General Form of Judgment or Order

Business
&
Property Courts
in Manchester
Technology and Construction
(QBD) Court

Claim Number	D50MA043
Date	17 July 2018

MR J MORTIMORE	**1st Claimant Ref** 34028.TURNER.016.MH.LMC
UNITED UTILITIES WATER LTD	**1st Defendant Ref** GP/WHO02.17227

Warning: you must comply with the terms imposed upon you by this order: otherwise your case is liable to be struck out or some other sanction imposed. If you cannot comply you are expected to make formal application to the court before any deadline imposed upon you expires.

Before His Honour Judge Pearce sitting as a Judge of the High Court at Manchester District Registry, Civil Justice Centre, 1 Bridge Street West, Manchester, M60 9DJ

UPON the hearing on 14, 15, 16 and 17 May 2018, judgment handed down on 13 July

IT IS ORDERED THAT

1. Judgment for the Claimant in the sum of £8,545.00, along with interest of £897.22 (calculated at a rate of 3% per annum from mid-February 2015 onwards).

2. Payment of the total sum of £9,442.22 is to be made by the Defendant to the Claimant by 4:00pm on 20 July 2018. If payment is not made by that date, interest will accrue at a rate of £0.70 per day until the date of payment.

3. The Defendant is to pay the sum of £50,000.00 in respect of costs (including interest if applicable) to the Claimant by 4:00pm on 20 July 2018. Save as aforesaid, each side shall bear its own costs.

Dated 13 July 2018

IN THE HIGH COURT OF JUSTICE Claim No.

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (QBD)

Before His Honour Judge Pearce, sitting as a Judge of the High Court at Manchester Civil Justice Centre on 14, 15, 16 and 17 May 2018, judgment handed down on 13 July 2018

JONATHAN MORTIMORE

Claimant

and

UNITED UTILITIES WATER LIMITED

Defendant

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

JUDGMENT

Appearances: Claimant: Mr Simon Williams

Defendant: Ms Gaynor Chambers

Notes:

A. References in bold are as follows:

1/page no.	Trial bundle, volume 1
2/page no.	Trial bundle, volume 2
Supp/page no.	Supplemental trial bundle
Day 1 (etc)/page no./line no	Live note transcript for day 1 (etc.)

B. There are appended to this judgment a dramatis personae identifying the main actors and a chronology listing the main events.

Introduction

1. The Claimant was the principal shareholder of Mortimore Enterprises Ltd ("MEL") a company that provided training services from premises at 33 Boundary Street, Liverpool ("the property") until it ceased trading in January 2015. The Claimant contends that MEL ceased trading because of damage to the property caused by an escape of water on 25 October 2014 for which the Defendant is liable pursuant to Section 209 of the Water Industry Act 1991. On 2 February 2107, MEL assigned to the Claimant its cause of action against the Defendant.

2. Section 209(1) of the Water Industry Act 1991 provides: *"Where an escape of water, however caused, from a pipe vested in a water undertaker causes loss or damage, the undertaker shall be liable, except as otherwise provided in this section, for the loss or damage."*

3. It is common ground that:

   a. The Defendant is the water undertaker liable for this escape of water;

   b. The Claimant is entitled to recover MEL's losses caused by the escape;

   c. Those losses are most appropriately calculated as being the value of the business at the time that it ceased trading.

   d. The appropriate method of valuation is agreed to be a multiple of annual maintainable earnings. (The Claimant contends that the annual maintainable earnings and therefore the value of the business were considerable; the Defendant contends that the annual maintainable earrings and therefore the business value were at best minimal.)

   e. The two interim payments referred to below in the total sum of £107,540, should be deducted from the value of the claim calculated on this basis. (For the avoidance of doubt, the Defendant does not seek any repayment if the value of the business is below this figure.)

4. In its Defence and at the commencement of the trial, the Defendant raised three issues:

   a. The proper valuation of MEL ("issue 1");

   b. Whether the Claimant and/or MEL had acted reasonably to mitigate the losses suffered by MEL because of the flood ("issue 2")

   c. Whether third parties, in particular, the landlords of the property and their insurers and/or loss adjusters had acted in a manner that broke the chain of causation between the escape of water and the cessation of trading by MEL ("issue 3").

5. At the conclusion of the evidence, the Defendant abandoned issue 3, and maintained the other two arguments.

The trial

6. The trial took place between 14 and 17 May 2018 inclusive.

7. At the beginning of the trial, the Claimant sought permission to rely upon a supplemental witness statement from one Jan Garner. The purpose of that witness statement was to fill a clear gap in the Claimant's case as to the factual basis for the projections as to the future profitability of MEL made in the accountancy evidence adduced on behalf of the Claimant. I refused that application at the time. I later refused an application to examine the Claimant in chief on the same issues.

8. During the trial, I heard lay witness evidence from the Claimant (the majority shareholder in and Chief Executive of MEL), Ms Karen Cushion (a minority shareholder in MEL and its Sales and Marketing Manager, Company Secretary and Buildings Manager), Ms Gill Callaghan (Senior Claims and Litigation Officer with the Defendant) and Mr Jay Calvert (Director of the Forshaw Group).

9. I heard expert evidence from two structural engineers, Mr Maciver of Sutcliffe's instructed by the Claimant and Mr Milnes of the Vinden Partnership instructed by the Defendant; and from two forensic accountants, Mr Pillar of Toppings instructed by the Claimant and Ms Clifford of DTE instructed by the Defendant.

10. I was satisfied that all witnesses who gave evidence during the trial were seeking to assist the court by recounting matters to the best of their recollection. In so far as the Defendant suggested the contrary in respect of Mr Mortimore, I reject that for reasons given below.

11. I am however conscious that the Claimant and other employees of MEL may have a natural tendency to overstate the effect of the flood on the viability of the business, just as the Defendant's witnesses may seek to understate it.

12. In summarising the evidence, it is helpful to begin with considering the nature of the damage to the property and how this was analysed by various people and to go on to look at the effect of the damage to the property on the viability of MEL.

Evidence – damage to the property

13. The Claimant became aware of the flood on Saturday, 24 October 2014, though he had not realised the extent of the damage until he went to the workshop on the following Monday morning. He describes in his witness statement how he asked Ms Cushion, as building manager for MEL, to contact the insurers, and how the water was cleared during the following week. Ms Cushion in turn contacted CBRE, the managing agents for the landlords. She also instructed Mr Ian Maciver of Sutcliffe's to report on the damage.

14. Mr Maciver's opinion, summarised at paragraph 18(a) below, was contained in a report dated 21 November 2014. That report was provided to the Defendant. The Defendant in turn instructed Mr Milnes of the Vinden Partnership, who visited the property on 28 November 2014 together with a representative of Uretek.

15. The representative of Uretek advocated a solution to stabilise the slab and filling voids underneath it (see quotation at **1/89**). Mr Milnes reported to the Defendant on 2

December 2014 that he had "*little confidence*" in the report from Mr Maciver of Sutcliffe's and that he favoured the solution proposed by Uretek (see email at **2/300**). Mr Milnes also noted MEL was "*extremely resistant to the proposal,*" its stated reason being that "*Sutcliffe Engineers have said it cannot be done and they are concerned that the mezzanine above is now damaged beyond repair and dangerous...*"

16. Thus, by early December a significant difference was apparent between the evidence obtained by the Claimant and that obtained by the Defendant as to the appropriate repair work. In order to understand that difference, it is necessary to know a little more of the property at 33 Boundary Street. It is a two-storey brick building, the front elevation of which can be seen in the upper photograph at **1/82.** The interior floor of the building is a concrete slab. Onto this has been constructed a mezzanine floor providing storage, office and seating areas. One can see the concrete flooring below the mezzanine in the lower photograph on **1/83** and the mezzanine itself on the upper photograph of that page. The mezzanine itself was described by Mr Maciver as a box sitting on masonry piers that themselves sat on the slab. It follows that instability or movement of the slab would affect the mezzanine.

17. It was common ground between the structural engineers that there was evidence of historic movement of the slab that predated this flood. Indeed, the engineers agree that the mezzanine structure was constructed to accommodate the unevenness on the floor, indicating that the movement of the slab probably preceded the construction of the mezzanine (see paragraph 9, **1/95**).

18. Mr Maciver said in cross examination that he had seen documents that indicated that a Building Control officer had signed off a mezzanine level in this building in 2008. He made the obvious point that he would not have expected an officer to sign off the mezzanine if it had been built on an uneven floor and that therefore such documents would be supportive of the Claimant's case that the flood significant damage to the floor. I had the impression that, when Mr Maciver referred in cross examination to documents from a Building Control officer, Ms Chambers had not seen such documents. Certainly, no such documents have been drawn to my attention. It is difficult to assess the weight to be attached to this piece of evidence but for reasons set out below it does not affect my judgment.

19. Following the flood, the Claimant contended that new cracking appeared (see paragraph 5.2 on **1/78**). The Claimant, the Defendant and the landlords each instructed surveyors to investigate the damage to the property. Investigations by BDI, structural surveyors instructed on behalf of the landlords, showed there to be voids to be at the back right hand corner of the building, as indicated in the drawing at **1/100(ww).**

20. Following their investigations, the various surveyors proposed remedial works as follows:

    a. Mr Maciver (of Sutcliffe's for the Claimant): take down the mezzanine, excavate the floor slab, fill the void, consolidate the hard-core, cast a new slab and rebuild the mezzanine – six weeks work.

b. Mr Milnes (of the Vinden Partnership for the Defendant): grout beneath the floor, screed the deflected floor section and inspect mezzanine for any damage - two weeks work (or three weeks if repair required to mezzanine).

c. Mr Foreman (of BDI, instructed by the landlords' agents): provide temporary to support the mezzanine by pinning, extra-late the floor slab, fill the voids, consolidate the hard-core and cast a new floor slab – four weeks work.

21. In their joint statement, Mr Maciver and Mr Milnes agreed that the void (or voids[1]) underneath the concrete slab may have been exacerbated by the flooding (see paragraph 5 on **1/95**). However, it was apparent from their supplemental reports that they disagreed as to the appropriate remedy:

a. Mr Maciver considered that because the stability of the slab was in doubt, the grouting solution was insufficient;

b. Mr Milnes considered that the slab could be stabilised with grouting and that any issue as to the adequacy of the construction of the mezzanine was not caused by the flood.

22. In their oral evidence before me, Mr Maciver and Mr Milnes each stood by their original opinions as to the necessary work. Mr Forman did not give evidence before me but Mr Maciver and Mr Milnes each adopted parts of what he had said in his report. Mr Maciver relied upon Mr Foreman's opinion that it was necessary to remove the floor slab, fill the voids, consolidate the hard-core and cast a new slab. Mr Milnes relied upon Mr Foreman's opinion that it was possible to provide temporary support to the mezzanine as evidence that it was unnecessary to take it down altogether.

Evidence – effect of the damage to the property on MEL's business

23. It is important to understand how MEL operated. At paragraphs 2 to 7 of his witness statement (**1/38-39**), the Claimant describes the nature of the business. From 2001, the company provided training services for the construction industry. From 2009, it was based at the premises. Practical training was carried out either in the workshop area on the ground floor of the premises or at the trainees' workplaces. Academic elements of training could be carried out in the premises at mezzanine floor level.

24. The result of the damage to the premises was that MEL was not able to undertake training there. In his witness statement, the Claimant explains that MEL was obliged to offer training facilities from its premises and that they were unable to do so because of the damage (paragraph 22, **1/40**). In order to ensure that the business survived, training was offered at workplaces where possible, in the anticipation that the repairs would be speedily carried out.

[1] During Mr Maciver's cross examination, he considered whether there was a single void or more than one. This could not be known without opening up the slab, but it does not alter the substance of the issue, since there was either one larger or more than one smaller voids, either of which could affect the stability of the slab.

25. On 13 November 2014, Miss Cushion emailed Stephen Richardson at CBRE, Ms Gadd of the Defendant and GAB Robins[2] – see **2/279**. Having summarised the opinion of Mr Maciver, including his opinion that the workshop of the premises was likely to be out of use until around Easter 2015, she continued:

"Obviously this has already had an impact on our business and I fear moving it forward it will have major ramifications. We have apprentices who should attend the training centre to carry out practical training on a weekly basis. The workshop has already been closed for three weeks and we need to look in to how quickly we will be compensated for the interruption and any increased cost of working. The predicted interruption of six months is critical. Without the workshop, we do not have the capability to deliver some of the qualifications that our learners require to progress with their programs. If this is not dealt with as a matter of absolute urgency, we fear our accreditation to deliver the qualifications will be a jeopardy and from that, the contracts that generate a high proportion of our income will be at risk imminently and in the future, ultimately the business as a whole will be affected. It is vital we find a suitably equipped alternative facility in order to carry out the training required whilst the workshop is deemed unusable."

26. On 18 November 2014, the Defendant admitted by letter (at **2/288**) its liability for losses caused by the leak.

27. On 26 November 2014, Ms Cushion sent a further email (**2/289**) to Mr Richardson at CBRE, copying in Ms Gadd and GAB Robins, enclosing the report prepared by Mr Maciver and stating:

"We are in a position now where a decision urgently needs to be made on how we move forward. An accreditation to deliver training qualifications has been suspended as we do not have a training facility to deliver them and we are losing business are some employers that were due to start apprentices with us have requested they are placed with an alternative provider given the delay. Our contracts are major risk currently. As we are currently unable to register new apprentices, this is also affecting the amount of business we have moving forward so there will be a claim for loss of earnings. There are currently two options and it is critical that we obtain permission to move forward this week:

1. *We have located potential alternative workshop premises and the agent is happy to take us in. The unit is at DBH Business Centre on Boundary Street and is available immediately at the cost of £1,100 per month plus VAT. The agreement would be for three months initially then extended by one month increments. The premises would need to be made fit for purpose and we estimate the cost to do this would be an additional £15,000. The premises would also need to be approved by ourawarding body to reinstate our accreditation to deliver the qualifications.*
2. *As a construction training provider, we have the expertise in-house to commence work on dismantling the existing workshop immediately and carry out the repairs required. Jon* (the Claimant) *has indicated we could have the workshop*

[2] Initially loss adjusters appointed for MEL, but latterly acting for the Defendant as well.

operational by the end of January. With this option, there will be less delay in starting the renovation, there would be no additional rent on time would effectively spent concentrating on repairing our workshop, rather than making an alternative premises fit for purpose and making good following its use stop

Can you please advise how we should proceed as a matter of urgency? Jon has stated he would prefer option 2..."

Ms Cushion goes on to ask how various costs are to be met.

28. As at 2 December 2014, CBRE was indicating that the landlord's insurers, NFU Mutual (which was CBRE's principal), was requesting the commencement of a tender process to fund the works indicated by Mr Maciver. However, it would appear that the differing opinion of Mr Milnes on the appropriate remedial works was creating a possible problem.

29. In an email to Mr Weston, MEL's insurance broker, dated 2 December 2014 at **2/302**, Ms Cushion stated:

"Given the meeting with the surveyor representing United Utilities on Friday, the loss adjuster today advised that the insurance claims will be messy with disputes between insurance companies. Stephen Richardson suggested another option may be more feasible to us which would be to relocate to new premises permanently. A current rent for workshop and offices amounting to 250 m² are charged at £1541.67 per month. Moving would also involve the following costs:

- *rent for offices/classroom = £1,000 per month (awaiting costings to be confirmed)*
- *rent for workshop = £1,350 per month (100m² only) (awaiting costings to be confirmed)*
- *making workshop fit for purpose = £15,000*

If we were to consider this option, Jon asked would our insurance policy pay for additional rent and the work carried out making the premises fit for purpose and costs to move?

We also need compile a claim against United Utilities for uninsured losses, basically, work that has been lost or not been completed due to the business interruption. To date the impact is estimated as below, total of £61,650, and we really need to understand how and when this will be paid to us:

- *Completion of 6 apprentices for work to be carried out in November = £3,000*
- *Increased cost of working (4 people for 2 weeks) = £4,800*
- *Completion of 25 NVQ candidates due in November = £12,500*
- *Time spent by me coordinating all parties = £1,850*
- *The impact of me not carrying out my primary role = £15,500*
- *Loss of work, six apprentices that were waiting to start their programme and = immediate impact is £3000 but total income lost is £24,000*

Professional services (lease)	£1,500
Core sample for floor and building regulations for walls	£1,200
Take down existing wall	£800
Skip	£200
Build work bays (labour)	£4,000
Build ceiling studwork	£2,000
METSEC and timber	£4,800
Build two additional toilet blocks	£2,000
Materials	£1,000
Build separating wall to distinguish between workshop and welfare facilities	£8,640
Electrics 110V power and lighting	£5,000
Heating	£1,000
Total	£37,340

The email also estimated additional staff resources of £25,419 for a 3 month period, based on £8,473 per month.

36. As Ms Chambers for the Defendant pointed out, the effect of these further calculations was to increase the amount that MEL was saying that it needed to continue trading in the short term from around £20,000 to a figure of over £65,000.

37. During cross examination, the Claimant and Ms Cushion were each asked about this significant increase from the previous estimate of £15,000 to fit out alternative premises. The Claimant said that the original figure was incorrect and was given "*under pressure.*" Ms Cushion said that the figure of £15,000 was a rough estimate based on the building expertise within MEL having inspected the proposed new premises. The increased figure in this communication followed a breakdown of the likely materials and labour costs involved.

38. By an email dated 9 December 2014 (**2/316**), Mr Hardy of GAB Robins, acting on behalf of the Defendant and reflecting the advice received from Mr Milnes as set out at paragraph 12 above, indicated that the Defendant was prepared to meet the cost of the remedial work proposed by Uretek "*albeit (for clarity) without any admission of liability for the alleged damage at the property or any consequential loss flowing from it. Notwithstanding, United Utilities will also consider contributing to the reasonable business interruption loss of the tenant on presentation of a properly substantiated and evidenced claim for the period of the remedial works undertaken by Uretek and including an appropriate lead-in and post work period.*"

39. Ms Cushion responded by email dated 12 December 2014 (**2/318**):

"Please find below a summary of our claim for losses incurred to date as a result of the flood:

Sales income lost – workplace learning	*£57,400*
Sales income lost – apprenticeships	*£49,050*
Completions income/cash flow lost/at risk – workplace learning	*£31,863.53*
Completions income/cash flow lost – apprenticeships	*£8,604.25*
Increased staff costs	*£9,395.20*
Total claim (to date)	*£156,312.98*

...

As previously discussed, it is critical that this interim payment is made w/c 15 December 2014. We need to have this confirmed in writing by 17 December 2014 as, as indicated previously, we currently do not have cash flow to operate beyond December and without a significant injection of cash flow, there will be serious ramifications on the current structure and future of our business."

40. Ms Cushion was asked in cross-examination about the increase in the figure for loss of contracts from £47,500 in the email of 8 December 2014 to £150,000 in this email, more than tripling over a period of 4 days. Ms Cushion responded that the problems were escalating. The estimate of loss was, she said, *"basically, what would have happened if we were dealing with employers and they wanted to sign an apprentice up with us, we couldn't sign them up because of the loss of the accreditation, the loss of the workshop, the fact that we couldn't use it. We've basically lost that money because we couldn't sign that apprentice up at that time. So that learning would have gone to a different college or a different training provider so we've lost that income."* She clarified that this figure was the loss projected over the period of the lost contract, which might be 18 months or even 2 years.

41. Ms Chambers contended based on the clarification that Ms Cushion must be overstating the immediate cashflow problem, since the email suggested an immediate crisis in respect of a loss of cashflow that in fact would have been received over many months if not years. Ms Cushion responded that it might look like this on paper but that the general impression she had had at the time was that the business was under a lot of pressure in respect of cashflow.

42. On or about 19 December 2014, the Defendant made an interim payment to MEL in the sum of £25,000 (see paragraph 43, **1/42**).

43. During January 2015, there are several communications demonstrating that contracts between MEL and other bodies for the delivery of training were terminated either by MEL or the other party apparently as a result of MEL's inability to deliver on the contract:

    a. On 6 January 2015, an email from MEL to Leeds City College at **2/327**;

b. On 8 January 2015, a letter from CITB[5] at **2/328**;

c. On 12 January 2015, an email from CITB at **2/329**;

d. On 15 January 2015, an email from CITB at **2/332**;

e. On 15 January 2015, an email from the City of Liverpool College at **2/333**

f. On 16 January 2015, an email from Asset Training at **2/334**.

44. On 14 January 2015, the Claimant emailed Ms Gadd of the Defendant (see **2/330**):

"...Since the turn of the new year, things have gone from bad to much worse for us. We have had x 3 apprenticeship contract terminated, total current value of which is approximately £346,000 and a WPL contract valued at hundred and £11,000 (estimated profit £92,000). We have also lost x 15 learners on a SUPS course valued at £37,000 with an estimated profit of £26,025. In addition, we have lost three key members of staff of the company (internal verifier) due to the businesses and stable condition. All of the above are a direct result of the flood and the time it is still taking to sort the claim out.

Due to a lack of internal verifiers I cannot now complete any remaining work left in our system as these people audit the completed files we produce. I am the only assessor/internal verifier left at the company and cannot internally verify my own work. Due to the removal of contracts my staff are now redundant and all company work remaining suspended.

I appreciate that Jackie Clifford[6] visited yesterday to understand the impact on the business and Jackie understands the above fully. However I am not in a position where I can wait for Jackie to make her proposals next week. I cannot fund the cost of redundancies and the company is fast heading towards insolvency.

I have made it clear since last month that the situation would worsen and that we are trying to minimise the liability to United Utilities by trying to keep the business running. However, I cannot do this any longer and should the business become insolvent, there will be further, significant liability to United Utilities.

So we can keep trading and ultimately keep your liability as low as possible I need you to make the following intervention.

Pay the redundancy fees for my staff, who have all lost their jobs because of the flood	*£43,545*
Pay the business interruption figure presented to you last year	*£156,000*
Pay the profit and loss contract (WPL)	*£92,000*
Pay the profit on lost SUPS course	*£26,025*
Total interim payment required immediately	*£317,570*

[5] The Construction Industry Training Board

[6] The forensic accountant, instructed by the Defendant. Her opinion is referred to further below.

This will enable the company to keep trading and I can build my business back up again. It will also allow us the time to discuss and value the rescinded apprenticeship contracts (one of which I have had the 12 years) stop these contracts were my core business.

I cannot over stress this next point. The flood and lack of intervention from your company has killed my business stone dead. If the company was to close the next year's contracts are worth approximately £877,650 profit and I would pursue you legally for this amount multiplied by another 14 years trading (extrapolated forward for loss of future trading) ... "

45. On 21 January 2015, the Defendant made a further interim payment in the sum of £82,540, expressed to be "*inclusive of approximate redundancy and notice costs and in addition to the £25,000 already received*" (see **2/326**). It is apparent that the decision to make that offer followed advice that the Defendant had received from Ms Clifford, the accountant with DTE who subsequently was instructed as a Part 35 expert in these proceedings.

46. In an email dated 11 February 2015 at **2/356**, Ms Cushion confirmed a conversation that the Claimant and Ms Gadd of the Defendant had had that morning to the effect that MEL would cease trading that week.

47. In the event, the repairs to the property commenced in March 2015 and were completed by mid-April 2015.

48. The cross examination of Ms Callaghan and Mr Calvert, witnesses called on behalf of the Defendant, went largely to the Defendant's argument (which was subsequently abandoned) as to a break in the chain of causation. Much of the questioning related to the reasonableness of the actions of the Defendant and of the landlords in respect of this claim. In my judgment, that evidence is not relevant to the remaining issues in the case, save to provide some context for considering the reasonableness of the Claimant's acts in mitigation.

What would have happened to the MEL but for the damage to the property?

A. Lay evidence

49. The Claimant contends that, had the property not been damaged, had the repairs being carried out more speedily or had the Defendant funded MEL moving to other premises, the business of MEL would not only have survived but would have flourished.

50. In support of this contention, he points to:

    a. The fact that MEL had traded since 2001 (paragraph 55 of his statement, at **1/43**);

    b. The good reputation that he personally and MEL generally had within the industry at the time of the flood (paragraph 56 of the Claimant's statement at **1/43** and his oral evidence, for example **day 2/17/24-18/2**);

    c. His anticipation of further work from a variety of sources (paragraphs 58 to 64 of his statement at **1/43-44** and his oral evidence).

51. As to the last of these, he drew particular attention to:

a. An email from Ms Holly Tong of Joint Learning at **2/390**, which refers to an intended contract in early 2015 for the provision of training services by MEL with an anticipated value of £144,000, together with the possibility of further contracts and "*a long term partnership*" between the two businesses.

b. An email from Mr Jeremy Clayton of AIS at **2/381**, which refers to a significant number of trainees and/or apprentices;

c. An email from Ms Ruth Smith of Asset Training at **2/382**, which spoke of the existing contract between Asset Training and MEL which was frustrated by the flood and possibility of growth in their dealings;

d. An email from Ms Gemma Gannon of Shared Services (part of the City of Liverpool College Group) at **2/384**, referring to their having worked with MEL since 2008/2009 and anticipation of continued working together; and

e. An email from Mr Chris Raus of Leeds City College referring to the inability of MEL to continue to deliver training pursuant to a contract that was current at the time of the flood. Mr Raus is unable to confirm any growth figures, but in general terms his email is consistent with a good working relationship between the College and MEL.

52. None of the authors of these communications were called to give evidence on behalf of the Claimant, a point to which I shall return.

53. During cross-examination, the Claimant was asked about the calculation by the forensic accountants of the profit and loss account for MEL during the period April to October 2017. The experts gave their opinion on this issue at paragraph 3.1 of the joint statement (**1/158**). Mr Pillar had calculated the figure at a loss of £1,057 (a figure later revised to a loss of £1,250 – see paragraph 3.6 at **1/163**) and Ms Clifford at a loss of £7,734. The Claimant accepted that the company made a small loss during this period, though he said that this was due to exceptional circumstances.

54. The Claimant said that that the period leading up the flood had been difficult for MEL. The CITB, a major source of work, had put MEL on sanctions in 2013 and 2014, which had led to delays in obtaining certificates and invoicing for sales. It had also prevented MEL for applying for new work. However, the Claimant said that these problems had been resolved by November 2014.

55. Ms Chambers put both to the Claimant and to Ms Cushion that they were aware that the company was in decline at the time of the flood and that they were happy for the company to be liquidated and for a claim to be made against the Defendant for alleged losses. Both rejected that suggestion, each stating that they had worked hard to build the company up and were committed to its continued viability.

56. In particular, the Claimant said (**day 2/19/2ff**), *"It wasn't in decline, it did have cash flow issues, as I spoke about yesterday. To reiterate, CITB did cause us a lot of issues and probably affected us at least 50 per cent financially from what we actually turned over. In actual terms the work that we were trying to do with them took ten times*

longer for every individual NVQ that we delivered. Basically it was a horrendous time. I can say it in more detail, but that's the upshot of it. It affected our cash flow a lot, even to the point when we got - we had a visit on 18 July 2017 - sorry, 2014, apologies. CITB put us on a sanction that was completely illegal and didn't even tell us about and it we couldn't claim an NVQ certificate until 28 November. We could raise some money for the work that we did, but a major part of our delivery was NVQs and we used to get paid in excess of £1,000 to £1,400 per NVQ and we physically couldn't have the NVQ certificate in front of us to raise an invoice to claim and that affected us massively that year and the year before. It was a horrendous time. Then the flood came along and finished us off."

57. It was also suggested to Ms Cushion that the money in fact paid by the Defendant, namely £25,000 on 19 December 2014 and £82,540 on 21 January 2015, could, should and would have spent on keeping the company afloat, had that been what its Directors wanted to do. Ms Cushion responded that they were trying hard to save the company but that they did not know how long the premises were going to be out of commission and that in the mean time they had incurred redundancy costs.

58. Ms Chambers pointed out to the Claimant that, during 2015, MEL received two payments from the Skills Funding Agency totalling just less than £100,000 (see **2/379 and 2/380**). She asked him why, if he considered that his company had a potentially profitable future, he had not invested this money in restarting the business. The Claimant responded that, by the time of these payments (May and November 2015), the business had lost its contracts.

B. Expert evidence

59. The parties each instructed accountants. In their joint statement at **1/157**, the accountants agreed on significant features of the evidence:

a. The company made a loss during the period April to October 2017;

b. The net assets of the company as at 31 March 2014 were £27,792 (less legal costs, stated by Mr Pillar at paragraph 2.1 on **1/162** to be £3,199).

c. The appropriate basis on which to value the company is the annual maintainable earnings multiplied by a factor of 2.5.

60. The accountants disagreed on:

a. The amount of the loss for April to October 2017. Mr Pillar puts the loss at £1,250 (see **1/163** at paragraph 3.6), whereas Ms Clifford puts it at £7,734 (see **1/158** at paragraph 3.1).

b. The net assets of the company as at 31 October 2014. Mr Pillar puts the figure at £26,542 (see paragraph 4.1 on **1/162**), whereas Mrs Clifford puts it at £20,058 (paragraph 4.1 on **1/158**).

c. The probable annual sales of the company, Mr Pillar contending for figures in the range £1.25 million to £1.5 million, and Ms Clifford for a maximum figure

based on sales during the period of 3 years and 7 months before the flood of £571,186;

d. The appropriate allowance to make for wages and sub-contractor costs, which Mr Pillar took to be fixed wages of £300,000 plus sub-contractor costs of £125,00 (for sales of £1.25 million) or £150,000 (for sales of £1.5 million), a range of 30-34% of sales, and Ms Clifford took to the historic figure of 52% of sales.

61. On the issue of annual maintainable earnings, Mr Pillar's valuation turns on assumptions as to the appropriate calculation of wage and subcontract costs and assumptions as to the expected annual sales. His figures in the joint statement reflect the assumptions of the preceding paragraph but calculate profits both on his figure as to wages/sub-contractor costs and alternatively on Ms Clifford's figure for those costs. His calculations are summarised by Ms Clifford at paragraph 3.5, **1/190**, as follows:

	Wages/subcontract costs at 52% of sales		Wages/subcontract costs at 30 - 34% of sales	
Expected annual sales	£1,250,000	£1,500,000	£1,250,000	£1,500,000
Expected pre-tax profit	£130,008	£188,258	£390,008	£566,258
Expected post tax profit	£104,006	£150,606	£312,006	£453,006
Multiplier	2.5	2.5	2.5	2.5
Valuation	£260,015	£376,515	£780,015	£1,132,515

62. For the Defendant, Ms Clifford contends that the company arguable had no value, on the basis that the Company had problems that meant that it may have had to cease trading in any event. She identifies at paragraph 5.1 of the joint statement (**1/159**):

a. *"MEL may have run out of funds and had to cease trading in any event";*

b. *"MEL may have had difficulties obtaining government funding contract when main contractors undertook due diligence, if MEL's statutory accounts had been accurately prepared rather than including £174,044 in net assets, due from a connected company, when this sum was known to be irrecoverable";*

c. *"any prospective purchased is likely to have been deterred because MEL was making losses, had poor cashflow and inaccurate accounts*[7]*."*

63. Subject to those arguments, she calculates the valuation of the company as (at most) £116,085, calculated at paragraph 3.56, **1/204** as follows:

	Wages/subcontract costs at 52% of sales
Expected annual sales	£571,186

[7] This is a reference to the inclusion in MEL's assets of the sum of £174,044 owed by Otis, another company of which the Claimant was a shareholder. The Claimant contended that this sum was correctly included as an asset because Otis intended to repay the money, though Mr Pillar saw it as a potential bad debt – see paragraph 4.12 at **1/110**.

Expected post tax profit	£46,434
Multiplier	2.5
Valuation	£116,085

64. It is relevant to note, for reasons that are apparent below, that if the seven-month period ending 31 October 2014 is excluded from this calculation, Miss Clifford's maximum valuation of the company would be:

Adjusted profit before tax over 36 months from 1.4.11 to 31.3.14	£245,500
Average annual profit before tax (£245,500 x 12/36)	£81,833
Less corporation tax at 20%	-£16,367
Post tax maintainable profits	£65,466
Multiplier	2.5
Valuation (£65,466 x 2.5)	£163,665

65. Mr Pillar agreed during across examination that the actual sales for the full years ending 31 March 2012 to 31 March 2014 and for the 7 months to 31 October 2014 were as appendix 22 to Ms Clifford's report at **1/257**, namely:

	31 March 2012	31 March 2013	31 March 2014	31 October 2014
Sales	£707,979	£447,637	£629,690	£261,444[8]
Pre-tax profit	£180,303	£43,470	£21,27	See footnote[9]

66. During cross examination, Mr Pillar clarified that his estimate of future sales involved new contracts as set out at appendix 5 of his report at **1/125**, an annual figure of £1.084 million. Accordingly, to reach total sales of £1.25 million to £1.5 million, MEL needed to achieve sales from existing contracts of between £166,000 and £416,000 per annum.

67. Mr Pillar accepted that his calculations were dependent upon the estimate of contract values supplied to him by the Claimant and that his projected figures required a big increase in income from various sources. He accepted that annual historical sales for the period 1 April 2010 to 31 March 2014 in the range £441,000[10] and £780,000. He clarified that he did not expect sales for the year end 31 March 2015 to reach the kind of estimations that he had put on future sales (£1.25 to £1.5 million), given that sales in the 7 months up to 31 October 2014 had averaged only just over £40,000 per month.

68. He was asked about the evidence that lay behind his figures at Appendix 5, **1/125.**

    a. In respect of AIS, he agreed that the documentary evidence at **2/381** contained no figures to value the contract. If he were advising a purchaser of the company

[8] This equates to an annual figure of £448,190.

[9] This figure is omitted because the figure in appendix 22 was not agreed by Mr Pillar – the difference on the calculation of this figure arises from the correct accountancy treatment of various matters but is not relevant to the calculation of loss.

[10] See the table at paragraph 4,1 of his report at **1/107**, though the lower figure should have been £447,637 in accordance with the corrected figure referred to in paragraph 64 above.

he would not have considered the documentary evidence sufficient to support a valuation of the company based on a contract with this provided though he indicated that, had the contract ben going ahead, he would have expected there to be more documentation available.

b. In respect of the Joint Learning Partnership, he accepted that the email from Ms Holly Tonge at **2/390** supported the loss of a contract valued at £144,000 not £150,000.

c. In respect of Asset Training, he agreed that the email at **2/382** did not support the contention that MEL would have obtained a contract for 50 apprenticeships;

d. In respect of Leeds City College, he agreed that the only documentation, namely the email at **2/388** did not support his figures.

69. Mr Pillar was also asked whether prospective sales were the proper basis to value the company. In an exchange at **day 3/47/4-20,** the following exchange took place:

> *"**Ms Chambers:** Even if, Mr Pillar, we're entirely wrong on this and your figure was always correct in relation to £1.25 million, you can't just look at prospective sales when you're valuing a company, can you, because the average purchaser is going to necessarily look at what's just been happening and what's happening in the past?*
>
> ***Mr Pillar:** I would agree with that. I did set out originally just looking at future, but certainly if you're looking at this in terms of a prospective purchaser, they would be looking at the historical figures as well.*
>
> ***Ms Chambers:** Therefore, even if you've got a higher figure for the future, what you do is look back by 3 or 4 years and take an average?*
>
> ***Mr Pillar:** You take those into account, yes.*
>
> ***Ms Chambers:** And is one way of doing that by simply adding up three years and then dividing by 3?*
>
> ***Mr Pillar:** It is, yes, averaging it, yes."*

70. Mr Pillar agreed that that the company was technically insolvent on Ms Clifford's figures at the time of the flood and had just £3,000 in net assets on his figures.

71. The following exchange then took place between Ms Clifford and Mr Pillar:

> *"**Ms Chambers:** So in the absence of cogent evidence, strong evidence, that there's something big coming in around the corner, some actual big contract, this company has no value at all, has it, to the average reasonable purchaser?*
>
> ***Mr Pillar:** Well, subject to the point you just made, which is whether or not there was evidence of that then, yes, I agree it does have very little value. But you do have to take into account what was going to be happening in the future.*
>
> *Ms Chambers: But that's a matter of evidence, isn't it?*
>
> *Mr Pillar: Yes."*

72. Ms Clifford was asked in cross examination about paragraph 3.44 of her report at **1/200.** She agreed with Mr William's suggestion that it was reasonable in valuing a company by the earnings method to have regard to known changes of patterns of sales, but she said that one would not speculate about this.

73. Ms Clifford accepted that, as shown in Appendix 4 to Mr Pillar's report at **1/180**, the funding from the Skills Funding Agency through various bodies varied between years.

74. Ms Clifford was also asked at some length about changes in the funding of skills training and its likely effect on MEL, with particular reference to the part of her report headed "*Expected Annual Sales*" at **1/190 – 1/199.** She accepted that parts of her analysis involved assumptions about the nature of the training industry, as to which she did not have specialist knowledge.

75. Ms Clifford accepted that the email at **2/381** appeared to indicate that AIS considered MEL to have the capacity for the high numbers of leaners referred to in the email.

76. Mr Williams asked Ms Clifford about the calculation of wage costs. He put to her the possibility that an employer in the position of MEL might be able to reduce such costs significantly. At **day 3/99/5 – 16**, this exchange took place:

> "***Mr Williams:*** *it's quite conceivable that somebody might change their policy on wages and take some fairly drastic steps, or take any steps, and could significantly reduce their wage bill so that the combined wage/subcontractor costs as a percentage of turnover could be reduced and could be reduced by an amount to the amount that Mr Pillar has suggested at 30 to 34 per cent.*
>
> ***Ms Clifford:*** *No, I disagree. I think that's wholly unrealistic.*
>
> ***Mr Williams:*** *But it could be done?*
>
> ***Ms Clifford:*** *No, I don't think it would be sustainable. I think if that could be done, it would have been done far sooner.*"

77. Ms Clifford was asked about her opinion that the business was in a weak position at the time of the flood. She relied in support of that conclusion on the evidence as to the assets of MEL, its need to take out a loan of £30,000 and the fact that the Claimant; was not drawing a salary in 2014. She also noted that there were accounting errors in MEL's books, that they had taken on Mr Jim Gregory as a fixed term employee carrying out assessment, the sanctions from CITB (which she said she had not known about when she wrote her report) and the failure to update the company website. She saw these, in particular combined with the downturn in sales recorded above as indicators that the company might be in trouble.

78. Mr Williams asked Ms Clifford about paragraph 3.58 of her report at **1/205**, especially her comments on the cash situation of the company in late 2014. She accepted that the state of the company finances and the reasons for the decision to cease trading were not really matters of accountancy expertise but rather involved the court considering the evidence from the Claimant and Ms Cushion as to the practicalities of continuing to deliver training and the demands on company finances and at that time.

79. Within their reports, their joint Statement and their oral evidence during trial, several other differences of opinion can be identified between the accountants. In my judgment it is unnecessary to resolve those differences in order to determine the issues within this case. For that reason, I do not summarise those other differences of opinion.

Issue 1: Valuation of MEL – the Claimant's case

80. The Claimant contends that he gives a credible account of a growth in his business, supported in particular by the history of his successful business and by the communications summarised at paragraph 43 above.

81. In his closing submissions, Mr Williams described Mr Pillar as being a very helpful and frank witness. He acknowledged that the company was close to being technically insolvent at the time of the flood but he examined the evidence and made realistic projections.

82. The Claimant's own evidence was said to be a cogent account of developing relationships with customers. There was no reason not to accept what he had to say.

83. The period following the imposition of sanctions by the CITB had been difficult. However, by November 2014, those problems were in the past and the business was looking to grow.

Issue 1: Valuation of MEL – the Defendant 's case

84. The Defendant questioned the factual basis for Mr Pillar's projections as to future profitability of the company. The Defendant contends that this is hearsay evidence which should have been set out in witness statements. Notwithstanding the wide terms of the Civil Evidence Act 1995 in respect of the admission of hearsay evidence, the court has wide powers to prevent the abuse of the procedure set out in CPR Part 33 which is intended to regulate the admission of such evidence - see the decision of Turner J in Gladwin v Bogescu [2017] EWHC 1287.

85. The Defendant contended that I should place no reliance upon the material referred to in Mr Pillar's report, save in so far as it was supported in the witness evidence of the witnesses were called and/or the documents that had been disclosed. But even if I did not accede to the submission that I should refuse to place any reliance on the evidence, the Defendant contended that the evidence carried little weight.

86. The Defendant draws my attention to the judgment of His Honour Judge Stephen Davies in Contact (Print and Packaging) Ltd v Travellers Insurance Company Limited [2018] EWHC 83. This was a claim under an insurance policy by which the Claimant sought the payment of monies said to be due under the physical damage and business interruption sections of the policy, arising from physical damage to and the failure of a printing press. The Defendant was critical of the Claimant's failure to disclose documents and/or call witnesses on important evidential matters. Having indicated that he declined to draw any adverse inference from the failure to call witnesses, the judge went on, "*I do accept that where the evidence the Claimant adduced on a significant issue was limited to second-hand non-specific evidence from Mr Smith and where the Claimant might reasonably have been expected to take at least some steps to obtain a statement from a witness in relation to a particular issue I should not give it the benefit*

of the doubt if there is no evidence that it did not take any steps and reason to believe that the witness could have been called."

87. In the context of this case, the Defendant draws attention in particular to the failure to call the witnesses who wrote the emails referred to at paragraph 43 above.

88. The Defendant accepted that Ms Cushion was an honest witness who was trying to assist the Court. Ms Chambers was more critical of the Claimant's evidence. In particular:

a. She pointed to contradictions in the Claimant's evidence as to the purpose of the loan of £30,000 taken out in November 2014 was for infrastructure changes rather than to ease cashflow problems (**day 1/62/10ff**), whereas Mr Pilar had identified it as being needed to deal with short term cash flow problems (see paragraphs 4.17 to 4.20, **1/111**).

b. The severity of MEL's problems with the CITB were raised for the first time in oral evidence. Whilst they are in touched upon in Mr Pillar's report at paragraph 2.4 on **1/103**, one would not realise from that passage the significance of the issue as put by the Claimant in his evidence as quoted at paragraph 56 above.

c. The Claimant overstated the amount of contact that MEL had with the Defendant prior to its request for financial assistance on 8 December 2014.

d. He referred for the first time in his oral evidence to reasons for inaction including the death of his cat (to explain why he had not acted more speedily to report the flood in the first place) and his own ill health (to explain why he was not in a state to try to kick start his business at around Christmas 2014)

89. In looking at the prospective earnings of MEL, the Defendant invited me to place the greatest weight on historical matters. It is clear that the company's income from different sources varied greatly from year to year – see the table at paragraph 3.13 of Ms Clifford's report at **1/192.**

90. Further, the sales of MEL to October 2014 were such that the company needed to obtain new contracts even to get back to historic levels of turnover.

91. The Defendant contends that, in the light of the figures analysed at paragraph 65 above, the projections of Mr Pillar are unrealistic and unsustainable.

92. Further, the Defendant contends that Mr Pillar's supposition that wage and sub-contractor costs might fall was no more than speculation. Put simply, if these costs could have been cut, they would have been done prior to the flood.

93. For these reasons, the Defendant invite me to reject Mr Pillar's evidence. On the other hand, it invites me to conclude that Ms Clifford's evidence shows the highest valuation of the company based upon historic figures, a figure that should be adjusted to reflect the risks of the company failing

Issue 1: Valuation of MEL – discussion

94. Dealing first with the question of the appropriate deduction for wages and subcontractor costs, the material before the court strongly supports the figure of 52% adopted by Ms Clifford unused does not turn it argument by Mr Pillar. That accords with the historical figures which had been within the range 48.1% to 59.5%, set out Mr Pillar at paragraph 5.41 of his report (**1/173**).

95. The alternative reduced range of 30 to 34% referred to by Mr Pillar supposes one or both of two changes:

a. That Mr Mortimore would have been able to run his business more efficiently than he had in the past. Whilst that is of course always possible, the obvious question as to why it had not been done earlier is unanswered in the evidence before me.

b. That the business carried out by MEL might have changed so that it was less labour-intensive for example training already qualified workers rather than apprentices. Again, such changes are always possible but if they were an easy route to better profitability for the business, one again this bound to ask why such changes were not put into effect earlier.

96. There is no evidence before the court to support a change in the business such as to lead to a reduction in costs as contended for behalf of the Claimant.

97. In my judgment, the Claimant has produced little evidence to support the contention of a growth in the business of MEL to anything like the levels referred to by Mr Pillar in his report. I have referred above to the attempts to plug this gap in the Claimant's case by seeking permission to rely upon supplemental evidence. In the event, the Claimant was limited to relying upon such material as had been disclosed, either through his witness statement, the report of Mr Pillar and/or the documentary evidence. This was supplemented by answers in cross-examination.

98. As with the judgment of His Honour Judge Davies in Contact Print and Packaging cited above, I see no reason to give any benefit of the doubt to the Claimant in respect of omissions in the evidence that could have been plugged by witnesses being called. To do so would simply be to speculate on what those witnesses might have said.

99. Further, I am cautious about placing reliance upon what the Claimant may have said[11] to Mr Pillar at the time of the preparation of his reports. Clearly, answers given in cross-examination in court are admissible evidence of that which was said. But insofar as Mr Mortimore was not cross-examined on issues referred to in the reports but not in the Claimant's statement, I can see no basis either for criticising the failure to cross-examine nor any basis for placing reliance on what was said.

100. The Civil Procedure Rules set out a clear basis for the admission of evidence. The use of witness statements (if necessary served with a hearsay notice) allows a party to know

[11] I use the phrase "may have said" because paragraphs 3.2 and 3.3 of Mr Pillar's report of 4 June 2015 at **1/134-135** refer to the provision of information by the Claimant and Ms Cushion without distinguishing between the two.

the case that it has to meet. It would be wrong to allow a party to introduce significant controversial material through other routes such as in a background section to an expert's report then to expect the opposing party to cross examine on the issue without knowing what the witness has to say on the point.

101. For these reasons, I reject Mr Pillar's conclusions insofar as they are based upon material that has been communicated to him but is not otherwise in evidence either within witness statements, oral testimony or documents.

102. In the event, this does not significantly affect my judgment in the case because even if the material provided by the Claimant and/or Ms Cushion to Mr Pillar is accepted as if they had given the same evidence from the witness box, the lack of documentary support for what they said makes it inherently weak.

103. I have considered whether the absence of supportive evidence for parts of the case put by the Claimant, coupled with the criticisms of his evidence by the Defendant, should lead me to conclude that this is a dishonestly framed claim. The obvious accusation that could be levelled against Mr Mortimore is that he was already planning to dissolve MEL and that the flood came along at a convenient time to blame the dissolution on the Defendant and to seek to recover damages from it.

104. That suggestion has not been put with any force by the Defendant, but lest the issue be left in any doubt, I reject the suggestion that the Claimant has brought this case claim dishonestly. In coming to that conclusion, I am influenced in particular by:

a. The Claimant's behaviour in the witness box. Whilst I consider this to be a relatively weak indicator of honesty, I saw nothing in his behaviour to indicate dishonesty on his part.

b. The emails referred to at paragraphs 25, 27, 29, 31, 32, 39 and 44 above show that Mr Mortimore was concerned about the effect of the flood on his business from an a very early stage. Whilst of course that could be explained by an early determination to bring a dishonest claim against the Defendant, it seems to me inherently unlikely that he would have put in place a dishonest plan so early on and times when he was still communicating with potential customers.

c. The evidence of Ms Cushion, which the Defendant accepted to be honest and which, if accepted, is only consistent with a lack of dishonesty on the part of the Claimant.

d. The poverty of the attempt to bring a dishonest claim if that was the Claimant's intention. Whilst I consider this again to be a relatively weak indicator, I would have expected that, if the Claimant was seeking to be dishonest, he would have made a better job of it.

105. Having rejected a calculation of projected profits based upon the assumptions made by Mr Pillar, I am left in a position where the only clear starting point for an assessment of the maintainable earnings of the business is the historic pattern. This is the starting point identified by both experts, and I consider Ms Clifford reasoning for such an approach at paragraph 3.44, **1/200,** to be cogent.

106. In considering that historic pattern, it is necessary to consider whether there is any sufficient evidence to adjust the figures so as to reflect particular features at the time of the flood that make those figures unreliable.

107. The obvious factors to consider are as follows:

a. The threats to the business identified by Ms Clifford and summarised at paragraph 62 above;

b. The fact that the CITB sanctions appear to have reduced the profits of MEL in the period preceding the flood but that those sanctions had been lifted by the time of the flood, such that the profits in particular for the seven months to 31 October 2014 might have been artificially low.

c. The prospect that, notwithstanding my rejection of the assumptions made by Mr Pillar in support of his projections, I can nevertheless have some confidence that MEL would have increased its sales during the following years.

108. In my judgment, the issues identified in (a) and (c) of the preceding paragraph balance each other out. This was an established business. The evidence before the court shows that the training business is a relatively volatile one, with changes in funding and players both entering and leaving the market. The Claimant had however shown an ability to run a company that had turned over significant sums of money over many years, albeit that those figures had fluctuated.

109. I accept that the issue with the CITB was significant and was a real threat to the business. The Claimant's evidence, set out at paragraph 56 above, was, insofar as it spoke of the problems with his business prior to the flood, against his interest. I found it compelling and accept the evidence as accurate. This leads me to the conclusion that overall the business had probably just about overcome that problem at the time of the flood. Having reached that conclusion, I see little to lead me to the conclusion that the threats and the opportunities were any more than evenly balanced.

110. As regards the issue identified at paragraph 103(b) above, I have considered whether I should disregard the company's profitability for the seven months to 31 October 2014 on the basis that this was an exceptional period which distorted the historic profits of the company. The effect of such a disregard would be to alter the valuation of the business as set out at paragraph 63 above.

111. It is arguable that the period of difficulty with the CITB was one of those difficulties that I have identified at paragraph 108 above. Whilst it short-term effect may have been significantly greater than other problems that the business had encountered, it can be said that the benefits of using historic profits as a basis of calculation all undermined once one begins to cherry pick which period one takes.

112. On the other hand, it is notable that sales in the years prior to year end 31 March 2011 were higher than those for the period of three years and seven months which have been taken to be the basis of this claim. Looking at the table at paragraph 3.43 of Ms Clifford's report (**1/200**), the average sales for the year ends 31 March 2009 to 31 March 2014 was £697,881, whereas the sales for the period taken in her calculation at

paragraph 3.45 (**1/200**) to calculate the historic profits is only £446,699[12]. This certainly suggests that the figure for the seven months to 31 October 2014 is significantly below average.

113. Even for the four periods taken by Ms Clifford at paragraph 3.45 of her report, the annualised equivalent to the year-end 31 October 2014 is below the norm, though not below the figure for the year ended 31 March 2013.

114. It is the last point alone that causes me to conclude that I should not exclude that seven month period from calculation of historical profits. The sales during those seven months are not so outside the norm as to lead me to the conclusion that they can properly be disregarded. Rather, I think it right to take an average that includes profitability through to the date of the flood.

115. For these reasons, I accept Ms Clifford's "maximum valuation" of £116,085 as being the proper valuation of MEL at the time of the flood.

Issue 2: Mitigation – the Claimant's case

116. The Claimant points to the fact that the burden of proof lies upon the Defendant to prove a failure to mitigate loss. The Claimant and his company were faced with a difficult situation following the flood. Whilst one might, with the benefit of hindsight, suggest that different steps might have been effective to insure the survival of the company, the actions taken by parties in their position should not be judged harshly given the difficult circumstances that they faced – per Lord MacMillan in Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452 at 506, per Lord MacMillan..

Issue 2: Mitigation – the Defendant's case

117. The Defendant's case is that MEL was already in decline by the time of the flood and that the decision to cease trading was a failure to mitigate the company's loss flowing from (presumably) a belief by its directors that it was not a company worth saving. Of course, that supposes that the company had some value, a matter dealt with above.

118. In support of this contention, the Defendant points to:

a. The failure to accept the solution proffered by Uretek;

b. The failure to relocate to alternative premises, when the cost involved was not great;

c. The speed with which the decision was taken to cease trading;

d. The failure to invest the interim payments made by the Defendant and other sums received by the company in continuing to trade.

Issue 2: Mitigation - discussion

119. The burden lies on the Defendant to prove that the Claimant (and/or MEL) failed to take reasonable steps to mitigate the losses sustained as a result of the flood. The Defendant's contention has two parts:

[12] Including an annualised equivalent for the 7 months to 31 October 2014 of £448,190.

a. That the Claimant and/or MEL should have accepted the Defendant's proposal to carry out repair works by way of the grouting solution proposed by Uretek and that their failure to do so was unreasonable;

b. That the Claimant and/or MEL should have relocated the business to other premises in order to trade through the problems caused by the flood and that their failure to do so was unreasonable.

120. In my judgment, the differences of opinion between Mr Maciver and Mr Milnes did not need to be resolved in order to determine the issues that are outstanding in this case. Had the Defendant continued to maintain that the delay in carrying out the repair work was a new intervening at broke the chain of causation, it would have been necessary to look in further detail at the quality of advice that each party had received, although on the face of the information before me I consider that the Defendant would have struggled to show that the landlord or its agents had acted unreasonably in favouring the solution suggested by Mr Maciver. In the event, the only relevance of this evidence is as to whether the Claimant and/or MEL acted reasonably to mitigate MEL's loss.

121. Given the opinion that was expressed by Mr Maciver, supported to a material extent by Mr Foreman, as set out above it seems to me that one cannot criticise the Claimant and/or MEL for failing to push for speedier albeit less extensive remedial works. They were entitled to rely on the expert evidence that the Uretek solution as an inadequate solution to the problem. There was nothing about Mr Maciver's opinion either as expressed to them or as explored in cross examination that should have led to the conclusion that the opinion was unreasonable. In those circumstances, the Defendant fails to show conduct of a kind that might lead to a mitigation argument.

122. It follows from this that the only basis that the Defendant has for alleging a fairly to mitigate on the part of the Claimant and/or his company is their failure to secure a temporary removal to other premises.

123. I have rejected the suggestion that the Claimant is a dishonest witness for the reasons identified above. That of course does not absolve him or his company of the allegation that they took reasonable steps to fairly to mitigate the loss. But once I have accepted, as I do, that at the time of the flood, the Claimant wished his business to survive, it is in my judgment difficult to criticise him or the Company more generally for the steps that it took. In retrospect, other steps may have been more effective and, as a paper exercise, one can see how the money coming into the company may have been spent differently. But I accept that the Claimant was faced with the need to meet a variety of expenses (including redundancy costs) and also to maintain his personal reputation within the business that he was operating.

124. For these reasons, I reject the argument that the Claimant personally or MEL more generally failed to act reasonably so as to mitigate the loss caused by the flood.

Conclusion

125. For the reasons set out above, I determine the value of the claim to be £116,085 less the sums already paid by the Defendant totalling £107,540, a net liability of the Defendant of £8,545.

126. The parties have agreed interest in the sum of £897.22 (calculated at a rate of 3% per annum from mid-February 2015 onwards), making a total judgment sum £9,442.22.

DRAMATIS PERSONAE

	Name	Role
Companies	Mortimore Enterprises Limited	Construction industry training company; tenant of the property
	GAB Robins	Loss adjusters for MEL
	Gary and Linzi Bell	Landlords of the property
	CBRE	Managing agents for the landlords
	NFU	Landlords insurers
	Crawford's	Loss adjusters for the landlords
	United Utilities	Defendant; statutory undertaker with liability under the Water Industry Act
	Sutcliffe's	
	Uretek	
Individuals	John Mortimore	Claimant; CEO of MEL
	Karen Cushion	Sales and Marketing Manager, Company Secretary and Building Manager of MEL
	Ian Maciver	Surveyor employed by Sutcliffe's and instructed by Claimant
	Mark Pillar	Accountant instructed by Toppings and instructed by the Claimant
	Richard Weston	Insurance broker for MEL
	Paul Hardy	Loss adjuster at GAB Robins (loss adjusters employed by MEL's insurers)
	Charlie Hughes	Loss adjuster (employed by GAB Robins) for MEL
	Gary and Linzi Bell	Landlords
	Simon Peck	Loss adjuster (employed by Crawford's) for landlords' insurers (NFU Mutual)
	Nick Forman	Surveyor with BDI instructed by Crawford's
	Stephen Richardson	CBRE (Managing agents for landlords)
	Angela Gadd	Employee of Defendant
	Gill Cunningham	Senior claims and litigation officer with Defendant
	Chris Milnes	Surveyor (employed by the Vinden partnership) instructed by Defendant
	Patrick Grant	Technical sales at Uretek
	Peter Whittam	Accountant employed by DTE and instructed for the Defendant
	Jacqueline Clifford	Accountant employed by DTE and instructed by the Defendant

CHRONOLOGY

Date	Reference	Event
25.10.14	**1/39**	Escape of water causing damage to the premises (33 Boundary Street, Liverpool)
31.10.14	**2/274**	Email from Karen Cushion to Richard Weston Ltd
13.11.14	**1/70**	Ian Maciver attends the premises
13.11.14	**2/279**	Email from Karen Cushion to Stephen Richardson and Angela Gadd. Ms Cushion reports Mr Maciver as saying that the mezzanine level will need to be dropped so that the concrete floor could be lifted to make repairs. The works could take until Easter 2015. (NB: Easter day in 2015 was 5.4.15.)
21.11.14	**1/68**	Inspection carried out by Sutcliffe's
26.11.14	**2/289**	Email from Karen Cushion to Stephen Richardson; Defendant copied in. Reference is made to the inspection by Sutcliffe's and the fact that the void under the concrete slab is said to make the workshop unsafely use. Miss Cushing proposes either relocating to alternative premises at a cost of £15,000 to make the premises fit for purpose and £1100 per month plus VAT for additional rent or work by MEL to repair the existing workshop.
28.11.14	**1/76**	Inspection carried out by the Vinden Partnership
1.12.14	**1/89**	Uretek report advocating stabilising the slab by injection and filling voids.
2.12.14	**2/300**	Email from Chris Milnes to Angela Gadd in which Mr Milnes proposes the Uretek solution and indicates little confidence in the Sutcliffe's report
2.12.14	**2/302**	Emil from Ms Cushion to Richard Weston about business losses
3.12.14	**2/304**	Email from Ms Cushion to GAB Robins indicating that the costs involved in renting alternative workshop space are rent of £4050 for three months plus £1350 for each additional month, £15,000 to make premises fit for purpose, £18,000 for three months plus a further £6000 per additional month for additional staff resources and £11,000 to clear the alternative workshop on leaving.
8.12.14	**2/307**	Email from Ms Cushion to Paul Hardy at GAB Robins indicating alternative workshop costs as set out above plus a further £1000 for approval of the premises costs/loss of income (in the short and longer term) of £88,000 together with the anticipation of further losses.
9.12.14	**2/316**	Email from Paul Hardy to various – Defendant is prepared to pay full cost of Uretek works and will consider contributing to MEL reasonable business interruption loss on presentation of a properly substantiated and evidenced claim.
9.12.14	**2/311**	Email from Ms Cushion to Paul Hardy stating that the £15;000 was insufficient the cost of alternative premises and giving further detail of the total cost of £37,340.

12.12.14	2/318	Email from Ms Cushion to Mr Hardy stating losses to date to be more than £156,000 and warning of cashflow problems.
20.12.14		Defendant instructs DTE regarding the quantum of claim
19.12.14		Interim payment of £25,000
19.12.14	**2/337**	BDI surveys premises on behalf of landlord.
8.1.15	**2/328**	MEL meet CITB. Contract terminated.
14.1.15	**2/330**	Email from John Mortimore to Angela Gadd dealing with the financial problems. MEL has lost business and staff have left. In order to carry on trading, and immediate payment of £317,570 is required.
14.1.15	**2/353**	GAB Robins contact Simon Peck.
16.1.15	**2/333**	Email from the City of Liverpool College indicating that contract terminated.
16.1.15	**2/334**	Email from Asset Training indicating that contract terminated.
19.1.15	**1/100(hh)**	Report by Nick Foreman of BDI.
21.1.15	**2/326**	Further interim payment by Defendant to MEL of £82,540
11.2.15	**2/356**	Email from Ms Cushion to Angela Gadd and Gill Callaghan indicating that MEL would cease trading that week.
13.2.15	**2/353**	Simon Peck speaks to GAB Robins. He had been told that unless work started on Monday 16 February, MEL business would fail. The Foreshore group had offered to start work on the Monday.
28.3.15		Repairs commenced