Neutral Citation Number: [2022] EWHC 333 (TCC)

Case No: HT-2019-000342

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2022

Before :

RECORDER ANDREW SINGER QC
(sitting as a Judge of the Technology and Construction Court)

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Between :

(1) GAVIN STRUTHERS	**Claimant**
(2) STACEY STRUTHERS	
- and -	
(1) ALASTAIR DAVIES	**Defendant**
(trading as "ALASTAIR DAVIES BUILDING")	
(2) DESIGN-CUBED LIMITED	

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Mr Hugh Saunders (instructed by **Devonshires Solicitors LLP**) for the **Claimants**
Ms Hannah McCarthy (instructed by **Gateley Legal PLC**) for the **First Defendant**

Hearing dates: **23rd, 24th, 25th November, 14th, 15th December 2021**

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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.

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RECORDER ANDREW SINGER QC :

(1) Introduction

1. This is the trial of a claim brought by the Claimants (Mr and Mrs Struthers) originally against both their former Building Contractor, the First Defendant, and their Architects/Contract Administrator as Second Defendant arising out of building works at the Claimants' home, Rosemead Cottage, 109 Hookfield, Epsom, Surrey KT19 8JH ("the Property"). The claim against the Second Defendant was settled in July 2021. The Claimants seek damages for defective work said to have been carried out by the First Defendant. They also claim for the cost of completing works consequent on the termination of the First Defendant's contract in January 2016. It is accepted that the claim for incomplete work can only be brought at all if the First Defendant's contract was terminated lawfully.

2. The Claimants and the First Defendant were the only factual witnesses called before me. There was a witness statement from the Second Defendant's Mr Barnard in the trial bundle, but he was not called. In addition, each party relied upon expert evidence as to liability and quantum. That was given by Mr Rushton for the Claimants and Mr Milnes for the First Defendant.

3. After the pre-trial review which I heard, the parties helpfully agreed a list of issues for the trial. They are as set out in the next section of this Judgment.

4. Mr Hugh Saunders appeared for the Claimants and Ms Hannah McCarthy for the First Defendant. I am grateful to them both for their helpful and comprehensive written and oral opening and closing submissions. I have taken them all into account in reaching my Judgment. I do not deal in this Judgment with every point raised, but that should not be taken as meaning that I have not considered them all; simply that I do not regard it as necessary for them all to be set out in this Judgment.

(2) The Issues

5. The list of agreed issues is as follows:

   As to the Building Contract agreed between the parties on or around 31 March 2015, what were or was the agreed:

   (a) Contract drawings?

   (b) Pricing document?

   (c) Specification?

   (d) Payment terms?

   Were the terms contained within the Building Contract varied by agreement and/or the conduct of the parties?

   For each defect alleged:

(a) Does the defect exist?

(b) Was the work within the scope of First Defendant's works under the Building Contract (either when the Contract was made or as subsequently varied by the Claimants and/or the Contract Administrator)?

(c) If so, was the work carried out by the First Defendant in accordance with the terms of the Building Contract?

(d) If not, did the First Defendant carry out the work? If so, on what basis?

(e) What work is necessary to rectify the defect?

(f) What is the cost of rectifying the defect?

For each alleged item of incomplete work:

(a) Was the work within the scope of the First Defendant's works under the Building Contract (either when the Contract was made or as subsequently varied by the Claimants and/or the Contract Administrator)?

(b) Was the First Defendant prevented from (a) carrying out the works; and/or (b) completing the works by matters that were not the First Defendant's responsibility under the Building Contract? Does that matter in view of the contract terms agreed between the parties?

(c) What work is necessary to complete this item?

(d) What is the cost of completing this item?

Were the Claimants entitled to terminate the Building Contract? If so, did the Claimants validly terminate the Contract (either in accordance with its terms or at common law)?

What consequential losses if any are the Claimants entitled to recover?

What (if any) credit should be given against the Claimants' claim in respect of sums which would have had to be paid to the First Defendant? Is there any evidence in support of such sums?

6. The parties have also agreed four matters:

(i) The Claimants are the owners and occupiers of the Property;

(ii) The First Defendant is a sole trader and Building Contractor;

(iii) The Second Defendant is an Architectural and Design Company which has already settled with the Claimants in this matter; and

(iv) The Claimants and the First Defendant entered into a Building Contract on or around 31st March 2015.

(3) General comments on the parties' factual and expert evidence

7. Before reaching specific findings in section (4) of my Judgment, I set out my general views on the factual witnesses and respective experts.

8. The Second Claimant was not cross-examined at all and I accept the evidence in her witness statement in its entirety.

9. The First Claimant was on the whole a reliable witness in my judgment. He was out of the country working for large parts of the relevant history but was given details of what was and was not happening at the Property by his wife, the Second Claimant. He did have a tendency to summarise documents a little inaccurately. For example, his evidence at Paragraph 45(vi) did not quite say the same as the email dated 16.9.2015 and nor is his evidence at Paragraph 24(e)(iii) borne out by the contemporary documents. However, his evidence was certainly not deliberately overstated or in any way seeking to mislead, in my judgment, and large parts of his detailed witness and oral evidence did wholly coincide with the contemporary documentation. Further, he struck me as being significantly better as a historian than did the First Defendant. In particular, I was impressed by his evidence of payments made to the First Defendant and the reasons why such payments were made even absent any invoice from the First Defendant and when in the Claimants' view the First Defendant was in serious delay.

10. In contrast, the First Defendant's witness statement was lacking in any real particularity and in his oral evidence he was clearly at times unable to remember any of the detail of his work at the Claimants' property. He was clearly deeply suspicious of the Claimants' motives, particularly after mid-August 2015 when the First Defendant instructed the large rear bifold windows to be removed from the site. In my judgment, that episode coloured his attitude to the Claimants going forward until his contract was terminated. In addition, his evidence that the First Claimant affected his order for steelwork was untrue, not least because the First Claimant was not in the United Kingdom at the time. As a general proposition, whenever his evidence conflicts with that of the First Claimant, I prefer the First Claimant's evidence.

11. The parties' respective expert evidence is key to determination of this case because the majority of the issues between the parties as to the existence and extent of defects and incomplete works including the quantum attaching to the same required expert input and comment. I have made individual findings on the existence/extent of defects and remedial costs and as to the extent of incomplete works and the cost of completion within Appendix A to this Judgment. I have also dealt with some of the more significant issues of principle, in particular whether it was necessary or not for the Claimants to demolish the extension built by the First Defendant and reconstruct the foundations and structures, in section (4) at Paragraphs 24 to 32 below.

12. It will be apparent from my findings that I have preferred the opinion and evidence of Mr Rushton over that of Mr Milnes in all cases where they disagree either as to liability or quantum issues. In brief, my reasons for doing so are, first, that Mr Rushton had the benefit of visiting the Property three times before and during the remedial works carried out by Trucraft who were employed by the Claimants after the First Defendant's involvement had ceased. On his visit in April 2016, Mr Rushton saw the uncovering of the foundations built by the First Defendant. By contrast, Mr Milnes had no opportunity to visit the site and his views as to the extent of defects were largely derived from viewing site photographs provided to him. Whilst that is of course not determinative, nevertheless I do find that Mr Rushton's views of the existence/extent

of defects are inherently more reliable because of his first-hand knowledge of the state of the works in early 2016 and following. Second, whilst Mr Rushton was prepared to comment on and consider Mr Milnes' views in his evidence before me, surprisingly Mr Milnes was not prepared to discuss the views of his opposite number notwithstanding that his role as an independent expert assisting the Court clearly involves that task. I am unwilling to characterise Mr Milnes' evidence as evasive, but it was at times positively unhelpful and throughout it was lacking in persuasive weight. Third, Mr Milnes was at one stage prepared to suggest that the absence of foundations from some photographs of the work in the extension was because an unknown third party had removed them. This unheralded and unsupported allegation was made in his oral evidence and had not been put to Mr Rushton in his cross-examination. Fourth, when considering the role of Building Control Officers in inspecting the First Defendant's work, Mr Milnes relied solely on an email from Mr Barilli in October 2016 but he had either ignored or had not read that from Mr Hill, even going so far as to suggest that Mr Hill might not be a Building Control Officer at all and that the report might not be Mr Hill's own view. These suggestions cast considerable doubt on Mr Milnes' impartiality and views. Fifth, Mr Milnes' calculations as to the quantum of items claimed were less than transparent and derived either from price book items or in a significant number of cases from Mr Milnes' attempts to seek to rely on figures discussed in without prejudice meetings. By contrast, Mr Rushton's figures were all clearly set out in his Appendix 4 and supported by objectively supportable reasoning and Mr Rushton's own expertise. I was further not satisfied that Mr Milnes had taken sufficient care in preparing his report to the Court compared with the clearly careful and reasoned approach of Mr Rushton.

(4) Discussions and decisions on the issues

13. This section of my Judgment will identify factual findings I have made with any reasons for so finding where appropriate. I also set out my decisions on any contentious issues of legal principle between the parties, again with reasoning where appropriate.

The Building Contract

14. The parties agree that they entered into a Building Contract on or around 31st March 2015. The background to the negotiations between the parties is, in my judgment, not relevant to any issues of interpretation of the Building Contract, but I do note that it was accepted by the First Defendant that this project was the first of its type that he had undertaken and that he was keen to expand his portfolio of work when approached about carrying out this project.

15. The Contract as signed by the First Defendant is at E1/E190.1-5 in the Bundle. Whereas the Contract signed by the First Claimant on his and his wife's behalf is not completely identical to that, it is identical so far as the "Contract Details" are concerned and I am satisfied (it not being disputed) that the following are express terms of the RIBA Building Contract.

16. Clause 1 provided:

> "1.1. The Contractor shall:
>
> 1.1.1. start the Works on the Start Date;

1.1.2. carry out the Works regularly, diligently and in a good and workmanlike manner to ensure that they are completed properly in accordance with the Contract and all statutory requirements by the Date for Completion ..."

Clause 2 provided:

"2.1. The Customer shall allow the Contractor reasonable access to the site for the following purposes …

2.1.2. carrying out the works.

2.2. The Customer has appointed the Architect/Contract Administrator and may replace it by informing the Contractor of the replacement and the date the replacement takes effect."

Clause 5 provides so far as relevant:

"5.4. The Architect/Contract Administrator may issue the following instructions:

5.4.1. Change to Work Instructions …

5.4.7. instruction requiring further documents …

5.6. All instructions from the Architect/Contract Administrator shall be in writing. The Contractor shall comply with instructions immediately …

5.9. Within 10 days of receiving a change to Works Instruction the Contractor shall calculate the effect (if any) of the instruction on the Contract Price and/or the Date for Completion and shall submit details to the Architect/Contract Administrator. After this period the right to a Revision of Time and additional payment will be lost."

Clause 7 provided:

"7.1. At the frequency specified in Item (O) of the Contract Details the Architect/Contract Administrator shall issue the Parties with a Payment Certificate …

7.3.1. the Contractor shall issue the Customer with an invoice based on the Payment Certificate;

7.3.2. the Customer shall pay the invoice within 14 days of receipt."

Item (O) under the heading "Payment Certificate Frequency" provided:

"Invoices to be raised by the Contractor on Payment Dates. The invoice to be submitted by the Contractor must include a full breakdown of costs spent to date and a copy of all receipts for goods purchased on behalf of the client together with a running summary against the overall Contract Sum."

Clause 8 provided for the Contractor's right to suspend. The Contractor did not purport to operate that right during the course of his works at the Property.

Clause 9 provides:

> "9.9. The Contractor may apply (with supporting documentation) for a revision of time if the works are delayed by any of the following:
>
> 9.9.1. the Architect/Contract Administrator issues a Change to Works Instruction …
>
> 9.9.3. the Customer or its agents cause delay or disruption …
>
> 9.9.6. the Architect/Contract Administrator issues an Instruction resolving an inconsistency unless the inconsistency is due to a document prepared by the Contractor …
>
> 9.9.8. the Contractor suspends some or all of its duties …
>
> 9.9.11. the Customer's risks (including errors in the design prepared by the Customer: see Clause 9.1.2) …
>
> 9.10.1. if the event is a single event the Contractor shall apply for the Revision of Time within 10 days of the event ending;
>
> 9.10.2. if the event is a continuing event the Contractor shall inform the Architect/Contract Administrator of the event within 10 days of its commencing and shall apply for:
>
> (a) revision of Time (with supporting documentation) within 10 days of the last element of the event …
>
> 9.10.3. if the Contractor fails to apply within these periods it will lose the right to a Revision of Time …
>
> 9.13. If an event attributable to the Customer or its agents adds costs and expenses to the Works the Contractor may apply for an adjustment to the Contract Price …
>
> 9.13.2. if the event is a continuing event the Contractor shall inform the Architect/Contract Administrator of the event within 10 days of it commencing and shall apply for the additional payment (with supporting documentation) within 10 days of the last element of the event;
>
> 9.13.2. if the Contractor fails to adhere to these time periods the right to the additional payment will be lost"

Item (Y) of the Contract Details also applied by Optional Clause A9. That provides:

> "If a Revision of Time and/or a request for an additional payment are submitted these will be assessed via a Change Order.
>
> Change Orders must be completed with the following information:
>
> Description of the proposed change;

> Reason for the proposed change (client request, instruction from Building Control etc);
>
> Time impact of the proposed change to the building programme in days;
>
> Cost impact of the proposed change to the works - £+/-.
>
> Additional payments will only be approved if a Change Order has been submitted prior to the additional works or change has been carried out. Once completed and issued Change Orders must be approved or rejected within 7 days of this in order to avoid secondary impact for the project programme."

Clause 11.9 provides:

> "Any change to the Contract that the parties agree shall be written down and signed by both parties."

Clause 12.3 provides that:

> "If the Contractor:
>
> 12.3.1. abandons the Works;
>
> 12.3.2. fails to proceed regularly and diligently;
>
> 12.3.3. consistently fails to comply with instructions;
>
> 12.3.4. is in material breach of the Contract;
>
> 12.3.5 then the Architect/Contract Administrator may issue the Contractor with a Notice of Intention to Terminate referring to this clause and stating the reason.
>
> 12.4. If the Contractor has not remedied the default within 14 days of receiving the Notice the Customer may end the Contractor's employment under the Contract by issuing a Notice of Termination."

The Start Date under the Contract was 30th March 2015 and the Date for Completion was 10th August. Liquidated damages were set out in Item (I) at £75 per day and noted to be:

> "assessed as the cost of providing overnight accommodation off-site for a family of four in rented accommodation."

The Contract Documents in Item (F) were identified as:

> "Drawings, Design Cube Contract Pack March 2015.
>
> Pricing Documents, Outline Specification and Tender Price Rev.B March 2015.
>
> Specification noted on Contract Pack Drawings."

17. As can be seen from the express terms I have set out, the Building Contract provides expressly for the basis on which changes are to be made to the scope of Works to be

carried out under the Building Contract and as to the entitlement to claim extensions of time and any additional payment arising out of any instructions or failure to provide instructions. It is also clear from Item (R) of the Contract Details that the First Defendant had responsibility for the detailed design of steelwork and fabrication.

18. The "Design Cube Contract Pack" identified on the Building Contract has not been produced in these proceedings and its contents are not particularised in the Particulars of Claim. As at 31st March 2015 it is common ground that the Contract Drawings were incomplete and/or subject to further revisions/updating. That said, there were Contract Drawings in existence and in the First Defendant's possession as at 31st March 2015 on the basis of which the specification and the First Defendant's price had been produced and the work had commenced on 30th March 2015. Those drawings included incomplete VKHP drawings of "The initial Structural Engineer's information and drawings" which Mr Rushton accurately describes when he says that they "Do not show specific construction details leaving them open to the builder to decide or to request further details." Further drawings were provided during the course of the First Defendant's work and the First Defendant had them when carrying out his work. It cannot be seriously contended that the further drawings were not Contract Drawings in the sense that the First Defendant was entitled to ignore them. Nor does the First Defendant contend that that is the position and he did not seek to suggest otherwise in his oral evidence. The First Defendant has argued in written Submissions that the Contract Drawings fall foul of Clauses 5.4 and 11.9 of the Building Contract. I do not agree. It is customary practice for later versions of contract drawings to be supplied to a contractor whilst works are progressing and for those to be accepted as contract drawings and documents, and that is precisely what happened in fact in this case. The drawings are of course written documents and are in my judgment properly said to be a "Change to Works Instruction". In reality, the precise contractual status of drawings issued after 31st March 2015 is of academic interest because, as I have already noted, the First Defendant accepted that he was in possession of completed/varied drawings before he carried out the work. Further, the terms of the Building Contract do not bar a variation to the scope of the Works even if not in writing. What is subject to a bar is a change to the Contract's terms which is not the effect of a revised or updated drawing. In addition, even if the First Defendant was carrying out work without full or completed drawings which had the status of being Contract Drawings then as a competent Contractor he ought, I am satisfied, to have questioned the work to be provided rather than simply carrying on. In addition, in his cross-examination the First Defendant accepted that if drawings which he relied on contained errors, that was "down to him." Further, to the extent that the First Defendant seeks to rely on individual issues with drawings received in Appendix A, I address those points there where appropriate. In summary, I do accept that all drawings received whilst the First Defendant was at the Property had the contractual status of being Contract Documents and/or documents that the First Defendant was obliged to follow or at the very least to consider and raise any questions with the Architect/Contract Administrator if he had occasion as a responsible Contractor to consider that the instructions were unclear.

19. The Pricing Document is the document which appears with the Second Defendant's email to the Claimants dated 26th March 2015, as accepted by both parties.

20. The Specification is the document at Bundle H/H1. The extent to which the Specification is in itself relevant is very modest indeed.

21. The Payment Terms were those contained in the Building Contract at Item (O) subject to the agreed advance payment of £10,000. The Contract Price was £150,000 + VAT.

Were the Building Contract's terms varied?

22. The First Defendant has sought to argue that the Building Contract terms were varied by agreement and/or conduct in respect of his design obligations and payment provisions and the Completion Date. So far as the argument as to variation of the payment provisions is concerned, it was made clear during opening oral submissions that that matter was not to be pursued on the basis that it had not been pleaded or properly addressed in the parties' witness statements. I agree that that matter does not properly form part of the issues before me.

23. Mr Saunders submits that all these arguments are doomed to fail because of the effect of Clause 11.9 of the Building Contract and applying the decision of the majority of the Supreme Court in ***MWB Business Exchange Ltd v. Rock Advertising Ltd*** **[2018] UKSC 24**. In her written Closing Submissions Ms McCarthy refers to the dissenting judgment of Lord Briggs and the possibility of the parties agreeing orally to remove a non-oral modification clause. However, in this case there is no suggestion or evidence at all that the parties agreed to remove or waive Clause 11.9. Further, whilst of course the views of a Justice of the Supreme Court must be given due weight, nevertheless those dissenting views cannot override the clear views of the majority of the Supreme Court in the ***Rock Advertising*** case whose decision is clearly authority to the effect for which Mr Saunders contends. It follows that the terms of the Building Contract cannot have been varied and the Court will consider the claims against the First Defendant on that basis. Even if my view as to the law was wrong, in any event there was no compelling evidence of an agreement between the parties to vary the First Defendant's design obligations and/or to extend or set aside the original Contract Completion Date.

Was the First Defendant's work defective and if so to what extent and what remedial costs have been incurred by the Claimants?

24. The most significant issue between the parties is whether it was necessary or not to demolish the extension built by the First Defendant and reconstruct the foundations and steelwork. The parties and their respective experts disagree fundamentally on this issue. The respective cases are helpfully summarised in the written Closing Submissions dated 10th January 2022.

25. The relevant factual background to this is, I am satisfied, as follows.

26. The First Defendant was in receipt of VKHP's Structural and Foundation Designs in April 2015 when the work was being carried out and he sought to carry out the work in accordance with them. Both parties' experts accepted that the First Defendant did not in fact comply with the designs.

27. When the First Defendant's involvement at the Property ended in January 2016 the Claimants continued to rely on VKHP and engaged Trucraft as a remedial contractor and Mr Rushton as their independent expert. As I have already noted above, Mr Rushton inspected the works on 22nd January 2016. On 19th February 2016 VKHP produced a report. That report recommended that:

> "Some significant investigations in terms of trial pits be undertaken to ascertain exactly what foundation was installed in terms of width and depth and … a further assessment of loadings … can be undertaken based on the findings."

No such further investigation was carried out. Ms McCarthy submits that ignoring VKHP's advice means that the decision to demolish and reconstruction cannot be justified. However, the decision to demolish was taken after further consideration and investigation by Trucraft and Mr Rushton. Mr Milnes accepted that Mr Rushton was himself qualified to reach judgment as to the defects and the need to demolish the extension. I have reviewed the Voluntary Further Particulars and the photographs of the First Defendant's work which show clearly that the work that was carried out by First Defendant was haphazard and demonstrated no coherent attempt to comply with the design and/or with good building practice. I accept entirely Mr Rushton's evidence as to the inadequacy of the work done by the First Defendant and whilst of course the First Defendant has no burden at all to demonstrate the work was not defective or otherwise did not require removal, nevertheless Mr Milnes whilst disputing that the work was required did not provide a positive reason for that other than simply disagreeing with it. He also failed to provide any evidence that the structure as originally constructed was structurally sound. Whilst Mr Rushton may well have formed a view as to the need to demolish and rebuild on 22nd January 2016, I am satisfied that in line with his conduct as a careful and independent expert he continued to consider the position after the VKHP report of 20th February 2016 and, as he put it, his view was "reinforced" by his later inspections of the foundations.

28. In any event, even if the defects which existed in the First Defendant's work did not, contrary to my view, compel or necessitate the demolition or rebuild of the extension and the foundations and steelwork, I agree with Mr Saunders' submission that the relevant question as a matter of law is whether the Claimants in relying on the opinion of Mr Rushton have failed to act reasonably/mitigate their loss. Both parties accept that the relevant principle of law is encapsulated in the well-known judgment of HHJ Newey QC in the ***Great Ormond Street*** case (19 Con LR 25). In particular, at Paragraph 94 Judge Newey QC said:

> "The plaintiff who carries out either repair or reinstatement of his property must act reasonably. He can only recover as damages the costs which the defendant ought reasonably to have foreseen that he would incur and the defendant would not have foreseen unreasonable expenditure. Reasonable costs do not however mean that the minimum amount which with hindsight it could be held would have sufficed. When the nature of the repairs are such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take such advice and be influenced by it."

Judge Newey QC continued at Paragraph 98 to explain that when parties put forward rival schemes:

> "The Court has to choose between them or variants of them … The assessment has to be made on the basis of what the plaintiff can reasonably do."

Adding that:

> "It is not for the Court to consider de novo what should have been done and what costs should have been incurred either as a check on the reasonableness of the plaintiff's actions or otherwise."

29. I also agree with Mr Saunders that asking the question "Could the works have been provided in an alternative scheme for a lower cost?" and answering it as "Yes" is not an answer of itself to the Claimants' claims. Neither in my judgment is the undoubted truism that because "the minimum" is not required that does not equate to "the maximum" being automatically awarded, of itself an answer, especially since there is no evidence at all that the sums the Claimants paid to remedy the defects were "the maximum" which any remedial contractor could have charged. Even if the costs are high or very high, that does not mean they are objectively too high or unreasonable and Mr Rushton's evidence was that the costs were in the overwhelming number of cases reasonable for remedial works of this nature. I accept that evidence.

30. The requirement to demolish and reconstruct the foundations and steelworks also means that a number of items of remedial works which are specifically identified as defects such as Items 10, 12, 32, 33 and 34 were appropriately carried out as part of that work and do not need to be the subject of separate detailed findings. However, for the avoidance of doubt I record that I was wholly satisfied that on those items Mr Rushton's evidence was correct and the items were defects requiring the remedial work identified.

31. It follows that the Claimants' decision to demolish the First Defendant's work to the extension and reconstruction the foundations and steelwork was necessary and appropriate and in any event was not an unreasonable decision to take on proper expert advice.

32. I have made findings in Appendix A as to the extent of and remedial costs for the individual items. The effect of those items is set out at the conclusion of this Judgment.

Was the Building Contract validly terminated by the Claimants?

33. Although the order of the list of issues deals with the issues of incomplete work before this issue, since it is rightly accepted by Mr Saunders for the Claimants that the First Defendant cannot be liable for the costs of completing the works unless the Building Contract was validly terminated it is sensible to address this issue first.

34. The Claimants seek to rely on the termination of the Building Contract in accordance with the contractual machinery and in the alternative on a "common law" repudiation by the First Defendant which the Claimants accepted in January 2016. The relevant background to the end of the First Defendant's involvement at the Property I find is as follows:

The First Defendant's work at the Property commenced on 30th March 2015, the day he signed the Contract (and the First Claimant signed the next day).

The Completion Date within the Contract was 10th August 2015. The First Claimant's witness statement identifies that as the Completion Date neared, "It became apparent that the build would not be completed by 10th August 2015" (Paragraph 24(v)). The First Claimant further states in his witness statement and I accept that the First Defendant confirmed that the

site would be ready for window installation by 11th August 2015. The installation was to be carried out by a third party, Bowalker. On 16th August 2015 the First Claimant attended site and decided it was not ready for the windows to be fitted without damage. The First Claimant's witness statement at Paragraph 24(b)(iv) explains what was missing from the First Defendant's work at site as at that date. The First Claimant and Mr Garnham, then acting as Contract Administrator, agreed to suspend the window installation to ensure that the site was ready for that to take place. The First Claimant informed the First Defendant of that decision on 18th August 2015. The rear bifold windows and first floor sliding windows were removed and put into storage on 17th August 2015. Bowalker's revised new installation date was 17th October 2015 and the First Defendant was informed of this date by the First Claimant.

35. I find that that the First Claimant's action in mid-August 2015 were entirely reasonable and sensible and that the First Defendant's approach to the work and to the First Claimant's motives thereafter was one of deep suspicion (as I have noted in Section (2) of my Judgment) and of little real sustained work thereafter and certainly no attempts to recover lost time. Despite the original Completion Date having passed and the appointment of Mr Garnham as replacement Contract Administrator and his instruction to the First Defendant to issue applications for extensions of time (3.9.15), at no time did the First Defendant make any applications for extensions of time so the original Completion Date remained binding on the First Defendant and his pleaded case did not include any claim for extensions of time or additional payments for prolongation.

36. Further, despite as the First Defendant accepted in cross-examination, his not having made any compliant applications for payment and despite being encouraged to do so by the Claimants and the Contract Administrator, nevertheless the Claimants continued to pay him after the Completion Date. £15,000 was paid on 23rd September 2015. The payment on 23rd September was made despite the production by Mr Garnham on 21st September 2015 of Valuation No.7 showing a sum of only £511 being due.

37. £5,000 was paid on 21st October 2015. The windows had been reinstalled from 9th October 2015 by Bowalker again despite the fact that the First Defendant failed to prepare the openings two months on from the original installation date. A further and final sum of £5,000 was paid on 5th November 2015.

38. It has at times during the trial been suggested by the First Defendant that there was an agreement made in September 2015 pursuant to which the monies from 23rd September were paid and it is further claimed that the "agreement" varied the terms of the Contract between the parties. As I have already noted, on the first day of the trial it had been made clear by the First Defendant's Counsel that such a case was not being pursued and I am not prepared to allow that claim to be reinstated by way of closing submissions. In any event, the allegation is not made out of the facts as I have also noted in my Judgment. I entirely accept the First Claimant's case in evidence that the money was intended to encourage the First Defendant to complete his work and was certainly not a variation in any meaningful or binding sense.

39. I also accept and find as a fact that the First Defendant failed to carry out any appreciable work on site (see the Second Claimant's email dated 23rd November 2015) and carried out no further work after 10th December 2015. The First Defendant also failed to provide any completion programme for the works. By 10th December 2015 the First Defendant was, as he admitted to the Claimants at the time, working on other jobs partly to attempt to fund the completion of the Claimants' project, using materials which the Claimants had paid for on those other jobs, and would not purchase other

materials for the Claimants' work until the other jobs were completed and paid for. As he accepted in answer to a question from me during his oral evidence, the First Defendant did not know until the project was complete and his year end was concluded whether the work would be profitable or not. It is clear based on that admission and in the light of the matters accepted above as to other jobs, that the First Defendant was working at a loss on the Claimants' work and was disinclined to complete it at anything other than his own pace and subject to his own financial situation. The Claimants were of course not responsible for any of those issues. The Claimants were even in December 2015 asking the First Defendant to make applications for further payment (in the email of 10th December 2015). That is the very same day that the First Defendant last carried out any work at the Property. The First Defendant's email of the same date is relied upon as showing that he had not repudiated the Contract at that date. I deal with that matter below.

40. On 23rd December 2015 the Claimants sent a document to the First Defendant's home address by email and recorded delivery. That document has been described by the Claimants as a Notice of Intention to Terminate and it must of course comply with the provisions of Clause 12.3.5 of the Contract if it is to be valid contractually. As at 23rd December 2015 the First Defendant was visiting his home in France as part of his Christmas holidays. On 8th January 2016 the First Defendant replied to the Notice by email including in that email his suggestion that the Contract had been "declared void" at a meeting with Mr Garnham and seeking to rely on a later payment agreement which I have dealt with already.

41. On 11th January 2016 the Claimants sent a Notice of Termination to the First Defendant by recorded delivery arriving on 12th January 2016 and sent the Notice by email on the same day. The Claimants rely on the Notice as being valid and therefore entitling them to terminate the Contract in accordance with Clauses 12.3 and 12.4. The First Defendant disputes the validity of the termination pointing out correctly that the Contract requires the Contract Administrator to issue the Notice of Intention but the Claimants had done that themselves. Absent a valid Notice of Intention, no further notice to terminate can be sent. Ms McCarthy correctly points out that it is established law that termination clauses must be construed strictly (see ***Hudson* (14th edition) at 8/052**). In addition, the First Defendant contends that there is no evidence to show that the Notice of Intention had been delivered/received by any particular date and therefore no proof that the required 14 day period between Notices had passed. In answer to the validity argument, the Claimants rely on Akenhead J's judgment in ***Obrascon Huarte Lain SA v. The Attorney General for Gibraltar* [2015] EWHC 1028 (TCC)** where despite a notice being sent to the incorrect address (site office, not head office) the Learned Judge upheld the validity of the notice. I was also referred to the judgment of Dyson LJ (as he then was) in ***Rennie v Westbury Homes (Holdings) Limited* 2007 EWCA Civ 1405 at paras.15 and 16** where the Judge considers how the question whether a step should be taken is or is not an "indispensable condition" to a notice's validity, is to be decided and concludes that it is a question of contractual interpretation.

42. Mr Saunders rightly points out that the language of Clause 12.3.5 is not mandatory in the sense of saying that only a Contract Administrator can issue the Notice of Intention. However, despite seeing the force in those submissions it does not seem to me as a matter of interpretation that the Claimants' argument is correct as a matter of law and it seems to me that there are sound reasons for requiring the initial Notice to come from

the Contract Administrator rather than the client. I was not referred to any authority where the wrong person had sent a contractual notice triggering termination where nevertheless the notice was held to be valid. In addition, I am not satisfied that the First Defendant did receive the Notice of Intention a clear 14 days before the Termination Notice was sent to and received by him. On this issue, I do accept the First Defendant's evidence and there is no first-hand factual evidence from the Claimants to demonstrate that the Notice of Intention was in fact received by the First Defendant and when. Even if, therefore, the Notice was valid it has not been shown that the contractual Notices were properly served on the First Defendant. That leaves open the issue of whether the Notice to Terminate operates as the Claimants' acceptance of the First Defendant's repudiatory breach of contract. It was accepted by Ms McCarthy during closing oral submissions that if the First Defendant was, contrary to his position, in repudiatory breach by 11th or 12th January 2016 then the Termination Notice operates as an acceptance even if not a contractually valid Notice.

43. I have no hesitation whatsoever in concluding that the First Defendant was in repudiatory breach of the Contract with the Claimants as at 11th January 2016 at the latest. I should also make it clear that the evidential matters on which the Claimants rely for their claim of common law repudiation are well within the bounds of the pleaded case as Mr Saunders correctly submitted in oral submissions on the last day of the trial without any oral response from Ms McCarthy. The Claimants rely on the First Defendant's conduct in refusing to purchase materials for the works; using materials the Claimants had paid for on other jobs; failing to progress the works and confirming he would not and indeed could not progress the work for the Claimants until finalising other works, as together and separately being repudiatory breach of the Contract. I have found as a fact that all of these matters are correctly laid at the First Defendant's feet. In specific answer to the last issue, the First Defendant places some weight on his email of 10th December 2015 (as I have noted above). However, that is a single email which needs to be considered in the context of what was by then a litany of failures to carry out work in time and to give any indication of a final date for already delayed works. I also accept the submission based on ***Keating* at paras.6/109 and 6/123** that notwithstanding what D1 said in his email on 10th December 2015 he effectively refused to attend at the Property and carry out any further work by 11th January 2016, well after any Christmas holidays would have finished. D1's actions from 10th December 2015 and his lack of actions thereafter can only be consistent with "clearly showing an intention to abandon and altogether refuse to perform the work." The vague assurances in the email of 10th December 2015 do not in any way affect what was actually happening and the First Defendant's true approach to his contract with the Claimants. I am satisfied, therefore, that as at 10th December 2015 and if not then certainly as at 11th January 2016 the First Defendant had abandoned the works in the sense of his refusal to perform the contract and having given up any attempt to comply with his obligations to continue and complete the works for the Claimants: see ***Eminence v. Heaney* [2010] EWCA Civ 1168 at para.68**. That is, of course, of itself sufficient to amount to a repudiatory breach which the Claimants accepted.

44. In addition, I also accept that the First Defendant's approach to the work on site by 10th December 2015 was a failure to regularly and diligently progress the works and I again refer to the factual findings I have made above. I also repeat the findings I have made as to the lack of applications for payment by the First Defendant despite repeated requests from the Claimants and the Contract Administrator. Mr Saunders referred me

to the passage in ***Hudson* at 8/006**. I agree that the facts of this case are almost entirely on all-fours with the proposition in ***Hudson*** which I am happy to adopt and accept as self-evidently amounting to repudiatory breach. I also accept that ***Supamarl* (9 Con LR 25 at p.31**) is a demonstration that a failure to progress regularly and diligently can in an appropriate case amount to repudiatory breach and that ***Hill v. Camden LBC (1980 18 BLR 31)*** is not said to be authority to the contrary, certainly as a blanket proposition. In the factual circumstances of this case, I am in no doubt that the First Defendant's egregious self-caused failures to progress regularly and diligently are in fact and law repudiatory in nature. It follows that the Claimants were entitled to accept the First Defendant's repudiatory breach of contract and did so in January 2016. It also follows that the First Defendant is liable for the additional reasonable costs of completing any of the works which were incomplete as at that date.

(5) Incomplete works

45. I have made specific findings as to individual items of incomplete works in Appendix A as per the defects claim. I set out the effect of those findings in the conclusion of this Judgment.

46. There are, however, some issues of principle which the First Defendant has raised and there are also some items claimed by the Claimants which have been the subject of specific submissions in written Closings which I will address in this section of my Judgment.

47. As far as issues of mitigation/reasonableness are concerned, I have already found thatMr Rushton's position is to be preferred to that of Mr Milnes and further that in respect of the decision to remove and replace the rear extension I have found that decision to be correct and/or in any event reasonable. Similarly, for items of incomplete work, despite the fact that the costs of completion are significantly higher than those put forward by Mr Milnes, nevertheless it does seem to me that for the same reasons as regards my findings as to the quantum of the defective work claims that Mr Rushton's position is correct. Reference to the original costs of the Contract as agreed by the First Defendant is to my mind of little assistance, not least because there was no evidence at all put before the Court to attempt to demonstrate that the figure used by the First Defendant was appropriate and indeed the First Defendant's own evidence did not support that figure and I have already made findings in that regard. I do not accept that the Claimants are to be criticised in any way for the lack of competitive tendering. It is well-known that the costs of completing another person's work can often if not always be much higher than the work would have cost had the original personal completed the work. That in itself proves nothing as to the reasonableness of the costs of completion by others. The real and indeed only question is whether the completion costs incurred by the Claimants were objectively reasonable and I am satisfied on the basis of Mr Rushton's evidence that they were.

48. Item 40: First fix plumbing:

On the basis of concessions said to have been made by Mr Rushton in cross-examination, the First Defendant submits that his proposed figure of £12,624 is incorrect. However, as the Claimants' closing submissions correctly record, Mr Rushton's evidence in cross-examination was that the figure "may" have been incorrect. In my judgment, the Claimants' submissions are correct as to what was in

fact included in the First Defendant's work by reference to the Second Defendant's Schedule of Works; installation of the wet underfloor heating system is a "contract clarification" at Item 15 and the installation of the hot water cylinder, circulation bund and boiler were "Additional Item 1". I am therefore satisfied that the work claimed and the quantum sought are correctly payable by the First Defendant as work which he had not completed when the Contract was lawfully terminated by the Claimants.

49. Items 42 – 44: First fix electrical:

In her written Closing Submissions Ms McCarthy repeats reliance on Paragraph 60.3 of her written Opening both as to the principle of the Claimant's claim for "sign off for habitation" and as to the quantum claimed as against the First Defendant's original price. The objection in broad terms is that effectively the Claimants are asking the First Defendant to pay for second fix works which he was not obliged to carry out and seeking to have the First Defendant pay for the removal and reinstallation of all works done to date which is unjustifiable. However, in my view the answers to these complaints are addressed in Mr Rushton's report at Section 5.5 that Item 43 testing was reasonably required to see what if any of the original installation could be retained because the First Defendant had not arranged for a test before then and it was reasonably concluded that none of it could be retained. On that basis, the reinstallation and testing costs are both recoverable.

50. Item 55: Replacement of ground floor joists:

The First Defendant's objection to paying for this work is that no "top hat" scaffolding was required as part of the First Defendant's contract scope. That is correct as a matter of fact. However, Clause 6.1.4 of the Contract renders the Contractor (the First Defendant) liable for loss of or damage to property "due to the negligence of D1 in carrying out the works." Mr Rushton confirmed in his evidence, which I have accepted for the reasons I have already given, that a competent Contractor would have taken steps to avoid that damage (such as by use of tarpaulins). The First Defendant did not take these steps, which was negligent on his part, and therefore this claim is recoverable from him. I do not accept that Clause 6.2.1 applies to the First Defendant's benefit because the joists are not properly regarded as existing structures and fixtures and in any event Clause 6.2.1 cannot oust the clear effect of Clause 6.1.4.

51. Item 68: Paving:

In line with the reasonable and objective way in which he approached his role as an independent expert, Mr Rushton's view is that the reasonable cost of this work is £18,030. Mr Milnes' objection to that figure is, in common with other generic objections, that it was possible to carry out the work for a lower figure. But for the reasons I have given above, I do not accept that as a reason in and of itself to adopt a lower figure either generally or for this specific item.

(6) Consequential Losses

52. The Claimants seek the following as consequential losses and liquidated damages:

(1) 152 days of liquidated and ascertained damages at the Contract Rate of £75 a day being a total of £11,400;

(2) The cost of rental of alternative accommodation from January 2016 to July 2016 at £11,350, Council tax of £1,127, storage costs of £5,327 and post redirection costs of £40;

(3) Additional mortgage interest and financing fees from the remedial/completion works - £29,637.27 (as per the calculation submitted with Closing submissions);

(4) The installation of a temporary floor covering and cooking facilities at the Property - £916.05.

(5) General damages for physical inconvenience and discomfort and associated mental suffering.

53. It is not in dispute that as a matter of law liquidated and ascertained damages are recoverable from the completion date until the date of termination (as per the confirmation of the "orthodox" legal position in the Supreme Court's recent decision in ***Triple Point Technology Inc v. PTT Public Co Ltd*** **[2019] UKSC 29**). The grounds on which the First Defendant resisted the award of liquidated damages in opening and closing submissions are to rely on acts of prevention due to a failure to make payment to the First Defendant and/or the Claimants' alleged repudiatory breach, both of which I have rejected. In the circumstances, there is no answer to the award of the liquidated and ascertained damages as claimed.

54. Likewise, subject to proof of the incurring of sums claimed, there can be no answer to the award of post-repudiation damages for alternative accommodation and extra financing costs and temporary works. The First Claimant's witness statement at Paragraph 27(a)(iii) confirms that consequential losses have been incurred. The Claimants' financial position and the financial arrangements they made to pay for the remedial and extra completion works is set out in some detail at Paragraph 27(b)(i) to (xv) including evidence as to the need for a temporary floor at sub-paragraph (xiv). There was no challenge to the First Claimant's evidence as to the sums claimed at trial and I accept the Claimants' evidence. It follows that the sums claimed are recoverable from the First Defendant.

55. I have been provided with updated figures and calculations with the Claimants' written Closing Submissions and I am satisfied that those sums are accurate, and I award them.

56. It is also not disputed that in principle the Claimants can recover general damages for physical inconvenience, discomfort and mental suffering. In his written Opening Submissions, Mr Saunders sought the figure of £5,000 per Claimant. The First Defendant did not argue for any specific lower figure, instead arguing for a modest sum. I am satisfied that the sum claimed is a modest one having accepted the Claimants' evidence as to the toll on both of their health (Paragraph 27(b)(xviii) and I therefore award the sum sought to both Claimants. In that regard, whilst I note the position as to the level of awards in general, I also accept that that general figure does not include any award for personal injury which the Claimants have both suffered from in this case.

Credit against the Claimant's claims

57. The Claimants accept that credit must be given against sums awarded to them for the unpaid part of the original Contract Sum in the amount of £30,740. In addition, the

Claimants' settlement with the Second Defendant gives rise to a further £30,000 credit for the First Defendant.

58. The First Defendant also contends for a credit being the value of variations identified in Variation No.7 and supported by Mr Milnes in the sum of £22,622. Mr Milnes' report deals with this issue at Paragraph 5.7 which simply records the sum having been included in the valuation from Mr Garnham. In addition, at his Paragraph 6.8 Mr Milnes expresses the view that a reasonable cost to undertake and complete variations is £7,760. The claim for credit of retention due if the Claimants were in repudiatory breach of contract of course fails in light of my findings that the First Defendant was the party in repudiatory breach.

59. In answer to the claim for credit due to variations, the Claimants point out that no variations had been instructed in time in accordance with the Contract mechanism and in particular the time limits in the Contract have not been complied with. In addition, it is to be noted that some items were omitted from the Contract Works, but those matters do not appear to have been taken into account by the First Defendant's claim for variations. Insofar as the First Defendant seeks to claim additional credits to those which are accepted, in my judgment he needs to demonstrate or at least provide some evidential basis as to the state of his account with the Claimants as at the termination of his contract with them. Simply providing figures of variations and costs to complete variations is not of itself sufficient. What is required, as Mr Saunders' Opening points out, is a reconciliation of additions and omissions which is wholly absent even assuming that the failure to comply with the Contract mechanism were curable. Since there is no evidence from the First Defendant as to the state of his account as at January 2016, the claim for additional credit fails. In any event, I am not satisfied that the failure to comply with the Contract mechanism is curable, not least because at no time were the Contract Administrator or the Claimants themselves asked to make any decision under Clause 9.14.

Conclusion

60. The Claimants' claims for damages for breach of contract in respect of defective and incomplete work succeed in the sum of £148,062.73 for the defective works and £192,793.62 for the incomplete works and £69,797.32 for the consequential losses including the sums for general damages. Credit of £60,740 is to be given against the sums above giving the total sum due to the Claimants from the First Defendant as £349,913.67.

61. The parties have agreed consequential matters as to interest and costs following receipt of the draft Judgment and I have approved a Consent Order to that effect.