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Case No: HT-2016-000329

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/04/2019

Before :

MRS JUSTICE JEFFORD DBE

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Between :

(1) MR STUART HOWARD RUSSELL **(2) MRS NAOMI PATRICIA RUSSELL**	**Claimants**
- and –	
(1) PETER STONE (TRADING AS PSP CONSULTANTS) **(2) PSP CONSULTANTS (A FIRM)**	**Defendants**

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Jennifer Jones (instructed by **Elborne Mitchell LLP**) for the **Claimants**
Lynne McCafferty QC (instructed by **Beale & Co. Solicitors LLP**) for the **Defendants**

Hearing dates: 6-7 June, 11-14 June, 18-20 June, 4 July 2018

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Approved Judgment

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

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MRS JUSTICE JEFFORD

Mrs Justice Jefford :

Introduction

1. These proceedings arise out of the construction of the claimants' home in Hampstead, at 36 Millfield Lane. The house is an impressive residence with a curved shape built on a sloping site. Putting it neutrally, the project to build this house was beset with problems and there is no doubt that it took longer and cost more than the Russells expected or would have wished. Although other issues arise, at the heart of the dispute is the contention on the part of the claimants, the Russells, that, to a significant extent, the property cost them more to build than it ought to have done as a consequence of the negligence of the defendants, a firm of quantity surveyors whom they had engaged. As the Russells put it in opening submissions, they claim that by reason of its failure PSP caused them to spend significantly more on their property than they would have had to had the project management, contract administration and quantity surveying roles undertaken by the defendants been properly performed.

2. For the purposes of the trial, the parties agreed a list of issues which forms Annex 1 to this judgment. Both parties were, however, clear that the list of issues was intended to assist the court in focussing the issues and not to be a substitute for the pleaded cases which I will refer to in a number of instances, particularly where the case ultimately advanced had shifted.

The evidence generally

3. Although the dispute was concerned with events many years earlier, the trial of the action took place in June/July 2018 with written and oral closing submissions following the hearing of oral evidence. I heard evidence from the following:
   (i) Stuart Russell
   (ii) Naomi Russell
   (iii) Peter Stone
   (iv) Linda Stone
   (v) Paul Greenwell, the claimants' expert witness on project management issues
   (vi) David Somerset, the claimants' expert witness on quantity surveying [and contract administration issues]
   (vii) Keith Strutt, the defendants' expert witness on project management issues
   (viii) Kenneth Orr, the defendants' expert witness on quantity surveying issues.

The witnesses of fact

4. I regarded all of the witnesses as trying to do their best to give honest evidence.

5. Mr Russell is plainly a highly successful and experienced businessman. His area of expertise is commercial property. He has, however, no personal experience of, or particular knowledge of, construction contracts. He described himself as learning as he went along and emphasised that on this project, as in his business, if he engaged professionals to advise him, he took their advice. I entirely accept all of that but it is equally clear to me that Mr Russell, as an intelligent, commercial operator, was able to understand what was going on and to exercise a considerable degree of judgment of his own, and he described himself as someone who orchestrated other professionals. On this project, he challenged his professional advisers and did not meekly accept what they told him; he raised queries and pressed for answers; and he examined figures put before him rigorously. He sought to downplay his level of understanding and input to the project. He has, in my view, persuaded himself that what went wrong on this project was PSP's

responsibility: downplaying his own role was then a natural product of his desire to blame PSP but it did not fairly reflect what had happened at the time.

6. Mr and Mrs Russell had only recently married when they bought 36 Millfield Lane. Although Mrs Russell did not accept the description, to call it their dream home is appropriate. It was a very personal project for them. Mrs Russell had a background in textile design and the house was an opportunity for her to bring her design "eye" to their home. She wanted a "wow factor" in each space. Mr Russell's regard for and pride in his wife was patent and his passion for this project reflected that. It did not, however, completely overwhelm his commercial instincts.

7. Mr Stone was an experienced quantity surveyor and presented himself as a straightforward witness. He was, to my mind, unwilling in cross-examination to accept some measured criticism but was otherwise open in his answers.

8. Mrs Russell and Mrs Stone (who was involved in the project throughout) were both in an unusual position in this case. Mrs Russell gave evidence about the background to and progress of the project but the evidence of both Mrs Russell and Mrs Stone was primarily related to an allegation made in the Defence that the claimants were responsible for problems on the project because of their failure to take design decisions promptly. That issue seems to me to have taken on a life of its own in this litigation and ultimately to have turned out to be largely a non-issue.

9. Mrs Russell was also doing her best, although she became somewhat overwrought when giving her evidence. I formed the view that, during the project, some of her expectations were unrealistic but that is of no particular relevance to the issues in this case.

10. The claimants fairly make no criticism of Mrs Stone's evidence other than to suggest that she had formed the view from the outset that the Russells were demanding clients; that she was determined to paint them as always in the wrong; and that that attitude went a long way to explain what had gone wrong on this project. That was not the view I formed of Mrs Stone or her evidence. I certainly did not gain the impression that she had somehow set her face against the Russells either during the project or now, although she fairly accepted that towards the end of 2011 the relationship between her and Mrs Russell was deteriorating. Her evidence was fair and balanced; she might have displayed some frustration with the Russells but no more than that. In any event, the suggestion made in the claimants' submissions that any adverse view of the Russells on Mrs Stone's (or Mr Stone's) part goes a long way to explain what went wrong on this project is fanciful and no foundation for any claim in negligence against PSP.

The experts

11. Mr Greenwell was called to give evidence on the project management role performed by PSP. In his report he gave his specialist expertise as construction project management for both building and civil engineering works. His evidence was unimpressive. As I consider further in this judgment, there were key elements of his evidence on which he based his criticism of PSP that were misconceived, and although his evidence was crucial to the allegations that PSP had negligently managed the tender process, he had not considered the entirety of the tender documentation and had paid little regard to the evidence of Mr Stone about PSP's performance. These matters, cumulatively,

significantly undermined the confidence that I could have in his evidence. Further, in my view, in his oral evidence in particular, he gave lengthy answers that were based on hypothetical situations and bore little relationship to what had actually happened on this project. On behalf of PSP, Ms McCafferty QC submitted that Mr Greenwell adopted an approach which she variously described as unrealistic, technical and academic. Those adjectives are well chosen and it seemed to me that Mr Greenwell held PSP to the standard of the so-called counsel of perfection but failed to meet the same standard himself.

12. Mr Somerset is by qualification a quantity surveyor. PSP submits that the reliance I can place on his evidence is fundamentally undermined by the fact that Mr Somerset had omitted to disclose, in his report, the full extent of his relationship with the Russells. What emerged from his evidence was that for about 5 months from November 2013 to March 2014, he had acted as a "Client Representative" for the Russells. His evidence was that it was not a "formal" appointment and arose at a time when the Russells were having problems with the contractors, Cameron Black (whose role I address below). He had, therefore, to that extent been involved in the continuation and completion of the project after PSP's involvement had ceased and, however informal the role, he had invoiced for that work. That was obviously relevant and I can see no satisfactory explanation for his failure to mention this role in his report but rather declaring that he had no other relationship with the claimants (which was factually wrong). I do not, however, think that it would be fair or realistic to dismiss Mr Somerset's evidence simply on the basis that he lacked independence. He was still capable of expressing an independent view on the matters on which he was asked to opine. However, it does seem to me that it may have led Mr Somerset on occasion to try too hard to advance the claimants' case and I bear this in mind when assessing his evidence.

13. Keith Strutt was an impressive expert witness. He is qualified as a chartered construction manager, chartered quantity surveyor and chartered civil engineering surveyor. He had lengthy experience as a project manager on residential and commercial projects and with contractors. His evidence was fair and balanced and appeared to have been thoroughly researched. He also sought to ground his expert opinion in the facts of this case and not to be distracted by hypothetical scenarios that were put to him. Because of the view I have formed of the reliability of Mr Greenwell's evidence, I say rather less in this judgment about Mr Strutt's evidence than I might have done but that is not intended to devalue his evidence.

14. Mr Orr is a quantity surveyor. There were some difficulties with his report, in particular missing spreadsheets. The defendants' legal team took responsibility for this but it nonetheless caused difficulties with his report. His report seemed to me to be less well researched than it could have been and in cross-examination areas were exposed where his evidence was based on assumption or he said he was waiting for information which he did not seem to have pursued. Nonetheless overall his evidence was persuasive and realistic and he too had not become lost in hypotheticals.

Dramatis personae

15. In addition to the Russells and the Stones, there are a number of professionals and contractors who will be referred to in this judgment. As the claimants did in opening submissions, I set them out in alphabetical rather than chronological order:
    (i) Cameron Black Ltd, the second contractor ("Cameron Black")

(ii) Charles Leon Associates, Architects ("CLA")
(iii) Charter Construction, unsuccessful tenderer ("Charter")
(iv) DF Keane Building Services Ltd, the third contractor ("Keane")
(v) Doyle PLC, Ibex's parent company
(vi) Fairacre Properties Ltd, a property investment company in which Mr Russell is a shareholder and was for a time the sole shareholder ("Fairacre")
(vii) Gleeds, quantity surveyors engaged by the Russells before PSP's involvement
(viii) Ibex Interiors Ltd, the first contractor engaged on the project
(ix) Landscape Perspectives, landscape designers
(x) Orbell Associates, chartered surveyors
(xi) Pierce Hill Ltd, quantity surveyors engaged by the Russells after PSP's involvement ("Pierce Hill")
(xii) Relicpride, an unsuccessful tenderer
(xiii) Taylor Wessing LLP, solicitors advising the Russells during the project
(xiv) TMD Building Consultancy Ltd, project managers both before and after PSP's involvement ("TMD")
(xv) Vascroft, an unsuccessful tenderer
(xvi) Vector Design, the first M&E engineers engaged on the project ("Vector")
(xvii) Walsh Associates, structural engineers ("Walsh")
(xviii) Woodcraft, kitchen fabricators

Outline chronology

16. I set out below what is intended to be the core chronology in this case. It largely follows that helpfully given in the claimants' opening submissions and in Mr Russell's witness statement.

17. In August 2006, the Russells purchased 36 Millfield Lane and lived in the original property. They had in mind first to carry out a major refurbishment of the house then on the site. They engaged TMD to provide project monitoring advice and Gleeds as quantity surveyors. The estimated cost of the refurbishment and other advice they received led them instead to consider demolishing the existing house and undertaking a new build.

18. In January 2007, CLA were instructed as architects to design the new house and in September 2007 planning permission was obtained for their design. This did not include a basement swimming pool, although the intention was to add that to the design later and seek planning permission. In May 2007, Gleeds produced a cost plan for the then design in the sum of £1,550,000. In October 2007, first stage tender documents were sent to 4 contractors including DF Keane. It appears that subsequently second stage tender documents were sent to DF Keane who returned a tender in the sum of £2,725,000. That was higher than Gleeds' cost plan and the Russells' budget and the tender (and possible savings) were carefully examined, not least at a design and value engineering meeting held at Mr Russell's offices on 31 March 2008. The claimants' opening submissions stated that Orbell Associates reviewed the Gleeds cost plan and Keane tender return and concluded they were reasonable. They suggested a project cost of between £250 - £300 per square foot (as against a cost plan figure of £274) and that a contract period of 50 weeks for construction would be competitive in light of the complexity of the work.

19. In April 2008, the Russells were introduced to PSP and in May 2008 Gleeds' involvement came to an end. There are some limited issues as to the precise date of PSP's engagement in various roles but it is agreed between the parties that nothing turns on that. In short,

PSP was ultimately engaged to act as quantity surveyor, project manager and contractor administrator. No issue has been raised in these proceedings as to whether Mr Stone personally (first defendant) or his firm (second defendant) was engaged and I simply refer to PSP throughout without distinguishing.

20. In June 2008, PSP produced draft cost plans including cost plan 3 in the sum of £2,518,000 (including £376,000 for fees). At that point in the story, there was a hiatus in proceedings. The design team was asked to "down tools" while the Russells considered their position. In December 2008, however, they decided to proceed with the new build but this time with a smaller and different scheme. The kitchen was now to be the focal point of the house; the house was to have more flow between spaces; and for the first time CLA proposed a curved design which also made best use of the sloping site. That design was what was then taken forward.

21. In February 2009, PSP produced cost plan 4 in the sum of £1,748,000 excluding fees. That scheme was sent out to tender to test the market. Vascroft Contractors Ltd. and Edentime Builders Ltd. tendered and their tenders gave Mr Russell, in his words, significant comfort and confidence in PSP's costs advice. In August 2009, PSP issued cost plan 7 for £2,068,000 including £319,000 for fees and £54,000 for VAT (thus the net sum was £1,695,000).

22. On 27 October 2009, pre-qualification questionnaires were issued to proposed tenderers. On 6 November 2009, PSP tabled cost plan 8 in the amount of £1,989,000 excluding fees and VAT but including £50,000 as a client contingency and assuming a construction period of 50 weeks. Mr Russell's evidence was that he was very concerned at the increase from cost plan 7 and asked the design team to identify where savings could be made. In any event, on 9 November 2009, invitations to tender were issued to Relicpride, Vascroft, Charter, Jacobs Midlands and Ibex. PSP's Pre-Contract Status Report for November 2009 recorded that the design was completed to RIBA Stage E.

23. During January 2010, four of the prospective tenderers returned tenders - Jacobs Midlands did not – and on 18 January 2010, PSP produced a tender report. The tender report set out the bids and programme and planned programme durations as follows:

    (i) Ibex: £1,551,833.75 and 39 weeks
    (ii) Charter: £1,849,968.96 and 53 weeks
    (iii) Relicpride: £2,289,885 and 68 weeks
    (iv) Vascroft: £2,430,784.65 and 64 weeks

24. Those tenders compared with a figure of £1,741,733 extracted from cost plan 8 and PSP set out the percentages by which the bids were higher or lower. However, PSP then undertook an exercise of adjusting the bids, for example, to take account of items that had not been priced or where the tenderer had included a lower provisional sum than had been allowed for than PSP. Once those adjustments had been made the figures were:
    (i) Ibex: £1,653,250.19
    (ii) Charter: £1,872,511.96
    (iii) Vascroft: £2,215,784.65
    (iv) Relicpride: £2,289,885.00

The Charter tender was thus 7.51% higher than cost plan 8 and the Ibex tender was 5.2% lower (the tender report said 6.12% but that was corrected during the trial). PSP recommended that a post tender interview was arranged with Ibex.

25. On 27 January 2010, as a result of responses to tender queries, Ibex's tender was increased to £1,635,724.

26. Over the next few months, the scheme was then further developed to include the basement and swimming pool which, in March 2010, Ibex priced at approximately £477,000 with a revised contract period of 48 weeks. In June 2010, Ibex provided a revised offer in the sum of £2,098,643.02 (consisting of the original tender price of £1,635,724.67 plus swimming pool at £477,918.35, less a commercial discount of £15,000, and including a client contingency of £50,000).

27. On 22 June 2010, PSP issued a letter of intent to Ibex. The letter provided:

"… You are to proceed in strict accordance with the following terms and conditions on the understanding that as soon as the formal documents are drawn up you will enter into a contract with Mr & Mrs Russell. This shall be in the form of the JCT Standard Building Contract without Quantities 2005 and such amendments as referred to in item 6 of this letter. In any event, it is understood that such terms and conditions become fully operational upon your commencing works.

1. Contract Sum - £2,098,643.02. The contract sum includes a client contingency of £50,000.

2. Contract Period – 48 weeks

3. Date of Site Possession – 8th July 2010

4. Date of Contract Commencement – 12 July 2010

5. Date for Completion – 10th June 2011

6. Contract Documents - The Contract Documents will comprise the following:

- *JCT Standard Building Contract without quantities 2005 and such amendments as referred to in Employer's Requirements dated November 2009.*

6. Contract Documents (cont'd)

- *Contract drawings – as detailed in the Employer's Requirements dated November 2009 and the tender correspondence detailed below.*
- *Tender correspondence as detailed in the attached schedule.*

7. Warranties

If warranties are required to be entered into, they will be substantially in the form as referred to in the Employer's Requirements dated November 2009.

8. Contract Conditions

Your tender is deemed to be inclusive of all works, terms and conditions as described, drawn and contained within the above documents.

Subject to your acceptance of, and compliance with the above, unless and until a formal contract is prepared and executed, this letter, together with your acceptance thereof, shall be deemed to constitute a formal contract between you and Mr & Mrs Russell to carry out the works as described in the aforesaid documents and this letter.

…."

As indicated there were annexed to the letter of intent lengthy lists of relevant emails from PSP and Ibex (including Tender Query Responses 1 to 11) and a schedule of "Ibex

Contract Comments" and PSP's Responses. On 7 July 2010, Ibex returned the signed letter of intent.

28. Progress on site was, on any view, poor. During the works, PSP produced monthly status reports. By December 2010, PSP was recording that Ibex had advised the project was 2 weeks behind programme. By January 2011, that was already 7 weeks behind. By June 2011, a revised Ibex programme showed a completion date of the end of September 2011, a delay of approximately 16 weeks; and in July 2011, that was revised to a completion date of 14 October 2011. By August 2011, that had gone out yet further to 16 March 2012.

29. During this time, no bond was in place and, on 3 September 2011, PSP informed the Russells that Ibex could not obtain a performance bond.

30. On 14 October 2011, Ibex issued a forecast final account of £2,558,673 (excluding loss and expense), which was more than £500,000 over the Contract Sum. Just over 2 months later, on 22 December 2011, Ibex gave notice that it was suspending work.

31. Thereafter, on 30 January 2012, PSP awarded Ibex an extension of time to 8 July 2011 (10 days late receipt of information/ design matters; 10 days inclement weather). On 30 January 2012, PSP issued a non-completion certificate. On 6 February 2012, Ibex finally withdrew from site. I note that no reliance is placed by either party on any issue as to whether Ibex was entitled to suspend work and/or terminate its contract. It is the simple fact that that is what they did.

32. At that point, the works were plainly incomplete and the Russells had no house. In the immediate aftermath of Ibex's departure, TMD came back into the picture with Mr Russell initially proposing that TMD should take over as project manager and PSP continue as quantity surveyor only.

33. However, on 11 May 2012, PSP terminated their engagement, they said, for non-payment of fees, and on 18 May 2012, the Russells indicated they would treat that as a repudiatory breach (which they accepted as terminating the engagement).

34. On 22 June 2012 Ibex entered insolvency. Taylor Wessing, the Russells' then solicitors, wrote on 4 July 2012. There is a discrete issue as to when and how the contract formed by the letter of intent was in fact terminated and I will address that later in this judgment.

35. Under the auspices of TMD, the completion of the project was put out to tender. That resulted, on 4 December 2012, in the appointment of a second or replacement contractor, Cameron Black.

36. The project proceeded with Cameron Black as main contractor until 7 January 2014 when Cameron Black sought to terminate their contract with the Russells. On 28 January 2014, Cameron Black went into administration.

37. Subsequently, in March 2014, and with no further tendering process, DF Keane were engaged, under a letter of intent, to complete the works. The completion date was 1 December 2014 but by that date the works were still not complete. In May 2015, DF Keane's engagement was terminated following a payment dispute and an unsuccessful

reference to adjudication by DF Keane. The works were eventually finished by individual tradesmen it would seem around 4 years after the original completion date.

38. There can be no doubt that from the Russells' point of view this was a project beset with difficulty and, as homeowners undertaking a very personal project, one can only sympathise with them over their experience. But that is not what this case is about. Rather it is about PSP's responsibility, and the extent of their responsibility, for what went wrong, and in particular what has been described in these proceedings as an "overspend" of nearly £1 million.

The engagement of PSP

39. As I have mentioned, there were on the pleadings, and are in the list of issues, a number of disputes as to precisely how and when PSP was engaged and on what terms as to fees. It was agreed, in the course of the closing submissions, that many of the issues identified were irrelevant and that the position could be summarised as follows. In early 2008, the Russells engaged PSP to carry out some cost assessment work. Subsequently they were retained as project manager, contract administrator and quantity surveyor. The precise date is unclear but does not matter. The parties have agreed the terms of the engagement (a point I shall return to below), the schedule of services (for PSP's roles as project manager and quantity surveyor) and the appointment as contract administrator to perform the function and services of a contract administrator under the JCT contract.

40. The relevant provisions of the Schedule of Services are set out in Annex 2.

41. To the extent that the terms of PSP's engagement remain in issue, these matters are relevant to the Russells' claim for repayment of fees and PSP's counterclaim and are dealt with last in this judgment.

42. There are some further and more general points, however, to be made about PSP's retainer and the expert evidence in this case.

43. Firstly, the claimants have placed a degree of reliance on PSP's initial letter of engagement dated 6 May 2008. In that letter, Mr Stone offered to :

"generally co-ordinate and control the project from cost planning and programming through the setting of a rigorous suite of full contract documentation. This covers the contract administration through the coordination of issue of completion paperwork…. At cost planning stage we highlight alternatives so that informed decisions can be made to optimise choices. At tender stage we prepare a comprehensive set of tender documents to achieve the best competitive tenders from contracts as well as advising the most appropriate contract method etc. to ensure the best result in terms of cost/time/quality. During the post contract period we monitor all aspects of the scheme and report regularly so that any changes can be fully appraised and the scheme can be properly controlled to avoid cost and time overrun… We read this role as releasing the administrative burden from the entire team rather than creating another tier of bureaucracy … Our philosophy is to "make it happen" – we offer a comprehensive service that dovetails with our clients and helps push schemes forward."

44. On behalf of the claimants, Ms Jones submitted that these were representations that PSP could manage everything (including dealing with/coordinating the team) and that it was

unattractive for PSP to seek to limit the scope of its responsibility by reference to a narrow interpretation of the schedule of services.

45. It is obvious that PSP were "selling themselves" in this early letter which did precede their initial engagement but it does not change the scope of what PSP contracted to do. The Russells' perception, if it departed from the contractual position, is immaterial; the "make it happen" approach does not, for example, change the fact that CLA, as architects, remained the lead consultant as set out in their own terms of engagement and confirmed at project meeting no. 1 on 11 July 2007, before PSP were even involved. The expression that the project manager is the "guardian of the client's interests" was coined by Mr Greenwell and not departed from by Mr Strutt who accepted that part of the role was to safeguard the client's interests. It captures the nature of the role but it is a descriptive expression and not a definition of a contractual service to be performed. More to the point, and as I will consider in this judgment, it does not seem to me that PSP's case does involve relying on a restrictive interpretation of the Schedule of Services. Rather the nature of PSP's case, in part at least, is that they did not contract on a basis that would make them liable for anything that went wrong without consideration of whether they had discharged their duties with reasonable care and skill. That is what needs to be considered in this case without hyperbole.

46. There is no issue that there were, in fact, three roles that PSP undertook to perform: project manager, quantity surveyor, and contract administrator. So far as the expert evidence was concerned, the experts sought to agree a division between what fell under each role and was to be the subject of a particular scope of expert evidence. There was then criticism of the defendants' case from the claimants because, they said, the experts called by the defendants did not include an expert in contract administration and the only relevant evidence was a portion of the evidence of Mr Strutt addressing PSP's role in monitoring work and the discrete claim made in that respect.

47. In my view, PSP's role should be considered more as a whole and a rigid division of tasks (and by the same token expert evidence) amongst these roles was and is unhelpful. The "contract administrator" is not a distinct profession or expertise. It is a role played under standard form contracts which may be discharged by someone with the qualifications of an architect, engineer or quantity surveyor or indeed others. Mr Strutt's evidence, which I accept, was that the roles of project manager and contractor administrator could not be rigidly distinguished: the role of contract administrator was not a separate discipline and, when the project manager undertook the role of the contract administrator, the latter role was, in practice if not contractually, subsumed by the project manager role.

48. In any case, the only respects in which there were breaches pleaded of the contract administrator duties (although not specifically pleaded as being breaches of those duties) were in respect of the alleged failure properly to value the works carried out by Ibex and in respect of monitoring of the works carried out by Ibex. Mr Orr gave evidence on the former and that was well within his expertise and both Mr Strutt and Mr Orr gave evidence on the latter (also within their expertise).

The tender process

The pleaded case and the list of issues

49. Without quoting at length from the pleaded case, it seems to me necessary to give some description of how the allegations of breach are pleaded and then drawn together in the list of issues and similarly how the alleged loss and damage is pleaded and reflected in the list of issues. That is, firstly, because, as I consider further below, there are some particular features of the way in which the Russells' case is put that can only be understood against this background and secondly because the expert evidence adduced in support of this claim did not, in the event and in my judgment, support the pleaded case.

50. The Particulars of Breach are set out at paragraph 27 of the Particulars of Claim. They run to 13 sub-paragraphs with numerous sub-sub-paragraphs. So far as the tender process is concerned, the pleaded case was that PSP "failed properly to manage and/or advise on the tender process." That allegation of breach was repeated in the list of issues: issue 6 relates to PSP's "failure properly to manage and/or advise on the tender process" that led to the appointment of Ibex and the sub-paragraphs a. to m. are specific instances of the alleged negligent conduct or management of that process.

51. Importantly, this case was advanced on the basis that there was a single breach. What that meant was that, in order to find PSP negligent, I would not need to find that they were negligent in each of the pleaded respects but equally, a finding that they were negligent in one pleaded respect, might not be sufficient to make a finding that the management of the tender process as a whole was negligent. The mere identification of some "failing" is not sufficient for a finding that PSP failed to exercise reasonable care and skill but, in the way in which the claimants' case was expressed, cumulative failings might lead to that conclusion. Nothing in that, however, changes the essential test to be applied. I can do no better than quote Ms McCafferty QC's written submissions:

"The burden is on the Claimants to prove that PSP's advice about the tender and the management of the tender process in the circumstances at the material time fell below the standard of a reasonably competent quantity surveyor, project manager, and contract administrator, causing them to suffer the loss claimed."

52. On the claimants' case, however, and as set out above, whether some act or omission of PSP is negligent is not a question to be asked in isolation from other conduct. That creates a potentially complex factual matrix and an impressionistic task for the court. It also means that this is not a case in which there is or is alleged to be a simple linear relationship between a discrete breach and a discrete loss but, rather that the matters which cumulatively are alleged to have amounted to negligence caused the losses claimed. Further, and to add to the complexity, in the way in which the allegations were framed, there was a mix of allegations, on the one hand, that PSP caused the tenders (and in particular Ibex's tender) to be too low and, on the other hand, that PSP failed to advise the Russells that Ibex's tender was too low and/or as to the extent of risk in Ibex's tender. The latter was far more the focus of the trial. In addition, a number of the allegations made seemed to go to the ability of PSP or others to manage the project after the tender stage.

53. So far as issue no. 6 is concerned, the consequent issues as to causation and loss are those in issue nos. 7 and 14:

[7] If the Russells prove breach under paragraph 6 above: but for that breach, would the Russells have postponed the appointment of Ibex, or chosen not to embark upon the project?
[14]Did the alleged breaches at paragraph 6 above cause the Russells to spend more than they ought to have done to complete the Project as detailed at paragraphs 38 to 40 of the Amended Particulars of Claim.

54. The way that case had been pleaded was this:
"Had PSP not breached the PSP Appointment and/or been negligent in the respects set out above, then the Russells would have had the opportunity, and would have taken the opportunity, to postpone the appointment of Ibex until a proper and thorough review had taken place, following which negotiation with either Ibex or others could and would have been undertaken or the Russells would not have embarked on the project." (paragraph 27.14)

55. Then, at paragraphs 38 and 39:
"By reason of the premature appointment of Ibex, the Russells have had to spend significantly more than they ought to have done to complete the Project. For the avoidance of doubt, the Russells accept that PSP is not responsible for each and every overspend on the project, but only for those losses that were caused by PSP.

Accordingly, in order to give PSP the benefit of the doubt where appropriate, the Russells have adjusted the Ibex tender to ascertain what would have been a reasonable price for carrying out the Project and only claim the loss incurred in excess of that sum."

56. The calculation that followed took the Ibex contract sum of £2,098,644.34 and added to it amounts for additional preliminaries (on the basis of a longer contract duration), a sum for M&E works and a sum for Site Works. The Russells took the sums paid to Ibex plus those apparently paid or agreed to be paid to Cameron Black and adjusted that total by taking out variations, the cost of rectifying defects, betterment, items not within the Ibex tender and provisional sums. The difference between the two gave the amount claimed. This calculation which came from Mr Somerset is considered further below.

57. The Russells further explained in opening submissions that this calculation was "*premised on the basis that Ibex's price was too low and its programme too short, but that Cameron Black's price was more likely to be reasonable. The Russells have compared the Ibex contract sum (plus variations in the usual way) against what they really needed to spend to complete the works (ie the Cameron Black price) and have used the figure obtained to crystallise their loss*." Importantly again this was a single loss caused by a single breach.

The law

58. It is not in dispute that it is open to the claimants to advance a case in the way in which I have set out above but it is inevitably a difficult case to prove particularly when it comes to the issues of causation. PSP relied on the decision of His Honour Judge Stephen Davies in *William Clark Partnership Ltd v Dock St PCT Ltd* [2015] EWHC 2923 (TCC). That case concerned a claim by an employer against his quantity surveyor in respect of cost overruns. The case differs from the present case because the works were completed by the same contractor and it appears that it was the "cost overrun" paid (as part of the settlement of the final account) that was claimed. It further differed because the claim in

respect of the construction phase was put squarely on the basis that the acts or omissions of the quantity surveyor had caused the project to cost more and that is not how the case is put here.

59. Nonetheless, the judge's observations about the evidential difficulties faced on a claim that a professional adviser is responsible for cost overruns are apt and I quote and adopt them. At paragraph 6.10 of the judgment, His Honour Judge Davies observed: "*…establishing causation in construction related professional negligence claims against design professionals such as quantity surveyors and project managers is notoriously difficult precisely because of the difficulty in showing how things would have turned out differently even if the professional had not acted negligently.*"

60. The Judge at [6.12] criticised both quantity surveying experts for their failure to carry out any kind of detailed exercise to compare the original contract sum with the final outturn cost and explain the difference, an exercise which he considered ought to have been carried out. He held at [6.15] that it was for the employer to:

"*…demonstrate on the balance of probabilities that the project, if properly run by [the QS], would have resulted in a lower outturn, and what that would have been. The obvious starting point is to consider [the contractor's] final account of £8.109M, identify the principal reasons for the principal cost increases, and demonstrate why [the QS] bears responsibility for some or all of them.*"

61. Given the inferences that I was invited to draw, as I discuss later, Ms McCafferty QC also placed particular importance on the Judge's observation at [6.17] that "*This is not a straightforward case where the court can simply infer causation from evidence of breach, evidence of loss, and evidence that the loss is of a kind likely to have resulted from that breach*". She submitted that in a case such as that before His Honour Judge Davies and before me, even if there is any finding of negligence, where there were multiple competing and overlapping potential causes of costs increases, it is vital that causation is proved, not inferred. In my view that goes too far. The drawing of inferences from the evidence before the court is a proper exercise for the judge to undertake both as to negligence and causation but what the decision in the *William Clark* case emphasises, rightly in my view, is that in this sort of case that is not a straightforward exercise and that causation of loss does not follow from a finding of negligence without more.

The expert evidence on the management of the tender process

62. I shall address the discrete particulars of breach below but I start with a broad overview of the expert evidence adduced by the Russells in support of these allegations. That was the evidence of Mr Greenwell and I have already said something, in general terms, about my assessment of his evidence.

63. He was a replacement expert appointed in January 2018. The pleaded case (which was not amended after his appointment) was not, therefore, based on advice from him as to the respects in which PSP had allegedly failed to exercise reasonable care and skill in their project management role. An issue arose in inter-solicitor correspondence as to whether the claimants' claim had been pleaded with the benefit of expert evidence at all. As their solicitors, Elborne Mitchell, explained in that correspondence, the claimants had originally intended to instruct a Mr Peter Hopson but had changed their minds before he was "formally appointed" (by which I assume was meant appointed to give expert evidence in this case). Mr Hopson had, however, produced a report in August 2016

which was very properly disclosed. That would seem to have been the report available to the claimants at the time proceedings were commenced. In the interests of transparency, as they said, Elborne Mitchell also recorded openly that the claimants had for a period of time intended to instruct another expert, a Mr Vosser, but decided not to proceed with his engagement (it appears because he was the subject of adverse comment by Coulson J (as he then was) in another case). His draft report dated June 2017 was also disclosed.

64. The first intimation (albeit a rather opaque one) of a substantial part of what was to come from Mr Greenwell's evidence appeared in the Joint Statement of the Experts (Greenwell and Strutt). These experts agreed that PSP had no design development role but Mr Greenwell's view (relying on clauses 4.8, 2.1, 2.6 and 3.3 of the Schedule of Services) was that *"PSP had a role to ensure, insofar as was reasonable, that the design requirements of the project were allocated within the team, that the team included the appropriate skills, and that, once allocated, those design obligations were fulfilled."*

65. In his report in April 2018, Mr Greenwell then addressed the allegation that PSP as project manager "failed properly to manage the design team"**.** He described that as the pleaded allegation but it is not what paragraph 27 of the Particulars of Claim expressly alleged and the particulars of breach in the following sub-paragraphs did not reflect an allegation that PSP failed properly to manage the design team. Nor is this the allegation captured in the list of issues. The claimants accept that it was and is unpleaded.

66. Having set the position up in this way, Mr Greenwell then proceeded to examine the allocation of design responsibility on the project and created "a Responsibility Matrix". In cross-examination, he sought to justify this approach by saying that it was these alleged failings in allocation of design responsibility that had led to or underlay the failure properly to manage and advise on the tender process. His report itself, therefore, set out no causal connection between these alleged failings and the matters actually pleaded under the paragraph 27 umbrella.

67. The point that this case was not pleaded is not a technical one and, indeed, the case now advanced was fully addressed at trial and is considered below. However, by the time of Mr Greenwell's appointment, the claimants had already been advised by 2 experts and their reports have been disclosed. Neither of them made the criticisms Mr Greenwell makes about allocation of design responsibility. Secondly, Mr Greenwell's approach makes it all the more difficult to discern what the claimants' case is both as to the potential significance of any alleged failing on the part of PSP and how the alleged breaches caused them to suffer the loss calculated as set out above. Mr Greenwell was unable to identify any example in which the alleged failure properly or clearly to allocate design responsibility had caused any loss at all and, as will be seen, the case came down to one about advice on risks which had not materialised.

Design responsibility and the tender

68. In any case, Mr Greenwell's primary point about the allocation of design responsibility turned out to be completely misconceived. Although it may seem to take matters out of order, and to depart from the pleadings, I will, therefore deal with this first.

69. The contract was intended to be made on the JCT Standard Building Contract without quantities, 2009 edition. The tenth recital referred to the Employer's Requirements as the requirements for the design and construction of the Contractor's Designed Portion, even though there was no CDP. The Employer's Requirements had been issued with the

tender (as part of Preliminaries) and, in fact, covered more general requirements such as the quality of materials.

70. In his report, Mr Greenwell identified what he portrayed as confusion in the allocation of design responsibility. A significant element of that confusion arose, he said, from the inclusion of clause A11 in the Employer's Requirements. A11 was headed TENDER AND CONTRACT DRAWINGS and clauses A11:110 and A11:120 then provided:

> *"110* ***THE TENDER DRAWINGS:*** *as listed in appendix B of the Employer's requirements*
> *120* ***THE CONTRACT DRAWINGS:*** *will be the same as the Tender drawings."*

Clause A11:130 provided for the Contractor to prepare all drawings required for the design, construction and installation of the works and the following clauses referred to builderswork drawings, working drawings, co-ordination drawings and manufacturers' drawings.

71. As the argument was developed in his report, Mr Greenwell recognised that there was no Contractor's Designed Portion, that clause A11 nonetheless appeared to impose design responsibility on Ibex, but that the response to Ibex's tender query and the schedule appended by Ibex to the letter of intent, made it clear that Ibex had no design responsibility. He then leapt to the conclusion that "*the design team was assembled with the expectation that Ibex would carry the construction, coordination and working drawing production obligations*" whereas Ibex had set out clearly that it intended to do no such thing. So he further concluded that that created a gap on the "design responsibility matrix". He continued:

> *"It follows therefore that PSP should have noted and raised this emerging responsibility gap and taken steps to either:*
> *a Amend the consultant's scope of work to make up the design responsibility or*
> *b Revert to Ibex to increase the Ibex design contributed*
> *c To have arranged a coordinated combination of a and b."*

72. In fact the inclusion of A11 in the Employer's Requirements was an error and, the matter having been raised in Mr Greenwell's report (for the first time), that was explained in PSP's Opening Submissions:

(i) The intention had always been to have a contract based on the employer's design and not a design and build contract. The claimants were well aware of that and the consultants' appointments were all made on that basis. However, PSP included a clause (A11) from a design and build contract in the tender. That was a copying error. Everyone makes mistakes and it is not and could not have been suggested that that was a negligent mistake.

(ii) The mistake was quickly corrected. As Mr Greenwell had noted, Ibex raised a tender query [*"Can you please confirm if there are any work elements which are to [be] Contractor Designed"*] and PSP responded [*"There are no elements of contractor design included in the tendered scope of works"*]. However, he did not take account of Tender Query Response schedule no. 4 (dated 23 November 2009) by which PSP, consistently, replaced clause A11 with clauses A11:110 and A11:120 as above but no clause A11: 130.

(iii) That change was reiterated in the Letter of Intent sent to Ibex and dated 22 June 2010. That letter of intent identified the Contract Documents including the tender correspondence detailed in the attached schedule. That in turn referred to Tender Query Response no.4. The schedule of Ibex Contract Comments appended to the letter recorded Ibex's comment and PSP's response as follows:

"Prelims Section A11 calls for the contractor to take on a number of design & drawing responsibilities. Please note that we cannot accept & have not allowed for these.

Please see revised Preliminaries issued under Tender Query Response 4."

(iv) Mr Greenwell had also not taken account of that schedule. The document that he had referred to in his report was Ibex's statement without the response.

(v) Thus, and proving that everyone makes mistakes, Mr Greenwell did not notice that clause A11.130 had been queried and removed and he missed this point twice.

73. It was never the case, therefore, either that the design team was "assembled" on the basis that Ibex would take a level of design responsibility or that the other members of the design team were confused and thought that Ibex would have greater responsibility than they did or, indeed, that Ibex were confused. There never was any design responsibility gap and one did not emerge for PSP to note and action. Still less, and unsurprisingly, was there any evidence that this fictitious gap had ever caused a problem.

74. The point having been raised in PSP's Opening Submissions, Mr Greenwell produced a "Note on impact of identification of revised A11 upon P Greenwell Opinion" at the end of the first week of trial. In that Note he considered the effect of his mistake on his opinion. It was bizarre document. Despite the understandable explanation given by PSP, Mr Greenwell proceeded as if A11 had originally been included deliberately in the tender documents – and he appeared to consider it a sensible inclusion because it filled any gaps in the allocation of design responsibility. What he then criticised was what he repeatedly called its "revision" (which was, in fact, its complete deletion because it should not have been there in the first place) without due consideration of the impact on the allocation of design responsibility and/or advice to the clients as to the impact of the "revision". This was essentially the same point that he had made already when the obligations in A11 were not accepted by Ibex, namely that it created a gap in design responsibility. He still failed to recognise that that was not the case and his Note did not, therefore, advance his thesis at all.

75. Before this note had been produced and with regard to this case on design responsibility (which did not rest solely on clause A11), I raised in the course of opening submissions the question whether I would, in the course of the evidence, be taken to examples where the alleged gap in design responsibility had led to the design not being properly developed with that leading to consequent problems. I was told that I would see a lot of examples where the design was not properly developed, so as to cause problems, and where it was unclear why something had not been designed properly. I was told that there were many examples but I can say shortly that in the course of the trial there were not.

76. Subject to the limited further points addressed below, the matter very largely rested with A11 and Mr Greenwell's note. Mr Greenwell was unable to give a single example of the impact of the deletion of A11 or any so-called gap in design responsibility. Aside from the specific point about clause A11 this absence of evidence is material in a broader sense because the defendants submit that I could not possibly infer from the evidence that a gap in design responsibility was the cause of the difference between the two figures pleaded and on which the overspend case is based. I return to this below.

77. A further matter relied on by Mr Greenwell as creating a gap in design responsibility was clause B37 in the Electrical Specification prepared by Vector. It contained the following provisions:

"01 The tender drawings are design drawings only and must not be considered as working drawings.

02 The Building Services Contractor shall be responsible for preparing all working detail and fabrication drawings for the proper execution of the works. Note that the Contract may adopt the design drawings for this purpose, providing that the drawings become the responsibility of the contractor and are overstamped as such. The Contractor shall also add any relevant details such as required by this specification.

03 The Building Services Contractor(s) shall be responsible for the following final design elements:-

Cable, conduits and trunking route

Ceiling rose locations

Luminaire connection details

Fire alarm panel internal wiring

Support of all plant and equipment

All builderswork associated with the services installation

…"

There were further references to wiring and pipework and ductwork routes which it is not necessary to set out in full.

78. Mr Greenwell contended that this clause placed a degree of design responsibility on the contractor/M&E subcontractor:

(i) PSP's response was that this was to misunderstand the clause which simply reflected the fact that, in accordance with common practice the contractor would determine exactly where cable runs, for example, were to go and as the contractor carried out the work would annotate drawings to show the as built runs. That was Mr Stone's evidence and it was supported by Mr Strutt, whose evidence, given with a wealth of contracting experience, I generally prefer to that of Mr Greenwell. Mr Strutt explained that cable conduit routes and trunking routes would normally be for the contractor even where there was employer's design; so would ceiling rose

locations, for example, be a matter for the contractor, although in this case they were selected by CLA. A fire alarm panel was a specialist item which a contractor would select and wire in the most efficient way. He did not examine the entire list but the thrust of his evidence was clear, and he concluded:

"So as I say there's an element, even when you have … full employer's design where the contractor is involved even though the contractor will say, "We have no design responsibility", there are elements that they are involved in, and that's normal."

(ii) When Mr Greenwell was cross-examined on this issue, he accepted that what the contractor was to undertake was not "design". He disagreed with Mr Stone's evidence that the clause was concerned with the production of as built drawings and illustrated the point with a convoluted answer relating to the Lutron system which had never been mentioned before. It seems to me that on the face of the clause he is right that it is not about as built drawings but the clause still contemplates the marking up of existing drawings as working drawings and that is not design.

(iii) Again Mr Greenwell appeared to have overlooked that any possible design gap or confusion about design responsibility had been resolved at an early stage. At a pre-commencement meeting held on 1 July 2010, it was minuted that:

"VDC explained that further to their contract drawing, they would expect the M&E contractor to provide a set of working drawing (sic) to coordinate the services for (sic) approval by VDC. VDC confirmed that they retain the design responsibility for the M&E packages."

(iv) Mr Greenwell accepted both that Ibex had been clear that they took no design responsibility and that Vector had confirmed that they retained all design responsibility and further that the responsibility for design co-ordination lay with the design team and in particular CLA.

(v) Further, Mr Greenwell had not realised that there were, in the tender drawings, 29 builderswork drawings provided by Vector.

(vi) This was, therefore, again an instance where there was no "responsibility gap" and no evidence that anyone had ever thought differently. Against that background, it was again unsurprising that Mr Greenwell was not able to proffer a single example where the alleged gap had caused a problem. Some of Mr Greenwell's responses in cross-examination on this issue are instructive. As part of this answer about the Lutron system, he said this:

"So in this particular case, the responsibility or co-ordination, which we're saying is all down to the M&E contractor, is also for the AV system as well, and …. this is part of my challenge with trying to work out what it was that caused the problems we saw on this project, was that the issues, as a succession of issues, were grey at best and sometimes contradictory, and this is a very good example."

What was lacking in that response was any identification of "the problems we saw on this project" and whether they had anything to do with the so-called gap in

> design responsibility and Mr Greenwell was unable to get to the point of saying that they did. At the conclusion of this portion of evidence, I asked him specifically whether he had an actual example of an instance in which, on his interpretation of it, the presence of this clause in the tender caused a problem. His answer was "no" and that he would have "a terrible problem" providing it. He embarked on an example of a problem relied on in Ibex's first application for an extension of time to do with the co-ordination between a pump in a sump and the concrete for the relevant pile cap (which he then said was a bad example and accepted was to do with the late provision of information to the pump supplier). This had nothing to do with clause B37 and the end result of his evidence was agreement that he could not provide a single example of this clause causing a problem.

79. In fairness to the Russells, I should say that Ms Jones approached this issue in a rather different way, even, it seems to me, from Mr Greenwell. What she identified was that the Ibex tender included provisional sums for M&E design development from which it could be inferred that some design development was anticipated. These appeared as item U "Mechanical controls development ,…", item V "Mechanical works design development …" and item W "Electrical works design development …", in each case "as detailed in Vector Design's pricing breakdown". Further, Cameron Black's Contract Sum Analysis included for developing Vector's designs under a Contractor's Designed Portion and, it was submitted, since the specifications (for the M&E works) were the same, it followed that there needed to have been an equivalent CDP in the Ibex contract but there was not.

80. That does not follow. I repeat what I said above about B37. Ibex may have decided to include that work within a provisional sum and a different approach may have been taken when the Cameron Black contract was let. There is no evidence that Vector ever queried the absence of a CDP in the Ibex contract. Absent any factual evidence about why a CDP was included in the Cameron Black contract, I am not at all persuaded on the balance of probabilities, that it was because a gap in design responsibility (and one that had negligently been permitted in the Ibex contract) had been identified and filled.

81. As I have said, Mr Greenwell was unable to identify any actual problem that was caused on site or give any actual example of the impact of this provision (B37). Leaving to one side the point that such a clause is entirely unexceptional, one of the reasons he could identify no impact was that the project (under Ibex) never progressed as far as any substantial electrical work. The nature of the claimants' case must therefore be that an alleged inadequacy in the allocation of design responsibility in the tender documents in 2009 somehow caused an (unidentified) increase in the costs of the project when that project came to be completed by another contractor (Cameron Black) or would have been completed by that contractor – and despite the fact that, on the claimants' case, that gap had been filled in the Cameron Black contract. On its face that seems improbable. It is conceivable that there might be a particular factual scenario in which a causal connection of that nature could be shown but there has not been any attempt to establish such a causal connection here.

82. The only other matters that were raised in relation to Mr Greenwell's case on the gap in design responsibility related to piling; Chiswell, the swimming pool contractor; and Formes Alutek, the specialist aluminium windows contractor. The issue he had raised about piling fell away in cross-examination.

83. In Mr Greenwell's report so far as Chiswell were concerned, his point was that when the swimming pool was introduced, responsibility for general M&E design was unclear and although Chiswell did provide design information that was not within a CDP so that it was unclear who they were acting for. He also raised the issue of direct payments to Chiswell. This seems to me to be no more than an instance of a specialist sub-contractor carrying out design work (which may have raised co-ordination issues to be resolved by the lead consultant) and an issue as to contractual relationships. There is no evidence of any co-ordination issues. In the event of a defects claim in respect of the swimming pool, the contractual relationship might have merited some investigation. As it is, it is impossible to see what costs consequence it could have had.

84. So far as Formes Alutek is concerned, in his report, Mr Greenwell was concerned with the fact that direct payments had been made to Formes Alutek so that, he said, it was unclear whether they were providing a separate role as designer direct to the Russells or as sub-contractor to Ibex. He concluded that Formes Alutek had clearly provided design information (but not within a CDP) and that it was "also unclear what recourse the Russells would have in the event the design provided was found to be flawed."

85. By the trial, the issue about Formes Alutek appeared to have shifted. In Mr Greenwell's Note, he asserted that between tender and the start of the construction, "a number of issues became apparent around design responsibility" and he referred to Formes Alutek being the named supplier for the windows. He cross-referred to the part of his report I have referred to above. That did no more than suggest that there was some unspecified issue about design responsibility.

86. The Formes Alutek sub-contract with Ibex dated 17 March 2011 was made on the DOM/2 form, used where there is sub-contractor's design, and appeared to include design work. I note that this sub-contract was added to the trial bundle in the course of the trial. It was clearly not at the forefront of anyone's mind. The scope of the obligation it imposed was unclear and how it fitted with the role of the architects was, on the documentation and evidence at trial, equally unclear but, once again, there was no evidence of any actual problem that this had caused.

87. In cross-examination, Mr Greenwell then volunteered a series of wholly new points about the development of the Formes Alutek product and issues about the number of sliding panels. He asserted that this design had to be done by Formes Alutek and could not be done by CLA. Mr Strutt's response was that CLA were the window designers but it was entirely possible that they would have consulted Formes Alutek: *"So it doesn't strike me as being particularly unusual where the designer for the windows is the architect taking elements of design advice from a fabricator".* That is common sense and in no way evidences a gap in design responsibility or negligence on the part of PSP.

88. In oral closing submissions, Ms Jones then identified that Formes Alutek had featured in a claim for an extension of time made by Ibex dated 1 February 2012. In an e-mail to PSP sent on 30 January 2012, Ibex referred to Contract instruction no. 90 which it said gave a revised finishing specification. Ibex said that Formes Alutek had advised that they were unable to comply with that instruction until the time and cost were agreed and that the cost would be in the region of £30,000 including £27,000 for redundant material and £3,000 for the additional finishing. Ibex said that delay in the windows installation was the dominant delay and that the works had reached a complete standstill until the windows were delivered and installed. Ibex continued:

"This significant delay has come about due to the fact that you have chosen to control the procurement of the window package through the Contract Instruction process, the manufacture of the windows has been delayed due to a significant number of changes made by the Architect in the drawing production and approval process and the final delay has been due to the Employer not accepting the standard Formes Alutek finish resulting in the enhanced specification instructed under Contract Instruction no. 90."

The first point might have been a criticism of PSP but was not further explored, and the latter two points were matters for CLA or Formes Alutek as manufacturer, either in the specification of the finishing or its execution.

89. Mr Stone responded by e-mail the same day:

"Since there appears to be a significant amount of obfuscation here it may help if I briefly set out what we regard as the issue. At issue is the finish of the frames – their suitability and fitness for purpose. Formes are the window sub-contractor – that is not in dispute. They have produced extrusions which are anodised correctly. What they have not done is produce a window frame which has an acceptable finish on its adjacent sections. Your e-mail confirms that such a requirements can be met and indeed you have ascribed the costs of circa £3,000 to meeting that requirement.

To suggest that in a multi-million pound high end one off house the client should accept window frames which are patently and irrefutably non-matching (in an individual frame rather than one to another) but [when] that standard could have been achieved so easily is astonishing."

90. In the extension of time claim, Ibex then relied on what it referred to as the situation regarding the procurement of the Aluminium Windows and Doors which was a reference back to the issues raised in its e-mail.

91. That was relied on as a good, or even the best, example of where the failure to allocate design responsibility had caused a real problem. In fact, rather than being a good example, it was a vague assertion made late in the day and derived from the Ibex extension of time claim which on its face was principally about Formes Alutek's performance in manufacture, and possibly about CLA's specification, and had nothing to do with, and did not flow from, any alleged failure to allocate design responsibility.

92. I find it impossible to see how the fact that two sub-contractors may have been anticipated to and/or actually provided some element of design work in itself demonstrates that PSP was negligent as alleged in allocating design responsibility and managing the tender process. The claimants' case is that PSP must be regarded as having fallen short of the standard of reasonable care and skill because of the risk to which they were exposed in these circumstances but that simply does not hold water. As I have said, it all depends on the circumstances as a whole, and there is a dearth of evidence in this case that it rendered the tender documentation inadequate and/or resulted in a tender price that was too low and/or exposed the Russells to any risk of which they ought to have been advised.

93. I should add that, in Mr Greenwell's report, there was reference to other direct payments, for example, to an interior designer and AV contractor with the suggestion that these represented routes by which PSP sought to overcome "the consequences of the design matrix gap" through the addition of design costs to the Russells. These further instances

were not aired at trial or in submissions. In short, the design responsibility gap was not identified; the consequences were not identified; and there was no discrete claim for these costs.

94. Before I address the other issues of liability set out in the list of issues, it bears repeating that there is also a real difficulty with causation which, in my view, the claimants' case fails to grapple with. If there were evidence that the absence of some particular aspect of a developed design led to Ibex's tender being too low that would be one thing but that is not the case. If there were evidence that the absence of some element of design responsibility in the tender documentation had caused increased cost, that also might be another matter and an identifiable loss. If what had happened was that the examples relied upon of gaps in design had in fact resulted in some additional cost (which might otherwise have been avoided), the risk would have materialised and that would have provided evidence from which the court could have inferred that failing to plug the hole or allowing the project to go out to tender with the hole in it was negligent. As I have already said, this was the issue I raised at the start of the trial and on which I received a clear indication that this was the sort of evidence that I would hear, but I did not. The logic of the claimants' case on allocation of design responsibility and the stage of design development reached (the subject of a further issue) is that the project ought not to have been put out to tender at this point at all but only after further work including design work had been carried out. The claimants have no real case as to what would have happened then. There is no case as to the impact that would have had on the tender beyond the general proposition that somehow Cameron Black's tender is indicative of a reasonable figure. This is an extraordinary leap of logic.

95. Thus in my judgment, the allegation of failure to allocate design responsibility (even if open to the claimants) fails. There was no such failure, let alone a negligent one. Given the focus of the expert evidence on this issue as the primary failure properly to manage the tender process, it might be thought that that conclusion is sufficient to dispose of the claim in its entirety but that would ignore the way in which the case was in fact pleaded and I turn to that next.

Issue 6 a to f

96. Issues a to c involve criticism of the extent to which the tender documentation was developed at the time it was put out to tender. I have already alluded to and will deal in more detail with the causation issues that arise below but the direct consequence contended for by the claimants is that the tender submitted by Ibex was too low and/or that it exposed them to too great a risk of increased cost. Issues d to f focus on the adequacy of information within the tender sum and the tender sum analysis and the consequences for financial management including but not limited to the pricing of variations. To put these issues in context, I repeat a little of the background to this project.

97. The property on the 36 Millfield Lane site which the Russells bought and lived in was a linear property of brick construction and their original plan was a substantial refurbishment of that property which changed to the plan to rebuild. The professional team they engaged were CLA, TDM and Gleeds. Mr Russell liked to work with people he had personal experience of or who came on a personal recommendation and that was the case for each of these firms. This team produced various designs and costs estimates.

98. There came a time when Mr Russell decided to dispense with the services of both TDM and Gleeds because he was not satisfied that they were right for, or "up for" as he put it,

the project. The details are immaterial but it is clear, as I have indicated above, that Mr Russell was able to exercise his own judgment about their performance. The claimants continued to engage CLA because they liked their "evolutionary" and collaborative approach.

99. Around the same time, PSP were brought in exercise control over costs. Mrs Russell said that the Russells regarded CLA as an unusual and slightly "rogue" practice and wanted PSP to rein them in. PSP's appointment was on the basis of a personal recommendation from a Mr Blair who, apparently, told Mr Russell that Mr Stone was like a Rottweiler with contractors - that is not a standard of performance to which Mr Stone could be held but it gives the flavour of the Russells' expectations of PSP and goes some way to explain why they hold them responsible for what they perceive to be costs overruns.

100. The scheme as it was at the time of cost plan no 4 was put out to tender and tenders returned within range of the cost plan.

101. The project was formally put out to tender, that is, with the intention that a contractor would be engaged rather than for testing the waters shortly after cost plan 8 was produced.

102. There was some suggestion in Mr Greenwell's report that the short time (3 days) between the production of cost plan no. 8 (which was itself £300k greater than the previous cost plan) and going out to tender was itself an example of poor project management. This was, to my mind and on the contrary, another example of Mr Greenwell trying to pick holes in PSP's performance to no good end. This allegation was not pleaded. It did not reflect the realities of the situation: without setting out the detail, the invitations to tender came at the end of a lengthy process which included a number of meetings involving the Russells through June to October 2009 which were themselves covered by Mr Russell's evidence. Mr Greenwell accepted that the Russells were fully aware of what was going on. In any case, any failing on the part of PSP (which I do not consider there was) would have had no consequences. It is not part of the Russells' case that, if they had had more time to consider cost plan 8, they would have done anything differently.

103. Although two of the tenders were in significantly greater sums than cost plan 8, two of the tenders were within reasonable sight of the cost plan (both above and below). Mr Greenwell, in cross-examination, agreed that both Ibex and Charter's tenders were very close to the cost plan number. It was not his evidence that it was wrong to appoint Ibex but rather that it exposed the Russells to a series of risks which needed to be managed. I observe again that, in that case, I might have expected to see evidence both that those risks materialised and that they had a financial impact but I did not. Nor did Mr Somerset advance the proposition that it was in principle wrong, and negligently so, to appoint the lowest tenderer and he agreed both that Cameron Black had been the lowest tenderer when appointed and that DF Keane had been appointed without any tendering process at all. The mere fact that the Ibex tender was lower than the estimate in cost plan 8 was, in the result, no evidence of any lack of care and skill on PSP's part at all.

104. Once that point is dismissed, whether the tender design was sufficiently advanced in terms of design or to enable adequate pricing is principally a matter for expert evidence (which must be expert evidence that identifies real inadequacies and does not merely seek to infer them) but there are a number of factual matters that are also relevant. Firstly, not

one member of the professional team had any reservations about embarking on the tendering process with the design as it was. Secondly, no tenderer expressed concern that they could not tender on a proper basis with the information provided. On the contrary, there appears to have been a commonplace process of requests for tender clarifications and responses to those requests. Lastly, the return of a mixed bag of tenders some of which were significantly different from the costs plan does not appear to have caused the professional team any concern and that is entirely understandable. A judge of this court is, I think, entitled to say from experience that that too is commonplace.

Issue 6a

105. So far as issue 6a and design development is concerned, it was the position, clear to the claimants themselves, that there was further design work to be done. Mr Russell in his evidence indicated that in his mind there was a difference between design and specification. Any such distinction does not, I think, matter for present purposes. What was clear was that there were items covered by Provisional Sums where the design and/or specification was to be developed further but it was anticipated that there was time to do this. This last point overlaps with the issues about the inclusion of Provisional Sums and I will return to it below. There were also items including furniture, fittings and equipment (FF&E) and the kitchen that were outwith the contract to allow design decisions to be taken.

106. So far as this sub-issue is concerned, it is also instructive to look at how this case was put by the claimants. The case was put by reference to the standard RIBA stages including stage E (Technical Design), Stage F (Production Information) and Stage G (Tender Information). Stage G is more fully described as "Preparation and/or collation of tender documentation <u>in sufficient detail</u> to enable a tender or tenders to be obtained for the project" (my emphasis).

107. Mr Strutt made the important point that these stages are not discrete and do not follow neatly with one stage complete before another starts. Rather, at any point during the design and tender stages, a project is likely to be at different stages of development in different respects. His report included a table in which, having reviewed the tender drawings and specifications, he identified the stages reached on various design items: structural, M&E, general arrangements and buildersworks were largely at stage F; design layouts and interiors were at stage D/E as were other finishes items. He concluded that "the drawings provided are sufficient for tender at RIBA Stage E overall."

108. In the first place, therefore, the claimants submitted that where a contract with employer's design is let at stage E, the employer will need to complete the design with, as it was put, "the concomitant risk of an adverse impact on the contract price." As I understand it, I was invited to find that it followed from that alone that the tender documentation was insufficiently advanced and that PSP had been negligent in putting the project out to tender at that stage. But that is a wholly generalised case and, as so often, it all depends. It is not the case that a rigid assessment of whether a particular RIBA stage has been reached or completed, or a determination that it has not, necessarily leads to a finding of negligence. Mr Strutt considered that the level of detail was sufficient for tender purposes and I accept that evidence. Mr Orr took the same view. Mr Greenwell also appeared to accept that stage F was acceptable (and that was the stage for a substantial part of the design). His real complaint was the design responsibility gap the complaints about which I have already dismissed.

109. Unless particular aspects of design were identified that carried such a risk (because they were insufficiently developed at tender stage) and there was evidence that those risks ought to have been identified by PSP, it cannot be said that PSP had failed to exercise reasonable care and skill. Perhaps recognising that difficulty (and the nub of Mr Greenwell's evidence), the claimants' case went further and relied on the alleged lack of clarity in design responsibility as exacerbating the risk and the alleged negligence. As a result, in submissions, Ms Jones considered the issue of the allocation of design responsibility under the heading of this sub-issue and that rather demonstrated the difficulty with the claimants' case.

110. There was, therefore, in my judgment, no evidence that the tender documentation was insufficiently advanced for a contract with employer design.

Issue 6b

111. So far as issue 6(b) is concerned, it had seemed to me that the principal evidence on which the claimants relied for the allegation that the tender documentation was insufficiently developed to allow Ibex to return an accurate tender price was the assertion that the tender was too low and I have addressed this above. Having said that, and in the event, the claimants approached this issue rather differently and I take the issues that they relied on next.

112. I should observe at the start that there were in Mr Greenwell's report a number of allegations in this respect:

    (i) One was the absence of builderswork drawings but he conceded that CLA had in fact produced such drawings.

    (ii) Another was the absence of schematic drawings and schedules in the versions of the Vector and Walsh specifications that Mr Greenwell had reviewed. In cross examination, he conceded that he had not seen the tender issue versions, saying that he had not found the full tender package when he wrote his report. He had no opinion to express on the specifications themselves; he had not considered the drawings actually forming part of tender package; and he could give not relevant evidence on their sufficiency.

113. The first issue left, as set out in the joint statement, was whether there should have been an <u>overall</u> specification for the building works. There is, of course, a standard National Building Specification which can easily be incorporated into tender documentation by reference. On the face of it, it might have appeared if that had been done, the claimants' case would have fallen away. In any event, as Mr Somerset accepted in cross-examination there is no standard practice (departure from which could in itself be negligent) of incorporating that specification.

114. So far as the tender documents were concerned:

    (i) There were specifications for certain aspects of the work (M&E and structural works) and no criticism is now made of those by the claimants for the reasons already explained. Further, Mr Somerset was, in cross-examination, taken through a sample NBS and agreed Sections E, F and G were covered in Walsh's specification which was sufficient.

(ii) Walsh's specification also covered drainage (section R in the NBS specification).

(iii) There was a provisional sum for landscaping (Section Q in the NBS specification). The claimants make a discrete complaint about this provisional sum but that is not material to the specification issue.

(iv) PSP then submits that, for the remaining sections, it can be seen by comparison with the Employer's Requirements prepared by CLA that the items were covered. It is not necessary for me to undertake a precise analysis of this issue. What the evidence makes clear is that a broad brush allegation that there was no specification is wrong and an allegation that the National Building Specification was negligently not incorporated is too generalised to be valid.

115. Mr Somerset's position, in summary, was that on a contract where the clients required a high standard of finish, there needed to be a properly detailed specification not least so that all tenderers specified for the same standards. In isolation that is a reasonable statement and might lead to the conclusion that the failure to include such a specification was at least an omission capable of falling below the standard of reasonable care and skill but it is, once again, a wholly generalised statement.

116. What Mr Somerset's evidence was then more particularly concerned with was the specification of standards – what that meant was in itself unclear. It appeared to relate to British Standards but his evidence did not extend to identifying what the specification ought to have included but did not include.

117. To the extent that he meant standards of finishes, that is inconsistent with the position that the Russells well knew that they would be selecting finishes as the project proceeded and were aware of the inclusion of provisional sums in part at least to take account of such matters. It is further inconsistent with Mr Somerset's acceptance that including provisional sums for matters such as fixtures and fittings is reasonable. There was some criticism in Mr Somerset's report of a lack of reference to preferred suppliers. In fact, CLA's tender issue door and ironmongery schedule, finishes schedule and sanitaryware schedule (which run to over 25 sheets on a room by room basis) all contain numerous references to recommended suppliers and manufacturers and, in some cases, specify products. Vector and Walsh's specifications also specify preferred suppliers.

118. It seems, therefore, to be the claimants' case that they ought to have been advised not to proceed in this way with this level of specification (in the absence of a single overall specification and/or the incorporation of the National Building Specification) and that it was negligent for PSP not to give that advice. That is unrealistic and unsustainable.

119. A further element of this case, as put by the claimants in submissions, was that because there was no specification there was no clarity as to exactly what the Russells were purchasing and that this meant that subsequently controlling the price/ any applications for variations became impossible. That takes in or overlaps with sub-issues e and f. Other than the two instances that were relied on and are considered below, there was not a shred of evidence to support this proposition and no example of when the absence of the specification of a standard or anything else led to an increase in Ibex's Contract Sum or made it impossible properly to identify and price a variation. That is not only an issue going to causation: it demonstrates the lack of merit in the case that the omission of an overall specification was negligent.

120. The two particular instances that were addressed at trial were chimney pots and landscaping. As Mr Orr said, the chimney pots were an extremely low value item. the point the claimants made was that the chimney stack was to be brickwork but there was no further specification of materials (such as facing materials) to be used. If that could ever have caused a problem as to cost of materials, it could hardly have been said to have been a negligent omission by CLA or negligent of PSP not to plug the hole.

121. The argument about landscaping works arose in this way. Cost plan 8 included a sum of £128k for site works including landscaping. Ibex's tender included only £49k and there was an adjustment made by PSP for both site works and soft landscaping. Charter allowed a provisional sum of £80k and said that they did not have sufficient information to price. That was characterised as the tenderers "struggling" to price these works and put to Mr Orr that PSP should have advised the Russells of this so that they could decide what to do. The description of the tenderers as struggling is emotive and overstated. Mr Orr's response was:

"… This is after the tenders have been received. As we went through all of the tenders, every contractor to a greater or lesser extent has priced the landscaping and Charter in fact being the one who have, if you like, taken a different view from the other three by providing a provisional sum for everything. They had the opportunity during the tendering period to ask questions if they weren't clear. But each of them took a slightly different approach but other than Charter generally the same approach of putting in a mixture of prices for individual items plus provisional sums."

122. In February 2010, PSP produced a schedule giving a figure for site works of £139k. The document stated that the previous allowances amounted to about £88k and that the additional costs were just over £50k. I note that £25,872 was included for a timber clad retaining wall. It was put to Mr Orr that PSP ought to have advised the Russells of such an increase. His response was that he assumed that the design was developing in discussion with the Russells and that they would have been aware that if they asked for more they would have to pay for it. It is right that involved assumption but it was also Mr Russell's evidence that, after the tenders were returned, they were working to get the landscape design completed because it was anticipated that that would be a condition of the grant of further planning permission. It seems to me that what was happening was anticipated development of the landscape design that in no sense evidences an inadequacy in the tender documentation. The cost would be dealt with as part of the design process and the suggestion that an increase in the cost of landscaping would have had any impact on the Russells proceeding with the project or not is fanciful.

Issue 6c

123. There was a particular criticism of the tender documentation for including too many provisional sums and this forms the subject matter of sub-issue 6c. The nature of the criticism was that the inclusion of provisional sums did not sufficiently fix the tender or contract price; exposed the Russells to the risk of increased costs; and did not enable them to make an informed decision about the tender and/or the project. However, Mr Somerset conceded in the experts' joint statement that the level of provisional sums in the tender was reasonable.

124. As a matter of fact, even though he may have had no prior knowledge, Mr Russell came to understand what a Provisional Sum was and why Provisional Sums might be included

in a construction contract. His witness statement implied that he did not know what provisional sums were but, in his oral evidence, he placed the emphasis on the fact that Mr Stone had not told him what a Provisional Sum was but accepted that he, in fact, knew.

125. In the written closing submissions on behalf of the Russells, Ms Jones submitted that the Russells' position on this issue had developed from the pleaded case and was now:

(i) that although the level of provisional sums was reasonable at tender stage, by the time Ibex started works they were too high.

(ii) In addition, the PSP tender report did not separate out provisional sums and so the client could not identify where the risk factors were.

The emphasis was, therefore, now on what was characterised as a significant increase in the level (that is the number) of provisional sums at a later stage and on their identification. This shift reflected Mr Somerset's evidence following his earlier concession.

126. In his report Mr Somerset described the level of provisional sums as a high risk matter that ought to have caused PSP to advise the postponing of Ibex's appointment. His oral evidence was far less trenchant. He accepted that the use of provisional sums was a reasonable approach and that many were low value but said that they ought to be looked at in the context of the contract as a whole and he expressed concern that the work within them would need to be instructed promptly to avoid delay. He also accepted that he could identify no instance in which the use of a provisional sum had caused an increase in cost. This is hardly sufficient to establish negligence.

127. The claimants, therefore, sought to rely on the alleged concession of Mr Orr that, in principle, the Russells ought to have been advised about a significant increase in the number of provisional sums and his acceptance under cross-examination that they ought to have been advised about the increase in fact. That, I think, somewhat overstates the effect of Mr Orr's evidence. He pointed out that of an increase of £150k in provisional sums, £85k was accounted for by the pool and the M&E works to the basement. As to the balance, there was then this exchange:

"A: One would assume that in the six months between January and July that PSP and the Russells did actually talk to one another about what design development was going on and what adjustments would have to be made.

Q: You make that assumption and obviously it's a matter of fact for the judge in due course?

A: Yes

Q: Assume they weren't told that that provisional sums were going up outside of the pool, they should have been told shouldn't they?

A: If you make that assumption, then, you know, yes, you could say that. I think it's an assumption that would probably not be borne out in practice."

What Mr Orr did not, therefore, deal with, because it was a question of fact, was what the Russells had been told and there is no evidence about this on which I could conclude that they were somehow kept in the dark.

128. The increase in the level of provisional sums as a product of the addition of the basement and pool was part of the anticipated design development and there is no criticism of PSP in this respect. A summary of the total cost was set out in an e-mail to the Russells sent on 9 June 2010 together with a breakdown of cost. This showed a total measured work cost of approximately £2.3 million (derived from Ibex's original tender and Ibex's figure for the basement pool works together with an adjustment of provisional sums to £222k) and identified additional cost (including soft landscaping, top soil and a retaining wall) described as "not included in budget estimate or Ibex's current offer".

129. Taking these points together, I can see no basis on which it can be said that PSP negligently failed to manage or advise on the tender process such that the level of provisional sums was too high (which is the pleaded case) and there is insufficient evidence that there was an unreasonable increase in the number of provisional sums which was either to be laid at the door of PSP or in respect of which they ought to have issued some warning. In any event, in the period before the letter of intent was issued, the Russells were kept properly informed of costs estimates. In so far as the case had shifted to a complaint about the identification of those provisional sums in the tender report, there was no cogent evidence that that was negligent.

130. In any case, there is no evidence that the inclusion of provisional sums caused any difficulty or any costs "overspend" on the project.

Issue 6d

131. Sub-issue 6d concerns Ibex's Tender Sum Analysis which, in common with that of other tenderers, used the word "included" to indicate where works were included in an overall figure. It is simplest to set out the Russells' case on this sub-issue by reference to Ms Jones' written closing submissions: *"This is a similar issue to others: the Russells will say that it is necessary for a Tender Sum Analysis to be clear in order that one knows that is covered, and how to value variations in due course. The item also includes the desirability (on the Russells' case) for a schedule of rates ….. The point of principle that divides the experts is whether or not, as a reasonably competent quantity surveyor, PSP should have taken more steps to protect the Russells from inadequacies in the pricing that could lead to uncertainty and therefore claims to variations."*

132. That is a brief and helpful summary of the point and the issue between the experts but it also illustrates how this point adds nothing. Mr Somerset's evidence does not support the proposition that the failure to include a schedule of rates is necessarily negligent, indeed it is not the subject matter of the relevant section of his report. In so far as this is another manifestation of the argument that PSP failed adequately to warn the Russells about risk, it is wholly unsupported by any evidence that those risks emerged.

133. I address Issues 6 (e) and (f) shortly as there was no instance identified where any aspect of the Ibex tender or tender price had an impact on financial management or the pricing of variations (whether because of the use of provisional sums or the word "included" or otherwise). In fairness to the Russells, they do not allege that these points directly led to any overspend but make clear that they rely on them as reasons why the project ought

not to have been allowed to proceed without further clarification. I reject that argument for the reasons I have given. As I have indicated the significance, in my judgment, of the absence of evidence of any of the alleged risks materialising is that, on the one hand, it means that the Russells cannot rely on any evidence of what happened to support the inference which they invite me to draw that there was a material risk of which the defendants ought to have warned and, on the other hand, that they cannot rely on such evidence to demonstrate that there was, putting it simply, anything wrong with the tender documentation, the tender, the tender sum analysis or the tender report.

The contract programme: issues 6g and 6h

134. Issues 6g and 6h are concerned with the adequacy of Ibex's tender programme. Ibex's tender programme was considerably shorter, at 39 weeks (before the addition of the swimming pool) than PSP's estimate or than any other tenderer. In contrast to the position in respect of the tender sum, it does seem to me that that ought to have, at the least, given PSP pause for thought and it might have been prudent to make further inquiries of Ibex.

135. Both Mr Greenwell and Mr Strutt agree that the Ibex programme was too short for the works (by 8 weeks) and that the difference between the Ibex programme and the programmes of the other tenderers is principally to be found in the fit-out phase of the contract.

136. Much of Mr Greenwell's evidence as to the inadequacy of the programme length was based on his evidence about the design responsibility arguably undertaken by Ibex under clause A11.130. Beyond that Mr Strutt's evidence was that the PSP's review of the tender programme fell "below standard": *"I do not consider that PSP carried out a sufficient review of the ambitious programme submitted by Ibex. The lack of a detailed programme review and reporting of this is a failing by PSP."*

137. It is fair to say that Mr Strutt also expressed the view that identifying the critical path was probably beyond what could be expected of a reasonably competent project manager but that the dependence of the programme on design delivery was clear. When cross-examined, he emphasised that what he would expect the project manager to then do is give appropriate warnings about the importance of timely design decisions but that is not an answer to his own clear view that more ought to have been done to interrogate the programme and report on it.

138. Mr Stone obviously accepted that he was aware of the difference in the programmes but his explanation for not querying this was that Ibex were specialist fit out contractors and both bigger and more experienced than Charter. Further Ibex's tender included a full construction programme, a design release/ procurement programme and an indicative labour histogram, all indicating that the programme was well-thought out and not, for example, an underestimate with a view to getting the job. Mr Stone described it as a very persuasive submission. He further made the point that there was a 6 month period between tender and the letter of intent and said: *"So we did interrogate the programme, we did so over the full 6 month period."* What that, however, amounted to, in my view, was a statement that Ibex did not raise any doubts about their own programme (which Mr Stone had already formed a positive view about) and not that PSP did anything to verify the validity of what Mr Stone at the same time accepted was an ambitious programme.

139. The point that PSP also made was that any delay was at Ibex's risk and that the contract would include provision for the payment of liquidated damages for delay. That is so but it is equally obvious that a contractor who has contracted on the basis of too short a construction programme may be alive to any opportunity to seek an extension of time. That is the sort of warning that one might reasonably expect to be given to the lay client.

140. It seems to me that Mr Stone was presented with a programme which he recognised was ambitious but also considered persuasive. He took no steps to verify that it was achievable and, in consequence, was unable to give the clients any advice. On the basis of Mr Strutt's evidence, I consider that PSP did fail to give sufficient advice/ warnings to the Russells and were negligent in this particular respect. That is, however, a very particular aspect of the management of the tender process and I do not consider that it goes any further than this particular issue. In other words, it is not sufficient to make out the single breach of failure properly to manage the tender process.

141. The claimants submit, however, that this breach also goes to discrete claims and I address this below.

142. In any event, and leaving these discrete claims to one side, even if PSP had warned of the risks of proceeding with Ibex and this programme, consideration needs to be given to what difference, if any, that would have made. In all likelihood the project would have gone ahead and the Russells would have had the opportunity to claim liquidated damages if there was an overrun. Alternatively, the project would have proceeded with a different contractor with a longer programme at increased cost. The latter, as I understand it, is the assumption in Mr Somerset's calculation of the overspend claim. Certainly, the fact that PSP did not advise the Russells that the fit out stage of the work might overrun never had any actual impact because this stage of the works was never reached by Ibex.

Other delays

143. Issue 6i is concerned with procedures to limit or mitigate delays due to uncertain and/or missing design information. The claimants' pleaded case was no more detailed than that.

144. As it was put in closing submissions (albeit not in the pleadings) this issue related to an alleged failing by PSP (in its project manager role) to implement a document sign off procedure. Mr Strutt, it is argued, accepts that that was a failing (albeit primarily one of CLA) and, therefore, this point should be resolved in the claimants' favour. That argument does not hold water. Mr Strutt's acceptance of a failure (by the lead consultant) does not amount to an admission of negligence on the part of PSP. In any event, there was no case that a breach on the part of PSP caused delay to the progress of the works such that Ibex had some claim against the Russells which they would not otherwise have had and/or that the Russells became unable to deduct LADs. It seems to me, therefore, to hold PSP to too high a standard to say that the project manager ought to have required the lead consultant to do something that he did not himself apparently consider necessary and which cannot be said to have resulted in any difficulties.

145. There was a second issue relating to delay which may explain why a great deal of time was spent in evidence and at trial on matters that may or may not have caused delay to the progress of Ibex's work. This issue is also separately identified as issue no. 15 and it was described by Ms Jones as being the core of PSP's defence. It was not and I have already described this as a non-issue.

146. The issue seems, in the first instance, to have arisen in this way. I quoted from paragraph 38 of the Particulars of Claim (the case on causation) above which includes the assertion that the Russells accept "that PSP is not responsible for each and every overspend on the project, but only for the losses that were caused by PSP". At the start of the Defence in paragraph 2 (which was a summary of PSP's defence), the defendants said that the principal cause of the delays and overspend on the first building contract (with Ibex) was the claimants' failure to issue timely instructions to the Design Team; their numerous and substantial design changes and changes of mind; and their failure to make timely design decisions. Then in response to paragraph 38, the defendants, at paragraph 58 of their Defence, said:

> *"The reasons why the Claimants have spent so much more on the Project than originally estimated are not attributable to any breach of contract or negligence on PSP's part. Rather the works cost so much more than initially estimated and so much more than they ought reasonably to have cost due to …. the following matters:….."*

147. Those matters were then said to be:

(i) the claimants' failure to issue timely instructions to the Design Team and make timely decisions (sub-paragraph 1);

(ii) the numerous and substantial design changes instructed by the Claimants (sub-paragraph 2);

(iii) delay and poor performance by CLA (sub-paragraph 3);

(iv) the termination of the building contract with Ibex, Cameron Black and DF Keane and the claimants' delays in appointing replacement contractors and progressing the completion of the building works (sub-paragraph 4);

(v) the insolvency and administration of Ibex and Cameron Black (sub-paragraph 5); and

(vi) the poor performance by all the contractors.

148. There was, therefore, in the summary of the defendants' defence and within this list, one completely generalised allegation (amongst a number of other allegations) that the claimants had caused the project to cost more by reason of their delay in making design decisions. The claimants made exactly that point in their Reply. They said that paragraph 2 was wholly unparticularised and that it was for PSP to particularise and prove *"the alleged failure to issue timely instructions, design changes, changes of mind and failure to make timely design decisions and also for PSP to particularise and prove the effect that the same are said to have had on the first building contract".* Similarly the claimants said that much of paragraph 58 was wholly unparticularised and vague. There was a positive denial that delay was caused by the matters in sub-paragraphs 2 and 3 (although not apparently sub-paragraph 1) and it was said that the Russells would rely on PSP's contemporaneous assessments of delay which were inconsistent with the case they now sought to advance.

149. The claimants sought further information. I will summarise by saying that the responses relied on the Information Required Schedules produced during the course of the project, Ibex's request for information missing from the schedules, and complaints made in

contemporaneous correspondence. Further it was said that the witness statements and expert evidence would address the impact of these matters on the Project.

150. As Ms McCafferty QC put it, the claimants then appear to have become rather distracted by this delay case although it was not material to any claim made by them. Ms Jones identified it as a key issue and the core of PSP's defence. So far as it operated as a defence, it was a generalised point in answer to a generalised claim as to why the costs of the project increased. The end result, therefore, was that there was a general point taken in defence which at best might have provided some element of explanation of why there might have been delay in the progress of Ibex's work in circumstances where no loss was claimed arising from that delay.

151. For these reasons, I do not make any specific or detailed findings as to causes of delay. More generally, the view I formed on the evidence, both on the documents and the evidence of Mrs Russell and Mrs Stone was this:

(i) PSP took a sensible approach in producing/ obtaining from Ibex schedules of information required. These were provided to the Russells and their importance emphasised on a number of occasions.

(ii) The Russells generally endeavoured to respond to requests for their input. On some occasions that was provided later than the dates in the schedule. They, and in particular Mrs Russell, were particular about their requirements – the house was very important to them - and they did not want to be pressurised into making decisions. They exercised their own judgment as to when information was genuinely required in order to avert delay to the works. Mrs Russell in particular sometimes became frustrated that she was being pressed for decisions too early and she also felt that she needed further information, such as the complete design of a room, in order to make her choices.

(iii) PSP and other consultants found this, on occasion, frustrating, and there was correspondence between them which reflected that. There was a particular example to which Mr Russell was taken in cross-examination – a rather emotive e-mail from CLA (Charles Leon) to PSP (Richard Moore) sent on 17 June 2010 (shortly before the letter of intent was issued). Mr Leon attached a draft Information Required Schedule. The e-mail continued:

"In theory these dates do not pose any problem, however, the difficulty is agreeing the design with the clients. Frankly, judging from yesterday's meeting I would doubt that this is possible.

Hours seem to pass in agonizing over the minutiae of every detail and progress is only made negatively. We are damned if we provide too much information (we've gone too far) and damned if we do not provide a holistic view (how can I decide without the whole picture). The exterior of the building went through a similar phase, with endless sketches and explanations. …."

When that e-mail was put to Mr Russell, he suggested that PSP ought to have raised that with him and emphasised the risk to the project and that this was another example of PSP failing in their duties. He went so far as to say that PSP should have told them to stop the project until design decisions were taken. That seems to

me wholly unrealistic. PSP's obligations included liaising with the design team and, on a practical level, PSP had to manage both the design team and the client. It would have placed them in an awkward position and probably been counter-productive if they had told the Russells that they, the Russells, were being criticised by CLA and it borders on the absurd to suggest that PSP ought, on this basis, to have advised the Russells to stop the project going ahead. Instead what PSP tried to do was emphasise the need for design decisions and prioritise the information that was required. This example demonstrates a sensible approach being taken by PSP.

(iv) PSP did not identify and I am unable to identify any particular instance in which Ibex's works were delayed by a lack of a design decision from the claimants. Any extension of time claim from Ibex on this basis was not, as such, the subject matter of this trial.

152. So far as the list of issues is concerned, that is sufficient to dispose of issues nos. 15 and 16.

Issues 6j, 6l and 6m

153. These three issues can be dealt with together.

154. So far as sub-issue 6j is concerned, the only "inadequacies" that have been identified are those that have been covered under the preceding issues. For the reasons I have set out, I am not satisfied that there were any such inadequacies and, in consequence, there is no reason PSP ought to have interrogated Ibex about them. Mr Somerset's evidence, which does little more than compare items in the (higher) Charter tender with Ibex's tender does not add anything or evidence negligence.

155. It also seems to me to follow that the answer to issue 6l [*"Did PSP fail to provide an adequate tender report?"*] must be "no" and Mr Somerset also says that it is subsumed within sub-issue (j). The only criticisms that could be made of the tender report would be a failure to identify inadequacies and give advice or warnings of the nature which the claimants allege should have been given. By the same token, the answer to issue 6m [*"Did PSP fail to carry out adequate post-tender interviews with Ibex?"*] must be "no". The issue was not addressed in the claimants' expert evidence.

Issue 6k

156. This issue raises a discrete point about PSP's obligation to "interrogate" the financial standing of Ibex and its parent company. It is pleaded and identified in the list of issues as a particular of the allegation that PSP failed properly to manage and/or advise on the tender process. As I understand it, that is because the claimants do not seek to make PSP responsible for the consequences of the demise of Ibex but rely on this more broadly as a reason that the Russells ought to have been warned about the risks of contracting with Ibex or positively advised not to.

157. However, this sub-issue also became entangled with the issues relating to the obtaining of a performance bond and the letter of intent. This development in the claimants' case seems to me to have been the product of the fact that the pleaded case was unsustainable. Both Mr Russell (who was well able to make an informed judgment) and Mr Somerset accepted that Ibex's management accounts and the parent company, Doyle's accounts, provided prior to the award of the contract did not suggest that Ibex was a company in

financial difficulty or give any other cause for concern. It was, on the basis of that evidence, wholly unclear what it was alleged that PSP ought to have done but failed to do.

158. Mr Greenwell's evidence was that if a contractor's financial position appeared to be "in a downward spiral", a project manager would or should advise checking the financial position with accountants. But here, despite its eventual insolvency, the evidence was not that Ibex was in a downward spiral. Mr Somerset's evidence related to a concern that no steps were taken to confirm whether Ibex could provide a bond which fell far short of evidence of negligence.

159. The claimants were, therefore, left seeking to construct something out of the defendants' own evidence. Mr Strutt's evidence was that a trigger would have to be needed to see advice from an accountant. In cross-examination, he was then asked whether the effect of the letter of intent mattered and his response was that he thought it might and that legal advice would be needed. Mr Strutt thought that legal advice had been taken on the letter of intent which it now appears was not the case but that mistake was not his fault. The claimants now submit on the basis of this exchange that *"the only logical inference is that PSP should either have advised the Russells to seek advice from an accountant on the accounts, or from a lawyer on the effect of the letter of intent. To do neither is not good enough."* But that is not the only logical inference. It presupposes that there was any reason or trigger for PSP to have advised that accountants or lawyers should be consulted and the best that can be said is that it might have been incumbent on them to do more. That on any view falls short of evidence of negligence and, given the information that had been provided about Ibex and Doyle's financial position, there was no such trigger.

Summary

160. In my judgment, therefore, taking the allegations cumulatively and as going to a single breach, PSP did not fail properly to manage and/or advise on the tender process and the answer to issue no. 6 is "no".

Causation and loss

161. It is convenient to address at this point the loss and damage which is alleged to have been caused by the alleged negligence of the defendants. The claimants' claim is for £967,931.47.

162. As formulated by the parties, the next issue is issue no. 7 [*If the Russells prove breach under paragraph 6 above; but for that breach, would the Russells have postponed the appointment of Ibex, or chosen not to embark upon the project?]*. That issue is in turn material to issue no. 14 [*"Did the alleged breaches at paragraph 6 above cause the Russells to spend more than they ought to have done to complete the Project as detailed in paragraphs 38 to 40 of the Amended Particulars of Claim?"*] and then to issues nos. 21 to 24 in respect of loss and damage.

163. Even if I had found PSP to be negligent in the management of the tender process, the claimants' case would, in my view, have failed on the issue of causation. So far as the group of issues concerned with the Ibex tender is concerned, there were a number of strands to the claimants' case on causation which were not always easy to disentangle. By the close of the trial, the case came down to the contention that if PSP had, on the

claimants' case, properly advised them as to the inadequacies in Ibex's tender, they would have taken the opportunity to reconsider or re-evaluate the project. It was not the case that they would then have been able to proceed with the same project at the same cost (through better management or whatever may have been suggested) but that they would have been able to proceed with a project which had been modified so as to be at the same cost. That itself was yet another shift in the claimants' case.

164. If that case was founded on the Ibex tender being too low in monetary terms, it involved the proposition that PSP ought to have advised the claimants not to accept the lowest tender and Mr Somerset at one point went so far as to suggest that there is always a risk in accepting the lowest tender. That is a remarkable generalisation if he intended to suggest that a client should always be advised not to accept the lowest tender, or that there is a risk in doing so, even if the tender is exactly as anticipated. I cannot accept that proposition. More realistically, what is well known in the construction industry is that a contractor who puts in a low tender and is awarded the contract on that basis may try to improve his position by making claims for variations and loss and expense. There may be circumstances in which a professional adviser might be expected to give the client advice about such a risk but it seems to me that there would need to be something about the tender that put the adviser on notice that such advice needed to be given. An obvious omission or a particularly low tender might be such examples.

165. So far as the amount of the tender was concerned, the Ibex tender was a small percentage lower than cost plan 8 and Charter's tender a small percentage higher. In other words both were within reasonable bounds of cost plan 8. The cost plan itself has not been the subject of any criticism and it follows that a tender that was within reasonable bounds of the cost plan is not one that is so low that it would trigger the need to give the client warnings about the potential consequences of acceptance. Rather the case that took centre stage at trial was that PSP ought to have warned the Russells of the risks inherent in the tender.

166. Even if PSP had been obliged to and had given such warnings about risk, there must be a factual issue as to what the Russells would then have done and what they might have done might itself vary according to the nature and extent of the risk identified. I gave the example above of the possible outcomes if the Russells had been warned that the programme period for the fit out works was inadequate. Given what happened on this project and with hindsight, the Russells now say, and I have no doubt honestly say, that they would not have gone ahead but would have taken time to reconsider their position. They draw no distinction between different types of risks and responses and the case is binary, in the sense that the course they would have taken is said to be one thing or another and nothing in between.

167. If the Russells would have paused and revisited the project, then there needed to be some articulated and particularised case as to what they would have done and what the outcome would have been on the balance of probabilities. There simply was nothing other than a generalised assertion. I note also that the case was never put on the basis of the loss of a chance.

168. At the close of evidence, and given the way that the evidence seemed to have developed, I asked the claimants to clarify in closing submissions how they put their case. I identified three possible formulations and I invited submissions on quantum, and the identification

of the evidence relevant to quantum, on whichever of those formulations the claimants adopted (or indeed on any other formulation of their case that they advanced).

169. In due course, in closing submissions, the claimants clearly stated (i) that their case was not that the alleged inadequacies in the tender process led to the works costing more because they could have been done for less had they been properly designed, and design responsibility properly allocated, in the first place and (ii) that Mr Somerset had not undertaken an analysis that would support such a case.

170. The claimants submitted that their case was put in one of two possible ways. Firstly, had they known how much the works would cost or were likely to cost (ie Ibex's scope of works properly priced on the basis of adequate tender documentation), they would have cut their coat according to their cloth and changed the scope of works/ specification to avert the "overrun". Secondly, had they been properly advised they would either not have gone ahead with the project (in its current form) at all or, using an expression which I introduced, they would have paused and reflected (and not then proceeded until the project was fully designed and properly costed). This latter possibility allowed for the argument that the Russells might have gone ahead with the same project but at greater cost. However, they said in answer to the questions I had posed that the most likely option was that they would have made changes to bring the cost back down to something close to cost plan no. 8. Thus it was said in their written closing submissions:

"In the case of either option, the Russells do now have their house and so the question is why PSP must pay for the overrun. The reason is that by issuing the letter of intent in the way that they did, PSP locked the Russells into a contract that they could no longer fix (eg. by amending the design). In other words, the extra cost would have been avoided: the Russells would still have had a house, but it would have been for the price (and specification they chose) rather than with an overspend of over £1 million)."

171. The defendants' position is that the claimants would not have taken any of these courses and would not have accepted advice not to proceed at this stage and I find, as a matter of fact, that it is highly unlikely that the claimants would have decided not to proceed because of the sorts of risks which it is contended they ought to have been warned of. The project was over 3 years into development; the Russells had the comfort of the cost plan and tenders within bounds of the cost plan; no tenderer had expressed any concern about the tender documentation; and the Russells understood that there was further design work to be done including within items covered by provisional sums (which would not, therefore, have caused them any concern).

172. Even though Mr Russell took the advice of his professional advisers, as I have said, he was still able to exercise his own judgment. In this case, if he had been given firm advice not to proceed, in my view, he would have challenged, or at the least interrogated, that advice. It is complete speculation what might then have happened, including whether he might have gone ahead with a higher tender. If he had been given warnings that there was a risk that the lower tenderer might try to inflate the contract price by making contractual claims, it seems to me the more likely that he would have decided to proceed, but with instructions to his professional advisers to ensure that such claims did not arise or were not justified. If Mr Russell had been warned that the project might take longer, he would equally have been told that there was provision for liquidated damages and I very much doubt that the tender programme alone would have been a reason he would not have gone ahead with Ibex.

173. Mrs Russell's evidence, which it is emphasised was not challenged, was that if PSP had warned of the risks, the Russells would have looked at other contractors even if their prices were higher and might then have re-considered their position. That does not support the case now advanced and does not take matters any further.

174. On behalf of the claimants, Ms Jones made two submissions relevant to what I have just said and which I address. Firstly, she made the point that the emphasis put on how long the project had already been underway by tender stage (in around November 2009) was misconceived because the as-constructed scheme was not even considered until late 2008. That is right on the chronology but it seems to me to ignore the fact that the Russells had been working towards the refurbishment or rebuilding of their home since they had bought it over three years earlier and that, once they had a scheme they were happy with, they would want to get on with it. Advice that the tender sums were too low; that more design detail was required from the outset; and so forth would have been wholly unwelcome.

175. Secondly, Ms Jones drew attention to the fact that the Russells had had two schemes designed already (demonstrating that they were prepared to revisit the project) and that there had been a 6 month break when it was apparent that a designed scheme was not appropriate to their needs or budget. So I was asked to infer that, properly advised, the Russells would have taken the same course again. That again seems to me to be wishful thinking with the benefit of hindsight and does not reflect the probabilities once the Russells had the scheme they wanted and in the position they were once the tenders within striking distance of cost plan were returned.

176. Even if I am wrong about this, the claimants' case is still fraught with difficulty. Ms Jones relied on the decision in *South Australia Asset Management Corporation v York Montague Ltd.* [1997] AC 191 ("SAAMCO"). This well-known decision arose out of appeals in three cases of claims in negligence against valuers who had overvalued properties causing lenders to make loans that would not have been made if the lenders had known the true value. The speech of Lord Hoffman includes the following statements of principle:

> *"The calculation of loss must of course involve comparing what the plaintiff would have lost as a result of making the loan with what his position would have been if he had not made it. If for example the lender would have lost the same money on some other transaction, then the valuer's negligence has caused him no loss.*
>
> *The distinction between the "no transaction" and "successful transaction" cases is of course quite irrelevant to the scope of the duty of care. In either case the valuer is responsible for the loss suffered by the lender in consequence of having lent upon an inaccurate valuation. When it comes to calculating the lender's loss, however, the distinction has a certain pragmatic truth. I say this only because in practice the alternative transaction which a defendant is most likely to be able to establish is that the lender would have lent a lesser amount to the same borrower on the same security. If this was not the case, it will not ordinarily be easy for the valuer to prove what else the lender would have done with his money. But in principle there is no reason why the valuer should not be entitled to prove that the lender has suffered no loss because he would have used his some money on some altogether different but equally disastrous venture. …"*

177. In the case of a lender, the measure of loss will usually be the difference between the amount of the overvaluation and the true value, but, if he would have used it on some equally disastrous adventure, then there is no loss. If, improbably, the lender would have lent the same amount for less security, there is no loss. It is inherent in that analysis that the lender must establish that had he been properly advised he would have done something different. In the loan cases, as Lord Hoffman indicated, it would normally be self-evident that the lender would have lent a lesser amount or nothing at all. The same is true in this case, namely that the Russells must establish that they would have done something different. That cannot be that they would not have built the house at all because that would result in their having something for nothing. For the reasons I have set out above, I do not accept that they would have done something different but, for completeness, I consider the position on the basis of the assumption that they would have done something different.

178. As I have said, at the outset and on the pleadings, the Russells' position seemed to be that they would have entered into a contract that was risk free but at a greater cost than the Ibex contract (which was represented by the amount of the Cameron Black tender adjusted to exclude elements for which PSP could not be responsible). This was the subject matter of Mr Somerset's evidence. Over the course of the trial, that case crystallised into the significantly different case that the Russells, if they had been aware of the risks they were facing would have waited until those risks had been removed and at the same price as the Ibex tender.

179. This case was put in the most generalised way, no doubt because it had never been the focus of Mr Somerset's evidence. On that case, the claimants would have needed to adduce evidence at the least of what changes could or would have been made to bring the cost back down so that they could have the specification of their choice at a fixed price. It was only after Ms Jones had concluded her oral closing submissions that it was suggested, on instructions, that the Russells would have taken off the top floor and done less to the basement. There is, therefore, absolutely no evidence of what changes could have been made to achieve this price other than the assertion in closing submissions and, in the circumstances, there was no further elucidation of that case and the cost "saving".

180. In any event, the claimants did not "cut their cloth" when they had the opportunity in 2012 – on the contrary they enhanced at least some aspects of the specification. The result was that they got what they paid for.

181. To develop the hypothetical scenario used at trial, say that the original specification had included gold taps, and say further that the claimants, if given advice which would have led them to realising that the project was going to cost more than they had anticipated, would have downgraded the specification. The gold taps would have, perhaps, been the first thing to go. If instead the claimants, in fact, went ahead with the gold taps still in the specification, and realised later that the project was going to cost more, the gold taps, if not yet procured and/or installed could still have been the first thing to go. But if the claimants decided to go ahead with gold taps anyway, it would be absurd for that cost to be laid at defendants' door.

182. The failure in this case to consider with any particularity what advice the claimants allege they ought to have been given and what they would have done given that advice leaves the court with no point of comparison that would be analogous to the true value on the SAAMCO basis.

183. That would equally be the position if the case was still put as it appeared to have been pleaded and on the basis that the claimants would have entered into a contract at a greater price (but risk free). This is what Mr Somerset's evidence addressed and it did not make out the claimants' case.

184. Mr Somerset annexed to his report a preliminary report which he had produced in September 2012. It did not deal with the now case on management of the tender process or identify any actual or prospective "overspend". He accepted that he had given subsequent advice which provided the basis of the letter of claim from Taylor Wessing to PSP dated 13 October 2014. In that letter, Taylor Wessing said that their clients had been advised by an expert that the Ibex tender was deficient in a number of respects; that Ibex therefore understated their tender allowance; and that a realistic tender allowance would have been £2.2 to 2.4 million. PSP should, it was alleged, have recognised that Ibex had "bought" the project and that that was inherently risky. The letter continued:

"By the time the Project is finished in early 2015, removing the costs of the lower ground floor and pool area, the total construction costs are likely to be in the region of £4.3 million. PSP should have known that a more realistic tender would be between £2.2 -2.4 million and advised the Claimants of this in the Tender Report. If the Claimants had received the correct advice in respect of the true cost and duration of the eventual build and decided to proceed with the project in that form (which would not necessarily have been the case) they would have elected to proceed with a contractor whose costs were in the realistic region of £2.2-2.4 million. The additional cost incurred in respect of construction work due to negligence advice from PSP is therefore approximately £1.6 million (being the difference between what the Claimant would have paid if advised correctly and what they have actually paid)."

A footnote explained that this figure was the difference between £4.3 million and £2.3 million less £388,000 for the rectification of defects which was claimed separately.

185. The thrust of the case was one that sought to place at PSP's door all the consequences of Ibex's not completing the works; it was based on the hypothesis that the Russells would have proceeded at a higher price; and the comparison of figures, as Mr Somerset accepted, took no account of any differences in the scope of work undertaken, or to be undertaken, by Ibex and the subsequent contractors.

186. By the time of the Particulars of Claim the position on quantification had shifted somewhat and I have set out above that case and the calculation of loss that accompanied it which was still the product of Mr Somerset's efforts.

187. If I start, as Ms McCafferty QC did, with quantum Mr Somerset recognised that he needed to compare apples with apples but he approached this exercise in the most unsatisfactory way. Firstly, despite his original approach, he now accepted that it would be unfair to take as a comparator the total cost of the works, so he had now excluded the sums paid to DF Keane. That meant that his comparator was the sum that he said would have been paid to Cameron Black had they completed. On the quantum side of the exercise, that carried with it the assumption that the scope of works was the same, and, on the liability side of the exercise, it involved the assumption that the works had cost more either because Ibex's tender was simply too low or because the tender documentation was inadequate which had exposed the Russells to risks which had

materialised (since, if the risks had not materialised, they could not contribute to the greater sum).

188. What Mr Somerset, therefore, sought to do was identify the sum that would have been paid to Cameron Black for the same scope of work. He did so by seeking to exclude from the works included in the CB tender/ contract sum those that were not included in the Ibex scope of works. The exercise that he then undertook appears to have been rather perfunctory and was, in my judgment, an unsatisfactory basis for this claim. It emerged in cross-examination that Mr Somerset's figure for the Cameron Black tender was itself an adjusted figure which he had wholly failed to explain.

189. His explanation of what he had relied on to identify what scope of work was included in the Cameron Black tender (to be compared with the Ibex tender) was confused. He appeared to have relied solely or primarily on Cameron Black's Contract Sum Analysis. That was an overly simplistic approach. One simple example, explored in cross-examination, was that of the flooring. Timber flooring was clearly within Ibex's tender but it was what might be called basic engineered board. What was in Cameron Black's tender (as could be seen from the post-contract Bills of Quantities produced by Cameron Black if not the Contract Sum Analysis) was a far more high end specification. So he was not comparing like with like. What was put to Mr Orr was that the total for different areas of flooring (carpeting and timber flooring) was approximately the same in both the Ibex and Cameron Black tenders. Mr Orr pointed out that carpeting was omitted from the Ibex tender and was a provisional sum in the Cameron Black tender and that had the areas of timber flooring been the same the cost would have been greater in the Cameron Black tender.

190. Trivial though this example may seem, it illustrated that Mr Somerset had not made any sufficient attempt to compare the design at the stage of Ibex's tender and tender drawings with the drawings at the time of the Cameron Black tender. He had not seen and had not taken into account all the relevant drawings. There was a particular issue with this in that the Cameron Black tender drawings had not apparently been available in complete (or nearly complete) form until the April before trial. Before that Mr Somerset had had only a few drawings. This seemed to me to indicate that he had not appreciated the potential significance of these drawings. It was, however, evident that there were changes from the design at the Ibex tender stage which were within Cameron Black's works but had not been identified by Mr Somerset as "variations" or additional works. In cross-examination, he was taken through a number of examples which I do not set out in detail but which included changes in walls, the external terracing and in the layout of the kitchen and the so-called multi-use room. In each instance, there may have been a largely semantic argument about whether there was a change in design or a development in detailing but there were certainly differences. I reject the submission that there was any unfairness in the cross-examination of Mr Somerset on these matters, the unfairness being said to arise from lack of notice. It had been incumbent on Mr Somerset to consider this evidence which was obviously material to the approach he took and the opinions he expressed.

191. What Mr Somerset had done is identify the additional "detailing" on the Cameron Black tender drawings. These were set out at Appendix 3.14 to his report. None was treated as a change in design. There were 22 items which ranged from cross references to more detailed drawings in the Cameron Black tender/ Contract Sum Analysis to a provision for a particular type of ceiling not in the Ibex tender to instances where there was no

difference (for example both stated that external finishes were to be confirmed by the landscape designer).

192. What was left, therefore, was Mr Somerset's opinion that these details were insignificant and could not account for the difference between the Cameron Black tender and the Ibex tender. That opinion was, it seems to me, driven by the need to disavow any design changes and to allege that the original tender documentation was inadequate but, at the same time, if the differences were so insignificant they could not account for the difference in pricing which could only be a product of Ibex having put in an artificially low tender (which they did not and which it is now accepted PSP could not be criticised for recommending be accepted).

193. Mr Somerset made no allowance for the premium that a replacement contractor might command (despite recognising that the third contractor, DF Keane, would have commanded such a premium).

194. In relation to the M&E works, Mr Somerset had no explanation for the fact that the tendered cost had approximately doubled from that in the Ibex tender despite the fact that some of the scope of work, including the electrical first fix, had already been completed. He agreed that something must have happened to account for this, including a premium that would have been sought for taking over existing work, but could offer no further explanation.

195. In addition, Mr Somerset made the point a number of times that the market had changed in 2012 which might also account for an increase in cost. But that had nothing to do with the defendants – they did not cause Ibex to leave site and they did not cause the claimants to take many months to proceed with a new contractor.

196. Even if, therefore, I were to accept on the balance of probabilities that the Russells would have proceeded with the same works but at greater cost, I would be left with no reliable evidence as to what that greater cost would have been.

197. What this further illustrates is that the claimants cannot by putting the case on a "no transaction" or "different transaction" basis avoid any consideration of what actually happened and whether the alleged risks in the Ibex tender materialised. It might have been argued that the Cameron Black tender reflected what would have been the outcome if Ibex had proceeded further with the works, but that would only be the case if the risks which it is alleged were inherent in the tender had materialised. Thus the claimants' case has to be that I can infer that the risks would have materialised and would have had that impact on the Ibex price (which could have been avoided if the Russells had been properly advised). As I have already observed, despite the promise in opening submissions, there were no examples of any of the particular alleged failings causing any problems or having any practical effect and there is no evidence from which I could draw that inference.

198. In my judgment, ingenious though all these arguments are, they cannot get around the fact that, had I found the defendants to be negligent, there is simply no causative link or no sufficient evidence from which I can infer that any monies expended by the claimants which exceeded the amount of the Ibex tender were expended by reason of the defendants' negligence.

199. I should add that these findings are also sufficient to dispose of issues nos. 17 and 18 which do not then arise.

Issues 8 to 13 and issues 19 and 20

200. The next group of issues all relate to discrete allegations of breach against PSP and, as the issues are formulated, to the issues of loss and damage at issues nos. 19 and 20.

Issue no. 8: performance bond

201. The allegation made against PSP is that they were negligent in not obtaining the intended performance bond from Ibex or in failing to recommend the withholding of any payment until the bond was obtained.

202. The requirement for a performance bond is set out in the Employer's Requirements at A20:120 together with a form of bond:

(i) A20: 120 provides:

*"**CONTRACT GUARANTEE BOND***

Allow for providing a bond for the due performance of the Contract to the Value of 10% of the Contract Sum and incorporating agreed amendments, from an approved Bank/ Insurance Company or similar institution. The bond must be in place before any money is paid under this contract."

(ii) The draft form of bond was a default bond (using the terminology of a guarantee) and not an on demand bond. By clause 1, the Guarantor guarantees the due and punctual performance of the Contractor's obligations and:

"… shall in the event of a proven breach of the Contract by the Contractor (which definition shall include insolvency or other events listed in Contract Clauses) ….. satisfy and discharge the damages costs and expenses sustained by the Employer as established and ascertained pursuant to and in accordance with the provisions of the Contract."

(iii) Clause 2 set out the maximum amount of the bond.

(iv) Clause 3 provided:

"Any event of insolvency as set out in clause 8.5 of the Contract shall be deemed to be a proven default upon which the Guarantor shall satisfy and discharge the established and ascertained damages caused to the Employer up to the Bond Amount."

203. The effect of such a bond would be that, in order to claim under the bond, the beneficiary would have to prove a default on the underlying contract and prove the loss and damage suffered as a result of that default. Insolvency was automatically a default requiring no further proof of default but the guarantor's obligation was still to pay the loss and damage suffered.

204. In the event, Ibex never provided the bond. PSP requested the bond (together with the signed contract) from Ibex at the pre-commencement meeting on 1 July 2010 and again in November 2010 and February 2011. It was not until August 2011 that there was any

further request for the bond. PSP sent it again to Ibex on 15 August 2011 and requested an urgent update on 23 August 2011. On 2 September 2011, Ibex informed PSP that the market had changed and they would not be able to secure the bond. Ibex offered instead a parent company guarantee. It is evident from the documents that Mr Russell was kept informed. Ibex still said that it would provide the executed contract but in the end did not do so, it said, because it could not provide the bond and would, therefore, automatically be in breach of contract. That makes little sense since Ibex was already obliged to provide the bond under the contract formed by the letter of intent but it was Ibex's position at the time.

205. The defendants' case is that PSP could not force Ibex to provide the bond or sign the contract and that no bond could be finalised because it was contingent on the contract being signed. The issue, therefore, became entangled with the issue relating to the progress of the works under a letter of intent rather than a signed and executed contract. The issue, in essence, is whether it was negligent on PSP's part to permit the works to continue under a letter of intent with no formal contract or bond in place or negligent of them to fail to warn the Russells of the risks attendant on doing so.

206. That necessarily begs the question of what PSP ought to have done or ought to have warned. The evidence about this from the perspective of what might reasonably be expected of a project manager is unsatisfactory. In the joint statement, Mr Greenwell says that PSP ought to have sought proof from Ibex pre-contract that they could provide the bond. In his report, his point appears to be that the letter of intent omitted a requirement for the bond. His conclusion is simply that during the tender period, PSP failed to procure the bond prior to making payments.

207. So far as the letter of intent is concerned, a number of Mr Greenwell's reservations seem to me to be misconceived. For example, he states that the letter of intent did not state key contract terms such as the defects liability period and applicable law. This is indicative again of pushing too far in seeking to criticise PSP. The letter of intent on its face incorporated the terms of the intended contract and thus provisions as to a defects liability period. There is no need for an express applicable law clause. His key points are identified by the claimants as (i) the omission of a Contractor's Designed Portion notwithstanding the contractor's design responsibility (a point which falls away in the light of my decisions on these issues); (ii) the omission of a cap on time and expenditure and (iii) the omission of the requirement for a bond. The last point simply repeats rather than evidences the allegation of negligence in failing to procure the bond.

208. What is then argued is that the interaction of (ii) and (iii) had the effect of trapping the Russells in a situation where they were deprived of the protection they would have had if the JCT contract had been executed. The idea that the Russells were somehow locked into a letter of intent which was less beneficial to them than a JCT contract is repeated elsewhere. The argument does not make sense. Assuming that the letter of intent formed a contract (and given both the contention that the Russells were locked into it and that the contract was terminated in July 2012, that must be common ground), the Russells were in the same position they would have been if the contract had been executed. The requirement for the bond was still there. There might have been a difficulty with the identification in the bond of the underlying contract, and to that extent the bond and the formal contract were tied up with each other. But it simply does not follow that permitting the work to proceed under the letter of intent somehow evidences negligence in failing to procure the bond.

209. The question therefore remains as to what more it is alleged PSP ought to have done and there is no articulation of that case in the claimants' evidence. The nearest that one comes is that PSP ought not to have certified payments to Ibex until the bond was obtained. There is, however, no pleaded case that the certification of payments was itself negligent and the works would not have proceeded without payment being made.

210. Drawing these points together, it would clearly have been preferable for the bond to be in place but there is no sufficient evidence that PSP was negligent in not procuring that bond.

211. In any case, the defendants argue that there would, in any case, be no loss and/or that there is no pleaded loss arising from any failure to procure the performance bond. I do not propose to deal with each of the arguments advanced but only with the key points and principally because they took on something of a life of their own only in oral closing submissions.

212. The defendants submitted that there was no pleaded case as to the basis on which the Russells would have been entitled to call the bond and that there was merely a claim for £209,864.30 being 10% of the Ibex contract sum. The defendants said that default could not be Ibex's insolvency because that happened after the termination of Ibex's engagement (in February 2012) and further that that termination had been on a drop hands basis. The claimants' response was that that was factually wrong: Ibex became insolvent on 22 June 2012 and the contract was formally terminated on 4 July 2012.

213. The contention that the contract was terminated in February 2012 arose from the fact that Ibex had stopped work at that time. A meeting was held on site on 15 February 2012 with the Russells, Mr Stone and representatives of Ibex in attendance. According to Mr Russell, the outcome of this discussion was that it would be best for everyone if there were to be a "drop hands agreement" to terminate the contract. PSP's e-mailed letter to Ibex sent on 24 February referred to that meeting and said that it was intended that that should occur 14 days from the letter. The letter attached a final account which was to be in full and final settlement of all current claims and counterclaims. Mr Russell's evidence was that that letter followed an intense period of review and discussion between Mr Stone and Mr Cobb of Taylor Wessing and he referred to it as "the termination letter". However, he went on to say that Taylor Wessing were also to draft heads of terms for agreement; these were the subject of further comment and negotiation; and were never concluded. No copy of the draft heads of agreement or a concluded agreement was included in the documents before the court.

214. The claimants' case, therefore, was that the contract with Ibex remained extant until it was terminated by Ibex's insolvency and Taylor Wessing's letter on 4 July 2012.

215. These competing contentions and their consequences led to largely unheralded submissions in oral closings about the precise date and terms of the termination of Ibex's contract on which the evidence was missing or unsatisfactory. Ultimately, however, it seems to me that these contractual issues went nowhere.

216. The claimants submitted firstly that the full amount of the bond was recoverable in any event following the automatic default on insolvency. That, in my view, is wrong: it would still be necessary to prove the loss consequent on the default which, on this analysis, was termination. In reality, however, Ibex had stopped work in February 2012

and for all practical purposes its services were terminated then. It is difficult to see, therefore, how its insolvency in June 2012 and the termination of the contract thereafter could have caused any loss. The claimants submitted that the most obvious measure of loss was the cost of remedying defects in Ibex's works – this would have involved a distinct default and loss. In principle there is merit in this argument but it is completely vague. As I consider below, there is some evidence that there were defects in Ibex's works (and a claim against PSP in this respect) but there is no pleaded and particularised case (to which PSP had had an opportunity to respond) as to what the claim against Ibex would have been and for what actual cost of carrying out remedial works. The claim could not succeed simply on the basis of claiming the full amount of the bond.

Issue no. 9

217. This is a broad issue in respect of deficiencies in the letter of intent. As briefly pleaded in the same paragraph as that relating to the alleged breach in respect of the bond, the only particular of "woeful deficiency" in the letter of intent was that it did not contain a financial cap or time limit on the works to be carried out by Ibex. As opened, the claimants' case in respect of the letter of intent focussed on the issue relating to clause A11.

218. That point having fallen away, in closings the focus had shifted or reverted to the matters above in relation to the bond and it was then submitted that *"had the letter of intent been restricted, or had the JCT terms been properly operated, it is highly likely that the issues that have in fact been encountered would have been identified much earlier and resolved with minimal loss, unlike the position in which the Russells find themselves today."* That formulation of the issue and claim illustrates why it is hopeless and simply speculation as to what might have happened. I can see no basis on which to find that PSP was negligent in relation to the letter of intent and, in any event, that the terms of the letter of intent and the progress of the works on that basis caused any loss.

Issue no. 10

219. This issue turns on valuation no. 18 the last valuation of Ibex's works in December 2011. The Russells' pleaded case is that they did not pay valuation no. 18 so their claim is made by reference to the alleged overpayment on interim certificate no. 17. However, the amount of that claim increased from the pleaded position in Mr Somerset's report (adjusted in his examination in chief) largely by the addition of an amount for preliminaries. The claim is now for £274,574.17.

220. The claimants' case is based on Appendix 4 to Mr Somerset's report in which he sets out his valuation based on a site inspection in September 2012 (with certain later adjustments). At the time of his inspection he took 43 photographs. The Appendix ran to 7 pages of line items with commentary against those where he disagreed with or queried PSP's valuation. Both parties adopted a fairly broad brush approach to this evidence rather than inviting the court to deal with each item individually which would have been wholly disproportionate. The claimants say that Mr Somerset carried out a visual inspection and what he saw must have been apparent to PSP and should have been taken into account in valuation. There are, on this basis, obvious errors in the valuation, and I assume that I am asked to infer from that that the valuation as a whole was not carried out with reasonable care and skill and that I should therefore prefer Mr Somerset's valuation. In this respect, the defendants have drawn my attention to the RICS Guidance Note (Interim Valuations and Payments) (1st ed. 2015) which indicates that 5% is an acceptable margin of error on valuation of contracts with a value less than £2.5m.

221. The defendants' point, however, is that the apparently far greater percentage difference here is illusory and not a proper basis for an inference of negligence. The largest differences in the valuations are (i) the inclusion in the PSP valuation of £56,316.54 for drainage (as against nil in Mr Somerset's valuation); (ii) the inclusion of £209,955.09 in respect of Contract Administrator Instructions and Variations in PSP's valuation (as against £51,507.54 in Mr Somerset's); (iii) the inclusion of £24,840.00 in PSP's valuation for materials on site (as against £1600 in Mr Somerset's); and a difference of £12,715 in the valuation of provisional sums. These figures account in very large part for the overall difference in the valuation.

222. Ms McCafferty QC submits that in respect of the CAIs, variations and provisional sums Mr Somerset's comments are short and perfunctory and boil down to comments that there is a lack of information or documentation before him. I agree with that description. Comments such as *"PSP asked Ibex to adjust and provide a breakdown. No evidence the works have been carried out"* do not provide persuasive evidence of negligence. The nil value of the drainage item ("drainage remeasure") is explained by the comment: *"PSP in the CSA assessed the drainage at £42,790.10 but did not carry this forward to the Valuation Summary. No CAI was issued for the revisions to the drainage."* The reason for omitting this item then appears to be the fact that it was not included in the contract sum analysis and that there is an absence of documentation, and not that this work has not been done and should not be paid for. It is instead included in the overspend calculation. Mr Somerset's valuation of materials on site is based on an inspection some 9 months after Ibex had suspended work. The only evidence that he had of what was on site at the time of PSP's valuation was PSP's valuation.

223. The defendants also draw attention to one example where Mr Somerset's visual inspection must be in doubt. Against "Controls and Commissioning", valued by PSP at over £22k, Mr Somerset says that this is part of the lump sum; that "the photographs identify no control equipment"; and that during his visit there was no evidence of any control equipment. However, Vector had carried out a defects inspection on 23 March 2012 which recorded that the main items of plant currently installed included the electrical switch panels and lighting control panels.

224. Mr Orr conceded that there were some minor items where there appeared to be less work complete than had been valued but that is not sufficient to establish that PSP's valuation was not carried out with reasonable care and skill.

225. Mr Stone's evidence was, in summary, that to carry out valuations during the course of the works PSP would assess the percentage of work complete with input from the design team and that they invariably reduced the amount certified from the sums in Ibex's applications for payment.

226. On balance, I do not consider that Mr Somerset's evidence in relation to the CAIs, variations, provisional sums and material on site supports a case that PSP failed to exercise reasonable care and skill. There is reason to doubt the accuracy of Mr Somerset's observations and that is reinforced by my lack of confidence in his evidence in other respects. PSP were best placed to value the works at the time; there is no evidence that they consistently overvalued; and I do not find that their valuation no. 18 was negligent in any particular respect or as a whole.

Issue no. 11

227. There is a mismatch between the claimants' and defendants' submissions on this issue. The first sub-issue relates to the payment of PSP's fees, which the defendants address under this issue but the claimants do not. I deal with it in relation to fees generally.

228. The second element of this issue/claim is pleaded as being that PSP failed to check, alternatively properly to check, the applications for payment from Vector and Walsh. The claim is for £20,805.82 (Vector) and £4,675.80 (Walsh). There is, however, no pleaded case as to what PSP ought to have done and failed to do but merely the assertion that, at the time Ibex's contract was terminated, the mechanical and electrical works were approximately 50% complete and the structural works approximately 70% complete and that in the cases of both Vector and Walsh a fair and reasonable assessment was that they should be paid 70% of their fees. Mr Somerset's calculations reach slightly different percentages.

229. That case was elaborated in expert evidence and submissions. The claimants accept that the appointments of Vector and Walsh were silent on time for payment (and, for that reason, it is unnecessary for me to set them out in any detail). The claimants then argue that interim payments to Vector and Walsh ought to have been made on a basis that reflected the percentage completion of the relevant construction works. That case seems to me to be hopeless. The relevant duty is that of the project manager to check applications for payment by the professional team and recommend payments to the client (clause 1.9). It must be the Russells' case that no competent project manager could recommend payment other than on the basis of an assessment related to the percentage completion of the construction works. Even Mr Somerset does not say that: he says no more than that Vector and Walsh have been overpaid on that basis of assessment.

230. As the claimants accept, the appointments of these consultants are silent as to time for payment. The invoices in fact submitted were for a mixture of fixed and time related charges and differentiated between design fees and monthly charges for site attendance. There was nothing express or implied that related these to the progress of work on site. No case that PSP was negligent in recommending the payment of the invoices of these consultants is made out.

Issue no. 12

231. This issue relates to an allegedly inadequate procurement process for the kitchen which was to be supplied by a company called Woodcraft. The claim is for £30,204.00. By closing submissions the case was limited to this one supplier. The pleaded case was that, notwithstanding that the project was severely delayed, PSP advised the Russells to place orders with suppliers and make payments of deposits rather than this being done by Ibex. That was said to put the Russells at risk of the suppliers' insolvency and the loss suffered was said to have occurred as a result of the insolvency of Woodcraft.

232. The defendants' first point is that there was agreement in 2009 that the kitchen supply would fall outside the main contract. That does not seem to me to be a complete answer to the claimants' allegation since one might still have expected PSP, in their project management capacity, to advise the Russells on procurement routes.

233. Having said that, in relation to Woodcraft, the kitchen was ordered in May 2011 (and a deposit paid). At that stage the property was still a shell with no windows and nowhere close to weathertight. Ibex was advising that the completion date would be towards the

end of August 2011. In his evidence, Mr Stone accepted that the Ibex date was unrealistic.

234. The Russells' case must therefore be, it would seem, that PSP should have positively advised them not to place the order for the kitchen and to delay doing so until some later date when a more accurate completion date could be fixed. That in itself would have involved a substantial risk – Ibex might have been as good as their estimate or the works might have been completed relatively soon after that date and delay in placing the order would potentially mean that the kitchen would not be ready and that completion of the works would be delayed as a result – exposing the Russells to a claim for an extension of time and loss and expense. In fact, Mr Greenwell accepted that that would have been a risk and considered that the more important point was to advise the Russells of the financial risk and/or obtain some kind of advance payment bond. The latter suggestion is unrealistic and the former both reflects the obvious and is pointless since the Russells would have had to place an order and pay a deposit to obtain the kitchen.

235. In any event, it is impossible to identify any causal connection between any alleged lack of advice from PSP and the loss claimed. No date is identified when the order for the kitchen ought properly to have been placed. What, in fact, happened, the order having been placed in May 2011, was that Woodcraft remained involved while Cameron Black was the contractor and did not become insolvent until 2013. It is wholly unclear to me on the evidence what services and products were supplied by Woodcraft but any loss caused by Woodcraft's insolvency was, on a common sense basis, the product of the delay following Ibex's departure from site and during the period of Cameron Black's involvement, with the result that Woodcraft remained involved (and, it has to be assumed had still not supplied goods and services to the amount of the deposit) in 2013. This claim therefore fails.

Monitoring the quality of Ibex's works: issue no. 13

236. It is easiest to start consideration of this issue with what the claimants are claiming. In Mr Somerset's report, he says this:

> *"Defective works were known whilst Ibex was still on Site. After Ibex departed Site, further defects were identified but the extent was not fully evident until the tender for further works was prepared by Cameron Black."*

He then sets out how he has undertaken his assessment. He has reviewed Cameron Black's application for payment no. 22 and Pierce Hill (the then quantity surveyor's) certificate for payment no. 22. He has taken from those the description of defects and the amount certified for payment to Cameron Black for remedying those defects. His "workings" are set out in Appendix 3.9 to his report.

237. The following appears on the face of the report and the Appendix. Some of the defects were identified while Ibex was still on site; some of the defects were identified after Ibex left site. There is no analysis of which is which. Mr Somerset makes reference to, and his Appendix cross refers to, a CLA site inspection report. This was prepared in April 2012 and expressly states that it is to be read with similar reports from Vector and Walsh. The vast majority of the defects (other than M&E defects) are identified in the CLA report and Mr Somerset makes some reference also to the Vector report. Some of the defects have a CAI reference or VO reference suggesting (although not explored in evidence) that they were not identified at the time of the Cameron Black tender. Because

the amount certified for payment to Cameron Black is being claimed, this is a claim for the cost of carrying out remedial works and not for over-valuation.

238. At best the allegation of breach is rather vague. It is pleaded as a breach of the services of the project manager at clauses 1.6 and 1.8, 5.3, and 6.1 which in part involve liaising with others to obtain reports on progress and quality and maintaining a defects administration procedure (again with other members of the design team). The defendants submitted that those obligations did not extend to an obligation to inspect Ibex's works and identify defects. As a matter of contractual construction, that seems to me to be right but I leave open the question of whether on particular facts liability for defects might arise out of a breach of such obligations.

239. In any case, the claimants' position shifted, as so often in this case, so that the Russells' case was also put on the basis that this claim arose from a breach of PSP's functions as contract administrator. The defendants accept that the RICS Guide to Contract Administration identifies the services the Contract Administrator will be required to provide as including the review of the quality of workmanship and checking that works conform to the specification and drawings. That is relevant to other functions including valuation. In the normal course, however, the obligations of the contract administrator would not, in themselves, render him liable in respect of defects in the contractor's works. He might be liable if he had a more onerous obligation to supervise or if a negligent failure to monitor or inspect had the consequence either that a defect that could have been identified and remedied was not, or where he overvalued work by failing to take account of defects.

240. It is further common ground that the carrying out of inspections can be delegated and that is to be expected where the architect or engineer is the more appropriate person to monitor the quality of particular aspects of the works. In the present case, each of CLA, Vector and Walsh had obligations in their contracts to carry out periodic inspections. In the case of Vector and Walsh their obligations were to make periodic visits as appropriate to assist the Lead Consultant to monitor that the works were being executed "generally in accordance with the contract documents and with good engineering practice" and to advise on the need for instructions to the contractor.

241. The claimants' case is simply that there is no evidence that PSP properly discharged its inspection function by delegation or otherwise and it is right that there is no comprehensive collection suite of inspection reports from CLA, Vector and Walsh.

242. Mr Stone's evidence, however, was that during the course of the project, the design team did undertake quality assurance and make site visits and that was taken into account for valuation purposes.

243. The claimants rely on an e-mail from CLA (Gavin Challand) on 20 March 2012 which they submit suggests that CLA carried out no inspections after August 2011. That is a complete misreading of the e-mail. In that e-mail what CLA say is that their fees were based on a completion date of 10 June 2011 and that *"we carried out site attendance and inspection work, exercising reasonable skill care and diligence, for the duration of the intended construction programme, and an additional 10 weeks beyond this without further charge."* That 10 weeks gets to August. However, the e-mail continues:

"Following this, a fixed monthly fee was agreed for the four months between September and December 2011: this enabled us to continue our works in attending site, responding to contractor RFIs, and trying to close down remaining design issues. .....

I have already documented all deficiencies in Ibex's work that I have observed in the course of my regular site inspections that took place while Ibex were proceeding with the construction work. I will be happy to make a further inspection and specific report for the purposes of assessing any damage or latent defects that have occurred over the last three months ....."

Properly read, therefore, the e-mail confirms that CLA carried out site inspections and documented defects up to the time when Ibex suspended works.

244. The claimants further rely on the CLA site inspection report in April 2012 (and the corresponding Vector and Walsh reports) as clear evidence that the defects identified existed and that could and should have been identified on earlier inspection. The defendants' argument is the exact opposite, namely that instructing the carrying out of these inspections was the proper discharge of PSP's obligations. The claimants' case presupposes that there were no or no sufficient earlier inspections and the CLA e-mail makes it clear that there were.

245. It is important that the burden of proof is on the claimants. In this case, the evidence as to whether PSP did or did not (by delegation) properly carry out its inspection function is on both sides broad brush but, on the balance of probabilities, I find that the other consultants did carry out the periodic inspections they were engaged to do. There is, in any case, no evidence as to what defects ought to have been identified when and, in particular, whether defects now relied on ought to have been, but were not, identified in the course of the works. Where the defects appear to be the subject of an instruction or variation under the Cameron Black contract, the inference must be that they were not identified at the time that tender was prepared.

246. If particular defects ought to have been identified in the course of the works, Ibex could have been instructed to remedy them (and I repeat that the claim is for the cost of remedial works and not overvaluation). However, that opportunity was lost. It was lost because Ibex stopped work and left site and not because of anything that PSP did or failed to do. If there had been a properly articulated case that defects ought to have been identified at a time when there could have been an instruction for them to be remedied and that the claim against PSP arose as a result of a failure to identify such defects and instruct their rectification, it might have been a tenable case but, as it is, it is not. There is insufficient basis for me to find PSP negligent or that any negligence caused any recoverable loss.

247. I note that there was a further claim entitled "Professional Adviser's fees for witnessing defects" which it seemed to me at first blush might be related to this issue. That, however, appears to have been a misapprehension on my part. Mr Somerset and Mr Orr agree that there is no evidence to support this head of claim and value it at nil; it does not appear in the claimants' schedule of loss; and the claim is not now pursued.

248. The claim was a catch all for a variety of items set out in Appendix E to the Particulars of Claim totalling £61,558. These items included time costs associated with potential claims against each and all of the consultants; a "time based charge" in respect of Woodcraft; costs of engaging a temporary CAD operator; and time spent "in respect of

… warranties". In March 2013 (which must be a typo for 2012), there was a claim for what appeared to be fees charged for getting up to speed on the project and inspecting the site following Ibex's departure. These were either matters for which PSP could not be responsible – for example they were not responsible Ibex's departure from site – or where there was no explanation of any possible basis of claim. They seem to me to evidence the claimants' unfortunate approach to this claim in which costs have just been claimed against PSP without any thought or logic. Sense prevailed and the claims were not pursued but they should not have formed part of any claim at all.

Remaining issues

249. Issues nos. 14 to 20 are causation issues. Issues nos. 14-16 are addressed above. As I have said, issues 17 and 18 do not, in the result, arise.

250. Issue no. 19 addresses the losses allegedly caused by the alleged breaches encapsulated in issues nos. 8 to 13. I have set out above why I do not consider PSP to have been in breach and, where appropriate, why I would, in any event, have found that no loss was caused to the claimants.

251. Issue no. 20 captures a series of other discrete losses which are, on the face of the Particulars of Claim and the issue as framed, said to result from "PSP's failings". As such they do not strictly need to be considered since the claim in negligence fails but I will say a little more about them for completeness and because they provide some further illustration of the lengths to which the claimants have been prepared to stretch their case in order to seek to recover from PSP expenditure for which PSP could not conceivably be responsible.

252. Although there was no claim as such for any costs incurred by reason of delay to the project during the Ibex period, each of these claims was in some shape or form reliant on delay to the project. That is no doubt why Ms Jones submitted that the "timetabling point", that is sub-issue 6g relating to the contract programme, has a direct impact on quantum and that is the one issue on which I consider that PSP did fail to exercise reasonable care and skill. There might have been a cogent case that, if the Russells had been advised that the Ibex contract would take longer than programmed, they might have organised their affairs differently and avoided some loss that would not have been compensated in liquidated damages but that, despite Ms Jones' valiant submission, is not how the case has been put or evidenced.

253. The first discrete claim is for financing charges in the revised sum of £141,770.82. The claim is for the cost of financing incurred between 13 December 2012 and 31 October 2013 following the procurement of a secured loan with the EFG Private Bank. As pleaded, that is said to flow from the need to fund the "costs of the Property caused by delays to the project arising by reasons of PSP's breach." If PSP gave inadequate advice as to the length of Ibex's programme, that was not the cause of delay; there is no evidence that, if the claimants had engaged another contractor, the period could have been shortened; there is no case that PSP caused any actual delay (which is not the thrust to the allegation of breach in any event); and the period over which this claim is made post-dates the period of involvement of both Ibex and PSP. This claim fails.

254. There is a claim for additional security for site which is a claim for security for on site for the period from which Ibex ceased work to when Cameron Black started. The basis on which that is claimed against PSP is not set out. The only basis on which this could

be claimed would be if PSP was somehow responsible (a) for Ibex leaving site and (b) for the subsequent time taken to appoint Cameron Black. Neither case is made out.

255. There is further a claim for extended rent by reason of not being able to occupy the Property. This claim for rent is advanced for the period from December 2011 (when Ibex suspended work) to January 2014 when Cameron Black became insolvent. That attempts to fix PSP with liability both for Ibex's departure from site and the time taken to complete the works. There is simply no causal link to the alleged breaches.

Loss and damage

256. Issues nos. 21 to 24 appear under the heading loss and damage. For the reasons I have given, the answer to issue no. 21 is that no loss flows from any breach by PSP. Issues nos. 22 to 25 do not then arise and I again say no more about them.

Counterclaim (issues nos. 25 and 26) and issues nos. 1 to 5

257. These issues did not bulk large at trial but were the subject matter of some cross-examination and submissions together with document references. To some extent, therefore, it is necessary for me to piece together the story and the arguments and to set out, at least briefly, how the matter was put in the pleadings (and to do so despite the parties' agreement that precise dates are immaterial).

258. The Russells' pleaded case was that PSP was first engaged in May 2008. Subsequently, in 2011-2012, the Russells sought to formalise the agreement and, on 27 February 2012, PSP sent the Russells a written agreement which the Russells said represented the conclusion of negotiations and the agreement between them ("the 2012 Agreement"). Appendix 1 to that Agreement set out the Schedule of Services (which is not in issue) and Appendix 2 provided that PSP's Fee (as defined) would be "5% of the value of the Works" (exclusive of VAT and disbursements). As I have mentioned, on this basis, and by reference to the value of the work done by Ibex, the Russells now say that they have overpaid PSP.

259. In their defence, PSP said that it was not until May 2009 that they were orally instructed to take on the role of project manager, quantity surveyor and contract administrator. At that time no final agreement on fees had been reached but it was agreed orally between Mr Stone and Mr Russell that, pending such agreement, PSP would invoice Fairacre £5,000 per month. PSP did so on a monthly or bi-monthly basis from August 2009 to March 2012 (on occasion invoicing lesser sums). All the invoices were paid by Fairacre except for two invoices for Additional Services (which are the subject matter of the counterclaim).

260. The parties intended to enter into a formal agreement and in October 2010 PSP sent to the Russells a proposed form of appointment (which included the Schedule of Services). The fees were still not agreed and nor were they in July 2011 when a further copy of the appointment was sent. The e-mail sent on 27 February 2012 was sent against the background of what was happening, or more accurately not happening, on site with Ibex. The Russells re-appointed TMD to take over PSP's role as project manager (only) and the form of appointment sent was against the possibility that PSP would be appointed as quantity surveyor only. That appointment was never agreed. PSP's case, therefore, is

that there was never an agreement that it should be paid for some or all of its roles 5% of the value of the Works.

261. In the Defence, PSP's case was summarised as follows:

"... the Claimants appointed PSP as quantity surveyor, project manager, and contract administrator on the Project on or around May 2009 on the basis of an agreement as to fees which was considered by both parties to be interim pending final agreement; the terms of the PSP Appointment and the services to be provided thereunder were later agreed on the basis of the Form of Agreement in or around October 2010; no further agreement was reached as to PSP's fee; hence PSP continued to invoice Fairacre on a monthly or bi-monthly basis in the sum of £5000 per month".

262. In answer to that, it is submitted that the Russells did agree in May 2009 that interim payments would be made at £5000 per month but also that the total paid would not exceed 5% of the contract sum. Thereafter there was discussion about the fee structure but nothing further was agreed.

263. In fact, what Mr Russell said in his first statement was as follows:

"It was around this time [May 2009] that I agreed with Peter Stone that he would interim invoice me for £5k per month on a cash flow basis pending a final agreement as to his fee. However, we also agreed that these payments would not exceed 5% of the contract sum, or whatever other percentage we subsequently agreed. The 5% was a figure which [was] in my head as a maximum because Peter Stone had previously advised that he would do the work of project manager and quantity surveyor for 3.8%. I had been advised by David Copsey [TDM] that 4% to 5% was a reasonable range for the services that Peter Stone was providing. When invoices came in from PSP I did not think much about these and simply paid them. This was because I trusted PSP to police their own fees ..."

264. Unusually on an issue of contract formation, the documents do not provide a complete answer to what was agreed. So far as the documents are concerned, at a preliminary meeting on 12 May 2009, CLA and PSP were told that Fairacre was now to be the client and I have seen an example of an invoice then addressed to Fairacre (and I understand from the Further Information that where copies of invoices were requested they were provided). There does not seem to be any dispute that fees of £5000 per month or less were paid since that forms the basis of the claim for repayment. There is evidence from Mr Russell's accountants that, however the invoices were addressed, all except 4 were paid by the Russells and not Fairacre.

265. Sums in excess of 5% of the value of the Works were paid, and consistently with Mr Russell's evidence, paid without question. Mr Russell is an astute businessman and that cannot have escaped him. If the agreement was that the monthly sums would be paid up to a cap, and as he said he had that percentage in mind as a maximum, he would surely have queried further payments when that cap was reached. The fact that he did not is more consistent with Mr Stone's recollection that that cap had not been agreed and, indeed, Mr Russell's own evidence does not go so far as to state that a cap was agreed. Further, one might have expected to see some discussion in 2012 about how the "overpayment" was to be dealt with if the fees were agreed at 5% of the value of the Works but there was none.

266. Thus far that seems to me to be more consistent with the 5% figure not having been agreed as a maximum at any time. In cross-examination, however, Mr Stone was taken to the September 2009 status report which listed the professional appointments and recorded PSP's total fee as 5% and he agreed that that was the agreed fee "at this stage".

267. He was also asked about an e-mail dated 5 December 2011 in which he referred to the scope of work done and the prolonged contract period. He proposed a simple solution: *"If our fee at 5% is applied to the total value of the project that will in part pay for our professional time in some of the areas mentioned above, The easiest way to deal with the prolongation would be to pay our monthly fee of £5,000 for the period of the project ….. In summary our suggestion is that our 5% fee is based on the project value which would naturally "update" the original fee but we agree a fee of £5,000 per month for the extended period. The original fee would have ended in June so there should be a fee of £5k per month from July onwards. On that basis I suggest we invoice £25,000 for the period July-November."* His explanation, which seems to me to be exactly what the e-mail says, was that he was suggesting a 5% fee up to June 2011 and £5000 per month thereafter with a payment of £25,000 (at that rate) for work from June to November 2011. Whilst that implies that the 5% was agreed, it is also common ground that that additional £25,000 was paid and that is, at the very least, inconsistent with the 5% of value of the works representing the maximum PSP was to be paid.

268. I am left with the impression that neither Mr Stone nor Mr Russell was particularly clear about what they had or had not agreed. There is certainly some evidence to support the view that a 5% fee had been agreed and that no variation to that (such as the change to £5000 per month) was ever agreed but, at the same time, what was paid was patently well in excess of that and some additional payment (at a rate of £5,000 per month) was made. It seems to me most likely that the 5% figure was what they both had in mind to form part of formal terms of the appointment (which there never was) but that events, and payments, overtook them and, pending any final agreement, regular monthly payments were made to PSP instead. In those circumstances, there was no agreed cap on PSP's fees. The payments made to PSP were not made under protest or by mistake or with any reservation and, as PSP submits, there is no pleaded basis for the Russells' entitlement to repayment. It is not then necessary for me to decide whether the payments were made by the Russells or Fairacre.

269. Finally, and the subject matter of issues nos. 24 and 25, PSP advances a modest counterclaim for additional fees (in a total of £19,756.50 including VAT). The claim is for the payment of two invoices dated 14 March 2012 and 10 April 2012 for "Additional Services" which were services provided between October 2011 and March 2012 assisting the claimants and their solicitors, Taylor Wessing, to prepare a claim against Ibex.

270. The documents relied upon start with an email from Mr Stone to Mr Russell (the e-mail is undated; it is said by both parties to have been sent on 25 January 2012; but appears in the trial bundle in June 2011.) Mr Stone said that Mr Russell had asked for an outline of the contractual position before a meeting with solicitors the following day. Mr Stone gave such an outline (including drawing to Mr Russell's attention the reduction in his financial protection in the absence of the bond, a matter which has been discussed "extensively"). It is clear from this e-mail that what was at the forefront of his mind was a potential delay claim from Ibex. In that context he said *"One commercial consideration you need to be aware of is that should the claim crystallise then your exposure to fees will escalate quickly. Obviously our own input for claims work is beyond our base fee*

agreement and will be time charged." I note that Mr Russell's evidence is that he was told in the e-mail that PSP's costs would be chargeable on a time basis for a claim against Ibex. Although there is reference in the e-mail to the Russells' potential claim for liquidated damages that is obviously not the claim which might "crystallise" and give rise to additional claims work. In any case, it is not the claim that eventuated.

271. PSP then says that the starting point for the claims work that it did was an e-mail from PSP to Taylor Wessing dated 12 October 2011 which gives a "snapshot" of the contractual position in respect of Ibex and, following a meeting, Taylor Wessing advised the Russells ("with Peter as appropriate") to produce a bullet point list of grounds for and against termination under the JCT Contract. Mr Stone's evidence is that from March 2012, Mr Russell confirmed that he expected PSP to be involved in closing out matters with Ibex. By e-mail dated 14 March 2012, Mr Stone set out what PSP would do. There was no reference to fees.

272. The Russells say in their defence to counterclaim that they accept that PSP carried out some work of the type described but that there was no agreement that this entitled PSP to additional fees and they understood the work to fall within the (on their case) agreed 5% fee. Further PSP did not advise them that there would be any additional charge.

273. On any view, there is sparse evidence that the Russells instructed PSP to carry out additional work for which PSP was entitled to charge on a time related basis. The correspondence I have referred to above is entirely consistent with Mr Russell believing that this was part of PSP's services. The only reference to additional fees (whatever the date of the e-mail) does not assist because it is clearly related to Ibex's potential delay claim.

274. The difficulty with the claim, in any event, is that PSP relies on the terms of the Form of Appointment and clause 6 of the Form of Appointment which provides for payment for services not falling within Basic Services (essentially those in the Schedule of Services) at rates set out in the Appointment Particulars. There are such rates in Appendix 2:

    (i) Clause 6 provides: *"If at any time the Client requires the Consultant to perform any services which are not identified as Basic Services in the services listed in the Schedule ("Additional Services"), the Client pays the Consultant for such additional Services at the rates set out in the Appointment Particulars unless otherwise agreed. If the Client requires Additional Services, the Consultant informs the Client of the likely additional fee to be charged …."*

    (ii) Clause 7.1 provides: *"Payment of the Fee, any additional fee payable for Additional Services and the Reimbursable Expenses is due on receipt by the Client of a VAT invoice from the Consultant. Invoices are submitted on each instalment date or on completion of each activity or work stage set out in the Appointment Particulars ……."*

275. I quoted above from the Defence because it seems to me that that claim must be made on the basis that in October 2010 everything was agreed (including rates and the entitlement to payment for Additional Services) despite PSP's case being that "the Fee" was not agreed. I find it difficult to spell out of the parties' cases in relation to what happened in October 2010 such a nuanced agreement. Indeed, PSP's case goes further and seeks to include within the alleged agreement the provisions of clause 7 for payment of the Fee

(as well as payment for Additional Services) when on their own case the Fee is not agreed.

276. In my view, PSP cannot rely on part only of the agreement as to payment in the Appointment. There is no other pleaded basis of claim and, in any case, it does not seem to me that there was any further agreement that PSP should be paid time related charges for work done in relation to claims by or against Ibex or otherwise.

277. Accordingly, I find that PSP is not entitled to any further payment on their Counterclaim.

Annex 1: List of issues

Contract formation

1. Was PSP retained as project manager, contract administrator and quantity surveyor in or around May - June 2008, or alternatively in or around May 2009? For the avoidance of doubt, this question is aimed at the date and not the fact of appointment, the fact of appointment being common ground.

2. On what terms (both express and implied) was PSP retained as project manager, contract administrator and quantity surveyor? In particular, but without limitation, what if any agreement was reached as to PSP's fee, and when?

3. It is common ground that the Schedule of Services which appears (in the same terms) at Appendix 1 to the different versions of the Form of Appointment attached to the Amended Particulars of Claim and to the Amended Defence and Counterclaim respectively governed PSP's appointment. When was PSP's Schedule of Services first agreed: in or around October 2010 (as PSP contends) or on or around 27 February 2012 (as the Russells contend)?

4. Did the parties enter into a new and/or separate agreement in or around 27 February 2012 and, if so, on what terms (both express and implied)? In particular, but without limitation:

    a. What if any of the terms set out at paragraphs 1 -3 above were agreed?

    b. Was there any agreement as to PSP's fee?

5. Did the parties enter into only one contract or into two (or more) separate contracts in 2008 and/or 2009 and/or 2010 and/or 2012 and, insofar as it differs from the above, what were the terms (express and implied) of that contract/ those contracts?

Allegations of breach of contract/ negligence

(For the avoidance of doubt, it is common ground that the Russells must prove breach of contract/ negligence to make out any of the allegations below. In other words, it is common ground that it would not be enough for the Russells simply to prove the factual matters stated, they must also establish that PSP's conduct fell below the standard of the reasonably competent project manager, contract administrator and/or quantity surveyor, and identify which obligation, if any, has been breached. The detail is in the pleadings and will be in the submissions in order to keep this document brief.)

6. Did PSP fail properly to manage and/or advise on the tender process as set out below?

    a. Did PSP propose tender documentation that was insufficiently advanced for a contract with employer design?

    b. Did PSP proceed to tender on the basis of tender documentation that was insufficiently advanced and was not suitable for allowing Ibex to return an accurate price for the work?

c. Was the level of provisional sums in Ibex's tender too high in the circumstances? Should PSP have taken steps either to reduce the level of provisional sums in the tender, or to warn the Russells of the risks of proceeding with a tender containing the level of provisional sums that the Ibex tender contained? If so, did PSP fail to do so?

d. Did PSP provide a Tender Sum Analysis that was insufficiently clear by reason of the word "included" in the "Value" column and, if so, what were the consequences of this?

e. Did PSP accept a tender price from Ibex that was insufficiently detailed in all the circumstances to permit effective financial management of the works?

f. Did PSP fail to ensure that the tender sum contained sufficient pricing information to price variations in all the circumstances? If so, what were the consequences of this?

g. Did PSP fail properly, adequately or at all to interrogate, question or review the contract programme?

h. Was Ibex's contract programme too short and likely to fail, and did it contain significant inherent risk? If so, did PSP fail adequately or at all to warn the Russells of the risks of proceedings with such a programme?

i. Did PSP fail to put adequate procedures in place to limit and mitigate delays due to uncertain and/or missing design information?

j. Were there any inadequacies in Ibex's tender sum? If so, did PSP fail to interrogate Ibex about inadequacies in the tender sum/ to assess those inadequacies/ to advise the Russells about the same, particularly in light of the high end nature of the project?

k. Was PSP required (and if so, to what extent) to interrogate the financial standing of Ibex/ Doyle/ the Doyle group of companies and/or to assess that financial standing and/or to advise the Russells about the same? Did PSP fail properly to do so?

l. Did PSP fail to provide an adequate tender report?

m. Did PSP fail to carry out adequate post-tender interviews with Ibex?

7. If the Russells prove breach under paragraph 6 above: but for that breach, would the Russells have postponed the appointment of Ibex, or chosen not to embark upon the project?

8. Was PSP in breach of contract or negligent in not obtaining a performance bond from Ibex, or in allegedly not trying to obtain one until August 2011? Should PSP have recommended the withholding of monies in light of the fact that Ibex did not provide a performance bond? If so, did PSP fail to do so?

9. Was the letter of intent that was issued to Ibex deficient and, if so, in what respects and what were the consequences of this?

10. Did PSP fail properly to value Ibex's works?

11. Did PSP fail properly to check applications for payment from the professional team?

12. Did PSP fail to recommend an appropriate procurement process for the works or fail to advise the Russells of the risk of proceeding on this basis (namely of the risks to the Russells of placing orders with suppliers directly)?

13. What if any obligations did PSP have in relation to monitoring the quality of Ibex's works? Did PSP fail properly to discharge any such obligations?

Causation

14. Did the alleged breaches at paragraph 6 above cause the Russells to spend more than they ought to have done to complete the Project as detailed at paragraphs 38 to 40 of the Amended Particulars of Claim?

15. Did Ibex's works cost more than originally estimated or more than they ought to have cost, or take longer than they should have done, due to the Russells' failure to issue timely instructions to the design team/ their design changes/ their changes of mind/ their failure to make timely design decisions, or something else?

16. To what extent (if at all) did PSP warn the Russells of the risks of their conduct as detailed in paragraph 15 above, and were PSP's warnings (if any) justified?

17. Were Ibex or CLA responsible for the matters of which the Russells complain and, if so, what impact does this have and in particular can PSP nonetheless also be liable for the losses allegedly caused and, if so, to what extent?

18. Did Ibex bear the risk of any inadequacies, errors or omissions on the contract price and contract programme so as to defeat the Russells' claim against PSP?

19. Did the alleged breaches at paragraphs 8 to 13 above cause the losses claimed by the Russells at paragraphs 41 to 46 of the Amended Particulars of Claim?

20. Did the alleged breaches at paragraphs 6 and 8-13 above or any of them cause the losses claimed by the Russells at paragraph 47 of the Amended Particulars of Claim?

Loss and damage

21. What loss (if any) flows from PSP's alleged breaches. The parties will endeavour to agree a schedule of loss, showing both parties' cases.

22. Have the alleged losses been suffered by the Russells or by Fairacre?

23. Did the Russells fail to mitigate their loss in any material respect?

24. What entitlement (if any) do the Russells have to interest?

Counterclaim

25. Was PSP instructed by or on behalf of the Russells to carry out Additional Services in connection with the proposed termination of Ibex's contract in or around October 2011 – March 2012?

26. If so, is PSP entitled to payment for these Additional Services and if so in what amount (including any entitlement to interest)?

Annex 2: Schedule of Services (Project Manager and Quantity Surveyor)

By Appendix 1, Schedule of Services:

*"**Schedule of Services – Project Manager***
Core Services
Note supplementary services not listed herein are excluded from the schedule of services
1 Generally
1.1 …
1.2 …
1.3 …
1.4 Issue instructions, on behalf of the Client, to the Professional Team and Contractor in accordance with the terms of their Appointment/ the Building Contract.
1.5 …
1.6 Monitor the performance of the Professional Team and the Contractor. Report to the Client.
1.7 Liaise with the Professional Team, prepare and maintain the Programme for the procurement and construction of the Project. Monitor actual against planned progress. Report to the Client.
1.8 Liaise with the Professional Team and coordinate issue of regular/ monthly quality, progress and cost reports. Advise the Client of any decisions required and obtain authorisation.
1.9 Check applications for payment from the Professional Team. Recommend payments to the Client.

2 Preparation (RIBA Outline Plan of Work 2007)
2.1 Establish review, approval, variation and reporting procedures. Prepare recommendations for the Client's approval.
2.2 …
2.3 …
2.4 Advise the Client on specialist services, including consultants, contractor, sub-contractors and suppliers required in connection with the Project.
2.5 …
2.6 Advise the Client if required on the selection, the terms of appointment and fee structures for the Professional Team. Conduct negotiations with, and prepare and complete the forms of appointment for, the Professional Team.
2.7 Advise the Client on the Professional Team's professional indemnity insurance cover.
2.8 …

3 Design (RIBA Outline Plan of Work 2007)
3.1 Liaise with the Professional Team and establish a structure and procedure for reporting and management. Establish review, approval, variation and reporting procedures. Prepare recommendations for the Client's approval.
3.2 Establish the roles and responsibilities of the Client, the Professional Team, the Contractor and specialist/ design sub-contractors.
3.3 Confirm the scope of the Building Contract to the Client and advise on additional works required by third parties.

4 Pre-construction (RIBA Outline Plan of Work 2007)
4.1 Advise on tendering and contractual procurement options. Prepare recommendations for the Client's approval.
4.2 Advise on suitable tenderers for the Building Contract. Prepare recommendations for the Client's approval.
4.3 Liaise with the Professional Team, establish review, approval, variation and reporting procedures. Prepare recommendations for the Client's approval.
4.4 Attend pre- and post-tender interviews if appropriate.
4.5 Monitor and report to the Client on the procurement process.
4.6 Advise on the tenderer's construction programmes and method statements.

4.7 Liaise with the Professional team on negotiations with tenderers. Obtain documentation from the Professional Team to confirm adjustments to the tender sum.
4.8 Liaise with the Client and the Professional Team and advise on methods of progressing design and/or construction works prior to the execution of the Building Contract.
4.9 Obtain confirmation that required insurances are in place prior to commencement of works on Site.
4.10 Obtain contract drawings and specifications from the Client and the Professional Team.

5 Construction (RIBA Outline Plan of Work 2007)
5.1 Agree approvals required from the Professional Team under the Building Contract.
5.2 Obtain authorisation from the Client for additional costs where the Consultant's limit of authority is exceeded.
5.3 Obtain progress and quality reports from site staff representing the Client, the Professional Team and the Contractor.
5.4 …
5.5 …

6 Use (RIBA Outline Plan of Work 2007)
6.1 Liaise with the Client, the Professional Team and the Contractor to prepare and maintain a defects administration procedure, or similar management tool, to identify the roles and responsibilities of the Client, the Professional Team and the Contractor. Establish review, approval, variation and reporting procedures. Prepare recommendations for the Client's approval.
6.2 …

Schedule of Services – Quantity Surveyor
Core Services
Note supplementary services not listed herein are excluded from the schedule of services
1 Generally
1.1 …
1.2 Prepare regular/ monthly cost reports. Advise the Client of any decision required and obtain authorisation.

2 Preparation (RIBA Outline Plan of Work 2007)
2.1 …
2.2 …
2.3 Advise on the cost of the Project.
2.4 Advise on alternative procurement options.
2.5 Advise the Client on any factors likely to affect cost, time or method of implementation.
2.6 Prepare a preliminary cost plan and cash flow forecast.

3 Design (RIBA Outline Plan of Work 2007)
3.1 Prepare, maintain and develop a cost plan and cash flow forecast.
3.2 Advise on the cost of the Professional Team's proposals. Advise on any cost variances to the allowances contained in the cost plan.
3.3 …
3.4 Confirm the scope of the Building Contract to the Client and advise on additional works required by third parties.

4 Pre-Construction (RIBA Outline Plan of Work 2007)
4.1 Advise on tendering and contractual procurement options. Prepare recommendations for the Client's approval.
4.2 …
4.3 Liaise with the Client's legal advisors if required and advise on warranties/ third party rights etc.

4.4 Liaise with the Client's legal advisors if required and advise on bonds for performance and other purposes.
4.5 Liaise with the Client's legal advisors if required and advise on use and/or amendment of standard forms of contract or contribute to drafting of particular Client requirements.
4.6 Obtain tender drawings and specifications from the Client and Professional Team.
4.7 Liaise with the Client and the Professional Team and prepare tender documentation.
4.8 Prepare pricing documents for inclusion in tender documents.
4.9 Advise on suitable tenderers for the Building Contract. Prepare recommendations for the Client's approval.
4.10 Investigate prospective tenderers and advise the Client on their financial status and technical competence if required. Prepare recommendations for the Client's approval.
4.11 Attend pre- and post-tender interviews if appropriate.
4.12 …
4.13 Check tender submissions for errors, omissions, exclusions, qualifications, inconsistencies etc.
4.14 Liaise with the Professional Team and advise on errors, omissions, exclusions, qualifications and inconsistencies between the tender documents and the tenders received. Prepare recommendations for the Client's approval.
4.15 Liaise with the Professional Team and prepare a tender report. Prepare recommendations for the Client's approval.
4.16 Conduct negotiations with tenderers on the original tender returns. Prepare analysis of adjustments to the tender sums. Prepare recommendations for the Client's approval.
4.17 …
4.18 Obtain contract drawings and specifications from the Client and the Professional Team. Liaise with the Client's legal advisors if required, prepare the contract documents and deliver to the Client and the Contractor for completion.

5 Construction (RIBA Outline Plan of Work 2007)
5.1 Visit the Site monthly and assess the progress of the Project for interim payment purposes.
5.2 Prepare recommendations for interim payments to the Contractor.
5.3 Advise on the cost of variations.
5.4 Agree the cost of instructions, excluding loss and expense claims, issued under the Building Contract.
5.5 Advise on the rights and obligations of the parties to the Building Contract.

6 Use (RIBA Outline Plan of Work 2007)
6.1 Prepare recommendations for interim payments and release of retention funds.
6.2 …
6.3 …