Neutral Citation Number: [2018] EWHC 3166 (TCC)

Case No: HT-2015-000090

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
Mr Martin Bowdery QC
(Sitting as a Deputy High Court Judge)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2018

Before :

MR MARTIN BOWDERY QC

- -

Between :

Mr Peter Burgess **Mrs Lynn Burgess**	**Claimants**
- and -	
Mrs Basia Lejonvarn	**Defendant**

- -
- -

Mr Seb Oram (instructed by **Mayo Wynne Baxter Solicitors**) for the **Claimants**
Mr Louis Flannery QC and Mr David Shard (instructed by **Stephenson Harwood Solicitors**) for the **Defendant**

Hearing date: 28th June 2018

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Judgment Approved

Martin Bowdery QC:

1. This Judgment is made up of six sections:

    1. The Introduction;
    2. The Preliminary Issues as reviewed and determined by the Court of Appeal;
    3. The Evidence;
    4. The issues of alleged breach by the Defendant;
    5. The loss and damage allegedly caused by the alleged breaches;
    6. Conclusions, Findings and Orders

1. Introduction

2. The Claim made in these proceedings has been the subject of two Judgments in relation to preliminary issues:

   i) The Judgment of Alexander Nissen QC sitting as a Deputy High Court Judge [2016] WHC 40 (TCC) dated 15th January 2016;
   ii) The Judgment of the Court of Appeal [2017] BLR 277 dated 7th April 2017.

3. The general background to this claim was summarised in the Judgment of Lord Justice Hamblen where, in paragraphs 1 to 5 of that Judgment, it was recorded that:

   > "1. The Claimant Respondents ("the Burgesses") own a residential property in North London called "Highfields". In 2012 they decided to carry out landscaping to their garden. A quotation of £155,837 plus a planting budget of £19,785 (both exclusive of VAT) was quoted by Mark Enright of the Landscape Garden Company Ltd. Although the Burgesses liked the plan produced by Mr Enright they regarded his quotation as being too expensive.
   >
   > 2. The Defendant Appellant ("Mrs Lejonvarn") was a friend and former neighbour of the Burgesses. She is an American qualified architect although she is not a registered architect in the UK. She worked for two architectural firms in the UK from 2007 to 2013 during which time projects were both discussed and one project performed for Mr Burgess's firm, Retail Human Resource plc ("RHR"). By spring 2013 she had decided to work on her own account and had adopted a trading name of Linia Studio.
   >
   > 3. The Burgesses decided to ask for Mrs Lejonvarn's assistance with their landscaping scheme ("the Garden Project"). She secured a contractor to carry out the earthworks and hard landscaping and a quotation was provided. She intended to provide subsequent design work in respect of the "soft" elements of the Garden Project such as lighting and planting for which she would charge a fee. The project never got that far. The Burgesses were unhappy with the quality and progress of the work and Mrs Lejonvarn's involvement came to an end in July 2013"

4. The Burgesses claim that much of the work done during the period of Mrs Lejonvarn's involvement was defective, that she is legally responsible for it and claim damages exceeding the cost of the Defendant's original budget for the works. Their claim was originally advanced in contract and also in tort on the basis that Mrs Lejonvarn assumed responsibility for the provision by her of professional services acting as an architect and project manager.

5. During the five day trial, I heard the evidence from the following people:

The Claimants' Factual Witnesses

Peter Burgess

Robert Carr

Lynn Burgess

Martin Platt

Philip Ellis

Robert Strong

Ivor Schlosberg

Adam Evans

Russell Pigeon

The Claimants' Expert Witnesses

Murray Armes a Chartered Architect

Philip Ellis a Chartered Quantity Surveyor

The Defendant's Factual Witnesses

Basia Lejonvarn

Przemek Kordyl

The Defendant's Expert Witnesses

Robert Evans a Chartered Architect

Mark Pontin a Chartered Quantity Surveyor

6. I also had the benefit of reading an Expert Report from Christopher Milnes, a Chartered Building Surveyor, jointly instructed by the parties to prepare a report regarding "the existence on or before 9 July 2013 of defects and non-conformances at 11 Highfields Grove London N6." Neither party chose to call Mr Milnes for cross-examination.

7. I have also had the benefit of a site visit to see what is now a quite spectacular garden. The Claimants are rightly proud of the finished product which is beautiful and has been impeccably maintained.

2. The Preliminary Issues as reviewed and determined by the Court of Appeal

8. By an order dated 10th July 2015, Mr Justice Edwards-Stuart ordered that there be a trial of the following preliminary issues:

   i) Was a contract concluded between the Claimants and the Defendant, as pleaded in paragraphs 21 to 23 of the Particulars of Claim or otherwise?

   ii) If so, what were its terms?

   iii) On the assumption that the defects set out in Schedule 1 to the Particulars of Claim existed as at 9th July 2013, did the Defendant owe any duty of care in tort in light of the matters, and in the terms, pleaded in paragraphs 18 to 20 of the Particular of Claim, or otherwise?

   iv) If so, what was the nature and extent of her duty?

v) Was a budget of £130,000 for the Garden Project discussed between the Defendant and either or both of the Claimants as pleaded in paragraphs 10(1)(e), 11, 16(3), 21(2)-(3) and 29(3)(a)(b) of the Defence, at any time before 5th July 2013, and if so when?

9. Paragraphs 21 to 23 of the Particulars of Claim (as originally pleading) provided as follows:

> "E. The Garden Project: The Defendant's contractual duty
>
> 21. The conduct and exchanges of the parties set out above in paragraphs 9 to 13 above [sic], gave rise to a contract between the Claimants and the Defendant ("the Contract"). The Contract came into being on or around 15 May 2013, alternatively 28 April 2013, as a result of the matters pleaded in paragraphs 13 and 12 respectively.
>
> 22. By that Contract the Defendant agreed, in consideration of remuneration that she would draw out of the Cost (whether in the first phase or subsequent phases of the Garden Project), alternatively of the financial benefit that the Defendant would receive from her engagement on the Office Project:
>
> 22.1 to act as architect and/or project manager on the Garden Project, and to perform the services set out in paragraph 14 above; and
>
> 22.2 to procure the design and construction of the Enright Design at the Cost (allowing a reasonable margin as set out in paragraph 18.2).
>
> 23. It was an implied term of the Contract that the Defendant would exercise reasonable care and skill in the performance of those services, that term to be implied: by section 13 of the Supply of Goods and Services Act, because the Defendant was acting in the course of her business as Linia Studio; alternatively, because it was obvious, or necessary to give business efficacy to the contract."

10. Paragraphs 14 and 15 of the Particulars of Claim provided as follows:

> "14. Between 6 March 2013 and 9 July 2013 the Defendant performed the following professional services, as architect and project manager, in relation to the Garden Project:
>
> 14.1 the selection and procurement of contractors and professionals needed in order to implement the Enright Design, including agreeing the terms on which they were engaged;
>
> 14.2 the planning of site commencement, preliminaries and initial strip out;
>
> 14.3 preparing such designs as were necessary to enable the Garden Project to be accurately priced and constructed;

14.4 attending site at regular intervals (approximately twice a week) to project manage the Garden Project, and to direct, inspect and supervise the contractors' work, its timing and progress;

14.5 receiving applications for payment from the contractor, and advising and directing the Claimants in relation to their payment; and

14.6 exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it.

15. In particular, the Defendant undertook detail design of the Enright Design, and made revisions to that design. The Claimants are aware of the following:

15.1 the Defendant produced a series of drawings dated 15 May 2013, under her professional trade name of Linia Studio, by way of detail design of the Enright Design ("the Drawings");

15.2 around May 2013 the Defendant made a revision to the structural design of the Garden. In an email dated 23 May, timed at 13:52, she told the First Claimant that:

> We are not going to use double layers of sleepers on any other walls than the one at the very front. (the first one) from here onwards, we are using a steel structural support and bolting vertical sleeper [sic] to that (from behind) to minimise the use of sleepers as they are so pricey.

15.3 the Defendant altered, in the circumstances pleaded in paragraphs 16 and 17 below: (i) the shape of the curved lawn in the Enright Design, to make it straight-sided; (ii) the levels and design of the terraces in the Enright Design; and (iii) the layout of the paths of the Garden."

True copies of the Drawings and email referred to in this paragraph are attached to these Particulars of Claim as Appendix E.

11. At paragraph 206 of his Judgment, Alexander Nissen QC sitting as a Deputy High Court Judge answered the preliminary issues as follows:

> "Summary and Conclusions
>
> 206. For the reasons set out above, I answer the preliminary issues in the following terms:
>
> i) No.
>
> ii) Not applicable.
>
> iii) Yes. Mrs Lejonvarn owed a duty of care to Mr and Mrs Burgess to exercise reasonable skill and care in the provision by her of professional services acting as an architect and project manager on the Garden Project.

iv) The duty was to provide those services pleaded in paragraphs 14 and 15 of the Particulars of Claim with the exception of paragraph 14.2 and subject to the additional limitations and qualifications identified in the body of this judgment.

vi) Yes, on both 28 April and 17 May 2013."

12. The Court of Appeal dismissed the appeal on preliminary issue (3) and varied the judge's answer to preliminary issue (4) as follows:

> "Conclusion
>
> 128. For the reasons outlined, I would uphold the judge's finding both of a general duty of care in relation to the provision of professional services and of a specific duty of care in relation to the services which he found were provided as identified in paragraph 14.1 and 14.2 to 14.6 of the particulars of claim.
>
> 129. I would, however, recast the answer to preliminary issue (iv). In relation to each specific duty alleged I would answer the question in the terms set out above, which may be summarised as follows:
>
> > "In providing the professional service acting as an architect and project manager of:
> >
> > (1) project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress;
> >
> > (2) preparing designs to enable the Garden Project to be priced sufficiently for a fairly firm budget estimate to be prepared;
> >
> > (3) preparing designs to enable the Garden Project to be constructed;
> >
> > (4) receiving applications for payment from the contractor, and advising and directing the claimants in respect of their payment; and
> >
> > (5) exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it;
> >
> > Mrs Lejonvarn owed a duty to exercise reasonable skill and care."
>
> Subject to that revision I would dismiss the appeal."

13. Before addressing the issues raised, it is necessary to review what the Court of Appeal in fact decided. As set out in the BLR head-note at pages 277 and 278, the Court of Appeal held as follows:

> "(1) Where a party voluntarily tenders skilled advice or services in circumstances where she knows that advice will be relied on by the recipient, that voluntary assumption of liability is the appropriate test

for whether a duty of care comes into existence, and it is not necessary separately to consider whether it would be fair, just and reasonable to impose a duty in those circumstances (see paragraphs 59 and 60);

Customs & Excise Commissioners v Barclays Bank plc [2006] UKHL 28; [2007] 1 AC 181; [2006] 2 Lloyd's Rep 327; [2006] 3 WLR1; [2006] 4 All ER 256 and White v Jones [1995] 2 AC 272 applied.

(2) In a case where the relationship between the parties is akin to contract, it is unnecessary to make a further enquiry into whether it would be fair, just and reasonable to impose liability, that question being subsumed in the determination of the question of whether there had been an assumption of responsibility (see paragraphs 63 and 64);

Henderson v Merrett Syndicates Ltd. [1994] UKHL 5; [1995] 2 AC 145; [1994] 3 All ER 506, applied.

(3) Positive obligations are the realm of contract, whereas negligence is concerned with breach of a duty to avoid doing something or doing something badly. In negligence, a continuing failure to perform a positive act will not sustain a cause of action in negligence (see paragraph 68);

General Accident fire & Life Assurance Ltd v Tanter ("The Zephyr") [1985] 2 Lloyd's Rep 529, followed.

(4) Whether there had been a voluntary assumption of liability so as to give rise to a duty of care and the scope of that duty is a matter of mixed fact and law having regard to all the circumstances on which the findings of the judge will be held to be of considerable significance. In the present case, there have been no findings as to what services Mrs Lejonvarn actually provided and so no definitive statement of the nature and extent of the duty owed could be provided (see paragraphs 90 and 91)."

14. In broad terms, as explained by Jackson L.J in Robinson v PE Jones (Contractors) Limited [2011] EWCA Civ 9, contractual and tortious duties have different origins and different functions. Contractual obligations spring form the consent of the parties and the common law principle that contracts should be enforced. Tortious duties are imposed by law, as a matter of policy, in specific situations. Contractual obligations are negotiated by the parties and then enforced by law because the performance of contracts is vital to the functioning of society. Tortious duties are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct.

15. However, the Court of Appeal made it clear that a professional providing gratuitous services was liable for what he or she does but not for what they fail to do. This becomes somewhat clearer when one considers how the Court of Appeal reformulated the duty owed by the Defendant. For example, in respect of any duty of care owed in respect of the design of the Garden Project, paragraphs 101 to 112 of the Judgment state:

"Ground 3: The judge erred in holding that Mrs Lejonvarn had an obligation at common law to undertake and/or owed the Burgesses a duty of care in respect of the design of the Garden Project

101. This reflects paragraph 14.3 of the particulars of claim. The judge found that a duty of care was owed to exercise reasonable skill and care in the provision by Mrs Lejonvarn of the professional service of "preparing such designs as were necessary to enable the Garden project to be accurately priced and constructed".

102. The judge qualified this duty by finding that the duty meant that the designs be sufficient "to enable a fairly firm budget estimate to be prepared" rather than to enable them "to be costed with an absolute degree of precision".

103. On behalf of Mrs Lejonvarn it is contended that it was wrong for the judge so to conclude. In particular:

    (1) As to the alleged duty to prepare designs to enable the Garden Project to be accurately priced, the particulars of claim do not allege that Mrs Lejonvarn failed to exercise reasonable skill and care in performing such a duty, nor is it alleged that any such failure caused the Burgesses to suffer loss. In those circumstances the judge should have declined to make any finding in relation to the question of whether a duty of care was owed in the provision of the service.

    (2) The qualified duty found by the judge confuses and elides the content of any contractual duty which an architect (or project manager) might owe to his (or her) client with the question of what an architect's (or project manager's) duty might be to third party at common law absent any contractual relationship.

    (3) A duty of care is owed in order to prevent loss and damage but the nature of the loss which the duty found is aimed at preventing is not identified.

    (4) The duty found involves a positive obligation to act in a specific manner in the future.

    (5) As to the alleged duty to prepare designs to enable the Garden Project to be constructed, this would require Mrs Lejonvarn to go to considerable time and expense to perform services for the Burgesses free of charge until her involvement in the Garden Project was brought to an end. This is not the function of the law of tort, there is no previous case in which an analogous duty has been found to exist and to extend the law in this way is not justified as a matter of principle or authority.

104. In relation to the alleged duty to prepare designs to enable the Garden Project to be accurately priced, the judge was asked to make findings by reference to the services set out in paragraphs 14 and 15 of the particulars of claim and cannot be criticised for so doing.

105. Mrs Lejonvarn said that she would do what was necessary for the project to be priced out accurately and prepared drawings to enable this to be done. Pricings were then provided which (based on the £130,000 budget figure) Mrs Lejonvarn claimed were accurate and were being adhered to.

106. This is not therefore a case in which Mrs Lejonvarn merely said she would produce designs to enable the work to be priced, but it is a case in which she did so. Further, as the email exchanges of 8 March 2013 make clear, Mrs Lejonvarn knew that costs and a reasonably accurate budget were crucial to Mr Burgess and the decision to use her rather than Mr Enright.

107. It is correct that there are some passages in the judgment in paragraph 193 which suggest that there was a positive obligation to produce designs. There was no obligation to do design work, but the design work which was done had to be done with reasonable skill and care so as "to enable a fairly firm budget estimate to be prepared".

108. I would accordingly define this duty as follows:

> "In so far as Mrs Lejonvarn provided designs to enable the Garden Project to be priced, thereby performing a professional service acting as an architect and project manager, she owed a duty to exercise reasonable skill and care to ensure that they were sufficient to enable a fairly firm budget estimate to be prepared."

109. In relation to the alleged duty to prepare designs to enable the Garden Project to be constructed, paragraph 15 of the particulars of claim avers that detail design work was done and revisions to the Enright design made. The judge found at paragraph 200 that she did in fact undertake detailed design work. In doing so she had to act with reasonable skill and care.

110. The judgment at paragraph 201 goes rather further than this and suggests that there was a duty in the following terms: "If an architect should have appreciated the need for appropriate designs to be prepared beyond those which had in fact been prepared then Mrs Lejonvarn ought to have used reasonable skill and care in ensuring that those further designs were prepared either by a professional or by the contractor provided that, in the latter case, she had reasonable grounds to be satisfied that the contractor had sufficient competence and experience to prepare the appropriate designs and was in fact doing so."

111. I consider that the judge has here been drawn into matters which depend upon a more detailed consideration of the evidence and of the facts. In my judgment for present purposes the judge should have confined himself to the terms of paragraphs 14 and 15 which were the tasks for which it was alleged that responsibility had been assumed.

112. I would accordingly define this duty as follows:

> "In so far as Mrs Lejonvarn provided designs to enable the Garden Project to be constructed, thereby performing a professional service acting as an architect and project manager, she owed a duty to exercise reasonable skill and care."

16. Paragraphs 92 to 100 of the Judgment state in respect of any duty of care to inspect and supervise the works.

> "Ground 2: The judge erred in holding that Mrs Lejonvarn owed the Burgesses a duty at common law to inspect and supervise the works
>
> 92. This reflects paragraph 14.4 of the particulars of claim. The judge found that a duty of care was owed to exercise reasonable skill and care in the provision by Mrs Lejonvarn of the professional service of "attending site at regular intervals (approximately twice a week) to project manage the Garden Project, and to direct, inspect and supervise the contractors' work, its timing and progress".
>
> 93. The judge qualified this duty by finding that it required "periodic inspection" rather than continuous attendance.
>
> 94. On behalf of Mrs Lejonvarn it is contended that it was wrong for the judge so to conclude. In particular:
>
> (1) There is no previous case in which a common law duty of care to avoid economic loss has been found to arise in connection with the supervision of another's work.
>
> (2) It is particularly inappropriate for such a duty to arise in circumstances where, as here, no duty of care is owed by the person executing the work.
>
> (3) The duty found by the judge involves a positive obligation to act in a specific manner in the future. That is the function of the law of contract, not of tort.
>
> (4) There was no reasonable reliance through choosing not to utilise Mr Enright. He as not to be employed to act as a supervisor or indeed in any professional capacity.
>
> 95. As to (1), whilst there may be no such previous case, I can see no reason in principle why such a duty may not be owed where it is a professional service for which responsibility has been assumed and which is then performed negligently. If, for example, Mrs Lejonvarn had intervened during the course of her supervision of the work and negligently directed that a terrace be constructed in a particular manner with the consequence that it fell down causing economic loss then there would be a clear case of liability in the light of the general duty found.
>
> 96. As to (2), this is essentially the same argument which was raised in relation to the finding of a general duty of care. As already observed, whilst a relevant consideration, it does not mean that in the circumstances as found in this case no duty of care can or should arise.
>
> 97. As to (4), the judge found that the Burgesses relied on the provision by Mrs Lejonvarn of her professional services in relation to the Garden Project. Reliance does not require it to be established that, but for provision of services by the defendant, those very same services would have been performed by another. Reliance is generally sufficiently

demonstrated by a claimant showing that he would have acted differently, and the judge so found in this case.

98. As to (3), I agree that it would not be appropriate for a duty of care to involve a positive obligation to act in a specific manner in the future. The duty found, however, is linked to paragraph 14 of the particulars of claim which avers that Mrs Lejonvarn performed the services there set out. It is accordingly alleged that she did provide the professional service of "attending site at regular intervals (approximately twice a week) to project manage the Garden Project, and to direct, inspect and supervise the contractors' work, its timing and progress". In doing so she owed a duty of care to act with reasonable skill and care.

99. It is correct that the judge speaks of a duty of periodic inspection and does so in generalised terms rather than linked to findings as to what Mrs Lejonvarn actually did. There was a dispute between the parties as to the regularity of her attendance on site and the judge only refers to three such visits. Without a more detailed consideration of the evidence I do not consider that any duty of inspection can at this stage be expressed in such specific terms.

100. Whilst accepting that the judge was entitled to find that a specific duty arose, given the importance of the detailed facts I would define the duty in the following terms:

> "In providing the professional service acting as an architect and project manager of project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress Mrs Lejonvarn owed a duty to exercise reasonable skill and care."

17. In respect of any duty to exercise cost control prepare a budget for the works and oversee expenditure against that budget and to review and advise in connection with applications of payment: see paragraphs 113 to 121 of the Judgment which state:

> "Ground 4: The judge erred in holding that Mrs Lejonvarn owed the Burgesses a duty at common law to exercise cost control, prepare a budget for the works and oversee expenditure against the budget, and to review and advise in connection with applications for payment
>
> 114. This reflects paragraphs 14.5 and 14.6 of the particulars of claim. The judge found that a duty of care was owed to exercise reasonable skill and care in the provision by Mrs Lejonvarn of the professional service of "receiving applications for payment from the contractor, and advising and directing the claimants in respect of their payment" (14.5) and of "exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it" (14.6).
>
> 115. The alleged breaches of this duty are set out at paragraph 31 of the particulars of claim which provides that:
>
> > "The defendant was negligent in that she:
> >
> > 31.1. failed to produce an adequate budget for the works, in particular, breaking down the work elements

necessary to complete the Garden Project, and attributing each element a reasonable proportion of the Cost;

31.2. failed to produce any other adequate budget for the works;

31.3. failed to appreciate that the Cost under-estimated the likely reasonable cost of carrying out the Garden Project, and to advise the claimants of that fact before the works commenced, or at all;

…

31.7. failed to properly assess, and to advise the claimants in relation to, applications for payments made by the contractor, and directed the claimants to make payments in excess of the proper value of the work undertaken."

116. On behalf of Mrs Lejonvarn it is submitted that the nature and extent of the breaches alleged highlight that the duty found is one which would need be agreed by contract rather than imposed by law.

117. It is further emphasised that the judge has not identified any specific act or advice which was relied upon by the Burgesses and to which the duty might attach.

118. In relation to applications for payment the judge found at paragraph 198 that "the receipt of applications for payment from the contractor and the provision of advice and direction to the Burgesses in relation to payment of such applications" was a service which Mrs Lejonvarn was providing. Having so found he was justified in finding that Mrs Lejonvarn owed a duty to exercise reasonable skill and care in so doing. Without a more detailed consideration of the facts it would not in my judgment be appropriate to be more specific as to what this duty required.

119. In relation to overseeing the budget the judge found at paragraph 199 that the pleaded service was one which Mrs Lejonvarn did in fact undertake. Again, having so found he was justified in finding that Mrs Lejonvarn owed a duty to exercise reasonable skill and care in so doing.

120. Consistently with the other specific duties I would define these duties as follows:

> "In providing the professional service acting as an architect and project manager of receiving applications for payment from the contractor, and advising and directing the claimants in respect of their payment Mrs Lejonvarn owed a duty to exercise reasonable skill and care."
>
> "In providing the professional service acting as an architect and project manager of exercising cost control by preparing a budget for the works, and overseeing actual expenditure against it Mrs Lejonvarn owed a duty to exercise reasonable skill and care."

18. As the Court of Appeal made abundantly clear in paragraph 88 of the Judgment:

> ""It is important to stress that this is not a duty to provide such services. It is a duty to exercise reasonable skill and care in providing the professional services which Mrs Lejonvarn did in fact provide in relation to the Garden Project. She did not have to provide any such services, but to the extent that she did so she owed a duty to exercise reasonable skill and care in the provision of those services." (My emphasis)

19. I agree with the Defendant's Written Opening Submissions that the task this Court is now faced with is that:

> ""It must consider in detail what the Defendant actually did during the course of her involvement with the Project and identify whether she acted (as alleged) in a way that was negligent whilst doing what she did."

20. The Claimants in certain cases go too far in their expectations as to what the Defendant was obliged to do and what she should have discovered whilst providing a service of inspection. For example, the Claimants contend that the Defendant was, in general terms, providing the service of inspection between 15th May and 9th July 2013, and that in order to do so competently she was under a duty to attend site at periodic intervals including at the times stated in the Re-Amended Particulars of Claim, paragraph 26.1A **[A/18]** and had she done so, the defects which they allege would have been identified and corrected.

21. I consider that this goes too far. The Defendant is simply obliged to exercise reasonable skill and care in providing the professional service acting as an architect and project manager of project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress.

22. As Deputy Judge Alexander Nissen QC found the Defendant "did supervise the works. She attended site at regular intervals to oversee what was going on". In her email dated 11th June 2013, she was "expressly concerned with the contractor's work and got involved in it". In her email of 3rd July 2013, she reflected the nature of what she was doing by saying that the subcontractors were accountable to her and had to work to her standards or they would not get paid.

23. Now the evidence has been heard and the detailed facts can be considered, it is now the appropriate time to provide a conclusive statement of what services were provided and the nature and extent of the duty owed and of what that required.

3. The Evidence

24. During the trial there were:

    i) Many disputes of fact;

    ii) Many witnesses called whose evidence was of limited relevance to the key issues;

    This scattergun approach to the principal criticisms of the Defendant's performance as Project Manager and Architect was unhelpful. The relevant events took place some five years ago when personal recollection of who said what and who did what are necessarily unreliable, particularly when the recollections of what happened can be

influenced by the dispute and the hardening of attitudes caused by somewhat protracted litigation.

25. There is also a large amount of correspondence involving all parties during this period which assists in understanding what happened. However, before I provide a chronology of relevant events which will provide a framework against which the performance of the Defendant as Project Manager and Architect can be judged, I will provide a brief commentary on the witness evidence provided by both parties.

Factual Witnesses : Claimants

26. The Claimants called some nine factual witnesses:

i) Main witnesses - Mr and Mrs Burgess;

ii) Witnesses who attended site and commentated on the Works - Robert Carr, Martin Platt and Russell Pigeon;

iii) Witnesses relevant to the remedial work - Philip Ellis and Adam Evans;

iv) Witnesses who lived or worked locally - Ivor Schlosberg and Robert Strong.

27. I found Peter Burgess' evidence unsatisfactory. He gave a lot of evidence about what he thought the Defendant was doing but he was in Majorca for significant periods of times between March and June 2013 as set out below:

28 March 13 (09:10) – 2 April 13 (15:25)	Both away [**E5/T.7/2, 7]**
2 April (afternoon) – 18 April	Only C1 here
19 April (06:55) – 23 April (15:25)	Both away [**E5/T.7/21]**
23 April – 9 May	Only C1 here
9 May (18:10) – 14 May (15:25)	Both away [**E5/T.7/26, 16, 7]**
14 May (afternoon) – 10 June	Both here
11 June (09:40) – 20 June	Only C1 here **[E5/T.7/35]**
21 June (06:55) – 2 July (15:25)	Both away [**E5/T.7/35, 43]**
1 July (afternoon) onwards	Both here

Examples of his unsatisfactory evidence are as follows:

i) In the first hearing before Deputy Judge Alexander Nissen QC, Peter Burgess maintained that no budget figure of £130,000 had been mentioned despite the Defendant's contemporaneous Note of the Meeting of 28th April 2013;

ii) In relation to payments being made in cash, Peter Burgess said that what the Defendant had written contemporaneously in her notes was not true [Day 2/13 : B-H] :

> "Q. No. Well, these are the notes that in the last hearing, Mr Burgess, you said she had fabricated for the purposes of the trial, and that was not a case that was put to the defendant, [and] the Judge clearly did not accept it. I want to draw your attention, please, to the next page on the right hand side, about two thirds of the way down, it says "Jason says he wants cash for his own reasons, and that is between him and Przemek", and that is Hardcore, is it not, or Jarek, that is JL4 Build, yes?
>
> A. That's what she says, yes.
>
> Q. And then underneath that she says "I can't take cash though", does she not? That is what it says?
>
> JUDGE BOWDERY: Where is this? This is page 15?
>
> MR FLANNERY: It is the next page, my Lord, on the right hand of the two pages, two thirds of the way down, "Jason says he wants cash".
>
> JUDGE BOWDERY: I see.
>
> MR FLANNERY: Yes, "That is between him and Przemek, I can't take cash though", do you see that?
>
> A. Yes.
>
> Q. "I'll need to bill through Linia", yes?
>
> A. Yes.
>
> Q. That is her company, right?
>
> A. Yes.
>
> Q. So she is making it clear that at the meeting you were very keen to pay cash and you were also keen to pay the invoices through Mark Enright - sorry, through RHR?
>
> A. No, that is totally untrue.
>
> Q. Well, if you look at the left hand page, Mr Burgess, at the bottom, when I say the left, of the page where it says "Jason said". Near the bottom it says "He said he wouldn't get away with paying Mark Enright through RHR"?
>
> A. I wouldn't get away with ---
>
> Q. That is true, is it not?
>
> A. That's what it says, yes. It's not true though. It's not true that I said that."

I prefer to accept the Defendant's evidence supported by the contents of the contemporaneous note which was written when the parties were still co-operating and were still friends;

In relation to the birch trees which, if they had remained, would have had a detrimental effect on the garden design, Peter Burgess also maintained that the Defendant's notes, written as a contemporaneous note and recording that Mr O'Sullivan had told her "Peter wants those birches gone", was not true [**Day 2/58 : D – 2/59 : D] :**

> "Q. "Joe told us Peter wants those birches gone. Richard..." that's the tree man - yes? – "… told Joe to stop all excavation near birches before I arrived" - yes? And then further down on the same page "Richard told Joe what he needs to do to roots exposed near those excavations. Joe needs to backfill with mulch or compost. I told Joe to stay clear away from the trees. Joe said he was just doing what Peter wants."
>
> A. Yes, that isn't true.
>
> Q. Those notes are a contemporaneous record of what Mrs Lejonvarn remembered on the day, Mr Burgess, and you're now trying to say five years ago she is wrong. Might you be mistaken?
>
> A. No.
>
> Q. Sorry?
>
> A. No, I'd be fairly certain on that. I know what happened with those trees and, as I say, if I'd wanted to prune - if I'd wanted to chop them down ---
>
> Q. Yes.
>
> A. --- I could have done ---
>
> Q. Well, Mr Burgess ---
>
> A. --- it in 2010."

Again, I prefer to accept the Defendant's evidence supported by the contemporaneous note.

28. Peter Burgess' answers were argumentative and often inconsistent with the contemporary documentation. I also found his criticisms of the work carried out before he fell out with the Defendant in early July 2013 very difficult to understand, as he continued with the work with the very same subcontractor, Joe O'Sullivan of London Piling, a specialist groundworks subcontractor, for two months after 9th July 2013 without making any serious attempt to sort out either an alternative contractor or an alternative Project Manager/Architect. Lynn Burgess' evidence generally followed the evidence of her husband. However, it was clear that until 5th July 2013, the parties had enjoyed a good relationship. On 5th July 2013, the Defendant mentioned the £130,000 budget to Mrs Burgess which the Defendant rightly thought had been agreed. This led to an almost immediate collapse in the working relationship between the Defendant and the Burgesses. After that discussion of the 5th July 2013, the Defendant

did not visit the site again and, by the morning, the Claimants had decided to press ahead with London Piling to try and complete the garden without any continuing involvement from the Defendant,

29. It seems clear, and I so find, that the budget Peter Burgess had discussed and agreed with the Defendant had not been shared with his wife and when she found out that the budget was £130,000, the Defendant's continuing involvement with the garden rapidly came to an end. This confusion between Peter and Lynn Burgess and the Defendant as to the agreed budget figure was the cause of the breakdown of their relationship with the Defendant.

30. Mr Burgess accepted that this was the cause of the breakdown in their relationship, see [Day 2/11 : F-H] :

> "Q. And if you look at the first paragraph it is the essence of what was then the dispute between you?
>
> A. Yes.
>
> Q. Because you thought you were working to a budget of £78,000, not £130,000, do you see that?
>
> A. Yes."

Mr Burgess confirmed that the dispute over £78,000 or £130,000 was the cause of the dispute and that they "fell apart because of money**" [Day 2/63 : B-E] :**

> "Q. Well, can we agree on one thing, Mr Burgess, you and the defendant really fell apart because of money?
>
> A. Yes?
>
> Q. And you also had a view of her ability to manage builders and budgets, didn't you - yes?
>
> A. The more I got into it, yes.
>
> Q. Nothing to do with the quality of the work, it was just ---
>
> A. At that stage, yes.
>
> Q. That was the one thing you were happy with - yes?
>
> A. Well, I didn't really give it any thought. I assumed it was going according to plan.
>
> Q. Yes, and the emails that we know featured heavily around the 8th of July are all to do with the budget - yes?
>
> A. Yes."

They did not fall apart because of concerns about the quality of the work being carried out on site by Joe O'Sullivan . If the Claimants had any real concerns regarding the work they would not have continued to employ Mr O'Sullivan between 6th July and 19th September and pay him a further £65,000.

31. Robert Carr, Martin Platt and Russell Pigeon gave evidence as to what they saw in July 2013 and what they regarded as poor quality works. I found this evidence to be of limited assistance:

    i) they were inspecting a building site where the Claimants were content to continue with the groundworks subcontractor for another two and a half months:

    ii) the Joint Expert Surveyor, Mr Milnes, has given evidence as to whether or not the defects alleged by the Claimants were defects which required remedial work and his evidence has not been challenged by either party to this litigation.

32. Philip Ellis and Adam Evans give factual evidence regarding the remedial/completion works. However, they could not provide any real assistance as to what was completion works and what was remedial works and to what costs should be attributed to remedial works rather than completion works. In any event, this issue was addressed by the single Joint Expert, Mr Milnes.

33. Robert Strong had worked at Highfields Grove in 2013 gave evidence as to whether the Defendant was a frequent visitor to the site. His written evidence suggested she visited most days for the first couple of months. His oral evidence suggested it was "more twice a week rather than one. It could be three":

    "Q. So, you couldn't say whether it was once a week, or twice a week, or three times a week?

    A. I would actually say it was more twice a week, rather than one. It could be three." [Day 3/108 : A-B].

34. Ivor Schlosberg was a Director of Highfields Grove Management Limited, responsible for the management of the Highfields Grove Estate. His evidence was clear and concise. He wanted the Claimants to appoint "a contractor of high repute" who could resolve the problems from July 2013 onwards. Again, it is surprising that against that background, the Defendants continued to employ a subcontractor for a further two months if they had any real concern as to the standard of his work.

    Factual Witnesses: Defendant

35. The Defendant answered questions clearly and concisely. She had an impressive grasp of the contemporaneous documentation and gave her evidence with a great deal of composure, despite a very robust cross-examination. I thought her evidence, particularly compared with Peter Burgess' evidence, was impressive and largely consistent with the contemporaneous documentation. All litigation is stressful but I considered that the Defendant generally did her best to assist the Court by giving clear and direct answers to the questions without being argumentative or evasive. On all factual issues, save one, I prefer her evidence to the evidence of the Burgesses.

36. The factual evidence of the Defendant which I cannot accept is that she denied that it was ever intended for her to project manage the whole Project and her role was limited to the second stage decorative phase of the Project. I agree with and adopt the observations and finding of Deputy Judge Nissen QC where he held

    "[180] ...She expressed a degree of confidence in her own ability to manage projects, control budgets and to select, organise and approve payments for contractors. The Burgesses had no reason to disbelieve that she had such expertise and experience. Indeed, during the Bank

> Project Mrs Lejonvarn provided services of the type described... Although the subject matter of the Garden Project, namely earthworks and landscaping, was different from the subject matter of the Bank Project, which was more traditional construction, the principles of project management were the same. Moreover, Mrs Lejonvarn herself confirmed to the Burgesses that she had experience of landscaping works. The services she was providing were the same. In my view, the thrust of all of Mrs Lejonvarn's written communications is consistent with that type of service having been provided...
>
> [189] By way of over-arching objection to the allegations, it was submitted on behalf of Mrs Lejonvarn that she cannot have assumed responsibility for the various services pleaded against her because she was an architect who neither possessed nor professed to have any particular expertise other than in respect of aesthetic design. I reject that submission. At no stage did Mrs Lejonvarn indicate that aesthetics were the limit of her expertise or ability. She readily took up the task of becoming involved in the Garden Project. If she had wanted the Burgesses to understand that she had no or no sufficient experience of earthworks and landscaping then it was incumbent upon her to dispel the impression that she had created that she had that experience. The e-mails which she sent in March 2013 professed no doubts in that regard. She portrayed herself and Hardcore as a team and assured Mr Burgess that Hardcore would be suitable for the project. She also said to Mr Burgess that she did have landscaping experience. Whilst I accept that Mrs Lejonvarn's specific expertise of aesthetics would have come to the fore once the earthworks had been completed that was not the only sphere of responsibility which she assumed."

Mr Kordyl also gave evidence in respect of Mrs Lejonvarn's involvement with the project and confirmed that he thought she was there "to look after the Claimants interests".

37. Having heard the factual evidence of both parties, the factual background to this dispute was as follows:

i) What happened prior to commencement of work on site from 6th March 2013 to 22nd of May 2013?

a) Mr Burgess emailed the Defendant on 6th March 2013 **[E1/357]**:

> "I have a builder starting work on the 3rd April. He is not of your guys standard and won't be able to build the desk. Do you think your guys will have time? Also, do you think your guys could do our garden? I will send you the plans. This would be a decent job for them."

The "guys" were Hardcore Builders Limited ("Hardcore") with whom both Mr Burgess and the Defendant had worked in the past.

The plans were the Enright Plans sent to Mr Burgess on 25th July 2012 [E1/298] with a quotation for its implementation at £155,837 plus VAT [E1/302] plus an estimated planting budget of £19,785 plus VAT. Mr Burgess thought these prices were too high but Mr Enright was only prepared to reduce his price to £150,000 plus VAT. See his email dated 1st October 2012:

> "We have looked at the figures and could do the job for 150k plus VAT…"

ii) The plans were sent to Hardcore but the Defendant, in an email dated 7th March 2013 to Hardcore, suggested that they could not give the "total price" until more design was specified;

iii) On 18th March 2013, a number of emails were exchanged, all discussing, amongst other matters, whether Hardcore would give a cheaper price. In one of those emails, the Defendant described the proposed project team:

> "I see the project team as follows:
>
> 1. Labour:
>
> 2. Project Management and detail design (to include layout and procurement of hard materials such as paving, decking, possibly balustrades and design features (possibly a water feature), consideration of technical aspects such as drainage and building of raised beds and or supports, fences, barriers and or other built item such as storage cupboard and all related finishes.) ME.
>
> 3. Lighting: Mark DAVIS.
>
> 4. Trees: Richard Wassels
>
> 5. Planting and any pots or decorative features: Matt
>
> 6. Misc. items: underground drainage and irrigation.
>
> My guys are prepared to do all the "building work", the ground works, the raised beds and terraces, the deck areas and stairs, and storage and the paved areas at the ground level and they can have it all ready to receive planting."

iv) On the 27th March 2013, as Mr Kordyl explained, he went on site with Jerry Latacz of JL4 Build because Mr Kordyl was waiting for a quotation for the groundworks from Mr Latacz. Only when work started did Mr Kordyl find out that Mr Latacz had subcontracted the groundworks to Mr O'Sullivan of London Piling;

v) On 9th April 2013, Mr Latacz submitted his quotation of £37,000 plus VAT to Hardcore, added a mark-up of £8,000 for the first phase demolition and structural works and added allowances for sleepers, decking, steps, irrigation and fencing, to give a total of £78,500;

vi) The Defendant sent Hardcore's cost estimate to the Claimants on 17th April 2013, but made it clear that "Hardcore have given you a price for the 1st phase of works and as such have itemised what this comprises of. The subsequent stages are only budget estimates.";

vii) On 28th April 2018, the Defendant met with Mr Burgess to discuss pricing issues. Deputy Judge Alexander Nissen QC has already made findings including that the overall budget of £130,000 plus VAT was discussed. It was suggested by Mr Burgess that at this meeting the Defendant insisted that

payments had to be made in cash. I reject that suggestion and I prefer the evidence of the Defendant that it was Mr Burgess who wanted to pay in cash. This is consistent with the Defendant's email of 9th July 2013 which stated:

> "I did not put it in an email because you wanted to pay in cash and for that reason I write it down in my notes…"

a statement not challenged at the time by Mr Burgess;

viii) Following this meeting, the Burgesses decided to proceed with Hardcore;

ix) JL4 arranged to start on 14th May 2013 and asked for a £7,000 advance payment;

x) On 15th May 2013 there was a meeting on site at which Mr Burgess, Mr Kordyl and Mr Latacz were present and it was announced that the Highfields Grove Estate could not allow concrete delivery lorries onto the Estate so the walls would have to be built using railway sleepers, rather than using piled concrete;

xi) The Defendant's contemporaneous notes recorded that this was discussed on 27th May 2013 at a kick-off meeting and the Defendant noted:

> "Przemek says he is confident that despite the no concrete deliveries constraints doing it in sleepers will be fine with respect to Jarek's orig estimate of 45... Przemek happy that with budget as generous as 130, room for the 45k to increase. Peter agrees"

xii) Work on site started on or about 22nd May 2013.

B. What happened after the commencement of works on site until 9th July 2013 when the Defendant no longer worked on the Project?

xiii) During this period it is the Claimants' case that the Defendant;

b) carried out detailed design;

c) made changes to the design of the garden;

d) carried out periodic inspections of the works;

e) advised the Claimants regarding payments to Hardcore;

As the Court of Appeal stated, it is necessary to make findings as to what services the Defendant actually provided and provide a definitive statement of the nature and extent of the duties owed by the Defendant;

(a) <u>Detailed design</u>

xiv) Insofar as it is alleged that the Defendant should have advised the Claimants that appropriate detailed designs from an architect or a structural engineer were required before a budget could be agreed or work could commence, as Deputy Judge Alexander Nissen QC noted, such a duty would be discharged if she had

"reasonable grounds to be satisfied that the contractors had sufficient competence and experience to prepare the appropriate designs and was in fact doing so";

xv) I consider for the groundworks being carried out on site, she was entitled to rely upon the experience and expertise of the contractors employed by the Claimants to carry out their works. They did not need a structural engineer in order to implement the necessary works including retaining walls, all as indicated in the Mark Enright design;

xvi) The drawings which the Defendant produced were produced after works commenced on site;

xvii) The Defendant in her Closing Submissions submits that the relevant chronology was as set out below:

> "43. On 23rd May 2013, D went to site as part of an exercise she was undertaking at the time to try and establish the future finish floor levels for the stairs (BL3/36 [B/239]). On that day, she relayed to Mr Burgess that "[t]hings are moving along, on site and we are all in agreement about levels etc" [E2/564]; and that "I have adjusted the steps a little as the levels were not realistic" [E2/567]. That D was considering at this stage how the levels would work for the stairs is also confirmed in notes written by her on 24th May: [E5/Tab 4/12]
>
> > "Idea is to look at circulation to confirm future steps will be logically laid out to suit exist'g levels. I'm pretty certain M.E's plan has never tested anything. Need a section."
>
> 44. Following on from this, D sent some sketches to the contractor ([E2/548A-548B], attached with the email at [E2/575H]) with a "quick diagram of the 3 initial retaining walls we are building at the present time". The aim of these sketches was to calculate the number of sleepers" which was itself dependent on the required height of the walls, and identified a short Level 3 wall at just 400mm high, with a larger wall (Level 4 on the sketches) below the birch trees. Later the same day, D messaged Mr Burgess to let him know that she was "working on the lay out. I believe we have to adjust some of it. Just in terms of the levels and how the terracing works out. I think there is one terrace too many. The two trees really govern it and I also want to reduce the sheer number, of retaining walls..." [E2/575J].
>
> 45. On 27th May, 17.57, Mr Burgess asked if they could "go through your alterations to the plan at some point" [E2/575M]. D responded at 18.23 [E2/575M], noting that "[a]s it happens I was just working on your garden plan which I am trying to rationalise the levels above the ones we have just done... My concern now is to make the works progress quickly and smoothly and set all the levels now. The stairs are what I am working on in order to give the lay out the necessary breaks (landings) but still have it work with the levels. I am not changing anything in principle, but I need to adjust things nonetheless".

46. Mr Burgess did not express surprise at any such 'adjustments', simply observing that "you are certainly on the ball" [E2/575Q]. The Drawings themselves were then sent by D to Mr Burgess later that same evening: [E2/575SA]. Again, there was no suggestion by Mr Burgess that any kind of change to the layout drawn on the Enright Plan would be unacceptable. They were sent to Hardcore about fifteen minutes later ([E2/575]), D noting that "I hope Peter will agree to the minor changes I made..." Subsequently, on 30th May D noted in an email to Mr Kordyl that "Peter is up for the adjustments I made to the design and I am going to meet him on the weekend to discuss further..." [E2/591].

Having reviewed this chronology with the Defendant's and the Claimants' evidence and the contemporaneous documents, I accept that this chronology of what happened regarding the Defendant's drawings is accurate and correct and the drawings were never intended to be "detail designs" or to be used for construction purposes. They were produced to see how the finish/floor levels could be made to work on site in the context of the stairs and stair landings. They were not, on any view, produced negligently;

(b) Made changes to the design of the garden

xviii) At the end of the evidence there appears to be three complaints about design changes:

a) It is complained that an email dated 23rd May 2013 showed a design change, see Re-Amended Particulars of Claim, paragraph 290B.1. However, by 9th July 2013, none of the walls had been constructed in accordance with this alleged design change and thereafter none were;

b) It is claimed that changes were made to the Enright Design, the first relates to how a straight edge lawn came to be built. However, after the dispute over the budget erupted in July the Defendant emailed Mr Burgess and stated:

> "Would it help if I were to show you in a drawing how the edge of the lawn can still be curved despite Joe's straight retaining section"

Mr Burgess thereafter expressed delight with the design and, in any event, no cost is alleged to arise with regard to this alleged non-compliance;

With regard to the changed design of the so-called meandering path, Mr Burgess accepted in his oral evidence that before the Defendant left the Project, she was only suggesting that the Claimant discuss any proposed change, see [Day 2/38 : F-G] :

> "Q. I would like to discuss with you since time pressures upon us, [is] the meandering path up the steep incline at the back, Joe reckons he can do it but I feel it might take longer than even he can estimate just because of the sheer steepness the issue will create", yes, and then she says, "A set of gradual steps would be easier and a lot faster, and would not carry the same risks", yes?

A. Yes.

Q. Now, before she leaves site that is about as far as it gets with that suggestion, yes? It is all it became, there was not a design change at that point, was there? It is just a suggestion to discuss, yes?

A. I mean, I think it would have been a design change, because the plan that she was working to was what was eventually built, a sort of diagonal path straight across the bank, which is as Joe did build it.

Q. OK.

A. It was either one or the other.

Q. Well, she is only suggesting that you discuss it at that point?

A. Yes."

On any view, these alleged changes to the design of the garden were not produced negligently;

(c) Periodic Inspections

xix) This part of the history of the project is difficult to fathom. The Claimants' own architectural expert states that he "can find nothing in the correspondence that provides evidence that inspections were carried out" [C/117/10-18.4]. Nor I find, having read and heard evidence from the architectural experts, would any architect be expected to inspect periodically, or otherwise, structural works and the groundworks of the type being carried out up to 9th July.

xx) However, the times at which the Defendant was on site and what she was doing on site is apparent from the correspondence. Mr Strong's evidence when cross-examined suggested the Defendant was on site two or three times a week. Some weeks that is correct according to the documentation but not throughout the period between May and July. I prefer the record of visits evidenced by the contemporaneous documentation rather than Mr Strong's somewhat vague recollection;

xxi) The records suggest:

15th May 2013	Defendant on site but no works underway;
17th May 2013	Defendant on site but no work underway;
22nd May 2013	Defendant on site discussing levels but no work underway;
24th May 2013	Defendant on site but did not go into garden because no one on site because of rain;

29th May 2013	Defendant had an accident and could not walk properly;
1st June 2013	Meeting on site to discuss removal of birch trees. A lot of evidence was given as to the removal of the birch trees. I consider that having heard all the evidence nothing sinister occurred and the removal of those birch trees was in the best interest of everybody and were a major contribution to the success of the eventual design of the garden;
13th June 2013	Further meeting on site to discuss the birch trees;
18th June 2013	Meeting on site to discuss the lawn;
19th June 2013	Further meeting where the Defendant wanted to check with Mr O'Sullivan the condition of the birch trees in the vicinity of the lawn;
2nd July 2013	The Defendant visited the site and had a long discussion with Joe O'Sullivan about rear incline and the Defendant took progress photographs after a complaint that not much work was taking place
5th July 2013	The Defendant with Mrs Burgess when the dispute over the agreed budget of £130,000 erupted.

So in eight weeks from 15th May until 5th July 2013, the Defendant visited the garden ten times, but only eight times after work commenced. I accept the Defendant's evidence that this was the extent of her visits to the garden. Furthermore, given the number of contemporaneous emails and other documents, if there were further visits they would have been recorded in the contemporaneous documentation. I also accept the Defendant's evidence that:

c) the visits in May were largely before work started;

d) the visits in June were largely to discuss the birch trees and the lawn;

e) the visits in July were to discuss progress and the budget with Mrs Burgess.

However, I consider and so find that the Defendant was visiting the site and was inspecting the works periodically and sufficiently to review and to advise regarding applications for payment but she was not inspecting the structural work and groundworks for non-compliance. This is hardly surprising because most, if not all, of the work being carried out up to 9th July 2013 were structural

works and groundworks which no architect could be expected to inspect as the architectural experts broadly agreed was correct;

xxii) As Deputy Judge Alexander Nissen QC found, it was up to the Defendant to review the applications for payment and to give advice as to whether the sum applied for was appropriate in the circumstances. Furthermore, the Defendant was responsible for exercising cost control by preparing a budget for the works and for overseeing expenditure against it. The spreadsheet she provided in July 2013 made it clear that she was monitoring expenditure against the budget agreed with the Claimants;

(d) Payment to Hardcore

xxiii) The original price of £37,000 given by JL4 Build was for groundworks based on the construction of piled concrete retaining walls. This proved impossible, so the design was varied to use railway sleepers and JL4 asked to be paid on a daywork basis. Between May and July, interim payments were requested on a time and materials basis. The Defendant's evidence is that Mr Burgess was aware of this request and I accept the Defendant's evidence on this point. Again, it is supported by the contemporaneous correspondence which Mr Burgess did not query, see [E2/649, E2/680]. The following payment requests were forwarded to the Defendant and passed on to the Claimants:

17th May 2013	£7,000	Initial down payment
2nd May 2013	£7,193	Payment request to purchase 200 railway sleepers
30th May 2013	£12,000	Payment request for labour
30th June 2013	£20,600	Payment based on daywork rate reduced from £1,700 to £1,500 for ten days plus £5,600 for materials. This request was passed on to Mr Burgess, see **[E2/649, E2/675, E2/680];**
30th June 2013	£3,600	Payment request for 100 sleepers.

It is alleged that the Defendant failed to properly assess and to advise the Claimants in relation to applications for payments made by the Contractor and directed the Claimants to make payment in excess of the proper value of the works undertaken.

I disagree: -

a) these payments were only interim payments and were not excessive or unreasonable in the context of the works being carried out;

b) these payments were based on daywork rates and material costs as had been agreed with Mr Burgess;

c) the Claimants carried on paying Mr O'Sullivan after 9th July 2013 on a similar basis:

xxiv) Events after 8th July 2018

8th July : Defendant produces a budget tracking spreadsheet in order to explain the current financial situation of the project, and explains that ‘‘we are very close” to the £130,000 budget sum. Further, Joe states that she informs Peter Burgess that she anticipates 2 weeks to finish the groundworks phase [E2/746].

In an email on 9th July at 08:45 [E2/761] the Defendant informed the Claimants that:

> “It is my responsibility to work in the best interests of my clients and as such I make great efforts to make clients aware of any potential problems, issues, or shortcomings that may affect the success of a project. I am not a Quantity Surveyor and as such I do not price jobs. I have also assembled an experienced team and offered to you their services which I have managed.
>
> I promised to work to a budget that we agreed, and that is exactly what I have done.
>
> Unfortunately I don’t believe we will come to a mutually agreeable conclusion. I am sorry that this has ended our relationship but I cannot work under these circumstances.
>
> I don’t want to leave you with an unfinished project so I will ask my contractors if they would be willing to continue with you directly. There are risks associated with this. Problems may arise on site that require someone to manage them with a knowledge of technical, logistical and design solutions. You will be exposed and vulnerable to cost increases, or unacceptable results in terms of how it is finished off or detailed. The fact that you do not have any technical design drawings for the stairs leaves them open to the interpretation of the builders. Nevertheless I wish you the best of luck.”

4. The Issues of Alleged Breaches of Duty by the Defendant

38. The nature and scope of the alleged breaches of duty alleged against the Defendant have developed somewhat over time. Despite this claim having been case-managed by at least eight different full-time or part-time TCC High Court Judges and despite Written Opening and Closing Submissions running in length in excess of 250 pages,

the nature of the case advanced against the Defendant is still not clear and the precise breaches of duties alleged against the Defendant are still not clear.

39. However, I intend to address the specific breaches of duty alleged against the Defendant against the backdrop of the Claimants' Written Closing Submissions which provide the most precise summary of the Claimants' updated complaints against the Defendant. I will then summarise my response to the Outline List of Issues the Claimants' Counsel very helpfully attached to his Written Skeleton Opening.

40. Under the heading "DESIGN AND PROJECT MANAGEMENT", paragraph 35 of the Claimants' Closing Submissions state as follows:

> "35. The Particulars of Claim (APoC, ¶29.1-3) plead three different allegations as to how D ought to have discharged her design and project management duties, which it is useful to bear in mind when considering the evidence of the tasks that she undertook for Cs:
>
> (1) first, giving a warning/advice to Cs that the construction works should not be commenced or continued without sufficient construction detail being in place (APoC, ¶29.3). That duty did not depend on D's involvement in undertaking any particular aspect of the design, but because of her undertaking, as designer and project manager, the initial procurement and management of the project, identifying the necessary skills, locating the project team and arranging their appointments.
>
> (2) secondly: (i) identifying the need for the detail designs and specifications that needed to be produced (by her or by another competent professional) without which there existed the risk that the works could not be safely built; and (ii) advising Cs of that need; and
>
> (3) thirdly, including in her designs (whether in her Drawing or otherwise) sufficient construction detail to enable her design to be built and, in particular, the structural elements identified in APoC, para. 29.1."

41. Given the way in which the Defendant's duties were reformulated by Hamblen LJ from those found by Deputy Judge Alexander Nissen QC, it is clear that the Court of Appeal Judgment found that the Defendant owed a duty to take reasonable skill and care insofar as a particular service was provided, such as a design was produced or inspection of the works was carried out.

42. The Defendant selected and procured the contractors and persons needed to implement the Enright Design. As Deputy Judge Alexander Nissen QC found, the Defendant "was responsible for setting up the contractual relationship between Hardcore and the Claimants and for agreeing the terms on which Hardcore were engaged. The duty is qualified in one material respect. It was clear that Mr Burgess liked and trusted Hardcore with whom he had had previous experience."

43. I am not sure how that qualifies the Defendant's duty but it is clear that the Defendant assembled or procured and was in the process of assembling and procuring a capable and competent team to implement the garden project. Mr Burgess had a high regard for Hardcore and the Defendant cannot be criticised for recruiting Hardcore or indeed the other proposed contractors for this project.

44. However, the Claimants' claim for negligent design and project management lacks credibility and conviction. After Deputy Judge Nissen QC's Judgment at first instance and prior to the Court of Appeal hearing, the Claimants accepted that the drawings themselves were not produced negligently (RFI Response dated 8th March 2016, para. 9.8 [A/260]) but that other drawings should have been produced. Following the Court of Appeal Judgment, they reviewed their position and stated that the drawings produced by the Defendant were produced negligently and argue that those drawings should have been detail design drawings containing all kinds of construction details but the Defendant negligently failed to incorporate all these necessary details. I prefer their original case and I agree with the Defendant that those drawings were not only never intended to be detail design drawings issued for construction with all necessary structural details but were never treated as such by either the Contractor or the Claimants.

45. In any event, the Claimants are unable to identify any drawings produced by the Defendant which caused any defective construction or any advice which was given negligently. With regard to the complaint of a failure to advise or of a failure to warn the Claimants of various matters, in the absence of any contract, the Defendant was not under any duty to offer any such advice or warnings. However, until the parties fell out over the budget for the works, there was no advice or warnings which the Defendant should have given which were not given.

46. However, the Claimants' case on design and project management is even more threadbare. By the time the Defendant left the Project, the work carried out on site was still heavy digging and structural work being carried out by an experienced and competent specialist groundwork contractor. This work was constructing retaining walls in someone's back garden in Highgate. It never needed a fully independent structural or detailed design.

47. The Claimants' own independent architectural expert accepted that it was possible for a contractor to build to its own design "depending on the capabilities of the contractor" [C/698] and both architectural experts gave evidence that they would expect a "piling subcontractor to carry out its own specialised design". Yes, the design changed because the Estate refused to allow concrete lorries onto the Estate. However, if one can assume that Mark Enright could build a retaining wall based on their own experience and expertise without a design from a structural engineer as Mr Adam Evans confirmed he would have expected, it is difficult to understand why London Piling, who specialised in mini piling, ground beams, raft foundations, basements, retaining walls and reinforced concrete works, could not do likewise. Indeed, they seemed to have greater expertise and experience than Mark Enright when it came to groundworks and constructing retaining walls.

48. There was no reason for the Defendant to challenge the competence of JL4 and London Piling as being capable of carrying out groundworks and building retaining walls. The walls they built were not structurally unsafe and were either left in place in the final design or removed for reasons not related to their structural robustness.

49. I have reached the conclusion that the Defendant was not in breach of the duties set out above or, indeed, any of the duties of care alleged at Re-Amended Particulars of Claim, paragraphs 29.2 – 29.4. With regard to any remaining criticism of the Defendant's alleged revision of the design and/or any alleged departing from the Mark Enright design. I will deal with each allegation in turn.

Steel Supports

50. This refers back to the 23rd May 2013 email from the Defendant to Mr Burgess [E2/566]. However, no walls were built with steel structural supports and vertical sleepers by 9th July 2013, so this criticism goes nowhere. In any event, such a proposal was not and would not be negligent given that the Mark Enright design referred to construction using sleepers and RSJ's [E1/308].

Strengthening of the Lawn

51. The drawing prepared by the Defendant was never ultimately adopted, so it is difficult to see how she acted negligently. Furthermore, Mr Burgess concluded that the Section which the Defendant prepared did not show a large difference between the terraces [Day 2/36 : B] :

> "Q. You are not talking about how it is built, Mr Burgess, you are talking about what her design changes were. There is no design change in this drawing that creates this huge step, is there?
>
> A. I can't see a huge step on there, no."

Meandering Path

52. The allegation is that they were told on 5th July 2013 that the path would need to follow a steep stepped incline. What was said is in dispute but a requested design change which was never implemented could not seriously give rise a claim in negligence.

53. Where this claim for defective design and project management goes wrong is that from the period the Defendant was involved in this Project, the works were specialist groundworks being carried out by a specialist groundworks contractor carried out to a design he was more than capable of carrying out than including the specialist design of the temporary and permanent works necessary to achieve the finished levels Mark Enright required as part of his design of the Claimants' back garden.

54. The Defendant was not a design and build main contractor subcontracting the construction work to JL4 and, in turn, London Piling. She was an architect fully entitled to let them get on with their works to produce the necessary retaining walls and finished levels the Mark Enright design required.

55. In the circumstances, I find that such designs as were produced by the Defendant were not produced negligently or in breach of a duty of care because:

i) the designs failed to include the construction details set out at paragraph 29.1 of the Re-Amended Particulars of Claim including:

> "29.1.0A structural detail showing the location, type and size of: (i) structural members such as earth retaining structures: (ii) foundations; (iii) works required to restrain the retaining structures, including the methods of fixing and restraining the timber sleepers and steel supports; (iv) surface water drainage;
>
> 29.1.0B detailing of interfaces of different materials and structural elements and the details of, in particular, the steps and retaining walls;

29.1.1 design detail, or specifications of work and materials, for the foundations, footings or backslope for the terrace walls (defects 1-2 and 20);

29.1.2 provision for land drainage within those parts of the Garden held within retaining walls (defect 6); and/or

29.1.3 design detail, or specifications of work and materials (namely the size, dimensions, quality, or modes of preparation or fixing) of the Steel Posts (as defined in the Schedule) or timber sleepers (defects 7 to 21);"

For any such structural design and associated structural details the Defendant acting competently was entitled to rely upon the skill, experience and expertise of the contractor doing this work.

Accordingly, the Defendant did not act negligently or in breach of duty of care by allowing the works to commence and/or continue on site without sufficient construction detail or a specification of works or by failing to advise the Claimants that such designs were necessary and/or that without them there was a risk that the works built without such designs could be unsafe.

56. Under the heading "INSPECTION", paragraphs 70 and 78 of the Claimants Closing Submissions contends that:

"F.1 What D was doing on site

70. On the facts, D assumed responsibility for:

(1) arranging when site inspections ought to take place;

(2) on those occasions when she visited site, or should have visited, inspecting the progress of the contractor's work and ensuring (so far as possible by the application of reasonable care) that it complied with the requirements of the construction contract and conformed to the Enright Design; and

(3) in the event that those inspections identified defects or non-conformances in the work, giving instructions to the contractor to remedy those.

78. D was in breach of duty because, having assumed responsibility for the task of inspection of the works, on her own account she did not actually undertake any inspections of the work. She would only identify whether the work was defective or non-conforming if she happened to see something obvious on site."

The Defendant, on her own evidence, and in my view reasonably did not carry out any inspections of the ongoing structural and groundworks then being carried out. Applying the clear guidance from the Court of Appeal:

"It is important to stress that this is not a duty to provide such services. It is a duty to exercise reasonable skill and care in providing the professional services

which Mrs Lejonvarn did in fact provide in relation to the Garden Project. She did not have to provide any such services, but to the extent that she did so she owed a duty to exercise reasonable skill and care in the provision of those services."

I cannot find that her inspections of these works were carried out negligently.

57. However, the specific complaints of failing to identify specific individual defects or non-conformities which it is alleged that the Defendant should have identified on any such inspections and should have instructed the Contractor to correct faces specific further problems:

i) Many of the alleged defects are alleged to have compromised the structural integrity of the walls and rendered them unsafe. The Claimants' own architectural expert accepted that an architect would not be expected to identify structural defects;

ii) The Claimants, I consider, have done what Mr Justice Coulson (as he then was) warned against in McGlinn v. Waltham Contractors Ltd and Others [2007] 111 Con LR, that is to assume any claim for bad workmanship against the Contractor must automatically be reflected in a claim against the Defendant on the basis that if there is a defect, then the Defendant has been negligent for not identifying it and having it remedied: see paragraph 218 of Judgment which stated:

> "(b) Summary of applicable principles
>
> [218] In the light of these various authorities, I would summarise the legal principles relating to an architect's obligation to inspect as follows:
>
> (a) The frequency and duration of inspections should be tailored to the nature of the works going on at site from time to time: see Corfield v Grant and para 8-240 of Jackson and Powell. Thus it seems to me that it is not enough for the inspecting professional religiously to carry out an inspection of the work either before or after the fortnightly or monthly site meetings, and not otherwise. The dates of such site meetings may well have been arranged some time in advance, without any reference to the particular elements of work being progressed on site at the time. Moreover, if inspections are confined to the fortnightly or monthly site meetings, the contractor will know that, at all other times, his work will effectively remain safe from inspection.
>
> (b) Depending on the importance of the particular element or stage of the works, the inspecting professional can instruct the contractor not to cover up the relevant elements of the work until they have been inspected: see Florida Hotels Pty Ltd v Mayo (1965) 113 CLR 588 and para 8-241 of Jackson and Powell. However, it seems to me that such a situation would be unlikely to arise in most cases because, if the inspecting officer is carrying out inspections which are tailored to the nature of the works proceeding on site at any particular time, he will have timed his inspections in such a manner as to avoid affecting the progress of those works.

(c) The mere fact that defective work is carried out and covered up between inspections will not, therefore, automatically amount to a defence to an alleged failure on the part of the architect to carry out proper inspections; that will depend on a variety of matters, including the inspecting officer's reasonable contemplation of what was being carried out on site at the time, the importance of the element of work in question and the confidence that the architect may have in the contractor's overall competence: see Sutcliffe's case and para 8-242 of Jackson and Powell.

(d) If the element of the work is important because it is going to be repeated throughout one significant part of the building, such as the construction of a proprietary product or the achievement of a particular standard of finish to one element of the work common to every room, then the inspecting professional should ensure that he has seen that element of the work in the early course of construction/assembly so as to form a view as to the contractor's ability to carry out that particular task: see the George Fischer Holding case. That accords with Mr Jowett's evidence in the present case, with which Mr Salisbury agreed.

(e) However, even then, reasonable examination of the works does not require the inspector to go into every matter in detail; indeed, it is almost inevitable that some defects will escape his notice: see East Ham BC v Bernard Sunley & Sons Ltd [1965] 3 All ER 619, [1966] AC 406 and para 8-239 of Jackson and Powell.

(f) It can sometimes be the case that an employer with a claim for bad workmanship against a contractor makes the same claim automatically against the inspecting officer, on the assumption that, if there is a defect, then the inspector must have been negligent or in breach of contract for- missing the defect during construction. That seems to me to be a misconceived approach. The architect does not guarantee that his inspection will reveal or prevent all defective work (see Corfield v Grant). It is not appropriate to judge an architect's performance by the result achieved (see para 8-238 of Jackson and Powell). To that extent, therefore, I agree with the points made in paras 49 and 50 of the written opening prepared by Mr Bartlett QC and Mr Hamilton on behalf of HTA."

58. The wise words of Lord Upjohn in *East Ham Corporation v. Bernard Sunley & Sons Limited* [1966] AC 496 at 447 should not be overlooked. He stated that:

> "As is well known, the architect is not permanently on the site but appears at intervals, it may be of a week or a fortnight, and he has, of course, to inspect the progress of the work. When he arrives on the site there may be very many important matters with which he has to deal: the work may be getting behind-hand through labour troubles; some of the suppliers of materials or the sub-contractors may be lagging; there may be physical trouble on the site itself, such as, finding an unexpected amount of underground water. All these are matters which may call for important decisions by the architect. He may in such circumstances think that he knows the builder sufficiently well and can rely upon him to carry out a good job; that it is more important that he should deal with urgent matters on the site than that he should make a minute inspection on the

> site to see that the builder is complying with the specifications laid down by him… It by no means follows that, in failing to discover a defect which a reasonable examination would have disclosed, in fact the architect was necessarily thereby in breach of his duty to the building owner so as to be liable in an action for negligence. It may well be that the omission of the architect to find the defect was due to no more than error of judgment, or was a deliberately calculated risk which, in all the circumstances of the case, was reasonable and proper."

59. In this case, the Claimants made little or no effort to explain when the Defendant should have identified the alleged defects and non-conformities and did not even put to the Defendant that she acted in breach of any duty of care in failing to identify the alleged defects and non-conformities.

60. However, both parties have invested a great deal of time and resources in respect of the alleged defects and non-conformities and the Defendant's Counsel has provided a helpful Scott Schedule attached to their Final Written Submissions setting out the Defendant's response to each allegation of alleged failures in supervision and inspection. Dealing with the remaining items of alleged defects and non-conformities – Items 1 and 9 not being pursued according to the Claimants' Closing Written Submissions.

Item 5: The Damaged Bollard

61. The evidence as to when this bollard was damaged is conflicting. It may have been damaged in June 2013 or, on the basis of Mr Strong's evidence, in September 2013. On this issue, I accept Mr Strong's recollection that the bollard had been damaged by a digger in September 2013.

Item 6: Land Drainage

62. Mr Milnes did not consider that the absence of land drainage, as at 9th July 2013, was a defect and Mr Armes confirmed, in his oral evidence, that it would not have been a defect not to have drainage installed by 9th July. I accept their evidence and no claim in negligence is established.

Item 7: Steelwork Oxidation

63. The Defendant's architectural expert Mr Milnes expressed the view that steel supplied prior to 9th July was red-primed and that untreated grey steel was used as part of the works after 9th July 2013. Mr Robert Evans reported that he had discovered "no document which shows the Contractor was required to provide corrosion protection to steel" and that "if the Contractor was not required to protect the steel not doing so would not be a defect in the Contractor's work". However, as at 9th July 2013, these works were not covered up so any complaint, if a further protective finish had to be provided, would be an example of incomplete and not defective work. In those circumstances, I do not consider that a case in negligence is established.

Item 8 : Non-continuous steelwork columns

64. The Claimants contend that the Defendant was negligent not to identify that four steel posts forming part of the Level 3 retaining wall had been extended vertically by joining two lengths of universal channel. It is alleged that the structure was unsafe, but there is no evidence to support such allegation.

65. Mr Armes stated that "[t]he sufficiency and structural performance of the steelwork is outside the expertise of an architect" [C/103], in which case it is difficult to see why even an inspecting architect could be expected to identify this as a defect. Mr Robert Evans also identifies that "[t]he contractor's method of construction including temporary structural modifications are not something that an architect would ordinarily inspect" [C/384/4.7.4].

66. In any event, the Level 3 wall was reduced in height after the birch trees were removed. I cannot see how the Defendant acted negligently in respect of this alleged defect/non-conformity.

Item 9 : Steelwork cut from universal channel sections into T's

67. The Claimants contend that the Defendant was negligent not to identify that four steel posts had been constructed by cutting universal channel sections into T-shapes. It is alleged that the resulting construction, or its design, will have a shorter usable life, but there is no evidence to support such allegation.

68. Mr Milnes does not support the allegation that there was even a defect as alleged [C/547]. Again, Mr Armes states that "[t]he sufficiency and structural performance of the steelwork is outside the expertise of an architect" [C/103]. Mr Robert Evans is of the same view [C/385/4.8.0]. That being so, no claim in negligence has been established. In any event, the Claimants in their Closing Written Submissions abandoned this claim.

Item 10 : Steelwork bowed

69. The Claimants refer to steel posts having bowed on the Level 3 terrace. They do not actually allege in terms that the Defendant was negligent not to identify the bowing itself, since they are unable to say that it became apparent prior to 9th July [A/40]. Instead, they say it is "symptomatic" of other alleged defects, in which case it is unclear what the relevance of this item is said to be. The Defendant did not observe any steelwork "bowing" [B/250/67]. The photographs adduced in evidence [D/94] taken on 2nd July 2013 do not show any bowing.

Item 11: Bolts securing sleepers

70. The Claimants contend that the Defendant was negligent not to identify the use of coach bolts rather than "Timberlok" screws as fixings in the retaining walls, to identify some bolts which are said to have been misaligned or without washers, or to identify bolts in some locations fixed into the end grain of the sleepers or too close to the edge of the sleeper or steel posts. It is alleged that the resulting construction, or its design, was unsafe. There is no evidence to support this allegation that the retaining walls were unsafe.

71. Many of the posts identified had not even been built prior to 9th July. Mr Milnes considers that it "would have been clearly evident that washers had not been used but not whether a coach screw or friction bolt had been used" [C/549]. Mr Armes again notes that "[t]he sufficiency and structural performance of the steelwork is outside the expertise of an architect" [C/103]. He also says that "the photographs do not show anything that in my view would have alerted a reasonably competent architect there was a problem" [C/691].

I accept that evidence and, as such, no claim in negligence is established.

Item 12 : Missing Bolt Fixings

72. The Claimants contend that the Defendant was negligent not to identify that in numerous locations, bolts providing fixings between the timber sleepers and steel posts were missing or had corroded. Mr Milnes contends that:

> "I do not consider this defect to be of such severity that the defendant would have needed to take immediate action other than perhaps to enquire when the missing bolt or screw would be fitted. This fixing used visually appear from the photographs to be generally galvanised and whilst the exposed heads would eventually corrode, I am satisfied that using galvanised fixing rather than say stainless steel is not a defect which would require wholesale replacement of the same." [C/552]

Mr Milnes was not cross-examined and I accept this evidence. No case in negligence has been established.

Item 13: Use of steel sections to retain sleepers

73. The Defendant was, the Claimants contend, negligent not to identify that timber sleepers had been joined at their rear using steel braces held only by coach bolts held only by friction. It is alleged that the resulting construction, or its design, was unsafe, but there is no evidence to support such allegation.

74. One of these posts was not built prior to 9th July [B/251/72]. In relation to the other, Mr Milnes notes that he "has not seen a specific allegation or evidence that this post 2/6 as constructed failed as a result of the variance in design and... this defect alone would not require remedial work" [C/552]. Mr Robert Evans notes that when he visited site in December 2013, there was no obvious sign of distress which would have alerted the Defendant to any defect in the Contractor's works [C/386/4.11.0]. This allegation of negligent inspection also fails.

Item 15: Steel post not high enough to support sleepers

75. The Claimants contend that the Defendant was negligent not to identify that in various locations steel posts were shorter than the highest-laid horizontal sleepers. It is alleged that the resulting construction, or its design, was unsafe, but there is no evidence to support such an allegation.

76. Mr Milnes does suggest that the posts ought not in the finished works to have been short of the upper surface of the top timber sleeper [C/553]. However, several of these posts were not built prior to 9th July [B/251/73]. Mr Armes says he would expect this issue to arise from inadequate or no structural design and that "[t]o what extent the design is suitable (or not) is a matter for a structural expert" [C/105]. Mr Robert Evans notes that when he visited site in December 2013, he did not see any lack of support in the works completed before 9th July that the Defendant could be expected to have identified [C/387/4.12.0].

77. I do not consider the Defendant can be successfully accused of negligence in failing to notice this alleged defect.

Item 16: Sundry steel defects

78. The Claimants contend that the Defendant was negligent for not identifying the sundry defects set out in the Re-Amended Particulars of Claim [A/44]. But the steel posts

referred to were not even built as of 9th July [B/252/74] (a point made by Mr Milnes [C/554] and Mr Robert Evans [C/387/4.13.01]). No claim in negligence can possibly be suggested.

Item 17: Gaps in sleeper jointing

79. The Claimants contend that the Defendant was negligent for not identifying in various areas timber sleepers laid with vertical and horizontal gaps [A/45]. Many of the areas said to have been affected had not even been built as of 9th July [B/252/75]. Mr Armes does not address the alleged gaps, but says in the joint statement that gaps "are to some extent inevitable" [C/692]. Mr Armes says that a geotechnical membrane should have been used behind the sleepers and that if it was not this should have been evident on inspection [C/106]. There is, however, no pleaded allegation to the effect that this was required or should have been identified. Further, Mr Milnes does not appear to see this as a "defect", and notes that no geotechnical membrane was specified, although he does consider it would have been "beneficial" [C/555]. In an email dated 13th December 2013, [E3/1153], Mr Ellis stated in relation to the Level 3 wall that "I think we will need to add some geotextile membrane in to the soil which will help to control any erosion etc, but this is quite a simple thing to do and will not affect the visual appearance". Any lack of a geotextile membrane should have been identified as a defect at a time when the works were not even complete is not clear to me. Again, no claim in negligence is made out.

Item 18: Defective sleepers

80. The Claimants refer to timber sleepers having allegedly split horizontally on the Level 3 retaining wall. It is alleged that the resulting construction, or its design, was unsafe, but there is no evidence to support such allegation.

81. However, the Claimants cannot say whether any of this was apparent before 9th July 2018 [A/40]. The relevance of this allegation is unclear and no discrete loss is claimed.

82. The reason may be, as Mr Armes notes, "*[m]ost sleepers will exhibit cracking*". They are made of a natural material. This is not a defect. The as-built garden is full of "cracked" sleepers in any event.

Item 19 : Bulging and bowing sleepers

83. The Claimants do not allege that any bulging and bowing ought to have been apparent prior to 9th July but that this was "symptomatic" of other alleged defects [A/46]. Mr Milnes was "not persuaded any remedial work was warranted as a result of this alleged defect alone" [C/557]. No claim in negligence in respect of this item can possibly succeed.

Item 20 : Inadequate sleeper foundations

84. The Claimants say the Defendant was negligent for failing to identify that some vertical sleepers providing retaining support were constructed without foundations and/or that concrete used for the foundations and their construction were of poor quality. This is said to affect the Curved Lawn Wall. It is alleged that the resulting construction, or its design, was unsafe.

85. This wall was not built in its final position by 9th July 2013, Mr Armes accepts that the Defendant, as an architect rather than a structural engineer, may not have known that foundations were required. But given the Defendant was not on site when this wall

would have been built, it is difficult on any view to see how she acted negligently in not identifying this alleged defect against which no discrete cost is claimed. No case in negligence in respect of this item can possibly succeed.

Item 21 : Timber preservation

86. The Claimants contend that the Defendant was negligent for failing to identify that timber sleepers on site were not weather-treated. Mr Milnes [C/559], Mr Armes [C/107] and Mr Robert Evans [C/389/4.16.0] state that oak sleepers are usually installed untreated. There is no defect. This claim also fails.

Items 26 – 33 : Alleged non-conformances of as-built work with the Enright Design

87. With regard to these alleged non-conformities, little oral evidence was heard in support of these eight claims of alleged non-conformity between the as-built works and the Enright Design. I note that only three of these items, Items 26, 28 and 33 are linked to any specific loss in the Claimant's Schedule of Remedial Work.

88. These claims are, on any view, hopeless and no claim in negligence against the Defendant in respect of these claims should have been pleaded, let alone pursued. The Claimants in their Reply to the Defendant's Closing Submissions accept that these matters cannot be relied upon in pursuit of complaints about the Defendant's inspection of the works but contend that they remain valid to a claim that the Defendant failed to advise them as to the inadequacy of the designs in relation to the right-hand steps. I do not accept that Mr Milnes' reasons for regarding Item 31 as a defect can be disregarded. I agree with Mr Milnes that any encroachment was justified by the temporary position of the ramps. I did not find Mr Ellis' overlay drawing of any assistance in understanding this thoroughly unmeritorious claim. The overlay drawing:

i) was not accurate;

ii) shows the state of works as at 9th September not 9th July 2013;

iii) does not distinguish between temporary and permanent works;

iv) show the as-built terraces extending beyond the tree position, see cross-examination of Robert Evans [Day 5/146 : G – 147 : G]:

> "Q. And photograph 124, please, which my learned friend took you to, a few minutes ago.
>
> A. Well, I am sorry, 1 have closed the file. That is - there she is.
>
> Q. Now, could you remove that 124 from the - from the bi - from the bundle and if you turn it on its side, let us see if we can finally credit or discredit the infamous encroaching blue lines theory, by looking at the left of that photograph and seeing, what I hope you will agree is, the last steel post to that lower wall, yes?
>
> A. Yes.
>
> Q. And would you say that it stopped short of the boundary of the edge of the building on the right, by a couple of feet?

A. It might help if you turn back to page 54. lam sorry if that is inconvenient, but there you can see the survey drawing shows the last steel post, and then draws the wall as if it is going on past it.

Q. Yes.

A. And that is what the blue dotted line has reproduced.

Q. So, would you say that photograph 124 is - is evidence as to where the end of the wall lies, in relation to the end of the building?

A. It is - as far as I could tell from this, using the joints in the paving as a square to work from, it is about a flag - a paving flag back from the comer of the building.

Q. And can you look then at A55 where you have got some pink shading. Would you say that that accurately represents the end of the wall rather than the blue lines?

A. Probably. It - it is about right. But what I can say with absolutely certainty is where those lines are dotted on, and I can tell that they come from the preceding drawing. They are simply, the - the man abandoned the thing, he just did not mind where he finished.

Q. So, it is a question of draughtsmanship rather than construction?

A. Yes, and I would be embarrassed if a drawing of this quality had ever been produced by anyone and got out of the door, in any office I have ever run."

89. In the circumstances, I find that the Defendant did not negligently or in breach of a duty of care fail to identify the alleged defects and/or non-conformities identified against numbers 5 - 13, 15 - 21 and 26 – 33 of Schedule 1 of the Re-Amended Particulars of Claim.

G. Budget Duties

90. The Claimants in their Closing Submissions in Reply to the Defendant's Closing Submissions contend that:

"31. There are two separate issues that need to be determined, that D's submissions do not distinguish.

(1) The first is how a reasonably competent architect would have approached the task of preparing a budget, and whether D met that standard. Mr Armes has addressed that ([C/126], para. 10.23.6) and concludes that the various elements that formed the budget were not costed.

(2) The second issue is whether the Budget Sum was in any event correct (because, unless it was incorrect, Cs could not have suffered loss). That does not depend on evidence of

> architectural practice and there was no need for Mr Armes to consider it. It is true that he notes that "it would not normally be possible for an architect to know if the budget was adequate" (para. 10.23.6(2)) but in circumstances where D held herself out as undertaking that task, that cannot help her. A professional who trespasses into the territory of an unfamiliar discipline will ordinarily be held to the standard of ordinary competence that he has professed to have."

As Deputy Judge Alexander Nissen QC found "the figure of £130,000 was the subject of detailed calculation by her even if all the details were not reported to Mr Burgess. She gave the budget figure at a time when she knew that Mr Burgess would not have proceeded with the works using her and Hardcore unless the budget figure was cheaper than the cost of employing Mr Enright".

91. I have found this allegation of negligence against the Defendant particularly difficult to understand how, on the evidence, it could be seriously maintained. In the Claimants' original claim, it was said that the Project, but for the failure of the Defendant to produce an adequate budget, would have been completed at the cost of £78,500 plus a reasonable margin, see Re-Amended Particulars of Claim deleted paragraph 32.1 [A/26] and paragraph 11.5 [A/11]. Mr Burgess also maintained at the time he would have refused a budget of £130,000 and, if discussed, would have cancelled the Project.

92. As with their design allegations following the preliminary issue judgment, the Claimants advanced a new and wholly inconsistent case that the budget of £130,000 was always unachievable and this Project could not have been completed for less than £188,000. What I find difficult to understand is how this can be correct when Mark Enright, who was described as the most expensive landscape gardener in England, had quoted a price of £150,000 for the Project. To review this claim, the Claimants' quantity surveying expert, Philip Ellis, has repriced the works and produced a cost of £188,000. The Defendant's quantity surveyor, Mark Pontin has produced a figure of £95,955.12. I have reviewed both estimates of cost in some detail and I prefer Mr Pontins' figure. Amongst the reasons why I prefer Mr Pontin's analysis regarding a suitable budget are:

i) Some of Mr Ellis' figures are unrealistic, such as £20,000 for preliminaries;

ii) Mr Ellis has included additional items as part of the as-built works not shown on the original Mark Enright Plan, such as fencing, a high sleeper wall at the boundary with No. 12 to the front edge of the lawn;

iii) Mr Ellis' exercise is based on pricing walls built with sleepers and steels, not the original method of piled concrete used by Hardcore to produce their price.

93. At all material times, the Claimants knew that the Defendant's Budget Sum was not a fixed price but was a "fairly firm price" according to Peter Burgess. I do not think she can be criticised for asking for a quote from her builders and then providing what she considered to be a reasonable uplift for the balance of the works.

94. Mr Armes states that it would not normally be possible for an architect to know if the budget was adequate, see paragraph 10.23.6(2) of his Report. That statement, I consider, significantly underplays the duties architects generally owe regarding reviewing budget costs. However, I do not accept that:

i) How the Defendant approached the task of preparing the budget was wrong or that

ii) The budget itself was incorrect

I certainly reject any uggestion that the budget was produced negligently as alleged by the Claimants in their original claim or their revised claim.

95. In the circumstances, I find that the Defendant did not, negligently or in breach of any duty of care:

i) In producing an inadequate budget or an inadequate breakdown of that budget for the works before mentioning the Budget Sum to the Claimants as alleged at paragraph 31.1 of the Re-Amended Particulars of Claim;

ii) In failing to appreciate that the budget under-estimated the likely reasonable cost of the Garden Project or that the completion of the Garden Project within a budget of £130,000 plus VAT was unachievable as alleged at paragraph 31.3 of the Re-Amended Particulars of Claim;

iii) In failing to advise the Claimants of those matters as alleged at paragraph 31.1 and/or 31.3 of the Re-Amended Particulars of Claim.

The Duties in respect of applications for payment

96. The Claimants allege that the Defendant failed to properly assess and to advise the Claimants in relation to applications for payments made by the Contractor and directed the Claimants to make payments in excess of the proper value of the works.

97. The Claimants do not identify which payments or which parts of which payments it is alleged the Defendant was negligent to approve or to recommend and why. The complaint is that the amount paid was more than a newly calculated "value of work which was undertaken." However, I fail to see how that is relevant. These payments were all interim on-account payments. Mark Enright required payment as follows:

i) 30% up front followed by

ii) 40% as an interim payment

iii) 30% on completion

98. The Claimants were concerned with staying within budget now recognised to be £130,000. The payments made prior to 9th July 2013 were £50,397 and not much more than Mark Enright required to be paid upfront. I do not see how, on any view, the Defendant's role in respect to those interim payments on account can be deemed to be negligent. The payments were made on the basis of dayworks and the cost of materials and were prudent and not excessive given the amount of work carried out before the Defendant left the site.

99. In the circumstances, the Defendant did not act negligently or in breach of any duty when it assessed and advised the Claimants in relation to applications for payments made by the Contractor or in directing the Claimants to make payments to the Contractor as alleged at paragraph 31.7 of the Re-Amended Particulars of Claim.

5. The Loss and Damage Allegedly Caused by the Alleged Breaches

.1 The Global Claim

100. The Claimants' Reply to the Defendant's Closing Instructions helpfully explain that:

> "Cs accept that their claim based on the difference between what they have in fact incurred, as against what they would have incurred had they proceeded with Enright, is dependent on the budget claim and the Court's acceptance that D was assessing the risk of the financial project on their behalf. Those losses are claimable if D was responsible not simply for the accuracy of her advice, but for the decision to enter the transaction, so that D's responsibility resulting from negligence extends to the financial consequences of entering into the transaction. The closing submissions characterise the budget advice as "a specific aspect relevant to a broader decision" (para. 140.4.2) but that does not fit with the evidence. As D accepted, Cs saw no relevant distinction between the quality of Enright's and Hardcore's work (BL, Day 4/88B-D) and Cs considered that they had a fixed quotation from Enright."

101. The sums that the Claimants' incurred to complete the Garden Project were some £359,288 made up as follows:

Description	**Amount (inc. VAT, where applicable and paid) (£)**
Payments made up to 5 July 2013	
Hardcore payments	50,397.00
Drain survey	468.00
Purchase of patio tiles	9,477.82
Sub-total for period	60,342.92
Payments made between 6th July and 19th September 2013	
Payment to site contractor for works (Mr Jerry Lactaz)	2,160.00
Payment to site contractor for piling and earthworks (Mr Joe O'Sullivan)	65,100.00
Skip hire	5,250.00
Gravel and cement	532.80
Timber decking	10,058.56
Topsoil	2,301.00
Sleepers	7,347.05
Steel	1,530.00
Replacement of trees and vegetation damaged during the works	10,248.00

Description	Amount (inc. VAT, where applicable and paid) (£)
Electrical works	3,500.00
Sun-total for period	108,027.41
Payments made after 19th September	
Mark Enright remedial costs payments	£181,075
Fees paid to construction professionals retained by them to advise in relation to, and specify, necessary remedial works	£8,330
Charged by the management company of the Property's estate to repair damage to a lighting bollard	£1,453.20
	190,858.20
TOTAL	**359,228.53**

102. It is then said that if properly advised, the Claimants would have accepted the Mark Enright fixed price of £150,000 plus VAT and a comparison between that figure and the figure of £359,228.52 shows the Claimants' loss:

> "It is the maximum amount (leaving aside the question of general damages) that they can say they suffered as a result of the decision to proceed with Harcore and D. If Cs should have been advised of the risk of proceeding with an inadequately-developed design it represents the amount that as a matter of factual causation they would have suffered had they decided to proceed with Enright rather than the Defendant and Hardcore."

103. This global claim has many weaknesses, leaving aside my findings that the Defendant did not act in breach of any duty owed to the Claimants.

104. The Claimants parted company with the Defendant because of their confusion over the correct size of the budget. Even now, the Claimants seek to intimate that they thought the budget was £78,000 not £130,000 by suggesting they didn't hear what they were told by the Defendant. I find that evidence unconvincing in the light of Deputy Judge Alexander Nissen QC's findings of fact. However, the global cost includes many items which the Defendant cannot, on any view, be liable for:

i) decking installed after 9th July 2013, the Claimants accept the Defendant cannot be responsible for that work but it is all part of the gloibal sum;

ii) cost of felling birch trees;

iii) payment for electrical work and patio tiles not part of Mark Enright's quote;

iv) payments for whatever Mr O'Sullivan was asked to do by the Claimant after 9th July 2013, totalling some £65,000, for which remarkably there are no invoices.

I consider that the Claimants could and should have attempted to identify what actual, if any, losses were suffered as a result of the breaches alleged. To claim that the Defendant is liable for this global claim offends common sense and I find it wholly unsupported by the evidence which I have heard and read. The agreed budget was a realistic and practical budget. When the Defendant left the project, I have seen no convincing evidence why the Defendant, if allowed to finish the project, could not have completed the garden within budget with any changes and variations priced separately and to the satisfaction of the Claimants. The Defendant had the experience and expertise to compete this project if the agreed budget had been respected and had been acknowledged by the Claimants.

105. The problems the Claimants' face is that their relationship with the Defendant broke down because of the misunderstandings as to whether her budget was £78,000 or £130,000. The Claimants are in no position to know, if they had not fallen out so badly with the Defendant, whether the garden project would have been completed within the Defendant's budget. On the balance of probabilities, I consider that the garden project could have been completed within the Defendant's agreed budget of £130,000 with any changes and variations priced separately. Furthermore, I simply do not understand why the Defendant is responsible for the defective works, if any, carried out by the Claimants, contractor both before and after 9th July 2013.

106. A great deal of authorities have been cited by both parties but whether analysed in terms of causation, scope of duty or remoteness this claim for the difference between Mark Enright's quotation and what the Claimants paid out cannot be justified as having been caused by the Defendant's alleged negligence.

107. This global sum was spent for various reasons which have no relation to any alleged breaches of duty and I do not consider that this global claim can be regarded as a foreseeable consequence of the alleged breaches of duty, all of which, in any event, I have rejected. The Claimants entered this transaction when the budget was £130,000 not £78,000. The Defendant's budget was a reasonable and competent budget.

108. To pursue this claim suggests that the Claimants seek to punish the Defendant for her alleged negligent mistakes rather than seek fair and reasonable compensation for her alleged mistakes. The Claimants' alternative claim advanced at paragraph 99 of their Closing Written Submissions that the Defendant should be liable for the difference between the Budget Sum and the competent budget that she ought to have identified whilst more appropriate fails because her budget was a reasonable and competent budget.

.2 Cost of Remedial Works

109. The Claimants' primary case for claiming the cost of remedial works is that they are entitled to the entirety of the monies paid to Mark Enright to complete the garden £180,000. This figure is far in excess of the sum the Claimants have allocated to the remediation of the alleged defects so must include other costs of completion. Indeed, it was never suggested that Mark Enright was engaged only to carry out remedial work and not the necessary outstanding completion work to complete the garden project.

110. The Claimants' secondary case for claiming the cost of remedial works attempts to quantify sums allegedly paid to Mark Enright in order to remedy the alleged defects itemised in the Re-Amended Particulars of Claim Schedule 1. This measure of loss is only pleaded against the alleged supervision and not the design breaches. This gives rise to a claim of some £50,000.

111. There is a problem with this claim. The quantity surveyors have priced it out of the remedial costs complained of by the Claimants and not the cost of remedial costs identified by the jointly appointed Expert Surveyor. There is little, if any, correlation between these different lists which lead to the conclusion that most of the costs claimed by the Claimants are more likely to be completion costs and not remedial costs. However, taking each complaint, however minor, in turn.

LINE 1 : Reinstallation of existing horizontal sleepers vertically (Level 1 Terrace) : £10,217.56

112. This claim is for the reinstallation of the Level 1 sleeper wall. The cost is alleged to be the result of alleged defects in Schedule 1 Items 1, 8-13, 15,17, 19 and 21. The base cost, to which other elements are applied on a pro-rata basis, is said to be £7,600.

113. Mr Milnes does not support this 'defect'. The Level 1 wall was rebuilt not because of the alleged defects, but because the Level 1 wall was re-designed to extend across the terrace as a whole. I accept his evidence on this point.

LINE 2 : Reinstallation of existing horizontal sleepers vertically (Level 2 Terrace) : £4,308.24

114. This claim is made for the reinstallation of the Level 2 sleeper wall (although the description is misleading given the works included as explained below). The cost is said to have been incurred as a result of alleged defects in Schedule 1 Items 1, 8-13, 15, 17, 19 and 21. The cost is alleged to have been £4,308.24.

115. In fact the wall was only rebuilt as a result of subsequent instructions from the Burgesses (see Mr Ellis' report at paragraph 7.51 [C/194]). These works were not linked to any defects in the wall requiring reconstruction.

LINE 3: Reinstallation of existing horizontal sleepers vertically (Level 3 Terrace) : £2,876.74

116. This claim is made for the reinstallation of the Level 3 sleeper wall. The cost is said to have been incurred as a result of alleged defects in Schedule 1 items 1, 8-13, 15-16, 17-19 and 21. The cost is alleged to have been £2,876.74.

117. The work consisted of vertical sleeper cladding to the Level 3 wall, only added on the Claimants' instructions in or around February 2014 [E3/1329]. See further, Mr Ellis' evidence at [Day 3/98 : C-E] :

> "Q. --- it's level 3, but what is being priced there is simply to supply and install, bolted to the existing sleeper wall, 75 vertical sleepers, yes?
>
> A. Vertical sleepers, yes.
>
> Q. In other words, the level 3 retaining wall, the one that was reduced by three sleepers, was then clad with vertical sleepers, yes?
>
> A. Yes.
>
> Q. Well, that's not a remedial work, is it, that's a finishing, that's a completion, yes?

A. I would need to understand the reason for this variation to be able to confirm that, but on the face of it, it is cosmetic rather than structural.

Q. Right, but that figure of £2,876 has found its way to the final account, at 1371, yes?

A. Yes, the last but three."

This is completion work which would have been carried out irrespective of the alleged 'defects' in the wall

Line 4: Reduction of sleeper walls and additional terrace: £15,950.15

118. This claim is made for the reduction of the Level 3 sleeper wall and the construction of an additional terrace to form another level following the removal of the birches. The cost is alleged to have been incurred as a result of alleged defects in Schedule 1 Items 26, 28 and 36. The base cost, to which other elements are applied pro rata, is alleged to have been £11, 864, derived from Mr Enright's January 2014 quote [E3/1216].

119. In fact, these costs are an amalgamation of: (i) the cost of reducing the Level 3 wall in height by three sleepers and (ii) the cost of constructing another Level with a further wall behind Level 3. The cost of reducing the height of the Level 3 wall by three sleepers will have been minimal, in the order of a day's work for a couple of men [Day 3/70: G – 71 : A] :

"Q. Yes, but we can look at that in due course. We can see that this involves - that's the reduction in height, yes?

A. Yes.

Q. That's not really a lot of work, is it?

A. It shouldn't be, no.

Q. I mean, two men in a day, easily, yes?

A. Possibly."

and assessed contemporaneously by Mr Ellis at around £1,100 (see [3/1261] Items 1-7), so the vast majority of this head of claim (including any allocation for the use of additional sleepers) relates to the cost of building another level (see also [Day 3/97 : B-F]):

"Q. And I believe you're going to agree that there's a slight error on this page - and it's not a trick question, but do you see at the top, "remove existing horizontal sleepers to level 2 to reduce to 2,300 height"; I think you mean "level 3"?

A. Yes, sorry.

Q. You do; and all the way down, I think, to number 8 on that page, 1261 - so, the top part of the page - is all referable to that reduction, yes?

A. Yes.

Q. And at a rough calculation, would you say that's around £1,000?

A. Approximately.

Q. So, if that is carried across to page 151, even if you add your preliminaries and so forth, you would still say that almost £20,000 of that element would be referable to the creation of the new terrace?

A. The only thing that I would say is that you are comparing my estimated figures with actual figures from Mark Enright's final account, so you're not really comparing apples and apples.

Q. No, but you're certainly giving a figure that reflects what you think would be the element of reducing the remedial work?

A. Yes.

Q. And I think we've established that additional terrace would only be possible once the trees were removed?

A. Yes. The other thing to bear in mind is my figures are net figures, to which 20 per cent profit is added."

So it appears that this work was only made possible once permission had been given for the birch trees to be felled, as was accepted by various witnesses. As Mr Ellis said: "In principle, though, it was reduced in height, simply because it made the whole scheme more workable. Q: Yes, and that was only possible once the birch trees had gone? A: Correct" [Day3/72 : F].

120. This is therefore not a 'remedial' cost linked to the breaches alleged, but a completion cost that was only made possible by the removal of the birch trees and would equally have been carried out by Hardcore under the supervision of the Defendant had the trees been felled during the initial works and had her employment not been terminated with the works remaining incomplete.

Line 5: RIW application to visible steelwork: £2,409.27

121. This claim is made for the alleged costs of applying RIW treatment to the exposed steelwork. The cost is alleged to have been incurred as a result of alleged defect Item 7 in Schedule 1. The cost claimed is a pro-rated calculation from Mark Enright's quote of £3,920 for the work [E3/1216]. See [Day4/102 : A]:

"Q. Right. So isn't there at least an inference that no proofing was put on those posts, or at least a possibility?

A. I suppose there's a possibility."

Adam Evans accepted the possibility that no RIW was carried out to the Level 3 wall. Further, as the application of RIW to exposed faces is, I consider, completion work: if it had been carried out as part of the initial works prior to 9th September 2013, it would not have been done for free, and the Claimants would have had to pay for it in any event. This I find is not a remedial cost for which the Defendant should be held responsible.

LINE 6: Ducting for future lights and irrigation: £1,168.57

122. This claim is said to be connected to Schedule 1 Item 6, which alleges that the land drainage provision for the retained terraces was inadequate. The sum claimed is the amount quoted for "Ducting for future irrigation and lighting". The installation of ducting for future irrigation and light has nothing to do with an alleged absence or inadequacy of draining to the retained terraces.

LINE 7: Lawn and soiling including mid-level soakaway : £2,354.89

123. The claim is said to be connected to Schedule 1, Items 6, 20 and 33. Item 6 is related to land drainage for the terraces and is not linked to the lawn. Item 20 alleges inadequate sleeper foundations and has nothing to do with the remedial costs claimed, related to lawn drainage (see AE1/para. 8(xi) [B/217]). Item 33 relates to the "straight lawn" wall which was built up after 9th September 2013 and retained in the final garden, and also has nothing to do with the remedial costs claimed. I find that there is no link between the "defects" alleged to have been relevant, and the work for which the costs are claimed.

.3 Alleged overpayments : Re-Amended Particulars of Claim, paragraphs 33.5 – 33.6

124. There is no entitlement to claim the difference between the sums paid to Hardcore and the alleged reasonable value of the work carried out prior to 9th July 2013 for many reasons, including the fact that there was no agreement that interim payments based on dayworks and the cost of materials would be based on the value of works carried out.

.4 General Damages

125. The Claimants are not entitled to damages for alleged distress, discomfort and inconvenience. The Defendant did not act in breach of any duty. Any distress, discomfort and inconvenience arose because the parties fell out over what was the true agreed budget for the works in July 2013. But for that, I see no reason why the Defendant and her contractors could not have completed the garden all within budget with any changes and variations priced separately to the standards required by the Defendant.

6. Conclusions, Findings and Orders

126. The answers to the Claimants' Outline List of Issues are as follows:

INSPECTIONS

1. Did the Defendant fail, negligently and in breach of a duty of care, to identify each of the alleged defects and/or non-conformances identified against numbers 1, 5 - 13, 15 - 21 and 26 - 33 of Schedule 1 to the Amended Particulars of Claim, as alleged at paragraph 26 of the Amended POC?

Answer

1. No, the Defendant did not.

2. In relation to the timing of the Defendant's inspections:

   2.1 How are the services (of inspection) that the Defendant performed on site, to be characterised? Was she: (i) inspecting the contractor's work at periodic intervals, leaving to her own judgment the timing of those inspections; or (ii) inspecting only on given occasions?

   2.2 In light of that, did the Defendant fail, negligently and in breach of duty, to plan her inspections to coincide with the contractor's commencement of the stages of work identified in paragraph 26.1 A of the Amended Particulars of Claim?

   Answers

   2.1 (i)

   2.2 No, the Defendant did not.

3. If so, what was the recoverable loss (if any) suffered by the Claimants as a result of any such breach?

   Answer

   3. None

DESIGN

4. Were such designs as were produced or revised by the Defendant produced negligently and in breach of a duty of care because the designs failed to include the construction details alleged at paragraph 29.1 of the Amended POC?

   Answer

   4. No, they were not.

5. Did the Defendant fail, negligently and in breach of a duty of care:

   5.1 to appreciate the need for those construction details, as alleged in paragraph 29.2 of the Amended POC?

   5.2 to advise the Claimants that those construction details were necessary, and that there was a risk that works built without them would be unsafe, as alleged in paragraph 29.2 of the Amended POC? and/or

   5.3 to allow the works to commence or continue on site without sufficient construction detail or a specification of works, as alleged in paragraph 29.4 of the Amended POC?

   Answers

   5.1 No, the Defendant did not.

5.2 No, the Defendant did not.

5.3 No, the Defendant did not.

6. If so, what was the recoverable loss (if any) suffered by the Claimants as a result or any such breach?

Answer

6. None.

BUDGET

7. Did the Defendant fail, negligently and in breach of a duty of care, to:

7.1 Produce an adequate budget for the works before mentioning the Budget Sum to the Claimants, as alleged at paragraph 31.1 of the Amended POC?

7.2 Appreciate that the Budget Sum underestimated the likely reasonable cost of carrying out the Garden Project and that the completion of the Garden Project within a budget of £130,000 (ex VAT) was unachievable, as alleged at paragraph 31.3 of the Amended POC?

7.3 Advise the Claimants of those matters (in question 7.2), as alleged at paragraph 31.3 of the Amended POC?

Answers

7.1 No, the Defendant did not.

7.2 No, the Defendant did not.

7.3 No, the Defendant did not.

8. If so, what was the recoverable loss (if any) suffered by the Claimants as a result of any such breach?

Answer

8. None.

PAYMENTS

9. Did the Defendant fail, negligently and in breach of a duty of care, to properly assess and advise the Claimants in relation to applications for payments made by the contractor, and in directing the Claimants to make payments in excess of the proper value of the work undertaken, as alleged at paragraph 31. 7 of the Amended POC?

Answer

9. No, the Defendant did not.

10. If so, what was the recoverable loss (if any) suffered by the Claimants as a result of any such breach?

    Answer

    10. None.

127. This claim is dismissed. Unless a Cost Order can be agreed I will hear the parties on the question of costs.