Neutral Citation Number: [2019] EWHC 454 (TCC)

Case No: HT-2017-000184

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2019

Before :

MARTIN BOWDERY QC (SITTING AS A DEPUTY TCC HIGH COURT JUDGE)

- -

Between :

(1) MR PHILIP FREEBORN	**Claimant**
(2) MRS CHRISTINA GOLDIE	
- and -	
MR DANIEL ROBERT De ALMEIDA MARCAL	**Defendant**
(Trading as DAN MARCAL ARCHITECTS)	

- -
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Mr Robert Clay (instructed by **Healys LLP**) for the **Claimants**
Mr Thomas Ogden (instructed by **Caytons Law**) for the **Defendant**

- -

Approved Judgment

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

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MR MARTIN BOWDERY QC

Martin Bowdery QC :

1. This judgment consists of seven sections:

   (1) Introduction;

   (2) The Defendant's Retainer;

   (3) The Evidence Relating to the "Key Dispute" or "Main Dispute";

   (4) The issues of alleged breach by the Defendant;

   (5) The loss and damage allegedly caused by the alleged breaches;

   (6) The answers to the list of issues prepared by the Claimant;

   (7) Conclusions, Findings and Orders.

1 INTRODUCTION

2. This is a claim for professional negligence brought by the owners and occupiers of a house at 3 Horseshoe Lane, Barnet. The property consists of a Main House and a Pool House. The Pool House is connected to the Main House by a linking room. The Defendant is an architect registered by the Architects Registration Board. He has been employed by various companies and the projects he has been involved in have been shortlisted for and have won awards.

3. The Defendant and Christina Goldie first met on the 7th May 2014. The Defendant's brother had been carrying out works to the Claimants' garden and introduced them to each other. Christina Goldie wished to convert the Pool House into a function room and to build a cinema for her husband Philip Freeborn.

4. Between 2014 and 2016 various works were carried out to both the Main House and the Pool House including:

   i) hibernating the swimming pool;

   ii) constructing the "glass box on legs" cinema room and staircase in the Pool House;

   iii) partial installation of the audio-visual equipment in the cinema room;

   iv) installing a wooden support for the new flooring to the Pool House (the plan was for it to serve as a function room);

   v) electrical, lighting and joinery works to the Pool House;

   vi) replacement of the window casements in the Main House;

   vii) decorating works to the Main House.

5. The contractors principally involved in these works were:

i) Accomod8: constructed the staircase and other bespoke carpentry for the Claimants;

ii) Advanced Pool Services ("APS"): installed submersible sump pumps to the pool basin as part of the hibernation of the pool;

iii) Connect Construction Services ("Connect"): installed (i) a damp-proof membrane around the existing pool and (ii) a timber structure to support the new floor for the Pool House;

iv) DKD: decorating works in the Main House;

v) Ridlands: detailed design and construction of the cinema box and stairs. Ridlands retained Malishev Engineers to provide structural engineering and design services;

vi) Olive Audio Visual ("Olive Audio"): supplied and installed audio equipment;

vii) Routley & Lemon ("Routley"); electrical works to the cinema box and the Pool House:

viii) Tubridy Builders ("Tubridy"): replacement of the window casements in the Main House.

6. There were 10 witness of fact called to give evidence.

The Claimants called:

- Christina Goldie
- Philip Freeborn
- Matthew Rogers
- Jason Bayford
- John Routley (he also gave a witness statement to the Defendant).

The First and Second Claimants were impressive witnesses. Despite a robust and thorough cross-examination from Mr Ogden their evidence was clear and concise. They avoided exaggeration and speculation. The Claimants' remaining factual witnesses were truthful and helpful even if their involvement in the major disputes was somewhat limited.

The Defendant called:

- Daniel Marcal
- Donald McDermott
- Jeremy Murphy

- Robert Tubridy.

The Defendant's evidence is analysed in some detail in Section 3 of this judgment. Whilst the Defendant did his best to assist the Court his recollection of key events was confused and not convincing, he gave the impression of being somewhat disorganised in his approach to this project. The Defendants' remaining factual witnesses were also truthful and helpful even though their involvement in the key disputes was extremely limited.

7. The Defendant also filed and served a witness statement from Mr Williams who lives in Canada and did not attend the court.

8. There were five experts:

   - The architectural experts were John Perry for the Claimants and Ian Salisbury for the Defendant. The quantity surveying experts were John Wood for the Claimants and John Farrow for the Defendant. There was also a jointly appointed audio-visual expert Christopher Adair.

9. The Claimants provided a revised list of issues to the Defendant on the 28th November 2018. The Defendant's written closing submissions were very helpfully updated to cross-refer to the issues identified is that list where appropriate. Appendix 1 contains the List of Issues.

10. The Defendant contends that the following principles of law relating to the duties and obligations of architects should be applied:

    i) The primary basis for the duties owed by an architect is the contract pursuant to which he is engaged[1];

    ii) It is common ground that the Defendant owed the Claimants a duty to provide the services he supplied with reasonable care and skill (s.13 of the Supply of Good and Services Act 1982);

    iii) The standard of reasonable care and skill is not a standard of perfection. It does not make an architect the insurer or guarantor that the work has been properly done. It is not sufficient to prove an error to show that there has been a failure to exercise reasonable skill and care. A claimant must establish actual negligence[2];

    iv) An architect is entitled to recommend to a client that the client appoint a third party with the requisite knowledge to carry out work which requires that specialist knowledge. Ordinarily the architect will carry no legal responsibility for the work to be done by the specialist which is beyond the capability of an architect of ordinary competence[3];

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[1] Jackson & Powell on Professional Liability, 8th Edition, para 9-013

[2] Jackson & Powell on Professional Liability, 8th Edition, para 9-119

[3] Investors in Industrial Commercial Properties v South Bedfordshire DC; Ellison & Partners and Hamilton Associates (Third Parties) [1986] 1 All E.R 787 CA

v) An architect's obligation to supervise or inspect works will depend on various factors including the terms of the retainer, the nature of the works and his confidence in the contractor[4];

vi) The Claimants are only entitled to recover any loss and damage caused by the Defendant's negligence and which they have sought to mitigate;

vii) The damage ordinarily recoverable where a building suffers from defects consequent upon the negligence of an architect is the cost of rectification.[5]

11. The Claimants in their written and oral submissions have not sought to challenge or to correct these submissions which I accept are an accurate summary of the general principles of law relating to the duties and obligations of architects.

12. As the Defendant in his closing written submission correctly identifies:

> **"The key dispute between the parties is whether or not Mr Marcal redesigned the cinema box without telling the Claimants and arranged for the construction of a cinema box which they had not approved."**

13. That issue will have to be analysed after the issue as to the Defendant's retainer has been resolved.

.2 THE DEFENDANT'S RETAINER

14. The Defendant's case is that the scope and nature of his role changed over time as his instructions changed. The Defendant's opening position was that he entered into an ad hoc contract with the Claimants under which he provided various architectural services in relation to the cinema room and Pool House as well as miscellaneous works to the Main House. These services were provided at an hourly rate of £35 per hour and were invoiced directly by the Defendant to the Claimants.

15. I reject that analysis. The submission that the Defendant acted on the basis of ad hoc instructions is inconsistent with the facts. I consider and so find that the engagement was made partly orally and partly in writing in May and June 2014.

16. By an email dated the 9th May 2014 Dan Marcal informed Christina Goldie:

> **"Dear Christina,**
>
> **Hope this email finds well. Further to our discussions earlier this week, I would be very happy to work on developing and managing a scheme to reconfigure your swimming pool area and connecting space.**
>
> **In terms of a way forward we can split the works in to the following:**
>
> 1. **I will survey the existing building and draw up on CAD.**

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[4] Jackson & Powell on Professional Liability, 8th Edition, para 9-220

[5] Jackson & Powell on Professional Liability, 8th Edition, para 9-177, 9-180 and 9-183

2. **I will develop scheme options and a brief: We can go for a Bronze, Silver and Gold approach ie budget conscious to high end options. This will be represented as a series of drawings which I can present to you.**

3. **Go out to tender: We can obtain 2 to 3 prices from different contractors, and see which will be most suitable. Contractors can work under a JCT Minor Works contract, which protects all parties and will allow us to formalise a programme, scope of work and budget.**

I have contractors I would like to put forward who work on similar jobs, for example 'City Basements' who specialise in below ground works.

The following areas of work can be given to separate contractors who specialise in specific trades:

- **Below ground works where swimming pool currently exists: In effect we will be creating a basement which will be fully waterproofed and warranted. This will accommodate a cinema room, WC (option), storage and connecting corridor. A new floor will be constructed over the existing swimming pool to allow for a function room at ground level.**

- **Fit out works: To include all electrical (lighting, AV, power, data), plumbing, joinery, decorations etc to all areas. This includes newly formed below ground areas, new function room where swimming pool exists, adjoining room where mezzanine level exists.**

- **Helical staircase: There are companies who can make staircases off site and install thereafter. This offers a very high standard of finish, and can be carried out in the most economical manner. We can decide on finishes when I present some options to you.**

- **Skylight Replacement: We can look in to producing more architectural features with new glazed skylights installing new drylining beneath to create crisp detailing.**

We can add omit or change any of these areas as we proceed at design stage.

In terms of my role I would like to design and project manage through to completion. This will include all Building Control matters, site visits etc. Because the works are internal planning will most likely not be required, however if an application is required, I can deal with this also. How does this sound?

I can firm up a programme and fee if you are happy on this basis. Because the works are stage based, we have hold points where we can review my input accordingly and you can decide what suits you best.

Hope you have a great weekend, and please do not hesitate to contact me should you have any queries."

17. Also, on the 9th May 2014 by an email directed to the wrong email address for the Second Claimant the Defendant invited her to sign and return the RIBA Standard Agreement 2010 Conditions for Appointment for an Architect 2012 Edition. The Claimants never received that email or the enclosed Standard RIBA Conditions but the fact that they were sent suggests that the Defendant was expecting to be appointed and to act as architect for the project.

18. Christina Goldie replied on the 9th May 2014 to the email she had received and stated:

> **"That all sounds great. My husband is due back tonight so I would like to show him your email and get back to you on Monday if that is ok.**
>
> **Have a great weekend."**

19. Having spoken with her husband Christina Goldie further responded on the 13th May 2014:

> **"Dear Dan,**
>
> **Hope you had a good weekend. We would like to go ahead and I am really pleased that you will be able to design and project manage the whole thing. Let me know what happens next.**
>
> **Best wishes**
>
> **Christina"**

20. There was a further meeting held on the 19th May 2014 during which it was understood the Defendant would act as Architect and Project Manager in respect of the works.

21. Then by an email dated the 7th June 2014, the Defendant emailed Christina Goldie and stated:

From: **Dan** drdamarcal@gmail.com
Subject: 011_Invoice 1
Date: 7 June 2014 15:49
To: Christina Goldie christina.goldie@sky.com

Dear Christina,

Thanks for your time today, I feel we've made some great progress and I'm very excited about moving forward on th

Just a quick snapshot looking toward the next two weeks:

1. Graham (structural engineer) and I will develop the basement design and produce some drawings, specifications i get some costings for the build. Regarding the"fit out" I will obtain some material samples/ swatches etc which we ca scheme.
2. I will investigate Planning requirements, I suspect this will be required.
3. I will get a draft programme together to give you a feel for construction period.
4. I will speak to Olive AV and get a survey of your existing data/lighting/power/security/ audio visual.
5. On the miscellaneous (windows, lead work, gates, waterproofing, floor restoration) leave this with me and I will arr pricing etc. I will give you plenty of notice!
6. I will also develop a scheme with Graham to create the Orangery. Also, just as a quick note take a look at : dinese flooring. I will obtain various sample finishes (timber, porcelein etc).
7. Lastly I attach an invoice for preliminary work. This includes time for next week to develop the design so we have a arrangement drawings. I have lowered my rate by 15% which I would like to offer to you going forward also, because of project I love working on!

All the best, and see you soon.

INVOICE

Dan Marcal
58 Avenue Road
London N6 5DR

Attention: Christina Goldie
3 Horseshoe Lane
London N20 8NJ
Date: 07/06/2014

Project Title: 011_3 Horseshoe Lane
Invoice Number. 1

Description	Quantity	Unit Price		Cost	
Item 1 Survey work (3 visits)	10 hours	£	35	£	350
Item 2 Feasability study	20 hours	£	35	£	700
Item 3 Preliminary drawing set (showing basement beneath garage) to be used for pricing and general arrangement. Detail drawings to follow.	21 hours	£	35	£	735
Item 4 Meetings (structural engineer, cost consultant, client)	6 hours		£35		£210
		Subtotal		£	1,995
		Total		£	1,995

Lloyds

MR DANIEL R D MARCAL

30-91-57

22. The Defendant eventually invoiced the Claimants for something in the region of 1,000 hours of work in the overall sum of £35,000 for the services he provided.

23. In the circumstances I consider that by a contract made partly orally and partly in writing the Defendant was retained as architect and project manager to provide a full Architectural and Project Management service for the project at a fee of £35 per hour.

24. Insofar as Ian Salisbury in his report and during his evidence sought to support a series of "ad hoc" appointments I reject that part of his evidence. Whilst generally an impressive and convincing expert witness on this issue an independent expert can provide little if any assistance. For example, I disagree that a billing arrangement based on an hourly rate indicates an ad hoc arrangement. Similarly, it is unnecessary to rely upon "Occam's" or rather Ockham's razor which states that the single explanation which explains the facts before you is to be preferred to explaining those facts by a host of different explanations as I was invited to by Counsel for the Claimants. The evidence that the Defendant was appointed as architect and project manager for the entire project was clear and convincing. In contrast no attempt was made by the Defendant to plead and prove the list of instructions which cover all the acts the Defendant undertook.

25. The Defendant's further contention that the Defendant's retainer was varied at a meeting on the 9th July 2015 is inconsistent with his continued involvement in all the activities and in all the matters he listed as having been handed over to the client.

26. The meeting note which is said to have recorded that agreement is to be found in Bundle Q/6996. That meeting note stated as follows:-

"012 Handover Meeting Notes

Meeting held 09/07/2015 (evening) at 3 Horseshoe Lane

Notes 10/07/2015

Attendees

Christina Goldie

Philip Freeborn

Daniel Marcal

1. **I propose to handover my responsibilities to Christina further to Christina allowing Jason / Darren to complete works without my knowledge.**

2. **Decoration works to cinema box: Christina brought her own trade (Darren) on to do the works despite my having instructed another decorator to carry out works.**

3. **Christina explained she was unaware I had instructed another decorator. I explained I had been communicating and agreeing scope with Philip directly hence the confusion!**

4. Decoration works to function room: as above

5. Philip has requested that I stay on the project to focus on completing the cinema. Agreed.

6. All other works are being managed by Christina who is allowing Jason to complete the following:

- **Pool**
- **New sub-floor**
- **Dinesen floor**
- **Re-plastering raked ceiling local to front elevation of cinema box"**

27. Bundle Q contained extracts from the Defendant's daybooks, notebooks and sketch pads. As volunteered by the Defendant these notebooks contained a "tumble dryer of information". I would suggest a "tumble dryer of misinformation". The notebooks are confused, confusing and chaotic.

28. They are not in any chronological order or indeed in any order. It was pure chance which led to any daybook, notebook or sketch pad being used on any particular day or for any particular project or, indeed, being used for personal rather than professional purposes. The Defendant had no clear recollection whether any entry was a proposed agenda, minutes of a meeting or subsequent retrospective musings. It was never clear from the notebooks who attended any particular meeting or who said what.

29. Given that the Defendant produced:

i) no written contract;

ii) no written brief for the project or any part of the project;

iii) no minutes of any meetings with the Claimants and/or the contractors for the Claimants to agree or disagree;

iv) no progress or planning reports;

v) no interim accounts or valuations for the works.

the Defendant to explain what he thought happened had to rely upon this "tumble dryer of information" which when analysed in any detail could not be readily understood let alone relied upon in the absence of supporting contemporaneous document evidence.

30. For example, despite that First Claimant being cross examined on the basis that the Defendant's note was a truthful record of what was discussed and agreed on the 9th July 2015 Counsel for the Claimants in a careful and thorough cross-examination forced the Defendant to concede that those notes could not have been written on the 10th July or even close to that date.

As the Claimants explained in Appendix 4 of their Written Closing Submission:

"Various questions were put to Mr Marcal which were very relevant to his continued involvement after 9th July, and which prove the inaccuracies of his account of the 9th July meeting, and indirectly demonstrate that the note dated 10th July could not have been written on that date for the reasons set out by Mr Freeborn in his statement at Paragraph 65. However the cross examination which led to him to admit, more than once, that the 10th July typed note could not have been written until later relied on the following six points in particular.

They relate to Point 6 of the note which says:

> ***"All other works are being managed by Christina who is allowing Jason to complete the following:***
>
> ***Pool***
>
> ***New Sub floor Dinesen floor***
>
> ***Re-plastering raked ceiling local to front elevation of cinema box"***

There are six of them. All are a more detailed version of the reasons which Mr Freeborn testifies to at Paragraph 65 of his first witness statement:

> **Point 1**
>
> **Claimants did not know and were not told on or before 10 July that any more work needed to be done to the pool so there would be no discussion of Jason doing work in the pool**
>
> **Point 2**
>
> **No question of Jason being involved in the new subfloor in July 2015. The Defendant is still in correspondence with VA Hutchison until November 2015 about sub-flooring quotes, and much of that correspondence was put to the Defendant**
>
> **Point 3**
>
> **No question of Jason being involved in the Dinesen floor in July 2015**
>
> **Hutchison were shown as doing it in the documents**
>
> **Point 4**
>
> **Raked ceiling local to front elevation had not been plastered in July 2015, so no need to replaster it**
>
> **Point 5**
>
> **The need to replaster raked ceiling local to front elevation only became known at end of September 2015, when Ridlands found that the glass did not fit**

Point 6

CJ Plastering, not Jason, was doing the plastering of the raking ceiling in July, and carried on doing the plastering of the raking ceiling in July, and were down to do the replastering on programmes long after this"

31. There was a limited attempt to resurrect the Defendant's credibility when he was re-examined and it was suggested that "raked ceiling" was in fact a reference to the unraked piece of plasterboard which had been substituted for the lengthier horizontal piece of glass at the top of the cinema. That attempt to suggest that one of the reasons why the note was written on or about the 10th July 2014 was unimpressive and cannot begin to repair the damage done to the Defendant's credibility by this cross examination.

32. Counsel for the Claimants put it to the Defendant that this part of his evidence was a "plain and straightforward lie". The Claimants' closing submission stated that the date 10th July written on the note is a forgery and a lie. I consider and so find that the Defendant's answers were not dishonest. They were self-serving assertions based on little thought and chaotic records. Whenever the note dated 10th July 2015 was written and it may have been written on a number of occasions it clearly was not written on the 10th July 2015 and did not accurately record what was discussed let alone agreed on the 9th July 2015. On this issue I accept the Claimants' evidence that the Defendant's retainer was not raised at this meeting on the 10th July as alleged by the Defendant.

33. Perhaps as a result of this cross-examination, the Defendant in his Written Closing Submissions sensibly and, perhaps, inevitably, conceded that

> **"The precise scope of Mr Marcal's retainer is less important to the determination of this case than it might appear from the statement of case."**

It was then accepted at paragraph 17 and 18 of the Defendant's Written Closing Submissions that:

> **"17. Mr Marcal accepts that he produced the architectural design for the cinema room on legs and that he was responsible for that design meeting the requirements (such as they were) provided by the Claimants. He also accepts that he agreed to co-ordinate contractors and inspect the cinema room works. He accepts that he was obliged to carry out that work with reasonable skill and care.**
>
> **18. The main dispute between the Claimants and Mr Marcal is whether his design met their requirements and whether they agreed to it. Mr Marcal does not dispute that he was responsible for producing the concept design. He was not responsible for the structural engineering drawings but it does not appear that that allegation is being made against him."**

.3 THE EVIDENCE RELATING TO THE "KEY DISPUTE" OR "MAIN DISPUTE"

34. At their first meeting Christina Goldie suggested that she wanted to create a cinema for her husband. The idea at that stage was to use the swimming pool as a basement room

containing a cinema and then create a function room at ground level. This was referred to as Scheme 1.

35. After discussions with a structural engineer Graham Ling of Greig Ling it was decided that the basement cinema was structurally too complex and it was agreed that the Defendant would consider the feasibility of creating a new basement under the existing kitchen/garage area of the Main House which would home the new cinema. The swimming pool would be converted into an orangery. This was known as Scheme 2.

36. The Defendant submitted a planning application for Scheme 2 which was approved by Barnet Borough Council. However, in around October 2014 it was decided not to proceed with Scheme 2.

37. In October 2014, the parties began discussing a glass box suspended from the ceiling to house the cinema. The Defendant recommended a glass box supported by four legs and it is common ground that the Defendant began to develop a design for a glass box supported by four legs. The proposed design was encapsulated in some 3D mock ups which were sent to the Claimants on the 30th October 2014. A copy of those mock ups is attached and is set out in Appendix 2 annexed hereto.

38. What was eventually provided is shown in the photographs at T/6278 which photographs are set out in Appendix 3 annexed hereto. It is the Defendant's case that the transformation of the glass box scheme from what has been described by Counsel for the Claimants as the "sleek modern look" illustrated by the 3D mock up as exhibited by the photographs at Appendix 2 to the "wonky industrial look" again to adopt the description used by Counsel for the Claimants as shown by the photographs in Appendix 3 was agreed at the meetings held:

- on the 6th November 2014
- on the 11th November 2014
- on the 17th March 2015
- on the 19th March 2015
- on the 8th May 2015

and the industrial look with six rather than four columns was included in the drawings emailed to the Claimants on the 8th May and which were approved by the Claimants.

TAKING EACH MEETING IN TURN

the 6th November 2014

39. When cross examined the Defendant accepted that the First Claimant may not have been at this meeting. He also accepted that the "meeting note" contained in his notebook contained matters discussed in the pub with Ridlands alone before the meeting began. He now cannot be clear what was said at the meeting with the Second Claimant.

the 19th November 2014

40. There was more than one 19th November 2014 meeting. The note in the daybook which the Defendant relies upon concerns moving the staircase to the gable wall. It says nothing about increasing the number of columns from four to six.

the 17th March 2014

41. Christina Goldie in her evidence was adamant that she was not present at any meeting on this day. However the note in the "tumble dryer of information" shows not six but ten columns. The Defendant says when cross-examined that he marked out the position of the six columns in magic marker for the Second Claimant's benefit. In his witness statement he said he marked out the position of the columns in chalk. However Miss Goldie says she was not there and as at the 17th March 2014 the number and location of the columns was still in a state of flux although, for example, at this stage the number of columns was ten. There is no email confirming any discussion with Miss Goldie let alone a discussion where the number of columns had been increased from four to six or, indeed, ten.

the 19th March 2014

42. In cross examination the Defendant accepted that there was more than one meeting on this day. The First Claimant had a meeting with the Defendant and Olive Audio. There is no clear record that at any of those meetings four, six or ten columns were discussed let alone approved by the First Claimant. The Defendant then asserted that that doesn't matter because he agreed the column positions with Christina and not with Philip Freeborn.

43. None of the Defendant's accounts as to how the design developed from sleek modern to wonky industrial to use the words of Counsel for the Claimants, which I consider is a fair description as to what was anticipated by the Claimants and as to what was provided, is convincing. The Defendant's general lack of credibility when it comes to making the best of what he scribbled in his daybooks makes his history of the alleged development of the design very difficult to accept. The parties communicated mainly by email. It is striking that there are no emails which show that the Claimants knew let alone approved the transformation of the sleek modern design for the cinema box to the industrial wonky look eventually provided.

44. The Defendant now relies on 800 series drawings allegedly emailed and posted to the Claimants on the 8th May 2015 or as originally pleaded on the 9th May 2015. It is these drawings relied upon by Ian Salisbury in his evidence which it is suggested show the Claimants' consent to the development of the brief. Sadly the email referred to does not exist. There is no proof of postage. Even the suggestion that on the 8th May 2015 there was a meeting to discuss and approve the 800 drawings seems highly improbable:

    i) at that date the 800 drawings had not been completed. In cross-examination the Defendant accepted that the most useful drawings in the 800 series showing the appearance of the scheme post-date the 8th of May 2015;

    ii) they were construction drawings and were never intended for discussion of any changed brief.

45. The emails of 8th May which were put to the Defendant in cross examination concern all sorts of other matters but do not mention a drawing review. I consider and so find, as the Second Claimant contends, no meeting took place on that day.

46. In general, I accept the evidence of the Claimants that they never received the 800 series drawings whether by email or by post. Their evidence on this point was clear and convincing. The Defendant's evidence was muddled and confused.

47. As the Claimants' Counsel put it in his Written Closing:

> **"The case asserting a critical meeting on the 8th May is another attempt to build a case retrospectively from scant hints in the notes of Mr Marcal."**

48. I agree with that statement. I also find and so hold that Mr Marcal redesigned the cinema box without telling the Claimants and arranged for the construction of a cinema box which they had not approved and which was significantly and critically different from the sleek modern look they were expecting. The wonky industrial look was not discussed with the Claimants, was not what they expected to be provided and had not been approved by them.

49. The disputes of fact as to whether certain issues were, in fact, resolved and agreed orally at various meetings was a new case contrary to the pleaded case that the changes were approved by reference to drawings. This new case requires the Claimants to prove a negative that at no time during the six months of alleged meetings to discuss and approve the developing design were the things they now take exception to agreed to and approved by them. I am satisfied on their evidence that at none of the meetings referred to was the industrial wonky design eventually constructed ever shown to the Claimants, let alone was agreed to by the Claimants. In respect of the case put to Ms Goldie that there was agreed to by the Claimants or was approved by the Claimants an agreement on an industrial design in November 2014 on the basis of a few pinterest pictures:

    i) I find that those pictures generally do not show an industrial feel and this case can only be based on one picture of a theatre in Manchester;

    ii) I accept Ms Goldie's evidence that she had little or no interest in the pinterest photographs;

    iii) I accept her evidence that it was never explained to her that the eventual design could be based upon an industrial look, let alone based upon a photograph of a theatre in Manchester.

    However, on one ancillary issue which the architectural experts differed on, I will make findings which, given my findings of fact that the final design was never shown to the Claimants let alone agreed to by them, may not be strictly necessary.

50. The expert evidence with regard to the "key dispute" or "main dispute" differed on one important topic, how an architect should record a brief and develop a brief. As the Defendant explained in his Witness Statement :

"5. I am an Architect. I obtained my BA in Architecture (RIBA Part 1) from Manchester University in 2001. I then obtained a first class (with commendation) Diploma in Architecture (RIBA Part 2) from the Bartlett School of Architecture, University College, London in 2004, and completed my RIBA Part 3 (with Merit) at London Southbank University in 2006. I am a member of the ARB."

51. John Perry, in his first Report, explained that :

"5.1.9 Mr Dan Marcal is registered with the Architect's Registration Board ("ARB") under registration number 072365G. Please see http://www.architects-register.org.uk/search/name/marcal.

5.1.10 Such registration entitles Mr Marcal to use the protected title "Architect". This title has the meaning given to it by the Architects Act 1997 http://www.legislation.gov.uk/ukpga/1997/22 /pdfs/ukpga 19970022 en.pdf. To gain this title a particular level of training and experience is required. A person registered with ARB is required to abide by the ARB's code of practice. I include a copy of the Code current at the time of Mr Marcel's work in this matter at Appendix 3 to this report. This Code may be referred to as the ARB 2010 Code of Conduct ("ARB 2010").

5.1.11 In my opinion the conduct of Mr Marcal stands to be judged against the standards set out in ARB 2010.

5.1.12 I set out below a copy of sections 4.4 to 4.7 of ARB 2010:

"4.4 You are expected to ensure that before you undertake any professional work you have entered into a written agreement with the client which adequately covers:

- ***the contracting parties;***
- ***the scope of the work:***
- ***the fee or method of calculating it;***
- ***who will be responsible for what;***
- ***any constraints or limitations on the responsibilities of the parties;***
- ***the provisions for suspension or termination of the agreement;***
- ***a statement that you have adequate and appropriate insurance cover as specified by the Board;***
- ***your complaints-handling procedure (see Standard 10), including details of any special arrangements for resolving disputes (e.g. arbitration).***

> ***4.5 Any agreed variations to the written agreement should be recorded in writing.***
>
> ***4.6 You are expected to ensure that your client agreements record that you are registered with the Architects Registration Board and that you are subject to this Code; and that the client can refer a complaint to the Board if your conduct or competence appears to fail short of the standards in the Code.***
>
> ***4.7 You should make dear to the client the extent to which any of your architectural services are being subcontracted."***

52. Where John Perry disagreed with Ian Salisbury was in whether the brief should be written down and when that brief is changed or varied, whether those changes or variations should be recorded in writing. Ian Salisbury's view was that the brief need not be recorded in writing and that meetings need not be minuted. He explained that in his view, based upon his experience, residential projects could be dealt with more informally and that it was less important to minute matters in a small job.

53. I disagree. Although I was not taken to any technical guides or professional publications, I would consider that it would be bad practice for:

    i) the initial brief not to be recorded in writing;

    ii) any design development or changes not to be recorded in writing.

    Relying on sample boards, mood boards or pinterest pictures is not sufficient for both architect and client to have clarity as to what has been designed and what was to be built. Having considered the expert evidence of John Perry and Ian Salisbury on this topic, I prefer the evidence of John Perry.

54. On the facts of this case there was :

    i) no written agreement;

    ii) no written brief.

55. As John Perry concluded in his Report at paragraphs 5.1.21 to 5.1.22:

> **"5.1.21 For such work in my opinion a competent architect would agree a brief in writing with his client(s). I have seen no such written brief in this matter. In the absence of a written brief it was unclear to the claimants what the final design should achieve in terms of accommodation, cost, level of finish and operational requirements.**
>
> **5.1.22 Equally there is no record of what the architect was trying to achieve for his clients."**

56. As John Perry expressed on Day 4, pages 32 and 33:

"Q. Now, you presumably also accept, Mr Perry, that what an architect is required to do depends on what he has agreed to do with his client, and what the client has asked him to do?

A. Yes, it's commonly called a "brief".

Q. And as part of that, you need to look at both what it was that passed between the parties - so, any discussions, emails or anything written down.

A. Well, what I look for, as an architect, is a brief. A set of instructions agreed between the client and the architect and then a written brief which sets out the basis on which design - for which the design should aim. A brief may change over time, but the brief will be updated over time to reflect how that design was to change.

Q. Well, you are answering a slightly different question. What I am - what I am asking ---

A. I'm sorry.

Q. --- about is a brief, at its most simple, a brief simply reflects the client's requirements, would you agree with that?

A. I agree.

Q. And a client can express those requirements in a number of different ways, would you agree with that?

A. I wou --- I would, yes.

Q. And the purpose of establishing a brief is so that both client and architect understand what the client is requiring?

A. I agree.

Q. And so what you are aiming for is for them to be in agreement?

A. The client and the architect and the brief to be in agreement?

Q. Well, client and architect to agree as to what ---

A. The brief is.

Q. --- the client - exactly. Now, you can then, if you wish, put that in writing, but it does not change the fact that it - that the clai - the client and the architect have already agreed what is to be done.

A. In - in my experience, and in my opinion, if this - building design is a complex matter and if at that early stage what is agreed is not recorded in writing, I - I find it very difficult to see how a project can progress. I - I agree if it's agreed, it's agreed. What is difficult is to know what was agreed down the line because what you - what you do as an architect is you

> **look back down the line to see what was agreed and you look to see how it was expressed in writing, in my experience, but I agree with you to make agreements. I agree with you, you can agree something without writing it down, but it doesn't help in two months' time when you want to know what was it we did agree."**

I agree with those comments.

57. I do not accept Mr Salisbury's evidence given during his cross-examination when he tried to explain why it is common in domestic projects not to have a formal brief, see Day 5, page 15:

> **"… as often as not, clients don't know exactly what they want when they start off, except that they have a notion as to what they want, but don't know how to do it. So they go into a journey of exploration with the architect. That's quite normal and an essential part of the architect's duty…"**

58. This journey of exploration was a journey taken by the Defendant without inviting the Claimants to accompany him or even with the Claimants being told where he was heading to. To avoid misunderstandings at the very least, a written brief is essential and changes to that brief must be recorded in writing whether by drawings, sketches and/or minutes of meetings. If that is not done, the absence of such written records must be explained to the clients in writing and they must make an informed decision not to receive a written brief and written records of any changes or developments of that brief.

59. This is not only necessary but the absence of these documents was causative of the losses claimed on this claim. The Defendant effectively went on a frolic of his own producing a wonky industrial design rather than the sleek modern design the Claimants were expecting. Again, I accept John Perry's evidence that a written brief is of even greater importance when the project is a small project with a novel design. In those circumstances, it is even more important to have a brief expressed not just in words but there must be a drawing and/or a mock-up or a 3-D drawing and a detailed written description of the design so I find that any reasonably competent architect should ensure that the brief is recorded in writing whether or not that is best expressed in 3-D sketches together with drawings and detailed descriptions. I would also find that any reasonably competent architect who did not in exceptional circumstances produce a written brief and did not explain in those exceptional circumstances in writing why such a written brief had not been produced would be in breach of any duty of care owed to the client.

60. The same approach should also be adopted to any changes or variations to the written brief. This approach is not to help manage a client's expectations as to what is being designed and what can be built. This approach is an essential part of the architect's services paid for by the client. This approach, I consider, is all the more important where there is an element of unfamiliarity in the relationship between the client and the architect to ensure that the client knows what is being designed and the architect knows what the client expects to be built.

4 THE ISSUES OF ALLEGED BREACH BY THE DEFENDANT

(1) The scope of the Defendant's engagement

1.1 Whether as the Claimants contend the Defendant acted under an engagement to act as

a) architect and

b) project manager

to completion.

1.2 Whether, as the Defendant contends, the Defendant acted on an "ad hoc" basis:

a) architect and

b) project manager.

1.3 Whether as the Defendant contends, the Defendant's engagement changed to a more limited engagement following the meeting on 9th July 2015, in relation to his position as:

a) architect and

b) project manager.

61. **1.1 and 1.2** : For the reasons set out above, and in light of the evidence, the engagement was made in May and June 2014 and that it governed the relationship between the parties until the end of 2015 and beyond is the only sustainable analysis of the relevant evidence. The Defendant did not act on an ad hoc basis, either as architect or project manager.

62. **1.3** : The suggestion that his appointment was varied at a meeting on 9th July is inconsistent with the relevant evidence and incidentally with his continued involvement in all matters which he said had been handed over to his clients.

63. The suggestion made by the Defendant that he was over-awed by the First Claimant and did work which had been agreed would be done by others I find difficult to accept because Philip Freeborn, when he gave evidence, did not give the impression that he was over-bearing and the Defendant, when he gave evidence, gave the impression, particularly during a robust cross-examination, that he was not easily over-awed.

64. Furthermore, the note which allegedly recorded that agreement was not written on that day because it lists actions or matters which had not arisen by that date.

(2) Issues related to the brief for the cinema design - was the brief properly prepared, documented, and agreed, and were the features which the Claimants dislike in fact approved by them?

2.1 Was there an agreed brief for 6 columns rather than 4?

2.2 Was there an agreed brief for the location and size of the columns?

2.3 Was there an agreed brief for an "industrial feel"?

2.4 Was there an agreed brief for the final form of the glass panelling?

2.5 Was there an agreed brief for visible spider bolts?

2.6 Was there an agreed brief for a wooden box, rather than glass walls?

2.7 Was there an agreed brief for a mechanical trapdoor dependent on electrical power?

2.8 Was there an agreed brief for the staircase up to the cinema?

2.9 Was it necessary to commit the brief to writing, or is the existence or non-existence of a written brief simply a matter of evidence?

2.10 Was the absence of an agreed brief in any of the respects set out above an error which fell below the standard of skill and care?

65. The central plank of the Defendant's case on approval was the so-called daybooks. However, these daybooks – the tumble dryer of information – could not be relied upon because they could not be reliably used as a source document. Not even the Defendant could understand what they recorded or when these records were produced. The Defendant's failure to produce a written brief was a serious breach of duty which went to the root of the difficulties which he and the Claimants encountered. What was also an important failure was his failure to record the design changes from the sleek modern design for the cinema box illustrated in the 3-D picture he commissioned to the wonky industrial design eventually produced to the Claimants for their approval, albeit only after it had been largely designed and constructed.

66. The short answer to this woeful attempt at explaining how the design changed from "sleek modern" to "wonky industrial" is that the Claimants were clearly shocked by what was built and did not like what was built because none of these matters were envisaged or were shown on the concept drawing and 3-D mock ups, which existed when the building control notice was sent in. They were not discussed with the Claimants nor explained to the Claimants nor approved by the Claimants. On these matters, I accept the clear consistent evidence of the Claimants.

67. The Defendant failed :

i) to illustrate;

ii) to record in writing;

iii) to explain;

iv) to seek approval for:

- the six columns rather than the four columns legitimately anticipated by the Claimants;
- the "industrious feel";
- the final form of glass panelling;

- the visable spider bolts;
- the wooden box;
- the mechanical trap-doors dependant on electrical power;
- the staircase up to the cinema.

68. The Defendant's Written Opening took the bold position that what the Claimants say in respect of these matters is not credible (see paragraph 68.6 of the Defendants Written Opening which stated:

"68 However, it is clear that the Claimants agreed to the as-built design of the cinema box which included six legs.

68.1 The cinema had been designed initially to be supported by four columns and this was the design included in the design concept drawings discussed with the Claimants in late 2014 and early 2015[6]

68.2 However, the Claimants wanted the cinema to be bigger and after it was re-resized it was necessary for it to be supported by six rather than four columns. These structural design drawings were prepared by Malishev Engineering; Ridlands had sub-contracted the work to Malishev. The Defendant and Ridlands prepared a "soft" programme based on six columns to present to the Claimants on 17 March 2015.

68.3 At a meeting at the Property on 17 March 2015 attended by Ms Goldie, the Defendant and Ridlands, Ms Goldie agreed to six columns and their location; at the meeting the Defendant and Ridlands paced out where the columns would be situated. The Defendant made a note of the meeting in his daybook."

68.4 At a meeting at the Property attended by Mr Freeborn and Ridlands on 19 March 2015 Mr Freeborn confirmed his agreement to the columns and requested that they be pushed as far as possible to the existing wall. The Defendant made a note of the meeting in his daybook.

68.5 Drawings which showed six columns and their location were emailed by the Defendant to Mr Freeborn on 20 March 2015.

68.6 The Claimants were heavily involved in the project, took a keen interest in its design and it was being built at their home. It is not credible for them to suggest that they did not know that six columns were being installed and it is telling that the Claimants made no contemporaneous complaint that there were six rather than four columns.

68.7 The design intent (i.e. the steel/glass aesthetic) was frequently discussed by the Defendant with the Claimants and Ms Goldie in particular. The

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6 [DM1/138-145], [A21]; [F/2976]

Defendant created a Pinterest board with various images and the Claimants agreed to the aesthetic."

69. However, the Defendant's case in respect of these matters was argued and pursued by reference to particular meetings based upon the Defendant's daybooks. These notebooks were not seen by anyone other than the Defendant at the time. They are confused as to dates and order. The notes were in the Defendant's own words a "tumble-dryer of information". As the Claimants contend in their Written Closing, on close examination this case gradually disintegrated.

70. The Written Closing of the Claimants suggests that:

"One could multiply these examples, but in truth the only meeting which the Defendant continued to say was a meeting at which 6 columns were discussed and agreed was the meeting on 17th March. There are insuperable problems with that theory, apart from the problem that Ms Goldie denies that she was present while 6 columns were marked out in magic marker for her benefit [day 1, page 53]:

(a) the note does not show 6 columns at all. It shows 10, because the columns near the side walls were at that time contemplated as pairs of columns a few feet apart. So we are asked to believe that after objecting to columns she agreed not to 6 columns abut to 10 Q/6869-70, or that the marking out was of 6 columns though 10 are shown on the sketch [day 3, page 40, lines 28-43 line 27]

(b) the number of columns was still 10, and changed to 6 later on, so it was too early to discuss the final form of the columns;

(c) there is no email confirming any discussion of columns with Ms Goldie;

(d) The position and placing of the columns was still in flux for some time later, because the pile positions had to be discussed. Although the intention might have been to put them close to the footings, the precise position of the piles and columns could not be marked out on 17 March."

71. With regard to the spiders, there was no agreed brief for visible spider bolts. Reliance on random photographs on the pinterest board does not establish that what the Claimants contend are unsightly were ever approved by them. They were not shown on the concept drawings sent for building contract. They were never discussed, explained or approved.

72. Similarly, the Claimants on the basis of the concept drawings were expecting a glass box not a wooden box with glass panels. No drawing was sent to the Claimants which showed the final appearance of the cinema. The concept of a wooden box was not sent to the Claimants and was not shown on any drawings until the 800 series drawings.

73. Those 800 series were alleged in the pleadings as having been emailed and posted to the Claimants on the 9th May 2016. The email referred to does not appear to exist whether dated the 8th or 9th May. There has been no proof of postage whether they were

sent on the 8th or the 9th. On the 8th May 2016 the most helpful drawings, according to the Defendant, did not even exist.

74. The Defendant's case at trial switched to a meeting not on the 9th May but on the 8th May. This date was latched on to because of a date on one page of the Defendant's notes. The Second Claimant denies any meeting on the 8th to review drawings and the emails on the 8th May do not mention a drawing review or, indeed, any meeting on that date. I accept the Second Defendant's evidence that no such meeting took place on the 8th May 2016.

75. The mechanical trapdoor and the staircase up to the cinema were late revisions to the design. I accept that the Claimants agreed to the design of the stairs on the 31st August 2015 because the contemporaneous documents showed that the Claimants agreed to the design of the stairs on the 31st August 2015.

However, by this stage, the sleek modern design had long disappeared and the Claimants were at that time making the best of a very bad job on the insistence of the Defendant who hoped to persuade the Claimants to grow to like the unapproved industrial wonky design.

76. With regard to the trapdoor, this was a late development of the design and I consider that the Claimants' clear recollection that no such approval was given to be correct. It was a clumsy, dangerous and incomplete design in any event.

77. My conclusions are, based on the evidence I have read and heard, that the brief was not only not properly prepared and documented or agreed orally or in writing and that the features of the brief, which the Claimants so dislike, were not, in fact, approved by them. What they saw I accept their evidence when they state it shocked them, for what they saw was not what they had anticipated or had been illustrated in the 3D mock-ups provided to them as set out in Appendix 2 annexed hereto.

(3) Issues related to the defects in the cinema design clearly communicated to the client

3.1 Is the misalignment of the glass a defect?

3.2 Is the cause of the misalignment of the glass a matter of architectural design?

3.3 Is the misalignment of the steel frame a defect?

3.4 Is the absence of a means of changing the lights a defect?

3.5 Is the clash between the top corners of the glass and the roof of the building a defect?

3.6 Is the absence of a means of escape a defect?

3.7 Is the absence of a failsafe in the trapdoor a defect?

3.8 Is there a gap in the soundproofing and lightproofing of the cinema at the trapdoor, and is that gap inappropriate for a private cinema?

3.9 Is the absence of a balustrade protecting the hole over the trapdoor a defect?

3.10 Is the step near the trapdoor a defect likely to cause tripping?

3.11 Is the presence of a steel column close to the foot of the stair a defect?

3.12 Is the absence of a balustrade at the foot of the stair by the steel column a defect?

3.13 To the extent that there are any such defects are they the consequence of acts or omissions of the Defendant in relation to his design obligation?

3.14 Were any such acts or omissions errors which fell below the standard of skill and care?

Addressing these issues in the following order:

3.1 Is the misalignment of the glass a defect?

3.2 Is the cause of the misalignment of the glass a matter of architectural design?

3.3 Is the misalignment of the steel frame a defect?

78. I accept the evidence and submissions of the Defendant that:

i) The Claimants have not established that the glass and steel was out of tolerance despite numerous measurements and surveys having been taken. On this issue, I prefer the evidence of Ian Salisbury and his conclusion that the correct standards permit a deviation of 23mm plus an additional fabrication tolerance. Ian Salisbury's measurements clearly show the columns to be within tolerance;

ii) The Claimants have not established a case that the Defendant was responsible for the steel being installed out of tolerance given that:

- the structural designs were produced by Malishev;
- the steel and glass were installed by Ridlands.

79. However, the Claimants' complaints at trial were more nuanced than a case based on tolerances. The Claimants contend that the sleek modern design required a special design to remove or to adjust for the inevitable distortions in the structure. The complaint is not that the structure was out of tolerance but that normal tolerances should not have been relied upon. This is not a case that appears to have been clearly pleaded. However, it is part of the sleek modern/wonky industrial design issue which maintains that what was provided was not what had been suggested by the Defendant. The sleek modern design could not be achieved by glass panels not accurately being centred on the beams. I consider this misalignment was a defect. It was noticeable and once noticed was a cause of significant irritation for the Claimants. More importantly, it was part of the industrial wonky design they did not expect, did not approve and did not like. I consider that any competent architect should have ensured that the sleek modern design was provided, but if it could not be provided should have sought approval to re-design and have built what was designed and built. No attempt was made to explain

that the sleek modern glass box was not being built and no attempt was made to explain what was built was being built. No reasonably competent architect would have made these errors.

3.4 Is the absence of a means of changing the lights a defect?

80. To change the lights behind the glass panels would require 3 or 4 strong men to remove a 150Kg glass panel. This is a design which was not practical or sensible. To say the Claimants should rely upon the light bulbs manufacturer's guarantees is not sufficient. This was a bad design which no competent architect should have produced.

3.5 Is the clash between the top corners of the glass and the roof of the building a defect?

81. The clash was embarrassing for the Defendant who was responsible, as part of his architectural and project management duties, for the co-ordination between the contractors, plasterers, builders of the box and electricians. However, I agree with the Defendant that this was unfinished work and the issue could have been, and still could be, resolved. This was a defect which could have been designed away by replacing the plasterboard with something thinner.

3.6 Is the absence of a means of escape a defect?

82. It is common ground that there is no secondary means of escape. It is also common ground that the cinema room needed to satisfy Requirement B1, which is contained in Approved Document B and which provides:

> ***"Means of warning and escape***
>
> ***B1 The building shall be designed and constructed so that there are appropriate provisions for the early warning of fire and appropriate means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used at all material times."***

Requirement B1 is followed by guidance. Mr Perry suggested that the guidance was mandatory but this is incorrect and Mr Clay appeared to accept that when cross-examining Mr Salisbury.

83. Mr Marcal's concept, explained on Day 4 of the Trial was that the motor operating the trap door would be linked to the fire alarm system which would fail safe open in the event the alarm was activated:

> ***"as soon as the roof door was conceived, the intention was that the entire roof door is operable in the event of a fire. That is the premise of the fire escape strategy – that the entire roof door operates in the event of a fire. It's done – it does that by means of a battery back-up, whereby if the fire alarm to the general house or the pool room is activated, either by a person or a smoke detector, there is a link from the fire alarm system to the winch motor which tells the winch motor to open the trapdoor in its entirety in the event of a fire. The escape hatch – the inner hatch that is located in the trapdoor is there – is a means of assuring the occupants that there is another means of escape. It's like a third – it's like***

> ***an additional safety factor, so the roof door is intended to be operable in the event of a fire, which means you can walk down the stairs freely."***

He also thought Building Control might have approved the design because of the proximity of the bottom of the stairs and the final exit door.

I am not convinced that this system was either safe or compliant.

84. Ian Salisbury at Day 5 of the Trial stated:

> **"*The advice that's given in the approved document is that the secondary means of escape through an aperture to the place of safety has to be of a minimum size of 450 millimetres by 450 millimetres. In other words, so large that someone reasonably may be expected to obtain passage through it, in other words to pass through it. It is not stated that there should be an escape stair from every inner room. If it – if that were the case then you'd go to New Court or wherever it is that I've been going to see counsel, you would have a myriad of escape staircases coming down from the inner rooms and I was in one yesterday evening. From all the upstairs rooms which are inner rooms and this just does not happen. So, I don't agree with Mr Perry that there is a need under the building regulations for a protective staircase going down and I think that the reason that I say that this is sufficient, adequate, what might be expected and not in the same words as you're describing but reasonable for an architect to provide, that the occasion of a fire is sufficiently rare that the necessity for building that staircase is unnecessary because if it happens you will jump from a window and you will survive."***

85. Mr Farrow and Mr Wood estimated in the Joint Statement that adding a simple emergency exit would have cost between £2,900 and £3,500 at 2015 price levels assuming the works were carried out with the original works but would cost £8,100 to £9,000 at 2018 price levels.

86. Whilst neither Expert expressly stated that the Defendant's unapproved design was negligent, both agree that a secondary escape was necessary. I consider that even if the Defendant's design was not approved or was negligent it could be easily remedied by a discrete aperture at modest cost. An external staircase, whilst not strictly necessary in my opinion, could also have been added if planning permission could have been obtained, at modest cost. On balance, I consider that planning permission, if sought, would, on the balance of probabilities, have been obtained. The absence of a means of escape was a defect but could have been remodelled at a modest cost and the Defendant did not act negligently in regard to this matter.

3.7 Is the absence of a failsafe in the trapdoor a defect?

87. A quite disproportionate amount of time was spent on the alleged defect. Having heard the evidence of the Experts and the Defendant, I am satisfied that had not the project been stopped, a fully functioning and safe trap door would have been designed and would have been installed. Whether a manual winch or a battery back-up was the safer option, I prefer the evidence of Ian Salisbury who stated that in his professional opinion a battery back-up was, in fact, safer than a manual override. However, these complaints by the Claimants are of an incomplete design not a defective design.

3.8 Is there a gap in the soundproofing and light proofing of the cinema at the trapdoor, and is the gap inappropriate for a private cinema?

88. The short answer to this complaint is that Mr Williams (the Director of Olive, which supplied the audio-visual equipment) explained in his Witness Statement that the room provided sufficient isolation from external light and to provide an appropriate environment for the audio-visual system.

89. If that gap had to be plugged, again that would have involved a trivial amount of work. I do not consider that gap was a defect or was caused by any negligent design from the Defendant.

3.9 Is the absence of a balustrade protecting the hole over the trapdoor a defect?

90. On this issue the Experts agree that additional balustrading is necessary but that can be added for minimal cost. Mr Farrow and Mr Wood agree that adding a balustrade to the rear of the cinema would have cost between £4,000 to £5,000 at 2015 price levels but will cost £4,700 to £5,700 at 2018 price levels.

91. This defect is a defect because the additional balustrading needs to be added to make this element of the works safe. It should have been included in the Defendant's design for these works. I consider that these complaints by the Claimants are of an incomplete design not a defective design.

3.10 Is the step near the trapdoor a defect likely to cause tripping?

92. This alleged defect was not put to either the Defendant or Ian Salisbury. I do not consider the step to be an unsafe hazard. I do not consider that case that the Defendant inclusion of the step was negligent has been established.

3.11 Is the presence of a steel column close to the foot of the stair a defect?

3.12 Is the absence of a balustrade at the foot of the stair by the steel column a defect?

93. This allegation reflects incomplete rather than defective work. It is a minor complaint at best. Mr Perry agreed that a balustrade at the foot of the stairs could have been added at modest cost.

3.13 To the extent that there are any such defects are they the consequence of acts or omissions of the Defendant in relation to his design obligation?

3.14 Were any such acts or omissions errors which fell below the standard of skill and care?

94. I consider that the misalignment of the glass was a defect but more significantly was part of the overall complaint of the Claimants that no reasonably competent architect would have designed and would have allowed to be constructed the wonky industrial look cinema without the clear written approval of the clients particularly when they were reasonably anticipating a sleek modern look for this new cinema.

95. The remainder of the alleged defects were, for the reasons explained above, items of incomplete work or work which, if defective, was not caused by acts or omissions of the Defendant, which fell below the standard of the reasonably competent architect and project manager and, even if they did, could have been remedied or could have been completed at a very modest additional cost.

Remaining Allegations of Alleged Defects

96. From the List of Issues, it appears that the Claimants no longer criticises the Defendant in respect of the following matters that:

    i) the design makes no provision for differential movement between the cinema box and the Pool House structure;

    ii) the glass box is tightly enclosed into the ceiling makes it difficult to paint the ceiling soffit close to the top of the glass wall panels;

    iii) there is a spider fixed directly to a steel member;

    iv) there is no sealing to the arris junctions which allows in insects and dust which cannot be cleaned;

    v) Mr Marcal instructed contractors to install mastic which has sealed in insects and dust; and

    vi) wiring visible behind the gaps is unsightly.

    In these circumstances, I make no findings in respect of these matters other than noting that they have been abandoned by the Claimants.

(4) Whether the swimming pool should have been waterproofed, and whether it was waterproofed

4.1 Was there water ingress into the swimming pool in 2015 in addition to that caused by the flood of late August 2015?

4.2 If there was such water ingress, was it caused by poor workmanship or failure to follow the design in penetrations installed by Connect, or by the absence of a sufficiently robust design to waterproof the swimming pool?

4.3 Did the Defendant undertake any design or inspection obligations in relation to the swimming pool?

4.4 Were such obligations as the Defendant undertook in relation to the swimming pool discharged by the employment of (i) APS, the swimming pool specialists, or (ii) Connect, the contractors who built a support structure within the pool

4.5 Should the Defendant have specified waterproofing and waterproof fixings for the pool?

4.6 Should the Defendant have identified the poor workmanship of Connect in installing penetrations to the pool?

4.7 Should the Defendant have revised the design in 2015 in the light of the leaks in the swimming pool?

4.8 Were the works undertaken by JBR successful in mitigating the water ingress, in whole or in part?

4.9 If so, are the costs spent on JBR recoverable as costs spent in reasonable mitigation?

4.10 If (the pool is not restored to working condition) is further work (in the amounts agreed by the Quantum experts) necessary to waterproof or ventilate the pool before finishes are laid on the new structure put in by JBR?

97. In respect of these issues, I generally agree with the submissions of the Defendant. The Defendant, I find, was asked to hibernate not to waterproof the pool and, in his role as architect/project manager, co-ordinated/managed the following:

1 In October 2014, APS chemically cleaned the pool, tapped into the sump and installed two fully submersible sump pumps and a leak detection system. APS was a specialist swimming pool contractor. The purpose of the sump pump was to remove any water that accumulated in the pool;

2 In around December 2014, Connect installed (i) a damp-proof membrane around the perimeter of the existing pool and (ii) a timber structure comprising tanalised wood to support the new floor for the Pool House.

98. I do not consider that the Defendant acted negligently in respect of the works to hibernate the pool for the following reasons:

i) It was reasonable for the Defendant to rely upon the experience and expertise of APS and Connect to carry out the works they did carry out. No further services were required to be deployed by the Defendant to augment these works whether in respect of the high water table or at all;

ii) When the pool was drained, there is no evidence that the Defendant either knew or should have known that the pool was leaking;

iii) What caused the water ingress is far from clear but neither expert suggested that it was caused by any bolts drilled through the bottom of the pool;

iv) If any bolts were drilled through the bottom of the pool, it is clear that the Defendant neither instructed any such drilling or could reasonably be aware of any such drilling;

v) Once the problem arose, the Defendant suggested various solutions, none of which were pursued by the Claimants.

99. All in all, I agree with Ian Salisbury's clearly expressed view that in respect of these aspects of the project, the Defendant discharged any and all obligations he owed to the Claimants.

4.1 Was there water ingress into the swimming pool in 2015 in addition to that caused by the flood of late August 2015?

100. It is common ground that there was further water ingress after August 2015.

4.2 If there was such water ingress, was it caused by poor workmanship or failure to follow the design in penetrations installed by Connect, or by the absence of a sufficiently robust design to waterproof the swimming pool?

101. There was much confusion regarding these complaints. Mr Perry's Report focussed on holes being made in the side of the pool not the bottom of the pool. He rightly conceded during his oral evidence that if, as Connect maintain, the holes in the side of the pool were constructed using waterproof fixings, his complaints fall away. Furthermore, Mr Perry was unclear whether the pool continues to leak.

102. Ian Salisbury had a rather complicated theory that when the pool was uncovered and left uncovered after the initial drying out, any water ingress may have been balanced by evaporation within the thickness of the concrete. However, when the pool was covered and closed, the humidity of the chamber would have reached near saturation point which would have reduced evaporation allowing water to reach the surface and leak.

103. During the course of the oral evidence, it became clearer that the Claimants' case that the water ingress was caused by bad workmanship was based upon Mr Bayford's evidence that Connect drilling fixing rods into the bottom of the pool. However, as the Defendant observed in his Written Closing Submissions:

> **"First it is not clear that bolts were drilled into the bottom of the pool. After being taken to his email dated 30 November 2016 Mr Marcal thought that maybe one bolt had been connected to the bottom of the pool but he was not sure. However,**
>
> **1 Mr McDermott, of Connect, gave evidence that there was no bolt connections to the bottom of the pool;**
>
> **2 Mr McDermott was unsure whether the picture at J/116/4475 or J/116/4479 showed knots in the wood or bolts but gave evidence that [if] it was a metal fixing it would have been used to screw to [two] bits of timber together and would not have gone through the pool surface;**
>
> **3 There are no pictures of any holes in the pool after JBR removed the Connect structure and the experts did not inspect the pool before JBR installed the new structure.**
>
> **Secondly, even if one or more bolts were drilled into the bottom of the pool by Connect (or someone else) neither expert expressed the view that any water ingress was caused or continues to be caused by a fixing inserted into the bottom of the pool."**

104. On the balance of probabilities, I find that the Claimants have not established that bolts were drilled into the bottom of the pool or that any such drilling is the cause of the water

ingress problem. I also do not consider that the Claimants have established that the Defendant acted negligently in respect of these matters or that any acts of alleged negligence caused the problems with water ingress.

4.3 Did the Defendant undertake any design or inspection obligations in relation to the swimming pool?

4.4 Were such obligations as the Defendant undertook in relation to the swimming pool discharged by the employment of (i) APS, the swimming pool specialists, or (ii) Connect, the contractors who built a support structure within the pool

105. The Claimants in their Written Closings concede that the Defendant was entitled to treat these companies as well-qualified "to keep a swimming pool going or to hibernate it". I consider and so find that it is wrong to criticise the Defendant with regard to his obligations in relation to the hibernation of the swimming pool. There is no evidence that the Defendant knew or should have know the pool was leaking. The Claimants have not established any clear or convincing case as to why the pool leaked or, indeed, whether it is still leaking. When the issue of a leak was raised in October 2015 the Defendant advanced a number of proposals to remedy the problem. No criticism was made of those proposals by the Claimants. However the Claimants did not pursue those proposals and instead instructed JBR to carry out further works. I am not satisfied that the Defendant acted negligently in the performance of his duties regarding the hibernation of the pool so that the swimming pool room could be turned into a function room.

4.5 Should the Defendant have specified waterproofing and waterproof fixings for the pool?

106. Mr McDermott's evidence which I accept and, indeed, was not challenged, was that fixings used at the side of the pool were covered in a waterproof resin and that Connect were not to put any fixings in the base of the pool. If any fixings were put into the base of the pool I consider that the Defendant cannot be at fault in failing to identify any such fixings. It is not good enough for the Claimants to submit that:

> **"He passed Connect's work for payment and he had ample opportunity to inspect it."**

They have not established on the balance of probabilities that any fixings were put through the base of the pool, let alone that the Defendant acted negligently in failing to identify any such alleged defect.

4.6 Should the Defendant have identified the poor workmanship of Connect in installing penetrations to the pool?

107. The Claimants have not identified any poor workmanship for which Connect are responsible.

4.7 Should the Defendant have revised the design in 2015 in the light of the leaks in the swimming pool?

108. The Defendant did make detailed proposals contained in an email to the First Claimant dated the 30th October 2015. There has been no criticism of these proposals. The Claimants simply chose to instruct JBR, who were general building contractors rather than swimming pool specialists, to carry out all necessary works.

4.8 Were the works undertaken by JBR successful in mitigating the water ingress, in whole or in part? And

4.9 If so, are the costs spent on JBR recoverable as costs spent in reasonable mitigation?

109. JBR, on the Claimants' instructions : (i) removed the timber support installed by Connect; (ii) removed the pump installed by APS; (iii) applied Desmopol (a liquid membrane) to the surface of the pool; and (iv) installed a new support system made of steels and timber frames. The steel frames cut into the existing pool.

110. These works, unfortunately, have not worked. I accept Ian Salisbury's evidence that the Desmopol lining has failed under pressure. Mr Perry has expressed no clear view on these works. However, in circumstances where the Claimants:

i) chose not to accept the advice of the Defendant;

ii) elected to use JBR who did not have the appropriate experience and expertise.

I consider that it is unreasonable to expect the Defendant to fund those works which failed, irrespective of the fact that no act or omission of the Defendant's whether negligent or otherwise caused the works which have failed to be carried out.

4.10 (if the pool is not restored to working condition) Is further work (in the amounts agreed by the Quantum experts) necessary to waterproof or ventilate the pool before finishes are laid on the new structure put in by JBR?

111. Unfortunately, the Experts are not clear on either what is causing the further leaks or what remedial action is required. The Defendant cannot be held responsible for the failure of the waterproofing works carried out by JBR and, as such, cannot be held responsible for the cost of remedying those failed works. With regard to the introduction of a humidifier, that was something recommended by the Defendant in 2015 but it was the Claimants who decided not to introduce one. On any view, the Defendant cannot be held responsible for the costs of introducing a humidifier at 2019 prices or at all.

(5) Whether the Defendant failed properly to specify and supervise work to the windows in the main house

5.1 (if not resolved under engagement issues above) Did the Defendant undertake duties to specify the work to the windows?

5.2 (if not resolved under engagement issues above) Did the Defendant undertake duties to inspect the work to the windows?

5.3 How many of the defects in the window schedule which are not common ground between the experts are defects?

5.4 Are the defects in the window schedule matters which the Defendant would have prevented of corrected in 2015 if he had acted with ordinary skill and care in specifying or inspecting the work carried out by Tubridy Builders, and/or DKD the decorators?

5.5 Alternatively are the defects: (1) either matters which have arisen since 2015, or (2) matters which an ordinary architect exercising skill and care would not have prevented or corrected?

Taking each in turn:

5.1 (if not resolved under engagement issues above) Did the Defendant undertake duties to specify the work to the windows?

112. It is clear from the documents, which were put to him and accepted, that the Defendant procured the window work, and specified what was to be done.

113. The Defendant also accepts that he inspected the window casement work and signed them off.

5.2 (if not resolved under engagement issues above) Did the Defendant undertake duties to inspect the work to the windows?

114. Again, this is clear from the documents and the Defendant agreed that the inspected the window casements and signed them off.

5.3 How many of the defects in the window schedule which are not common ground between the experts are defects?

115. The Defendant relies on the window survey carried out by Mr Salisbury. The Claimants rely on the window survey carried out by Mr Perry's colleague, Tom Findlay, and a subsequent inspection by Mr Perry. The Defendants say Mr Salisbury's evidence should be accepted. Neither expert was cross-examined in any detail on these matters. However, on these matters I prefer the evidence of Ian Salisbury. His window survey is contained in his Supplemental Report. He inspected the windows on an October day when the wind was a South Force 4 on the Beaufort Scale and he did not notice draughts when the windows were shut. Compared to Tom Findlay's investigation, Ian Salisbury's seemed more thorough. For example neither Tom Findlay nor Mr Perry recorded that the wind conditions when they inspected the windows. Tom Findlay was not called as a witness.

5.4 Are the defects in the window schedule matters which the Defendant would have prevented of corrected in 2015 if he had acted with ordinary skill and care in specifying or inspecting the work carried out by Tubridy Builders, and/or DKD the decorators?

116. Mr Salisbury did not notice draughts when the windows were shut. In any event any issues with the frames can be remedied. Mr Farrow whose estimate I accept as being reasonable suggests that they can be remedied for £3,000.

5.5 Alternatively are the defects: (1) either matters which have arisen since 2015, or (2) matters which an ordinary architect exercising skill and care would not have prevented or corrected?

117. Having read and heard all the evidence on these issues, I am satisfied that the Defendant discharged his obligations in respect of the window works competently. The Defendant arranged for Sash Window Conservation to survey the windows. The Defendant arranged for quotes from Sash Window Conservation. He inspected the replacement casements with the Second Claimant. When the Second Claimant complained of draughts, he arranged for Mr Turbidy to return and fix further seals. The Defendant also ensured that DKD returned to carry out the work on a number of occasions. I also accept the contention made by Mr Salisbury that Mr Wood in his estimate of the cost of repair makes no allowance for wear and tear or damage in use. Looking at the written evidence and the very limited cross-examination of the Experts on these window issues, I am clear that no case that the Defendant acted negligently in respect of these matters has been made out.

(6) Competitive Tendering

6.1 (If not resolved under engagement issues above) did the Defendant undertake to seek 3 tenderers?

and

6.2 (if not resolved under engagement issues above) or did the Defendant, as the Defendant contends, receive instructions to obtain work by negotiation with a single contractor?

118. I accept the evidence of the Defendant on these issues. The Defendant and the Claimants agreed that they would generally work with contractors recommended by the Defendant rather than go out to tender. The Defendant explains this in his First and Second Witness Statements. The Claimants, particularly the First Claimant, were financially sophisticated and if unsatisfied by the procurement choices made by the Defendant. I would have expected contemporaneous complaints.

6.3 Are there trade contractors who were tendered competitively other than Tubridy builders?

119. External decorations and WC hire. This is explained by the Defendant in his Second Witness Statement.

6.4 (In the event that the Claimants are not entitled to wasted costs in any event) are the Claimants entitled to the saving they should have received from negotiated tenders?

120. The Defendant and the Claimants agreed that he would use recommended contractors and would not have to tender all of the works. For a project of this nature that seems

sensible and appropriate in any event. The Claimants would not want to work with the cheapest but with the best or most highly recommended.

6.5 In assessing the amount of any such saving should the 10 to 15% "rule of thumb" agreed by the expert quantity surveyors be reduced further to take account of costs of tender?

121. No. The agreement between the Experts should be respected and implemented. In assessing the amount of any such saving the 10 to 15% "rule of thumb" agreed by the Expert quantity surveyors should not be reduced further to take account of costs of tendering.

(7) Dinesen flooring

7.1 Was the Dinesen flooring poorly stored at the premises of Hutchison?

7.2 (If not resolved under engagement issues above) was the ordering and delivery of the Dinesen flooring within the duties undertaken by the Defendant?

7.3 Was the poor storage of the Dinesen flooring the consequence of an error which fell below the standard of skill and care of an architect project managing the project?

7.4 (In the event that the Claimants are not entitled to the cost of the Dinesen flooring, less salvage value, as wasted cost in any event what is the figure which properly represents the damage caused by poor storage of the Dinesen flooring?

Taking each issue in turn:

7.1 Was the Dinesen flooring poorly stored at the premises of Hutchison?

122. I accept the evidence of Mr Farrow that there remains sufficient wood in good enough condition to install the flooring without there being any detriment to the Claimants. As Mr Salisbury reported, he only saw two physically damaged boards and he considered they could be accommodated within the normal wastage allowance.

7.2 (If not resolved under engagement issues above) was the ordering and delivery of the Dinesen flooring within the duties undertaken by the Defendant?

123. The Defendant accepts that he ordered the floor. He says that he did so to avoid a price rise which is a reasonable explanation and one that I accept.

7.3 Was the poor storage of the Dinesen flooring the consequence of an error which fell below the standard of skill and care of an architect project managing the project?

124. No. The Defendant acted reasonably in expecting Hutchison VA Flooring, to store the wood properly and without causing any damage to the flooring.

7.4 (In the event that the Claimants are not entitled to the cost of the Dinesen flooring, less salvage value, as wasted cost in any event) what is the figure which properly represents the damage caused by poor storage of the Dinesen flooring?

125. I consider that the flooring can still be installed. Mr Salisbury and Mr Farrow are of the opinion that a light sanding will remove discolouration. Mr Salisbury considers that they are fit for laying. No evidence was called from the manufacturer to suggest otherwise. I accept that evidence as being plausible and correct.

(8) Other Minor Claims

8.1 Skylights: should the Defendant have appreciated that if there was to be a mezzanine or cinema in the pool hall, there was no reason to replace all four skylights?

8.2 What is the cost of the two extra skylights?

8.3 Delay issues: adjourned at PTR.

8.1 Skylights: should the Defendant have appreciated that if there was to be a mezzanine or cinema in the pool hall, there was no reason to replace all four skylights?

126. I consider this complaint to be not only trivial but unjustified. It is clear that the skylights had exceeded their design life and something needed to be done to them. The issue was replace or remove. If removed, additional work to the roof would be necessary.

127. Replacing the skylights meant that they would be there if the swimming pool was reinstated.

8.2 What is the cost of the two extra skylights?

128. The Claimants claim the 50% of the value of the two skylights, ie. £3,060. I do not consider that the Defendant is liable for those costs on any view. His decision to replace rather than remove was not only a reasonable decision but I think was the appropriate decision.

8.3 Delay issues : adjourned at PTR

129. This was not pursued at this trial.

(9) The Pool House Works

130. The Claimants have not pursued the pleaded claims in respect of the Pool House works. These are set out at paragraphs 52 to 60 of the Amended Particulars of Claim and range from allegations that a thermostat was installed in the wrong place to "shoddy" electrical installation.

131. I dismiss these allegations.

.5 TIME LOSS AND DAMAGE ALLEGEDLY CAUSED BY THE BREACHES

132. I accept the Defendant's summary of this section of the Claimants' claim as set out in their Closing Written Submissions.

133. In order for the Claimants to recover any damages from Mr Marcal they must, of course, establish that not only was Mr Marcal negligent but that his negligence caused them a loss and that the loss fell within the scope of Mr Marcal's duty.

134. The Claimants' primary case is that they are entitled to demolish the cinema and either (i) re-instate the pool (£595,000) or (ii) hibernate the pool properly (£163,000). They, therefore, seek the costs of carrying out either option plus the "wasted costs" they have spent on the cinema room to date (£465,625)[7].

135. In the alternative, the Claimants seek:

i) the additional sums they say they spent because the works were not tendered: £150,900[8];

ii) the additional sums they say they spent on design changes caused by Mr Marcal's negligence: £97,497.36[9].

136. In addition, the Claimants seek:

i) the cost of carrying out remedial works to the windows in the main house: £50,000;[10]

ii) the costs of the works carried out by JBR to the swimming pool: £21,099.60[11]

iii) damages for distress and inconvenience: £10,000.

137. Taking each issue in turn:

(9) The Claimants' decision to demolish the cinema room.

9.1 Given the Claimants intend to demolish the cinema room, is the reason that it contains features not agreed as part of the brief, and contains defects, or is it, as the Defendant contends, a change of mind on their part?

138. The Defendant contends that this is not a question the Court should consider. It is submitted that the issues the Court should consider are:

(1) Did the Claimants agree to the design of the as-built cinema room?

a) If the answer is "yes", then the Claimants are not entitled to any damages in respect of the design claim;

b) If the answer is "no", then the question for the Court is whether the difference was caused by Mr Marcal's negligence. If the answer to that is "yes", then the Court needs to decide whether the cinema room can be

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7 APoC [86] and [87]
8 APoC [84(2)]
9 APoC [90]
10 APoC [85]
11 APoC [89]

made into the design agreed by the Claimants and whether the cost of doing so is reasonable;

(2) Are there any defects in the cinema room? If so, have those defects been caused by the negligence of Mr Marcal? If so, have those defects caused the Claimants a loss? If so, what is the sum of that loss?

139. In the light of my preceding findings with regard to whether the Claimants knew let alone agreed to the design of the cinema room, these issues can be dealt with shortly. However, I agree with the Defendant that I should approach this issue applying the questions raised by the Defendant in his Written Closing.

140. The Claimants did not agree to the design of the cinema room. The Claimants not knowing and not agreeing to the design of the cinema room as implemented, and the change from sleek modern design to industrial wonky design, was all as a result of the Defendant's negligence in having no written brief and no consultation with the Claimants as that brief changed so dramatically. None of those changes were shared with the Claimants in writing or otherwise. They were entitled to be outraged by what they saw had been produced at great cost, which was not what they were expecting.

141. The Claimants have decided to demolish the cinema room. I consider such a decision to be a reasonable decision. Whilst I accept that the ordinary measure of damage when an architect has acted negligently is the cost of rectification, I do not consider that this particular ugly duckling can be turned into a swan. What was provided is so different to from what the Claimants reasonably expected that I consider demolishing this cinema is the reasonable course going forward.

142. Whilst I have found that some of the alleged defects in the cinema are items of incomplete works or were not caused by the negligence of the Defendant, I do not consider those defects themselves justify demolition rather than repair.

143. The cinema as-built is so different in kind to what was anticipated and, given my findings that none of this "design development" was even discussed with or agreed to by the Claimants, I consider that they are fully entitled to demolish the cinema.

144. The appearance of the cinema and who likes what are all issues which are somewhat subjective. There may be people who prefer the industrial wonky design to the sleek modern design. However, that is why it was essential not only to agree the brief but also to ensure that the Claimants had a clear understanding as to what would be provided. The Claimants were clear in their reaction and rejection of what was provided in their oral evidence. This is supported by the Second Claimant's reaction in February 2016 noted privately to her Husband:

> **"We were promised precision bespoke and high end. This looks cheap and thrown together."** (See **K/131/5071**)

145. The defects with the industrial wonky design are significant and would be expensive to remedy, with or without the external staircase, which on balance I do not consider necessary. However, Mr Perry's figures as submitted by the Claimants' Closing Submissions for the necessary remedial works total:

Escape with staircase	**£45,600**
Balustrade	**£4,700**
Trapdoor	**£4,200**
Installing up to date Olive equipment	**£58,765**
Total	**£151,065**

146. I consider that these are reasonable estimates of what would be required. None of these costs begin to approach the aesthetic difficulties and unacceptable features which the Claimants rightly complain about. I do not consider that this cinema can be transformed into the design the Claimants were expecting without demolition or at a cost which would be well beyond reasonable. I note that the Defendant's case is silent as to what to do and what it would cost to transform the wonky industrial look into a sleek modern look. The Defendant's case is not much more than the Claimants will have to get used to what he has produced for them.

147. On the basis of the pleadings and Ian Salisbury's evidence, the Claimants are effectively being told that they should:

i) redecorate where the corner digs into the plaster at the soffit;

ii) complete the incomplete work;

iii) in relation to the look – just get used to it.

I consider and so find that that approach to mitigation of loss is unreasonable.

(10) Whether the Claimants can recover their wasted costs, and costs of returning to the position they were in at the outset

10.1 In the light of the answers under headings 2, 3, and 9 above, were the Claimants' costs of the cinema project wasted?

148. I consider and so find that the as-built cinema is so far removed from what the Claimants reasonably expected and initially approved, that the only option is to demolish what was built.

10.2 What are the Claimants' wasted costs when they carry out their intention to demolish the cinema? (this issue includes the audio-visual equipment costs which are dealt with by the single joint expert)

149. The cinema room is to be demolished. The Claimants have already agreed that that is what will happen. The costs spent on it were wasted. The sums wasted was as follows:

(1) £465,625.47 (the sums including 75% of the £140,553.38 paid to Olive Audio Visual said to have been spent in Annexure 1 to the Particulars of Claim);

(2) plus £5,733 (adjustments agreed in the Joint Statement to 1.04, 1.05 and 1.05);

(3) less £29,889.72 withheld by Mr Freeborn from Ridlands;

(4) less £10,710 which is the residual value of the AV equipment;

(5) **Total : £430,758.75**.

150. The figure of £465,625.47 is an agreed figure. The three adjustments recommended by the Defendant in his Written Closing Submissions are, I consider, appropriate and correct. During the course of the trial, some time was taken up with disputes as to whether the Claimants were promised an architectural jewel or a cinema with a wow factor. I make no findings as to what precisely was said because I consider that any architect authorised to spend sums in excess of £460,000 on a glass box would be expected to produce a design not only in accordance with his clients' expectations but also something "bespoke" and "high end". That is not what the Claimants reasonably thought had been provided. What was provided had not been discussed with them and had not been approved by them. I dismiss the Defendant's contention that the Claimants simply declined to complete the building. What was provided had not been discussed with the Claimants nor explained to the Claimants nor approved by the Claimants.

10.3 What is the cost of Option A, returning the pool hall to a working pool?

151. The Claimants' pleaded case is for the sum of £595,000:

(1) £74,000 for the removal of the cinema;

(2) £68,000 for repairing the pool house windows; and

(3) £453,000 for the re-instatement of the pool.

152. Mr Wood has corrected the total to £525,000 which he breaks down as follows:

(1) £26,000 for the removal of the cinema;

(2) £50,000 for repairing the pool house windows; and

(3) £466,000 for the re-instatement of the pool.

153. With regard to these figures, I agree with Mr Wood when he explains that the sum of £50,000 relates to the main house and not the cinema room. However, I prefer the approach of Mr Wood to Mr Farrow. Mr Wood's explanation of the differences between the two Experts is set out in Mr Wood's Appendix 3:

"I have included a comparison of the budgets at Appendix C. Major differences are due to the following:

High quality finishes to the pool house as existed before the works commenced;

Provision of a new integrated spa to replace the unit removed as part of the Works;

Professional fees to help ensure that the design and works are properly designed and constructed;

Inflation on-costs. My estimate was based on costs at 2015 price levels."

154. I consider that in respect of each of these differences of approach, Mr Wood's evidence should be preferred as being more reasonable:

(1) I consider that the Claimants would, on any view, be entitled to high quality finishes;

(2) The Claimants are entitled to a new spa to replicate what was previously there;

(3) Professional fees should be incurred for this project;

(4) I consider that Mr Wood's prices from 2015 plus inflation are more appropriate than Mr Farrow's figures based on a 2018 pricing book which does not capture the high quality work the Claimants are entitled to expect. Mr Wood's figures are based on the cost of the 2015 project.

Accordingly, I find that the Claimants should recover in respect of Option A, £542,000, the costs identified by Mr Wood in his Second report at paragraph 2.1.10 (C147/1652).

However, I consider that the option to restore the pool cannot be described as a realistic option flowing from or having been caused by the breaches of duty the Defendant is responsible for. Furthermore, the Claimants' evidence was that they wanted to replace the swimming pool with a function room to entertain their friends and family. The Claimants are entitled to recover the wasted costs of the cinema room and the costs necessary for the function room to be completed. The recovery of the costs to reinstate the swimming pool would not only be unreasonable but would also totally ignore the Claimants' own decision that they wanted to convert the swimming pool into a function room for parties and to entertain their friends and family."

10.4 What is the cost of Option B, hibernating the pool and completing the pool hall as a party room or function room?

155. The Claimants' pleaded case is for the sum of £165,500:

(1) £74,000 for the removal of the cinema;

(2) £68,000 for re-pairing the pool house windows; and

(3) £23,500 for the waterproofing, dehumidifying and ventilation.

156. However:

(1) Mr Woods has corrected the figure of £74,000 to £26,000:

(2) Mr Wood has corrected the figure of £68,000 to £50,000 but that figure only applies to the window works to the main house and is therefore not relevant to the sum claim under Option 2;

(3) Mr Farrow thought the figure of £23,500 was too high. Mr Farrow's figures were £14,000 to £18,000. On this claim, I would wish to err on the side of caution and support the figure of £23,500. On any view, the difference is not unreasonable for the nature of these works.

So, the total for Option B appears to be:

Removal of Cinema	£26,000
Waterproofing, de-humidifying and ventilation	£23,500
	£49,500

The Defendant is only responsible for £26,000 out of the £49,500.

This is the option which the Defendant is responsible for as a result of the negligence in respect of the design and development of the cinema.

10.5 In respect of costs incurred in the past (principally the wasted costs) are the Claimants entitled to interest pursuant to the Senior Courts Act section 35A?

157. This should be answered "Yes". It should run from April 2015, the date the Claimants began paying Ridlands. This is a discretionary matter, but these costs were wasted and interest should run on those costs which were wasted. I will await a calculation of interest which I trust can be agreed.

10.6 Are the Claimants entitled to general damages for distress and inconvenience?

158. This is a case for which damages are appropriate. The Claimants have not suffered physical inconvenience (on their own evidence they rarely went into the pool house) but the retainer was one to provide peace of mind, pleasure or freedom from discomfort. Instead of enjoying a cinema and function room which they would show off to their friends and family, the whole project was an almost complete failure, preventing the Claimants from having the opportunity to entertain their friends and family in their new function room and private cinema. I would assess these general damages at £5,000 being reasonable in the circumstances outlined above.

(11) Whether the Claimants can only recover damages on some much more limited basis?

11.1 Is the decision to demolish the cinema a failure to mitigate on the part of the Claimants?

159. No, for the reasons set out above. The decision to demolish is a reasonable choice.

11.2 If the Claimants should have mitigated their loss by keeping the cinema, what steps in mitigation (short of demolition of the cinema and reinstatement of the pool house as it was before), should they have taken to complete the cinema and mitigate their loss?

160. As set out above, the Defendant's pleaded case as to the steps which should have been taken would be insufficient to mitigate the Claimants' loss. It would not begin to deal with the aesthetic problem. It would cause further difficulties. The Claimants' proposals, in particular Option B, but not option A are a reasonable and proportionate response to the problems and difficulties they face because of the Defendant's negligent discharge of his obligations which he owed them.

11.3 If the Claimants should mitigate their loss by completing the cinema, what is the cost of the steps which they should take instead of demolition?

161. This issue does not arise because the Claimants are not required to mitigate their loss by completing and keeping the cinema. That would be an inappropriate remedy in the circumstances and, in any event, the Defendant and his advisers have not begun to provide figures for completing the cinema so that it reasonably matched the Claimants' reasonable aesthetic vision in what they thought was going to be provided. The Claimants' solution will involve the introduction of less new money in that the cinema can be demolished quickly and cheaply and the function room can be reinstated quickly and cheaply.

11.4 If the cinema is not demolished, are the Claimants entitled to recovery in respect of:

a) the allowance for lack of competitive tendering costs set out above

162. No, as I have found the Defendant was not obliged to tender all works. The Claimants were not only content but agreed to take advantage of the contractors recommended by the Defendant.

11.4 (b) If the cinema is not demolished, are the Claimants entitled to recovery in respect of the damage to the Dinesen floor, set out above?

163. No. There is sufficient Dinesen flooring to complete the flooring. Mr Farrow's analysis of this is set out in his Supplemental Report at paragraphs 3.1 to 3.4. Furthermore, the Claimants had an opportunity to replace damaged boards at no cost but did not take this up at the time.

11.4 (c) If the cinema is not demolished, are the Claimants entitled to recovery in respect of the costs of remedying defects in the waterproofing of the pool, set out above?

164. No. The Defendant discharged his duties in respect of hibernating the pool. The works carried out by JBR were ineffective and were chosen by the Claimants, not the Defendant and whose proposals were rejected by the Claimants.

11.4 (d) If the cinema is not demolished, are the Claimants entitled to recovery in respect of the costs paid to JBR to mitigate the consequences of the water in the pool and the damage to the structure?

165. No, as set out above, the works carried out by JBR were chosen by the Claimants and not the Defendant whose proposals were rejected by the Claimants.

11.4 (e) If the cinema is not demolished, are the Claimants entitled to recovery in respect of the costs required to remedy admitted defects?

166. The Claimant, in light of my findings, are entitled to demolish the cinema at the Defendant's expense so this head of recovery does not arise.

11.4 (f) If the cinema is not demolished, are the Claimants entitled to recovery in respect of the costs to remedy aesthetic and other defects not admitted by the Defendant?

167. The Claimants, in light of my findings, are entitled to demolish the cinema at the Defendant's expense. Furthermore, this is not a pleaded claim and no costs have been produced by either party in support of such a claim.

11.5 Should the remedies for defects short of demolition (where remedies are put forward) follow the suggestions of Mr Salisbury or those of Mr Perry?

a) means of escape, hatch only for the figure agreed by the QS experts, or door with outside staircase, £46,000;

b) trapdoor, complete the existing design, or replace with a new configuration, £39,000;

c) clash with ceiling soffit, redecorate, or replace the glass for £39,000;

d) balustrade (figure agreed by experts £4,700 to £5,700 C/39/1332)

168. I am informed by the Claimants' Written Closing Submissions that each of the figure here are referring to the solution of Mr Perry and the costing of Mr Wood. Given that the Claimants are fully entitled to demolish the cinema and reinstate the function room as a result of the negligence of the Defendant, these schemes and figures are a somewhat artificial exercise. However, in respect of all of these works, they are examples of incomplete rather than negligent design and I do not consider any of these works were caused by the alleged negligence of the Defendant.

169. In light of this Judgment, I would invite the parties to agree an appropriate order. Unless a Cost Order can be agreed, I will hear the parties on the question of costs.