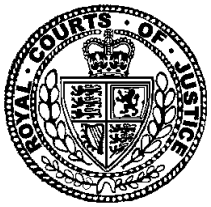

Neutral Citation Number: [2022] EWHC 2372 (TCC)

Case No: HT-2021-000350

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

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

Date: 21st September 2022

Before:

MR JUSTICE EYRE

- -

Between:

SOLUTIONS 4 NORTH TYNESIDE LIMITED	**Claimant**
- and -	
GALLIFORD TRY BUILDING 2014 LIMITED	**Defendant**

- -
- -

Lynne McCafferty KC (instructed by **Fladgate LLP**) for the **Claimant**
Adam Constable KC and Andrew Fenn (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 2nd and 3rd March 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE EYRE

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be **10:00** on **21st September 2022**

Mr Justice Eyre:

1. This dispute arises out of a PFI project ("the Project") in respect of local authority sheltered housing dwellings for elderly residents of North Tyneside. The Project concerned 26 facilities. Some of which were single buildings containing a number of flats and related facilities while others were complexes containing a number of buildings: the number of flats in the facilities ranged from 24 to 45.

2. The Project was to run from March 2014 to March 2042 and had two phases. The first, the Design and Construction phase, involved the demolition and replacement of ten of the buildings ("the New Build Dwellings") and the refurbishment of the other sixteen ("the Refurbishment Dwellings"). The second, the Facilities Management phase, concerned the maintenance and management of the buildings after their construction or refurbishment as the case might be.

3. The Claimant is a special purpose vehicle formed to undertake the Project. It entered the Project Agreement with North Tyneside Borough Council ("the Council") on 26th March 2014. The Output Specification which was Schedule 1 to the Project Agreement had two parts relating to the two phases of the Project with Part A addressing Design and Construction requirements and Part B setting out the Facilities Management Services requirements.

4. Sections 2.9 and 2.10 of Part A of the Output Specification addressed the minimum design lives which were to be achieved (ranging from 4 years for internal paint finishes to 60 years for roof and floor structures and other structural items) and specified the residual life expectancy which was to remain when the dwellings were to be handed back to the Council in 2042 (ranging from 1 year for internal paint finishes to 30 years for certain of the structural items). The effect of these provisions as applied to the contract between the Claimant and the Defendant is at the heart of the dispute between them and I will consider them in some detail below.

5. The following three agreements were entered at the same time as the Project Agreement and back-to-back with it.

6. The Defendant is a construction company and it entered the Construction Sub-Contract with the Claimant. Schedule 1 of that agreement was the Output Specification and provided that Part A of the Output Specification of the Project Agreement was to be deemed to be Schedule 1 to the Construction Sub-Contract and incorporated as if transposed therein with some limited exceptions.

7. The Claimant entered a "responsive repairs and cyclical maintenance and renewal contract" ("the Facilities Management Sub-Contract") with Lovell Partnerships Ltd (now Morgan Sindall Property Services Ltd: "MSPS"). Schedule 1 of that contract was also the Output Specification and provided for the incorporation in that contract of Parts B and C of the Output Specification of the Project Agreement.

8. Finally the Claimant, the Defendant, and Lovell Partnerships Ltd entered the Interface Agreement which was expressed to be for the purpose of "detailing certain arrangements between them in connection with matters" which were the subject of the Construction Sub-Contract and of the Facilities Management Sub-Contract and to

provide for rights and obligations directly between the Defendant and Lovell Partnerships Ltd.

9. In December 2009 the short-listed bidders seeking to enter the Project Agreement with the Council had jointly funded the Stock Condition Survey. This was undertaken by Michael Dyson Associates Ltd and resulted in a report to the Council addressing the condition of the properties which were to be the subject matter of the Project Agreement. At an earlier stage in the dispute the Defendant placed considerable weight on the Stock Condition Survey as limiting its obligations. That is no longer the Defendant's position and the importance of the Stock Condition Survey for the issues before me has been markedly reduced.

10. The dispute relates to the Refurbishment Dwellings. The final Certificate of Availability in respect of those dwellings was issued on 6th April 2017. Neither party seeks relief in respect of the New Build Dwellings (in relation to which the final Certificate of Availability was issued on 16th June 2017). Some consideration of the rights and obligations in respect of the New Build Dwellings will be necessary to resolve the dispute in respect of the Refurbishment Dwellings because I will have to consider the extent to which the contentious obligations on the Defendant are confined to the New Build Dwellings. Nonetheless, the declarations being sought on each side relate solely to the Refurbishment Dwellings and the obligations in respect of the New Build Dwellings are not directly in issue before me.

11. The Claimant says that defects in the roofs of the Refurbishment Dwellings emerged in mid-2018. Its case is that the Defendant is liable for the rectification of these defects. There is dispute not just as to where responsibility for these matters lies under the Construction Sub-Contract but also as to whether the matters alleged are defects; their extent; and their cause. These proceedings relate solely to the issue of the parties' rights and obligations under and the correct interpretation of the Construction Sub-Contract and there has been no particularisation of the alleged defects nor of the parties' cases as to any matter other than contractual interpretation.

12. The parties have been in dispute for a considerable time. In the course of that dispute matters were referred to adjudication. The adjudicator made certain declarations sought by the Claimant but declined others. The current proceedings were avowedly brought by the Claimant "to have the proper construction of the material terms of the Construction Sub-Contract finally determined by the court in order to resolve this dispute". In the course of the dispute the parties' contentions as to the correct interpretation of the Construction Sub-Contract have evolved. They were continuing to evolve in the course of the hearing. These changes generated a degree of heat between the parties and attracted considerable emphasis. Thus Miss McCafferty KC placed weight on the fact that, as the Claimant saw matters, it was only in the Defence that the Defendant abandoned the flawed contention that its obligations were limited by the Stock Condition Surveys. In her oral submissions Miss McCafferty enunciated what she described as a clarification of the Claimant's case in relation to the effect of sections 2.9 and 2.10 of Part A of the Output Specification. For his part Mr Constable KC described this as being a *volte face* rather than simply a clarification of the Claimant's existing case and sought to say that the marked change of approach should be seen as support for the Defendant's position.

13. Understandable though it was that counsel on each side made forensic play of the changes of view on the other side reference to such changes does not assist me in the exercise of contractual interpretation. The fact that a different interpretation was previously advanced by a party has minimal if any relevance to the question of whether or not the interpretation that party is now advancing is correct. The evolution of the cases on each side did mean that the pleadings and skeleton submissions of each party were in large part directed to the other side's case as it had been or as it was perceived to be rather than to that case in the form in which it was finally presented. This was in part a consequence of the matter being presented in abstract rather than in the context of particular alleged breaches and I will consider the consequences of that aspect of the case further below. It also meant that large parts of the pleadings and of the skeleton submissions became irrelevant. In addition the clarified or recast form of the Claimant's case meant that the terms of some of the declarations sought in the Particulars of Claim went beyond what was appropriate even on the Claimant's case and that others, if to be read in the light of that revised case, became less contentious.

14. I will address the parties' cases as I understood them to stand at the close of the hearing and will seek to avoid making reference to earlier iterations. There were three areas of dispute. In condensed terms those and the parties' cases in respect of them were as follows.

15. The principal dispute was in respect of the effect of sections 2.9 and 2.10 of Part A of the Output Specification. In its clarified form the Claimant's case was that the Defendant's obligation in respect of the Refurbishment Dwellings was to return those dwellings at the time of the relevant Certificate of Availability with a design life of the duration specified in Table 1 of section 2.10 and in such a condition that provided the Claimant and MSPS properly performed their obligations under the Project Agreement and the Facilities Management Sub-Contract they would have the residual life expectancy specified in that table at the Handback date. This meant that in relation to the timber roof structures these were to have a design life of 60 years as at the date of the Certificate of Availability and to be such that provided the Claimant and MSPS performed as they should have done there would be a residual life of 30 years in 2042. The Defendant accepted that it had obligations in relation to sections 2.9 and 2.10 in respect of the New Build Dwellings and in respect of those aspects of the refurbishment works which involved New Build works but pointed out that those were not in issue before me. It did not, however, accept that there were such obligations in respect of the refurbishment works themselves. The obligation in relation to those works was to put the Refurbishment Dwellings into a condition such that at the date of each Certificate of Availability they met the Availability Certification Requirements. In essence the difference was between an interpretation under which the Defendant had to ensure that the Refurbishment Dwellings had a certain life expectancy or at least were capable of having such a life expectancy and one where the focus was on the physical condition of the dwellings at the time of the Certificates of Availability.

16. There was also dispute as to whether the Output Specification formed part of the definition of the scope of the works to be performed by the Defendant or related solely to the standard to which the works (the scope of which was otherwise defined) were to be performed. The Claimant advanced the former position and the Defendant the latter.

17. There had been dispute as to the effect of the issue of the Certificates of Availability. The Defendant no longer pursued the contention that the issue of such certificates

amounted to a conclusive determination that the works had been performed properly and that all its obligations had been met. However, it did contend that the issue of a certificate was determinative of whether the availability standards had been achieved. It will be convenient to address in this setting the remaining dispute. This was in respect of the extent of the Defendant's obligations with regard to the external envelope of the Refurbishment Dwellings.

The Contractual Terms.

18. I was taken through the contracts in some detail but it suffices for present purposes to note the provisions which are central to the matters I must determine.

19. In the Project Agreement the following were defined terms:

> "Availability Certification Requirements" meant "the requirements that are to be satisfied prior to the issue of a Certificate of Availability as set out for each Certificate of Availability within Appendix B of Output Specification Part A"
>
> The "Availability Standards" were: "each or all of the Availability Standards (Initial) and Availability Standards (Full)"
>
> "The "Availability Standards (Full)" means when the context so admits both or together the Availability Standards New Build (Full) and the Availability Standards Refurbishment (Full)"
>
> The "Availability Standards New Build (Full)" means the full standards applicable to New Build Dwellings set out as Availability Standards in the column headed "Availability Standard New Build (Full)" in the table within Section 2.1 of Output Specification Part B"
>
> The "Availability Standards Refurbishment (Full)" means the full standards applicable to Refurbishment Dwellings set out as Availability Standards in the column headed "Availability Standard Refurbishment (Full)" in the table within Section 2.1 of Output Specification Part B;"
>
> "Contract Period" means the period from and including the Commencement Date to the Expiry Date, or if earlier, the Termination Date;"
>
> "Contractor's Proposals" means the specific proposals for the construction and refurbishment of the Dwellings and Properties and provision of the Services to satisfy the Output Specification, as contained in Schedule 2 (Contractor's Proposals);
>
> "Cyclical Maintenance and Replacement Programme" means the programme for Cyclical Maintenance and Renewal Works as contained in Part B (FM Proposals) of Schedule 2 (Contractor's Proposals) as may be varied from time to time in accordance with the Review Procedure;"

"Cyclical Maintenance and Renewal works means the works relating to the maintenance of and renewal of elements in the Dwellings or Properties required to satisfy the Output Specification;"

"Expiry Date" means the twenty-eighth (28th) anniversary of the Services Commencement Date (Existing Dwellings);"

"Handbook Standard" means the standard to which the Dwellings are to be handed back to the Authority on the Expiry Date as set out in the Output Specification;"

"Initial Works means each or both of the New Build Works and the Refurbishment Works;"

"New Build Works means those parts of the Works undertaken prior to the issue of a Certificate of Availability (New Build Completion) in relation to a New Build Dwelling;"

"Refurbishment Works means those parts of the Works undertaken prior to the issue of a Certificate of Availability (Refurbishment Completion) in relation to a Refurbishment Dwelling;"

"Services Commencement Date (Existing Dwellings) means in relation to the Existing Dwellings 26th March 2014"

"Services Commencement Date (New Build Dwellings) means for each New Build Dwelling the date of issue of a Certificate of Availability (New Build Completion) in respect of that New Build Dwelling;"

"Stock Condition Survey means the stock condition survey of the Dwellings and/or Properties carried out by the Stock Condition Surveyor in accordance with the Stock Condition Surveyor's Appointment and any other stock condition surveys listed in Appendix 6;"

"Works means all the works (including design and works necessary for obtaining access to the Sites, Dwellings or Properties) to be undertaken in accordance with this Agreement to satisfy the Output Specification"

20. Clause 10.1 made provision as follows for the obligation to carry out:

"The Contractor shall, and shall procure that the Construction Contractors (and its sub-contractors and/or consultants) shall, carry out the design (including the preparation of Design Data) and the construction and completion, commissioning and testing of the Works so that:

> 10.1.1 each Dwelling shall achieve the Certificate of Availability (Full Standard) on or before the Planned Refurbishment Completion Date or Planned Services Commencement (New Build) Date (as appropriate) for that Dwelling…
>
> …
>
> 10.1.3. the Works fully comply with and meet all the requirements of this Agreement, the Output Specification, the Sub-Contractor's Proposals, Good Industry Practice, Guidance, all Consents and all applicable Authority's Policies, Legislation and the provisions of the Tenancy Agreement. In the event that the Contractor enters into any sub-contract in connection with the Works it shall ensure that such sub-contractor complies with and meets all the requirements of the Equality Requirements..."

21. By clause 18.8 the Council accepted responsibility for any defects in the Refurbishment Dwellings which were not apparent from a reasonable and prudent contractor's interpretation of the Stock Condition Survey.

22. Clause 20.3 made provision for the effect of a Certificate of Availability saying so far as is relevant:

> "20.3.1 The issue of a Certificate of Availability by the Independent Certifier shall indicate only that the relevant Initial Works satisfy the criteria for the issue of a Certificate of Availability as set out in the Independent Certifier's Deed of Appointment...
>
> 20.3.3 As between the Authority and the Contractor the Certificate of Availability shall be conclusive as to whether the relevant Initial Works have been completed in accordance with clause 20.2 (Issue of Certificate of Availability) and in respect of a Project Phase, that such Dwellings within that Project Phase have reached the relevant Availability Certification Requirements, at the date of such Certificate of Availability…"

23. Clause 23.1 made provision for maintenance saying:

> "23.1 The Contractor shall ensure on a continuing basis that at all times its maintenance and operating procedures are sufficient to ensure that:
>
> 23.1.4 the Dwellings and Properties are handed back to the Authority on the Expiry Date (or if earlier on the Termination Date) in a condition complying with the Handback Standard…"

24. It is to be noted that the Construction Sub-Contract did not contain a provision equivalent to clause 23.1.4 of the Project Agreement.

25. Clause 23.3 provided for the Claimant to implement the Cyclical Maintenance and Replacement Programme and for an annual review to plan work for the following five years.

26. The Output Specification was Schedule 1 of the Project Agreement.

27. Part A of the Output Specification addressed the Design and Construction Requirements. It began with an explanation of its structure in these terms:

> "This Part A of the Output Specification (Design and Construction Requirements) details the standards that the Contractor shall meet in the design and the construction of the new and refurbished sheltered accommodation to support North Tyneside Council's (the

Authority) Quality Homes for Older People PFI Project. The meanings of the definitions and abbreviations used within this Schedule 1 Part A are contained within a separate document within this schedule 1, titled 'Definitions and Abbreviations'.

Part B of the Output Specification contains the Facilities Management Service Requirements, and is contained in a separate document.

Part C of the Output Specification contains the ICT Output Specification, and is contained in a separate document"

28. Sections 2.9 and 2.10 are of particular significance in the context of the current dispute and with the accompanying Table 1 they provided that:

"2.9 The Contractor shall consider the long-term maintenance and lifecycle replacement implications of the design and selection of materials used in the Works and shall adopt a strategy that:

i. Promotes a long-lasting high-quality appearance and meets the design quality aspirations of the Authority as described in section 2.3.2.4 above;
ii. Meets the lifecycle investment requirements contained within the Property Maintenance Service of the Output Specification Part B;
iii. Minimises adverse impact upon the environment (in accordance with sections 2.3.2.5 and 2.8 above);
iv. Minimises disruption to Tenants; and
v. Minimises risks to the health and safety of those people responsible for the maintenance and lifecycle replacement.

As a minimum, the Contractor shall select materials that provide minimum design lives in accordance with BS 7543:2003 and ISO 15686.

Good Industry Practice for a design life at the point of issue of a Certificate of Availability for the elements of new build is listed in Table 1 below. For the avoidance of doubt, the Contractor shall meet the requirements set out in Table 1 below.

The Contractor shall demonstrate that the design life proposed for any of the elements within Table 1 below will be achieved.

Specific standards to which the Sites shall be maintained are set out in Part B of this Output Specification (Facilities Management Service Requirements). The Contractor shall ensure that the Sites are built and/or refurbished in a manner that allows the Part B obligations to be met.

2.10. The Contractor shall provide Sites that are capable of being available for use without interruption, for the duration of the Contract Period. The design of the Sites shall allow for structural elements of the Sites to have a minimum residual life expectancy of 30 years at the Expiry Date.

Non-structural elements of the Facilities shall be in a condition which is consistent with good maintenance practice, and at the end of the Contract Period shall have a minimum residual life expectancy of 5 years, unless specifically set out within Table 1 below.

Materials and components forming part of the Sites, which require maintenance and replacement within the Contract Period, shall be selected, located and fixed to the fullest extent possible to minimise future inconvenience, disruptions and to avoid temporary closure of any of the Sites"

Table 1: Minimum Design Lives and Handback Requirements

Item	Design Life	Residual Life at Handback
Primary elements		
External walls – brickwork, block work	60 years	30 years
Internal walls – load bearing	60 years	30 years
Roof Structure - timber	60 years	30 years
Drainage and below ground civil engineering infrastructure	60 years	30 years
Floor structure	60 years	30 years
External openings, doors and sealed double glazed windows	25 years	5 years
Rainwater gutters and down pipes – plastic	25 years	5 years
External elements		
Wall finishes, (excluding painted finishes to windows and doors)	25 years	5 years
External painted finishes	4 years	2 years
Roof claddings and membranes	40 years	5 years
Flat roof coverings	25 years	5 years
External hard landscaping elements	No less than 20 years from first maintenance	5 years
Internal elements		
Internal partitions – plasterboard and stud	40 years	5 years
Doors and internal timber work	25 years	5 years
Sanitary appliances	15 years	5 years
Communal kitchen appliances	15 years	3 years
Internal finishes (excluding paintwork)	15 years	2 years
Internal painted finishes	4 years	1 year
Floor finishes and skirting	15 years	2 years
Engineering elements		

Engineering plant	CIBSE Guide to Ownership, Operation and Maintenance of Building Services	
• Thermostats for heating		3 years
• Access control equipment		3years
• CCTV equipment		3 years
• Intruder alarm equipment		3 years
• Fire alarm equipment		3 years
• Bollard lighting (external)		3 years
• Laundry equipment		2 years
• Solar thermal/photovoltaic panels		N/A – no lifecycle replacement: see FF&F category 2
• Air source heat pumps		N/A – no lifecycle replacement – see FF&E category 2
• Engineering services distribution systems	CIBSE Guide to Ownership, Operation and Maintenance of Building Services	5 years

29. Section 4 addresses the New Build Works Technical Requirements. These included at 4.1.7 the following in respect of the external envelope:

> "The building envelope includes all external wall and roof cladding elements. The Contractor shall design the building envelope to provide a high quality enclosure to the accommodation. In addition, external finishes shall:
>
> i) Meet the design quality aspirations of the Authority as described in section 2.3.2.4 above;
> ii) Meet the requirements of the Planning Authority;
> iii) Be resistant to impact damage and intruder break-in, either by cutting or disassembly of the wall components;
> iv) Be essentially self cleaning and present a fair outside appearance irrespective of the frequency of maintenance;
> v) Be able to resist silently, without detriment to the required performance or appearance, the action of elements, including, but not limited to: wind, rain, hail, show, ice, solar radiation, temperature changes, moisture movement, structural movement, construction tolerances, thermal movements, the internal environment of the building and dead or imposed loads;
> vi) Resist the passage of dampness both into the building structure, fabric and accommodation; and
> vii) Address other considerations as identified by the Contractor.

> The Contractor shall also seek to improve the U-value and air permeability requirements of the Building Regulations Part L which are current at the time of the Works being carried out, so far as can be reasonably foreseen."

30. The requirements governing the external envelope in the Refurbishment Dwellings were set out thus at Section 5.1.7:

> "The Contractor shall comply with the requirements, as described for the New Build Sites within section 4.1.7, on the Refurbishment Sites. In particular the Contractor shall carry out repointing Works to outside works where appropriate, and shall as a minimum, carry out repairs to external render and decorate and repair as necessary all fascias and soffits.
>
> Where required due to the standard of the existing building fabric, the Contractor shall also improve and upgrade all roof void and cavity wall insulation, and shall seek to improve the U-value requirements of the Building Regulations which are current at the time of the Works being carried out".

31. Appendix B to Part A of the Output Specification set out in tabular form the Availability Certification Requirements in respect of both the New Build and the Refurbishment Dwellings.

32. Part B of the Output Specification set out the Facilities Management Service Requirements.

33. At section 2.0 the Availability Standards were specified. These were set out in a table and the requirements for Availability Standard Refurbishment (Full) and for Availability Standard New Build (Full) were in identical terms in the same column.

34. The Key Objective of the Property Maintenance Service was expressed thus at section 3.3.1:

> "To ensure that the Sites and Properties are maintained through Reactive Repairs, Planned Maintenance and Cyclical Maintenance and Renewal Works to comply with the standards in the Output Specification Part A: Design and Construction Requirements and the Property Maintenance Standards in Section 3.3.4 of this Facilities Management Service Specification; also that maintenance issues are addressed efficiently and within the prescribed timescales"

35. The Property Maintenance Standards were set out at section 3.3.4, the preamble to which began:

> "During Initial Services the Contractor shall comply with the relevant Property Maintenance Standard to the extent that is relevant given the Initial Condition, and is not expected to carry out any enhancements to achieve that Property Maintenance Standard as described within Section 1.2.1.2.
>
> For the avoidance of doubt, Indication of Failure is generally where the Property Maintenance Standard is not met and the standards described within the Design and Construction Requirements (Schedule 1 Part A) are not maintained".

36. The standard for roofs including eaves and chimneys included the following:

> "Roofs and roof coverings shall be maintained such that they retain their energy efficiency and are fit for purpose.

All elements of the building fabric, finishes, or a services system component shall be functional, operational sound secure and weatherproof where appropriate."

37. The Construction Sub-Contract made reference to the Project Agreement in a recital and used that as a defined term. It also defined the following terms, among others:

"Availability Certification Requirements" meant "the requirements that are to be satisfied prior to the issue in a Certificate of Availability as set out for each Certificate of Availability within Appendix B of Output Specification Part A"

The "Availability Standards" were: "each or all of the Availability Standards (New Build (Full) and Availability Standards Refurbishment (Full)"

The "Availability Standards Refurbishment (Full)" were "the full standards applicable to Refurbishment Dwellings set out as Availability Standards in the column headed "Availability Standard Refurbishment (Full)" in the table within Section 2.1 of Output Specification Part B"

A "Certificate of Availability" was "a Certificate of Availability (Internal Refurbishment) or a Certificate of Availability (Refurbishment Completion) or a Certificate of Availability New Build Completion) as the case may be"

The "Contract Period" was "in respect of the Works the period from and including the Commencement Date to the Expiry Date, of if earlier, the Termination Date"

"Defect" meant "any defect in any Dwelling of Property, or any part of them, attributable to:

a. defective design

b. defective workmanship or defective materials, plant or machinery used in the construction of such building(s) having regard to Good Industry Practice and to applicable British standards and codes of practice current at the date of construction of the building comprising the relevant Property of part thereof;

c. defective installation of anything in or on a Dwelling or Property having regard to Good Industry Practice and to applicable British standards and codes of practice current at the date of such installation;

d. defective preparation of the site on which a Dwelling or Property is constructed; or

e. any part or parts of a Dwelling or Property which do not meet the standards or requirements set out in this Agreement and which arises out of a failure by the Sub-Contractor to comply with its obligations under this Agreement but excludes Snagging Matters (as defined in Appendix 1 (Snagging Protocol) and "Defects" shall be construed accordingly"

"Dwelling" was defined as "each of all:

a. The Existing Dwellings; and

b. The New Build Dwellings"

> The "Expiry Date" was "the date falling twelve (12) years after the issue of the final Certificate of Availability in relation to the Initial Works"
>
> A "Refurbishment Dwelling" was "the flats or houses to be refurbished in accordance with this Agreement listed by address in part 1 of Appendix 2 (List of Dwellings) of the Project Agreement"
>
> The "Refurbishment Programme" was "the programme for carrying out the Refurbishment Works as contained in Part A (Design and Construction) of Schedule 2 (Sub-Contractor's Proposals) a copy of which is contained in Part 1 of Schedule 15, as may be varied from time to time in accordance with the Review Procedure"
>
> The "Refurbishment Works" were "those parts of the Works undertaken prior to the issue of a Certificate of Availability (Refurbishment Completion) in relation to a Refurbishment Dwelling"
>
> The "Sites" were "the area edges red on the relevant Site Plan together with the Dwellings and Properties and the service ducts and media for all utilities and services serving the Dwellings and Properties"
>
> The "Sub-Contractor's Proposals" were "the specific proposals for the construction and refurbishment of the Dwellings and Properties to satisfy the Output Specification, as contained in Schedule 2 (Sub-Contractor's Proposals)"
>
> The "Works" were defined as "all of the works (including design and works necessary for obtaining access to the Sites, Dwellings or Properties) to be undertaken in accordance with this Agreement to satisfy the Output Specification"

38. Clause 1.8 provided that:

> "Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Contractor, shall unless otherwise expressly stated in this Agreement, relieve the Sub-Contractor of any of its obligations under the Project Documents or of any duty which it may have hereunder to ensure to correctness, accuracy or suitability of the matter or thing which the subject of the approval, consent, examination, acknowledgement or knowledge".

39. By clause 4.8 the Defendant agreed to carry out the Works in accordance with the Construction Sub-Contract and then clause 4.9 provided that:

> "The Sub-Contractor acknowledges that it is (and the Sub-Contractor shall be deemed to be) fully aware of the obligations of the Contractor under the Project Documents (and the Contractor shall provide a certified copy of all project Documents other than the Ancillary Documents) and Initial Financing Agreements as at the date of this Agreement. The Sub-Contractor acknowledges that a breach of its obligations under this Agreement may result in, among other things, a liability of the Contractor under the Project Documents and the Initial Financing Agreements. The Sub-Contractor further acknowledges that the obligations and potential liabilities referred to in this clause 4.9 are (and such obligations and potential liabilities shall be deemed to be) within the contemplation of the Sub-Contractor in so far as such obligations and potential liabilities relate to the Works being carried out by the Sub-Contractor…"

40. By clause 4.11 the Defendant acknowledged that:

> "…if it commits any breach of its obligations under and pursuant to this Agreement it could cause or contribute to a breach by the Contractor of its obligations under a Project Document and if it commits any breach of Schedule 3 (Sub-Contractor Finance Agreement Obligations) it could cause or contribute to a breach by the Contractor of its obligations under the Initial Financing Agreement and/or cause or contribute to a liability and/or risk to the Contractor under a Project Document and/or the Initial Financing Agreements (as the case may be). … "

41. The relevant parts of clause 10.1 provided that:

> "The Sub-Contractor shall, and shall procure that its sub-contractors and/or consultants shall, carry out the design (including the preparation of Design Data) and the construction and completion, commissioning and testing of the Works so that:"
>
> > "10.1.1 each Dwelling shall achieve the Certificate of Availability (Full Standard) on or before the Planned Refurbishment Completion Date or Planned Services Commencement (New Build) Date (as appropriate) for that Dwelling;
> >
> > …
> >
> > 10.1.3 the Works fully comply with and meet all the requirements of this Agreement, the Output Specification, the Sub-Contractor's Proposals, Good Industry Practice, Guidance, all Consents and all applicable Authority's Policies, Legislation and the provisions of the Tenancy Agreement..."

42. Clause 18.8 set out provisions as to responsibility for defects which were not revealed by the Stock Condition Survey and for the circumstances in which compensation was payable to the Defendant in respect of addressing the same.

43. Clause 20.3 provided as follows for the effect of a Certificate of Availability:

> "20.3.1 The parties acknowledge that the issue of a Certificate of Availability by the Independent Certifier shall indicate only that the relevant Initial Works satisfy the criteria for the issue of a Certificate of Availability as set out in the Independent Certifier's Deed of Appointment."
>
> 20.3.2 The issue of a Certificate of Availability shall in no way lessen or affect the obligations of the Sub-Contractor under the Agreement.
>
> 20.3.3 As between the Authority, the Contractor and the Sub-Contractor the Certificate of Availability shall be conclusive as to whether the relevant Initial Works have been completed in accordance with clause 20.2 of the Project Agreement (Issue of Certificate of Availability) and in respect of a Project Phase, that such Dwellings within that Project Phase have reached the relevant Availability Certification Requirements, at the date of such Certificate of Availability.
>
> 20.3.4 "The parties acknowledge that a Certificate of availability cannot be revoked for any reason after it has been issued"

44. The Construction Sub-Contract provided for a Defects Liability Period in respect of each phase of the Works for 12 months from the issue of the relevant Certificate of

Availability. At clause 21B the Construction Sub-Contract set out arrangements for the making good of Defects in the Defects Liability Period. It was pointed out that there is no equivalent provision in the Project Agreement. That is not surprising given the different nature of the agreements but it does demonstrate that the Construction Sub-Contract and the Facilities Maintenance Sub-Contract do not completely mirror the provisions of the Project Agreement.

45. Schedule 1 was headed "Output Specification" and provided:

> "Schedule 1 Part A of the Project Agreement is deemed for the purposes of this Agreement to be Schedule 1 to this Agreement and to be incorporated as if fully transposed herein provided that:
>
> 1. any references to "the Authority" therein shall be treated for the purposes of this Agreement as references to "the Contractor" save where the context clearly requires otherwise including the definitions of "Care Call", "Concierge", "General Fund", "OBC", "Planning Authority", "Public Sector Comparator", "Sheltered Housing Officer" and "Sheltered Housing Service";
>
> 2. any references to "the Contractor" therein shall be treated for the purposes of this Agreement as references to the "Sub-Contractor" save where the context clearly requires otherwise including the definitions of "Full Services", "Initial Services" and "Response Periods"; and
>
> 3. any references to "schedules" shall be references to schedules to the Project Agreement unless the context clearly requires otherwise"

46. Under the heading "Sub-Contractor's Proposals" Schedule 2 provided that Schedule 2 Part A of the Project Agreement was deemed to be Schedule 2 to the Construction Sub-Contract and "to be incorporated as if fully transposed" with the references to the Authority and to the Contractor being seen as references to the Claimant and the Defendant respectively.

47. The following provisions of the Facilities Management Sub-Contract are of particular note.

48. The following were defined terms:

> "Cyclical Maintenance and Renewal Works means the works relating to the maintenance of and renewal of elements of the Dwellings or Properties required to satisfy the Output Specification"
>
> "Expiry Date means the twenty-eighth (28th) anniversary of the Services Commencement Date (Existing Dwellings)"
>
> "Handback Standard means the standard to which the Dwellings are to be handed back to the Authority on the Expiry Date as set out in the Output Specification"
>
> "Services Commencement Date (Existing Dwellings) has the meaning given to it in the Project Agreement".

49. By clause 10.1.3 the following obligation to carry out was imposed:

> "10.1 The Sub-Contractor shall and shall procure that its sub-contractors and/or consultants shall carry out the design (including the preparation of Design Data) and the construction and completion, commissioning and testing of the Cyclical Maintenance and Renewal Works so that…
>
> 10.1.3. the Cyclical Maintenance and Renewal Works fully comply with and meet all the requirements of this Agreement, the Output Specification, the Sub-Contractor's Proposals, Good Industry Practice, Guidance, all Consents and all applicable Authority's Policies, Legislation and the provisions of the Tenancy Agreement. In the event that the Sub-Contractor enters into any sub-contract in connection with the Cyclical Maintenance and Renewal Works it shall ensure that such sub-contractor complies with and meets all the requirements of the Equality Requirements…"

50. Clause 23 dealt with the condition of the properties and the relevant part of clause 23.1 provided as follows

> "23.1 The Sub-Contractor shall ensure on a continuing basis that at all times its maintenance and operating procedures are sufficient to ensure that…
>
> 23.1.4 the Dwellings and Properties are handed back to the Contractor on the Expiry Date (or if earlier on the Termination Date) in a condition complying with the Handback Standard"

51. It is to be noted that the Construction Sub-Contract did not use or define the Handback Standard and that it did not impose an obligation to hand back any dwelling or property in accord with that standard.

52. Clause 23.5.1 provided that:

> "It shall be the responsibility of the Sub-Contractor in producing the Planned Maintenance Programme and the Cyclical Maintenance and Replacement Programme (and using the standard of performance required by this Agreement) to identify all works including, without limitation, reasonably foreseeable works that may constitute Lifecycle Works, which need to be undertaken to the Properties in order that they continue to satisfy the requirements of the Project Agreement and having regard to the handing back of the Properties in accordance with the Handback Standard"

53. Schedule 1 was headed "Output Specification" and provided:

> "This Schedule 1 of this Agreement, shall be read to incorporate Parts B and C of Schedule 1 of the Project Agreement, subject to:
>
> (a) any necessary amendments so that the Contractor's rights and obligations in Schedule 1 of the Project Agreement are with the Sub-Contractor under this Agreement;
> (b) any necessary amendments so that the Authority's rights and obligations in Schedule 1 of the Project Agreement are with the Contractor under this Agreement;
> (c) any necessary amendments to the obligations (including any relevant time periods) on the Contractor in Schedule 1 to this Agreement, so that that Sub-Contractor is able to comply with its

obligations, and exercise its rights, set out in Schedule 1 of this Agreement; and

(d) any necessary amendments to the obligations (including any relevant time periods) on the Sub-Contractor in Schedule 1 to this Agreement, so that the Contractor is able to comply with its obligations, and exercise its rights in Schedule 1 of the Project Agreement".

54. The Interface Agreement adopted the definitions in the Project Agreement but identified a number of additional or different definitions. These included "defect" which was defined as being:

> "(for the purpose of this Agreement), a "Defect" (as defined under the Construction Sub-Contract) for which the Construction Sub-Contractor is responsible under the Construction Sub-Contract"

55. Clause 6 addressed design development and in respect of "works" clause 6.1 provided as follows:

> "6.1.1. The FM Sub-Contractor confirms that as at the date of this Agreement, it has reviewed the Contractor's Proposals contained in or referred to in the Project Agreement and is satisfied that the Contractor's Proposals are such that the FM Sub-Contractor shall be able to satisfy its obligations regarding the Services.
>
> 6.1.2. The Construction Sub-Contractor undertakes to the FM Sub-Contractor that it shall use its reasonable skill and care to ensure that the Works are designed such that the Equipment is reasonably accessible by the FM Sub-Contractor for the purposes of routine maintenance and for the purposes of replacement and the FM Sub-Contractor shall satisfy itself of the same."

56. Clause 10 was concerned with defects (as defined above) and provided thus at 10.2 and 10.3:

> "10.2. The FM Sub-Contractor acknowledges that no provisions of the Construction Sub-contract shall be construed as providing a guarantee as to the lifecycle expectancy of any materials, equipment or plant provided under the Construction Sub-Contract, provided that this **clause 10.2** shall not be treated as diminishing any statutory implied terms as to the standard or quality of any materials, equipment or plant.
>
> 10.3 The parties acknowledge and agree that the Construction Sub-Contractor shall not be liable under this Agreement for the rectification of any Defects or Deductions or any SAA Cost resulting from Defects which arise after the relevant Construction Sub-Contract Expiry Date and the FM Sub-Contractor's obligations and liabilities in relation to Defects and Deductions and any SAA cost after the relevant Construction Sub-Contract Expiry Date are provided for under the FM Sub-Contract".

The Competing Declarations.

57. The first tranche of declarations sought by the Claimant related to the relevance of the Stock Condition Surveys to the Defendant's obligations. Thus at [45.1] – [45.4] and [46.1] the Claimant sought declarations that:

> "45.1. The Construction Sub-Contract does not determine that the Defendant is only required to make good defects in the Stock Condition Surveys.

> 45.2. Clause 18.8.1 of the Construction Sub-Contract does not require the Defendant to limit its work to defects identified in the Stock Condition Surveys.
>
> 45.3. The Stock Condition Surveys do not in themselves determine the scope or extent of the Defendant's works under the Construction Sub-Contract.
>
> 45.4. The Defendant is responsible for (and therefore liable to remedy) any defects that were negligently omitted from the Stock Condition Surveys.
>
> 46.1. Clause 18.8.1 of the Construction Sub-Contract neither required nor permitted the Defendant to limit the Refurbishment Works to the rectification only of defects identified in the Stock Condition Surveys, and did not limit or determine the scope of the Refurbishment Works."

58. The declarations at [45] had been made in the adjudication. To the extent that the Defendant had previously argued that its obligation was only to remedy the defects which had been identified in the Stock Condition Surveys that was no longer its case and none of these declarations were contentious before me.

59. At [46.2] the Claimant sought a declaration that:

> "Part A of the Output Specification identified the scope, nature, and extent of the Works (including the works to the Refurbishment Dwellings) that the Defendant was required to carry out pursuant to the Construction Sub-Contract, as well as the standards which the Defendant was required to meet in carrying out those Works."

60. This was contentious with the Defendant arguing that the Output Specification defined the standards which it was to meet in undertaking the Works but did not play any part in defining the scope of the Works.

61. At [46.3] – [46.6] the Claimant sought the following declarations as to the obligations imposed on the Defendant by section 2.9 and 2.10 of Part A of the Output Specification.

> "46.3. The Defendant was under an obligation pursuant to section 2.9 of Part A of the Output Specification to carry out the Refurbishment Works so that the roofs of all of the Refurbishment Dwellings would meet the lifecycle investment requirements set out in Part B of the Output Specification, and would meet the requirement in section 3.3.4 of Part B that the roofs be "*functional, operational sound secure and waterproof where appropriate [and] free from damp penetration or spalling*", regardless of whether any relevant defect had been identified in the relevant Stock Condition Survey.
>
> 46.4. The Defendant was under an obligation pursuant to section 2.10 of Part A of the Output Specification to carry out the Refurbishment Works so that the structural elements of the roofs and other structural elements of all of the Refurbishment Dwellings would have a minimum residual life expectancy of 30 years at the Expiry Date, regardless of whether any relevant defect had been identified in the relevant Stock Condition Survey.
>
> 46.5. The Defendant was under an obligation pursuant to section 2.10 of Part A of the Output Specification to carry out the Refurbishment Works so that the non-structural elements of the roofs and other non-structural elements of all of the Refurbishment Dwellings would meet the "*Minimum Design Lives and Handback Requirements*"

> stipulated in Table 1 of Part A, regardless of whether any relevant defect had been identified in the relevant Stock Condition Survey.
>
> 46.6. The Defendant was obliged, if there was a defect in any of the Refurbishment Dwellings, whether it was or ought to have been identified in the Stock Condition Survey, to remedy that defect so that the applicable life expectancy requirements in section 2.10 and Table 1 of Part A of the Output Specification were met."

62. The conflict as to the proper interpretation of sections 2.9 and 2.10 was at the heart of the dispute between the parties and those declarations were opposed by the Defendant.

63. At [46.7] the Claimant sought the following declarations as to the Defendant's obligations pursuant to sections 4.1.7 and 5.1.7 of Part A of the Output Specification in respect of the external envelope of the Refurbishment Dwellings.

> "The Defendant was under an obligation pursuant to sections 4.1.7 and 5.1.7 of Part A of the Output Specification to carry out the Refurbishment Works so that the external envelope (including roof cladding elements) of all of the Refurbishment Dwellings shall:
>
> 46.7.1. Be able to resist silently, without detriment to the required performance or appearance, the action of elements, including, but not limited to: wind, rain, hail, snow, ice, solar radiation, temperature changes, moisture movement, structural movement, construction tolerances, thermal movements, the internal environment of the building and dead or imposed loads; and
>
> 46.7.2. Resist the passage of dampness both into the building structure, fabric and accommodation, regardless of whether any relevant defect had been identified in the relevant Stock Condition Survey."

64. The Defendant said that the declarations sought were too wide and were to be qualified as being an obligation to meet the requirements of sections 4.1.7 and 5.1.7 as at the date of each Certificate of Availability and as being subject to the Defendant's entitlement to additional payment under the terms of clause 18.8 of the Construction Sub-Contract.

65. The dispute in respect of the declaration sought at [46.8] mirrored that in relation to [46.7]. The Claimant sought the following declaration in respect of the Defendant's obligations under section 5.3.2 of Part A of the Output Specification and the Defendant contended the declaration should be limited to make reference to the obligations being as at the date of each Certificate of Availability and to be qualified by the Defendant's rights under clause 18.8:

> "The Defendant was under an obligation pursuant to section 5.3.2 of Part A of the Output Specification when carrying out any new structural work as part of the Refurbishment Works and/or when carrying out any repairs to address weaknesses in the existing structure of the Refurbishment Dwellings to meet the requirements in section 4.3 of Part A in respect of loading and structural flexibility, regardless of whether any relevant defect had been identified in the relevant Stock Condition Survey."

66. Finally, at [46.9], the Claimant sought a declaration that:

> "The issue of [the] final Certificate of Availability did not absolve the Defendant of its obligations pursuant to the Construction Sub-Contract, and did not amount to any or any conclusive evidence that the Defendant had met its obligations under the Construction Sub-Contract."

67. The Defendant said this went beyond a proper interpretation of the Construction Sub-Contract because although the issue of the Certificate of Availability was not conclusive evidence that all its obligations had been met it was conclusive as to the performance of some of those.

68. For its part the Defendant sought the making of three declarations. The first, at [55.1] of the Defence and Counterclaim, was that:

> "The Defendant was not required, by the Output Specification, the Construction Sub-Contract or otherwise, to demolish and replace the existing roofs at the Refurbishment Properties, subject to paragraph 55.2 below."

69. The Claimant does not accept that this declaration is appropriate. It is not the Claimant's case that the proper interpretation of the Construction Contract requires all the existing roofs to be either demolished or replaced. The Defendant says that such a course would be necessary if the Claimant's interpretation were correct but that is advanced as part of the Defendant's arguments as to why that interpretation is not correct. It would not be correct, the Claimant says, for the court to make a declaration knocking down an "Aunt Sally" which the Defendant had itself put up and which was not part of the Claimant's case.

70. The declaration sought by the Defendant at [55.2] reflected with some expansion the qualifications which the Defendant said should apply to the declarations sought at [46.7] and [46.8] of the Particulars of Claim. It was that:

> "The Defendant was required to carry out the Refurbishment Works such that they met the requirements of Sections 4.1.7 and 5.1.7 of Part A of the Output Specification as at the date of each Certificate of Availability and was entitled and/or required to define the scope of such works through the production and agreement of the Contractor's Proposals and/or the detailed design for the Refurbishment Works, subject to its responsibility for Defects pursuant to Clause 18.8.3 of the Construction Sub-Contract."

71. The Claimant does not accept the Defendant's obligations were limited in this way and so resists the grant of this declaration.

72. Finally, the Defendant sought a declaration that:

> "The Defendant did not warrant, through the performance of the Refurbishment Works, that the Claimant would or would be able to achieve the Handback Standard under the Project Agreement."

73. Whether this declaration was appropriate will depend in large part on the conclusion reached as to the proper interpretation of sections 2.9 and 2.10 of Part A of the Output Specification.

The Approach to be Taken.

74. There is no dispute as to the approach to be taken in general terms to questions of contractual interpretation. The approach is to be based on the principles set out in the Supreme Court decision of *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 explaining the effect of the decisions in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 and *Arnold v Britton* [2015] UKSC 36, [2015]

AC 1619. In short, the court's task is to seek to ascertain the intention of the parties by reference to the language used when seen in context. I was referred to and adopt the summary of what that task entails in the context of commercial contracts given by Popplewell J in *The Ocean Neptune* [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep 654 at [8].

75. There were modest differences of emphasis between Miss McCafferty and Mr Constable in relation to the weight to be placed on the language of the contracts and that to be placed on their context but no real disagreement that I am to determine the meaning of the language used in the context of the structure of the contracts and of the nature of the parties' dealings.

76. The issues before me are matters of interpretation. There is disagreement between the parties as to the responsibility for and the extent of the problems which are said to have arisen with the sundry properties. There is, however, no claim for damages and no particular breaches are alleged: nor is there any assertion of a right to particular sums as a consequence of particular acts or omissions of either party. There was, accordingly, no evidence about such matters. That does not necessarily mean it is inappropriate to grant declarations of the kind being sought but it does mean that a degree of caution is required. That is for two reasons. The first is that although a contract is to be interpreted by reference to its language and to the circumstances as they were at the time of its formation it is nonetheless a truism that consideration of such matters is best undertaken in the context of a particular alleged breach. The potential practical consequences of competing interpretations as those consequences were envisaged at the time of the contract form part of the context in which the language of a contract is to be interpreted. The court must exercise care in having regard to what it regards as commercial common sense and to the consequences envisaged. In particular it must not rewrite the parties' contract to protect one or other side from having made a bad bargain or entered a commercially foolish arrangement. Nonetheless regard is to be had to the commercial consequences of competing interpretations as part of the exercise of ascertaining the parties' intentions from the language used when seen in its context. When the interpretation exercise is undertaken against the background of a particular alleged breach the court can form a better view of the consequences flowing from the competing interpretations. At the lowest knowledge of how events have transpired can assist in the exercise of considering what commercial consequences were properly capable of being envisaged at the time the contract was made. The second reason is related to the first. In dealing with questions of interpretation in the absence of a dispute derived from particular facts the court is not saying what the effect of the contract is in circumstances which have actually arisen. Rather it is saying what the terms of the contract mean in abstract. There is a risk that in choosing between competing interpretations in such a case the court will end up simply expressing the contract in different words. Such an exercise involves a heightened risk that the court will in effect be making a contract different from that which the parties agreed.

77. As a consequence a degree of caution is needed both in undertaking the exercise of contractual interpretation and in determining the terms of such declarations as are to be made. That caution should operate in particular as a restraint on any inclination to reformulate the terms of the proposed declarations. I am to consider whether the Claimant or the Defendant is or is not entitled to the declarations as claimed in their respective pleadings and to be wary of speculating as to other potential forms of words.

The Defendant's Obligations in respect of the Refurbishment Dwellings.

78. At the core of the current dispute are the differences as to the Defendant's obligations in respect of the life expectancy of the Refurbishment Dwellings. Resolution of these turns on the applicability and effect of sections 2.9 and 2.10 of the Output Specification as incorporated in the Construction Sub-Contract. The trigger for the proceedings had been the allegations as to failings in respect of the roofs of the dwellings but the same obligation will apply to each of the elements listed in Table 1 of Part A of the Output Specification.

79. As explained above the difference was between (a) the Claimant's case that the Defendant had to ensure the Refurbishment Dwellings had a design life of the required duration and were capable of achieving the requisite residual life expectancy at 2042 and (b) the Defendant's case that its obligation was to ensure that the Refurbishment Dwellings met the Availability Certification Requirements at the date of the Certificate of Availability but that sections 2.9 and 2.10 did not come into play and that there was no obligation as to the future life expectancy of the Refurbishment Dwellings.

80. I am satisfied that the interpretation for which the Defendant contends is substantially correct. The obligations arising from sections 2.9 and 2.10 relate to New Build works. That means that they apply to those dwellings which the Defendant has demolished and replaced. They also apply in circumstances where refurbishment works have been undertaken which involve elements of new building. In the latter circumstances the new build elements of the work undertaken on the Refurbishment Dwellings had to have a design life of the duration specified in the second column of Table 1 as at the date of the relevant Certificate of Availability. The Defendant was not, however, obliged to undertake works during the period of the Construction Sub-Contract in circumstances where those works would not otherwise be needed but where the works are necessary to enable the structures to have the residual life specified in the third column of Table 1 whether at the Expiry Date of the Construction Sub-Contract or the expiry of the Project Agreement in 2042 or any other date. Similarly, the Defendant was not obliged to replace elements of the Refurbishment Dwellings which were otherwise in sound condition and where such replacement was not envisaged in the Contractor's Proposals so as to ensure that those elements had a design life of a particular duration or so as to ensure that maintenance work by MSPS would be sufficient to cause those elements to have a residual life of the duration specified in column 3 of Table 1 in 2042. I am satisfied that such is the correct interpretation of the language used when seen in context having regard to the following factors.

81. Somewhat simplified the structure of the arrangements was that the Project was to run to 2042. At the outset of the Project the Defendant was involved through its demolition and reconstruction of some dwellings and the refurbishment of others. When those works had been completed the Defendant's involvement came to an end with MSPS then taking up the facilities maintenance role. Then the Claimant was answerable to the Council in respect of the condition and residual life of the dwellings as at the end of the Project. The structure of the arrangement is highly relevant to the consideration of the obligations which each of the parties had.

82. By the time the final Certificate of Availability was issued to the Defendant in respect of the New Build Dwellings those dwellings were to have been completed to the required standard. By the time the final Certificate of Availability was issued in respect

of the Refurbishment Dwellings the defects in those were to have been addressed and they were to have been brought up to the Availability Standard Refurbishment (Full). That arrangement contemplated the Refurbishment Dwellings being brought up to a sound standard and freed from defects. However, bringing an existing building up to a sound standard is different from putting it into a condition such that it will not need further significant refurbishment and potentially replacement as it ages during the lifetime of the Project. A building and its structural components can be in a sound condition in 2017 even if it can confidently be predicted that it or some of those components will have come to the end of its or their life at some point between 2017 and 2042. In that regard it is significant that the Availability Standard in relation to "Structure and Building Fabric" for both the Refurbishment Dwellings and the New Build Dwellings is in the following generalised terms:

> "The Area shall be fit for human habitation with permanent structural elements, building fabric and communal area floor coverings present, in sufficiently good order and not demonstrating failure or damage which materially or adversely affects use of the Site".

83. It is of note that the standard is expressed with reference to the condition of the elements at the time of the assessment and does not specify a period for which that condition must persist.

84. In light of the nature and structure of the arrangements it is not surprising that the Expiry Date is defined differently in the Project Agreement and the Construction Sub-Contract with the consequence that the Contract Period of each is different. However, this does mean that care is needed when considering the Defendant's obligations and that the "read across" from the Claimant's obligations to the Council to the Defendant's obligations to the Claimant is not complete. It is also significant that the Handback Standard is not a defined term in the Construction Sub-Contract but is a defined term in both the Project Agreement and the Facilities Maintenance Sub-Contract. Moreover, by clause 23.1.4 of the latter sub-contract MSPS is expressly required to ensure that its maintenance and operating procedures are sufficient to ensure that the Dwellings are handed back on the Expiry Date "in a condition complying with the Handback Standard". This provides strong support for the contention that the Defendant's obligations (at least with regard to refurbishment) were focused on the condition to be achieved at the date of the Certificates of Availability in contrast to the obligations of the Claimant and of MSPS which had reference to the condition to be achieved at the end of the Project.

85. Regard is to be had to the language of sections 2.9 and 2.10. The former section first makes reference to "design life" and to Table 1 when stating that "Good Industry Practice for a design life … for the elements of new build is listed in Table 1 below. … the Contractor shall meet the requirements set out in Table 1 below". That passage expressly links the design life requirements to the new build elements and it is in respect of new build that it is stipulating that the requirements be met. It is right to note that the paragraph immediately following namely "the Contractor shall demonstrate that the design life proposed for any of the elements within Table 1 below will be achieved" does not expressly limit that obligation to new build. However, the two passages are to be read together with the second most naturally being seen as requiring a demonstration that the obligation set out in the first has been satisfied rather than imposing an obligation to ensure that all elements of all the Dwellings whether new build or refurbishment achieve the design life set out in the table. One would expect such an

obligation if being imposed to be expressed clearly. In addition the use of the terms "design lives" and "design life" in section 2.9 and the reference in section 2.10 to "the design of the Sites" is more naturally read as referring to new build works undertaken by the Defendant (whether by way of the replacement of a demolished building or through the replacement of part of a Refurbishment Dwelling) rather than as to an obligation in respect of unaltered parts of a Refurbishment Dwelling.

86. The Claimant placed some reliance on the final sub-paragraph of section 2.9 and on the reference to the Defendant ensuring "that the Sites are built and/or refurbished in a manner that allows the Part B obligations to be met". I do not regard those words, when seen in context, as being of assistance to the Claimant. Mr Constable was right in his submission that this passage was a reference to ensuring that the form of the new buildings and/or the manner in which the refurbishment was undertaken were not such as to prevent or hinder MSPS in its performance of the maintenance work in due course.

87. The third sub-paragraph of section 2.10 imposed an obligation as to the way in which materials and components "forming part of the Sites, which require maintenance and replacement within the Contract Period" were to be selected, located, and fixed. That expressly contemplated that some materials and components would need maintenance and replacement but by implication indicated that others would not. This is a modest factor indicating that a wholesale replacement was not contemplated. It is also an indication that the expectation was that there would be replacement from time to time during the life of the Project. This would inevitably be the case in circumstances where the Project was to run to 2042 and some elements would naturally need to be replaced a number of times in that period. That is not readily compatible with the Claimant's emphasis on the consequences of the works to be done by the Defendant at a comparatively early stage in the life of the Project. It is, however, more readily compatible with the Defendant's contention that the intention was that where replacement was necessary it should take place during the lifetime of the Project and with MSPS and/or the Claimant having responsibility for such works after the Defendant's involvement came to an end. In this regard the Defendant was right to point out that although the dispute between the parties has focused on the obligations in respect of roofs Table 1 lists a range of other elements some of which have no designated design life and others where the design life is shorter (in some instances markedly shorter) than the 60 year design life of the roofs. To the extent that there are obligations under section 2.9 and 2.10 they apply to those elements as well as to the roofs and they must be interpreted in a way which reflects the intention in respect of all the elements.

88. The Claimant's interpretation of the Construction Sub-Contract would require the Defendant to perform refurbishment works which were not otherwise necessary during the limited period of the Construction Sub-Contract so as to ensure that the Dwellings all had the residual life expectancy at the end of the Project or, in the revised form of the Claimant's case, so as to ensure that the Dwellings would be capable of having that residual life expectancy. I remind myself that I must guard against rewriting the parties' contract and if the Defendant entered an agreement which had that effect then so be it. The consequence of the Claimant's approach is nonetheless a relevant consideration particularly when regard is had to the context of the Construction Sub-Contract. I was not initially attracted by the Defendant's argument that the Claimant's interpretation would require the Defendant to replace all the roofs of the Refurbishment Dwellings

because that was the only way the Defendant could be confident that they would have the necessary residual life expectancy at the end of the Project. However, on reflection I am persuaded that in a modified form this is a point which has force. The Defendant is right to say that the Claimant's interpretation would mean that the Defendant was having to undertake significant refurbishment works well in advance of the date they would otherwise be due. That is because it would be possible to identify a roof (or other structural element) which, while in a sound condition as at April 2017, would be likely to come to the end of its natural life and to require replacing at some point well before 2042. The Claimant's position would require the Defendant to have undertaken work on that element so as to ensure that at 2042 it could be said to have the specified residual life expectancy. The Defendant is right to say that in many instances that could only be achieved by a total replacement of that element in the course of the Construction Sub-Contract and so well before the date when total replacement would be needed if one were to have regard only to the structural effectiveness of the element. It would have been possible for the parties to have agreed that the Defendant was required to put the Refurbishment Dwellings into a state such that minimal work was needed from the Claimant or MSPS and to warrant that all elements of those dwellings would have the required residual life expectancy in 2042 and to contemplate that this would require the Defendant to replace structural elements before the end of their natural life. However, that would be an unusual arrangement (not to say a wasteful one) and if such were the parties' intention one would have expected it to be set out in clear terms. Instead it is not an interpretation which can readily be discerned from the terms of the Construction Sub-Contract.

89. The Sub-Contractor's Proposals are of some relevance to the preceding point in that they were part of the context in which the parties were contracting. Miss McCafferty contended that the effect of clause 1.8 of the Construction Sub-Contract was that the Claimant's knowledge of the terms of the Sub-Contractor's Proposals was not to be seen as an acceptance that performance of the works specified therein would fulfil the Defendant's obligations. I do not agree that this was the effect of clause 1.8. That clause was dealing with very different circumstances. It was addressing the question of whether knowledge on the part of the Claimant of how the works had been performed and of related matters relieved the Defendant of its obligations under the Construction Sub-Contract and provided that such knowledge did not excuse a failure of performance. It had the effect that if the Defendant had failed to perform the works properly it could not invoke the Claimant's knowledge of or even the Claimant's approval of the way in which the works had been performed as a defence. The Claimant's knowledge of the Sub-Contractor's Proposals is relevant at an earlier stage in the process and to a different question namely that of determining the extent of the Defendant's obligations under the Construction Sub-Contract. Those proposals formed an important part of the context of that contract. It is important to note that: "Sub-Contractor's Proposals" was a defined term in the Construction Sub-Contract; those proposals were set out in Schedule 2; the Refurbishment Programme was defined by reference to them; and reference was made to them in clause 10.1.3 when setting out the requirements which the Defendant's works were to satisfy. The situation is very different from that of proposals which are set out in pre-contract negotiations and which are superseded by a subsequent written agreement. Here the proposals were expressly referenced in the Construction Sub-Contract. In those circumstances the Defendant is right to say that account is to be taken of them as part of the context in which that contract is to be interpreted. It is, accordingly, relevant to note the extent of the work

envisaged in those proposals and in particular to note that the replacement of sound structures before the end of their natural life was not contemplated.

90. This point is reinforced by the terms of the Project Agreement which similarly defines "Contractor's Proposals" and incorporated them as a schedule with the Contractor's Proposals being relevant either directly or by reference to the definitions of the Cyclical Maintenance and Replacement Programme, the Initial Works, the Refurbishment Works and the Refurbishment Programme. The Project Agreement was an important part of the context of the Construction Sub-Contract and is significant both as indicating the works which it was envisaged would take place during the construction phase and also as indicating that renewal was contemplated as taking place during the maintenance phase of the Project. This is powerful support for the Defendant's contention that the intention was that it was to undertake limited and identified works.

91. The Defendant no longer places as much weight on the terms of the Stock Condition Surveys as it did previously. Rightly it no longer contends that they should be regarded as determining the work to be performed. However, it says that the Stock Condition Surveys remain relevant as part of the context. In that regard the Defendant says it is to be noted that the expected life of the roofs is identified and that for some the need to replace the roof is described as likely to take place in the Facilities Management phase of the Project rather than as part of the initial works. This point has some limited force and supplements the powerful consideration flowing from the Contractor's Proposals which I have just noted.

92. Mr Constable referred me to the terms of the Claimant's tender to the Council. It is right to note that at 5.0 under the heading "Value for Money and Best Value" the Claimant said that it had arranged matters so that boilers and roofs would only be replaced when it was necessary to do so. The Claimant contrasted this approach with what it said was a more costly one where "elements in refurbishments are needlessly replaced during the capital phase to provide a straightforward starting point". Mr Constable stressed the Claimant's previous invocation of Value for Money saying that the interpretation now being advanced by the Claimant would require the replacement of sound structures before the end of their natural life and was inconsistent both with Value for Money and with the approach which the Claimant had told the Council it would adopt. Forensically attractive although this argument was it cannot assist me in the current exercise. Although the preamble to the Project Agreement made reference to the tender process and to the Council's standing as a "Best Value authority" the tender was not a contractual document. I must look to interpret the contractual documents and if the proper reading of those in context leads to a result contrary to that which the Claimant had, when tendering, said would be achieved or which is potentially not the most cost effective then those considerations should not cause me to adopt a different interpretation.

93. The effect of the definition of "Availability Standards Refurbishment (Full)" is that the standard to be achieved by the Defendant to obtain the grant of a Certificate of Availability is defined in Appendix B of Part A of the Output Specification and Section 2 of Part B of the Output Specification. The language there is not necessarily incompatible with the Claimant's case as now formulated. However, it is more naturally read as consistent with the Defendant's interpretation of the dealings and as imposing an obligation to put the Refurbishment Dwellings into a particular condition as at the date of the relevant Certificate of Availability with attention directed to how the

structure was functioning at that time without regard to the structure's life expectancy. It is also of note in this regard that the Availability Standards for New Build Dwellings and Refurbishment Dwellings are defined separately. The provisions of the table in section 2.1 of Part B of the Output Specification are identical for each but the definitions are separate. This provides some, though again limited, support for the view that the obligations were different and that the Claimant's approach which conflates those obligations at least to some extent is inconsistent with this.

94. The Claimant accepts that as between it and the Defendant the Expiry Date for the purposes of clause 2.10 is to be seen as the Expiry Date as defined in the Construction Sub-Contract namely 12 years after the issue of the final Certificate of Availability in respect of the initial works. That would be 6th April 2029. Two points follow from this. The first is that it leads to a somewhat unnatural reading of clause 2.10 with the words there having one meaning as between some parties and a different meaning between others. It would be possible for the contractual arrangements between the parties to have that effect but it would be an artificial effect and the Defendant's reading of the provisions fits more naturally with the language used. Second, it has the consequence that even on the Claimant's reading of the obligations it could become necessary for major works to be undertaken by the Claimant or MSPS. Thus if the expiry date between the Claimant and the Defendant is April 2029 and if it is by reference to that date that the life expectancy of 30 years is to be calculated then this would not of itself preclude the need for further works to ensure that there was a residual life expectancy of 30 years at the Handback date in 2042. This is perhaps best seen as demonstrating the artificiality and complexity of the Claimant's interpretation.

95. The terms of clauses 4.1.7 and 5.1.7 in respect of the "External Envelope" of the dwellings fit more readily with the Defendant's interpretation than with the Claimant's. Those provisions envisage that the refurbishment would involve the replacement of some items and the upgrading of others to bring them up to a sound standard. However, they do not contemplate the replacement of otherwise sound structures which are wind and watertight so as to ensure that structures are in place which will have the requisite life expectancy at the expiry date.

96. The Interface Agreement is part of the context of the dealings between the Claimant and the Defendant. The provisions of clause 10 of that agreement provide some albeit limited support for the Defendant's contentions. That clause provides for MSPS to be entitled to require the Defendant to remedy defects in the Defendant's work and for compensation in the event of failure to do so. However, it is significant that by clause 10.2 MSPS "acknowledges that no provisions of the Construction Sub-Contract shall be construed as providing a guarantee as to the lifecycle expectancy of any materials, equipment or plant provided under the Construction Sub-Contract" subject to a proviso as to terms implied by statute. Moreover, clause 10.3 clearly contemplates MSPS having an obligation in respect of continuing works.

97. In support of the Claimant's interpretation of the Construction Sub-Contract Miss McCafferty said that the Claimant was dependent on the Defendant performing its obligations properly in order for the Claimant to be able to satisfy the Handback Standard at the end of the Project. That argument has force in respect of the New Build Dwellings because the contract expressly provided for those to be constructed by the Defendant and it can readily be understood that a failure by the Defendant to construct the dwellings properly would impact on the life of the dwellings and on the residual life

expectancy at the end of the Project. However, it begs the question in respect of the Refurbishment Dwellings which is that of the extent to which the Defendant was obliged to undertake the rebuilding of those dwellings or the replacement of the structural elements of them. In particular the argument does not assist with the question of when in the life of the Project structural elements had to be replaced. Similarly, it does not assist with the question of whether during the period of the Construction Sub-Contract the Defendant had to undertake the replacement work which would be necessary for the dwellings or the structural elements thereof to have the required residual life expectancy at the end of the Project but which was not necessary for those dwellings to be in a sound condition at the date of the relevant Certificate of Availability.

98. A related argument for the Claimant is based on the fact that all involved knew that substantial roof replacement works were not envisaged as a part of the Cyclical Maintenance and Replacement Programme. The Claimant says that this is an indication that the parties were proceeding on the footing that such works would not be undertaken in that phase of the Project. It follows, the Claimant says, that the intention was that in the Design and Construction Phase the Defendant would put the roofs into such a condition that they would have the requisite life expectancy at the Handback date without further substantial work having been undertaken in the subsequent phase. There is force in this contention but it is far from conclusive and cannot warrant a strained interpretation of the terms of the contracts.

99. The Claimant's reference to the fact that the Defendant participated in the consortium which formed the Claimant and in the engagement of Michael Dyson Associates Ltd under the Stock Condition Survey does not advance matters. Miss McCafferty was right to say that this was part of the factual matrix in which the contractual documents were to be interpreted and to say that it meant that the Defendant was aware of the Claimant's obligations under the Project Agreement but it does not go beyond that. The position is that there were a series of related contracts giving effect to the Project. Each of the contracts forms part of the context against which the other contracts are to be interpreted. Indeed, this was provided for explicitly in clause 4.9 of the Construction Sub-Contract and reference was there made to the fact that a breach of that contract by the Defendant might cause the Claimant to be in breach of its obligations under the Project Agreement. I do not, however, find that of assistance in the task before me of establishing the extent of the Defendant's obligations.

100. It follows that I prefer the Defendant's interpretation of the effect of the Construction Sub-Contract in this regard and I will consider below the consequences of that for the declarations sought.

Does the Output Specification form Part of the Definition of the Scope of the Works or is its Relevance limited to defining the Standard to which the Works are to be performed?

101. Although this was strictly a separate issue between the parties and as such may be relevant when considering the wording of the proposed declarations its main relevance was as part of the debate I have just addressed about the effect of sections 2.9 and 2.10 of Part A of the Output Specification. As such it was closely connected with the contentions as to the relevance of the Contractor's Proposals and the Sub-Contractor's Proposals which I have considered at [89] and [90] above. The Claimant's contention that the Output Specification operated to define the work to be performed was an aspect

of the argument that the Defendant had to ensure the Refurbishment Dwellings had a particular potential life expectancy at the Expiry Date. Conversely, the Defendant said that the issue of what works it was to perform was a prior question and that the Output Specification was relevant when considering the standard to be achieved but not when considering what was to be done.

102. The Defendant's argument could be supported by reference to clause 10.1.3 of the Construction Sub-Contract which required the Defendant to carry out the design, construction, completion, and testing of the Works so that "the Works fully comply with and meet all the requirements of this Agreement, the Output Specification, the Sub-Contractor's Proposals, Good Industry Practice, Guidance, all Consents and all applicable Authority's Policies, Legislation and the provisions of the Tenancy Agreement". That was said to be identifying a set of standards which had to be met in the performance of the separately-defined Works. Similarly, the Output Specification was defined in clause 1.1 as being "the output specification for the Works contained in Schedule 1 (Output Specification)". It is said that if the Output Specification is defined by reference to the Works then how can it operate to define the scope of the Works? The latter point while having logical force becomes less compelling when the definition of Works is considered. In clause 1.1 Works is defined as being "all of the works …to be undertaken in accordance with this Agreement to satisfy the Output Specification".

103. In my judgement there was an element of artificiality in both stances though it was most marked in the Defendant's argument. Both arguments overlooked the fact that it is almost inevitable in contracts of the length and complexity of those connected with the Project that there will be infelicities in the drafting and that there may be definitions which are worded in a way which on a strict logical analysis is circular but whose meaning will be more or less easily and clearly discerned when seen in context. That is why, as must any contract, the Construction Sub-Contract must be read as a whole and in context. When that is done the existence and terms of the Output Specification are relevant in the exercise of the determining the scope of the Works to be performed by the Defendant and their relevance is not limited to setting the standard for those works. However, the terms of the Output Specification must themselves be seen in the context of the Construction Sub-Contract and the related contracts as a whole and it is from the Construction Sub-Contract as a whole that the scope of the Works it is to be derived.

The Effect of the Certificate of Availability and the Defendant's Obligations in respect of the External Envelopes of the Refurbishment Dwellings.

104. These are logically distinct questions but as will be seen they are closely related and can conveniently be addressed together. They can also be considered shortly in light of the conclusions I have already reached.

105. The declaration which was sought at [46.9] of the Particulars of Claim was in stark terms and was intended to counter the Defendant's former stance that the issue of a Certificate of Availability was conclusive evidence that it had performed all its obligations. The Defendant's position had been refined and before me it was not contended that such a certificate was conclusive evidence of the performance of all obligations but rather that it was conclusive as to the performance of those necessary for the grant of the certificate.

106. That development (or clarification) of the Defendant's position meant that the dispute in this regard was more apparent than real. The terms of clause 20.3 of the Construction Sub-Contract are clear. The issue of a Certificate of Availability is conclusive as to the matters stated in 20.3.3 namely "whether the relevant Initial Works have been completed in accordance with clause 20.2 of the Project Agreement..." and in respect of a Project Phase that such Dwellings [as are] within that Project Phase have reached the relevant Availability Certification Requirements at the date of such Certificate of Availability". The provision at 20.3.2 that the issue of the certificate "shall in no way lessen or affect" the Defendant's obligations is subject to the provision in 20.3.3. The effect is that the issue of a certificate does operate as conclusive evidence as to particular and significant matters but does not preclude any claim arising out a breach of the Defendant's obligations to the extent that they are not covered by those matters.

107. I have set out the position in somewhat general terms but that is the inevitable consequence of the course which has been taken in the proceedings and which requires consideration of the terms of the Construction Sub-Contract in circumstances where no particular breaches are alleged let alone substantiated. The practical effect of the terms will need to be worked out in the context of particular allegations. When such allegations are made it will be possible to determine whether a certain alleged breach amounts, if proven, (a) to a failure to complete the Initial Works in accordance with clause 20.2 of the Project Agreement or to a contention that dwellings within a Project Phase had not reached the Availability Certification Requirements: in either of which cases the certificate will operate as a conclusive answer or (b) to a breach of some other obligation of the Defendant: in which case the certificate will not be conclusive.

108. The dispute as to the obligations in relation to the external envelopes of the Refurbishment Dwellings under sections 4.1.7 and 5.1.7 of the Output Specification can also be addressed shortly.

109. The dispute is as to whether the obligation that the external envelope meets the requirements of section 4.1.7 relates solely to its state at the date of the Certificate of Availability or involves an obligation to ensure that the state persists for some further period. The answer flows from the conclusions which I have set out above as to the proper interpretation of the Construction Sub-Contract and the obligations in relation to sections 2.9 and 2.10 of Part A of the Output Specification. I have already noted, at [95] above my assessment that the wording of sections 4.1.7 and 5.1.7 supported the Defendant's interpretation of the other provisions and of the Construction Sub-Contract more generally. Similarly, here the Defendant's interpretation accords best with the language and context of the Construction Sub-Contract. Consistent with the effect of that contract as a whole the obligation in respect of the Refurbishment Dwellings is to put them into a particular condition at the date of the relevant Certificate of Availability but without an obligation to ensure that such condition will persist for a particular further period of time.

110. Although the Defendant's reading of the provisions is correct it is necessary to guard against artificiality and to remember that I am addressing matters in the abstract and not in the context of particular alleged breaches. It will be in the latter context, if and when it arises, that it will be necessary to consider the extent to which satisfaction of the Availability Certification Requirements, as to which the issue of the Certificate of Availability will be conclusive, met the obligations under 4.1.7 and 5.1.7 in the particular context.

The Declarations which follow from that Analysis.

111. As I noted at [76] and [77] above the fact that I am addressing the interpretation of the contracts in the absence of particularised allegations of breach means that caution is necessary when considering whether to make a declaration in a form different from that pleaded. I will set out below my conclusions as to the effect which my interpretation has for the declarations sought. When determining the form of order to be made as a consequence I will invite submissions as to whether it is appropriate to make declarations in different terms in the light of my conclusions but my current and provisional view is that such would not be appropriate.

112. The Defendant accepted that the declarations sought at [45] and [46.1] of the Particulars of Claim properly reflected the effect of the Construction Sub-Contract and there was no argument about those issues before me. The Defendant went so far as to join with the Claimant in requesting that declarations in those terms be made. However, it is well-established that as a matter of practice the court will not normally make declarations as to matters which are not in dispute between the parties. Thus in *Thomas Brown Estates Ltd v Hunter Partners Ltd* [2012] EWHC 21 (QB) Eder J explained, see at [16], that caution was needed and that in the absence of a "compelling reason" the normal course would be to decline to grant a declaration in respect of matters which were agreed. It is not suggested that there is anything approaching a compelling reason for making a declaration as to non-contentious matters here. In those circumstances I will not make declarations in those terms but in due course the order to be drawn up will be preceded by a recital recording the parties' agreement that the Construction Sub-Contract had the effect stated in the proposed declarations.

113. In respect of the declaration sought at [46.2] I have explained at [101] – [103] above that the Output Specification is relevant as part of the material from which the scope of the Works is to be determined. Its relevance is not limited to setting the standard by which the Works, whose scope is defined otherwise, must be performed. To that extent the Claimant's contention was correct. However, as pleaded the declaration at [46.2] is not a correct statement of the position because it could be read as identifying the Output Specification as the sole determinant of the scope of the Works. Accordingly, a declaration in those terms cannot be granted.

114. To the extent that the declaration at [46.3] is saying that the Defendant's obligations were not limited by the Stock Condition Surveys the point is no longer contentious. However, the first limb of the declaration with the reference to meeting the lifecycle investment requirements in Part B of the Output Specification is not in accord with the interpretation I have found to be correct. Moreover, the Defendant is right to say that the reference to section 3.3.4 of Part B is incomplete because it does not include the qualification that enhancements are not required. This declaration also cannot be granted.

115. The declarations sought at [46.4] and [46.5] do not accord with the interpretation which I have found to be correct and cannot be granted.

116. The first limb of the declaration sought at [46.6] is again correct in making the point that the Defendant's obligations are not limited by the Stock Condition Surveys but the further reference to the life expectancy requirements is not in accord with the correct interpretation of the Construction Sub-Contract and cannot be granted.

117. Similarly the declaration sought at [46.7] makes the now uncontentious point as to the limited relevance of the Stock Condition Surveys. However, in the light of my conclusion as to the date at which the Defendant's obligations in respect of the external envelope were to be satisfied it is at best incomplete as a statement of the effect of the contract.

118. The same point applies in relation to the declaration sought at [46.8]: it is correct so far as it goes but is incomplete and as such inappropriate.

119. The declaration sought at [46.9] correctly says that the issue of the Certificate of Availability did not absolve the Defendant of all its obligations but it is not a correct statement of the terms of the Construction Sub-Contract because it does not reflect the fact that the Certificate was conclusive as to the performance of some of the Defendant's obligations.

120. I turn to the declarations sought by the Defendant. That sought at [55.1] of the Defence and Counterclaim is not appropriate. I have already explained that the Claimant is not contending that the Defendant was obliged to demolish and replace all the existing roofs. The question of whether a particular roof is or is not to be replaced will depend on whether such replacement was necessary to ensure it was in the required state at the date of the Certificate of Availability. The qualification of the proposed declaration by reference to the terms of [55.2] does not save it. That is because the words of [55.2] define the scope of the Works too narrowly and in addition the reference to sections 4.1.7 and 5.1.7 is an incomplete summary of the Defendant's obligations. Thus a declaration in the terms of [55.2] is not appropriate whether as a free-standing declaration or as a qualification of the terms of that sought at [55.1]. However, the declaration sought at [55.3] does accord with my interpretation of the Defendant's obligations and is to be granted.