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Case No: HT-2019-000218

Neutral Citation Number: [2021] EWHC 1414 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date of judgment: 28 May 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

(1) Beattie Passive Norse Limited
(2) NPS Property Consultants Limited
Claimants

- and –

Canham Consulting Limited
Defendant

- -

Judgment No. 2 (Costs)

- -

Helena White (instructed by **Birketts Solicitors**) for the Claimants
Rupert Higgins (instructed by **Reynolds Colman Bradley LLP**) for the Defendant

Hearing date: 25 May 2021

- -

Mr Justice Fraser:

1. This judgment is in relation to costs and associated matters, following the judgment that was handed down on the substantive claim. After the costs hearing on 25 May 2021, I indicated in outline to the parties what the outcome of that hearing was, and explained that I would provide full reasons in a written judgment. These are those reasons. The substantive judgment is to be found at [2021] EWHC 1116 (TCC). In that judgment, I dismissed the claim brought by NPS Property Consultants Ltd ("NPS"), one of the two claimants, in its entirety. I awarded the other claimant, Beattie Passive Nourse Ltd ("BPN"), the sum of £2,000 in damages against the defendant, in respect of a far larger pleaded claim of approximately £3.7 million.

2. The substantive judgment itself should be consulted for full details, for any reader who wishes a full understanding of the litigation that had led to this decision on costs. As I explained in that judgment, what at first seemed to be entirely conventional proceedings in professional negligence against structural engineers for design failings in respect of foundations for two blocks of housing in a development in Sussex, proved to be far less conventional upon closer analysis.

3. The three fundamental aspects of the proceedings that are unusual were firstly, that the foundations for the two blocks that were constructed by the specialist sub-contractor, Foxdown Engineering Ltd ("Foxdown"), were *not* the foundations as ultimately designed by Canham. Foxdown had been issued with drawings of an earlier, superseded design, which were stamped "Issued for Construction". Perhaps unsurprisingly in the circumstances, Foxdown had used these for construction. The second unusual feature is that the buildings that had been constructed were so defective for other reasons (not connected with their foundations) that they had to be demolished in any event. Block A was the first block to be demolished, and at that stage it was thought that Block B could be saved with some remedial work. That work was underway when the greater knowledge obtained from the demolition of Block A made it obvious that Block B was irretrievably doomed, hence had to be demolished as well.

4. The third such feature is the party responsible for the construction of those buildings had its engagement terminated by BPN prior to completion. The construction had been performed by a company called Beattie Passive Construction Ltd ("Beattie Construction"), which was associated with, and wholly owned by, BPN. Beattie Construction shared many of the same directors as BPN. Beattie Construction had been engaged by BPN under the JCT Design and Build Contract terms, and its employment was terminated under those contract terms. It was following that termination that the problems with the two blocks were investigated.

5. The award of £2,000 in damages to BPN was not an award of nominal damages, but rather represented my apportionment of the quantum experts' best assessment of the cost of certain very limited remedial works that had been carried out to the foundations of Block B prior to its demolition. Those limited remedial works were partially performed, and therefore that sum represented (as close as could be assessed at trial) the actual cost to BPN of remedial works that had partially been performed. Those works were required due to the negligent omission by Canham from the design drawings that were actually used by Foxdown of dowel connections.

6. Following the handing down of the judgment, the parties could not agree on consequential matters. No application for permission to appeal was made by the claimants. The only outstanding matters, therefore, concerned costs.

7. Canham had made two Part 36 offers. Both were far in excess of the amount awarded. On 21 December 2020 Canham offered to pay the claimants £50,000 plus costs of certain elements of the claimants' claim. That offer was open for acceptance until 11 January 2021 ("the First Part 36 Offer"). The second offer was dated 25 January 2021. It was on the same terms as the first, save for the fact that the amount offered to the claimants was £110,000 ("the Second Part 36 Offer").

8. Given the award of damages was only £2,000, the Second Part 36 Offer is not specifically relied upon by Canham. The First Part 36 Offer is relied upon, and would ordinarily entitle Canham to be paid its costs from the last date of acceptance, namely 11 January 2021, with the claimants entitled to their costs (or more accurately perhaps, BPN being entitled to its costs) up to that date. That would be the conventional outcome by virtue of the terms of CPR Part 36.17(3) and CPR Part 44.2.

9. However, this is not a conventional case, and Canham do not seek such a conventional order. Notwithstanding its entitlement to its costs from 11 January 2021 as a result of the First Part 36 Offer, Canham seeks an order for all of its costs for the whole action from its commencement, to be assessed on the indemnity basis. This is for the following reasons (in summary):

    1. The claim that was advanced by the claimants wholly ignored the factual causation issue which lay at its heart, namely that the foundations as constructed by Foxdown were not the foundations as designed by Canham. It is also said that this point was not only ignored, it was disguised.

    2. The quantum of the damages awarded, £2,000, whilst not accurately described in legal terms as nominal (as explained at [127] to [129] of the substantive judgment), is so small by comparison to the sum claimed as to be derisory. Mr Higgins submitted that this amount is even below the small claims court limit, where costs are not awarded in any event.

    3. The claim was advanced and supported by Mr Hughes, the structural engineering expert appointed by the claimants. Mr Higgins submitted that the criticisms of Mr Hughes in the substantive judgment are such that, alone, would justify an award of indemnity costs.

    4. So far as the claim by BPN is concerned, this was a claim brought by that company without the authority of its board of directors. It is therefore said that the proceedings were ultra vires. To substantiate this, Canham provided a witness statement (said in the heading to be a "Draft Witness Statement") from Mr Ron Beattie. This document was signed and dated and therefore appears to be an actual, rather than a draft, witness statement. It is dated 20 March 2020 but was not served upon the claimants or the court until 21 May 2021. No explanation for this 14 month delay is available.

    5. The claimants refused opportunities to narrow the issues and wholly ignored a Notice to Admit Facts served by Canham.

10. The application for costs by Canham is resisted by Ms White for the claimants. She contended for the conventional outcome of costs where a defendant relies upon its own Part 36 offer which a claimant has failed to beat. This is that the claimants

recover their costs up to the relevant date (here 11 January 2021) followed by an order in the defendant's favour for costs thereafter. Further, and in particular, she also relied upon what she submitted was an unreasonable refusal on the part of Canham to mediate at any time prior to early 2021, when a mediation was eventually held. She also criticised that type of mediation, which was the only type in which Canham would agree to participate.

11. I shall deal with these points below, and then explain the just order for costs, taking into account the relevant principles from both the CPR and the authorities. CPR Part 44.2 states in part as follows: that the court has a discretion in respect of costs. Rule 44.2, under the heading "Court's discretion as to costs" provides:

"(2) If the court decides to make an order about costs –
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order."
Rule 44.2(4) provides:
"(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if that party has not been wholly successful; and
(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

12. CPR Part 36.17(1) makes clear that Part 36.17 applies where a claimant fails to obtain a judgment more advantageous than a Part 36 offer made by a defendant. That is the case here. (3) states:

"(3) Subject to paragraphs (7) and (8), where paragraph 1(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to: -

(a) Costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) Interest on those costs".

13. The notes to CPR Part 17.3 make it clear how the court is to approach the question of whether it "considers it unjust to do so" in terms of departure of the normal costs order consequential upon failure to beat a Part 36 offer. ***Lejonvarn v Burgess*** [2020] EWCA Civ 114 sets out, in section 4.2 of the judgment the inter-relationship between Part 36 and Part 44. Coulson LJ stated at [43] the following, of direct applicability to the situation here:

"[43] In short, therefore, taking the CPR and these authorities together, the position is that, in contrast to the position of a claimant, a defendant (such as the appellant in the present case) who beats his or her own Part 36 offer, is not automatically entitled to indemnity costs. But a defendant can seek an order for indemnity costs if he or she can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be "out of the norm". Moreover, if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made. That is what happened in *Excelsior*."

14. He also added the following later in the judgment:

> "[80] When a defendant beats its own Part 36 offer, the court should always consider whether, in consequence, the claimant's conduct in refusing that offer took the case out of the norm. Sometimes it will; sometimes it won't. Mr Cohen articulated the question that had to be asked in these terms:
> 'At any stage from the date of the offer to the date of the outcome, was there a point when the reasonable claimant would have concluded that the offer represented a better outcome than the likely outcome at trial?'
> Mr Oram agreed with that formulation orally. So, respectfully, do I. Although in his post-hearing note Mr Oram sought to qualify his agreement by reference to the offeree's prospects of success, I consider that such a qualification is unnecessary. The important point for present purposes is that (as Mr Oram accepted at paragraph 11 of the same note), the judge was not asked to consider this question, or anything like it, and so did not do so. That was an error of law. Accordingly, I consider that this court must address the question on appeal."

15. In my judgment therefore, in addition to the matters specifically relied upon by Mr Higgins, I must also consider the question posed by Coulson LJ in that case. At any stage, from the date of the First Part 36 Offer to the date of the outcome, was there a point where the reasonable claimant would have concluded that the offer represented a better outcome than the likely outcome at trial? A different way of phrasing the same question is to consider whether the claimants were unreasonable in not accepting that offer. That can however only assist in terms of the claim for indemnity costs for any period after the First Part 36 Offer was made.

16. This judgment is not an attempt to conduct an extensive review of all the relevant authorities. I have had a number cited to me and any failure to refer to them in this judgment should not mean that I have ignored them. Costs orders seeking indemnity costs are not entirely routine, and depend on unusual facts. The authorities are therefore, for the most part, somewhat fact specific. I will refer only to small number.

17. The court is obliged to consider 'all the circumstances of the case' but these fall predominantly into the categories of:-

    1. Conduct before and during the proceedings (Part 44.2(5)(a))

    2. The reasonableness of the claimant's decision to pursue a particular allegation or issue (Part 44.2(5)(b))

    3. The manner in which a claimant has pursued its case (Part 44.2(5)(c))

    4. The extent to which a claimant has exaggerated its claim (Part 44.2(5)(d))

18. Here, there is no doubt, and it is common ground, that the First Part 36 Offer and the terms of Part 36.17(3) would entitle Canham to its costs from 11 January 2021. For that reason it is convenient to consider the periods (somewhat unusually) in reverse chronological order. The issues between the parties on costs are therefore:

    1. The basis of assessment for Canham's costs from 11 January 2021 onwards;

    2. The correct order for costs prior to that date, and whether the claimants or Canham should recover costs for that period;

3. The correct basis of assessment, either standard or indemnity, for the award of costs prior to 11 January 2021.

19. In ***Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson and another*** [2002] EWCA Civ 879 the Lord Chief Justice stated the following, where a trial judge's award of indemnity costs was challenged on appeal:

"[31] In the context of that case I see that those paragraphs set out the need for there to be something more than merely a non-acceptance of a payment into court, or an offer of payment, by a defendant before it is appropriate to make an indemnity order for costs. Insofar as that is the intent of those paragraphs, I have no difficulty with them. However, I would point out the obvious fact that the circumstances with which the courts may be concerned where there is a payment into court may vary considerably. An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.

[32] I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

20. It is crystal clear that there must be something that takes the case out of the norm for indemnity costs to be awarded. This was stated to be a "critical requirement".

21. In ***Fox v Foundations Piling Ltd*** [2011] EWCA Civ 790 the Court of Appeal reviewed the inter-relationship between Part 36 and Part 44. In particular, Jackson LJ stated the following:

"[44] From this review of authority I draw the following conclusions. First, where one party makes a Part 36 offer and then achieves a more advantageous result than that proposed in his offer, the provisions of rule 36.14 modify the court's general discretion in respect of costs. This is important because parties who choose to use the Part 36 mechanism in their settlement negotiations need to have a clear understanding of the legal effects of making, accepting and rejecting offers under Part 36.
[45] Secondly, parties are quite entitled to make *Calderbank* offers outside the framework of Part 36. Where a party makes such an offer and then achieves a more

advantageous result, the court's discretion is wider. Nevertheless it may well be appropriate to order the party which has optimistically rejected the *Calderbank* offer to pay all costs since the date when that offer expired. This was what the court ordered in *Stokes*.

[46] A not uncommon scenario is that both parties turn out to have been over-optimistic in their Part 36 offers. The claimant recovers more than the defendant has previously offered to pay, but less than the claimant has previously offered to accept. In such a case the claimant should normally be regarded as "the successful party" within rule 44.3 (2). The claimant has been forced to bring proceedings in order to recover the sum awarded. He has done so and his claim has been vindicated to that extent.

[47] In that situation the starting point is that the successful party should recover its costs from the other side: see rule 44.3 (2) (a). The next stage is to consider whether any adjustment should be made to reflect issues on which the successful party has lost or other circumstances. An adjustment may be required to reflect the costs referable to a discrete issue which the successful party has lost. An adjustment may also be required to compensate the unsuccessful party for costs which it was caused to incur by reason of unreasonable conduct on the part of the successful party.

[48] In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v Bennett UK Limited* [2008] EWCA Civ 1658. For example, the claimant may succeed on some of the pleaded particulars of negligence, but not on others. Indeed the fact that the claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs: see *Morgan v UPS*. A defendant who has obtained video surveillance evidence is perfectly well able to protect his position on costs by making a modest offer under Part 36.

[49] Nevertheless in other cases (as stated above) the fact that the successful party has failed on certain issues may constitute a good reason for modifying the costs order in his favour. This is commonly achieved by awarding the successful party a specified proportion of its costs. In *Widlake* the facts were so extreme that the successful party was ordered to bear all of its own costs."

22. The case of ***Widlake v BAA Ltd***, to which Jackson LJ referred in the passage above, is at [2009] EWCA Civ 1256. In that case, a security guard at Stansted Airport fell and tripped on a loose step. She recovered approximately £5,500 damages against a payment into court of £4,500. Her losses had originally been claimed in the very high figure of about £150,000, but that figure had fallen before trial to about £23,000. The defendant had deployed secret surveillance video evidence of the claimant acting normally, notwithstanding her allegedly crippling and debilitating back pain. The Court of Appeal overturned the costs order below (which was in her favour, because she had beaten the Part 36 offer) and ordered each side to bear its own costs.

23. Ward LJ stated at [39] that the defendant had been "put to expense arising out of the manner in which the case was unreasonably being conducted, certainly up until the final schedule of loss was served in October. Some compensation for the defendant put to the expense of defending such an exaggerated claim should be entered on the notional balance sheet."

24. Finally, in ***Excalibur Ventures LLC v Texas Keystone Inc and others*** [2013] EWHC 4278 (Comm), a judgment by Christopher Clarke LJ (at first instance), the unsuccessful claimant had to pay the defendants' costs. The only issue was whether

they should be on an indemnity or standard basis. Mr Higgins relies on the dicta at [5] and onwards, which it is convenient to reproduce:

"[5] In the ***Three Rivers*** [2006] EWHC 816 (Comm) case Tomlinson J as he then was pointed out that if a claimant chooses to pursue speculative, weak, opportunistic or thin claims, he takes a high risk and can expect to pay indemnity costs if he fails. He gave examples of circumstances which took the case out of the norm as being where a claimant:
"(a) advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time.
(b) advances and aggressively pursues such allegations despite the lack of any foundation in the documentary evidence for those allegations and maintains the allegations without apology to the bitter end.
(c) actively seeks to court publicity for its serious allegations both before and during the trial.
(d) turns a case into an unprecedented factual inquiry by the pursuit of an unjustified case.
(e) pursues a claim which is to put it most charitably thin, and in some respects far-fetched.
(f) pursues a claim which is irreconcilable with the contemporaneous documents.
(g) commences and pursues large scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant and during the course of the trial of the action the claimant resorts to advancing a constantly changing case in order to justify the allegations which it had made, only then to suffer a resounding defeat."
That seems to me to a considerable extent a summary of the present case.

[6] In ***European Strategic Fund Limited v Skandinaviska Enskilda Banken AB*** [2012] EWHC 749 (Comm), Gloster J, as she then was, awarded indemnity costs in circumstances where the claim was:
"(i) speculative involving a high risk of failure; (ii) grossly exaggerated in quantum; (ii) opportunistic; (iv) conducted in a manner that has paid very little regard to proportionality or reasonableness giving rise to the incurring of substantial costs on both sides; (v) pursued on all issues at full length to the end of the trial."
That too seems to me a pretty fair summary of the present case.

[7] The fact that a claimant loses a massive claim and does so badly is not of itself a reason for ordering indemnity costs. Cases involving very large sums which founder on sharp juridical rocks are not automatically outwith the norms of this court. But all depends on the circumstances. This case was in my judgment out of the norm for a considerable number of reasons.

[8] The claim was essentially speculative and opportunistic. It has been advanced at great length and by the assertion of a plethora of causes of action, all of which have been maintained to the last possible moment, no doubt upon instructions. Gulf, and to a lesser degree Texas, have been put to enormous expense in terms of legal costs and Mr Kozel has borne a heavy personal burden in dealing with it.

[9] The litigation has been gargantuan in scope, involving a five month trial and 373 trial bundles. But it was based on no sound foundation in fact or law and it has met with a resounding, indeed catastrophic, defeat. The fact that it has done so arises in

large measure as a result of facts and matters which were known to the Wempens before the case started. As Gloster J put it in ***JP Morgan Chase v Springwell*** [2008] EWHC 2848 (Comm):
"A party who chooses to litigate on such a wide and extravagant canvass takes the risk that if unsuccessful it may have to pay costs on an indemnity basis."

[10] That the claim merits the description I have given to it is apparent for a number of reasons. Excalibur is and always has been nothing but a nameplate for the Wempen brothers, who lacked experience of the oil industry or oil finance and had no technical expertise whatever. Notwithstanding these deficiencies, Excalibur sought what would have been an enormous reward in the shape of an indirect interest in, inter alia, 30 per cent of the Shaikan oil field for what was essentially no more than the introduction of Texas and Gulf to the KRG, important though that was. It did so in circumstances where it had agreed to a bid going forward without Excalibur being a bidder, where it lacked the ability to finance its share, if it had one, and was inherently unlikely to be an acceptable partner for any financial institution, or acceptable to the Kurdistan Regional Government.

[11] The claim was opportunistic."

25. Mr Higgins identifies each of the above features, referred to in the three cases of ***Excalibur, Three Rivers*** and ***European Strategic Fund***, as applying here. He maintains that this was a case where there was a lack of foundation in the documentary evidence for the claimants' claim. It involved the pursuit of an unjustified case, and one which the claimants knew to be unjustified, because they knew that Foxdown had not constructed the foundations to the latest design by Canham (called the Revision B design in the substantive judgment). He characterised it charitably as thin, if not far-fetched. It is said to be irreconcilable with the contemporary documents, not least the emails of April 2016 which made it clear that Foxdown had constructed the foundations to the earlier superseded design (further explained at [54] to [58] in the substantive judgment). Finally, Mr Higgins relies on what he submits is an extraordinarily exaggerated claim. The pleaded value was £3.7 million. Even when, belatedly, the claimants made a claimants' Part 36 offer it was in the sum of £1.7 million. Against that, one of the claimants, BPN, has recovered only £2,000. This is a very small sum indeed, and justified only a claim in the small claims court.

26. Ms White, with commendable fortitude in the sense of being required to occupy difficult ground, submitted that there was no justification for an award of indemnity costs, and the claimants had indeed recovered something. On that latter point she is undoubtedly correct. The fact that it was less than the First Part 36 Offer of course justified payment to Canham of its costs from 11 January 2021, but not recovery of its own costs before that.

27. She also strongly maintained that Canham had unreasonably refused to mediate throughout 2020, and criticised what she submitted was the very narrow style of mediation in fact adopted by the parties in 2021, which was the only mediation in which Canham was prepared to engage.

28. An unreasonable refusal to engage in mediation can justify a departure from what would otherwise be the ordinary costs consequences in any proceedings. There are numerous authorities to this effect, and it is not necessary to list them. However, Ms

White's submissions on this particular point fail to pay sufficient attention to the state of play of the proceedings themselves when the claimants' solicitors were pressing for a mediation to take place.

29. The Defence expressly raised the point that the foundations were not constructed to the design that Canham produced. The Particulars of Claim had "entirely omitted this important fact", to quote from [60] of the substantive judgment. After it was pleaded in paragraph 11.9 of the Defence, the Reply avoided properly dealing with that averment, to quote from [62] of the judgment:

"The clear assertion is made [in the Defence] that the foundations were not constructed as designed by Canham. That point was actually known by each of those directors, based on what they had been told in emails in 2016 into which they were copied, to be true. Yet it was swerved in the Reply, which stated that it was "unparticularised". It plainly should have been admitted."

30. There is another point on the pleadings which makes this approach by the claimants even worse, in my judgment, in terms of impropriety. This is that Canham made a Request for Information about both the Particulars of Claim and the Reply. Request 22 asked the following, in respect of a phrase used by the claimants that had referred to "significant deficiencies in the design and therefore the construction of the foundations…."

"22. Is it the Claimants' case that the foundations (including the ground beams and any connecting features) were constructed in accordance with the Defendant's design?"

The answer, which was served by the claimants on 13 March 2020, was as follows:

"Yes, as far as the details in the design could be discerned."

31. This answer is completely factually inaccurate. This is a more polite way of saying directly untrue. The Further Information was supported by a Statement of Truth, but this was signed by one of the claimants' solicitors, not a director of either of the claimant companies. I have found at [62] of the substantive judgment, in the passage quoted above at [29], that the two directors who gave evidence before me knew that the foundations had not been so constructed. The claimants' solicitors must have been instructed by the claimants that answer 22 was true, otherwise they could not have signed the statement of truth. From that date on, the claimants were advancing a plainly untruthful case on a major and central point in the litigation. There is simply no excuse for this, and none has been proffered.

32. I find that the refusal by Canham during 2020 to engage in mediation was not unreasonable in all the circumstances of the case. This refusal came at a time when the claimants were advancing, and continued to advance, a factually untruthful case.

33. Dealing with another point relied upon by Ms White, namely the type of mediation that was adopted, there are many different styles of alternative dispute resolution. The type adopted in 2021 is what is called "blind bidding"; it is a cheaper method, but it does involve a mediator. I am reluctant to impose a qualitative analysis upon different types of mediation. In any event, given the point that I have explained at [31], the type of mediation adopted is not relevant. The stage at which the mediation was undertaken is, in my judgment, understandable in the circumstances of this case and particularly so given Canham's need to consider both disclosure and witness evidence. I do not consider that Canham's position regarding when it was prepared to

mediate to be unreasonable, and therefore it is not relevant to the exercise of the court's discretion in the circumstances of this case.

34. Turning to the other specific features relied upon by Mr Higgins, it is unnecessary to dwell on them in any great detail. I have considered all the circumstances of this wholly unusual case. I have dealt with the failure by the claimants properly and accurately to deal with the issue that Foxdown constructed the foundations to an earlier superseded design. Considering the factors referred to in the above cases, this plainly was an exaggerated claim. Indeed, I would go further and say that it was wholly opportunistic. It was unjustified and extremely thin, at least so far as the quantum case was concerned. That quantum case was entirely far-fetched, and wholly irreconcilable with the contemporaneous documents.

35. Causation is a complex field, and in many cases there is scope for understandable contested causation issues, with judicial resolution of the different arguments required or justified. This is not one of those cases. Beattie Construction constructed the two blocks wholly defectively and they had to be demolished, regardless of their foundations. Beattie Construction's specialist sub-contractor, Foxdown, was given superseded foundation design drawings, which were stamped "issued for construction", and Foxdown used these drawings for the foundations rather than the design produced by Canham. Yet the claimants brought proceedings against Canham seeking the full cost of demolition as damages, said to have been caused by the defective design of foundations, as though these inconvenient other facts could be glossed over. That was wholly unreasonable, and considerably out of the norm.

36. Dealing with the separate and independent attack on the evidence of Mr Hughes, the claimants' expert, I do not find that his conduct was such that would of itself justify an award of indemnity costs. There are cases where the conduct of experts is such that would, of itself, justify indemnity costs, such as ***Williams v Jervis*** [2009] EWHC 1837 (QB), a decision of Roderick Evans J, where two medical experts supported an entirely unwarranted attack on the bona fides of a claimant in a personal injury action. They both gave "strong evidence as to the integrity in the claimant's case", which at [36] and [37] meant that the costs of dealing with their evidence was ordered to be assessed on the indemnity basis.

37. Here, although Mr Hughes' approach to his task left much to be desired, and the list of criticisms are provided at [79] and [80] in the substantive judgment, I do not consider that alone would justify an award of indemnity costs. I do, however, sound this note of caution in terms of experts' compliance with their duties generally. This is not to equate the quality of Mr Hughes' evidence in this case, with the experts in the cases to which I now refer. Mr Hughes's compliance with his duties to the court was of a far higher quality than the failures in these following cases.

38. There is a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties. Practice Direction 35 makes the position very clear:

> "2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
>
> 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate."

39. CPR 35.3 makes clear that the expert's overriding duty is to the court and that this overrides any duty to his or her client. This has been reinforced by numerous decisions in the authorities since then. Concentrating solely on more recent ones, in ***Bank of Ireland v Watts*** [2017] EWHC 1667 (TCC), Coulson J (as he then was) stated:

"The duties of an independent expert are set out in the well-known passages of the judgment in ***The Ikarian Reefer*** [1993] 2 Lloyds LR 68. For the reasons set out above, Mr Vosser did not comply with those duties and I was not confident that he was aware of them or had had them explained. For him, it might be said that The Ikarian Reefer was a ship that passed in the night."

40. I made certain similar observations in ***Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*** [2018] EWHC 1577 (TCC) at [237]. In another very recent case, ***Dana UK Axle Ltd v Freudenberg FST Gmbh*** [2021] EWHC 1413 (TCC) Joanna Smith J excluded, during the trial itself, the entirety of the defendant's technical expert evidence due to "the full and startling extent of the Experts' breaches of CPR 35". Parties to litigation who rely upon expert evidence that fails to comply with the rules should not be encouraged by my finding that in this case the approach of the claimants' expert was not sufficient, alone and of itself, to justify an award of indemnity costs.

41. The final point relied upon by Mr Higgins, which can be dealt with briefly, is the witness statement of Mr Beattie, which asserted that, as a director of BPN, he did not agree to the action being issued against Canham and, so far as he knew, there was no board authority for the legal proceedings. He asserted that the decision to issue a claim on behalf of BPN was not made in line with the Memorandum and Articles of Association of BPN and was, on that basis, *ultra vires*. He made these statements in a document dated over one year ago, but which was kept confidential to Canham until just a few days before the costs hearing.

42. This witness statement was met with a short one in reply by Mr Gawthorpe, which asserted that there was a board meeting, but said Mr Beattie had not been invited, because he had earlier indicated he would not attend any. Mr Gawthorpe did not produce any minutes of such a meeting or board resolution, but it is not necessary to consider this matter any further for this reason. This is because Canham chose not to do anything at all about Mr Beattie's claims during the proceedings themselves, or even put these points to Mr Gawthorpe when he gave evidence during the trial.

43. In cases where claims have been issued without authority, that fact does not render the claim form a nullity, but rather leaves it vulnerable to being struck out as an abuse of process. In ***Adams and others v Ford and others*** [2012] EWCA Civ 544 at [32] the Court of Appeal held that:

"The legal consequence of proceedings being issued without authority is also well established. The proceedings are defective and liable to be struck out on that account, but they are not devoid of legal effect until they are struck out. Moreover, the court is not bound to strike them out if at the time of the strike out application the client on whose behalf the action was commenced wishes it to continue and to accept responsibility for it."

44. There is also the not insignificant issue of Part 4 of the Companies Act 2006 dealing with the capacity of a company and the power of directors to bind it.

45. No application to strike out was issued by Canham on the basis of the witness statement of Mr Beattie. This might, with hindsight, have been a sensible reluctance on Canham's part. Mr Beattie chose not to disclose in that statement the existence of his refusal to attend any more board meetings, which does throw a little more light on why he may not have been invited. Each of the two witness statements – that of Mr Beattie from March 2020 deployed in May 2021, and that of Mr Gawthorpe in reply – almost pose more questions than they answer, given their elliptical terms. Mr Gawthorpe, for example, explains in terms of authority that "as far as I was concerned" he was entitled to give instructions to the claimants' solicitors. Such careful wording, in view of Mr Gawthorpe's earlier performance as a witness, does not fill one with confidence. However, the court was spared the task of weighing up evidence from Mr Beattie against that of Mr Gawthorpe in a contested strike out application. I do not consider it either helpful or relevant to conduct an ex post facto exercise to the same end in terms of considering the costs of the proceedings that have in fact already been occurred.

46. I do not therefore propose to take the witness statements by Mr Beattie and Mr Gawthorpe, nor the challenged claim of lack of authority, into account in any respect in considering the appropriate costs order.

47. Turning to other features relied upon by Canham, I do not understand why, or how, the claimants should have chosen to ignore the Notice to Admit Facts, which was served upon the claimants' solicitors dated 29 April 2020. This Notice was specifically drafted to identify the factors leading to the decision to demolish each of the two blocks. If it had been approached in the way it should have been, some of these facts ought to have been admitted and this would have highlighted to the claimants (and their advisers) that factual causation presented a very real, if not insurmountable, obstacle to any meaningful recovery in the litigation. Perhaps the Notice to Admit was ignored in the hope that this problem would disappear in some mysterious way, or alternatively, perhaps the claimants decided that if they held their nerve, as the trial date approached, a different and more charitable approach would be adopted by Canham. In a sense that latter scenario did come to pass, as it was some months after the Notice to Admit was served that each of the Part 36 Offers was made by Canham. It is not necessary to speculate about the reasons for the claimants acting as they did, but the majority (if not all) of the facts in the Notice ought to have been admitted. That is a feature, but not of itself a compelling one.

48. Finally, considering the question at [15] above, it was plainly unreasonable for the claimants not to have accepted the First Part 36 Offer. That offer was made before Canham had focused upon the crucial emails of April 2016 in respect of Foxdown constructing the foundations to the superseded design, although given the way Canham pleaded its case in the defence it must at least have suspected this, otherwise it would not have pleaded paragraph 11.9 of the Defence in the way it did. This point is dealt with at [59] to [62] of the substantive judgment. That First Part 36 Offer was very generous, both in view of the lurking question about the foundations as constructed by Foxdown, and also in hindsight. That would justify an award of indemnity costs from 11 January 2021 alone and of itself, but cannot assist Canham in the period prior to the offer being made.

49. Considering all of these features together leads to the inescapable conclusion that this case plainly sits outside the norm. These features also paint the claimants in an extremely poor light indeed. The justice of the case demands not only that the claimants do not recover any of their own costs, given the true factual basis compared to their pleadings, but also that the court reflects its disapproval of the claimants pleading "facts" so directly contrary to the true situation, as was done in Answer 22 of the Further Information served on 13 March 2020.

50. It must also be remembered that, notwithstanding the tiny amount of money awarded as damages, Canham was found to have been negligent in certain respects, and also this was in issue on the pleadings.

51. For all those reasons I have come to the conclusion that the justice of the case requires no order for costs at all, in either party's favour, up to the date of the service of the Further Information on 13 March 2020; thereafter the defendant Canham shall recover all of its costs of the proceedings from that date onwards (which encompasses the period up to the making of the First Part 36 Offer; the period when that offer was open for acceptance; and the period thereafter). I also consider that Canham's costs from 13 March 2020 onwards be assessed on an indemnity basis. This reflects the stark fact that from that date onwards, the claimants were conducting the litigation on a wholly false factual basis, something that must have been known to the directors of both the claimant companies. The claimants' pleading at Answer 22 was positively untrue. From that date onwards, this should be reflected by an award of indemnity costs, notwithstanding BPN's recovery of £2,000. This decision on costs encompasses all of the different periods and issues that I have set out at [18](1) to (3) above.

52. I now turn to the amount which the claimants should pay to Canham on account of costs pending the detailed assessment. The costs budget submitted by Canham that was approved by the court early in the proceedings is in the sum of £637,000. That was for the whole of the action, and I have made clear that there is no order for costs for the period prior to 13 March 2020, which is about nine months after the claim form was issued on 28 June 2019. However, on the other hand, given the award of indemnity costs for the period from 13 March 2020 onwards that, the figures approved in the costs budget have less relevance than they would if the detailed assessment of those costs were to be done on the standard basis.

53. Taking all the relevant factors into account, and considering the broad brush exercise that is involved in making an order for payment on account of costs pending detailed assessment, the claimants should make a payment on account of costs to Canham in the sum of £500,000, to be paid within 14 days. There is no justification in the circumstances of this case for any longer period to be granted to the claimants for making that payment.