Covid-19 Protocol: This judgment on the applications is to be handed down by the judge remotely by circulation to the parties' advisers by email and release to Bailii. The date for hand-down is deemed to be 22 October 2021.

Case No: HT-2020-000084

Neutral Citation Number: [2021] EWHC 2796 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 22 October 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

BDW TRADING LIMITED
Claimant

- and –

(1) URS CORPORATION LIMITED
(2) CAMERON TAYLOR ONE LIMITED
Defendants

Simon Hargreaves QC and David Sheard
(instructed by **Osborne Clarke LLP**)
for the Claimant
Fiona Parkin QC and Christopher Reid
(instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the Defendants

Hearing Dates: 5, 6 and 7 October 2021

Mr Justice Fraser:

Introduction

1. In these proceedings the court is asked to answer some preliminary issues on the basis of assumed facts. This is the judgment on those issues which were agreed by the parties. The assumed facts are included in Appendix A to this judgment. They are high level, in the sense that the assumptions of fact that are made by the parties (and which the court is asked to assume) are very general. The nature of the claim brought in these proceedings is one in tort in relation to structural defects in a number of high-rise buildings. The Claimant, BDW Trading Ltd ("BDW") was the owner and developer of the buildings at the time that they were built. The Defendants, URS Corporation Ltd ("URS") and Cameron Taylor One Ltd (only the Second Defendant URS has been involved in this trial) were responsible for the structural designs that are said to have been negligent. As a result of negligent design, the structures are said to be inadequate. In very general terms, the structural designs are said to be seriously defective such that remedial works were required. The claims against the Defendants are tortious ones for professional negligence.

2. There are two unusual aspects to these proceedings. The first is that BDW is said to have had no legal obligation to make payment of the very sizeable losses which are said to have been incurred or arisen as a result of the dangerous structural state of the buildings to which the claims relate. This is because it is said by the Defendants that BDW would, if so minded, have been entitled to defend any claims brought against it by relying upon the benefit of a range of defences, including limitation. Given some of these buildings were constructed in 2005, and the problems were discovered in 2019, limitation is doubtless a central feature in the litigation as a whole. Only URS appears on the Preliminary Issues. Another defendant, Cameron Taylor One Ltd, was given permission to appeal by the Court of Appeal on 5 February 2021 in respect of an earlier decision by HHJ Kramer sitting as a judge of the High Court. In that decision, in October 2020, HHJ Kramer permitted BDW to amend its claims in certain respects, including substituting Cameron Taylor One Ltd for another defendant (no longer, pending that appeal, involved) called Cameron Taylor Consulting or CTC. That appeal concerns, inter alia, substitution of parties and also, importantly, issues of limitation. That appeal will be heard in December 2021.

3. These preliminary issues do not concern those issues on that appeal. If that appeal succeeds– and the Court of Appeal have decided it has real prospects of success – then the shape of the litigation may change. The decision on these preliminary issues may in any event turn out to be hypothetical or academic, if any of the assumptions in the assumed facts are not made out. The application for the hearing of preliminary issues was sought by consent, and approved by the court in June 2021. Because an order had already been made (albeit a consent order), and the parties had expended much time and expense in preparing for the trial of the Preliminary Issues, it was sensible to hear it. However, I do question it being listed prior to the outcome of the appeal, and also in circumstances where the outcome may become wholly academic. I am reminded of the warning given many years ago by Lord Scarman in ***Tilling v Whiteman*** [1980] AC 1, 25 that "preliminary points of law are too often treacherous short cuts". The Technology and Construction Court Guide also expressly refers to the potential pitfalls of using preliminary issues. It is to be hoped that the answers to these issues will assist both BDW and URS in terms of the litigation going forward.

4. Here, the assumed facts include what could be said to be whole swathes of the likely battleground between the parties should the matter proceed, absent settlement. Both the existence of the defects, their severity, and indeed causation, are all assumed. These preliminary issues are therefore examples of the parties setting the court a series of questions as though it were sitting an academic examination. Having said that, however, the subject matter of the issues is, given the factual background, potentially interesting, and the parties have cited much authority to the court, both English and Commonwealth. I will not refer to all the cases in this judgment; there are over fifty of them. I will only refer to such authority as is necessary for me to answer the isssues.

5. It is a curiosity of this trial of Preliminary Issues that, for buildings that were designed – and then constructed – so long ago, limitation *per se* does not form part of the issues that the parties wish the court to resolve at this stage. This is particularly surprising given the number of times that URS in particular included reference in its submissions to the fact that claims against BDW were, or would be, time-barred. This may very well be because limitation is such a central part of the ongoing appeal. Whatever the reason for the strange sequence of amendment, application for permission to appeal, preliminary issues and then appeal, it is a sequence that ought not to be routinely followed. I doubt it is entirely in accordance with the overriding objective.

6. The second unusual feature is that, because of the particular facts, BDW – who discovered the structural inadequacies in 2019 – contends for the accrual of its cause of action as early as possible, and URS, the negligent designer (on the basis of the assumed facts), is arguing for it to be as late as possible. The usual positions of tortfeasor and claimant are reversed, in that a tortfeasor would normally contend for a far earlier date for accrual of cause of action, and a claimant for a later one. This does not affect the legal analysis of accrual of cause of action, and scope of duty, but it is unusual nonetheless.

7. The Preliminary Issues are as follows, and these were included in the consent order dated June 2021 to which I have referred:
"On the basis of the Assumed Facts:
(a) Did the scope of URS' duties extend to the alleged losses?
(b) Are BDW's alleged losses recoverable in principle as a matter of law in tort?
(c) In particular as to (b), is it nonetheless, and on the basis of those Assumed Facts, a defence to URS in law that: (i) the losses were not in the contemplation of the parties at the time of entering into the appointments; (ii) the losses are too remote; (iii) BDW has caused its own losses; (iv) BDW's actions broke the chain of causation; and (v) BDW has failed to mitigate its loss?"

8. It will be noted that Preliminary Issue (c) asks whether it is "a defence to URS in law that….." and then poses a number of different questions, including whether BDW caused its own losses, had broken the chain of causation, or failed to mitigate its loss. Mr Hargreaves also clarified orally that by use of the term "health and safety" in the assumed facts, the parties intended to mean defects that presented a danger to life and limb, rather than those defects being contrary to the Health and Safety Regulations. In other words, they are of a far more serious character than the term "health and safety" is sometimes interpreted to mean.

9. Causation, and mitigation of loss, are highly fact sensitive. The assumed facts do not provide a sufficient basis for any proper consideration (still less a finding that would be binding at first instance) that the chain of causation has been broken, or that BDW has failed to mitigate its loss. I therefore do not consider that Preliminary Issue (c)(iii), (iv) and (v) can properly be addressed at this stage in the action, and without full consideration of the facts. I do not therefore propose to address these parts of that third issue. Those points can only be resolved at trial.

10. URS has also issued a separate application to strike out BDW's claims because, even if the Court determines the Preliminary Issues in BDW's favour, URS contends that BDW's Particulars of Claim disclose no reasonable cause of action against it and should be struck out on that basis in any event. Broadly the same legal issues arise, in the sense that consideration of the law under the Preliminary Issues is required properly to consider the strike out application. URS issued this application only quite recently on 16 September 2021 and wishes to have it heard at the same time as the Preliminary Issues.

11. URS explained that it had done this because URS was also concerned that the Preliminary Issues as drafted might not "catch" all of the problems that BDW had in terms of its claims. BDW took a pragmatic course and did not object to the strike out application being heard at the same time as the Preliminary Issues. That application will have to be considered against the relevant rules in the CPR dealing with the striking out of pleadings, but I will turn to do that after considering the Preliminary Issues themselves.

Factual background to the proceedings

12. BDW itself may not be a household name, but it has as some of its brands Barratt Homes, and David Wilson Homes, which are. As is well known, after the Grenfell Tower disaster in which so many people lost their lives, investigations were undertaken by responsible developers on a wide variety of buildings that had similar cladding to Grenfell Tower. In late 2019, whilst carrying out unrelated cladding remedial works, BDW noticed cracking in the structural slab of a building known as 'Citiscape'. The structural design of that block had been carried out by a company that is now a member of the AECOM group. After investigation, it was discovered that the structural integrity of the slab was seriously deficient, to the point that the building was at risk of impending structural failure. This was so serious that it resulted in the evacuation of that block and the execution of remedial works to stabilise it.

13. This discovery also resulted in a wholesale review by BDW of the structural condition of a number of other blocks which it had developed, and for which members of the AECOM group – including the Defendants in these proceedings– had been engaged to provide structural engineering designs for their construction. URS is also a member of the AECOM group, hence its appearance as a defendant in these proceedings. This review by BDW revealed that for some additional buildings, including those in respect of which claims are made in these proceedings, the structural design had been negligently performed. This meant that in structural terms, the existing structure was not safe. This lack of safety is said to have occurred or been present as a result of the deficiencies in their design, which were not known about before the inspections I have

mentioned. These other buildings did not all exhibit physical cracking of the type which led to the initial Citiscape investigation, but the investigations showed (on BDW's case in the proceedings) that they had been built to dangerously inadequate structural designs, which are said to have compromised their structural integrity. In other words, the original investigation generally led to very surprising and highly concerning structural concerns at other buildings. Those other investigations uncovered other, equally serious, structural defects, including where the AECOM group had performed structural engineering design.

14. In one of the blocks – Ross Apartments in the Capital East Development – the defects were considered so serious that evacuation was also necessary. In other instances, temporary propping was utilised, followed by permanent works to remedy the structural defects.

15. However, by the time when these deficiencies in design came to light, BDW no longer owned the buildings. BDW maintains that it was, however, subject to liabilities to the occupants of the buildings in respect of them (including under contracts pursuant to which the individual units had been sold by BDW, as well as pursuant to the Defective Premises Act 1972 ("the DPA")). URS maintains that BDW would potentially have had the benefit of limitation defences had claims been made against it, and was not legally obliged to act as it did. It is these opposing positions that the parties have sought to capture in the Preliminary Issues.

16. I will here quote a passage from the skeleton argument of BDW on the Preliminary Issues which explained why BDW says it chose to act as it did. "Nevertheless, and given the seriousness of the defects, BDW did not as a responsible developer consider that it could simply ignore the problem once it had come to light. Rather, it was compelled to act to ensure that the blocks were made safe. In doing so, it has incurred or will incur expenditure running to many millions of pounds, the recovery of which it now seeks from URS in these proceedings."

17. The Defendants are said to be responsible for the negligent designs which necessitated the expenditure to which BDW refers in that passage, although URS does not accept that it is required to compensate BDW in respect of these losses. URS maintains that BDW has never suffered any damage, and so has no accrued cause of action in tort against it. In the alternative, URS maintains that, by definition in circumstances in which BDW no longer owned the relevant buildings and could have raised a defence of limitation in respect of claims that might have been brought against it, the losses suffered must be outside the scope of URS' duty of care in tort and/or be too remote to recover and/or have been caused by BDW itself as opposed to URS and/or represent a failure by BDW to mitigate. These latter ways of putting the defence on URS' position are reflected in preliminary issue (c), which is effectively a sub-set of (b).

18. BDW also submits that the Defendants' position in the litigation, and URS' position on the issues now before the Court, is unmeritorious. Whether that is right or not, it does not much advance matters as a matter of law. There is an old adage that states "hard cases make bad law". To be fair to Mr Hargreaves QC, he has advanced his case on the substantive law rather than on the merits, but with the merits (or lack of them, from the perspective of BDW) hovering in the background, as it were. Ms Parkin QC for URS characterises the claim as "anything but conventional", and she

describes it as a claim "masquerading as a conventional professional negligence claim". This is because she says the costs of remedial work were incurred in order "to mitigate an altogether different type of damage: Reputational Loss". There are separate heads of loss pleaded in paragraph 48 of the Particulars of Claim, described by BDW under the heading "Reputational Damage" (they are at paragraphs 48.7, 48.13 and 48.18, one paragraph for each of three developments) but it would be wrong to describe these as the entirety of the losses advanced. I shall refer to these as the "Reputational Damage Losses". The other heads of loss include costs of investigation, costs of repair, project management costs as well as "other costs" which include internal employee and management costs in dealing with the structural inadequacies. I will refer to these as the "Paragraph 48.1 to 48.6 losses" to differentiate them from the Reputational Loss claims. They do, however, appear in other places too in the Particulars of Claim, in respect of the other developments. I consider it convenient to consider the Reputational Damage Losses separately.

19. Also by way of background, URS referred to some matters as being of note, which are not, in my judgment, of direct relevance to the Preliminary Issues. One is that the defects in the Citiscape development that initiated the widespread investigation to which I have referred were in respect of a design carried out by "an entirely separate engineering firm, Thorburn Colquhoun Ltd". In other words, companies in the AECOM group were not responsible for the design of that initial development which was found to have severe structural deficiencies. It is part of the factual history of how BDW discovered the structural safety issues with the other developments, but I do not see how that is relevant to the Preliminary Issues. Thorburn Colquhoun is now a member of the AECOM group, but I do not see how its corporate affiliation, either then or now, can be relevant to the claims brought against URS. URS also draws the court's attention to the fact that "although the designs which are the subject of this action (and others brought by BDW) were provided by a number of companies which are *now* part of the AECOM group, at the time that the designs were prepared there was no corporate connection between any of them." I do not see how that can be relevant either. It may potentially affect the insurance position within the AECOM group itself, in the sense that companies now a part of the group might have brought with them existing (but at that time unknown) potential claims, or that insurance cover is provided on a claims made basis, but that does not seem to me to fall within the scope of the existing Preliminary Issues. BDW brings its claims (or for the purposes of the Preliminary Issues, appears to) against the entity that designed the blocks in question.

20. URS was engaged by BDW under contract to act as the structural designer. The duty of care arises as a result of that contractual engagement. Neither party relies upon the terms of the specific contracts to any particular extent. I do not therefore propose to recite them. The existence of the contracts is what leads to a conventional duty of care on the part of the designer, which was an express term. That is a duty of care co-existent with the designer's contractual duties. This is entirely conventional.

21. Finally in this introduction, the defects under consideration (at least for the purposes of the Preliminary Issues) are those that present a health and safety risk; this much is clear from the assumed facts. At the Capital East Development, in the Ross Apartments the slabs are said to have been designed in such a way that they are significantly overstressed for punching shear (set out in paragraph 30.2 of the

Particulars of Claim) failing at the first critical perimeter away from the column support, and also in some cases at the column face. This gives rise to what is pleaded as "a critical safety issue". In Ross, Atlantic, Adriatic, Alaska and Oceanis (other areas of the development), the same defect in terms of overstressing of the slab is alleged to exist (paragraph 35). Additionally, the slabs are subject to varying levels of bending moment. The concrete grade, thickness and reinforcement are all said to be inadequate (paragraph 36). One does not have to be an engineer to understand that "significant overstressing" of structural members of a building is not a beneficial state of affairs, particularly when it relates to structural slabs and column supports. Bending moment is the measure of the bending effect that can occur when a moment (which is another way of referring to an external force) is applied to a structural element. This can lead to failure of the structural element in question.

22. At Freemens Meadow, another development, although investigations are also ongoing, for blocks C4-C7, elements of the slabs and supporting elements are inadequate. There is a critical safety issue in some locations as a result of the first floor slab being significantly overstressed in punching shear (paragraph 39.1 of the Particulars of Claim). There are defects in the transfer columns due to offset column geometry and inadequate slab thickness, column width and slab reinforcement (paragraph 40). There are also defects in the upper slabs due to inadequate slab thickness, column width and slab reinforcement (paragraph 41).

23. Whether the nature of these defects are such that they do, or do not, lead to a conclusion that these buildings (or some of them) were "doomed from the start" may arise because of the use of that phrase by Lord Fraser in ***Pirelli General Cable Works Ltd v Oscar Faber*** [1983] 2 AC 1. I will return to that point later in the legal analysis below at [119] for reasons that will become clear.

Analysis

24. There are two important matters which, in my judgment, need to be accepted when considering resolution of these preliminary issues, given how the issues themselves are drafted.

25. The first is the correct characterisation of the legal nature of a limitation defence in English law. It is widely accepted that the correct characterisation of limitation, which arises under statute, is that it is a procedural bar to a cause of action. In other words, the underlying or substantive cause of action is not extinguished, but a defendant is entitled, if a limitation defence is available and is relied upon, procedurally to bar the claim from proceeding against it. This may amount, in terms of the practical outcome to that defendant, to the same outcome– the claim cannot proceed – but in terms of technical legal analysis, it is very different. The underlying claim against that defendant, though time-barred, continues to exist in law. It also means that limitation is a matter for a defendant to raise. Not all defendants do so. If limitation is not raised as a defence by a defendant, then the claim is permitted to proceed because the substantive claim still exists.

26. Part of what I could describe as URS' current limitation difficulty is that although the Preliminary Issues do not concern limitation *per se* – and although limitation is a very live issue before the Court of Appeal in December – URS repeatedly in its submissions makes reference to the fact that BDW's claims are statute-barred.

However, it is claims against BDW by third parties (original owners, or subsequent purchasers) that would be statute-barred; this is included in Assumed Fact 9(b). That is not the same as BDW's claims against URS being statute-barred. Claims against URS may be time-barred, but I do not interpret the Preliminary Issues as requiring resolution of time-bar defences. If I did, I would not have been prepared to hear them in advance of the Court of Appeal hearing the existing appeal in December. Although proper analysis of the Preliminary Issues does require consideration of the point at which any cause of action BDW arose, that is not the same as deciding that such claims are time-barred. It is important to make this clear.

27. The second important point is the nature of the loss, which URS seeks to characterise as being *other* than the type of loss in the contemplation of the parties. URS submitted the following (taken from paragraph 7 of its skeleton argument), that the costs claimed were not recoverable because they were "an altogether different type of damage: Reputational Loss". This is not an accurate or correct characterisation of all of the different heads of loss advanced by BDW. It risks confusing the type of damage, with the motivation on the part of BDW for performing the works. The type of damage advanced in the Paragraph 48.1 to 48.6 losses are conventional heads of loss. These paragraphs set out the conventionally pleaded costs of investigating and remedying the structurally defective nature of the structural elements of the buildings. Alternatively, it could be described as the cost of the remedial works necessary to put right those structural defects. It is not, for example, damage of a different kind entirely, such as a claim for damages by BDW in respect of (or to avoid) reputational loss. That is pleaded separately, and that is why I have chosen to approach each type of loss separately. I therefore reject that characterisation by URS of all the different types of loss sought to be recovered by BDW. The type of loss suffered here (as I consider at [30] below) is, at least partly, the cost of remediation. I accept that Reputational Damage Losses do not constitute the cost of remediation and ought to be considered separately. But it would be wrong to tar all of the pleaded heads of loss with the reputational damage brush. That is not how the claim for damages is pleaded.

28. Another point relied upon by URS is that the losses which BDW advances against it are in law a result of a "voluntary assumption" of responsibility by BDW. Voluntary assumption of responsibility is one way in which a duty of care may be found to arise. Such cases are somewhat infrequent, but they do occur sometimes. For example, a garden designer doing a favour for a friend and neighbour (but who was not engaged contractually or even paid) may voluntarily assume a duty of care to perform those services with reasonable skill and care, as in ***Lejonvarn v Burgess*** [2017] EWCA Civ 254. However, this is not a voluntary assumption of responsibility case. The duty of care under consideration in this case arises not because URS voluntarily assumed responsibility to BDW. It arises because URS was engaged by BDW as the structural designer, and professional designers owe their clients duties to perform their designs exercising the reasonable care and skill to be expected of one in their profession. It may be that by this phrase Ms Parkin meant to express in different words one of her main submissions, that BDW had no legal obligation (as URS would see it) to remedy the structural condition of the buildings, and voluntarily therefore assumed responsibility to the current occupants. If so, then that is not included in the Preliminary Issues (a) and (b). What URS really means is voluntarily assumption of loss, in the sense that URS' contention is that BDW was not obliged to remedy the

structural defects in the buildings and could (as URS would have it) have simply refused to do anything.

29. Mr Hargreaves maintains that URS' position on the Preliminary Issues is wrong as a matter of law. He submits that there is no dispute that, concurrent with its contractual duties, URS owed BDW a duty of care in tort extending to pure economic loss. The risk that was inherent (and he submits foreseeable) in a failure by the designer to exercise due care in performing the structural design was that structural defects would as a result be present in the relevant blocks. Accordingly, BDW would potentially incur costs associated with their rectification. The losses incurred by BDW (which are costs associated with such rectification, including the investigation works) are of exactly the type that might have been expected to occur as a result of a breach by URS. As long as it was not unreasonable for BDW to incur those costs, in the circumstances which it did, then they represent the loss that was in fact suffered by BDW as the result of URS' negligence, and so they are recoverable in principle from URS as damages in these proceedings. He submits that it was not unreasonable for BDW to have incurred those costs, given the severity of the defects, but maintains that this is an issue which will in any event ultimately be a matter for trial.

30. I would refine that somewhat. Each of Mr Hargreaves, and Ms Parkin, group all the losses together, as though the same answer must apply to all of them. I consider that it would be helpful (indeed, that proper legal analysis requires) to consider the position in respect of the Paragraph 48.1 to 48.6 losses separately from those claimed as being Reputational Damage Losses in Paragraph 48.7. Certainly the costs of investigating and remedying structural defects are of a different character and nature to those that could be described as "Reputational Damage" under, as the example I have already given, paragraph 48.7 of the Particulars of Claim. That states "the presence of the defects identified causes and/or risks causing reputational damage to BDW." That is loss of a different nature to conventional remedial costs and it is clearly pleaded as such. I consider it ought to be analysed separately.

31. There are two general matters that must be borne in mind. They both arise as a result of the points advanced in argument, and how URS puts its case (both in its skeleton argument and also the witness statement of Mr Steven Williams, URS' solicitor, supporting the strike out application). The first is that BDW has not suffered any damage at all. Mr Williams states "BDW did not suffer any actual damage at the time that the allegedly defective blocks were constructed. There is no plea that any physical damage was manifest in the Developments at that point in time (or indeed at any other point). Furthermore, each of the Developments was sold by BDW for full value long before the discovery of the alleged defects in structural capacity…" This requires consideration of the time at which damage (if any) was suffered by BDW. However, just because a developer sells a house or development for full value does not mean that developer does not have obligations if that house or development turns out to be defective structurally. The nature of those obligations will depend upon the terms of the sale. If a dwelling, the Defective Premises Act 1972 may be engaged. If a commercial sale of a development, the terms of the sale to another commercial party will be relevant. In both circumstances, limitation may arise (depending upon the facts). But these matters are not currently caught by the preliminary issues.

32. The second is whether a claim against BDW by a third party (such as an original owner, or subsequent purchaser) is necessary in order for BDW to have suffered any

actual damage, to give BDW a cause of action. This is because URS maintains that BDW has not suffered any actual damage as a result of third parties having acquired an interest in the dwellings in each development. URS relies both upon the fact that no claims have been brought against BDW by others as a result of the presence of the alleged defects, and also the potential for any such claims to be time-barred as a result of the Limitation Act 1980.

33. Although it was not explored by either party in any detail in their submissions on the Preliminary Issues, some of the dwellings may still be owned/occupied by those third parties who bought them from BDW, and others are likely now to be owned by subsequent purchasers. I shall refer to each of these two groups as "the original owners" and "subsequent purchasers". It was accepted for the purposes of argument that there are likely to be these two groups, and it was also accepted that BDW no longer had a proprietary interest in the blocks. I do not have copies of any of the contracts of sale, and therefore must express the following in very general terms. The original owners could have claims against BDW under their contracts of sale (which would have been with BDW) and under the Defective Premises Act 1972 ("DPA 1972"). Absent any special arrangements between subsequent purchasers, original owners and BDW (and there is no suggestion of any, such as assignments of causes of action, for example) the subsequent purchasers could only have a claim against BDW under the DPA 1972. Time bar defences may potentially be available to BDW, depending upon the actual facts as they turn out at trial.

34. However, I remain of the view that these two general points only arise tangentially for consideration during analysis of the Preliminary Issues themselves. This is because of the way that the issues are worded. They are clearly in respect of scope of duty and recoverability of losses in principle. I shall deal with the Preliminary Issues by considering Issue (a) first, and then Issues (b) and (c) together. Issue (c) is really a further refinement or particularisation of Issue (b) in any event.

Preliminary Issue (a)

35. This is "did the scope of URS' duties extend to the alleged losses?" This requires consideration of the type of loss sought to be recovered by BDW. As explained above, these fall into two categories, namely the Paragraph 48.1 to 48.6 Losses, and the Reputational Damage Losses.

36. The Paragraph 48.1 to 48.6 Losses are conventional investigation and remedial works costs. Paragraph 48.1 comprises costs paid to date to Buro Happold for investigation; 48.2 are costs associated with the evacuation of Ross Apartments; 48.3 are costs of temporary and permanent works including propping; 48.4 are the costs of project management services; 48.5 are internal management time managing investigation and remedial works; and 48.6 are costs not yet expended for future remedial works. URS maintains that none of the losses claimed in the proceedings, whether the conventional investigation and remedial costs or otherwise, are included in the scope of URS' duties, which Ms Parkin maintains did not extend to such losses.

37. The pleadings in this case were settled, and the Preliminary Issues themselves were framed, before the recent decisions of the Supreme Court in the linked cases of ***Manchester Building Society v Grant Thornton UK LLP*** [2021] UKSC 20 and ***Meadows v Khan*** [2021] UKSC 21. These decisions were handed down on 21 June

2021. These are evidently highly important cases on the law of negligence, and were heard by a Supreme Court comprising seven (rather than the usual five) Justices of the Supreme Court, with the same panel of seven Justices hearing both cases. These two cases involved, respectively, a claim against an auditor for the way that interest rate swaps had been dealt with in accounting terms, leading to loss on the part of the building society; and a doctor negligently failing to advise a person to undergo genetic testing to determine whether she carried the haemophilia gene. They were both therefore on obviously different facts. The former additionally included consideration of the difference between providing information and advice, something that was the subject of far earlier decision in ***South Australia Asset Management Corp v York Montague*** [1997] AC 191. It was therefore what might be called a "professional advice" case. However, I consider its ratio is applicable to negligence more generally, and not limited to professional advice cases.

38. Given the recent nature of these decisions, and their primacy in terms of stating the law, it is unnecessary to consider a large number of the earlier cases that were cited by both sides.

39. The majority in ***Manchester Building Society*** identified six questions which arise where a claimant seeks damages from a defendant in the tort of negligence. They are of general application, and concern, in particular, consideration of the scope of duty on the part of a defendant. These questions are carefully set out at [6] by the majority:

"[6] ……When a claimant seeks damages from a defendant in the tort of negligence, a series of questions arise:

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)

Application of this analysis gives the value of the claimant's claim for damages in accordance with the principle that the law in awarding damages seeks, so far as

money can, to place the claimant in the position he or she would have been in absent the defendant's negligence.

[7] The first question is a threshold question and asks whether the matter about which the claimant complains is actionable. A claimant may have a cause of action in negligence to recover damages for physical injury, psychiatric injury, damage to property and economic loss, but not all complaints are actionable in negligence. Personal upset or annoyance and diminished enjoyment of a person's property resulting from noises or smells are not actionable in negligence. A defendant may act carelessly without incurring liability to a claimant in the absence of actionable loss.

[8] The second question addresses the scope of a defendant's duty and is the central question in this appeal. The fact that the defendant owes the claimant a duty to take reasonable care in carrying out its (the defendant's) activities does not mean that the duty extends to every kind of harm which might be suffered by the claimant as a result of the breach of that duty. In *Spartan Steel Ltd & Alloys v Martin & Co (Contractors) Ltd* [1973] QB 27, for example, the duty of care owed by workmen not to cut off electrical power to the claimant's factory was imposed in order to protect the claimant from suffering damage to its property, so the claimant could only sue for damages to compensate it for property damage it had suffered as a result of the breach of the duty of care, and not for damages to compensate it for the distinct loss of business it had suffered as a result of the loss of power. Similarly, in *Caparo Industries plc v Dickman* [1990] 2 AC 605 ("*Caparo*") it was recognised that although the auditor of a company's accounts owes a duty of care to shareholders in the company for some purposes, breach of that duty does not mean that a shareholder can claim damages for loss flowing from its reliance on the audited accounts to make investment decisions (p 627 per Lord Bridge of Harwich; pp 651-653 per Lord Oliver of Aylmerton; pp 660-662 per Lord Jauncey of Tullichettle). As Brennan J stated in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, at 487:

"It is impermissible to postulate a duty of care to avoid one kind of damage - say, personal injury - and, finding the defendant guilty of failing to discharge that duty, to hold him liable for the damage actually suffered that is of another independent kind - say, economic loss. … The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

40. I therefore consider that the correct place to start is by considering each of these questions. Breach is assumed under the assumed facts, which means that question 3 does not arise. Each of the others must be addressed. I shall consider each of them in turn.

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

41. BDW's proposed answer to this is "yes". Mr Hargreaves submits that the harm which is the subject matter of the claim is economic loss resulting from URS' breaches of duty, and is actionable in negligence in circumstances where a duty of care was owed extending to economic loss (and with the heads of loss claimed being those which would typically be expected to eventuate from the breaches alleged). He also submits

that actionable damage was suffered when the blocks were constructed in accordance with the negligent designs – this was his primary case on time of damage. He also advanced alternative dates, and these are dealt with in more detail below under the heading "the date when damage occurred".

42. URS accepts that the loss, injury and damage included in paragraphs 48.1 to 48.6 were, in principle, actionable in negligence. Ms Parkin maintains that the tort of defamation is the appropriate cause of action for damages for loss of reputation, and although that is a tortious remedy, is not the same as the type of harm that would be actionable in negligence against a designer in circumstances such as these. Ms Parkin also sought, in one of her arguments, to characterise all of the losses claimed by BDW (thus all of paragraphs 48.1 to 48.7 inclusive), as being incurred as damages that were in reality for loss of reputation. However, as explained I will consider the two types of damage separately, that is I will differentiate paragraph 48.7 from the other losses. I do not accept that characterisation by her of the Paragraphs 48.1 to 48.6 losses, although I do accept it is accurate for the Paragraph 48.7 losses.

43. Mr Hargreaves relied upon a number of cases in other fields such as ***GKN Centrax Gears Ltd v Matbro Ltd*** [1976] Lloyds LR 555 to submit that damages for loss of reputation could be recovered in a case such as this one; in other words, that a cause of action in defamation is not the only way that such losses can be recovered. That case concerned supply of faulty axle assemblies to a company that made fork lift trucks. In particular in that case – although it was an appeal from a decision at first instance in respect of questions posed by special case in an arbitral award, before even the Arbitration Act 1979 had been passed – the Court of Appeal held that loss of repeat orders (in other words, lost future sales) were within the contemplation of the parties under the well-known rule in ***Hadley v Baxendale*** (1854) 9 Ex 341. The Court of Appeal therefore held that such lost sales were recoverable. With respect to Mr Hargreaves, I do not accept that such authority (or similar ones he relied upon such as ***Aerial Advertising Co v Batchelors' Peas (Manchester) Ltd*** [1938] 2 All ER 788) assists him so far as the Paragraph 48.7 losses are concerned. None of them stands as existing authority that a structural designer assumes responsibility for potential loss of reputation on the part of a developer in these circumstances. I consider it would be an unwarranted extension of the scope of such a duty of care to hold that such losses are included, or that there is a duty upon a structural designer to hold a developer harmless from such losses. It would be, potentially, extraordinarily wide in its breadth, were such loss to be found to be within the scope of the duty owed by a designer in the position of URS.

44. Cases in other fields which were relied upon such as ***Riyad Bank v Ahli United Bank (UK) plc*** [2005] EWHC 279 (Comm), [2005] 2 Lloyd's Rep 409 are plainly distinguishable. Firstly, that case concerned a claim in misrepresentation. Secondly, the claim for loss of reputation was only pursued as a secondary claim in the event that the primary claim, based on a breach of duty of care, did not arise. This is clear from [161] in the judgment of Moore-Bick J (as he then was). Given the judge did find there was such a duty, the claim did not arise. Thirdly, the judge was making what I consider to be a vital distinction between "loss of reputation as such and financial loss arising from damage to reputation"; this is made clear at [163]. Fourthly, the learned judge plainly would have dismissed that claim in any event, as he made clear in his conclusion after his obiter consideration of it in a number of

paragraphs, when he came to his conclusion at [172]. In that paragraph he said "I am satisfied that this alternative claim would not have succeeded". This case simply cannot be stretched in any direction to assist Mr Hargreaves in this respect.

45. However, I reject Ms Parkin's characterisation of *all* of BDW's losses as constituting, in reality, damages or losses for harm to BDW's reputation. Her approach seeks to insert into consideration of the type of loss or harm arising – which must be considered under this question –the subjective motivation on the part of the claiming party for incurring the expense in question. I do not accept that consideration of the scope of duty in this – or indeed, any – case requires analysis of the subjective views on the part of the claiming party. To do so would insert into the legal test an uncertain element that would be contrary to principle. It could also mean that type of loss in one case might be recoverable, whereas the same type of loss in another very similar case may not be, depending upon the factual circumstances of the two claiming parties, and their different subjective decisions. Such an approach to analysis of the scope of duty on the part of a designer would be wrong, in my judgment.

46. The Paragraph 48.7 Losses are, however, to be considered differently. As Brennan J stated in ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424, at 487, in a passage expressly cited and approved at [8] in ***Manchester*** itself:

> "The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

47. I do not consider that URS, or a structural engineering designer generally, is under a duty to avoid or prevent damage to the reputation of a developer. It would be incredibly difficult to quantify in advance what the potential extent of such a liability would be, which would have a detrimental impact upon a professional adviser's ability to obtain suitable professional negligence insurance. It would also mean that, depending upon the commercial fortunes of that developer on other projects and in later years, the extent of the loss could be (potentially) dramatically expanded. I do not consider that there is any authority to support such a proposition. Accordingly, the Paragraph 48.7 losses are not, in my judgment, of a type in respect of which URS was under a duty to avoid or prevent. The other, more conventional, heads of loss at Paragraphs 48.1 to 48.6 are.

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

48. BDW submits that the answer to this question is the risk that, if reasonable skill and care were not exercised in the production of URS' designs, there would be structural defects in the relevant buildings, resulting in economic loss to BDW. URS submits that the answer to this question is risks eventuating from the damage to BDW's economic interests as a result of defects in the design.

49. I conclude that there is no appreciable difference in these two formulations, and they amount to the same thing. I consider that the answer to this question is the risks of harm to BDW, the employer, against which the law imposed upon URS, the structural designer, a duty to take care was the risk of economic loss that would be caused by a

construction of a structure using a negligent design such that it was built containing structural deficiencies or defects.

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

50. The parties accept that this is, for the purposes of the Preliminary Issues, to be assumed. It does not therefore require any analysis at this stage of the proceedings.

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

51. BDW submits that the answer to this is yes. This is because if the defects had not existed, there would have been no remedial works required and the losses suffered by BDW would not have arisen. URS' primary submission is that matters of factual causation are to be determined at trial, having heard the relevant evidence, and not for determination at the trial of Preliminary Issues on assumed facts.

52. However, URS made clear that on the basis of the assumed facts, its case was as follows. If and insofar as the loss for which BDW claimed damages was 'reputational loss,' then URS accepted that the loss for which BDW sought to recover damages was the consequence of URS' acts and/or omissions. However, if the loss for which BDW sought damages was not reputational loss, then: (i) URS' breaches merely provided BDW with the opportunity voluntarily to incur loss; (ii) URS did not cause any damage against the occurrence of which it owed a duty to protect BDW; and/or (iii) BDW's actions broke the chain of causation.

53. It is difficult to square a submission that factual causation was something that should only be resolved at trial, with one that BDW's actions broke the chain of causation. I do not consider that causation can be considered "as a matter of law", as I explain further at [123] and [124] below. It is a particularly fact-sensitive inquiry. I accept URS' primary submission, which I have summarised at [51]. I accept that factual causation cannot be determined at this stage, given the limited scope of the assumed facts and the lack of agreement of the parties. I do not accept that URS is correct in categorising any breaches as merely providing the opportunity for BDW voluntarily to incur loss, but given I accept URS' primary submission that does not much matter. It certainly does not affect the answer to the Preliminary Issues.

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

54. BDW maintains that there is a sufficient nexus, but also points out that this has already been answered in the second, earlier, question. URS takes the opposite view and submits that the answer to this question is no. The submission is that the harm for which BDW seeks damages has arisen in circumstances where "BDW has no legal liability for the cost of the repair works and is therefore able to insist that current residents should bear the costs of the work." It is submitted by URS that this is nothing to do with URS' acts or omissions, instead being the result (i) of the way in which BDW has chosen to structure its business; and (ii) the operation of law rendering claims under the Defective Premises Act 1972 time-barred.

55. I consider that URS has fallen into error in the way that it approaches this question. By "particular element of the harm" I consider that the Supreme Court means the type of harm. I have already explained at [27] above that URS confuses the subjective motivation on the part of BDW in choosing to perform the remedial works (what is essentially a subjective issue on the particular facts of this case) with the nature, element or type of harm suffered. A different way of expressing the duty nexus question is "does the harm suffered fall within the category, type or element of harm that is encompassed by the defendant's duty of care?" I do not see how that question can be sensibly answered by considering the motivation upon any particular claimant in acting as he or she did on the particular facts. That is a factual causation question, and is the preceding one in the list in ***Manchester***.

56. Further clarification in the duty nexus question is given by the Supreme Court later in the judgment of ***Manchester***. At [12] this explains further in the following terms:

> "[12] In some cases, a claim may be answered at stage 2 without the need to address the questions of breach and factual causation. However, in cases where the scope of duty question is relevant to the *extent* of loss of a particular kind, as in *SAAMCO* and *Hughes-Holland*, it is generally more appropriate to examine this after first ascertaining on a simple "but for" basis what is the extent of the loss which has flowed from the alleged breach of duty. Proceeding in this way means that one identifies the losses which are in fact in issue so that it is possible to focus with greater precision on the extent to which they fall within the scope of the duty of care owed by the defendant. This was the approach adopted in the valuer negligence cases which followed *SAAMCO*. As Lord Nicholls explained in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company) (No 2)* [1997] 1 WLR 1627, 1631, one begins by identifying what he called "the basic measure" of the claimant's loss and what Lord Hobhouse in *Platform Home Loans* described as "the basic loss" which the claimant has suffered (ie the loss which can be identified as flowing from the alleged breach of duty as a matter of "but for" factual causation), and then examines the extent to which that loss falls within the scope of the duty assumed by the valuer (see also *Hughes-Holland*, para 31, and our judgment in *Khan v Meadows*, para 52). This is the reason why in this sort of case it is appropriate to ask the duty nexus question at stage 5. But it should be recognised that this is simply a practical approach to working out the implications of the scope of duty concept which arises, in principle, earlier in the analysis, at stage 2."

57. By "this sort of case" the Supreme Court probably means a professional advice case, which is what ***Manchester*** concerned. The instant case is not a professional advice case. URS provided a structural design which was used to build the construction in question. That is not the same as providing advice to BDW to enable BDW to consider a potential course of action. In reliance on the advice in the ***Manchester*** case, the society carried on a strategy of entering into long-term interest rate swap contracts as a hedge against the cost of borrowing money to fund mortgage lending. Indeed, it was because it was a professional advice case that the recoverable losses incurred by the society were reduced by 50% because (as explained at [39]) "The contribution by the society to its own loss arose from the mismatching of mortgages and swaps in what was an overly ambitious application of the business model by the society's management."

58. Thus the extent of the losses in that case were, as claimed, *all* the losses that arose following the negligent advice, but by approaching it in the two-stage manner that it did, the Supreme Court found that the head of loss was recoverable in principle. It was reduced for reasons of contributory negligence. The duty nexus question was a refinement of the earlier analysis. Question 5 was a practical approach to working out the implications of the scope of duty concept.

59. That will not arise in all professional negligence cases, and may well not be required as a separate step in a case, as here, which is not a professional advice case at all. Here, the professional in question designed the structural elements of the building. This was not done in order that BDW could decide whether to build a structurally sound building; it was done specifically in order that the building that BDW built to that specific design would be structurally sound. However, the duty nexus question still requires addressing, even in a design (rather than a professional advice) case.

60. There is some overlap between this question and the second question. However, regardless of that overlap, in my judgment, there is a sufficient nexus between the particular elements of the harm for which BDW seeks damages and the subject matter of URS' duty of care as the structural designer for each the heads of loss pleaded in the Paragraphs 48.1 to 48.6 Losses. The same conclusion does not apply to the Reputational Damage Losses in paragraph 48.7. A different way of expressing the same finding is to remind oneself of the approach of Lord Nicholls in ***Nykredit plc v Edward Erdman Ltd*** [1997] 1 WLR 1627, 1630 when he said:

> "I add only the cautionary reminder that the loss must be relevant loss. To constitute actual damage for the purpose of constituting a tort, the loss sustained must be loss falling within the measure of damage applicable to the wrong in question."

61. In my judgment, the approach of BDW to answering this question is the correct one. I do not consider that URS has approached this question with the separate consideration required, as subjective motivation is not relevant.

62. However, notwithstanding that, I do not consider all the heads of loss claimed pass the "duty nexus" question in BDW's favour. Reputational Damage Losses simply cannot be characterised as "relevant loss". They do not fall within the measure of damage applicable to the negligence by a structural engineer in the structural design of a building. Mr Hargreaves could produce no authority justifying inclusion of this type of losses in the harm in respect of which a structural designer had a duty of care. I also consider it would be far more than an incremental step to include it. In my judgment, there is no sufficient nexus between this particular head of loss and the duty of care owed by URS. The Paragraph 48.7 Losses therefore fail at this hurdle. The others do not.

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)

63. This encompasses consideration of my findings in respect of the Paragraph 48.7 Losses, but expressed in different terms and at a different stage of the analysis. This

might be because the question "Is the harm (loss, injury and damage) which is the subject matter of the claim" is a general question not intended to make any distinction between heads of loss that are recoverable, and heads of loss that are not.

64. If I was wrong to consider the losses separately at the stage of the earlier questions, then the same considerations or conclusions would arise at this stage. The particular element of harm which I conclude is irrecoverable is the loss that arises in the Paragraph 48.7 Losses, namely the Reputational Damage Losses. This type of loss is simply not recoverable by a developer from a professional structural designer, in my judgment. It is not only too remote, but it is a head of loss in respect of which a designer does not owe an employer or developer a duty of care to save harmless. However, the more conventional losses pleaded at Paragraph 48.1 to 48.6 are not too remote, and were within the contemplation of the parties at the time of contracting.

65. Ms Parkin made a number of points on URS' behalf to reinforce her central submission that Reputational Losses were not recoverable. One of them was the difficulty, in a case such as this one, with designs for different blocks each having been produced by different allegedly negligent designers, of the court ascertaining how much loss had been caused by each to the overall reputation of BDW generally. I appreciate that this situation would present a potential difficulty of quantification in the way she outlines. However, in the absence of any evidence, it is difficult to conclude that such difficulties of quantification would, of themselves and for that reason alone, be fatal to recovery. The law of damages is a highly flexible mechanism, and the award of financial sums to recompense reputational harm is a conceptually artificial analysis in any event. If such losses were otherwise recoverable, such difficulties as are present in quantifying those losses would have to be grappled with. Admittedly, this could only occur at trial, and given my finding that such losses are not recoverable, it will not arise in any event.

66. Ms Parkin, however, extends that attack on the Reputational Losses under Paragraph 48.7 to *all* of the losses which BDW seeks to recover. She maintains, in the contended for answer to this question in her post-hearing submissions, that "when incurred in the particular circumstances claimed by BDW, the losses at paragraphs 48.1 – 48.6 and 48.8 – 12 of the Particulars of Claim are irrecoverable because they were (i) not in the contemplation of the parties at the time of entering into the Appointments and/or too remote…." I do not accept that characterisation. Remedial works costs of a structurally inadequate building cannot, in my judgment, be properly characterised as being not in the contemplation of the employer and structural designer at the time they contract, nor are they too remote. In my judgment, they plainly are in the contemplation of the parties and they are not too remote.

67. There are no other different effective causes of those losses at Paragraph 48.1 to 48.6, including novus actus interveniens, which BDW seeks to recover from URS in these proceedings.

68. Turning to the question of whether BDW has failed to avoid loss which it could reasonably have been expected to avoid, this encompasses a number of Ms Parkin's points. She makes these points in relation to all of the claimed losses, including the incurred remedial works expenditure. She maintains that it is simply unreasonable for BDW to have chosen to incur the remedial works that it has, in circumstances where there could be no good legal claims against it, or alternatively where no formal legal

claims were even initiated against BDW, or in circumstances where BDW would have had a valid time-bar defence against claims either by original owners or subsequent purchasers.

69. I reject those submissions. To explain this finding, I will consider the Ross Apartments. Ms Parkin seeks a finding that it would be unreasonable for a developer, who discovers that a structural slab not only lacks the necessary structural integrity, but is in danger of imminent structural collapse, to become engaged in incurring expense in evacuating that block of apartments, and remedying its structural defects, in order to avoid a catastrophic collapse, because it may have a time-bar defence. Indeed, one has only to apply the submission to the actual real-world situation here, to see quite how extreme the submission by URS is. I do not see how BDW could, to use the phraseology of ***Manchester***, "reasonably be expected to avoid" such a loss. I find that BDW could not be reasonably expected to avoid such a loss. I repeat my observations about limitation at [5] above.

70. Nor do I accept that by acting in this way BDW has necessarily failed to mitigate its loss. There is an inherent difficulty in terms of how Preliminary Issue (c) is phrased in that the question it poses asks if it is "a defence to URS in law that…..". It then includes both mitigation and causation in that series of questions, which are particularly fact-sensitive issues. I do not consider these can be answered as a matter of law. Question 4 in ***Manchester*** is actually described by the Supreme Court as being the "factual causation question". I examine this point further when considering that specific Preliminary Issue (c) below.

71. I do not consider it is a necessary ingredient of the cause of action that BDW must have been served with, or been in receipt of, a legal claim from a third party, such as any of the original owners or subsequent purchasers. It is correct that in some of the other cases, and a great many of them were cited to me, a contingency must crystallise in order for some causes of action to be completed. The most central one is ***Law Society v Sephton & Co*** [2006] 2 AC 543. I will consider those authorities in more detail when deciding the correct answer to the next issue. However, the case BDW brings against URS is plainly not a contingency case. There is a great danger in attempting to strain the reasoning of other cases, which do not concern negligent design, to apply to the instant case. General principles of the law of negligence do, of course, apply to cases involving negligent design. However, a designer preparing a negligent structural design of a building, which is then constructed, does not incur only a contingent liability to the employer who has engaged that designer to perform the structural design. The building will either be constructed, or it will not. If it is not constructed at all, then the employer will have suffered no loss, but the designer will still be in breach of contract. In those circumstances, the employer would potentially only be entitled to nominal damages. Depending upon the facts, if the negligent design is discovered prior to construction, then (if the building is built later), the damages could be the cost of instructing a subsequent designer to perform another design, or the costs of remedying the non-negligent design (such as performing a design check and making amendments). But in neither case – nor in any case where the building is constructed to the negligent design – could it be said that the liability on the part of the designer is merely contingent.

72. Stepping back therefore, and considering the terms of Preliminary Issue (a), the findings are in BDW's favour with the exception of the Reputational Damage Losses.

These appear at paragraphs 48.7, 48.13 and 48.18 of the Particulars of Claim, although I have concentrated on paragraph 48.7 when analysing them simply for convenience.

73. The answer therefore to the actionability question which is posed in this issue is as follows:

(a) Did the scope of URS' duties extend to the alleged losses?

Answer: Yes, with the exception of the losses specifically pleaded as Reputational Damage at paragraph 48.7 (and the two other paragraphs consequential upon that one for two other developments, namely 48.13 and 48.18).

74. I consider that the other heads of loss and damage, namely the investigation, remedial and other costs pleaded at paragraphs 48.1 to 48.6 are entirely conventional, within the reasonable expectation of the parties, not too remote and actionable in negligence against URS. I therefore turn to consider the next two issues, namely Preliminary Issues (b) and (c).

Preliminary Issues (b) and (c)

75. There are as follows:

(b) Are BDW's alleged losses recoverable in principle as a matter of law in tort?

(c) In particular as to (b), is it nonetheless, and on the basis of those Assumed Facts, a defence to URS in law that: (i) the losses were not in the contemplation of the parties at the time of entering into the appointments; (ii) the losses are too remote; (iii) BDW has caused its own losses; (iv) BDW's actions broke the chain of causation; and (v) BDW has failed to mitigate its loss?

76. I have already explained that I consider that (c)(iii) to (v) cannot be addressed at this stage of the proceedings absent full consideration of the facts. These are fact specific matters, and cannot be answered as questions of law. It is of course available to URS to defend the claims by maintaining factual causation and/or mitigation defences, but these can only be resolved at trial.

77. Ms Parkin firmly maintains that none of the losses claimed by BDW in these proceedings – whether for investigation and/or remedial costs actually incurred, or for reputation – are recoverable in principle. In order to explain that, it requires as a starting point a decision on the date when BDW's cause of action was completed. Ms Parkin maintains that the cause of action arose when BDW in fact discovered that the design was negligent, namely in 2019. She submits that this is because, prior to that date, there was no physical damage by way of cracking (for example) or otherwise, and that this is required in order to complete BDW's cause of action. She also maintained that because in 2019 BDW had no proprietary interest, it had no proper cause of action at any time on her analysis. It is only necessary to address that latter point if she is right in terms of the prior analysis of the date of accrual of cause of action.

78. Mr Hargreaves advanced a number of different potential dates for the date of accrual of the cause of action. These were the dates of construction of the different buildings,

which was his primary case, or when third parties acquired an interest in the dwellings. This latter date was his secondary case, and arose, he submits, because at that point BDW would have incurred a liability to those third parties, either under the Defective Premises Act 1972 or under the individual contracts of sale.

79. He also advanced a different tertiary case. This was the time at which the defects in the design became known. During oral argument, he refined this tertiary case yet further into two strands, which he called Case 3(a) and Case 3(b). Each of his secondary and tertiary cases were alternatives, which would only arise in the event that BDW was wrong on its primary case. On the way that both leading counsel therefore argued their cases, the date on which damage accrued was a central plank of their analyses. It is noteworthy that on the face of the wording of neither Preliminary Issue (b) or (c) is this clear; but given such resources were expended by both sides in arguing their respective cases on the date upon which the cause of action arose, it seems sensible to answer it.

The date when damage occurred

80. There are a number of alternatives for this. This topic has been considered many times in a number of different cases. I shall only concentrate on some in this judgment. I have explained at [76] to [79] what the alternatives that were contended for by the parties are.

81. The starting point for consideration of these points is ***Pirelli General Cable Works Ltd v Oscar Faber*** [1983] 2 AC 1. That is a very well known case. It concerns damage to a chimney where cracking had occurred, but it was not known that cracks had indeed appeared until much later. Lord Fraser gave the leading speech and found that the cause of action of the building owner accrued on the date when cracking occurred. The case is authority for the proposition that where a defect has manifested itself by causing physical damage, a cause of action in tort will accrue on the occurrence of that physical damage, save perhaps "where the defect is so gross that the building is doomed from the start, and where the owner's cause of action will accrue as soon as it is built". That is taken from the speech in that case by Lord Fraser at 16G-H. ***Pirelli*** may have come in for a degree of academic criticism in the period of almost four decades since it was decided, but it has not been overruled. Date of knowledge is not relevant.

82. Mr Hargreaves submits that the case does *not* establish that, in circumstances in which a defect has not yet manifested itself in physical damage at all, there is no cause of action in tort in respect of that defect. I accept that submission, but in any case, the facts of ***Pirelli*** did not concern such a situation. In ***Pirelli*** the chimney in respect of which the defects were present (namely cracking) had been built in June and July 1969. Cracks began to appear not later than April 1970 on the evidence. These were discovered by the plaintiffs, the owner of the factory, in November 1977 and it was found that they could not with reasonable diligence have been discovered before October 1972. Accordingly, whether there would have been a cause of action without *any* physical damage at all was not an issue in the case.

83. The perceived injustice of the result of that case, which was that a cause of action would become in existence, and hence the limitation period would run without anyone knowing, is what led Parliament to act and change the law. That led to the passing of

the Latent Damage Act 1986 ("LDA 1986"). Interestingly, and also of academic note, Parliament did *not* change the date upon which the cause of action itself accrued. Instead, it changed the way that limitation was calculated in certain situations, including where latent damage was in existence. Latent damage is damage the physical manifestation of which is not present.

84. The short description of the LDA 1986 is as follows:

"An Act to amend the law about limitation of actions in relation to actions for damages for negligence not involving personal injuries; and to provide for a person taking an interest in property to have, in certain circumstances, a cause of action in respect of negligent damage to the property occurring before he takes that interest."

85. It is convenient to quote part of section 14A of the LDA 1986, including its heading:

"14A – Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.

….(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both-

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are-

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it alleged that the act or omission was that of a person other that the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsections (5) above."

86. Ms Parkin submits that, although for a case such as ***Pirelli*** date of knowledge is not relevant, in terms of the time or date upon which the cause of action accrues, this is different in cases concerning latent damage. In those cases, where such as here a design is performed negligently, the structure may as a result not be safe and it may contain latent defects. However, she submits that the building owner or employer has no cause of action until he or she realises, or comes to know of, the existence of latent defects. She says that given there is no physical damage present – by definition – in a latent damage scenario, the cause of action cannot be complete. Therefore some other later date is required to complete the necessary ingredients of the cause of action. She submits that later date can only be the date upon which the innocent party (here, assumed for the purposes of the preliminary issues as being BDW) knows there is something wrong with the design. Prior to that, they have no cause of action at all. A different way of expressing this is that – effectively – there can be no cause of action for negligent design until the developer or employer has been told (or should otherwise know) that the design is negligent.

87. On this analysis, she accepted that – to use the facts of this case – the structural defective slab that was constructed to the negligent design must be viewed as containing no defects. She refined that by submitting it contained no patent defects, as distinct from containing *latent* defects. I consider this analysis could only possibly stand if one were to conclude that the structural slab was free from damage when it is constructed. This was met by Ms Parkin making the point that the slab in this case had functioned perfectly adequately – as she put it – as a structural slab to date, by which she meant that it had not collapsed. But if that is an apt analysis, then it would apply to its function after discovery of its structural inadequacy, but before it had cracked or even collapsed. In any case, I do not consider that it is an apt analysis.

88. It is necessary therefore to examine some of the cases to consider what the state of law is so far as accrual of cause of action, and the nature of damage. I have already dealt with ***Pirelli***. In ***New Islington and Hackney Housing Association v Pollard Thomas & Edwards Ltd*** [2001] PNLR 20, Dyson J (as he then was) held that a cause of action for negligence against an architect in respect of sound proofing that did not comply with the Building Regulations accrued no later than the issue of the certificate of Practical Completion. He held at [37] to [39] that ***Pirelli General Cable Works Ltd v Oscar Faber*** [1983] 2 AC 1 had not been over-ruled in ***Murphy v Brentwood DC*** [1991] 1AC 398, and was binding on him. This is because the House of Lords in ***Murphy*** did not say that ***Pirelli*** was wrongly decided. Although he described the "present state of affairs [as] hardly satisfactory" in terms of how reasoning in each case could be reconciled, I agree with him that ***Pirelli*** has not been over-ruled. Only the Supreme Court can do that. Whether satisfactory or not, ***Pirelli*** is binding upon me. The Court of Appeal confirmed in ***Abbott v Will Gannon & Smith Ltd*** [2005] EWCA Civ 198 at [19] that ***Pirelli*** remains binding authority. In that case, it was also clearly stated that "the facts in ***Pirelli*** are indistinguishable from those in the present case", as there was cracking in both cases. In the instant case, of course, there is no cracking. But ***Pirelli*** remains good law.

89. The approach identified in these cases means that the date when a claimant first knows of a defect, or ought reasonably to know of the defect, is *not* the date when the cause of action accrues. That this is not the date of knowledge is clearly stated in ***Pirelli*** in the speech of Lord Fraser at page 16. Although Deane J in Australia in

Council of the Shire of Sutherland v Heyman (1985) 157 CLR 424, 503 stated the date of knowledge was the accrual of a cause of action in these circumstances, and that dicta was broadly accepted by Lord Keith in ***Murphy v Brentwood,*** as Dyson J stated in ***New Islington*** at [39]:

"But the fact remains that the knowledge test has not been applied in English law as marking the date on which damage is first suffered for the purpose of completing a cause of action in negligence. This test was disavowed in ***Pirelli*** itself; and it has not been applied in the line of cases exemplified by ***Forster*** either. It is because a claimant can suffer loss without being aware of it that the Latent Damage Act 1986 was passed."

(emphasis added)

90. Indeed, that statute was passed after the decision in ***Pirelli*** and I fully accept, as explained by Dyson J, that it was passed by Parliament precisely because English law does not, and has not, applied the so-called knowledge test for the accrual of a cause of action in tort. That underlined sentence is directly contrary to Ms Parkin's submissions on time of accrual of cause of action.

91. In ***Co-operative Group Ltd v Birse Developments Ltd (in liquidation)*** [2014] EWHC 530 (TCC), Stuart-Smith J (as he then was) considered a claim against consulting engineers ("Jubb") by a main contractor ("Birse") by way of contribution claim after the main contractor was sued by the then-owner ("Co-op"). One of the issues that had to be addressed was when the cause of action Birse had against Jubb had accrued. These were considered as preliminary issues, predominantly in respect of limitation but also another separate point (which does not arise in this case) concerning assignment of warranty without consent. These are set out at [5] of the judgment.

92. On the issue that arises in the instant case, namely date of accrual of cause of action, the judge found that this had arisen "by practical completion at the latest" at [47]. The claim by Birse was therefore time-barred.

93. Ms Parkin faced up to the difficulties that this judgment presented her argument by maintaining that the judgment was simply wrong. She said it was wrong in law in two specific respects. Firstly, the way that the judge had decided or applied "the damaged asset rule", which she says does not apply to design cases. This is at [44] to [47] of the judgment. Secondly, she said that the judge's conclusion that ***Law Society v Sephton & Co*** [2006] 2 AC 543 could be distinguished was also wrong, and that the judge was wrong at [46] where he found that there was essentially measurable loss because there was reliance on the design at the point when construction was carried out. She maintained that conclusion was contrary to the ratio of ***Pirelli***.

94. There is no doubt that under the doctrine of *stare decisis* other first instance judgments are not binding on me, but they are persuasive. I have not simply blindly followed this particular judgment, and have approached the matter from first principles myself. However, ***Co-op v Birse*** does contain a very detailed and careful analysis of all the relevant authorities, and the closer I studied it, the more I concluded I would be entirely justified even were I simply to apply its reasoning, and its result. I am entirely confident that, contrary to Ms Parkin's submission that it is wrong, both the analysis and conclusion in ***Co-op v Birse*** are entirely correct.

95. There are two strands to this. The first is the case of ***Sephton***, which the judge distinguished. I have already mentioned that case at [71] above, but not in detail. In that case, the House of Lords heard an appeal by defendant accountants. The facts are as follows. The accountants had performed auditing duties for a sole practitioner solicitor, and between 1989 and 1995 a partner at the accounting firm had signed reports stating that the solicitor had complied with the Solicitors' Accounts Rules. These were forwarded to the Law Society. In fact, the solicitor was fraudulent and was taking money from the client account, misappropriating over £750,000. This came to light in 1996, when the solicitor was struck off. Clients of the solicitors were entitled to claim from the Solicitors Compensation Fund, which is a statutory fund administered by the Law Society, who was also a trustee of the fund. The first claim was made against the fund in May 1996.

96. The Law Society sought to recover these losses by way of a legal action which was commenced in May 2002. If the cause of action had arisen when the claims were received by the Law Society, the proceedings were not time-barred. If it had arisen when the negligent reports had been signed by the accountants, then they were time-barred. At first instance, Mr Briggs QC (as he then was) sitting as a deputy Judge of the High Court found the latter, and struck out the claim. That decision was over-turned by the Court of Appeal, who found the former date. The House of Lords dismissed the appeal from that decision. In broad terms, they found that the fund had suffered a contingent liability, namely the possibility of an obligation to pay claims in the future, and that this was not itself damage necessary to complete the cause of action until the contingency occurred. Accordingly, until the claims were received and paid out in 1996 and following, the Law Society had no completed cause of action in negligence.

97. I do not consider it is necessary further to lengthen this judgment by dealing with a detailed exposition of the reasoning of the House of Lords in that case. It is, in my judgment, different (and therefore clearly distinguishable) from a case of a negligent structural engineer designing the structure of a building which is then built to that negligent design. It was correctly distinguished by Stuart-Smith J (as he then was) at [46] in ***Co-op v Birse***, and I distinguish it for the same reasons. There was no detriment to the Law Society's interests when the negligent report(s) were sent to the Law Society by the accountants. That is plainly not the case when a large tower block is constructed to a negligently prepared and inadequate structural design, such that the structure is not structurally safe. The detriment to BDW's interests here occurred when the buildings were built. This conclusion is a valid one, notwithstanding that the defective and dangerous structures were thought to be entirely structurally safe. The lack of knowledge of the true structural condition is not relevant to the accrual of the cause of action.

98. Considering detriment is also consistent with the dicta of the Court of Appeal in ***Knapp v Ecclesiastical Insurance Group plc*** [1998] PNLR 172 where Hobhouse LJ said, after an extensive review of the authorities:

> "From these authorities it can be seen that the cause of action can accrue and the plaintiff have suffered damage <u>once he had acted upon the relevant advice to his detriment and failed to get that to which he was entitled</u>. He is less well off than he would have been if the defendant had not been negligent".

(emphasis added)

Even though this is not an advice case, the concept of the claiming party being worse off, or having acted to his detriment, applies in the instant case to when the building is built to a structurally unsafe design.

99. The second strand is the judge's consideration and application of the ratio of the other relevant cases, such as ***Forster v Outred & Co [1982] 1 WLR 86*** and ***AXA Insurance Ltd v Akther & Darby*** [2009] EWCA Civ 1166. It was that latter case in which the phrases "the damaged assets rule" and "the package of rights rule" were adopted by Arden LJ (as she then was). I shall deal with each of those two cases because they are important, but because they are dealt with fully in ***Co-op v Birse*** and I agree with the analysis of them in that case, I need not do in great detail.

100. In ***Forster v Outred & Co [1982] 1 WLR 86*** Mrs Forster executed a mortgage in the presence of her solicitors that encumbered her freehold property with a charge as security for a loan made by a company to her son. He subsequently went bankrupt and a demand was made under the mortgage which Mrs Forster paid. She claimed against her solicitors, and it was found that her cause of action was time-barred because it had accrued when the charge was executed, not when she had to pay out under the mortgage. She had suffered actual damage at that point because her property became less valuable. That subjected her to a liability that could (and on the facts, later did) mature into financial loss. But that later maturation into financial loss was not necessary for the accrual of the cause of action.

101. That decision received extensive attention by the Court of Appeal in ***AXA Insurance Ltd v Akther & Darby*** [2009] EWCA Civ 1166. In that case, an insurer was involved in after-the-event or ATE insurance schemes, enabling members of the public to bring litigation in personal injury cases on a no win, no fee basis. The insurer based its business on the assessment of chances of success of individual claims provided by a panel of solicitors, who had certain obligations in terms of advising on merits of success and other relevant details (called vetting the claims), with ongoing obligations where prospects of success changed. Negligently, some panel solicitors failed to comply with those obligations. The defendants raised limitation defences against claims by the insurer and at first instance the claims were struck out where the relevant failures to notify had occurred earlier than six years before the date the action commenced. The insurer appealed.

102. The Court of Appeal dismissed that appeal. They held that a measurable loss had to have occurred for the cause of action to have commenced, and that this had done so when the insurer's book of business carried liabilities as soon as the respective policies had been underwritten, so as to incur liabilities in excess of those which would have been incurred if the vetting breaches had not occurred. Arden LJ explained the cases as either being within or under what she called either the damaged asset rule, or package of rights rule. She also said at [32]:

[32] In my judgment, the damaged asset rule and the package of rights rule are best regarded not as a series of independent qualifications on the basic rule in *Sephton* that the assumption of a "pure contingent liability" does not cause the limitation period to start to run, but as different cases in which the courts have tried to express a central idea. That idea has to be found by seeking the ultimate ratio in *Sephton*, that is, a ratio

which expresses the reason for the decision on which, despite the differences in expression, all the members of the House in that case were agreed. As I see it, the concept on which all the members of the House agreed was that there had to be measurable loss before time began to be run, that is to say, loss which is additional to the incurring of a purely contingent liability. In my judgment, for this purpose, rights of contribution or subrogation must be ignored because those rights arise by operation of law, unless excluded by agreement or statute. If they were taken into account, they would undermine the basic rule which is clearly established in *Sephton* that a pure contingent liability is not damage.

[33] In my judgment, the central idea in *Sephton* is that there has to be loss additional to that resulting from the incurring of a purely contingent liability.

103. One of the reasons Ms Parkin maintained that ***Co-op v Birse*** was wrongly decided was that in some way it had "extended" the ratio of ***Axa***. I do not accept that it did. But even if I am wrong about that, the passage above makes it clear that Arden LJ herself identified at [32] that both the damaged asset rule and the package of rights rule "are different cases in which the courts have tried to express a central idea". She identified that idea as "the concept on which all the members of the House agreed [in ***Sephton***] was that there had to be measurable loss before time began to be run, that is to say, loss which is additional to the incurring of a purely contingent liability."

104. That measurable loss, in the case of a negligently designed structure that has been constructed, for example, is the cost of making it structurally safe. That occurs when the structure is constructed in accordance with the negligent design. It cannot be right to say that the developer of a building has no such loss unless and until he discovers that the building he has had constructed is structurally unsafe. That proposition is not in accordance with fundamental principles in terms of accrual of causes of action in negligence. It also introduces a concept that is not accepted generally in English law, which is that a cause of action accrues upon date of knowledge.

105. Finally, one other way in which it was contended that ***Co-op v Birse*** was wrong is that Ms Parkin maintained it was in conflict with another first instance decision, namely that of Akenhead J in ***Linklaters Building Services Ltd v Sir Robert McAlpine Ltd and others*** (No.2) [2010] EWHC 2931 (TCC). In that case a firm of solicitors brought proceedings against a number of entities all of whom had been involved in the redevelopment of a City office block which the solicitors took under a full repairing covenant 25 year lease. There were two separate actions both being heard together. It had been found that certain of the services were extensively corroded, and widespread replacement of the services was required at significant cost. One of the many claims within the framework of the litigation was one in tort by the M and E sub-contractors, How Engineering Services Ltd ("How") against its sub-sub-contractors, Southern Insulation (Medway) Ltd ("Southern") who had installed faulty insulation to the pipes. How had given McAlpine a 100% indemnity and so were contractually liable "up the line", and sought to pass that liability down to Southern.

106. In the judgment, it is made clear at [109] that none of the claims in tort by How against Southern arose as a result of the factual findings. The judge stated that "technically, in the light of my factual findings, it is unnecessary to decide all of these issues". He did however, out of deference to counsel, briefly touch on some of the arguments. It is clear that his obiter views on the date of accrual of cause of action

flowed from his view of the scope of the duty of care upon Southern in that particular case, namely that because of the nature of installation, damage might not occur for many years, and the potential liability up the line would arise as a result of collateral warranties that were executed. He stated:

"[112]…..There was unchallenged evidence that collateral warranties would commonly be provided by sub-contractors in How's position to the end user of the property. The duty of care therefore encompassed a situation where How could be claimed against at any time either by McAlpine or directly or indirectly by an end user such as Linklaters after completion of the work in question."

107. The specific scope of the duty of care in that case, on those facts, cannot be ignored when one is analysing the later part of the judgment. The judge in ***Co-op v Birse*** was not persuaded to follow the obiter dictum at [113], that follows the passage I have reproduced from [112]. However, Birse had relied upon [113] to underpin their submission that the cause of action did not accrue in their case until any liability it may be under to the Co-op had been ascertained – this is made clear at [43] in ***Co-op v Birse.*** I do not consider that the obiter dictum to which I have referred in ***Linklaters*** could ever found such a submission as Birse sought to argue it before Stuart-Smith J. It certainly does not assist Ms Parkin in demonstrating that ***Co-op v Birse*** is wrong. *If* ***Linklaters*** were not obiter, and *if* it were in direct conflict with ***Co-op v Birse*** (and I do not consider either of those conditions are necessarily made out) I would follow ***Co-op v Birse*** in any event.

108. I therefore conclude that the cause of action accrued, with all of its necessary ingredients completed, not later than the date of practical completion of each of the blocks. This conclusion has the following benefits. It is consistent with, and continues, the approach of English law that knowledge is not required to complete a cause of action. It is therefore consistent with orthodoxy. It is also consistent with the other first instance decisions relied upon in argument, in particular ***New Islington*** and ***Co-op v Birse***. It is also consistent with the concept of BDW being worse off, or having acted to its detriment, as explained by Hobhouse LJ in the Court of Appeal in ***Knapp v Ecclesiastical Insurance Group plc*** [1998] PNLR 172.

109. As I observed with counsel during the hearing, so-called "transaction advice" cases, and contingent loss cases such as ***Sephton***, are not on all fours with cases of negligent design. However, if I am wrong about that, and they are, the "something more" that is required in those type of cases to complete the cause of action in the instant case would be the building owner or employer actually constructing the building to the negligent design. The cause of action in such a case cannot accrue later than the date of practical completion, the same conclusion reached in ***Co-op v Birse***.

110. If the time when the defects were, or ought reasonably to have been, discovered, is not the time when a cause of action accrues, because it has accrued already upon construction, then logically it cannot accrue after that (such as the time when a third party brings a claim against BDW). Although that may help URS in its subsequent arguments on limitation, it does not assist it in any of its arguments that a legal claim is required (either from the original owners, or from subsequent purchasers) in order to complete any cause of action that BDW might have against it. Further and in any event, if the cause of action in negligence is completed when the building is constructed to the negligent design, then there can be no subsequent crystallisation of

that same cause of action. Accordingly, and in other words, if Mr Hargreaves is right on his primary case, this disposes of his own secondary and tertiary cases; it also disposes of Ms Parkin's case too.

111. I consider that Mr Hargreaves is right. I consider that it is right as a matter of analysis; it is also consistent with, and follows the reasoning of, the other cases I have referred to, such as ***New Islington*** and ***Co-op v Birse***; and it is further supported by the wording of the LDA 1986 itself too. When one reaches the same result by a variety of different potential routes, then that is a powerful confirmatory factor that the result is the correct one.

112. Ms Parkin maintained, in post-hearing submissions, that section 14A(5) of the LDA was directed to a situation where physical damage had been discovered at a later date than it had in fact occurred. She submitted that the word "knowledge" for the purposes of the section was not confined simply to knowledge of the material facts. That is undoubtedly true in the sense that the section requires, at section 14A(6)(b) "knowledge of other facts relevant to the current action". But I do not consider that the post-hearing submissions made on this point on behalf of URS much assist it in its case on the date the cause of action was completed. I have not reached my conclusion based solely on an interpretation of the LDA. Rather, as I have explained at [111] above, I have reached that conclusion by way of analysis and considering the reasoning of other authority, with the added comfort that my conclusion is consistent with the wording of the LDA. I consider that Ms Parkin's submissions, were they to be accepted, would be inconsistent with the LDA, and in particular with the use of the past participle in the clause "the earliest date on which the plaintiff or any person in whom the cause of action was vested before him" in section 14A(5). But whether I am right or wrong about that, I do not accept that date of knowledge is the appropriate starting date for the cause of action.

113. Finally on this point, it must be remembered that the issue being addressed here is where a designer has performed a negligent structural design, and as a result the completed structure may pose a danger to persons or property; is there any damage (in its wider sense) before this is discovered? That is an effective description of what the law refers to as latent damage. It cannot be right that latent damage, which is what Ms Parkin accepted was the correct description of the structural slab as constructed here, does not count as damage at all. The purpose of the Latent Damage Act is to assist a claimant who may not know he or she has a cause of action, even though it has accrued and time is running. It does that by inserting provisions into, or amending, the Limitation Act 1980. It does not postpone the commencement of time from when the cause of action accrues. Under Ms Parkin's analysis, such a statutory correction to the common law position would never be necessary for latent damage, because until the necessary knowledge is obtained, there would be no cause of action in existence in any event, because there would be no damage. I consider that analysis to be incorrect.

114. It would also be very surprising if, in all the detailed analyses over the years considering the dates of accrual of causes of action in negligence for non-contingent cases, in all the judgments which state (as Dyson J did in ***New Islington***) that "the fact remains that the knowledge test has not been applied in English law as marking the date on which damage is first suffered for the purpose of completing a cause of action in negligence", all of those judges had been mistaken, and for one specific category of case in negligence the knowledge test *was* the one that English law applied. If Ms

Parkin were right, then applying the date of knowledge test in latent damage claims would be a very marked exception to the general rule in English law. Such a marked exception would be highly unlikely to have passed everyone by. I find this a further confirmatory factor that my analysis is correct.

115. Finally, in the very well-known case of ***Murphy v Brentwood DC*** [1991] 1 AC 398, the following point appears in the ratio in the headnote in the Official Law Reports:

"Held, allowing the appeal, that, while the principle in *Donoghue v Stevenson* [1932] AC 562 applied to impose a duty on the builder of a house to take reasonable care to avoid injury or damage, through defects in its construction, to the persons or property of those whom he ought to have in contemplation as likely to suffer such injury of damage, that principle as stated extended only to latent defects….."

116. The issue of latent defects was plainly in their Lordships' mind when they were considering ***Murphy***. They also expressly considered ***Pirelli***, although ***Murphy*** was obviously not a limitation case. In ***Pirelli***, Lord Fraser expressly stated that the knowledge test was not part of English law. Had their Lordships in ***Murphy*** thought he was wrong about that for latent defects, I consider that one could have expected them to have said so, even on a basis that would have been obiter. They did not do so.

117. In all those circumstances, the main battleground on Preliminary Issue (b) is resolved in favour of the arguments advanced by BDW in terms of the date of accrual of cause of action. Date of accrual of cause of action was one of the main points advanced by URS as to why BDW's alleged losses were not recoverable in principle as a matter of law in tort.

118. The others were the nature of the damage – all of the losses were said to be to avoid reputational damage – and the extent of scope of the duty. The latter is resolved by my consideration of Preliminary Issue (a). So far as the different heads of damage are concerned, I am of the view that the Reputational Damage Losses (namely those in paragraph 48.7 of the Particulars of Claim) are simply not recoverable. They were not in the reasonable contemplation of the parties, and they are also too remote. Given my finding on the date of accrual of the cause of action, the points advanced by Ms Parkin concerning BDW's proprietary interest (or lack of it) at the date of the accrual do not arise.

"Doomed from the start"

119. Ms Parkin observed that Mr Hargreaves' submissions taken as a whole were effectively tantamount to the buildings being "doomed from the start", even though he had initially disavowed this in his oral submissions on Day 1 as not being an applicable label to the instant case. Lord Fraser in ***Pirelli*** had used this phrase, and there was some discussion about what it should be taken to mean. I gave the parties time to consider their responses to the question of what this phrase might mean, and they each lodged brief further written submissions to deal with it.

120. BDW submitted in these further submissions that the relevant damage occurred when, as he put it, the "damaging effects" were first present. Using an analogy with the defective sound-proofing in ***New Islington***, Mr Hargreaves submitted that the damage had occurred when the building was constructed in accordance with the defective

design. This is because the damaging effects – in the present case, the building being dangerously defective – were immediately present at that point. There was not any separate physical damage. Because in ***New Islington***, Dyson J had not applied the "doomed from the start" approach in order to arrive at his conclusion that the damaging effects were immediately present, Mr Hargreaves submitted that he did not have to do so in this case. However, although he preferred to rely upon the analysis in ***New Islington***, he accepted that if the physical damage analysis in the present case was a true example of the "doomed from the start" concept or approach, "then so be it".

121. URS declined, in the further submissions, to define circumstances which might properly describe the categories of buildings "doomed from the start". This position was said to be justified by Mr Hargreaves' initial oral submissions to which I have referred at [119] above. Ms Parkin also submitted that because these buildings "have performed for in excess of twelve years without any physical damage having materialised" they could never be so categorised.

122. That latter submission rather ignores the potential overlap between the two different concepts, namely buildings "doomed from the start" and incidences of catastrophic structural failure. Catastrophic structural failure is a sudden failure of a structure, of which there have been certain notable examples in history. Bridges or dams that suddenly collapse without warning are examples of catastrophic structural failure. If Ms Parkin is right, because these buildings have not collapsed or experienced physical damage, then a structure that suddenly suffers a catastrophic structural failure could never, prior to that failure, be "doomed from the start". I find that difficult to accept merely as a matter of logic. However, I do not consider that it is necessary to attempt to define, in this judgment, what constitutes a building that is "doomed from the start". This is because it is not necessary to do so in order to answer the Preliminary Issues. It would also be an exercise of extremely limited utility to other cases given the limited nature of the assumed facts.

The chain of causation and mitigation

123. Causation is highly fact-specific, as are breaks in the chain of causation. I do not consider that the question posed in Preliminary Issue (c)(iii) and (iv) can, in this case, be answered "as a matter of law". Similarly I do not consider that failure to mitigate, the question posed at Preliminary Issue (c)(v), another fact sensitive issue, can be answered properly at this stage of the action without a full examination of the facts. I have already referred to this at [9] above.

124. Given that each of the points at Preliminary Issue (c) are, in any event, sub-sets of the wider question posed in Preliminary Issue (b), which has been answered, I do not consider that the court is in any way failing properly to deal with the substance of the Preliminary Issues. However, to take a particularly fact sensitive issue and dress it up by including the words "as a matter of law" is not a sensible way to proceed. That is not to say that the parties might not be assisted by, for example, some decision on those matters short of a full trial, if they do genuinely represent an obstacle to some sort of compromise. If that is the case, then the correct approach is for the parties to engage either in Early Neutral Evaluation or some alternative form of dispute resolution to do so. It is not to include them in Preliminary Issues disguised as matters of law.

Strike out application

125. I therefore turn to the application by URS to strike out the Particulars of Claim under CPR Part 3.4(2)(a) as disclosing no reasonable cause of action. This is a different test, and is to be considered differently, to resolving the Preliminary Issues, although obviously consideration of the same legal issues is required. Preliminary Issues are decided in a trial, substantively with finality (albeit at first instance), whereas striking out a claim is done at a procedural stage. The test is therefore different. The notes in the White Book to this rule states that (a) and (b) of the same rule "cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence". There is some overlap with CPR Part 24 and the test for summary judgment.

126. The majority of submissions were made in respect of the substantive answers to the issues themselves, rather than in terms of applying those findings of law to the strike out application. As well as her main legal submissions, Ms Parkin took a number of points against the actual pleading itself, to demonstrate (for example) that what she maintained were strict requirements on the part of BDW to plead (for example) the actual making of claims against BDW by original owners and subsequent purchasers had not been specifically identified or pleaded. However, in the majority of instances, these points were potentially dependent upon my findings on the issues concerning the date of accrual of causes of action for latent defects. So if BDW's secondary case was the one I may accept on the time of accrual of cause of action, Ms Parkin maintained that claim or claims from third parties were a necessary ingredient, and none were pleaded. Mr Hargreaves for his part sought to persuade me that, if I were otherwise minded to strike out any part of the pleading, I ought to give him a chance to remedy any deficiency by way of amendment. There is some limited authority in the notes to CPR Part 3.4.2 in the White Book for this course of action, although it would be wrong to construe that as being strictly required in every case. He also maintained that (depending upon what deficiencies were identified) the explanation may already, potentially, be found either in the Reply or in the Further Information already provided by BDW.

127. Given my findings on the issues, striking out any part of the Particulars of Claim only arises in the following respect. That is the part of loss and damage pleaded at paragraph 48.7 (and two other paragraphs that expressly follow and repeat it, namely 48.13 and 48.18). This is the one specific head of loss to which I have already referred at [18] above, and is entitled "Reputational Damage". I separately identified that for consideration earlier in this judgment because it is a different head of loss than the more conventional ones in these circumstances, such as costs incurred in investigation and remedial works.

128. In my judgment, the scope of duty upon URS as the structural designer simply does not extend to this specific head of loss on the part of a developer, for reasons that I have explained whilst analysing the scope of duty.

129. Ms Parkin had a number of other objections to such a head of loss, not least quantification of such loss per developer, and also that the tort of defamation is conventionally the correct cause of action for such losses. It is not necessary to

address those points because in my judgment Mr Hargreaves fails at the first hurdle. Such losses are simply not included in the scope of duty upon a structural designer.

130. It seems to me that no amount of amendment could cure that difficulty with the lack of recoverability of the Paragraph 48.7 losses, and their close cousins at paragraphs 48.13 and 48.18. I therefore propose, in the Order that will be consequential upon this judgment being handed down, to strike out those three paragraphs of the Particulars of Claim. If this proposed course of action is considered not available to me for some reason, then upon receipt of this draft judgment the parties have an opportunity to address me on that, if they are so advised. However, given URS sought to strike out the whole pleading, I consider I am entitled, fairly and within that same application, to strike out just one or more discrete parts of it in terms of the specific heads of loss that I have held are not recoverable for the reasons that I have explained.

131. Permitting the other pleaded losses to proceed to trial does not, of course, mean that they will necessarily succeed. Striking out a pleading is an interlocutory step. As Evans LJ said in ***Galoo Ltd (in liquidation) v Bright Grahame Murray Ltd*** [1994] 1 WLR 1360, 1387, permitting an allegation to proceed to trial does not mean that it will necessarily succeed. In particular in the instant case, URS wishes to maintain that the chain of causation has been broken, and also that BDW has failed to mitigate its loss. These are particularly fact-sensitive lines of defence which can only be properly decided after a full examination of all the facts.

132. The answers to the Preliminary Issues are therefore as follows:

(a) Did the scope of URS' duties extend to the alleged losses?

Answer: Yes, with the exception of the losses specifically pleaded as Reputational Damage at paragraph 48.7 (and the two other paragraphs consequential upon that one, 48.13 and 48.18).

(b) Are BDW's alleged losses recoverable in principle as a matter of law in tort?

Answer: Yes, again with the exception of the losses specifically pleaded at paragraphs 48.7, 48.13 and 48.18.

(c) In particular as to (b), is it nonetheless, and on the basis of those Assumed Facts, a defence to URS in law that: (i) the losses were not in the contemplation of the parties at the time of entering into the appointments; (ii) the losses are too remote; (iii) BDW has caused its own losses; (iv) BDW's actions broke the chain of causation; and (v) BDW has failed to mitigate its loss?

Answer: for the paragraph 48.1 to 48.6 losses (i) No (ii) No. Sub-issues (iii) to (v) are all highly fact dependent and can only be finally determined at trial. For the paragraph 48.7 losses the answers are (i) Yes (ii) Yes.

133. By "paragraph 48.7 losses" in the last answer, I also include those under paragraphs 48.13 and 48.18.

Appendix A
Assumed Facts

1. URS provided structural design services to BDW in connection with the Capital East and Freemens Meadow Developments ("**the Developments**") pursuant to contracts under which URS owed BDW a duty to exercise reasonable skill and care in the provision of its services.

2. URS owed BDW a common law duty of care in tort concurrent with, and arising out of, the obligations assumed by URS under the contracts to exercise reasonable skill and care.

3. BDW had a proprietary interest in each of the Developments at the time at which it was constructed.

4. The existence of the defects alleged by BDW at paragraphs 27 – 41 of the Particulars of Claim ("**the Defects**") is established.

5. The existence of the Defects was the result of URS failing to meet the requirements alleged at paragraphs 46.1 – 46.2 of the Particulars of Claim and/or failing to exercise the degree of skill and care alleged at paragraphs 46.2 – 46.3.

6. The existence of certain of the Defects presented a health and safety risk.

7. The existence of the Defects put BDW in breach of its duties to third parties at the time that they acquired an interest in the dwellings in each Development.

8. There is no claim made by BDW against URS for breach of contract.

9. At the time that BDW first became aware of the Defects and/or first incurred the costs pleaded at paragraphs 48.1 – 48.13 ("**the Costs**"):
    a. BDW no longer had any proprietary interest in the Developments; and
    b. BDW did not have an obligation in law to rectify the Defects. BDW's case is that (i) it owed obligations to third parties in relation to the Defects but (ii) any action brought by third parties against BDW to enforce those obligations would be time-barred.

10. There was a risk to BDW's reputation and consequent commercial losses to the extent that the Defects which presented a health and safety risk were not rectified, or if the residents were forced to fund the remedial works required in respect of the same (and costs consequential thereon).

11. BDW has incurred or will incur the Costs in respect of those Defects which present a health and safety risk (i) to protect occupants against the danger presented by those Defects; and (ii) in mitigation of the risk of damage to BDW's reputation set out in Assumed Fact 10, and costs consequential thereon.

12. BDW does not intend to incur any costs in connection with any of the Defects which do not present a health and safety issue.