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

[2022] EWHC 3356 (TCC)

Case No: HT-2020-000080

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

Date: 23/12/2022

Before :

Ms VERONIQUE BUEHRLEN K.C.
Sitting as a Deputy High Court Judge

- -

Between :

LDC (PORTFOLIO ONE) LIMITED

Claimant

- and -

(1) GEORGE DOWNING CONSTRUCTION LIMITED

(2) EUROPEAN SHEETING LIMITED (In Liquidation)

Defendants

- -
- -

PAUL BURY (instructed by **Walker Morris LLP**) for the **Claimant**
ISABEL HITCHING KC (instructed by **Mills & Reeve LLP**) for the **First Defendant**

Hearing dates: 1 and 2 November 2022

- -

Approved Judgment

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.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 23rd December 2022 at 10.30am

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MS VERONIQUE BUEHRLEN KC

Introduction

1. These proceedings are concerned with claims brought by the Claimant ("**LDC**") in relation to re-cladding and associated remedial works to address fire safety and water ingress issues in relation to the external wall construction of three high rise tower blocks operated by LDC as university halls of residence at Parkway Gate, Manchester, M15 6JH (the "**Property**"). The Property was constructed in 2007 and 2008.

2. LDC is part of the Unite Students ("**Unite**") group of companies. LDC is the freehold owner of the Property. It acquired the freehold from Wilmott Street Limited ("**WSL**") in September 2015.

3. The First Defendant ("**Downing**") was the main contractor on the project pursuant to a building contract between it and GMD Developments Ltd ("**GMD**") dated 11 June 2007 (the "**Main Contract**"). The Second Defendant ("**ESL**") was the specialist subcontractor in relation to the external wall construction, including the cladding and rainscreen works under a subcontract dated 8 September 2008 (the "**Sub-contract**"). Both contractors were retained on a design and build basis and both issued collateral Deeds of Warranty dated 17 October 2008 in favour of the then employer, GMD. Those Deeds of Warranty were subsequently assigned by GMD to LDC. LDC has sued the Defendants pursuant to those warranties.

4. By Tomlin Order dated 17 October 2022 the proceedings between LDC and Downing were stayed on settlement terms set out in a confidential Schedule to the Tomlin Order (the "**Settlement**"). Whilst those settlement terms remain confidential, they include the payment by Downing to LDC of the sum of £17,650,000 ("the **Settlement Sum**") in full and final settlement of LDC's claims against Downing. ESL, however, is in Creditor's Voluntary Liquidation. It has not played any part in the proceedings since about May 2022. By letter dated 19 October 2022, ESL's liquidator stated that she did not object (but could not consent) to judgment being entered against ESL.

5. Subsequent to the Settlement, and given ESL's position, LDC and Downing now each seek to enter judgment following a trial in ESL's absence against ESL in respect of:

   5.1 LDC's claim against ESL in the sum of £21,152,198.87 calculated as follows:

      5.1.1 Cost of remedial works: £16,457,825.87; and

      5.1.2 Loss of Income: £4,694,373.00; and

   5.2 Downing's claim for an indemnity and/or contribution against ESL in the sum of £17,650,000 together with Downing's reasonable costs of defending the claim brought against it by LDC.

6. Further, Downing asks for an order that ESL's claim against it for a contribution and/or indemnity be struck out.

7. Since ESL would not consent to judgment being entered against it, a trial of the claims was made necessary. The trial was originally listed for 9 days commencing on 7 November 2022. However, following an Application dated 21 October 2002 made by LDC, O'Farrell J made an Order reducing the trial to two days including one judicial reading day commencing on 1 November 2022 ("**the 21 October 2022 Order**").

The approach to trial in the absence of ESL

8. CPR rule 39.3(1) provides that "*The court may proceed with a trial in the absence of a party*" and that "*if a defendant does not attend"* the Court *"may strike out his defence*

or counterclaim". However, it remains necessary for a claimant to prove its case and for the Court to address the defendant's case in so far as it purports to give rise to a defence: see *Stewart Milne Group Ltd v Protex Corp Ltd* [2008] EWHC 3171 (TCC) per Akenhead J at [11].

9. In *Habib Bank Ltd v Central Bank of Sudan* [2006] 2 Llyod's Rep 412 at [10], Field J stated that:

> "The absence [of the Defendant] has meant that the court has to be particularly alert not only to any matters potentially in [the Defendant's] favour on the merits but also to matters going to the court's jurisdiction and to whether [the Defendant] has been given due and proper notice of all relevant matters."

10. Taking that guidance on board, LDC and Downing have provided the Court with information in relation to ESL's position and the notices which have been provided to ESL and its liquidators in relation to the current proceedings. Further, LDC has addressed each of the arguments run by ESL in its Defence and the reasons why it says those arguments should be rejected. Consistent with the terms of the Settlement, Downing has made no admissions as to its own alleged breaches. It, however, adopts LDC's case against ESL and argues that it is entitled to a full indemnity or contribution from ESL in respect of the Settlement Sum. It too has addressed ESL's case as set out in ESL's Defence to Downing's Contribution Notice.

The position of ESL

11. ESL is the Second Defendant to LDC's claims, the Defendant to Contribution proceedings brought against it by Downing and the Claimant in Contribution proceedings brought by it against Downing.

12. At the Case Management Conference in April 2021, the Court ordered a stay followed by a timetable commencing with disclosure in early 2022 to trial in November 2022. Some limited disclosure was provided by ESL in early 2022 albeit without a signed Disclosure Certificate. In May 2022, LDC and Downing were informed by the appointed liquidator, Ms Victoria Galbraith of Bridgestones ("**the Liquidator**"), that ESL had entered creditor's voluntary liquidation and that neither ESL nor the liquidator would take part in the proceedings. In accordance with that statement, no witness statements or expert reports were filed or served by ESL. Several communications evidence the fact that LDC and Downing sought to keep ESL, and more particularly the Liquidator, apprised of the on-going nature of the proceedings including the Pre-Trial Review and the trial.

13. Most recently, following the Settlement, Downing's solicitors ("**M&R**") wrote to the Liquidator on behalf of both Downing and LDC on 17 October 2022 to request her consent to Judgment being entered against ESL pursuant to CPR Rule 40.6. By letter dated 19 October 2022, the Liquidator once more advised that she would not (including as agent of ESL) take part in any proceedings. However, whilst she stated that she did not object to an order that there be judgment for both the Claimant and the First Defendant against ESL (in the form of the draft Order then provided to her) she did not consent to judgment being entered. Similarly, as regards ESL's claims she stated that she did not object to these being struck out. It is therefore clear that the Liquidator, as agent of ESL, has had full and proper notice of the proceedings and this trial and that she has (as is evidenced by her correspondence) stated that neither she nor ESL would take part in the proceedings.

14. A creditor's voluntary liquidation under s.84 of the Insolvency Act 1986 does not entail any automatic stay of proceedings. It has therefore been necessary for the trial to proceed in ESL's absence and for LDC and Downing to prove their respective cases against ESL. To that end, LDC and Downing prepared a joint List of Issues a copy of which is appended to this judgment as I have found it helpful to follow LDC and Downing's approach.

The Factual Background

15. At this stage it is useful to say something about the works. The Property consists of three individual blocks around a central courtyard. Each block is over 18m high, and each has a different configuration of external wall cladding:

    15.1 Block 1 has Cor-ten steel cladding on its North, East and South elevations. It has Composite cladding on its West elevation.

    15.2 Block 2 has Composite cladding on its North elevation. It has Glazed panels on its East, South and West elevations.

    15.3 Block 3 has Composite Cladding on all elevations.

16. In each case, on the inside of the external wall cladding there is a breather membrane and what are known as Structural Insulated Panels ("SIPs"). The SIPs are fixed to the structural concrete frame of each block.

17. LDC's case is that following water ingress issues and subsequent investigations into the as-built Property, it was discovered that:

    17.1 There are several defects in the external wall construction of the composite cladding elevations which have led to water ingress and deterioration of the SIPs.

    17.2 There are fire barrier and fire stopping issues on all elevations; including in relation to the cavity barrier provision between the outer face of the SIPs and the rear face of the cladding panels on the Cor-ten elevations, and between the rear of the SIPs and the concrete slab and between SIPs, on all elevations.

The factual witnesses

18. LDC relies on four witnesses of fact:

    18.1 Ged Abel, a former Regional Estates Manager at Unite. Mr Abel's statement addressed the identification of the defects and discussions with Downing and ESL as to their remediation.

    18.2 Chris Sorenti, a Project Director at Unite. Mr Sorenti addressed the temporary and permanent remedial works carried out by LDC.

    18.3 George Boehm who works in Unite's Finance department. Mr Boehm's statement dealt with LDC's loss of profit claim.

    18.4 Chris Holmes, a Group Reporting Manager at Unite. Mr Holmes' statement addressed the losses said to have been incurred by LDC.

19. Downing relied on three witnesses of fact:

    19.1 James Dean, Downing's former commercial manager. Mr Dean dealt with various issues including ESL's allegation to the effect that Downing instructed them to omit the EPDM membrane from the design of the cladding.

19.2 Andrew Thomas, a former quantity surveyor with Downing. Mr Thomas dealt with issues raised by ESL in relation to the Vapour Control Layer ("VCL"), the EPDM membrane and the fire breaks.

19.3 Ian Orton, a former construction manager at Downing also dealt with the same issues as Mr Thomas.

20. Pursuant to the 21 October 2022 Order, LDC and Downing were given permission to rely on their respective signed witness statements without the witness being required to attend Court to swear his statement. As already noted, ESL did not serve any statements of witnesses of fact.

The Experts

21. Each party had permission to call evidence from experts in the fields of architecture, fire engineering and quantum. The following provided detailed expert reports:

Discipline	LDC	Downing
Architect	Nick Barnes	Peter Fung
Fire Engineer	James Lavender	Adam Cowlard
Quantity Surveyor	Richard Jenkinson	Mike Bradley

22. Further, I was particularly assisted by the experts' joint statements. Notably, there was a very significant amount of agreement between the experts in their respective fields. Mr Barnes and Mr Fung agreed on nearly every issue relevant to liability. Where they parted company was in relation to whether certain elements of the permanent remedial scheme adopted by LDC were reasonable. A matter which I address further below. The Fire Engineers agreed on broadly every point. As regards the quantity surveyors their valuations were broadly similar. Thus, Mr Jenkinson (for instance) valued the permanent remedial scheme adopted by LDC at £16,485,119.31 as against Mr Bradley's £16,430,532.42. There was a greater element of disagreement between the quantum experts in relation to the valuation of the so called "Alternative Remedial Scheme" but what was striking about that was how relatively close the costings of that scheme were compared to the cost of the permanent remedial works.

23. Pursuant to the 21 October 2022 Order, LDC and Downing were given permission to rely on their expert witnesses' signed joint statements and reports without the expert being required to attend Court. As already noted, ESL did not serve any expert reports.

ESL's case

24. ESL served an Amended Defence to LDC's claims on 17 June 2021. That pleading raised several potential defences to the claims:

24.1 *Firstly*, ESL took issue with the scope of its duty under the Sub-contract (Issues 1 and 2 of the List of Issues). In particular, ESL stated that it was not responsible for the design of the cavity barriers and that it was instructed to omit the EPDM which caused or contributed to the water ingress issues;

24.2 *Secondly*, ESL denied liability (Issues 3 and 4 of the List of Issues) and more particularly denied that the alleged particulars of breach were breaches of the Sub-contract and/or of the Requirements of the Building Regulations;

24.3 *Thirdly*, ESL took issue with LDC's case on causation and loss (Issues 5 to 10 of the List of Issues). Notably, ESL pleaded that LDC had failed to mitigate its

loss by failing to take steps to remedy the alleged defects in the period November 2012 to September 2018. ESL also averred that LDC's permanent remedial scheme was a significant enhancement to what was reasonably necessary and put LDC to proof as to its alleged losses.

25. As regards its defence to Downing's Contribution claim, ESL's case is that there should be no flow down of LDC's claim against Downing to it, ESL. Further, it is alleged by ESL that it was instructed by Downing to omit the VCL and EPDM membrane and that responsibility for the design of the fire breaks (i.e. the cavities) was that of Downing.

26. Subject to ESL's pleaded defence to Downing's claim for damages for breach of contract and/or a contribution pursuant to the Civil Liability Act 1978 ("the **Act**"), the issues as between Downing and ESL concern whether the settlement sum was reasonable (Issues 11 and 12.1 of the List of Issues) and whether the claim is in respect of the same damage (for the purposes of the Act).

27. I deal first with LDC's claim and ESL's defences, that is with Issues 1-10 of the List of Issues, before turning to the position as between Downing and ESL. However, before turning to the issues it is necessary to set out the relevant contractual provisions.

The Sub-contract

28. The Sub-contract is dated 8 September 2008 and was executed as a deed. It was in the JCT Standard Form of Sub-contract for Domestic Sub-contractors (DOM/2, 1981 Edition, incorporating Amendment 1 (1987), Amendments 2, 3, 4, 5 and 6 (1989) and Amendment 7 (1992)) with further bespoke amendments. The contract documents were made up of Articles of Agreement, Conditions of Contract, a Schedule of Amendments and a Schedule of Sub-contract Documents which included among other documents an "Architectural Specification – External Envelope" dated 17 November 2006 prepared by Ian Simpson Architects ("**ISA**") ("the Architectural Specification").

29. The First Recital of the Articles of Agreement provided that:

> "the Contractor desires to have designed and executed the works (hereinafter "the Sub-Contact Works") referred to in the Appendix, part 2 and described in numbered documents, if any, identified in that part of the Appendix (hereinafter called "the Numbered Documents")"

30. In turn, Part 2 of the Appendix set out by way of Particulars of the Sub-contract Works:

> "The supply of all labour plant materials and facilities to carry out external envelope works including inner wall structure, external cladding, rainscreen, roofing, windows, curtain walling and external doors".

31. By Article 1 of the Articles of Agreement:

> "1.1 The Sub-contractor shall be deemed to have notice of all the provisions of the Main Contract except any detailed prices of the Contractor included in the Employer's Requirements, the Contractor's Proposals or the Contract Sum analysis. […]
>
> 1.5 Save where the provisions of this Sub-contract otherwise require, the Sub-contractor shall execute and complete the Sub-contract Works so that no act or omission or default of the Sub-contractor in relation to the Sub-contract Works shall constitute cause or contribute to any breach by the Contractor of any of

his obligations under the Main Contract or any other contracts made by him in connection with the Main Contract.

1.6 The Sub-contractor acknowledges that any breach by him of this Sub-contract may result in the Contractor committing breaches of and becoming liable in damages under the Main Contract and other contracts made by him in connection with the Main Contract and may occasion further loss and/or expense to the Contractor in connection with the Main Contract and all such damages loss and expense are hereby agreed to be within the contemplation of the parties as being probable results of any such breach by the Sub-contractor."

32. Clause 4 of the Sub-contract Conditions stated that:

"4.1.2All workmanship shall be of the standards described in the Sub-contract Documents or, to the extent that no such standards are specified in the Sub-contract Documents, shall be of a standard appropriate to the Sub-contract Works.

4.1.4 All work shall be carried out in a proper and workmanlike manner and in accordance with the Health and Safety Plan. […]

4.7 The Sub-Contactor warrants to and undertakes with the Contractor that all materials and equipment used in the Sub-contract Works whether by the Sub-contractor or any sub-sub-contractor shall be of the respective kinds and standards described or defined in the Main Contract. In any event all materials and goods shall be of good sound and satisfactory quality and reasonably fit for their intended use. The Sub-contractor shall not substitute anything so described or defined without the prior written consent of the Contractor such consent not to be unreasonably withheld."

33. By clause 5 of the Sub-contract Conditions:

"5.1.1 [The Sub-contractor] shall observe, perform and comply with all the provisions of the Main Contract as referred to in the Appendix part 1 on the part of the Contractor to be observed, performed and complied with so far as they relate and apply to the Sub-contract works (or any portion of the same). Without prejudice to the generality of the foregoing, the Sub-contractor shall observe, perform and comply with the following provisions of the Main Contract Conditions: clauses 6, 9, and 34; […]

5.3.1 To the extent that the Sub-contractor is required to carry out any design in relation to the Sub-contract Works, the Sub-contractor has exercised and shall continue to exercise all of the skill, care and diligence in the design of the Sub-contract Works to be expected of a professionally qualified and competent designer or specialist Sub-contractor, as appropriate, experienced in carrying out work of similar size, scope and complexity to the Sub-contract."

34. As noted above, one of the Sub-contract Documents comprised the Architectural Specification (itself also part of the Employer's Requirements under the Main Contract) which identified who (as between Contractor and Sub-contactor) was responsible for various aspects of the design. General fire stopping was identified as Sub-contractor Designed. Paragraph H43.1416 in the Metal Panel Cladding/Features section of the Architectural Specification listed the Specific Fire Performance Requirements as including for the purposes of fire and smoke stopping "all cavity barriers to meet the requirements of the Building Regulations Approved Document B". Paragraph

H92.1423(d) in the Rainscreen Cladding section of the Architectural Specification similarly provided:

> "Fire and Smoke Stopping: Provide cavity barriers in the external wall and fire stopping at the junction of the external wall with other fire resisting elements of the structure."

35. Accordingly, ESL was obliged to comply with the requirements of the Main Contract in relation to its own scope of work including the terms of the Architectural Specification which expressly included the design of the fire stopping cavity barriers.

The Main Contract

36. The Main Contract is dated 11 June 2007 and was executed as a deed. It was in the JCT Standard Form of Building Contract with Contractor's Design 1998 Edition incorporating Amendments 1 to 5 and further bespoke amendments.

37. The key terms of the Main Contract included:

37.1 Clause 2.1 (as amended) of the Conditions of Contract by which:

"2.1 The Contractor shall upon and subject to the Conditions carry out and complete by Sections the Works referred to in the Employer's Requirements, the Contractor's Proposals (to which the Contract Sum Analysis is annexed), the Articles of Agreement, these Conditions and the Appendices in accordance with the aforementioned documents and for that purpose shall complete the design for the Works including the selection of any specifications for any kinds and standards of the materials and goods and workmanship to be used in the construction of the Works so far as not described or stated in the Employer's Requirements or Contractor's Proposals."

37.2 Clause 2.5 (as amended) by which:

"2.5.1 Without Prejudice to any warranties implied by common law or statute, the Contractor warrants and undertakes to the Employer that:

2.5.1.1 he will be fully responsible for the entire design of the Works including all designs contained in the Employer's Requirements and the Contractor's Proposals and any design which the Contractor prepares or has prepared or has caused or shall cause to be prepared or issued by the Professional Team or any Sub-contractors; […]

2.5.1.3 without derogation from sub-clause 2.5.1.1, the Contractor has exercised and will continue to exercise in the design of the Works all the reasonable skill, care and diligence to be expected of a properly qualified and competent professional architect, or as the case may be, other appropriate professional designer experienced in the design of works of a similar size, scope and complexity as the Works;

2.5.1.4 the Works have been and/or will be designed and carried out and completed using proven up-to-date practices and to appropriate standards available at the date of this Contract and consistent with the intended use of the Works (save as may have been agreed with the Employer) […]

2.5.1.8 the Works will be carried out and completed in accordance with and, when completed, will comply with the Development Control Requirements, all Statutory Requirements and Consents […]"

37.3 Statutory Requirements were defined in clause 6.1.1.2 which obliged Downing and therefore ESL to "*comply with…any Act of Parliament, any instrument, rule or order made under any Act of Parliament, or any regulation or byelaw of any local authority or of any statutory undertaker which has any jurisdiction with regard to the Works*" and therefore with the applicable Building Regulations.

37.4 The Employer's Requirements included various specifications at Appendix C for the quality and performance of the Works, including the Architectural Specification already referred to above which provided for the following:

"**H43 METAL PANEL CLADDING/FEATURES**
[…]
H43.1400 PERFORMANCE REQUIREMENTS
[…]
Environmental
[…]
H43.1405 Moisture Movement
The works shall withstand movement without permanent deformation or any reduction in the specified performance:
a) Due to changes in the moisture content of its components, resulting from variations in the moisture content of the air.
b) Due to the expansion of absorbed or retained moisture caused by freezing.
c) Caused by the flow of rainwater to the inside of the panels.
H43.1411 Weather and Water Penetration Resistance
The works, including flashings and junctions with adjacent components, shall be fully weatherproof and watertight under all conditions with full allowance made for deflections and other movements.
[…]
Fire
H43.1416 Specific Fire Performance Requirements
[…]
e) Fire and smoke stopping
i) Provide all cavity barriers to meet the requirements of the Building Regulations Approved Document B […]

H92 RAINSCREEN CLADDING
[…]
H92.1400 PERFORMANCE REQUIREMENTS
[…]
Fire
H92.1423 Specific Fire Performance Requirements
a) Refer to Fire Safety Strategy.
[…]
d) Fire and Smoke Stopping: Provide cavity barriers in the external wall and fire stopping at the junction of the external wall with other fire resisting elements of the structure.

> **K10A STRUCTURAL FRAME WALL INFILL SYSTEM**
> […]
> **K10A. 1000 SCOPE, SUBMITTALS, TESTING AND PERFORMANCE**
> […]
> **K10.A.1400 PERFORMANCE REQUIREMENTS**
> […]
> **Fire**
> K10A.1410 General
> a) Refer to Sections H43 and H92.
> b) Refer to the Fire Strategy Report.
> […]
> e) Fire cavity barriers shall be provided with the partition cavities as required to satisfy Building Regulations and the Fire Strategy Report.
> […]
> **K10A.2000 MATERIALS/ PRODUCTS AND FABRICATION**
> […]
> **K10A.2200 MATERIALS AND COMPONENTS**
> […]
> **Cavity Barriers**
> **K10A.2208** Fire Barriers
> Provide continuous barriers using mineral fibre or acceptable equivalent material where indicated on the Tender Drawings or otherwise required. The barrier shall maintain the performance of the works to a point of interface that will provide a complete barrier to fire and smoke (in excess of the wall)."

37.5 The Employer's Requirements which referenced the Fire Strategy Report. Paragraph 4.2.2 of the Fire Strategy required each apartment to form an individual fire resisting compartment.

The Collateral Warranties

38. As already noted, WSL entered into collateral warranties, both dated 17 October 2008, with Downing in respect of its obligations under the Main Contract and with ESL in respect of its obligations under the Sub-contract. These were in materially similar terms, and, in addition to warranting that Downing and ESL had complied with their respective contractual obligations (clauses 2.1 and 2.2.3), contained additional undertakings as to:

38.1 the works being carried out in a good and workmanlike manner (clause 2.2.1); and

38.2 a reasonable skill care and diligence obligation in respect of the design of the Works (clause 2.2.2).

39. LDC obtained the benefit of the collateral warranties by a deed of assignment dated 2 September 2015 between WSL and LDC.

Issues 1 and 2: The Scope of ESL's obligations under the Sub-contract

40. These issues are concerned with determining the scope of ESL's obligation under the Sub-contract to comply with the Building Regulations and the scope of its responsibilities in respect of the fire barriers (i.e. cavities) and the EPDM membranes.

41. At paragraph 10 of its Amended Defence, ESL states that it was not obliged to comply with the Main Contract "*if and so far as the [Main] Contract contained greater obligations than the Sub-contract and has no liability to LDC under the ESL Warranty*". Further, at paragraph 9 of its Defence to Downing's Contribution claim, ESL went on to plead that by virtue of clause 5.3.1 of the Sub-contract Conditions it was only liable for design matters if it failed to exercise the reasonable skill and care to be expected of a professional designer. In other words, it appears to have been ESL's case that its design obligations were governed by an obligation to exercise reasonable skill and care only as opposed to a strict obligation to comply with the Building Regulations.

42. LDC submitted that ESL was wrong in its assertion for the following reasons:

    42.1 By Article 1.1 of the Sub-contract Articles of Agreement, ESL is deemed to have notice of the material provisions of the Main Contract.

    42.2 The Main Contract obligations include, at clause 2.5.1.8, a strict obligation that the Works will comply with "*all Statutory Requirements*". Those Statutory Requirements include various Building Regulations and Approved Documents.

    42.3 Article 1.5 of the Sub-contract Articles of Agreement requires ESL to complete the Sub-contract Works "*so that no act or omission or default of the Sub-contractor in relation to the Sub-contract Works shall constitute cause or contribute to any breach by the Contractor of any of his obligations under the Main Contract.*"

    42.4 These words are clear: in carrying out the Sub-contract Works, ESL is not to put Downing in breach of its Main Contract obligations. The commercial intention is to make the contracts back-to-back.

    42.5 The only carve-out is that Article 1.5 of the Sub-contract Articles of Agreement is "*Save where the provisions of this Sub-contract otherwise require…*"

    42.6 However, there are no provisions of the Sub-contract which require ESL to execute the works in such a way as may entail a breach of the Main Contract.

    42.7 ESL points to clause 5.3.1 of the Sub-contract Conditions. However, this clause is a general provision relating to the standard of care for design. It is similar to clause 2.5.1.3 of the Main Contract, in that it clarifies that the general standard for the design is reasonable skill and care.

    42.8 However, clause 2.5.1.3 in the Main Contract is subject to the separate obligation in clause 2.5.1.8 of the Main Contract that the Works will comply with "*all Statutory Requirements*."

    42.9 On a proper construction of clause 5.3.1 of the Sub-contract Conditions, it operates to the same extent: ESL's obligation to comply with the Statutory Requirements in respect of its scope of works applies regardless of the otherwise applicable standard for its design.

    42.10 Clause 5.3.1 does not water down, and should not be construed as watering down, in the Sub-contract the separate requirement in the Main Contract that the Works are to be completed so as to be in accordance with the Building Regulations.

43. Further, LDC relied on the recent judgment of HHJ Stephen Davies rejecting a similar argument to that raised by ESL in *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC) at paragraph 52. LDC also relied on a passage in *Keating on Construction Contracts* (11th Edition) at [16-054] dealing with the absence of an express requirement to comply with building regulations:

> *"If there is no such express term, a contravention of the building regulations might be strong evidence that the contractor was in breach of an express or implied obligation of good workmanship, or, possibly, of fitness for purpose. The court might alternatively imply a term that the contractor would build lawfully in accordance with the regulations… Contravention of the building regulations may be evidence of want of care by the contractor."*

44. LDC's alternative case being that if there was no strict obligation to comply with the Building Regulations then a contravention of those regulations was evidence of ESL's breach of the remaining provisions of the Sub-contract as to reasonable skill and care in the design of the Property (under clause 5.1.3 of the Sub-contract Conditions), workmanship (under clauses 4.1.2 and 4.4.4 of the Sub-contract Conditions) and choice of materials (under clause 4.7 of the Sub-contract Conditions).

45. I agree with LDC's submission that, on a proper construction of the Sub-contract, ESL was subject to a strict obligation to comply with "all Statutory Requirements". As was submitted by LDC, Article 1.5 of the Sub-contract Articles of Agreement required ESL to complete the Sub-contract works so that no act, omission or default in relation to those works would give rise to any breach on the part of Downing of its obligations under the Main Contract. By Article 1.1 of the Sub-contract Articles of Agreement, ESL was deemed to have notice of the material provisions of the Main Contract and therefore of the obligation for the works to comply with "all Statutory Requirements". The commercial intention was clearly to make the contracts back-to-back.

46. The opening words of Article 1.5 of the Sub-contract Articles of Agreement do provide that the obligation to ensure that Downing is not put in breach of the Main Contract is "save where the provisions of this Sub-contract otherwise require". However, there is then no provision requiring otherwise. Clause 5.3.1 of the Sub-contract Conditions, which imposes an obligation on ESL to exercise reasonable care, cannot in my view be relied upon to somehow supersede the obligation to ensure that Downing is not placed in breach of its obligations vis a vis LDC under the Main Contract. The point was made by Lord Neuberger in *MT Hojgaard AS v E.ON Climate and Renewables UK* [2017] UKSC 59 that if there are two clauses imposing different standards or requirements, treating the clause imposing the lesser standard as a minimum requirement makes more sense. Treating it as qualifying a more onerous obligation effectively renders the more onerous obligation redundant. I also note that there is nothing in the wording of clause 5.3.1 itself to suggest that it is to take precedence over the strict obligation to comply with the Statutory Requirements. Not to mention the fact that if that was correct the attempt to make the contracts back-to-back would have failed despite the clear intention behind Article 1.5 of the Sub-contract Articles of Agreement. It follows that in my judgment ESL was required to comply with the applicable Building Regulations in carrying out its works.

47. There is therefore no need to consider LDC's alternative case to the effect that a breach of the Building Regulations might be strong evidence of a breach on the part of ESL of its obligations in respect of workmanship, the choice of materials and the exercise of reasonable care and skill in the design of the exterior envelop of the Property.

48. In addition to its reliance of Article 1.5 of the Sub-contract Articles of Agreement and clause 5.3.1 of the Sub-contract Conditions, ESL's Amended Defence relies on two specific scope of work issues.

49. *Firstly*, ESL states that it was not responsible for the installation of fire barriers by reference to its tender and to "Minutes of the Pre-Selection Meeting of 4 May 2007", Item 28 of which stated that ESL had not allowed for any vertical fire barriers, but were of the opinion that these were required. On the basis of the tender and the Minutes it is averred by ESL that "[t]he Sub-contract clearly excluded the provision of fire breaks". At paragraph 43(3) of its Amended Defence ESL also stated that WSP specified the fire breaks and relies on two emails dated 21 August 2007 and 3 December 2007.

50. The Sub-contract clearly set out ESL's responsibility for the design of the cladding and rainscreen. At paragraph 11 of its Amended Defence ESL admits that it agreed to undertake the design and construction works in relation to the cladding and rainscreen on the Property. That must include the requisite fire barriers. The Architectural Specification included the provision of fire barriers. Clause 5.1.1 of the Sub-contract Conditions makes clear that ESL was to comply with all the provisions of the Main Contract in so far as they related to the Sub-contract works. Those provisions also included the relevant paragraphs of the Architectural Specification (i.e. paragraphs H92.1423, K10A.1410(e) and K10A.2208 of the specification set out above) which directly related to the design and construction of the cladding and rainscreen. Were that not sufficient, the Architectural Specification also expressly formed part of the Sub-contract Documents.

51. The tender is dated 9 January 2007. It stated that ESL had not included for a ventilated fire barrier within the cavity of the structure. However, the document was clearly superseded by the Sub-contract entered into on 8 September 2008 and did not form part of the Sub-contract documents. Further, the tendered price of £2.95 million became a significantly higher Sub-contract Sum of £5.28 million suggesting a significantly increased scope of work by the time the Sub-contract was executed.

52. However, whilst the tender was not a contractual document, the Schedule of Sub-contract Documents did include the Minutes of the Sub-contract Pre-Selection Meeting held on 4 May 2007 on which ESL relies. Those minutes state at Item 28 that:

> "ESL have not allowed any vertical fire barriers as per architects advise. However, ESL are of the opinion that this is required by building regulation. [Downing] to allow as provisional sum."

53. All the same, I do not consider that a statement that ESL had not allowed in its tender for vertical fire barriers and that Downing should allow a provisional sum for vertical fire barriers, recorded in minutes of a meeting dating back 16 months prior to the Sub-contract being entered into, should detract from the detailed requirements of the Architectural Specification, which clearly did require the design of the cladding to include the provision of all cavity barriers to meet the requirements of the Building Regulations Approved Document B. Further, the Minutes of Meeting relied upon by ESL refer to the provision of vertical cavity barriers only whereas the defects complained of by LDC were not limited to the absence of vertical cavity barriers. Accordingly, I do not consider the note in the Minutes to be sufficient to somehow supersede the detailed provisions of the Architectural Specification.

54. The two emails relied upon by ESL do not take the matter further. Those emails do not evidence an instruction to ESL to exclude fire barriers or the architect taking on responsibility for the design of the cavities. Nor do they suggest that ISA, WSP or

Downing or anyone else was responsible for this element of the design. On the contrary, when asked by ESL to confirm that the fire barrier in the Cor-ten elevations was to be installed at floor level only, ISA replied that as far as they were aware the fire barriers were required both horizontally between the floors and vertically between the clusters. ISA also made the point several times in correspondence that the fire barriers had been specified for all cavities behind the rainscreen cladding in the tender package documents and that "Controlling fire spread within cavities is a standard requirement for all buildings like the ATS scheme and something which we would expect to see in all cladding designs".

55. It also appears that ESL understood that vertical cavity barriers were required as is evidenced by an email from Mr Evans of ESL dated 3 December 2007 (that is pre-dating execution of the Sub-contract) in which he stated:

> "Following latest information received we are advised that the corten rainscreen cavity requires fire protection at every floor level and vertically providing compartmentation at clusters of flats.
>
> We confirm that our system by default is providing vertical closure every 900mm with the carrier system, however there is still a requirement at every floor slab position horizontally."

56. Further, in an email dated 20 June 2008, shortly before the Subcontract was executed, ISA emailed various drawings to Downing stating that the fire barriers had been specified but not drawn in the tender package and providing a schematic drawing with what they described as "details designed by ESL". The documents therefore do not support ESL's case that WSP /ISA specified the fire breaks.

57. Further, not only were the fire cavities specifically required by the Architectural Specification but it comes as no surprise that they were also required by the Building Regulations which ESL was required to comply with and which I address further below.

58. *Secondly*, as to its scope of work, at paragraph 37(1) of its Amended Defence, ESL states that the EPDM (ethylene propylene diene monomer) membrane was omitted from the installation because of an instruction from Downing on 7 August 2007. However, there is no document referred to in the pleading to support this averment and no witness or other evidence has been provided by ESL in support of this aspect of its case. Downing's witnesses do give evidence that the design of the EPDM had to be revised during the installation of the cladding but insist that the design remained a matter for ESL. In the circumstances, there is no evidence to support ESL's case in relation to an alleged instruction to omit the EPDM membrane.

The Relevant Statutory Requirements

59. It was common ground between the parties that the Statutory Requirements included Regulation 4 of the Building Regulations 2000, which required the Works to be carried out so as to comply with the following functional requirements in Schedule 1 to those Regulations:

59.1 Requirement B3:

> "(1) The building shall be designed and constructed so that, in the event of fire, its stability will be maintained for a reasonable period.
>
> (2) …

> (3) To inhibit the spread of fire within the building, it shall be sub-divided with fire-resisting construction to an extent appropriate to the size and intended use of the building.
>
> (4) The building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited."

59.2 Requirement B4(1):

> "The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building."

59.3 Requirement C2:

> "The floors, walls and roof of the building shall adequately protect the building and people who use the building from harmful effects caused by:
>
> (a) ground moisture;
>
> (b) precipitation and wind-driven spray;
>
> (c) interstitial and surface condensation; and
>
> (d) spillage of water from or associated with sanitary fittings or fixed appliances."

60. Further, section 6 of the Building Act 1984 provides for the issue of approved documents which provide practical guidance for compliance with the Building Regulations requirements and by section 7(1) of the same Act proof of a failure to comply with an approved document may be relied upon in civil proceedings as tending to establish liability.

61. As regards Approved Documents, LDC relied on:

61.1 The provisions of Approved Document B 2000 (with 2002 amendments) (the "**ADB**") in relation to fire safety (including paragraphs 9.15, 9.22, 9.27 and 13.7 of that guidance); and

61.2 The provisions of Approved Document C 2004 ("the **ADC**") in relation to water ingress.

62. The ADB provides:

62.1 At paragraphs 9.15 and 9.22 for the provision of compartment walls or floors to form a complete fire barrier between compartments with appropriate fire resistance;

62.2 At paragraph 10.2 and Table 13 for the provision of cavity barriers;

62.3 At paragraph 13.7 that "the external envelope of a building should not provide a medium for fire spread if it is likely to be risk to health or safety"; and

62.4 At paragraph 9.27 that "where a compartment wall or compartment floor meets another compartment walls, or an external wall, the junction should maintain the fire resistance of the compartmentation"

63. Paragraphs 5.2, 5.17, 5.19 to 5.27 and 5.29 to 5.30 of the ADC provide several requirements for walls, cladding systems and other structures to resist water penetration. Paragraph 5.2 of ADC, which the Architectural Experts specifically relied upon in their Joint Statement, provides that:

> "Walls should: […]
>
> (c) resist the penetration of precipitation to components of the structure that might be damaged by moisture; and
>
> (d) resist the penetration of precipitation to the inside of the building; and
>
> […]
>
> (f) not promote surface condensation or mould growth given reasonable occupancy conditions."

64. There was no dispute that the various requirements of the Building Regulations relied upon by LDC were applicable to the Works. Rather, ESL's case was that the requirements provided no more than guidance and only required "adequate" resistance to the spread of fire or the passage of moisture. However, that could not help ESL in circumstances in which, as can be seen from the photographs, the external wall construction in issue allows extensive water ingress to components of the structure as well as the inside of the buildings and does not (according to the expert evidence) include adequate measures to inhibit the spread of fire. LDC and Downing's experts agreed that the design and installation of the cladding at the Property did not comply with the Building Regulations. Nor did ESL present any evidence to support its case that what had been installed at the Property was adequate be it either in relation to water ingress or the inhibition of fire spreading.

Breach of contract: The water ingress Issues

65. The issues are whether ESL was in breach of its Sub-contract obligations in respect of water ingress defects and, if so, whether those defects caused the losses claimed by LDC (Issue 3 of the List of Issues).

66. LDC's case was that defects in the design and/or construction of the external wall system on the composite cladding elevations led to water ingress. There were nine separate breaches relied upon by LDC. Photographs provided in Mr Barnes' expert report clearly evidence water staining in long vertical lines where the cladding panels were removed during the permanent remedial works. Photographs in the Atom Report dated 11 April 2017 show the severely degraded condition of some of the SIPs.

67. ESL denied each of the alleged breaches either on technical grounds or on the basis of compliance with the Building Regulations. However, prior to the Settlement, Mr Barnes and Mr Fung addressed each of the alleged breaches in their Joint Statement. They agreed that all but one of the matters complained of was a breach of the Building Regulations. In each instance, they considered that the breach was likely to have caused the water ingress issues, save for the use of the wrong material for staples affixed through the breather membrane. They identified three of the breaches as significant causes of water ingress. These are:

    67.1 The sealed composite cladding system design which Mr Fung described as "fundamentally flawed" in respect of watertightness;

    67.2 The design of the top hat insets at the joints between cladding panels; and

    67.3 The fitting of the metal flashings without seals or fixings.

68. There is no basis or other reason for me not to accept the architectural experts' joint statement that is clear and uncontradicted evidence of breach of ESL's Sub-contract obligations. This expert evidence, which I accept, clearly supports the conclusion that ESL were in breach of Article 1.5 of the Articles of Agreement and/or clause 5.1.1 of

the Sub-contract Conditions and/or of their obligation to exercise reasonable care and skill under clause 5.3.1 of Sub-contract Conditions in that:

68.1 ESL produced a design and/or installed the composite cladding external walls which did not meet paragraph 5.2 of ADC or Requirement C2 of Schedule 1 of the Building Regulations; and/or

68.2 ESL produced a design and/or installed the composite cladding which did not meet the requirements of paragraphs H43.1405 and/or H43.1411 of the Architectural Specification.

69. The failure in the design of the sealed composite cladding system and the design of the top hat inserts is also a breach of the requirement to choose materials suitable for their intended use under clause 4.7 of the Sub-contract Conditions and/or of the reasonable skill and care obligation imposed by clause 5.3.1 of the Sub-contract Conditions. The failure in respect of the fitting of the metal flashings without seals or fixings is a breach of ESL's workmanship obligations under clauses 4.1.2 and/or 4.1.4 of the Sub-contract Conditions.

70. It follows that ESL were in breach of clauses 2.1, 2.2.1, 2.2.2 and/or 2.2.3 of the ESL Collateral Warranty.

Breach of contract: The Fire Safety Defects

71. The issues are whether ESL was in breach of its Sub-contract obligations in respect of fire safety defects and, if so, whether those defects caused the losses claimed by LDC (Issue 4 of the List of Issues).

72. LDC's case is that defects in the design and/or construction of the external wall system on all elevations mean that the external walls are non-compliant with fire safety requirements in the Building Regulations and/or the Architects Specification. There are five separate breaches relied upon by LDC. ESL denies the alleged breaches either on technical grounds or on the basis that it complied with the Requirements of the Building Regulations.

73. The fire engineering experts for LDC and Downing have produced a Joint Statement in which they agree that the matters complained of by LDC constitute breaches of the relevant Building Regulations. Dr Cowlard, Downing's expert, does this on the assumption that the evidence bears out the existence of the defects as he did not personally inspect the Property and defects. Mr Lavender, LDC's expert on the other hand sets out in his report the evidence of the defects complained of following his site inspection, all of which supports LDC's claim. The defects which the fire engineering experts agree constitute a breach of the Building Regulations are:

73.1 The absence of vertical fire barriers;

73.2 The omission or poor installation of horizontal fire barriers;

73.3 The omission of fire stopping between the rear of the SIP panels and the concrete slab;

73.4 The use of Rockwool RW45A material for fire stopping which is not suitable to provide an effective fire barrier; and

73.5 The omission and/or inadequate installation of fire stopping between the SIPs.

74. The fire engineering experts further agreed that the Cor-ten cladding steel support system would not act as a cavity barrier. They also agreed that these were matters that needed to be remedied. No evidence was produced by ESL to the contrary. The fire

engineering experts' evidence, which I accept, clearly supports the conclusion that ESL's design and/or installation of the cladding was in breach of the fire safety requirements of the Building Regulations and the terms of the Architectural Specification and that these issues required remedial works.

75. Given the evidence of the fire engineering experts and the absence of any evidence challenging their joint conclusions, I accept LDC's case that ESL was in breach of Article 1.5 of the Sub-contract Articles of Agreement and/or clause 5.1.1 of the Sub-contract Conditions, ESL having failed to comply with the terms of the Main Contract and more particularly having failed when designing and/or installing the external walls to comply with:

    75.1 paragraphs 9.15, 9.22, 9.27, 10.2, and/or 13.7 of the ADB and/or Requirement B3 and/or B4 of Schedule 1 of the Building Regulations; and/or

    75.2 paragraphs H.92.1423, K10A.1410, and/or K10A.2208 of the Architects Specification.

76. ESL's failure to comply with the Requirements of the Building Regulations and the Architectural Specification also constitutes a breach of its obligation to exercise reasonable care and skill pursuant to clause 5.3.1 of the Sub-contract Conditions. Further, the omission and/or poor installation of horizontal fire barriers, of fire stopping between the SIPs and of fire stopping between the rear of the SIP panels and the concrete slab are also breaches of ESL's workmanship obligations under clauses 4.1.2 and 4.1.4 of the Sub-contract Conditions.

77. The use of unsuitable Rockwool RW45A material as fire stopping where it had been included was also a breach of the requirement to choose materials suitable for their intended use under clause 4.7 of the Sub-contract Conditions.

78. It follows that ESL were in breach of clauses 2.1, 2.2.1, 2.2.2 and/or 2.2.3 of the ESL Collateral Warranty.

The Remedial Works (Issues 5 to 8)

79. LDC pursued three claims in relation to the remedial works:

    79.1 *Firstly*, LDC claimed the incurred cost of certain temporary remedial works it undertook in 2018 upon being advised of a risk that because of the deterioration due to water ingress of the SIPs the cladding panels might detach themselves and fall; these works were referred to as the Temporary Remedial Works;

    79.2 *Secondly*, LDC claimed for the incurred costs of carrying out permanent remedial works to the Property in 2021/2022; these were referred to as the Permanent Remedial Works; and

    79.3 *Thirdly*, LDC claimed loss of student rental income during the period of the Permanent Remedial Works.

80. In its Amended Defence, ESL averred that LDC had failed to mitigate its loss and took issue with the reasonableness of the remedial works. It is therefore necessary to set out the key applicable legal principles.

81. Costs incurred are the starting point for an analysis of what is reasonable. As Coulson J stated in *Hall v Van Der Heiden* [2010] EWHC 586 (TCC) at paragraph 66:

> "the costs actually incurred will always be the starting point for an analysis of what is reasonable (particularly if, as here, they are the costs of work which the

> claimants carried out on advice) and, if there is no reason to justify a departure from the actual costs incurred, then they will be regarded as reasonable costs to be recovered as damages."

82. In determining whether a remedial scheme was reasonable, the Court will consider whether, and to what extent, the claimant relied on expert advice in deciding to carry out the remedial works at issue. Akenhead J summarised the relevant authorities in *Axa Insurance UK Plc v Cunningham Lindsey* [2007] EWHC 3023 (TCC), at paragraphs 267 to 270 of his judgment. The relevant principles are as follows:

    82.1 The question of whether advice of an expert, even if professionally reasonable, can convert expenditure into reasonable expenditure involves a consideration of the facts in any given case. If the advice of the expert is merely tangential or coincidental to the work the cost of which is recoverable as damages, the costs of the work carried out to that extent upon the expert's advice, will generally not be recoverable (paragraph 267 of the judgment).

    82.2 There must be some effective causal link between the incurrence of the expenditure upon the advice of the expert and the breach of contract (paragraph 267 of the judgment).

    82.3 If two remedial schemes are proposed to rectify a defect which is the result of the defendant's default, and one scheme is put in hand on expert advice, the defendant is liable for the costs of that built scheme, unless it could be said that the expert advice was negligent; albeit that to put in issue the reasonableness of a decision based on expert advice does not require conduct on the part of the expert amounting to professional negligence (paragraph 269, citing *McGlinn v Waltham Contractors (No. 3)* [2007] EWHC 149 (TCC), paragraph 827 of the judgement).

    82.4 Although reliance on an expert will always be a highly significant factor in any assessment of loss and damage, it will not on its own be enough, in every case, to prove that the claimant has acted reasonably (paragraph 269 of the judgment, again citing *McGlinn*).

83. When considering alternate remedial schemes, it is necessary to consider their cost, efficacy, and any guarantees or bonds offered by the relevant manufacturer or contractor: see *McGlinn v Waltham Contractors (No. 3)* [2007] EWHC 149 (TCC), paragraphs 793 and 794.

84. It is also well accepted that a claimant cannot recover for losses which it has failed to avoid because of its own unreasonable acts or omissions: *British Westinghouse Co v Underground Ry* [1912] AC 673, per Viscount Haldane LC at 689.

85. Further, the claimant is subject to a duty to mitigate his loss although the Court will not be too critical of his choices if made as a matter of urgency or on incomplete information. That point was made clear in *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC), by HHJ Stephen Davis who considered several of the authorities on the duty of the claimant to act reasonably to mitigate its losses and who went on to state at [302]:

> "[…] the touchstone is what is reasonable. […] if a claimant has to make a choice as a matter of urgency or on incomplete information then it is not surprising that the court will not be too critical of a decision to choose option A which, with hindsight, turns out to be more expensive than option B. In contrast, if the claimant chooses, for his own personal interests, option A rather than

> option B, knowing that option B was a reasonable alternative, then it is not surprising that the court will only allow him to recover the cost of option B."

86. Further, it is not of itself an answer to a claimant's claimed remedial scheme to demonstrate that the defects could have been rectified through an alternative scheme for a lower cost. ESL must demonstrate that the remedial scheme claimed for was unreasonable: see *St James's Oncology SPC Ltd v Lendlease Construction (Europe) Ltd and another* [2022] EWHC 2504 (TCC) (12 October 2022) at [316] per Joanna Smith J.

87. Finally, in relation to alleged betterment, where works of repair or reinstatement result in the claimant having a better or newer building than it would have had but for the wrong for which damages are claimed, a deduction from the damages awarded will not usually be made for betterment if the claimant has no reasonable choice (*Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447 CA). This includes betterment resulting from compliance with legislation introduced since the original works were carried out which requires additional or enhanced standards to be met.

The Temporary Remedial Works

88. LDC claims the cost of temporary remedial works following advice received by Thomason Partnership Limited ("**TPL**"), a firm of civil and structural engineers, that the fixings which secured the composite cladding to the Property could fail. This was because of the deterioration in the SIPs due to water ingress to which the fixings were attached. Notably, pull out tests undertaken in July 2018 showed 39 failures out of 39 tests undertaken. In August 2018, TPL recommended that urgent works be carried out. The temporary remedial works were carried out by Topek Southern Limited ("**TSL**") pursuant to a contract dated 29 August 2018. Mr Sorenti explains in his witness statement that TSL were briefed to re-fix all the SIPs on the composite cladding elevations to ensure that they would not detach from the buildings. TSL did this by bolting the Composite Cladding to the inner leaf of the building.

89. ESL alleges that LDC failed to mitigate its loss (paragraph 52 of the Amended Defence refers). *Firstly*, ESL avers that it was delay on the part of LDC in undertaking the remedial works in the period 2012 to 2018 that caused the water ingress issues to worsen. *Secondly*, ESL alleges that the nature of the temporary remedial works was unreasonable because they involved the insertion of coach bolts into the Composite Cladding making it impossible for the SIPs to be reused in any subsequent remedial scheme.

The alleged delay in undertaking remedial works

90. ESL alleges that the deterioration in the SIPs was due to ongoing water ingress issues which LDC failed to remedy in the period 2012 to 2018. ESL pleads that it was not aware of any complaint being made or received by it between November 2012 and September 2018. However, that is not borne out by the contemporaneous documentation that evidences the fact that ESL did receive complaints from LDC and was involved in remedial works in the period 2012 to 2018.

91. Following a Cladtech report highlighting issues with the rainscreen installation and the SIPs in March 2012, ESL carried out remedial works in 2012 and 2013. Whilst the extent of those remedial works is not clear, ESL provided a condition survey report

following its undertaking certain remedial works in March 2013. Some further remedial works were then undertaken and in an email dated 23 August 2013, Mr Evans (ESL's Group Contracts Director) reported to Downing's then Commercial Manager that he and a colleague had attended the Property that morning when they had inspected a number of rooms and concluded that "the remedial works carried out have been effective and there is no further issue". Mr Dean of Downing confirmed the fact that ESL undertook remedial works and that it was thought that "things had fixed themselves" at paragraph 14 of his witness statement.

92. However, by mid-2015, there were further meetings on site, and on 6 July 2015 Unite's Mr Abel wrote to ESL (including Mr Evans) identifying areas where there was further water ingress, or further remedial action required and referring to an agreement on the part of ESL to return to the site over the summer to "carry out a thorough investigation and repair and clean down as necessary".

93. However, the problem did not stop there and by mid September 2016, LDC were again writing to Downing and ESL asking them to come up with a permanent solution to continuing water ingress problems in respect of a number of windows. In an email dated 21 September 2016, Mr Corbett (a former defects manager with Unite) expressed his view that there was "a lack of DPM integrity around the window frames". The email chain evidences further remedial works being undertaken by ESL and/or its subcontractor, North Cheshire Windows ("NCW").

94. On 10 November 2016, Unite wrote a further email to ESL (Mr Evans) and NCW complaining that it was still awaiting an inspection of the façade and requesting urgent action and amongst other things, a "*firm commitment to evaluate the ongoing and long-standing ingress issues*". What then happened is not clear from the available documentation but by February 2017, LDC had instructed TPL to investigate the water ingress issues at Blocks 1, 2 and 3 Parkway Gate. TPL inspected certain of the panels, particularly on Block 1 and reported on 11 April 2017. They concluded that:

> "With the exception of panel (ii) on Block 2 where the OSB was found to be in reasonable condition, the remaining SIPS panels exposed were saturated to the extent that timber had started to break down and decay. At Block 1 and 3 wet rot (Coniophora puteana) propagation was evident."

95. TPL then returned to the Property on 18 April 2017 with Atom Engineering ("**Atom**") and Hemsec SIPs, the SIP manufacturer. Atom reported to TPL on the condition of the SIPs in a report dated 26 May 2017. They suggested that further inspection work be carried out as well as in-situ load testing of the SIPs and pull out tests on the screws embedded in the OSB sheathing (making up the SIPs) to determine whether these could withstand the design loading conditions. Atom also identified the absence of a ventilated cavity between the SIPs and the metal composite panels to the courtyard façade of Blocks 1, 2 and 3. There then followed several meetings to discuss the way forward.

96. In February 2018, an abseil survey was carried out to check cladding panel fixings with the intention of replacing missing fixings and securing any fixings that were found to be loose. Further investigations (reported on by TPL) then took place in April, June and July 2018. In July 2018, Design Fire Consultants attended at the Property.

97. TPL reported again on 1 August 2018 including results of the pull-out tests on the SIPs and recommended further inspections in relation to fire safety issues. The report concluded that "there are significant issues that require immediate attention with respect

to Blocks 1, 2 & 3. Two issues are of concern, i.e. the structural integrity and fire integrity of the three blocks". The report went on to state that:

> "Recommendations are now required to confirm the most economical way to either undertake extensive remedial treatment or replacement of the SIPs and external finishes to the courtyard façade at Block 1 & 2 and all façades to Block 3. Thomasons are in the process of preparing remedial options to minimise internal disruption to the building".

98. By way of summary, TPL reported the following:

> "1. The SIPs to the 3 courtyard elevations on Blocks 1, 2 and 3 and the remaining 3 elevations of block 3 all require extensive remedial treatment or replacement as they have failed structurally due to decay following water ingress. The lack of a ventilated cavity to maintain the OSB in these areas is due to poor design.
>
> 2. A scheme for replacement of the SIPs (see 1 above and possibly 6 below) requires further assessment together with trial repairs. This will also include a new façade i.e. cladding system to these areas, incorporating a ventilated cavity.
>
> 3. We would recommend that a full and detailed inspection of the glazed panels to Block 2 be commissioned as several issues were noted. Potential remedial works will also be subject to the findings of the fire integrity assessment.
>
> 4. The SIPs to the rear of the Cor-ten panels to Block 1 and the glazed panels to Block 2 were all noted to be in a reasonable condition at the locations inspected.
>
> 5. A full fire integrity assessment of the buildings is required, as set out in the DFC proposal. We are awaiting for further instruction in this matter.
>
> 6. As a consequence of the likely findings, conclusions and recommendations, following the assessment at item 5, significant works will be required i.e. the introduction of fire barriers and the replacement of combustible materials."

99. It is clear from the above review of the available documentation that LDC did take steps to investigate and address the water ingress issues starting with the Cladtech report in 2012. It is also clear that ESL carried out remedial works at various times and claimed that the issues had been resolved. However, it then appears that by late 2016 LDC were not obtaining the level of co-operation they required to progress matters and that they then turned to external consultants to undertake the numerous investigations that followed. That said, it does seem to me that there was a period between late May 2017 and June 2018 when more could have been done by LDC to advance the investigations and remedial works. However, ESL has not produced any evidence to suggest that any delays during that period impacted the scope of the required remedial works.

100. LDC also submitted that if anything, the cause of deterioration over time was ESL's failure adequately to address the water ingress issues when they were first notified of them in 2012 and well into 2016. I accept that that failure on the part of ESL was indeed a significant cause of the deterioration since they were given ample opportunity to address the issues but failed to do so.

101. It follows that any delay on the part of LDC in undertaking the required remedial works was at best limited to the period May 2017 to June 2018 and was not causative of the scope of the required remedial works.

The nature of the Temporary Remedial Works

102. As regards ESL's case that the temporary remedial works were unreasonable because they resulted in permanent damage to the SIPs preventing their re-use, I have concluded

that these works were not unreasonable. In their August 2018 report TPL advised LDC that the SIPs had been "significantly compromised … rendering them incapable of adequately supporting the composite stell panels and lateral wind loads. As a consequence of this, the steel cladding panels are inadequately supported and vulnerable to failure during moderate wind conditions". In those circumstances, it was clearly right for LDC to take immediate steps to undertake emergency repairs to prevent a failure. A failure that would have seen the panels falling off the building and which on any view would have been a significant hazard. Mr Sorenti explains at paragraphs 3.7 to 3.10 of his witness statement that as a result, Unite asked TSL, experienced site contractors who Unite were used to working with, to come up with a remedial solution. That solution involved bolting the cladding to the inner leaf of the building to ensure that the cladding would not fall off. No alternative remedial solution has been suggested by ESL as to how these urgent works should have been carried out and there is therefore no basis on which to conclude that they were unreasonable in the circumstances that pertained at the time. Further, the architectural experts have opined on this issue. They consider that alternative methods of securing the cladding would have been possible but jointly concluded that:

> "The risk of a composite panel falling would have posed an unacceptable risk to Unite and required an immediate robust failsafe solution … In view of the urgency of the safeguarding works, the TSL temporary works were reasonable."

103. There is therefore no basis for concluding that the Temporary Remedial Works were unreasonable or that TSL otherwise failed to mitigate its loss in relation to those works.

The Permanent Remedial Works

104. LDC implemented its permanent remedial scheme in mid-2021. The scheme involved:

104.1 The removal of the cladding on all elevations (including the glazed panels);

104.2 The removal of the SIPs;

104.3 The installation of proper fire barriers and fire stopping;

104.4 The substitution of the SIPs with a new Steel Framing System ("SFS");

104.5 The reinstatement of the existing Cor-ten steel panels;

104.6 The replacement of the Composite Cladding and Glazed panels; and

104.7 Making good of internal areas affected by water leaks or the remedial works themselves.

105. At paragraph 52 of its Amended Defence, ESL admitted that if there were fire stopping defects and it was responsible for those defects then the permanent remedial works then proposed by LDC were one means of rectifying those defects. ESL reserved the right to plead an alternative remedial scheme, if so advised, in due course but no such alternative scheme was then proposed by ESL. However, ESL did take issue with LDC's proposed Permanent Remedial Scheme to the extent that:

105.1 It averred that the Composite Cladding was replaced to comply with post-Grenfell enhanced Building Regulations and/or because of damage due to the Temporary Remedial Works rather than because of any defects in the original design and construction of the Composite Cladding (Issue 6);

105.2 It put LDC to proof that the substitution of the SIPs with an SFS system was required and/or reasonably necessary and did not constitute betterment (Issue 7); and

105.3 It denied that it was reasonably necessary to replace the glazed panel elevations (Issue 8).

Replacement of the Composite Cladding

106. There is no evidence to support ESL's allegation that the replacement of the Composite Cladding was unreasonable or that it was not required as a result of the defects in the original design and installation. The Composite Cladding had to come off the Property to address the water ingress issues and to instal adequate fire cavity barriers. As is pointed out by LDC, neither of the architectural experts criticise LDC for replacing the Composite Cladding panels and Downing's Defence admitted that those remedial works were reasonable. Further, since it was reasonable for LDC to undertake the Temporary Remedial Works in the way that these were undertaken it follows that to the extent, if any, that the Composite Cladding had to be replaced by reason of any damage done because of those works then it was reasonable to undertake that replacement as part of the Permanent Remedial Works.

The substitution of the SIPs with an SFS system

107. LDC's case is that the substitution of the SIPs with an SFS system was reasonably necessary and did not constitute betterment. In support of that submission LDC submitted that ESL had not put forward any positive case as to why the SIPs should not have been replaced as proposed or any alternative scheme and that the condition of the SIPs was such that they had to be replaced. At paragraph 11.4 of his expert report Mr Lavender (LDC's fire engineering expert) explained, and I accept, that the SIPs could not be replaced like for like because they did not comply with the revised Building Regulations 2010 (as amended) and in particular Regulation 7(2). Any upgrade to comply with the revised Building Regulations is not betterment in line with the approach of the Court in *Harbutt's Plastics*.

108. However, in the Architectural Experts' Joint Statement, Downing's architectural expert, Mr Fung states that in his opinion it was not reasonable to remove the SIPs and replace them with a different system on the Cor-ten and glazed elevations. Albeit that the way Mr Fung expressed his opinion was to say that "the requirement to replace the SIPs had not been demonstrated and in my opinion [sic] unreasonable". In Mr Fung's view it would have been possible to encapsulate the SIPs and reinstated them. This was as close as any party came to proposing an alternative remedial scheme. As it turns out, it is one that LDC considered and initially favoured. Mr Sorenti's unchallenged evidence is that encapsulating the SIPs was originally LDC's preferred option but that ultimately LDC decided against encapsulation on the expert advice it received at the time. The professional team which gave this advice included the construction managers, RGCM Limited, architects Hadfield Cawkwell Davidson Limited, structural engineers Tier Consulting, building control consultants Assent Building Control, and fire engineers Cahill Design Consultants. There is nothing to suggest that LDC did not act reasonably in following that advice.

109. Since there is nothing to suggest that it was unreasonable for LDC to follow the advice it received I need not go further. However, it is also the case that Mr Barnes, LDC's architectural expert disagrees with Mr Fung. Mr Barnes sets out several reasons why in his expert opinion the encapsulation of the SIPs with a cementitious board would

have given rise to several issues. In my judgment, Mr Barnes' criticisms of the encapsulation approach ring true. For instance, it must be right that the weight of the encapsulation (involving layers of boards to each side of the existing SIPs) would add substantial loading to the existing structure which the existing slab will not have been designed to withstand. Similarly, I see the force of Mr Barnes' view that it would be impractical to try to retrofit new mineral wool insulation to act as a cavity barrier at every junction between the SIPs. The very fact that in Mr Barnes' opinion the removal of the SIP panels behind the Cor-ten and glass façades was reasonable reinforces the conclusion that it was reasonable for LDC to follow the advice it was given in 2021.

110. It is also correct, as submitted by LDC, that neither Downing nor ESL have put forward a fully designed alternative remedial scheme. This has been noted by the quantum experts who make the point that no definitive alternative solution had been presented by the technical experts.

111. Further, Mr Fung whilst criticising LDC's approach states that "[h]owever, if the issue is whether the functional requirement of the Building Regulations is met then this is a matter for the fire experts". That is, as LDC submitted, crucial because the fire engineering experts' view was that there was insufficient evidence to explain how the encapsulation scheme would deliver the required fire resistance performance. In their joint statement, the fire engineering experts state that:

> "Considering the fire safety aspects alone, it is considered that based on the information available for the encapsulation remedial scheme, the evidence available has not adequately articulated how the scheme will deliver the requisite performance requirements as discussed above.
>
> On the assumption that the fire strategy defines what is required for a 'compliant' system, i.e. a system designed to the recommendations of Approved Document B (including compliance with Regulation 7(2)), there is sufficient information available for the removal and replacement remedial scheme to demonstrate that these recommendations (and requirement of Regulation 7(2)) have been met."

112. At paragraph 11.5 of his expert report, Mr Lavender (LDC's fire engineering expert) rejected the encapsulation solution as lacking the requisite detail to say whether it was reasonable from a fire engineering perspective and considered the removal and replacement scheme adopted by LDC as "*entirely reasonable*". There is nothing to suggest that Mr Lavender's approach is not correct and I therefore accept his evidence.

113. Lastly, it is instructive to look at the cost of the two schemes because they seem to be not dissimilar, always noting that there is much greater certainty as to the costs of the remedial scheme that was implemented than the encapsulation scheme that was not fully developed. There was very little between LDC and Downing's quantum experts in relation to the cost of the Permanent Remedial Scheme which they agreed to quantify at some £16.4 million. The Alternative Remedial Scheme, if one can call it that, was valued at £15.1 million by Mr Bradley and £17.3 million by Mr Jenkinson. I have little to go on to determine which of these valuations is the most accurate. However, both are inevitably somewhat speculative since there is no clearly specified Alternative Remedial Scheme. The midpoint between those two valuations, however, is £16.2 million. The obvious implication being that the Alternative Remedial Scheme is unlikely to have resulted in a significant reduction in cost as compared to the cost of the Permanent Remedial Scheme.

114. It follows that the substitution of the SIPs with a SFS system has not been shown by ESL to be unreasonable.

Replacement of the glazed panel elevations

115. No evidence has been presented by ESL to support its case that it was unreasonable for LDC to replace the glazed panel elevations.

116. The architect experts' Joint Statement records at paragraph 12(v):

> "If the SIPs are to be replaced due to the combustibility and/or fire resistance issue in item 9.1 above then the existing curtain walling, glazed panels and supporting frame, would require removal. Although curtain wall systems readily lend themselves for salvaging and reuse due to their fixing and component nature, the curtain wall may have to be replaced as it is likely to be uneconomical to salvage for reinstatement. Time required to salvage and clean, age and condition of the curtain wall and the availability of replacement parts would be key factors in any decision.
>
> The existing windows could potentially have been retained for reuse as part of a new base wall construction - depending on the time required to salvage and clean the windows. The age and condition of the windows and the availability of replacement parts would be key factors in any decision."

117. Mr Barnes explains the risks and difficulties with re-using the glazed panel system at paragraph 9.6.6 of his report. This includes issues with the fixtures and SIPs behind the glazed panels, as well as the risks that "*the glazing system of this age would not withstand being dismantled, stored, and then reinstated without affecting the integrity of the system. It would be very difficult for a subcontractor to provide a warranty for their work if removing and replacing the glazed panels*". Taking this and other factors into account he concluded that the replacement of the glazed panel system was reasonable.

118. Mr Fung on the other hand stated in the Joint Statement that:

> "If the SIPs are retained and the only issues are the missing or defective cavity barriers and the small areas of water ingress then it is not reasonable to remove and replace the glazed panels."

That, however, falls away given my finding that it was reasonable to replace the SIPs. Mr Fung did not in the Joint Statement contradict Mr Barnes' opinion as to the risks involved with dismantling the glazing system if it was reasonable to replace the SIPs. I therefore accept Mr Barnes' evidence that replacement of the glazed panel system was reasonable.

119. ESL's case to the effect that the Permanent Remedial Works were not reasonable has therefore not been proved and taking all the above facts and matters into account, I am satisfied that LDC acted reasonably in implementing the Permanent Remedial Scheme for which they now claim.

Quantum of the Remedial Works

120. Mr Jenkinson valued the Permanent Remedial Works at £16,485,119.31. Mr Bradley valued them at £16,430,532.42. LDC and Downing therefore took the sensible approach of agreeing the total cost of the Permanent Remedial Works (including the cost of the Temporary Remedial Works) at £16,457,825.87. ESL has made no positive case as to the value of the remedial works. However, I agree with LDC that it is reasonable to assume that any quantum expert instructed by ESL would have come up with a figure similar to those presented by Mr Bradley and Mr Jenkinson. I therefore accept the

quantification of the cost of the Permanent Remedial Works, including the cost of the Temporary Remedial Works, as totalling £16,457,825.87 based on the expert evidence of Messrs. Bradley and Jenkinson.

Loss of profit

121. LDC claims loss of the rental income it would have received from student lettings for the 2021/2022 academic year, less its saved costs, in the sum of £4,694,373. The calculation is based on income from the 2019/2020 academic year. At paragraph 54 of the Defence, ESL put LDC to proof in respect of the claim and did not admit:

    121.1 *Firstly*, the likely duration of the remedial works. This, however, is now a matter of record, the Permanent Remedial Works having taken a year to complete and there is nothing to suggest that the works could have been completed in a shorter time frame.

    121.2 *Secondly*, the need to decant students from the Property. Mr Sorenti's unchallenged evidence was that the need to remove the SIPs meant that students could not remain living in the blocks. Consideration was given to the possibility of works being undertaken on one block at a time but Mr Sorenti's evidence was that this would have involved complex logistics, a 2-year programme and disruption payments to those living in the other blocks. Mr Sorenti's evidence, which I accept, was that "this option would have had a bigger impact on rents and reputation".

    121.3 *Thirdly*, the loss of rental income, including the projected income for 2021/2022, the rental income and the operating costs. These matters are addressed in detail in Mr Boehm's witness statement on behalf of LDC. Mr Boehm is a Chartered Management Accountant and currently Unite Integrated Solutions Plc.'s Finance Analyst and Finance Manager. Mr Boehm explains in detail how the projected income for 2021/2022 was based on the income for the Property in 2019/2020 and how he calculated both the saved costs and those incurred in any event using the relevant data from the Unite Group's Students finance reporting system. The rental income for 2019/2020 is based on the actual bookings for that academic year. For the period 2019/2020 the total rental income generated by the actual room bookings was shown to be £5,391,003. From this falls to be deducted costs savings of £696,630 (taken from Mr Boehm's detailed cost savings calculations) leaving a balance of £4,694,373. Mr Boehm's evidence was unchallenged and seeing nothing to contradict it, I accept his evidence.

122. The quantification of LDC's loss of rental net of the saved costs as a result of having to undertake the Permanent Remedial Works is therefore the sum of £4,694,373.

123. Lastly, at paragraph 7 of its Defence, ESL put LDC to proof that it was the appropriate Claimant and to demonstrate that according to its lease of the Property it, rather than Unite, was responsible for the remedial works (Issue 10). LDC relied in this regard on the witness evidence of Mr Holmes, an accountant working at Unite as Group Reporting Manager. Mr Holmes' witness statement explains that LDC is the freeholder of the Property, that the Leasehold owner is Unite Accommodation Management One Hundred Limited ("**UAM**") and that it is UAM that contracts with students to lease the rooms. Mr Holmes' also explains that the operational costs are incurred by Unite Integrated Solutions Plc ("**UIS**") as agent for UAM and that UIS then recharges those costs to UAM. UAM then deducts the operating costs from the rent it receives, and pays the net operating

income as turnover rent to LDC. Capital costs are also incurred by UIS but then recharged directly to LDC. The costs of the remedial works and the lost rental income were therefore losses incurred by LDC.

124. LDC's total loss recoverable against ESL is therefore:

Claim	**Amount**
Cost of remedial works	£16,457,825.87
Loss of Income	£4,694,373.00
Total	**£21,152,198.87**

125. LDC claims interest on its losses from the mid-point on which those losses were incurred being 25 January 2022. It seeks interest at a rate of 3% above the Bank of England Base Rate. I consider that a rate of 2% above the Bank of England Base Rate payable from 25 January 2022 until the date of the Order to be reasonable. However, account also needs to be taken for the purposes of the Order of the fact that Downing has agreed to pay LDC £17,650,000 in full and final settlement of LDC's claims in respect of the same matters the subject of LDC's claim against ESL.

Downing's Contribution Claim against ESL

126. Having agreed to pay LDC the sum of £17,650,000 in full and final settlement of LDC's claims made against it in these proceedings, including the principal sum, interest and LDC's costs, Downing has brought a contribution claim against ESL seeking to pass down the entirety of its liability to LDC as damages for breach of contract and/or recovery of a contractual indemnity and/or of a full contribution amounting to an indemnity under the Civil Liability (Contribution) Act 1978. Downing seeks to recover against ESL the sum of £17,650,000 plus its reasonable costs of defending the claim made against it by LDC, those costs to be assessed. ESL and its liquidator have been kept fully informed of Downing's claim.

127. Downing made no admissions at trial as to its own breaches of the Main Contract but adopted LDC's submissions in respect of ESL's breaches of the Sub-contract. In addition to Articles 1.1, 1.5 and 1.6 of the Sub-contract Articles of Agreement and clause 5.1.1 of the Sub-contract Conditions by which ESL undertook in short to execute the Sub-contract Works in accordance with the provisions of the Main Contract, and which are set out above, Downing relied on clause 5.1.2 of the Sub-contract Conditions by which ESL agreed to "indemnify and save harmless [Downing] from":

> ".1 any breach, non-observance or non-performance by [ESL] … of any of the provisions of the Main Contract insofar as they relate and apply to the Sub-contract; and
>
> .2 any act or omission of [ESL] … which involves [Downing] in any liability to [LDC] under the provisions of the Main Contract insofar as they relate and apply to the Sub-contract; and
>
> .3 any claim, damage, loss or expense due to or resulting from negligence or breach of duty on the part of [ESL]…."

128. It follows that Downing is entitled to an indemnity from ESL in respect of Downing's liability to LDC arising out of ESL's breaches of the terms of the Sub-contract and non-observance of the terms of the Main Contract as applied pursuant to the Sub-contract.

The defects resulted from breaches of the Sub-contract for the reasons I have already given which in turn put Downing in breach of its obligations under the Main Contract and those same breaches resulted in breaches of both the Downing and the ESL Collateral Warranties. Further, since a claim for damages by LDC against Downing based on breaches on the part of ESL of the Sub-contract was within the parties' reasonable contemplation (as is evidenced by the terms of the Sub-contract themselves) so was it reasonably foreseeable that Downing might settle a claim brought against it by LDC. I also accept Downing's submission to the effect that this is not a case in which any issues of apportionment arise since Downing passed on all its design and construction obligations in respect of the cladding under the Main Contract to ESL under the Sub-contract.

129. ESL raised a number of potential grounds of defence in its Defence to Downing's Contribution Notice:

129.1 *Firstly*, ESL repeated its averment that its obligations under the Sub-contract were limited to a duty to exercise the reasonable skill and care to be expected of a professional designer and that at all material times it exercised the requisite standard of skill and care;

129.2 *Secondly*, ESL averred that it was not liable to LDC for the same damage or at all and that accordingly Downing had no cause of action against it; alternatively, that it would not be just and equitable for Downing to receive any contribution from ESL on the grounds that Downing's own acts were more causally potent and morally blameworthy than those of ESL. The alleged acts of Downing relied upon by ESL being:

129.2.1 That Downing elected to omit the VCL causing or materially contributing to condensation within the blocks;

129.2.2 That Downing instructed the omission of the EPDM membrane following an inspection on 7 August 2007 and instructed the replacement with a metal flashing fixed to the windows; and

129.2.3 That Downing was responsible for and engaged WSP as its fire engineer to specify the fire breaks (the instructions for which were confirmed by ESL in its communications dated 21 August and 3 December 2007).

130. I have no hesitation in dismissing ESL's defence to Downing's indemnity claim. ESL's obligations under the Sub-contract were not limited to the exercise of reasonable skill and care for the reasons I have already given. Further, as regards any issue of apportionment:

130.1 The expert architects agree that not only was there "no evidence that a [vapour control layer] was omitted" but that it was "not omitted"; there is therefore no factual basis for the allegation that Downing elected to omit the VCL causing or materially contributing to condensation within the blocks. No evidence has been filed by ESL in support of its averment.

130.2 Similarly, the evidence does not support a finding that Downing instructed the omission of the EPDM membrane. There were some issues with the EPDM where it overlapped affecting the cladding alignment during construction. However, Mr Thomas categorically denied that any such instruction was given by Downing to ESL. I have no reason not to accept Mr Thomas' evidence particularly in circumstances in which no evidence be it in the form of a written instruction, minute of meeting or any other document has been produced by

ESL to support its case that an instruction was given by Downing to omit the EPDM membrane.

130.3 For the reasons already given I have concluded that responsibility for the design of the fire breaks was and remained with ESL throughout.

131. As was stated by Edwards-Stuart J in *Fluor v Shanghai Zhenhua Heavy Industry Co Ltd* [2018] EWHC 1 (TCC), at [465]: "It is settled law that, in principle, C can recover from a contract breaker, B, sums that it has paid to A in settlement of a claim made by A against C in respect of loss caused by B's breach of its contract with C" as long as the settlement is objectively reasonable. Therefore the only issues that arise are:

131.1 Whether the Settlement sum was reasonable (Issues 11 and 12.1 in the List of Issues); and

131.2 Whether, for the purposes of the contribution claim, the claim is for the same damage as that for which LDC sued Downing (Issues 12.2 of the List of Issues).

132. As regards the latter issue, there is no need for Downing to make good a claim under the Civil Liability (Contribution) Act 1978 given its contractual right to an indemnity from ESL. However, had it needed to then it is plain that the settlement compromised claims for the same damage as ESL is liable for to LDC not least given the back-to-back obligations under the Sub-contract and the Main Contract relied upon by LDC.

Was the settlement reasonable?

133. It is evident that Downing was right to settle LDC's claim and that they did so for a reasonable amount. *Firstly*, it is obvious given my conclusions in respect of LDC's claim against ESL that the claim brought by LDC against Downing under the Main Contract and the Downing Collateral Warranty not only had substance but that it would most probably have succeeded and that Downing were therefore right to settle it. *Secondly*, as regards the amount of the Settlement and the applicable principles, I need go no further than cite Ramsay J's summary of those principles in *Siemens Building Technologies FE Limited v Supershield Ltd* [2009] EWHC 927 (TCC) at [80(5)-(6)] (upheld by the Court of Appeal at [2010] EWCA Civ 7):

> "The test of whether the amount paid in settlement was reasonable is whether the settlement was, in all the circumstances, within the range of settlements which reasonable people in the position of the settling party might have made. Such circumstances will generally include:
>
> (a) The strength of the claim;
> (b) Whether the settlement was the result of legal advice;
> (c) The uncertainties and expenses of litigation;
> (d) The benefits of settling the case rather than disputing it.
>
> …
>
> The question of whether a settlement was reasonable is to be assessed at the date of the settlement when necessarily the issues between A and B remained unresolved."

134. Whilst Downing settled LDC's claim with no admission as to liability, the evidence as to the existence of the alleged defects and breaches relied upon by LDC against ESL is substantially the same evidence as LDC would have relied upon at trial against Downing. Further, the strength of LDC's position against Downing at the time the Settlement was entered into could be seen from Downing's expert evidence and the joint statements of both the architecture and fire engineering experts. Given the joint quantum expert evidence in respect of the cost of the remedial works which they jointly

agreed to value at £16,457,826, the settlement sum of £17,650,000, including interest and a contribution towards LDC's costs was clearly reasonable. Indeed, it in effect provided a discount of some £4 million in respect of LDC's claim for £21,152,199.

135. Whilst not waiving privilege, Downing also confirmed that the Settlement was the result of legal advice received from both its solicitors and leading counsel. To that falls to be added the fact that the Settlement saved Downing the costs of a trial and the possibility that the claim might increase as a result of an issue (at the time of the Settlement) as to whether VAT would fall to be added to the remedial works figure of £16,430,532. There can be no doubt in my judgment that the amount of the settlement fell within the range of a reasonable settlement sum given the merits of LDC's case and the sums in issue.

136. Since Downing are entitled to a full indemnity from ESL in respect of the settlement sum, they are also entitled to recover their reasonable costs of defending the claim brought against them by LDC from ESL. As the Court held in *Biggin v Permanite* [1951] 2 KB 314, 325 "if the settlement was a reasonable one, the damages will be the amount of the settlement and the costs reasonably incurred".

137. Lastly, it follows that ESL's claim for a contribution and/or indemnity from Downing falls to be struck out and for ESL to pay the costs of that claim.

The form of Order

138. Following the trial I was provided with a draft form of Order by LDC and Downing's counsel which I have amended and which I will finalise once I have received the parties comments on that revised draft.