including those costs already incurred.

64. Another explanation for the difference between the £3.1 million in the undisclosed document of July, and the costs of £3.7 million now claimed, is said by Mr Crossman to be an additional figure of £812,000, made up of two separate elements of costs which were not included in the internal July 08 estimate. One was said to be the costs incurred in contemplation of litigation, including the pre-action protocol and the pre-action mediation, and the second was said to include the costs incurred by Fitzpatrick's key personnel.

65. Unhappily, neither of these two new elements has been given a figure; all we know is that they are said to come to a total of £812,000. Moreover I have serious reservations about the recoverability of these new items of cost. Pre-action costs are often not recoverable; in **Lobster Group Ltd v Heidelberg Graphic Equipment Ltd** [2008] EWHC 413 (TCC), I ruled that pre-action mediation costs were not generally recoverable in subsequent litigation. And although the costs of key personnel can be recoverable, it is usual for those costs to be claimed as damages in accordance with the authorities summarised by Wilson LJ in **Aerospace Publishing Ltd v Thames Water Utilities Ltd** [2007] EWCA Civ 3. Indeed, Mr Thomas points out that, in the present case, there was indeed such a damages claim by Fitzpatrick for the time spent by key personnel. That claim has, of course, now been settled, and that must, at the very least, cast some doubt over the recoverability of this new element of costs.

66. Most important of all, I am troubled that the main discrepancy between the undisclosed July 08 estimate and the actual costs has not been the subject of any explanation at all. Much was made of the comparison between the £3.7 million actually incurred and the £3.1 million in the internal estimate in July. But that is not comparing like with like. Even giving Fitzpatrick the benefit of the doubt, and allowing them to rely on the £3.1 million, rather than the £2 million plus from the questionnaire, that does not begin to address the real problem. The £3.1 million was said to be the estimated costs of the whole case. The £3.7 million actual costs are no such thing; they do not include the costs of experts' reports (because those have not been exchanged, although doubtless some work was done on drafts); they do not include counsel's briefs and refreshers; and they do not include all of the daily costs of the trial. The trial was estimated to last 7 weeks. It is difficult not to conclude that, on the basis of the latest figures, if the trial had fought through to a conclusion, Fitzpatrick's costs would have been in the order of £5 million or even £6 million. That is a huge increase on the £3.7 million estimated in the internal breakdown, let alone the £2 million plus referred to in the CMC questionnaire.

67. Of course, the assessment of an interim payment on account of costs is a rough and ready business, as Jacob J identified in **Mars**. It would not be appropriate for me to become too involved in the reasons for these discrepancies. The sort of analysis referred to in **Leigh** will have to wait for another day. But, for the reasons that I have outlined above, I am troubled about the size of the costs

incurred to date when compared with the estimates given last summer, and I believe that I should reflect those concerns in my calculation of the interim payment. In short, the discrepancies are an early indication that the £3.7 million figure may not be reasonable.

I. CALCULATION OF INTERIM PAYMENT

68. I consider that, in the round, I should use the figure of £2.5 million as the starting-point for the calculation of the interim payment. That takes the £3.1 million odd from the internal July breakdown, and reduces it to reflect the fact that there was never a trial, and that a number of important preparatory steps (like the exchange of experts' reports) were not taken. It does add in an allowance, although not a huge one, for the fact that the £3.1 million was based on a November 08 trial, rather than an April 09 trial. In the light of the observations made above, I do not consider that the figure of £2.5 million could be regarded as unfair or unreasonable to Fitzpatrick.

69. A common approach to the calculation of an interim payment on account of costs is to take 50% of the costs figure and then multiply that by 75% to reflect the necessary caution required for an interim payment. That is the course I propose to take here. Accordingly, if the starting figure is £2.5 million, then I reduce that by 50% to £1,250,000 in order to reflect the possible outcome on the assessment of costs, particularly given the points made above. A further reduction to reflect the 75% 'caution allowance' would give a total of £937,500. That is the amount that I propose to order by way of an interim payment on costs.

70. I recognise that, in July 2008, I ordered that Fitzpatrick should pay 60% of Tyco's costs of and occasioned by the adjournment. The subsequent correspondence, such as the letter from Tyco's solicitors to Fitzpatrick's solicitors of 18th September 2008, indicates that Tyco may not have fully understood what is covered by that order, and more importantly, what is not. However this Judgment is not the place for a detailed enquiry into that matter, particularly as it was not directly addressed in argument. However, in my judgment, the worth of that order to Tyco will be relatively modest and will certainly not be sufficient to make any difference to the rough and ready calculation referred to above. Put another way, the robust nature of the assessment of an interim payment on account of costs means that I am entirely confident that, even if I am wrong and the value of my July order to Tyco is greater than I presently believe it to be, it is still adequately covered by the 50% and the 75% calculations referred to above.

71. Accordingly, I order Tyco to pay Fitzpatrick the sum of £937,500 on account of costs.

J. CONCLUSIONS

72. For the reasons set out in **Section C** above, I conclude that, as a matter of principle, the presumption as to indemnity costs in CPR 36.14 is not to be inferred into CPR 36.10.

73. For the reasons set out in **Section D** above, I reject the alternative contention that a claimant who wishes to seek indemnity costs on the late acceptance of his Part 36 offer can avoid making such a case by reference to CPR 44.3. In my judgment, there is no 'halfway house'.

74. Even if my conclusions in **Sections C and D** above are wrong, I am in no doubt, for the reasons set out in **Section E** above, that this is not an appropriate case for indemnity costs. Accordingly, Fitzpatrick's costs will be assessed on the standard basis if they cannot be agreed.

75. For the reasons set out in **Section F** above, I rule that Tyco should pay interest at 1% over base on all the costs paid by Fitzpatrick to their solicitors after 14th February 2008.

72. For the reasons set out in **Sections H and I** above, I order Tyco to make an interim payment on account of Fitzpatrick's costs in the sum of **£937,500.**

73. I would be grateful if the parties would draw up an order in consequence of this judgment. I will deal separately with any other matters, such as costs, that may arise.