Case No: HT-11-374
Neutral Citation Number: [2013] EWHC 3025 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th October 2013

Before:

MR JUSTICE AKENHEAD

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Between:

THE BOARD OF TRUSTEES OF NATIONAL MUSEUMS AND GALLERIES ON MERSEYSIDE **Cla**

- and -

AEW ARCHITECTS AND DESIGNERS LIMITED **Defe**

- and -

PIHL UK LIMITED and GALLIFORD TRY CONSTRUCTION LIMITED (trading together in partnership as a Joint venture "PIHL GALLIFORD TRY JV) **Third**

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Sean Brannigan QC (instructed by **DWF LLP**) for the **Claimant**

Paul Reed QC and **Brenna Conroy** (instructed by **Plexus Law**) for the **Defendant**

Jonathan Lee (instructed by **Pinsent Mason LLP**) for the **Third Party**

Hearing dates: 22-25, 29-30 April, 1-2, 7-9 May and 10 June 2013

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JUDGMENT

Mr Justice Akenhead:

Introduction

1.
I handed down two judgments on 31 July and 20 August 2013, respectively [2013] EWHC 2403 and 2576 (TCC) which addressed all aspects of liability and quantum. There remain issues between the parties relating to interest and costs. So far as interest is concerned, an interesting but previously undecided issue has been raised as to whether the Late Payment of Commercial Debts (Interest) Act 1998 applies to an award of common law damages arising for breach of a contract between the litigation parties. In relation to costs, there are arguments as to whether NML should have its costs on an indemnity basis, whether NML should recover 100% of its costs on whatever assessment basis is decided, whether there should be an interim payment on account and if so the extent to which the

Court should have regard either to the Conditional Fee Agreement entered into between NML and it solicitors or to the costs management order made by the court in early 2012. Some similar issues also arise between AEW and the Contractor on the third party proceedings.

INTEREST

2.
The parties accept, rightly and sensibly, that NML should be entitled to interest on those parts of the judgment sums which relate to historical cost. Thus, for instance, NML incurred costs and expenses in 2011 in relation to dealing with the collapsed SAS ceilings. The issue is the rate at which interest should be allowed: should it be allowed at the currently usual discretionary rate (0.5% plus 2%) or at the much higher rate allowed for by the Late Payment of Commercial Debts (Interest) Act 1998 (8%).

3.
The 1998 Act materially provides as follows:

“1 (1) It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part.

(2) Interest carried under that implied term (in this Act referred to as “statutory interest”) shall be treated, for the purposes of any rule of law or enactment (other than this Act) relating to interest on debts, in the same way as interest carried under an express contract term.

2. (1) This Act applies to a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business…

(2) In this Act “contract for the supply of goods or services” means…

(b) a contract (other than a contract of sale of goods) by which a person does any, or any combination, of the things mentioned in subsection (3) for a consideration that is (or includes) a money consideration.

(3)Those things are…

(c) agreeing to carry out a service.

3 (1) A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a “qualifying debt” for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section.

(2) A debt does not carry statutory interest if or to the extent that it consists of a sum to which a right to interest or to charge interest applies by virtue of any enactment (other than section 1 of this Act).

This subsection does not prevent a sum from carrying statutory interest by reason of the fact that a court, arbitrator or arbiter would, apart from this Act, have power to award interest on it…

4 (1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).

(2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.

(3) Where the supplier and the purchaser agree a date for payment of the debt (that is, the day on which the debt is to be created by the contract), that is the relevant day unless the debt relates to an obligation to make an advance payment…

5A (1) Once statutory interest begins to run in relation to a qualifying debt, the supplier shall be entitled to a fixed sum (in addition to the statutory interest on the debt)…

8 (1) Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late payment of the debt…

16 (1) In this Act…

“qualifying debt” means a debt falling within section 3(1)…”

4.
It is clear that the provisions of the 1998 Act apply to what is called any "qualifying debt", albeit that the definition section simply refers back to Section 3(1). That Section identifies that for the purposes of the Act a qualifying debt is one "created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price”. It is interesting and important to note that the word "debt" is not as such defined and, indeed, it might be said that it is such a well-known term at least in legal circles that it is not necessary to define it.

5.
In its simplest meaning, the word "debt" deriving from the Latin word (debere: to owe) connotes something which is owed or due by someone, usually referred to as a debtor. There was historically an action for or on a debt albeit that this is a technical term is now obsolete. The word "debt" is and has historically been used in many different types of statute ranging from Gaming Acts to Insolvency Acts. Thus, Section 267 of the Insolvency Act 1986 talks about creditor’s petitions “in respect of one or more debts owed by the debtor”; in accordance with usual rules of statutory interpretation, one will always need to look at the context in which the expression "debt" is used in a given Act of Parliament.

6.
A helpful statute to turn to in the context of interest is the Senior Courts Act 1981 and in particular Section 35A:

“Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and

(a) in the case of any sum paid before judgment, the date of the payment; and

(b) in the case of the sum for which judgment is given, the date of the judgment.”

This provides an interesting pointer because it refers to both "debt" and "damages" which comprise a large bulk of the Courts’ business in terms of monetary awards by way of judgment. There was at least in that statute a perceived difference between the two types of entitlement.

7.

The 1998 Act specifically identifies "debt" only as attracting the specific interest provisions. It is only "qualifying" debts which attract statutory attention and those debts are by Section 3 specifically to relate to “an obligation under a contract to which this Act applies to pay the whole or any part of the contract price”. There is a very clear distinction to be drawn between the payment of the contract price and any liability for damages for breach of contract because the latter does not usually arise as such pursuant to an obligation to pay the “contract price”. In any event, a debt is usually considered to be a sum due for work done, materials delivered or services rendered which sum is either specifically ascertained and agreed within or by the contract in question or is ascertainable from what has been agreed. Of course, in the case of a claim for breach of contract for (unliquidated) damages, that claimed entitlement can only convert into a debt as a result of a judgment or arbitration award; it does not become a debt until that stage and at that stage it attracts the specified judgment rate of interest for late payment of a judgment sum.

8.
That is not to say that the contract in question could not convert or bring what is or might otherwise be a liability for damages for breach of contract into the contractual machinery for the payment of the contract price. A common example in certain construction contracts is the liability on the part of the Contractor to pay liquidated damages for culpable delay; that is often to be brought into the certification and payment regime and, indeed, the certification regime can result in a net sum payable by the Contractor to the Employer; that might be caught by the 1998 Act regime.

9.
There is no suggestion however that the contract between NML and AEW contains any such provisions. In essence, NML’s claim in the proceedings was not in any way for payment "of the contract price"; the "contract price" was the total fee payable to AEW. NML’s claim was for breach of that contract, primarily involving complaints about failures to exercise reasonable care and skill on the part of AEW. It was not a claim for a debt as such.

10.
It follows from the above that I do not consider that the 1998 Act applies to what has been established by the judgments as NML’s entitlement to damages for breach of contract against AEW. It therefore follows that the Court does have power and a discretion to award interest pursuant to Section 35A of the Senior Courts Act 1981 for such periods and at such rates as the Court thinks fit. There is general agreement, as I understand it, that interest should be allowed at 2½%, that is Bank of England base rate plus 2%, from the dates that the historical costs were incurred up to 3 September 2013. I decided at the recent hearing that interest on the full amount of damages awarded by the two judgments should run at the judgment rate from 3 September 2013 on the basis that there was no good reason why the two judgment sums had not been paid by AEW by that stage at the latest. I leave it to the parties to agree the arithmetic.

COSTS

11.
There are essentially three issues, the first being whether and upon what basis (indemnity or standard) NML should be awarded all its costs, the second being whether any interim payment on account of costs should take into account the impact of the CFA between NML and its solicitors and thirdly whether such interim payment should reflect the cost management order made in April 2012 or the later costs management budget schedules submitted for the Pre-Trial Review.

Indemnity or Standard and 100%

12.
The principles upon which indemnity costs may be awarded have been addressed in numerous cases and in broad terms, this Court in **Igloo Regeneration (GP) Ltd v Powell Williams Partnership** [2013] EWHC 1859 (TCC) broadly summarised the position:

“2 The authorities are now well established and I do not intend to repeat them. There is largely, if not entirely, an overlap between what both counsel are putting forward as the appropriate basis: cases such as Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (a firm) [2002] EWCA Civ 879 , per Waller LJ, in which he said:

"Is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

3. There are also the well known cases of Kiam v MGN Ltd (No 2) [2002] 2 All ER 242 , in particular the judgment of Simon Brown LJ (as he then was), Gloster J (as she then was) in Euroption Strategic Fund Ltd v Skaninaviska Enskilda Banken AB [2012] EWHC 749 (Comm) , and this Court in Walter Lilly & Co Ltd v Mackay & Anr [2012] EWHC 1972 (TCC) , although this was on obviously on different facts and considerations, when the Court referred to yet more authority, in particular Andrew Smith J in Fiona Trust & Holding Corporation v Yuri Privalov [2011] EWCR 664 (Comm) and The Mayor & Burgesses of the London Borough of Southwark v IBM UK Limited [2011] EWHC 653 (TCC) . I do not intend to repeat the summary of principles and considerations to be taken into account. Obviously, the fact simply that one parties loses the case, and maybe loses it on the basis of a firm judgment, does not mean, as such, that the losing party should pay costs on an indemnity basis. There must be some conduct which takes the case out of the normal run of the mill.”

The conduct of the party against which indemnity costs are sought does not have to be lacking "in moral probity or deserving of moral condemnation" but the conduct should generally be unreasonable to a high degree.

13.
More generally Mr Justice Jackson (as he then was) provided useful guidance broadly in relation to costs orders **in Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd** [2008] EWHC 2280 (TCC), deriving a number of principles from his detailed review of the authorities at Paragraph 72:

“(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.

(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."

14.
NML's Counsel points to a number of factors which, he argues, supports a case for indemnity costs in his client's favour:

(a) The belated failure by AEW to make the admissions which it did only several working days before the trial commenced.

(b) The failure by AEW to admit liability overall either well prior to the trial or at the latest after the unimpressive expert evidence deployed by AEW coupled with the admission that the AEW liability experts were not asked to address liability issues in their exchanged report. To this is added the unexplained non-deployment of AEW's factual witnesses.

(c) The unwillingness to engage effectively in the run up to the trial and during the trial on quantum matters.

(d) The failure at any time, and even after evidence and closing submissions, to make any realistic offer.

15.
Mr Reed QC and Ms Conroy for AEW argue that not only should there not be indemnity costs but that NML should only have 60% of its standard costs to reflect the following (which I take from their written Note for the costs hearing):

"8… (a) the conduct of NML in relation to supplement the claim;

(b) the provision of a Remedial Scheme thirteen months after the proceedings were issued;

(c) the late appointment of a Quantum Expert seventeen months after proceedings were issued and two months before the trial;

(d) the late provision of quantum information, with 400 pages being served on the parties three days before trial and information being drip fed throughout [the] trial;

(e) late amendments to the sums being claimed;

(f) the fact that NML failed on significant elements of the quantum case…

10…(a) NML amended their case on a number of occasions in circumstances where the case could have been pleaded correctly at the outset;

(b) NML's quantum documentation did not [materially] substantiate their claim, with a large part of the documentation on quantum served shortly before trial commenced without any or any valid excuse; and

(c) NML was unwilling to mediate for an inordinate an unjustifiable period of time."

16.
The following represents the relevant chronology:

DATE	EVENT
January 2010	The first appreciation by NML that there was a problem with the amphitheatres
December 2010	NML's solicitors ask AEW to admit liability in relation to the amphitheatre problems
May 2011	The SAS ceiling collapse
July 2011	The initial opening of the Museum
20 Sept 2011	NML issues its proceedings against AEW
November 2011	NML serves its Particulars of Claim
January 2012	Armstrong ceiling tiles are dislodged
Jan 2012	AEW served its Defence and very detailed Request for Further Information
24 Feb 2012	First CMC - 22 April 2013 trial date fixed; expert report due for exchange by 30 November 2012
March 2012	AEW serves its third party claim against the Contractor
31 July 2012	Disclosure originally due
21 Sept 2012	Witness statements originally due
3 Oct 2012	NML serves details of amphitheatre remedial scheme
25 Oct 2012	NML serves Amended Particulars of Claim

Nov 2012	Procedural agreement about further directions with new disclosure arrangements between 26 November 2012 and 14 Jan 2013, witness statements to be exchanged by 15 Feb 2013, Joint experts' statements by 15 March 2013 with reports by 29 March 2013
Mid-Jan 2013	AEW suggests mediation in mid-Feb 2013
25 Jan 2013	AEW asks NML for identity of its quantum expert
28 Feb 2013	NML appoints Mr Fitch as its quantum experts
4 March 2013	Court orders exchange of witness statements by 8 March 2013 (effectively against AEW which was in default) – final and unless orders. Joint experts' report to be filed by 21 March 2013
22 March 2013	Pre-Trial Review. Quantum experts joint statement to be filed by 26 March 2013 with quantum reports to be served by 2 April. Order relating to late disclosure from AEW.
2 April 2013	Mediation between all parties - unsuccessful
17 April 2013	NML serve two further witness statements including Ms Granville's 3rd and some 400 pages of attached documentation
22 April 2013	Day 1 of trial
9 May 2013	Day 11 of trial and end of evidence
10 June 2013	Final speeches
31 July 2013	1st judgment awarding £1,127,870. 40 in favour of NML
20 Aug 2013	2nd judgment awarding £1,236,419.24 in favour of NML

17.
In my view, no blame is to be attached to NML in relation to any alleged failings on its part in the conduct of the proceedings at least up until about September 2012. Indeed, after proper reflection by Mr Reed QC, he accepted that he did not maintain a criticism for this period primarily because he rightly accepted that the problems relating to the steps and terraces in the amphitheatres represented a complex problem and that the selection of appropriate remedial schemes was bound to take some considerable time; therefore NML could not and should not be criticised for failing to

particularise and quantify its remedial scheme to the amphitheatres until about that time. I referred at various places in the first judgment to how complex the problem was and indeed I was critical of one expert for seeking to over-simplify what had proved "historically to all concerned to be intractable and almost insoluble problems with the geometry of the steps and seats" (Paragraph 41). It was not unreasonable for NML and its professional team to give extensive and researched thought to the problems of how to address by way of remedial schemes the geometry and other problems raised in relation to the amphitheatres. This can not have been assisted by the absence of disclosure from AEW.

18.
It needs also to be borne in mind that with the original Particulars of Claim in late 2011 some extensive particulars were given at least of the historical costs. Although the Court has been provided with an incomplete pleadings bundle, it is clear from the Request for Further Information served by AEW in January 2012 that particulars were sought of the detailed figures claimed for such historical costs. It is difficult to criticise the later provision by NML in about October 2012 of the substantial further corroborative information and documentation in circumstances in which no order for the old-fashioned and exceptionally detailed Request had been sought and when parties had effectively agreed to defer disclosure until later in the year.

19.
The parties seem in the latter half of 2012 to have been willing and indeed keen to maintain the trial date in April 2013 notwithstanding the criticisms that are now made by AEW of NML. There was consent by all parties in November 2012 to adjust the programme with some important activities such as disclosure been pushed back to the end of the year, witness statements pushed off to about two months before the trial and important expert activities being finalised in March 2013 about one month before the trial was to start. The parties were pragmatically trying to bring matters on and apparently managing tolerably well.

20.
It should be pointed out that the Amended Particulars of Claim quantified the damages claim at some £3.8 million but particulars were provided of what alternative future remedial schemes were being put forward and relied upon and relatively detailed particulars were given of the likely costs. These were not prepared by Mr Fitch who have not yet been appointed but by the well-known firm of Turner and Townsend, who had been the quantity surveyors retained by NML and indeed representatives of whom were called as witnesses of fact by NML. By October 2012, NML had produced a sufficiently particularised pleading of its quantum case which was sufficient for AEW to get to grips with, whether or not it or its experts could accept in principle the reasonableness or otherwise of the two alternative remedial schemes which had been priced and particularised; they had more than enough to be getting on with.

21.
What was happening however with all parties’ knowledge and consent was that many of the important activities in terms of preparation for trial were being concertinaed into the last eight weeks before the trial and it is unsurprising that various frustrations arose on all sides but particularly AEW and NML.

22.
It was at least unfortunate that NML did not appoint its quantity surveyor expert by the end of December 2012 at the latest. This was because it was always going to be unlikely that NML would be able to prove its loss at least in respect of the future remedial works without the assistance of independent quantum expertise; the expert would need time to acquaint himself with the detail of the

case and to start liaising with the other parties' quantum experts. I can see however that a substantial part of the quantum, in particular the historical costs, the future NML staff costs and such items as the NML future loss of profit associated with the remedial works would not to a significant extent need independent quantum expert evidence.

23.
Criticism is made not only of the late appointment of Mr Fitch but also of the unwillingness of NML and its representatives to participate in mediation in mid-February 2013. NML was reluctant to become involved in mediation prematurely when the liability experts had not finalised what they agreed and disagreed about in relation to the remedial schemes, which they were continuing to discuss in February and March 2013. I do not consider that it was unreasonable of this public and charitable organisation to need to understand what the ambit of the expert dispute was in relation to the remedial schemes before mediation took place. This is for the simple reason that it would be inevitable that negotiations within the mediation context would focus on the likely costs of any different remedial schemes, which each side's experts were promoting. If, as proved not to be the case at least until late April 2013, the parties' experts had agreed large elements of an appropriate remedial scheme for each of the areas of complaint, negotiations would have been simplified. Even if lines were drawn between the experts, compromises could be considered by the parties somewhere between the competing remedial schemes. Until the liability experts had got to that stage, it would have been difficult in the context of this case for a settlement to have been achieved or one which would or could reasonably have satisfied this public organisation that it had sufficient by way of the settlement to carry out appropriate remedial schemes.

24.
The criticism made by AEW of the belated provision particularly of Ms Granville's further witness statement towards the end of the week before the start of the trial seems at first blush to be an arguable one. However, apart from a few minor if not trivial amendments to the quantum, she was in her third statement largely seeking to support the already pleaded and largely documented quantum, which had been put forward in October 2012. It is clear that a significant number of the documents attached to this third witness statement had previously been disclosed in any event and indeed most were attached to Mr Fitch's first report exchanged within time, albeit that this was on 2 April 2013. However, as I have said before, the parties collectively had largely by agreement allowed themselves mutually to have a belated and congested run-up to the trial.

25.
However, no objection was taken by AEW once the trial started to the introduction of this evidence primarily from Ms Granville. I would not have been averse to adjourning certain aspects of quantum if AEW had asked but it did not do so. It was prepared through its professional team to proceed on the basis of a full trial of liability and quantum on the basis of the evidence proffered. Even if the evidence had been proffered a few weeks before, I doubt that it would have made any difference either in the mediation or otherwise.

26.
The adage "the proof of the pie is in the eating" comes to mind. The reality is that AEW, even after all the evidence had been heard and indeed after the closing submissions, never produced a Part 36 or comparable offer of settlement that was anywhere near what the judgments secured for NML. The trial certainly did not last any longer than it would have done and, if anything, the trial turned out to be shorter by at least one day than all parties had initially programmed. I therefore conclude that as a matter of fact the belated appointment of Mr Fitch and the provision of Ms Granville's further

statement did not materially affect the length or even conduct of the case and the earlier appointment or submission of that further statement would in all probability not have led to a settlement. I can however accept that the late appointment of Mr Fitch and the belated submission of particularly Ms Granville's third statement may well have led to some relatively limited additional costs occasioned by the disruption to final trial preparation. It also must have materially contributed to the fact that it would have been difficult to agree or even necessarily list all the disagreements in relation to quantum in any ultimately helpful sense of much before the trial.

27.
The amendments to the quantum made in 2013 were minor and AEW's professional team very much took them in their stride; they were in any event relatively minor.

28.
It is simply wrong to suggest that NML failed on significant elements of the quantum case. An examination of the numerous heads of quantum show that NML succeeded on every head of loss in relation to the steps and stairs claim although there were reductions in some of the heads and a relatively few sub- or sub-sub-heads of loss were disallowed. The same can be said of the ceilings and other claims addressed in the second judgment, although the £110,000 claim for repayment of AEW fees was fully disallowed. What did happen was that, after some level of agreement between experts, quantum was reduced and I in effect marked down a number of sub-claims. I can not see that any additional costs are likely to have been incurred by either party as a result of the reductions in quantum recognised by the judgments. NML remained substantial "winners" of this litigation and achieving a substantial measure of success on almost every head of quantum.

29.
It is to be observed that neither NML nor AEW put forward offers of settlement which directly have any impact on the exercise of the discretion in relation to costs. Mr Brannigan QC has provided a table of the relevant offers:

Date	**Communication**
23 Dec 2010	Letter from NML to AEW: "If in fact you accept liability then we respectfully request and require written conformation of this admission by return"
4 Mar. 2013	Part 36 offer from AEW: Offer to pay £950,000 plus costs in respect of all liability.
23 Apr. 2013	NML make a WP Save as to costs offer to take £2.94 million plus indemnities, all as set out in a detailed Scott Schedule listing each element of the claim and the figure attributed to that element. AEW do not respond.
26 Apr 2013	No response having been received NML make a further WP Save as to costs offer to take £2.99 million plus indemnities. Again, NML set out that offer in a detailed Scott Schedule listing each element of the claim and the figure attributed to that element. Again, AEW do not respond.
27 Apr 2013	No response having been received to those two offers NML make its offer of 26th April 2013 openly, indicating that it wishes to receive counteroffers on its detailed Scott Schedule. AEW do not respond: it simply ignores the open offer.
1 May 2013	AEW write offering to pay £1.4 million plus costs to, apparently, include the effects of all indemnities. That offer was not broken down by reference to the Scott Schedule.

	NML immediately respond asking for clarification of how the offer “worked” re the indemnities and whether it was correct that the intention of the offer was to include all sums payable under the indemnities within the £1.4 million. Again AEW do not respond, and simply ignore that request for clarification.
15th May 2013	Its email of 1st May 2013 having been ignored by AEW, NML writes repeating its request for clarification.
17 May 2013	AEW finally respond, providing some clarification on the indemnities point. NML reply on 21st May 2013 seeking to pin down precisely what the indemnity is that is being offered. Again AEW do not respond, and simply ignore that request for clarification
24 June 2013	AEW write making a composite offer to pay £1.175m in respect of the amphitheatres and £600,000 in respect of the ceilings on the basis that: NML give up all claims forever more in relation to those areas – ie.. not just the claims in these proceedings and NML accept that offer as a composite: “should NML not accept any of the offers, the offers shall have no effect”

30.
Thus, NML did not recover more than the level of settlement which it had offered and AEW did not "beat" any of the offers which it made at any stage. It is difficult therefore to give either party particular credit so to speak on the costs question in relation to the offers.

31.
However, there are some facets of AEW’s conduct which do merit particular comment:

(a) No explanation has been given by AEW as to why either it decided to call no factual evidence (although witness statements had been exchanged) or why it admitted some aspects of liability only several working days before the start of the trial. Mr Reed QC suggests that I have no evidence as to why and therefore the Court should not take it into account. The remainder of the actual evidence both documentary and witness evidence (to which the court did have access) however suggests that the defence on liability was, at its best very thin, and at worst unsustainable. Notwithstanding this, AEW maintained its defence on all aspects of liability until almost the 12th hour. I do not suggest however that it was unreasonable on the part of AEW to deny liability in the pleadings but following disclosure and the retention by it of liability experts, the admissions of liability could and should have been made some weeks earlier than they were. I bear in mind that the pleaded case on liability on the SAS and Armstrong ceiling claims and the steps and stairs claim did not materially alter. I also take into account that it must have been known to AEW and its professional team at the very least some weeks before the exchange of witness statements of key members of AEW’s original architect team (such as Mr Hiscock who had apparently left the firm) were not going to be called as witnesses to deal with important aspects of liability.

(b) AEW was unjustifiably late (in mid-March 2013) in disclosing particularly Mr Hiscock’s notebooks which, importantly, contained serious admissions and corroborated Ms Granville’s recollection of what was said between them in January 2010.

(c) I said at Paragraph 37 of the first judgment:

“I was surprised (to say the least) to be told by Mr Wasilewski that he and Mr Pepper (who both work for the same firm) had not been asked to consider what could reasonably be expected of architects in AEW's position. This extraordinary state of affairs (in a case all about alleged professional negligence on the part of architects) may explain why such little coherent thought had been given by Mr Pepper to this aspect of the case. Mr Pepper was wholly unconvincing about all aspects of liability.”

To this point, Mr Reed QC, on instructions, referred to instructions which went to Mr Pepper from his solicitors on 17 November 2011 which asked that expert to "provide a preliminary view" on the issues of negligence (amongst others). Whatever preliminary views he may have provided on a privileged basis on the professional responsibility aspects of this case (if any), the joint report prepared by him and Mr Wasilewski is noteworthy at least for its omission to address clearly, obviously or at all issues of responsibility of either AEW in particular or in relation to what a competent architect exercising reasonable care should or should not have done. That omission is so glaring that it must have been known to AEW, its insurers and its professional team. I have no reason to doubt the evidence put forward (as set out above). The reality is that if, as is the case, the two experts were not asked to consider and address in their report the key issues of professional responsibility which were challenged in the pleadings, it is unsurprising and almost inevitable that it would have emerged that there was, on any proper analysis, no real defence on liability either in fact or otherwise on the merits. That is borne out by the evidence. It is borne out by the extensive admissions made by Mr Pepper on liability. Matters should never have got as far as a trial on liability.

(d) The above point is compounded by the non-acceptance of liability in all its respects following the extensive concessions made by Mr Pepper and in particular following his extraordinary concession that he was seeking to defend the indefensible in the interest of his client. I specifically asked Mr Reed QC after Mr Pepper had given evidence whether the denial of liability was being maintained and Mr Reed, properly, said that he would take instructions; no further concessions were made. It must have been obvious that, following Mr Pepper’s evidence, AEW was facing very real difficulties on liability. Indeed, Mr Reed’s written and oral closing hardly touched on liability in any material sense.

(e) Turning to quantum, I expressed surprise during the trial at various stages but with a growing concern that greater efforts were not being made by the quantum experts and the parties to agree substantial areas of quantum or at the very least identify the extent of disagreement. This emerged at best slowly. The production by NML during the trial (on or about Day 5) to the Court and to AEW and PGT of an open offer which listed each and every head of quantum and identified what figures (below those claimed) which NML would accept either overall or by reference to any individual figure was an imaginative and sensible move. There was however no (at least no open) equivalent response from AEW and, even in the final oral and written closing submissions on behalf of AEW, there were few concessions. An example is that there was nothing accepted as due in respect of NML staff costs notwithstanding the compelling evidence of Ms Granville (whose integrity and reliability were not seriously challenged in cross-examination).

32.
All these factors would have supported a case that costs should be on an indemnity basis in favour of NML as from about early April 2013 or as from the start of the trial. However, my concerns about the late admissions and failures to admit liability on the part of AEW and the reluctance to make concessions on quantum are balanced by my concerns in relation to the late appointment by NML of Mr Fitch and the belated production of Ms Granville’s third statement. I have therefore formed the

view that that taking into account all the above factors, a fair and reasonable decision is to award NML all its costs but on a standard basis throughout.

Interim Payment on Account of Costs

33.
There can be no real objection to an order that AEW makes a payment on account of costs; NMLshould not be kept out of its entitlement to costs and, although the Court can not know what final figure would be ordered on an assessment by a costs judge, experience and knowledge of the case enables the judge in most cases and particularly in this case to have a good idea what is a safe and fair proportion of the likely overall bill of costs to award by way of interim payment.

34.
The first issue raised by AEW relates to the costs management order made by the Court as long ago as February 2012. At that stage, PGT not then being a party, the Court approved each party's cost budget. NML's costs budget at that stage was £492,727.57 (as accepted by Mr Reed QC and Ms Conroy in their note for the cost hearing at Paragraph 19). By 3 January 2013, NML's estimate had gone up to £1,129,880.01 as indeed had AEW's up to £1,002,907.00. These estimates were contained in budgets in the then appropriate forms, which were lodged with the Court for consideration at the Pre-Trial Review on 22 March 2013. I have a clear recollection that they were before the Court and that it was intended to review them at that hearing. I am told and accept that there was no hint or suggestion from either side that the other's revised cost budget was objectionable. Indeed, even now, there is no suggestion that overall or in relation to individual items these revised cost budgets were objectionable.

35.
At that stage, the TCC was subject to Practice Direction 51G, which permitted the judge to make costs management audits. Paragraph 3.1 required each party to "file and exchange its cost budget substantially in the form set out in Precedent HB". Paragraph 4.1 explained that the court would "seek to manage the costs of litigation, as well as the case itself" and Paragraph 4.2 made it clear that the "objective of the cost management is to control the costs of litigation in accordance with the overriding objective". Paragraph 4.3 required the court to "have regard to any cost budgets filed pursuant to this Practice Direction and decide whether or not it is appropriate to make a costs management order." Proportionality was important. Paragraph 6 stated:

"In a case where a costs management order has been made, at least seven days before any subsequent costs management hearing, case management conference or pre-trial review, and before trial, a party whose cost budget is no longer accurate must file and serve a budget revision showing what, if any, departures have occurred from that party's last approved budget, and the reasons for any increased budget. The court may approve or disapprove such departures from the previous budget."

Finally, Paragraph 8 stated:

"When assessing costs on the standard basis, the court –

(1) will have regard to the receiving party's last approved budget; and

(2) will not depart from such approved budget unless satisfied that there is good reason to do so."

36.

Mr Reed QC argues that, applying the words and logic of Paragraph 8, the costs judge will not be able to depart from the last formally approved budget (£492,727.57) and therefore any interim payment on account must or at least should relate only to this overall figure. He relies upon the case of **Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd** [2013) EWHC 1643 (TCC) in which Mr Justice Coulson considered the impact of costs management orders. The facts of that case are different to the current case and were summarised by Coulson J:

“3. On 10 May 2011, the claimant took out ATE Insurance against the risk of having to pay the defendant's costs. The cover was up to £250,000. These proceedings were commenced on 25 July 2011, and the following day, the claimant notified the defendant of both the funding and the limit of the cover.

4. At the CMC on 29 March 2012, Edwards-Stuart J ordered that the defendant file and serve its costs budget in accordance with CPR PD 51G, the Costs Management in Mercantile Courts and Technology and Construction Courts - Pilot Scheme. On 31 May 2012, having considered the costs budgets submitted by both parties, Edwards-Stuart J made Costs Management Orders approving the claimant's costs budget of £317,333.25 (being £212,533.25 in respect of costs and £104,800 for the ATE Insurance premiums), and the defendant's costs budget of £264,708.

5. At the Pre-Trial Review on 18 January 2013, Ramsey J enlarged the cost management orders to cover the costs of daily transcripts at the forthcoming trial. This had the agreed effect of increasing the defendant's approved costs budget to **£268,488**. Apart from that, at no time before or at the trial (which started before me on 4 March 2013) did either side apply to increase or revise the costs budgets which were the subject of the costs management orders.

6. This was despite the fact that, on 7 February 2013, just a month before trial, the defendant sent the claimant and the court a revised costs budget, which doubled the previous estimate to **£531,946.18**. On 22 February, the claimant's solicitors objected to the revised budget, but at the same time notified the defendant's solicitors of a much smaller increase in their own budget figure to £372,179.53.

7. Although these exchanges were sent to the court, they were not included in the trial bundles, which were the only papers in this case that I ever saw: accordingly, I was wholly unaware that the defendant's estimated costs were now twice the amount approved in the costs management order. I was, however, aware (because I was told this expressly at paragraph 9.1 of Mr Susman's written opening) that:

"The defendant has not yet made any application for further enlargement of the Costs Management Order made on 31 May 2012, but any such application if made will be strongly resisted by the claimant."

No such application was made and the matter proceeded to trial and judgment.”

The Defendant "won” the case and issues involving indemnity costs, interim payments on account of costs and the impact of the costs management orders made came into play.

37.
The relevant parts of the judgment are:

“28. Prima facie, whether under PD 51G paragraph 8, or CPR 3.18, the costs management order (with its approval of the costs budget) is expressed to be relevant only to an assessment of costs on a standard basis. However, as a matter of logical analysis, it seems to me that the costs management

order should also be the starting point of an assessment of costs on an indemnity basis, even if the 'good reasons' to depart from it are likely to be more numerous and extensive if the indemnity basis is applied.

29. The first reason for this is that, as set out in paragraphs 2 and 3.2 of PD 51G (paragraph 10 above), the costs budgets represent the parties' estimate of all the costs that they think that they will incur. It is not an estimate based on any particular form of costs assessment; it is just an estimate of likely costs. If it is an accurate estimate of all the costs that will be incurred, then it seems to me that it should be the relevant starting point for an assessment of costs on an indemnity basis as well as for an assessment on the standard basis…

33. It seems to me that, whether regard is had to the TCC Pilot, or the new rules in the CPR, or the guidance in **Henry**, the result is the same: unless the defendant can amend/revise upwards the costs management order or approved costs budget pursuant to paragraph 6 of the Practice Direction (and now r.3.15(3)), or persuade the court that there are good reasons to depart from it in accordance with paragraph 8 of the Practice Direction (and now r.3.18(b)), then the defendant's costs are going to be assessed by reference to the costs management order.

36…if the defendant wanted the court to approve the significant changes to its costs budget, then it had formally to seek such approval. It was not enough simply to file the material at court. As I have said, coming late to this case, I was entirely reliant on the parties to provide me with the information that I needed properly to manage the trial. I was wholly unaware of the fact that the defendant's estimate of costs had almost doubled in the weeks before trial. Had I known, I would have put the defendant to its election at the outset of the trial.

37. When should an application to revise/amend a costs management order be made? In my judgment, it ought to be made immediately it becomes apparent that the original budget costs have been exceeded by a more than minimal amount. On the facts of this case, that appears to be late January/ early February 2013…

38. I am in no doubt that the application pursuant to paragraph 6 of PD 51G ought to have been made before the trial. That is because paragraph 6 identifies expressly the stages when such an application could be made, which are said to be "any subsequent costs management hearing, case management conference or pre-trial review, and before trial". There is nothing in paragraph 6 which envisages an application after the trial; indeed, I consider the paragraph expressly requires any application to be made before the trial.

39. Furthermore, in my judgment, an application to amend an approved costs budget after judgment is a contradiction in terms. First, it would mean that the exercise would no longer be a budgeting exercise, and would instead be based on the actual costs that have been incurred. Secondly, it would encourage parties to 'wait and see'; only applying to increase the budget costs if it was in their interests. Thirdly, it would make a nonsense of the costs management regime if, at the end of the trial, a party could apply to double the amount of its costs budget. The certainty provided by the new rules would be lost entirely if the parties thought that, after the trial, the successful party could seek retrospective approval for costs incurred far beyond the level approved in the costs management order.”

38.
Having decided that he, as trial judge, should not as such amend or revise the costs management order made, he then went on to consider in some detail whether there was "good reason to depart

from the approved budget pursuant to Paragraph 8" of the Practice Direction. The judge identified facts relevant to the exercise which included the fact that the "pleadings were not significantly amended" (Paragraph 47 of the judgment), "not getting the budget right in the first place" (Paragraphs 48-9), alleged lack of prejudice to the claimant (Paragraph 50, the judge finding that there was prejudice), unnecessary attendance of expert at trial (Paragraph 57) and increased importance as the case got closer to trial of a particular topic (Paragraphs 59 and 60, said by the judge to be a reason to justify departure from the approved costs budget).

39.
I see no reason to disagree with the principles set down by Mr Justice Coulson. I have one observation however which is that Paragraph 6 of PD 51G requires parties to file and serve budget revisions when its previous budget is no longer accurate with the court at the next procedural hearing to approve or disapprove departures from the previous budget; that suggests that no formal application needs to be issued by the parties seeking a revision and that the court may of its own motion approve or disapprove the revision, albeit doubtless giving the parties the opportunity to be heard. There are, however, important differences between the **Elvanite** case and this, the most prominent being that here there was, simply, an oversight by both parties and, indeed, by the Court at the PTR to get round to addressing the substantially increased costs budgets of both NML and AEW; so far as I can recall, this was because there was a lot of business to get through on what was a busy Friday in the TCC. There has been no hint or suggestion that either was challenging or would have challenged the other's revised budget. Indeed, it is more probable than not that each would actually have agreed the other's. There are some very obvious reasons why the costs budgets had substantially increased since early 2012 and these include:

(a) PGT had not then been brought into the proceedings; it was brought in some weeks after the first CMC.

(b) There were substantial amendments to the Claimant's case in the autumn of 2012, particularly in relation to quantum.

(c) It is clear that the case by the autumn of 2012 was becoming much more complex, particularly in relation to quantum, than had been earlier envisaged by the parties.

(d) From the autumn of 2012, in particular, the tone, content and quantity of solicitors exchanges increased beyond what could reasonably have been envisaged at the earlier stage, which was to lead to heated disputes about disclosure.

(e) From the autumn of 2012, and largely by agreement, the parties' legal representatives agreed a much more concertinaed programme up to trial which will inevitably have increased costs beyond what was envisaged at the time of the first CMC when an ordered programme was laid down.

These points can at least in part be gleaned from a comparison of the NML earlier and later budgets with pleadings costs rising by some £80,000, disclosure costs being some £180,000 higher, witness statements about £50,000 higher and expert reports £190,000 higher. The trial and trial preparation costs went up from about £150,000 to £345,000, which, at least to a large extent, reflects the greater complexity.

40.
As the trial judge and at this late stage, it would not be appropriate as such to revise NML's only formally approved budget. This is, however, a very obvious case, based on my knowledge of the case

and the case management, for a substantial upward departure from the approved budget. It is most appropriate however to leave the detail of this issue to the costs judge but, doubtless, he or she can take into account what I have said.

41.
Leaving aside the issue relating to the Conditional Fee Agreement (for which see below), I consider that it is more likely than not that I would have approved a revised budget for NML at the PTR of at least £1 million and, allowing for appropriate departures (for good reason) from the originally approved budget, that is an appropriate basis at least against which to assess the interim payment of costs on account. NML's solicitors have identified and their costs to date excluding costs incurred in September and October 2013 were just over £1.2 million; it is clear that costs incurred after August 2013 were probably not budgeted for as it was probably unforeseeable that there would be such a level of disagreement about costs and interest (and indeed evidence by the cornucopia of issues raised and addressed by the parties and within this judgment).

The CFA

42.
On 22 September 2011 NML and its solicitors (DWF LLP) entered into a CFA agreement entitled "CFA with discounted hourly rate and success fee". This was two days after the proceedings had been issued. It purported to cover "all work done after the date of this agreement and from 26 April 2011" in relation to the proceedings (bar any appeal against the final judgment). After defining what was meant by "successful" or "unsuccessful" outcomes, it defined "Ordinary costs" as meaning basic charges and tax "in respect of work covered by this agreement, plus the success fee, calculated at the rate allowed by the court for work undertaken in this matter as set out in schedule 1" to the agreement whilst "Discounted costs" meant basic charges and tax "in respect of work covered by this agreement, calculated in accordance with the rates set out in schedule 2". Under the heading "Paying us", the following appears:

"If there is a successful outcome you will pay our ordinary costs, our disbursements and the success fee. You are entitled to seek recovery from your opponent of part or all of our ordinary costs, our disbursements and the success fee.

If there is an unsuccessful outcome, you will pay our discounted costs and our disbursements. You may also be liable for your opponent's costs, subject to your own insurance arrangements…"

"Disbursements" are explained. Under the heading "The success fee", this appears:

"The success fee is set at 50% of basic charges as set out in Schedule 1…The success fee cannot be more than 100% of basic charges.

Where the success fee becomes payable, then if we or you are required by the Court…to disclose to it or to any other party the reasons for setting the success fee at the level assessed by us, we may do so."

Under a "Miscellaneous" heading, it was said that if "any part of this agreement is found to be unenforceable, the remainder of it shall continue in full force and effect".

43.
Schedules 1 and 2 set out the "ordinary" and the "discounted" hourly rate costs as follows:

Level	Schedule 1	Schedule 2

Equity Partner	£320	£150
Partner	£300	£150
Associate	£220	£110
Senior Solicitor	£200	£100
Solicitor	£180	£90
Trainee Solicitor/Legal Adviser	£110	£60

44.
From quantum documentation put before the Court, there was evidence as to what DWF actually charged NML for instance in 2010 in connection with both an adjudication and also in relation to preliminary advice in connection with the case against AEW. Mr Reed QC identified in his written Note rates of £190 and £120 per hour in this earlier period being charged by DWF to NML for Partner and Associate or Senior Solicitor. He also highlighted the "Guideline Rates" for Manchester to which regard is had on costs assessments: partner (£217 per hour), associate (£192), other Solicitor (£161) and trainee/legal adviser (£118). Essentially, he argued that the agreement was invalid or otherwise unenforceable, that the sums claimed were unreasonable and that the success fee under a retrospective CFA is irrecoverable. He referred to the Courts and Legal Services Act, Section 58:

"1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

(2) For the purposes of this section and section 58A—

(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and

(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

(3) The following conditions are applicable to every conditional fee agreement -

(a) it must be in writing…

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

(4)The following further conditions are applicable to a conditional fee agreement which provides for a success fee -

(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor…"

45.
In essence, Mr Reed's primary argument on unenforceability is that the previous charging levels demonstrate (as a matter of fact) that the Schedule 1 ("ordinary costs") rates were not and can not

have reflected the amount “which would be payable if it were not payable only in specified circumstances”. Another way of putting the argument is that DWF would only have charged rates equivalent to those which they had charged NML in the latter half of 2010 going into 2011 or, even if that is not right, their normal charges would have been much less than those set out in Schedule 1.

46.
This is challenged by Mr Brannigan QC both on legal and factual grounds. He relies on a witness statement prepared by Mr O'Kane which identifies in effect that he had agreed substantially discounted rates for the work done in connection with the adjudication and that the rates entered in Schedule 1, which he says were "very competitive”, were DWF’s set rates.

47.
As I indicated during argument, I consider that it is more appropriate that this issue is addressed by the costs judge. I can not resolve the factual issues on the limited and untested evidence available I offer, however, the following obiter comments, with a view to assisting the parties to avoid a full-blown costs assessment:

(a) On any count, the rates charged by DWF, which is a substantial firm, in connection with the adjudication and related matters in late 2010 and early 2011 appear, even on Mr Reed’s assertions, seem to have been less than even the Guideline rates.

(b) I do not consider that there is anything necessarily unlawful or unenforceable in the CFA agreement identifying "discounted" rates which would be chargeable if NML had lost the case. A significant number of CFAs have identified that, if the client loses the case, the solicitors will charge nothing. The discounting of rates in the event of failure is simply a commercial arrangement as between the client and the solicitor, which is not inherently unlawful or wrong.

(c) If the basic (or as here the "ordinary”) rates are above what is fair, reasonable or realistic for solicitors in a particular area doing the particular work encompassed by the particular litigation, it is open to the costs judge simply to mark down those rates so that in the end the losing party, the Defendant, pays no more on a standard assessment than by reference to reasonable and appropriate rates. Subject to that and to the risk which it took in contesting the proceedings after becoming aware of the CFA, AEW would then be liable for costs assessed on such reasonable and appropriate rates plus any mark-up (up to 50% thereon) which the costs judge endorses or accepts.

(d) I doubt that the mark-up can be applied to fees charged for work done prior to the date of the CFA.

48.
I strongly suspect that the CFA is broadly enforceable but I do not consider that it is appropriate, given the factual differences between the parties let alone the legal arguments, to assess any interim payment on account by reference to the possible success of NML on the issue.

Assessment

49.
In my judgment, NML, which has had to fight this case over a period of now two years and which has been put to substantial cost, is entitled to payment on account of its costs entitlement. I can see that it is likely that its approved cost budget will be revised substantially upwards and, for the reasons given earlier, I can see that a figure of at least £1 million will be considered to be a proper revised figure. Of course, that figure itself and any actual costs bill submitted in any costs assessment will need to be critically reviewed by the costs judge and there is at least some prospect that the eventual recovery

on the bill, leaving aside the CFA aspects, will be below £1 million. In all the circumstances, a safe but fair figure for AEW to pay on account of costs is £700,000. I informed the parties at the conclusion of the oral hearing on costs that AEW should pay on an interim basis pending this judgment £300,000 on account of costs within a short timetable. The figure of £700,000 represents the overall total and therefore credit for this needs to be given assuming that the £300,000 on account of costs has been paid by the time that this judgment is handed down.

THE POSITION IN RELATION TO PGT

50.
The Danish parent of part of this joint venture has relatively recently gone into an equivalent to administration in Denmark as has Pihl UK Ltd which has ceased to instruct solicitors and Counsel. They however were instructed by the Galliford Try part of the joint venture and were able to make appropriate submissions on costs. Pending any further application, any order made against PGT is to be enforceable against the Galliford Try part of the joint venture.

51.
The main area of argument between PGT and AEW related to costs are with PGT arguing that AEW should pay 65% of its costs and bearing its own costs of the contribution proceedings for the period up to 15 April 2013 and thereafter AEW should pay all its costs. The 15 April 2013 date is selected because that is the date when an offer to settle had been made by PGT. AEW argues that PGT should pay its costs of the Part 20 proceedings and 25% contribution towards AEW’s costs of defending the claim by NML and 25% of 75% of NML’s costs.

52.
The starting point, at least, is the fact that AEW did succeed to some extent against PGT in that it secured a contribution, namely £205,080.90 towards those parts of the damages awarded against AEW which were attributable to PGT’s defaults; this was based on a percentage of 25%. It only related to the steps and seats issues as it was never suggested that PGT was responsible for failures relating to either type of ceiling.

53.
However, of the three live issues in relation to the steps and seats (geometry, gaps and reinforcement cover), PGT was only responsible for the inadequacy of the reinforcement cover. In relation to the geometry, AEW had maintained a third party case against PGT in respect of the geometry until at the 11th hour it openly abandoned that complaint against PGT on 19 April 2013, that is, on the Friday before the first Monday of the trial. No real explanation has been provided by AEW as to why it waited until the last moment. Based on all the evidence in the case, there appears to be no good reason to have waited that long.

54.
The measure of success on the part of AEW against PGT was relatively limited. In its Part 20 claim, it claimed (Paragraph 42) "a contribution from PGT amounting to an indemnity". That was, with respect to those advising AEW, highly optimistic. The actual contribution awarded in monetary terms represented about 18% of the sum found (in the first judgment) against AEW in respect of the steps and stairs claim.

55.
It is difficult for the court to ascertain, overall, how much time and cost was spent by AEW on the steps and stairs claim and how much of that time and cost was spent on the geometry and gap issues

as opposed to the reinforcement cover issues. Doing the best that I can and considering the documentary, written and oral evidence and the emphasis placed by the parties on these various issues, no more than 25% to 30% of AEW's overall cost, time and effort were applied to the reinforcement cover issues, including the pursuance of PGT on that issue. There was a substantial concentration by the experts and other relevant witnesses on the geometry problems and some concentration on the gaps issue, neither of which could be laid effectively at the door of PGT. 25% to 30% of the overall time and effort of AEW must have been attributable to the ceiling issues which, after all, accounted for the greater part of the quantum (at least as found). Thus, about 40% to 50% was spent on the geometry and gaps issues.

56.
The reality is that AEW and PGT largely lined up together on the reinforcement cover issue, which was, mainly, an expert issue which revolved around what a competent designer/coordinator should have allowed/specified/provided for by way of cover to the pre-cast concrete steps and stairs. There was some time which had to be spent on, historically, how it came about that cover of 25 mm had come to be put forward (ultimately by PGT and its sub-contractor), but that side of the case was largely documented. They both lost on the reinforcement cover issue.

57.
The history of offers made by PGT is as follows:

(a) On 8 April 2013, its solicitors wrote a "without prejudice save as the costs" letter to AEW's solicitors (accepted not to be a Part 36 offer as such). It was written in the context of the most recent offer made by AEW to NML on 4 March 2013 in which £950,000 plus costs had been offered to NML of which £350,000 related to the steps and stairs. Having explained various difficulties and their reasoning, they said:

"Our client's offer is therefore as follows:

(1) PGT offers to join AEW in making a joint offer to NML which enhances AEW's previous offers.

(2) The joint offer to NML must, if accepted by NML, settle all liabilities in relation to the amphitheatres: that AEW has to NML in the main action; that PGT has to AEW in the third party action; and all liabilities (save for latent defects discovered after the date of acceptance) that PGT has to NML.

(3) The joint offer, which will stand as an alternative to AEW's previous offer of £350,000 in respect of the amphitheatre geometry and fees claim, must be in the minimum sum of £875,000 [there being a footnote that "AEW are free to increase this sum"]. If accepted, PGT will pay £350,000 and AEW will pay the balance, with neither party having recourse to the other beyond those sums.

(4) AEW will pay NML's costs.

(5) Both AEW and PGT will bear their own costs of the litigation (i.e. both main and third-party actions)."

(b) This offer was effectively repeated on 18 April 2013 albeit that the minimum sum figure of £875,000 referred to in sub-paragraph (3) above was reduced to £700,000. This offer was withdrawn by e-mail dated 19 April 2013 because there was some reluctance on the part of AEW to offer as much a £700,000 in relation to the steps and stairs claim.

(c) The trial being well underway, on 29 April 2013 PGT's solicitors made a further "without prejudice save as the costs" offer:

"Our client's offer to compromise your clients' remaining contribution claims is therefore as follows:

(1) PGT offers to join AEW in making a joint offer to NML which enhances AEW's previous offers in respect of the amphitheatres.

(2) The joint offer to NML must be approved by PGT before it is made; and must contain the following provisions:

(a) NML must:

(i) undertake to include in the final accounts (without abatement, set-off or contra-charge) the full value of the work in relation to the amphitheatres; including the value of CVI340 and the later removal of the plinth; and any loss and/or expense that from CVI340 and the removal and the plinth - both of which NML must agree are Relevant Events and Relevant Matters;

(ii) undertake not to rely now or in the future (against PGT) on the efficacy of the amphitheatre design.

(b) Unless a sum is agreed between NML and AEW, that AEW indemnify NML in respect of:

(i) the value of CVI340 and the removal of the plinth; and

(ii) the value of such additional sum as is payable to PGT by way of loss and/or expense arising out of or in connection with the amphitheatre geometry, CVI340 and the removal of the plinth.

(c) It must, if accepted by NML, settle all liabilities in relation to the amphitheatres: that AEW has to NML in the main action; that PGT has to AEW in the third party action; and all liabilities (save for latent defects discovered after the date of acceptance) that PGT has to NML.

(d) It must be open to AEW and/or PGT to withdraw the joint offer unless and until it is accepted by NML.

(3) The joint offer will replace that part of AEW's offer dated 4 March 2013 which relates to the steps and terraces. The joint offer must be in the minimum sum of £800,000 [with the footnote as before]. It must maintain the sub-division between amphitheatre and ceiling issues. The joint offer will not be 'wrapped up' into a global offer but also extends to the ceiling issues in which PGT has no interest. There must be attached to the joint offer no conditions additional to or different from those set out in his letter, save by agreement between AEW and PGT. If the joint offer is accepted, PGT will pay £450,000 and AEW will pay the balance with neither party having reports to the other beyond those sums

(4) AEW will pay NML's costs.

(5) Both AEW and PGT will bear their own costs of the litigation (i.e. both main and third-party actions)."

(d) This had been preceded by a telephone discussion between AEW's and PGT's solicitors in which the latter had explained that the "likely settlement zone' on amphitheatres is £1.2m" noting that the former were "of more or less the same view" and that there was "likely to have to be a settlement fund of £1m if there is to be a deal". Whilst the Court can not know whether NML would have settled the

amphitheatres claim at between £1m and £1.2m, that range of figures was not unrealistic (certainly in the light of the judgment sum of £1,127,870.40).

(e) In the result, AEW made a further "without prejudice save as to costs" offer to NML on 1 May 2013 in the sum of £1.4 million (of which £800,000 related to the amphitheatre) plus costs. It broadly incorporated the conditions suggested by PGT several days before.

58.
The problem for the Court with these offers from PGT is that, although the sums of £350,000 and £450,000 offered exceed the quantified contribution which PGT has to make, PGT was seeking to settle not just the contribution proceedings but also to secure commercial advantages in relation to the final accounting position between it and NML, most particularly set out in sub-paragraphs 2 (b) and (c) of its solicitors letter of 29 April 2013. The Court is not in a position to quantify therefore what part of these sums reflect these extraneous commercial advantages, particularly in circumstances in which PGT was pointedly reluctant in the proceedings to put forward its latest final position in relation to its final accounts and claims under its contract with NML. Put another way, PGT was not offering to settle merely the contribution proceedings against it; it was seeking a resolution by its offer of other matters and seeking to secure commercial advantage (if that offer been accepted), which the Court can not quantify. What is certain however is that the additional commercial advantages were substantial and substantive, rather than obviously relating to some purely nominal sum. If accepted by NML, it would have put PGT in a very strong position in the negotiation of its final account and claims whilst putting NML in a much weaker position. I therefore consider that it is not appropriate to attach much weight to the offer. It was always open to PGT to protect its position by making a clear and limited offer to settle the contribution proceedings against it; that could have been done by a percentage offer or by a money sum.

59.
Taking into account principally the unexplained 11th hour abandonment by AEW of its claim on the geometry issue, its failure to succeed on the gaps issue and its success on the reinforcement cover issue (albeit well short of the 100% indemnity sought in this) , I do not consider that this is a case in which AEW should recover all of its costs of its Part 20 proceedings against PGT. In my judgment, AEW should recover 60% of its costs thereof, as reflecting these factors. I also take into account in this regard as a minor factor the fact that PGT was much more realistic than AEW in its assessment of what was needed to settle the proceedings in general and the amphitheatres claim in particular; AEW throughout (and indeed after final speeches) continually pitched its offers much too low. I emphasise that this entitlement relates to the costs of the Part 20 proceedings which are additional to those which AEW expended defending the claim against AEW by NML in relation to the amphitheatre claims.

60.
It is sensible to draw a distinction between the costs of AEW's contribution proceedings against PGT and the costs of the main proceedings, which encompass NML's costs of pursuing the proceedings as well as AEW's costs of defending them. I bear in mind Lord Phillips's dictum in the Court of Appeal in **Arkin v Borchard Lines** [2005] 1 W.L.R. 3055 at Paragraph 75:

"In the usual course of things the court will consider the incidence of costs in the main proceedings quite separately from the incidence of costs in the Part 20 proceedings, but nobody submitted that this was an inviolable rule. Even under the former regime, and long before the House of Lords illuminated the wide scope of section 51 of the Supreme Court Act 1981 in Aiden Shipping Co Ltd v

Interbulk Ltd [1986] AC 965, this court had held that both the High Court and the county court had "full and ample power to make such orders as to costs as between plaintiffs, defendants and third and subsequent parties as the justice of the case may require."

61.
I therefore turn to consider what proportion (if any) of NML's costs as eventually assessed or agreed should be borne by PGT. There was a witness statement from Ms Patterson of AEW's solicitors, which suggested that 75% of NML's costs related to the amphitheatre claim. However, this was based on an incorrect and artificial apportionment exercise and I therefore attach no weight to it.

62.
I am anxious however, in line with the overriding objective, to limit the costs of the costs assessment exercise if it is fair and sensible to do so. One could order that PGT pays a proportion of those costs which NML and indeed AEW spent on the reinforcement cover case. That would involve however a microscopic and expensive exercise on the costs assessment. A broader brush should suffice. In my judgment, a fair and realistic allowance, taking into account all the factors referred to earlier, is that 7½% of both NML's and of AEW's costs incurred after the commencement of the Part 20 proceedings should be borne by PGT. This corresponds to 25% (the level of contribution ordered) of my assessment of the upper limit of the overall time, effort and cost applied in relation to the reinforcement cover issues (30%). This takes into account the abandonment of the geometry claim by AEW against PGT and the ramifications thereof.

63.
In relation to a payment on account of costs by PGT, I indicated to the parties after argument that PGT should pay £50,000. This is the best that the Court can do in circumstances in which there is no information as to what the extra over costs of the Part 20 proceedings have been and little information about what AEW's costs have turned out to be.

64.
So far as interest is concerned, I do consider that PGT should contribute so far as interest is concerned but the interest calculation needs to take into account those heads of loss in relation to which it has been ordered to make a contribution. In quantum terms, much of that loss related to future remedial work (and related) costs. Mr Lee (in his Note for the costs hearing) produced at Paragraph 10 a calculation which represents in principle what should be allowed, albeit that he took his calculation only up to 31 July 2013. To reflect the period thereafter, I would round the interest up to £700 which should be added to the judgment sum in the Part 20 proceedings. That should be paid within 7 days of handing down of this judgment.

RESERVED COSTS

65.
Three sets of costs were reserved: (i) 10.04.13: NML's application for specific disclosure; (ii) 19.04.13: NML's application to adduce supplementary evidence to be heard on the first day of trial with the costs of the application to be dealt with by the trial judge; and (iii) 30.5.13: NML's application to re-amend the Amended Particulars of Claim. In relation to the latter two reserved matters, there can be no real argument that NML should pay its own and AEW's and PGT's costs of the application; I make it clear however that the costs of preparing the supplementary evidence would be costs in the case. In relation to the first matter, this needs to be looked at in the context of the serious failings in AEW's disclosure which emerged in March 2013 and, as it appears from its solicitor's witness statement of 11 April 2013, yet more disclosure emerged later; I consider that the Claimant's application was

justified in the circumstances, particularly given the looming trial and that these costs should be considered as costs in the case.