Case No: HT-12-116

Neutral Citation Number: [2014] EWHC 1099 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11 April 2014

Before:

THE HONOURABLE MR. JUSTICE COULSON

- -

Between:

GREENWICH MILLENNIUM VILLAGE LIMITED

Cla

- and -

ESSEX SERVICES GROUP PLC

1st Defe

(formerly known as ESSEX ELECTRICAL GROUP LIMITED)

2nd Defe

- and -

and 5th

HOARE LEA (a firm)

- and -

HS ENVIRONMENTAL SERVICES LIMITED

(in administration)

3rd

- and -

W T PARTNERSHIP LIMITED

4th

- and -

6th

D G ROBSON MECHANICAL

SERVICES LIMITED

- -

- -

Mr Piers Stansfield QC

(instructed by **Greenwoods**) for **GMVL, the Claimant**

Miss Fiona Sinclair QC (instructed by **Kennedys**)

for Essex, the 1st Defendant

Mr Alexander Hickey (instructed by **Berrymans Lace Mawer**)

for Hoare Lea, the 2nd Defendant and 5th Party

Mr Simon Hargreaves QC and Mr Karim Ghaly

(instructed by **Clyde & Co**) **for HSE, the 3rd Party**

Mr Roger ter Haar QC and Mr Alexander Macpherson

(instructed by **Fox Hartley**) **for Robson, the 6th Party**

Hearing dates: 4, 5 and 6 March 2014

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Judgment

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1.
In the Main Judgment handed down on 25 October 2013 ([2013] EWHC 3059 (TCC)), I upheld the claim by the claimant ("GMVL") against the two defendants, Essex and HL, arising out of the flooding of a block of flats on the Greenwich Peninsula. There were two effective causes of the flooding: the closed Isolation Valve ("IV") and the installation of a Non-Return Valve ("NRV"). These were both matters of workmanship. Essex were liable as the specialist M & E sub-contractor responsible for design and workmanship. HL were liable principally because of their supervisory role, a liability which I found to have been exacerbated by their design responsibility for this relatively novel water system ("BMCWS").

2.
The claim was passed on by Essex to its sub-sub-contractor, HSE, and in turn by HSE to the mechanical sub-sub-sub-contractor, Robson. HSE had a design obligation as well as a workmanship obligation. Robson were only responsible for workmanship, although, as noted, that was where the fundamental failings occurred. Quantum was agreed at £4.75 million, together with interest at agreed rates pursuant to Section 35A of the Senior Courts Act.

3.
Although the parties are broadly agreed about the orders to be made arising out of the Main Judgment, that agreement does not extend to the costs issues. Indeed, there are something like two dozen separate issues on costs arising between the parties. That in turn necessitated a costs hearing which took three full days, involved six lever arch files of documents concerned with costs alone, and led the parties to prepare two files of authorities containing over fifty reported cases. In **Fox v Foundation Piling Limited**[2011] EWCA Civ. 790, [2011] 6 Costs LR 961, Jackson LJ referred to the recent trend of "numerous first instance hearings in which the only issue is costs". It might be said that this case is a paradigm example of that unhappy development.

4.
The myriad issues that the parties required the court to address in this Costs Judgment have necessitated a study of the steps taken pursuant to the pre-action protocol; an analysis of the conduct of the litigation and, in particular, the preparations for trial, including the preparation of the trial bundles; a consideration of whether or not Part 36 offers and offers made 'without prejudice save as to costs' should or could have been accepted and, because they were not, whether or not the refusal to accept them was unreasonable and/or broke the chain of causation; a consideration of what the Main Judgment actually decided, and what that Judgment could have decided if other events had intervened; an analysis of which parties might, if they had conducted themselves differently, not have been present at the trial at all; a close study of CPR 36.14, 44.3, 44.5 and 52.7; an analysis of the extent (if at all) to which claims for costs arising under a contractual indemnity equate to an

entitlement to indemnity costs; a consideration of the financial positions of both Robson and HSE, said to be relevant to Robson's application for a stay of execution; and a consideration of whether or not Essex was entitled to an order pursuant to Section 51 of the Senior Courts Act requiring other parties to make direct payments to GMVL in satisfaction of Essex's liability for GMVL's costs. Other lesser issues arose along the way. It was a relatively daunting task for a judge who had thought, perhaps naively, that he had decided the principal issues between the parties in October last year.

5.
There is one essential ingredient of almost all these costs issues which needs to be stated at the outset. That concerns the position of Robson. Robson were responsible for the two critical workmanship failures which caused this flooding. That is despite the fact that, at the trial, they took every possible point in defence of their position, whilst at the same time making no concessions of any kind. They made no attempts to settle the claim brought directly against them by HSE, much less endeavour to stop the avalanche of costs being incurred further up the line. As Mr Hargreaves QC put it during his oral submissions on behalf of HSE: "Robson lost this litigation. They denied all things at all times, and made no offer of any money and lost…it doesn't really come as any great surprise that the consequences of that, in multi-party litigation, are quite severe."

6.
There can be no doubt that the consequences for Robson are severe. They have paid out £3.5 million odd of the £5 million insurance cover which, they say, is the maximum cover available to them (although inevitably there is a dispute about that, too). They say that, if they had to find more than £1.5 million by way of costs (i.e. the balance of the insurance monies), they would almost certainly go bankrupt. Accordingly, the vast majority of the disputes on costs arise out of points raised by Robson which can generally be summarised in this way: although they have lost and accept that they are liable for the costs of the Part 20 proceedings brought against them by HSE, Robson maintain that they are not liable for the costs incurred back up the contractual chain and, instead, they argue that those costs were incurred because of flawed litigation decisions made by other parties which were nothing to do with them. This stance has had the effect that, although many of the proposed costs orders are agreed between the parties at the top end of the contractual chain, it is Robson (who may ultimately be liable to pay for them) who say that such orders should not be agreed. It is this stance (which is obviously critical to Robson) which lies at the heart of this Costs Judgment and, I am afraid, makes it so long.

2. ORDERS CONSEQUENTIAL ON MAIN JUDGMENT

7.
The parties are agreed that, in broad terms, the following orders arise from the Main Judgment:

(a)
GMVL has judgment on its claims against Essex and HL.

(b)
Essex and HL are jointly and severally liable to GMVL for damages and statutory interest in the sum of £4,985,686.85, in respect of the Core 2 leak.

(c)
In addition, Essex is further liable to GMVL for damages and statutory interest in the sum of £433,537.99 in respect of the Core 3 leak.

(d)
Essex has judgment on its CPR Part 20 claim against HSE. HSE is liable to indemnify Essex in respect of Essex's liability to GMVL for damages, costs and interest.

(e)
Essex has judgment on its CPR Part 20 claim against HL. HL is liable to make a contribution of 40% in respect of Essex's liability to GMVL in respect of the Core 2 leak, amounting to £1,994,274.74 in respect of damages and statutory interest.

(f)
HL has judgment on its CPR Part 20 claim against Essex. Essex is liable to make a contribution of 60% in respect of HL's liability to GMVL in respect of the Core 2 leak, amounting to £2,991,412.11 in respect of damages and statutory interest.

(g)
HSE has judgment on its CPR Part 20 claim against Robson. Robson is liable to indemnify HSE in respect of HSE's liability to Essex for damages, costs and interest.

8.
However, under those broad heads, there are a myriad of disputes between the parties relating to precisely how those claims for costs are to be assessed, and what they should include and what they should exclude. I deal with those starting at **Section 4** below. First, however, I say a word about the Costs Management Orders in this case.

3. THE COSTS MANAGEMENT ORDERS

9.
This case was case-managed by Ramsey J. The costs budgeting pilot scheme, which was being run in the TCC amongst other courts, operated in respect of this case. The parties are agreed that the costs management orders ("CMOs") which he made are relevant to the disputes before me because it is the amount in those CMOs which ought to form the basis for the interim payments as to costs which are sought.

10.
I set out below a table showing the costs management orders which were made and, where they are known, the actual costs incurred by the parties:

Party	**Approved Budget at CMC on 26 October 2012 [1/1/4]**	**Approved increase at PTR on 5 June 2013 [1/4/16]**	**Increased Costs Budget**	**Actual Costs**
GMV	£1,992,746.97 [**1/6/19**]	£160,000	£2,152,746.97 [**1/7/28**]	£2,177,266.10 [**1A/20/371**]
Essex	£1,386,216.77 [**1/8/37**]	£15,000	£1,401,216.77 [**1/9/63**]	£1,346,351.45 [**1A/22/387D**]

Hoare Lea	£852,711.70 [**1/10/81**]	None	n/a	Unknown
HSE	£1,375,252.90 [**1/9/72**]	£81,500	£1,456,752.90 [**1/9/77**]	£1,610,649.86 [**1A/24/395**]
Robson	£1,074,623.53 [**1/11/90**]	£205,938.86	£1,280,562.39 [**1/11/99**]	Unknown

11.
It will be seen that, where the actual costs are known, the figures are very similar to the CMOs made by Ramsey J. It should also be noted that the bulk of the difference between the budgeted and actual costs on the part of HSE is explained by post-judgment costs which were not in the original budget. On the face of it, therefore, it might be said that costs budgeting has worked well in this case.

12.
But there has been one problem, in-built from the start. The claim in this case has always been around £5 million. As Mr ter Haar QC pointed out during his opening at the start of trial last July, the value of the CMOs, when added together, produced a broadly equivalent sum. In any case where the parties are collectively spending £100 in order to argue about their liability to pay £100, it is overwhelmingly likely that, in reality, the dispute between them has become a dispute about costs. That is particularly so in a case such as this, where there was always a risk that liability for all or almost all the total amount of costs would be visited on just one party: GMVL if the claims failed; Robson, if the cause of the flooding was workmanship; and principally HL (and/or HSE) if the cause was design. It is impossible not to conclude, therefore, from the amount of the CMOs alone, that the arguments on costs with which this Judgment is concerned were inevitable once the case did not settle at a relatively early stage.

4. COSTS AND INTEREST ISSUES AS BETWEEN GMVL AND ESSEX

4.1
The Issues

13.
It is sensible to set out at the outset two important matters as between GMVL and Essex which are either not in issue before me now, or which are not in issue at all. The first is that Essex accept that they are liable to GMVL for the costs of the action. The only possible qualification to this would be any costs incurred by GMVL which relate exclusively to the proceedings against the other defendant, HL. Mr Stansfield QC tells me that there are no such costs, and he may well be right. Ultimately, however, that is a matter for a costs judge.

14.
Secondly, it is unnecessary for me to deal with the success fee of 75% that is an important element of GMVL's costs. That is because the parties accept that the interim payments on costs which I must make will involve an element of the success fee and, for present proposes, nobody seeks to argue about the 75%. However, it should be noted that there may be arguments about the appropriateness

of that percentage in the detailed assessment before the costs judge. Nothing I say in this Judgment should be construed as approving or disapproving that success fee.

15.
The remaining issues between GMVL and Essex are as follows:

(a)
GMVL's claim for indemnity costs pursuant to Part 36;

(b)
GMVL's claim for interest on both damages and costs pursuant to Part 36;

(c)
A discrete issue as to the costs of the trial bundle;

(d)
An apportionment between the costs incurred on Cores 2 and 3;

(e)
The amount of any interim payment on account of costs.

I deal with those issues in turn below.

4.2
The Claim For Indemnity Costs

4.2.1
The Facts

16.
On 10 September 2009, Greenwoods, acting for GMVL sent a detailed claim letter to Essex. It is to be noted that the way in which the claim is set out in that letter is very similar to GMVL's pleaded case, and their ultimately successful pursuit of that claim at trial. Following the letter there were many requests for information from Essex and their solicitors, Kennedys, which were answered in full. On 19 July 2010, following receipt of that further information, Kennedys replied in detail. The reply indicated the extent of the factual disputes between the parties: Kennedys were even maintaining that the defective elements of workmanship, such as the installation of the NRV, occurred after Essex had left site.

17.
Following further exchanges, on 10 October 2011, Greenwoods identified the quantum of the claim at a figure just over £5 million. By this stage, Greenwoods had 16 lever arch files relating to the quantum of the claim and, following a request by Kennedys, those were provided. On 28 November 2011 there was a pre-action protocol meeting involving not only GMVL and Essex but also HL and HSE. Although the meeting failed to resolve the claims, the following year, in August, Essex agreed quantum in the sum of just over £5 million.

18.
Both HSE and Robson played a full part in the pre-action process. They both maintained vigorous denials of any wrongdoing on their part. For example, HSE's robust defence of their position was set out in the letter from their solicitors, Clyde and Co, dated 9 December 2010, whilst Robson's similarly

full response, again taking every possible point, can be seen in the letter from their solicitors, Fox Hartley, dated 4 July 2011.

19.
GMVL commenced these proceedings in April 2012. At the same time, on 12 April 2012, they sent Kennedys a Part 36 offer, offering to accept £4,850,000 in full and final settlement of their claim for damages and interest. It is agreed that this was a valid Part 36 offer. The offer was open for acceptance until 3 May 2012: after that it could be accepted but with the usual costs consequences. In fact, Essex never at any stage accepted that offer.

20.
On 18 May 2012, Kennedys wrote to Clyde and Co, who were acting for HSE, a lengthy letter which, although not conforming to CPR Part 36, was a clear and admissible letter sent 'without prejudice save as to costs'. That essentially passed on GMVL's offer of £4,850,000, offering to accept that sum from HSE in full and final settlement of Essex's claim against HSE. The intention, as the letter made plain, was to pass that money onto GMVL. At the same time, Kennedys wrote a second letter, urging HSE to take over the conduct of Essex's defence against GMVL. HSE did not take that course; neither did they accept the offer of £4,850,000. Indeed, it appears that they even failed to pass these letters on to Robson, so Robson did not know about those offers until after the trial.

21.
Shortly after the proceedings commenced, in late 2012, there was a mediation which involved all five parties to the litigation, including Robson. It represented the last chance that the parties had to settle the case before large sums were incurred by way of costs. The mediation failed.

4.2.2
The Law

22.
CPR 36.14 has been amended twice. The parties are agreed that the version which governs the rights and liabilities of the parties in this case is the previous version of the rule now in force. That is the first amended version set out at pages 1144 and 1145 of the 2013 White Book. It is in the following terms:

"**Costs consequences following judgment**

36.14 – (1) This rule applies where upon judgment being entered –

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

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

(1A)
For the purposes of paragraph (1), in relation to any money claim or money element of a claim, 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly.

(2)

Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –

(a)
his costs from the date on which the relevant period expired; and

(b)
interest on those costs.

(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 –

(c)
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 period starting with the date on which the relevant period expired;

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

(e)
interest on those costs at a rate not exceeding 10% above base rate; and

(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 refusing to give information for the purposes of enabling the offer to be made or evaluated.

(5)
Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate.”

23.
The authorities dealing with Part 36 can, for present purposes, be grouped under three heads: those dealing with the justification for what might be called the Part 36 enhancements (namely, indemnity costs and enhanced interest rates on damages and costs); those dealing with the correct approach to such enhancements; and two more recent cases discussing the effect of Part 36 in multi-party cases.

(a)

The Justification

24.
In **Petrotrade Inc v Texaco Limited**[2002] 1 WLR 947, Lord Woolf set out the reasons for providing the court with the power to award costs on an indemnity basis or interest at an enhanced rate. He said:

"63. The ability of the court to award costs on an indemnity basis and interest at an enhanced rate should not be regarded as penal because orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings. The very process of being involved in court proceedings inevitably has an impact on a claimant, whether he is a private individual or a multi-national corporation. A claimant would be better off had he not become involved in court proceedings. Part of the culture of the CPR is to encourage parties to avoid proceedings unless it is unreasonable for them to do otherwise. In the case of an individual proceedings necessarily involve inconvenience and frequently involve anxiety and distress. These are not taken into account when assessing costs on the normal basis. In the case of a corporation, corporation senior officials and other staff inevitably will be diverted from their normal duties as a consequence of the proceedings. The disruption this causes to a corporation is not recoverable under an order for costs.

64. The power to order indemnity costs or higher rate interest is a means of achieving a fairer result for a claimant. If a defendant involves a claimant in proceedings after an offer has been made, and in the event, the result is no more favourable to the defendant than that which would have been achieved if the claimant's offer had been accepted without the need for those proceedings, the message of Part 36.21 is that, prima facie, it is just to make an indemnity order for costs and for interest at an enhanced rate to be awarded. However, the indemnity order need not be for the entire proceedings nor, as I have already indicated, need the award of interest be for a particular period or at a particular rate. It must not however exceed the figure of 10 per cent referred to in Part 36.

65. There are circumstances where a just result is no order for costs or no interest even where the award exceeds an offer made by a claimant. Part 36.21 does no more than indicate the order which is to be made by the court unless it considers it is unjust to make that order. The general message of Part 36.21, when it applies, is that the court will usually order a higher rate of interest than the going rate…"

25.
In **McPhilemy v Times Newspapers Ltd & Ors**[2001] EWCA Civ. 933, Chadwick LJ said that the rule in respect of indemnity costs was designed:

"…to address the element of perceived unfairness which arises from the fact that an award of costs on the standard basis will, almost invariably, lead to the successful claimant recovering less than the costs which he has to pay to his solicitor."

(a)
The Correct Approach

26.
The correct approach to Part 36 enhancements has been set out in a trio of recent Court of Appeal cases: **Gibbon v Manchester City Council**[2010] EWCA Civ. 726; **Fox** (already referred to above)

and **F&C Alternative Investments (Holdings) Ltd & Ors v Barthelemy and Anor (No. 3)**[2012] EWCA Civ. 843, [2013] 1 WLR 548.

27.
In **Gibbon**, Moore-Bick LJ described Part 36 in these terms:

"4. It can be seen from Part 36 as a whole, as well as from the extracts cited above, that it contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted and the offeree fails to do better after a trial… In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Part 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court's discretion is much more confined, they must follow its requirements.

5. Part 36 is drafted as a self-contained code. It prescribes in some detail the manner in which an offer may be made and the consequences that flow from accepting or failing to accept it. In some respects those consequences reflect broadly the approach the court might be expected to take in relation to costs; in others they do not; for example, rule 36.14(3) allows the court to award a claimant who has obtained a judgment at least as advantageous as his offer interest on the sum for which he has obtained judgment at an enhanced rate of up to 10% over base rate, costs on the indemnity basis and interest on those costs at an enhanced rate as well."

28.
Fox was decided before CPR 36.14 was amended the first time, but emphasised the importance for a defendant, when facing an inflated claim, of making an early effective Part 36 offer to protect their position on costs. And in **F&C**, the Court of Appeal stressed that an offer which did not comply with Part 36 did not attract the Part 36 costs regime, whether indirectly or by analogy, and that Part 36 was to be regarded as a self-contained regime.

29.
It is important to note that the amendments to Part 36 mean that some earlier decisions of the Court of Appeal dealing with the original version of the rule are no longer of direct application. For example, my attention was drawn to **Kastor Navigation Co Ltd & Anor v AXA Global Risks (UK) Ltd & Ors**[2004] EWCA Civ. 277 which concluded, by reference to CPR 36.21 and 44.3, that when assessing claims for indemnity costs in circumstances where an offer had been bettered, the court first had to decide what costs or proportion of costs the winner was entitled to, before considering whether or not those costs should be assessed on an indemnity basis. That approach was justified under the old rules because, under r.44.3, prior to its amendment, the court had to take into account admissible offers, whether made under Part 36 or otherwise. Now, under r.44.3, the court takes into account admissible offers which are not offers to which the costs consequences under Part 36 apply. In other words, r.44.3 now only applies if there is no admissible offer under Part 36. If there is an admissible offer under Part 36, then it is Part 36 alone which governs the issue of costs. Thus **Kastor** does not deal with the Rules as they now are.

(a)
Contractual Chain Cases

30.

My attention was drawn to two cases which considered the operation of Part 36 in cases where there were Part 20 claims. In **Dunlop Haywards (DHL) Ltd v Erinaceous Insurance Services**[2009] EWHC 3479 (QB), Hamblen J found that the defendant, HPC, was liable to the claimant for Part 36 enhancements (principally interest on costs) because they rejected the claimant's Part 36 offer, which the claimant then beat. HPC had a claim over against a Part 20 defendant, Forbes, who did not know about the Part 36 offer. Although HPC recovered against Forbes, the claim was reduced for contributory negligence by 80% and the judge awarded them only 50% of the costs of their Part 20 claim. The judge said that there was no good reason why Forbes had to pay to HPC any of the Part 36 enhancements payable by HPC to the claimant. He also ruled that, on the facts, Forbes were not liable for the costs which HPC had to pay the claimant.

31.
In **Linklaters Business Services v Sir Robert McAlpine Ltd and Ors**[2010] EWHC 3123 (TCC), Akenhead J had to deal with the difficulties created by the claimant's decision to make identical Part 36 offers to both defendants, McAlpine and How. The difficulty was that, if both defendants had accepted the offer, Linklaters would have recovered twice the amount of their claim. There was therefore a natural query raised by the defendants as to how the offers were intended to work, but once Linklaters had made plain that they were willing to settle at the net figure, the position was clear. Akenhead J said at paragraph 28:

"…it was and must have been obvious to both Defendants, once they had the letter of 1 September 2010, that Linklaters was willing to settle at the net figure of £2.28m plus costs to be assessed. There is no good reason why that offer could not have been accepted; it was How which in effect would have to accept it given the fact that it was obliged to indemnify McAlpine. It follows that by applying CPR Part 36.14(3) the general rules should follow but from a reasonable time in the circumstances after the letter of 1 September 2010 was received by the Defendants. How (and McAlpine) should pay Linklaters' costs on an indemnity basis from and including 7 September 2010 and on a standard basis prior to that date."

4.2.3
Should Essex Be Ordered To Pay Indemnity Costs To GMVL?

32.
For the reasons set out below, I order that Essex pay GMVL's costs on an indemnity basis from 3 May 2012 (the date that the offer expired) until the date of the Main Judgment.

33.
The total claim was agreed at £4.75 million, together with agreed statutory interest which increased the amount to about £5.4 million. Thus GMVL did better in the litigation than their Part 36 offer of 12 April 2012. In such circumstances, r.36.14(3)(b) applies. Following the approach in **Gibbon**, **Fox**, **F&C** and **Linklaters**, I should order indemnity costs unless I consider it unjust to do so.

34.
The particular matters to be looked at when considering that question are set out in r.36.14(4) (paragraph 22 above). Going through each in turn:

(a)
The terms of the Part 36 offer in this case were very clear and it is not suggested otherwise.

(b)

The offer was made at the start of proceedings so that, if it had been accepted, it would have obviated large swathes of the costs that were incurred.

(c)
As set out in paragraphs 16-21 above, full information was available to Essex, both as to the nature of the GMVL claims and what the sub-contractors down the line were saying about those claims. In addition, Essex's insurers had been involved from the outset and had appointed their own expert. He inspected the relevant areas of the building just one week after the flooding, on 8 August 2007. I find that Essex had more than enough information on which to reach a considered view of the GMVL offer.

(d)
GMVL provided all the information that they were asked for. It is not suggested that there were any difficulties with the information provided to Essex by GMVL.

For all those reasons, it would not be unjust to order Essex to pay indemnity costs. The matters of fact which arose in **Dunlop Haywards** that led to a different result do not apply to the position as between GMVL and Essex (for the position as between Essex and HSE, see further at paragraph 133 below).

35.
Ms Sinclair QC's principal argument against that proposition was that Essex could not accept the offer without securing a back-to-back agreement from HSE. She said that, because that was unforthcoming, and because both HSE and Robson were aggressive in their refutation of the GMVL claims, Essex could not realistically accept the offer of settlement. She points to Essex's own letters to HSE, passing on the claim and inviting HSE to take over their defence, and submits that they could not realistically have done anything else.

36.
It seems to me that Mr Stansfield QC is right to say that none of that provides a reason why it would be unjust for Essex to pay GMVL's costs on an indemnity basis. I accept, for the purposes of this argument, that Essex were keenly alive to the potential difficulties in which they found themselves and acted reasonably in writing those letters to HSE; and that HSE behaved unreasonably in not being of more help to Essex. But none of that can possibly affect GMVL. GMVL had no interest in what was happening down the contractual chain. They had a claim against Essex and they sought to protect their position under Part 36 in respect of that claim. Essex cannot avoid their prima facie liabilities to GMVL by praying in aid the recalcitrance of their own Part 20 defendant, HSE. Those difficulties might well improve Essex's prospects of recovering indemnity costs against HSE, but they do not and cannot diminish their own liability to pay costs on that basis to GMVL.

37.
An additional point of principle arose in respect of this element of the dispute. Ms Sinclair QC suggested that it would not be appropriate to order indemnity costs in circumstances where this was a subrogated claim and that, in reality, GMVL were bearing none of the burdens of litigation. This argument, which was argued with even greater force by Mr ter Haar QC on behalf of Robson, suggested that, in considering whether or not the Part 36.14(3) enhancements were appropriate, the court had to consider the individual nature of each claimant to see whether or not the compensatory or penal justifications referred to in **Petrotrade** and **McPhilemy** were applicable. Mr ter Haar QC went as far as to suggest that, in a subrogated claim, a claimant could never recover costs on an indemnity basis, because the burden of the litigation would always be borne by the insurers.

38.
I reject that argument both as a matter of principle and as a matter of the proper construction of CPR 36.14. The fact that a claimant is or may be insured is irrelevant: it is, to use the old phrase, res inter alios acta. It would be contrary to principle to suggest that a claimant with a subrogated claim was never entitled to the Part 36 enhancements. Unsurprisingly, there is no authority to that effect.

39.
Furthermore, I consider that such an approach cuts right across the recent authorities that have made plain that Part 36 is a self-contained and highly prescriptive code. If an offer falls within Part 36 then the mechanism applies. There is nothing in the wording of Part 36 which suggests that, as a threshold point, a claimant has to demonstrate an entitlement to compensation.

40.
Although I have rejected that point as a matter of principle, I ought to say that, if I am wrong about that and GMVL do need to demonstrate a right to compensation for some form of disruption as a result of these proceedings, then I am in no doubt that they have done so. Not only did a number of GMVL witnesses have to come to court, but they had to spend time identifying documents from the archives, including the contract documents which they had received in wholly inadequate form from the management contractor, Laings. Accordingly, if (which I reject) the particular characteristics of a claimant are a factor that needs to be established before Part 36 enhancements apply, then I am in no doubt that GMVL fall within the description provided by Lord Woolf in **Petrotrade**.

41.
The final point that was urged on me in this connection was that I must decide whether or not Essex acted unreasonably in failing to accept the offer. Mr ter Haar QC said that this was a fundamental element of Part 36. With respect, I disagree. There is nothing in Part 36 which identifies the need for the court to decide whether or not it was reasonable to reject the Part 36 offer, or which hints that any entitlement to the enhancements depends on such a finding. In some circumstances, such as a late change in or modification to the law after the offer was made and rejected, the issue of reasonableness may arise as part of a consideration of injustice under r.36.14(4), but that is not this case. Whilst the underlying philosophy of the Part 36 regime is that the offer should have been accepted, that is – or can be – a different thing to reasonableness at the time that the offer was made. I can, however, say with confidence that, knowing what they know now, Essex would and should have taken the offer; to that extent, therefore, their failure to accept it was unreasonable.

42.
For all the reasons noted above, I conclude that Essex must pay GMVL's costs on an indemnity basis from 3 May 2012 to the date of the Main Judgment. The costs incurred prior to 3 May 2012 should be assessed on the standard basis.

4.3
Part 36 Interest

4.3.1
Compromise

43.
GMVL claim interest on damages and on costs pursuant to r.36.14(3)(a) and r.36.14(3)(c). The claims are disputed by Essex on the facts and there is also a dispute about the rate. But Robson have raised a threshold point, namely that, when the parties agreed the applicable interest rate on damages,

towards the end of the trial, they were also compromising these claims. That argument is not supported by anyone else.

44.
In the proceedings there was a claim for statutory interest pursuant to section 35A of the Senior Courts Act 1981. The parties agreed the quantum of the damages claim part way through the trial, although interest remained in dispute. I have seen a series of exchanges between counsel in which they then sought to agree the interest claim. Eventually, on 25 July 2013, interest was agreed. The terms of the agreement, and the particular rates agreed, were identified to me in open court the following day.

45.
I am in no doubt that what was being compromised by counsel was GMVL's claim for statutory interest pursuant to Section 35A and nothing else. I am confident that that is the case because:

(a)
When the agreement was announced in open court, Mr Stansfield QC made express reference to the settlement of the claim for statutory interest;

(b)
The exchanges of emails refer to various authorities, including the decision of Ramsey J in **Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd. & Anor**[2012] EWHC 2429 (TCC), which were concerned with statutory interest; and

(c)
The emails make clear that, if agreement was not reached, the parties would have to deal with interest in their closing submissions. The closing submissions could only have dealt with the claim for statutory interest.

46.
Further, there can be no doubt that the claim for Part 36 interest (either on damages or costs) formed no part of counsel's exchanges and/or the ultimate agreement. There is no mention of it in the emails. Nor should there have been: such a claim had not arisen (because GMVL had not yet won), so it would have been impossible for such a claim to be dealt with in either the emails or the closing submissions. Moreover, it borders on the absurd for Robson now to suggest that they were compromising the potential interest claims under Part 36 at a time when, on their own case, they did not even know about the offers, so they did not know that a claim for Part 36 interest might be made. It would have been impossible for Robson to consent to compromise the potential claim for Part 36 interest when they were wholly unaware of the existence of any such claim.

47.
Accordingly, I find that there was no compromise, and that interest on damages and costs are claims open to GMVL pursuant to Part 36.

4.3.2
Interest On Damages

48.
As to the principle of whether or not interest on damages should be awarded, the arguments are precisely the same as those dealt with in **Section 4.2.3** above. For the same reasons that I have concluded that indemnity costs are payable under Part 36, I also conclude that interest is payable on

damages pursuant to CPR 36.14(3)(a). The relevant period is from 3 May 2012 (when the offer expired) to the date of the Main Judgment.

49.
That leaves the question of rates. There is little guidance as to the appropriate rates: the court should exercise its discretion in accordance with the circumstances of the case. There is some guidance in **Petrotrade** where Lord Woolf said:

"77. The amount of the claim is also a relevant factor. If a claim is small, enhanced interest has to be at a higher rate than if the claim is large, otherwise the additional advantage for the claimant will not be achieved. In this case the sum involved was neither particularly large nor particularly modest (it was about £125,000). The conclusion that I would come to is that, if the matter was one for my discretion at first instance, I would award in the region of 4 per cent above base rate for the appropriate period."

Lord Woolf went on to say that it was wrong in principle to take 10% as a starting point.

50.
GMVL are claiming 7.5% above base rate. In so doing they rely on various authorities including **F&C** (where 10% was ordered); **Hemming (t/a Simply Pleasure Ltd) & Ors v Westminster City Council** [2012] EWHC 1582 where 10% was ordered and was upheld on appeal at [2013] EWCA Civ. 591; and **Mehjoo v Harben Barker (a firm) & Anor** [2013] 5 Costs LR 645, again where 10% was ordered.

51.
Against that, Robson have drawn to my attention cases where much lower rates were ordered such as **Dunlop Haywards** (4%); **Linklaters** (5%); and **Kumar v Got**[2009] EWHC 2961 (QB) (2.5%).

52.
Taking all the circumstances of this case in the round, I consider that, by TCC standards, the claim for £5 million falls somewhere in the middle of the range. It is neither for a modest sum but neither is it for a very significant sum. It is not a case where a percentage towards the upper end is appropriate. Accordingly I conclude that the appropriate uplift is 4% over base rate, a not uncommon uplift in Rolls Building litigation.

4.3.3
Interest On Costs

53.
As a matter of principle, the same points noted above apply again to the claim for interest on costs. I conclude that interest on costs pursuant to r.36.14(3)(c) is payable. For the same reasons I consider that 4% over base rate is the appropriate rate.

54.
The interest would be payable, in accordance with authority, from the date when there is a liability to pay the element of costs or disbursements being considered, down to the date of this Costs Judgment. There are arguments about when, if at all, there was a liability to pay costs, given the nature and terms of the CFA in this case, but that is something for detailed assessment. Similarly, the costs judge can work out when there was a liability to pay disbursements and apply interest from then until the date of this Judgment.

4.4

The Costs Of The Trial Bundle

4.4.1

The Position Between The Parties

55.

This issue comes about in this way. Originally, when GMVL was seeking its costs, Essex, HSE and Robson all said that GMVL were not entitled to all of their costs in relation to the trial bundles, because of the alleged problems in the preparation of those bundles and ongoing difficulties with it during the trial. The sort of figure being suggested, namely a possible reduction of £30,000 in GMVL's costs, were relatively modest in the overall scale of the litigation. Accordingly, although GMVL strongly disputed either that there were any problems with the bundles or, if there were, that they were GMVL's responsibility, they offered to accept a £10,000 reduction in the amount of their costs to reflect the point. Well before the hearing, Essex, HSE and HL all agreed to accept the £10,000 reduction and to forego their own claims that GMVL should pay some part of their own costs in connection with the bundle. However, not only do Robson not accept that compromise, but they also belatedly sought orders that GMVL make payment to them for their wasted costs in respect of the bundle.

56.

That is not an end of the disputes concerned with this modest item, another sign perhaps that, for Robson at any rate, this case has long been about the costs of the litigation rather than anything else. By an order dated 22 November 2013, Akenhead J ordered that Robson had to identify any orders that they sought at the hearing on costs no later than 4:00pm on 9 December 2013. The hearing was due to take place on 17 December 2013 but it was subsequently adjourned because the parties had not allowed sufficient time for it. No change or variation was ever made to the order. Robson did not notify the parties that they sought a costs order in their favour in respect of the trial bundles until 20 February 2014, and they subsequently sought to rely on a statement provided only on 24 February 2014, which set out a variety of matters that had not been in evidence before. There was no explanation of this late service and no time for GMVL to respond before the hearing. Mr Stansfield therefore maintains that the court should not entertain Robson's application in any event, and that GMVL would be prejudiced if the issue was resolved on the basis of this late and unanswered evidence.

57.

With that unpromising background in mind, I turn to deal, firstly with the status of Robson's application, and then to go on to deal with the facts.

4.4.2

Robson's Application

58.

There can be no doubt that, prior to the £10,000 compromise, GMVL's ability to recover in respect of their costs of the trial bundle was in dispute. In addition, both Essex and HSE had sought costs from GMVL in connection with the bundle, although Robson had not. Accordingly, Robson's announcement of their intention to seek an order that GMVL pay Essex's, HSE's and Robson's wasted costs in connection with the bundle, given in the last paragraph of their letter of 20 February 2014, was the first intimation of any such application. Further, I consider that Mr Stansfield QC is right to say that there is no application notice in accordance with CPR 23.3; that the circumstances noted at 23APD.3

(where an application could be made without service of an application notice) have not arisen; and that any such application would be about 2½ months outside the time limit set out in the order of Akenhead J.

59.
In my judgment, these factors present an unanswerable case that the application now made by Robson for orders that GMVL pay their (and/or others') costs of the trial bundles is made too late to be entertained by the court. The late witness statement on which Robson purport to rely contains a raft of matters which have not been raised before and which Greenwoods, GMVL's solicitors, would ordinarily be entitled to answer. It is not appropriate for the court to adjudicate upon these criticisms, which have at least a hint of professional negligence about them, in circumstances where the solicitors concerned have not had an opportunity to respond. An adjournment, in circumstances where it has taken the parties almost 5 months to find a date for this lengthy costs hearing, is out of the question.

60.
Although Mr ter Haar QC is right to say that the issue arises out of a point taken fairly and squarely by all defending parties at the outset, namely that there should be a reduction in the costs because of the allegedly inadequate nature of the trial bundles, that proposition actually runs together two different things. Whilst all parties argued for a reduction in GMVL's costs, there was never any suggestion by Robson that GMVL should pay costs in connection with the bundles until Robson's recent letter. It is only that latter point which Robson cannot now raise. I agree with Mr ter Haar QC that the argument as to whether there should be a reduction from GMVL's costs to reflect allegedly inadequate preparation is a matter that remains open to Robson although, like so many of the other disputes, it is a matter on which Essex and HSE, having agreed with GMVL the £10,000 reduction, do not raise further objection (although it appears that other points, such as the rates charged for bundle preparation, may arise during the detailed assessment).

4.4.3
The Trial Bundle Itself

61.
My starting point is this. I was genuinely surprised to learn that significant criticisms were being made of the trial bundle. Unhappily, trial bundles in long cases are often a source of real and consistent difficulty to the parties and the judge. When I find myself in those circumstances, I share my views in the Judgment. I did not do that here: indeed, I remind myself that I was complementary to both solicitors and counsel for the way in which the trial was conducted. Thus, to the extent that it was said that, as the trial judge, I was in the best possible position to address the criticisms of the trial bundle, I consider that there were no obvious criticisms which I felt should sound in costs.

62.
Of course, my lack of concern about the trial bundle may be explained by the fact that, by the time I saw the files, they were in a reasonably good state. That is perhaps consistent with the fact that, on analysis, the criticisms of the trial bundle concern its preparation in the weeks prior to trial, rather than its state at the trial itself. It is therefore necessary for me to look at those criticisms, although that hardly puts me in any better position than the costs judge to consider these matters, given that they were resolved before the trial started (and therefore before I had any knowledge of this case).

63.

Mr Stansfield QC has provided a helpful appendix which deals with the history of the preparation of the trial bundle. That demonstrates that Greenwoods circulated a proposed trial bundle on 13 May 2013, with one eye on having the trial bundles agreed by Friday 17 May 2013 in accordance with the court order. It may well be that that index could and should have been circulated earlier, although Mr Stansfield QC is quite right to say that, by circulating the index then, GMVL were not in breach of any court order.

64.
Thereafter, I find that the delays and problems in the preparation of the trial bundle were the result of a lack of co-operation between the five parties which was only a minor feature of the main trial, but a major element of these costs disputes. The stance taken by a number of the solicitors for the defending parties was unjustifiable, such as the view of Clyde and Co (HSE's solicitors) that all of the documents disclosed should be included in the chronological run, an example of the 'stick-it-all-in-some-of-it-will-be-relevant' approach which always makes the life of counsel and the trial judge so much more difficult than it need be. Opposing views as to what the bundle should contain and how it should be organised were argued in the correspondence all the way through May and into June 2013.

65.
Throughout the correspondence, it is plain that Greenwoods, GMVL's solicitors, did their best to accommodate the wildly fluctuating requests of the other parties' solicitors and to produce the bundles and then get them out to counsel. In my judgment, no criticism can attach to them.

66.
A point is made that the trial bundles were in such a state that additional documents had to be added to the trial bundles during the course of the trial. I have never known a trial which lasted for any length of time where that did not happen: it is inevitable, even in the best-run trials. Although documents were added to the bundles here, the additions were not excessive. Furthermore, if it is now to be said that the additions to the trial bundle were the fault of Greenwoods, then it would be necessary to go back and look at each set of additions and work out who was asking for them, and why they had not previously been included. It would not necessarily follow that any of that was Greenwoods' responsibility. No such exercise has been attempted.

67.
In the round, therefore, I do not consider that the preparation of this trial bundle was out of the ordinary. Neither do I consider that the bundles that were used at the trial were particularly difficult to use or suffered from any major defects. When Mr ter Haar QC described the bundles as "a nightmare" I considered that to be an unjustified exaggeration.

4.4.4
Conclusion

68.
I take the view that the only possible criticism of Greenwoods is that they ought to have circulated the index slightly earlier. It seems to me that the cost consequences of that delay (if that is what it was) are more than covered by the £10,000 which has been offered by GMVL and accepted by all the parties except Robson. I therefore order the sum of £10,000 is be deducted from GMVL's costs entitlement but that no further deduction or adjustment by reference to the allegedly inadequate preparation of the trial bundle is appropriate or justified. As noted above, any other points outstanding are for the detailed assessment.

4.5

The Split Between Core 2 And Core 3

4.5.1

How This Issue Arose

69.

This issue does not arise between GMVL and Essex because, as I have already indicated, Essex are liable to pay GMVL's costs of the proceedings save for any element of costs which may be referable exclusively to HL. But the issue arises down the line because, although Essex were liable in respect of Cores 2 and 3, there was no claim against HL in respect of Core 3. Therefore, an apportionment between Cores 2 and 3 is necessary.

70.

It is in Robson's interest for the percentage of costs to be attributed to Core 3 to be as small as possible. This is because, although they are liable for both Cores, they can then argue that the costs incurred by GMVL and the other parties on Core 3 were plainly disproportionate. A reduction in the Core 3 costs also increases HL's share of the total costs (because they are only liable for Core 2), and would thus reduce the costs coming down to Robson via Essex and HSE. Accordingly, Robson say that the split on costs should reflect the split on the quantum of damages, which was 92% for Core 2 (£4,370,000) and 8% for Core 3 (£380,000). In the alternative, they argue that the split should be 85/15%. At the other end of the spectrum, GMVL, Essex and HL all argue a 60/40% split. HSE maintain that the right split is 70/30%.

4.5.2

The Correct Approach

71.

When these sorts of apportionment exercises have to be attempted, the authorities make plain that the court should not embark on a detailed attempt to provide a perfect solution (see **Fox**). Instead, what is required is a generally broad brush approach. In **Hospira UK Limited v Novartis AG**[2013] EWHC 886 (Pat), Arnold J said:

"It is well recognised that in dealing with these costs issues it is necessary to take a broad brush approach and the exercise is not one which is susceptible of precision. It is recognised that it is generally better for the court to do its best to arrive at a percentage figure rather than to put the parties to the costs of a detailed assessment."

72.

The same approach was adopted by Ramsey J in **Mears Ltd v Leeds City Council**[2011] EWHC 2694 (TCC) when he said at paragraph 28:

"…there is no simple formula for establishing the percentage based on the number of issues, pages of evidence or paragraphs of submissions or judgments. The decision must to some extent be impressionistic based on my knowledge of the case."

4.5.3

The Evidence

73.

Despite the approach set out above, the parties in this case have gone to considerable time and expense to try and justify the percentage splits for which they argue. Mr McDaid, a solicitor with Kennedys, has provided a statement to demonstrate the legitimacy of the 60/40% split; Mr Sorrell of Clyde and Co, a qualified costs lawyer, identified two separate ways at which he has arrived at the 70/30% split, and Ms Lallement, a solicitor acting for Robson, has done an exercise which she says demonstrates the 85/15% split.

74.
Of those exercises, it seems to me that Mr Sorrell's effort is the best and most accurate. This may be because Mr Sorrell is the only one of the three who is a qualified costs lawyer. He has calculated his 70/30% split, first by reference to the written and then the oral evidence, the latter following an analysis of the trial transcripts. The results of each exercise are remarkably similar.

4.5.4
Analysis And Conclusions

75.
There can be no doubt that, on one view, too much by way of costs was spent on the Core 3 issue. However there are specific reasons for that, which I address in greater detail in paragraphs 155-157of this Judgment. But in terms of the time that the Core 3 issue took (both at the trial, and for the purposes of my Main Judgment), a 92/8% or an 85/15% split does not begin to do justice to the time and effort involved in the Core 3 issues. Extensive factual evidence was required, identifying when and how the over-tightening came about (and importantly whether or not that was before or after practical completion); and expert evidence was necessary as to the precise cause of the failure of the valve. Moreover, this was important because it was the first failure in Core 3 which led directly to the second and much more catastrophic failure in Core 2.

76.
At the other end of the spectrum, a 60/40% split does not correlate with my recollection of the oral evidence or the expert considerations. There was a greater preponderance of material in respect of Core 2 than would be measured by a 60/40 split.

77.
Accordingly, my own impression of the split between Core 2 and Core 3 was 70/30%. As noted above, the 70/30% split is that advocated by Mr Sorrell on his more scientific analysis. For those separate reasons, therefore, I adopt the 70/30% split.

4.5.5
Proportionality

78.
It is convenient at this point to consider the issue of proportionality in connection with the costs of Core 3. On behalf of Robson, Mr ter Haar QC argued that 30% of GMVL's costs of the whole case would be in excess of £1 million, and that it was disproportionate for GMVL to spend that sort of money on Core 3, a claim worth about £380,000. He says that, if the issues had only been concerned with Core 3, then there would not have been a trial of this kind, and leading counsel would not have been involved. He says that the costs payable by Essex to GMVL (and therefore the costs payable down the line) should be significantly reduced to reflect the fact that disproportionate costs were spent on the issues in respect of Core 3.

79.
In my judgment, this argument is flawed for a variety of reasons. First, as between GMVL and Essex, proportionality is not an issue, because GMVL are entitled to their costs on an indemnity basis (See **Section 4.2** above).

80.
But secondly, I consider that it is wholly artificial to hive off one dispute, which was always treated as part of a much greater whole, and then say that, if that dispute had been tried on its own, the costs would have been far less. Self-evidently, a smaller issue would have cost less to try. But that is not what happened (or could have happened) in this case. Here, the dispute about Core 3 was being dealt with as part of the wider case about the flooding in Core 2. Because it was inextricably linked to that wider case – indeed, the Core 3 problem triggered the effects in Core 2 - it made perfect sense for the two claims to be dealt with together. In those circumstances, it is meaningless to postulate what might have happened if Core 3 had been dealt with on its own.

81.
Thirdly, because the disputes in respect of Core 2 and Core 3 were being dealt with together, it would be unfair, particularly to HL, if deductions were made to the Core 3 costs because those had been separated out and regarded as disproportionate. That would increase the costs by reference to Core 2 and thus increase HL's liability. Mr Hickey is right to say that his costs liability in connection with Core 2 should not be increased because disproportionate costs were incurred on the Core 3 claim, which had nothing to do with HL at all.

82.
Finally, for the reasons explored in greater detail in paragraphs 155-157 below, I do not consider that Robson are entitled to put forward any case about the proportionality of the Core 3 costs, because Robson took every possible point in respect of Core 3 issues. Not only did these points go to their defence on workmanship, but they also took a completely different line on causation to any other party, arguing that the cause of the Core 3 failure was to do with the design of the pumping system as a whole, as opposed to issues of workmanship. In short, I conclude that, to the extent that the costs in relation to Core 3 were disproportionate, that was the responsibility of Robson.

4.5.6
Conclusion

83.
For the reasons which I have given, I consider that the right split between Core 2 and Core 3 is 70/30%, and there is nothing in any proportionality argument in respect of Core 3.

4.6
Payment on Account

4.6.1
The Sum Sought And The Issues

84.
GMVL sought an interim payment of £2.5 million against Essex. Subsequently they said they were prepared to accept £1.95 million. HL made a voluntary payment of £300,000 odd, thereby leaving a balance which GMVL said they would accept by way of an interim payment on account of costs of £1.65 million.

85.
The £1.95 million amounted to just under 60% of GMVL's costs (including the success fee). It is based on the cost management orders. It is therefore agreed by Essex and HSE. On behalf of Robson, Mr ter Haar QC said that, although he could not technically interfere with the amount, it was his case that Essex should not agree to make an interim payment in such an amount and he would be entitled to submit, down the line, that the figure was unreasonable. In those circumstances, it seems sensible for me to deal with this dispute here.

4.6.2
Guidance

86.
The leading case on interim payments on account of costs remains the decision of Jacob J (as he then was) in **Mars UK Limited v Teknowledge** [1999] 2 Costs LR 44. In that case the judge said:

"If the detailed assessment were carried out instantly he would get the order 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 of some lesser amount which he 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 than the likely full amount."

87.
In that case, the judge made criticisms of the claimant's costs and arrived at an interim payment based on 40% of their costs. But for that conduct, he would have identified a percentage of 66.6%.

4.6.3
The Correct Percentage

88.
Mr ter Haar QC argues that, in the present case, the 40% figure applied by Jacob J in **Mars**, and used by numerous judges since, is the correct percentage to be applied to GMVL's costs. But I disagree for two reasons.

89.
First, this is a case where, for reasons previously given, GMVL are entitled to their costs from Essex on an indemnity basis. That was not the case in **Mars**. That must increase the amount which the claimant "will almost certainly collect". 60% is an appropriate percentage for an interim payment to a claimant who is going to recover indemnity costs.

90.
Secondly, these costs are being assessed by reference to GMVL's costs budget and the CMO. They have therefore already been approved by the court. That is another reason to conclude that the percentage applicable for an interim payment should be substantially higher than the 40% in **Mars**.

91.
For these reasons, therefore, I conclude that GMVL are entitled to £1.65 million by way of interim payment from Essex. I note that both Essex (and, for what it is worth, HSE) agree that calculation. I also note that, although that includes an amount for the success fee, it does not preclude the parties from arguing about the precise fee that should be recoverable on the detailed assessment.

5. COSTS AND INTEREST ISSUES AS BETWEEN GMVL AND HL

5.1

Costs

92.
As noted above, I have apportioned the costs split between Core 2 (which involved HL) and Core 3 (which did not) as 70/30%. Moreover, in the contribution proceedings, I have already split liability between Essex and HL on a 60/40% basis.

93.
On that basis it is agreed that HL will pay 40% of 70% of GMVL's costs. Those costs do not include any Part 36 enhancements (because HL were not involved in the Part 36 offer and its rejection). Such costs are to be assessed on the standard basis.

5.2

Interest

94.
There are no disputes remaining between GMVL and HL on interest. The only interest in respect of which HL had any liability was the statutory interest claim under section 35A and, as noted above, that was agreed prior to the conclusion of the trial.

6. COSTS AS BETWEEN ESSEX AND HL

6.1

The Agreement Between The Parties

95.
The issues concern the costs of the contribution proceedings. It is agreed that HL are liable to pay 40% of 70% of GMVL's costs of the main action. There are, however, particular issues arising in respect of that liability which I need to address in **Section 6.2** below. In addition, it is agreed that HL are liable to pay Essex's costs of the contribution claim. No issue arises in respect of that claim.

6.2

The Individual Items In Respect Of HL's Liability To Essex For GMVL's Costs

6.2.1

The Part 36 Enhancements

96.
It is agreed that HL are not liable for the Part 36 enhancements (indemnity costs and additional interest) noted above.

6.2.2

GMVL's Success Fee Before 11 June 2013

97.
The parties are agreed that HL are not liable for GMVL's success fee before 11 June 2013. That is because there was no relevant notice of funding to HL.

6.2.3

Essex's Contractual Points

98.
HL say that the costs incurred by GMVL in arguing, successfully, as to the extent of Essex's contractual obligations should not be visited on them. Essex say that costs orders should not be so finally tailored (see **Fox**), and that, in any event, there was very little evidence on the contract issues (and therefore very little by way of costs). Moreover, Essex say that it was HL who put the issue of Essex's design obligation front and centre, as part of their attempts to avoid or share responsibility for their own design liability.

99.
I consider that Essex's submissions are correct. This was not a matter that took up a great deal of time or generated very much cost. Furthermore, Essex are right to say that this issue only assumed importance because of HL's denial or minimisation of their own contractual responsibility for design. In those circumstances, there should be no reduction for this element of GMVL's costs.

6.2.4
Essex's Submissions On Contributory Negligence

100.
HL say that Essex alone maintained allegations against GMVL of contributory negligence and, because those allegations failed, the costs consequence should not now be visited on HL. Essex maintain that, again, these matters did not generate very much evidence or costs and that, in any event, they were essentially just one element of the wider issues of causation.

101.
Again I prefer Essex's submissions. There was very little evidence on this aspect of the case. Such evidence as there was, was designed to assist on the issue as to when the particular problems, including the closed IV, came about, and in particular, whether that was before or after practical completion. Essex are right to say that the allegations of contributory negligence were simply a facet of causation, and again no reduction of costs is appropriate.

6.2.5
All Of Essex's Liability For GMVL's Costs After Either The Offer (3 May 2013) Or The Mediation (19 November 2012)

102.
This is an important issue for two separate reasons. First it is important as between Essex and HL, because it goes to almost the entirety of Essex's liability for GMVL's costs of the main action. But it is also important because it raises a similar causation issue to that which is at the heart of Robson's submissions on these costs issues, namely that Essex should have accepted the Part 36 offer, and their refusal so to do broke the chain of causation and made them liable for all of these costs rather than (in this case) HL. Because of the centrality of the causation issue to Robson's submissions, I deal with it in greater detail in **Section 7.5** below.

103.
It is sufficient for present purposes to identify the relevant question: did Essex's failure to accept the offer amount to a novus actus interveniens and break the chain of causation that would ordinarily exist between, on the one hand, HL's breaches of contract, and on the other, their liability to contribute to Essex's liability for GMVL's costs incurred by reason of those breaches? In my view, the failure to accept the offer did not amount to a break in the chain of causation. Instead, for the reasons developed in **Section 7.5** below, I consider that each party's liability to pay or contribute to the costs

of the next party up the line was caused by their breaches of their underlying contracts, and not by anything else. Thus HL are liable to Essex for their share of GMVL's costs by way of contribution because of their underlying breaches of contract.

104.
I should add this. HL's argument suggests that it must always have been obvious to Essex that GMVL were going to win on workmanship/supervision, and that therefore they should have conceded liability long before, or at least at the trial. That is an easy argument to run in hindsight but, if there is anything in it, it must apply with equal force to HL. After all, the workmanship/supervision allegations against HL were the same as those against Essex. Indeed it was HL's witness, Mr Gilbert, who took the photograph of the IV in the closed position during his inspection: see paragraphs 102-109 of the Main Judgment. Therefore, there is no basis on which I should distinguish between Essex and HL in respect of the alleged obviousness of GMVL's case.

105.
On that point, it is also worth noting that, when HL finally made an offer, it was in the sum of £1.2 million for both damages and costs. That was a wholly insufficient recognition of HL's potential liability. Moreover, it was an offer which was not made until 1 June 2013, just one month before the start of the trial. It demonstrated that HL, even at that late stage, undervalued the risk that they were running. That is not necessarily to criticise them; but it is to point out that, again, they were in no different a position to Essex regarding their failure to protect their position on costs, and/or their failure to appreciate the strength of the underlying claim.

106.
More widely, I think that there is a real danger of the court getting drawn into a lengthy counter-factual analysis of what could or should have happened if the parties had known the outcome of the trial at the start of the litigation. Ultimately, that is a meaningless exercise because, as I have already noted, if the parties had known what the outcome was going to be, they would have settled the claim forthwith. An application of 20/20 hindsight is an inappropriate approach to costs liability. For there to be a break in the chain of causation for liability for costs up or down the contractual chain, one party must be able to show that it did all it could to avoid what Mr Hickey rightly called the "haemorrhaging" of costs, and were unreasonably baulked by the other parties. In my view, HL cannot show that they acted in such a way in this case. Indeed, other than GMVL, who took the sensible step of making a Part 36 offer, which they then bettered, none of the other parties seemed to take seriously the risk that they may incur a significant costs liability by the end of the trial.

7. COSTS AS BETWEEN ESSEX AND HSE

7.1
The Claims

107.
As between Essex and HSE there are three packages of costs which Essex seek to pass on to HSE. They are:

(a)
HSE's liability for Essex's share of GMVL's costs;

(b)
HSE's liability for Essex's defence costs; and

(c)
HSE’s liability for Essex’s costs of the Part 20 claim.

The claim at (a) is claimed pursuant to the contractual indemnity between Essex and HSE. The claim at (b) and (c) is made either pursuant to the indemnity, or by way of the CPR.

7.2
The Issues

108.
There is agreement between Essex and HSE in respect of HSE’s liability for these three packages of costs. However, Robson raise a number of important points which, not unreasonably, HSE seek to pass on to Essex if they find favour with the court. There are arguments about the scope of the indemnity. Moreover, Robson run a fuller version of the causation argument to which I have already referred: that they are not liable for these costs at all because they were incurred as a result of the failure of Essex and/or HSE to resolve the litigation up the line. In addition Robson raise arguments on individual items or heads of cost.

7.3
The Relevant Facts

109.
Pursuant to the sub-sub-contract between Essex and HSE, HSE agreed to indemnify Essex in the following terms:

“The Sub-Sub-Contractor shall:

…

5.1.2 Indemnify and save harmless the Sub-Contactor against and from:

…

5.1.2.3 Any claim, damage, loss or expense due to or resulting from any negligence or breach of duty on the part of the Sub-Sub-Contractor, his servants or agents…”

In addition, at clause 6.3, there was this provision;

“The Sub-Sub-Contractor shall be liable for, and shall indemnify the Sub-Contractor against any expense, liability, loss claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Sub-Contract Works and to the extent that the same is due any negligence, breach of statutory duty, permission or default of the Sub-Sub-Contractor…”

110.
No issue arose as to the proper construction of this indemnity. Essex and HSE agree that the indemnity bites on all three packages of costs referred to above. After some equivocation, Robson also accepted that there was no point on the wording of the indemnity itself. Certainly, on the face of it, that indemnity would give rise to a liability on the part of HSE for each of the three packages of costs with which this part of the case is concerned.

111.

It is also relevant to note that, when these proceedings started, Essex made an offer to HSE in the sum of £4.85 million (see paragraph 20 above) and also urged HSE to take over the proceedings on behalf of Essex, by reason of the back-to-back nature of the contractual arrangements between Essex and HSE. HSE did not accept the offer and did not make a counter-offer. HSE did not take over the conduct of the proceedings and left Essex in the action. It does not appear that HSE even passed on Essex's offers to Robson.

112.
On behalf of HSE in his written submissions, Mr Hargreaves QC suggested that Essex had not beaten the offer because of my finding that HL were liable for 40% of the damages claimed. The argument seemed to be that HSE had done better than the Essex offer because, if the amount of HL's liability was deducted from the whole, the sum remaining as Essex's liability was less than the £4.85 million offered. That argument was not advanced orally.

113.
To the extent that the argument remained live, I refute it. Whether an offer is made pursuant to Part 36 or by way of a 'without prejudice save as to costs' letter, the court must consider the judgment which the successful party has obtained, not the net effect of enforcing that judgment. The mere fact that Essex are entitled to a contribution from HL does not affect the fact that GMVL has established an entitlement for the full amount against Essex, and that Essex has, in turn, successfully passed that liability onto HSE. That amount exceeds the amount of the offer. HSE are therefore wrong to suggest that, in some way, Essex have not done as well as the offer. Furthermore, of course, if HSE had taken up the offer to let Essex out and take over their place in the proceedings, then HSE would have been entitled to the same contribution from HL. Accordingly, I approach the issue of Essex's costs claims against HSE on the basis that, just as Essex did not beat GMVL's offer, so HSE did not beat Essex's offer.

7.4
The Indemnity Claim

7.4.1
The Dispute

114.
Essex claim all of these packages of costs against HSE pursuant to the contractual indemnity. As I have noted, HSE agree those claims, but Robson raise issues on the indemnity claim which boil down to this: does a contractual indemnity entitle the indemnitee to costs on an indemnity basis? In order to answer that question, it is helpful first to look at CPR 44.5, and then to consider some of the relevant authorities.

7.4.2
CPR Part 44.5

115.
CPR Part 44.5 provides as follows:

"**44.5**

(1) Subject to paragraphs (2) to (4), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a

contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –

(a) have been reasonably incurred; and

(b) are reasonable in amount,

and the court will assess them accordingly.

(2) The presumptions in paragraph (1) are rebuttable. Practice Direction 44 – General rules about costs sets out circumstances where the court may order otherwise.

(3) Paragraph (1) does not apply where the contract is between a solicitor and client."

116.
Both Ms Sinclair QC on behalf of Essex and Mr Hargreaves QC on behalf of HSE submitted that, in terms, the application of this rule amounted to a presumption that, pursuant to a contractual indemnity of the kind here, the court would assess costs on what amounts to an indemnity basis (because proportionality does not matter and there are presumptions that costs have been reasonably incurred and are in a reasonable amount), although they acknowledged that, in particular circumstances, those presumptions were capable of being rebutted. Mr ter Haar QC argued that the presumptions related to the terms of the underlying contract; that proportionality was still a factor; and that the rule did not alter the ordinary burden of proof. In my view, Mr ter Haar QC was right about the first point (although it does not appear to lead anywhere), and wrong on the other two.

117.
First, I consider that the presumptions in CPR Part 44.5 are twofold: that, unless the contract expressly provides otherwise, the costs which are payable under that contract a) have been reasonably incurred and b) are reasonable in amount. These presumptions are intended to act like implied terms of the contract. In the present case, nobody could point to any contrary provision in the contract between Essex and HSE, so the presumptions will apply. When allied to an absence of proportionality, they give rise to an entitlement that is broadly similar to the assessment of costs on an indemnity basis. But r.44.5(2) makes plain that the presumptions are rebuttable so, on the detailed assessment, it is possible that a particular head of costs will be found to have been unreasonably incurred or is unreasonable in amount.

118.
Secondly, turning to proportionality, I am in no doubt that it is an irrelevant concept to the assessment of costs payable under a contractual indemnity and/or these presumptions. Proportionality is a concept introduced and policed by the Civil Procedure Rules. It is not a creature of the common law. Accordingly, if proportionality was a relevant concept to the assessment of costs payable under a contract, then r.44.5 would expressly say so. It does not; it makes no mention of it at all.

119.
Moreover, a requirement that costs would be assessed by reference to proportionality could not be implied into the sub-sub-contract here: no such term would be necessary in order to make the contract work; it would be at odds with the ordinary meaning to be ascribed to the word 'indemnify'; and it would be contrary to the r.44.5(1) presumptions. That is also consistent with the commonsense starting point that costs due pursuant to a contractual indemnity are assessed on an indemnity basis. There is plenty of authority for the proposition that, if costs are to be assessed on such a basis,

proportionality is irrelevant: see, for example, **Lownds v Home Office**[2002] EWCA Civ. 365, [2002] 1 WLR 2450; and **Petrotrade** (referred to above).

120.
Finally, I do not agree with Mr ter Haar QC that r.44.5 is neutral on the question of the burden of proof. On the contrary, r.44.5 makes plain that, absent a contractual term to the contrary, there are presumptions as to reasonableness in favour of the claiming party. Although those presumptions are rebuttable, that must mean that the burden of proof lies on the paying party to demonstrate that an item of costs has not been reasonably incurred or is not a reasonable amount.

121.
For those reasons, it seems to me that, absent authority, Essex and HSE are right to say that, subject only to the rebuttable point on a detailed assessment, HSE are liable to Essex for the sums claimed under these heads pursuant to the contractual indemnity and on an indemnity basis. I now turn to the authorities to see if they make any difference to that conclusion.

7.4.3
Authorities

122.
In **Gomba Holdings (UK) Ltd v Minories Finance Ltd (No. 2)**[1993] Ch 171, the mortgagor guaranteed to pay "all costs charges and expenses howsoever incurred by the bank or any receiver under or in relation to this mortgage…on a full indemnity basis including (but without prejudice to the generality of the foregoing) all costs charges and expenses which the bank or any receiver may incur in enforcing the security…". The Court of Appeal held that this meant that the defendants were entitled to recover their actual costs, charges and expenses except for any costs that had not been reasonably incurred or was unreasonable in amount and that they were contractually entitled to payment on an indemnity basis. The Court of Appeal also said that the court's discretion as to the basis of taxation of the costs should normally be exercised so as to correspond with the contractual entitlement.

123.
In **AstraZeneca UK Ltd v International Business Machines Corporation**[2011] EWHC 3373 (TCC) Ramsey J had to consider whether the contractual indemnity entitled the claimant to indemnity costs. The contractual indemnity was to the effect that IBM would indemnify AstraZeneca "on demand from and against all defence costs incurred by AstraZeneca in connection with any dispute in which judgment is given in AstraZeneca's favour". By reference to CPR 48.3 (the predecessor of r.44.5) it was said that the overall effect of the provisions in the CPR was substantially the same as an assessment on an indemnity basis.

124.
Ramsey J upheld these submissions. He said:

"45. As a result, my conclusion as to the basis on which costs are to be assessed in this case derives, first, from the fact that the parties have agreed, by Clauses 89.4 and 89.5 of the MSA, to indemnify the other party for costs incurred by that party in connection with any Dispute in which judgment is given in favour of that other party and have agreed that the basis of assessment should be the equivalent of an indemnity basis under the provisions of CPR 44.4(3). Secondly, that basis would, in any event, be the same or substantially the same as the default basis for a contractual claim to costs as set out in CPR 48.3 and paragraph 50.1 of the Costs Practice Direction.

46. Accordingly, in exercising my discretion as to costs, I consider that where the parties have agreed the basis upon which costs are to be assessed, the court should ordinarily exercise its discretion so as to reflect those contractual rights and, in this case, should award costs on an indemnity basis."

125.
Finally, I note that in his judgment in **Linklaters**, Akenhead J noted that one defendant had agreed to pay the other defendant's costs on an indemnity basis. The judge said that "that was inevitable given the contractual indemnity arrangements". Mr Hargreaves QC argued that this again demonstrated the usual position that, where there was a contractual indemnity, costs were agreed to be paid on an indemnity basis. He maintained that Robson's suggestion to the contrary was novel.

126.
Although the wording of the indemnities is different in each case, the authorities noted above are in line with my conclusions at paragraphs 116-121 above, that the contractual indemnity here entitled Essex to recover their costs against HSE on an indemnity basis (subject only to the 'rebuttable' point). I agree that, in some ways, the authority closest to this case is **AstraZeneca**. Although Mr ter Haar QC put forward a number of arguments in which he sought to distinguish that case from this (one such argument was that the indemnity was different; another was that Ramsey J had relied on paragraph 50.1 of the Costs Practice Direction ("CPD") which had now been deleted), I do not consider that either of the alleged points of distinction is well-founded.

127.
First, although the indemnity was in different terms, I do not accept that, in reality, there was any difference in its effect. As a matter of construction, both indemnities gave rise to an unfettered entitlement to costs, provided those costs were caused by the indemnitor's breach. As for the change in the CPD, that is irrelevant. Although the first sentence of paragraph 50.1 of the CPD has now been deleted, it is clear that it was only deleted because it was repeating what was in the Rule already. CPR 48.3, as it was, made plain that, although there was a presumption that costs were reasonably incurred and were reasonable in amount, that was rebuttable. Those same presumptions are in the new Rules. Paragraph 50.1 of the CPD said that costs would be disallowed if it could be shown that costs had been unreasonably incurred or were unreasonable in amount. That was just the mirror image of both the old and the existing rules and it therefore served no purpose, which is why it was deleted from the CPD. By reference to CPR, I consider that the essence of Ramsey J's decision in **AstraZeneca** is the same as my conclusion here.

7.4.4
Summary

128.
Accordingly, whether by reference to the indemnity and CPR Part 44.5, or by reference to authority, I conclude that, prima facie, Essex are entitled to an indemnity in respect of these packages of costs from HSE. Although that is subject to the presumptions being rebutted on detailed assessment, that is broadly equivalent to an order that costs will be assessed on an indemnity basis. This conclusion is, of course, subject to the causation argument (**Section 7.5** below) and any individual items of dispute (**Section 7.6** below).

129.
Finally, I am in no doubt that there is an overwhelming case on the merits that HSE indemnify Essex in this way. As I have already made plain, GMVL were entitled to indemnity costs from Essex because Essex failed to beat the Part 36 offer. Even though Essex's offer to HSE was not under Part 36 but was

a ‘without prejudice save as to costs’ letter, HSE failed to beat that. Had it been a question of discretion, I consider it would have been entirely appropriate that HSE were liable to Essex on an indemnity basis in the same way as Essex are liable to GMVL.

7.5

Robson’s Principal Submission On Causation

7.5.1

The Nature Of The Issue

130.

Mr ter Haar QC described Robson’s causation objection to Essex’s claim against HSE as the “big issue” and it is easy to see why. On behalf of Robson, he submitted that Essex’s claim for the GMVL costs, for their defence costs, and for the costs of their Part 20 claim against HSE, were not costs which were caused by the underlying breaches, but were instead costs caused by Essex’s (and HSE’s) commercial decisions to fight the case in the way that they did. Thus it is argued that liability for, say, GMVL’s costs, arose not from the breaches of the underlying sub-sub-sub-contract, but from Essex/ HSE’s erroneous decision not to settle with GMVL at a much earlier stage. This was (eventually) identified during the costs hearing as an issue of causation. But it is a far-reaching one and it touches upon the way in which costs should be approached by the court in multi-party, contractual-chain litigation like this.

7.5.2

Authorities

131.

The usual approach was that set out by Diplock J (as he then was) in **LE Cattan Ltd v A Michaelides and Co**[1958] 1 WLR 717. He noted that, although a matter of discretion, the relevant costs liability would usually be passed down the contractual chain. He said:

“In remitting it, I think that I should make these observations about the way in which costs should be dealt with where third, fourth, fifth or sixth parties have been brought in in these string contract cases which are very common. In doing so, however, I want to make it clear that I am not seeking to substitute my discretion for that of the arbitrator, or to suggest that there may not be reasons in some circumstances for making a different order. But, in the ordinary way, where damages are claimed for breach of contract on one contract in a string of contracts, and the seller brings in his immediate seller as a third party, and that party brings in his immediate seller as a fourth party, then, provided that the contracts are the same, or substantially the same, so that the issue as to whether the goods comply with a description is the same, in the normal way the defendant - though in this case it was the plaintiffs, because it was a counterclaim - if successful should recover against the plaintiffs not only his costs but any costs of the third party which he has been ordered to pay; the third party in like manner should recover from the defendant his own costs and any costs of the fourth party which he has been compelled to pay, and so on down the string. That is the normal way in which costs should be dealt with in this kind of action where there is a string of contracts in substantially the same terms. In saying that I am not excluding the possibility that there may be special reasons for departing from that normal practice. Whether it was reasonable for the defendant to bring in a third party at all is always a question to be considered.”

132.

That approach was subsequently approved in **Johnson v Ribbins and Ors** [1977] 1 WLR 1458. Goff LJ (as he then was) said:

"Generally, we think it will be found, and certainly so in this case, that the defendant and the third party stand in relation to one another as if the defendant had brought a separate action against the third party…"

133.
Although that is the general approach, the caveat in the judgment of Diplock LJ in **Cattan** should not be forgotten: it does not follow that, merely because costs have been incurred up the line, liability for those costs should automatically be passed down to the party at the end of the contractual chain. In any given case there may be good reason for departing from that practice. Thus, for instance, in **Dunlop Haywards** the defendant, HPC, could not pass on to the Part 20 defendant Forbes its liability for the claimant's costs. However, that was a very different sort of case to the present: not only was there no indemnity, but the judge concluded that HPC never had a defence to the claimant's claim and that the claimant's claim did not allege or depend on any breach by Forbes, so that the Part 20 claim passed on to Forbes was a different type of claim (unlike the claims passed down to HSE and Robson here).

134.
My attention was also drawn to the decision of Mann J in **Sycamore Bidco Ltd v Breslin and Dawson**[2013] EWHC 583 (Ch); [2013] 4 Costs LO 572. In that case, in a detailed costs argument, the judge refuted the suggestion that the defendant could not have known of the judgmental factors that eventually went into the judge's assessment of damages. Mann J went on:

"Any litigant has to form a view of the likelihood of a range of remedies. Where damages (or any other issue) depend on judgmental factors, a party is expected to take a view on what is likely to happen. If he or she gets it wrong then they pay the price in terms of liabilities in the litigation, and it is one of the judgments that has to be made in making or assessing Part 36 offers. The litigant takes the risk of his/her own judgment differing from the judge's. Logically, were it otherwise, and since every disputed case involves an element of judgment, every litigant could assert that he/she could not tell which way the case would go, so litigation (and the rejection of Part 36 offers) was reasonable and should be free of costs consequences. That cannot be the case."

135.
Although **Sycamore** was not a multi-party case, Mr ter Haar QC relied on this passage in support of his submission that, in the present case, the position in relation to costs had to be assessed, by reference to the commercial decisions taken by each party, at each relevant costs interface. Whilst, for the reasons already noted, I agree that liability for costs has to be considered at each interface, I consider that that has to be done against the background of the general approach in **Cattan**, the usual rules of causation, and the realities of multi-party litigation.

136.
The leading case on breaks in the chain of causation is **Borealis AB v Geogas Trading SA**[2010] EWHC 2789 (Comm). In that case Gross LJ set out some well known principles, namely that:

"(1) Although an evidential burden rests on the defendant insofar as it contends that there was a break in the chain of causation, the legal burden of proof rests throughout on the claimant to prove that the defendant's breach of contract caused its loss.

(2) Secondly, in order to comprise a novus actus interveniens, so breaking the chain of causation, the conduct of the claimant "must constitute an event of such impact that it 'obliterates' the wrongdoing" of the defendant: **Clerk & Lindsell on Torts**(19th ed.), at para. 2-78.

(3) For there to be a break in the chain of causation, the true cause of the loss must be the conduct of the claimant rather than the breach of contract on the part of the defendant; if the breach of contract by the defendant and the claimant's subsequent conduct are concurrent causes, it must be unlikely that the chain of causation will be broken. In circumstances where the defendant's breach of contract remains an effective cause of the loss, at least ordinarily, the chain of causation will not be broken: **County Ltd v Girozentrale**[1996] 3 All ER 834.

(4) It is difficult to conceive that anything less than unreasonable conduct on the part of the claimant would be capable of breaking the chain of causation. It is, however, also plain that mere unreasonable conduct on a claimant's part will not necessarily do so. By its nature, reckless conduct by the claimant would or would ordinarily break the chain of causation, though there is no rule of law that only recklessness on the part of the claimant will do so: **Lambert v Lewis**[1982] AC 225.

(5) Fourthly, the claimant's state of knowledge at the time of and following the defendant's breach of contract is likely to be a factor of very great significance. For the chain of causation to be broken, the claimant need not have knowledge of the legal niceties of the breach of contract; nor, as it seems to me, will the chain of causation only be broken if the claimant has actual knowledge that a breach of contract has occurred – otherwise there would be a premium on ignorance."

This decision was recently approved by the Court of Appeal in **Flanagan & Anor v Greenbanks Ltd (t/a Lazenby Insulation) & Anor**[2013] EWCA Civ. 1702.

7.5.3
Analysis

137.
It is important at the outset to remember the overall structure of these claims and the result at trial. The principal allegations in GMVL's claim against Essex were allegations of bad workmanship and supervision. It was said that the bad workmanship/supervision created two effective causes of the flooding: a closed IV and an NRV in the wrong place, which prevented the surge arrestor from working and meant that, when the right conditions occurred, flooding at Core 2 was inevitable. Furthermore that was exactly the case which, on the evidence, GMVL established at trial. Thus the workmanship allegations, which were the direct cause of the flooding, lay at the heart of i) GMVL's claim against Essex; ii) GMVL's claim against HL; iii) Essex's claim against HSE; and iv) HSE's claim against Robson.

138.
By contrast, the design allegations were peripheral. Many of them were designed to bolster GMVL's claim if I concluded (contrary to their primary case) that the IV was closed after practical completion. Since I found that the IV was closed at practical completion, the pleaded design allegations became of little direct relevance. Indeed, in the Main Judgment, the general design obligations on the part of HL were important only because they served as the context for HL's failure properly to inspect/supervise. HL were the designers of what was then a relatively novel system and they, therefore, had a particular obligation to supervise and inspect with that in mind.

139.

Not only were the critical workmanship allegations passed down the contractual chain, but the defences to them coming back the other way were the same. These defences were based on Robson's case that the IV was closed at practical completion (which I rejected) and that the NRV was not causative of the flooding (which I also rejected). There were a wide variety of other matters raised by way of defence, but they always came back to these fundamental issues of workmanship/supervision/ causation, which lay at the heart of this case. That is where the costs went. There may have been four different defending parties, and they may have had slightly different hymn sheets, but they were singing what was broadly the same tune. In those circumstances, I consider that it is now extremely difficult for any of them to say that, in some way, an event up or down the line broke the chain of causation in respect of their liability to pay costs arising out of their breaches of the underlying contracts.

140.
In addition, neither HSE nor Robson, the two parties at the end of the contractual chain, ever made any offer, of any kind, to settle this case. They took a robust view of what was likely to happen and ran the risk that, if they got it wrong, they would have to 'pay the price' (to use Mann J's words). Although Robson now argue that Essex should have settled with GMVL, and that HSE should have settled with Essex, so that the only issues were between themselves and HSE, they did not suggest that at any time before the end of the trial. In essence, therefore, Robson's stance now is based on the alleged reasonableness of something which they failed to suggest at the time.

141.
In my view, with the exception noted in paragraphs 178-182 below, there was no special circumstance or event in this case which meant that any particular package of costs was not incurred because of the underlying breaches of contract of the paying party, but because the receiving party took a decision or reached a conclusion in the conduct of the litigation that broke the chain of causation. Indeed, very little was put forward as even arguably breaking the chain of causation.

142.
On behalf of Robson, Mr ter Haar QC argued that Essex were not a "transparent" middle party, simply seeking to pass claims up and down the line and no more. He submitted that, instead, they were a party who raised particular issues which did not concern HSE or Robson and therefore cannot now seek an automatic entitlement to their costs down the line. He submitted that Essex took its own decisions during the conduct of the litigation, and if, as has turned out to be the case, those decisions were poor ones, they should bear the cost consequences. In addition, he maintained that Essex's decisions, such as the refusal of the GMVL offer or the failure to otherwise resolve the litigation, were matters which were Essex's responsibility and broke the chain of causation.

143.
I do not accept any of those submissions. The concept of a "transparent middle party", who only gets his costs if he acts as a conduit and takes no positive steps himself, is not identified in any of the authorities. More importantly, in the present case, any point that Essex took up the line or down, always mirrored a point taken by another of the defending parties, usually Robson. To a very large extent, Essex's defence was exactly the same as that of HSE and Robson, namely that the IV had been open at practical completion, that the NRV was probably not causative, and/or that the problems were ones of design. To the small extent that they ran different points, those all stemmed from that basic defensive position. Thus, for example, the arguments about Essex's contractual obligations, and the allegations as to design, both arose out of Robson's positive case that the IV was closed at practical

completion. To that extent, therefore, Essex could be described as a “transparent” middle party: they certainly incurred no costs on anything that was not an integral part of the cases run by HSE/Robson.

144.
On analysis, the costs interface between Essex and HSE is remarkably similar to the costs interface between GMVL and Essex. Accordingly, even scrutinising that interface afresh, as Mr ter Haar QC urged me to do, I conclude that the result is the same, namely that Essex are entitled to pass on to HSE the same packages of costs for which they are liable to GMVL, together with their own costs. I can see no substantive difference between Essex’s liability to GMVL and HSE’s liability to Essex.

145.
There was no break in the chain of causation. The costs which Essex seek to pass on to HSE all stem from HSE’s failed defences, defences which Essex ran against GMVL and lost. These costs were incurred because of the underlying breaches of contract which all the defending parties had the opportunity to identify and admit at the start of the litigation, but failed so to do. In circumstances where there was such synchronicity between the defending parties, it is not open to one now to say that there was a break in the chain of causation because others should have settled up the line. On the facts of this case, I consider that the defending parties must stand and fall together.

146.
Accordingly, in line with the authorities noted above, I consider that Essex’s decisions within the litigation did not break the chain of causation or render it impossible for them to recover these packages of costs against HSE. On the contrary, I consider that Essex’s position vis-à-vis HSE is very similar to GMVL’s position against Essex. I therefore endorse the express position of both Essex and HSE that, as a matter of law and fact, HSE are liable to Essex for the costs claimed.

7.6
The Individual Items

7.6.1
The Issue

147.
In addition to the principal point on causation, dealt with in the last section, Mr ter Haar QC raises various individual items which he says should not be passed on by Essex to HSE. I deal in turn with each of those, endeavouring as I do so to remember the words of Jackson LJ in **Fox**, namely that it is a mistake for a first instance court to “strive for perfect justice in the individual case”. I also guard myself against the risk of 20/20 hindsight. Perhaps most importantly of all, I approach these individual items on the basis that Ms Sinclair QC was right to say in her oral submissions that “Robson’s denial of the workmanship allegations generated almost all the costs of this litigation”.

7.6.2
The Particular Items

(a)
Contract

148.
My views are the same as those set out at paragraphs 98-99 above. Essex spent a small amount of time pursuing their claim that they had no design responsibility to GMVL. The design issue arose out of Robson’s case that the IV was open at the time of practical completion (it therefore being said by

GMVL that the IV should have been of a different design so as to make it harder or impossible to close once the building was occupied). Furthermore, if Essex had been successful on this issue, that would have been directly in the interests of both HSE and Robson because it would have increased HL's liability and reduced Essex's liability. Essex were unsuccessful. They can pass the costs of this part of the case onto HSE because those costs were incurred as a result of the failures of workmanship which lie at the heart of the case.

(b)
Contributory Negligence

149.
My views are the same as those set out in paragraphs 100-101 above. The allegations of contributory negligence had a negligible cost impact on the trial. They arose out of the causation arguments. By the end of the case, it was Robson who was the most insistent, in the teeth of the evidence, that the NRV was not causative of the flooding and that everything depended on the position of the IV at practical completion. Again, therefore, these costs can be traced directly back to Robson.

(c)
Design Issues

150.
I have dealt with this in paragraph 148above. This related directly to Robson's defences that there were no workmanship failures.

(d)
The Closure Of The IV

151.
Robson say that it would not be reasonable to order HSE to pay GMVL's costs in connection with the alleged post-practical completion closure of the Core 2 IV. They say that, although GMVL succeeded in showing that the IV was not closed after practical completion, it would have been open to Essex to admit that issue and then contest it down the line or leave it to be contested between others. Robson argued that GMVL's costs were increased because Essex decided to resist this claim and that in those circumstances it would not be reasonable for HSE to pay those costs. Significantly, this is not an argument which HSE themselves put forward.

152.
It seems to me that it is at this point that Robson's arguments on the individual items descend into an unreal world of hindsight and special pleading. Each of the defending parties ran the closed IV case, none more enthusiastically than Robson. For the detailed facts to make that case good, Essex were relying on HSE, who in turn were relying on Robson. Since this defence was Robson's main case, it was entirely reasonable for HSE to seek to persuade the court that it was correct. It was an issue in respect of which Robson, and therefore HSE, plainly bore the risk vis-à-vis Essex. It would be wrong in principle now to endeavour to carve out those costs as being somehow irrecoverable by Essex against HSE.

(a)
Costs Of Causation/Core 2

153.

Robson argue that HSE should not compensate Essex for these costs because Essex argued that the closed IV was the sole cause of the flood and the NRV was irrelevant. That again was an issue on which Essex lost. But the same points about unreality apply again: by the end of the case, it was Robson who were arguing most strongly that the NRV was causatively irrelevant and that the only cause of the flood was the closed IV. Again it is not open to them now to criticise Essex for maintaining the same position.

154.
I go further. In my view, it is not generally appropriate for a losing party in litigation of this sort to go through each issue on which the claimant was successful and argue that the parties up the contractual chain ought to have conceded the point, such that the only costs that would be recoverable would be between the two parties at the end of the chain. That is not how this kind of litigation works. Robson would have known from the outset that, if the court concluded that GMVL were right and that the NRV was a cause of the flooding, they would be in grave difficulty, since they could not defend the installation of the otiose NRV. Those difficulties have now materialised, but they do not arise from any break in the chain of causation. They arise out of Robson's breaches of the underlying sub-sub-sub-contract.

(a)
Core 3

155.
Robson argue that Essex should not be able to recover from HSE GMVL's costs in respect of Core 3. Again it is said that Essex ought to have conceded this issue such that GMVL's costs should not be passed on to HSE. Mr ter Haar QC maintains that this should just have been an issue as between Robson and HSE, and that there was no reason for Essex to incur any costs in respect of Core 3 or to be able to recover such costs against HSE. This argument is also coloured by the suggestion, previously dealt with, that the Core 3 costs, when seen in isolation, were disproportionate.

156.
Again I reject Robson's submissions. Again they seem to me to be wholly unrealistic. The party who took the hardest line on the Core 3 problems was Robson. As the Main Judgment makes clear at paragraphs 131-152, by the end of the trial there was a good deal of agreement between GMVL and Essex in respect of the causation issues on Core 3. But Robson (and therefore HSE):

- denied that any of its employees would have used a metal tool,
- denied that its operatives would have had any such tool available to them,
- said that the use of such a tool had not occurred,
- said that if such tools had been used, this had occurred after practical completion, during maintenance,
- put HSE to proof that the nut which failed was installed before practical completion,

- refused to accept that the nut was over-tightened,
- refused to accept that over-tightening was the cause of the Core 3 failure: in this regard they were alone in maintaining such a case,
- identified a whole raft of other potential causes of the failure, including the design of the entire hot water system,
- denied that metallic debris had been deposited during their works and suggested that the debris had either been deposited at the factory where the valve was made or after practical completion during the maintenance work,
- denied that, if the debris had been installed during their work, it was a breach of contract,
- suggested that it would have been impossible, when the valve was taken out of its packaging and installed, to keep it entirely free from debris,
- denied that it was obliged to clean the nut,
- denied that metallic debris was the cause of the Core 3 failure.

157.
It is entirely unsurprising that, to a greater or lesser extent, Essex went with some of these points in their defence to the GMVL claim and that, similarly, HSE ran these points in their defence to the claim passed down the line by Essex. Robson, who were the principal authors of these lines of argument, each of which I rejected at the trial, cannot now argue that in some way these matters should all have been conceded by Essex as against GMVL or by HSE as against Essex. They made no such suggestion at the time.

(g)
Summary

158.
In my view, these individual items raised by Robson again demonstrate that there was no break in the chain of causation and that the general approach to costs recovery in **Cattan** should be followed.

7.7
The Interim Payment

159.
As against HSE, Essex seek payment of the £1.65 million which will form the interim payment to GMVL. In addition, Essex seek a sum on account of their own costs. They seek £800,000 which, when the costs in respect of HL are stripped out, amounts to about 80% of Essex's costs.

160.

On behalf of HSE, Mr Hargreaves QC accepts liability for the £1.65 million that forms the GMVL interim payment. As to Essex's own costs, he says that the 80% figure is too high. He argues for a 60% figure based on the total of Essex's costs once the costs in respect of HL have been stripped out. That amounts to a total of £525,000.

161.
First, I consider it right that the interim payment of Essex's costs by HSE relates only to those costs which can be passed down the line to them, and therefore should exclude the element of HL costs. On that basis, I also consider that the 80% is too high. I have made an interim payment in favour of GMVL on the basis of 60% (see paragraphs 88-91 above). I can see no reason why there should be a different percentage here. Thus the additional amount to be added to the £1.65 million is £525,000.

162.
Thus the total interim payment from HSE to Essex will be in the sum of **£2,175,000**.

8. COSTS AS BETWEEN HSE AND ROBSON

8.1
The Claims

163.
As against Robson, HSE seek from Robson:

(a)
HSE's liability (through Essex) for GMVL's costs;

(b)
HSE's share of Essex's defence costs and Part 20 costs;

(c)
HSE's own costs of defending the Essex claim; and

(d)
HSE's costs of their own Part 20 claim against Robson.

(a) and (b) are claimed by way of indemnity or damages, not the CPR. (c) is claimed by way of indemnity, damages or the CPR. (d) is claimed by way of an indemnity or the CPR.

8.2
The Issues

164.
The issues are very similar to those set out in **Section 7** above, namely whether HSE can claim these costs pursuant to the indemnity, which itself gives rise to similar arguments in respect of causation. In addition there is a separate dispute about the claim for damages.

8.3
The Facts

165.
Clause 15.3.1 of the sub-sub-contract between HSE and Robson was in these terms:

“The Subcontractor hereby agrees to indemnify [HSE] against each and every liability which [HSE] may incur to any other person or persons and further to indemnify [HSE] in respect of any liability, loss, claim or proceedings of whatsoever nature such as shall arise by virtue of the breach or breaches of this Subcontract Agreement by, or at, default or negligence of the Subcontractor.”

166.
As already noted, Robson were responsible for the installation of the entirety of the BMCWS. Accordingly, any successful allegations of bad workmanship, and any case on causation linked back to that bad workmanship, was ultimately going to be their responsibility in law. Despite that, they made no offer to settle the claim against them by HSE and made no concessions of any kind in relation to the detail of the litigation. I have already set out at paragraph 156 above the stance that they adopted in respect of the Core 3 flooding, a matter for which, ultimately, they were wholly responsible.

167.
Their stance on Core 2 was, if possible, even more uncompromising. As to the IV:

- they denied that they installed the IV,
- they denied that they were obliged to ensure that the IV was left open when they left the site,
- they denied that they had had any cause to close the IV,
- they did not admit that they would have left the IV open,
- they denied that the IV was closed at practical completion,
- they maintained that the IV was closed subsequently, either in the course of maintenance or in some other inadvertent way which was not their responsibility and was therefore the responsibility of GMVL.

Moreover, in respect of the NRV, which was a completely pointless piece of installation not shown on any design drawing, Robson were particularly difficult. Thus:

- they did not admit that the NRV had been installed at the time of practical completion,
- they denied that they installed the NRV,
- they alleged that other subcontractors, who were not responsible for the BMCWS, had somehow installed this particular NRV,
- they denied that the installation of the NRV was a breach of contract for a variety of reasons,
-

they denied that the NRV was an effective cause of the Core 2 failure.

168.
Just as with the Core 3 allegations, Robson's denial of every aspect of GMVL's Core 2 case provided the agenda for the principal part of the trial. These were the issues that had to be worked through. They all arose from Robson's various defences. Moreover, it is not even right to suggest, as Robson do, that the design allegations which were pursued by GMVL (and which were not Robson's responsibility) were unconnected with these defences because, as I have already noted, they were only there at all in order to provide GMVL with a secondary case if Robson were right and the IV was closed after practical completion.

169.
At one point during his oral submissions, Mr ter Haar QC said that the nature, scope and extent of Robson's denials, and the issues that Robson raised at the trial, were unimportant. I disagree: the nature, scope and extent of the matters put in issue by Robson were vital, because they were the party who actually carried out the work which caused the flooding. They therefore knew (or should have known) more than anyone else about the detail of what had happened, when and why. The defending parties up the contractual chain were entitled, so it seems to me, to take Robson's wide-ranging denials into account when deciding whether or not to settle the dispute. In the event, they were wholly let down by the erroneous nature of every part of Robson's case.

8.4
The Indemnity Claim

170.
The relevant indemnity is at paragraph 165 above. In my view, it is materially the same as the indemnity to which I have referred at paragraph 109 above, being the indemnity as between HSE and Essex.

171.
Accordingly, I can find no reason to distinguish between the outcome of the indemnity argument as between Essex and HSE (paragraphs 114-128 above) and the outcome of the same issue as between HSE and Robson. The r.44.5(1) presumptions apply again, there being no term of the sub-sub-sub-contract which provided to the contrary. Accordingly, with one exception to which I refer in paragraphs 178-182 below, I conclude that Robson are liable to HSE pursuant to the indemnity for all of the packages of costs set out in **Section 8.1** above. These costs are – subject always to the rebuttable presumptions – are to be assessed on the indemnity basis, again save for the exception at paragraphs 178-182 below.

8.5
Damages Claim

172.
In the light of my finding in respect of the indemnity provision, it is probably unnecessary for me to deal in any detail with the alternative argument that the costs are recoverable as damages. However, I ought to say briefly, since the matter has been raised, that, in my view, the costs noted at paragraph 163(a), (b) and (c) above would be recoverable as damages: see **Herrmann v Withers LLP**[2012] EWHC 1492 (Ch), [2012] 4 Costs LR 712. Although Mr ter Haar QC noted that the Main Judgment in this case did not expressly address damages, and only dealt with the claim based on the indemnity, that was because Robson and HSE argued all the issues between them by reference to that indemnity;

it was never at any time suggested that the damages claim gave rise to any additional or separate issues. As to the claim for costs by way of damages itself, Mr ter Haar QC noted rather vaguely that there might be issues arising out of the application of **Hadley v Baxendale**. I reject that stance on the facts of this case, given my views on causation set out at **Section 7.5** above and reiterated at **Section 8.6** below. It follows from the foregoing that, in my view, such costs would be recoverable on an indemnity basis, save for the exception at paragraphs 178-182 below.

8.6
Causation

173.
I have already dealt with, and rejected, Robson's causation argument in the context of the claim for costs by Essex against HSE: see **Section 7.5** above. It is unnecessary to set it all out again. In summary, I consider that Robson's arguments are a combination of 20/20 hindsight and a series of arguments which, on analysis, and with one exception, get nowhere near to breaking the necessary chain of causation.

174.
This can perhaps best be illustrated by reference to Mr ter Haar QC's oral submissions towards the end of the second day of the hearing. He identified three steps to his argument. Step 1 was that there was no defence available to Essex, so they should not have defended the GMVL claim. Either Essex made a mistake or HSE put them in a difficult position but either way it was not Robson's fault. Step 2 was that there was no reason why Essex could not pass all of its claims onto HSE because of the back-to-back nature of their contracts, so Essex's involvement was as a result of HSE's decision to keep Essex in the proceedings. Step 3 was that it was unreasonable to have three parties' costs – that is to say the costs of GMVL, Essex and HSE – rest with Robson.

175.
The first point to make is that, of course, Robson would have always been liable for HSE's costs, because HSE were making claims against them which Robson disputed. Thus the real issue was Robson's liability for the costs up the line, that is to say the costs of Essex and GMVL.

176.
For the reasons that I have already given, I consider that the three steps are unrealistic. Obviously, with hindsight, in view of the terms of the Main Judgment, there should have been no litigation at all. The fact that there was a fully-contested trial was because the party who actually carried out the work that was the cause of the flooding, namely Robson, refused to accept liability and fought every point. Because of that, HSE were entitled to conclude that Robson's defences might well be right, and so too were Essex. In that way, Robson knew that there was the risk that, after judgment, they would be facing the possibility of reimbursing the costs of GMVL, Essex and HSE.

177.
Furthermore, the argument based on the three steps might have had a little more force if they had been identified by Robson to the other parties during the preparation for trial, together with proposals as to how the tidal wave of costs might be averted. They did not adopt that course. They made no offers to settle or proposals to reduce costs. Accordingly they now seek to avoid the logical consequences of their wholesale failure by criticising others for not taking decisive action which they themselves did not even propose, much less take. It is in my view a hopeless position.

178.

I conclude, however, that there is one exception to this. That concerns the Part 36 enhancements that I have ordered Essex to pay to GMVL. For the reasons set out in **Section 7.4** above, I consider that those enhancements should be passed on to HSE by Essex for a variety of reasons, including the fact that HSE were aware of the Part 36 offer and did not accept it. What is therefore appropriate for GMVL as against Essex is appropriate for Essex as against HSE.

179.
But Mr ter Haar QC has persuaded me that the Part 36 enhancements due to GMVL should not be passed on by HSE to Robson. Robson did not know about the Part 36 offer or the 'without prejudice save as to costs' letter from Essex to HSE. If Part 36 is a complete code, and its prescriptive consequences are to be visited on defending parties who fail to accept claimants' Part 36 offers which are then bettered, then it is a basic starting-point that the paying party knew about but failed to act upon the Part 36 offer. Robson were not in that position.

180.
To put the point another way, Robson's lack of knowledge of the offers broke the chain of causation. Robson are liable to reimburse GMVL's costs (via Essex and HSE) on the standard basis for the reasons that I have given. But liability for indemnity costs and enhanced interest arising out of Part 36 is a separate, self-contained liability which flows out of Part 36 itself, not the underlying breaches. Thus, whilst Robson's efforts to avoid liability for the general run of costs does not meet the test in **Borealis**, their defence to the claim for Part 36 enhancements does meet that test. Their lack of knowledge of the Part 36 offer and the Essex offer obliterates the underlying breach. Liability for the Part 36 enhancements arose not out of Robson's breaches of the underlying sub-sub-sub-contract, but the making of offers (of which Robson was unaware) and the rejection of those offers (of which Robson was also unaware).

181.
I reject Mr Hargreaves QC's submission that Robson's lack of knowledge was irrelevant because, even if Robson had known about the offers, there is nothing to say that they would have done anything differently. That is again straying too far down the counter-factual road. It also ignores the particular operation of Part 36, which applies on the facts here to GMVL, Essex (and indirectly HSE), but not Robson. I also take comfort from the fact that this conclusion was the same as that reached by Hamblen J in **Dunlop Haywards** when he rejected the claim that the Part 20 defendant was liable for the Part 36 enhancements to be paid by the defendant to the claimant (paragraphs 33-35 of his judgment).

182.
Accordingly, whether the claim is put by way of an indemnity, or as damages, or as a claim under the CPR, the Part 36 enhancements are not an element of costs for which Robson should be liable because they do not stem from any breach by Robson of the sub-sub-sub-contract. That is, however, the only individual element of Mr ter Haar QC's causation submissions which I accept (see below).

8.7
Individual Elements

183.
The individual elements of the costs raised by Robson have already been dealt with **Section 7.6** above. Other than the Part 36 enhancements, and for the reasons given in that Section, I am satisfied that these individual elements of cost are the direct consequences of Robson's breaches of the underlying sub-sub-sub-contract. So, in respect of the packages of costs set out in paragraph 163

above, a) will be assessed on the standard basis; and b), c) and d) will be assessed on the indemnity basis, although subject to the rebuttable presumptions noted above.

8.8

Interim Payment

184.
HSE claim an interim payment of around £3.274 million against Robson. This is made up of the £1.65 million which Essex must pay GMVL; the £800,000 which Essex claim for their own costs against HSE; and £874,000 being 60% of HSE's own costs of defending the claims bought by Essex and bringing the claim against Robson. The first point to make is that the claim must be reduced by £275,000 because I have awarded Essex £525,000 against HSE, not the £800,000 claimed (see paragraph 161 above).

185.
Although Robson accepts that any interim payment will be well into seven figures, they challenge an interim payment on this scale. First they say that HSE's own costs should not have been so high and were only high for reasons which go back to the causation arguments. Robson take half of Essex's costs (£770,000) and then submit that only 40% of that should be awarded. They then have other arguments, to which I have previously referred, about the appropriate amount of the interim payments up the line.

186.
In addition, Robson also point out that their insurance cover was limited to £5 million. A figure of £3.5 million has already been paid by way of damages, leaving a figure of just over £1.55 million available out of the insurance monies. It is said that any payment over and above that sum will have a dramatic effect on Robson and the suggestion is that it would put them out of business. Robson argue that any interim payment above £1.55 million should be stayed, pending the outcome of Robson's appeal on certain Core 2 issues, which I deal with in the next section of this Judgment.

187.
As to the amount of the interim payment, I take the view that, like the other parties, HSE is entitled to an interim payment based on 60% of their own costs by reference to the CMO. That means that the starting point of any interim payment is **£874,000** odd. Next is the claim over for the payment which HSE have to pay in respect of GMVL's costs and Essex's costs, a total of £2.125 million (£1.6 million plus £525,000).

188.
I accept that stripping out the Part 36 enhancements (paragraphs 179-182 above) will make a difference to the GMVL costs element of this figure, because Robson do not have to pay those costs. A reduction from the £2.125 million is therefore appropriate. But it is impossible to see how any such reduction could reduce the amount below **£1.7 million**.

189.
Accordingly, the interim payment to be paid by Robson to HSE should be in the sum of **£2.574** million. That is made up of the £874,000 in respect of HSE's costs, and £1.7 million in respect of the sums which HSE have to pay in respect of the costs of Essex and GMVL.

190.

£1.55 million of that amount, being the balance of the insurance monies can be paid immediately and I so order. There can be no question of a stay in respect of that amount; neither can there be any question of requiring guarantees or the like from HSE that the money would be paid back if the appeal was successful. That is because, on any view, the costs incurred in respect of Core 3 by GMVL, Essex and HSE were in excess of £1.55 million. Indeed, it is the amount of those costs that led Mr ter Haar QC to argue, unsuccessfully, that the costs on Core 3 were disproportionate. Robson are liable for those costs, come what may, because the appeal that Robson raise is unconcerned with Core 3. There is therefore no basis for a stay of the £1.55 million, nor any basis for requiring guarantees as to repayment from HSE following success on the appeal. It is therefore unnecessary to consider HSE's financial position further.

191.
The remaining issue, dealt with in **Section 9** below, is whether there should be a stay on the balance of the interim payment, of about £1 million.

9. ROBSON'S APPLICATION FOR A STAY

9.1
The Law

192.
CPR 52.7 provides as follows:

"52.7 Unless –

(a) the appeal court or the lower court orders otherwise;…

an appeal shall not operate as a stay of any order or decision of the lower court."

As the notes in the White Book make plain, the general rule is that a successful litigant should not be deprived of the fruits of their litigation pending appeal, unless there was some good reason for this course "The normal rule is for no stay": see Potter LJ in **Leicester Circuits Ltd v Coates Brothers Plc**[2002] EWCA Civ. 474 at paragraph 13. Sullivan LJ noted in **DEFRA v Downs**[2009] EWCA Civ. 257 that, in order to displace the normal rule, solid grounds had to be put forward. He said that such grounds would normally be "some form of irremediable harm if no stay is granted".

193.
I was taken to a variety of other authorities on this aspect of the dispute. I note in particular:

(a)
In **Linotype-Hell Finance Ltd v Baker** [1993] 1 WLR 321, Staughton LJ said that "if a defendant can say without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

(b)
In **Hammond Suddard Solicitors v Agrichem International Holdings Ltd**[2001] EWCA Civ. 2065, Clarke LJ (as he then was) said:

"Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the

respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

194.
I was also referred to various other authorities which I consider to be irrelevant for present purposes. These included **Keary Developments Ltd v Tarmac Construction Ltd** [1995] 3 All ER 534 and **Contract Facilities Ltd v Estates of Rees (Deceased) and Others**[2003] EWCA Civ. 465, which are both cases dealing with whether or not the appeal would be stifled if a stay was not granted. That is not the case here, because Mr ter Haar QC has made plain that the insurers will fund the appeal come what may. Furthermore the cases of **Lloyds Bank PLC v Croad** [1996] unreported, and other parts of **Hammond Suddard**, are concerned with terms which may be imposed on any stay, and issues as to the sufficiency of evidence. Again, in my judgment, these points do not arise here. **In Re Wenborn & Co**[1905] 1 Ch 413 is immaterial because it is concerned with liquidation and preferred costs.

195.
In my view, despite the attempts of Mr Hargreaves QC to persuade me that the test for a stay was more restrictive, I consider that the rule and the authorities lead to these issues:

(a)
Are there grounds for departing from the usual rule that there will not be a stay?

(b)
"Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice" (see Potter LJ in **Leicester Circuits**).

9.2
The Evidence

196.
The original financial position of Robson was dealt with in the statement of Mr Garry Julyan, the Commercial Director of Robson, in a statement dated 11 December 2013. That exhibited the most recent accounts related to the year ending 31 December 2012. That made plain that:

(a)
Robson were entirely owned by T Clarke PLC;

(b)
The most recent accounts, up to 31 December 2012, showed a profit of just over £1 million on achieved turnover of £21 million odd.

(c)
The net current assets were £1.86 million.

(d)
Robson had a very poor year in 2013 due to the tough economic trading circumstances which was likely to lead to a small loss for the year of around £100,000.

(e)

“The position at the moment is precarious, with DGR operating on a hand to mouth basis in the hope of an upturn in performance. If DGR was required to pay a significant sum in relation to costs in the near future then I consider it likely that the company would be forced into an insolvency situation.”

(f)
The trading prospects for the next year were not good.

(g)
If Robson were obliged to meet any significant sum in excess of its insurance cover they would have no alternative but to liquidate the business, making all staff and operatives redundant.

197.
The position was updated by a further statement by Mr Julyan dated 18 February 2014 which, in summary, noted some slight improvement in the available financial information but still referred to the financial position as precarious, with Robson “operating on a hand to mouth basis in the hope of an upturn in performance.” The trading prospects for 2014 were described as uncertain.

198.
In relation to the financial support from T Clarke PLC, the financial position can, I think, be summarised as follows. There is an overall overdraft facility amongst all the companies in the group of £8 million. Currently there is a balance available to the companies, including Robson, of around £400,000. Although Mr Julyan’s statement appeared to suggest that T Clarke PLC both could not lend any further money to Robson and would not lend any further money to Robson, the subsequent statement from Mr Walton appears to support only the second argument, namely that T Clarke PLC is not prepared to finance Robson in respect of the litigation or its liabilities up the line.

199.
In the light of that, it appears odd that, in December 2013, Robson provided T Clarke PLC with the sum of £500,000. This was at precisely the time that Robson were saying that they did not have any money to meet their liabilities arising out of the litigation other than the insurance money. The explanation for the payment was not given at the time and was not given until Mr Robson’s subsequent statement on 3 March 2014. Furthermore, Mr Robson’s explanation, that the money was payment for group relief and for services provided by T Clarke PLC to Robson, amongst other things, seems curious, given the timing of the payment and the fact that the records show that this money was not expected or anticipated to be paid by Robson to T Clarke PLC: the documents show a forecast for this amount at £0. The evidence certainly demonstrates that, in December, Robson had £500,000 which they could have paid to discharge their liabilities in this litigation but instead chose to pay to their parent company.

200.
HSE complain that, if they have to wait for any further payments from Robson then they will be prejudiced. However, I rather agree with Mr ter Haar QC that it is very unclear what that prejudice might be. If the appeal fails, it looks unlikely that Robson will have sufficient monies to make any significant further payments to HSE. And if the appeal is successful then, depending precisely on the outcome, it may be that Robson’s liability for costs will not be more than £1.55 million, to which I have already referred and which is the subject of the interim payment that I have ordered without a stay.

9.3
Analysis

201.
I accept on the evidence before me that, if Robson are ordered to pay more than the £1.55 million referred to in paragraph 190 above, there is a significant risk that they will be put out of business. That would be irremediable. On the other hand, if I order a stay of any amount beyond the £1.55 million, the prejudice to HSE is uncertain at best and must in any event be limited, particularly as the Court of Appeal has now indicated that the appeal can be accommodated in June 2014. That suggests strongly that, balancing the alternatives and considering what is less likely to cause injustice, I should impose the stay.

202.
As will be apparent from paragraph 199 above, I am not entirely satisfied about the explanation of the payment of £500,000: it may be an attempt by Robson to clear debts to T Clarke PLC whilst they are still trading which would be at least an indirect way of depriving HSE of the fruits of the judgment. But I do not have enough evidence to conclude, even on the balance of probabilities, that this is what happened.

203.
For these reasons, I consider that Robson have made out the necessary test under CPR 52.7. A stay of the balance of the interim payment until after the judgment in the Court of Appeal is less likely to cause injustice, particularly given the relatively short time and the potentially catastrophic consequences for Robson if they have to make further payment now. In those circumstances, I grant the stay on the remaining £1 million odd of the interim payment until judgment in the Court of Appeal.

10. ESSEX'S APPLICATION UNDER SECTION 51

10.1
Orders Sought

204.
Originally, Essex sought orders that, in respect of Essex's liability to GMVL, and HSE's liabilities to Essex:

(a)
Payment in satisfaction of those liabilities was to be made by Robson to GMVL (to the full extent of Essex's liabilities to GMVL) and by Robson to Essex (to the full extent of HSE's liabilities to Essex);

(b)
If and to the extent that Robson fail to make any payment required under (a), then HSE will do so;

(c)
If and to the extent that HSE fail to make any payment required under (b) then Essex will do so;

(d)
GMVL will accept payments made by Robson under (a) by HSE under (b) in full or partial (as the case may be) satisfaction of Essex's liabilities to GMVL;

(e)
Essex will accept payments made by Robson under (a) and by HSE under (b) in full or partial (as the case may be) satisfaction of HSE's liabilities to Essex.

205.

At the end of the hearing, when Ms Sinclair QC made this application, she said that the order would have to be amended because, as a result of the appeal, the order in respect of Robson would just relate to Core 3. No draft orders were provided as a result of this modification. It was, I think, a demonstration of the complications likely to result from an order of this sort.

10.2
The Law

206.
There is no doubt that the court has the jurisdiction to make the order sought by Essex, arising from Section 51 of the Senior Courts Act. Indeed, in case law it can be derived from **Edgington v Clark and Another** [1964] I QB 367, subsequently confirmed by the House of Lords in **Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No. 2)**[1986] 1 AC 965.

207.
However, in **Johnson v Ribbins**, referred to above, Goff LJ (as he then was) said:

“Thus, the question resolves itself in our view into this, namely, is there on the facts of this case anything which should lead the court in exercising its discretion to depart from the normal principle that costs follow the event? We can see nothing. On the contrary, in our judgment, the facts call strongly for it to be observed.

Apart from the impact of legal aid the consideration of which, as we have already observed, is excluded by the Act itself, we can see nothing which the defendants can call in aid except the impecuniosity of the plaintiff, but it cannot be right to deprive a third party of an order for costs to which he is otherwise entitled against the defendant, because the defendant when looking to the plaintiff for reimbursement finds a person not worth powder and shot.”

10.3
Submissions

208.
On behalf of Essex, Ms Sinclair QC said that the orders that she sought, although potentially more complex, will avoid Essex having to try and collect monies and pass it on to GMVL. She said that they effectively followed the same packages of costs to which I have already referred.

209.
No one else was attracted to the orders suggested by Ms Sinclair QC. Mr Stansfield QC, on behalf of GMVL, said that, if the matter was as straight forward as Ms Sinclair indicated all of the defendants would agree to it. He said that it would give rise to unnecessary further complications particularly in circumstances when HSE were in administration and Robson were in a precarious financial position. He also said it was difficult to see how the orders could possibly work now that, as Ms Sinclair QC conceded, much of it would relate only to Core 3. He concluded that the effects of the order was that GMVL were being asked to agree to the replacement of a solvent company, Essex, by an insolvent company (HSE) and one in a precarious financial position (Robson). He was also concerned about delays in payment.

210.
Similar points were raised by both Mr Hargreaves QC and Mr ter Haar QC. Mr Hargreaves QC made the point that, if the position was free from complexity, the parties would not be in court dealing with these complicated points in the first place. In any event the position was likely to be more complicated

with suggestions of claims against insurers, points about the construction of policies and the solvency of Robson. Mr ter Haar QC agreed with that and added that he doubted whether the court had full jurisdiction to make these orders because of the existence of the contractual indemnities. Those might allow the court to order 'A' to pay money to 'B' where there was a contractual indemnity in the contract between them, but it might be difficult to order 'A' to pay the money to 'C' with whom he had no contract and therefore no indemnity.

10.4

Conclusion

211.

In my view, the submissions of Mr Stansfield QC, Mr Hargreaves QC and Mr ter Haar QC are to be preferred. This is not a case in which I should depart from the usual order relating to the payment of costs. The order adds a level of complication which this case does not need. It may cause delay and may have unforeseen, but very unfortunate, financial consequences because of the precarious financial position of HSE and Robson. For all those reasons, I refuse Ms Sinclair QC's application on behalf of Essex for orders under Section 51 of the Senior Courts Act.

212.

I would ask the parties to draw up an order reflecting the decisions noted in this Costs Judgment.