



Neutral Citation Number: [2022] EWHC 1892 (TCC)

Case No: HT-2020-000436

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 21/07/2022

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

Between:

**BARKBY REAL ESTATE DEVELOPMENTS
LIMITED
(FORMERLY KNOWN AS TARN COURT AMBIT
DEVELOPMENTS LIMITED)
(COMPANY NUMBER: 12195490)**

Claimant

- and -

**CORNERSTONE TELECOMMUNICATIONS
INFRASTRUCTURE LIMITED
(COMPANY NUMBER 08087551)**

Defendant

Jonathan Ward (instructed by **Naphens LLP**) for the **Claimant**
Peter Petts (instructed by **Osborne Clarke LLP**) for the **Defendant**

Hearing dates: 12, 13, 14 July 2022

APPROVED JUDGMENT

Mr Roger ter Haar QC :

A. Introduction

1. In this action the Claimant originally claimed £111,445.24. By the time the case came before me the claim had been reduced to £68,574.27.
2. By the standards of the TCC, this is a very small claim. Notwithstanding its modest size, the claim has been prepared efficiently by both firms of solicitors and the trial has been conducted efficiently and proportionately by two experienced and able counsel.

B. The Parties

3. The Claimant (“BREDL”) is a wholly owned subsidiary of Barkby Group PLC. I heard evidence from two directors of BREDL. The first to be called was Mr. Gary Langridge-Brown. Mr. Langridge-Brown is a director of BREDL, but not an employee of that Company: he acts as a consultant providing his services through another company, Ambit Developments Limited (“Ambit”). The history of the development of the project set out below is generally based upon his written and oral evidence, which I accept.
4. The second director from whom I heard was Mr. Charles Dickson, who is now the Executive Chairman of Barkby Group PLC.
5. The business of BREDL was and is the development of trade parks in the United Kingdom.
6. As described in the Defence, the business of the Defendant (“Cornerstone”) is that of a national infrastructure provider involved in the installation of electronic

communications on land to enable companies such as Vodafone (“Vodafone”) and Telefonica UK Limited (known as O2 in the market: hereinafter “Telefonica”) to provide mobile phone services to the general public. Cornerstone is more than just a contractor and acts as both an agent for Vodafone and Telefonica in the management of sites from which they operate their respective electronic communications networks, as well as owning and deploying communications infrastructure in its own name.

7. I heard evidence from Mr. Stephen France, the build manager for Cornerstone.
8. BREDL specialises in developing contract backed sites in the South East of England: I understand the expression “contract backed” to mean that before development of a site begins BREDL has identified and reached an agreement with an anchor tenant or anchor tenants for that site and with a “forward purchaser” for the site.
9. BREDL’s approach is that once a site has been identified as having potential to be developed as a commercial scheme, Ambit is retained. Ambit then brings in different professionals to support the project which involves acquiring the site, obtaining planning permission, developing the site, marketing it to prospective tenants, getting tenants interested and selling the scheme on a forward funding basis.

C. The Project

10. The project out of which this dispute arises is a development at Bexhill Road, Hastings. Before this development, the site had been in two different

ownerships and uses. One part had been a food store; the other had been a car dealership known as Yeomans.

11. At Ambit's suggestion and with Ambit's assistance, BREDL put the project site together, reached agreements with tenants for the site, including the well known supermarket chain, Aldi, and forward sold the project to Hastings Borough Council.

D. BREDL's team

12. For the development, BREDL engaged the services of the following professionals:
 - (1) For the design stage, Roberts and Cartwright Design Limited ("RCD") as utilities engineer;
 - (2) Mitchell Design and Construction Limited ("MDCL") as the main contractor for the development work itself;
 - (3) Rex Procter and Partners ("RPP") as the Employer's Agent/QS;
 - (4) The Harris Partnership ("THP") as the architect;
 - (5) JPG Limited as the engineer;
 - (6) Ambit as the Development Manager to oversee the whole project from acquisition to planning to advance letting to construction to handover (to Hastings Borough Council).

E. Initial exchanges

13. By the beginning of 2018 the Bexhill Road site had been acquired for development and BREDL entered into discussions with RCD. The site had a mobile telephone mast. BREDL formed the view that it was probable that it would be necessary to relocate the mast and its adjoining cabinets. In this BREDL was right as the highway authority required its removal so as to create safe sight lines for traffic emerging from the site.
14. RCD, on BREDL's behalf undertook a site/area investigation to confirm services that were likely to impact the development. RCD noted an O2 label on the boxes: they contacted O2 who in turn put them in touch with Cornerstone, who was approached by RCD on 17 January 2018.
15. On 8 February 2018 Mr Sorge of Cornerstone sent an email to Mr Sherwood of RCD¹:

“Further to your query through our website on the site move costs, the site you have identified looks to be a ‘streetworks’ installation in the public highway:

[there are two photographs inserted]

“Depending on availability of alternative location, planning, decommissioning and build costs you'd probably be looking at a rough cost of C£60k and timescale of c9 months.

“The matter would be dealt with by our ‘Lift and shift’ team.”

16. On 18 April 2018, Mr Sherwood sent an email to Mr Sorge²:

“ I hope you are keeping well.

The project is now moving forward and we have been asked to find out what the process is for getting this mast relocated.

¹ C 15

² C 14

The client [has] proposed a new location which is really just moving the mast back a few feet from the road to make way for the bus lane. This is now with planning for their approval. We are aware that your company will obviously need to confirm this location is suitable too.

We now need to know the following and [wondered] if you could help.

5. How do we start getting the mast relocation going?
6. What forms do we need to complete with you?
7. How do we go about getting a formal quote from you?
8. What are the timescales you work to?

I would be grateful if you could provide the information and please feel free to call me if it is easier to discuss over the phone.”

17. After a little delay, on 17 May 2018, Mr Michael Swash, a surveyor at Cluttons, (acting for Cornerstone), responded, again by email³:

“Your enquiry has been passed on to me. In answer to your questions:

1. How do we start getting the mast relocation going?

-The notice provided is sufficient. If you have drawings of the proposed scheme this will help our suppliers to find a relocation option.

2. What forms do we need to complete with you?

-If you wish to proceed our client CTIL will need to set the developer up as a supplier and need request some basic payment info. I will forward the forms once it is confirmed that they wish that they wish to proceed with relocating the telecoms Site.

3. How do we go about getting a formal quote from you?

- The process is in 2 stages.

1 – the initial Acquisition & Design (A&D) – this involves surveying the site/area, finding an

³ C 13

alternative location, obtaining planning if required, and design of the site at the relocation option.

2 – The Construction phase – build of the tower & cabinets, supply of power and BT/Virgin transmission to the telephone network.

We will raise an initial quote for the 1st stage. At which point if your client wishes to proceed they will need to complete the forms (@2.) and once payment has been received, CTIL will instruct their A&D partner to progress.

Once this stage is complete, we can then request the quote for the 2nd phase. Your client will then have the option to progress or not prior to this stage starting. If they wish to proceed, payment will need to be made to CTIL. Again once payment received CTIL will instruct their partner to proceed with the construction of the new site and then the decommissioning of the old site once the new one is Live.

A total ballpark if a new site is required £120,000.

4. What are the time scales you work to?

- 12-18 months.”

18. On 11 June 2018 Mr Sherwood sent an email to Mr Swash instructing Cornerstone to proceed⁴.

F. Cornerstone’s team

19. In order to understand the email traffic which has been placed before me and to understand who was doing what at different stages, the roles of the different members of Cornerstone’s team need to be understood. Of that team, Galliford Try are perhaps most important as it had the most significant co-ordination role. Mr. France sets out the parties involved⁵:

“14. As I have set out above, my role at Cornerstone is to oversee the build and decommissioning project, as Cornerstone has overall responsibility for the mast infrastructure. Cornerstone

⁴ C 12

⁵ A 85

check that the new site designs are viable, oversee the project, raise purchase orders and ensure health and safety procedures are followed. However, Cornerstone does not carry out much of the build and decommissioning work itself and is instead assisted in its projects by a number of suppliers who carry out [discrete] roles. I have set out below a brief explanation of the different parties' roles in this project to give some context to the documents and emails that have been disclosed by the parties.

“ 14.1 Cluttons LLP – Cornerstone’s agent who manage the site on a day-to-day basis.

“ 14.2 Galliford Try – Cornerstone’s acquisition, design and build partners. They are responsible for all the necessary works to get the new site built including preparing the site designs.

“ 14.3 Dael – Cornerstone’s decommissioning suppliers. They are responsible for ensuring the Old Site is decommissioned once the New Site is connected to the network.

“ 14.4 Sinclair Dalby Limited – Galliford Try’s sub-contractors. They are responsible for the acquisition stage.

“ 14.5 Telefonica – Cornerstone’s ultimate customer. They provide the active equipment on the site and arrange the transmission link between the new site and their network.

“ 14.6 Openreach Limited – Telefonica’s sub-contractors who supply the fibre link from the site into Telefonica’s network.”

20. To this list I would add Veny, contractors who undertook the civil engineering works for the relocation of the telecommunications equipment.

G. The Design and Acquisition Phase

21. In September 2018 Cornerstone sent BDREL a quotation and an invoice for £8,389.46 plus VAT (£10,067.35) for the phase 1 “A&D” works⁶. BDREL paid this on 21 September⁷.

⁶ B 120 and B121

⁷ B 122

22. Mr. France describes the significance of the Design and Acquisition Phase⁸:

“10.1 No work would be carried out by Cornerstone under this phase until the acquisition and design costs were agreed and paid by the site provider.

“10.2 Once payment is made, the operator whose equipment is located on the mast (in this case Telefonica UK Limited) (“Telefonica”) would inform their radio planning team so that they can carry out site searches and select a new site location.

“10.3 Cornerstone would then send an acquisition surveyor to the site of the existing mast to look for suitable potential new sites within a search area identified by the radio planner.

“10.4 Once the acquisition surveyors have identified potential sites the radio planner would then select their preferred option and a Multi Skilled Visit (“MSV”) would take place to assess the viability of that site on the ground. At this stage, trial holes would be dug to check whether there are services running under the proposed site and to assess ground conditions up to 1.2 metres depth.

“10.5 If the site is deemed suitable after the MSV, general arrangement planning drawings are produced and planning permission is sought.

“10.6 Once planning has been granted construction permission is sought.

“10.7 The costs are then raised with either Cornerstone or the site provider (if [it is] the site provider that is paying for the works) who will then decide whether to go ahead with the build or not.

“11 Cornerstone would then negotiate terms and enter into a Code agreement to acquire the necessary rights over the new mast site to allow the site to be built.”

23. Payment by BREDL of Cornerstone’s charges for the first phase of its work not only established a contract between them, but also fired the starting gun for Cornerstone to complete that first phase, including most importantly for present purposes, the design of the foundations for the new mast.

⁸ A 83 to 84

24. The purpose of moving the existing mast was to improve the sight line of vehicles leaving BREDL's new development which was otherwise obstructed. This involved a move by a short distance from a pavement or footpath to a location closer to the new supermarket.
25. Whilst the two locations were a short distance apart, the moving of complex telecommunication equipment is not a simple exercise: on the contrary it requires co-ordination between a significant number of interested parties.
26. Part of the design process involved excavating a trial pit to a depth of 1.2m. There was evidence before me which established that the purposes of excavating a trial pit were twofold: firstly, to establish whether there were any existing services which might be affected; and, secondly, to establish the ground conditions.
27. I have no difficulty in accepting that the excavation was adequate for the purpose of establishing whether there were any services to be avoided or diverted.
28. I do not accept that the excavation was adequate to establish whether the design proposed was adequate for the site conditions at the point of erection. The design drawing eventually proposed shows a 3m deep foundation. I accept the evidence of the Civil Engineer called by BREDL, Mr. Gooud, that in order to establish the bearing capacity of the ground underneath the proposed foundation, it would be necessary to know the ground conditions at that point.

29. The short point is that at the end of phase 1 of Cornerstone's engagement, a foundation design had been produced which was inappropriate for the actual ground conditions.
30. I return below to consider the implications of that finding in respect of the claim made in this action, which is for the alleged costs arising out of delays.
31. I refer above to "the end of phase 1": the design was complete by the end of March 2019: with that phase 1 came to an end.

H. The Build Phase

32. The arrangements set out in the email exchanges to which I have referred above make it clear that phase 2 of Cornerstone's enjoyment ("the Build Phase") would not start until Cornerstone had been paid.
33. The relevant quotation for the Build Phase is in the sum of £104,142.81 (inclusive of VAT)⁹. On the face of the quotation it was said:

"The CTIL selected suppliers for these works are Galliford Try, Dael and Telefonica.

"Upon receipt of full payment from the customer, Cornerstone will proceed to instruct works. Any unused funds will be credited back to the customer once Cornerstone have accepted the final cost of works from our suppliers."

34. There was delay on the part of BREDL in making payment, but in the event BREDL made payment on 28 August 2019.

⁹ B 127

35. Thereafter there was some delay in Cornerstone appreciating that it had received payment, but by 4 September 2019 Cornerstone knew that payment had been received.
36. It was not until 21 October 2019 that Galliford Try's team arrived on site: before that in an email dated 24 September 2019 Mr. Langridge-Brown had expressed concern to Mr. Short of Galliford Try that there had been no contact with BREDL's site manager.¹⁰ Ms Morrall of Galliford Try responded the same day saying "struggling to resource with people being on leave"¹¹.
37. On 26 September 2019 there was an email mainly circulating within the Galliford Try team but addressed to Craig Henstock of Telefonica which said¹²:
- "Nice to meet you too, we pre-started this site on Friday and our supervisor has advised there is a supermarket being built behind where our site is meant to be going. Our supervisor has stated that the boarding put up around where the supermarket is to be built/being built is where our kit should be going"
38. The offending hoarding can be seen in a number of photographs: in photograph B 63 the hoarding can be seen from the existing street side, with the equipment cabinets for the old mast still in situ. Photograph B 15 shows the hoarding from the other side with the old mast being shown on the far side of the hoarding and the intended location of the new mast being shown in blue.
39. Insofar as I can trace, BREDL was not told about the hoarding problem: had it been, I am sure that Mr. Langridge-Brown would have taken steps to make sure

¹⁰ C 168

¹¹ C 167

¹² C 180

that it did not cause a problem: taking down the hoarding for however long was necessary would in my view have been a minor thing to do.

40. On 22 October 2019 an email from Mr. Barton of Galliford Try to Mr Henstock of Telefonica, Mr France of Cornerstone and to other members of the Galliford Try team said¹³:

“Our contractor arrived as planned on site yesterday. However, the principal contractor redeveloping the site had not cleared the required area and brought the ground level up to what will be the finished ground level as part of the whole area development, as agreed at the site meeting. The PC was looking to have this cleared/ground made this morning. I have left a message with our contractor for an update and will forward the latest on as soon as I get it.”

41. The problem was short-lived: the email just quoted was sent at 10.51. At 16.44 he sent a follow-up email¹⁴:

“Latest on site. The PC for the redevelopment has only this afternoon completed the operation to bring the ground level up to what will be the approx.. finished ground level when the whole redevelopment gets completed. This in turn has impacted on us as we’ve been unable to progress much while waiting. However, we can now progress with the excavation of the cab and pole base tomorrow ready to install the roots and concrete.

“Tomorrow morning’s update should confirm the excavations are ongoing – the afternoon update should confirm if the pour has gone ahead (current plan to pour by finish tomorrow).”

42. Thus as of the late afternoon on 22 October 2010, Galliford Try’s expectation was that after a delay of about two days because of spoil on the site (shown on the photograph at B 100) on 23 October all excavation would have been

¹³ C 179

¹⁴ C 179

completed for the foundations and the concrete for those foundations (as well as the “roots” of the mast) would have been poured.

43. Unfortunately, when the excavation took place on 23 October, gravel and standing water was discovered, as recorded in Mr. Barton’s email to Mr France at 14.32 that day¹⁵:

“Further to discussion on the call, the latest on this site below:

- Excavation down to 1800mm and hitting running gravel/standing water.
- Machine has backed away from the excavation due to danger of collapse.
- PICW has spoken to the site manager of the supermarket build – they dug down to 4m for the building foundations and were still hitting gravel.
- Works are on hold at present as contractor and design lead discuss a solution.
- Potential for excavation to be widened and shuttered with additional mass fill concrete to enclose the pole root.
- Larger machine will be required if this progresses.”

44. On 26 November 2019 Galliford Try instructed that a geotechnical survey should be carried out¹⁶.

45. It is not entirely clear to me when that geotechnical survey was carried out but it was some time in January 2020: there are entries in a log at B 265 which would support a date of 7 January 2020 and at B 264 which support a date later

¹⁵ C 217

¹⁶ C 238

that month. I am satisfied that it had been carried out by the end of January at the latest, but probably earlier.

46. A redesign of the foundation was carried out, shown on a drawing dated 28 January 2020¹⁷. This shows a more substantial cuboid foundation.
47. An email dated 12 March 2020 from Mr Hales of Galliford Try to Mr France and others shows Galliford Try's intended programme as at that date¹⁸:

“Please see attached POW¹⁹ for the above site.

“We are starting work on 23/04/20 with Piling and the pole installation date on 14/04/20. The gap between SOS²⁰ and pole install is down to Council rejecting our symology and Easter being in between.

“we are looking to install the cabinet and pole on 14/04/20. Both sites will have a power supply on 14/04/20, so TX can be delivered any day after 14th April.

“We currently have a REC date of 9th April, however we suspect the Council will reject their permit. If REC cannot be delivered in time then we will submain over to the new cabinets.”

48. A fuller explanation of the expected programme was given in an email the same day from Mr. Hales to Mr. Langridge-Brown²¹:

“Further to our conversation (and [your] email this evening, I have been working on the plan to get the new equipment installed, this has been scuppered by the Council as they have rejected my request to close a lane and bus stop for 01/04/20. You say that you have had similar issues with the Council due to Gas works a lot further up the road. They have advised that I can plan this job in after 9th April. However, this is Easter weekend, so I will be completing the pole install on 14/04/20.

“We are looking to start work on 23/03/20 with excavations and piling then concrete pour happening shortly after and then the

¹⁷ A 116

¹⁸ C 408

¹⁹ Programme of Works

²⁰ Start on Site

²¹ C 415

ground will be re-instated. We will be working from your land and within the heras fencing that is currently on site.

“Please see attached drawings that we are working to. Page 17 shows the base that we will be installing and page 4 shows the area that we will be working in.

“POW is attached, outline below

23/03/20 start on site with piling

25/03/20 excavation and concrete pour complete

14/04/20 New pole and cabinet delivery

15/04/20 We will be leaving site ready for O2 to return.

“The Electricity company have provided dates of 8th and 9th April, however I suspect the council might reject their request. I have attached their plan. We will be installing their duct and the DNO will need to do a joint pit by the existing meter cabinet”

49. As I understand this programme, it meant that by 9 April the pole and cabinets would be in place (the pole having been delivered with the relevant equipment pre-installed), cables laid to it and a mains electricity supply provided either by the local electricity company (the “REC”) or by use of the supply on site leading to the development itself. This would leave Telefonica (O2) to carry out its final commissioning works including a period of “soak”: on the evidence before me from Mr. Arnold, Cornerstone’s expert, this “soak period” would normally be 56 days, but in this case was reduced to 21 days. Thereafter Telefonica would remove the old mast.
50. In the event, the first part of this programme was achieved pretty much on time: an email of 27 March 2020 records that the base had been poured and the root set²².

²² C 468

51. Thus by 27 March 2020 the project was in the position it had been expected it would be by 23 October 2019 – a delay of about 5 months.
52. A further complication was that before the project had been delayed in October 2019, Cornerstone had ordered the necessary replacement mast: however, it appears from the evidence of Mr. France that, when the delay then occurred, the mast which had been ordered was used elsewhere and it became necessary to order a new mast. I am unclear as to the extent that this caused delay which would otherwise have been avoided. In the event the site was built and connected to power by 21 April 2020²³.
53. Thereafter there was some further delay because an order placed with Openreach for fibre had lapsed: Openreach had to re-survey the site and re-quote for the works. The order was re-raised at the end of April 2020²⁴. Asked about this, Mr. France said that he was unaware of any steps having been taken in anticipation of the order expiring.
54. It appears that there was a limited problem as a result of someone on site contracting Covid-19: however there was agreement before me that this might have caused a day or two of delay at most.
55. It is Cornerstone's case that a problem then arose because it turned out that a duct intended for carrying fibre cables to the new mast had been used by Aldi's contractors for another purpose. This is one of only two substantial factual

²³ Mr. France's witness statement, paragraph 24 at page A 88

²⁴ Mr. France's witness statement, paragraph 25 at page A 88

disputes in this matter (the other is as to the state of completion of BREDL's development on 30 June 2020).

56. There is some contemporaneous evidence in BREDL's log that there was some delay from a duct being blocked, but there is no evidence of this being raised either orally or in correspondence contemporaneously as being something holding up the project: in my judgment either this was a false alarm (as Mr. Langridge-Brown said he had been told) or the problem was solved without causing completion of Cornerstone's works later than they otherwise would have been completed. I am sure that if it had been a problem causing significant (or any) critical delay, it would have been documented contemporaneously by Galliford Try, Cornerstone, Telefonica or some other party engaged in the works.
57. In particular, on 18 June 2020 Mr Langridge-Brown sent an email to Cornerstone and other members of Cornerstone's teams complaining about delays²⁵. If any significant part of the delay had been attributable to a blocked duct, I am sure it would have been mentioned in Telefonica's email in response²⁶.
58. In the event Cornerstone completed its works on or about 7 August 2020²⁷.

I. The Completion of BREDL's development

59. As I have indicated above, there is a significant difference between the parties as to the state of completion of BREDL's development as at 30 June 2020. The significance of this date is that it is BREDL's case that when the main

²⁵ C 531

²⁶ C 531

²⁷ Mr. Langridge-Brown's witness statement paragraph 25 at A 63

development was completed on 30 June 2020, it could not be handed over to the purchaser, Hastings Borough Council, because the sight lines were still obstructed by the old mast.

60. Cornerstone's response is that the works for the main development were not then complete so that the delay to completion of its works caused BREDL no loss which BREDL would not have suffered in any event.
61. The resolution to this dispute turns upon the snagging lists produced by RPP, the Employer's Agent.
62. On 2 July 2020 RPP sent to Mr. Langridge-Brown and others a Sectional Completion Statement certifying²⁸:

“Under the terms (clause 2.27.2) of the above mentioned Contract, Sectional Completion of Section 1 (ie 4nr retail units and associated external works) of the Works was achieved on: 25 June 2020.”

63. RPP also sent a Schedule of Outstanding Works running to 7.5 pages²⁹.
64. On 10 August 2019 RPP certified Practical Completion for the whole Works as having been achieved on 7 August 2020 (the difference being that the 30 June certificate covered the whole of BREDL's project apart from that dependant upon Cornerstone's works, whilst Practical Completion took account of completion of Cornerstone's works).

²⁸ C 738

²⁹ C 729 -736. A further copy of the Certificate and Schedule (in a slightly different format) is at B238-B245

65. In my view the fact that Practical Completion became dependent upon completion of Cornerstone's works may in itself be sufficient to resolve this issue in favour of BREDL.
66. However, I have looked with care at the list of outstanding works as at 30 June 2020, and I accept Mr Langridge-Brown's evidence that these were of the nature of snagging works which would not have prevented hand over to Hastings Borough Council.
67. In coming to that conclusion, I am satisfied that Mr Langridge-Brown, although not an independent witness, is a man of considerable experience and was giving me the benefit of his genuine opinion.
68. For these reasons, I accept BREDL's case that the delay in handover after 30 June 2020 was as a result of the need for Cornerstone and its team to complete its works.
69. I now turn to the question of whether Cornerstone was contractually responsible for any delay.

J. The Terms of Cornerstone's Contract with BREDL

70. There is no written contract between the parties – or perhaps it should be said that there are no written contracts between the parties, since it seems to be possible to analyse what happened as being the formation of one contract in two phases or two contracts, one for each phase.

71. The pleaded case for BREDL is based upon one contract for the Build Phase³⁰.
72. Cornerstone's pleaded case is that there was no contract at all³¹: that pleading seems to me to mix up the difference between the absence of a "formal" contract and the absence of any contract.
73. By the time the matter came before me, there was no suggestion that there was no contract, but the first issue which I was asked to answer was "On what date was the Contract entered into?"
74. In Mr Petts' Skeleton Argument he dealt with this issue as follows:

"26. Although not pleaded, it is understood that there is little difference between the parties as to the contract date, it was either 28/08/2019, when payment was made by C for the Phase 2 works, or 05/09/2019, when payment was accepted by D as having been made for those works.

"27. Not a great deal turns on it, but it is submitted the latter date is to be preferred, D's quote being an invitation to treat; C's acceptance of the quote being an offer, which D accepted by acknowledging payment, on 05/09/19."

75. I agree with Mr. Petts that not a great deal (I would say nothing) turns upon this issue, but as I am asked to decide it, I accept Mr. Petts' submission above that the Contract was formed on 5 September 2019.
76. The parties are agreed that the Contract was subject to Section 14 of the Supply of Goods and Services Act 1982, which provides:

"Implied term about time for performance.

"(1) Where, under a [relevant contract for the supply of a service] by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be

³⁰ Paragraphs 4 to 9 of the Particulars of Claim at A 7 – A 8

³¹ Defence paragraphs 8 to 10 at A 19 – A 20

fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.

“(2) What is a reasonable time is a question of fact.”

77. Both parties referred me to *Hick v Raymond & Reid* [1893] A.C. 22 in which Lord Watson said at page 32:

“When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.”

K. What was a reasonable time for completion of the works, in the light of the matters raised at paragraph 14 of the Defence?

78. The Claimant’s pleaded case in paragraph 10 of the Particulars of Claim is as follows³²:

“It is the Claimant’s contention that the Defendant ought to have carried out and completed its works by no later than 30 June 2020. From the date of payment by the Claimant (4 September 2019), that would have allowed the Defendant a period of ten months to remove and replace a single telephone master. In fact, a reasonable period for such works would have been considerably shorter, but for the purpose of its claim the Claimant will proceed on the basis that ten months was the contractually required time for performance.”

79. In answering what was a reasonable time for completion, it seems to me that I am entitled to and should take into account what actually happened.

³² A 8

80. I have analysed above the events which happened during the Build Phase. It was pointed out, with justification, by Mr Ward for BREDL that the total time on site of the Cornerstone team was about 11 working days. Apart from the delay attributable to the ground conditions, the suggested causes of delay in paragraph 14 of the Defence³³ are all, in my judgment minor, and do not adequately explain the length of time it took to complete Cornerstone's works.
81. In their respective closing submissions, both counsel agreed that the crucial issue before me is who takes responsibility for the 5 month delay attributable to the unsatisfactory ground conditions.
82. Despite the evidence I heard from Cornerstone's expert witness, Mr. Arnold, as to what might as a generality be a reasonable time for completion, I am satisfied on the evidence before me that had it not been for that 5 month delay, Cornerstone would have completed its works by about the end of March 2020.
83. Thus on the facts of this case the answer to the question, what would be a reasonable time for completion, depends upon how responsibility for that 5 month delay is to be allocated.

L. **Did the Defendant fail to carry out and complete its works within a reasonable time?**

84. As I have said, the crucial issue is how responsibility for the 5 month delay is to be allocated. There are two sub-issues: firstly, who bears responsibility for the fact that the original foundation design was inappropriate; secondly, once

³³ A 20 to A 23

the foundation problem had been identified, did Cornerstone act with reasonable expedition to deal with the problem?

85. As to the first sub-issue, there was evidence before me both from Mr France and Mr Arnold that the practice in the United Kingdom telecommunications industry is to carry out the design of the foundations having carried out a 1.2m excavation of the intended location of a mast.
86. I have no reason to doubt that that is the usual practice, but the evidence suggested to me that that was because of the importance of establishing whether there are any pre-existing services at the proposed location. The initial design drawing (at A 114) was clearly a standard design, intended for use generally. It anticipated a 3 metre deep foundation.
87. Although Mr. Gooud, called by BREDL, cast doubt as to whether the design was satisfactory, it was not the inadequacy of the design which he identified (a failure to allow adequately for the to-be-expected overturning moment) which proved in the end to be the problem. Rather it was the actual inadequacy of the soil conditions from a depth of 1.8m downwards.
88. The design produced by Cornerstone in the first phase was inadequate. It may well be that the industry as a generality manages to get by using designs based upon the information gleaned from a 1.2m excavation, but that does not answer the question as to who is to bear responsibility if that excavation is inadequate.
89. Mr. Arnold's evidence was that if he had been asked to design the foundation in this case, he would have consulted the British Geological Survey, and having done so would have requested a full geotechnical survey for this site.

90. Mr Goud's evidence was that he would have wanted to know what the soil conditions were at the base of the proposed foundation in order to be able to assess the adequacy of that soil to withstand the likely bearing pressure which would be applied to it.
91. All parties agreed that a particular factor concerning this site was that it was only a few hundred feet from the sea.
92. On the basis of this evidence, I have no doubt that, whatever the general practice of the telecommunications industry, a competent designer would have called for a geotechnical survey before finalising the design.
93. This was not done: as a result the design in place at 23 October 2019 was inappropriate.
94. It is not suggested by Cornerstone that it can distance itself from responsibility for design because it was prepared during the first rather than the second phase of its works.
95. This is a sufficient basis upon which to hold that Cornerstone failed to carry out its works within a reasonable time.
96. However, that conclusion is strengthened by consideration of the second sub-issue referred to above: in my judgment there is no explanation as to why it took 5 months to resolve the problem once identified. It seems to me that at most a couple of months would be needed to find a solution and get the team back on site.

97. That problem was then compounded by releasing the ordered mast to another site and allowing the contract for supply of fibre to lapse.
98. The overall impression I have is that Cornerstone was very busy – it had about 50 contracts on the go according to Mr France, of which this was not a high priority contract: there was telling evidence from Mr France as to the priority given to projects subject to a Tomlin Order: respect for Court orders is obviously essential, but it illustrated that if appropriate priority was given then these projects could proceed expeditiously.
99. I also find that Cornerstone was made aware (whether it penetrated to Mr France is a separate matter) that the execution of Cornerstone’s works was necessary to enable BREDL to achieve its objectives – and that the “build contract” (i.e. the main development) was only 8 months³⁴.
100. In those circumstances, I have no hesitation in holding that the Cornerstone works should have been completed well before 30 June 2020, and would have been but for matters for which Cornerstone is contractually responsible.

M. If the Defendant breached its obligation as to time, is the Claimant entitled to damages, and, if so, in what amount?

N. Were the Claimant’s losses too remote?

101. These two questions are inextricably linked.

³⁴ E mail at C 112

102. The losses particularised in paragraph 13 of the Particulars of Claim are as follows³⁵:

“a. Additional project finance costs: £41,360.24;

“b. Rent free period allowed to the Claimant’s tenants: £47,585.00;

“c. Additional project management costs: £15,000;

“d. Laying new tarmac: £7,500.00.”

103. Before the trial began, the Claimant abandoned claim “b” in respect of the rent free period.

104. In his closing submissions Mr Ward for BREDL accepted that on the evidence at trial new tarmac would have to be laid after the old mast had been removed no matter whether Cornerstone had completed its works earlier or not. Accordingly item (d), laying new tarmac, has not in the event been pursued.

105. The amount claimed under head “a” was increased in the Schedule to the Particulars of Claim to £46,074.27³⁶.

Additional project finance costs

106. The amount claimed is set out in the Schedule to the Particulars of Claim to £46,074.27³⁷:

“a. July 2020 - £3,637 monthly and £20,545 interest.

“b. August 2020 - £3,637 monthly fee and £18,255.90.”

³⁵ A 9 – A 10

³⁶ A 31

³⁷ A 31

107. The Facility Letter from Close Brothers³⁸ and the relevant bank statements³⁹ have been produced.
108. I am satisfied on the evidence before me that as a result of delay in the completion of BREDL's transaction with Hastings Borough Council there was delay in redemption of the loan from Close Brothers as a result of which the fees and interest set out above were incurred.
109. The calculation is premised upon the assumption that if Practical Completion had occurred on 30 June 2020 the fees and interest would have been avoided.
110. I do not accept that premise in its entirety. Once the Practical Completion Certificate was eventually issued in August, it still took about 21 days for the transaction to complete. I am not convinced that that particular delay would have been significantly less had Practical Completion occurred on 30 June 2020.
111. In my judgment, but for Cornerstone's delays, the transaction with Hastings Borough Council would have been completed on or about Tuesday 21 July 2020.
112. On that basis BREDL would in any event have incurred the monthly fee for July 2020 and interest up to and including 21 July 2020. Conversely, but for Cornerstone's delays, BREDL would have avoided the monthly fee for August 2020 and interest after 21 July 2020.
113. It is contended by Cornerstone that this loss is too remote to be recoverable.

³⁸ B 134

³⁹ B 142 and B 147

114. The legal principles applicable in deciding whether the loss claimed is too remote have recently been restated by the Privy Council in *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18; [2021] A.C. 23 at [29] to [35] of the Judgment of Lord Hodge DPSC:

“29. More recently, Professor Andrew Burrows [now Lord Burrows JSC] in *A Restatement of the English Law of Contract* (2016), in which he was assisted by an advisory body of academics, judges and practitioners, described the general rule on remoteness of damage in contract in these terms (p 128):

“The general rule is that loss is too remote if that type of loss could not reasonably have been contemplated by the defendant as a serious possibility at the time the contract was made assuming that, at that time, the defendant had thought about the breach.” (Emphasis added.)

“Drawing on *The Achilleas* [2009] AC 61, the text went on to state a further restriction on recoverability for the loss. But, as the Board has stated, the question of such a restriction does not arise on this appeal.

“30. From this brief review of the main authorities, the position may be summarised 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 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 a result of a breach of their contract is a factual one.”

115. In this case Cornerstone knew (1) from about 5 February 2019 that the build period for the main development was only 8 months starting 5 weeks from that date⁴⁰; (2) from at least 7 February 2019 that the project had been forward sold to Hastings Borough Council⁴¹ and (3) from at least 12 February 2019 that BREDL needed the mast removed before it could complete its development: on that date Mr Langridge-Brown sent an email saying “I have visions of our development being completed with a mast and boxes in the middle of the footpath.”⁴²
116. Accordingly, Cornerstone knew, or should have appreciated, that this was a main development where the build period was relatively short, needed the mast removed for its satisfactory completion and that it was being sold on to Hastings Borough Council.
117. There is no reason to suppose that Cornerstone knew in any detail of BREDL’s precise arrangements with Hastings or with its financiers, but any intelligent consideration would have made them realise that there was a serious possibility that BREDL would have some sort of financing arrangement in place and that BREDL’s final ability to pay off that financing would be tied to practical completion of the project, including its works.

⁴⁰ C 112

⁴¹ C 55

⁴² C 53

118. For these reasons I reject the suggestion that the financing costs were too remote to be recoverable.
119. I am reassured in that conclusion by the decision of H.H. Judge Thornton Q.C. in *Earl's Terrace Properties Limited v Nilsson Design Limited* [2004] EWHC 136 (TCC) particularly paragraphs [60] to [65], where the learned judge held that financing costs were not too remote to be recoverable.
120. Accordingly, under this head of claim I award the monthly fee for August of £3,637 and the interest incurred between 22 July 2020 and the date of redemption of the loan (28 August 2020).

Additional project management costs

121. These are claimed in the sum of £15,000 and relate to a fee of £15,000 paid to Ambit (I assume the sum of £3,000 VAT is not claimed because BREDL has been able to recover that sum from HMRC).
122. I am satisfied that the sum was paid: it has been spoken to by both Mr Langridge-Brown and Mr Dickson – of these two Mr Dickson had the greater knowledge of this transaction – and the invoice is before me⁴³.
123. I accept that this additional fee may not have been a fee to which Ambit was strictly entitled under the terms of its engagement by BREDL, but it is the sort of additional fee very often paid to a professional adviser when the work involved in a project has been much delayed as this was.

⁴³ B 144

124. Accordingly, I hold that it was a payment reasonably associated with and caused by the delay to the main project and was the sort of payment which Cornerstone (which had been keen to charge extra for its additional expenditure in putting in the larger foundations) would or should have regarded as a serious possibility.
125. A more significant issue is whether the payment was associated with general delay to the main project or to the effect of Cornerstone's delays upon the main project. As to that, Mr Dickson's evidence was clear, that it was the additional time and work involved for Ambit/Mr Langridge-Brown because of Cornerstone's delays which was the reason for the payment: I accept that evidence.
126. Accordingly I hold that BREDL is also entitled to recover the claimed sum of £15,000.

O. Conclusion

127. For the above reasons I hold that the claim succeeds in part in respect of the additional project finance costs and in whole in respect of the additional project management costs.
128. I invite submissions as to the form of order to follow this judgment.