Neutral Citation Number: [2019] EWHC 2402 (Comm)

Claim No: CL-2017-000370

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Date: 20 September 2019

B e f o r e :

MR JUSTICE WAKSMAN

BARTHÉLEMY HOLDINGS, LLC

Claimant

and

DUET GROUP LIMITED

Defendant

and

DUET TRUST AND FIDUCIARY SERVICES S.A.

Third Party

Brian Doctor QC and **Giles Robertson** (instructed by Quinn Emanuel Urquhart & Sullivan LLP, Solicitors) for the Claimant
Matthew Cook and **Genevieve Burley** (instructed by Mishcon de Reya LLP, Solicitors) for the Defendant

The Third Party did not appear and was not represented

JUDGMENT

Hearing dates: 20, 24-27 June, 1-4, 8-12 and 24-25 July 2019

INTRODUCTION

1. This case concerns the development of a hotel on the North Caribbean island of Saint-Barthélemy ("St Barts"), called Le Barthélemy Hotel and Spa ("the Hotel") which opened in October 2016. As at late 2014 the owner of the Hotel was a French company called Saint-Barth Drep Hotel Invest SAS ("SBDHI"). 50% of its shares were held by the Claimant, a Delaware company called Barthélemy Holdings LLC ("BH"). This is the corporate investment vehicle of Mr Mark Nunnelly and his wife Ms Denise Dupré, both US nationals. The other 50% shareholding in SBDHI was owned by the Third Party, Duet Trust and Fiduciary Services SA ("DTFS"). The Defendant, Duet Group Ltd ("Duet") had a group of companies of which DTFS was one.

2. In 2013 the Hotel's loan liabilities were refinanced with a bank called Colony Capital ("Colony"). It provided finance to the Hotel via a new subsidiary company called Colfin Grand Cul-de-Sac Funding SARL ("Colfin").

3. On 23 December 2014, BH, DTFS and Duet (among others) entered into a written Amended and Restated Investment Agreement ("the Agreement"). The obligations of DTFS under the Agreement were guaranteed by Duet. By a separate Share and Land Purchase Agreement also dated 23 December 2014 ("the SPA"), DTFS agreed to sell to BH a further 28% interest in SBD1 in return for a series of stage payments.

4. In this action, BH claims against Duet, as guarantor, an amount equal to the damages which it says it is entitled to as against DTFS for breach of warranties in the Agreement relating to the adequacy of the specification for the Hotel and its budget. Put at its simplest, BH's primary case is that the warranted budget for the Hotel ("the Budget") was €29m whereas the actual cost of constructing and completing the hotel was €61.5m, and accordingly BH claims the difference of €32m.

5. Duet denies those allegations in a variety of ways. In addition, insofar as it is liable to BH as guarantor it invokes a counterclaim which could be made by DTFS as principal debtor, relating to the way in which BH acquired property held by Colfin as security for a separate loan to DTFS. This loan was to enable DTFS to construct two villas on the same site as the Hotel ("the Villa Loan"). What happened here was that DTFS was late in repaying the Villa Loan which entitled Colfin to foreclose. While an extension of time for repayment was being negotiated, BH agreed to buy Colfin from Colony, and with it the benefits of the Villa Loan and the now foreclosed villas. Duet says that it is entitled to set off as against any liability to BH, such damages as would be available to DTFS in respect of that claim.

6. There are some more minor claims made by BH ("the Villa Costs Claim" and the "Colony Costs Claim" respectively). These are resisted by Duet on a number of grounds.

7. DTFS is now wholly owned by BH. The latter has made no claim against it even though it is the principal debtor. Indeed it is not clear whether DTFS now has any assets at all. It was brought into this action by Duet who makes a claim against it for an indemnity in respect of any sums for which Duet will be found liable to BH as guarantor. Although not formally represented in these proceedings and not having played any part in them, DTFS has at least intimated that it does not resist an order for an indemnity against it and in favour of Duet.

SOME BACKGROUND MATTERS

St. Barts

8. St Barts is a French "collectivity". It is a small island with an area of about only 25 km², lying between Anguilla to the north and St Kitts and Nevis to the south (see page 36 of the Brochure referred to below). It is considered to be a high quality and somewhat exclusive holiday destination, accessible only by boat and light aircraft. It has a number of hotels, holiday villas and apartments. Its capital is the town of Gustavia. A useful map of the island can be found in the Brochure.

9. Prior to the opening of the Hotel, it is agreed that there were 6 hotels that were clearly of a general 5-star standard (without, at this stage, attempting to define precisely what the appellation "5-star" entails in this context). They were (in no particular order) Eden Roc, Le Toiny, Le Sereno, Isle de France, Le Guanahani and Hotel Taiwana. The Hotel lies on a site to the east of the island in a bay known as Grand Cul de Sac. It is further from Gustavia than the other hotels. It looks out onto a secluded bay although, like the other hotels on the island, its beach is in fact accessible to the general public. To the rear of the Hotel is a lagoon. The original project to build it started in 2007 but the development ran out of money leaving a partly constructed hotel which many regarded as an eyesore. As at 2012 the local population was 7000.

10. Mr Nunnelly, Ms Dupré and their children had holidayed on St Barts for many years and had a holiday home there. Mr Nunnelly has had a very successful career in finance and consultancy. He worked first at the management consultancy Bain, and later founded Bain Capital. Ms Dupré's career included teaching courses on hotel management. Neither, however, had any real experience in hotel construction and development projects. Nonetheless they became attracted by the idea of investing in the Hotel so as to bring the project to completion.

11. Not only did they have a substantial amount of capital available for investment but they wanted to involve themselves in a project on the island that they knew so well and which had so many happy memories for them.

The Principal Agreements

The 2012 Agreement

12. Following some initial meetings in early 2012, Mr Nunnelly and Ms Dupré were provided with a copy of the brochure for the Hotel referred to below ("the Brochure"). They were interested in investing and pursuant to a written Investment Agreement dated 14 August 2012 ("the 2012 Agreement") they agreed to do so. By that stage, Duet had provided €33m, €15m by way of a cash injection so as, among other things to acquire the land and a further €18m by way of a loan to the then operating company for the hotel, being SBDHI. Pursuant to Clause 3.2 of the 2012 Agreement BH paid €6m and was committed to providing a further €6m providing certain conditions were met. In return, BH would obtain a 44.44% interest in SBDHI with DTFS holding the balance. Clause 3.4 gave an option to BH to purchase a further amount of shares which would then make it a 50% shareholder. DTFS gave a series of warranties and its obligations were guaranteed by Duet.

The 2013 Agreement

13. By March 2013 the project was falling behind, as it had done previously. Duet wished to refinance the loan which one of the group companies had made and this was ultimately done

through the introduction of Colony. A further Investment Agreement was made on 10 September 2013 ("the 2013 Agreement"). This provided for BH now to have a 50% interest following the payment of the second instalment of €6m. The corporate structure changed so that the investment of both BH and DTFS was in the form of a mixture of A and B shares and Convertible Preferred Equity Certificates ("CPECs"). Also the shareholding in SBDHI was now taken entirely by Saint-Barth Drep 2 ("SBD2") which was itself wholly owned by Saint-Barth Drep 1 ("SBD1") which was now the company holding the investments of BH and DTFS.

The Agreement and the SPA

14. By the Agreement, BH became a majority shareholder with a 78.75% interest in shares and CPECs. It would have 3 seats on the latter's board as opposed to one for Duet, and DTFS was no longer obliged to manage the development.

15. By the SPA, DTFS agreed to transfer its remaining shares and CPECs in SBD1 ("the Sale Interests") to BH in return for a further €6m. In addition, DTFS agreed to sell to BH the land on which the third intended Villa was to be constructed ("the Villa Land") for a further €2m. BH also agreed to pay up to a further €8.5m in respect of any "defisc" (defiscalisation) proceeds. These were, in effect, contributions payable by the French Government in recognition of the investment in St Barts constituted by the hotel. It was not by any means certain that such contributions would in fact be due. I deal further with the terms of this agreement in paragraph 115 below.

16. Although the 2012 Agreement was governed by French law, the 2013 agreement by Luxembourg law and the Agreement and SPA by English law, no foreign law evidence has been adduced and all parties have proceeded on the basis that English law governs all claims and the counterclaim.

The Brochure

17. This is a 43-page document produced in 2012 essentially as a tool devised by the Duet group of companies to encourage interest from potential investors. It is necessary to refer to a substantial part of its contents. In the "Introduction" at page 3, it stated that in the 1980s the Rockefellers and Rothschilds were among the first to become aware of the tourist possibilities of the island. Since then tourism was the principal source of revenue giving rise to hotels, restaurants and a plethora of upper echelon boutiques. At page 3 and following there are a number of computer-generated photographs giving an impression of how the Hotel would look ("renderings"). At page 4 it was stated that the complex would have 52 suites, a restaurant, a spa, swimming pool and private access to the beach. Almost all of the suites would overlook the sea and have easy or private beach access. It went on to say as follows:

> "The Dupoux design mixes traditional materials and contemporary design ideal for island living… Trendy restaurant serving contemporary cuisine.… The spa and well-being centre along with a comprehensively equipped state-of-the-art fitness centre will be operated by a top spa operator...Project... Exit: Hotel as a going concern and Condo sales.… Project Cost: €46million… Turnkey [i.e. opening date]: 4Q [i.e. fourth-quarter] 2013."

18. Page 5 is a photograph of the harbour at Gustavia, in a section headed "Glamour in St Barth". It refers to the best New Year's Eve parties being on the yachts that moor there such as that of the billionaire Paul Allen.

19. Page 6 states that it is an idyllic island and has become the "must visit" for resort travel in the West Indies. It refers to 27 beautiful white sandy beaches for "today's savvy tourists". It refers to its wide range of cuisine and then says that:

> "St Barth's also offers an enviable variety of accommodations, from economically priced hotels to stellar world-class luxury hotels and vacation villas."

20. The detailed description of the Hotel begins at page 8. It refers to the garden style layout of buildings with most of the public space being located on the first floor. Landscaping would feature area shrubs, flowerbeds and tropical trees. Sidewalks would be present along the front entrance and throughout the hotel. At page 9 is a description of the common areas stating as follows:

> "The public areas like the entire hotel will reflect a distinctive design by Dupoux featuring a luxurious comfortable and modern atmosphere… The hotel's lounge and bar are located on the first floor adjacent to the lobby. Refreshments will be served all day in the public areas and lounge and bar… The restaurant will be located on the ground floor. It will offer a relaxing and warm atmosphere. The restaurant with 120 seating spaces will be open for breakfast, lunch and dinner, and provide room service to both the hotel guests and the villa owners...The spa and well-being centre with 8 treatment rooms and the comprehensively equipped state-of-the-art fitness centre will be operated by a top spa operator. The property will have a swimming pool and Jacuzzi facing the ocean.… The complex will also offer a small marketing room, shopping facilities and 90 parking spaces including 75 underground spaces.… The property will be equipped with central air and heat in the public areas with individual thermostats in all of the guest rooms."

21. This page also includes a photograph of a highly stylised reception area with fabric drapes coming down from a wooden roof structure and with the sides consisting of wooden structures which are largely open to the elements. The second photograph is of the dining room with the same kind of roof, then, again, highly stylised tables and chairs and serving units.

22. Page 10 refers to the 40 intended suites most of which would have private access to the beach and a sea view. Each room would have a dresser, flatscreen television, desk and chair, side chair and table lamps, pictures, mirrors and an honour bar or small fridge. Larger suites would also include sofas, tables and other related home furnishings. All features will be of "top quality and respect the hotel environment." Standard bathrooms would have walk-in showers, toilet and a separate vanity area. Larger bathrooms would possibly have a combination tub and shower. And there are again images of the suites.

23. Page 11 deals with the 6 two-bedroom condos. It states that they will benefit from "all of the hotels 5 star facilities and amenities such as free access to the spa, in room dining, daily cleaning etc" and two plans are shown. Page 12 deals with the 3 villas intended to be constructed and managed by the Hotel. The same reference to access to the Hotel's "five-star facilities" is made.

24. Page 15 deals with the St Barts hotel market. At the time there were about 25 hotels most of which had 15 rooms or less. The largest was the Guanahani with 69 rooms. According to a current CBRE report at the time guest occupancy on the island was between 70 and 80%, with villas and suites at high season commanding more than $1,500 per night. Local hotels had started special packages to attract visitors during the summer which is the low season. Duet believed a luxury spa clientele could be attracted at that time.

25. Page 16 is important. It is headed "Competition". Apart from 3 photographs it contains the following table (slightly adjusted for formatting reasons only):

Hotel Property	*No. of Rooms & Suites*	*No. of Villas*	*F&B*	*Spa*	*Opening Days/ Year*	*Occupancy*	*Rates (€s) for dble bedroom/ small suite for 2010/2011: Christmas & New Year*	*High Season*	*Low Season*
Le Guanahani	*69*	*0*	*2 restaurants: Le Bartholomeo and L'Indigo*	*Yes*	*365*	*69%*	*995*	*643*	*386*
Eden Roc	*37*	*4*	*2 restaurants: On the Rocks and Sand Bar*	*No*	*321*	*70%*	*Upon request*	*900*	*490*
Le Toiny	*15*	*0*	*Le Gaiac restaurant*	*No*	*321*	*53%*	*Upon Request*	*1,680*	*750*
Le Sereno	*34*	*3*	*Restaurant des Pecheurs*	*No*	*321*	*65%*	*1,080*	*680*	*480*
Isle de France	*38*	*1*	*La Case de L'Isle restaurant*	*Yes*	*321*	*85%*	*1,175*	*850*	*450*
Hotel Taiwana	*30*	*0*	*2 restaurants: Le Taiwana and Pacri*	*No*	*321*	*65%*	*1,200*	*1,000*	*450*

26. I shall refer to these hotels as "the Competition Hotels".

27. Page 19 shows the state of construction at the time. Page 21 gives projections of average daily rates starting at €744 in 2013 rising to €849 in 2017. The range is not because the room rate is expected to go up but rather because of an expected increase in occupancy from 55% to 70% presumably on the basis of the time it takes for the Hotel to establish itself.

28. Page 22 refers to the basic acquisition and development cost of €46m (which in fact included the cost of acquiring the land and demolishing the hotel which previously existed there), interest of €2.7m and a net hotel cost per room of €763,462. An exit from the projected investment was contemplated and page 23 noted that Le Toiny had been sold for $17.75m in 2006, the Guanahani was sold the same year for $60.18m, Le Sereno for $52m in 2009 and Isle de France for $62m in March 2010. Pages 25-33 are taken up with the financial standing and interests of the Duet Group. It referred to Mr Henry Gabay who was the co-founder and chairman of the Duet Group. His background was in investment banking. It referred also to Mr Emmanuel Aim. He joined Duet Real Estate Partners in 2006 and also Duet Real Estate Partners as director and partner in the same year. His background was in logistics and manufacturing.

29. Page 37 states that St Barts offers a range of elegant and upscale boutiques normally associated with the Faubourg St Honoré which is a function of its French heritage and the typical clientele attracted by the islands. The location of the Hotel is said to be on one of the island's pre-eminent beaches and the easiest beach for sailing, windsurfing and kite surfing because it has a reef which

closes off the entire bay. Page 43 refers to the growth of tourism on the island and makes reference to its "niche status as an exclusive and private resort-island".

THE EVIDENCE

Lay Witnesses

30. For BH I heard from Mr Nunnelly, Ms Dupré and Mr David Tanner. Mr Tanner was BH's Chief Financial Officer who dealt with the Hotel from late 2014 when BH assumed control of the project. For Duet I heard from Mr Gabay and Mr Aim.

31. While sometimes all of the witnesses were doing their best to assist the Court, on other occasions their evidence was not satisfactory. In the case of Mr Nunnelly and Ms Dupré, on certain matters their evidence was implausible. On the other hand, it is also plain that Mr Gabay feels extremely aggrieved at the events in 2016 when, as he saw it, BH colluded with Colony to arbitrarily deprive DTFS of the two villas which formed part of the security for the Villa Loan which, in fact, DTFS could have paid off. Instead, as Mr Gabay saw it, BH was able to acquire the villas at a very cheap price. Sometimes this has coloured his evidence. As for Mr Aim he had largely withdrawn from the project by about August 2014 so his evidence had a more limited scope. Yet on occasion he gave his views on emails from a later period when he was not involved. My full comments on these witnesses appear in context, below.

32. Further, this claim is only one part of a plethora of litigation between these parties. In May 2016 Duet, through one of its subsidiaries Saint Barth Drep 3 ("SBD3") brought proceedings in Luxembourg against DTFS, SBD1 and Colfin. At almost the same time BH made a formal written demand on DTFS in respect of its claims for breach of warranty. In August 2016 SBD3 issued proceedings against Colony again in relation to the sale of the villas, in Delaware. Those proceedings are presently stayed. The proceedings before me commenced on 12 June 2017. Attitudes have inevitably hardened over time.

33. All of that said, in fact, the number of true issues of primary fact in this case are limited. In large part, fortunately, they can be resolved by reference to the great wealth of contemporaneous documentation which has been produced.

Expert Witnesses

34. For BH I heard from Sean Hennessey, a Consultant in the hotel industry, and from Warren Feldman, the CEO of a company providing architectural and project management services for hotels, restaurants conference centres and spas.

35. For Duet I heard from Alan Tantleff, a Senior Director at FTI Consulting LLP ("FTI") with responsibility for corporate finance and restructuring, and from John McSorley, a Chartered Quantity Surveyor and also a Senior Director at FTI.

36. Together, the experts were instructed to address issues 9-11 and 13-16 of the agreed issues in this case. They are as follows:

> "Issue 9: Has the hotel been built to a higher standard than the quality represented by the Brochure?

Issue 10: On what basis was the 2014 Budget prepared? Did it include the costs of the redesign then contemplated?

Issue 11: What are the reasons for the increased cost and time to complete the Hotel compared with what the parties expected in 2012 and 2014? In particular, were those increases caused by:

a. Defect in the original design;

b. Defect in the 2012 and 2014 budgets;

c. Changes requested in or after 2014 by BH; and/or

d. A desire on BH's part to build a "palace" hotel?

Issue 13: Was the 2014 Hotel Budget prepared on a prudent and reasonable basis?

Issue 14: Did the 2014 Hotel Budget identify all the costs of the design, construction engineering finish and fit out works required to complete the Hotel Development (as defined in the 2014 Investment Agreement) and to furnish and equip it as an operational hotel?

Issue 15: What was the "Specification" referred to in each of the 2012 and 2014 Investment Agreements (hereinafter referred to as "the Specification")?

Issue 16: Were the Specifications referred to in the 2012 and 2014 Investment Agreements sufficient to provide for the construction, completion and fitting out of a hotel of the quality represented by the brochure attached in the Due Diligence Bundle?"

37. Although there was reference in the stated Issues to the 2012 Agreement the experts and their evidence concentrated (correctly) on the Agreement.

38. Mr Hennessey addressed Issues 9-11 and 15-16 while Mr Feldman addressed issues 11, 13 and 14. So they both dealt with issue 11.

39. Mr Tantleff addressed Issues 9-11 and 15-16 while Mr McSorley addressed Issues 10-11 and 13-14. So they both dealt with Issues 10 and 11.

40. A substantial amount of written material in terms of their reports and supplementary reports was provided along with Joint Statements in respect of each of the relevant Issues. Despite all of that, in some ways the assistance to be afforded by the experts was limited, because

(1) Issue 15 was not really a matter for expert evidence at all;

(2) Issue 16 depended on what the Specification was, and what the quality represented by the Brochure was, being largely matters of construction and factual analysis;

(3) The experts, for the most part, gave their opinions on the basis of the underlying cases (as to the Specification and quality of the Brochure) put forward by the party instructing them; in general they did not opine on alternative assumptions;

(4) While Mr Feldman and Mr McSorley addressed Issue 13 as to whether the Budget had been prepared on a prudent and reasonable basis they did not address (because they were not instructed to) what relevant figures would have been contained in a budget which <u>was</u> reasonable and prudent. This has serious consequences for BH's primary claim as I explain below;

(5) There were some problems with each of the expert's evidence in terms of its persuasiveness. So, for example,

(a) Mr Hennessey had a tendency to avoid making any concessions even where it was obvious for example on whether the large amount of wooden shuttering and fabric covered walls resulting from the redesign was really necessary to meet the quality standard in the Brochure having regard in particular to the Competition Hotels; on other occasions he focused on what he thought was necessary to compete with the Competition Hotels while ignoring the physical attributes of the rooms shown in the Brochure; finally, in terms of the increased restaurant provision in the Hotel as completed, he argued that this had always been necessary but on the basis that tastes had changed since 2014. That disregarded the fact that the issue was whether the Specification met the quality set out in the Brochure;

(b) The evidence of Mr Tantleff was more cogent generally but was to some extent influenced by Duet's own case. Thus his response to the suggestion that the Model Room (see paragraphs 58 - 69 below) revealed design problems was that this was not so, it was rather that Ms Dupré was subjectively unhappy with what she saw;

(c) Mr Feldman's evidence was hampered by the fact that often, he seems to have taken the view that because an assumption underlying the Budget proved later to have been wrong, it meant that the Budget could not have been reasonably prepared. In the end, he accepted (as is obviously the case) that the reasonableness or otherwise of the Budget has to be viewed against what was known or should have been known at the time;

(d) As Mr McSorley's cross examination went on, he became partisan which was reflected for example in his evidence about the correct estimate for FFE (moveable furniture, fixture and equipment); see below.

41. Accordingly, the usefulness and cogency of the opinion of any of the experts depended very much upon the issue in question.

THE FACTS

42. The history of the Hotel project from 2012 to 2016 has been trawled over in great detail in the written and oral evidence. It is not necessary or proportionate for me to deal with every fact or every factual issue. In this section I simply set out those facts (whether agreed or as found by me) which are necessary to enable me to decide the actual issues as they now are.

Key players on the hotel project as at early 2014

43. On BH's side, they were Mr Nunnelly and Ms Dupré. For Duet and DTFS they were Mr Gabay, Mr Aim (until his departure from the project in late 2014) and Mr Daglar Cizmeci. The latter was a partner in Duet Private Equity Capital Limited based in London. At this stage I should mention some of the other individuals or companies involved.

44. Mr Terry Scanlan had been brought into the project in June 2013, through his Anguillan company, Resort Consulting Group Ltd. ("RCG") to act as a project and cost consultant to Colony, as reflected in a written Project Consulting Agreement signed later in August. Also, from November 2013 to January 2014 he agreed to provide additional project support to SBDHI. For November/December 2014 Mr Scanlan had a contract with BH at €10,000 per month. Accordingly, at no material time was he either an employee of or agent for Duet/DTFS.

45. Mr Franck Guetta was an experienced project manager in St Barts. He had been engaged for this project by SBD1 through his company, BT Conseils. He was at all material times a core member of the project team but he was not an employee of Duet/DTFS nor could it be said, objectively, that he was, or was held out to be the latter's representative or agent for the purpose of contractual matters.

46. The engagements of both Mr Scanlan and Mr Guetta were terminated by BH at the end of 2014 following the making of the Agreement because, according to Ms Dupré, the existing management team was not working together effectively and had become "increasingly dysfunctional".

47. I have explained the role of Mr Tanner above.

48. In January 2015 a hospitality consultant called Peter Hartevelt, who by then was working for Mr Nunnelly and Ms Dupré in relation to another hotel they had purchased in August 2014, agreed to work on the Hotel to include managing pre-opening activities and generally assisting Mr Tanner and Ms Dupré.

49. PRD was the existing Site Manager for the project as at the end of 2014. It was represented at the Hotel in particular by Mr Yannick Bruneau and Mr Patrick Raffeneau. However, on 29 December 2014 Ms Dupré confirmed to PRD that going forward it would now be the overall Project Manager for the Hotel following the departure of Mr Scanlan and Mr Guetta. This change of role was set out in a written agreement signed in December ("the PRD Agreement") stating that PRD would represent SBDHI (of which BH was now the majority shareholder) "for the management, completion of the Project by October 15, 2015 and opening to the public by November 1st, 2015" dealing with all aspects of project management for which it would be paid €67,000 per month. In addition there would be a bonus of €200,000 if the Hotel was indeed completed by October 2015 and in accordance with the "Construction Budget". The latter was not the Budget but rather a detailed budget for whose development PRD would be responsible as part of their services - see Clause 1 (4) (d) of the PRD Agreement. Mr Bruneau left PRD at the end of July 2015 and at the end of September 2015 PRD's contract was terminated.

50. In addition, at the end of December 2014 Ms Skye Young was introduced by BH to the management team "to assist in the transition and provide further connectivity". She had worked with Mr Nunnelly and Ms Dupré extensively before. She had no prior experience in construction.

51. On the technical side, SOCOTEC were the engineers for the project.

The Villa Loan

52. By a Loan and Security Agreement entered into between Colfin and DTFS, Colfin agreed to finance the building of two Villas adjacent to the hotel in the sum of $21,569,170. By a further agreement made on 23 December 2014, that funding was increased to $22,385,170 ie a further $816,000. As security for this loan, Colfin held subject to charges, the B shares which represented the minority interest in SBDHI held by DTFS, the two Villas and the land for the third villa.

Athea design

53. By the time of the 2012 Agreement a new French designer (to replace Dupoux being the designer contemplated in the Brochure) had been appointed. This was Athea Design ("Athea"), the business run by Mr Aim's sister, Athenais. It was Athea's designs that were incorporated into the 2013 Drawings (as defined at paragraph 157(1) below). Prior to the showing of the Model Room on 30 August, Ms Dupré had been very involved with the Athea designs and in general terms was positive. It is true that in October 2012 she said that the question of the wood to be used for the furniture and their comfort were important but this was not a criticism of the design itself. On 6 December 2013 Mr Aim emailed to Ms Dupré a 400 page file relating to the Athea designs. In cross-examination she said that she thought the design was "fine" (later "okay") although she would have to see how it was executed and the Model Room had to be of acceptable quality. On any view, there is no evidence of her having any major objections to the designs prior to August 2014.

54. Following the showing of the model room any further role which Athea may have had was terminated at the instruction of Mr Nunnelly and Ms Dupré.

Cyprien Bru

55. Mr Bru was a designer whom Duet had used for its earlier Hotel Taiwana project. It had hired him here to carry out the procurement of the furniture in accordance with the Athea designs. It appears that the furniture had been ordered in around May and June. It was to be made in Spain. Following the showing of the Model Room, the furniture order placed through Mr Bru was cancelled. Ultimately, the figures show that €784,000 had been spent but following cancellation, €300,000 was returned. Some of the furniture had been made by the time of cancellation.

56. By 27 August 2014, Mr Aim was already thinking that while the base of the Athea designs was quite good, the Model Room about to be shown was a bit simple. So he asked Mr Bru to "give a little more life and luxury touch to the room (within keeping to the latest budget)".

57. In fact, following the Model Room showing, and the interviewing of new designers at the instance of Ms Dupré, one of whom was Mr Bru, he was not selected and that effectively ended his involvement.

The Model Room

58. A model room is an important stage in the development of a hotel because it is the physical embodiment of a guest room which, until that point, has only been shown in designs, drawings and possibly artists' photo-renditions. As Mr Aim accepted, the Model Room here was late in being completed. The relevance of the Model Room here however, should not be overstated. The Model Room is not part of the Specification. The Model Room here becomes relevant insofar as it assists as to whether there was a breach of the Specification Warranty (as defined in paragraph 156 below) by reference to the 2013 Drawings. Otherwise, it is relevant as a prelude to what followed.

59. Prior to the showing of the room, Mr Aim was letting Ms Dupré know that he had some reservations. In his email of 1 August, he said that from the photos of the furniture which he had received, its quality was "good but need to adapt some minor changes." When Ms Dupré saw the

photos it led her to question whether the furniture was made of real wood (which she had inferred from Athea's design books) or only "painted" which I assume indicates some form of veneer.

60. Following a meeting in Paris, Ms Dupré also wrote to Mr Aim to say that the rooms seemed "under-designed for the price" and that they should go for "special".

61. Once Mr Aim had actually seen the furniture after it arrived, he emailed Ms Dupré to say that he personally liked the design but the quality of the furniture (excluding the lamps and objects) was "not that great" and "won't work for us". He added that (as noted above) Mr Bru would take over the final drawings and use different materials. Mr Scanlan also thought that the furniture was disappointing and in an email on 20 August gave it 2 out of 10.

62. The furniture for the Model Room, as distinct from the furniture to be ordered generally for the guest bedrooms, had been ordered from a supplier in China and it is common ground that the quality of the furniture supplied was poor. Mr Aim then sent to Ms Dupré the email of 27 August referred to in paragraph 56 above.

63. When Ms Dupré visited on 30 August, she was not impressed by what she saw of the furniture. Her complaint at the time is set out in her email of 31 August. She stated that:

> "… the quality of the room furnishings are more than disappointing… our input from design sessions completely dropped with no prewire (no rope molding, no light in minibar, no clothing hooks, etc. etc)… furniture not only poorly made-- and I understand we didn't have great specs in the first place, bed wobbles, wrong height of dresser so plugs show, hardware in closets and on doors is subpar, logo items/special moments non-existant"

64. On the same day Mr Nunnelly sent a strongly worded email to Mr Gabay saying that the visit had been a disaster, very low quality, mis-sized and nothing at all special to the design. He said that Athea should be off the project as of now and "we all brainstorm a potential set of design partner solutions and not default to the new one [i.e. Mr Bru] recently selected."

65. According to Mr Cizmeci's email to Mr Gabay of 31 August, he told him that he had just spoken with Mr Nunnelly, who had asked him if "Duet was going to nickle and dime its way through the opening of the hotel." Mr Cizmeci told him that Mr Gabay was single-handedly financing the whole project and that he needs to have an investor to investor talk with Mr Nunnelly. Mr Gabay forwarded this email to Mr Aim who replied that it was true that the furniture manufacturing was not good. China had been as a try. That last point cannot have been correct because the evidence shows that the furniture which was intended to be used in all of the rooms had been ordered by May or June through Mr Bru. Mr Aim added that he had actually officially refused the design and furniture. He said that "We got Athea out of the project since June".

66. There is a dispute about whether Athea was dismissed only after the Model Room showing or whether her role had effectively come to an end by then. The email of 31 August suggests the former. Moreover, in his email of 1 September, Mr Gabay said she was "terminated in June". That would also square with the (limited) brief already given to Mr Bru before the showing of the Model Room (see above). In evidence Mr Aim and Mr Gabay suggested that in fact she had not been dismissed as such - rather her role as a designer of the furniture was really at an end anyway in June and procurement was now going to be handled by Mr Bru. I do not think that this is correct because it does not explain the language of the emails and in any event Athea was

present at the Hotel for a week prior to the showing of the Model Room and might have then been expected to have a further role following the showing, in terms of any revisions at set. But all of that said, the only relevance of this is the extent to which the misgivings about Athea go to the existence or otherwise of any breach of the Specification Warranty (along with reflecting on the credibility of Mr Aim and Mr Gabay on this point). In any event, BH wanted Athea's role to cease and in the light of the delays with opening the Model Room and its reaction to the quality of the furniture, I can see why Mr Aim and Mr Gabay readily agreed.

67. Mr Aim added in the 31 August email that 8 months before, Ms Dupré had been in Paris and validated most of the previous design but they would have "nice rooms at the end". By a separate email to Ms Dupré, Mr Aim said that it would be good to have a general talk on FFNE. In an email to Mr Nunnelly from Ms Dupré which forwarded the email from Mr Aim, Ms Dupré said

> "… Some things in progress… I saw wood veneer piece but means all furniture will be in that. Like colour and did have nice grain, but is veneer. New firm would have to agree so no finger-pointing. Much improved but dictates a lot.…Franck thinks closet doors that were ordered were much heavier, and real wood detail seems nice, but again haven't seen and new designer should feel comfortable. A lot of closet doors-so we should get arms around cost involved here and how far along."

68. On 1 September, Mr Nunnelly sent a further email to Mr Gabay stating that "FFE is too important… we are not in support of any ffe decision until we have explicitly signed off."

69. I think Duet is right to say that an analysis of those emails (as opposed to what is being said now) is that there were obvious and serious problems with the existing FFE as made by the supplier in China which would require new FFE but not some general redesign of the rooms as a whole.

The New Design

70. Mr Aim arranged interviews with 4 new designers to take place in Paris between 23 and 25 September 2014. Ms Dupré drew up some design notes for this purpose ("the Design Notes") to be sent to the designers in advance. Her covering email to Mr Aim said this:

> "… I also tried to put together some "design notes" to help articulate what we are after. I thought this would be useful for our discussion. Thanks for your input here-want to be sure I capture what we've learned, where we are headed."

71. On 18 September, Ms Dupré agreed to incorporate into the Design Notes the opening date of October 2015 and that "the big message is top luxury but still with in a small boutique resort experience. Fancy but with most natural beauty."

72. The Design Notes themselves read:

> *"Overall design objectives for Le Barthelemy*
> ** Aiming to be the best hotel on the island.*
> **Design very much dictated by the spirit of the island. Island is quite chic and upscale, but not fussy. Our sense is customers want superb but not fancy.*
> **Beach location demands practicality in terms of weather, wet environment, easy care.*
> **More modern than formal. Comfort matters as much if not more than aesthetic.*
> **Sense of privacy.*
> **Design with flair using natural beauty as elements.*
> **Top luxury but still within a small, boutique hotel and resort experience.*
> **Design highlights include location on a beautiful 600 meter beach. All underground parking so a sense of pedestrian pathways and serenity while on property. Unique on the island from this perspective. Because done with a master planning view, all rooms have either a view of the ocean or the lagoon (also*

very nice), the public spaces are well oriented and connected, well located and generously sized pool, high end spa and exercise room.
**Satisfy wide mix of customers: special occasions, couples for getaways, as well as families on vacation (kids club provided. Calm beach for watersports.) Island attracts international clientele: majority Americans, but also rich mix of Europeans (French, Italian, German), some (and increasing South American, Russian, Asian).*

Specific design objectives for the rooms.
**Showcase the view. Maximize sense of size.*
"Private balcony space (and some plunge pools, private gardens) also present opportunities for the room experience.
**Light, airy, with use of color. Preliminary color scheme (turquoise of the sea and muted tans/off-whites) has been selected.*
**Practical, useful furniture but with sense of style.*
**Bathrooms that communicate luxury but again, that function well.*
**Breathtaking details, surprises imbedded in the experience of the room.*
**Does not have to be "over the top". Customers want to be comfortable.*
Specific design objectives for the spa.
"Tranquil, light, airy, cool.
"Highlight seaside location (Le Mer is product line).
"Facilities include exercise machines, personal training and massage and beauty treatments (no hair salon).

Specific design objectives for the restaurant and lobby.
**Wow and welcoming.*
**Though looking for a "wow" must be without losing comfort and a sense of the understated.*
**Speaks to St Barths spirit and setting.*
**Will be multiple objectives in restaurant area (bar space with light food offerings), different concepts at lunch (Casualle Barth's restaurant) and dinner (Guy Martin is restauranteur), late night bar and light food. Dress is casual.*

Current status.
**Targeting October 15, 2015 opening.*
**Rooms are well underway so "box" is defined. FFE remains. Model room by current designer was not up to standard so retooling."*

73. They are important because BH contends (but Duet denies) that they form part of the Specification. In cross-examination, Ms Dupré said that they were to "set the stage" for the interviews to give the designers some "landing lights to what kind of project this was" and "The purpose was to give the designers a way to think about the hotel in as efficient a way as I could."

74. Mr Aim attended at least the introductory part of the meetings with the designers. On 28 September, Ms Dupré told one of the prospective designers, Sybille de Margerie, whose business, SMD, was based in Paris, that she wanted to end up with a "superb room" even if that meant some backtracking. If their collective evaluation was that what had been ordered or installed could contribute to a great outcome it could stay but if not it should be changed.

75. In a subsequent letter dated 29 September, SMD proposed, following their meeting that there were 2 options. "Option 1" was "We will be redesigning the project according to building structural constraints. Our fees would be as per the scope described in our fee proposal below…446000€HT." "Option 2" was that "We will not change the project in terms of space planning but will improve finishes, fit out and FFE. 280,000 €HT." SMD added that they believed a better result would be obtained if they were able to change the layout (i.e. Option 1). This proposal was not passed on to anyone at Duet.

76. Then, on 2 October 2014 Ms Dupré emailed Mr Gabay, Mr Cizmeci and Mr Scanlan (copied to Mr Nunnelly) as follows:

> "Subject: FFE UPDATE AND PROCESS PLAN
>
> I wanted to post on ffe and get a your sense of best process plan going forward.
>
> *Interviews are complete with four designers (including Cyprian Bru). Expecting proposals from the other three.
>
> *I am planning follow up calls with each, get things apples to apples in terms of proposals and to narrow the selection
>
> *I would propose sharing the contracts with Terry for input on negotiation and to be sure we are coordinated with the site and construction team in terms of execution .
>
> *Denise, Terry and Henry to choose designer
>
> *immediately thereafter, set up coordinating meetings between the various parties. Would appreciate your input on who all should be included here. (architects, who from construction team, etc)
>
> * your input on Emmanuel's role with respect to ffe?
>
> Learning from the interviews:
> *timetable (October 15 opening) is tight-but-doable. Need to make selection as soon as possible
> *designers seem comfortable we can do for 500E/sq meter
> *"model room is imperative and all will do (expect about January time frame)
> "some do ffe procurement for a fee, others do not and use others (I am following up with procurement specialists as well per references).
> *concern was raised around: bathrooms (view to ocean), dressing areas, lighting (status of electrical plan?)) and landscaping (this integrates into interior design in pathways/around pool etc
>
> Guesstimate of budget impact for ffe:
> *@if 500E/m2 and 3500 me we are at 1750, plus designer procurement fee of +15% of ffe cost as fee to procure, 2MM total
> *estimated fees for ID design services of 300k-500k , so total of 2.3-2.5MM
> Do I understand current budget is 1.9? less (300-400K we have already burned?)
>
> Immediate needs.
> "we need ACCURATE (I know already on terry's radar for obvious reasons) auto cad file ASAP. All asked for this and don't (understandably) really want to proceed without it.
> *need photo file of state of various spaces (eg rooms, public etc) to help evaluate what can/should be changed
> *need status of all materials (eg purchased not shipped, on site, installed etc). Key questions will revolve around how far we need to backtrack for quality outcome. Careful evaluation of what stays and goes based on sunk costs and intensity of time and money to make changes
>
> Thanks for imput on process. I'll keep moving things forward.
>
> d"

77. The estimate of €500 psm (per square metre) as expressed in that email, while obviously not a guaranteed outcome, was clearly being put forward as a serious figure because the email sought to compute an overall outcome of €2.3-2.5m against Ms Dupré's understanding that the current budget figure was €1.9m less 300-400 "already burned". The latter must be a reference to costs wasted on the previously ordered furniture. In fact, the FFE figure in the March Budget was €2.481m which became €2.5m in the September Budget. I agree with Duet that in cross-examination when being asked about the €500psm figure Ms Dupré was backtracking when she suggested that in fact it was not a real figure at all.

78. As at 7 October, no one at Duet knew which if any designer had in fact been chosen. However, it seemed that Ms Dupré did send to Mr Aim a copy of SMD's proposal of the previous week and that they both agreed on engaging SMD. Thus, on 8 October she wrote to Mr Gabay and Mr Aim as well as Mr Scanlan:

> "Hi Henry and Terry,
>
> We have received and evaluated proposals for interior design.(The third was received yesterday.)
>
> Emmanuel and I spoke last evening and are in agreement both in terms of price and flexibility to work with where we are.
>
> Though all three are quality professionals with hotel experience, our recommendation as best choice for this project is Sybille de Margerie (SM designs) and would like to proceed immediately. In short, proposals were Pinto 2.1MM euro (some help on ffe purchasing), Rochon 500K euro and SM 280K euro,
>
> *'very clear from all designers we are on a tight time frame
>
> *purchasing approach still to be determined with terry's help but SM can do (12percent of ffe). We will need to eval best alternatives in terms of cost and time
>
> *'SM is willing to begin with letter of intent while we finalize contract. Need to get her 10 percent payment (28K Euro) asap as well as a set of accurate autocad drawings. This is critical and I understand Yannick is working on these,
>
> Henry please advise if you would like follow up phone call and/or copy of I'd [Interior Designer] contracts. I did send to Terry and had call with him to brief as well--he concurs with decision. I'm available this afternoon or tomorrow. Otherwise, we'll assume ok to proceed. Please advise questions.
>
> Regards, Denise"

79. Neither that email nor any previous one mentioned that the figure in the SMD Letter (see paragraph 82) for €280,000 referred not only to FFE but also to finish and fit out although Mr Aim would have seen this the night before.

80. Although Mr Gabay was then offered the opportunity to see the contracts, which he did not take up, the essence of the text of this and the previous emails sent to Mr Aim and/or Mr Gabay was that SMD was going to be retained to deal only with FFE. Indeed, Mr Nunnelly accepted in evidence that this was the "main" focus of the parties. Ms Dupré thought that a reference to FFE did in any event, or should, include fit out or even changes to layout but that is simply not what this expression means.

81. Viewed objectively, the most that one can get out of the emails sent at the time is that this was all about FFE.

82. The letter of intent sent by SMD on 8 October 2014 ("the SMD Letter") contained the following passages relating to the deliverables from SMD:

> "… we will consider option 2 of our original fees proposal. ..we will not change the project in terms of space planning but will improve finishes, fit out and FF&E. The project will be design as per the existing constraints (as per the existing partition plan and considering the existing finishes and sanitary equipments and lighting fixture). SM DESIGN will make alternative proposals if the existing finishes are not the level of quality planned for a 5 stars hotel.… We're on a fast track project as you're planning to open the hotel end of next year...
>
> ...SM DESIGN shall prepare the design which shall include, for each area:
> - definition of specific Interior Design concept;
> - development of furniture layout;
> - selection of colours, materials and finishes;
> - development of furniture concept....
>
> These documents shall take into consideration the preliminary architectural, structural, electrical, mechanical and plumbing facilities…"

83. Further, the work was to be done in relation to guest rooms and suites along with lobby, bar, restaurant and spa.

84. The SMD Letter was signed by Ms Dupré on behalf of "the CLIENT" although her signature purports to be on behalf of SBDHI. In cross-examination Ms Dupré accepted that she may not have had authority to sign on behalf of SBDHI. She added, somewhat disingenuously in my view, that it was probably a good thing this was a letter of intent and not a proposal.

85. I deal below with the question as to whether any part of that document could be regarded as a part of the Specification. This involves whether it could be said to have been agreed as such by Duet but also whether it is inherently capable of being part of the Specification.

86. Subsequently, Ms Dupré dealt with SMD alone although she did copy in Mr Nunnelly and Mr Scanlan. Neither Mr Gabay nor Mr Aim or anyone else at Duet were copied in.

87. As to why not, Ms Dupré said in cross-examination that she was merely "trying to coordinate a process that's efficient and thoughtful". I confess that I simply do not understand what this means here as an answer. In truth she did not give an answer as to why Duet were not kept in the loop.

88. On 21 November 2014, SMD sent to Ms Dupré, Mr Scanlan, Mr Bruneau and Mr Guetta the proposed designs and drawings. They were not sent to or forwarded to anyone at Duet. Those proposals included changing the location of vanity units and toilets and adding vanity units and the creation of an increased number of connecting rooms changing the stairwells in the 6 duplex apartments and changing the fit out of the dressing area and baths. There was a meeting in Paris shortly after this attended by, among other people, Mr Guetta. Duet was not invited to or aware of this meeting. In an email to Mr Scanlan dated 25 November, Mr Guetta stated that "our meetings in Paris were extremely constructive and productive. All the suppliers already for the challenge to end the works for October 2015 as soon as their contract will be approved.… SM DESIGN done remarkable work and i am very enthusiastic to be able to collaborate with them and to bring to a successful conclusion this new project…"

89. As might be gathered from these emails, the role of SMD was already expanding. This was confirmed in Ms Dupré's email to Mr Tanner of 12 December which stated that SMD had started with Option 2 "but clearly have migrated to the more expensive program 446k euro". This was not forwarded to Duet either.

90. The fact that Mr Guetta was project manager cannot possibly mean that whatever he received from Ms Dupré or SMD and of which he approved in some way, could constitute agreement on the part of Duet for the purpose of the Specification or Budget as they related to the warranties in the forthcoming Agreement. Mr Gabay certainly did not accept this and there is in truth no evidence going the other way. Mr Guetta himself, of course, was not called as a witness by BH. This conclusion is especially obvious when it is remembered that there was at the time no need for BH only to deal with Mr Guetta. Mr Gabay and Mr Cizmeci were still there and indeed Mr Nunnelly was continuing his communication with Mr Gabay on other matters.

The Budget and the Parallel Budget

91. It is unsurprising that for a project of this kind there was a budget both for the benefit of the owners of the Hotel and any external funder.

92. The 2012 and 2013 Agreements both had warranties in respect of a defined Budget. It is necessary here only to refer to the budgeting process as it evolved in 2014 and early 2015.

93. There is no real dispute that a number of different professionals were involved in compiling the various budgets. First and foremost was Mr Scanlan who of course was acting almost exclusively for Colony and not at all for Duet. Mr Guetta and PRD were involved as Project and Site Managers respectively along with Mr Schwarz of Colony and obviously Mr Aim and Mr Cizmeci, and Mr Nunnelly and Ms Dupré as relevant shareholder representatives.

94. On 20 March 2014, Mr Scanlan passed on to Mr Gabay and Mr Schwarz a budget with a total amount of €23.6m, including €2.5m for FFE. This was duly passed to Mr Nunnelly ("the March Budget").

95. On 8 May, a revised budget was circulated which had risen to €24.9m mainly because of the addition of pre-opening costs and insurance.

96. By 8 July, the budget had risen to €27.8m due to waterproofing costs and contractor payments and bonuses. On 5 September 2014 Mr Cizmeci circulated a further budget now at €29.4m ("the September Budget").

97. By November, although the Agreement had not yet been signed, it was clear that BH would shortly be taking complete control over the project as a result of Duet's desire to sell its controlling interest to it. Duet wanted to exit the project by that stage and indeed Mr Aim had effectively stopped day-to-day involvement by September. Mr Tanner was also now on board as from the end of October.

98. By an email of 10 November, Mr Nunnelly asked Mr Scanlan to identify latent liabilities "out there" as he was progressing the (buyout) discussions with Mr Gabay. The only ones that Mr Nunnelly could see were relatively modest-Cyprian Bru costs and those arising from the roofer who went bankrupt. Mr Scanlan sent a detailed letter of response the same day which identified a number of other items. Overall, he thought that there could be as much as a further €5m required. This included something more on FFE.

99. On 16 November 2014 Mr Scanlan emailed Mr Nunnelly and Ms Dupré a spreadsheet which in fact contained two budgets. One had a final column headed "DUET Adjusted Budget" and this was for €29,356,208 and this became the Budget. The other was the same budget but with additional columns ending with "Adjusted Budget" in the sum of €37,103,722. Although in the same electronic document, the additional columns were hidden in such a way that anyone reviewing it would not know to look further for them unless they were aware of them. No one at Duet was told of this. The second budget has been referred to in these proceedings by Duet as the Parallel Budget. Obviously that was not its title at the time. Nonetheless I adopt that expression for convenience because the budgets were parallel, in the sense that different versions

were being produced in tandem. This appellation is not intended to have any pejorative connotation.

100. Because so much attention has focused on these two budgets I have appended them in a manageable format to this judgment, as Annex A, being the Budget and Annex B being the Parallel Budget. Mr Scanlan explained in the covering email that most of the increase was due to an allowance of €4.671m for the change in room design where "we are starting over in many of the rooms". He also said that the completion date was now October 2015 which added 6 months to the "Duet Adjusted Budget".

101. Mr Scanlan later emailed the two budgets to Mr Tanner, Mr Nunnelly, Ms Dupré and Ms Young explaining why one was more than the other.

102. It is common ground that as at December 2014, and prior to the execution of the Agreement which contained the warranties by DTFS as to the Budget, BH was aware that a different version thereof prepared by the same author had shown a much greater amount which was not in the budget to be warranted. Neither Ms Dupré nor Mr Nunnelly suggested that they had actually thought that the Parallel Budget would become the warranted Budget.

103. It is worth noting how Mr Nunnelly dealt with the question of the Parallel Budget once it had been raised in Duet's evidence, in paragraphs 10 and 11 of his Supplemental Witness Statement. Here he said that:

> "… I have been shown the budgets Duet are referring to. They were prepared by Terry Scanlan. In late 2014 there had been some discussion of using Mr Scanlan as a project manager … Mr Scanlan's revised budget comes to a total of around €37m. I recall that figure only in broad shape. We didn't have full confidence in Mr Scanlan and weren't in a position to know whether his figures were right or not. I note that in some sense it was in Colony's interest to have a higher figure floating around, since the higher the construction cost, the riskier the project would be-and the easier it would be for Colony to justify increasing the cost of the funding."

104. He added in paragraph 12 that after 2014 when Mr Tanner reported budget increases or changes he generally did so by reference to the €29m figure in the Budget.

105. The view of Mr Scanlan expressed by Mr Nunnelly here is odd, since it was he who asked Mr Scanlan to tell him about the liabilities "out there" in the first place and he did not suggest to Mr Scanlan that the Parallel Budget was of no use or unreliable, when he read it. Indeed BH now positively invokes it in support of its alternative claim in respect of individual items (see below).

106. Duet argues correctly, in my view, that since no-one at or acting for BH ever gave a copy of the Parallel Budget to anyone at Duet or even informed them of it, there were only two realistic possibilities. Either BH saw no reason for Duet to have the Parallel Budget because in essence this was (in the main) dealing with estimates for the project as it went forward in a changed form, conceived by BH, which it did not expect Duet to be warranting. Alternatively and disingenuously, BH fully expected Duet to warrant only the Budget which it knew was inaccurate at the start but so as to allow BH to gain an immediate windfall in that a warranty claim could be made on Day 1.

107. Neither Mr Nunnelly nor Ms Dupré were prepared to admit to either of these scenarios in their oral evidence. Mr Nunnelly said that he did not pass on the information in the Parallel Budget because

> "It was Duet undertaking. It was their budget. And I think, you know, it was prepared on the basis that they thought it was the best cut—point of view on— you know, of the project."

108. As for Ms Dupré, she thought that the estimated cost of the design changes at €4.6m was "a rough guess". Duet had access to Mr Scanlan. He was a cost consultant to Colony and they could have asked him whatever they wanted.

109. I think that in truth the first explanation or some variation of it is the correct one. It is given support by an email from Mr Tanner to Mr Cizmeci on 12 December where he says this:

> "Daglar here is how I would summarize our discussion at the beginning of the week - does this look right to you?
> At the end of August, a new Budget was released showing €29.3m as compared to the original budget of €16.3m. The €29.3m was expected to increase due to three factors:
> 1. FF&E changes (approx 2.5m increase)
> 2. Design changes (unknown)
> 3. Other understated costs/surprises which Terry was supposed to unearth (assumed to be~2m increase)
> The Draw summary in July (prior to equity injections by Henry/Mark) showed a cumulative spend of €14m. This would imply a further €15.3m (29.3m less 14m) to be funded - the Completion Reserve Account has €2m and the refi would bring in €13.5m (debt 8.5m and equity of 5m) – so it looked like the new financing would cover the 29.3m Budget and Mark would be left to fund the three factors above.
> Thanks
> David"

110. Mr Cizmeci replied "Exactly" to this email. I agree that in evidence, some of Mr Gabay's answers to questions about this email showed that he felt disengaged from the project in any event, even though he would still have a role as a warrantor. But that does not in my view detract from the importance of the last sentence.

111. In the light of that email it is perhaps unsurprising that Duet took the view that the essentially new elements of the project going forward were outwith the warranted budget even though, of course, DTFS would have been much better advised to seek clarity on the position so that they were legally protected in the event of a claim.

112. From the point of view of BH and regardless of whether this would strictly amount to a defence to the claim under the Budget Warranty, the logic of BH's own case must be that it entered the Agreement in the full knowledge that the Budget was materially defective because there was another one showing an increase of nearly €8m.

113. If this is really how BH really understood its position at the time, being an unattractive one on any view, it is remarkable why it did not complain to Duet almost immediately. Yet it did not do so. Not even after Mr Tanner produced an even higher budget in April 2015. Nothing happened until the dispute arose much later, in 2016 when there was the issue over BH's purchase of the villas. Mr Nunnelly in evidence nonetheless said he also thought in 2015 there had been a breach of warranty. Yet he did not mention it. He said that this was because the warranties lasted over a period of time and he and Ms Dupré were "trying to get their arms around what the full content of those were". I found that unconvincing. It also contrasts with how it was put in BH's Closing (see paragraph 199 below) that when he saw the Parallel Budget at $37m he did not think about a warranty claim.

114. I think the truth is more prosaic. It is that BH simply thought that the sort of increase which Mr Scanlan had alerted them to in the Parallel Budget was going to be their responsibility. Once the costs kept increasing into 2016 they might then have taken a different view.

The SPA

115. Under the SPA "the Sale Interests" were the B Shares and CPECs. As these were presently the subject of charges by way of security in favour of Colony for the purposes of the Villa Loan, they could not be immediately transferred to BH. Accordingly, the completion date for the sale of these to BH was 28 days after they had been released from the charges held over them by Colfin. €2m was payable on that date, €2m at the opening of the Hotel and the final €2m on the date of the refinancing of the loan with Colony relating to the Hotel. The long-stop date for the release of the B Shares and CPECs by Colfin back to DTFS was 23 December 2017. Completion of the sale of the plot for the third villa was the later of the Hotel opening and release by Colfin of its security and so the €2m payable for that land was not due until that time. If the Sale Interests were not released by the long stop date then the SPA would terminate. BH would not receive the assets, nor of course would it have to pay for them. Even if that happened, it would make no difference to the question of control over the Hotel project since, by reason of the 2014 Agreement, BH was now a majority shareholder and DTFS had no longer any management role.

116. It also follows (and is not in dispute) that if Colfin foreclosed over the security held by it for the Villa Loan this would have the effect of terminating the SPA because it would mean that the Sale Interests could never be released and transferred to BH, whether by the long-stop date or at all.

The Indenture

117. Apart from the execution of the Agreement and the SPA, on 23 December, SBDHI and Colfin entered into the Indenture by which Colfin agreed to lend to SBDHI $11.4m for the Hotel development going forwards. SBDHI warranted the accuracy of the Budget and agreed to provide "a revised and final Construction Budget" and "revised and final Approval Plans" within 120 days. That revised budget had been prepared by Mr Tanner (now the CFO of BH) by 10 April 2015. The new figure was €43,386,983. He made the comparison with the €29m figure in the Budget. I shall refer to this revised budget as "Mr Tanner's Budget."

Events after 2014

118. It is not necessary to undertake a complete history of the project from this point on. And indeed, as a history in its own right, it was not much emphasised in BH's Closing. However the important point is that in the light of all the evidence, it is impossible not to conclude that there were numerous reasons why costs increased so dramatically from the end of 2014, by no means all of which could somehow be laid at the door of DTFS when it was still involved or (more importantly) which would entail breaches of the Specification or Budget Warranties (see paragraph 156 below).

119. By way of example,

(1) the promotion of PRD to Project Manager by BH was a serious error especially as its previous work had simply been as a Site Manager. Over the next few months, it became apparent that it was simply unable to cope with a project of this size. It was dismissed with immediate effect on 30 September 2015. In an email sent by Mr Tanner to Ms Dupré on 2 August 2015 he stated that "PRD has blown both the timeline and is clearly over

budget" to which Ms Dupré responded by agreeing and adding that PRD had failed repeatedly to comply with the manpower requirements of the contract; see also the detailed list of performance deficiencies set out in the draft letter to PRD dated 27 August 2015;

(2) indeed, the prior decision to dismiss (again with immediate effect) Mr Guetta as a highly experienced local Project Manager was itself a serious error;

(3) there were delays in the new designs which had a knock-on effect on completion for October 2015; the actual full new design drawings did not emerge for guest rooms until February 2015 and for the other rooms not until April;

(4) a third Model Room was commissioned after the second one was shown at the end of April 2015. The third room was scheduled to be shown on 27 July. Although Ms Dupré suggested that there were minor changes only, this does not seem correct; certainly decisions on FFE and electrics were suspended in the meantime; in that regard, Mr Feldman accepted that one-third to one-half of 2015 had been taken up with getting to an acceptable design;

(5) the footprint of the hotel appears to have increased by some 10% by February 2016 which would have had a knock-on effect on time and costs. The restaurant alone increased capacity so that it could take 420 rather than 333 guests;

(6) the ultimate figure of €61m referred to in the final Application 42, dated 30 April 2017, included €5m incurred since the opening of the hotel as pre-opening costs; it is difficult to see how there could be such costs incurred once the hotel was opened. It may be that some of this figure refers to liabilities actually incurred before the hotel opened but on any view this is an extremely high figure for which there is no proper explanation;

(7) on 6 March 2015 Mr Tanner wrote to SBDHI's accountants in relation to any impairments in its financial position, in these terms:

> "As you are aware, the new management for the Le Barthelemy Hotel has made a large number of improvements to the planned hotel. These upgrades and improvements are based upon membership in the *Small Luxury Hotels O f The World*...Membership in this exclusive hotel club is dependent upon very high quality standards that significantly exceed the original standards budgeted and considered in 2013.
>
> While the essential footprint has not been changed, the new investors engaged a design firm resulting in significant design changes to the room layouts (including walls, showers and windows), upgraded interior finishes (woodworking, tile, metals etc.), electrical and lighting (such as four times as many electrical outlets and lighting fixtures as well as higher quality fixtures), extensive woodworking and decking using high higher quality woods and finishes. The result is the estimated cost of fitting out the rooms has more than doubled to over €100,000 per room (50 rooms). The FF&E budget has been increased by almost €8m. Finally, there have been other safety modifications such as the addition of electrical hurricane-proof shutters and an investment in state of the art waterproofing system for the entire concrete structure below sea level.
>
> Using the 31/10/14 book value of €58.4million, we estimate that future capitalized constructions costs will be between €18 - €20million plus capitalized finance costs of approximately €2.5million resulting in a final completed cost of between €79 and €81million.
>
> The increase in the budget and costs since the 2014 budget are primarily the result of these improvements and value added modifications which have added approximately €13million to overall hard construction costs and increased overall FF&E, cost by almost €8million.

> Management believes that the value added improvements combined with a much healthier economic environment in 2015 as compared to 2013, do not indicate any impairment exists."

120. Mr Tanner sought to downplay the significance of this email (for example by suggesting that the changes referred to had in fact arisen in 2014) but in my view this email, especially from a qualified accountant, speaks for itself. Equally the attempts in evidence by Mr Nunnelly and Ms Dupré to explain away its contents were not impressive, for example to suggest that this was done for the purposes of joining a marketing group, or that it was best to ask Mr Tanner about it because the contents were "confusing".

121. Although both Ms Dupré and Mr Nunnelly asserted that they were careful about not letting costs run away, there is little contemporaneous evidence of that. Moreover, even where there was some form of tendering process (which Ms Dupré apparently left to SMD as far as FFE was concerned) that does not help if very expensive types of furniture or other items were sought in the first place for example, the extensive use of decorative shutters in the bedrooms was based on a pre-installation and pre-tax cost of around €1.5m and much more with the costs of installation, duties, shipping, project management etc. There were bedside tables priced between €1,000 and €1,500 each, and coffee tables at between €2,000 and €2,900 each and with bedside hanging lamps priced from €2,350 and up to €10,000.

122. A Heed Lux report of July 2015 highlighted various deficiencies in the way the project was being carried out at the time.

123. None of this is perhaps surprising given that neither Mr Nunnelly nor Ms Dupré had any personal experience of running a large hotel construction project.

124. The point of all of this is not to set out a conclusive history of events since 2014 but simply to show that it is quite impossible to suggest that there were not diverse and significant causative factors leading to delayed opening and serious increases in costs not attributable to any breach of warranty. This is the foundation for the point that whether Clause 38.4 was an absolute guarantee or not, any attempt to calculate loss by reference simply to the actual costs incurred less only volitional items, is hopeless (see below).

125. In this context, I was referred in the course of argument to the decision of Akenhead J in *Lily v Mackay* [2012] EWHC 1773. This was a contractors loss and expense claim where all of the loss and expense suffered was attributed to the defaults of the employer. In that sense, it was referred to as a "global claim" and in that sense it bears a resemblance to the primary claim of BH here, attributing the entirety of the increased cost of constructing the hotel to breaches of the Specification and/or Budget Warranties. The context of course is very different but the resemblance remains.

126. In *Lily*, Akenhead J said this at paragraph 486:

> "(a) Ultimately, claims by contractors for delay or disruption related loss and expense must be proved as a matter of fact. Thus, the Contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be). I do not accept that, as a matter of principle, it has to be shown by a claimant contractor that it is impossible to plead and prove cause and effect in the normal way or that such impossibility is not the fault of the party seeking to advance the global claim. One needs to see of course what the contractual clause relied

upon says to see if there are contractual restrictions on global cost or loss claims. Absent and subject to such restrictions, the claimant contractor simply has to prove its case on a balance of probabilities…

(c) It is open to contractors to prove these three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof There is no set way for contractors to prove these three elements. For instance, such a claim may be supported or even established by admission evidence or by detailed factual evidence which precisely links reimbursable events with individual days or weeks of delay or with individual instances of disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost.

(d) There is nothing in principle "wrong" with a "total" or "global" cost claim. However, there are added evidential difficulties (in many but not necessarily all cases) which a claimant contractor has to overcome. It will generally have to establish (on a balance of probabilities) that the loss which it has incurred (namely the difference between what it has cost the contractor and what it has been paid) would not have been incurred in any event. Thus, it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return. It will need to demonstrate in effect that there are no other matters which actually occurred (other than those relied upon in its pleaded case and which it has proved are likely to have caused the loss). It is wrong, as Counsel suggested, that the burden of proof in some way transfers to the defending party. It is of course open to that defending party to raise issues or adduce evidence that suggest or even show that the accepted tender was so low that the loss would have always occurred irrespective of the events relied upon by the claimant contractor or that other events (which are not relied upon by the claimant as causing or contributing to the loss or which are the "fault" or "risk" of the claimant contractor) occurred may have caused or did cause all or part of the loss.

(e) The fact that one or a series of events or factors (unpleaded or which are the risk or fault of the claimant contractor) caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss does not necessarily mean that the claimant contractor can recover nothing. It depends on what the impact of those events or factors is. ..."

127. In my judgment, this is not a special rule of law applicable to construction contracts or indeed any contract. It is simply an application of the general principles of causation and loss as relevant to the context where global claims are made. Where (as here) the difficulties of making a global claim are insuperable (see paragraphs 118-124 above), then, of course, an alternative is to claim in respect of individual items. Ultimately, and as a belated alternative, that is what BH has done here (see below).

Foreclosure by Colfin in respect of the Villa Loan

128. This matter is not relevant to BH's claim. But it forms the factual backdrop to the Villa Loan Counterclaim. Accordingly I deal with the evidence about it here.

129. According to Mr Gabay, in relation to the involvement of Colony for the refinancing in 2013, he was introduced to that funder by an intermediary called Mr Neirick. In fact, Mr Nunnelly's family was an investor in various Colony funds. Mr Nunnelly was not always forthcoming about his communications with Colony. For example, on 21 July 2014 he emailed Mr Schwarz of Colony to ask for a quick "quiet" conversation in which he indicated that long-term he wished to own 100% of the hotel. He did not copy DTFS in on this. Yet by an email dated 10 July 2014 he indicated to Mr Gabay that he had not been in conversation separately with Mr Schwarz. Given what happened shortly afterwards this email was at best disingenuous.

130. In an email to Mr Tanner dated 24 February 2015 Mr Nunnelly told him in relation to the Villas that Colony had "all the leverage and is on our team". It is right to say of course that as far as the Hotel was concerned one would expect BH to be dealing with Colony exclusively since it now had control. But that was not so with the Villas.

131. On 1 October 2015 the Villa Loan fell due for repayment, this being the contemplated opening date of the Hotel. DTFS was unable to repay it at that point and so a forbearance agreement was executed extending time until 3 November 2015 ("the First Forbearance agreement"). On 3 November, time was extended further to 15 December 2015 ("the Second Forbearance Agreement") at which point time was extended yet further to 1 March 2016 or 1 April if certain conditions were met ("the Third Forbearance Agreement). The interest payable over the extension periods was at a high rate. The first two extensions alone cost about $400,000.

132. By an email dated 18 December 2015 Mr Schwarz told Mr Nunnelly about the Third Forbearance agreement from which Mr Nunnelly inferred that it was likely that Colony would take the Villas over (i.e. foreclose for non-payment) and he noted that Colony had already looked at foreclosure under Luxembourg law.

133. On the next day it is common ground that Mr Nunnelly contacted Mr Schwarz, obviously acting on what he had been told the previous day. According to Mr Schwarz's internal notes of the meeting:

> "… Interestingly, Nunnelly called me directly today. Was fishing around to see if we would (a) potentially sell our loan at a discount or (b) foreclose and sell him the villas. I basically told him we were sellers at par, if that was of interest. He's a bit concerned about the likely fight with Henry if he needs to exercise his rights… Sounds like his team is telling him that owning the villas could be a positive thing for the hotel… We'll see how this plays out in the coming couple of months."

In cross-examination, Mr Nunnelly said that he did not agree with this email's characterisation of the conversation but I have no reason not to believe how the matter was put (internally) in this email at the time.

134. Subsequently, BH looked into the economics of purchasing the Villas and they were seen as a very good opportunity to increase the scope of what could be offered at the Hotel.

135. On 18 March 2016 Mr Tanner sent an email to Mr Nunnelly and Ms Dupré stating that one way in which BH could buy the Villas was if Colony foreclosed and then sold to them, although he noted that this was not the best outcome for Colony.

136. By now of course, the later deadline of the Third Forbearance Agreement - 1 April - was looming and Colony and Mr Gabay were in discussions about a fourth forbearance agreement. On 1 April itself, a draft fourth forbearance agreement extending time by a further 3 months was sent to Mr John Fulco, DTFS's lawyer.

137. On 5 April, Mr Gabay wrote as follows to Mr Schwarz:

> "I just heard from my lawyer. I have to say that working with you has been one of the most unpleasant experience in my professional career.
> 1. Nobody is delaying the interest payment As soon as we sign. I pay the interest monthly over the next 3 months
> 2. I do not agree with your figure of an additional 100. As we have funds in reserve account, Despite that I agreed to do it
> 3. The loan is completely mispriced as nor the hotel or the villas have any development risk
> 4. There is no need for additional contingency of 20,000 euros as we are adding another 100,000 euros. Now after all this you are threatening of foreclosure fir the x time. My offer will not change and if you decide to go legal and foreclosure after having received more than 7m in interest on a loan of 21m, we will do whatever we have to do to defend our interest and take all the measures necessary.
> Let me know your final position."

138. Later the same day Mr Schwarz responded:

> "So then repay the loan, as it is past due. If not possible, I layed out an alternative. I am willing to skip the 20k additional reserve, but I will need the 2 months of interest funded upon signing."

139. On 6 April, Mr Gabay sent Mr Schwarz a further email thus:

> "We are working on the repayment
>
> As mentioned to you on the phone, we are a bit tight this month and that's why we requested monthly interest payment, as we have done over the last months.
>
> We are ready to proceed on 3 months extension, payable monthly and 100,000 increase upfront for the budget.
>
> Regarding the following months, we have good inflows at the end of April, so the interest will be repaid as we have done it over the last 3 years."

140. So at this stage, there was still disagreement with Colony over the requested (by now) 2 months' interest payable in advance.

141. On 13 April, Mr Gabay received notice of the foreclosure from Colony stating that the enforcement of the pledge agreements had taken place that day following the event of default under the Villa Loan.

142. On the same day, Mr Fulco wrote to his counterpart at Skadden Arps, the lawyers for Colony to say that he had been advised by Mr Gabay that the outstanding issue remaining was whether to pay one or two months' interest in advance. Mr Gabay had emailed Mr Schwarz but not received a reply. At this point Mr Gabay was "fine" with 2 months advance interest. This was of course now too late. In a subsequent email from Mr Fulco after he had a discussion with Mr Levy at Skadden Arps, he wrote this:

> "Thank you discussing with me the unfortunate turn of events in this matter which it was not Henry's intention to bring about. As a sign of good faith, Henry has executed, and I herewith attach, the Fourth Forbearance Agreement. Upon Colony's acceptance of same, Henry is prepared to wire the funds therein required tomorrow morning. Please let me know if this is acceptable and whether Colony is willing and requires anything further to reverse today's enforcement actions."

143. However, Colony did not execute the fourth forbearance agreement.

144. By 20 April Colony had decided that it was prepared to sell the Villas to BH although as subsequent correspondence shows, it was still prepared to negotiate with Mr Gabay on reversing the foreclosure if suitable repayment terms could be agreed.

145. By 30 April Mr Gabay had already taken the view that BH and Colony were wrongfully colluding against him - see his email to Mr Nunnelly of that date. However he also said that his refinancing was almost complete but if he could not settle with Colony then he would move to multiple litigation.

146. Then, as noted previously, on 16 May SBD3 issued proceedings in Luxembourg and on 18 May BH served the 2016 Demand (as defined below).

147. However, at the same time Mr Gabay was trying to persuade Colony to reverse the foreclosure, by the promise of refinancing. An indicative term sheet was sent by Colony to SBD3 on 12 May which was countersigned, and Mr Fulco sent out a repayment proposal on 13 May. Mr Gabay

had been negotiating the refinancing with a Dutch bank, GarantiBank International N.V. ("Garanti") and on 17 June it sent a letter to Mr Gabay stating that all the loan documents had been signed and that it would be shortly holding in a segregated account €20m in connection with the refinancing. Garanti would be prepared to transfer the funds to Colfin subject to proper documentation in and releases including release of all collateral.

148. A further copy of this letter was sent to Mr Gabay on 30 June and then forwarded by Mr Fulco to Mr Levy. There was a slight difference between the letters because the first one stated that Garanti would be holding the money in a segregated account shortly whereas in the second letter it said that it was now holding that sum. But on any view the money was being held by Garanti. Mr Levy responded attaching a calculation of the outstanding amount due under the loan as of 30 June.

149. At paragraph 187 of his witness statement, Mr Gabay said that the money was in fact in escrow. That was not correct, it had never left Garanti. On the other hand, Mr Gabay may have genuinely thought that the deal could now go through. And in any event the way the matter was put to Mr Levy by Mr Fulco was that Garanti was holding the monies. There were further discussions with Colony's Luxembourg lawyers subsequently in terms of what structure would be required for the repayment proposals. By this time, there were already court appearances in Luxembourg.

150. However, by 22 July, Colony had indicated that it was not going to proceed any further with settlement discussions. In an email of that date Mr Fulco expressed his surprise and dismay at this turn of events and recited a history of the negotiations but then said that if the matter could not be resolved, then DTFS would have to conclude that Colony had been acting in bad faith all along and would take all relevant legal steps. An internal email from Mr Schwarz dated 26 July gave some indication of Colony's thinking:

> "We are currently walking towards a near-term sale to Mark Nunnelly. As we have learned over the course of this transaction, doing anything with Henry Gabay involves complication and a high degree of uncertainty. This is all posturing if the litigation does not go in his favour. Ron and/or I can give you a full download on the status of where everything stands if desired."

151. Finally, on 26 August 2016 LEBV Holdings LLC (a company owned and controlled by Mr Nunnelly) purchased Colfin for €22,385,170 (being the equivalent of the outstanding Villa Loan) and agreed to indemnify Colony against any legal action against it in respect of the foreclosure. As a result of that acquisition, Mr Nunnelly now had the benefit (through Colfin) of the outstanding Villa Loan together with the (now foreclosed) two Villas and the other security held by Colfin including the B shares and CPECs. In addition of course the SPA terminated. At the same time, the underlying loan in respect of the Hotel was repaid.

152. In relating this account of the foreclosure, I have done so principally by reference to the contemporaneous emails rather than each side's take or gloss on them now. In my view it is plain that Colony had been prepared to sell the Villas to BH at least as from 20 April and had regarded Mr Nunnelly as a good proposition. On the other hand, it had not irreversibly decided to do so and at least until July was negotiating with Duet entities on the basis of a refinancing package. Ultimately, however, it decided to go with Mr Nunnelly's offer to purchase.

153. Mr Gabay says that all of this enabled BH effectively to purchase the Villas at a price much below their market value. That view, no doubt, informs his present strong sense of grievance. Where all this takes DTFS in terms of the Villa Loan Counterclaim, I discuss below.

The Hotel opens

154. The construction of the Hotel was completed in about September 2016. It had a "soft" opening on 1 October and opened fully on 28 October. Despite all of the problems along the way, once open, it was a success scoring highly with travel websites.

TERMS OF THE AGREEMENT

155. To return to the Agreement, the following were material terms thereof:

(1) By Clause 1.1,

(a) "**Hotel Budget** means the costs budget and cash flow relating to the Hotel Development showing all development costs, costs of hotel fixtures, fittings and equipment, cost of interest payments and sums available to fund the opening and operation of the Hotel to anticipated Hotel Break Even which is attached at Annex B with such variations as may be approved by the Board;

(b) **Hotel Construction Contracts** means the Hotel Works Contracts and the Hotel Consultants Appointments;

(c) **Hotel Consultants** means the persons listed as such in Schedule 1 and includes such other consultants or advisors in relation to the Hotel Development as the Propco may at any time appoint with the prior approval of the A Shareholder and Hotel Consultants Appointments shall be construed accordingly;

(d) **Hotel Development** means the redevelopment of the Hotel Land as a hotel and condominium complex in accordance with the Hotel Specification and the provisions of this Agreement;

(e) **Specification** means the specification relating to the Hotel Development attached at Annex B as varied with the approval of the Board and the updated specification prepared and approved under para 1 of Part A of Schedule 3 Part A;

(f) **Hotel Works Contractors** means each of the construction contracts let by the Propco to carry out certain works as part of the Hotel Development and which: (i) are listed in Schedule 1; and (ii) are subsequently let in accordance with the Business Plan or with the approval of the Board; and Hotel Works Contracts shall be construed accordingly;

(g) **Warranties** means the warranties given by the Sponsor [DTFS] set out in Schedule 2;"

(2) By Clause 2.2, headed **Sponsor Warranties**, DTFS warranted to BH that "…as at the date of this Agreement each of the Warranties is true, complete, accurate and not misleading";

(3) By Clause 3.12 (c), headed **Transaction Legal Costs**, DTFS agreed to pay and indemnify BH against "(i) all legal and related costs or associated with the original Colony financing of the Hotel and the Villas in 2013 as contemplated by the Hotel Indenture and the Villa Credit Agreement… and all sums paid by the Group in reimbursing legal and related costs incurred by Colony and (ii) the costs of Ropes & Gray relating to advice provided to the Investor [BH] in 2013 in the sum of £85,000 plus disbursements";

(4) By Clause 23.1, headed **Covenant and indemnity**, Duet

"23.1.1 covenants with the A Shareholder, as a primary obligation, that the Sponsor and the B Shareholder and the Guarantor shall at all times duly perform and observe all the obligations on the part of the Sponsor and the B Shareholder contained in this Agreement and shall be jointly and severally.. liable for so doing;

23.1.2 indemnifies, as a primary obligation, the A Shareholder against any liability or loss arising in any way directly or indirectly out of any default by the Sponsor or the B Shareholder in the performance and observance of such obligation;"

(5) By Clause 23.2, headed **Guarantor's liability "**The Guarantor further covenants with the A Shareholder as a primary obligation, that the Guarantor shall be liable… for the fulfilment of all obligations of the Sponsor… Under this Agreement and agrees that the A Shareholder, in the enforcement of its rights under this Agreement, may proceed against the Guarantor as if the Guarantor was named as the Sponsor… in this Agreement";

(6) By Clause 23.3, headed **"No release"** "None of the following, or any combination of them, shall release, determine, discharge or in any way lessen or affect the liability of the Guarantor as principal obligor under this Agreement or otherwise prejudice or affect the right of the A Shareholder to recover from the Guarantor to the full extent of this guarantee:… 23.3.4 any other act, omission, matter or thing whatsoever as a result of which, but for this provision, the Guarantor would be exonerated wholly or partly…"

(7) By Clause 23.5, headed **First demand**, BH and Duet agreed that BH would, before making a claim or demand on Duet under Clause 23.1 or 23.2 first make a written claim or demand on DTFS and may then only make a claim or demand on Duet if, following the initial claim, DTFS did not pay or perform its obligations within 15 days after receipt by it of written notice making the initial claim;

(8) Schedule 1 Part 5 is headed Hotel Works Contracts and lists a number of contract dates and contractors and their roles; Schedule 1 Part 6 headed Hotel Consultants Appointments does the same in respect of a number of consultants which included Athea;

(9) Schedule 2 contains the warranties given by DTFS to BH including the following:

"38. In relation to the Hotel Development:

38.1 the Specification is, and following its variation and update prior to the date of this agreement will be accurate in all respects and is or will be sufficient to provide for the construction, completion and fitting out of a hotel of the quality represented by the brochure attached in the Due Diligence Bundle;

38.2 the Hotel Budget has been prepared on a prudent and reasonable basis and:

38.3 identifies all the costs of the design, construction, engineering, finish and fit out works required to complete the Hotel Development, to pay the interest required to be paid under Clause 4 (a) of the Hotel Loan Note and to furnish and equip it as an operational hotel; and

38.4 contains either costs for work packages which have been fixed in Work Contracts that have been signed or are prudent and reasonable estimates or provisions for the cost of all work not yet let or covered by Works Contracts all of which have been independently reviewed and signed off by an independent cost consultant."

156. I shall refer to the warranty contained in paragraph 38.1 as the Specification Warranty and those contained in paragraph 38.2-38.4 as the Budget Warranties. There is no dispute over the identity of the Budget, which, while not actually attached as Annex B is agreed to have been intended to be so attached. Likewise, there is no dispute over the identity of the Brochure referred to in paragraph 38.1.

157. However, no specification was attached within Annex B (or elsewhere). It was entirely missing. That being so, one has to look beyond the four corners of the Agreement to see what it consists of since, objectively, all parties to the Agreement intended that there should be an operative specification for the purposes, among other things, of the Specification Warranty. The parties both agree that the Specification consisted of at least:

(1) the collection of drawings and plans identified as the relevant specification for the earlier 2013 Agreement, to which I shall refer as "the 2013 Drawings"; and

(2) a set of drawings and plans which formed part of a submission filed for a modified building permit (akin to planning permission) in respect of the Hotel although in the event that particular submission was not pursued. These documents essentially summarised the 2013 Drawings for building permit purposes although there was also some modest changes as well; I shall refer to these documents as "the Permit Drawings".

158. However, BH contends (but Duet denies) that there were three other sets of documents which ought to be regarded as part of the Specification. They are:

(1) a two-page document created by Ms Dupré on or around 15 September 2014 and in preparation for forthcoming meetings with a number of prospective interior designers ie the Design Notes;

(2) a binding letter of intent produced by one particular such designer called SMD on 8 October 2014 ie the SMD Letter; and

(3) a set of design drawings prepared by SMD in November 2014 ("the SMD Drawings").

159. I deal with that issue in paragraphs 175-190 below.

THE WARRANTIES – INTERPRETATION

The Specification Warranty

160. There is no real dispute between the parties as to the meaning of this provision. Apart from a general requirement of accuracy, the Specification has to be sufficient for a hotel of the quality represented by the Brochure. What is in dispute is what that quality requirement ("the Brochure Quality") connotes (see paragraphs 168-174 below).

161. It is common ground that insofar as the Specification is insufficient because it omits some element or feature which is necessary to satisfy the Brochure Quality,

(1) that is a breach of the Specification Warranty;

(2) the measure of loss is to be calculated by reference to the recoverable loss on the basis that the Budget has not made provision for the cost of that element or feature but should have done.

The Budget Warranties

162. In my judgment Clause 38.2 is itself an overarching requirement that the Budget be prepared on a prudent and reasonable basis. While Clauses 38.3 and 38.4 are separate requirements they are, in my judgment, express examples of what Clause 38.2 requires. This is borne out by the use of a colon at the end of Clause 38.2. This serves the purpose of effectively saying at the end of 38.2 "and in particular". It is true that Clauses 38.3 and 38.4 are not sub-clauses of Clause 38.2. An earlier version of the same set of warranties as appears in the 2013 Agreement did in fact show them as sub-clauses. There is no objective reason to suppose that the parties now intended them to have a different effect. To the extent set out below, BH does not accept that Clauses 38.3 and 38.4 are worked out manifestations of the general duty in Clause 38.2. It is therefore necessary to examine the meaning of the later clauses.

163. BH contends that Clause 38.3 is an absolute warranty in relation to all the cost items referred to therein. In other words whatever the costs of the construction as set out in the Budget, to the extent that they are in fact exceeded, Duet is strictly liable for them. That would be a surprising result since as at 2014 the Hotel had not yet been completed and it is common ground that the Budget had to consist, in significant part, of an estimate of future costs. It would be commercially odd for the warrantor to guarantee the costs in circumstances where only estimates as to future costs could be given. In my judgment, the language of Clause 38.3 makes it plain that this is not the case. The obligation under Clause 38.3 is to "identify" all the particular costs cited therein. The purpose of this provision is obviously to ensure that the Budget is complete in the sense that it captures all the costs which it needs to. In this way Clause 38.3 is a reflection of the definition of the Hotel Budget set out above. What it requires is that each of the particular categories of cost are set out and quantified. But it does not require that the quantification has to meet a particular standard of accuracy. It does not need to, first because of the overarching requirement in Clause 38.2 that the Budget be prudent and reasonable, and second, because of Clause 38.4, to which I now turn.

164. This provision requires that the Budget include all of the fixed costs which have been committed to by contracts and then prudent and reasonable estimates of the costs of work yet to be contracted or covered by the existing contracts. There is no real dispute between the parties about the meaning of Clause 38.4. But on that basis, BH's interpretation of Clause 38.3 would conflict with Clause 38.4 since the former constitutes an absolute warranty whereas the latter imposes a reasonableness requirement. Mr Doctor QC for BH sought to distinguish these provisions on the basis that Clause 38.3 deals only with certain costs whereas Clause 38.4 covers all of them. But the costs covered by Clause 38.3 are fundamental because they include design, construction engineering, finish and fit out works, leaving little else. It would be extremely odd if there was an absolute warranty in respect of these basic costs and yet not in respect of others. Moreover, on BH's interpretation of Clause 38.3, it would be inconsistent with the general requirement of reasonableness set out in Clause 38.2.

165. On the other hand, the narrower interpretation of Clause 38.3 then means that it (along with Clause 38.4) is consistent with and simply expresses manifestations of Clause 38.2. Both manifestations are in fact obvious. One could hardly have a reasonable budget if it did not put in

figures for each necessary element of cost. Nor could it be reasonable if it did not include estimates of future works.

166. For all those reasons, it is plain, in my judgment, that Clause 38.3 does not create an absolute warranty in respect of the heads of cost identified therein. This conclusion means that on any view, BH cannot succeed in a claim which is based on no more than the difference between (a) the amount of costs for particular items set out in the Budget and (b) what those items in fact cost at the end of the day (less deductions for items which represented new elements added after the Agreement). That is true whether (as is BH's primary case) the claim is put on a "global" basis taking the difference between the total Budget figure of €29m and the total actual costs of €61m, or whether (as is now put forward as an alternative) the difference between the Budget figure for each particular head of costs and the actual costs incurred on that element.

167. That being so, any amount claimed for breach of the Budget Warranty must, *prima facie*, be the difference between the total Budget figure and what a putative reasonable budget figure should have been or, in respect of particular items, the difference between the Budget figure for an item and what a reasonable figure for that item should have been. Duet essentially accepts that this is the appropriate measure of damages where a breach of the Budget Warranties (as I have construed them) is established.

The Brochure Quality

168. As refined in the course of closing submissions, BH's case is that the Brochure Quality meant: top quality, design by a named international designer (or a distinctive design) able to compete with the other best hotels on the island (which has to be a reference to the Competition Hotels) and an aesthetic illustrated by the renderings in the Brochure.

169. On the other hand Duet contends that a hotel of Brochure Quality would be one which met the requirements for 5-star under the French Official Rating System (known as Atout), complied with the specific requirements identified in the Brochure relating to number, type and size of rooms, the views, the details of bathrooms, food and beverage outlets, air conditioning and heating etc, and which would be "in the mix" with the Competition Hotels. It is common ground that if the Atout standard was the relevant one, then the Hotel would be 5-star as would be the Competition Hotels.

170. I would make the following preliminary points:

(1) The only specific contractual purpose of the Brochure is to provide the quality standard which itself is relevant only to the sufficiency or otherwise of the Specification for the purposes of the Specification Warranty. In particular it is not a direct yardstick for the adequacy or otherwise of the Budget;

(2) The quality yardstick concerns, and only concerns, a standard of some description. It does not mandate *per se* any particular design style or size save to the extent that this is necessarily to be drawn from the Brochure; this is emphasised by the reference in Clause 38.1 to "a" hotel of the Brochure Quality;

(3) The Brochure Quality has to be seen in the context of the Competition Hotels whose details were given in the Budget. On any view the Hotel had (at least) to compete effectively with the opposition. But there is no suggestion from the Brochure that the

intention was to construct a hotel of such quality that it would in reality be in a different league from the competition so that no meaningful comparison could be made at all. If that were the position, there would have been no point in setting out all the details of the Competition Hotels. There was no evidence that, for example, the Hotel could trade at maximum occupancy throughout the year by appealing to a highly discrete set of clients who would be prepared to pay significantly more than they would at any of the Competition Hotels simply for the privilege of staying at the Hotel. That is borne out by the intended room rates for the Hotel set out in the Brochure as compared with those for the Competition Hotels. This is also borne out by the fact that since opening, the Hotel has operated within the broad room rate confines of the Competition Hotels. The room rates were somewhat lower to begin with which is common in the industry so that the Hotel could "ramp up" its position in the market and offer discounts in order to secure customer interest and loyalty;

(4) Much was made in argument and evidence about the importance of the expression that the Hotel should be the "best on the island". In truth this is no more than an aspirational statement, however worthy. I am sure that the Competition Hotels would all like to see themselves as the best (or rated the best by travel websites, for example). After all, no hotel within this bracket is going to express the intention of being simply the second or third best. In its pleaded case, Duet suggested that the use of this expression by Ms Dupré in particular meant that BH's intention was to construct a hotel of a wholly different character to the Competition Hotels and to that which was suggested by the Brochure. But this is a false point, first because I do not read this from the Brochure and second, because if that is what it did mean, then Duet was on notice of it for months before the execution of the Agreement since it was a phrase used by Mr Nunnelly or Ms Dupré in a number of emails;

(5) There was no real dispute between the parties that the quality of a hotel is concerned not simply with the physical attributes of the accommodation and common parts. It is also about the location and standard of service whether generally or in relation to the food and beverage offerings. However, in this particular context one is concerned with what the Brochure Quality requires in terms of actual specification because that is the context of the sufficiency of the Specification;

(6) By the time of the arrival of the 2013 Drawings, certain, albeit limited, departures had been made from the way the Hotel was presented in the Brochure. First, Dupoux was not in fact used as the designer; instead it was Athea, whose design informed the 2013 Drawings. Second, the lobby's design was changed to one somewhat less ornate, as shown in the 2013 Drawings, and the same was true of the restaurant. Since those changes formed part of the 2013 Drawings which were expressly agreed between the parties and had formed at least one part of the Specification since the 2013 Agreement, it would be absurd to suggest that the Specification had to be in compliance with particular features in the Brochure which had been expressly dropped.

171. The Brochure does not suggest anything particularly distinctive or unusual about facilities like the swimming pools, gym or elements such as air conditioning or heating. The fact that the swimming pool and Jacuzzi would be "facing the ocean" is hardly remarkable. I accept, however, that the spa element of the Hotel was intended to be special in the sense that there would be 8 treatment rooms. And leaving aside the rendering of the restaurant, there is nothing there to suggest that it is of a type that is clearly superior to that found in the Competition Hotels. Indeed,

all that is said is that it would be "trendy" and serving contemporary cuisine which is unremarkable. The same can be said about it offering a "relaxing and warm atmosphere." Indeed, it is to be noted that two of the Competition Hotels were offering two restaurants. As I have already noted, there are some respects in which it can be said that the rendering of the restaurant in the Brochure suggests some quite ornate features and furnishings although with an open beach-house style accentuated by the high wooden ceilings and white walls. But as also noted, that design had changed in any event by the time of the 2013 Drawings. The same can be said about the lobby.

172. There are various references in the Brochure to "glamorous" and "luxury" but I do not think that they really add very much to the specific features set out therein.

173. The Brochure does of course refer to "5-star" facilities and amenities although the examples given are free access to the spa, in-room dining, daily cleaning etc which, again, is hardly remarkable. There was a debate between the parties as to whether the expression 5-star is simply a reference to the Atout standard as Duet contended or to some rather less precise but more qualitative standard which could be divined as a matter of "common usage". I did not find the expert evidence on this point particularly useful. The respective experts seem to be adopting a somewhat partisan view aligned with the case being made by those instructing them. On the one hand, I accept that compliance with the Atout standard would be both straightforward for the Hotel but would not really tell one much about it. On the other hand, to suggest that there is something which is of common usage does not say very much unless it is placed in a particular context. I do not consider that the evidence established a sufficiently clear and objective standard in this sense. Indeed this is reflected in the fact that at the end of the day, neither side wished to incorporate the expression "5 Star" in their definition of Brochure Quality. In the context of St Barts, it is hard to see what that expression means other than to denote a hotel which is at the high-end of the market but without purporting to be something higher than and outside the bracket of the Competition Hotels. Indeed, BH eschewed any suggestion that the Hotel had to be beyond 5 Star status.

174. In the light of all of that, I consider that the Brochure Quality is a standard which encompasses:

(1) Such physical dimensions of the bedrooms and public facilities, and particular features (such as that of the spa) as are indicated in the Brochure (save where they had already been changed in the 2013 Drawings, principally the restaurant and lobby);

(2) An ability on the part of the Hotel to compete well with the Competition Hotels in terms of facilities and quality of construction;

(3) A smart-casual ambience or feel in keeping with the general ethos of the higher end of the visitors to the island; and

(4) Featuring a specific design from an international designer but which would include a designer such as Athea, whose designs were already incorporated in the 2013 Drawings.

What was the Specification?

175. The word "specification" may mean different things in different contexts. Mr Tantleff said that it could be constituted by various types of document. But here, in my judgment, the Specification is intended to be a detailed set of drawings and plans so that it could be a meaningful specification

for the construction of a hotel of Brochure Quality. It is that which is necessary for the implementation of that objective. It is not, in my judgment, meant to import general or vague or incomplete material which cannot be implemented, as a matter of physical construction, without more.

176. That approach is reflected in the provisions of the 2012 and 2013 Agreements. They both, by their respective Schedules 3 Part A paragraph 1, permit subsequent variations but these had to undergo a rigorous approval process. Indeed, as at the making of the 2012 Agreement on 14 August 2012, it was known by the parties that the original Dupoux designs from 2008 (and as still referred to in the Brochure) were not going to be used. Athea, as the new designer, had been in place since 2011. Yet the Specification as warranted in the 2012 agreement was identified as the collection of prior drawings and plans as attached to its Annex B. Subject to later variation, as at the date of the 2012 Agreement, DTFS as warrantor took the risk if BH at that point wished to sue for breach of warranty etc. And indeed, by the time of the making of the 2013 Agreement on 10 September 2013, the 2013 Drawings had been created and were contained within the Annex B to that agreement.

177. The Agreement suffered from the defect that (a) although there was an Annex B, nothing was attached to it although the Specification Warranty clearly assumed that something would be, and (b) there was no Schedule 3 dealing with the procedure for further variation, although the Specification Warranty was drafted as if there were. Instead there was a quite different Schedule 3. BH argues that as a result, the approach to what could or could not amount to the Specification for the purpose of this Specification Warranty must be different because there was no mechanism for future variation. I disagree. That simply does not follow. What does follow is that in practical terms, the parties (and in particular here BH is the putative beneficiary of the Specification Warranty) needed to ensure for their own protection that a correct specification was attached to Annex B. If their approach (and/or that of their lawyers) was so casual as to disregard this, then that is their own contractual look-out, as it were. At one point Mr Doctor QC submitted on behalf of BH that really, no-one thought about the (missing) Specification. But if so, that hardly assists BH on what I should decide it contains.

178. Since there was in fact no document at all attached as Annex B, in my judgment, and having regard to the contractual history and bearing in mind that objectively there had to be a Specification, the only candidate would be the existing contractually effective specification i.e. the 2013 Drawings. There is nothing contractually odd or commercially unreasonable or absurd about that. Moreover it enables the operation of the Specification Warranty in a certain way. The very fact that there has been all the evidence before me about what other documents might constitute the Specification for these purposes just proves that point.

179. As to the documents which BH contends form part of the Specification, by their very nature, the Design Notes are wholly unsuited to constitute a specification. They were not designed as such but instead as a brief to the potential new designers to be interviewed by Ms Dupré and Mr Aim. One only has to refer to the language of the Design Notes (see above) to see this. No meaningful allegation of breach of the Specification Warranty could be made by reference to this document. The fact that the Design Notes were "agreed" between Ms Dupré and Mr Aim for the purpose of acting as a brief is irrelevant. For example, the fact that it is common ground that the parties agreed to a new interior designer for the purpose of FFE does not mean that they agreed to whatever design might later be produced in whatever form or scope and whether confined to FFE or not for the purpose of the Specification.

180. The same is true of the SMD Letter which in any event was concerned with the provision of FFE only, being at a stage where no detailed design or specification had been provided. It is hopeless to suggest that this document could constitute a specification when the specification had yet to arrive. Again, the fact that the existence of this document and the price of the work to be done by SMD had been communicated to Mr Gabay is irrelevant.

181. In closing, BH placed particular emphasis on a set of Design Drawings ("the SMD Drawings") produced by SMD in late November 2014. These were emailed to Mr Guetta at the time but not to Mr Aim or Mr Gabay or anyone else at DTFS. At paragraph 253.3 (c) of his report, Mr Hennessey opines that such drawings did form part of the Specification. That being so I cannot agree with Duet's submission that this was an entirely new point raised only in closing. However, and as set out below, not much of this was made at trial itself the emphasis being on the Design Notes (see for example paragraph 44 (c) of BH's written opening) and the SMD Letter. But I cannot see how the SMD Drawings can be part of the Specification when DTFS itself never agreed to them as such and indeed was not itself aware of them. I do not accept that sending them to Mr Guetta (and his approval thereof) could possibly amount to an agreement on the part of DTFS. Nor could Mr Guetta possibly be viewed as having actual or ostensible authority to make such an agreement on behalf of DTFS.

182. In evidence, Mr Nunnelly said that because Mr Guetta had been hired by SBDHI at the time when it was controlled by DTFS, he assumed Mr Guetta was its authorised representative and also that DTFS wanted to exit anyway. But that is no support for the notion that Mr Guetta was agent for DTFS in terms of agreeing changes to the Specification. Equally, the fact that Mr Gabay in his witness statement referred to Mr Guetta as part of DTFS's "core team" for managing the project hardly means that he would have had such authority. It was also suggested that Mr Nunnelly and Ms Dupré assumed that whatever they said to Mr Guetta, would "get back" to Duet. But that does not confer the necessary authority on him and it still does not explain why they did not simply contact Mr Gabay directly to agree a variation to the Specification.

183. It is correct, as BH points out in paragraph 89 of its Closing that there were various emails with Mr Gabay about some aspects of design change. But again, none of that can amount to an agreement on the part of Mr Gabay that this formed part of the Specification for the purpose of the warranty, especially where all of this was about the formation of plans for the future rather than an existing discrete set of drawings. The communications relied upon seem to end on about 16 October 2014 before any drawings had been produced by SMD. It is also noteworthy here that in his email to Mr Guetta and Mr Brunneau dated 6 November 2014 and copied to Mr Cizmeci, Mr Aim asked them to work in collaboration with Mr Nunnelly and Mr Scanlan. He said that they would make decisions on organisational structure and construction related works and hotel design changes and "Thank you to remain their good quality advisors as usual. However, he ended by saying "of course no document yet can't [sic] be signed by SDBHI without my consent and signature as President of the company and therefore legally responsible."

184. On any fair and objective reading, Mr Aim was retaining the need for formal consent on any matter of contractual significance of which the Specification was one. This email has also to be read in the light of the scale of the changes which had been indicated by Ms Dupré in her email of 2 October referred to in paragraph 76 above. I agree that the 6 November email does not suggest that BH was now assuming all responsibility for the warranties - clearly not - but that is not the point here.

185. Indeed it is not as if there was any need to use Mr Guetta as some form of conduit for agreement on the Specification. Mr Nunnelly and Mr Tanner did communicate with Mr Gabay, Mr Aim and Mr Cizmeci through November and into December.

186. It is true that both sides accepted that when the parties did agree matters they did not use the formal machinery provided for agreements set out in the Agreement. But that does not remove the need for clear agreement of some kind.

187. An overarching point made on behalf of BH is that it would be very odd if the Design Notes and other documents were not part of the Specification because it would mean that the Specification Warranty did not include the hotel design which everyone now thought was being used. I do not agree. If, practically, that was so, then it was incumbent on BH to ensure that it had adequate protection within the Agreement. There is nothing unfair or unjust (or more to the point, commercially absurd or unreasonable) in the situation which resulted because it was up to BH to negotiate for what it considered to be the appropriate Specification to be warranted. Had they sought to negotiate this expressly, it is highly unlikely that DTFS would have agreed without a change to other provisions in the Agreement most notably the Budget. Mr Gabay said as much in evidence. Moreover, the fact that on the ground, personnel like Mr Guetta approved of the direction which the new design was going to take is not the same as DTFS agreeing that this should form part of the Specification for the purpose of the warranties. The fact that the parties agreed on a new interior designer is not the same as they also agreed to a new set of designs not yet produced.

188. The question of the content of the Specification formed Issue 15 and was the subject of expert evidence, although in truth this is essentially a question of construction and (non-expert) fact. This is clear from the Joint Statement of Mr Hennessey and Mr Tantleff. The opinions contained therein were all based on certain factual assumptions lying behind the cases put forward by each respective party. But for what it is worth, I prefer the evidence of Mr Tantleff on this point. He considered that the Design Notes and the SMD Letter were too vague and simply amounted to themes. Indeed the SMD Drawings were not even put to him. In the end he said that even if these documents had been agreed between the parties they still would have been too vague. In any event, for the reasons already given questions about "agreeing" these documents are not very much help. As for Mr Hennessey, he agreed in cross-examination that the SMD Drawings were expressions of what one would hope to achieve. But he also accepted that the Design Notes gave a description, though not detailed. As for the SMD Letter he agreed that this did not give any idea of the themes to be used. As for the SMD Drawings, he said that they were a "first cut" of a vision for the rooms which would be refined, once the owner had considered each element.

189. It is true that both sides accepted that a further document which should be regarded as forming part of the Specification was the set of Permit Drawings filed for the purpose of modifying the existing building permits. This was a substantial set of drawings and plans (see p4043 – 4087). For the most part they were summarising what was in the 2013 Drawings although they did include some minor modifications. The fact that both sides agreed to treat this as forming part of the Specification does not alter the contractual analysis of what it contained above. And indeed for the purpose of the warranties, not much turns on what was stated in this set of documents. In any event, such documents could hardly be described as very general or broad.

190. For all those reasons I find that the Specification consisted only of the 2013 Drawings and the Permit Drawings and no other document, as contended for by Duet.

BH'S GLOBAL CLAIM

191. BH's primary claim suffers from a number of serious defects. First, it proceeds on the simplistic basis that assuming that some breach of the Specification and/or Budget Warranties can be shown that it must follow that BH is *prima facie* entitled to the actual cost of the Hotel less the budgeted cost i.e. around €30m less only the "volitional" items i.e. those accepted as not being required by any view of the Specification or Budget. Even on BH's own case the amounts for those volitional elements varied depending on whose evidence one considered - Mr Hennessey's, Mr Feldman's or that of Ms Dupré herself.

192. However, even if the warranty at Clause 38.3 is to be interpreted as BH has suggested (which I have rejected) that would not allow BH to claim for losses which arose independently for example as a result of later defective workmanship and/or poor project management or any other event unforeseeable as at the date of the Budget. BH already accepts in principle that there has to be some deduction for independent events because that is why it has deducted the cost of volitional items. But it is not done so for other relevant events. This is not a speculative matter because, as the history shows, there were significant problems over workmanship and management when the project was in the sole control of BH after 2014 (see paragraphs 118-124 above).

193. Secondly, given the correct construction of the warranty, it is necessary for BH to show what figures, on its case, a reasonable and prudent budget would have shown. Given that the warranty is not a guarantee as to future costs, BH could never recover more than the difference between the actual budget and a notional reasonable budget. BH has never sought to produce such a document. It is no answer to say that the experts were not instructed to calculate what they said would be a reasonable budget because they should have been, if it was necessary to prove BH's case. Nor is it any answer to say that it would have been a difficult exercise. Perhaps it would have been, but the production of a reasonable budget, like the production of what should have been true and fair accounts, is something that expert witnesses are capable of doing and are asked to do particularly in the context of a breach of warranty claim. Of course there will be an element of judgment in such an exercise and a range of reasonable opinion but this often arises in such cases. Here, each side had two experts even though their evidence and perhaps expertise sometimes overlapped or was inconsistent. So it cannot be said there was a shortage of expert resources. In this regard it was suggested that a paucity of records might have been responsible for an inability to say what a reasonable budget should have been. I do not accept that, and indeed from the end of 2014 the project was under the control of BH. If records from an earlier period (or later) which must have existed were now lost, that cannot be said to have occurred under the watch of DTFS/Duet. In any event, from what I have seen of the financial records, I do not consider that they are so sparse as to make it impossible for any experts properly instructed to say what a reasonable budget would have been. The fact remains that there are no such figures.

194. BH can of course pin its colours to the single mast of its claimed interpretation of the warranty as a guarantee but then it really had no other case should it lose on that point, as it has done. That is so even though the concept of a reasonable and prudent budget being the benchmark was already in play because the experts were instructed to say whether the actual Budget was reasonable and prudent - see Issue 13.

195. Mr Feldman himself recognised the limits of BH's claim when in answer to questions from the Court he accepted that the question was not what the actual costs turned out to be but what it was reasonable to have predicted at the relevant time. It is true that in a further exchange he did

venture as a rough guess that a reasonable budget would have been something around €40m. BH correctly does not seek to rely on that single piece of evidence. But it does rather suggest that had the experts been asked to think about this in detail it would have been possible for them to come up with a figure.

196. Thirdly, BH did not originally have an appropriately formulated alternative claim based on what its position was with regard to breach of the Specification and/or Budget Warranties in the event that BH was wrong on what the Brochure Quality or Specification entailed.

197. Fourthly, it must be remembered that any notional reasonable and prudent budget might contain figures for particular items that were overestimated as it were. If there were any such items, credit would have to be given. I do not accept that BH would be able to cherry pick on any new budget.

198. For all of those reasons, BH's primary claim is completely unsustainable. Until closing that would have left it with no claim at all (apart from the Villa Costs and Colony Costs Claim).

199. However, in its written closing ("BH's Closing") it sought to claim for the first time:

(1) an alternative claim for damages by reference to either the Parallel or Mr Tanner's Budgets on the basis that they would serve as proxies for the notional reasonable Budget;

(2) in the yet further alternative by reference to a collection of individual items. Many of those items had been canvassed for the purposes of showing why the actual budget was not reasonable or prudent but thereafter the figures claimed were on the global basis referred to above. Even here the figures said to be attributable to each particular item were mainly based on their cost as opposed to what a reasonable estimate in respect thereof might have been.

200. Duet's riposte to all of this was to say that this represented a fundamental shift in BH's case which would require permission to amend in circumstances where the claim was still deficient because of the absence of particular reasonable sums and because there had been no or no proper opportunity for Duet properly to cross-examine the relevant witnesses on this basis. Nor had Duet's experts addressed the claim in this way. On that basis the new alternative claim was too little, too late and unfairly prejudicial to Duet. I agree that there is force in all of those points.

201. BH's response in turn was to say that so far as the first alternative claim was concerned there was no reason why it should not be able to rely upon the Parallel Budget which was, on any view, a budget and had the advantage of being based upon the Budget showing line by line where the increased figures came from. It was said to be superior to any expert's ex post facto evidence as to what a notional reasonable budget would have been because it was actually in existence at the time. I see that, but Mr Scanlan was not an independent expert dealing with the actual issue now in question. The same is equally true, if not more so, in relation to Mr Tanner's Budget produced some 4 months later. Moreover, as BH accepted in paragraph 185 of its Closing, both the Parallel and Mr Tanner's Budgets were prepared on the basis that BH's case as to the Specification was correct. But I have found against it on that point. Accordingly, if BH is to succeed on its alternative claim it has to be by reference to individual items.

202. All of that said, following receipt of BH's Closing, Duet produced overnight a detailed supplementary note which dealt with each and every of the items now claimed on an individual basis as well as the first alternative claim based on either of the Scanlan or Tanner Budgets. BH in turn, on the following day, produced its own note in reply prior to its reply oral submissions. I shall refer to each of these notes as their Supplemental Closings respectively.

203. So far as any permission to amend is concerned, in my judgment, the correct approach is to permit BH to amend to the extent that with regard to any particular item I consider that the trial produced enough material (appropriately challenged) to allow me to address that item, in a way which is fair to both sides. I shall do this on an item-by-item basis.

BREACH OF THE SPECIFICATION WARRANTY

Introduction

204. So far as BH's expert evidence here was concerned this was adduced (and adduced only) on the basis that BH's contentions as to Brochure Quality were correct. But in fact, broadly, I have preferred Duet's position on the point.

Design

205. BH argues that if (contrary to my finding) the Specification did include the further documents then there would be no breach of the Specification Warranty so far as design was concerned but if the Specification did not include them, then there would have been a breach. That is because the Specification would not then have been sufficient to construct a hotel of Brochure Quality so far as design elements were concerned. Although BH claims a breach of the Specification Warranty in this regard (see paragraph 122 of its Closing) no particular figures are claimed at this stage as distinct from its other Specification Warranty claims dealt with below. Moreover paragraph 184 of its Closing did not include design as being one of the issues referred to as arising under the Specification Warranty. In the context of the individual claims, there is a much-reduced claim in respect of design which focuses on FFE, said still to be relevant.

206. There are certain arguments made by BH to why the design element of the 2013 Drawings was in breach of the Specification Warranty which in any event I do not accept:

(1) It is said that the Specification was not accurate because by the time of the Agreement both sides had agreed to use a different designer. I disagree. I think that the "accuracy" requirement is a reference to the hotel as shown in the Brochure, otherwise it is not clear what this requirement goes to at all. Moreover, there was no expert evidence to this effect as distinct from looking at the general sufficiency or otherwise of the Specification by reference to Brochure Quality;

(2) For the reasons set out below, I do not think that it can be said that there was an insufficiency of electrical provision in each room so far as the 2013 Drawings were concerned; to the extent that there was a problem over the height of any sockets I have dealt with this in the context of the Budget Warranties breach;

(3) The fact that Cyprien Bru said that there had to be a way of manufacturing the furniture more easily again does not necessarily mean that the Specification was insufficient. Nor is there any particular loss said to flow from this. It is not suggested that the furniture originally ordered through him in mid-2014 cost more than any other furniture. The fact

that for the Model Room, DTFS used a supplier in China to keep costs down is not relevant because the point in issue is the Specification not how the Model Room sought to implement it;

(4) Mere criticism of Athea does not necessarily indicate a breach of the Specification warranty. And for the most part, Ms Dupré had approved of the designs which is some indication of their sufficiency. The fact that Athea's engagement had been terminated following the Model Room showing does not necessarily mean that the designs previously approved were defective, leaving to one side the question of the quality of the furniture;

(5) As for the furniture already on order, through Mr Bru (as opposed to that supplied for the Model Room) there is really no expert evidence that it would not meet Brochure Quality as I have defined it; on the other hand, I do not accept that the much more expensive changes for example a large amount of wooden shuttering and expensive light fittings in the rooms were necessary in order to get the Hotel to Brochure Quality;

(6) There is a reference to Mr Bru's comments on electrics at paragraph 122 (c) but that is not a sound basis to say that the Specification was defective. Otherwise, Duet deals with the question of electrical costs within its Budget Warranty claim and I deal with it there below;

(7) A point was made as to whether the design of the room was in keeping with a need to be "distinctive" and said that it was not. As to that (a) I do not include it in the Brochure Quality definition because I do not know what it really means here and (b) if the Design Notes are a true reflection of Ms Dupré's concept (presumably in keeping with Brochure Quality) she was actually not suggesting that the room should be ornate or materially different from other hotels. She said the style should not be fussy but be light and airy with muted tans/white/blue colours. It should also conform to the basic St Barts spirit;

(8) I also consider that Athea can be called an international designer;

(9) Mr Feldman suggested that there was an insufficiency of connecting doors; he did not appear to know how many there are in fact were. There were in fact 8 such doors which meant there were 16 connecting rooms. He agreed that they would be sufficient depending where they were. But he had not previously focused on particular locations;

(10) It does seem as if the specified height of the toilets was wrong but I have allowed for this below; I cannot see why the rest of the bathroom layout would amount to a breach of the Specification Warranty;

(11) Nor do I consider the lack of changing rooms for the spa is a breach of Brochure Quality not least when some of the Competition Hotels did not have them either.

207. Overall on design, to the extent this is now pursued as a separate individual head of claim, I do not consider that there was a breach of the Specification Warranty in this regard (save where I have dealt with such items in the context of the Budget Warranties below). But even if there was a breach (a) it was minor and (b) in any event it goes nowhere because of a lack of quantification. Accordingly, I now turn to the other individual claims made in relation to the Specification Warranty.

208. Furthermore, Mr Hennessey accepted in evidence that the Athea designs were in keeping with the style and "vibe" of the Competition Hotels.

209. For all of those reasons, it seems to me that any allegation of breach of the Specification Warranty relating to design does not go anywhere and I disregard it here.

The Beachfront Works

210. In December 2015 the contractor Plasse Batiment was engaged to do various works at the front (beach) side of the Hotel and on that part of the beach which was within the frontage of and owned by the Hotel. It is common ground that the various works were not within the Specification. BH now claims €1,439,592 in respect thereof. That is a reduced figure from the previous one which was over €1.7m. The whole question of the beachfront works was sufficiently ventilated at trial to allow me, fairly, to deal with this item.

Fire access decking

211. One element, costing €79,000 was the construction of wooden decking across the strip of the beach owned by the Hotel so as to enable emergency vehicles to access the frontage. Although it was suggested that a fire officer had not specifically recommended this but rather something different (namely fire hydrants) there was no real suggestion that such access was not necessary as a safety measure. Since it was not provided for in the Specification and was necessary for a hotel of Brochure Quality (or indeed any hotel at this location) this was a breach of the Specification Warranty.

Beachfront foundations

212. The next (and now the only other) item claimed for is the work required to provide sufficiently substantial foundations for the frontage of the hotel next to the beach. It is common ground that in November 2014 both sides had agreed to take a risk here and go for shallow foundations only. However the more substantial foundations became necessary following a soil survey in relation to this part of the hotel which had not been commissioned before. There was little expert evidence on the question of the need for this foundation work save that Mr Hennessey clearly opined that it was. See paragraph 145 of his report. There was no direct challenge to this; instead, Duet concentrated on whether the costs claimed had been correctly allocated. While it appears that the further foundational works were as a result of the expansion of the hotel's footprint, Duet did not suggest that this was an answer to the claim. Indeed in its Closing, Duet suggested that it had been originally planned but the issue was whether all it amounted to was the foundations costing more than the parties had thought so as to be, if anything, a claim for breach of the Budget Warranty whereas BH characterised it as a breach of the Specification Warranty. On this point, I agree with BH. The Specification was deficient so far as the extent of foundational work was concerned. As it happens it does not matter where any breach lies. If this was necessary to make the Specification work, then a reasonable budget should have provided for the cost of substantial and not shallow foundations. The fact that the parties thought they could get away with the latter is not relevant. At one stage it was suggested (by Mr McSorley for Duet) that the increased cost could have been avoided by the parties giving a waiver to the relevant contractor in the event that the shallow foundations proved insufficient in the event of, for example, a hurricane. I do not agree that that would have been an appropriate course and indeed it appears that the contractor refused, understandably, to take such a waiver in any event.

Quantum

213. It is true that the only figure one has in respect of these breaches is the actual cost of the two items of work. There is no separate reasonable budget figure. On the other hand there is no evidence that the actual cost was excessive and assuming that this work had been quoted for at the time of the Budget, which it should have been, then the figure claimed or something like it, would have been inserted. Accordingly, I award the full amount now claimed.

SOCOTEC

214. This claim originates in the report produced by the engineers in October 2015. It was its summary of the Hotel condition then and it listed 107 items as having an "Unfavourable" (D) opinion and 289 further items with a "suspended" (S) opinion.

215. At paragraph 79 of his witness statement, Mr Tanner says that he estimated at the time that it would take €500,000 to fix all of the items referred to in the report. It is not clear that all of the D items related to defects in the specification as opposed to how the specified construction work was carried out although some clearly were. In cross-examination Mr Tanner accepted that he had not attempted to break down the £500,000 in any way.

216. More focused was Mr Feldman's evidence at paragraph 64.3 of his first report which he said was based in particular on the permitted modification documents from 2015 and the SOCOTEC report. He listed 24 separate items which he classed as design defects. They related essentially to safety and disability access. However he noted that the most material defects in terms of adding to the time and cost of the project were fire access to the beach, foundation strengthening, fire alarm system, proper ventilation and the fire rating of walls. The first two of those items have already been dealt with above. There was no costs breakdown in relation to these matters.

217. In those circumstances it is quite impossible to put a figure on those breaches of the Specification. No sum can therefore be awarded.

218. I agree that if there was a design deficiency whether it first arose in 2012 or only with the 2013 Drawings makes no difference. Nor does it matter when it was discovered. But that will not assist BH here.

Back of House Provision

219. At paragraph 64.11 of his report, Mr Feldman identified a number of spaces which needed to be created "back of house" so as to allow the Hotel to function properly and which had been omitted from the Specification. These included offices for staff, a laundry and although not featured on this particular list a staff cafeteria. In fact, it would seem that the laundry and staff cafeteria had been included in the Permit Drawings which form part of the Specification. If so there could be no breach of the Specification Warranty in respect of them.

220. However, on the assumption that there was an absence of at least some of these items this would lead to a breach of the Specification Warranty. But again, there is no costs breakdown. Paragraph 127 of BH's Closing asserts that these items appeared to account for most of the increase in concrete costs other than the beachfront works. But ultimately that was not supported by BH's expert evidence. At paragraph 73.3 of his second report, in answer to Mr McSorley's point that no figures had been allocated, the best that Mr Feldman could say in response was that "I would

expect that some of the works… would have had some limited concrete component to the works (and, therefore, a degree of increased concrete costs beyond what the 2014 Budget anticipated…)" He also agreed (in the context of a breach of the Budget Warranty insofar as this was relevant here) that the fact that an assumption as to the amount of concrete needed turned out to be wrong does not necessarily mean that the original estimate was unreasonable.

221. For all of those reasons it is quite impossible to award anything in respect of this breach.

BREACH OF BUDGET WARRANTY

222. In the light of what I have concluded in paragraphs 191 - 198 above, a global claim for the increased costs cannot be sustained. Accordingly, the issue as to whether one should use Mr Hennessey's global figure of €23,717,876 or Mr Feldman's figure of €30,699,346 does not arise.

Process

223. Before turning to individual items it is necessary to address BH's argument that overall, there was a failure in the budgeting process which itself led to a breach of the Budget Warranties. The breach would have to be of the general requirement that the Budget be prepared on a reasonable and prudent basis i.e. Clause 38.2. In my judgment, that overarching requirement does not entail any particular way of drawing up the Budget. Rather, its focus is on the basis for the Budget i.e. the assumptions and calculations made. Provided they are reasonable and prudent and provided that there is no breach of the more specific requirements set out in Clauses 38.3 and 38.4, I cannot see why the particular methodology employed - or lack of it -matters. It may of course be called in aid to explain why there was a breach in terms of imprudent figures etc but that is a different matter. And since no figure is (or could be) put on a failure of process per se, any extended discussion of the budget process here is even less useful.

224. I agree that there appears to have been no thorough examination of what had changed from 5 September and in particular the implications of the completion date. On the other hand, while many people, perhaps too many, were involved in the budgeting process, to some extent this was inevitable given the different parties interested. But I do not think this tainted the budget process as a whole. The fact that 4 months later Mr Tanner signed off on a significantly larger budget does not necessarily mean there was an unreasonable process adopted for the Budget. After all, it was in standard spreadsheet form with many underlying files and workings and as far as I am aware in a format which had been used before.

225. So if one is looking at process by itself, I do not accept that this led to a breach of the Budget Warranty but even if it did, by itself it goes nowhere.

Individual Items

226. The list of individual items which are the subject of this alternative claim is set out in paragraphs 186-189 of BH's Closing. I deal with them separately below and then with a generic defence which is raised in respect of some of them.

FFE Costs

227. Paragraph 186 states that "if the basis is redesign of FFE only (Duet's pleaded case on the budget)" then there ought to have been included in the budget:

(1) the SMD FFE as it would have been estimated by an independent cost consultant which itself would have been either the additional €500,000 provided for by Mr Scanlan so as to make the total €3m or a total of €4.6m on the basis that both Mr Hennessey and Mr Feldman estimated that the cost per key (i.e. room) should have been assessed as at least €100,000 for the 46 rooms;

(2) there would then have been a further €100,000 in respect of the cost of a new Model Room.

228. Some care needs to be taken when characterising Duet's "pleaded case". What it said at paragraph 51 (b) of its Amended Defence was that "the only re-design which had been agreed by the parties at the time of the… Agreement was the replacement of the interior designer. The agreed FFE budget (along with fees) for this designer to work to, which was based on figures provided by Mrs Nunnelly, was fully incorporated in the 2014 budget." So while it is accepted that the parties agreed that there would be a new interior designer, Duet did not admit that any increased budget figure was required. The original figure for FFE was €2.481m as set out in a document from March 2014. It is correct that this was later rounded up to €2.5m in the Budget. But that is not much of a difference. On this point, Mr McSorley sought to suggest, somewhat unconvincingly, that the addition of the €18,451 to make it €2.5m was somehow connected with the interior design change or decisions in Paris. I do not accept this but it makes no difference to the analysis.

229. While BH pointed to a number of emails following the Model Room showing, suggesting that there might be cost implications following the appointment of a new interior designer, that has to be set against the specific points of reassurance made by Ms Dupré in her email of 2 October. Moreover they need to be seen in context. So, for example, the email from Mr Nunnelly to Mr Cizmeci mentioning Mr Pinto whom Mr Aim had said was one of the most famous designers in the world and the charge just for design work would be €1-2m. Mr Nunnelly then referred to Mr Pinto saying that he had done much work in small boutique hotels but was sure they would be expensive. So when Mr Cizmeci responds by saying that "these look like they will add another digit to the FF&E budget number" it was all about a designer like Pinto - who was not ultimately chosen. Nothing else can be read into that response.

230. As for the SMD Letter in this context, by itself, it does not suggest a higher FFE provision and while there was now the prospect of some improved finish and fit out, without any agreed plans or drawings, no meaningful figure could have been put on it. That might, in theory give rise to a question whether, in that event, the Budget should have allowed for a greater contingency than it did or whether some kind of caveat should have been attached, but in the end nothing turns on this because (a) I have found that the SMD Letter did not form part of the Specification and (b) in any event even if the Budget had been wanting in this respect, no meaningful figure could be put on that breach, nor has it been. Any suggestion that the parties somehow agreed to provide in advance for some limited redesign of fit-out and finishes (as opposed to merely FFE) therefore goes nowhere.

231. Duet's basic point is that, judged against the Specification, a budget figure of €2.5m was or should have been sufficient as a reasonable and prudent estimate of FFE costs wherever the FFE came from and whoever chose or supplied it. This was supported by Ms Dupré's "FFE Update" email of 2 October 2014.

232. Accordingly, it is for BH to explain why the figure of €2.5m on a reasonable and prudent basis was out by either €500,000 or €2.1m. BH did not in terms either in its Closing or Supplemental Closing make a primary case as to which figure should be adopted.

233. As to the extra €500,000 added by Mr Scanlan in the Parallel Budget, it is correct that this was his estimate at the time. Of course it was not made with any detailed analysis and moreover it was made on the basis that there would be new designs forthcoming for the rooms in the future so far as FFE was concerned. Taken by itself, this would not be very strong evidence that a reasonable budget should have been for €500,000 more. On the other hand, that figure does gain some support from the evidence of Mr Feldman. He said in cross-examination that overall, he thought that the budgeted cost per room should have been at least €100,000, that would take into account all of the FFE costs wherever they were including all public spaces. He gave that evidence by reference to what he said he would have expected an appropriate five-star hotel to consist of. In fact, of course, the "target" of the Budget was not the Brochure itself but rather the Specification. To this extent there was a mismatch in his evidence.

234. Be that as it may, Mr Feldman's ultimate evidence was that if one was going to use a value per square metre for the FFE related to the rooms themselves then one would look to the figure in the Rooms section of the Budget. This came to a total of €1.17m. From that one had to deduct, according to Mr Feldman, exterior furniture because the exterior space was not included in the space for the purpose of the total sum of the guest rooms FFE. Second, he said that the "ordinary" lighting costs for each room should not be included as the room FFE as opposed to decorative lighting. The former would go into construction costs. On that basis, the figure of €1.17m should be reduced by about €310,000. Mr Feldman in fact gave a deduction figure of €225,000 but I think that is wrong. I think that instead of deducting the lighting figure he deducted the smaller figure immediately above it, for curtains, being €52,674. If I am right about that, then the new total for the FFE in the guest rooms is €860,000. His evidence was that the correct figure per square metre of the guest rooms should have been at least €500 which was the figure which Ms Dupré had referred to. He then multiplied that by what he said was the total guest room space. He calculated that as 2600m^2. In fact, PRD had stated in its email dated 2 February 2015 that the relevant guest room space was 2340m^2. Mr Feldman said he thought that was on the light side because of calculations he had done by reference to a number of drawings. I did not find that especially persuasive, and would prefer to use the figure of 2340m^2. On that basis, the total for the guest rooms FFE would be €1.17m. That would then be about €300,000 more than the notional figure of €860,000. If one did use the larger area, the total would be €1.3m. On that basis, the differential would be €440,000.

235. He agreed that €1.3m would be a reasonable figure provided also that account was taken of the "sunk costs". The point here was that Mr Feldman saw that in Application 16, and as against the budgeted FFE cost of €2.5m, €784,000 had apparently already been spent. In fact one would have to set off against this the €300,000 which came back from Mr Bru in that regard leaving an amount spent of €484,000 (see paragraph 159 of BH's Closing). Mr Feldman postulated that if (as BH accepts) the parties proceeded on the basis that there was to be a new interior designer, any person compiling a reasonable budget would wish to make some provision for the fact that the costs already spent might be wholly or partially wasted. I accept that there is force in this.

236. Duet placed emphasis on the fact that some account had to be taken of the fact that DTFS had some experience of constructing and budgeting for hotels because had built the Taiwana and therefore, it was said that it had a good working basis for projecting what the FFE costs of an

equivalent hotel would be. This is not a conclusive point, however, because the hotels were not identical and DTFS was not infallible.

237. Taking all of those points together, I think that they provide support for the figure which Mr Scanlan came up with namely €500,000 (but no more) and I award this figure in relation to the FFE breach of the Budget Warranty.

Electrical Work

238. The total figure claimed here is €2m. Mr Scanlan allowed €200,000 for electrical changes excluding labour, which I assume would have been new or different sockets, wiring etc, and then he provided a separate labour figure of €1.8m. The latter cost was described as "Paint/Demo/Tile/Framing/Drywall/Cleaning/Furniture placement" and then the "cause of change" was said to be "new design-in each room we need to completely demo and redo or add framing of walls, sheetrock, painting, electrical rough in, plumbing rough in some rooms, some tile, some waterproofing. In zones I, J, G, F, we need to basically demo and redo rooms. Double cost." That obviously covers a multitude of different work items.

239. When considering whether the Budget was reasonable in this respect the targets of that analysis should have been the Specification which, as I have found, consists of the 2013 Drawings and the Permit Drawings. But the experts had tended to focus on the Model Room. Although BH's evidence was that the number of sockets and power points in the Model Room were seriously inadequate, there is, first, no basis for saying that the 2013 Drawings did not contain a sufficient number of such items. There were in the drawings a large number of sockets per room including USB ports etc. See in particular the drawings at CB 3/164 and 221. See also Annex A to Duet's Closing an earlier version of which had been put to Mr Hennessey in cross examination. This is a detailed document (the accuracy of which was not challenged). It contains a side-by-side comparison of the electrical features in the 2013 Drawings with those contained in the later 2015 redesign.

240. The 2013 Drawings included provision for 23 non-light electrical outlets, 20 actual lights and a variety of switch zones controlled at particular points. Mr Hennessey's evidence was unsatisfactory on this point. When shown the 2013 Drawings on the electrics, he declined to say how or why those specifications were insufficient saying instead that he would defer to the construction experts. He could not explain how he could justify the increased electrical costs because he could not say why they were needed in the first place, by reference to the 2013 Drawings. Nor could he really say that the extra electrical provision in the 2015 redesign was there because it had to cope with defects in the 2013 Drawings, as opposed to simply a yet higher specification which, in some cases, was clearly volitional. See in particular T10/85-86 and 114-119. While he said that there were design problems with the Model Room, he could not point to any particular problem with the 2013 Drawings.

241. Mr Feldman's evidence did not materially add to this even though Mr Hennessey wished to defer to him. Overall, I preferred Mr Tantleff's approach which was that the 2013 Drawings were not in any material way insufficient and that to a large extent the later 2015 electric provision was excessive and over-specified. It could not be said to any material extent that the electrical provision contemplated in the 2013 Drawings was in any material way less than that in the Competitive Hotels.

242. In fact, it appears that at least as far as the number of sockets at set up provided was concerned the Model Room had followed the 2013 Drawings. Certainly, in its Closing, Duet has proceeded on that basis. It may be that the reason why BH thought that there were very few sockets is because some of them were obscured. Alternatively pieces of furniture or lighting were not in the right place. Certainly, the photos at D1/49 show a number of sockets visible below the level of the drawer unit placed against them. See also what appear to be at least two sockets to the side of the bed. What is not clear insofar as the height of sockets or points is concerned is whether they were created in accordance with the height levels specified in the 2013 Drawings. If they were, then it would appear that they were too high assuming that the correct furniture was present, at the correct size and put in the correct place. Here, it must be remembered that the furniture used in the Model Room had been the subject of a special order to a manufacturer in China. On any view and as both sides accepted, the particular furniture was inadequate.

243. In my judgment, the only respect in which the Specification may have been deficient was not in terms of the number or sophistication of sockets or points but their height in some instances. On the basis of DTFS's own case that the Model Room was constructed in accordance with the 2013 Drawings, it must follow that there was something of a height problem. That would have to be addressed in all bedrooms since the electrics had already been chased into the concrete walls in at least most of them. However, none of that would have required anything like €1.8m worth of labour which, as the narrative shows, was based on the demolition of the walls (or presumably, the interior face thereof) along with many other different items.

244. In cross-examination, Mr Hennessey accepted that as far as repositioning the sockets was concerned one possibility was to adjust the size of the furniture. Another which he accepted would have been to mount the sockets in the headboard, as shown by way of example in the photo at p 3678 which is of a bedroom at Eden Roc.

245. A claim for €1.8m simply cannot be sustained. Unfortunately there is no other cost put forward to deal solely (and proportionately) with the problem of moving the sockets. I do not accept that it was necessary for this purpose to "frame" the walls so that there was a separate interior surface thereon into which the sockets and points could be mounted with the wiring left behind it. It is in this context that Mr Guetta's email to Mr Aim of 25 September should be seen. He said that his view was that if the designer of electrical installations changed it would add €700,000. But that depended on what work was going to be done and why and whether it was strictly necessary.

246. Any attempt by me to put a figure on what would have been a reasonable budget estimate for dealing with any necessary repositioning of the existing electrical sockets or points would be wholly speculative since there is no real evidence to support any particular figure less than €1.8m and I will not do so.

247. As for the €200,000 in respect of the changes to electrical items, I can see that in the act of repositioning them (if changes to the furniture would not be an adequate solution) there may be some wasted cost in respect of any sockets which could not be reused but (a) I have no figure for what that might be and (b) Mr Scanlan was clearly looking at a new design which might involve the provision of more sockets and points anyway or different ones. Again, I cannot properly award any figure here.

248. Accordingly, this individual claim fails as a whole.

Items in the Parallel Budget which relate to the existing design

249. These are set out at paragraph 189 (a) of BH's Closing. They are said to be items that had to be provided for, but were not, in the Budget. In fact, if such items were missing from the 2013 Drawings, they could be regarded equally as a breach of the Specification Warranty if that should have contained them to be sufficient. It does not in fact make any difference how the breach is characterised.

(i) Required by collectivity

250. Two items are claimed here. First, €150,000 for a large pipe to the road "required for fire" by the collectivity and second €90,000 for fireproofing for the parking garage making a total of €240,000. Mr McSorley has agreed these items at paragraph 104 of his report and so I allow them.

(ii) Bad Work

251. €75,000 is claimed here. It breaks down into €50,000 for rebuilding stairs and miscellaneous repairs to roof, €10,000 for tile labour and another €10,000 for tiles in respect of moving toilets, and €5000 for plumbing work for new drains. On the detail of those sums, Duet points out that the estimate which originally came from Mr Guetta in respect of moving the toilets was actually €18,000 because the balance had to be attributed to the toilets in the Villa rooms. In relation to the rebuilding of stairs, as Mr McSorley pointed out, these were volitional changes involving new stairs in the duplex suites and it is not clear if the €50,000 includes that. In addition, an element of the €50,000 was for roof repair because the old roof had been "terminated". While in theory the remedy for bad workmanship would have been to sue the prior roofer rather than charge the cost to the Budget, one has to be realistic. It might not be worth suing the old roofer and it is not known if there was any specific retention so far as the roofing contract was concerned. As for the drains, it had been said that the existing drains "did not work with tile detail" and so Duet argued that this was an aesthetic not technical matter. I do not read the narrative in that way - it looks to me to have been a technical problem.

252. It is also possible that the Budget allocation of €150,000 for a new woodwork contractor might have covered some of these items. On the other hand, Mr Scanlan obviously thought not because he added these new detailed items.

253. I think that there is sufficient material before me fairly to make some award which is as follows:

(a) €18,000 for toilets moving;

(b) €40,000 for stairs and roof (making some allowance for the work to the duplex suites); and

(c) €5,000 for new drains,

making a total of €63,000.

(iii) Scope change prior

254. This is a heading used by Mr Scanlan in contrast to "new design". There was provision here for €310,000 broken down into:

(a) €160,000 for concrete work in the zones H, I, J, to deal with strengthening the swimming pool;

(b) €30,000 for additional steel to the restaurant roof;

(c) €60,000 for additional windows to the restaurant;

(d) €50,000 for wood decking material and

(e) €10,000 for elevator.

255. At paragraph 200 of his report, Mr McSorley was prepared to allow the €160,000 for concrete if it had been required by SOCOTEC or the collectivity as opposed to simply a design change. In cross-examination he accepted that if the item was needed in order to build the hotel as shown in the 2013 Drawings, and it had not previously been provided in the Budget, then it should be allowed now.

256. The narrative about the swimming pool in the email from Mr Tanner of 2 January 2015 refers to the engineers putting in a structural reinforcement of the pool. I think I can assume that this would have been required because necessary, and does not seem to relate to the new design. On that basis, I would allow the €160,000.

257. Equally, the elevator appears to refer to the addition of a new freight elevator shown in the Permit Modification Drawings (CB 4/343) that should be allowed as well. I would also allow the steel for the restaurant rooms which seems to be a structural requirement.

258. I do not allow wood decking or further windows for the restaurants. I was not shown these items as present in the Permit Drawings nor any backup material which might explain them. Nor was there any such material put to Mr McSorley in cross-examination.

259. Accordingly, I allow a total of €200,000 here.

260. In this context, I should add that it was put to Mr McSorley that surely he should accept whatever Mr Scanlan had put in the Parallel Budget because after all, Mr Scanlan was there at the time and Mr McSorley was not. I consider that to have been a rather unfair line of questioning. Of course Mr McSorley was not there at the time - few expert witnesses are - but this does not absolve BH from the need to backup individual items properly. They are not allowable merely because they are contained in the Parallel Budget.

(iv) Kitchen Equipment

261. Although the original intention had been to acquire the kitchen equipment on a finance lease it was then decided to purchase it out right. This was done pursuant to a contract dated 20 June 2014 in the total sum of €713,000. As this is a matter of record and as the Budget only allowed €330,700, the difference of €382,300 as put in the Parallel Budget is clearly allowable. It is an incurred cost and whether it was more or less financially sensible to acquire it in this way as opposed to a finance lease is irrelevant.

(v) Insurance

262. The total insurance figure is increased in the Parallel Budget from €383,913 to €683,913 and the difference of €300,000 is claimed. No cause of this is given in the comment column only the

words “David [presumably Mr Tanner] to provide”. No explanation is given in Mr Scanlan’s covering email of 11 December 2014. The only point which BH could make here is that in principle it could not be due to new design matters because the design was expected to increase costs at that stage by 30% and yet this increase was much more. In fact the correct figure for the insurance in the Budget was actually €453,913 so the increase was somewhat less at €230,000. But in any event, the sort of reasoning proposed by BH is far too speculative a basis to justify allowing the difference. Although in the end BH reduced this claim to €201,896.16 so as to remove an overlap element of €98,103 that does not provide any more sound a basis for the claim.

263. There is no proper material to enable me to fairly assess a particular figure so I make no award here.

(vi) CIEC technical drawings and design coordination

264. Here, Mr Scanlan added a total of €480,000 of which he stated that €250,000 was referable to “old payable”. This was said to have been in connection with a contract already committed and had been pleaded out in paragraph 32 of the particulars of claim. That is not quite right because this paragraph is very generalised and makes no specific reference to this item. Mr Scanlan in his covering email says that it was a “past due” amount. I am prepared to accept that this is sufficient evidence to establish an already incurred debt which should be provided for.

265. However, Mr McSorley pointed to the fact that this item had been previously taken into account within the €750,000 general contingency and that is borne out by the Draw Synopsis of 30 November 2014 preparatory to Application 16. While Mr Scanlan then chose to take this item out of the contingency for the purpose of the Parallel Budget, Mr McSorley said that what was left in the contingency was reasonable having regard to the amount of actual construction work left. In my view, BH has not shown that it was necessary for a reasonable budget to have put this figure as a separate item and accordingly I disallow it.

266. As for the other €230,000 within this item which was described as “New/Old Design Changes” and which Mr Scanlan had described in his covering email as "additional drawing", BH claims 50% thereof on the basis that half of the €230,000 should be allocated to new design changes with the other half being for old design changes. That is hopeless speculation in my view, and I do not allow any sum here.

(vii) Landscaping

267. Here, the Parallel Budget increased the original Budget figure of €240,000 to €360,000 on the basis of “change of scope”. According to Mr Hennessey and Mr Feldman, the landscaping as set out in the Specification was inadequate for a Brochure Quality hotel. Strictly that would be a breach of Specification Warranty claim but it makes no difference. BH proceeded on the basis that the 2013 Drawings really did not show any landscaping, by reference to trees for example, at all. However this was wrong. See page 152 of those drawings. It is clear from paragraphs 113 (d) and 114 of his report that Mr Tantleff considered that the original landscaping provision was sufficient. The cross examination of Mr McSorley on this point only served to show the paucity of the evidence that the landscaping originally provided for in the Specification was inadequate, as opposed to being the result of a later decision to add some more or to put in a larger figure. There is nothing in this claim and I do not allow it.

Excess of actual spend over Budget as at December 2014

268. We now move away from items in the Parallel Budget. BH claims €357,095.71, based on a comparison of the actual spend as shown in Application 16 with the original budgeted amounts. This is as set out in paragraph 69.10 of Mr Feldman's report.

269. On insurance, the difference between the two figures is €98,103.84 (the amount deducted from the general insurance claim referred to in paragraph 262 above). Mathematically, the claimed difference is correct. See page 585.2 line 12. It is also correct that both the Budget and Application 16 then have a separate line for pre-opening insurance. But I cannot see how that can be taken into account so as to in some way mitigate or eliminate the difference. Application shows €98,103.84 as a specific overspend and I consider that it is recoverable.

270. As for "Ext. Trim labour/material", Mr McSorley addressed this point directly at paragraph 261-262 of his report. He said that there was not in truth the overspend of €187,940.26 as shown in Application 16. This is because of the slightly differently described items in the Budget itself at lines 4bis, 6 and 25 which add up to €780,000. So he argued that there was no overspend. However, Mr Feldman in turn explained in paragraphs 106-107 and 111-112 why this was not a good point because the budgeted items used by Mr McSorley had been addressed separately by different items in Application 16. And the fact remains that the application showed an overspend. Mr McSorley was not able to rebut this persuasively in his oral evidence.

271. In my judgment both elements of this claim are well-founded and I allow €357,095.31.

Change of basis of contracts to time and materials

272. Mr Guetta estimated in his email dated 27 September 2014 that contractual renegotiations might lie at around €1m and BH claims this amount. However, there is no breakdown of how that sum was arrived at, perhaps unsurprisingly since it appears to have been a guess on his part. Moreover, the Budget already made provision for further contractual sums. Mr Guetta referred to one of the contractors in his email as ENERSOL and yet it is clear from the Budget and underlying master files at line 602 that the figure for plumbing had been significantly increased.

273. BH seeks to rebut the suggestion that the claimed figure is arbitrary, which it is in my view, by saying that at least it is better than 0. Maybe, but the burden is on BH to come forward with a properly reasoned and evidenced figure if it wishes to make such a substantial claim here. As it has not, I allow nothing.

Amount to cover the extension of construction schedule to at least October 2015

274. The Budget postulated an October 2015 finish as can be seen from the heading, although there remains a column for figures in respect of "Adjustment due to May/August Completion". BH claims that the Budget should have added a further sum of €2m for the costs of the work running through the additional months of September and October 2015. This is on the basis of an email dated 8th July 2014 from Mr Scanlan who said that "Daglar [Cizmeci] brought up that it will cost €1m to delay the project for every month". That is not a sufficient basis for a claim that a reasonable budget should have included that particular sum. It is said that Mr McSorley endorsed this figure because he referred to it in paragraph 376 of his report. Indeed he did, but simply to recite the claim being made in the context of rebutting an argument that a delay of 12 months

was the responsibility of DTFS. Instead he said that the delay was due to BH's management changes or volitional works. So this takes the matter no further.

275. As to whether a provision for delayed completion should be made at all, in the March Budget which contemplated a completion date of November 2014 there was a figure of €1.73m provided for in a column headed "Acceleration Change". This (or the later appellation "Cost to Accelerate") according to Mr McSorley is the cost of getting the construction teams to move more quickly for example by overtime working, presumably to meet a particular completion date. Then, in the September Budget, this was calculated on the basis of a delayed completion date of May/August 2015. The Cost to Accelerate remained in at €1.73m. However, in addition there was a specific adjustment in the new May/August completion column of €1.079m. The breakdown of that figure shows that it is made up essentially of extended staff and consultants costs, insurance and the like. This then appears to be the provision to capture something like a six to nine-month delay from the previous postulated date of November 2014.

276. In the Budget, the Cost to Accelerate remains in but the adjustment for May/August completion reduces to €644,500. One can see that this is simply because €435,000 of legal fees have come out. They must however have been added to the overall fees because such fees totalled €1.071m in the September Budget and in the Budget, they were increased to a single item of €1.58m. On that footing, the amount allowed in respect of the extension of completion to May/August 2015 was relatively modest. It was certainly not running at €1m per month.

277. I agree that the Budget appears to have made no separate provision for the delay in completion to October 2015 and it should have done since previous budgets had done so. I did not find Mr McSorley's oral evidence as to why no further provision for this two-month extension was necessary to be persuasive. However, no reasonable budget figure for the claimed provision has been put forward. Mr Feldman made no such calculation. In addition, it seems odd that there is an unchanged Cost to Accelerate of €1.73m if the date is extended. As Mr McSorley explained, this is because the acceleration would not now be needed. BH complained that this explanation arose only in re-examination and that is correct, but it arose out of his cross examination. In any event, a degree of latitude has to be allowed if BH is now to be permitted to claim this as a separate item. While in principle there should have been a provision, this is again a case where I would be doing no more than selecting an arbitrary figure and I do not do so. So there is no award here.

278. BH in fact claimed further that "probably" the Budget should have provided for a much more extensive completion date say until April 2016. Mr Feldman was of the view that by December 2014 a completion date of even October 2015 was unrealistic. However, any such further claim suffers from the same defect as the more modest one dealt with above. Moreover, in my view, given what happened after BH took complete control in January 2015 and given that the Budget addressed the Specification, unalloyed by the redesign, I do not accept at all that a completion date of April 2016 should have been the basis for the Budget as at December 2014.

Pre-opening costs

279. The Budget provided €853,520 in respect of pre-opening costs. BH now says that the reasonable figure for a budget should have been €2,424,277 which appeared in Mr Tanner's Budget in April 2015. BH do not here use the Parallel Budget which is unsurprising since it contains the same figure as the Budget. In cross-examination, Mr Tanner had to admit that he was wrong to have

said in his witness statement that the Budget figure was unsupported. In fact, there was half a page of detailed line items behind it.

280. Mr Feldman challenged the Budget figure on the basis that the parties knew or should have known that there would be further delays which would elongate the pre-opening period. He postulated this on the basis of the delays that because the period in which they would be incurred would simply start later on. The pre-opening costs had not been significantly commenced as at December 2014. If, on the other hand, the delays which did happen meant that there was an elongated pre-opening period because the delay in completion dates was happening after the pre-opening costs had started to be incurred, I cannot see how this can constitute a breach of the Budget Warranty. Moreover to some extent this argument again depends on BH showing that the Budget itself should have appreciated a much later completion date as at December 2014 which I do not accept.

281. In truth, and as Mr Tanner's cross examination revealed, the figures he used for pre-opening costs appeared to be explained at least in part by having more extensive costs which he considered to be justified. For example he placed emphasis on supplies which would have to be obtained at some point anyway like uniforms and linen. But I do not see how that justifies the figure claimed. There has been no expert line by line analysis of the Budget figure so as to suggest that it was not reasonable and then to say what a reasonable figure would have been. And as Mr Feldman accepted in cross examination merely because a different figure is later chosen does not itself mean that the earlier figure was unreasonable.

282. For all of those reasons I make no award here.

SMD's initial fee of €280,000

283. Duet does not suggest that this figure, which had been contracted before December 2014 should not be covered by the Budget. Rather it contends that the FFE Budget was sufficient to cover it. However, for the reasons set out in paragraphs 227 to 237 above, I have accepted that there should have been an increase to the Budget here. On that basis, and as this was a contract in cost, the Budget should reasonably have provided for it and I allow this figure.

Wasted costs of €484,000

284. I agree that this should have been taken into account. It relates to the cancellation of furniture already ordered through Mr Bru. Why that order was terminated when it was and whether Ms Dupré was acting reasonably in cancelling it, is neither here nor there. It was a known incurred cost. However, I have already taken this factor into account in respect of the FFE claim, so there is no separate award here.

Fit out costs of closets

285. This item is claimed without explanation or quantification. Accordingly, I reject it.

Exterior lighting

286. The Budget provided €200,000 for exterior lighting. BH contended that the 2013 Drawings made no provision for exterior lighting at all. I do not think that this is correct because there appears to be a lighting plan at CB 3/151-154. BH retorts that these pages appear to be almost illegible

though they seem clear enough to me. Nor does the lighting area appear to me to be confined to internal lighting. BH says that there is no lighting outside the "footprint" of the buildings. I am not quite sure what footprint is being referred to here but there does appear to be lighting outside the rooms themselves and the common parts of the Hotel buildings which seems exterior to me. In any event, this dispute does not really matter because the Budget did make provision for exterior lighting anyway. The only question is whether it was inadequate and what a reasonable figure would have been.

287. According to Mr McSorley, the actual spend was €600,000, which he took from a 10 April 2016 document. That is the figure used by BH here to claim the increase of €400,000. However, there is no expert evidence to support the notion that a reasonable Budget figure as at December 2014 would have been €400,000. Again, I cannot simply pick a figure out of the air. Nor is there any detailed or expert evidence to the effect that the exterior lighting specification in the 2013 Drawings was itself insufficient for the purposes of a Brochure Quality hotel. Therefore I award no figure here.

Other Items

288. That completes the list of individual items claimed within the body of BH's Closing. However, the Schedule thereto claims two further items.

289. The first is €4.671m (including the €100,000 for the new Model Room addressed above) for other fit-out costs as indicated in the Parallel Budget. However, this is expressly claimed on the basis that the Specification included "SM Design Full Scope" but I have already ruled that out above. The overall redesign did not form part of the Specification and moreover there is no expert evidence to say that if it had, this figure would have been a reasonable budget provision. It also includes the £2m of electrical costs claimed above. Furthermore, there are volitional items contained within this sum. There is therefore no basis on which to award anything here.

290. The second item is €953,250 in respect of project management. Originally, the Schedule had claimed €1,558,250 (as contained within the Parallel Budget) but was reduced to take account of items within it that either appeared elsewhere or were clearly not project management. In fact, as the detail of the Parallel Budget shows, these were mainly various bonus payments apparently agreed or to be agreed at some point. Moreover, the comment says "New Design Changes-More Time". On that basis, (a) it appears to have been put in by Mr Scanlan on the basis of the redesign (b) since how or when these bonus payments occurred or would occur is not explained, there is no reason to assume that DTFS agreed to them or that the Budget should have assumed them. Therefore no award is made here either.

Contingencies and Swings and Roundabouts

291. Duet makes two general points in relation to any sums I award here. First, it is said that they may be covered by the contingency already in place. I disagree. I do not see how I can make some arbitrary reduction where there is really no specific evidence on the point. Second it is said that any notional reasonable budget would have to be a comprehensive exercise and it might turn out that some items had been budgeted too high. In theory that is correct but bearing in mind the limited number of items I have allowed and the difficulty of predicting accurately where there may have been a clear reduction, I do not make any deduction on this basis either.

The non-co-operation defence

292. However, Duet contends, by way of a further defence, that insofar as I allow the claim in respect of any items which appeared in the Parallel Budget but not in the Budget, that these were items which BH wilfully failed to disclose to Duet. That failure constituted a breach of an implied term or duty within the 2013 Agreement that each party would co-operate with each other in relation, among other things, to the preparation of budgets, including that which was to become the Budget in the Agreement. DTFS would have a claim in damages for breach of such a term which would equate to what would otherwise have been awarded to BH for breach of the Budget Warranties and so this amounts to a defence by way of circularity of action which can be relied upon by Duet as guarantor.

293. The context for such an argument now is that (a) I have found that the Specification does not include the additional redesign elements sought by BH, and (b) BH's claim is now confined to a list of individual items. The Parallel Budget items claimed on an individual basis were those set out at paragraph 189 (a) of BH's Closing together with the further items in the Schedule thereto. In respect of all of those items I allowed the claim relating to 4 of them only in the total sum of €885,300. See paragraphs 249-267 and 288-292 above.

294. As to the law, Duet contends that in the light of the case of *Al Nehayan v Kent* [2018] EWHC 333, parties owed each other a duty of fair dealing where there was a "relational contract". In other words a form of duty of co-operation or good faith but falling short of the usual array of fiduciary duties. However, when deciding whether any such duty arises in relation to any particular contract context is everything, and it is not necessary for me here to embark upon a lengthy discursus on such duties and relational contracts. In truth, this defence can be dealt with shortly.

295. First, the Budget as warranted had to have been independently reviewed and signed off by an independent cost consultant. It would be implicit in the role of such a consultant that he would be expected to make all such enquiries as were reasonable and necessary for him to carry out the review. If he could not obtain relevant information he would not review and sign off the Budget, there would be no Budget to be warranted and in all probability therefore no Agreement at all. The process of devising the Budget was not a future performance obligation under the Agreement going forwards. It was simply a document already in existence which is subject to a warranty, just like an existing set of accounts or indeed the Specification.

296. Second, if, despite the efforts of those preparing the Budget, and indeed those of the consultant, something important was left out and was not discovered because the other party, in the lead up to executing the Agreement deliberately withheld it, it could well be argued that the Budget was <u>not</u> unreasonable or imprudent in that respect because the matter in question was neither known nor should have been anticipated.

297. Third, since the defence cannot be based on a term of the Agreement for the reasons given in paragraph 295 above, it has to be put and is put by Duet on the basis of a term of the 2013 Agreement. But even if there was a duty of co-operation of some kind or other in relation to that agreement I fail to see how this would extend to the preparation of a document (even where the Budget had predecessors) for the future purposes of the Agreement not then in contemplation. That is particularly so where the 2013 Agreement itself obliged SBD1 to produce quarterly financial reports to shareholders and where DTFS was obliged to produce a business plan and

provide other relevant financial information and such other information as BH might require, for each accounting period - see Clauses 14.3.1 and 15.2. The context for the alleged duty here is entirely different from the *Al Nehayan* case which involved one party selling its shareholding in the joint venture company owned by both, without telling the other, and seeking to obtain a financial benefit from his position as shareholder at the expense of the other. And as the Court of Appeal pointed out in *Globe Motors v Lucas Varity* [2016] EWCA 396, the implication of such a duty is dependent upon the terms of the particular contract. It is still part of the process of implication whereby, among other things, necessity must be shown. In my judgment, the relevant term contended for by Duet in respect of the preparation of the Budget does not exist.

298. Finally, and in any event, it cannot be said in respect of any of the four items which I have allowed that they involved information that was deliberately withheld from DTFS by BH.

299. Accordingly, this defence fails.

CONCLUSIONS ON QUANTUM OF THE PRINCIPAL CLAIM

300. The individual sums which I have allowed here are:

(1)	Beachfront:	€1,439,592
(2)	FFE	€500,000
(3)	Collectivity Requirement:	€240,000
(4)	Kitchen Equipment	€382,300
(5)	Bad Work:	€63,000
(6)	Prior scope change:	€200,000
(7)	Overspend	€357,095.31
(8)	SMD fee	€280,000

making a total of **€3,491,987.31.**

THE OTHER BH CLAIMS

301. There are 3 other claims made by BH:

(1) Additional Equity Contribution Claim;

(2) The Villa Costs Claim; and

(3) The Colony Costs Claim.

302. The first claim has been admitted by Duet in the sum of €423,165.35 and so does not fall for determination.

The Villa Costs Claim

303. This is now for €255,598. It is set out in paragraph 140 of Mr Tanner's witness statement and relates to 10 categories of costs incurred in relation to the Villas. The claim is made pursuant to Clause 5.5 of the 2013 Agreement and Clause 5.4 of the Agreement. These are in the same terms and provide that:

> "Villa Separation indemnity
>
> In consideration of the Investor and the Propco entering into this Agreement, the Sponsor irrevocably and unconditionally undertakes to indemnify and keep indemnified (on an after tax basis) each of the Investor and the Propco against all liabilities (including any Tax) (i) which it has incurred or suffered from time to time up to the date of the Supplemental Agreement arising out of or in connection with the acquisition and ownership of the Villa Land, and (ii) which it incurs or suffers from time to time arising out of or in connection with the carrying out of the Villa Development or otherwise in any way in relation to or in connection with the Villas."

304. BH does not claim against Duet the entirety of these costs. Rather, it claims 50% of each item of costs save for items (i) and (j) of Mr Tanner's list and for the latter it claims only 10%.

305. Duet takes a number of points on this claim. The first is that the claim is brought by BH in respect of costs all of which were incurred by SBDHI itself now 100% owned by BH. So BH has no cause of action. Duet says that on the true construction of the clause, the only party which can bring the claim is the one which has incurred the relevant costs.

306. However, BH has two answers to this point. First, it says that, regardless of who incurred the costs, either party can claim. I disagree. There is no reason why the party that did not incur the cost should be entitled to sue. Rather, the clause refers to both simply because both could be incurring the costs and both could therefore have a potential claim. After all, there is (or certainly was at the time of the making of the Agreement which is the relevant time) no reason in principle why the relevant party could not bring the claim in their own right. So if BH was confined to the wording of this clause, the claim would fail.

307. However, in the alternative, BH relies upon the wording of Clauses 23.1.1 and 23.1.2 set out in paragraph 155 above. It contends that the obligation to indemnify (which is owed to BH only) is in respect of all obligations to be performed by DTFS, whether owed to BH or not. On that basis, it seems to me as a matter of contract that provided that BH can show some loss arising out of DTFS's failure to pay SBDHI pursuant to Clause 5.4, it can recover that loss. Moreover, that is not, in my view, a reflective loss claim which would be prohibited. There is a reference to BH having a shareholding in SBDHI in paragraph 46 of the Particulars of Claim but that is there in order to quantify the claim which BH has as beneficiary of the guarantee. While Duet resisted this claim in principle, it did not take issue with the notion that as 100% shareholder in SBDHI, BH's loss should be calculated as 100% of the loss to SBDHI, being the diminution in the value of its shareholding. Accordingly, in my view, BH does have *locus* to sue Duet in the full amount claimed.

308. However Duet then contends that Clause 23.5 requires as a condition precedent to liability as guarantor, that BH must have served a "written claim" on Duet and then the obligation in question must remain unperformed for 15 days.

309. The original written demand was made on 18 May 2016 (" the 2016 Demand") by reference to the Agreement only. Paragraph 18 makes claims for the Villa costs and identifies which item they are. At that point, the total amount claimed was €367,500.

310. As to the general validity of the 2016 Demand, Duet contends first that it is insufficiently detailed, second it is for a sum which is higher than that now claimed, and third the Villa Costs Claim is brought now under both the 2013 and 2014 Agreements and not just the Agreement.

311. In my judgment, there is nothing in any of those points (subject to what is said in paragraph 315 below):

(1) All that Clause 23.5 requires is that there is a written claim and no particular level of detail is specified. In my judgment, what is required is a demand which makes the guarantor sufficiently aware of what is being claimed against it; the 2016 Demand does this;

(2) The fact that BH has now reduced its claim from that set out in the 2016 Demand cannot possibly be a reason for its invalidity;

(3) While it is correct that in this claim, reliance has been placed upon the 2013 Agreement as well as the Agreement, in my judgment there was no need to do so. All that is needed is the Agreement whose indemnity provision is not time-limited and is simply the latest version of earlier indemnities. So whether the relevant costs were incurred in 2013 or 2014 or later, is irrelevant.

312. On that basis the Villa Costs Claim is viable in principle. However, if there was anything in the point about the validity of the 2016 Demand, BH has now served a further demand on 20 June 2019 ("the 2019 Demand") and it is not suggested that this was invalid. Rather what is said is that BH should not now be permitted to rely on it within these proceedings. That seems to me to be a somewhat hollow point because if there was any extent to which the 2016 Demand was invalid then assuming that the Villa Costs claim, or part of it, was justified, BH would have an incontestable claim against Duet in a fresh action. But it seems pointless and disproportionate to me to make BH go through that particular hoop especially when the only real prejudice to Duet would be in relation to costs, which can be dealt with. Accordingly, if permission were strictly required to rely upon this additional demand, I grant it.

313. I therefore turn to the substance of the Villa Costs Claim. The basic point is that BH has apportioned costs which were incurred on both the Hotel and the Villas on a 50/50 basis save for two items. It has done so on the footing that both the Hotel and the Villas have benefited from the incurring of those costs and the Hotel would have had to incur those costs whether or not there were the ancillary Villas. I disagree and prefer the approach taken by Mr Iqbal of Duet when dealing with this matter with Mr Tanner. Mr Iqbal said that the cost should be apportioned by reference to the relative proportions of the entire area occupied by the Hotel and Villas respectively. Those percentages are 74.38% and 25.62%. In the absence of any agreed apportionment (and there was none) I consider that to be the most fair and appropriate way of dealing with the costs.

314. BH has provided a helpful spreadsheet showing how the apportionment of costs plays out depending on each side's case.

315. The costs I award are as follows:

(a)	Villa Landscaping:	€47,500	This figure is agreed.
(b)	Concrete Costs:	€16,200	These cannot be claimed pursuant to the 2016 Demand because it made no reference to them. However, I consider that they are adequately covered by the 2019 Demand which itself makes reference back to the letter before action.
(c)	Road repaving:	€21,777	
(d)	Road border:	€2,864	
(e)	Utilities:	€8,774	
(f)	Parking:	€4,155	The position as to the 2016 Demand is the same as in relation to Concrete Costs but equally the 2019 Demand rectifies the position.
(g)	Permits:		There can be no claim here because Mr Tanner accepted that the question of permits related solely to the hotel.
(h)	Land Survey:	€2,671	
(i)	Project Manager:	€42,502	
(j)	Site Cleaning:	€7,078	

making a total of €153,521.

The Colony Costs Claim

316. By Clause 3.12 (c) of the Agreement (referred to above), DTFS would indemnify BH against "all legal and related costs [of] or associated with the original Colony financing of the Hotel and the Villas in 2013" and also all sums paid by BH in reimbursing the legal and related costs incurred by Colony.

317. The costs now claimed by BH under this head are as follows:

(1) Ropes & Gray legal costs: These are agreed at £85,000;

(2) As "legal and related costs of and associated with" the financing:

(a)	Origination fee:	US$351,671.25;
(b)	Advisers' disbursements in dollars:	US$963,742.67;
(c)	Advisers' disbursements in euros:	€741,501.03;

(3) As sums paid by BH in reimbursing Colony's legal and related costs:

(a)	Post-2013 costs of Mr Scanlan:	US$345,000 and
(b)	Waterproofing consultants fees:	US$38,640.

318. As a general point, Duet says that none of the items now claimed were mentioned in the 2016 Demand. I agree but they are now covered by the 2019 Demand which is sufficient.

319. As to item 2 (a) this is the originating fee for the loan. I do not consider that this is a legal or related cost associated with the finance. It does relate to the loan, broadly speaking but then so does interest. The fact that the wording of the clause has broadened somewhat since the 2013 Agreement does not make any difference here. If I was wrong on this point then the full amount would be awarded.

320. As to items 2 (b) and (c) they do not appear to be challenged but in any event they are correctly claimed being lawyers' disbursements.

321. Finally, as to items 3 (a) and (b), I do not agree that Mr Scanlan's costs fall within the clause. True, they were Colony's costs and he was acting in Colony's interests but I consider them too remote to be considered as a costs related to or associated with the financing. If I was wrong about that then the full amount would be awarded.

322. On the other hand, the costs of the waterproofing consultants to investigate the position prior to financing is recoverable, in the sum of US$38,640.

323. In total therefore the sums awarded are: £85,000 plus US$1,002,382.67 plus €741,501.03.

CONCLUSION ON BH'S CLAIMS

324. The total sums awarded against Duet pursuant to paragraphs 300, 302, 315 and 323 above are US$1,002,382.67 plus €4,780,174.69 plus £85,000. These are then subject to a defence by way of set-off arising from a counterclaim which Duet says DTFS would have had and on which Duet relies, *pro tanto,* to extinguish any claim against it ("the Villa Loan Counterclaim") to which I now turn.

THE VILLA LOAN COUNTERCLAIM

325. Duet argues that the sequence of events by which Colfin foreclosed on its security by reason of DTFS's breach of the Villa Loan (see above) shows the following:

    (1) BH was in breach of its implied duty under the Agreement and/or the SPA not to do anything which would prevent DTFS from performing the contract;

    (2) an unlawful means conspiracy between BH and Colony/Colfin, the unlawful means being the breach of the implied obligation; and/or

    (3) acts by the principal injurious to the rights of the surety such that the guarantee is discharged.

326. I have set out the relevant facts as I have found them to be in paragraphs 128 to 153 above.

327. In my judgment the Villa Loan Counterclaim fails at the first hurdle. At the time of the alleged breach of implied duty, DTFS was in breach of the Villa Loan. It might well have secured a fourth forbearance agreement had Mr Gabay not engaged in acts of brinkmanship as to the

upfront payment of interest which, in the light of subsequent events, were perhaps unwise. But BH did not cause or procure DTFS's inability to repay the outstanding loans to Colfin.

328. What this allegation really amounts to is that BH started negotiations with Colony/Colfin at a time when the latter might otherwise have made an agreement with DTFS to extend the repayment period. But there is no contractual obligation on a party to one contract to assist the other party in relation to its obligations under a separate contract with a third party (i.e. Colfin) in circumstances such as these. The obligation relied upon by Duet here is not characterised in that way. It is said to relate to DTFS's ability to perform the Agreement or the SPA. As to the latter, it is true that foreclosure under the Villa Loan would have the contractual effect of depriving DTFS of the €8m payment otherwise due from BH. But whether or not there was this foreclosure depended fundamentally upon DTFS's compliance with the terms of the Villa Loan. If it was in not in default, none of this would (or could) have happened. The same is true to the extent that foreclosure meant that DTFS could not then obtain certain benefits under the Agreement or perform certain obligations. The absurdity of implying any such term here is shown by the fact that if it existed, then even if Colony/Colfin had approached BH without the latter having made any initiative at all, to buy the assets if foreclosed, BH should have refused. I cannot see how any duty could be implied to that extent. It is no answer to this point to say that the difference is that in this case BH took active steps. The steps which the implied duty would prohibit BH from taking were not steps to approach the bank but rather steps not to buy the assets in the event of disclosure giving any such indication.

329. All of this is a very long way from the classic examples of where a breach of the duty not to prevent performance have been found. Thus, in paragraph 6.15 of Lewison on *The Interpretation of Contracts*, it is said:

(1) Where a contract required the buyers to tender a vessel ready to load between certain dates and where the nominated ship could not proceed to berth until some documentation required by the sellers was in order, it was an implied term that the sellers would do all that was necessary to put their documentation in order so as to enable the buyer's ship to berth – see *The World Navigator* [1991] Lloyds Rep. 23 CA;

(2) A land transfer granted the transferee the right to construct a road on the transferor's land and to have it adopted as a highway maintainable at public expense. The Court held that there was an implied term that the transferor would not object to the adoption – see *Beazer v Durham* [2010] EWCA Civ. 1175. (Indeed what might be described as a positive version of a similar term was expressly included at Clause 12 of the SPA.)

330. On the other hand, in an international contract for the sale of goods, there is no duty on the seller to cooperate with the buyer in enabling the latter to negotiate and finalise the terms of a letter of credit, nor any such duty to cooperate with the bank – see *Siporex v Banque Indosuez* [1986] 2 Lloyds Rep. 146.

331. In my judgment, the last example is much closer to this case than the first two.

332. Accordingly, the first way in which the Villa Loan Counterclaim is put must fail. I add two riders. First, I can well understand why Mr Gabay had a sense of grievance about what BH did. He might well be justified in regarding its conduct as very shabby. But I regret that this does not without more entitle Duet to a remedy here. Second, in relation to the whole episode of the

foreclosure and BH's acquisition of Colfin, I confine my findings to those which are necessary by reference to the allegations which have been made and the conduct of BH. I make no comment about what the position in law might be so far as Colony or Colfin is concerned.

333. My conclusion on this first aspect of the Villa Loan Counterclaim also disposes of the second, without more. For the purpose of any conspiracy claim there was no unlawful means.

334. Finally, I do not consider that the third ground of the Villa Loan Counterclaim succeeds either. Here, reference is made to the "equitable principle laid down in *Watts v Shuttleworth* (1860) 5 H&N 235 that the surety will be discharged from liability where the creditor does any act injurious to the surety or inconsistent with his rights or omits to do something which this duty obliges him to do". Whether, today, there is in fact a principle as broad as this may be open to question in the light of the scarce number of cases where it been applied on its own.

335. Be that as it may, in *Watts* itself the guarantor had guaranteed the obligations of a building contractor to supply fittings to the creditor's property among other things. Under the contract with the creditor, he was obliged to insure the building but did not do so. As a result, when there was a fire which destroyed some of the fittings already installed, there was no insurance money available to compensate the contractor for them. The contractor was obliged under the contract to return the prepayments already made to him.

336. In his judgment, Pollock CB referred to the principle cited above and said that this was a case where it applied because the creditor had been in breach of the building contract and the guarantor was therefore discharged to the extent of the insurance monies which he (or the creditor) would otherwise have received. By contrast, in this case, I have found there to be no relevant breach of contract on the part of BH for all the reasons given above. It is perfectly true that in a broad sense, to the extent that foreclosure by Colfin meant that DTFS could not now receive the €8m otherwise due to it under the SPA and lost the value of the Villas which it would have retained had it been given a final opportunity to repay through a fourth forbearance and had it in fact repaid and on the basis that without BH's involvement Colfin would not have foreclosed then there was a connection between BH on the one hand and DTFS's subsequent financial position on the other. However there are many "ifs and buts" in this scenario and it rather overlooks the fact that the reason for the problem in the first place was that DTFS was in default. On any view of the equitable principle, this situation is far too remote from it.

337. Finally, in my judgment, any such defence is ruled out by Clause 23.3.4 of the Agreement (see 155(6) above). I do not accept that on the facts of this case and even assuming a breach of the rule, this clause would not operate on the basis of some implied fraud exception (as is sometimes said to be the case in relation to exclusion clauses). I do not accept that the conduct of BH, even if unattractive, could be classed as fraud.

338. For all of those reasons, the Villa Loan Counterclaim fails.

CONCLUSION

339. On that basis, there will be judgment for BH against Duet for US$1,002,382.67 plus €4,780,174.69 plus £85,000. Further, I will order that DTFS is obliged to indemnify Duet, as guarantor in respect thereof.

340. I am extremely grateful to both Counsel and the legal teams generally, for the excellence of the written and oral submissions and the preparation for and presentation of this case. All consequential matters will be dealt with at a hearing following the formal handing-down of this judgment.