



Neutral Citation Number: [2025] EWHC 850 (TCC)

Case No: HT-2025-000282

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 April 2025

Before :

MARTIN BOWDERY K.C. (sitting as a Deputy High Court Judge)

Between :

VITSOE LIMITED

Claimant

- and -

WAUGH THISTLETON ARCHITECTS LIMITED

Defendant

William Webb KC and Thomas Saunders (instructed by Beyond Corporate Ltd) for the
Claimant.

Siân Mirchandani KC and Tom Asquith (instructed by Strata Solicitors Ltd trading as Caytons)
for the Defendant

Hearing dates: 21-23, 27-30 January 2025 and 24 February 2025

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 9 April 2025 at 10.30am.

MARTIN BOWDERY K.C:

The Judgment is set out in ten parts

- A. THE PARTIES**
- B. THE PROJECT**
- C. THE WITNESSES**
- D. THE AGREED CHRONOLOGY**
- E. THE EXPRESS TERMS OF THE AGREEMENT BETWEEN THE PARTIES**
- F. SCOPE OF DUTY**
- G. THE ALLEGED BREACHES OF DUTY**
- H. QUANTUM**
- I. CONTRIBUTORY NEGLIGENCE**
- J. CONCLUSION**

A. THE PARTIES

1. The Claimant is and was at all material times a company manufacturing and distributing globally high quality furniture.
2. The Defendant is and was at all material times a company offering architectural services.

B. THE PROJECT

3. In and around 2016, the Claimant was seeking to procure the construction of a new headquarters, office and distribution facility at Princes Drive, Royal Leamington Spa ("the Property").
4. To this end, the Claimant entered into a written contract with the Defendant dated 30 September 2016 ("the Appointment") whereby the Defendant agreed to provide architectural services in relation to the construction of the Property in return for a fee of £155,260.
5. The Defendant has a particular specialism in timber frame buildings. In January 2023, its website stated that "the practice is a world leader in engineered timber and pioneer in the field of tall timber buildings". The Defendant held itself out as having a similar specialism around 2016 at the time of contracting. The Claimant selected the Defendant at least in part as a result of that reputation.
6. The other relevant parties to the construction project were:
 - 6.1 JCA Concept Construction Limited ("JCA") - the construction manager.
 - 6.2 Hess Timber GmbH and Co ("Hess") - the timber frame contractor.

6.3 Stoneleigh Services Limited ("Stoneleigh") - the roofing contractor.

7. JCA was engaged by the Claimant as construction manager pursuant to a Construction Manager's Appointment dated 4 October 2016 ("the JCA Appointment").

8. JCA was responsible for: -

- (1) Reviewing the designs prepared by the Defendant and the Trade Contractors and advising as to their feasibility and suitability in practical terms for construction and as to compatibility between their separate parts;
- (2) Maintaining the overall programme including reviewing the Trade Contractors' programmes and ensuring that they were compatible with each other and the overall programme;
- (3) Ensuring that adequate steps were taken for the protection of the works and unfixed materials on site;
- (4) The management and control of the site during the Construction Period (which responsibility was exclusive); and
- (5) Complying with the Claimant's instructions and, insofar as was necessary, giving instructions to Trade Contractors to carry the Claimant's instructions into effect.

9. Hess was engaged by the Claimant as timber frame contractor pursuant to a letter from Hess to the Claimant dated 21 March 2016 and an undated and unsigned Construction Trade Contract ("the Hess Contract"). Hess was required to:-

- (1) Design the Trade Works with reasonable skill and care and to participate in the design review process;
 - (2) Co-ordinate with the Construction Manager and other Trade Contractors;
 - (3) Protect the Trade Works during construction;
 - (4) Carry out or arrange for the carrying out of testing of Materials as instructed; and
 - (5) Comply with the instructions of the Construction Manager.
10. Stoneleigh was engaged by the Claimant as roofing contractor pursuant to a Construction Management Trade Contract dated 16 December 2016 ("the Stoneleigh Contract"). Stoneleigh was required to:-
 - (1) Design the Trade Works with reasonable skill and care and to participate in the design review process;
 - (2) Co-ordinate with the Construction Manager and other Trade Contractors;
 - (3) Protect the Trade Works during construction; and
 - (4) Comply with the instructions of the Construction Manager.
11. Further the Claimant, as employer, participated in the design, procurement and construction phases of the Project, being assisted and/or represented by:-

- (1) Mr Mark Adams, the managing director of the Claimant, who was closely involved in all the phases of the Project;
 - (2) Mr Martin Francis, a designer, who assisted Mr Adams in developing the initial design concept;
 - (3) Mr Andrew Blasdale of Eckersley O'Callaghan, a structural engineering firm, who also assisted the Claimant in developing the initial design concept;
 - (4) Mr Vincent Wang, a registered architect, who advised the Claimant in relation to procurement, including the engagement of the Defendant, Hess, Stoneleigh and JCA and acted as the Employer's Representative and Development Manager of the Claimant; and
 - (5) Mr Simon Garwood, an engineer, who acted as the Claimant's project manager and, as such, was the Employer's Agent or Representative for the purposes of the JCA, Hess and Stoneleigh Contracts (and had previously performed the same role in relation to a similar project).
12. The Claimant's claim against the Defendant is for the allegedly negligent provision of architectural services in relation to the design and construction of its new headquarters in Royal Leamington Spa. The property was constructed using engineered timber in the form of laminated veneer timber ("LVL") posts and 25m full width span beams and cross laminated timber ("CLT") wall and roof panels.
13. The Claimant alleges that the Defendant is responsible for the rotting and decay of the building's roof panels which the Claimant alleges became wetted during construction and particularly during sustained rainfall around Christmas 2016.

14. In order to remedy the Property, it was necessary for the Claimant to: -
- (1) Remove and reinstate the roof covering. Where possible, insulation was retained and re-used.
 - (2) Replace all CLT panels where the extent of decay had compromised the structural integrity of the panel and repair those panels which have been subjected to a lesser degree of decay.
 - (3) Disconnect and reconnect elements associated with the roof such as solar panels, the lightning conductor and some services.
 - (4) Carry out the works under a mobile temporary over-roof to prevent any further water damage occurring.
15. The cost of the works was £4,045,403.

C. THE WITNESSES

Mark Adams

16. He was the managing director of Vitsoe. He gave clear and concise evidence. However on important points his oral evidence diverged from his written evidence.
- In his oral evidence he stated that he did not recall the Frankfurt Airport discussion regarding a temporary canopy. He accepted that his Witness Statement stated that:

“It is simply not true there was any discussion about a temporary canopy.”

- As regards the discussion with Mr Waugh about a 'temporary canopy to allow drying out' at the 12 January 2017 site meeting: Mr Adams stated he did not recall it, but in his witness statement he had gone further and said: "Andrew did not propose that a temporary roof was erected while the CLT dried out." Mr Adams appeared to accept that this would have been an "inconvenient discussion" to have had given the nature of the Claimant's claim.
- His written evidence suggested that the two loans the Claimant took out were to pay for the repair works, but this evidence was at the very least incomplete. Regarding the purpose of the CBILS loan his oral evidence said it was for "general working capital requirements" and regarding the purpose of the £1.2m loan the relevant documents showed that it was partly to pay for ERP software which was not mentioned in his written evidence.

Generally where his oral evidence diverges from his written evidence, I prefer to accept his oral evidence.

Martin Francis

17. His is the founder and director of Francis Design Limited and was a clear and honest witness although as the Claimant accepted in their Written Closing:-

"... it is not clear that his evidence is particularly important to the dispute."

Daniel Calderbank

18. Daniel was an employee of the Claimant. He was tasked with the move from London to Leamington Spa and gave clear evidence which primarily focussed on the nature of the decisions that were taken during the remedial work.

Alastair Ogle

19. Is an architect and an employee of the Defendant. Again I agree with the Claimant's Closing Submissions which stated that Mr Ogle appeared to be an honest witness who sought to answer the questions asked of him. He was also the central individual at the time of WTA's alleged third breach of contract.

- failing to take appropriate steps in response to the CLT being exposed to sustained rainfall around Christmas 2016.

Tom Westwood

20. Is an architect and a former employee of the Defendant. I agree with the Claimant's Written Closing where it is stated that Mr Westwood appeared to be an honest witness who sought to answer the questions asked of him. I do not accept the Claimant's criticisms of Mr Westwood as acting as a mere post box by adopting a passive and limited approach to the role of the architect. He spoke of how in respect of Moisture Content Control Plans ("MCCP") *"the advent of that particular form of document has come about in fairly recent years."* His evidence was clear that he had never come across an architect designing a canopy and had never worked on a project with a canopy.

Andrew Waugh

21. Is a director of the Defendant in these proceedings. He has a degree in architecture but never qualified as an architect with either RIBA or the ARB. With regard to

.1 MCCPs

Mr Waugh's evidence was clear. He explained to the Court that :

"The TRADA Wood Information Sheet WIS 4-14 of June 2016 referred to a 'Moisture Content Control Plan' or 'MCCP'. I had never prepared a MCCP or been instructed by clients, contractors, project managers,

construction managers or anyone else in projects to prepare a MCCP for a timber roof or other timber structure. I did not see, on any WTA project, a MCCP being prepared or mentioned by anyone. I refer to other parts of WIS 4-14 below. I do not recall anyone involved in projects referred to in 100 Projects, which were comparable to the Vitsoe project, telling me or anyone else at WTA that a MCCP was prepared by anyone during those projects.”

-2 The discussions of the 12th April 2016

Again Mr Waugh’s evidence was clear.

“There were a lot of discussions between Mr Adams and Mr Wang and myself, during the trip to Germany regarding the Building, One of the discussions was at Frankfurt Airport while we were waiting to board our plane back to England. Our flight was delayed so we had plenty of time to talk about the Building. We discussed what has been called in these proceedings a temporary shelter or canopy on scaffolding over the whole of the Building while it was being constructed. I think I would probably have referred to it as a canopy.

Canopies came up in our discussion at the airport because Mr Adams showed Mr Wang and I a photograph in a magazine which he had. I cannot recall now what the magazine was but I recall it was a trade or professional magazine of some sort I cannot recall if the photograph was part of an article or why it was in the magazine but I do recall that it was a photograph of a large canopy over a building while, it appeared from the photograph, it was being constructed but it might have been a photograph of a canopy being used in remedial works, So far as I can recall the photograph was of a site somewhere in Europe, possibly Sweden or possibly Switzerland.

I can recall Mr Adams holding the magazine and passing it to Mr Wang and me and asking us both *"Are you aware of this?"* or *"Have you seen this?"* or some similar words. Mr Wang did not say he had never seen such a canopy or ask me to explain what the function of such a canopy was intended. I recall Mr Wang saying a canopy like the one in the photograph was not needed. I recall saying to Mr Adams that I agreed with Mr Wang without saying much more. Mr Adams said *"It looks expensive. I am glad that we do not need it"* or something similar.”

-3 The discussions held on the 12 January 2017 between Mr Adams and Mr Waugh.

Mr Waugh stated

“I cannot recall exactly how the discussions in the portacabin with Mr Admas [sic] began but we began discussing how to try to prevent internal staining of the columns and beams before the Building was fully watertight and while works continued. So far as I recall I said *"you could install a large temporary canopy to protect the timber columns and beams and prevent further internal staining"* or some similar words. Mr Adams said *"Well that's not going to happen"* or something

similar. I cannot recall if Mr Adams or I referred back to the discussion between him Mr Wang and I at Frankfurt Airport in April 2015.

After our discussion in the portacabin on site we then took part in the site visit when everyone walked round parts of the Building. I did not go onto the roof, so far as I can recall. Also, so far as I can recall I was not asked to comment on the CLT and VCL and insulation and PVC during that site visit.”

I accept Mr Waugh’s evidence about MCCPs, the content of the conversations at Frankfurt Airport and the discussions held on the 12 January 2017 and I accordingly find that what Mr Waugh said was said.

Ms Hoey

22. Whilst Ms Hoey had less experience than Mr Potter to give technical evidence on the main issues in this dispute her oral evidence was thoughtful and helpful. She was at all times mindful of her overriding duties to the court and gave clear answers to the difficult questions put to her.

Mr Potter

23. The Defendant’s technical expert had more than sufficient expertise to address the main issues in dispute and I preferred his evidence to the evidence provided by Ms Hoey, particularly on the issue by architects of Moisture Content Control Plans and whether a temporary roof was necessary or non-essential for the construction of this project.

D. THE AGREED CHRONOLOGY

Date	Event	Ref.
27 Aug 2015	Claimant’s initial project brief	[E/895-898]
30 Sept 2015	Claimant sent Defendant initial project brief	[E/895-898]
30 Sep 2015	First meeting between Claimant and Defendant	Adams [30] Waugh 1 [103]
7 Oct 2015	Defendant proposes fee	[E/903-909]

Date	Event	Ref.
Nov 2015	Defendant begins preparing outline designs	RAPOC [15A] Ogle 1 [81]
11 Dec 2015	Mark Francis email following meeting attended by Mark Adams, Vincent Wang, Adam Waugh, Alastair Ogle, Martin Francis and others	[E/934]
Jan 2016	Defendant begins preparing more detailed designs	RAPOC [15A] Ogle 1 [82]
18 Feb 2016	Meeting between Claimant and Defendant agreeing that Kingerlee would not be used to build the building	[E/983]
22 Feb 2016	Meeting between Claimant, Defendant and Vincent Wang at which construction management decision made and Kingerlee to carry out pre-construction services	[E/983]
25 Jan 2016	Defendant produces a project outline	Ogle 1 [92] [E/957]
23 Feb 2016	Interviews of potential timber contractors at Defendant's offices.	AR [2.4] Adams [42] Westwood [44]- [45] [E/992]
24 Feb 2016	Hess provided quotation to Kingerlee	[E/1001]
25 Feb 2016	Hess provided further information to Kingerlee	[E/1008]
29 Feb 2016	Pre-appointment meeting for JCA, attended by Tom Westwood (Defendant).	AR [2.3] Westwood [40]
5 Mar 2016	Vincent Wang circulated his analysis of timber package tenders and recommended Hess	[E/1094]
5 Mar 2016	Mark Adams email stating Hess had agreed to be timber sub-contractor; Claimant would not proceed with Kingerlee; Claimant was in discussions with a construction manager.	[E/1096]
16 Mar 2016	Defendant produces a Timber Frame performance specification for the roofing works	RAPOC [31.IA] Ogle 1 [93] [E/1121]
21 Mar 2016	Hess provided tender letter to Claimant	[E/1132-1138]
21 Mar 2016	Claimant engages Hess as timber frame contractor	RRAD [8]
22 Mar 2016	Kick-off meeting attended by Claimant, Defendant, JCA, Hess, and others. Minutes by Defendant.	Adams [46] Westwood [56] Waugh 1 [118] [E/1144]

Date	Event	Ref.
12 Apr 2016	Disputed conversation between Andrew Waugh (Defendant) and Mark Adams and Mr Wang (Claimant) regarding possibility of constructing a protective canopy	RRAD [25(5)] AR [19.3] Adams [48] Waugh 1 [120]- (124]
15 Jun 2016	Defendant produces Combined Specification, Rev C for windows, cladding and roofing	Ogle 1 [97] [E/45]
23 Aug 2016	Visit to Hess in Germany attended by Mark Adams, Alastair Ogle and Tom Westwood among others. Email from Hess's Mr Thompson after visit	Ogle 1 [108] [E/1222]
5 Sep 2016	Work began on site	
28 Sep 2016	Mark Adams email attaching Claimant's brief	[E-1282 to 1283]
30 Sep 2016	Claimant and Defendant enter into the Appointment	RAPOC [4] [E- 129]
4 Oct 2016	Claimant engages JCA as construction manager	RRAD [7] [E- 159]
21 Oct 2016	Email from Adrian Kenny with latest programme	[E-1342]
7 Nov 2016	Alastair Ogle email to Rensteph Thompson asking about methods of protection among other things	[E-1375]
15-16 Nov 2016	Emails regarding weather protection and Christmas shutdown between Defendant, Hess and JCA.	RRAD [19(1A)]- [19(3)] [E/1389- 1394], [E/1398], [E/1400- 1404]
18 Nov 2016	Mr Jung (Hess) email to Mr Kenny about timing of installation of roof and Mr Kenny's response	[E/1418-1419]
18 Nov 2016	Emails regarding timing of roofing works between Defendant and JCA	RRAD [19(3A)]- [19(3B)] AR [13.3] [E/1422]
28 Nov 2016	Hess's works began on site	[E/1381] [E/1463- 1464]
5 Dec 2016	Mr Williams (JCA) email regarding handover	[E/1470]

Date	Event	Ref.
8 Dec 2016	Mr Jung (Hess) email regarding roofing work	[E/1495]
12 Dec 2016	Claimant contract with Hess	[E/333]
16 Dec 2016	Claimant engages Stoneleigh as roofing contractor	RRAD [9] [E/395]
22 Dec 2016	Email from Mark Adams (Claimant) to Defendant asking Defendant to make enquiries of Hess	RRAD [19(6)] [E/1648]
	Defendant inquired of Hess whether the CLT panels would dry out from the inside	RAPOC [31.3(2)] RRAD [19(7)] [E/1656], [E/1655]
	Rensteph Thompson (Hess) email to Alastair Ogle (Defendant) warning of the risks of moisture in CLT panels	RAPOC [27] RRAD [19(5)], [19(8)] [E/1657]
23 Dec 2016	Emails between Claimant, Defendant, Hess and JCA regarding protection of roof over Christmas period	RRAD [19(9)]- [19(13)] [E/1658-1680]
	Telephone call between Mr Garwood (Claimant) and Mr Ogle (Defendant). Terms disputed. Mr Ogle's emails following call.	RRAD [19(12)], [20] AR [13.7], [15.5] Ogle 1 [160] [E/1668], [E/1670]
	Emails between Hess and Defendant regarding timing of VCL membrane installation	RRAD [15(2)] [E/1678], [E/1680]
	Timber frame completed	RAPOC [24] RRAD [18(1)]
	Christmas shutdown begins	RRAD [19(4)]
3 Jan 2017	Christmas shutdown ends	RRAD [19(4)]
4 Jan 2017	Mr Westwood emailed Mr Ogle and others at Defendant following call with Mr Garwood	[E/1685]
5 Jan 2017	Mr Williams (JCA) emailed Mr Westwood that Hess had completed	[E/1686]
12 Jan 2017	Site meeting at which condition of roof was discussed. Terms disputed	RRAD [25(7)] AR [13.9], [19.4] Adams [63] Waugh 1 [151]- [159] [E/1713]
16 Jan 2017	Defendant sent email to Stora Enso, manufacturer of the CLT with queries concerning installation of VCL when CLT is	[E/1729]

Date	Event	Ref.
	wet	
20 Jan 2017	Defendant received a response email from the manufacturer of the CLT regarding queries raised including whether it could dry out from its internal face	RRAD [23(15)] [E/1734]
23 Jan 2017	Mr Westwood email to Mr Ogle and Mr Williams (JCA) following discussion including <i>"Temporary rainwater strategy"</i>	[E/1736]
8 Mar 2017	Mr Adams email regarding water damage	[E/1796]
Mid-Mar 2017	Roof covering is completed	RAPOC [24] RRAD [18(1)]
27 Apr 2017	Mr Adams emailed Mr Waugh a draft Note from Probyn Miers	[E/1829-1834]
26-28 May 2017	Move in apparently this weekend	[E/1881]
23 May 2017	TRADA / Exova moisture content survey	[E/1861]
23 June 2017	TRADA / Exova moisture content survey	[E/1889]
1-2 Aug 2017	TRADA / Exova moisture content survey	[E/1926]
28 Nov 2017	TRADA / Exova moisture content survey	[E/1978]
3 Apr 2018	TRADA / Exova moisture content survey	[E/2011]
7 Dec 2018	Claimant notified claim against Stoneleigh	[F/50]
21 Dec 2018	Claimant notified claim against Hess	[F/27]
24 Dec 2018	Claimant notified claim against JCA	[F/35]
4-5 Feb 2018	TRADA / Exova condition survey finds rot and decay	[E/2061]
3 Jul 2019	Claimant notified claim against Defendant	[F/3]

Date	Event	Ref.
4 Sep 2020	Claimant allegedly takes out CBILS loan	RAPOC [39] Adams [78]
5 Nov 2021	Remedial works begin	Adams [80]
8 Dec 2022	Remedial works are completed	Adams [83]
10 Jan 2023	Claimant allegedly takes out a further loan	RAPOC [39] Adams [84]

24. I did not hear from any witnesses from

- JCA the Construction Manger
- AMK Construction Subcontractor to the Construction Manager
- Hess the timber frame trade contractor
- Stoneleigh the roofing trade contractor

Nor did I hear from Vincent Wang the Claimant's Development Manager or Simon Garwood the Claimant's employee and the Claimant's Project Manager as described in the Agreed Dramatis Personae.

25. It is not for me to question why these potential witnesses were not called to give evidence. I must decide the case on the pleadings, the written evidence and the oral evidence provided and tested by the parties through their cross examination and re-examination and the parties written and oral submissions. I certainly do not think it is

appropriate to draw any inferences from the absence of any evidence from those potential witnesses who were not called to give evidence.

E. THE EXPRESS TERMS OF THE AGREEMENT BETWEEN THE PARTIES

26. The Claimant entered into a written contract with the Defendant dated 30 September 2016 ("the Appointment") whereby the Defendant agreed to provide architectural services in relation to the construction of the Property in return for a fee of £155,260.

Scope of Appointment

27. The introduction to the Appointment described the Defendant as occupying the roles of "Architect, Design Team Leader and Principal Designer".
28. By Clause 2.1 of the Appointment, the services to be provided were those set out in Schedule 1.
29. The Services included the following:

"1. Detailed Proposals

- 1.1 With our other consultants develop a scheme design from the outline proposals.**
- 1.5 Prepare outline specifications for materials, forms of construction and constructional standards.**

2. Final Proposals

- 2.1 Develop a detailed design from the approved scheme design, co-ordinate and incorporate the designs of our other consultants.**

3. Production Information

- 3.1 Prepare production information.**
- 3.2 Prepare detailed specifications.**
- 3.8 Assist in the preparation of a timetable for construction.**

5. Construction

- 5.1 Carry out the lead designer's duties under the Construction Management Contract and the Works Contracts that are entered into by us for the execution of the Works.**
- 5.3 Attend periodic project meetings to be convened, chaired and minuted by yourselves (unless we direct otherwise).**
- 5.5 Arrange, chair and minute site meetings with the Contractor fortnightly, giving us reasonable notice in writing of each meeting so as to afford us the opportunity to attend. Circulate the minutes of such meetings to ourselves and all attendees.**
- 5.9 As appropriate, instruct sample-taking and the carrying out of tests of materials and workmanship and examine the conduct and results of such tests whether on or off-site.**
- 5.10 As appropriate, instruct the opening up of work to determine that it is generally in accordance with the Construction Management Contract and the Works Contracts that are entered into by us for the execution of the Works.**
- 5.12 Visit the Works fortnightly (adjusted for key stages of the works before they are covered up by the progress of the works) to inspect the progress and quality of the Works and to determine that they are being executed generally in accordance with the Construction Management Contract and the Works Contracts that are entered into by us for the execution of the Works.**
- 5.13 Attend Site whenever reasonably requested to do so to assist in resolving difficulties with construction.**
- 5.14 Monitor and report to us upon the progress of the Works against the Contractor's programme. During Site visits, monitor compliance by the Contractor with any provisions of the Construction Management Contract and the Works Contracts that are entered into by us for the execution of the Works for the avoidance or minimisation of inconvenience, danger, disturbance or nuisance to third parties.**

8. Design Services

Subject to the terms of the Appointment prepare the detailed architectural design of the Development and prepare all detailed architectural drawings and other information required for the construction and completion of the Development.

18. Services in connection with design by sub-contractors

- 18.1 Advise on the need for specialist sub-contractors or suppliers to design and execute parts of the architectural Works. You are not to pass down any elements of architectural design to any such specialist without written instructions or approval.**
- 18.2 Prepare outline, descriptive or performance specifications for use where architectural elements of the Works are to be design by specialists; assist in obtaining quotations and other information in connection with specialist work.**
- 18.4 Where required, with our other consultants, appraise and report upon tenders received from specialist sub-contractors or suppliers.**
- 18.5 Review and comment on designs and specifications provided by specialist sub-contractors or suppliers, and co-ordinate and integrate their input."**

Express Terms of Appointment

- 30. By Clause 5.1 of the Appointment, the Defendant undertook to use "Skill and Care" in the performance of its duties under the Appointment.

- 31. "Skill and Care" was defined in the following terms:

"Skill and Care all the reasonable skill care and diligence to be expected of a properly qualified and competent architect, design team leader and principal designer experienced in performing duties similar to the Services on projects of a similar size, scope and complexity as the project and, for the purpose of the standard of reasonable skill, care and diligence the degree of competence shall be judged in the light of professional knowledge and standards current at the time the relevant service was provided."

- 32. Clause 5.4 further provided:

"You shall use Skill and Care to provide the Services to us so that the Services are Fully Co-ordinated with the design and work being carried out by us, other consultants, our trade contractors and sub-contractors and other consultants for the various specialist work packages relevant to (or which be affected by) the Services and by third parties in relation to the Development (such as statutory undertakers or their equivalent)."

F. SCOPE OF DUTY

- 33. The starting point for considering the Defendant's scope of duty is its contract with the Claimant but it may also be necessary to consider the contracts of others retained by

the Claimant. It was the Claimant who decided to go down the route of a Construction Manager with Trade Contractors.

34. The engagement of a construction manager is important. As noted in Keating on Construction Contracts, 12th edition, at 14-021, "*Usually, the project construction manager will be seen as the "co-ordinator and guardian of the client's interests".*" The quotation is taken from **Royal Brompton Hospital NHS Trust v Hammond (No. 9)** [2002] EWHC 2037 (TCC) at [23].
35. The Claimant retained JCA as construction manager pursuant to a Construction Manager's Appointment dated 4 October 2016. I find and so hold that JCA was obliged:
- (a) to review the designs prepared by Defendant and the Trade Contractors and advise as to their feasibility and suitability in practical terms for construction and as to compatibility between their separate parts.
 - (b) to maintain the overall programme including reviewing the Trade Contractors' programmes and ensuring that they were compatible with each other and the overall programme.
 - (c) to ensure that adequate steps were taken for the protection of the works and unfixed materials on site.
 - (d) to have exclusive responsibility for the management control of the site during the Construction Period;

- (e) and to comply with the Claimant's instructions and, insofar as was necessary, giving instructions to Trade Contractors to carry out the Claimant's instructions into effect.

36. **The Hess Trade Contract.** The Claimant retained Hess as timber frame contractor pursuant to a letter from Hess to Claimant dated 21 March 2016 and an undated and unsigned Construction Trade Contract. I find and so hold that Hess was obliged to:

- (a) design the Trade Works with reasonable skill and care and to participate in the design review process.
- (b) co-ordinate with the Construction Manager and other Trade Contractors.
- (c) protect the Trade Works during construction.
- (d) carry out or arrange for the carrying out of testing of Materials as instructed; and
- (e) comply with the instructions of the Construction Manager.

37. **The Stoneleigh Trade Contract.** The Claimant retained Stoneleigh as roofing contractor pursuant to a Construction Management Trade Contract dated 16 December 2016. I find and so hold that Stoneleigh was obliged to carry out the following:

- (a) Design the Trade Works with reasonable skill and care and to participate in the design review process.
- (b) Co-ordinate with the Construction Manager and other Trade Contractors.

- (c) Protect the Trade Works during construction; and
 - (d) Comply with the instructions of the Construction Manager.
38. The Defendant, particularly in its Closing Oral Submission reminded the Court of two recent decisions of the Court of Appeal
- **Rushbond Plc v The JS Design Partnership LLP Services Ltd** [2021] EWCA Civ 1889
 - **URS Corporation Ltd v BDW Trading Ltd** [2024] 2WLR 181.
39. Lord Justice Coulson expressed the view at paragraph 74 of Rushbond and at paragraph 35 of URS that the six-stage checklist set out by the majority of the Supreme Court in **Manchester Building Society v Grant Thornton UK LLP** [2022] AC 783 being:-
- “(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
 - (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)
 - (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)
 - (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)
 - (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)
 - (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question).”

was a helpful checklist.

40. Whilst the Claimant's claim is contractual, I agree with Lord Justice Coulson that this checklist, whilst helpful, was primarily designed to analyse duties of care in novel situations or where the type of loss was unusual or stretched the boundaries imposed by the law. This is not the case here. The Claimant procured the work by way of a construction management contract with trade contractors and a construction manager. This I find and so hold is a fairly standard practice in the construction industry and is certainly not an unusual or a novel method of procuring construction work.

41. I agree with the Defendant and so find that the Defendant's scope of duty was as follows:

- “(a) **Design**. Defendant was foremostly the designer and was under a duty to provide design information. It did so in the form of drawings and both outline and detailed specifications (clauses 1.5 and 3.2 of Schedule 1). However, Hess completed the detailed design of the timber frame and Stoneleigh completed the detailed design of the roof coverings.
- (b) **Co-ordination**. Defendant owed a duty to coordinate *designs* (clause 18.5 of Schedule 1 to the WTA Appointment), but not the programmes of other consultants. Hess and Stoneleigh were not only obliged to co-ordinate with JCA, as Construction Manager, they were also obliged to co-ordinate with other Trade Contractors, i.e. each other (Clause 30).
- (c) **Protection**. Defendant did not owe a duty to protect the Trade Works during their construction. Hess and Stoneleigh owed precisely these obligations. Further, both Hess and Stoneleigh were obliged to use reasonable skill and care to satisfy the performance requirements or specifications for the Trade Works, namely the requirements of Defendant's Timber Frame and Combined Specifications, which stipulated performance requirements for protection of works, adverse weather working and membrane work.”

42. When considering what the Defendant did or did not do it is necessary to have in mind the warning contained at paragraph 2-055 of Hudson Building and Engineering Contracts which states:

“The Architect's duty is normally confined to stipulating the final permanent result required and if this has already been done, the Architect is under no further duty to assist, and if inclined or requested to do so should normally

be careful to adopt a permissive attitude rather than to give mandatory instructions."

G. THE ALLEGED BREACHES OF DUTY

43. The alleged breaches of duty are helpfully summarised in the Agreed List of Issues.

"Did the Defendant fail to use reasonable skill and care in the performance of its services pursuant to its appointment in the ways alleged at paragraph 31 of the RAPOC, ('the alleged breaches')?"

- a. **In failing to produce a moisture content control plan (MCCP) or risk assessment?**
- b. **In failing to identify that Hess's tender contained no adequate moisture protection during construction?**
- c. **In failing to take appropriate steps in response to the CLT being exposed to sustained rainfall around Christmas 2016?**
- d. **Did the Defendant wrongly believe that the CLT would dry out sufficiently from its internal face?"**

44. The pleaded particulars of breach provided further detail of the alleged breaches of duty and state:

"In breach of contract, the Defendant failed to take reasonable skill and care in the performance of its services in that it:

PARTICULARS OF BREACH

31. 1 Failed to produce a moisture content control plan and/or risk assessment. This was part of the information required for the construction and completion of the Development and therefore required by paragraph 8 or the list of Services appended to the Appointment. It was also necessary to properly co-ordinate the work as required by paragraph 7.2 of the list of Services and to properly advise on the need for particular works as required by 18.1 of the list of Services. Had the Defendant prepared a proper moisture content control plan and/or risk assessment with reasonable skill and care, then it would and/or should have concluded that the only reliable and effective way to protect the large expanse of flat roof CLT panels during the construction phase was to erect a temporary shelter over the works area until the insulation and roof finish were installed and the roof rendered weatherproof. It would then have included such a requirement within its performance specification and/or preliminaries for a project of this size.

31.1.A Failed to identify when appraising and reporting upon Hess' tender and those of the other contractors, that they contained no, or adequate moisture protection during construction. This was required by the Defendant's own performance specification dated 16 March 2016. The Defendant should have been aware that the erection of a temporary shelter over the works area was the only reliable and effective way of protecting the works during construction (from the moisture content control plan and/or risk assessment referred to in Paragraph 31. 1 above) and should have advised the Claimant that a temporary shelter needed to be provided by one of the works contractors. Further, in the absence of an earlier moisture content control plan/risk assessment the need to properly appraise Hess' tender and those of other contractors should have been a further trigger to produce one.

31.2 Failed to take any appropriate steps in response the CLT being exposed to sustained rainfall around Christmas 2016. The Defendant should have

- (1) Advised Stoneleigh and/or JCA, and/or the Claimant not to install the VCL in the existing wet conditions.**
- (2) Instructed and/or advised the Claimant and/or JCA that moisture levels of the CLT should be tested in order to determine its moisture content. Had this been done, it would have been identified that some elements would need to dry out before the VCL was applied (thereby locking in any moisture which the CLT had absorbed and that some elements to which the VCL had already been applied had already absorbed an excessive amount of moisture.**
- (3) Instructed and/or advised the Claimant and/or JCA that a raised tarpaulin cover or temporary canopy be constructed over the building (or the incomplete sections of the roof) to permit the CLT to dry out as fully as possible before application of the VCL and then to enable the roof works to be completed in a dry environment.**
- (4) Insofar as any of the above matters were raised by the Defendant it should have followed up with JCA to ensure that they were being carried out and, if not, advised the Claimant that necessary steps to ensure the satisfactory completion of the works were not being undertaken.**

31.3 It is understood that the Defendant may have decided not to issue any instructions or advice on the basis of an erroneous belief that the CLT would dry out from its internal face which was not

covered by a VCL. Insofar as this was the Defendant's view, it was negligently wrong in that:

- (1) The CLT consisted of thick sheets which were a composite of wood and adhesive. It was unlikely that water which had entered the upper surface and edges of the timber would dry out through evaporation from the lower surface.**
- (2) Hess was best placed to determine whether the CLT would dry out from the inside and when the Defendant asked Hess whether this would occur (on 22 December 2016), the Defendant received the negative response summarised in Paragraph 27 above."**

45. Taking each in turn

"Did the Defendant fail to use reasonable skill and care in the performance of its services pursuant to its appointment in the ways alleged at paragraph 31 of the RAPOC, ('the alleged breaches')?"

- a. In failing to produce a moisture content control plan (MCCP) or risk assessment?"**

46. It is common ground that there was no mandatory requirement to produce an MCCP. In answer to questions from the Court, the Claimant's technical expert – Ms Hoey confirmed she herself never produced an MCCP.

[T6-960] J/KH

"Q. Can I just ask one question. If you could go to page 227 of volume D, please. Mr Potter in paragraph 8.7 says: "At no point have seen an MCCP nor been required to prepare such a document. Nor am I aware of any projects upon which such document has been prepared." In your report you do not identify your experience of MCCPs and their use on projects you have been involved in. Have you ever been asked to prepare an MCCP?"

A. Not an MCCP but I have been asked to prepare risk assessments and consider the risks of various different options or design changes, etc.

Q. But never an MCCP?"

A. Never an MCCP."

47. Mr Potter said that even if an MCCP was to be drawn up he would expect JCA rather than the Defendant to draw up such a document.

Mr Potter stated:

"I would suggest that the party I would expect to draw up this document would be someone like JCA rather than WTA" [T6/I 038/10-11]. Further, "the phasing of the works and the protection necessary for the works, push it - place more of the responsibility on the likes of JCA because I revert to comment I made earlier, it is not WTA s responsibility or any architects responsibility to dictate how works are done. It is really up to the main contractor in this case, JCA, to do that and that effectively means they are determining things like what is your plan for drying it out if it gets wet, how are you going to protect the works" [T6/1039/4-16]

48. However there are two fundamental problems with this alleged breach

- 1 the Defendant did produce an appropriate plan. The Defendant's specifications functioned as an effective moisture plan.

Ms Hoey agreed that the Defendant's Timber Frame Specification was "*suitable*" meaning "*suitable for the project*" and "*a reasonable performance specification to apply to the timber frame works package*" and which "*took the guidance into consideration in terms of moisture protection*" [T5/774/9-25] to [T5/775/2-4, 18-25].

Ms Hoey agreed that the Defendant's Combined Specification was "*a perfectly reasonable specification that is in accordance with guidance*" [T6-903/3-4], and that it did refer to putting up temporary covers in adverse conditions [T6/903/5-7].

Ms Hoey's view was that if the Defendant's Timber Frame Specification had been followed, "*there would have been no water anywhere near the timber*" [T5/782/13-19], and that the Defendant's Specifications ought to have been complied with by trade contractors like Hess and Stoneleigh, as well as JCA, [T5/783/7-15]. Ms Hoey accepted that Hess ought to have complied with the Timber Frame Specification and that Stoneleigh and JCA should have been aware that the VCL should not be laid on wet CLT [T5/783/4-6], [T6/903/20-21] and Ms Hoey also

agreed with the proposition that *"If they had complied with the WTA specification it would have involved not putting VCL down on wet CLT"* [T6/909/5-6] and the trade contractors should and could have put up temporary cover in the event of adverse weather [T6/909/11-12]

- 2 A Temporary roof over the works area was not the only viable and effective way to protect the roof. The Claimant relies upon BS 6229:2003 which refers to temporary roofs being used in exceptional cases.

The factors relied upon by Ms Hoey to make this building "exceptional" were challenged effectively and conclusively by the Defendant in its Written Closing Submissions as follows:-

- "(i) the Leamington Spa weather, which was essentially due to building in winter, with consequent risk of rain: if this was exceptional there would be no building could be undertaken in winter without a temporary roof and that plainly was not what happened;**
- (ii) the flat CLT, which was due to there being no pitch to the roof: but the BS 6229:2003 guidance all related to "flat roofs", so this point alone could not make the building exceptional;**
- (iii) the absence of temporary drainage: this was addressed by alternative methods of removal of water, such as brushing and vacuum pumping;**
- (iv) the use of sealed down VCL with insulation and a single ply membrane: this was a commonplace roof build up, and did not make a roof exceptional."**

49. Looking at the evidence it is clear and I so find that this building was not exceptional and did not require a temporary roof.

- Mr Ogle's evidence was as follows:

[T4-533] WW KC/AO

“Q. You accept the use of a canopy is a protection option available on a project?”

A. Correct.

Q. The position, I would suggest, on a very broad, flat single storey building is rather different perhaps from a lot of the other projects you have done, four or five storey buildings where you are covering over your last bit of work to allow it to dry out as you go up by each storey?

A. True, although one of my most recent projects is working for Department for Education on their platform for timber schools, to be able to use UK grade timber. Most of those are very large single storey buildings. None have been procured using a canopy.”

- Mr Westwood’s evidence was that:

“I have never worked on a project involving a canopy but I would also say I have never heard of any architect ever designing a canopy.”
[T3/439/3-5]

- Mr Potter explained that “*in 39 years*” of practice [T7-1140/24-25] despite being involved in “*the high 60s number of projects*” involving timber [T7/1118/8-18] and having done around “*40 flat roofs*” [T7/1141/2] he has only ever used a temporary canopy in four cases [T7/1140-1141/25-2]. Those cases were “*all existing buildings*” [T7/1141/16]. Mr Potter explained that this kind of protection would predominantly be used on an occupied building, [T6/1064/5-11].

50. A timber roof does not make a building “*exceptional*”. Mr Potter explained

[T6-989] SP

A. Given the number of brick and masonry buildings that I have taken to pieces over the years which have been seriously damaged by moisture, I would not distinguish a timber building as being necessarily of greater risk. Moisture is a risk to all buildings, whatever the fabric they are constructed from.

[T6-990] WW KC/SP

Q. So, to be absolutely clear, you do not agree that in general terms, timber buildings are at greater risk of moisture and water damage than more traditionally built buildings?

51. Mr Webb through an extremely robust and thorough cross-examination tried to suggest to Mr Potter that there were particular risk factors pertinent to this building [T6/988/23] to [T6/999/10]. These were rebuffed by Mr Potter.

(a) Notably, he did not accept that timber buildings were inherently riskier than those made of brick, as regards moisture.

(b) Mr Potter also did not accept that the existence of a parapet inhibited the provision of drainage once drainage holes had been cut.

(c) Nor did he consider that this case was particularly risky because of the application of VCL, given "*There is no flat roof that does not have a VCL as far as I am aware, with vertical insulation above the VCL.*"

(d) Building in winter was not riskier than building in Summer. He did, however, accept that there would be fewer daylight hours in Winter and generally colder temperatures. But he noted that the limiting criteria are not necessarily sunlight and temperature, but also relative humidity (since when it is lower the timber will dry out more quickly). In re-examination, he also referred to "*the movement of air across the surface of the timber*" and, if the relevant space was enclosed, the use of dehumidifiers.

(e) He accepted that a sloped roof would be a lesser risk than a flat roof.

On these points I accept Mr Potter's evidence as being correct.

52. This is a claim for professional negligence. It is relevant to consider that Ms Hoey or Chris Miers when they initially investigated the defective roof knowing that it had become

saturated after prolonged exposure to winter weather did not suggest that a temporary roof should have been used. Ms Hoey in her first, CPR Part 35 compliant report in 2022 made no such suggestion. See Ms Hoey's evidence below:

[T5-748] SM KC/KH

“Q. And in 2022, when you were instructed to look at whether there had been professional negligence by WTA, neither did you?

A. Neither did I come to a conclusion at that stage that it should have been built under a temporary roof, is that your question?

Q. Yes.

A. That is correct.”

53. In April 2017, Mr Chris Miers, of Probyn Miers, carried out a brief, high level review and report, [E6-18301] did not make any mention of a lack of a temporary roof during construction.

54. In April 2018, Mr Miers carried out a presentation at a multi-party meeting, which was again reported upon by him, and once again he did not mention, even though he was looking at 'what went wrong', that there was a lack of a temporary roof during construction.

See Ms Hoey's evidence below

[T5-743] Re: E6-1830, G3-247 SM KC/KH

Q. And as he says at the top of the page 1830: "*Brief review of concerns arising from prolonged exposure of the timber to the new Vitsoe building in Royal Leamington Spa.*" He says underneath: "*This is brief high level overview of concerns*"?

A. Yes.

Q. Then he continues -- "*The concerns arise because the frame and CLT was left exposed to the winter weather for some 12 weeks before being closed in.*"

A. Yes.

Q. So Mr. Miers is very much aware that the issue is that the CLT was left exposed to winter weather?

A. Yes, that would----

Q. Yes.

A. That is said.

Q. It would appear that, despite knowing that the concerns arose from this, once again there is no mention in his report of any lack of a temporary roof during construction?

A. No, I do not think that is mentioned at all.

Q. And you are aware also, are you not, that Mr. Miers conducted a multi-party meeting a year later, 11th April 2018, yes?

A. Yes.

[T5-747] SM KC/KH

6.43, it confirms -- *"It was confirmed that the VCL membrane and roof build up went down over a wet CLT substrate."*

A. Yes. I can see that.

Q. You know who CD is, I will tell you Craig Dediccoat?

A. The Stoneleigh gentleman, yes.

Q. He stated that this was due to programme pressure. Yes?

A. That is what it says, yes.

Q. And as you have already answered, he does not mention anything about a lack of temporary roof?

A. Not in the list of issues under construction, no

Q. Pausing there for a moment, we have had your -- we have had Mr. Miers doing this investigation in 2017/2018 and he does not mention that, the problem here, because he was specifically looking at what went wrong. He does not say that the problem here was a lack of temporary roof during construction?

A. No, he does not. He does talk about the fact that moisture has got in, so -- and he does not specifically say, *"Well, it would not have happened if there had been a roof over it".*

55. In the circumstances of this case in 2016 or 2017 I find and so hold that there was no obligation upon the Defendant to undertake a MCCP or risk assessment. In any event the Defendant's combined specifications were reasonable, suitable and if complied with there would "*have been no water anywhere near the timber.*" The Defendant provided a suitable and robust specification which provided adequate and suitable information for moisture control. In 2016 or indeed 2017 the Defendant was not obliged or was not required to produce an MCCP or a risk assessment relating to moisture control. Furthermore if a MCCP risk assessment had been carried out the Defendant would not have recommended a temporary roof and I am satisfied on the evidence of the conversations between Mr Waugh and Mr Adams that if a temporary roof had been recommended by the Defendant the Claimant would not have proceeded with a temporary roof.
56. I also find and so hold that the use of close sequencing is a reasonable and acceptable option in lieu of a temporary roof for the following reasons:
- (a) Close sequencing between CLT installation and roof covering is a legitimate method of construction. It was listed as an option for reducing the risk of trapping water during construction in BS6229:20043.
 - (b) Close sequencing was advised by the Defendant when the Defendant noted in its "Project Bulletin" single ply membrane to quickly follow CLT installation on site.
 - (c) Hess the specialist contractor chosen by the Claimant itself stated that "*Our programme is devised to close in the building as soon as possible. We will continue to minimise the moisture uptake through experienced planning of the installation.*"

57. In particular I find and so hold that the programming of the construction of the roof was not the Defendant's responsibility. The protection of the roof works was not the Defendant's responsibility. The supervision and management of the trade contractors was not the Defendant's responsibility.
58. JCA, Hess and Stoneleigh were all responsible for programming the works such that there would be close sequencing between Hess' CLT works and Stoneleigh's roof covering works. JCA, Hess and Stoneleigh all had responsibilities for the protection of the works on site.
59. The Defendant acted competently in realising that it was not necessary to erect a temporary roof over the whole of the roof works area.
60. Close sequencing is a suitable and appropriate method of moisture protection. JCA, Hess and Stoneleigh were all content with close sequencing as the appropriate method of moisture protection. There was nothing about this project that meant a temporary roof was required. Other specialists such as Probyn Miers, Exova BM Trada and Store Enso did not state that the lack of a temporary roof was an obvious mistake which was responsible for the water damage.
61. In all the circumstances I find that the Defendant was not acting in breach of duty and was not negligent in not advising or recommending a temporary roof.
62. For the sake of completeness I do not find that the judgment of HHJ Pelling in **Sky UK Limited and another v Riverstone Managing Agency Limited & Others** [2023] EWHC 1207 (Comm) is helpful or relevant to the facts of this case. HHJ Pelling KC found on the facts before him that the inclusion or not of a temporary roof was a design

not a construction issue. However that was a case concerned with different facts and different contractual arrangements and a markedly different design concept.

Did the Defendant fail to use reasonable skill and care in the performance of its services pursuant to its appointment in the ways alleged at paragraph 31 of the RAPOC (“the alleged breaches”)

(b) In failing to identify that Hess’ tender contained no adequate moisture protection during construction?

63. This alleged breach overlaps quite considerably with the previous alleged breach of duty. What the Claimant contends is that any review of Hess’ tender should have alerted the Defendant to reconsider the need for a MCCP/risk assessment and that would have inexorably led to the use of a temporary roof.
64. However for the reasons and findings made in respect of the first alleged breach of duty that process would not have led to the use of a temporary roof. That is largely a complete answer to this second alleged breach of duty.
65. Not only do I find that the Defendant cannot be criticised for failing to identify Hess’ tender contained no adequate moisture protection during construction. I find that on the evidence which I have read and heard.

-1 The Defendant had an extremely limited role in considering the tenders.

Kingerlee and not the Defendant

- prepared the tender package of documentation.
- produced the agenda and score sheet in the interviews.

- reviewed and reported back to the Claimant in respect of the tenders.
- 2 The Defendant had very limited obligations to review Hess' tender. The Defendant was only obliged to review and report upon subcontractors tenders "*where required*". On the facts of this case I am satisfied that the Defendant was not required to review and report upon Hess' tender.
- 3 The Defendant was not required to report upon or to conduct an appraisal of Hess tender. The Hess tender was reviewed, appraised and reported upon by Kingerlee and Vincent Wang. The agreed chronology records, that:

"5 March 2016 - Vincent Wong circulated his analysis of timber package tender and recommended Hess."

The Claimant did not require the Defendant to report upon or to conduct an appraisal of Hess' tender.

- 4 However despite all that the Defendant did report upon Hess' tender on the 4th November 2016 [F2/65] and in its second architect's report where the Defendant stated:

"3.4 HESS design co-ordination: ...Hess are providing temporary water protection to the Baubuche and CLT and have been liaising with JCA regarding weather protection and temporary rainwater drainage during construction. A small number of holes are to be cut in the CLT on site for rainwater outlets and the roof access hatch. WTA to coordinate with JCA as to whether Stoneleigh can cut these."

Hess had committed to provide temporary weather protection to the CLT. It was common ground, from the outset, that the intention was to rely upon close sequencing. There was no obligation for the Defendant to consider that the tender needed amending for further weather protection purposes and certainly there was no obligation to recommend that a temporary roof must be provided.

Did the Defendant fail to use reasonable skill and care in the performance of its services pursuant to its appointment in the ways alleged at paragraph 31 of the RAPC (“the alleged breached”)

(c) In failing to take appropriate steps in response to the CLT being exposed to sustained rainfall around Christmas 2016.

66. The factual background to the events leading up to the events around Christmas 2016 is the context within which this allegation of breach of duty must be considered.

67. There are a number of points in the correspondence where one could start this investigation. I will start with Tom Westwood’s email dated the 16th November 2016. It also illustrates that contrary to the Claimant’s submission he did not operate as a post box.

68. The first email on this topic is:

**“From: Tom Westwood <tom@waughthistleton.com>
Sent: 16 November 2016 15:14
To: Adrian Kenny; Oliver jung
Cc: Simon Garwood; 1_550@waughthistleton.com; Alastair Ogle;
Francesca White; Clive Williams**

Re: 16953 Vitsoe: roof drainage during installation?

Adrian/ Oliver,

I realise I didn’t attach my markup of the Hess programme, however the other point to raise is regarding Xmas shutdown.

4/ Xmas shutdown.

- a/ What is the period that the site is closed?**
- b/ The programme shows that Hess will have just started installation of phase III before Xmas, and as such the CLT would be unprotected over the Xmas shutdown. Is this advisable or should phase III installation be commenced after Xmas.**
- c/ In addition i would doubt there is time for Stoneleigh to protect the phase II roof between the phase II completion by Hess and the Xmas shutdown, leaving this unprotected over Xmas also.**

Thanks.

Time Westwood - Associate

69. JCA's response was sent the same day and stated:

"On 16 Nov 2016, at 22:59, Adrian Kenny <ade.mkconstruction@gmail.com> wrote:

**Tom,
xmas shutdown will be 23rd- 3rd Jan 17**

Our working programme will deal with the phasing and coordination with other trades."

70. This was followed up by an exchange of emails between WTA and AMK Construction as set out below:

On Fri, Nov 18, 2016 at 10:55 AM, Tom Westwood <tom@waughthistleton.com> wrote:

Hi Adrian,

Thanks for your time on the phone yesterday to talk this through. You explained that you are like to have handovers from Hess in 3-bay sections (so every 5 days or so). Thereafter your roofer will lay the bottom (secondary) waterproofing layer onto the CLT as a priority to act as temporary waterproofing before the full roof buildup is in place.

Yours

Tom Westwood – Associate

**From: Adrian Kenny <ade.amkconstruction@gmail.com>
Sent: 18 November 2016 11:07
To: Tom Westwood
Cc: Oliver jung; Simon Garwood; 1_550@waughthistleton.com; Alastair Ogle; Francesca White; Clive Williams**

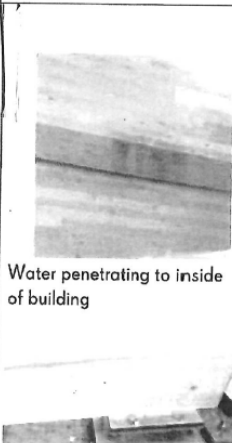
Subject: Re: 16953 Vitsoe: roof drainage during installation?

Hi Tom

Yes that's the plan with the proposed roofing contractor although they haven't been formally appointed yet which is a risk outside of JCA's control however we hope to resolve this with the client team next Wednesday

fingers crossed that the CLT install goes to plan and the weather is kind to - us."

71. Ms White employed by the Defendant on a site visit on the 8th December 2016 noted that temporary protection was missing in some places and reported this in the Architect Report dated 12 December 2016.

03	<p>CLT – installed to gridline 13</p> <p><u>Interior:</u></p> <ul style="list-style-type: none"> - Rain entering from roof is running down the internal face of the birch. - End grain of CLT window cills is exposed. - Dirt & scuffs to CLT panels at low level above upstand. - Forklift marks to soffit of CLT to bay 18. - Screw loose to shear wall cover panel along gridline 18. - Splintering to dowels of shear wall panels. <p><u>Exterior:</u></p> <ul style="list-style-type: none"> - Currently no air tightness tape between panels. - All lifting holes in CLT panels to be filled/plugged. 	<ul style="list-style-type: none"> - Stoneleigh to install membrane to roof as soon as possible to minimize water penetration. - JCA to install plastic sheets to windows to ensure water does not penetrate into end grain of CLT and down face of wall. - Hess to carry out remedial/cleaning work to CLT panels. - Hess to make good where there are defects e.g splinting to dowels. - Hess to plug lifting holes. 	 <p>Water penetrating to inside of building</p>
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72. On the 22nd December Ms Ogle asked Hess for advice copied to the Claimant regarding unprotected wet CLT panels.

**“Von: Alastair Ogle [mailto:alastair@waughthistleton.com]
Gesendet: Donnerstag, 22. Dezember 2016 16:58
An: Rensteph Thompson; Oliver Jung
Cc: Andrew Waugh; Tom Westwood; Mark Adams; Simon Garwood
Betreff: Re: Installing Roofing Membrane on Wet CLT**

Dear Rensteph / Oliver,

Re: Installing Roofing Membrane on Wet CLT

During installation there has been some rainfall on the CLT roof panels, and as they were, not protected during erection the roof panels have become wet. The Vapour Control Layer (bottom layer of the roofing buildup) is then being installed before the CLT has fully dried out. Our understanding is that the CLT will dry out from the inside as it is exposed internally, is this correct. Will this be possible with the temporary treatment/coating applied internally?

Please can you provide your comments on this process and if the roof is ready to receive the roofing while wet.

Alastair Ogle Associate”

73. The same day Hess responded suggesting Plotform measure the moisture content of the CLT panels.

**“From: "Rensteph Thompson" <rensteph.thompson@hess-timber.com>
Date: 22 December 2016 at 18:22:15 GMT
To: "Alastair Ogle" <alastair@waughthistleton.com>, "Oliver Jung" <oliver.jung@hess-timber.com>
Cc: "Andrew Waugh" <andrew@waughthistleton.com>, "Tom Westwood" <tom@waughthistleton.com>,”**

--'Mark Adams' <mark.adams@vitsoe.com>, "Simon Garwood" <simon.garwood@vitsoe.com>

Subject: AW: Installing Roofing Membrane on Wet CLT

Alastair,

I think we have to be careful with CLT roof panels that became wet on the outside and then being covered by a vapour control layer. This is especially critical if:

- the vapour control layer is 100% airtight which I believe is the case.**
- the CLT has a lot of moisture that needs to dry out**

The CLT roof panels don't have any primer coating on the inside. And this would not have had any impact.

I suggest we ask Plotform to measure the moisture content of the CLT roof panels. This would help us to make a decision.

However, if there is too much moisture within the CLT panel there is a risk of getting fungi/mold damages if the VCL is not allowing the moisture to lead off.

I am in the office tomorrow and we can speak on the phone."

74. The next day on the 23rd December 2016 Mr Ogle asked Hess amongst other matters to instruct Plotform to measure the moisture content on their return to site after the Christmas break, see his email below.

"Rensteph,

Further to your email, I would be grateful if you would contact Plotform directly and instruct them on how the roof should be protected over the next 10 days while the site is unmanned.

Our understanding of the current situation is as follows.

- 50-60% of the roof CLT is covered with Sika 5000E VCL. Drainage holes are in the process of being made through the up-stands in this area.**
- The remaining area of the roof is unprotected with the breather membrane left wrapped around the columns and beams below. The unprotected roof CLT panels have no tape to the joints. Photos attached.**

Please can you provide your comments and whether you consider that any further methods should be employed. It is our concern that this area of roof will be exposed and unprotected over the next ten days and could become saturated, further the structure below could become damaged from any water ingress. Plotform need to provide sufficient protection to the structure in their absence from site.

With regards to the fixing of the VCL. The VCL used "Sika 5000E" is airtight. Please could you instruct Plotform to measure the moisture content on their return to site after the christmas break and liase with Stora Enso as to whether any further drying out is required before applying the remaining VCL. Regarding the CLT panels which are already covered by the VCL and single ply membrane please advise as to whether further moisture tests are required in these areas.

Many thanks for you assistance,

Alastair."

75. At this stage Simon Garwood the Claimant's project manager was taking charge and sent an email to all concerned followed up with a telephone conversation with Mr Ogle.

His email stated:

On 23 Dec 2016, at 09.5.2., Simon Garwood <simon.garwood@vitsoe.com> wrote:

All

Having just reviewed with Clive the water protection of the building over Christmas, there are two clear strategies:

- 1. Sanavap membrane laid to 50% to 60% of the roof, along with drain holes to be added today (apologies I had mistaken that these drain pipes were already in) to allow the water to drain away rather than collect in large quantities.**
- 2. No protection to the top surface of the roof, water allowed to flow through gaps naturally, with the membrane laid over the beams to shed the water either side.**

I have attached some photos from the review to illustrate the strategy. From the discussion with Clive, he is confident this is the best and only strategy possible. Incidentally there are reasonably high winds forecast for over this weekend, and Clive is focussing on making sure that materials on site are not in a position to go flying into Morrisons Car Park.

Simon"

76. His telephone conversation with Mr Ogle was even more re-assuring. See below:

**" From: Alastair Ogle
Subject: Re: Water protection of Vitsoe RLS over Christmas
To: Andrew Waugh; Tom Westwood
Sent: December 23, 2016 11.30AM (UTC+00:00)**

I have just received a phone call from Simon at Vitsoe to tell us that his is happy with the protection methods employed by plotform and JCA onsite

over the christmas break and that we can stop panicking. Other points raised.

- The forecast is looking mild over the christmas period.
- The end grain in the parapets will be covered however the windows will not be covered or protected, stating he is happy to allow the air to blow through the building to naturally dry out any timber rather than cover them
- The moisture content has been continuously monitored by platform onsite as is currently at 12%

Alastair Ogle Associate”

77. Mr Ogle immediately followed this up with an email to JSA stating:

From: Alastair Ogle
Subject: Re: CLT moisture content.
“To: Clive Williams
Simon Garwood; Tom Westwood; Andrew Waugh; Adrian Kenny
Sent: December 23, 2016 11:47 AM (UTC+00:00)

Clive,

I have just spoken with Simon who informs us you have an agreed strategy in place for protecting the structure during the christmas break He also stated that Plotform are monitoring the moisture content of the CLT and I was wondering if you could give us more information on how this is being done and how the information is being used. Is it being used to inform Stoneleigh on when they can start applying the VCL for example or effecting how or when they hand the structure over to JCA?

Regards.

Alastair Ogle Associate”

78. Also on the 23rd December Mr Ogle had an exchange of emails with Hess as set out below:

“Alastair,

As already discussed on the phone please understand that we had clarified (back in October) and agreed with JCA that the roofing company needs to install the VCL membrane 1-2 days after we have installed the CLT rood panels partially.

We have tried to support JCA by trying to explain the importance of the roof cover. We just tried to get a hold of Clive/ Andy to clarify when the roofing company will cover the roof. So far it is our understanding that JCA was trying to get the roofing company on site up from 27th December. Unfortunately the roofing company left the site today at 11:00 AM. Clive has

also taken pictures to proof that the roofing company was not doing the works properly.

Regarding the moisture content I think that the torch process for the roof membrane is helping to dry the timber surface. However, it is my opinion that the roofing company should quickly come and apply the roof membrane.

As you see we are trying to help as much as we can but HESS and Plotform are not responsible in this matter.

I will also call Mark Adams to explain where we are."

Cc: Alastair Ogle <alastair@waughthistleton.com>, Oliver Jung <oliver.jung@hess-timber.com>, Andrew Waugh <andrew@waughthistleton.com>, Mark Adams <mark.adams@vitsoe.com>, Simon Garwood <simon.garwood@vitsoe.com>

From: Tom Westwood <tom@waughthistleton.com>
Subject: Re: AW: Installing Roofing Membrane on Wet CLT
Sent: Fri 23/12/2016 1:26:18 PM (UTC)
To: Rensteph Thompson <rensteph.thompson@hess-timber.com>

Dear Rensteph,

Many thanks for your input and advice. Let's catch up in the new year and discuss further the best way to complete the works.

Wishing you a great break,

Tom

Sent from my iPhone"

79. Against that factual background it is necessary to carefully consider the allegation of breach of duty made by the Claimant against the Defendant.

80. The Defendant has helpfully broken down the particulars of this breach of duty as follows: -

-1 the Defendant should have "Advised Stoneleigh and/or JCA and/or the Claimant not to install the VCL in the existing wet conditions". This will be referred to as the "Installation Allegation".

- 2 the Defendant should have "*Instructed and/or advised the Claimant and/or JCA that moisture levels of the CLT should be tested ...*". This will be referred to as the "**Moisture Testing Allegation**".
- 3 the Defendant should have "*Instructed and/or advised the Claimant and/or JCA that a raised tarpaulin cover or temporary canopy be constructed over the building (or the incomplete sections) ...*". This will be referred to as the "**Temporary Cover Allegation**".
- 4 Insofar as the Defendant did raise any of the above "*it should have followed up with JCA to ensure that they were being carried out and, if not, advised the Claimant ...*". This will be referred to as the "**Follow-Up Allegation.**"

Taking each in turn

-1 **The Installation Allegation**

This is a very difficult allegation for the Claimant to establish. It appears clear and undisputed that: -

Stoneleigh

Hess

JCA

the Claimant

all knew that VCL should not be installed in wet conditions. What is another difficulty is that Mr Adams knew from Hess by at least the 12th December 2016 when he had a conversation with Hess' Mr Thomson that was followed up by an email from Hess to Mr Adams.

**"From: Rensteph Thompson <rensteph.thompson@hess-timber.com>
Sent: 12 December 2016 10:42
To: Mark Adams
Cc: Simon Garwood
Subject: AW: Oliver Jung**

Dear Mark,

Please trust me that it is really not our intend to generate any harm on your side. Also please believe me that Oliver did nothing on an intentional basis. Furthermore, if you believe it or not: We are worried that your project is exposed to further risks (e.g. weathering/moisture damage due to missing roof membrane) and therefore we tried to find a solution with JCA.

I know that this is hard for you to understand as everyone has his own selective perception. The only chance to solve this conflict is to speak with each other. I am not sure if you would like to speak with me since your last sentence (*There is nothing further to discuss on this matter*) tells me that this is not the case. I hope that I have misunderstood the aforesaid and that we both can speak so that I can work out something that would help all of us.

I am happy to call you. Just let me know.

**Mit freundlichen Gru en I Best Regards
(Dipl.-Ing.) Rensteph Thompson
Projektleiter International/ Project Manager International"**

So from the 12th December 2016 the Claimant knew that Hess had completed work which was not covered or protected from the rain. The Claimant did not tell the Defendant about any of this. This was inexplicable as Mr Adams accepted when he was cross examined.

[T2-202] Re: E5-1512 SM KC/MA

"Q. And Hess then tell you "we are concerned about the protection of timber from the rain". That is Mr. Rensteph?

A. Correct.

Q. The roof company is having difficulty to protect the roof, yes?

A. Correct.

[T2-203] SM KC/MA

Q. And you were aware of that?

A. Andy Miles of JCA had made me aware of that, yes.

Q. Because there is no suggestion when you have that conversation that that came as a surprise to you; you already knew there was a problem with the roofers?

A. Correct."

The Installation Allegation fails because the Claimant cannot complain that the Defendant did not inform it of something of which the Claimant was well aware,

The Installation Allegations must fail because

- everyone knew the VCL should not be installed in wet conditions.
- when it was being installed in wet conditions the Defendant was the last person to be informed when everyone else knew what was happening including the Claimant and Hess, the timber specialist, neither of whom thought it necessary to tell the Defendant at the time of the roofer's difficulties in protecting the timber from the rain.

-2 **The Moisture Testing Allegations**

The 23rd December 2016 email is one in which Mr Ogle records Mr Garwood telling Mr Ogle to "stop panicking". That email also stated that the Defendant was told that :

"- the moisture content has been continuously monitored by Plotform on site and is currently at 12%"

This email was discussed by Ms Hoey in answer to the Court's questions as follows:-

[T5/862/4] to [T5/863/23]:

"THE JUDGE: Go back to page 1668. As I understand it, this was a record of a conversation from Simon Garwood, who was the representative of the claimant, telling Alastair Ogle that the moisture content has been continuously monitored by Plotform on site that is

currently at 12%. Do you think there is any reason why WTA should have challenged that information?

A. I think if that was delivered to them, I do not know that it needed challenging. It might have been helpful to understand what "continuously monitored" meant and where those measurements had been taken to understand whether it was representative, you know, whether they were taken from panels just laid one day or whether they had been laid for two weeks previously, whether it was in the middle of a panel or near a joint which was vulnerable. I think more information would have been useful to understand what that sentence really meant.

Q. So what would you have done if you had received this information from the client and wished the content to be continuously monitored?

A. I might have asked to understand what that meant. "Do you have any further information or can Plotform provide some information?" It was a rapidly developing scenario – every time there was rainfall, certain panels were getting wetter depending on where you were in the installation process. The later panels may not have got as wet as the earlier panels. Some of the earlier panels had been covered with a VCL. So that statement, as it is, gives me some comfort but it would not provide me with information as to whether they were monitoring something that had just been laid and therefore not subject to much wetting.

Q. Would you criticise the architect for being incompetent if he took this at face value without asking any questions?

A. I think it just needed some following up, whether it was immediately there and then.

Q. It is whether -- by not following it up, are you criticising them for being negligent and incompetent?

A. I think their obligation to determine whether the works are in accordance with their own -- with the works contracts in their own design, given the difficulties that there were on site, it is not possible for them to assess that adequately without more information as to the moisture content.

Q. So you say they are incompetent?

A. I say that not acting with reasonable skill and care.

THE JUDGE: Thank you."

81. When the Court asked Ms Hoey about the email stating the moisture content was currently 12% and whether she thought "*there is any reason why WTA should have*

challenged that information" and whether the Defendant was incompetent if it failed to do so, Ms Hoey said "*I do not know that it needed challenging*". [TS-862/8- 11] but then said that "*more information would have been useful*" and that in her view the Defendant was "*not acting with reasonable skill and care.*" [T4/863/22].

82. Ms Hoey's position was undermined when the following two documents were put to her.

-1 Mr Ogle's email dated the 23rd December 2017 [E5-1676] in which the Defendant sought further information from JCA regarding the moisture readings.

-2 Mr Ogle's email of 23rd December 2016 asking Hess to instruct Plotform to measure moisture content on their return to site after Christmas. The email went on to state:

"... and liase with Stora Enso as to whether any further drying out is required before applying the remaining VCL. Regarding the CLT panels which are already covered by the VCL and single ply membrane please advise as to whether further moisture tests are required in those areas"

and she was forced to effectively withdraw all her criticism of the Defendant in respect of moisture testing allegations. Ms Hoey agreed that these were all perfectly appropriate questions to be raising [T6/875/15-16]

83. I consider that Mr Hoey was correct in withdrawing her criticisms of the Defendant with regard to moisture testing. Moisture testing was being carried out "*continuously*". The reported readings were within safe limits $12^{\circ} \pm 3^{\circ}$. The Defendant raised the appropriate questions regarding moisture testing and recommended further tests should be taken after the Christmas shutdown. There was clear evidence to suggest to a reasonably competent architect that appropriate moisture readings were taking place.

-3 **Temporary Roof Allegation**

I accept Mr Waugh's evidence that there was a discussion regarding a temporary canopy to allow drying out. This discussion took place on the 12 January 2017. I accept Mr Waugh's evidence that Mr Adam's said "*Well that's not going to happen or something similar.*" I accept Mr Waugh's recollection of what was said in preference to Mr Adam's recollection of this conversation because Mr Adam's testimony on this occasion as on other occasions varied from his written evidence and that I consider makes his evidence less reliable than Mr Waugh's .

In the circumstances I fail to understand how the Defendant can be criticised or be accused of negligence by not raising the very point in fact raised by Mr Waugh.

-4 **Follow Up Allegations**

Neither expert criticised the Defendant in not following up with JCA to ensure that the moisture readings were being carried out.

Ms Hoey accepted that there was no evidence that the Defendant's 22 December 2016 instruction had not been followed [T5-681/17-18]. She "*did not know what did or did not happen.*" [T5/682/2-3].

Mr Potter was asked whether the Defendant should have intervened. His response was that: "*My understanding is that that is what they were doing in, stepping in, and asking the people who were running the project, to wit JCA, for example, what was going on, and Hess, who were organising, told them that they were going to ask Platform to organise moisture testing. Up to that point, I do not see that they had an obligation, nor would I expect them, to intervene in the situation.*" [T7/1115/16-22]

I consider that it was reasonable for the Defendant to assume and to rely upon Hess who the evidence shows were on site intermittently in January and February 2017, to ensure those moisture readings were being taken after the Christmas break and thereafter. Furthermore it was JCA who should have been checking that the moisture readings were being taken not the Defendant. JCA were in control of the site not the Defendant.

The Defendant did not fail to take appropriate steps in response to the CLT being exposed to sustained rainfall around Christmas 2016. The Defendant's advice before and after the Christmas 2016 break was sensible, prudent and appropriate. In respect of these matters the Defendant did not act in breach of duty.

Even if the Defendant had produced an MCCP or a risk assessment or if the Defendant had reported upon and appraised Hess' tender the Defendant and indeed any reasonable competent architect would not have recommended a temporary roof. In any event even if the Defendant had recommended a temporary roof the Claimant would not have agreed that a temporary roof was required.

Wrongly considering that wet timber would dry out.

84. At [31.3] of the RAPOC the Claimant pleaded that *"It is understood that the Defendant may have decided not to issue any instructions or advice on the basis of an erroneous belief that the CLT would dry out from its internal face which was not covered by a VCL ..."* [A-21].
85. This allegation at [31.3] of the RAPOC is not referred to in the Claimant's Opening Note. It appears to have been dropped by the Claimant.

86. That is unsurprising given Ms Hoey could not support the allegation. Her oral evidence indicated she could not support this as an allegation of negligence, saying "*I think at the time it was not very clear how long it would take to dry out. I think there was a consideration that it would dry out, but there did appear to be some uncertainty as to how long that would take.*" [T6-914/13-16]. Ms Hoey was asked whether she thought it was an "erroneous" belief to hold, she said "*I think it is a little bit more complex because it does depend on the moisture level. So it will dry out but it depends what the moisture levels are as to whether - how long they will take to dry out and therefore whether there is a risk of decay.*" [T6-914/24] to [T6-915/4].
87. The evidence is clear, Stora Enso, Exova BM Trada and Probyn Miers were all in 2017/18 contemplating the possibility of the CLT, with VCL laid on its upper surface still drying out from its interior face.
88. Accordingly it is no wonder that the Claimant did not pursue this complaint against the Defendant with any vigour.

H. QUANTUM

89. Given my findings on the alleged breaches of duty my findings with regard to the quantum of the claim are somewhat academic. However I will review the Claimant's losses under the following heads of loss.

-1	Sums paid to BKS	£3,607,666.90
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-2	Sums paid to Kingerlee	£ 23,877.00
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-3	Sums paid to Consultants	£ 271,526.00
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-4	Financing costs	£ 588,968.00
----	-----------------	--------------

-5 Vitsoe consistent with its case on liability suggest a credit should be given for the cost of a temporary roof in the sum of £476,000.00 as calculated by Mr Baldwin. Mr Huntley's "best guess" for the credit of a hypothetical temporary roof in 2016 was £1,342,968.

90. If contrary to my findings on liability the Defendant did act in breach of duty as alleged by the Claimant in the RAPOC it is clear that the losses under headings 1, 2 and 3 were caused by the Defendant's alleged breaches of duty.

91. The Defendant's case on quantum is summarised at Annex 4 to the Defendant's Closing Note dated 19th February 2025 as set out below.

“Quantum summary

In the event that the Claimant is entirely successful on liability issues, the Defendant contends that the Claimant is entitled to:

- 1) £2,011,019.78 for remedial costs [D-370].
- 2) Less £802,903.06 for work on the Northlights (if unnecessary) [D-370].
- 3) Less £13,363.38 for removing CLT panels (if work to the Northlights was unnecessary) [D- 370].
- 4) £0 for finance costs.
- 5) Less £1,342,968.00 for the hypothetical temporary roof [D-358].
- 6) Total: (£148,214.77) (minus)

Breakdown of remedial costs

BKS Contract Works

a) Early works order

- | | | |
|------|----------------------------------|--------------------|
| i. | Head office management: | £0 [D-363] |
| ii. | Drawing and detailing: | £0 [D-363] |
| iii. | Temporary works scaffold design: | £9,810 [D-363] |
| iv. | CLT replacement panels: | £124,779.39[D-364] |
| v. | CLT transport: | £0 [D-364] |

b) Management and staff prelims:

- | | | |
|-----|-----------|---------------------|
| i. | Off-site: | £0 [D-364] |
| ii. | On-site: | £137,4000.00[D-365] |

c) Site set up:	£0(included in b) [D-365]
d) Temporary scaffold roof:	£663,477.00 [D-365]
e) Roofing package:	£638,023.06 [D-365]
f) Lightning protection system:	£7,802.00 [D-366]
g) Mansafe:	£15,933.75 [D-366]
h) Remove and replace solar panels:	£12,337.50 [D-366]
i) Remove and replace CLT:	£249,733.18 [D-366]
j) Material storage of CLT off site:	£5,000 [D-366]
k) Storage of existing insulation:	£5,500 [D-367]

Insurances: £37,398.52 [D-367]

BKS risk contingency: £19,073.24 [D-367]

Variations

i. VO1:	£13,788.00 [D-367]
ii. VO2:	£5,575.00 [D-367]
iii. VO3 to V18:	£0 [D-367] to [D-368]

Less Final Account settlement deduction: £99,357.01 [D-368]

Betterment if no deduction made in respect of Northlight (£25,000) [D-369]

Professional fees:

i. Calfordseaden:	£77,548.95 [D-369]
ii. Eckersley O'Callaghan:	£17,356.19 [D-369]
iii. Membrane Roofing:	£5,121.00 [D-369]
iv. Triodos Bank:	£13,500 [D-369]
v. Warrington Fire Testing:	£51,090 [D-369]
vi. Michael Puttrick:	£0 [D-369]
vii. Thornton Consulting:	£0 [D-369]"

I consider that it is fair to conclude that the Defendant's quantum summary looks somewhat improbable and somewhat unreasonable. However that doesn't mean that the Claimant's quantum case should not be rigorously probed and challenged.

92. Taking each of the Claimant's head of claims

-1 Sums paid to BKS

I accept that the appropriate legal test is as set out in the Defendant's Closing

Written Submissions: -

“212. As Akenhead J held in *AXA Insurance UK Plc v Cunningham Lindsey UK* [2007] EWHC 3023 (TCC), “...it is generally incumbent upon an innocent claimant entitled to damages to demonstrate not only that the loss was within one of the *Hadley v Baxendale* limbs but also that it is reasonable to recover damages of the type and extent claimed.”

213. The touchstone is, therefore, reasonableness.

214. In this particular case, the court should not use the costs in fact incurred as a starting point when considering what is reasonable: see *Brit Inns Ltd v BDW Trading Ltd* [2012] EWHC 2143 (TCC), 145 Con LR 181. The remedial works were not undertaken pursuant to a competitive tender; they were not undertaken by an experienced main contractor; and they were not managed by an experienced client representative (Mr Calderbank).”

93. However I consider that the criticisms of how Mr Calderbank procured, managed and implemented the remedial works are unfair and unjustified. I was impressed by Mr Calderbank’s evidence and in difficult circumstances despite not being professionally qualified, I consider and so find that he acted reasonably and the costs incurred were reasonably incurred and it is reasonable to recover the damages of the type and extent claimed.
94. I found the written and oral evidence of the quantum experts less helpful than I had expected.
95. David Baldwin: the Claimant’s independent quantum expert was advised that the Defendant had not pleaded “*mitigation*” and was only subsequently instructed to engage in discussion of any mitigation points raised by the Defendant’s expert.
96. Chris Huntley: the Defendant’s independent quantum expert concluded that for the purpose of his Report he had in many cases insufficient documentation to review the quantum figures. However very late in the day the independent experts produced a Post Joint Statement statement dated the 24th January 2025.

97. Both independent experts did their best to assist the court but I consider it may have been more helpful if from the outset the scope of their reports and the precise issues they were being asked to address could have been agreed well before they produced their first Joint Statement.
98. The Defendant has sought to criticise the Claimant's procurement of the remedial works with BKS, both by its cross-examination of Mr. Calderbank and Mr. Baldwin and by the evidence of its own quantum expert (Mr. Huntley). However, in his oral evidence, Mr. Huntley accepted that the reasonableness of the Claimant's approach in this respect was a matter of fact.
99. The factual background was explained by Mr. Calderbank. When cross-examined on this subject, his evidence remained clear, consistent and persuasive. In short as summarised in the Claimant's Written Closing Submissions.
- .1 Calfordseaden's original specification was issued in July 2020, providing for the works to be carried out on the basis of full panel replacement (save for minor matters). Following a tender exercise, Kingerlee was selected.
- .2 BKS was introduced as Kingerlee's proposed subcontractor for the panel replacement works, following which the possibility of repair rather than replacement was raised.
- .3 Between September 2020 and January 2021, there were discussions between inter alia BKS, Kingerlee, Eckersley O'Callaghan (the structural engineers) and the Claimant regarding the feasibility and methodology of a possible panel repair scheme.

- .4 That repair-focused (rather than replacement-focused) remedial scheme had a number of advantages from the Claimant's point of view, in particular minimising disruption to internal M&E services and to the Claimant's operations in the building.
- .5 Kingerlee pulled out of the remedial project in around February or March 2021, and suggested that BKS should take over.
- .6 That left the Claimant with a choice: either to continue with BKS, or to go back to the drawing board and look for another contractor.
- .7 Faced with a difficult position through no fault of its own, the Claimant acted decisively and they went with BKS. BKS was already familiar with the remedial scheme which it had helped to develop, and had a good relationship with the Claimant and the rest of the team.

100. I consider and so find that the Claimant acted reasonably in deciding to proceed with BKS.

101. The Defendant seeks to compare the sums paid to BKS with the sums originally proposed by the tenderers in August 2020 following the July 2020 Specification. This ignores the following:

- .1 The Calfordseaden tender evaluation report identifies that the estimate of building works cost was "*based on a partial replacement of the CLT panels and remedial repairs to those panels where the decay is minimal.*" In other words, the basic philosophy of the proposal was replacement, with a possibility of repair "*where the decay is minimal*".

- .2 The remedial scheme in fact adopted was based on repair of the CLT panels, with replacement only where repair was impossible. See item 3.7.5.4 of the July 2021 Specification. The philosophy of the two approaches was therefore very different.
- .3 Those sums which were calculated by the tenderers - such as preliminaries - varied subject to change. That was particularly so because the figures were drawn from first stage tenders. Mr Huntley failed to take account of any of this in his evidence. Indeed, despite expressly identifying that the tenders were first stage tenders and subject to change, he sought in his oral evidence to suggest that they were firm prices. **[Day 7/1258/12-24]**

102. The Claimant submits, in my view, correctly in its Written Closing Submissions that this connects to a wider issue with the Defendant's quantum evidence, which is the relative superficiality of Mr Huntley's analysis. The Claimant in its Written Closing Submissions state: -

- “.1 The quantum experts were provided with, among other things, detailed breakdowns of the claims for prelims and scaffolding costs as well as over 1,100 pages of ITPs and related records in respect of the repair and replacement of the CLT panels.**
- .2 Mr Huntley's report suggests that the quantum of the claim should be reduced by over £1.3 million in respect of those three categories of costs alone:**

	Claim	Huntley	Difference
Prelims	£935,703.71	£137,470.00	£798,233.71
CLT works	£390,098.18	£249,733.18	£140,365.00
Scaffold	£1,069,700.00	£663,477.00	£406,223.00
TOTAL	£2,395,501.89	£1,050,680.18	£1,344,821.71

- .3 Despite that startling reduction, Mr Huntley's report does not engage with any of that information.**
- .4 Instead, the majority of Mr Huntley's analysis is limited to comparing elements of the BKS cost (at a very high level) with the sums proposed at an early tender stage by Kingerlee and / or Speller Metcalfe.**
- .5 There are three problems with this.**
- .6 First, such comparisons are inherently flawed for the reasons given above.**
- .7 Second, it is not an adequate degree of scrutiny to support any contention that the sums paid to BKS are so unreasonably high that the Claimant is not entitled to recover them. Such contentions are, again, unpleaded allegations of failure to mitigate. Even if the Defendant was entitled to pursue them, they would require a very high degree of unreasonableness to be shown.**
- .8 Third, it means that the complaints Mr Huntley makes elsewhere in his report about not having been provided with enough detail ring hollow. The Court has no reason to believe that he would have engaged with the additional detail he refers to, because he did not even engage with the detail he did have.**
- .9 This failure to engage with the detail is another example of what has previously been described as Mr Huntley's "*lax*" or "*cavalier*" approach to his role as an expert.**

103. I share these concerns regarding Mr Huntley's evidence and in these circumstances in respect of the reasonable costs of the remedial works I prefer the evidence and findings of Mr Baldwin save in respect of the hypothetical cost of the credit for a temporary roof.

104. To take just an example of Mr Huntley's approach see the Claimant's cost of the CLT works £390,098 18. Mr Huntley's main criticism of the cost of the CLT works was that the hourly rates for joiners and telehandler drivers were high.

105. As to that I agree with the Closing Written Submissions of the Claimant.

- .1 This is an unpleaded allegation of failure to mitigate.**

- .2 Mr Calderbank's factual evidence was that the rates charged were the rates which the Claimant could in fact achieve [Day 3/410/10-18]

"A. My experience of quantity surveyors is that they can always find a slightly cheaper price in a book than what we could actually get to site. In one of the discussions about joiners we had, I remember Michael Moran pulling out the industry guide saying what a joiner should cost and the site team saying, "If you can find us a joiner for that cost that is competent at doing it we would use them" and so it does not surprise me that the quantity surveyor can find a cheaper hypothetical joiner."

- .3 On that basis, Mr Huntley expressed the view orally that to pay those rates "was *unreasonable but potentially may have been unavoidable* "

- .4 It is not unreasonable to pay a rate which was "*unavoidable*". It has never been suggested (and it could not sensibly be suggested) that it was unreasonable for the Claimant to carry out the CLT works at all.

- .5 Mr Baldwin also identifies that such rates may have included other elements such as attendant labour.

106. Mr Huntley also made a complaint about not having the necessary records, to demonstrate that the extent of the works done. It emerged from his cross-examination that this complaint was less significant than it might otherwise have appeared to be, because he expressly accepted the time spent on the works.

107. In any case, he had not considered the extensive records of the remedial works supplied by the Claimant (and to be found in volumes [E11] to [E14] of the trial bundle).

108. I consider that the Claimant's criticisms of the Defendant's quantum expert are fair and are justified and save for the cost of the credit for a temporary roof I prefer Mr Baldwin's

figures which are fully explained in his column of comments and which I consider are both reasonable and are suitably supported by contemporaneous documentation. Accordingly I adopt the following costs and fees relating to the remedial works on the basis that if contrary to my findings the Defendant did act in breach of duty as alleged by the Claimant.

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
				<p>I have been advised by the Claimant's Solicitor that WTA has not pleaded mitigation and that mitigation should not therefore be an issue for discussion.</p> <p>However, I have been instructed to engage in discussion on any mitigation points raised by Mr Huntley, and to highlight that this should not be taken as an acceptance by the Claimant that mitigation is an issue for discussion.</p>
	SCOPE OF REMEDIAL WORKS			<p>I agree with Mr Huntley's brief description of the scope of remedial works carried out.</p> <p>A full description of the works can be found in 'Section 3 Schedule of Works' of the Contract Documents (pages 345-383 of QS Requested Documents).</p>
	<u>CONTRACT WORKS (9 weeks lead in and 56 weeks on site</u>			<p>It is agreed that BKS allowed for 9 weeks pre-construction lead in and a 56 week programme for the Works on site.</p> <p>The tenders which included programme periods ranging from 26 to 40 weeks were tenders received on 21st August 2020. These tenders were for a different scope of works than those carried out by BKS. Refer to the Schedule of Works included in the Tender Documents at PR0D.000S079 of the Claimant's Disclosure.</p>

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
				It should be noted that BKS commenced on site on 8th November 2021 and completed the works on 8th December 2022 which is 56 weeks, as per the programme allowance, Within the disclosed documents, I have not seen any evidence to suggest that BKS were delaying the works or not making reasonable progress with them. This suggests that the 56 weeks programme allowance was reasonable.
a)	Early works order			It is agreed that the early works order includes £33,960.00 for management and design and £136,990.14 for CLT and plywood for the remedial works.
				The fact that Kingerlee may have elected to withdraw from the project has no relevance whatsoever on the entitlement of BKS to payment of sums included in its contract under the early works order.
	Head Office Management	7,950.00	7,950.99	See above
	Drawing and Detailing	16,200.00	16,200.00	See above
	Temporary Works Scaffold Design	9,810.00	9,810.00	See above
	CLT Replacement Panels (Stock material)	124,779.39	124,779.39	<p>Some materials, as detailed in BKS Cost Breakdown, were purchased in advance in order to mitigate additional preliminary costs arising from delays resulting from long material lead-in times.</p> <p>The precise quantity of materials required could not be ascertained until the works were opened up for inspection and testing. In my opinion, ordering materials in advance was a sensible and reasonable commercial action.</p> <p>In any event, the quantity of 'spare materials' is recorded as being minimal. In the Client Progress Report dated 8th November 2022 (page 1215 of</p>

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
				QS Requested Documents) states "3nr valley panels at our storage, is the storage for this being extended?"
	CLT Transport	12,210.75	12,210.75	This sum forms part of the Contract Sum and BKS Is entitled to payment thereof
	Management & Staff prelims			<p>As stated above, the lenders which were received on 21st August 2021 were for a different scope of works than those carried out by BKS and a direct comparison of preliminary costs allowed should be treated with caution</p> <p>This longer programme period allowed and required by BKS would naturally increase the cost of preliminaries.</p> <p>I have already stated that I considered the 56 weeks programme to be reasonable.</p>
	Off site	45,270.01	45,270.01	These are off-site staff costs relating to the 9 weeks pre-construction period and I consider them to be reasonable.
	On-site	454,972.03	454,972.03	<p>These are on-site staff costs relating to the 56 weeks construction period and I consider them to be reasonable.</p> <p>The costs cannot be compared with Klingerlee's preliminaries because of the different scope of works and longer programme period.</p>
c)	Site set up	435,461.67	435,461.67	These are fixed and time related costs associated with site establishment and running costs for a 56 weeks construction period.
d)	Temp scaffold roof	1,069,700.00	1,069,700.00	<p>Of the four tenders returned on 21 August 2020, only one included a price for scaffolding and the others expressly excluded it from their tender.</p> <p>Atelier included an allowance of £303,000 in its tender but</p>

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
				qualified it by stating "budget costs only - to be priced in stage 1 period" (see page 1231 of QS Requested Documents), in its tender covering letter, Atelier stated that it would require the opportunity to re-review the scaffolding, support and roof costs, and that the costs will be heavily influenced by the engineering design and the temporary works design checks which would be carried out in the pre construction period.
e)	Roofing package	638,023.06	638,023.06	<p>All the roof covering had to be removed to enable all areas of CLT panels to be inspected and tested. It had already been established that the amount of water damage and decay was extensive so it was not unreasonable to allow for the whole roof to be checked.</p> <p>In the event, areas of CLT panelling within the northlight section of the roof did require, and were repaired and/or replaced.</p>
			-25,000.00	<p>The only difference in the Sarnafil coverings/membranes for the 25 year warranty was that the Sarna 'S327-15EL' membrane was upgraded to a '5327-20EL' membrane.</p> <p>The other work which was required to achieve the warranty status, and which can therefore be deemed to be betterment was the formation of the upstands at the Velux rooflights. The cost of this, however, was claimed as a variation and is adjusted in that section.</p>
f)	Lightning protection system	7,802.00	7,802.00	Agreed
g)	New Mansafe	31,987.50	31,987.50	In paragraph 16 of his witness statement, Daniel Calderbank of Vitsoe states that the existing "mansafe" fall arrest system was condemned during a routine

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
				<p>annual inspection due to a failure of posts which were anchored to decayed CLT panels. He has since advised me that he was informed that the system could not be repaired and reused because it would not comply with the latest regulations.</p> <p>I am unaware of the precise details, but I do know that BS 7883 which is the code of practice covering fall arrest systems was amended in 2019. The original system was installed in 2017.</p>
h)	Remove & replace solar panels	12,337.50	12,337.50	The solar panels had to be removed to enable the roof coverings to be removed (see item ref e) above). They obviously required re-fixing after the roof covering was replaced.
i)	Removal and replace CLT	390,098.18	390,098.18	<p>The disclosed documents (1,975 pages entitled 'CLT Moisture Evidence') contain significant records, including record drawings, showing the extent of works carried out.</p> <p>It is agreed that £59.02/hour is a very high rate for a Joiner but that is the rate used in the contract price. Although not stated as such, It is probable that the rate includes an allowance for subsistence. The rate also specifically includes tools, which included more specialist equipment than normally expected and it is possible that the rate included an allowance for attendant labour which wasn't priced elsewhere.</p> <p>It is agreed that £46.67/hour is a very high rate for a telehandler driver but that is the rate used in the contract price. Again, it is probable that the rate includes an allowance for subsistence.</p>
k)	Material Storage of CLT off-site	5,000.00	£5,000.00	Agreed

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
I)	Storage of existing insulation	5,500.00	5,500.00	Agreed
	SUBTOTAL	£3,267,102.09	£3,242,102.09	
	Insurance 2%	65,342.04	64,824.04	Agreed that 2% is a reasonable percentage
	SUBTOTAL	£3,332,444.13	£3,306,944.13	
	Bks Risk Contingency 2.5%	83311.10	82,673.60	BKS carried out the works, not Kingerlee or Speller Metcalfe. It should also be noted that Atelier included 3% risk contingency in its tender.
	SUBTOTAL (CONTRACT WORKS)	£3,415,755.24	£3,389,617.74	
	<u>VARIATIONS</u>			<p>In my opinion, paragraphs 48 to 62 of Daniel Calderbank's witness statement provides an adequate explanation of the variations and why they arose.</p> <p>I accept that no detailed cost build-ups are provided.</p> <p>Unless slated otherwise below, I am of the opinion that the variations are valid and arose as a result of the remedial works.</p>
VO1	Additional internal Scaffolding GL A-B	13,788.00	13,788.00	
VO2	Re-routing of Chimney	5,575.00	5,575.00	
V03.1	Rooflight Alterations	109,039.20	Nil	In his witness statement Daniel Calderbank confirms that the alterations were required to achieve the Silka 25-year warranty status.
V03.2	Valley Insulation Replacement-Phase 1	10,805.39	10,805.39	
V03.3	Roof Insulation Replacement-Phase 1	47,986.54	47,986.54	
VO3A	Additional Insulation	3,143.50	3,143.50	

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
VO4	Additional Internal Scaffolding to Phase 3	18,819.60	18,819.60	
VO5	Isolating and removing extraction units and cover vents thorough the main roof and canteen	17,405.28	17,405.28	
VO6	Drilling of angles to suit revised connection detail	1,018.86	1,018.86	
VO7	Additional plywood	9,928.50	9,928.50	
VO8	New Temporary Works Beams	5,939.65	5,939.65	
VO9	Valley Insulation Replacement Phase 2 and 3	24,549.59	24,549.59	
V10	CLT Panel Removal – Phase 2	11,439.75	11,439.75	
V11	Roof Insulation replacement Phase 2 and 3	89,439.57	89,439.57	
V12	Additional 50mm Insulation	577.85	577.85	
V13	CLT Panel Removal – Phase 3	23,803.00	23,803.00	An explanation of variation 13 is included in paragraph 57 of Mr Calderbank's witness statement.
V14	Kitchen Extraction Unit	4,143.68	Nil	An upstand would be required to achieve the Sika 25 year warranty status which, in my opinion, is betterment
V15	Site Security	27,000.00	Nil	In my opinion, this variation did not arise as a result of the necessity for the remedial works.
V16	Scaffold Fire Blanked	Not required	nil	
V17	Fire damage repair	6,783.87	nil	Although costs may have been incurred to repair the fire damage, I agree that it was not a defect due to WTA and, in any event, I would expect recovery of costs to have been made through an insurance claim,
V18	Storage of CLT materials from 1 st October 22 including scaffold tent hire	2,415.00	2,415.00	The quantity of surplus materials is recorded as being minimal. In the Client Progress Report dated 8th November 2022 (page 1215 of QS Requested Documents)

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
				slates "3nr valley panels at our storage, is the storage for this being extended?
	SUB TOTAL (VARIATIONS)	£433,601.77	£286,635.02	
	GROSS VALUE	£3,849,357.01	£3,676,252.76	
	Final Account Settlement deduction	-£99,157.01 -	-£94,888.95	It is agreed that there was a 'Final Account Settlement' at £3,750,000.00 It is also agreed that there were no details of specific items or costs which comprised the amount reduced. A commercial settlement with a lump sum reduction is not unusual and in my opinion, the reduction should be spread pro-rata through all the items, i.e., 2.581%
	Total BKS Structure - Final Account	£3,750,000.00	£3,581,363.81	
	Less £25,000.00 for betterment	-£25,000.00		
	Total Recoverable Loss	£3,725,000.00		As para 36.12 of re-amended POC
	Pre construction work by Kingerlee	£23,877.00	£23,877.00	As para 36.2 of re-amended POC As noted in paragraph 20 of Daniel Calderbank's Witness Statement, Kingerlee arranged for temporary scaffolding to prop the roof in the north east corner of the building where roof panels had been identified as being at risk of failure if there was significant snow. Kingerlee's invoice no. S1003 873 was in respect of these works.
	<u>PROFESSIONAL FEES</u>			
	Calfordseaden LLP - Contracts administrator for the remedial works	157,742.00	157,742.00	I do not consider that the services provided were unreasonable or that the costs are excessive.

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
	Eckersley O'Callaghan Ltd - Structural engineer for the remedial works	35,278.00	35,278.00	I do not consider that the services provided were unreasonable or that the costs are excessive.
	Membrane Roofing Consultancy Ltd- Consultant engaged to assess the adequacy of the initial design for the purposes of determining the nature and scope of	5121.00	5,121.00	I do not consider that the services provided were unreasonable or that the costs are excessive.
	Triodos Bank UK Ltd- Cost of quantity surveyor for the remedial works engaged by the funding bank but paid for by the	13,500.00	13,500.00	It is not unusual for a lender to insist that a bank monitor is employed and I do not consider the cost claimed to be unreasonable.
	Warrington fire Testing & Certification and EKova Consultants engaged to investigate the moisture content of the timber and investigate the need for remedial works	51,090.00	51,090.00	It is agreed that the Invoices included in the disclosed documents 'QS Requested Documents' only total £50,140.00. There was an invoice missing from the disclosed documents and a copy has now been provided.
	Michael Puttick - Building consultant engaged to advise on how to fix the roof. Thornton Consulting - carried out roof integrity testing to ensure that there were no leaks.	4,580.00 4,215.00	4,580.00 4,215.00	The invoices refer to WTA and to Hess which suggests that the services were in respect of the water damage to the CLT. This testing was an essential part of the procedure for determining the extent of damage and decay to CLT.
	SUB TOTAL (PROFESSIONAL FEES)	£271,526.00	£271,526.00	As para 36.3 of re-amended POC
	Claimant's Loss	£4,020,403.00	£3,876,766.81	Para 38 of re-amended POC. The amount stated in para 38 is £4,045,403 which is incorrect because the £25k betterment adjusted under

REF	DESCRIPTION	CLAIM	BALDWIN OPINION	BALDWIN COMMENT
				para 36.1 has not been deducted.

109. There are two deductions or credits which the Defendant contends the Claimant should give against its claim

-1 a credit for the hypothetical cost of a temporary roof which would have been incurred if the Defendant had given proper advice.

-2 Mr Huntley's 'north lights' deduction and a deduction in respect of PV panels.

110. The amount of any deductions must be established by the Defendant. See **Pattni v First Leicester Buses Ltd** [2011] EWCA Civ 1384, [2012] RTR 17, [35] (deduction for betterment); **Thai Airways International Public Company Ltd v KI Holdings Co Ltd** [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675, [92] (deduction for additional profits made as a result of mitigatory steps).

Taking each in turn.

-1 Hypothetical cost of a temporary roof

The Court has been presented with at least four figures for the hypothetical cost of a temporary roof during the original works:

.1 Claimant's pleaded figure: £250,000

.2 Defendant's pleaded figure: £1 million.

.3 Mr Baldwin's figure £476,000

.4 Mr Huntley's figure £1,342,968

It is surprising that this figure could not be agreed and the difference between the parties' figures is startling.

Mr Baldwin's figure is based upon a quotation from Kirk who never visited the site and it was accepted by Mr Baldwin that the temporary roof described in the Kirk quotation was too low to be effective.

Mr Huntley's views or approach is as follows:

- a. Ground preparation: £64,400.
- b. Scaffold and temporary roof: £702,828. This is a robust figure because it is an inflation adjusted version of H&H's quotation when they tendered to Kingerlee in November 2020.
- c. Extra cost of Hess in light of extended programme: £242,188.
- d. Scaffolders' attendance on Hess: £86,400.
- e. Extra cost of JCA in light of increased programme time for scaffold erection: £130,080.
- f. Extra cost of JCA in light of increased programme time for installation: £117,072.

g. Total: £1,342,968.

I consider and so hold that Mr Huntley's approach is logical, reasonable and well-reasoned. I consider the sum to be deducted for the cost of a hypothetical temporary roof in 2016 is £1,342,968.

-2 The North Lights and PV panels deduction

I reject the Defendant's case for further deductions. As the Claimant explained in its Written Closing Submissions.

"Vitsoe had a timber roof which was rotting. The remedial scheme which it adopted was to uncover the whole of that roof, inspect it, and carry out remedial works or panel replacement as and when required. That was a reasonable and appropriate approach in circumstances where the soundness of the CLT could not otherwise be known with any degree of certainty. As Mr Calderbank put it in cross-examination:

A. There was an intention to inspect them to see if they needed replacing. Our suspicion is because they were pitched they would not be as badly affected, but if they had been damaged we would have replaced them.

and:

A. Well, it [the removal of the solar panels] was required to strip off all the roof membrane and to inspect the panels, so you could not take the membrane off and inspect without removing the solar panels."

These costs had to be incurred as a result of the remedial scheme and they were reasonably and appropriately incurred. It would have been thoroughly unreasonable to expect the Claimant to have left their solar panels and roof in place and just hope for the best.

Finance Costs

111. Mr Adams accepted in evidence that the First Loan was raised for general working capital requirements and the Second Loan was raised partly to increase capital reserves

and partly for an IT project. He accepted that some of the money raised by both loans would have been allocated towards' lawyers' and experts' fees [T7/1184/13-19]. He also accepted the proposition that "*in claiming the costs of these loans, you are at least in part asking WTA to be responsible for the costs of borrowing money to sue it*". In those circumstances there is no or insufficient evidence of ringfencing.

112. **In Hope Capital Limited & Anor v Alexander Reece Thomson LLP** [2023] EWHC 2389 (KB), Constable J was faced with a claim for cost of funding. One of the sources of funding in issue was not ringfenced. The judge held as follows:

“126. There is, in my judgment, an insurmountable difficulty with the claim advanced by Hope in this regard, arising from the fact that the Claimants' borrowings, from which they derive their Cost of Funds rate, is derived from both the Triple Point and High Net Worth lending costs. Whilst it is right that the Triple Point funding is effectively ringfenced for lending purposes, the High Net Worth funding is not. It is, effectively, borrowing which is used to fund the operation of the business, including the bringing of legal claims including the present action and, for example, the Jones litigation. It is not possible to determine what the proper Cost of Funding would be after stripping out elements which should not be included in such a calculation.

127. In the circumstances, I conclude that any statutory interest which may be due should be recoverable at a reasonably foreseeable rate, namely that which would be typical for companies like Hope. Mr Penman, Hope's lending expert, agreed that this would be in the region of 3-4% over base. I therefore consider 3.5% over base to be appropriate.

113. I agree with Mr Justice Constable's analysis. I cannot see what are the costs of just funding the remedial works because there is no way of understanding how such funding was ringfenced or could be ringfenced. Accordingly the Claimant is left with statutory interest and I share Mr Justice Constable's view that that interest should be in the region of 3 – 4% over base and as such I consider 3.5% over base to be fair and appropriate.

I. CONTRIBUTORY NEGLIGENCE

114. The Defendant's allegations of contributory negligence

- were barely developed during the hearing

- were not put to the Claimant's relevant witnesses.

I do not consider that any of the alleged allegations of contributory negligence carry any weight or conviction. I do not think it is just or reasonable to criticise the Claimant for relying on the advice of their professional team and the work of very experienced contractors if contrary to my findings the Defendant themselves acted in breach of duty as alleged in the RAPOC or at all.

J. CONCLUSION

115. If, which I have not, I had found the Defendant liable to the Claimant I would have awarded the Claimant damages in the sum of £2,533,789.81 together with statutory interest at a rate of 3.5% above the base rate. The period during which interest would have been awarded would have required further submissions.
116. However for the reasons set out in this Judgment the Defendant is not liable to the Claimant as alleged or at all and in all the circumstances the Claimant's claims are dismissed. I invite the parties to agree the appropriate orders in the light of this judgment.

MARTIN BOWDERY K.C.

(sitting as a Deputy High Court Judge)

1st April 2025