Neutral Citation Number: [2015] EWHC 481 (TCC)

Case No: HT-13-390

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

Royal Courts of Justice

Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 5th March 2015

Before:

THE HONOURABLE MR. JUSTICE COULSON

- -

Between:

CIP Properties (AIPT) Limited

(Formerly known as Norwich Property Trust Limited)

- and -

Galliford Try Infrastructure Limited

- and -

EIC Limited

- and -

Kone PLC

- and -

DLG Architects LLP

- and -

Damond Lock Grabowski & Partners

- -

- -

Andrew Post QC and Frances Pigott (instructed by **Squire Patton Boggs**) for the **Claimant**

Adam Constable QC and Richard Coplin

(instructed by **CMS Cameron McKenna**) for the **Defendant**

Joanna Smith QC and Michael Wheater (instructed by **Plexus Law**) for the **Third Party**

Kate Livesey (instructed by **Norton Rose Fulbright**) for the **Fourth Party**

Fiona Sinclair QC and Siân Mirchandani

(instructed by **Mills and Reeve LLP**) for the **Fifth and Sixth Parties**

Hearing date: 13 February 2015

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COSTS JUDGMENT [No. 2]

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1.
This Judgment arises out of an all-day hearing on 13 February 2015 in which all the other parties made extensive and sustained criticisms of the claimant's costs budget. Towards the end of the hearing I indicated that I considered that the claimant's costs budget was an entirely unreliable document, and that both the costs already incurred by the claimant, and its estimated costs for the future, were disproportionate and unreasonable. I also said that I thought that a reasonable and proportionate figure for the entirety of the claimant's costs of this action would be broadly equivalent to £4.3 million, which is what its say it has already spent. I then canvassed the parties' views as to what, in those circumstances, the court should do.

2.
This Judgment explains in detail why I have formed such a dim view of the claimant's costs budget, and which of the various options suggested by the parties I have felt obliged to take. Along the way, a number of points of principle fall to be considered and decided.

3.
Thus, in **Section 2** below I set out the applicable parts of the CPR. In **Section 3**, I deal with the background and history of the litigation. Then, in **Sections 4**, **5** and **6**, I deal with the reliability of the claimant's costs budget, its proportionality and its reasonableness. Thereafter, in **Sections 7**-**12**, I set out the various options and my conclusion as to the appropriate option in this case. In **Section 13** there is a short discussion of the other parties' costs budgets.

4.
This is the second time that the parties have spent a full day before the court arguing about costs budgets. During the CMC held on 3 October 2014, there was a major dispute as a result of the claimant's novel argument that, because of the relatively high value of the claim, the court did not have the discretion to consider making any cost management orders at all. I ruled against the claimant on that topic ([[2014] EWHC 3546 (TCC)]). The latest hearing follows on from that ruling. This hearing focused on issues which, in my view, stemmed from the unreasonable stance adopted by the claimant. At one point, there were 26 people in court, excluding me, considering the detail of its costs budgets. Such satellite litigation, and the costs incurred in consequence, is very far removed from the spirit and purpose of the new costs management provisions in the CPR. I am bound to say that none of this reflects any credit on the claimant's decision to contest the principle of budgeting in cases over the threshold.

2. THE APPLICABLE REGIME

5.
The regime that applies in this case issued on 23 October 2013 is the version of the relevant Costs Management Rules as set out in the 2014 White Book. The relevant provisions are as follows:

"**Costs management orders**

3.15-(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.

(2) The court may at any time make a “costs management order”. Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will—

(a)
record the extent to which the budgets are agreed between the parties;

(b)
in respect of budgets or parts of budgets which are not agreed, record the court’s approval after making appropriate revisions.

(3) If a costs management order has been made, the court will thereafter control the parties’ budgets in respect of recoverable costs.

…

Court to have regard to budgets and to take account of costs

3.17-(1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.

(2) Paragraph (1) applies whether or not the court has made a costs management order.

Assessing costs on the standard basis where a costs management order has been made

3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will–

(a)
have regard to the receiving party’s last approved or agreed budget for each phase of the proceedings; and

(b)
not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

(Attention is drawn to rule 44.3(2)(a) and rule 44.3(5), which concern proportionality of costs.)”

6.
Practice Direction 3E provides as follows:

“**Budget format**

3EPD.1

1 Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with an easily legible typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party. In cases where a party’s budgeted costs do not exceed £25,000, there is no obligation on that party to complete more than the first page of Precedent H.

(The wording for a statement of truth verifying a budget is set out in Practice Direction 22.)

Costs management orders

3EPD.2

2.1 If the court makes a costs management order under rule 3.15, the following paragraphs shall apply.

2.2 Save in exceptional circumstances-

(a)
the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved budget; and

(b)
all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved budget.

2.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

2.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

2.5 The court may set a timetable or give other directions for future reviews of budgets.

2.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

2.7 After its budget has been approved or agreed, each party shall re-file and re-serve the budget in the form approved with re-cast figures, annexed to the order approving it.

2.8 A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party.

2.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets."

7.
It should be noted that, subsequently, Practice Direction 3E paragraph 2.4 has been amended and, instead of saying that the court "should" take the incurred costs into account, it now says that the

court “will” take those costs into account when considering the reasonableness and proportionality of the costs to be incurred.

8.
For reasons which will become apparent later, one of the difficulties in the present case is the very high level of costs which the claimant says it has already incurred. There have been two cases recently in which the level of costs already incurred has been considered by the court.

9.
In **Redfern v Corby Borough Council** [2014] EWHC 4526 (QB) HHJ Seymour QC upheld the decision of Deputy Master Eyre in a case where the Deputy Master considered that a proper figure for the costs of the case as a whole was £220,000. That was broadly equivalent to what had already been spent. On the appeal it was argued that the consequence was that the amounts which had been allowed for costs yet to be incurred were inadequate. Judge Seymour rejected that submission, saying:

“That, I think, must be a consequence, potentially, of taking into account in fixing the budgets the amount of the costs already incurred in deciding what would be reasonable and proportionate in respect of all subsequent costs. The only way in which one can take into account excessive costs already incurred in determining the reasonableness and proportionality of subsequent costs is to limit the approved subsequent costs at figures below what they might otherwise have been approved at but for the excessive sums which have already been expended.”

10.
In **Yeo v Times Newspapers Ltd** [2015] EWHC 209 (QB) Warby J also had to consider the problem of incurred costs. He said:

“61. However, if by the time the costs management process takes place substantial costs have been incurred, one thing the court may do is to “record its comments on those costs”: see PD3E 7.4. What the court will do is to “take those costs into account when considering the reasonableness and proportionality of all subsequent costs”: ibid. The court may reduce a budget for reasons which apply equally to incurred costs, or for reasons which have a bearing on what should be recoverable in that respect, for instance, that so much had been spent before the action began that the budgeted cost of preparing witness statements is excessive. If so, it is likely to help the parties reach agreement without detailed assessment later on if these reasons are briefly recorded at the time the budget is approved. I make some comments of this kind below.”

11.
In **Yeo**, however, I note that the amount of the incurred costs did not create as acute a problem as it did in **Redfern,** and as it does here.

3. BACKGROUND

12.
Prior to the first CMC before Ramsey J in February 2014, the claimant filed a Case Management Information Sheet. That estimated that the claimant had spent £1,575,425.39 by way of costs to date. The estimated total costs for the case on the part of the claimant, including the £1,575,425.39 already spent, was £3,420,425.39.

13.
Those figures are in stark contrast to the costs figures now put forward. The claimant now claims that it has incurred costs of £4,226,768.16 and that its total estimated costs are £5,050,469, making a total

of over £9.2 million. Although some last-minute corrections have reduced this to £8.9 million (changes which go to the reliability of the claimant's own figures), other large sums have been excluded which, when added back in, take the total towards £9.5 million.

14.
The claimant's figures are to be contrasted with those of the other parties. The defendant, who has also commenced proceedings against the third, fourth, fifth and sixth parties ("the additional parties"), has incurred costs of just under £1.5 million, and estimates incurring future costs of £3 million odd, making a total of £4,483,140.41. The third party's total costs (incurred and estimated) are put at £2.4 million odd; the fourth party's total costs at £1.15 million odd; and the fifth and sixth party's costs at £1.9 million odd. Put another way, the claimant's incurred and estimated costs are broadly equivalent to the costs of all four other parties combined.

15.
The sheer size of the claimant's costs needs of course to be considered against the backdrop of the claim in the litigation. The claimant owns a large development on the site of the former children's hospital in Ladywood, Birmingham. There are defects alleged in the works and the claim against the defendant, the contractor, is for the costs of remedial works to put right those defects.

16.
The claim is therefore a standard TCC defects claim. There are six principal items:

(a)
Drainage defects in the plaza area (£3 million odd);

(b)
Defective car park ventilation (£2 million odd);

(c)
Defective escalators (£1 million odd);

(d)
Defective storm water drainage to the plaza (£771,288);

(e)
Defective finish to steel work (£434,301); and

(f)
The need for a new plant room (£288,261).

All of these costs are exclusive of fees and other 'soft' costs, which appear from the pleadings significantly to increase the overall value of the claim.

17.
Although the total damages claim is currently put at £18 million odd, there are significant arguments that the claim has been grossly inflated as a result of the scope of the remedial works, the way those works are being carried out, 'betterment' and so on. Furthermore, although there are 785 individual complaints, 329 of those complaints have no direct value attributed to them; 115 complaints have a value of less than £100; 135 complaints have a value between £100 and £1,000; and the 6 principal items referred to in paragraph 16 above make up 82% of the value of the claim.

18.

It appears clear that this claim will be a relatively straightforward matter for the claimant to pursue. As is the way with defects claims, much will turn on the expert evidence relating, first, to the existence or otherwise of defects/breaches of contract; and, second, to the appropriate remedial work. Evidence of fact is likely to be extremely limited. Similarly, it is unlikely that there will be a need for an extensive chronological bundle. In my experience, defects cases do not turn on factual evidence as to what happened at the time of design or construction. What matters is the expert evidence about what went wrong.

19.
In addition, the defendant has a greater burden than the claimant in the litigation (at least from now on in) because, not only is it defending itself against the claims being made but, to the extent that those claims are sustained, the defendant seeks to pass them on to the third party (the sub-contractor responsible for the M&E works); the fourth party (responsible for the lifts and escalators); and the fifth and sixth parties (the architects). In my experience of cases of this sort, both in the preparation for the trial and at the trial itself, the principal burden always falls on the party seeking both to defend the claims and, where they are sustained, to pass them on to the relevant sub-contractors.

4. THE RELIABILITY OF THE CLAIMANT'S COSTS BUDGET

4.1
General

20.
Both the defendant and the third party made detailed and wide-ranging submissions as to the unreliability of the claimant's costs budget. In that they were supported by the more general submissions of the fourth, fifth and sixth parties. For the reasons set out below, I find that these criticisms were fully made out.

4.2
The Increase in Costs

21.
As I have already noted, a year ago, the claimant said that the costs it had incurred to date were £1.5 million odd. The claimant now says that, over the course of the past year, it has incurred an additional £2.5 million by way of costs, despite the fact that disclosure has not been completed and that work on witness statements, experts' meetings and reports, and other matters, has not yet started. The claimant has not sought to explain how such a vast increase in costs has come about, nor why such an increase can be justified. On behalf of the third party, Ms Smith QC submitted that, in the circumstances of this case, the absence of such an explanation is highly significant. I agree.

22.
The claimant indicated that it had spent about £1.5 million by the time of the first CMC. Since then, in terms of the action as a whole, very little has happened. A preliminary issue, first formulated by the defendant, was subsequently abandoned. Disclosure has taken place but is not complete. Moreover, as I have said, disclosure in a defects case is not usually a particularly significant exercise. Lots of documents may have been disclosed, but I doubt whether many of them will have any relevance to the issues at trial. The only other thing that has occurred in the last year has been the claimant's unsuccessful attempt to avoid having to provide a costs budget altogether.

23.

I find that nothing that has happened over the course of the last year could begin to justify an increase in the costs actually incurred by the claimant of £2.5 million, and I take the absence of any attempt to justify this increase as a tacit acceptance by the claimant that the costs incurred over the last year are unjustified.

24.
In his written submissions on behalf of the claimant, one of the points made by Mr Post QC was that the court should not have any great regard to the costs budget figures put forward by the defendant and the additional parties because they had ‘an incentive’ to advance low figures in their costs budgets. This suggestion of manipulation of the figures by the other parties was, understandably, the subject of considerable protest. It seemed to me to be an unwarranted accusation. In truth, the party who was most vulnerable to such an accusation was the claimant itself. The claimant had said that its incurred costs were £1.5 million and had subsequently argued that it should not produce any costs budgets at all. I ruled against the claimant on the point and the next thing that happens is that their incurred costs have mysteriously increased, without explanation, to over £4 million. The absence of any explanation for that increase inevitably makes the court suspicious of the figures for incurred costs now put forward by the claimant.

25.
In my view, the unexplained and significant increase in costs said to have been incurred renders the claimant’s costs budget unreliable.

4.3
Increase in Estimated Costs

26.
Precisely the same issues arise from the huge increase in the estimated costs put forward by the claimant. The claimant identified in its Case Management Information Sheet a figure of £1,695,000 for the estimated costs of the main action, together with £150,000 in respect of the preliminary issues. Subsequently, the claimant alleged that its costs for the preliminary issues alone were £500,000, a matter I deal with separately below. And its estimated costs for the main action are now put at £5 million odd, another vast increase for which there is no explanation. Furthermore, although Mr Post QC sought to argue that the figure for estimated costs in the CMIS did not include disbursements, such as counsel’s fees, there was no evidence that such a gross mistake had in fact been made. On the face of it, the submission was wrong, given that the CMIS expressly refers to the estimated figure of £1.5 million as ‘legal fees’ (which would of course include counsel’s fees).

27.
Again, therefore, this vast increase between the estimated costs originally indicated by the claimant, and the estimated costs in their latest costs budget, is unexplained and, on the face of it, wholly unjustified. I find that this is a further indication of the unreliability of the claimant’s costs budget.

4.4
Costs of Preliminary Issues

28.
I have already pointed out that, although the claimant originally estimated its costs for the preliminary issues at £150,000, once the defendant had abandoned that case and was ordered to pay the claimant’s costs, the claimant sought £515,806.53 by way of costs. Again, as is the pattern with the claimant, there was no attempt to explain or justify this vast increase in costs. Moreover, this

figure of £515,806.53 is **excluded** from the claimant's current costs budget. In other words, if this is added back in, the costs already incurred come close to £5 million and the claimant's overall costs are at about £9.5 million.

29.
The unjustified and unexplained increase in the costs in respect of the preliminary issues, and the exclusion of those figures from the costs budget, are further reasons why I am obliged to doubt the reliability of that costs budget. I also note that, when the claimant sought these costs from Ramsey J, he was not prepared to award them more than £125,000 by way of interim payment, less the sum of £42,000 by way of the costs in respect of the argument about the interim payment, because the claimant recovered less than the defendant had offered. Thus another judge in this same case has expressed his concerns about the fundamental reliability of the claimant's costs figures.

4.5
The Schedule of Assumptions and Contingency

30.
The claimant's costs budget was accompanied by a document entitled: 'Schedule of Assumptions and Contingency to the Claimant's Costs Budget.' In addition, Counsel's and experts' assumptions were set out separately in a section headed "Addendum Disbursements". This document runs over six closely-typed pages and contains no less than 65 separate assumptions and alleged contingencies pertaining to the claimant's costs budget. There are so many of these assumptions, and they are so widespread in nature and effect, that they alone render the claimant's costs budget wholly uncertain and therefore unreliable.

31.
For example, although the claimant served some proposed amended pleadings at the same time as this Schedule of Assumptions, the defendant and the additional parties argued that the Schedule of Assumptions makes plain that no allowance had been made in the costs budget for these very amendments. The claimant contended that the Schedule of Assumptions excluded only amendments relating to new matters that might in future be introduced by the defendant, but that was not borne out by the Schedule itself, and was another example of the claimant's failure to do any part of the exercise properly. Other examples include purported limitations on disclosure and even on the witness statements to be produced by the other parties. Thus, at assumption 6.2, it is said that the cost budget had been prepared on the basis that the defendant and additional parties will serve witness statements less then 20 pages in length. This is an entirely arbitrary limit and appears designed solely to ensure that, if the statements were longer, the claimant's legal team could claim more by way of costs at a later date.

32.
Other inappropriately restrictive assumptions relate to experts and the PTR. The latter is a good example of the claimant's approach. They estimate £101,000 as the costs of the PTR (equating to 290 hours). But the Schedule of Assumptions makes it plain that this element of the costs budget is estimated on the basis "that no chronology, case summary or dramatis personae will be required for the PTR". It also makes plain that it assumes that all relevant directions will have been complied with by the time of the PTR. In such circumstances, it is rather difficult to work out what the £101,000 is likely to be spent on.

33.

In my Judgment, the Schedule of Assumptions goes far beyond the legitimate identification of contingencies in Precedent H. I find that it is designed to ensure that the claimant's legal team is not limited to the already vast costs in the budget document, and can come back under a vast range of heads in order to claim more than the amount in the costs budget. It is a wholly illegitimate exercise in avoiding the certainty and clarity that comes from costs management orders; it is designed to undermine the whole basis of such orders.

34.
I also note that, despite the existence of this Schedule of Assumptions, the claimant has accepted, in the run-up to this hearing, errors in its original costs budget worth over £300,000. Ms Smith QC argued that this also demonstrated the inherent unreliability of the costs budget. I agree. The lack of care and scrutiny in the preparation of the original budget, and the modifications subsequently necessitated, make the claimant's budget wholly unreliable.

4.6
Conclusions

35.
For the reasons that I have outlined above, I consider that the claimant's costs budget is a wholly unreliable document. What is more, given the deliberate absence of any explanation for the huge increase in the costs incurred and estimated, and the Schedule of Assumptions which can only be designed to give the claimant's legal team the maximum room for manoeuvre later on, I am driven to conclude that the claimant's costs budget has been deliberately manipulated. The claimant did not and does not wish the court to make costs management orders. I find that the production of the costs budget in this format and in this way is a continuation of that stance by other means.

36.
These findings of unreliability mean that, when I come to comment on the incurred costs and fix budget figures, the claimant is in a particularly difficult (and sometimes vulnerable) position. In my view, it only has itself to blame for this.

5. THE PROPORTIONALITY OF THE CLAIMANT'S COSTS BUDGET

5.1
General

37.
Proportionality of costs is referred to in the overriding objective (CPR Part 1). They are dealt with expressly at CPR Part 44.3(5) which states that:

"Costs incurred are proportionate if they bear a reasonable relationship to –

(a)
The sums in issue in the proceedings;

(b)
The value of any non-monetary relief in the proceedings;

(c)
The complexity of the litigation;

(d)

Any additional work generated by the conduct of the paying parties; and

(e)
Any wider factors involved in the proceedings, such as reputation or public importance."

38.
In **Savoye and Savoye Ltd v Spicers Ltd** [2015] EWHC 33 (TCC) Akenhead J said at paragraph 17:

"In the light of the above, and for the purposes of costs assessment, the Court should have regard when assessing proportionality and the reasonableness of costs, in the context of the current case or type of case, to the following:

(a)
The relationship between the amount of costs claimed for and said to have been incurred and the amount in issue. Thus, for example, if the amount in issue in the claim was £100,000 but the costs claimed for are £1 million, absent other explanations the costs may be said to be disproportionate.

(b)
The amount of time said to have been spent by solicitors and barristers in relation to the total length of the hearing(s). For example, if 3,000 hours of lawyers time is incurred on a case which involves only a one day hearing, that might well point to a disproportionate incurrence of time spent.

(c)
In the context of time spent, the Court can have regard to the extent to which the lawyers for the party claiming costs and the party itself has incurred cost and spent time before the Court proceedings in connection with any other contractual dispute resolution machinery agreed upon between the parties. Here, for instance, there was provision for adjudication, in which the parties were required to pay their own costs of that process. If and to the extent that the work in connection with the adjudication duplicates the work done in the Court proceedings, or, put another way, if the same issue arises and was addressed in the Court proceedings as in the adjudication, it may be disproportionate to expend anew what is repetitious effort and time in the later proceedings.

(d)
The extent to which the case is a test case or in the nature of a test case.

(e)
The importance of the case to either party. If for instance an individual or a company is being sued for everything which he, she or it is worth, it may not be disproportionate for that individual to engage a QC even if the amount in issue is objectively not very large."

5.2
The Complexity of the Case

39.
I have already said at paragraphs 16-18 above that, in my view, this is not a particularly complex claim. It is a relatively standard TCC defects case and, as is typical, a handful of individual defects will take up the lion's share of the case. There will not be the need for extensive witness statements or a lengthy chronological bundle. The issues of both liability and quantum will almost certainly turn on the expert evidence.

40.

Furthermore, I consider that the party with the most work to do (certainly from now on) is the defendant, because it is effectively "looking both ways". I note that the defendant's costs, both incurred and estimated, come to a total of £4,483,140.41. I consider that to be at the upper end of costs which could be said to be proportionate to a claim of this type. It follows, therefore, that I find that the claimant's figure of around £9 million is wholly disproportionate to the complexity of the case.

5.3
Value of the Claim

41.
The claim is said to be worth £18 million odd. Those figures are hotly contested because the defendant and the additional parties say that the claim is grossly exaggerated. There are numerous arguments about the nature and scope of the appropriate remedial works.

42.
It is of course not possible for the court to form a concluded view at this stage as to the true value of the claim. However, I consider it most unlikely that the claimant will recover the full sum claimed by way of damages in this case. As already noted, the direct costs of rectifying the six principal defects is less then £8 million.

43.
The value of the claim is of course a factor in calculating proportionality although, in a case of this type, it is not as important as complexity. After all, it might cost £300,000 or £30 million to rectify drainage defects, but the expert evidence necessary to prove those defects (and the reasonableness of any remedial scheme) will be broadly the same. In my view, even if I took a value of £12 million for this claim, it would not be appropriate for the claimant's costs to be assessed at 75% of the value of the claim. That would be disproportionate.

44.
I consider that the defendant's figure of £4.4 million odd is at the higher end of proportionality. If the claimant's figure was in the same sort of bracket, and the additional parties' costs budgets are as they are set out above, the overall figures for costs would also be around £12 million, perhaps a little more. That again is at the upper level of what I consider to be proportionate. But again it means that the claimant's current figure, which is more than twice the defendant's £4.4 million is disproportionate by reference to the value of the claim.

5.4
Conclusions as to Proportionality

45.
In my view, by reference to CPR 44.3(5) and the decision in **Savoye**, the claimant's costs both incurred and estimated are disproportionate to the complexity and value of this claim. In my view they bear no relation to what is required to be spent to advance this case in a proportionate way. There is no reason – and no reason has been put forward – why the claimant's overall costs figures should not be similar to that of the defendant. In my view, if anything, it should be less, because the defendant will be doing most of the work in preparing for and running the trial. The claimant's figures currently put forward are plainly disproportionate.

6. THE REASONABLENESS OF THE CLAIMANT'S COSTS BUDGET

6.1

The Five Points

46.
In support of the claimant's position that its costs were reasonably more than twice that of the defendant, Mr Post QC put forward five reasons to justify the disparity:

(a)
The outcome of the proceedings was likely to be that the defendant would be ordered to pay the claimant's costs in full or in part, and the defendant in such a situation "has an incentive to advance low figures in its costs budget".

(b)
By virtue of its role as claimant, this claimant has been obliged "to bear the lion's share of the proceedings". Mr Post submitted that a claimant had to advance a case whilst a defendant "was free to criticise the claimant's analysis without going to the expense of undertaking an equivalent analysis".

(c)
The defendant had largely failed to engage with the issue of remedial works.

(d)
The claimant was having to respond and deal with the issues raised by all four of the additional parties and was therefore facing multiple teams of lawyers and experts.

(e)
Difficulties with disclosure had led to problems with the formulation of the claim. It is said that the defendant should have been more forthcoming at the pre-action protocol stage.

47.
I reject each of these five reasons put forward by the claimant to justify the disparity and the level of their costs.

48.
As to (a), I have already dealt with the suggestion that the defendant has manipulated its figures to keep them low: there is nothing to justify such an assertion. Moreover, it is wrong to say that it is likely that the defendant would be ordered to pay the claimant's costs. In cases of this sort, it is my experience that Part 36 offers are almost always made, and usually early. In a defects case like this, the usual question is whether or not the court's ultimate judgment is above or below the level of the offer: see **McGlinn v Waltham Contractors Ltd** [2007] EWHC 149 (TCC) for the substantive judgment on defects, and [2007] EWHC 698 (TCC) for the 120 paragraph judgment on costs, and the consequences of the various offers. Accordingly point (a) above is incorrect in both respects.

49.
As to (b), it is wrong to say that, simply because the claimant is the claiming party in these proceedings, it has the lion's share of the costs. As I have already explained, these cases tend to be run by the experts who have identified the defects and the appropriate remedial work. Whilst Mr Post QC may be right that there are some cases where the claimant has to do much of the work and the defendant can sit and snipe on the sidelines, this is not that sort of case. In the TCC the defendant needs to be on top of all the relevant material just as much as the claimant, particularly in a situation like this where the defendant has incurred the costs risk of joining in three additional parties.

50.
Furthermore, even if I was prepared to assume that the claimant's costs incurred to date are likely to be higher than those incurred by the defendant or the additional parties, because they were involved in investigating the defects at the outset, I would expect to see a concomitant reduction in the claimant's costs, and an increase in the costs of the defendant and the additional parties, as the case moves towards trial. That would be the logical consequence of such a learning curve. But that does not explain the claimant's costs here, which are far higher than anybody else's costs, whether one looks at the costs incurred or the costs estimated from now until the end of the trial. Again, therefore, there is nothing in point (b) above.

51.
As to the point at (c), it is not possible for the court to form a view as to the defendant's 'level of engagement' in respect of the remedial works. However, the court should record that the defendant (and the additional parties) has complained vociferously about the way in which the claimant is undergoing the remedial works, and the additional wasted costs that the defendant says is being incurred as a consequence. That is one of the issues in the case. It does not, however, justify the disparity in costs. In addition, I accept the defendant's criticism that the claimant's pleadings are very light on the detail of the proposed remedial works.

52.
As to (d), it is wrong for the claimant now to suggest that its own costs are greater because of the presence of the additional parties, given that the claimant has said throughout that its costs and its costs budgets have been prepared by reference to its claim against the defendant only. That is presumably why the claimant entered into a design and build contract in the first place. The presence of the additional parties may well justify an increase in the costs of the defendant; it does not justify any sort of increase in the costs of the claimant.

53.
The court cannot go into the point at (e) above, as to the disclosure issues. There is insufficient information and again the point is strongly argued on both sides. I note that considerable amounts of documentation have been disclosed. I can only reiterate the view that I have expressed before that, in my experience, only a tiny proportion of these documents will turn out to be relevant. In any event, since there are criticisms of disclosure on each side, that again cannot justify the disparity in costs.

54.
In all those circumstances, having rejected each of the five points put forward by the claimant as explaining the gross disparity in costs, I am left with a set of claimant's costs which are out of all proportion to those of anyone else, with no proper reasons put forward to justify the differences. On the face of it, therefore, the claimant's costs are unreasonable on this basis alone.

6.2
Hourly Rates; Work Done; Estimated Hours

55.
Although the claimant's solicitors are based in Birmingham, they are claiming for a partner at a Grade A rate of £370 per hour. This is to be contrasted with the guideline Grade A rate for Birmingham of £217 per hour. I consider the £370 to be unreasonable.

56.

In addition, the claimant's costs budget identifies vast swathes of hours worked/estimated to be done by the lead Grade A partner, with much less work being performed by junior lawyers. Having considered the written submissions on this issue, I consider that this is a specific cause of the unreasonable level of the claimant's costs. The hourly rate is too high but more importantly, the claimant is using the Grade A partner for work which is inappropriate and could be done more cheaply by lower grade assistants. This goes right through the claimant's costs budget.

57.
Thirdly, I consider that the hours said to have been worked so far, and the hours estimated to be worked in the future, particularly in the trial preparation and trial stages, are both excessive, for each phase of costs. The hours claimed are much more extensive than is reasonable or appropriate for a case of this type.

6.3
Pre-Action Costs

58.
It is said that pre-action costs have been incurred in the sum of £1.3 million. No explanation for, or justification of, this huge figure has been provided by the claimant. I consider that the sum is wholly unreasonable. I note that the defendant has spent £560,077 on pre-action costs. Even if I allow for slightly more for the claimant, given that they were investigating the defects at the outset in a way that the defendant was not, I would not be prepared to accept a figure of more than £680,000 as a reasonable sum for pre-action costs.

59.
It is well-known that many of those involved in the work of the TCC feel that the pre-action protocol is front-loading the costs of litigation to an unreasonable degree. The figure for pre-action costs in the claimant's costs budget in this case is proof positive that such concerns are not idle. It is impossible to justify spending £1.3 million in a defects case before you even start proceedings.

6.4
Issue/Statement of Case

60.
The claimant says that they have spent £630,945.85 in relation to pleadings, and estimate spending a further £442,475.

61.
In my view, the figure of £630,945.85 is unreasonable. An unreasonable amount of time has been spent by very expensive lawyers on the somewhat opaque pleadings as they currently are; Mr Constable QC demonstrated that the claimant was claiming the equivalent of one year's worth of lawyer time on this task. That is plainly unreasonable and unjustified.

62.
In addition, the figure for future costs of £442,475 is inexplicable. That is based on an additional 550 hours of solicitor time and yet more expert's fees. Time and costs at such a level are unjustifiable. It is in any event unnecessary to deal with amendments unless the case has been deficiently pleaded thus far (in which case there would have to be a further reduction in the costs to date). In my view, a sum of £500,000 in respect of the totality of pleadings is reasonable in a defects case like this.

6.5

CMCs

63.
£143,670 is said to be the costs incurred on past CMCs, and a further £123,225 is said to be incurred for further CMCs. As to the CMCs which have already occurred, I consider that not more than £50,000 should have been spent on the previous CMCs. Furthermore, one of the issues which arose at the October CMC was the costs argument, which the claimant lost. They should not recover those costs in any event.

64.
No significant sum should be allowed for further CMCs because they may not be necessary. They are in the diary as a precaution because of the difficulties with this case to date. They do not have to be utilised for the sake of it. I would allow no more than £50,000 in respect of any future CMCs. The sums claimed are based on the need for 275 hours to be spent on these matters, which is an absurdly high figure.

6.6
Disclosure

65.
The claimant's costs of disclosure are said to be £779,457.62 incurred and £402,090 estimated. I regard these figures as wholly unreasonable. I have already said, and I repeat, that defects cases do not turn on the historic documents. In my view, no more than £350,000 should have been spent on disclosure with no further sums allowable for the future. £350,000 is the upper limit of what might be regarded as reasonable for the entirety of the disclosure exercise in this case.

66.
The claimant's costs incurred suggest that they have spent more than 3,300 hours on disclosure. That is either wrong or, if it is accurate, it is unjustifiable. I remind myself that the claimant repeatedly claimed that it had no documents of its own, because it was a subsequent purchaser. That turned out to be wrong. The defendant, who has had to consider more documents than the claimant, has done so in about one third of the time and at one third of the cost. There is also evidence that the claimant's legal team has spent time on the disclosure of documents which, on analysis, relate to a wholly different project.

67.
The estimated costs are similarly unreasonable. Incurring counsel's fees of £110,000 in respect of the ongoing disclosure exercise is unreasonable.

6.7
Witness Statements

68.
The claimant estimates the sum of £324,880 as the costs of dealing with witness statements, the equivalent of 880 hours. This figure is unreasonably high. It appears that it is envisaged that the claimant will prepare witness statements from three people who dealt with the claimant's acquisition of the property, a topic which is likely to be entirely uncontroversial. The budget also envisages multiple witness statements dealing with the remedial scheme. Those statements too are likely to be peripheral at best because the principal issues are going to be what defects emerged and whether the

remedial scheme to deal with them was reasonable (which are matters for the experts), not what actually happened.

69.
That also gives the lie to the claimant's argument that the costs are not too high because this item also includes the time spent considering the defendant's statements; for the reasons given, those statements are also likely to be short and of peripheral relevance, so will not take long to read and understand.

70.
For those reasons, I consider that a figure of not more than £150,000 would be reasonable in respect of witness statements. Even that is more than the figure anticipated for this phase of work by the defendant, of £101,000.

6.8
Experts' Reports

71.
The claimant claims that it has spent £1,271,949 on expert reports to date with a further £1,038,060 to be spent in the future, making a total of £2,311,009.22 in respect of experts prior to trial.

72.
In my view, both these figures are unreasonable. As to the costs incurred, which equate to over 2 years' worth of work, given that there are no reports in existence and the claimant has made no complaint about the lack of progress in experts meetings, it is simply not explained how £1.2 million could have been spent on experts thus far. Furthermore, if such a figure was justified, it could only be on the basis that the experts' reports were prepared and were ready to be exchanged. That would then mean that the estimated future costs in relation to the experts would be minimal.

73.
I have explained how, in reality, this case centres on just 6 individual defects. The experts' costs should, therefore, be quite capable of being sensibly controlled. But I suspect that, because the claimant has failed to address that way of analysing the case, and instead maintains the fiction that this is a case where there are hundreds of items in dispute, they have allowed these experts' costs to get out of control.

74.
In addition, I agree with the defendant, that the claimant's experts' rates are excessive, and that there is a real risk that those involved in both the remedial works and the expert evidence are over-charging rather than allowing the claimant the benefit of the appropriate economies of scale. I also note that the claimant has already made one substantial concession in respect of the over-claiming of experts.

75.
In my view, looked at in the round, a total of £1.2 million is reasonable for the entirety of the experts' costs. That would be split £550,000 to date, and £650,000 to be incurred in the future.

6.9
PTR

76.

I have already dealt with this in paragraph 32 above. In my view the costs of the PTR should not be more than £50,000. That is the figure for the costs management order.

6.10
Trial Preparation

77.
The claimant's claim the costs of £1.1 million in terms of trial preparation. That is an inflated figure because of the number of hours which the claimant says it will spend on a relatively straightforward case; the unreasonably high grade of those said to be doing much of the work; and their hourly rates. I take the view that a reasonable amount for trial preparation would not be more than £625,000.

78.
One major reduction is the £313,000 estimated by reference to experts. Given the vast sums spent and to be spent on experts, only a small amount (say £50,000) can be included for expert input at this stage. That alone justifies a reduction of £250,000 from the sums claimed under this head. Again it is noted that a concession is made by the claimant under this head (although it is again nowhere near big enough).

6.11
Trial

79.
The claimant claims £919,098 for the trial. For the same reasons as for trial preparation, that figure is too high. In addition, the presence of 4 fee earners at the trial is unjustified and the hotel and travel costs are excessive. I accept that the involvement of counsel would increase the figures somewhat, although the brief fees claimed are unjustified. Accordingly I consider that a reasonable amount for the trial is £575,000.

6.12
Contingencies

80.
Extraordinarily, the claimant estimates figures of £77,380.60 in respect of ADR, and also has an additional ADR figure of £189,456, making a total of £265,000 odd in respect of this contingency. These figures are wholly unjustified. There was once a time when TCC cases settled through the common sense of the parties, without the need for a middleman.

81.
In my view, a figure of £50,000 is the most that could be said to be reasonable in respect of ADR/ settlement of this case.

6.13
Conclusions

82.
For the reasons set out above, I consider that the claimant's costs budget sets out figures which are wholly unreasonable and unjustified. The figures which I have indicated as the upper limit of what is reasonable amount to a total figure of £4.28 million (incurred and estimated).

7. SUMMARY OF OPTIONS

83.
Towards the end of the hearing on 13 February 2015, I made plain to the parties that I considered the claimant's costs budget to be unreliable (**Section 4** above); that the claimant's costs budget was disproportionate (**Section 5** above); and that the claimant's costs budget was unreasonable (**Section 6** above). Although I did not in the hearing do what I have now done, and identify general figures which I consider to be reasonable under each head, I did indicate that an overall figure of about £4.5 million was likely to be the upper limit of what I considered to be reasonable. In view of the huge disparity between this figure and the claimant's budget costs, and the difficulties which the level of costs already incurred had created, I asked the parties to identify what options were open to me.

84.
Essentially, four options were identified. Option 1A was to order the claimant to prepare a new budget. Option 1B was to decline to approve the claimant's costs budget, a course I was obliged to take in **Willis v MRJ Rundell and Associates Ltd and Another** [2013] EWHC 2923 (TCC). Option 2 was to endeavour to set costs budget figures on a phase by phase basis, looking primarily at the estimated rather than actual costs. And Option 3 was simply to refuse to allow anything more in the costs budget beyond that which had already been spent, so that the claimant could not recover anything more than the costs already incurred. I identify the pros and cons of each of these options before going on to reach a view as to the appropriate option in this case.

8. OPTION 1A: ORDERING A NEW BUDGET

85.
I ruled this out of the hearing on 13 February 2015. There are two reasons for that. First, the court's decision on costs budgets has been adjourned already in this case. To make the claimant go away and produce a fresh budget would simply add to the already high costs, and with no realistic prospect of any improvement in the information.

86.
Secondly, the real difficulty in the present case is the huge volume of costs which the claimant says it has already incurred. That is not going to change in any new budget. That problem therefore needs to be tackled head on, and now.

9. OPTION 1B: DECLINE TO APPROVE CLAIMANT'S COSTS BUDGET

87.
In one sense, this is the easiest solution. It ensures that the court does not approve a costs budget which it considers to be unreliable, disproportionate and unreasonable.

88.
But the downside of this option is also clear. If I decline to approve the claimant's costs budget, then all of the arguments that have already been canvassed will have been unresolved, and they will all fall to be considered and decided much later on in the litigation. In addition, the claimant's legal team may take the view that, without an approved costs budget, they can spend what they like and take their chances on the assessment of the costs incurred.

89.
For theses reasons, I have concluded that declining to order a costs budget, even in the extreme circumstances of this case, would be of no assistance to the parties, particularly the defendant and the additional parties. It is therefore not an option which I propose to adopt.

10. OPTION 2: SETTING BUDGET FIGURES

90.
Option 2 is to set budget figures, notwithstanding the difficulties created by all of the factors that I have already outlined. The claimant favoured this course. It is easy to see why: Mr Post QC repeatedly argued that costs budgeting was essentially a prospective exercise, so he wanted a costs budget fixed for the various phases of estimated costs, allowing the claimant to take its chances on my comments on the level of costs incurred to date.

91.
The difficulty with this course is obvious. If I simply commented on the costs incurred, and then did a budgeting exercise for the prospective costs, I would arrive at an overall figure that was far in excess of that which I consider to be a reasonable and proportionate figure for the costs as a whole. That was the defendant's concern, a concern shared by the additional parties. In addition, this would have the effect of allowing the claimant to ride roughshod over the costs management process; to be rewarded for the wholly unreasonable stance that they have taken throughout.

11. OPTION 3: REFUSE TO ALLOW ANY FURTHER COSTS

92.
This would involve putting the figure for all phases of future costs at 'nil'. The defendant and the additional parties were in favour of this option, which seems similar to the approach in **Redfern** (paragraph 9 above). They say that, if I refused to allow any further costs beyond those which have been incurred, because that figure is broadly in line with what I consider to be a reasonable figure for the claimant's costs in this case overall, then that would be an appropriate and just solution. It would also mean that the future risks as to costs would be borne by the claimant, which is the party who are, in that sense, in default.

93.
The potential difficulty with this course is the one that I myself identified during the hearing. If I did not allow any further costs beyond those which have already been incurred, then there is nothing to stop the defendant, at the assessment of the costs already incurred, seeking to reduce those figures considerably. The claimant may then be doubly penalised because its costs incurred would be the subject of significant reduction on assessment, and it would not have got anything further in relation to the costs to be incurred because I would have set its prospective costs at nil.

94.
I am not persuaded that this difficulty is alleviated by CPR 3.18, despite Mr Constable QC's submissions to the contrary. If I set the prospective costs budget at nil because of the size of the costs incurred to date, then it might be difficult for the claimant to modify that result by making an application under CPR 3.18. After all, all the relevant information is available now. That might be unfair in the result, for the reasons given.

95.
Regrettably, I conclude that this makes Option 3 (which would otherwise have been the best alternative because it put the risks where they belong, with the claimant) unworkable.

12. CONCLUSIONS ON THE AVAILABLE OPTIONS

96.

For the reasons that I have indicated, only Option 2 is workable. But, in the unusual circumstances of this case, I have decided that Option 2 needs to be modified in order to arrive at a better approximation to justice.

97.
What I propose to do is to identify and set out in a Cost Management Order the various figures which I have explained and identified in **Section 6** above. But the precise nature of the order will be tailored to the phase of costs in question. Accordingly:

(a)
In relation to the Pre-Action Costs, I conclude that, on assessment, those should not exceed **£680,000**. I take that figure into account when assessing each element of the prospective/estimated costs dealt with below. To the extent that the claimant recovers more than £680,000 on assessment under this head, it would mean that more work had been legitimately done in the earlier stages of the case than I thought, which would in turn mean that less remained to be done in the future. Thus the prospective costs figures approved below would fall to be reduced by an equivalent sum.

(b)
In relation to the Statement of Case, I conclude that, on assessment, the costs incurred should not exceed **£500,000**. I take that figure into account when assessing each element of the prospective/ estimated costs below. Again, to the extent that the claimant recovers more than £500,000 on assessment, it would mean that more work had been legitimately done in the earlier stages of the case than I thought, which would in turn mean that less remained to be done in the future. Thus the prospective costs figures approved below would again fall to be reduced by an equivalent sum. I allow nothing in the costs management order for the estimated costs of any future amendments because such costs have already been allowed for/included in the £500,000. That will therefore be a ‘nil’ item in any costs management order.

(c)
In relation to the CMCs I consider that **£50,000** is recoverable on assessment by way of the costs so far incurred. If more is recovered on assessment, there would have to be an adjustment in the future costs, as noted above. I allow a prospective figure of an additional **£50,000** for future CMCs. Nothing beyond the £50,000 by way of prospective costs will be recoverable for the future CMCs. That makes a total of **£100,000** for this item.

(d)
In relation to disclosure, I conclude that, on assessment, only **£350,000** will be recoverable by way of disclosure. If more is recovered on assessment, there would have to be an adjustment in the future costs, of the same type and for the same reason, as noted above. No prospective costs will be recoverable by way of disclosure; that will therefore be a ‘nil’ item in any costs management order.

(e)
In relation to Witness Statements, I approve the prospective costs in the maximum sum of **£150,000**.

(f)
In relation to the £1.2 million already incurred in respect of Experts, I find that only **£550,000** will be recoverable on assessment. If more than £550,000 is recovered on assessment, there would have to be an equivalent downward adjustment in the future costs of the experts, because it would mean that the experts were further advanced than I had thought, which in turn meant that there was less work

for them to do in the future. In relation to the estimated future costs in respect of experts, I allow an additional **£650,000** making a total for this item of **£1.2 million**.

(g)
In relation to the PTR, I allow the sum of **£50,000**.

(h)
In relation to the Preparation for Trial, I allow the prospective sum of **£625,000**.

(i)
In relation to the Trial, I allow the prospective sum of **£575,000.**

(j)
In relation to ADR and settlement discussions, I allow the prospective sum of **£50,000**.

98.
In that way, going forward, the assessed costs/costs budget for the claimant will be a total of **£4.28 million**, made up of the figures which I consider to be recoverable on assessment in respect of the costs said to have been incurred, and the approved budget figures in respect of the estimated costs. As noted above, the estimated costs fall to be reduced, £ for £, to the extent that the amounts actually recovered on assessment in respect of costs incurred are higher than the figures which I have indicated.

13. OTHER PARTIES' COSTS BUDGETS

13.1
Defendant's Costs Budget

99.
The defendant's costs budget is in the sum of £4,483,140.41. No issue is taken with any part of that budget save in respect of the costs of trial preparation (£969,500) and trial (£842,250). On behalf of the third party, Ms Smith QC argues that the hours in respect of both are excessive.

100.
In my view, notwithstanding the fact that the defendant has to marshal the additional parties, as well as facing a claim from the claimant, the hours that underpin the trial preparation and the trial are excessive. I would reduce the figure for each by £100,000, thus making the figure for trial preparation £869,500, and the figure for trial £742,250. That reduces the defendant's costs budget to £4.283 million odd.

101.
In addition, Ms Sinclair QC had a complaint in relation to the costs of the defendant's expert. This point, which had not been previously identified, compared the budget for the fifth and sixth parties' expert at £124,500 with the defendant's expert architect at £296,694. In my view, this does demonstrate that the defendant's expert architect allowance is too high. I would not however be prepared to reduce it beyond £240,000. That, therefore, is a further reduction of £56,694 in the defendant's costs budget, to a total of **£4,226,446.41**.

102.
For the avoidance of doubt, I consider that all the other points raised in relation to the defendant's budget by the additional parties were really questions of where matters could be found rather than

individual items of criticism of the costs budget itself. In those circumstances, I make no further reductions in the defendant's costs budgets.

103.
The approved costs budget for the defendant is, therefore, **£4,226,446.41**.

13.2
Additional Parties

104.
The costs budgets of the three additional parties were not the subject of criticism or debate. I consider them to be proportionate and reasonable. They are therefore approved in full.