Neutral Citation Number: [2022] EWHC 1490 (TCC)

Case No: HT-2021-000207

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

Royal Courts of Justice
Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/06/2022

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

ORCHARD PLAZA MANAGEMENT COMPANY LIMITED	**Claimant**
- and -	
BALFOUR BEATTY REGIONAL CONSTRUCTION LIMITED	**Defendant**

- -
- -

Ben Patten QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
William Webb (instructed by **Clyde & Co**) for the **Defendant**

Hearing date: 2 December 2021

- -

Approved Judgment

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

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THE HONOURABLE MR JUSTICE MORRIS

Mr Justice Morris:

Introduction

1. This is an application by Orchard Plaza Management Company Limited ("the Claimant") to strike out and/or for summary judgment in respect of one part of the defence of Balfour Beatty Regional Construction Limited ("the Defendant"). In short, by that defence, the Defendant contends that the Claimant's pleaded loss and damage is too remote to be recoverable.

Factual background

2. By these proceedings commenced on 30 November 2020 the Claimant seeks to recover the costs of remedial works to a development at Orchard Plaza, Poole, ("the Property") under the terms, and as assignee, of a collateral warranty given by the Defendant.

3. The development at the Property involved the conversion of an existing 1970s office block into 115 residential apartments and two commercial units. The development was designed and constructed by the Defendant (at the time called Mansell Construction Services Limited) during 2007 and 2008 pursuant to an amended JCT D & B contract with Coltham (Orchard) Limited ("Coltham"). Coltham was the then freeholder of the Property. The funder of the project was AIB Group (UK) plc ("AIB"); AIB lent sums to Coltham. On 22 October 2007 the Defendant granted an assignable collateral warranty to AIB ("the Collateral Warranty").

4. In due course, Coltham granted long leases to the purchasers of the apartments, which are said to be in materially identical form ("the Leases"). The Claimant is the management company established to acquire and hold a long lease of the Property. Each lessee was required to be a member of the management company. On 1 January 2008 Coltham granted a separate lease of the Property to the Claimant ("the Coltham Orchard Lease").

5. The Leases were sold with the benefit of Premier Guarantees, a specialist form of insurance for new build properties. Those guarantees were paid for by the Defendant. According to the Defendant, Premier appears to have admitted liability for many issues. However a funding agreement is in place under which the underwriters of Premier are refusing to pay the insurance proceeds until the present proceedings are resolved.

6. In 2015 the Claimant became aware of the possibility of defects in the rainscreen cladding to the development. It began obtaining reports, but did not carry out any remedial work.

7. On 28 June 2017 AIB assigned its rights under the Collateral Warranty to Coltham. On 10 July 2017 Coltham assigned its rights under the Collateral Warranty to the Claimant.

8. On 6 January 2020 Bournemouth, Christchurch and Poole Council issued an improvement notice to the Claimant ("the Improvement Notice"). A variation to that notice was issued on 11 May 2020. The Improvement Notice requires the Claimant to

carry out works, including the replacement of the rainscreen cladding. As at the date of the Particulars of Claim, the Claimant proposed to carry out a scheme of works. Since that date it has entered into a building contract. By these proceedings, the Claimant seeks to recover from the Defendant the costs of remedial works sufficient to correct the defects said to arise from the Defendant's works.

The application

9. By its application dated 24 August 2021, the Claimant initially sought summary judgment and/or strike out in respect of four paragraphs in the Defence, which in turn represented two different defences. The issues in respect of the first of those defences have now been resolved (and as a result the Particulars of Claim have been amended). The application concerns now only the second defence namely the "Performance Warranty Defence" set out at paragraphs 2.4 (2), 7.2 and 58.2 of the Defence: see paragraph 33 below. In summary, by that defence, the Defendant contends that the losses claimed by the Claimant are not the natural consequence of breaches of a warranty of the nature relied upon by the Claimant in this case and thus are too remote.

The relevant contractual materials

The Building Contract

10. The building contract was made between Coltham as Employer and the Defendant as Contractor on 1 December 2007 and is in amended JCT Design and Build Contract form. Article 10 provides:

> "The Contractor shall, within 14 days of a written request to do so by the Employer, execute and deliver to the Employer deeds of collateral warranty in the respective forms set out in Appendix 6 hereto in favour of any Fund, any Purchaser and any Lessee."

The Collateral Warranty

11. The Collateral Warranty was entered into on 22 October 2007 between the Defendant as Contractor, AIB as Funder and Coltham as Employer. It recites the fact that AIB had funded the works to be carried out and completed at the Property.

12. The "Works" is defined as the design and construction of the Property. In clause 1, the "Contract" is defined as the Building Contract; the "Project" is defined as the buildings comprising the Works which are to be carried out and completed at the Property.

13. The Collateral Warranty goes on to provide, inter alia, as follows:

> "**3. WARRANTY OF PERFORMANCE**
>
> 3.1 The Contractor warrants and undertakes to the Funder that it has exercised and shall continue to exercise all the

reasonable skill and care and diligence to be expected of a competent contractor experienced in the carrying out work and services of a similar size, scope, value, purpose and complexity to the Contract Works in

(a) the design and the approval of the design of the Contract Works and of any other part or parts of the Project to the extent that the Contractor has been or will be responsible for such design or such approval; and

(b) the selection of materials, goods, equipment and plant for the Contract Works or any part or parts of the Project to the extent that such materials, goods, equipment and plant have been or will be selected by or on behalf of the Contractor.

3.2 The Contractor further warrants and undertakes to the Funder that:

(a) it has performed and will continue to perform its obligations under the Contract;

(b) it has carried out and completed and will carry out and complete the Contract Works in accordance with the Contract Works and in a timely and workmanlike manner using up-to-date building practices and good quality materials;

(c) the Contract Works will on completion of the Project comply with all applicable British standards, Codes of Practice and statutory requirements, and will satisfy any standard, performance specification or requirements contained or referred to in the Contract;

(d) the Contract Works and all the materials, goods, equipment and plant comprised in them will correspond as to description, quality and condition with the requirements of the Contract and will be of sound manufacture and workmanship;

(e) it will comply with the requirements of the Health and Safety Executive, the Health & Safety at Work etc Act 1974 and all rules codes and regulations made thereunder (including the Construction (Design & Management) Regulations 1994 to the extent provided for in the transitional arrangements in the Construction (Design & Management) Regulations 2007), and all other legislation and laws relating to the health and safety of workers and to the undertaking of construction work; and

3.3 The warranties contained in this clause 3 shall extend to any work (including without limitation any work of design or selection of materials, goods, equipment and plant) carried out prior to the entering into of the Contract

…

7. STEP-IN

7.1 The Contractor shall not:

7.1.1 terminate the Contract or its employment thereunder;

7.1.2 treat the Contract as having been repudiated by the Employer;

7.1.3 treat its employment as determined under the Contract;

7.1.4 discontinue the carrying out of the Works

before giving the Funder 28 days' prior notice. The notice shall give particulars of any alleged breach of the Contract by the Employer.

7.2 The Funder

7.2.1 upon breach of the Contract by the Employer;

7.2.2 within the 28 day notice period referred to in clause 7.1;

may give notice to the Contractor that the Contractor is to accept the instructions of the Funder or its nominee instead of the Employer under the Contract. Upon receipt of the notice, the Contractor shall comply with it and shall not do any of the actions referred to in clauses 7.1.1 to 7.1.4. The Contract shall continue as if it had been entered into at the outset between the Contractor and the Funder or its nominee instead of the Employer.

7.3 Any notice which the Funder gives under clause 7.2 shall state that the Funder or its nominee accepts all the obligations of the Employer under the Contract, including payment of any part of the contract sum due to the Contractor and unpaid on the date of the notice.

7.4 Any notice which is given under clause 7.1 or 7.2 shall be copied concurrently to the Employer.

7.5 The Employer acknowledges that the Contractor shall:

7.5.1 be entitled to rely upon a notice which the Beneficiary gives to it under clause 7.2 as conclusive evidence, for the purpose of clause 7.2, that the Employer has breached the Contract

7.5.2 not breach the Contract if the Contractor complies with clause 7.1.

7.6 Any notice which the Contractor gives under clause 7.1 shall not constitute a waiver of any of its rights under the Contract.

…

10. SEPARATE OBLIGATIONS

10.1 The terms of this Agreement shall be separate and independent of any other deed, agreement, understanding or document between the parties, including the Contract. In the event of any inconsistency between this Agreement and any other deed, agreement, understanding or document, this Agreement shall prevail.

10.2 For the avoidance of doubt, nothing in the Contract or in the tender of the Contractor shall operate to exclude or limit the Contractor's liability for breach of the warranties contained in this Agreement.

10.3 This Agreement shall have effect notwithstanding any dispute, including as to payment of monies between the Purchaser and the Contractor, or the failure (howsoever arising) of any other person to enter into a similar Agreement with the Funder.

…

12. ASSIGNMENT

12.1 The benefit of and rights under this Agreement may, without the consent of the Contractor, be assigned by the Funder and its assigns provided that no more than two assignments are permitted by this clause.

12.2 The Contractor shall not assign this Agreement or any part or any benefits or interest under it.

12.3 The Contractor agrees with the Beneficiary not to contend or argue that any person to whom the benefit of this Deed is assigned shall be precluded or prevented from recovering under this Deed any loss or damage resulting from any breach of this Deed by the Contractor by reason of the fact that such person is an assignee only or otherwise is not the original beneficiary or because the loss or damage suffered has been suffered by such person only and not by the original beneficiary, or because such loss is different to that which would have been suffered by the original beneficiary. (emphasis added)

…

14. LIMITATION

14.1 No action or proceedings for any breach of this Agreement shall be commenced against the Contractor after the expiry of 12 years from the date of practical completion.

14.2 The Contractor shall have no greater liability to the Funder than it would have if the Employer and the Funder had jointly appointed the Contractor under the Contract".

The Assignments (from AIB to Coltham, and from Coltham to the Claimant)

14. First, by Deed of Release and Assignment dated 28 June 2017 made between AIB and Coltham, AIB acknowledged receipt of all monies advanced by it to Coltham and released Coltham from all its obligations under the prior facility agreement and the Security Documents. The Security Documents, as defined, included a number of warranties including the Collateral Warranty. Clause 3 headed "assignment" provided that "in consideration of the [repayment AIB] hereby assigns to [Coltham] all of its rights interest and claims in the Warranties." The "Warranties" as defined include the Collateral Warranty.

15. Secondly, the subsequent assignment of the Collateral Warranty by Coltham to the Claimant was effected by deed dated 10 July 2017 and made between Coltham as assignor and the Claimant as assignee ("the July 2017 Deed"). The July 2017 Deed provided inter alia as follows

"…

BACKGROUND

The Assignor has the benefit of the Construction Warranties, which were assigned to the Assignor by the AIB Group (UK)

> Plc, and the Assignor has agreed to assign the benefit of those Construction Warranties to the Assignee (the Assignor no longer having an interest in the Building and the Assignee having an interest in the Building).
>
> **AGREED TERMS**
>
> 1. Interpretation
>
> …
>
> 1.1 Definitions
>
> …
>
> **Construction Warranties**: the warranties listed in lines number 7-11 (inclusive) in the schedule of the AIB Deed (including for the avoidance of doubt the contractor warranty from Mansell Construction Services Ltd dated 22 October 2007).
>
> …
>
> **2. ASSIGNMENT**
>
> 2.1 On the date of this deed, the Assignor assigns the benefit of the Construction Warranties to the Assignee absolutely and with full title guarantee."

Notice of the July 2017 Deed was given to the Defendant on 22 October 2017.

The Leases

16. Leases for individual residential units were, or were said to be, in common standard form. What follows is a description of one such lease ("the Lease").

17. The parties to the Lease are Coltham, the Claimant, defined as "the Management Company", and the individual or individuals taking possession of the particular unit defined as "the Lessee". In clause 1.1, "The Estate" means the entirety of the Property including the building and all other structures erected on it. "The Retained Parts" is defined as the parts of the Estate other than the particular apartment and the other apartments included in the leases of them. Clause 1.4.1 provides that once the Coltham has granted a lease of all apartments in the Property on terms similar to the particular lease, Coltham will grant the Claimant a concurrent lease of the Estate, all subject to the individual leases of the individual apartments. This is the Coltham Orchard Lease (see paragraph 21 below).

18. By clause 3, the Lessee covenants with the Landlord and with the Management Company [i.e. Coltham and the Claimant] to perform the Lessee's obligations contained in part 1 of Schedule 5. Those obligations include payment of the service charge and repair of certain parts of its own apartment.

19. Clause 4 contains covenants by the Landlord and the Management Company. The Landlord's covenants are in Schedule 6, including performance of the Services set out in Schedule 7.

20. Pursuant to clause 4.2.1 of the Lease, the Claimant covenants with the Landlord and the Lessee to observe on behalf of the Landlord the obligations of the Landlord set out in Schedule 6 paragraph 6.2. As regards the Landlord's covenants in Schedule 6, the obligation in paragraph 6.1 of Schedule 6 in relation to quiet enjoyment is imposed on the Landlord only. Paragraph 6.2 provides for the services to be provided by the Landlord; and all these obligations are taken over by the Claimant pursuant to clause 4.2 above. The Services are themselves set out at paragraph 7.3 of Schedule 7, including repairing obligations in respect of the Retained Parts and the external parts, such as windows, and door frames. By paragraph 7.3.20 the Services include the taking of any steps the Landlord considers appropriate for complying with any notice, regulation or order of any government department, local, public, regulatory or other authority or court, compliance with which is not the direct liability of the Lessee or any lessee of any part of the Estate. This would include compliance with the Improvement Notice.

The Coltham Orchard Lease

21. The Coltham Orchard Lease is dated 23 May 2014 and made pursuant to clause 1.4.1 of the Lease: see paragraph 17 above. It is a lease of the entire development known as Orchard Plaza and includes all buildings and other structures erected on the Property. It is a lease for 126 years. By clause 2, the Landlord demises the Property to the Tenant (i.e. the Claimant) with full title guarantee to hold to the Tenant for the term. By Clause 3 the Tenant covenants with the Landlord to pay the ground rent and to observe and perform the covenants on the part of the Landlord contained in the Leases and to indemnify the Landlord against any failure to observe and perform the same. By clause 3.11 the Tenant covenants to keep the Property in good and substantial repair and condition and to decorate the Property, to the extent that that is not an obligation on the individual tenants in the Leases.

The defects

22. On 6 January 2020 the Bournemouth Christchurch and Poole Council served the Improvement Notice upon the Claimant, requiring it to carry out remedial works specified in the Notice, including the replacement of the rainscreen cladding. The Notice was varied on 11 May 2020.

23. The Claimant alleges that there were defects in the Works. These fall into three broad categories: first, allegations that the cladding of the building is not safe in the event of a fire due to the materials used and method of construction; secondly, a variety of specific non-fire-related allegations about the cladding in terms of deterioration or similar; and thirdly a variety of complaints regarding the fire safety of the interior of the Property arising out of how it was designed and built.

The Pleadings

24. Particulars of Claim were served on 1 February 2021. The Defence was served on 23 March 2021. The Claimant served its Reply on 4 August 2021.

25. Paragraphs 1 to 7 of the Particulars of Claim summarise the claim and contend that the Claimant is required, pursuant to its obligations to the Lessees, to carry out remedial works sufficient to correct the defects and to comply with the Improvement Notice. By the recent amendment (see paragraph 9 above), the Claimant further contends that it is required to comply with the Improvement Notice as a matter of law.

26. In response, at paragraphs 1 to 7 of the Defence, the Defendant admits some of the defects but puts the Claimant to proof as to their extent. The Defendant contends that no loss has been suffered and that the loss suffered is too remote (see paragraphs 2.4 (2) and 7.2 in particular, set out in paragraph 33 below). The Defendant admits the Improvement Notice (paragraph 5) but denies that the defects fall within the repair obligations under the Leases (paragraph 6); and admits breach of the Collateral Warranty, but denies liability (paragraph 7).

27. Paragraphs 8 to 16 of the Particulars of Claim plead the Leases and the Claimant's obligations. Paragraphs 17 to 24 set out the terms of the Building Contract and the Collateral Warranty. The Defendant substantially admits these paragraphs.

28. Paragraphs 25 to 35 plead the investigations into the apparent defects in the rainscreen cladding and the reports that the cladding was defective and, in places, deteriorating. The Defendant admits that this is a broadly accurate summary of the reports.

29. Paragraphs 36 to 38 plead the fact of the Improvement Notice and the works that the Claimant was required to carry out by reason of that Notice. The Defendant substantially admits these paragraphs.

30. Paragraphs 40 to 45 of the Particulars of Claim set out the Claimant's case as to breaches of the Collateral Warranty. Some of these are said to be breaches of the Defendant's obligations to comply with the Building Regulations; others are said to arise out of other breaches of the Building Contract. Paragraphs 28 to 55 of the Defence admit some breaches, deny others and put the Claimant to proof as to the extent of many defects.

31. By paragraph 47 of the Particulars of Claim, the Claimant alleges that, by reason of the Defendant's breaches of the Collateral Warranty, the Claimant is required to undertake substantial investigations and remedial works. By paragraphs 48 to 52 the scope of remedial works is pleaded and other heads of loss are raised.

32. At paragraph 57 of the Defence, the Defendant essentially repeats its admissions and non-admissions as to breach. At paragraph 58(2) set out below, it is denied that the Claimant has any entitlement to the cost of remedial works.

The paragraphs of the Defence in issue

33. For the purposes of the issue before the Court, the relevant part of the Defence are as follows:

> **"INTRODUCTION**
>
> …
>
> 2. The Defendant's position in these proceedings is:

…

2.4 In any event, it is denied that the Defendant is liable to the Claimant for two primary reasons:

(1) ….

(2) In any event the Claimant brings this action as assignee of a collateral warranty issued in favour of a funder of the works. At the time of entry into that warranty, the losses claimed by the Defendant are not a likely or foreseeable consequence of breaches of that warranty of the nature alleged in this case. Accordingly the losses claimed are too remote.

…

7. As to paragraph 6:

7.1 It is admitted that the Defendant is in breach of the terms of the Collateral Warranty.

7.2 However, it is denied that it is liable to the Claimant under the terms of the warranty. The warranty was issued in favour of a funder and the Claimant can only recover losses of the sort which would ordinarily flow from a warranty provided to a funder in this factual scenario.

…

LOSS AND DAMAGE

…

58. In any event, it is denied that the Claimant is entitled to pursue the Defendant for the cost of the remedial works under the assigned Performance Warranty for two reasons:

58.1 …

58.2 Further, and in any event, the Claimant brings this action as assignee of a collateral warranty issued in favour of a funder of the works. At the time of entering into that warranty, the losses claimed by the Defendant are not a natural, likely and/or foreseeable consequence of breaches of that warranty of the nature alleged in this case. Accordingly the losses claimed are too remote.

> 58.3 For the avoidance of doubt, such a defence does not fall within Clause 12.3 of the Performance Warranty which does not displace the usual rules on remoteness"

The Claimant's pleaded response

34. By its Reply (at paragraph 2.3), and in response to paragraphs 2.4(2), 7.2, 58.2 and 58.3 of the Defence, the Claimant contends that those paragraphs disclose no reasonable grounds for defending the claim: that, first, it was foreseeable that in the event that a claim was made by a funder it would be for the reasonable costs of repairing defects in the Defendant's Works (being exactly the same type of loss as claimed in the proceedings); that, secondly, under clause 12.1 of the Collateral Warranty, there is no restriction on the persons to whom the benefit and rights of the Warranty could be assigned and the Defendant knew that losses might be claimed by an assignee who was not a substitute funder and/or who had suffered other types of loss than a substitute funder might suffer; and that, thirdly, in any event because Clause 12.3 of the Collateral Warranty covers the Defendant's contention and prevents the Defendant from raising its remoteness defence.

The Issues on the application

35. There are two issues on the application:

(1) Is the Claimant's loss in any event not too remote?

(2) Even if the Claimant's loss were otherwise too remote, is the Defendant precluded from relying upon such a defence by Clause 12.3 of the Collateral Warranty?

36. The Claimant contends, first, that the Claimant's loss is not too remote; it was within the reasonable contemplation at the time of the Collateral Warranty that the funder would or might wish to claim for repair costs; secondly that the Defendant's remoteness argument would create a legal black hole, such that neither assignor nor assignee could recover in respect of the breach of covenant giving rise to the costs of repair; and thirdly that in any event, even if the Claimant's loss were otherwise too remote, such a defence is expressly excluded by Clause 12.3 of the Collateral Warranty.

37. The Defendant contends, first, the Claimant's loss is or may be too remote; the type of loss within the original parties reasonable contemplation was diminution in value of its security in the Property, and not cost of repairs; secondly, Clause 12.3 does not preclude a defence of remoteness; Clause 12.3 is intended to preclude a defence based on the rule that an assignee can recover no more than an assignor.

The Relevant Legal principles

The Relevant principles on strike out/summary judgment

38. Under CPR 3.4(2) the Court may strike out a statement of case "if it appears to the court (a) that the statement of case discloses no reasonable grounds for … defending the claim".

39. Under CPR 24.2 the Court may give summary judgment against a defendant on a particular issue if it is satisfied that the defendant has no real prospect of successfully defending the issue and there is no other compelling reason why the issue should be disposed of at a trial.

40. The Court's approach to an application for summary judgment (in that case by the defendant) is contained in the familiar passage of the judgment of Lewison J in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 at §15, as follows (omitting case citation):

> "The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success… ;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable… .
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial"… .
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents … .
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial … .
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case….;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or

> construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction … .. (emphasis added)

41. In *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 at §27, the Court of Appeal addressed the position of a combined application for both summary judgment and a strike out (in the case of an application by defendants to dispose of a claimant's claim) citing with approval, and summarising, the approach in *Easyair v Opal*.

The relevant law on remoteness

42. The rules of remoteness of damage for breach of contract derive from the well-known leading authorities: *Hadley v Baxendale* (1854) 9 Exch 341 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 *The Heron II* [1969] 1 AC 350 and *The Achilleas* [2009] 1 AC 61. *Chitty on Contracts* (34th edn) Vol.1 at §29-129 states that the combined effect of the first three cases:

> "… may be summarised as follows: A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach."

43. An issue which arises from the decided cases is whether the appropriate test as to degree of probability of the loss is "a not unlikely result", or "a serious possibility". The Privy Council recently considered the leading authorities in *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18, and in particular this issue. After discussing at §§27 to 29 varying language used in *The Heron II* and *The Achilleas* and the view of Lord Burrows in his *Restatement of the English Law of Contrac*t, Lord Hodge summarised the position as follows:

> "31. First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.
>
> 32. But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.
>
> 33. Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.
>
> 34. Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.
>
> 35. Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one."
>
> (emphasis added)

44. In summary, it is clear that "loss" means "type or kind of loss". Further, the better view is that what must be reasonably contemplated is whether the type of loss is "a serious possibility" (rather than "not unlikely to occur").

Measure of damages for lenders

45. In *Nykredit Plc v Edward Erdman Ltd (No2)* [1997] 1 WLR 1627 at 1631F, the House of Lords held that, in a case of tortious negligent valuation of property provided to a lender who acquires that property as a security, the measure of the lender's loss is the difference between the amount loaned and the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property.

Principles applicable to assignments

The general principle

46. The starting point is the principle that an assignee cannot recover more from the debtor than the assignor could have done *had there been no assignment:* see *Chitty on Contracts*, supra, Vol 1 §22-077 citing *Dawson v Great Northern & City Ry Co*. [1905] 1 KB 260. *Chitty* continues at §22-078 as follows:

> "The application of this principle has given rise to particular difficulty in relation to building contracts or tort claims for damage to buildings. Say, for example, a building is sold at full value along with an assignment to the purchaser of claims in contract or tort in relation to the building. The building turns out to need repairs as a result of a breach of the builder's contract with the assignor (whether that breach is prior, or subsequent, to the sale to the assignee) or of a tort (damaging the building prior to the sale). The assignee pays for the repairs. It might be argued that the assignor in that situation has suffered no loss so that, applying the governing principle that the assignee cannot recover more than the assignor, the assignee has no substantial claim. If correct, "the claim to damages would disappear … into some legal black hole, so that the wrongdoer escaped scot-free". Acceptance of the argument would also nullify the purpose of the governing principle which is to avoid prejudice to the debtor and not to allow the debtor to escape liability. Perhaps not surprisingly, therefore, that argument was rejected in *Offer-Hoar v Larkstore Ltd*. The Court of Appeal said that, in applying the principle that the assignee cannot recover more than the assignor, one should be asking what damages the assignor could itself have recovered had there been no assignment *and had there been no transfer of the land to the assignee*. Substantial damages were, therefore, recoverable where an assignor had sold its land to an assignee along with, or prior to, the assignment of the relevant cause of action relating to the land."

47. I refer to the words in italics above as "the Larkstore gloss". *Chitty* then continues at §22-079:

> "The problem has, in any event, normally been circumvented because of the courts' recognition that, where a third party is, or will become, owner of the defective or damaged property, there is an exception to the general rule that a contracting party can recover damages only for its own loss and not the loss of the third party. Where the exception applies, the contracting party (the assignor) is entitled to substantial damages for the loss suffered by the third party (the assignee): by the same token, there is no question of an award of substantial damages to the assignee infringing the principle that the assignee cannot recover more than the assignor."

The Larkstore case

48. In *Offer-Hoar v Larkstore* itself [2006] EWCA Civ 1079 [2006] 1 WLR 2926 ("the *Larkstore* case"), the relevant facts were that Starglade was the owner of a building site for residential development. It obtained from Technotrade a favourable soil inspection report. In providing that report, Technotrade was in breach of its contract with Starglade, although that was not discovered until later. Starglade then sold the site to Larkstore, a property development company. After that sale, there was a

landslip resulting in a claim made against Larkstore. Starglade then assigned its rights under its contract with Technotrade to Larkstore and Larkstore brought a Part 20 claim against Technotrade. Thus, Technotrade was the defendant "debtor"; Starglade was the assignor; and Larkstore was the assignee. The particular difficulty on the facts was that the loss was suffered after the sale of the site and, by the time of the assignment, Starglade had suffered no recoverable loss.

49. Mummery LJ first of all identified the issue at §§2 and 3:

> "2. The main issue turns on the legal effect of the assignment of a cause of action for breach of contract. Is the assignee of the cause of action entitled to recover from the contract-breaker damages for loss, which occurred after the transfer of the development site by the assignor to the assignee, but before the assignment of the cause of action, in a larger sum than the assignor would have recovered?
>
> 3. One possible answer to this question would produce "a legal black hole." The expression cropped up in argument. The whole topic of assignment, including possible "black holes", is of special interest to practitioners in construction law and their clients. A "black hole" scenario would occur when loss is suffered in consequence of a breach of contract, but the contract-breaker's position is that no-one is legally entitled to recover substantial damages from him."

At §36 he recorded Technotrade's argument as follows:

> " 36 Mr Friedman QC (who did not appear in the court below) submitted on behalf of Technotrade that the assignment makes a crucial difference. His broad submission was that the only losses that Larkstore is entitled to claim by virtue of the assignment of the cause of action are the losses that Starglade could itself have recovered from Technotrade at the time of the assignment. As the assignment of the cause of action took place after Starglade had parted with the Site to Larkstore and the substantial damage occurred before the assignment of the cause of action to Larkstore, Starglade and therefore Larkstore had no right to claim and recover substantial damages for loss resulting from the landslip."

50. After referring to the general statement of principle set out in the then equivalent paragraphs of *Chitty* (as set out above), Mummery LJ continued:

> "**Application of principles**
>
> 39. Applying this concise account of the legal principles to the particular circumstances of this case, it is, in my judgment, fallacious to contend that Larkstore cannot

recover substantial damages from Technotrade, even if it can prove that Technotrade was in breach of contract and otherwise liable for them.

40. The contention is based on the propositions that Starglade (the assignor) had only suffered nominal damages at the date of the assignment, because it no longer owned the Site, and that Larkstore (the assignee) could not acquire by assignment from Starglade any greater right than Starglade had against Technotrade.

41. As I see it, that is not the true legal position. What was assigned by Starglade to Larkstore was a cause of action for breach of contract against Technotrade and the legal remedies for it. It was not an assignment of "a loss", as Mr Friedman described it in his attempt to persuade the court that the amount of the loss recoverable by Larkstore was limited by what loss had been suffered by Starglade, in this case nil. The assignment included the remedy in damages for the cause of action. The remedy in damages for breach of contract is not, in principle, limited to the loss suffered as at the date of the accrual of the cause of action or as at any particular point of time thereafter.

42. The principle invoked by Technotrade that the assignee cannot recover more than the assignor does not assist it on the facts of this case. The purpose of the principle is to protect the contract-breaker/debtor from being prejudiced by the assignment in having, for example, to pay damages to the assignee which he would not have had to pay to the assignor, had the assignment never taken place. The principle is not intended to enable the contract-breaker/debtor to rely on the fact of the assignment in order to escape all legal liability for breach of contract [i.e. of that contract].

…

44. Indeed, if Mr Friedman's arguments were accepted, far from being prejudiced by the assignment, Technotrade would improve its position as a result of it. Technotrade would escape all potential contractual liability for the damage caused by the landslip. It would have ceased to be liable to Starglade, which no longer owned the Site. It would not be liable to Larkstore, which did own the site, but the liability to Larkstore would be subject to the Starglade limit proposed by Mr Friedman, which would cancel any claim against Technotrade for substantial damages. By a legal conjuring trick worthy of Houdini the assignment would free Technotrade from the fetters of contractual liability. The position would be that the

> contract-breaker would be liable to no-one for the substantial loss suffered in consequence of the breach. As a matter of legal principle and good sense, this cannot possibly be the law, and fortunately the authorities cited in argument and discussed below do not compel the court to reach such a result.
>
> 45. Mr Friedman submitted that there was no "legal black hole" or conjuring trick here. He contended that the parties did not contemplate that any one other than Starglade would or might suffer loss in consequence of a breach of contract by Technotrade in respect of the report. Technotrade's retainer was on the basis that it was Starglade who would be carrying out the development of the Site. Losses have been suffered by Larkstore because it chose not to seek any form of warranty from Technotrade, did not engage its own geo-technical advisers and relied on the Technotrade report without obtaining the consent of Technotrade for a purpose for which it had not been written.
>
> 46. In my judgment, these arguments amount to no more than an ingenious attempt to deny what has been correctly conceded, namely that the report and the causes of action in respect of it were assignable by Starglade. There was no express prohibition against assignment. No prohibition can be implied from any special circumstances. It was not argued, for example, that the contract between Starglade and Technotrade was of a personal nature and therefore unassignable." (emphasis added)

51. Mummery LJ then turned to consider the authorities: *Dawson* supra, *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157 and *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 BLR 57 (CA). Importantly, he explained the case of *Dawson* in the following terms:

> "48. *Dawson v. Great Northern and City Railway Company…* was cited for the proposition that the assignee was not entitled to recover any greater amount of compensation than the assignor could have recovered. The width of the general proposition has to be read in context. In that case compensation under the Lands Clauses Consolidation Act 1845 was not payable to the assignee for "damage to [her] trade stock" (as distinct from structural damage to premises requiring re-instatement works which did not increase the burden on the defendants), because that was compensation for an item that could not have been recovered by the assignor from the defendants. The assignor did not trade in the stock in question and could not have made a claim for compensation for that item."

(emphasis added)

Turning to *Linden Gardens Trust*, Mummery LJ stated as follows:

> "51. The judge was criticised by Mr Friedman for relying on the following passage in the judgment of Staughton LJ in 57 BLR 57 at p80−81:
>
> "That brings me to the last point to be considered in connection with assignment of choses in action. Where the assignment is of a cause of action for damages, the assignee must of course have a sufficient proprietary right, or a genuine commercial interest, if the assignment is not to be invalid. It is no longer in issue in these appeals that the assignees had such a right in each case; we heard no argument to the contrary from the contractors. But it is said that in such a case the assignee can recover no more as damages than the assignor could have recovered. That proposition seems to me well founded. It stems from the principle already discussed, that the debtor is not to be put in any worse position by reason of the assignment. And it is established by *Dawson v. Great Northern & City Railway Co* [1905] 1 KB 260; see also *GUS Property Management Ltd v. Littlewoods Mail Order Stores Ltd* [1982] SLT 533 by Lord Keith of Kinkel at page 538, cited later in this judgment [pp 89−90]. But in a case such as the present one must elucidate the proposition slightly: the assignee can recover no more damages than the assignor could have recovered if there had been no assignment, *and if the building had not been transferred to the assignee*."
>
> …
>
> 54. The judgment of Staughton LJ was rightly relied on by the judge. I am respectfully of the view that the ruling of Staughton LJ on this point is correct as a matter of legal principle and good sense, and ought to be followed by this court in this case. It completely disposes of the argument raised in the defence of Technotrade that Larkstore is not entitled to claim substantial damages from Technotrade, because its assignor, Starglade, had suffered no loss, having parted with the Site before the landslip occurred and before the assignment of its cause of action to Larkstore.
>
> 55. I must, however, make it clear that the only point raised in this case at this preliminary stage is whether Larkstore had, by virtue of the assignment, a right to sue Technotrade for substantial damages for breach of contract in respect of loss claimed to have been suffered

> by it in consequence of the landslip at the Site. There is no question before this court, nor was there below, as to the proper measure or quantum of damages, which Larkstore is entitled to recover against Technotrade. We have heard no argument on it and I express no views on that aspect of the case." (emphasis added)

In essence, Mummery LJ adopted and applied the gloss on the "no loss" principle set out by Staughton LJ in *Linden Gardens Trust*.

52. Rix LJ agreed, first citing the then equivalent of *Chitty* §§22-078 and 22-079 (as above). He then considered the *GUS* and *Linden Gardens Trust* cases. In relation to the former, he stated as follows:

> "68. Thus in *GUS Property Management Limited v. Littlewoods Mail Order Stores Limited* [1982] SLT 583 the pursuers, GUS, were the transferees from an associate company, Rest, of a building which had suffered damage during works to a neighbouring property. Rest therefore had a claim in tort against the defendants, Littlewoods. After the damage had been caused, Rest transferred their building to GUS, as a matter of group policy designed to concentrate the groups' property assets in a single subsidiary. The transfer was made at book value, without any discount being allowed for the damage suffered, and indeed without any reference to the true value of the building. A few years later, Rest also assigned to GUS their cause of action against Littlewoods. Thus the cause of action and the loss caused by the damage started life in the same hands, viz with Rest, and ended up with their assignees, GUS. However, because of the transfer value obtained by Rest, Littlewoods alleged that Rest had suffered no loss, and that their assignees, GUS, therefore had no claim either. The First Division upheld this defence, but the House of Lords reversed that decision. As Lord Keith of Kinkel said, the price for which Rest had transferred the damaged building to GUS was entirely irrelevant for the purpose of measuring the loss suffered by Rest and was quite incapable of founding an argument that Rest had suffered no loss at all. Lord Keith protested against this attempt to make Rest's loss "disappear … into some legal black hole, so that the wrongdoer escaped scot−free".
>
> 69. The next argument raised by Littlewoods was that GUS were suing, on their pleadings, for their own loss in repairing the damage, and that that was not a loss suffered by Rest. That argument was also rejected. The cost of repairs was merely one way of evidencing the loss.

> Another possible way was to take the day one diminution of the value of the building due to the damage caused. In either event, the loss had been suffered by Rest, and it was Rest's loss for which GUS were suing as assignees. The First Division had taken too narrow a view of GUS's pleadings, "which was not conducive to the aim of doing justice between the parties"… (emphasis added)

53. After considering *Linden Gardens Trust*, Rix LJ continued as follows:

> "77. For the reasons given by Lord Justice Mummery, it seems to me that these authorities are directly applicable to the present appeal. It is true that in one, admittedly important, respect the present case goes beyond the *GUS Property Management Ltd* case…and *Lenesta*… whereas in those cases the damage caused by the breaches of contract or negligence had already occurred by the time of the assignments, albeit it had not been experienced as a financial loss until quantified by remedial works instituted by the assignees, and the assignees' loss of rent in the present case, although the breach of contract had already occurred before the assignment, the loss arising from the breach had not been caused until the development work was actually undertaken, by which time the development had been sold to Larkstore and the loss had not been experienced, even in an unquantified form, by the assignor Starglade. However, for the reasons given by Lord Justice Mummery, I agree that this difference is not crucial. Damage arising from a breach of contract is often slow in materialising. The delay in this case may give rise hereafter to arguments about causation or **remoteness:** I say nothing about those problems. However, it was Starglade who had experienced the breach of contract and owned the cause of action, and, **subject to issues of causation and remoteness,** it would have been **Starglade** who, subject to such issues, would have been entitled to have recovered for the financial consequences of that breach if it had not sold the development to Larkstore.
>
> 78. Thus the facts that the damages had only been nominal at the time of the sale of the property, or that the substantial loss only occurred after the sale, or that Larkstore suffered that loss before it had acquired, under the assignment, the right of action to go along with the loss, do not in my judgment prevent recovery by Larkstore. Those complications no doubt mean that the arguments about causation and quantum may be affected by considerations which would not have arisen if Starglade had developed the Site itself: see *Dawson v. Great*

> *Northern & City Railway Company* [1905] 1 KB 260, 273-274 where the defendant was not liable for that part of the assignee's claim which was premised on "damage to trade stock" by reason of disturbance to her drapery business, which was a different business from that of the assignor, in whose hands the land in question was simply used for the purpose of letting out. However, to hold that Larkstore's claim as assignee of Starglade's cause of action for breach of contract against Technotrade simply failed in limine would be to consign it to that black hole about which Lord Keith was concerned in the *GUS Property Management Ltd* case and which has been repeatedly alluded to in successive cases which have raised analogous problems." emphasis added)

54. Rix LJ concluded by considering the underlying policy of the law in the following terms:

> "85. Underlying all these cases can be heard the drumbeat of a constant theme, which could possibly be described as ubi ius ibi remedium , the maxim that where there is a right there is a remedy; but it could also be said that the courts are anxious to see, if possible, that where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered the loss. In the case of property development, where it is readily contemplated that a party which prepares the development will transfer the fruits of his work to one or more partners or successors, there is a particular need for some such solution.
>
> 86. The courts have to work with the analytical tools which are to hand. But the essence of the matter is that the general principles which have been developed to ensure that claims are confined to victims (the rule that a party may only claim in respect of his own loss; the rule in favour of privity of contract) and that a wrongdoer should not be made to pay compensation which goes beyond his breach (the rule that an assignee may not recover more than his assignor could have recovered), rules which as far as they go, are necessary and fundamental to good order and fairness in the litigation of claims, are not, if at all possible, to be allowed to become instruments of maladjustment and injustice. Thus the exception developed long ago in the carriage of goods context to allow a contracting party to recover damages against a carrier on behalf of another party to whom the goods in question are subsequently transferred has been brought into use in a modern situation where there is an equal

need to find a solution which matches the commercial situation, and where no other solution had been found to be at hand. Of course, where a solution has been provided by statute, as where a contract of carriage of goods by sea is novated statutorily, as in the case of bills of lading, or where there are other solutions readily to hand (as in *The Albazero* or in the *Panatown Ltd* case), there may be no need, and thus it will be thought to be undesirable, to find an exception to general principle.

87. In the present case, however, although the problem may arise, on these particular facts, in somewhat unusual circumstances, seeing that the consequences of the breach of contract were delayed until the Site was actually developed, I do not think that any true exceptions are being created. The first victim of the breach of contract was Starglade, in whose hands the cause of action for that breach originally arose. That cause of action was intended to be assigned to Larkstore at the time of the transfer of the substance of the development, but through an error was not then assigned. The substantive loss alleged to arise from the breach then occurred. At that point the cause of action and that loss are in separate hands: but following the assignment come together again. The apparent difficulty which is said at this preliminary stage to arise is that the assignee is seeking to recover more than the assignor could have recovered: but that, **subject to arguments of causation or remoteness** which are reserved, is not, at this stage of the argument, because of any novel intrusion brought into the matter by the assignee, but simply because all the possible losses brought in train by the original breach had been suspended until the Site was actually developed. Only the breach itself had so far occurred. However, in principle the assignee is seeking to recover no more than the loss which the assignor would have suffered and been entitled to recover if he had not transferred the development. The rule in *Dawson* is not designed to allow a defendant to escape liability for his breach, but to ensure that he does not have to meet a bigger liability than he would have been under to the assignor. In other words, the assignee cannot bring to his claim losses which do not follow from the original breach, but which he has separately introduced. Similarly, the rule that a party may only recover in respect of his own loss does not seem to me to create any difficulty in a case where cause of action and loss are, at this point, united in the same party. The cause of action for Technotrade's breach always brought with it potential or inchoate liability for all the losses which

> would ultimately, subject to matters of causation and remoteness, flow from it. (emphasis added)

55. The following points emerge from the judgments of Mummery LJ and Rix LJ in the *Larkstore* case:

    (1) The general principle is derived from *Dawson*; and on the facts in *Dawson*, the assignee could not recover because its loss was of a different kind (or a different "head of damage") from that which was or might have been sustained by the assignor : see Mummery LJ at §48 and Rix LJ at §78.

    (2) The *Larkstore gloss* principle originates in the judgment of Staughton LJ in *Linden Gardens Trust*: see Mummery LJ at §§51, 54 (and Rix LJ at §77).

    (3) As regards the *GUS* case, the House of Lords held that the assignor's loss in that case could equally be evidenced by way of cost of repairs (incurred only by the assignee) or initial diminution in value of the building damaged. Both measures were regarded as loss suffered by the assignor and were part of the same loss i.e. the former was not too remote : see Rix LJ at §69.

    (4) On the other hand, it is clear, particularly from the judgment of Rix LJ, that issues of causation and remoteness which might arise in the *Larkstore* case itself were not resolved by the judgment and that the decision that in principle Larkstore, the assignee, could sue for the loss it suffered, was subject to matters of causation and remoteness, as those applied to the assignor: see Rix LJ at §77 and 87 (and Mummery LJ at §55).

    (5) The overriding policy of the law is to provide a real remedy to the person who has suffered real loss arising from the breach of contract. The rule in *Dawson* is to protect the debtor from a bigger liability than he would have been under to the assignor, and not allow him to escape from all liability for his breach of the contract: see Mummery LJ at §§42, 44-46 and Rix LJ at §§85-87.

Approach to contractual construction

56. The relevant principles of contractual construction are well established by the leading Supreme Court cases of *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50*; Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173. These principles have been recently summarised by Carr LJ in *ABC Electrification Limited v Network Rail Infrastructure Limited* [2020] 1645 at §§17 to 19. In those paragraphs (which I do not set out in full), she emphasises that central reliance is to be placed upon the natural meaning of the relevant words and that commercial common sense, whilst very important, should not replace the central importance of the contractual words: "A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed".

The Parties' Submissions

The Claimant's case

57. Mr Patten QC accepts that the Claimant must establish that the Defendant's defence is bound to fail. It must establish that the loss cannot possibly be too remote, as a matter of fact and/or law, or, alternatively, that, even if it is or may be too remote, then that defence is excluded by operation of Clause 12.3 of the Collateral Warranty. He submits as follows.

58. First, if the Defendant's remoteness argument is correct, there would be a "black hole". A black hole is created where A is in breach of duty to B (the assignee) under a contract assigned by C (the assignor), but B is unable to recover its loss because of a legal rule that B (the assignee) can only recover the loss or type of loss sustained by C (the assignor) and C (the assignor) is unable to recover that loss from A for the benefit of B (the assignee).

59. It is not open to the Defendant to complain about the Collateral Warranty having been assigned to the Claimant. It was the intention of the original parties that the Collateral Warranty would be capable of being assigned to anyone, and of being enforced by that person. The individual leaseholders' rights under the Premier Guarantee are irrelevant.

60. In any event, the loss here is not too remote. The costs of remedial works must have been a serious possibility if thought had been given at the time to the consequences of breach of the Warranty. The loss is not in any way unusual or unexpected in terms of the Building Contract.

61. As to the suggestion that the kind of loss claimable by AIB, the funder, would be diminution in value, there was no implied understanding that the Collateral Warranty would be assigned to a particular person or class of persons. Moreover a claim by AIB, the funder for the cost of remedial works would not have been too remote. *At the time* that the Collateral Warranty was *entered into*, it was a natural and foreseeable consequence of a breach of its terms that *the funder* would have to expend moneys to repair the building because he would take possession and carry out the works. A funder might well take possession of the property on the borrower's default and if there are defects in the property, might well want to repair it. Even if the Court considers the Defendant's contemplation of the not unlikely consequences of a breach of the Collateral Warranty where it has in fact been assigned to the Claimant, it must have been within the Defendant's reasonable contemplation that the Claimant would have to carry out remedial works.

62. Finally there is no benefit in further factual inquiries into the detail of the particular losses. The Defendant contends that, in principle, all of the loss is too remote. That defence either succeeds on the facts known, or it does not.

63. As to Clause 12.3, in any event the Defendant's defence is caught by the express words of Clause 12.3. The Defendant's argument is that the Claimant's loss is different to the kind of loss which would have been suffered by AIB. That is the kind of argument that Clause 12.3 is intended to prevent. It is caught by the clear words of that clause. The final words cannot be read as qualified by an exception to the effect "save in case where it is contended that that loss is too remote". Moreover, neither clause 14.2 of the Collateral Warranty, nor Article 10 of the Building Contract are inconsistent with this construction of Clause 12.3.

The Defendant's case

64. Mr Webb submits that, first, it is necessary to distinguish between two separate points of law: the rules on remoteness and issues of "no loss" in the context of an assignment. As to the latter, whilst the normal rule that the assignee cannot recover more than the assignor was attenuated in *Offer-Hoar v Larkstore* in the case where the assignor is a building owner, that principle cannot apply to the position of a funder who never owns the building. So, in principle, the debtor could defeat the assignee's claim where the assignor was a funder and could not recover, had there been no assignment.

65. The assignability of a contract does not affect the application of the rules of remoteness which are fixed at the time of contracting by reference the original parties. If the possibility of assignment was sufficient to open up the rules of remoteness, then that would apply to all contracts unless they contain an express prohibition against assignment. It would always be foreseeable that the contract could be assigned to anybody and thus render the rules on remoteness a nullity.

66. Secondly, the effect of Clause 12.3 is to avoid that "no loss" argument, by making it clear that the assignee can recover for its own loss. But it does not displace any other rules which might limit damages recovery, such as the rules of remoteness.

67. The clause has no effect until assignment. The original funder is bound by the ordinary rules of remoteness. If the Claimant is correct, a replacement funder (assignee) who buys the debt would have a more relaxed damages rule than the original funder. Much clearer words would be needed if the effect of Clause 12.3 was to avoid not only the "no loss" defence, but other important rules of damages assessment, such the rules on remoteness. The clause does not refer to remoteness nor does it use concepts that fall within a remoteness defence such as "type of loss" or "likelihood/possibility of being suffered". The words "such loss is different" are not the same as "kind of loss is different". The distinction is between "difference in value" and "different in type or kind". A loss may be different in value (but of the same type) because of the purchaser's layout of the land or a different method of housing.

68. This conclusion is supported by clause 14.2 of the Collateral Warranty. The rules of remoteness must still apply to the Warranty and in the same way as if the funder had been an original party to the Building Contract. It is also supported by Article 10 of the Building Contract which provides for different collateral warranties to be issued in favour of differing parties, which must have been intended to cover different losses. Finally, the Claimant's construction leads to commercial absurdity. If the remoteness rules are jettisoned by Clause 12.3, it means that the value of risk inherent in the Warranty changes beyond all recognition. It becomes a free claim to be passed on to anybody.

69. Thirdly, as to remoteness on the facts of this case, first the detailed facts are not known and so the issue is not suitable for summary determination. There would have to be an investigation of AIB's interest in the Property at the time of the conclusion of the Warranty. That will involve how much did the funder lend, how much the completed Property was likely to be worth, how much equity there is, what are the costs of remedial work, how do they compare to the equity, and how secure were the

primary repayment covenants. In this regard the Defendant relies upon the witness statement of its solicitor, Mr Hodges, suggesting that the Court will need evidence as to the nature of AIB's interest and an understanding of the circumstances in which it would actually suffer loss.

70. In any event, it is doubtful that the loss claimed would not be too remote. A loss assessed by reference to the cost of curing defects is not a loss which would naturally or foreseeably have been suffered by the funder as a result of handing over a defective building. Nor is it a loss in respect of which the Defendant assumed responsibility under this contract with the funder. If, at the time of contracting, the funder had, or was expected to acquire, a security interest in the property, the funder's loss would be assessed by reference to diminution in value of its security: see *Nykredit* supra, at 1631F. If at the time of contracting the funder was not expected to acquire a security interest, then a breach consisting of post-completion defects would not have caused the funder any loss at all. In that event, the sole purpose of the Warranty would have been in the event that Step-In rights were exercised. On any view, the funder's loss is different in nature to that of the owner of the property. The funder's interest in the building is solely in terms of its value as a security. Step-In rights are not the solution. They are concerned with what happens during construction, and not with the handing over of a defective building.

Discussion and Analysis

Generally

71. I start by making some observations on the two "points of law" identified by the Defendant in argument: the rules on remoteness and the so-called "no loss" principle.

72. As to the rules on remoteness, these are of general application to any claim for damages for breach of contract. I have set out the general principles in paragraphs 42 to 44 above. In the context of the present case, in particular:

(1) Remoteness is to be assessed by reference to the reasonable contemplation of the parties (or at least the Defendant) as at the time of the conclusion of the Collateral Warranty.

(2) The question is whether loss of the kind now claimed was contemplated at that time as "a serious possibility".

(3) That includes certainly whether it was a serious possibility that the original party/assignor (here the funder) would suffer loss of that kind.

(4) There is a debate as to whether the Defendant would reasonably contemplate such loss being suffered by an assignee (no matter who). I deal with this below.

73. As to the so-called "no loss" principle and the *Larkstore* case:

(1) The general rule is that the assignee cannot recover more than the assignor could have recovered, if there had been no assignment: *Chitty* and *Dawson.*

(2) In *Larkstore*, the Court of Appeal added a "gloss" to that principle, applicable to the case of a building owner who assigns rights under a building contract: the assignee can recover if the assignor could have recovered if there had been no assignment *and no transfer of the property itself*, to the assignee.

(3) The application of the *Larkstore gloss* does not exclude the application of the rules of remoteness.

(4) The *Larkstore gloss* does not in terms apply to the AIB in the present case, as AIB did not ever own the Property nor transfer the Property to the Claimant.

Issue (1): Loss not remote in any event?

The type of loss suffered by the assignee

74. The first issue is, when considering what kind of loss was in the reasonable contemplation of the Defendant as a serious possibility as at the time of the conclusion of the Collateral Warranty, whether loss which might potentially be suffered by *an assignee* (as well as that which might be suffered by the original party/assignor) was within the Defendant's reasonable contemplation. I accept the Defendant's argument that, in the case of any contract in general, the mere fact that the benefit of the contract might, as a matter of general law, be assigned to a third party is not sufficient to bring within the defendant's contemplation the kind of loss which might be sustained by any such assignee. If it were otherwise, it would always be foreseeable that the contract could be assigned to any person and, in that way, potentially render the rules on remoteness superfluous. However that is not the position in the present case. The possibility of assignment is expressly provided for under the terms of the contact itself. Clause 12.1 makes express provision for assignment by AIB of the benefit of the Collateral Warranty. As the Claimant pleads in its Reply, there is no restriction on the persons to whom the benefit and rights of the Warranty could be assigned and the Defendant knew that losses might be claimed for by an assignee who was not a substitute funder and/or who had suffered types of loss other those which a substitute funder might suffer.

75. It follows that in my judgment, on the facts of the present case, it was within the reasonable contemplation of the Defendant at the time of entering into the Collateral Warranty that loss might be suffered by *an assignee*.

76. The next question then is whether, on the facts of this case, loss, in the form of the cost of repair, suffered by an assignee (who could be anyone) was within the Defendant's reasonable contemplation as being a serious possibility. In my judgment, it was reasonably foreseeable that, on default, the funder might take possession of the Property and that it would sell the site to another landlord with the benefit of the Collateral Warranty so that that person could carry out the remedial works. It was equally foreseeable that (as in fact happened) upon repayment by the borrower, the funder would release its security and assign the benefit of the Collateral Warranty to the borrower, who might in turn carry out remedial works or might pass on the benefit to another person with an interest in the property and required to carry out the remedial works (here, the Claimant management company).

77. On this basis I conclude that, at the time of the conclusion of the Collateral Warranty, it was within the reasonable contemplation of the Defendant as a serious possibility that an assignee of its benefit would incur the cost of repairs to the Property arising from the Defendant's breach of its terms.

The type of loss suffered by the Funder alone

78. Even if, in considering the issue of remoteness, it is only the position of the assignor (here AIB, the funder) which falls to be addressed, I accept the Claimant's submission that a claim for cost of repairs by the funder was within the reasonable contemplation as being a "serious possibility" arising from breach of the terms of the Warranty. A claim for diminution in value might well be the more likely type of loss that would be suffered by the funder arising from such a breach. (I note *Nykredit*, but, being a claim in negligence for a surveyor valuation, it does not assist greatly). However a claim for cost of repairs would be "a serious possibility" (or "not unlikely"). It was within the reasonable contemplation of the Defendant that the borrower, Coltham, would default and that the funder would take possession and carry out the repairs itself. The Collateral Warranty itself expressly provides for contractual obligations of due performance and quality which might otherwise also be enforced by the borrower. The funder wants those warranties so that, if need be, it can enforce the obligations primarily given to the borrower.

79. I accept the submission that at the time that the Collateral Warranty was entered into, it was the natural and foreseeable consequence of a breach of its terms that the funder would have to expend moneys to repair the building as a result of taking possession of the Property and carry out the works. The incurring of such repair costs by the funder was a "serious possibility".

80. I have given consideration to whether this issue should be left over until trial and, in particular, to the approach set out in §15 (vi) and (vii) of *Easyair v Opal*. However despite posing a number of questions (as set out in paragraph 69 above), the Defendant has not "shown by evidence" that material not currently before the court is likely to exist and can be expected to be available at trial which would put the current evidence in another light. On that basis, it is appropriate to "grasp the nettle" on this issue.

Conclusion

81. In my judgment, loss in the form of the costs of repairs incurred by the Claimant was within the reasonable contemplation of the Defendant as being a serious possibility at the time that the Collateral Warranty was concluded. In any event such loss incurred by the funder, AIB, was within the reasonable contemplation of the Defendant at that time as being "a serious possibility". Accordingly the loss now claimed by the Claimant is not too remote. For these reasons, the Defendant's remoteness defence in paragraph 58.2 of the Defence fails.

Issue (2): Clause 12.3

82. Assuming that loss in the form of the cost of repairs were otherwise too remote, the question then is whether in any event the Defendant is precluded from relying upon such a contention by reason of the terms of Clause 12.3 of the Collateral Warranty.

83. This is not a straightforward issue. The competing arguments of the parties each have merit. On the one hand, at first blush, and as a matter of construction of the words used, there is no reason to limit the concluding words "such loss is different" to "different in amount", and to exclude "different in type or kind". The words used are "different" in general and can cover both.

84. On the other hand, it does appear that the purpose of Clause 12.3 is to negate any possible "no loss" type defence arising from general rule on assignment (paragraph 55(1) above) and, perhaps, also taking into account the fact that *the Larkstore gloss* only applies where the building owner owns and transfers the property.

85. As to Clause 12.3 itself, it addresses the position where an assignee of the Collateral Warranty is making a claim against the Defendant e.g. in the present case, the Claimant. Secondly Clause 12.3 is dealing only with loss or damage resulting from breach of the Deed i.e it assumes that the breach of the Warranty has caused the loss claimed.

86. Clause 12.3 (set out at paragraph 13 above) provides that the Defendant is precluded from relying on any one of three distinct reasons for contending that the assignee cannot recover, namely:

(1) because the claimant/assignee is an assignee only and not the original party/the funder (i.e. the wording from "*by reason of the fact that …"*) (part (1));

(2) because the funder/assignor did not suffer that loss, and only the assignee has suffered the loss (i.e. the wording from the first *"or because..*") (part (2));

(3) because the loss suffered by the assignee is "different" to the loss which would have been suffered by the funder/assignor (i.e. the wording from the second "*or because …"*) (part (3)).

87. I approach this issue as a matter of construction of the relevant words of Clause 12.3. In my judgment, on the natural meaning of those words, part (3) includes loss which is "different in kind". Part (1) posits a situation where the loss resulting from breach has been suffered by the assignor/original party but not by the assignee e.g. where perhaps the assignment takes place after the loss has been suffered by the assignor or the assignment of the right of action under the Collateral Warranty. Part (2) covers the situation where the loss in question is suffered only by the assignee and not by the funder/assignor.

88. Part (3) addresses the comparative position as between the assignee's loss and the (hypothetical) loss which the assignor *would have* suffered, had there been no assignment. The question is whether the loss claimed by the assignee is "different" to that which would have been suffered by the assignor, absent the assignment.

89. The Defendant contends that in this context "different" means "different in amount" but not "different in kind or type", because Clause 12.3 is addressing the "no loss" principle and not the rules on remoteness. I accept that a difference in amount of loss i.e. where the loss suffered by the assignee claimant is greater than the amount of loss which would have been suffered by the assignor, in the absence of the assignment, would fall within part (3) (and possibly also within part (2)). However there is no

limit on the word "different". Loss may be "different" for a number of reasons. The loss suffered by assignee may be "different" to the assignor's "hypothetical" loss in "amount" or it may be "different" in "kind or type". As a matter of construction, there is no reason why part (3) should be limited to "difference in amount".

90. I turn to the Defendant's contention that the effect and purpose of Clause 12.3 is to prevent the Defendant from relying on the "no loss" principle, in factual circumstances where (and because) *the Larkstore gloss* cannot apply. The Defendant contends that, as made clear in *Larkstore* itself, the principle there set out does not exclude the application of the rules of remoteness and so, Clause 12.3 itself, is not intended to exclude the application of those rules of remoteness.

91. More accurately stated, the "no loss" principle is the general principle (expressed in *Dawson*) that an assignee cannot recover *more* from the debtor than the assignor could have recovered, had there been no assignment. The underlying rationale for the principle is that the debtor is not to be put in any worse position by reason of the assignment. One reason (amongst others) why an assignor could not have recovered the loss now claimed by the assignee would be that that loss would have been too remote in the assignor's hands; another reason is that it is a type of loss which the assignor could never actually have suffered: (as in the case of *Dawson* itself, where the assignee's business in respect of which the claim was made was different from that of the assignor).

92. The Defendant relies heavily upon the fact that the rules of remoteness survived (or are extraneous to) the decision in *Larkstore*. What the Court of Appeal said about remoteness in that case was said in the special context of that case i.e. the "no loss" principle is attenuated where the assignor was the building owner, allowing recovery in principle, but as long as it can be established additionally that that loss (in hands of assignor) was not too remote. However, on the Defendant's own case, here, on this hypothesis, the *Larkstore gloss* does not apply at all; rather the general "no loss" principle applies with full force. For the reasons set out above, that principle includes, but is not limited, the application of the rules of remoteness. So, if Clause 12.3 is intended to disapply that principle, that abrogation will cover also the rules of remoteness.

93. Such an analysis is entirely consistent with the wording of Clause 12.3 and in particular the wording of part (3). There is no reason to suppose that some reasons for "hypothetical" non-recovery, or different recovery, by the assignor are covered by Clause 12.3, but others are not covered.

94. I have given consideration to an analysis along the following lines: Clause 12.3 is concerned only with *comparing* the position of the assignee with that of the assignor, had there been no assignment; but the rules of remoteness are not concerned with a comparative position, but only whether the type of loss, had it been suffered by the assignor, was within the defendant's reasonable contemplation. Assuming no assignment, is there a distinction between (a) what type of loss the assignor could or would *have actually suffered* and (b) what type of loss the Defendant would *reasonably have contemplated could be suffered* by the assignor?

95. In *Dawson*, the leading case on the general "no loss" rule, the reason that the assignor could not have recovered the loss claimed by the assignee (compensation for damage

to trade stock) was simply because the assignor did not trade in that stock. That particular additional "head of damage" (or "kind of loss") could never have been recovered by the assignor and so could not be recovered by the assignee. (I note that *Dawson* was not a claim for damages for breach of contract, but rather a claim for statutory compensation, and it does not appear that questions of remoteness were directly in issue.)

96. In my judgment, the true analysis of Clause 12.3 is as follows:

(1) *Dawson* establishes the rule that an assignee cannot recover loss of a kind which the assignor could not have suffered (had there been no assignment).

(2) But, in this case, Clause 12.3 expressly reverses that rule and says that the assignee can recover loss of a kind which the assignor could or would not have suffered. Indeed the Defendant positively asserts that this is the effect and purpose of Clause 12.3.

(3) Can it then be said that, although the assignor could or would not have suffered that kind of loss and, by reason of Clause 12.3, that is not a bar to the assignee's claim, nevertheless the assignee still cannot recover that loss because at the time of the Warranty that kind of loss suffered by the assignor was *not in the reasonable contemplation* of the Defendant?

(4) In my judgment, the answer to this question is No. If remoteness (i.e. reasonable contemplation of kind of loss) survived Clause 12.3, it would wholly undermine part (3) of the clause. It would apply in every case where the assignee's loss was "different in kind". That is because, if the kind of loss suffered by the assignee would never have been suffered by the assignor (being the underlying factual basis for the application of part (3)), then surely it would or could not have been within the reasonable contemplation of the defendant that it might be suffered.

97. Some further support for the conclusion that there is no relevant distinction between actual and contemplated loss (absent the assignment) is provided by the following. Even if one were to seek to apply, additionally, principles of remoteness in the situation where the assignee's loss is different in kind, then, when considering what the Defendant *reasonably contemplated* at the time that the Collateral Warranty was entered into, that would include not only the fact, under clause 12.1, that the Warranty could be assigned up to twice and to anyone, but also that the very existence of Clause 12.3 meant that any assignee could recover for loss which was "different". In my judgment, whilst there may be a degree of circularity in this point, it indicates the fallacy in seeking to distinguish between actual kind of loss and contemplated kind of loss.

98. As to the Defendant's reliance upon clause 14.2 of the Collateral Warranty, in my judgment, it assumes the very proposition that it is said to support i.e. it assumes that "remoteness" is excluded from Clause 12.3. Although the assignor/funder's liability might be limited by reason of rules of remoteness, that still leaves the question of whether, by reason of Clause 12.3. the assignee can recover loss which is too remote in the hands of the assignor/funder.

99. As to Article 10 of the Building Contract, this provided for distinct warranties to be given to different parties. However it did not provide for a separate and different warranty to be given specifically to the Claimant (in addition to the Collateral Warranty).

Conclusion on Issue (2)

100. For these reasons, I conclude that, even if the loss claimed by the Claimant were otherwise (even arguably) too remote, the Defendant is precluded from so contending by reason of Clause 12.3 of the Collateral Warranty. It follows that the Defendant's remoteness defence in paragraph 58.2 of the Defence fails for this reason too.

Conclusions

101. In the light of my conclusions at paragraphs 81 and 100 above, the Claimant's application succeeds and the Defendant's remoteness defence in paragraph 58.2 of the Defence fails and the Claimant is entitled to summary judgment and/or an order striking out relevant parts of the Defence to that effect. I will hear the parties on the appropriate form of order and any consequential matters.

102. I am grateful to both counsel for their assistance and for the high quality of the argument placed before the Court.