



**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Royal Courts of Justice  
Rolls Building  
London, EC4A 1NL

Date: Wednesday 2<sup>nd</sup> November 2022

Before :

**MR ROGER TER HAAR KC**

**Sitting as a Deputy High Court Judge**

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Between:

**ASSOCIATED NEWSPAPERS LIMITED**

**Claimant**

- and -

**BUCKINGHAM GROUP CONTRACTING  
LIMITED**

**Defendant**

And between:

**BUCKINGHAM GROUP CONTRACTING  
LIMITED**

**Part 20 Claimant**

-and-

**AMTRUST EUROPE LIMITED**

**Third Party**

-and-

**ZURICH INSURANCE PLC**

**Fourth Party**

-and-

**LAVENHAM UNDERWRITING LIMITED**

**SAMPFORD UNDERWRITING LIMITED**

**GAI INDEMNITY LIMITED**

**Being members of LLOYDS SYNDICATE 2468**

**Fifth Party**

-and-

**LIBERTY MUTUAL INSURANCE EUROPE SE**

**Sixth Party**

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**Lynne McCafferty KC and Daniel Churcher** (instructed by **Baker & McKenzie LLP**) for  
the **Claimant**

**Ben Patten KC** (instructed by **Weightmans LLP**) for the **Defendant and Part 20 Claimant**

**Neil Hext KC** (instructed by **Womble Bond Dickinson LLP**) for the **Third Party** (in relation  
to “insurance matters”)

**Simon Henderson** (instructed by **Keoghs LLP**) for the **Third to Sixth Parties** (in relation to  
“Collier Defence matters”)

**Robert Stokell** (instructed by **DAC Beachcroft LLP**) for the **Fourth to Sixth Parties** (in  
relation to “insurance matters”)

Hearing date: 7 October 2022  
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**APPROVED JUDGMENT**

**This judgment was handed down by the court remotely by circulation to the parties’  
representatives by email and released to The National Archives. The date and time for  
hand-down is deemed to be 2 November 2022 at 10.30am**

**Mr Roger ter Haar KC :**

1. This matter came before me on 7 October 2022 for a Costs and Case Management Conference. In the event the Court was able to deal with most matters arising during the half day set aside for the CCMC. I was able to hear submissions in respect of cost budgeting during the time allocated for the CCMC, but there was not sufficient time to give judgment on that matter. This is my judgment on cost budgeting.

**Background****The Parties**

2. I take the background set out below from the Claimant's Skeleton Argument: of course the evidence in due course may require this background recital to be corrected or modified.
3. The Claimant ("ANL") is a newspaper publisher. It is the present owner of a site known as Plot 1, Thurrock Commercial Park, Oliver Road, Thurrock, Essex ("the Site"). It is part of the Daily Mail and General Trust plc ("DMGT") group.
4. The Defendant / Part 20 Claimant ("BGCL") is a civil engineering and building contractor. As set out below, BGCL undertook the design and construction of a new warehouse and production unit together with offices and outdoor areas at the Site ("the Works") to house a new printing facility for ANL.
5. The Third to Sixth Parties ("the Collier Insurers") are the professional indemnity insurers<sup>1</sup> of TR Collier Associates Limited ("Collier") a company in liquidation.

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<sup>1</sup> The Third Party is the primary layer insurer. The Fourth to Sixth Parties are the excess layer insurers.

Collier was engaged by BGCL to carry out the engineering design for the Works, including the design of the external areas.

The contracts, ownership of the Site, and the Works

6. On 15 December 2011 Harmsworth Quays Printing Limited (“HQPL”) purchased the Site with the intention of developing a new printing facility and associated buildings and external areas (“the Development”). HQPL was part of the DMGT group. HQPL had entered into a contract on 28 June 2011 with Goodman Logistics Developments (UK) Limited (“Goodman”) pursuant to which Goodman was to appoint a building contractor to carry out the Development.
7. On 24 May 2012 Goodman appointed Collier to carry out engineering services in respect of the Development pursuant to the “Collier Appointment”. The Collier Appointment was subsequently novated to BGCL.
8. On 20 June 2012 Goodman entered into a design and build contract (“the D&B Contract”) with BGCL for the design and construction of the Development. The D&B Contract expressly conferred certain rights and the benefit of certain warranties on HQPL.
9. Practical Completion of the Works was certified on 18 June 2012.
10. On 2 October 2016 HQPL sold the Site to ANL as part of a broader re-organisation of the DMGT group.
11. By a deed of assignment executed on 30 April 2020 HQPL assigned all of its rights under *inter alia* the D&B Contract to ANL.

The Alleged Defects

12. In or around October 2015 HQPL discovered physical damage to the external cladding around the interface point of the incoming gas supply at the Site. The concrete slab in the vicinity of the incoming gas supply had sunk by around 100mm. BGCL attended the site and carried out certain remedial works to the gas supply for no charge.
13. On around 16 August 2017 an underground sprinkler pipe in a yard area failed causing localised flooding. The slab in the vicinity of the pipe had sunk by between 50mm and 100mm. BGCL attended site and carried out remedial works to the failed sprinkler pipe, again for no charge.
14. As a consequence of the two instances of damage that had occurred to date, HQPL started to monitor slab movement at the site, and in early 2018 that monitoring exercise showed that there was differential settlement at the site. It is common ground between ANL and BGCL that *some* differential settlement has occurred, and that *some further* differential settlement will occur in the future, but ANL and BGCL dispute the extent of the differential settlement that has occurred and the likely extent of any future differential settlement.

These Proceedings

15. ANL alleges that:
  - (1) In breach of the terms of the Building Contract and / or negligently, BGCL:
    - (a) failed to properly investigate the ground conditions at the site;

- (b) failed to obtain and / or properly consider or follow recommendations and advice in relation to ground conditions;
  - (c) failed to include in its design piling measures or to take other steps (such as ground strengthening measures) that were necessary to prevent excessive settlement given the ground conditions of the Site.
- (2) Alternatively, the defects at the Site (or certain of them) arise from workmanship failures by BGCL.
  - (3) As designed and constructed by BGCL, and in breach of express and implied terms of the Building Contract, the external parts of the Works are not fit for purpose.
  - (4) BGCL is liable to ANL in damages for *inter alia* the costs of certain temporary repair works and a permanent remedial scheme, which ANL is to set out in a Schedule of Loss to be served on the other parties within 28 days of the CCMC.
16. BGCL's position in outline is as follows:
- (1) BGCL accepts that some differential settlement has occurred but says that it is not as severe as ANL suggests, and that any future differential settlement will be minimal.
  - (2) BGCL accepts that repairs are required to the Works but denies that the Works are unfit for their intended purpose.
  - (3) BGCL does not positively aver that its design for the external elements of the Works was competent, but disputes ANL's allegations as to what precisely the design for the external portion of the Works should have included in order to discharge BGCL's design obligations under the Building Contract.

- (4) BGCL says that a limited remedial scheme would be sufficient to remedy any defects in the Works.
  - (5) BGCL contends that ANL's claim is statute barred.
17. In its Particulars of Additional Claim BGCL alleges that any liability it may have to ANL was incurred as a consequence of Collier's failure to exercise reasonable skill and care in its design of the external parts of the Works, in breach of the terms of the Appointment. BGCL seeks declarations to the effect that Collier and the Collier Insurers are liable to indemnify BGCL against any losses it may incur as a consequence of ANL's claim.
18. The Collier Insurers admit that some damage has occurred due to differential settlement but make no admissions as to the extent of any damage and positively deny that any further substantial damage will occur. The Collier Insurers deny any breach on Collier's part; deny "*causation*"; and deny that they have any liability to BGCL.
19. The Collier Insurers also raise coverage defences as follows:
  - (1) The Collier Insurers say that there was a breach of the duty of fair presentation. The Third Party says that but for that breach it would have included in its contract with Collier an exclusion in respect of any claim arising out of the Collier Appointment. The Fourth to Sixth Parties say that they would not have entered into their insurance contracts at all but for that alleged breach, alternatively that they would have entered on different terms.

- (2) The Collier Insurers say that at the inception of their respective insurance contracts, Collier was aware of circumstances giving rise to BGCL's claim, and that that claim is excluded.
- (3) The Third Party says that Collier failed to notify the Third Party of its claim within the time required by its contract with Collier, and that Collier is not entitled to an indemnity under that contract as a result. The Third Party and the other Collier Insurers also say that Collier's notification may have been insufficient to encompass BGCL's claim.

### **Representation**

20. Before me ANL was represented by Ms. Lynne McCafferty KC and Mr. Daniel Churcher, instructed by Baker & McKenzie LLP, and the Defendant was represented by Mr. Ben Patten KC instructed by Weightmans LLP.
21. The representation of the other parties in this matter is a little complicated.
22. As set out above, BGCL has joined the Collier Insurers to these proceedings as the Third to Sixth Parties. The Collier Insurers deny that they are liable to provide any indemnity for the reasons summarised above.
23. Separately and in any event the Collier Insurers deny that Collier had any underlying liability to BGCL. In particular, it is alleged that Collier was entitled to rely on an earlier site investigation report, the Crossfield Report, which had been provided to Collier; that it was not necessary to undertake any works designed to shorten the period of settlement in the non-piled area; and that Collier allowed for settlement in its design and BGCL was aware of the same.



24. Prior to proceedings being issued, Keoghs LLP (“Keoghs”) had been acting on behalf of both Collier and its primary insurer Amtrust Europe LLP (the Third Party). However, in the light of the potential conflict that arose, the Third Party instructed Womble Bond Dickinson LLP (“WBD”) to act on its behalf in these proceedings, while at the same time retaining Keoghs to assist with that part of the defence which relates to Collier’s underlying position, i.e. in respect of Collier’s alleged liability to BGCL (which the Collier Insurers say needs to be established as a necessary first step before BGCL can establish liability against the Collier Insurers) as opposed to matters relating to the Third Party’s Defence in relation to insurance matters.
25. The Fourth to Sixth Parties, who have instructed DAC Beachcroft LLP (“DACB”) have adopted and relied on the defences as to Collier’s liability set out in the Third Party’s Defence.
26. However, there are also “insurance matters” insofar as the Collier Insurers contend that, by reason of material misrepresentation and/or non-disclosure, Collier was in breach of the duty of fair presentation under the Insurance Act 2015 and/or under the policies. Further (but without prejudice to such right to avoid and such other rights as insurers may have) the claim was subject to an exclusion in respect of matters of which Collier was aware or ought reasonably to have been aware prior to inception of the policies; and (in respect of the Third Party) there was late notification in any event.
27. The Collier Insurers have agreed to share the costs of the Collier defence (in the ratio of 25% to the Third Party and 75% to the Fourth to Sixth Parties), so that Mr. Simon Henderson now acts for the Collier Insurers in relation to the Collier

Defence, i.e. as to whether Mr. Collier was liable to BGCL, and, if so, in what amount, formally instructed by both WBD and DACB via Keoghs, who has been retained by the Collier Insurers to act in relation to those issues. However, in relation to insurance matters, the Third Party is represented by Mr. Neil Hext KC (instructed by WBD) and the Fourth to Sixth Parties by Mr. Robert Stokell (instructed by DACB).

28. These sensible arrangements made the submissions before me particularly in respect of cost budgeting simpler than they might otherwise have been.

### **Costs Budgets of BGCL and the Collier Insurers**

29. As between BGCL and the Collier Insurers, and as between the Collier Insurers themselves, their respective cost budgets were agreed.
30. Those costs budgets have not been agreed in terms by the Claimant. Accordingly I must consider those costs budgets: there was no challenge to any of them by the Claimant.
31. I have no hesitation in approving these cost budgets given, firstly, the lack of any criticism from the Claimant and, secondly, given that each of these budgets is significantly less than the Claimant's budget.

### **Applicable principles**

32. The following is a summary of the principles which I am required to apply:
- (1) 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: CPR 3.15(2).

- (2) The court may not approve costs incurred before the date of any costs management hearing, but may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of budgeted costs: CPR 3.17(3).
  - (3) A costs management order must record the extent to which the budgeted costs are agreed between the parties. In respect of the unagreed budgeted costs, it must record the court's approval after making appropriate revisions: CPR 3.15(2)(a)-(b).
  - (4) When reviewing unagreed budgeted costs, 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": CPR PD3E, paragraph 12.
  - (5) A costs management order concerns the totals allowed for each phase of the budget, and while the underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes to assist the court in fixing a budget, it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget: CPR 3.15(8).
33. In paragraphs [9] and [10] of his judgment in *GSK Project Management Ltd v QPR Holdings Ltd* [2015] EWHC 2274 (TCC); [2015] 4 Costs LR 729, Stuart-Smith J. said:

“9. The Costs Budgeting regime has led to disagreement about the extent of detailed argument that is appropriate when considering Precedent Hs. Experience in the TCC has shown that most costs budgeting reviews can and should be carried out quickly and with the application of a fairly broad brush. Only exceptionally will it be appropriate or necessary to go through a Precedent H with a fine tooth-comb, analysing the makeup of figures in detail. For reasons which will become apparent, however, this is an exceptional case which justifies a more detailed approach. The justification lies in the fact that the aggregate sum being put forward for approval is so disproportionate to the sums at stake or the length and complexity of the case that something has clearly gone wrong. The court’s interest in maintaining a robust and just approach to costs management requires an investigation into what has gone wrong for two reasons. First, to enable it to reach a figure which it prepared to approve; and, second, so that the court’s determination to exercise a moderating influence on costs is made clear.

“10. The parties are agreed that the approach adopted by Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC) is applicable in the circumstances of this case. I also agree, though Coulson J’s approach may better be seen as a guide rather than a straightjacket. On the facts of that case, he considered:

“i) The Proportionality of claimant’s Costs Budget [37-45];

“ii) The Reasonableness of the claimant’s Costs Budget [46-82];

“iii) Summary of Options [83-95];

“iv) Conclusions on the Available Options [96-98].

“I shall follow his lead.”

34. I set out below my application of this guidance.
35. Principle (5) of the principles set out at paragraph 32 above is derived from CPR 3.15(8) and is that it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget. This is not in dispute. However, it is relevant to have regard to the hourly rates of different fee-earners in order to see whether the proposed deployment of the legal team is reasonable and proportionate, subject to avoiding any temptation to micromanage the

expenditure or costs. In that regard, not only is the guidance of Stuart-Smith J. set out above relevant, but so also is the guidance of Jacobs J. in *Yirenki v Ministry of Defence* [2018] EWHC 3102 (QB) at paragraph [21]:

“The final vice [in the judgment under appeal], which is apparent from what I have already said, is that the process of setting the budget, and then the question at a detailed assessment of comparing how the budget was spent, becomes something which is being micromanaged by the court. That is something to be avoided. Paragraph 7.3 of the Practice Direction indicates that the ultimate aim is to arrive at budgeted costs which fall within the range of reasonable and proportionate costs. None of that means, of course, that it is not appropriate for the Master, when setting the budget and approving the figures, to look at the constituent parts. Indeed, it is impossible to see how a Master can sensibly come to figures without looking to see how they have been calculated by the party putting them forward. In so doing, the Master should use his or her experience as to how much time should be spent, the type of people who should be doing the relevant work, and his or her experience of hourly rates. However, all of those matters feed in to a finding as to the specific number of hours which are to be spent in the future, or a finding as to [a] specific figure for disbursements to be incurred in the future.”

36. Paragraph 5 of Practice Direction 3E provides:

“In deciding the reasonable and proportionate costs of each phase of the budget the court will have regard to the factors set out at Civil Procedure Rules 44.3(5) and 44.4(3) including a consideration of where and the circumstances in which the work was done as opposed to where the case is heard.”

37. CPR 44.3(5) provides:

“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 issue in the proceedings;

“(c) the complexity of the litigation;

“(d) any additional work generated by the conduct of the paying party; and

“(e) any wider factors involved in the proceedings, such as reputation or public importance.”

38. CPR 44.4 provides:

“The court will also have regard to –

“(a) the conduct of all the parties, including in particular –

“(i) conduct before, as well as during, the proceedings; and

“(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

“(b) the amount or value of any money or property involved;

“(c) the importance of the matter to all the parties;

“(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

“(e) the skill, effort, specialised knowledge and responsibility involved;

“(f) the time spent on the case;

“(g) the place where and the circumstances in which work or any part of it was done; and

“(h) the receiving party’s last approved or agreed budget.”

### **The Claimant’s Proposed Costs Budget**

39. The Parties’ respective costs budgets put before me were as follows:

	<b>ANL</b>	<b>BCGL</b>	<b>Third Party</b>	<b>Fourth/Fifth/Sixth Party</b>
Pre-action	198,434.10	140,594.78	0	
Issue / SoC	326,200.10	131,499.30	71,249.50	82,161.00
CMC	90,812.25	23,003.50	37,464.00	15,353.50
Disclosure	284,733.25	138,090.00	24,745.50	39,678.00

Witness S	152,749.00	57,415.50	12,720.00	16,070.00
Experts	671,381.63	328,426.00	43,650.00	33,615.00
PTR	85,135.00	24,900.00	25,440.00	10,895.00
Trial Prep	665,330.00	514,033.00	401,025.00	136,884.00
Trial	597,275.00	316,585.00	133,580.00	142,810.00
ADR / Settlement	109,108.00	103,215.50	20,680.00	30,390.00
Contingent A	0	96,046.00	0	0
Contingent B	0		0	0
			254,271.15 <sup>2</sup>	762,813.45 <sup>3</sup>
<b>Total</b>	<b>3,181,158.17</b>	<b>1,873,808.58</b>	<b>1,024,825.15</b>	<b>1,270,669.95</b>

40. It will be seen that ANL's budget exceeds BCGL's budget by a significant margin.

41. Delving into the detail of the parties' budgets shows that the most important difference between the parties is the amount of the hourly rates charged by the respective solicitors as shown in the following table:

Fee Earner Grade	ANL	BCGL	Third Party	Fourth/Fifth/Sixth Party	Guideline
Partner Grade A	£801	£215	£295	£365	£512

<sup>2</sup> 25% Share of Keoghs costs

<sup>3</sup> 75% Share of Keoghs costs

Senior Associate Grade B	£648	£180	£265	£280	£348
Senior Associate Grade C	£499.50	£160	£245	£180	£270
Associate Solicitor Grade C	£360	£160	£245	£180	£270
Trainee Grade D	£216		£150	£140	£186
Paralegal Grade D	£203	£110			

42. As set out above, I have no discretion to make a cost management order in respect of incurred costs. The offers made by BCGL in respect of the costs in respect of which I do have a discretion are as follows:

	ANL	BGCL's offer
Disclosure	231,880.00	138,090.00
Witnesses	151,680.00	67,750.00
Experts	559,500.00	298,500.00
PTR	85,135.00	41,925.00
Trial Prep	665,330.00	455,250.00
Trial	597,275.00	227,750.00



ADR / Settlement	109,108.00	68,358.00
<b>Total</b>	<b>2,399,908.00</b>	<b>1,378,658.00</b>

43. The difference between what is put forward by ANL and what is offered by BCGL can in large measure be explained by the difference in hourly rates between the Guideline rates which BCGL is willing to accept and the rates charged by ANL's solicitors, but not entirely. There are also differences as to the number of hours it is reasonable to expend upon disclosure, witness statements, experts, the PTR and trial preparation and the trial. Further, it is said that there is excessive involvement of counsel.
44. I am required to consider whether the cost budget put forward is reasonable and proportionate. In deciding whether the budget is proportionate, the most important factor to have in mind is the amount of the claim: however, in this case, the relevant remedial scheme has not yet been determined, and, accordingly, the amount claimed cannot yet be determined.
45. Notwithstanding that uncertainty, I was told by Ms. McCafferty KC that the amount was likely to be in excess of £10 million. This does not seem to me to be improbable – and it is clear that BCGL and other parties regard this as a heavy claim.
46. Ms. McCafferty also emphasised that this is a claim of importance for ANL, involving as it does its principal printing works.

47. Further, and importantly, this is a relatively complex case, reflected in the 12 day trial estimate.
48. For his part, Mr. Patten KC emphasised the disparity between the cost budgets for ANL on the one hand, and the other parties on the other hand. In particular he contended that the burden upon BCGL which has to deal not only with ANL's claim, but also with the issues concerning the Third to Sixth Parties is substantially greater than that upon ANL. He also took me through the various phases, contrasting the time and money budgeted by his client (and the other parties) with the time and money budgeted by ANL.
49. I am required to take a broad brush view of the budget put forward by ANL.
50. In my judgment, the amount estimated is disproportionate to the issues arising in the case, even allowing for the presently estimated amount of the claim. It is of course open to ANL to make use of expensive and experienced lawyers, but in doing so, ANL's legal team will need to consider the extent to which work can be delegated either to more junior members of the solicitor team, or to members of the Bar who are likely to charge lower hourly rates than the Grade B and C Senior Associates at Baker and McKenzie.
51. In reaching a view, I also take into account that the costs over which I have no jurisdiction (i.e. the incurred costs) are themselves very substantial.
52. My overall view is that the estimated costs should be reduced by about 15%. At this stage I am not going to allocate reductions on a phase by phase basis, but rather giving ANL an opportunity to come back with a revised budget taking this view into account.