

ENGLAND AND WALES / JUDGMENT

MJS Projects (March) Limited V RPS Consulting Services Limited

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Neutral Citation Number: [2026] EWHC 884 (TCC) IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS IN LEEDS TECHNOLOGY AND CONSTRUCTION COURT (KBD) Her Honour Judge Kelly sitting as a Judge of the High Court Case No: HT-2022-LDS-000011 The Court House Oxford Row Leeds LS1 3BG Between: MJS PROJECTS (MARCH) LIMITED

- and - RPS CONSULTING SERVICES LIMITED

- ----- Claimant Defendant Richard Sage (instructed by DWF Law LLP) for the Claimant Anna Laney KC (instructed by Beale & Company Solicitors LLP) for the Defendant Hearing date: 14 May 2025 Draft judgment circulated to the Parties: 08 April 2026 Date handed down: 15 April 2026

- ----- APPROVED JUDGMENT This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2.00pm on 15 April 2026. Approved Judgment Case Number: HT-2022-LDS-000011 Her Honour Judge Kelly

1. This costs judgment follows the dismissal of the Claimant's claim arising out of the design and construction of a container park near Felixstowe Port. The substantive judgment is at [2025] EWHC 831 (TCC).
2. At the costs and consequential orders hearing, I again had the benefit of oral and written submissions from both Mr Richard Sage for the Claimant and Ms Anna Laney KC for the Defendant.
3. The Claimant accepts that the usual order would be that costs follow the event. However, the Claimant also asserts that there are two reasons to depart from the usual order in this case. The first is the Defendant's unreasonable failure to mediate. The second is the last-minute change of evidence by the Defendant's expert. As a result of these matters of conduct, the Claimant asserts that the proper order is "no order as to costs".
4. The Defendant argues that there is no reason to depart from the usual order. There was no unreasonable failure to mediate when one looks at the facts. The expert did not depart from his written evidence until shortly before the trial. In any event, one has to look at the full chronology of events and the judgment to see the full picture. In addition, the Defendant seeks indemnity costs against the Claimant in respect of the expert evidence phase. The

Defendant criticises the Claimant's expert, his work and methodology in giving his expert evidence and the Claimant's control and instruction of their expert. The Law

5. CPR 44.2(1) and (2) provide that the Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the Court may make a different order. CPR 44.2(4) provides that in deciding what (if any) order to make about costs, the Court will have regard to all the circumstances, including: (a) the conduct of all the parties; and (b) Approved Judgment Case Number: HT-2022-LDS-000011 whether a party has succeeded on part of its case, even if that party has not been wholly successful.
6. CPR 44.2(5) provides that the conduct of the parties includes: (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; (d) whether a Claimant who has succeeded in the claim, in whole or in part, exaggerated its claim; and (e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution.
7. CPR 44.2(8) provides that where the court orders a party to pay costs subject to a detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.
8. As to the basis of assessment, CPR 44.3 applies. Where there is a detailed assessment, the court will assess the costs on either the standard basis or the indemnity basis. In neither case will the court allow costs which have been unreasonably incurred or unreasonable in amount. When costs are assessed on the standard basis, CPR 44.3(2) provides that the court will only allow costs which are proportionate to the matters in issue. Disproportionate costs may be disallowed or reduced even if they were reasonably or necessarily incurred. Any doubt about whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount will be resolved in favour of the paying party. CPR 44.3(3) provides that where costs are assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable in amount in favour of the receiving party. It should be noted that there is no test of proportionality where costs are assessed on the indemnity basis. 9. In addition to the rules, the parties relied on various cases which are summarised below: On Conduct Approved Judgment Case Number: HT-2022-LDS-000011
- (1) The court's endorsement of alternative dispute resolution ("ADR") is long standing and enshrined in the overriding objective (CPR 1.1). There is a large body of case law considering what amounts to unreasonable behaviour in a failure to engage in ADR. ADR must always be considered. Cases which are not suitable for ADR are rare. ADR may achieve results

satisfactory to both parties which the lawyers and the courts may not achieve. The fact that parties appear to be very far apart or intractable is not a reason not to mediate (see *Hurst v Leeming*

[2002] EWHC 1051 (Ch), *Dunnett v Railtrack plc* [2002] 1 WLR 2434, *Garritt- Critchley v Ronnan* [2015] 3 Costs LR 453 and *NJ Rickard v Holloway* [2017] 1 Costs LR 1).

- (2) The court can deprive a successful party of some or all of its costs for failure to agree to ADR. However, the burden is on the unsuccessful party to establish why the court should do that. ADR is not appropriate in every case and there is no presumption in favour of mediation as the preferred method of ADR. The fact that a party reasonably believes that they have a strong case is relevant to the question of whether they acted reasonably in refusing ADR. However, the mere fact of success at trial does not mean that the claim was unsuitable for ADR.
- (3) The Court of Appeal has provided a non-exhaustive list of factors that may be relevant to the question of whether a party has unreasonably failed to engage with ADR. These are:
 - (a) the nature of the dispute;
 - (b) the merits of the case;
 - (c) the extent to which other settlement attempts have been attempted;
 - (d) whether the costs of ADR would be disproportionately high;
 - (e) whether any delay in setting up and attending ADR would have been prejudicial;
 - (f) whether the ADR had a reasonable prospect of success (see *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002).
- (4) A failure to engage in ADR, even if unreasonable, does not automatically result in a costs penalty. It is one of the factors to take into account when exercising the discretion about costs. The question is whether the conduct as a whole is unreasonable. Making and standing by a reasonable offer may not be unreasonable conduct in the light of the ultimate judgment. A refusal to mediate or to accept an offer made when a party is then successful simply means the parties have lost an opportunity to resolve the case without a hearing (see *Assensus Ltd v. Wirsol* Approved Judgment Case Number: HT-2022-LDS-000011 *Energy Ltd* [2025] EWHC 503 (KB) and *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd* [2014] EWHC [2955] (TCC)). On Indemnity Costs
- (5) In considering whether to exercise the wide discretion of the court to order costs to be assessed on the indemnity basis, the question which must be asked is stated by Waller LJ in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* (a firm) [2002] EWCA Civ 879 at paragraph 39: “Is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?” Interim Payment on Account of Costs

- (6) CPR 44.2(8) provides that where the Court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so. The court has discretion as to the amount of any order on account of costs. What amounts to a reasonable sum will depend on all the circumstances of the case.
- (7) The starting point for what a reasonable sum on account of costs is the receiving party's approved costs budget with a maximum reduction of 10% as the budgeted costs have already been assessed as both reasonable and proportionate. Interest on costs should then be added (see *MacInnes v Gross* [2017] 4 WLR 49, per Coulson J as he then was). What is the appropriate costs order? Claimant's submissions
10. In asserting an unreasonable failure to mediate, the Claimant relies on pre action and post action correspondence. The Claimant suggested ADR pre action on 14 July 2022 when a suggestion was made to have a without prejudice meeting, mediation or meeting of experts. The Defendant declined that offer on 30 September 2022 stating that they did not consider mediation to be appropriate at least until the Claimant had provided its expert report. Approved Judgment Case Number: HT-2022-LDS-000011
11. The Claimant asserted that it was not proper to maintain a denial or refuse mediation before seeing the expert report. Proceedings were issued the following day. The Claim Form was issued on 14 October 2022. Particulars of Claim were served on or around 10 February 2023 and a Defence served on or around 14 April 2023. The Claimant's Reply was served on 19 May 2023.
12. In a letter dated 5 June 2023, the Claimant again raised the prospect of mediation before disclosure and stated that "our client would be willing to agree to an early exchange of expert evidence on a without prejudice basis, if that would assist". The Defendant replied the same day suggesting an early meeting between the respective experts. The Defendant stated that it was not "currently in a position to agree to a mediation" but "would be happy to reassess the position in relation to mediation once the discussion between the experts has taken place". The Claimant categorised this as a moving of the goal posts by the Defendant as the Defendant previously stated no mediation until it received the Claimant's expert report.
13. The Claimant submits that it continued to push for mediation. On 21 September 2023, mediation was again proposed and the Claimant stated that there was a "limited opportunity to mediate now before significant further costs are incurred". Two mediators were proposed and a mediation suggested in late October or November. By letter dated 28 September 2023, the Defendant refused the offer of mediation, asserting that there were various technical issues in dispute and it would not be a cost-effective exercise because liability was denied in full. If there was to be a mediation, it needed to take place after the experts' joint statements on 17 November 2023. The Claimant notes that the Defendant did not file a witness statement explaining the refusal at this stage.

14. Further suggestions of mediation were made by the Claimant. The trial in February 2024 was fast approaching. The Defendant suggested that the appropriate way forward was for the solicitors to engage in a without prejudice commercial discussion after the expert reports had been produced. The Claimant agreed to a without prejudice commercial discussion and asked for availability and the suggested format for the meeting. It did not receive a response from the Defendant. Approved Judgment Case Number: HT-2022-LDS-000011
15. Thereafter, there were counsel to counsel discussions and a without prejudice meeting was suggested by the Defendant to be attended by lawyers and experts so that the Defendant could better understand the reasons for the differences between the experts in more detail. The Claimant again proposed mediation, but in the meantime was happy for there to be an insurer-to-insurer telephone call.
16. Approximately two weeks before trial, the Claimant again suggested a mediation to take place in its office in Leeds, attendance limited to lawyers and decision makers, so that a commercial settlement could be discussed. The Defendant refused mediation on the basis that the experts would be excluded. The Claimant noted that its expert was in Singapore and so mediation with experts would not be viable. In addition, there were now expert reports, so the Claimant did not believe it was necessary to insist upon the attendance of the experts at any mediation. The mediation did not take place. Again, the Claimant asserts this was a shifting of the goal posts by the Defendant.
17. The Claimant asserts that, although the Defendant says it did not refuse to mediate, the reality is that none of the Claimant's offers to mediate were accepted and the objections put forward by the Defendant to any mediation changed as time went on. On looking at the considerations set up by the Court of Appeal in Halsey, this was not a case which would have been unsuitable for mediation. Professional negligence cases are routinely resolved at mediation and there was no reason not to try it. The fact that the allegations were of a technical nature was not a reason not to mediate. The fact that the parties' experts disagreed was routinely the case when mediation succeeded.
18. On considering the merits of the case, whilst acknowledging that the Defendant was ultimately successful at trial, the Claimant submitted that the evidence of the Defendant at trial turned "heavily" on last-minute calculations prepared by the Defendant's expert and required the court to reject part of the Defendant's expert evidence in relation to the mass concrete taper. If those last-minute calculations had not been done, or the Court had accepted what the Defendant's expert said about the need to compact the ground for a mass concrete taper, the outcome of trial would have been different. Approved Judgment Case Number: HT-2022-LDS-000011
19. The Defendant's expert in his written evidence had stated that the mass concrete taper was part of the design and the failure to install that mass concrete taper was a workmanship defect which caused the cracking. At trial, the Defendant's expert accepted that the mass concrete taper was not part of the design at the relevant joints and so was not a

workmanship defect. The Court accepted part of the Claimant's expert evidence that it would have been possible to compact the area by hand. It is therefore clear, it was submitted, that this was not a case where all of the arguments were overwhelmingly in one party's favour all along.

20. The fact that other settlement methods had been attempted did not justify the refusal to mediate. There were limited offers by the Defendant. Given the value of the dispute of nearly £400,000, the likely costs of mediation of up to perhaps £50,000 would have justified it. In addition, both parties' budgets included the costs of mediation in any event. Having offered mediation at various stages including pre action, the date of the mediation would not have entailed a delay to the trial date.
21. The Claimant asserts that there would have been a very high likelihood that a mediation would have resulted in the settlement of the case. This was not a case which turned on allegations of dishonesty nor a substantial legal or factual dispute. As the judgment noted, the parties were largely agreed as to the relevant legal issues and there was no animosity between the parties which might act as a barrier to settlement. Rather, there was a divergence of views between experts. Those disputes are routinely disposed of with a skilled mediator in commercial disputes.
22. The other reason why the order ought to be "no order as to costs" was because of the late change of evidence of the Defendant's expert in relation to the mass concrete taper and the provision of late calculations. The Defendant's expert wrongly believed that the mass concrete taper was specified at the relevant joints in the design. The Claimant was therefore entitled to approach the trial on the basis that the Defendant's expert would give evidence in accordance with the views he expressed in his written report and in the joint statement. The expert changed his mind as a result of very late additional calculations produced one week before trial. The Claimant asserts that last Approved Judgment Case Number: HT-2022-LDS-000011 minute change of mind had a decisive impact on the outcome of trial and thus it would be entirely unjustified if the Defendant recovered all of its costs. Defendant's submissions
23. Perhaps unsurprisingly, the Defendant takes a different view of the reasonableness of its conduct. Whilst it accepts the correspondence as summarised above, the Defendant submits that the whole of the history of the parties' behaviour including pre action conduct has to be considered. Pre action protocol exchanges are also critical.
24. The Defendant's stance has always been that workmanship issues were critical in this case. In the letter of response dated 22 May 2019, the Defendant thoroughly and carefully detailed (over some 6 pages) why the Defendant considered that its design was not negligent. That letter also set out 11 workmanship defects in addition to the use of the wrong size dowels. The Claimant's brief response dated 5 November 2019 did not engage with the allegations of poor workmanship at all. It maintained that the problem was incorrect calculations used by the Defendant and requested sight of the Defendant's calculations showing load transfer

across joints and the application of dynamic factors.

25. COVID-19 then caused some delay. By letter dated 22 December 2020, the requested calculations were provided and a response to the asserted workmanship defects was requested. The reply to that letter came 19 months later by letter dated 14 July 2022. This was the first letter relied upon by the Claimant in its submissions.
26. By this stage, having provided calculations as requested, and not having received any response, the Defendant's solicitors had closed its file. The Claimant's letter informed the Defendant that an expert structural engineer had now been instructed and the expert "supports our client's position that [the Defendant's] design fell below the standard of a reasonably competent firm of civil and structural engineers". As such, the claim was pursued and if liability was not accepted, the Claimant would be open to ADR. Further, if liability was not admitted or there was no agreement to ADR, the Claimant would "have no choice but to issue proceedings". A chaser e-mail dated 11 August 2022 was sent to the Defendant asserting that "if a response is not received Approved Judgment Case Number: HT-2022-LDS-000011 shortly, our client will need to issue proceedings in order to protect its position". The Defendant asserts that proceedings did not need to be issued at that stage from a limitation perspective because the agreement relied upon by the Claimant had been executed as a deed on 25 March 2019.
27. Whilst the Defendant accepts that it did not agree to mediation, it asserts that the correspondence needs to be considered as a whole to see the context of the refusals. Workmanship issues had been raised as the cause of the damage for four years before the issue of proceedings. Those issues were not substantively responded to by the Claimant. In its letter dated 30 September 2022, the Defendant provided further detailed explanation as to why the Defendant's design was not the cause of the damage and provided hand drawn diagrams intended to provide further clarification of the Defendant's case on causation. The Defendant asked for disclosure of the Claimant's expert report on a without prejudice basis and stated that it was not appropriate at this stage to consider ADR until the expert report was provided. At no stage did the Claimant provide its expert report on a without prejudice basis.
28. On 7 February 2023, the Claimant then made a Part 36 offer which was over £60,000 higher than the sum agreed by the quantum experts (after the overhead and profit claims of the Claimant had been excluded as there was no evidence to support those losses). The pleadings then followed. The workmanship defects were set out in detail by the Defendant in its Defence. The only workmanship defect admitted by the Claimant in its Reply was the use of the wrong size dowel. However, it was denied that the use of the wrong side dowel had any positive effect in any event.

29. As to the suggestions of mediation, the Defendant submits that it was not refusing to engage in a mediation process but, as the engineering evidence was of paramount importance in the case, the evidence of the structural engineering experts was required before meaningful mediation could take place.
30. The Defendant asserts that it is a mischaracterization of the correspondence as a whole for the Claimant to assert that the Defendant refused to mediate. The Defendant explained throughout its need to understand the Claimant's case. In particular, it Approved Judgment Case Number: HT-2022-LDS-000011 needed to understand why the Claimant asserted that the various workmanship defects pleaded were not causative of the cracking which had occurred by December 2017.
31. It is not a case where the Defendant was not engaging and trying to settle the case on a commercial basis. Calderbank offers were made between counsel at the start of 2024 before trial. The Claimant made a further Part 36 offer. Counsel for the Defendant by e-mail dated 2 February 2024 again raised the issue of workmanship and noted that the Defendant's expert had been told by the Claimant's expert "that he had not even been instructed to consider workmanship in any detail - which is astounding given that this has always been the Defendant's case on the pleadings".
32. Later in the same e-mail, various other concerns about the Claimant's expert changing his position without explanation were raised and the Defendant suggested a without prejudice meeting with lawyers and experts to try to better understand the reasons for the differences in expert opinion. The Defendant relies upon the fact that it was highlighting the same concerns which were identified as fundamental shortcomings of the Claimant's expert in the judgment.
33. The Claimant's response the same day did not engage with the asserted scope of the Claimant's expert's instructions. The e-mail suggested the Claimant would consider mediating once it received a statement from the Defendant's solicitors explaining why the Defendant did not agree to mediate previously. That statement was provided by return. However, the prospects of any settlement at a mediation were unrealistic at this point as the Claimant had asserted that the recent Part 36 offer "was not made for negotiation purposes. Our client has a strong case, and is confident it will beat the offer at trial... It will not be forced into 'meeting in the middle' at an unrealistic sum on the basis of very low offers put forward by" the Defendant.
34. On receipt of the Defendant's witness statement dealing with why mediation had not previously been agreed to, the Claimant stated it would be prepared to attend a mediation but only on two identified dates and on five other specific terms, including that the Defendant would have no say in the identity of the mediator appointed. The Defendant did not consider that those terms were appropriate to enable constructive Approved Judgment Case Number: HT-2022-LDS-000011 mediation and instead, by letter dated 7 February 2024, made a further Calderbank offer.

35. All of that, the Defendant states, is relevant background against which to consider the factors identified in Halsey. The nature of the dispute was always such that a decision would come down to assessment of the expert evidence as a result of the competing theories of causation. It is not a just or accurate assessment of the Defendant's behaviour since the claim was intimated to say that it has failed to engage in trying to resolve the dispute. It engaged fully in the pre action protocol process. In its letter of response, it provided detailed assertions about why the Defendant was not negligent and made assertions about the inadequacy of the workmanship. It provided calculations when requested to demonstrate its design worked.
36. In contrast to the Defendant's approach, the Defendant asserted that the Claimant did not engage properly with the pre action protocol process. Whilst the Claimant asked for mediation, it would not and did not provide its expert report on a without prejudice basis. It did not engage with the Defendant's assertions about workmanship issues. The Defendant asserts that the inadequacy of the Claimant's engagement with the issues is demonstrated by the evidence given by its expert during his evidence.
37. The Claimant's expert gave evidence to the effect that that the first time he made allegations of inadequacy against the Defendant's design, he had not done any hand calculations to see if the design physically worked in practice and it was a "theoretical criticism". In addition, he had not addressed the causative effect of the workmanship issues. He had not considered the relevance of when the damage occurred and readily agreed at trial that any design defect could not have manifested itself in the damage seen by December 2017. He had not asked himself the correct Bolam question when considering liability. All of these points were also relied upon by the Defendant when inviting the court to consider whether costs on the indemnity basis in respect of the expert phase of proceedings should be awarded to the Defendant.
38. The Defendant asserts that the Claimant's claim was wholly lacking in merit. The cause of the damage, as the court has decided, was workmanship. For whatever Approved Judgment Case Number: HT-2022-LDS-000011 reason, the Claimant simply failed to engage with the Defendant's case on workmanship. In those circumstances, it is not unreasonable for the Defendant to have asked the Claimant to deal with the workmanship issues and when no information or response was provided, to require expert discussions to be concluded before being willing to spend money on a mediation process. Various attempts at a commercial settlement were made by the Defendant. The Calderbank offers were made and there were discussions between counsel. As the claim was dismissed, the offer shortly before trial of £200,000 was generous and should have been accepted. The real failure here was the Claimant's refusal to engage with the Defendant's case.

39. The costs of ADR were not insignificant. Each side had budgeted £25,000 for mediation. As the net value of the claim was nearly £324,000, the costs of mediation were significant. Further, there was no prejudicial delay because ADR did not take place. The last suggestion of mediation by the Claimant, offering just two dates in February 2024, would have required the trial to be vacated. The suggestion by the Defendants to have commercial discussions was therefore a realistic and sensible approach.
40. The Defendant submits that the approach of the Claimant throughout shows why ADR would not have been successful. The Defendant made serious offers which were rejected by the Claimant. The Claimant refused to share expert evidence and then issued proceedings before issuing was necessary. Immediately before trial there was a gulf of £450,000 between the parties. Despite all that, the Claimant's assertion after the judgment was that it would be entitled to its costs because of the Defendant's behaviour and, by way of concession, it suggested that the appropriate costs order was no orders to costs.
41. The additional conduct points concerning the Defendant's expert evidence changing his position do not assist the Claimant either. The Particulars of Claim do not mention a mass concrete taper and do not assert that the failure to specify a mass concrete taper was a negligent defect in the design. It was never part of the Claimant's case that a mass concrete taper was required. It was only part of the Defendant's case that a mass concrete taper was needed if the materials underneath the joints could not be Approved Judgment Case Number: HT-2022-LDS-000011 adequately compacted. As such, and considered as a whole, the Defendant's expert evidence was not supportive of the Claimant's case.
42. Indeed, the lack of relevance of the mass concrete taper in relation to the design is shown by the fact that it was only first mentioned in the experts' joint statement dated 15 December 2023. The Claimant did not know the detail of the Defendant expert's evidence on this aspect of the design until his report was served on 26 January 2024, just over one week before trial. By this time, the majority of costs were already incurred.
43. In addition, it is wrong to assert that the Defendant's expert simply changed his evidence on the number of dowels engaged by the design when the court accepted his explanation that a further check was required after consideration of some of the points raised by the Claimant's expert. The Defendant's expert had done the calculations simply because the Claimant's expert had not done them. This provides no justification for departing from the usual rule for costs to follow the event. This additional check did not cause the Claimant to abandon its case. It did not incur additional costs as, by the time the calculations were served within two weeks of trial, brief fees and the majority of other costs had been incurred. Decision

44. In my judgment, the appropriate order in this case is the usual order and so the Claimant shall pay the costs of the Defendant, to be the subject of a detailed assessment if not agreed. I accept that the Defendant did not agree to the various suggestions for mediation which were proposed by the Claimant. However, I also accept the submission of Ms Laney that to look at that fact alone is to oversimplify the background to the discussions between the parties in this case.
45. As noted in Halsey, mediation is not the only, nor the preferred, method for parties engaging in ADR. Whilst the Claimant proposed mediation before proceedings were issued, I do not consider it unreasonable of the Defendant to have refused to engage in mediation at that stage. The Defendant had raised a number of workmanship issues in response to the letter of claim. In response, the Claimant asked for calculations to Approved Judgment Case Number: HT-2022-LDS-000011 justify the Defendant's design but the response did not deal with the alleged workmanship issues. The Defendant's calculations were provided.
46. The Claimant then did not respond for 19 months. When the Claimant wrote again, it stated it had expert support for its case. Once more, it did not deal with the workmanship issues. The Defendant asked for a copy of the expert report on a without prejudice basis and again raised the lack of response to the issues about workmanship and causation raised by the Defendant. The Claimant did not provide the expert report and did not engage with all workmanship issues in any meaningful way with the Defendant. I accept that the Defendant did not agree to the continued suggestions of mediation without having some understanding of the expert evidence. That cannot be described as unreasonable in my judgment. However, other forms of ADR were proposed by the Defendant throughout and, in addition, offers were being made by the Defendant.
47. I do not accept that the stance of the Defendant requiring an understanding of the Claimant's expert evidence before mediating was unreasonable. I accept the nature of the dispute would not prevent a successful mediation. However, having actively engaged, provided calculations and justification as to why the Defendant asserted it was not negligent, it was not unreasonable to require a meaningful response to the points made before mediation.
48. Mediation may have cost up to £50,000. That is not an insignificant sum, especially when the Claimant was not providing information which in my judgment was reasonably requested (even on a without prejudice basis). Once the expert evidence was available, the Claimant's offer to consider mediation was only weeks before the start of the trial and was offered only on potentially disadvantageous terms to the Defendant. If accepted, the trial date could perhaps have been kept. I think the submission recorded at paragraph 39 above is a little pessimistic. However, I do not accept that failure to agree to earlier mediation, nor to the last suggestion of mediation on the terms demanded, could reasonably be held against the Defendant. Approved Judgment Case Number: HT-2022-LDS-000011

49. I accept that the merits of the case were not all one way. There were two experts with different views, and no one has a crystal ball to be able to see how a witness may give evidence at trial. However, this is not a case where a Defendant refused to engage in ADR at all. The Defendant made various offers to settle, including a final offer of £200,000 about three weeks before trial. In light of the dismissal of the claim and the almost wholesale rejection of the Claimant's expert evidence, the Defendant's assessment of the strength of its case was justified. The commercial settlement offer made could accurately be described as generous.
50. The Defendant's reasoned rejection of one form of ADR, namely mediation, was not unreasonable. The legal issues were clear and largely agreed between the parties. This case would always depend upon the Court's assessment of the expert evidence. That being the case, the Claimant's refusal to disclose its expert evidence (even on a without prejudice basis) and its apparent failure to instruct its expert to consider all of the workmanship issues raised by the Defence would inevitably have had a significant impact on the likely success of any mediation.
51. Even had mediation taken place, I do not accept that it would have had reasonable prospects of success in this case. The Claimant had not engaged with the Defendant's allegations of poor workmanship nor provided its expert evidence. The Defendant's reasonable wish to understand the case it was meeting was not just going to disappear. Offers were being made both ways in the run up to trial. The parties remained a vast distance apart.
52. In addition, I do not accept the Claimant's assertions that a "late change" of evidence by the Defendant's expert supports a decision that no order as to costs is the appropriate costs order in this case. I found that the Defendant's expert was in error in asserting that a mass concrete taper was part of the Defendant's design. However, as the need for a mass concrete taper was never part of the Claimant's case that the Defendant's design was negligent, this does not seem to me to have had a material bearing on the outcome of the litigation.
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53. The Claimant's expert did not assert that a mass concrete taper was needed to make the design work. The first mention of the need for a mass concrete taper was about two months before trial when the experts produced their joint statement. Further, the need for a mass concrete taper was only if adequate compaction could not be achieved under the relevant joint. The detail of the Defendant's expert opinion on the need for a mass concrete taper came in his report served about one month before trial.
54. In both the joint statement and the report, the Defendant's expert made it clear that he knew that the mass concrete taper was shown on the design drawing for a different joint. However, he was of the opinion that the Claimant's workmen should have inferred that a mass concrete taper was also required under the relevant joint, even though it was not shown on the design drawings, because of the compaction issue. Again, the need for the mass concrete taper was only if adequate compaction could not be achieved. The Claimant's

expert opined that the necessary compaction could be achieved and that was the finding that I made.

55. The Defendant's expert also produced some additional calculations shortly before trial. However, as was stated in the judgment, that was done to enable him to consider the evidence of the Claimant's expert and the criticisms of the design and the conclusions drawn from them. In my judgment, this is classically an example of the sort of final "sense check testing" the court would expect from an expert, particularly when the expert evidence has been finalised very late in the day before trial. I accept the Defendant's submission that this was "simply part of the usual cut and thrust of a professional negligence trial". In those circumstances, it is difficult to see how any additional costs were caused by the late calculations in any event. I do not accept that these facts should lead to a conduct finding such that the Defendant should not recover its costs in the usual way.
56. Given all of these factors, I do not accept that there was unreasonable conduct on the part of the Defendant, still less conduct so unreasonable that the conduct should be sanctioned in costs. Costs on the Indemnity Basis for the Expert Phase? Approved Judgment Case Number: HT-2022-LDS-000011 The Defendant's submissions
57. The Defendant's claim for indemnity costs is based both on the court's criticism of the Claimant's expert and also criticism of the Claimant's lawyers for not identifying the inadequacy of their expert's evidence and ensuring the expert dealt with the issues and applied the correct legal test.
58. The question to be asked is whether there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs. The Defendant asserts that the answer is plainly yes. As well as relying on the various criticisms made of the Claimant's conduct during the course of the litigation, the Defendant also criticises the manner of instruction of the Claimant's expert and the oversight of the expert's work.
59. The Defendant asserts that the Claimant did not properly interrogate the application of the Bolam test, the Defendant's causation arguments, the significance of the date by which the damage had become manifest, nor provide any evidence about what the correct design would be if the Defendant's design was negligent. It is asserted these mistakes appear to have occurred because the Claimant's frame of reference for expert evidence appears to have been based on the initial analysis undertaken for it by Mr. John Frith, rather than instructing their expert to consider all of the issues raised in the pre-action correspondence.
60. The Defendant criticises the fact that the Claimant's expert did not directly answer the question "was the Defendants design one that a reasonable body of engineers could have produced?". The Claimant is criticised and its conduct described as "out of the norm" because proceedings were issued, the experts' joint statement produced and expert reports exchanged without that question being answered. As there were opportunities for that error to be caught and it was not, the "failing lies squarely on the shoulders of the Claimant's

team; and it falls to be sanctioned in costs”.

61. In addition to the failure to answer that fundamental question, the Defendant asserts that the Claimant did not consider the timing by which the damage had manifested itself. As the Claimant's expert readily accepted at trial, the damage having Approved Judgment Case Number: HT-2022-LDS-000011 manifested itself by December 2017, that could only have been caused by workmanship issues. The Claimant's expert's explanation that he had not considered timing “in order to keep things simple” was again something which the Claimant's team should have identified and dealt with before trial.
62. The Claimant's expert's decision to use FE analysis to assess the Defendant's design was also criticised, because FE analysis would not actually be used by a designer undertaking the design in this project. The expert's choice to adopt a forensic approach rather than using methods that a body of reasonably competent engineers would adopt in practice was not acceptable. The decision to use FE analysis was unhelpful in addition as there was no explanation as to what it was, how it worked and the benefits or shortcomings of using it.
63. In addition, the Claimant's expert used an out-of-date edition of a technical publication, without disclosing that fact, in order to justify his methodology. He changed his mind after agreeing the issue in the joint statement, without explanation, on the design loading issue. Having changed his mind and asserted that the design loading was inadequate in the design, when giving oral evidence, he gave different evidence again and stated that very little turned on the design load and it was not really relevant. The most surprising aspect of the Claimant's expert evidence was the fact that he volunteered that he had made additional changes to the model which underpinned the FE analysis over the weekend before the trial started. As noted in the judgment, it appeared that nobody was aware that had occurred before the expert mentioned it when giving evidence. That meant that his opinion had changed without anybody being aware of how or why.
64. All of those factors show the inadequacy of the Claimant's expert's compliance with CPR 35 and his expert duty. As such, the conduct of the Claimant and of the Claimant's conduct of the litigation is such that this case does fall outside of the norm and a cost sanction is required to mark that. The Claimant's submissions Approved Judgment Case Number: HT-2022-LDS-000011
65. The Claimant reminds me that the threshold for making an indemnity costs order is high. There must be something more than simply running a case and losing it to justify the high level of unreasonableness which would justify the making of an order for indemnity costs.
66. The Claimant states that the expert was in fact asked the correct question. Indeed, the test which he had to apply was set out both in the letter of instruction to him and also on the face of his report. In the report, he noted that his instructions were to answer the question as to whether the Defendant's design in this case “fell below the standard to be expected of a reasonably competent firm of civil and structural engineers. i.e. whether [the Defendant] exercised all reasonable skill, care and diligence to be expected of qualified and experienced

civil and structural engineers in carrying out their services”. His answers to the questions in the report stated that the design fell below the standard to be expected. There was nothing for the Claimant’s team to correct.

67. The court's judgment identified that the expert did not apply the test properly. However, the fact that an expert who appears in court appears to have misapplied a legal test in the way that he answers questions does not equate to conduct unreasonable to a high degree.
68. The judgment found that damage had occurred by December 2017 and damage by that date must have been caused by workmanship issues. The Claimant’s expert agreed with that in oral evidence. However, that did not mean that the Claimant’s case that the design was defective was flawed from the outset. The Claimant pleaded that the damage first occurred in December 2017. The Claimant’s expert report and input into the joint statement were all supportive of the design being the problem. The fact that the Defendant’s counsel successfully focussed attention on a particular date does not mean that it was unreasonable for the Claimant to have pursued that point. Further, the fact that the Claimant chose to focus on expert evidence about the Defendant’s design rather than on workmanship issues is not an unreasonable approach in this case. There were no contribution proceedings. All the Claimant had Approved Judgment Case Number: HT-2022-LDS-000011 to do was show the design was “a” cause of the damage. They lost that argument. To have pursued it was not so “out of the norm” as to justify indemnity costs.
69. Although the Claimant’s expert used FE analysis, that does not mean that he was applying the wrong test in assessing the standard of the Defendant’s design. The FE analysis was being used to test whether the damage was caused by workmanship or design errors. The judgment recorded the Claimant’s expert’s explanation was that he was attempting to model how the joint would have failed if built as designed. That process to analyse the cause of damage could not be said to be improper, nor to justify indemnity costs.
70. In addition, there was a “massive concertina-ing” of the timescale for expert evidence. The initial reports took longer than expected and were all served late in the weeks before trial. The parties missed out on time to discuss and so further late reports in reply were served up to a week before trial. This claim always would turn on expert evidence, and the expert evidence was not completed until days before trial.
71. Although the Claimant’s expert went off to do further calculations and did not tell anybody, that cannot be held to be the responsibility of the Claimant or its lawyers. As the judgment records, everybody was astonished when the Claimant’s expert said what he had done when giving his evidence. It certainly could not be asserted that the Claimant's expert did further work out of malice or any attempt to gain an advantage. The expert did not think he had done anything wrong.
72. The expert was criticised in the judgment. As a result of the various criticisms, his evidence was not accepted and the Claimant lost. The expert gave some possibly flippant or naive comments when giving his evidence. That does not mean indemnity costs are justified. He

was criticised in the judgment. The fact that the expert made mistakes does not mean mistakes were made throughout by the Claimant's lawyers. The Defendant wishes to punish the Claimant and the expert further with indemnity costs. That is not necessary. The court has already heavily criticised a professional expert – no further message or penalty is required. The Claimant lost. Approved Judgment Case Number: HT-2022-LDS-000011

73. The criticisms made specifically of the lawyers, such as not answering request for further information, do not assist in the pursuit for indemnity costs. The Part 18 requests for information were requests for evidence and not appropriate for a Part 18 request. Those were questions for cross examination. The refusal to answer inappropriately asked questions does not merit a finding of conduct so far outside of the norm as to merit indemnity costs. There is no suggestion that any of the matters raised by the Defendant were actions conducted in a knowing way to try to take an advantage, even in hindsight. The Claimant lost, but not because the lawyers did not consider or ask the expert to answer the Bolam question. The court found the expert did not apply the legal test, did not like his analysis and preferred the evidence of the Defendant's expert. That happens in the ordinary course of litigation. Decision
74. I remind myself that the question is whether there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs. I am just persuaded that the answer to that question in this case is no, and costs should be assessed on the standard basis throughout.
75. As was clear from the judgment, I had no confidence in the Claimant's expert or his evidence. I made findings that the expert did not properly understand his duties to the court pursuant to CPR 35, that he did not appear to have considered adequately the applicable legal test and he did not deal with the workmanship issues raised by the Defendant adequately. He used an outdated addition of a technical publication to justify some conclusions without providing any reference to the updated edition. He carried out additional tests and reran the FE analysis immediately before trial without telling anybody he had done this nor providing anyone with the results.
76. The Claimant lost the case because I had no confidence in its expert. However, I accept that the Claimant's solicitors had put the correct test in the expert's instructions, and the expert had set out the correct test in his written report and answered questions in a way which would indicate that he was considering the correct test when giving his opinion. When cross examined, it became apparent that he was Approved Judgment Case Number: HT-2022-LDS-000011 not correctly applying the test and had not given consideration to various matters to which I found he should have given consideration.
77. It is a high threshold before the court will exercise its discretion to order costs on the indemnity basis, even in respect of a single phase of the proceedings. I agree with the Defendant's submission that this was not simply a case of the court preferring one expert's evidence over another. The reality is that the criticism of this expert went beyond that.

78. I accept that a Claimant is responsible for their expert for the purposes of costs. However, I do not accept that there was sufficient material before trial in the expert's reports to indicate to the Claimant's legal team that their expert was going to give evidence in the way that he did. Further questions could perhaps have been asked of the expert during the proceedings. That may have been an error or a tactical decision. However, I do not accept that the asserted failure to spot the various problems with their expert's evidence is sufficient to pass the high hurdle before indemnity costs are justified.
79. The Claimant made various tactical decisions in how to pursue its case against the Defendant for negligent design. Some tactical decisions would always be needed when a company associated with the Claimant has carried out the construction work for the design and that work is criticised by the Defendant as being the cause of the damage. As Mr Sage acknowledged in his submissions, with hindsight, it may have been better expressly to instruct the Claimant's expert to deal with the various workmanship defects asserted by the Defendant. However, as the Claimant took the view that it only needed to prove that the defective design was "a" cause of the damage, it did not need to deal with all of those workmanship issues. The tactic was unsuccessful, but I accept that deciding on the tactic does not take the Claimant's lawyer's conduct "out of the norm".
80. It may be that the Claimant's legal team did restrict its frame of reference in respect of the expert evidence required because of the analysis undertaken by John Frith. However, the tactic of concentrating primarily on identifying a negligent design and Approved Judgment Case Number: HT-2022-LDS-000011 then establishing the negligent design was a cause of the damage, whilst unsuccessful, could not be said to take the conduct of the case so far out of the norm. The further criticisms of the Claimant's lawyers, such as refusing to answer Part 18 further information questions, I would not find to justify indemnity costs. If the Defendant felt that the refusal to answer the questions was unjustified, it could have made an appropriate application.
81. Mr Sage asked for clemency for the Claimant's expert as, in Mr Sage's words, his reputation has been tarnished by the judgment, and he will have to live with the consequences of that. I do not accept that clemency should form any part of the court's consideration. The question is whether there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs.
82. However, I also do not accept that the combination of the Claimant's tactics and the Claimant's expert approaching the case in a more technical rather than practical manner, then effectively going off on a frolic of his own immediately before trial and not giving the evidence expected during his oral evidence create circumstances to justify an order for indemnity costs in this case.

83. It is of relevance, in my judgment, that the expert evidence timetable was “concertina- ed” into a short time frame before trial. The joint expert report became available about 3 months before trial and the individual expert reports then followed. Supplementary expert reports were filed because of additional factors raised in the various reports which required a reply.
84. I do not find in the circumstances of this case that the conduct of the Claimant’s lawyers was such that the action was conducted, or the circumstances were such, that it was out of the norm in a way which justifies an order for indemnity costs. Payment on account
85. The parties were agreed that a payment on account of costs should be made. Applying the principles in MacInnes, the Defendant sought £312,700.75, being the Approved Judgment Case Number: HT-2022-LDS-000011 approved budget in the sum of £344,082, less 10% bringing that sum down to £309,673.80 and then adding interest at 4% of £12,386.96, payable with 21 days.
86. The Claimant seeks a reduction of 20% to take into account of the fact that there was not a mediation which had been part of the budgeted costs. The Defendant objects to further reduction as the budgeted figure was for all forms of ADR. There is no justification to consider individual phases to reduce further. Any adjustment can be dealt with at Detailed Assessment. Decision
87. In my judgment, the starting point for assessment of a reasonable sum is a 10% reduction. I do not accept that it is reasonable or proportionate to increase the percentage reduction further in this case. Mediation did not take place, but other forms of ADR did. Interest will run on the costs payable. I accept that 4% interest on prejudgment costs is a reasonable percentage. I award interim costs in the sum of £309,673.80 plus interest at 4%. 24

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Prepared on 24 October 2026 · Esheria