Neutral Citation Number: [2024] EWHC 667 (TCC)

Case No: HT-2020-000165

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

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

Date: 25/03/2024

Before :

MRS JUSTICE JEFFORD DBE

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Between :

(1) BRENDA VAINKER
(2) FRANCOIS VAINKER **Claimants**

- and –

(1) MARBANK CONSTRUCTION LIMITED
(2) MERCER & MILLER (a firm)
(3) SCd ARCHITECTS LIMITED **Defendants**

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Daniel Crowley and Kate Legh (instructed by **Fisher Scoggins Waters LLP**) for **the Claimants**
Robert Clay (instructed by **Fletcher Day Ltd.**) for the **First Defendant**
Benjamin Fowler (instructed by **DWF**) for the **Third Defendant**

Hearing dates: 5-6 October 2022, 10-13 October 2022, 17-20 October 2022, 24 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE JEFFORD

MRS JUSTICE JEFFORD:

Introduction and background

1. This claim arises out of the construction of a residential property known as The Croft at Walpole Gardens, Strawberry Hill, Twickenham, which I will refer to as the House or the property. The property is owned by the claimants, Mr and Mrs Vainker, who complain of defects of greater and lesser seriousness in the property. It was constructed by the first defendant, Marbank, and largely designed by the third defendant architects, SCd. Practical completion was certified on 15 May 2014. These proceedings were not commenced until 4 May 2020. Unusually, and for the reasons I will come to, the claimants' focus in respect of some of the larger claims was on advancing a claim under the Defective Premises Act 1972 ("the DPA") rather than pursuant to contract or in tort.

2. Ownership of the property was admitted by the first defendant, Marbank, subject to proof of title and not admitted by the third defendant, SCd. No further submissions were made on ownership at trial and I take it that no issue arises about this. As joint freehold owners, the claimants purchased the land and the house that then stood on the land in 1999. The former house was demolished in 2003. The intention was to build a new house on the land. This was a project in which Mrs Vainker very much took the lead on behalf of the claimants. Mr Vainker was living and working in Luxembourg and, in his evidence, gave his address as in France. The House was intended as a home for Mrs Vainker on her retirement.

3. In June/July 2009 she first met Steven Clifton of SCd. It was Mrs Vainker's case that she told Mr Clifton of the following requirements, and also her pleaded case that Marbank was or ought to have been aware of these requirements:

   (i) She wanted an environmentally friendly, modern house, using modern building techniques for her retirement years.
   (ii) The house had to have natural light and space in a calm and peaceful environment to enable her to practise meditation.
   (iii) The house was to be a home for herself and her two adult children and a base for Mr Vainker when he was in the UK.
   (iv) The house had to have 5 bedrooms (one for each member of the family).
   (v) The house had to be easy to maintain suitable for the needs of someone growing older. The house had to fall within their budget which was strictly limited by the family's resources
   (vi) They planned to put all their resources into the project but the budget was limited because they were at the end of their working lives
   (vii) If the project was to succeed the design would have to be reasonably achievable within budget and it was crucial that costs did not get out of control.
   (viii) Mrs Vainker had never built a dwelling house before and so was wholly reliant on others such as the defendants and other building professionals who became part of the project and had greater knowledge and expertise.

4. Marbank denied that it was aware of these alleged requirements and denied their relevance. SCd in the main admitted that Mr Clifton was told of those requirements but denied that he was aware that the property was to be a home for Mrs Vainker's adult children or that each family member should have a separate bedroom. It was suggested to Mrs Vainker in cross-examination that it was not her evidence that she had told Mr Clifton that the house was to be the permanent residence of her adult son and her response

was that she was pretty sure that she had told him that she had two children who were still students. It was further denied by SCd that SCd was instructed that the property should be particularly easy to maintain and asserted that it was envisaged that any maintenance would be carried out by contractors and not by the claimants themselves.

5. It was not the claimants' case that any of these requirements formed terms of any contract with the defendants but they were potentially relevant to the exercise of reasonable care and skill and to the measure of damages.

6. In June 2010, the claimants engaged Consol Associates, Jon Bowler, as quantity surveyors for the project.

7. SCd was engaged by Mrs Vainker in or about mid-2011. There is a dispute about the formation and terms of this contract. At about the same time, Mercer & Miller were engaged as Project Manager/ Contract Administrator. Mercer & Miller ("M&M") were party to these proceedings, as second defendant, until shortly before trial when the claim against them was settled. CBG Consultants Ltd. ("CBG") were also engaged to provide M&E services including a Mechanical Ventilation with Heat Recovery System (MVHR). Claims were made against them by Mrs Vainker but settled, by an agreement dated 5 April 2018, before any proceedings were issued.

8. On 26 March 2013, Marbank and Mrs Vainker entered into a contract on the standard form JCT Standard Building Contract Without Quantities 2011, with amendments, and with Contractor's Design Portion. The contract was under seal.

9. Works began in 2013 and practical completion was certified as having been achieved on 15 May 2014. In summary, during the course of the works, complaints were made about the state of the brickwork and water ingress. Following completion, complaints of water ingress continued. There were extensive snagging lists produced and other defects alleged but, equally, numerous defects were clearly remedied. A particular issue arose with the MVHR system which was the subject matter of the settlement reached with CBG.

10. These proceedings were commenced by a claim form issued on 4 May 2020 and, as part of the case management of the proceedings, directions were given for the claimants' claims in respect of defects to be set out in the form of a Scott Schedule.

11. It is common ground that the main defects in monetary terms, and as set out in the Scott Schedule, are: brickwork (items 1 to 7), glass (items 8 and 9), Accoya (item 10), the green roof (item 11), rooflight (item 12), Jura worktops and tiles (items 14 and 23), and the brise soleil (item 28). Nonetheless, the claimants also advanced claims that relate to all the defects set out in the Scott Schedule which runs to 64 items and includes matters such as the MVHR system. The upshot has been that, on the one hand, disproportionate amounts of time and ink have been spent by all parties on low and very low value items, whilst, on the other hand, many defects have been addressed in a high level manner which has made it difficult to identify and address the relevant issues and evidence and little attention has been paid to the specification of remedial works.

The basis of claims: contract, tort and the Defective Premises Act 1972

The contract with SCd

12. Mrs Vainker's pleaded case was that in or around mid-2011 she entered into a contract with SCd for architectural services, in connection with the property, falling under the then RIBA work stages E to L, stage E being technical design and stage L post-practical completion services. No further details of how the contract was said to have been formed were pleaded. It was said that Mrs Vainker did not sign any written terms of agreement with SCd and that Mr Vainker was provided with an undated and unsigned copy of the RIBA Standard Conditions of Appointment for an Architect in 2019. This was not addressed in Mr Vainker's evidence but Mrs Vainker said that she recalled being sent an unsigned and undated copy in 2018.

13. On the basis of the case that there was a simple contract, however formed, rather than one incorporating detailed written terms, it was Mrs Vainker's case that there were implied terms of the contract that:

    (i) SCd would carry out its services with reasonable care and skill;
    (ii) SCd would carry out its services so as to comply with relevant applicable legislation, standards, guidance and good practice;
    (iii) SCd would during the course of construction review its design and check that it would work in practice.

14. The latter two of these implied terms are in my view particular examples of the exercise of reasonable care and skill that may arise on the facts of a particular case. Whether an obligation to review design arises is a discrete matter which may be relevant where a party seeks to rely on a continuing duty in response to a limitation defence.

15. This case on contract formation was sparse to say the least. It was met by SCd with considerably more detail and, as Mr Fowler pointed out, there was no response to this case in the claimants' Reply. Nor was there any further elucidation in Mrs Vainker's witness statement. In her witness statement (at paragraph 11) Mrs Vainker said no more than that she entered into a contract with SCd appointing them as architect for the project and for RIBA stages E to L. She repeated that she had not signed any written terms of agreement.

16. SCd's case was as follows. On 2 October 2011, at the first project meeting attended by Mrs Vainker, Mr Clifton and Mike Fitzgerald of M&M, Mr Fitzgerald said that he would be co-ordinating the consultants' appointments. The following day, SCd sent to him its proposed terms which included the RIBA Standard Conditions of Appointment for an Architect 2010. M&M instructed SCd to proceed with the provision of its services. In so doing, M&M was acting as the agent of Mrs Vainker (but not Mr Vainker). Further, on or before 21 October 2011, Mrs Vainker paid SCd's invoice number BV11159 in respect of stage E. On either of these bases, Mrs Vainker accepted SCd's offer to provide its services on the basis of the RIBA Standard Conditions.

17. I note that Mr Clifton did not expressly address this meeting in his evidence and there were no minutes of the meeting, although there is an agenda for a meeting on this date which included "Appointments" as an item. But he certainly did email the Architect's

Appointment documents to Mr Fitzgerald on 3 October 2011 under cover of an e-mail which stated that it was for the client's approval. The client was named as Mrs Vainker.

18. SCd accepts that it did not receive back a signed copy of the appointment, despite sending further copies to M&M in May 2012 and October 2013 and a yet further copy to Mr Vainker in 2019.

19. Against this background, Mrs Vainker was asked in cross-examination about paragraph 11 of her witness statement. Her evidence was that she had been told about an agreement but it was not gone through with her and never signed. She continued:

"… so I continued on the basis of an agreement. I raised this once with the contract administrator. He said it didn't matter that I hadn't signed it and that was the end of the conversation. Initially I had understood that, certainly as regards the construction, he would be responsible for ensuring that things were signed but they weren't signed."
She agreed that she understood that there were some standard terms that SCd said applied to the contract.

20. Mrs Vainker was later asked about correspondence in 2014 relating to outstanding invoices and in which SCd relied on the standard terms. It was put to her that she did not at the time say that the standard terms did not apply (with which she agreed) and that the reason was that she knew that these were the terms on which SCd was retained. Her response to that was that she had not engaged with Mr Fitzgerald about it and was neglectful.

21. In my judgment the position is this. It can readily be inferred from the fact that SCd sent the draft Appointment to M&M that that was because M&M had been held out as acting as Mrs Vainker's agent. In any event, and whether or not an agency relationship existed, it is inherently unlikely that M&M would not have forwarded this to their client and that would also be inconsistent with Mrs Vainker's acceptance that she was told about an agreement and knew there were some standard terms. Mrs Vainker's evidence was not that she had never seen the terms but rather that she had not been taken through them and had not signed them. Her evidence that Mr Fitzgerald told her that her signature did not matter is consistent with SCd's appointment being on the basis of the standard terms whether or not the Appointment was signed. Signature is not a pre-requisite of a concluded contract and the facts that SCd were asked to provide their services and paid accordingly is sufficient acceptance by conduct.

22. Accordingly, I find that the contract between Mrs Vainker and SCd did incorporate the standard terms of the RIBA Architect's Appointment 2010.

23. As against SCd, Mrs Vainker's claims for damages for breach of contract in respect of design are time-barred. I do not understand that to be seriously in issue. Although failure to review the design is pleaded, no case has been properly advanced that a duty to do so arose or that any claim for breach would not be time-barred. There are, however, a number of reasons why the contractual terms remains potentially relevant.

24. Firstly, clause 2.1 of the Standard Conditions provides that:

"The Architect shall exercise reasonable skill, care and diligence in accordance with the normal standards of the Architect's profession in performing the Services …"

There is no issue that SCd owed Mrs Vainker a duty of care in tort co-extensive with this contractual duty.

25. SCd relies on the terms of the Schedule of Services to determine the scope of the services it was obliged to provide and correspondingly the extent of any duty of care in tort. In particular, SCd relies on the description in the Services which provides that where the Designer is engaged to provide services during the construction phase, the services include "making the appropriate number of visits to the site for: inspection generally of the progress and quality of the Relevant Design as built".

26. Secondly, clause 7.3 of the Standard Conditions contains a net contribution clause. That clause provides:

"… the liability of the Architect shall not exceed such sum as it is just and equitable for the Architect to pay having regard to the extent of the Architect's responsibility for the loss and/or damage in question and on the assumptions that:
7.3.1 all other consultants and contractors providing work or services for the Project have provided to the Client contractual undertakings on terms no less onerous than those of the Architect under this Agreement;
…
7.3.3 all of the persons referred to in this clause have paid to the Client such sums as it would be just and equitable for them to pay having regard to the extent of their responsibility for that loss and/or damage."

27. I note only, at this point, that SCd's case is that it can rely on this clause in respect not only of liability in contract but also in respect of liability in tort and under the Defective Premises Act and that, contrary, to the claimants' case, it can do so even where there is no claim for contribution.

28. So far as the second claimant, Mr Vainker, is concerned, he was not party to the contract with SCd and I can see no basis on which SCd can be said to have assumed responsibility to him giving rise to a relevant duty of care in tort. Mr Clifton's evidence, which was not challenged, was that he was unaware of Mr Vainker until December 2013 when discussions were taking place relating to the brickwork. No case was put to Mr Clifton in cross-examination, or evidence elicited from him, that would demonstrate that SCd had assumed responsibility to Mr Vainker so as to give rise to a duty of care to avoid causing economic loss.

29. Accordingly, as SCd submitted, in my judgment, the only cause of action that could possibly be open to Mr Vainker in respect of any or all of the alleged defects was that under the DPA.

30. It is convenient to add at this point that the position is the same as between Mr Vainker and Marbank. When I come to address the individual defects and, indeed, the counterclaim, I will generally refer to the claimants (in the plural) and to the claimants' claim because that is terminology of the trial. But, unless I find that Mr Vainker has a claim under the DPA, the reference will be, for the purposes of damages, to Mrs Vainker and not her husband. Similarly, in respect of Marbank's counterclaim pursuant to its contract with Mrs Vainker, any claim can only be against her.

The contract with Marbank

31. A contract ("the Contract") was entered into between Mrs Vainker (only) and Marbank, dated 26 March 2013, in writing and under seal. Accordingly, as against Marbank no limitation issues arise. The Contract Sum was £1,245,725. M&M were named as the Contract Administrator and Consol Associates as the Quantity Surveyor.

32. The Contract was made on the JCT Standard Building Contract Without Quantities 2011, with amendments, and included a Contractor's Designed Portion. SCd's Specification and construction issue drawings were issued to Marbank on 13 February 2013 as Contract Administrator Instruction ("CAI") no. 1.

33. I do not set out all of the terms that were pleaded and relied on, not least because this was a standard form contract, but, in particular, the terms of the Contract included the following:

    (i) Clause 2.1:
    "The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, ..."

    (ii) Clause 2.2 provided for the Contractor to carry out the Contractor's Designed Portion, including the selection and specification of materials, goods and workmanship.

    (iii) Clause 2.3.1:
    "All materials and goods for the Works ... shall so far as procurable be of the kinds and standard described in the Specification ..."

    (iv) Clause 2.3.2:
    "Workmanship for the Works ...shall be of the standards described in the Specification ..."

34. The date for completion was 17 February 2104. There was provision for the payment of liquidated damages for delay at a rate of £5,000 per week. The Rectification Period was 12 months.

35. I address below further provisions of the Contract which are relevant to Marbank's counterclaim.

The Defective Premises Act 1972

36. Section 1(1) of the DPA provides:

    "Duty to build dwellings properly
    (1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty –
    (a) if the dwelling is provided to the order of any person, to that person; and
    (b) without prejudice to paragraphs (a) above, to every person who acquires an interest (whether legal or equitable in the dwelling

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

In this case, a duty would be owed to Mrs Vainker as the dwelling was provided to her order and, as indicated above, a duty would be owed to Mr Vainker as a person with a proprietary interest in the dwelling.

37. Section 1(5) provides:

"Any cause of action in respect of a breach of duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1980, to have accrued at the time when the dwelling was completed, …."

38. Since the decision in *Thompson v Clive Alexander & Partners* (1992) 59 BLR 77, the duty owed under s. 1(1) has been construed as a single duty to see that the outcome is a dwelling fit for habitation when completed. Although in a footnote to the claimants' opening, the claimants said that they reserved the right to argue that the section imposed three discrete duties, no further argument was advanced.

39. In *Rendlesham Estates plc v Barr Ltd*., Edwards-Stuart J was concerned with defects in an apartment building which included issues with the intercom access system and defects that could lead to the occurrence of mould and damp. The judge drew the authorities together as follows and the claimants rely on his approach:

"*66. I consider that there can be a breach of section 1 of the Act if, when a building was completed, there were defects that, if left unrepaired, would have the result that the structural integrity of part of the building was subject to a risk of failure at some time during the design life of the building. The decision in Harrison shows that it is not necessary to prove that the risk is such that significant damage is likely: in my view, it must follow that it is sufficient that there are significant defects in the building or part of it which present a real risk to the security of the dwelling during its design life.*

67 In the case of defects which do manifest themselves, the authorities have not expressly considered the time within which they must become apparent. In my view this is a matter of fact and degree. I discuss this further below.

68. In my judgment, for a dwelling to be fit for habitation within the meaning of the Act, it must, on completion (without any remedial works being carried out):
(a) be capable of occupation for a reasonable time without risk to the health or safety of the occupants: where a dwelling is or is part of a newly constructed building, what is a reasonable time will be a question of fact (it may or may not be as long as the design life of the building); and
(b) be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants.

69. I distil principles (a) and (b) above from the authorities and, in particular, the decisions in Bole v Huntsbuild Ltd and Harrison v Shepherd Homes Ltd. I have added the qualification "undue" to "inconvenience" because I am sure that Dyson LJ would not have intended to include inconvenience that was relatively trivial or which amounted to no more than a minor irritation.

70. It is clear from the authorities that a dwelling may be unfit for habitation even though the defect which makes it so is not evident at the time of completion: for example, defective foundations - as in Harrison. As to what is a reasonable time, that will depend on the nature of the defect. Whereas the brick or stone structure constituting the shell of a building may be capable of lasting for a hundred years or more, one would not necessarily expect the same of the roof or the gutters. I consider that the upper limit of the reasonable time is the design life of the building, but for some components (such as a boiler) it may be substantially less. It seems to me that the test is not how long the component actually lasts, but how long it could be expected to last in the actual condition in which it was at completion. For example, in my view a lift that was installed in such a manner that within a year or two of completion it broke down with monotonous regularity could, subject to the degree of inconvenience caused, mean that the dwelling was not fit for habitation at the time when the work was completed.

…

74. If, in spite of the existence of a defect of design or workmanship, the cause of any risk to the health or safety of the occupants is a failure to carry out maintenance or refurbishment work which would rectify that defect - being work of a type that the owner/occupier ought reasonably to foresee to be necessary in the ordinary course of events - the builder is not liable.

…

76. In deciding whether a dwelling is fit for habitation where there is more than one defect it is not right to consider each of the defects in isolation. It is appropriate to consider whether the dwelling as a whole was unfit for habitation: see Bole v Huntsbuild Ltd.

77. Much was made at the trial on behalf of Barr of the fact that many people willingly choose to live in draughty Victorian houses, the construction of which would in some respects not meet the requirements of today's Building Regulations. That of course is so. But in my view the question of fitness for habitation must be judged at the time when the dwelling in question is constructed. For example, if a local authority would not permit a house built with a view to multiple occupation to be inhabited because it did not comply with regulations that concerned the means of escape in case of fire, then in my view it could be fairly said that the house was not fit for habitation when completed.

78. Defects that might be described as merely cosmetic or stylistic, do not in themselves give rise to any liability under section 1. The mischief at which the Act is directed is the construction of dwellings that are not fit for habitation: it was not intended to compensate owners for the loss of a bargain. Accordingly, a claimant is only entitled to recover the foreseeable loss and damage that flows from the fact that the dwelling is unfit for habitation: see Bole v Huntsbuild Ltd, at [38].

79. So far as mould and damp is concerned, I have discussed the consequences of this in more detail in Appendix E in the context of the external walls. I have no doubt that the presence of mould and damp in living rooms or bedrooms, if persistent and more than minor, renders an apartment unfit for habitation. Damp living conditions are well

known to pose a risk to health, and there is evidence from some witnesses of actual risks to health or concern about the potential risk, either to themselves or children."

…

82. In the light of my consideration of the authorities, I propose to approach the issues in the case with the following principles in mind:

…

iv) When considering whether or not an apartment is fit for habitation, its condition has to be considered at the date when the work was completed (which I consider extends to the end of any relevant defects liability period).

v) The defects in any particular apartment must be considered as a whole when determining whether or not that apartment was fit for habitation on completion.

vi) The apartments must be fit for habitation by all the types of person who might reasonably be expected to occupy them, including babies and those who suffer from common conditions such as asthma or hay fever.

vii) Whether or not an apartment is fit for habitation is to be judged by reference to the standards current at the time when it was built.

viii) If, at the time of completion, the state of an apartment is such that a local authority with knowledge of its condition would not approve it as fit for occupation under the Building Regulations (for example, for lack of suitable means of escape in the case of fire), it is probably unfit for habitation.

ix) The fact that a particular defect which renders an apartment unfit for habitation could be remedied at relatively modest cost, does not of itself mean that there is no breach of duty under section 1. That is relevant only to the measure of damages.

x) A defect may render an apartment unfit for habitation even though both the owner and the builder were unaware of its existence at the time: for example, defective foundations.

xi) A state of affairs that arises only because the owner does not carry out or has not carried out maintenance or refurbishment that a building owner would reasonably be expected to carry out, even if that state of affairs would not have arisen but for the presence of a defect created by poor design or workmanship in breach of section 1, does not mean that the apartment was unfit for habitation when completed. However, if the need to remedy the defect would make normal maintenance a waste of money, or render it abortive or futile, the failure to carry out such maintenance is unlikely to negate the breach of duty.

xii) Serious inconvenience that is not transient may make a dwelling unfit for habitation. For example, a lift in a tower block that was poorly installed so that it

frequently broke down could well make apartments on the higher floors unfit for habitation.

xiii) A risk of failure within the design life of the building of a structural element of the dwelling (or of the building of which the dwelling forms part) which exists at the date of completion (whether known about or not) may make the dwelling unfit for habitation.

xiv) Evidence of a need to vacate the dwelling in order to carry out work necessary to remedy work that was done in breach of the standard set by section 1 of the Act, is relevant to the question of fitness for habitation.

83. The application of these criteria will be very fact-specific in any particular case."

40. So far as the present case is concerned, a number of aspects of this decision seem to me to be relevant:
    (i) In considering whether the House was, at the time of completion, fit for habitation, it is relevant to take into account that it was intended to be not only a new build but a modern house in design. It is a fact sensitive question in respect of any particular defect whether the requirements Mrs Vainker had for the House have any relevance.
    (ii) It is unlikely that a defect that is only aesthetic or inconvenient would render a dwelling unfit for habitation.
    (iii) There may be a breach of the duty in respect of a defect which means that the condition of the dwelling is likely to deteriorate over time and render the dwelling unfit for habitation when it does so. In that case the dwelling can be said to be unfit for habitation at the time of completion.
    (iv) In considering whether a failure to carry out works in a workmanlike or professional manner renders a dwelling unfit for habitation at the date of completion, it is appropriate to consider the aggregate effect of defects. However, it must be the case that minor or aesthetic defects which do not contribute, and are not capable of contributing to, unfitness for habitation cannot be relevant in this consideration and damages cannot be recovered in respect of such a defect merely because other defects render the dwelling unfit for habitation.

Defects and evidence

Witnesses of fact

41. At trial, the following gave evidence:
    (i) Claimants:
        (a) Brenda Vainker
        (b) François Vainker
        (c) Eleanor Vainker (the daughter of the claimants)
        (d) Stephen Vainker (the son of the claimants)
    (ii) First Defendant
        (a) Mark Woods, Managing Director of Marbank
        (b) Gary Braggins, finishing foreman who became involved with the works from the late summer of 2014.
        (c) Graham Dow, Contracts Manager

(d) James Haffenden, a building surveyor and now a commercial director of Marbank
(e) Steven Brown, a director of Marbank
(f) Glen Wensley, a director of Marbank
(g) Trevor Roffey, site manager
(h) Kevin Burgess, a director of Weldtec Fabrications Ltd., sub-contractors to Marbank

(iii) Second Defendant
(a) Steven Clifton, a principal of SCd
(b) Jonathan Bowler, Quantity Surveyor

42. This is not a case that turns to any significant extent on the overall credibility of individual witnesses but far more on the documentary evidence that is consistent or otherwise with their evidence. I express my views on particular aspects of the evidence in the course of this judgment rather than making general comments on the manner in which witnesses gave their evidence or any general views I formed of them.

The liability experts

43. Each of the parties called an architect as expert on liability issues:
(i) Katerina Hoey gave evidence on behalf of the claimants. She gave her evidence in a clear and highly professional manner. She was, in particular, clear as to what matters were within her own knowledge and expertise and was willing to make appropriate concessions.
(ii) Christoper Smart gave evidence for Marbank. In his responses in oral evidence, he was less clear than Ms Hoey and occasionally somewhat dismissive of the matters put to him when that was not appropriate. Mr Crowley was particularly critical of Mr Smart as doing the bare minimum to identify defects. There was some merit in this criticism, in the sense that there were items of evidence that Mr Smart may not have taken into account, and I take account of that in a number of instances, but, in general, his report was thorough and has been of real assistance to me on many issues.
(iii) Mr Jon Satow gave evidence for SCd. He similarly created the impression of being dismissive of some of the matters he was asked to consider - which was unhelpful - but again his evidence was often helpful and clearly required weight to be given to it.
(iv) This is, therefore, not a case where I have a general preference for the evidence of one expert or the other.

The quantum experts

44. The position is different in relation to the quantum experts and I take the unusual course of saying something about quantum and the expert evidence before I turn to the individual defects alleged.

Remedial works and quantum

45. The claimants' case as to remedial works was set out briefly in respect of each item in the Scott Schedule with an estimated cost. In a few cases, that "estimated cost" was one already paid by the claimants for remedial works.

46. It was a notable aspect of Ms Hoey's report on liability that she said nothing about actual or proposed remedial works. In her second report, she explained, in general terms only, that she had been consulted on the remedial scheme where it fell within her expertise but had not produced it. The remedial scheme had been produced by Carl Smith of Richard Jackson Ltd. and refined by Ankura Consulting, the firm of Mr Finn, the claimants' quantum expert, before it was put out to tender. I note that although Mr Finn referred to Richard Jackson Ltd. as the claimants' consultant structural engineers, in his oral evidence he described Mr Smith as a building surveyor.

47. Ms Hoey's evidence in her second report was that she considered that the remedial scheme rectified the defects identified but she set out her position on a number of items where she took a different view. She added that:

"While there may be alternative solutions that could rectify the identified defects, I consider that the risks associated with these and/or the lack of detailed information are such that it is not possible to make an informed decision on their viability"

48. The claimants' evidence on appropriate remedial works was, therefore, extremely limited. As a quantity surveyor, Mr Finn's instructions were to provide an opinion on the cost of remedial works. To the extent that there was any more detailed evidence as to the works proposed, it was contained within Mr Finn's report, albeit this was a subject on which properly he did not seek to give evidence.

49. Mr Finn's evidence was that the Schedule of Remedial Works had been through 5 revisions. Rev 5 was appended to his report and was the revision used for tender purposes. It did not follow the structure of the Scott Schedule but Mr Finn provided a table allocating the numbered items in the Schedule of Remedial Works to the Scott Schedule items. So far as I am aware, there was no dispute about that allocation which appears to have been agreed at the time the quantum experts made the first joint statement.

50. Mr Finn's report set out that between June and September, he had evolved, from the documents attached to the Claimants' letter of claim dated 12 March 2020, a more detailed Schedule of Remedial Works. He did so in consultation with the claimants' structural engineers (as referred to above) and Ms Hoey and the purpose of producing five revisions was to incorporate their comments. Clearly, Ms Hoey's view of the extent of her involvement in that process was that it was limited.

51. Tender documents were then sent out on 15 September 2020 to a total of nine potential contractors. Six of these did not tender. The three firms who did tender submitted tenders as follows:
    (i) Urban Living Constructions Ltd ("Urban Living"): tender dated 16 October 2020 £407,683.00; revised tender 23 October 2020 £409,783.00.
    (ii) Properties Facilities Group Ltd. ("PFG"): tender dated 13 November 2020 £319,076.60
    (iii) Etec Group: tender dated 16 October 2020: £145,533.44; revised tender dated 23 dated 23 October 2020 £169,150.94.

52. Mr Finn made adjustments/ additions to the tenders from Urban Living and PFG to reflect items he was told were omitted or other allowances which then resulted in adjusted

tenders of £516,532.75 and £457,169.71 respectively. Mr Finn had prepared a preliminary cost plan. Having received and adjusted the tenders, he revisited his preliminary cost plan, as he put it on a line by line basis, giving a total of £405,424.45 (excluding VAT). It was the figures from this preliminary cost plan that formed the basis of his assessment which was the subject of the experts' first joint statement.

53. Unlike Urban Living and PFG, Etec had not visited the House at the time of these tenders but they did so on 4 November 2020. On 10 November 2020, Etec e-mailed Mr Finn's assistant, Mr Lenthall in the following terms:

"Further to the visit and upon reflection we feel that we cannot stand by our original tender submission and feel that we could only complete the works on a day rate basis due to its bespoke nature.
Due to the bespoke nature of the works, we would find it very difficult to agree rates for the works and feel confident that these would suit the required works."

54. Mr Finn, therefore, appeared to have taken no further account of this tender, although in the course of cross-examination he said that he and Mr Johnson, SCd's quantum expert, had relied on it to a minor extent. When Mr Finn was cross-examined, it was put to him that Etec may have been deterred by the fact that works were not to commence imminently. In other words, it was being suggested that the reason given by Etec for withdrawing was not genuine and the prices were credible. I can see nothing to support that suggestion – Etec gave a simple and understandable explanation for why they could not stand by their tender and it was, in any case, a tender that was significantly lower than those of the two other tenderers.

55. In the experts' first joint statement, Mr Finn and Mr Johnson agreed that the Etec tender was abnormally low. It formed the basis, however, of the assessment of the cost of remedial works by Mr McGee, Marbank's quantum expert. In his first report, Mr McGee appeared to be under the impression that Mr Finn had rejected Etec's tender as non-compliant as it contained a number of provisional sums and that Etec had then withdrawn their tender. He said that he would have expected negotiation with Etec. He suggested that the three tenderers were not comparable and that Urban Living and PFG could be expected to have higher direct and indirect overheads than "smaller general building contractors" such as Etec. In the absence of any evidence that Etec's tender was not bona fide, he, therefore, based his assessment of costs on Etec's tender.

56. In his supplemental report, and having seen the chain of e-mails leading to the Etec e-mail of 10 November 2020 that I have referred to above, McGee accepted that much of what he had said was wrong but he maintained that the fact that Etec withdrew their tender did not change his opinion that the rates contained in the tender:

".... were (other than those I have identified as being too low) were (sic) reasonable commercial rates for the works being undertaken and were not directly comparable to the other tenderers."

And he said that:

"In my opinion, the rates reflected the prices that would have been received from small local general builders experienced in undertaking works of this nature."

57. When Mr McGee was cross-examined, there was a challenge to the extent of his expertise. In terms of formal qualifications, he holds a HND in Building Studies and a degree in law. In 1975, he started work as a trainee quantity surveyor with a house building company. He continued to work as a quantity surveyor and manager for construction companies until establishing his own firm in 1990 and is currently employed by Currie and Brown as a claims consultant. His expertise was challenged on the basis that he is not a chartered surveyor, he holds no form of membership of the RICS and he has no degree level qualification in quantity surveying. Without setting out Mr McGee's CV in its entirety, and whilst making no criticism of this cross-examination, I am satisfied that Mr McGee has the background and experience to give the expert evidence that he did on matters that properly fell within the scope of evidence on the cost of remedial works and the value of the works done by Marbank which form the subject matter of the counterclaim.

58. However, the criticism of Mr McGee went further and he accepted that, in a number of respects, he had strayed outside his expertise as a quantity surveyor. He expressed a number of opinions on whether defects were caused by Marbank – this was not his remit and I place no weight on these opinions. He also accepted that he was instructed not to sign the second joint statement, which I refer to below, and that that was contrary to his duty to the court. These matters cause me to approach his evidence with some circumspection. In the course of cross-examination about the Etec tender, he claimed that he had priced up the works himself (excluding specialist elements) before he had seen the tenders and that the Etec tender was closer to his figures. Yet none of this was mentioned, let alone set out, in either of his reports, as he also accepted. None of this reflected well on the quality of his evidence.

59. In any event, I cannot accept the views he expressed about the Etec tender and, in my view, he was wrong to place reliance on it. There is no evidence to support the contention that Etec is a small local general builder or that its rates and prices were in line with what could be expected from such a contractor. Etec themselves did not stand by the tender; they were not able to provide rates; and their position was that they could only complete the works on a day rate basis.

60. The experts' first joint statement recorded agreement and disagreement amongst all three of the quantum experts. There was no dispute about the allocation of remedial works items to the Scott Schedule items and only in respect of quantum.

    (i) Mr Finn and Mr Johnson were in agreement on the cost of the building works for all the proposed remedial works except for item 11 in the Scott Schedule and those items which the experts did not address. Mr McGee was not in agreement because of his reliance on the Etec tender.

    (ii) Mr Finn and Mr Johnson agreed an add on for preliminaries of 15%. Mr McGee took a figure from the Etec tender which, on this occasion, was higher and equated to 28.65%.

    (iii) Mr Finn and Mr Johnson agreed a percentage addition of 13% for overheads and profit applied to the building works costs and preliminaries. Mr McGee took a lower figure of 7.39% based on the Etec tender. However, the joint statement

records that he considered this percentage unusually low and agreed that 13% was reasonable.

(iv) All three experts agreed a lump sum allowance of £14,150.00 for project and design team fees. In his report, Mr McGee made the point that, if the scope of the remedial works was drastically reduced, this figure would require adjustment. Mr Finn's response was that this would not be the case because the allowance had been spread across the claims. That can indeed be seen from Appendix 1 to the first joint statement.

(v) All three experts agreed a lump sum allowance of £4,000 for other development and project costs.

(vi) All three experts agreed an addition of 7.5% for risk.

(vii) The experts also agreed an allowance for inflation making assumptions leading to completion of the works in November 2022.

61. Mr McGee's position on the risk allowance and inflation were further unsatisfactory aspects of his evidence. In his report, Mr McGee set out his add-ons for Preliminaries, Overheads and Profit, and Professional Fees. Under the heading Contingency, he appeared to resile from the agreement in the first joint statement and said this [to which I have added paragraph numbers for ease of reference]:

"(1) Whilst I acknowledge that it is usual to add a contingency to construction budgets to reflect the risk of unknown circumstances occurring during the works, I do not consider it is appropriate to add a contingency where it is for the Claimant to evidence the actual costs for remediating the works .
(2) As the Claimant (sic) rely upon the outcome of the purported tender process that they undertook I do not consider that a contingency or risk allowance should be considered.
(3) In any event, a contingency should not be considered in circumstances where the Claimant rely upon actual costs incurred to justify their claim."

62. Whilst paragraphs (1) and (3) refer to not applying a contingency to claims for costs actually incurred, it is quite clear that paragraph (2) expressed the opinion that no contingency should be added to the claims based on tendered amounts. That was contrary to the joint statement. When Mr McGee was cross-examined on this matter, however, he persistently attempted to persuade the court that he was only saying that a contingency should not be added to actual costs and that he had allowed the contingency on estimated costs. He ultimately agreed that that was completely contradictory to what he said in his report and Mr Crowley's questioning demonstrated that what Mr McGee had said was, in any event, wrong.

63. Further, Mr McGee accepted that he had omitted inflation from his figures but had said nothing about that in his report. He said that he had instead used a current labour rate but, again, without any explanation or transparency in the report.

64. I see no reason for the any of the experts to depart from the agreed position and it is apparent, therefore, that the significant area of disagreement arises from the relevance or otherwise of the Etec tender.

65. Following exchange of the liability experts' reports, Mr Finn, Mr McGee and Mr Johnson continued to meet until 21 September. Thereafter, Mr Finn and Mr Johnson (only) continued to meet until 28 September and on 30 September these two experts signed a second joint statement. There were some changes to the sums previously agreed against individual Scott Schedule items. All of these revised sums were agreed between Mr Finn and Mr Johnson.

66. Both Mr Finn and Mr Johnson had, in my judgment, approached their tasks as experts in an entirely professional manner. Mr Finn, who bore the brunt of cross-examination on figures they had agreed, was able to explain his views with care and precision, did not stray into matters of liability, and was ready to accept figures as reasonable even when they were not supported by all the documentation that, in an ideal world, he would have wanted to see. Even without more, I would, therefore, be inclined to prefer their evidence to that of Mr McGee.

67. In light of the view I take of the quality of the quantum experts' evidence and the relevance of the Etec tender, where there is a figure agreed between Mr Finn and Mr Johnson for remedial works then, subject to issues of liability and/or scope of remedial works, that is the figure that I will find due to the claimants.

Brickwork (Scott Schedule items 1 to 5)

Introduction

68. The property is of a modern style and incorporates two types of brickwork, which are referred to as the red and buff brickwork, with parapet walls.

69. By way of introduction to this aspect of the dispute, I adopt the overview given by the claimants in opening submissions. As against SCd, the claimants' case is that the design of the brickwork is defective in that it combines exposed parapets and composite capping bricks which are flush to the front of the parapet wall (with no overhang or drip) and with dpc/ cavity trays set back from the face of the brickwork. The result is that water has saturated the capping bricks and percolated down through the brickwork and mortar, past the dpcs, giving rise to significant areas of permanently damp, stained and discoloured brickwork. Further aspects of the design have contributed to the risk of saturation of the brickwork. So far as Marbank is concerned, the claimants' case is that its workmanship has exacerbated the design deficiencies – cavity trays have been laid directly on to brickwork rather than on to a mortar bed; cavity trays have been set back excessively; and flush rather than recessed mortar joints have been formed – all of which have rendered the dpc/ cavity tray installation "defunct". Further complaints about Marbank's workmanship are also made. The same or similar defects are relied on against SCd on the basis of a failure in SCd's obligations in respect of inspection.

70. On the face of it, the principal complaint about the brickwork is an aesthetic one, namely the staining and discolouration of the brickwork with an apparent concentration at the corners of the property. From the many photographs I have seen in the course of the trial,

I have no doubt that this is unsightly and in no way in keeping with the intended modern aesthetic of the house. As was observed on many occasions during the trial, brickwork gets wet and when it gets wet it appears so. But it dries out and generally does not leave any kind of residual stain or persistent appearance of dampness. It is also part of the claimants' case that the alleged brickwork defects have caused water ingress into the house and most importantly that there is a risk of long term deterioration of the brickwork.

Chronology

71. The issue of staining or discolouration of the brickwork was first observed in October 2013, when Mrs Vainker observed that the brickwork appeared damp following rain and that that did not dissipate, leaving discolouration.

72. In an e-mail dated 29 November 2013 to SCd, Mr Fitzgerald described the bricks as "*unsightly and clearly unacceptable*" and "*saturated and extremely wet to the touch*". He requested that SCd investigate the issue, and queried whether Marbank had "*constructed to the required details*".

73. On 16 December 2013, Mr Clifton produced a report in respect of the wet brickwork. As the claimants submit, this did not address the cause of the damp and staining or whether the brickwork had been installed in accordance with SCd's design. The focus of the report was rather on a remedial solution. SCd said that they had consulted Simon Hays, the CEO of the Brick Development Association, who had seen construction details and site photographs. Three solutions were suggested: a surface protection product (Stormdry), a drip set 20mm into the joint, and a slender flashing sloping inwards. Mrs Vainker's evidence was that she was not satisfied with this report, in essence, because it did not address the cause of the staining and whether the brickwork had been properly constructed.

74. M&M also produced a short Condition Survey Report on the brickwork dated 17 December 2013 which identified areas of damp brickwork at high level (buff brickwork) and on the front red brickwork. The report suggested causes, referred to the proposed solutions in the SCd document, and indicated that a design solution was a matter for SCd.

75. Mr Clifton also sought advice from Duggan Morris Architects, sending photographs for consideration. On 18 December 2013, Mary Duggan responded, stating "*I guess the problem is a combination of so many things, it's difficult to know where to stop the assessment. The tall soldier course and slightly recessed joint for example*….".

76. In January 2014, there was what Mr Dow described as "*severe water ingress*" into the House, which was not reported to Mrs Vainker.

77. The brickwork was opened up on 7 February 2014. It is the claimants' case that the photographs from that opening up show that the dpc/ cavity trays were found to be extremely poorly installed, as well as cut and/or ripped and/or torn. On 11 February 2014, Mr Dow emailed his subcontractor EJ Roberts Roofing stating "*You were present at the opening of the brickwork last Friday where it can clearly be seen you have cut the cavity tray when installing lead works (photos attached). You acknowledged this to Trevor and said you were going away to talk to another Director*…"

78. Marbank commissioned a report from a firm called Leakbusters. The report dated 10 February 2014 also identified defects in construction.

79. On 31 March 2014, Mr Dow emailed a subcontractor Opus Brickwork attaching photographs which he said showed "*missing insulation, unlapped and unsealed DPCs. On photos 1839 and 1841 we found the tray to be again not lapped or sealed and as you can see we could stretch in and insert a 50mm plus diameter piece of foam into the gaps*".

80. On 1 April 2014, Mr Fitzgerald emailed Mrs Vainker, stating "*The damp in the property in the top bedroom is entirely a construction issue with poor workmanship by Marbank on the roof detailing at the perimeters. They have failed to follow the details set out on the Architects drawings and as a result water has penetrated*".

81. In April 2014, remedial works were undertaken on the red brickwork at parapet level on the higher part of the House, where the cavity trays had been cut or torn. As part of the remedial work, the weepholes which were missing from the front and back facades were installed on the red brickwork. Numerous photographs were taken by SCd and Marbank (Mr Mwale).

82. As the remedial works to the red brickwork were carried out, Mrs Vainker voiced her concerns to Mr Fitzgerald and SCd that there might be defects on the other side of the roof as well. In an e-mail on 16 April 2014, she said "*…if the roofers did such a bad job on the one side, how do we know that there is not a problem on the other? Obviously, it is not such a serious problem (otherwise there would be damp inside), but in view of the defects identified on the left, are we entitled to ask that they open up and we inspect the right hand side?*".

83. Mr Fitzgerald responded as follows:

"It is not just the roofers that undertook poor workmanship. It appears that the bricklayers did not install the cavity trays and damp proof membranes and flashings strictly in accordance with the architects drawings. If Steve has a quality concern that this may have occurred on other slopes then it is not unreasonable to open up."

84. On 23 April 2014, Mr Fitzgerald emailed Marbank instructing further investigation:

"*The design and quality team have been considering the situation with regard to the installation of the stepped flashings that have clearly been installed incorrectly on the high level roof allowing water penetration into the building. We have all seen that you have acted to eradicate the problem. It does however raise a confidence concern amongst the design and quality team and the client that perhaps other sections of the damp proof membranes have not been installed correctly in other areas, perhaps over the garage and the green roof areas.*

In view of this we are instructing that some sections of the copings should be opened up on those areas to show to the architect and evidence them for the all that the details required by the drawings have been followed. We appreciate that the details are not the same as the high level roof, and there has been no evidence of water penetration, but we must be able to have confirmed that the stepped damp proof membrane is not laid flat (as was the case on the upper roof) and the weep holes are not blocked by the method of

construction. It may be that you have photographic records to show exactly what detail was installed and their issue would possibly negate this requirement.

It would be useful if you would also review this with Trevor as I am sure he will have evidence from his own inspections of what was installed.

… This is a formal instruction under the contract."

85. Mr Dow replied suggesting that the better course would be to monitor over the defects liability period. However, on the same day, Mr Roffey emailed Mr Dow stating "*This is the only picture I could find regarding the DPC on the north roof*". The photograph showed a clearly poorly installed dpc. Mr Dow replied, stating "*I think it best we keep that one under wraps and cross our fingers when they open up…*".

86. On 23 April 2014, Mr Strike emailed a drawing showing two areas of buff brickwork to be opened up. Following the opening up, on 1 May 2014, SCd sent two photographs to Mr Fitzgerald which showed dpc/cavity trays set back more than 5mm from the face of the brickwork. Mr Clifton also e-mailed Mr Fitzgerald telling him that he had inspected the roof with Mr Mwale and had found work that was totally unacceptable.

87. After the certificate of practical completion was issued, there continued to be correspondence criticising the brickwork. Then on 18 December 2014, Mrs Vainker reported to Marbank that there was a recurrence of damp ingress on the second floor and, in January 2015, this and two other areas of water ingress were identified. I refer to the investigation of these areas further below.

88. In or about March 2015, the claimants had obtained an independent report from Powell Williams LLP, who describe themselves as a Building Consultancy, to consider whether SCd's design was negligent. This firm was not called to give evidence but it is helpful to set out their conclusions:

2.01 Our opinion is that the intermittent damp patterns to the walls will remain a visual issue only. The brickwork specified by SCD Architects is suitable for "severe exposure" and "suitable for prolonged saturation applications". … the damp patches should not have an effect on the durability of the bricks.
2.02 We are of the opinion that SCD Architects have not been negligent with respect to the building design and the selection of materials for the walls. The building does not incorporate drip/throating/coping stone details to parapet walls which are generally regarded as good practice. However, we consider the detailing noted in the sections provided as satisfactory to prevent water ingress. Notwithstanding the above, on specifying such a detail, the client should ideally have been advised of the potential for irregular damp patches to be visible following periods of rain.
….
2.04 It is possible to retrospectively fit a drip detail to the walls without significantly altering the aesthetic of the building to reduce the formation of wet patches.
…

2.06 We do not recommend that the walls are treated with any form of sealant/water proofing agent."

89. The brickwork in one of the areas of leakage, the front left-hand corner of the parapet, was opened up in May 2015. The claimants point to photographs which show a variety of construction defects. In an e-mail dated 14 May 2015, Mr Clifton explained to the claimants that in this corner there was, in summary, a significant gap in the dpc which had allowed water ingress. Remedial works were instructed.

90. Mr Ward of Powell Williams also attended the May 2015 opening-up and on 14 May 2015 he wrote to Mr Dow (copied to others) advising that part of the dpc should be replaced. In cross-examination, Mrs Vainker agreed that by March 2015 she had lost faith in SCd. This was one of the reasons for the instruction of Powell Williams, although she said the primary reason was that Mr Fitzgerald had advised in January 2014 that she obtain an independent view.

91. The area of water ingress reported in December 2014 was investigated by Mr Clifton in July 2015 and Marbank undertook remedial work in this area in November 2015.

92. On 9 November 2015 at 15:02, Mr Clifton emailed Mr Fitzgerald stating:

"Tom and I have just come back from inspecting the wall above the lightwell. Michael was very open and frank about the quality of the installation. We can confirm his findings, tear holes in the dpc, lappings the wrong way and weepholes installed underneath the cavity trays. (Photographs of holes attached.)

It has been agreed that both the dpc at parapet level and the cavity tray above the roof light will be replaced along the length of this run and not patch up the defects as previously suggested.
It was also noted that the lead flashing around the rooflight had been poorly installed and Michael would be replacing the flashings."

93. Later Mr Clifton e-mailed Mr Fitzgerald stating:

"*Following our inspection today we should highlight our findings with regards to the installation of the dpcs.*

The specification requires all dpcs to be installed 5mm back from the brickwork face. When the copings were re-laid back in April/May 2014 we were invited to meet the brickwork subcontractor to check the new trays being installed (10.04.14). As you will see from the attached photo (img0262), new trays were being correctly installed beyond the facing brick and then trimmed back as required.

At this morning's inspection, with the re-installed copings removed, it was noted that the top dpc did not extend to the face of the brick (img2690 attached as viewed during our initial visit.

It is doubtful that this would result in future water ingress but having viewed this today we had to bring it to your attention."

94. Mr Leavy of Marbank produced a report dated 10 November 2015 which identified 10 "issues" with the brickwork construction including that the cavity tray had been cut short and was not properly jointed.

95. There was no evidence of any further water ingress or any further investigation or activity in relation to the discolouration for years. As Mr Fowler put it, there was a period of silence. In an e-mail dated 4 July 2018, Mrs Vainker told Mr Fitzgerald that she had settled a claim in respect of the MVHR (referred to below) and as a result:

"… I finally have funds to investigate the wet bricks, which for the past couple of years have been wet throughout the year - even now, in this extremely hot weather.

Darren Ward at first agreed to investigate, but was then too busy. I eventually found Richard Hunt of Malcolm Hollis surveyors, who will be ordering fairly extensive opening up at roof level, to ascertain whether there are construction, as well as design issues.

The court was told that disclosure of correspondence with or any report from Malcolm Hollis had been withheld on privilege grounds.

96. It is the claimants' case both that there was further water ingress in 2022 and evidence of deterioration of the condition of the brickwork. Both are disputed by the defendants.

General issues

97. There are a number of matters which I address before turning to the design and construction of the brickwork.

98. Firstly, I have thus far referred variously to staining, discolouration and the damp appearance of the brickwork. The difference between staining and discolouration reflects the evidence of Mr Satow, SCd's architectural expert, who drew a distinction between staining, being dark streaks that were, in his view, consistent with dirty rain running off the building, and discolouration being the more widespread staining giving the brickwork the appearance of being permanently damp. In the balance of this judgment, I will use these terms interchangeably unless it is necessary to distinguish.

99. Secondly, on the evidence, and in particular the photographic evidence, I accept both that the staining has progressed and got worse over the years and that it is particularly noticeable at corners. The liability experts agreed that there was staining on at least three elevations and that there was some evidence that the patches varied over time. There was a belated attempt in the course of the trial to establish that there has been no deterioration by reference to a photograph taken from Google Earth. The quality of the photograph was simply not good enough to draw that conclusion.

100. Thirdly, the claimants' pleaded case in the Particulars of Claim (at paragraph 102) was that large parts of the brickwork at chimney, parapet level and below were permanently damp. In fact, despite the unsightly appearance, there was no evidence that the brickwork was permanently damp.

101. When Ms Hoey inspected in November 2019, she did not take any moisture readings. She did, however, do so in August 2021. She did not set out the detail of these readings in her report but in Appendix 3 to the report she provided her inspection notes. At section 9, she made the following General Observations:

"9.2 I took moisture readings to the brickwork that I was able to access, particularly the bricks that looked damp and/or discoloured and found them all to be in a reasonable (dry) range.
9.3 I, therefore, concluded that the discolouration evidence was just that, and not evidence of the brickwork being wet or saturated."

The experts also agreed that there was no evidence that the stained areas registered an unusually high damp reading in August 2021.

102. There were only two matters that indicated the contrary. Ms Hoey gave evidence of some moss growth at capping level which she said in cross-examination was consistent with saturation. No measurements were taken in support. In cross-examination, Ms Hoey agreed that moss will grow readily on any damp surface and is not necessarily indicative of any deterioration.

103. Secondly, Ms Hoey identified some mortar erosion which she said was consistent with sulphate attack which itself occurs only following prolonged saturation. That flies in the face of the evidence by measurement that the walls are not permanently damp. Whether there was evidence of erosion of brickwork by sulphate attack was considered further in the oral evidence and I refer to this further below.

104. Neither of these matters is, however, in my judgment, sufficient to establish on the balance of probabilities that some part or all of the brickwork is permanently damp. In particular, it does not establish that the areas of wall that are stained or discoloured are permanently damp. On the contrary, the walls retain that damp appearance even when, in fact, dry.

105. Fourthly, there is no evidence of further water ingress into the property which is related to and/or caused by the condition of the brickwork. In the joint statement, Mr Smart and Mr Satow said that they had seen no evidence that any water is now penetrating into the inside of the property via the external walls.

106. The joint statement recorded that Ms Hoey *"has been advised that there is some evidence of water penetration".* This was reflected in her report (at paragraph 2.2.86) in which referred she said that she understood that further water ingress had been experienced in April 2022. She relied on photographs of staining at the edge of a rooflight. This was a location where no examination of the brickwork had been undertaken and it represented, in any event, a single specific location rather than a widespread and/or persistent issue. I did not permit the claimants to rely on further evidence in this respect in Ms Hoey's supplemental statement served just before the trial.

107. The claimants similarly submitted that there had been further leaks and water ingress in April 2022. Photographs of the location, at the rooflight, were sent to the defendants in August 2022 and the defendants' experts invited to attend. The claimants sought to make something of that failure to attend but Ms Hoey had also not inspected or carried out any further investigation of the cause.

108. On the basis of the very limited evidence at trial, I am far from satisfied that any water ingress there may have been around the rooflight in April 2022 is caused or contributed

to by the defects in design or workmanship that are relied on in these proceedings. In short, there is no evidence of any water ingress so caused between 2015 and 2022.

109. The claimants also gave evidence in statements made a few days before the start of the trial about an inspection carried out by Mr Vainker on the roof on 21 September 2021. He was filmed picking up a corner brick which he said came away easily. Ms Hoey included in her supplemental report photographs which showed the brick and its location at the corner of the red brick parapet above the stairwell. She said that the wide mortar joint would allow moisture into the capping assemblage due to the porosity of the mortar, which in turn could compromise the integrity of the capping special and she expressed the opinion that the ease with which the brick came away suggested that the mortar was not holding which was "consistent with water saturation and/or inadequate mortar strength." But, as I have said, all the evidence was that the brickwork was not saturated.

SCd: brickwork

The case on design

110. The consideration of this case has not been assisted by the manner in which the case was pleaded and then developed and it seems to me relevant in assessing the claimants' case to have regard to how it has developed.

111. In the Particulars of Claim, the claimants first set out the defects they alleged. In the case of the stained brickwork, the defect was described as large parts of the brickwork being permanently damp and stained which, if left untreated, would lead to early brickwork failure. Further this was alleged to be dangerous and unhealthy and could lead to damp, mould and humidity and the risk of falling bricks.

112. There followed a number of alleged defects in coping bricks, dpcs/cavity trays, and the lead flashings.

113. In respect of the coping bricks, it was alleged that:
    (i) the copings had been installed so that they were flush to the front and back of the brickwork without an overhang or drip.
    (ii) Coping bricks were installed with no slope to the top.
    (iii) Composite bricks were used as coping bricks (and were vulnerable to water ingress) rather than specials.
    (iv) Coping bricks were poorly installed.

114. In respect of dpcs/cavity trays, the allegations were that:
    (i) These had been installed 10mm to 43mm back from the face of the wall and not to the outer face.
    (ii) They had been misplaced or not properly fitted.
    (iii) They had been installed without (my emphasis) a recessed mortar joint.
    (iv) They had been installed without exposing the edge.
    (v) Moisture had passed from the parapet brickwork into the brickwork below.
    (vi) The parapets were not protected by the roof structure.

    On the face of it, some of these defects were clearly installation defects or defects in workmanship whereas others could me matter of design or workmanship.

115. Various allegations were made about the lead flashings – which I do not set out at this point – but which all seemed to refer to the installation of the lead flashings.

116. The particulars of breach against SCd were as follows:
    (i) SCd failed, contrary to BD2452 and GBG 33, to ensure that clause F30/525 of the NBS Specification required that the dpc/cavity trays extended beyond the outer face of the wall.
    (ii) SCD failed to ensure that clause F30/525 of the NBS Specification required that the dpc/cavity trays were at least flush with the outer face of the wall.
    (iii) SCD failed, contrary to BD2452 and GBG 33, to specify or make clear that the flashings associated with the roof should lap under the parapet wall dpc.
    (iv) SCD failed clearly to communicate the relationship between the dpc cavity trays and the lead flashing in either the NBS Specification or the associated drawings.
    (v) SCD failed to design, consider or resolve the formation of effective cavity tray protection to corner junctions in the NBS Specification.

117. Further allegations were made that after inspections in 2013 and 2014, SCD had failed properly to instruct Marbank to correct defects.

118. The design allegations against SCd, therefore, appeared to be those in the particulars of breach set out above. These were repeated in the Scott Schedule at item 1.

119. In the Scott Schedule, item 2 was defective coping bricks. The defects included (i) coping bricks that were flush to the front and back of the parapet walls without any overhang or drip and (ii) copings installed without any slope. The breach by SCd was put simply as a failure to exercise reasonable care and skill or breach of section 1 of the DPA, without any further particularity, and a failure to instruct Marbank to use "specials" in accordance with the specification.

120. Under item 3, the nature of the defect was defective dpcs and cavity trays. The defects alleged included (i) that the dpcs were set back between 10mm and 43mm from the face of the wall and/or so that they did not protrude beyond the face of the wall and (ii) dpcs/ cavity trays fitted without a recessed joint. The breaches alleged against SCd thus reflected those set out above.

121. Under item 4, the nature of the defect was described as parapets which are not protected by the roof structure and are vulnerable to structural compromise. As against SCd and so far as the design was concerned, the particulars of breach were again as set out above.

122. Under item 5, the nature of the defect was described as defective and poorly installed lead flashings and the breaches relied upon were as briefly referred to above.

123. There was, therefore, largely consistency between the pleaded case and the Scott Schedule. By the time the matter came to trial, however, the detail of the claimants' case was put in opening submissions in a somewhat different manner and it was submitted that SCd's design was defective in the following respects.

124. Firstly, the claimants submitted that, contrary to industry guidance and good practice SCd had failed properly to consider the risk of water saturation affecting the brickwork to the House. This was a somewhat generalised allegation and was not pleaded in those terms.

125. More specifically, it was alleged that, contrary to industry guidance and good practice, no overhang or drip was specified to the parapets. This had been referred to in the Particulars of Claim as a defect in the installation of the copings, rather than the design of the parapets. In SCd's Defence, the description of the actual construction and the design was admitted but SCd denied that this was a defect. In the Reply (at paragraph 33), the claimants said that it was a design defect to specify coping bricks without a slope "in particular in circumstances were (sic) there was no drip or overhang either". The Scott Schedule at item 2 was in line with the Reply but, as I have said, no particulars of the alleged breach were set out. I note also that this was a separate item from item 1 so that no link was apparently drawn between the design of the parapets and/or the copings to the parapets and the stained brickwork. SCd, therefore, argued that the absence of a drip or overhang of the copings to the parapets was not pleaded against them and that nothing in the Scott Schedule could supersede the statements of case.

126. Next the claimants said that in places the capping bricks were specified so that were either flat or slope towards the brickwork below. This allegation also did not appear as a discrete allegation of breach in the pleaded case.

127. The claimants further submitted that:
    (i) contrary to industry guidance and good practice, the dpc / cavity trays were specified to be set back by 5mm from the face of the brickwork (rather than extending beyond the brickwork); and
    (ii) contrary to industry guidance and good practice, a recessed mortar joint was specified.

128. Clause F30/525 of the Specification provided as follows
"DPC/CAVITY TRAY LEADNG EDGE IN FACEWORK - SET BACK
Treatment of face of masonry: Set back 5mm from face of wall with recessed mortar joint to expose edge at the following locations: Generally."
The second element of this allegation, therefore, reflected what SCd had specified but was contrary to the pleaded case (both in the Particulars of Claim and item 3 of the Scott Schedule) which was that the absence of a recessed joint was a defect, at least at the ends of dpcs and cavity trays.

129. This pleaded case was consistent with the first report of Ms Hoey. For example, addressing Area A [east end of the south side elevation] at para. 2.2.19, she said:

"(c) While the requirement under F30/525 for the DPC/cavity tray to be set back 5mm from the face of the brickwork is contrary to industry guidance and good practice, which requires the cavity tray to extend beyond the outer face of the wall, I note that the specification calls for a recessed mortar joint to expose the edge of the DPC/cavity tray;

(d) The recessed mortar joint is essential to ensure that the DPC set-back will not effectively render the cavity tray element ineffective for the unprotected area which increase the risk of downward percolation through the brickwork; …."

130. The claimants further submitted:
    (i) That the corner details were inadequately designed. This had been expressly pleaded.
    (ii) In places the relationship between the dpc/ cavity tray and the lead flashing was poorly communicated. This breach was pleaded and it was also an observation made by Ms Hoey in her first report (at para. 2.2.84(f)) in relation to Area E – red brickwork at capping level on the garden facing or west elevation which was investigated in August 2021). When Ms Hoey came to give evidence, she made a correction to the statement in her report, and, whilst maintaining that there was insufficient detail in the drawings, she accepted that there was sufficient detail in the specification at clause H71/780.
    (iii) The specified mortar was not suitable for the capping and may also have been unsuitable for the external wall construction. This was not pleaded.
    (iv) Generally, away from the dpcs/ cavity trays, SCd had specified flush rather than tooled joints, although it appeared that Marbank may have installed bucket handle joints in any event. This was also not pleaded.

131. The identification of what is or is not part of the pleaded case is not an academic matter. The allegations against SCd are ones of professional negligence and SCd is entitled to know what these alleged breaches are and to respond to the alleged breaches rather than hit a moving target. Where it is said that the architect departed from industry guidance or good practice, it is necessary to identify that guidance or practice so that the architect knows the case he has to meet. It is no answer to say that the case is set out in the expert reports. The way the case was put in opening to a large extent reflected the first report of Ms Hoey. As one would expect, Ms Hoey had been instructed before the Particulars of Claim making allegations of professional negligence were prepared and SCd would have expected to see the case against them, in accordance with the expert opinion, set out in that pleading.

132. The proper particularisation of the allegations of professional negligence is not only a question of fairness in the litigation but also the less able a claimant is to say clearly and from the outset what the professional did, or failed to do, that amounted to a failure to exercise reasonable care and skill, the less likely the court may be to find such a failure. That is, of course, a case specific issue. It may be, for example, that further inspections or testing reveal flaws that were not evident from the outset but that would not be relevant to an issue such as the design of the parapets which is visible.

133. So far as the design allegations against SCd are concerned, in my view three matters relied upon at trial were pleaded and should form part of the case against SCd.

134. The first is the alleged breach in specifying that dpcs/ cavity trays should be set back 5mm from, rather than flush with or protruding beyond, the face of the brickwork. The next is the inadequate corner details. I also accept that the allegation of a design defect in the absence of any overhang or drip provided by the copings to the parapet walls was sufficiently pleaded as was the case in relation to sloping capping bricks. It was poorly pleaded and lacked detail both as to the nature of the breach and the consequences but it was clearly in play and sufficiently set out for SCd to know the nature of the case they had to meet. It was a matter that was at least referred to in the experts' reports and it was

fully canvassed in the course of the trial and there is no prejudice to SCd in having to deal with this issue.

135. I take a different view in respect of the allegation that mortar of insufficient strength was specified whether at capping level or elsewhere. Although that was considered at length in Ms Hoey's first report, it was not a pleaded allegation and no application to amend was ever made. It would not be right or fair to take that alleged breach into account.

Design guidance

136. The Claimants in their Opening Submissions helpfully provided an Appendix, which included quotes from various design guidance documents. For ease of reference, I annex that Appendix to this judgment as Appendix 1. The documents quoted included the Building Research Establishment documents BD 2452 and GBG 33 (referred to in the Particulars of Claim) and other documents reviewed by Ms Hoey in her first report (para. 2.2.88):

    (i) The Brick Development Association (BDA) Design Note 7 ("Brickwork Durability").
    (ii) The BDA's "Guide to Successful Brickwork" (Third edition, 2005)
    (iii) The BRE Guidance Document BD2452 – Safety of Masonry Parapets"
    (iv) BS EN 998-2:2003 "Specification for mortar for masonry"
    (v) BS 8215:1991 "Code of Practice for Design and Installation of damp-proof courses in masonry construction".
    (vi) The BRE Good Building Guide "Building damp free cavity walls"

SCD's evidence

137. The only witness of fact for SCd who addressed the design of the brickwork was Stephen Clifton who is an architect and director of SCD. He gave oral evidence and I regarded him as a clear and straightforward witness who expressed himself in a professional manner.

138. In his witness statement, his evidence was that, during the design process, (i) SCD reviewed the design and aesthetic of the brick parapets from various published architectural projects, in particular, Brick Bulletin, published by the BDA and (ii) worked closely with the brick manufacturers, Michelmersh. He said that brick parapets had been used for decades and there was never any suggestion from the brick manufacturer that they were inappropriate for this use. It was not apparent whether this design was undertaken by Mr Clifton personally and his evidence as to the matters taken into account in considering the design of the parapets and the dpcs was no more detailed than that.

139. In cross-examination, Mr Clifton's evidence was that the specification was put together by Tom Strike of SCd. A witness statement from Mr Strike was served but he was not called to give evidence at trial. Mr Clifton explained that the specification would have been put together by selecting standard clauses from the National Building Specification ("NBS"). All SCd's drawings showed the mortar joints as flush to the face of the brickwork, the inclusion of clause F30/525 was in error, and clause 515 ought to have been included – the latter provided for the dpc to be flush with the face of the brickwork and without the edge exposed.

140. Mr Crowley expressly asked Mr Clifton whether he accepted that it was poor practice to use clause 525 in conjunction with flush cappings. Mr Clifton "couldn't say" – as far as he was aware clause 525 was still technically correct and he couldn't say whether it would have altered the way the cappings performed.

The expert evidence in respect of design

Katerina Hoey

141. It is convenient to start with the evidence of Ms Hoey, on behalf of the Claimants. In her first report dated 24 June 2022, she recited the inspections that had taken place and her observations in respect of SCd's design. At paragraph 4.2.2, she then set out her conclusion on design as follows:

"I consider that SCd's design details were defective as follows:
a) SCd's mortar specification was unsuitable for use to those areas at high risk of saturation, namely unrendered external walls, unrendered parapets, the chimney and cappings;
b) SCd's specification required that the DPC/cavity tray be set back 5mm from the face of the brickwork, contrary to industry guidance and good practice which requires it to extend beyond the face by a minimum of 5mm. This would have applied throughout the development, renders the cavity tray element ineffective for the unprotected area and increased the risk of downward percolation of water through the brickwork; and
c) I have not seen any evidence that the formation of effective DPC/ cavity protection to corner junctions was considered, designed or resolved by SCd in their detail design of the parapet walls."

142. I note again that the allegation in respect of the mortar never formed part of the pleaded case. Ms Hoey's opinion was, however, also premised on its use in areas of high saturation. I also observe that these conclusions as to the respects in which the design was defective said nothing about the design of the parapets or the cappings.

143. Ms Hoey continued:

"4.2.3 All of the above are factors that increase the risk of water saturation which, if left for long periods, can increase the risk of sulphate attack to the joints, evidence of which I have recently seen at The Croft."

144. Later in her report (para. 4.2.12) , she set out the respects in which she held the view that SCd had failed to act with reasonable care and skill. In terms of design, rather than inspection, she identified only specifying a 5mm set back of the dpc/cavity tray from the face of the brickwork and failing to design a detail that specified a dpc/cavity tray which overlay the lead flashing with a drip extending 5mm beyond the outer face of the brickwork.

145. In cross-examination, Ms Hoey agreed that brick cappings on exposed parapets are used in modern architecture and she said that there is then a "team effort" in terms of the performance of the bricks, mortar and accessories (which I take to refer to things such as cavity trays). In her view, a coping with a drip detail, rather than a flush capping, would

have been "an alternative detail" and would have provided a primary line of defence against rainfall.

146. There is a distinction to be drawn between the issues in this case relating to the damp appearance of the brickwork and water ingress into the property. In broad terms what was addressed with Ms Hoey was whether the purpose of aspects of the design, and in particular the dpcs/cavity trays, was to prevent water ingress or to perform some other role in protecting the brickwork from rainfall. Ms Hoey disagreed that the primary purpose of a dpc or cavity tray is to prevent water entering the building – it was, in her view, one of the purposes another being stopping saturation of the brickwork. As she put it at one point it would act like a mattress cover over the brickwork so long as it extended the full width of the brickwork. If any kind of drip, protruding beyond the face of the brickwork, had been provided, it would have had the added benefit of throwing the water away from the wall.

147. She summarised her view as follows:

"... If there was a coping ..... then there would be less percolation through the brickwork of the water because the top of the brick would be protected. ... the top of the capping brick is porous because it's brick. It's not a concrete capping, it's porous – it's an appropriate brick but it is still a brick, so therefore it's porous, so that's coming through and therefore it is particularly reliant on the protection of the cavity tray, the DPC cavity tray. And that's consistent with the guidance actually that we were looking at just a little bit earlier on, BDA design note 7."

148. It was put to Ms Hoey that the same discolouration effect of discolouration might be seen from driving rain or rain "hitting" the wall. To my mind, the key aspect of her response to that proposition was that, if that were the case, you would expect to see the same or similar pattern of discolouration over the whole wall. In fact, there are different patterns of staining and increased staining at the corners.

149. In terms of what had happened and might happen to the brickwork:

(i) At capping level, and as set out in Ms Hoey's inspection report from August 2021, she had seen moss on mortar which was, in her view, evidence of water saturation and evidence of mortar erosion.

(ii) She had observed cracking and erosion on the garden elevation, the buff brickwork and the single storey buff brickwork (area D) which were consistent with sulphate attack.

(iii) On the garden elevation, she identified an area of what she described as zigzag cracking of the mortar. Mr Fowler put to her that this pattern of cracking was more consistent with structural movement. His point was that, although water might follow the path of least resistance, it was unlikely that that path would create a consistent zigzag pattern. Ms Hoey agreed that was possible, although she would expect to see evidence of movement lower down and she had seen no corresponding internal cracking. It was not a possibility she had addressed in her report.

(iv) Her responses to Mr Clay's questions made it clear that in terms of structural risk, she considered the major risk to be "through the mortar". She said that cracking and erosion of mortar that she had seen was consistent with sulphate attack which

> "happens only when things are continually and long-term saturated." She agreed that this was not "an absolutely firm diagnosis". The brickwork getting wet played its part because it allowed the passage of water to the mortar:
>
> *"I consider that the mortar that was specified is not strong enough for use in that location with or without the risk of sulphate attack. The risk of sulphate attack comes through water saturation, which I consider primarily related to the soaking of the brickwork ....*
>
> *... the sulphate attack risk, I think it increases the risk of structural instability, but that could occur without the sulphate attack. They are two separate issues."* (transcript day 7, page 24)
>
> Her response in respect of the suitability of the mortar even where it was not at risk of sulphate attack – that is where there was not a high risk of saturation – departed from her report.

150. As I have said above, so far as the staining was concerned, Ms Hoey agreed that she had taken readings to see whether the bricks which looked wet were, in fact, wet or only discoloured. Her moisture readings – taken in August 2021 - showed that the walls were dry and were discoloured even when not wet. No moisture readings had been taken on inspection in November 2019 and, although Ms Hoey did not entirely agree with the proposition put to her, I cannot be satisfied that the walls were wet at this time anymore than they were in August 2021 or any more than would be commonplace in wet weather.

151. Ms Hoey was unable to say what had caused the discolouration but agreed that it might be pollutants from rainwater. In the Joint Statement, the experts agreed that there was no evidence of the nature or causes of the staining, and no results of any tests of the brickwork had been presented.

Christopher Smart

152. Mr Smart also said that exposed brick parapets were not an unusual feature of modern architecture but that, without any projecting coping, staining from water run off and algae was likely to occur. He considered the staining that he had seen to be "partly consistent with water run-off stain" but noted that there was more extensive staining of an apparently random nature.

153. That implied a different mechanism of staining from Ms Hoey's but offered no explanation for the more extensive staining. Later in his report (addressing Scott Schedule item 3), Mr Smart said that, on the opening up in August 2021, he had looked for a visual connection between brickwork staining and the (short) cavity trays under the parapets. He could see none and did not consider that there was a plausible mechanism that would link the two.

154. He expressed no opinion about any alleged defect in the parapets other than that it was a design issue and not something for which Marbank could be responsible. In cross-examination by Mr Crowley, he did not accept that to have no coping was contrary to good practice but agreed that it may not be best practice if an architect wanted to be cautious. Mr Smart was taken through the guidance relied on by the claimants including BDA Design note 7, BD 24552, BS EN 56283:2005 and PD 6697:2010 (referenced in

Mr Satow's report). Eventually, having been taken through these documents, he agreed that the absence of a coping was not best practice. It was then put to him that the upshot of these documents was that it was best practice to have a coping over flush capping bricks and he agreed that that was right. Then he said this:

"Q: And so designing capping bricks without any projected coping is contrary to that best practice.
A: Yes, I suppose that's correct."
(transcript Day 8, page 35)

155. In his report, Mr Smart described the specification of dpcs set back from the face of the brickwork as a design inadequacy and expressed the view that recessed joints were "incorrect" and could exacerbate water ingress in exposed conditions. He maintained that position in cross-examination. When cross-examined by Mr Fowler, he agreed that the purpose of the dpc was to allow rain to run off down internal face of brickwork and not cross the divide to the internal leaf. However, he also agreed with Mr Crowley's proposition that that if the dpc/ cavity tray fell short of the wall, water could potentially percolate down below the dpc.

Jonathan Satow

156. In his report, Mr Satow concluded that the cause of discolouration or staining had not been fully determined:
    (i) He considered it unlikely that the brick cappings were admitting water because on inspection the dpcs were dry and damp appeared below.
    (ii) In his opinion the lack of a projecting drip was likely to have increased the wetting of the face of the brickwork and staining. But he observed that, whilst copings with overhanging drips are generally recommended, brick flush cappings have been successfully installed on other buildings without the problems that have occurred on this property.
    (iii) He did not consider that "minor deviations" in respect of recommended practice in respect of dpcs/cavity trays and the interface with lead flashing were significant factors.

157. In cross-examination, he elaborated on the primary objective of the design being to prevent water getting into the building. He agreed that following the guidance in relation to overhangs would mitigate the extent to which the bricks below would get wet. The dpc extending to the external face would prevent water seeping downwards but brickwork below the dpc would still get wet. He agreed that a coping on parapets was preferable in terms of reducing rain on the wall below but emphasised that it was a matter of architectural design.

158. Mr Satow went some way, although not as far as the claimants submit, to accepting that the mechanism and cause of staining which Ms Hoey described was plausible:

"Mr Crowley: *But there is nothing to suggest that the mechanism that I've described of having saturated capping bricks and then water percolating down from them to the mortar to the brick below, not hitting the DPC because it's set back and just going down the brick like that, is not operating here?*
A. *Only the fact, as I've said, that there is no evidence that I've seen of water having accumulated on top of the cavity tray."*

Discussion

SCd's design

159. I consider first whether SCd failed to exercise reasonable care and skill in any respect which I have accepted is pleaded against them and/or failed to carry their services in a professional manner.

160. It was submitted by Mr Fowler, on behalf of SCd, that the claimants had simply not grappled with a fundamental element of any cause of action and had not adduced evidence or put any case that met the *Bolam* test – that no reasonable architect would have designed as SCd did. It was argued that what was put to Mr Satow was only that the design was not in accordance with best practice rather than reasonable practice. Some reliance was placed, a I have already indicated, on the fact that the guidance focusses on the purpose of the dpcs/ cavity trays being to ensure that water does not penetrate the building internally by directing water to run down (usually) the exterior of the outer leaf or (less usually) the inside of the outer leaf. Little, if anything, in published guidance, is said about staining. Further, as I have also said, Mr Satow made the point that there is often a judgment call to be made in terms of balancing design guidance and the desired style or aesthetic.

161. I do not accept this general argument. Firstly, Mr Crowley's point was that the purpose of best practice was to avoid risk and the point that he put repeatedly was that no guidance on the design of parapet walls showed anything like the design adopted by SCd. Without reversing the burden of proof, this begged an explanation from SCd or its expert as to how risk had been assessed in a design that did not follow recommended practice. There was no evidence that SCd had taken some sort of balanced view or that they had taken steps to raise this "trade off" with the claimants (which itself might have been required in the exercise of reasonable care and skill). Whilst the burden of proof was plainly on the claimants, SCd did not adduce any evidence that the design they had adopted was one that a body of reasonable architects had adopted elsewhere and indeed Mr Clifton said that he had never designed a parapet wall like that before or since (albeit principally because the firm did not do much design work on residential houses).

162. Secondly, although the focus in the published guidance may be on preventing water ingress to the interior of the building, it does not follow that because no such water ingress has occurred, since remedial works were carried out, that the design was carried out with reasonable care and skill. It may be that the unspecified effect of following the guidance is that it prevents or mitigates the sort of staining that has occurred in this case. If the design did not comply with any established practice and was not carried out with reasonable skill and care, it does not matter that the consequence is not the expected one.

163. Turning then to the design and starting at the top, so to speak, the balance of the evidence is clearly that the parapet without a coping allows water to penetrate the brickwork. The guidance relied upon by the claimants recommends copings and, indeed, the British Standard document, PD 6697:2010, at paragraphs 6.2.8.5.2 goes so far as to strongly recommend them. Nonetheless they are not mandatory. The experts agreed in their joint statement that flush brick cappings are not an uncommon detail on contemporary domestic architecture. That was consistent with Mr Clifton's evidence, albeit brief, and with the oral evidence of Ms Hoey.

164. I do not, therefore, accept that to design the parapets in this way in isolation amounted to a failure to exercise reasonable care and skill. The only case that might have been advanced against SCd was that, having adopted this aesthetic design, they failed to take other steps to ensure the structural integrity of brickwork at parapet level that may, as a result, have become saturated with rainwater. Although canvassed by Ms Hoey, that was not a case that was ever pleaded and properly advanced against SCd.

165. However the case that was pleaded and advanced against SCd was that the specification of set back dpcs was negligent. It was accepted by Mr Clifton at the least to be an error. Although there was some confusion in the claimants' case, the purpose of specifying a recessed joint appears to have been to expose the set back dpc but what should have been specified was a dpc the full width of the wall - or extending beyond the wall – with a flush joint.

166. In conjunction with the absence of any overhang at parapet level, the specification of a set back dpc was in my view a negligent error, because it failed to provide an adequate means of protecting the brickwork from rainwater from which there was no protection from the parapet itself. Irrespective of any defects in construction, it provided a means for water to enter and soak into the brickwork below the dpc bypassing the cavity tray and not running off the face of the wall.

167. Contrary to the general submission of SCd that there was no evidence from which it could be concluded that no reasonable architect would have so designed the wall, Ms Hoey in her report said this:

> *"2.2.123* *I consider that an Architect acting with reasonable skill and care in designing a contemporary dwelling in brickwork would be aware of the guidance available and familiar with the issues associated with brickwork design and construction.*
>
> *2.2.124* *BDA Design Note 7 'Brickwork Durability' addresses many of the issues associated with modern brickwork and durability, stating that "saturation by water is the commonest potential enemy of brickwork, but recognition of this by appropriate design, specification and workmanship will ensure that modern brickwork will remain effectively maintenance free" (my emphases underlined).*
>
> *2.2.125* *I therefore consider that an Architect acting with reasonable skill and care would have an awareness of the high risk of saturation of the cappings, external wall construction, parapets and chimney and would consider how the design could protect the brickwork from saturation."*

And then in conclusion at paragraph 4.2.2(b):

"SCd's specification required that the DPC/cavity tray be set back 5mm from the face of the brickwork, contrary to industry guidance and good practice which requires it to extend beyond the face by a minimum of 5mm. This would have applied throughout the development, renders the cavity tray element ineffective for the unprotected area and increases the risk of downward percolation of water through the brickwork".

Thus in designing the dpc to be set back from the face of the brickwork, SCd did not take account of the risk of saturation as a reasonably competent architect would and should have done.

168. The precise mechanism by which the brickwork has become sufficiently stained that it remains so even when not damp is unclear. Ms Hoey's theory of the mechanism was that rainwater penetrates the brickwork from capping level and percolates downwards. A full width/ extended cavity tray would not only throw water clear of the brickwork but would also provide a barrier to the penetration of water in brickwork below that level. Although she fairly said that she could not be certain, in her opinion, it is that water penetration that is the probable cause of the staining.

169. In my view, on the balance of probabilities, that opinion is right. The discolouration is more likely than not to be the consequence of more rain water reaching the brickwork more often than it would have done had the dpc provided adequate protection. In other words the water is, as Ms Hoey postulated, penetrating the brickwork rather than there being merely rain on brickwork.

170. That conclusion is supported by the fact that no evidence was adduced of properties where there is similar staining but parapets were constructed in accordance with the recommendations in the guidance. Further, the advice from the Brick Development Association recommended the extended dpc as a method of mitigating staining – which itself implies that something similar had been experienced elsewhere and that the throwing of the water further from the face of the brickwork by some means had been an effective remedy.

171. It follows that, if I were concerned only with the issue of whether there was, in contract, a failure to exercise reasonable care and skill, and whether that breach had caused the discolouration, I would have found in favour of the claimants as against SCd on the basis of the failure, in the context of the overall design, properly to design the dpc. However, any claim in contract is time-barred. I turn to alternative bases of claim in respect of design below.

SCD's inspection obligations

172. Having found that SCd was engaged on the basis of the RIBA Standard Terms 2010 and to provide the services set out in the Schedule of Services, it follows that what might be described colloquially as SCd's inspection obligations were not obligations to inspect every aspect of the works or to do so with any particular frequency. Rather the obligation was to make the appropriate number of visits to the site for "inspection generally of the progress and quality of the Relevant Design as built".

173. It was, of course, the claimants' case that these standard terms were not the basis of any contract between Mrs Vainker and SCd and no specific breaches of this clause were pleaded. Rather, the claimants advanced a general case that SCd had failed to perform its services with reasonable care and skill. Given my conclusion as to the scope of SCd's obligation, the case against it must be a failure to exercise reasonable care and skill in carrying out the inspections referred to in the Schedule of Services. There was a repeated complaint that SCd had not kept the claimants informed of progress and defects. This

was a generalised allegation and one that goes nowhere in terms of loss and damage. Further, in respect of every workmanship defect, it was alleged that SCd had failed to instruct Marbank to remedy the defect, but the power to instruct the remedying of defects lay with the Contract Administrator.

174. I summarised above the opening up carried out in 2014 and 2015 when numerous examples of defects in construction were exposed, including in the setting back of the dpc far more than 5mm from the brick edge and other defects in the installation of cavity trays and lead flashings. The experts agreed, in the joint statement, that the cavity trays that were opened up on their inspection were set back from the face of the brickwork by at least 20mm. The claimants provided a table summarising what was observed by Ms Hoey (alone) and by Ms Hoey and the defendants' experts on inspections between 2019 and 2021. I reproduce that table at Appendix 2 to this judgment. I should make clear that that does not mean that I make findings of fact on all the matters referred to therein but it provides a useful summary of the evidence adduced as to the construction of the brickwork. From all this, it can be seen that there were numerous defects in construction. It would be disproportionate, if not impossible, to enumerate them all.

175. There was brief evidence as to the extent to which SCd, in fact, visited to carry out inspections and as to what was done. Mr Clifton said that they allowed for once a month visits. When SCd was on site there would usually be a client meeting in the morning followed by a walk around the house to review progress generally. He emphasised that SCd was not carrying out a clerk of works role but that, if anything arose on their inspections, they would make comments. In his statement, he continued:

"Our response to anything we identified on site would depend on its seriousness. Where minor issues were identified we would raise these with … Marbank's staff on site. … Where more serious issues were identified, this would be mentioned to Marbank's site manager at the time and then followed up by email."

He said nothing specifically about inspection of the brickwork.

176. The experts in their joint statement said nothing about SCd's performance in this respect.

177. Ms Hoey, in her report, first identified seven workmanship details, namely (i) capping bricks in 4 areas that were not the specified "specials" but site assembled composite bricks; (ii) insufficient mortar between capping bricks; (iii) the dpcs set back more than 5mm and as much as 65mm; (iv) lead flashings dressed over the dpc; (v) the dpc placed directly on brickwork rather than on a mortar bed; (vi) missing weepholes; and (vii) the dpc installed a brick course higher than indicated in SCd's drawings. These she said were evident in the as built construction.

178. I refer to these matters further below in the context of the claim against Marbank. However, I note at this stage the following statements of the experts in their joint statement:
    (i) So far as the "specials" are concerned, the experts observed that the brick cappings consisted of fabricated assembles but were not agreed whether this was a defect. They said nothing in the joint statements about the relevance to the staining or the structure.
    (ii) The experts were agreed that the dpcs were set back more than 5mm.

(iii) They agreed that flashings on the inner face of the parapets in the buff brickwork were generally lapped over the top of the cavity trays. SCd's drawings were not clear on this detail – although Ms Hoey's position on this changed - but recommended good practice is for the flashing to be lapped under the cavity tray. They said nothing about the relevance to staining or the structure.

(iv) The experts agreed that on the flat roof the flashing was tucked in one course lower than the cavity tray which was not in accordance with SCd's design. But they also agreed that there was no evidence that water ingress into the building had been caused by this issue. They said nothing about the staining or the structure.

(v) They said nothing about insufficient mortar, dpcs placed directly on the brickwork or missing weepholes.

179. Mr Fowler submitted generally that Ms Hoey's evidence did not provide expert evidence in support of the claimants' case as it was unclear, when she said that a construction defect was evident, whether she meant evident upon opening up or evident to every reasonably competent architect inspecting in accordance with SCd's duties. In her report, having identified these seven details, Ms Hoey then set out the sequence of events in terms of correspondence about the brickwork and the opening up and inspections up to 2015. Although she made various criticisms of SCd's performance post-practical completion and in response to requests for reports and so forth, these are not material to the pleaded case against SCd. None of Ms Hoey's evidence was concerned with what SCd ought to have observed and/or failed to observe carrying out their contractual obligations to visit to inspect generally the progress and quality of what they had designed as built.

180. Further, it is apparent that prior to the certification of practical completion, in e-mails dated 3 and 4 December 2013, SCd had raised concerns with Marbank about missing weepholes. Marbank's sub-contractors, Opus, claimed they had provided weepholes only at the end of sloped walls on the basis of a decision on site which had not been confirmed by the architect. It appears that Mr Clifton discussed this further with Mr Dow and his evidence was that he was given assurances by Marbank about this detail. Issues relating to the installation of the cavity trays, dpcs, and flashings had also already been raised. SCd attended the opening up on 1 May 2014 and provided photographs of the dpc set back more than 5mm. SCd prepared a snagging list dated 14 May 2015 which identified 22 instances of defects in brickwork and pointing. This is all evidence of SCd competently doing what they were engaged to do.

181. In my judgment, there is simply insufficient evidence from which to conclude that SCd failed in the course of the works to carry out their limited inspection obligations with reasonable care and skill and, any claim against SCd must, therefore be focussed on its design obligations.

Limitation and causes of action in tort and under the DPA

182. As I have said, it is not seriously in dispute that any claim in contract in respect of design is time-barred, as all relevant breaches occurred well before practical completion on 4 May 2014 and, therefore, more than 6 years before the commencement of proceedings. Although, on the face of the pleadings, that was denied by the claimants, no case was articulated as to why the claims in contract were not time-barred and the issue was not ventilated at trial. There is, however, no doubt that SCd owed a co-extensive duty of care to Mrs Vainker but there is no evidence on the basis on which I could find that SCd owed

any duty of care to Mr Vainker. It would follow from my previous findings that SCd would be liable to Mrs Vainker (and only Mrs Vainker) for breach of duty in tort unless that claim was also time-barred. The claim in tort would also obviously be time-barred unless Mrs Vainker could rely on section 14A of the Limitation Act 1980.

183. As relevant, Section 14A, provides for a limitation period of 3 years from the date of knowledge where that period expires later than the normal 6 year limitation period. The relevant provisions of subsections (5) – (10) are as follows:

"(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection 4(b) above is the earliest date on which the plaintiff… first had both the knowledge required for bringing the action for damages in respect of the relevant damage and a right to bring such an action.
(6) In sub-section (5) above, "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both
(a) of the material facts about the damage in respect of which the damages are claimed; and
(b) of the other facts relevant to the current action mentioned in subsection (8) below.
(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
(8) The other acts referred to in subsection (6)(b) above are –
(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.
(b) the identity of the defendant; and
(c) …..
(9) Knowledge that any acts or omission did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire –
(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate to act on) that advice."

184. In *Haward v Fawcetts* [2006] 1 WLR 682 at [8-10], Lord Nicholls said:

"8. Two aspects of these "knowledge" provisions are comparatively straightforward. They concern the degree of certainty required before knowledge can be said to exist, and the degree of detail required before a person can be said to have knowledge of a particular matter …
9. … knowledge does not mean knowing for certain or beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice." In

other words, the claimant must know enough for it to be reasonable to begin to investigate.
10. Questions about the degree of detail required have mostly arisen in the context of the need for a claimant to know that "the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence" ....

Lord Nicholls then set out a number of examples of the test given in different types of cases, all of which had the characteristic of requiring broad knowledge of the relevant acts and omissions.

185. Mr Fowler also relied on the decision of Ms Buerhlen QC (sitting as a Deputy High Court Judge) in *Richardson v Hills Contractors & Construction Ltd.* [2021] EWHC 479 (TCC):

"14 .... in cases of building defects, knowledge of the existence of a sufficiently serious defect and the identity of the party who would, in principle, be responsible may be enough to set the clock running. .....

34 As regards whether the claimants had the requisite knowledge that the damage was attributable in whole or in part to the design for which the second defendants were responsible, the claimants knew, as I have already noted, that the second defendant had designed the structure. On the basis that "attributable" means "capable of being attributed to" the design, I would have thought that it would have been obvious that the damage might be attributable to the design of the roof. The chances are that it was going to be attributable to one of two things, either the design of the roof or its construction. If I ask myself the question, "Did the claimants have enough knowledge to make it reasonable for them to commence investigation into the causes of significant roof movement?" it seems to me that they obviously did."

186. The claimants pleaded that they did not have the requisite knowledge within section 14A until after 4 May 2017. In answer to a Request for Further Information they said that they could not have known that the damage was attributable in whole or in part to the acts or omissions of the SCd which are alleged to constitute negligence before obtaining expert evidence which was not obtained until after 4 May 2017 and they referred to photographs of defects taken in 2018.

187. As Mr Fowler submitted, the test for knowledge is not knowledge of the precise breach to be alleged and, in this case, it is obvious that the claimants were aware of the potential claim against SCd long before they obtained expert evidence.

188. In her witness statement, Mrs Vainker said that she first noticed the discolouration in October 2013. In November 2013, when she mentioned this to Mr Dow, his response, she said, was that it was a design issue which should be raised with SCd. As set out in the chronology above, Mr Fitzgerald asked SCd to investigate the issue and they reported in December 2013. Mrs Vainker regarded this report as unsatisfactory and was not prepared to accept the proposal of an aluminium drip because she wanted to know whether the construction of the brickwork was a cause of or a contributory factor to the damp brickwork. Opening up and inspections were undertaken in 2014 and 2015.

189. SCd also prays in aid the fact that it notified its insurers in December 2013. Obviously the fact that SCd perceived a potential claim does not invest Mrs Vainker with the

requisite knowledge for the purposes of section 14A. However, when Powell Williams were first approached for independent advice in April 2014, nearly a year before they reported, Mr Ward wrote to Mrs Vainker with his proposal dated 15 April 2014. He referred to his conversation with Mr Fitzgerald, an e-mail from Mrs Vainker dated 15 April 2014 (which has not been disclosed) and a subsequent telephone conversation. He stated that:

"I understand that you are not represented by solicitors and no formal dispute has arisen. However, you have asked the architect to put his insurers on notice of a possible claim for negligence."

Although there was no further evidence about this, it is indicative of Mrs Vainker being aware of the potential claim against the architects. Further, in summarising his understanding of his instructions, Mr Ward said:

"You have explained that there are two types of brickwork to the elevations of The Croft. The red brickwork is reported to be satisfactory. However, the brickwork elsewhere is 'soaking wet', the appearance is 'very unpleasant' and you feel strongly that the building has been incorrectly designed so as to permit this condition to arise. You have a single fundamental question that you would like me to answer, i.e. "Has the wet brickwork been incorrectly designed?"

Accordingly, the relevant knowledge was not only knowledge which could have been obtained with appropriate expert advice but that advice had already been sought.

190. From Mrs Vainker's responses in cross-examination, her concern was to get to the bottom of the issue before she took any decision as to what to do. She was anxious to know whether there were workmanship defects before agreeing to any change in design and, in this respect, she was not satisfied with the reports she received. That does not change the fact that she had knowledge that the damage was attributable in whole or in part to SCd. That was the premise on which she was acting from late 2013 onwards and certainly well before May 2017. Any claim in tort (whether in respect of design or inspection) is, therefore, similarly time-barred.

191. No doubt recognising that risk, the claimants relied further on a claim for breach of the duty owed under the Defective Premises Act. Time runs from the date of completion of the dwelling (see section 1(5)) and SCd has not sought to argue, if any cause of action arises under the DPA, that it would time-barred.

192. For that reason, as against SCd, a key issue is whether, as a result of any failure by SCd to carry out its work in a professional manner, the House was unfit for habitation at the time of completion.

193. As I have said above, the claimants opened their case on the basis that there have been leaks and considerable water ingress into the house as a result of defective brickwork in 2013 to 2015 and again in 2022. I have explained above why I am not satisfied that any further leaks in 2022 were related to any brickwork defects.

194. It is further alleged that if left unrepaired the brickwork at parapet level is at risk of failure. The claimants contend that the "permanently damp" and stained brickwork forms

part of the structural element of the building and that prolonged saturation of the mortar may well result in sulphate damage to the mortar joints. They say that mortar is already missing in places. Further continued saturation could also increase the risk of frost damage.

195. Both of these matters – that is, water ingress and the structural risk - are relied upon as meaning that the House was unfit for habitation at the time of completion. So far as the leaks are concerned, the claimants' assumption must be that they were caused by the failure of the SCd to exercise reasonable care and skill. There is no evidence of the causal connection between any design defect and the leaks that occurred or any risk of future leaks. It may have been the case that some of the construction defects were causative but I have found that there is no breach on SCd's part in this respect.

196. So far as the structure is concerned, the experts agreed that there was no current evidence of structural brickwork failure or falling bricks. The claimants' case must, therefore, be that the condition of the brickwork at the time of completion meant that it was susceptible to failure at a later date to an extent that would make the property unfit for habitation. The claimants rely on the risk of failure of structural integrity and the associated risk to health and safety. Importantly, the premise of the claimants' case is that the walls are permanently damp but that is not supported by the evidence.

197. Ms Hoey explained in her evidence that the risk arises primarily from the deterioration of the mortar. In summary, water that penetrates the brickwork reaches the mortar and sulphate attack of the mortar puts its structural integrity at risk. There is substantial agreement amongst the experts that the risk of structural failure would arise from the brickwork being <u>permanently saturated</u> exposing it to sulphate attack:

    (i) The BDA Design Note 7 under the heading "Saturation – the main cause" states: *"... if brickwork remains saturated for long periods, sulfate attack may disrupt the joints unless a suitable mortar is used."*

    (ii) In her report, Ms Hoey referred to a number of aspects of SCd's design which she said were factors that increase the risk of water saturation *"which, if left for long periods, can increase the risk of sulphate attack to the mortar joints. The cracking and erosion in the mortar joints I observed to the garden elevation buff brickwork elevation and single storey buff brickwork (reference Investigation Area D) is consistent with sulphate damage"*.

    (iii) Ms Hoey, in her oral evidence, referred to cracking and erosion of mortar which she had seen but in terms of the cause said that *"sulphate attack happens only when things are continually and long term saturated."*
    And later:
    "The risk of sulphate attack comes through water saturation, which I consider is primarily related to the soaking of the brickwork and the soaking -- and that includes the bricks and the mortar."

198. Taking this evidence as a whole, it seems to me that Ms Hoey reasoned from erosion which seemed to her consistent with sulphate attack to there having been such sulphate attack even though that would only occur following long term saturation and there was no evidence of long term saturation other than the process of reasoning from the observed

erosion. At the conclusion of this part of her cross-examination by Mr Clay, it was put to Ms Hoey that the wording "consistent with sulphate damage" was not putting it "very strongly". Her response fairly was that it meant consistent but was not "an absolutely firm diagnosis".

199. Whether there had been any erosion of mortar and/or erosion that was consistent with sulphate attack was in dispute.

200. In her report, in the passage set out above, Ms Hoey referred to "cracking and erosion" in Area D. Neither Mr Smart nor Mr Satow agreed that they could see evidence of erosion.

201. In her report at paragraph 2.2.78, Ms Hoey said that the capping bricks in Area E showed evidence of extensive moss growth and erosion to the mortar joints. She did not express an opinion as to the cause of the erosion. This area and the close up photograph in Ms Hoey's inspection report (Appendix 3) was put to Mr Smart and Mr Satow as showing erosion. Neither or them agreed with that proposition and Mr Satow was adamant, on the basis of his own inspection and photographs, that no erosion could be seen.

202. Mr Smart recognised that he was not an expert on sulphate attack. When taken to a number of photographs, he expressed the view that what he saw looked more like movement causing mortar to dislodge rather than erosion. Mr Satow's evidence was that he would use a similar description to Mr Smart's to distinguish between mortar falling out, when dislodged, and mortar eroding. When taken to a number of photographs where mortar was missing, Mr Satow repeatedly said that he could not tell whether it had eroded or fallen out.

203. Mr Smart could offer no evidence of structural movement. Although Mr Smart could offer no such evidence, there was similarly no evidence to explain why erosion by sulphate attack would have manifested in the so-called zig zag crack, which was itself difficult to discern on the photographs. All that was ultimately put to Mr Smart and that he was able to agree was that if mortar fails, bricks may be dislodged. His evidence took matters no further one way or the other.

204. Although there was some reference to risk of frost damage, no instance of frost damage was identified.

205. I referred above to the evidence about moss in certain locations which, in my view on the evidence, did not necessarily signify long term saturation of the brickwork. In cross-examination, Ms Hoey also agreed that it did not necessarily indicate any deterioration of the brickwork:

"Q: So that one doesn't fear sulphate attack every time one sees a mossy wall?
A: No, I would say that's a reasonable statement."

206. Mr Satow was also asked about the presence of moss and it was put to him that that only occurred where there was saturation. His response was that there were other factors including the orientation of a wall which might cause it to dry out less quickly.

207. There was, as I have referred to above, only one instance of a brick which had come loose and could be removed easily by hand. It is important that, at the time of the joint statement, the experts all agreed that there was no current evidence of structural brickwork failure or falling bricks. In other words, not one of the experts considered any erosion or cracking that may have occurred to evidence structural failure. Nothing was said in terms about future risk but the only change following the joint statement was the one loose brick identified by Mr Vainker. The claimants' case at highest assumed that that was caused by erosion of the mortar which was itself caused by sulphate attack consequent on long term saturation despite the absence of evidence of long term saturation. One loose brick does not make that assumption good.

208. Drawing the threads together, I am satisfied that Ms Hoey observed some limited evidence of mortar erosion in Area D. However, I cannot conclude on the balance of probabilities that this was caused by sulphate attack and as a result of long term saturation of the brickwork. By the same token, I am not satisfied that there is any risk of further erosion and consequent structural risk to the brickwork as a result of any aspect of design or workmanship which has caused the staining to the walls. The staining is an aesthetic defect and not one that rendered the House unfit for habitation at the time of completion.

209. It follows so far as SCd is concerned that there was no breach of the duty owed under section 1 of the DPA.

Marbank: brickwork

The claimants' case

210. The claimants' case against Marbank in Scott Schedule items 1 to 5 is, in essence, that poor workmanship has exacerbated the defects in SCd's design and/or that the brickwork was not laid in accordance with SCd's design. I repeat that the principal complaints raised are (i) that the cavity trays have been set back excessively, that is, even more than the 5mm specified; (ii) that cavity trays have been laid directly onto brickwork rather than on to mortar; and (iii) that the mortar joints are flush rather than recessed contrary to clause F30/525 of the Specification. I also repeat what I said above about the contradictions in the case against SCd in this respect. All of these are said to render the dpc/ cavity tray installation "defunct" and to contribute to the brickwork being, as alleged, permanently damp or discoloured.

211. These aspects of the construction were pleaded as breaches of various clauses of Marbank's Contract but can conveniently be grouped together as alleged failures to carry out the Works in a proper and workmanlike manner or in compliance with the Contract Documents contrary to clause 2.1.

212. Further allegations are made that Marbank's workmanship was not in accordance with industry guidance or the specification. As set out in item 1 of the Scott Schedule, these allegations include the following:
    (i) Coping bricks were poorly installed. From item 2 (defective coping bricks) it appeared that this was intended to encompass an allegation that the coping bricks had been installed without any overhang, albeit that was in accordance with the design, but also (a) that the coping bricks were crooked and unsightly and (b) that

Marbank had failed to use "specials" contrary to clause F10/110 of the specification and instead used bricks with visibly glued joints.

(ii) As I have referred to above, below the first floor terrace, the dpc was laid a brick course lower than specified (although in the Scott Schedule this appeared as a more general allegation).

(iii) Lead flashings were installed so that they lapped over the cavity trays rather than under which was not in accordance with the guidance as to good practice in BD2452 or GBG33.

(iv) There were gaps in lead flashings which were vulnerable to water ingress.

(v) There was a general allegation that cavity trays were not fitted properly or in accordance with the specification. By the time of trial, this allegation appeared to have crystallised into an allegation that cavity trays were laid directly onto brickwork rather than on a bed of mortar.

213. These allegations were repeated, as relevant, under items 2 to 5 and item 2 advanced a discrete claim for damages to replace the coping bricks.

214. It is material, at least to the issue of breach if not damages, that, although (in item 1) these matters are said to cause or contribute to the damp condition of the brickwork, some or all of them are capable of being relied upon, if made out, as simple breaches of contract. Put another way, it is not necessary for the claimants to establish as against Marbank that these defects in workmanship rendered the House unfit for habitation. Although the claimants contend that Marbank was in breach of section 1 of the DPA, that cause of action is not central to the case against Marbank as there is no limitation defence available to Marbank in respect of the claim for breach of contract.

215. Firstly, it will be apparent from what I have said above in relation to the brickwork that I am satisfied that there is ample evidence that the cavity trays were set back to a significantly greater extent than the 5mm specified, that is by at least 20mm (as agreed in the Joint Statement) and by up to 65mm as observed by Ms Hoey. The setting back of the cavity trays even further than specified must have exacerbated the effect of permitting more moisture to penetrate the brickwork and, since I accept Ms Hoey's opinion that that is the probable cause of the damp appearance of the brickwork, that must have been contributed to by Marbank's breach of the specification. Other than the suggestion of Mr Satow that the mortar joints could be described as bucket-handled, that is slightly concave, there does not seem to be any dispute that the joints were also flush, rather than recessed which, even if the cavity trays had not been so far set back, would have prevented the exposure of the edge of the cavity tray.

216. Whether any other defects have contributed to the appearance of the brickwork is a more difficult question.

217. It is not in issue that, in one location, the dpc was laid a brick course lower than specified. Whilst a breach of contract, in the sense that Marbank did not comply with the terms of the contract, the experts are agreed that there is no evidence that this has caused water ingress and any impact must be de minimis.

218. The experts are agreed that lead flashings on the inner face of the parapets in the buff brickwork are generally lapped over the cavity trays contrary to good practice. It is not

apparent that this defect is more widespread. Ms Hoey's opinion is that this may contribute to water penetration of the brickwork because water is not deflected to the exterior of the building.

219. The placing of the cavity trays directly on to brickwork is contrary to good practice and the specification at F10/415 which provides for placement in continuous lengths on a full even bed of mortar. Again Ms Hoey's opinion is that that may contribute to rainwater penetration. On the basis of the table which I reproduce as Appendix 2, the claimants' contend, and I accept, that this defect is a general one with two areas designated as Area C2 at the west/rear elevation and area E being exceptions where there is no evidence that the cavity trays were so installed.

220. Ms Hoey's report also complained of the absence of weepholes which was an issue raised at trial, and Mr Smart agreed that there were some areas where there were no weepholes. This was not a matter pleaded and, in any event, it makes no difference to my conclusions. I say no more about it.

221. The claimants' case in relation to the coping bricks forms both part of item 1 in the Scott Schedule and a free-standing item 2 in respect of which a further discrete claim for damages is made.

222. Mr Smart made the point that these bricks were strictly speaking cappings and not copings because they had no overhang and were designed to be flush with the external brickwork. They were installed without any overhang in accordance with the design and I cannot see that there can be any breach of contract by Marbank in that respect.

223. I have seen little or no evidence that the fixing of the coping bricks was otherwise poor. In his report, Mr Smart noted that significant remedial works had been carried out to the cappings when there were issues with water ingress. These repairs appeared to have been satisfactory. He agreed that the photographs showed that the brick edge line on the back of the copings was irregular but, in his view, that could not be seen from the ground and did not affect the appearance of the property.

224. The specific allegation that the copings ought to have been but were not specials arose in this way. Under clause F10/110 (the red brickwork) and clause F10/111 (the buff brickwork), the specification provided that specials were to be installed as shown on SCd's drawings A(29)290. It does not appear to be in dispute that the specials were shown as the copings.

225. In her report, Ms Hoey said that the coping bricks appeared to her to be site assembled composite bricks. She understood composite brick specials to be common but said that they were usually assembled under factory conditions. Site assembled joints were in her view more vulnerable to water penetration. Further, as some locations the joints were not fully filled.

226. In cross-examination, she elaborated on bespoke specials which could be a single brick or a factory assembled composite but both would be covered by the same warranty. There was then this exchange:

"Q: So you don't criticise SCd or Marbank for using cut and bonded specials in itself.

A: No, not if they are done under factory conditions and they are covered by the same warranty. That is what you would normally expect.
Q: But you draw some attention to some specials which you say were .... which we assume were poorly assembled?
A: They did look poorly assembled and they had sort of quite wide grout joints that didn't quite match the brick. So they looked poor. There is no guarantee as to the adhesion, the joints were too big and therefore – with what looked like mortar there, which would potentially allow water into the brick itself. And presumably no warranty cover for that brick.
Q: Your opinion apparently is that that's a serious issue in relation to the saturation of the brickwork?
A: I think it could contribute.
Q: But you don't know how serious it is?
A: No, as I said, I haven't had a chance to go up and survey every single bit of parapet and say out of this run I can see this many joints this big and that's going to allow a bit more water in. ....."

227. In closing submissions, the claimants submitted that it was not disputed that "various of the specials" were assembled on site. The impression created by that submission was that there was some general acceptance of the claimants' case that the specials were assembled on site. The claimants referred to Mrs Vainker's evidence in her statement in which she had said that in the first week of May 2014, she had seen bricks being cut and stuck together by Mr Mwale who told her that Marbank had no choice because it would take too long to get the specials fabricated by a specialist brick supplier. The claimants also referred to Mr Dow's evidence. That evidence was, in fact, to the effect that the specials were manufactured specially by companies called Lite Speed and Just Facades and arrived on site already "glued" together. There was, however, he accepted occasional cutting and gluing of bricks on site because of the complexity of the design or where a brick was damaged.

228. That amounted only to a very limited acceptance that some cutting and bonding was done on site in particular circumstances and no more. This evidence was not, as such challenged in cross-examination, and the particular occasion which Mrs Vainker had referred to was not explored. It seems to me that the proper conclusion to be drawn is that the specials were predominantly factory assembled but there was <u>some</u> assembling on site in the circumstances Mr Dow referred to.

229. In cross-examination Mr Dow was also taken to an e-mail dated 20 August 2013, sent to Mr Richards, of Lite Speed, in which Mr Dow said that the "facing specials" were nowhere near the quality expected and required them to be remade. There was no further evidence as to whether these specials had been remade or whether any other specials were subject to the same criticism. At best it was evidence of some issue having arisen with the quality of the specials supplied.

230. Mr Smart also opined that specials for the corner locations were not included in SCd's drawings and appeared to have been produced by assembling on site by Marbank. He considered these to be of a reasonable standard. Having said that, and as Mr Crowley submitted generally, Mr Smart's opinions were often not backed up by photographs to demonstrate and support what he was referring to. In this instance, he was taken, in cross-examination, to a succession of photographs (not at corners) where he accepted,

with some reservations, that there were gaps between the edges of composite bricks which created the potential for water to get into the gaps. Ms Hoey's observations of the composites led her to believe that they were all site-assembled and not factory made. That seems to me indicative that the poor quality or poorly bonded specials were more widespread than the specific instances put to Mr Smart.

Marbank's position

231. In common with SCd, Marbank's focus was on the case against it that the brickwork was permanently damp and at risk of structural failure and on the matters alleged against Marbank that, on the claimants' case, had contributed to that condition and risk.

232. Mr Clay submitted that, although Marbank had pleaded various comments in relation to the specific allegations about their workmanship, it was only necessary to go into them if there was a serious defect necessitating rebuilding and that there was, in the event, no such defect. Mr Clay acknowledged that Marbank accepted that in 2014 some "poor detailing" was identified and dealt with as were other brickwork snagging items. But, he submitted, the walls generally looked good and there was no serious defect.

Discussion

233. I have not accepted the claimants' case that the walls are permanently damp or that there is serious risk of structural failure such that the House was not fit for habitation on completion. But, as I have observed, that is not a necessary element of the case against Marbank. There was a clear breach of contract in the excessive setting back of the dpcs and one that, in my judgment, has caused or contributed to the damp appearance of the walls. The issue then becomes one of the appropriate remedial scheme, if any, and thus the appropriate damages for breach.

234. Although some of the workmanship issues have been remedied in the course of the remedial works carried out when water ingress occurred and in the course of snagging, the more recent inspections provide ample evidence that they remain widespread. These include the manner in which the lead flashings were installed, the cavity trays placed directly on brick and the poor quality specials.

235. So far as the copings are concerned, there was no contractual requirement for the specials to be specially manufactured as a single brick. That is not a meaning which could properly be ascribed to the word "specials" in isolation. Indeed, Mr Clifton's evidence was that SCd had discussed this with manufacturers, Lite Speed and Michelmersh, and that it was not regarded as cost efficient or practical. There was, therefore, no breach of contract by Marbank in supplying specials which were manufactured by cutting and bonding. There was similarly no breach in site assembling of some specials. However, whether factory made or site assembled, I am satisfied that there were multiple instances of poorly made specials supplied and installed. That accords with Ms Hoey's observations and the concessions made by Mr Smart in cross-examination.

236. If, as I have accepted, the mechanism by which the brickwork has become stained and discoloured is one that involves the penetration of water into the brickwork to a greater extent that would have been the case if the walls had been properly designed and constructed, any of the defects that exacerbate that penetration in all probability contributed to the discolouration that has occurred.

Remedial works

237. The claimants offered two options for remedial works to the stained brickwork (items 1 to 5). Option A was pressure washing of the brickwork with a heavy duty grime and stain remover or acid wash. Option B was the removal of the stained brickwork and rebuilding. Although these two options were pleaded and costed, there was no evidence at all to assist the court in determining which to prefer. There was nothing in Ms Hoey's report beyond the limited evidence referred to above and nothing in the reports of Mr Smart or Mr Satow.

238. On behalf of SCd, Mr Fowler approached the issue of remedial works on the premise that SCd could only be found liable to the claimants under the DPA and that it followed that any remedial works for which SCd could be liable would be confined to those necessary to make the House fit for habitation which he argued should be limited to steps required to protect the parapets from any material risk of premature structural failure. I did not understand either Mr Fowler or Mr Clay to contend, however, that works to remedy the aesthetic appearance of the House would not otherwise be appropriate and the cost recoverable as damages for breach of contract. I would not have accepted such a submission. The walls should not appear permanently damp, the appearance is unsightly and it is not what Mrs Vainker bargained for.

239. Nonetheless the issues as to scope of remedial works and mitigation merit consideration. These include matters relied on by SCd even though I do not find them liable under the DPA. Although relied on by both defendants, the arguments were most forcefully advanced by SCd and amounted to a submission both that Mrs Vainker had failed to mitigate any loss and that her actions had broken the chain of causation.

240. SCd submitted that the proposals that it put forward in 2013 for the installation of a drip detail or a coping would have eliminated any risk of structural failure and mitigated any staining or discolouration. A similar proposal was included in Powell Williams report. Another possibility canvassed by SCd was the application of a product manufactured by Stormdry to the walls.

241. Mrs Vainker was cross-examined as to her reasons for not pursuing any of these options. Without setting out lengthy extracts of her responses, they were in summary that she wanted to know what the cause of the defect was and was concerned that a remedial solution that addressed design but not workmanship would not be satisfactory if there were also defects in construction. She wanted to know what the position was in that respect. To say, as SCd do, that she was aware by April 2014 of defects in construction is not an answer to her concern or a reason why she should have taken up one of the proposals being made. She wanted the full picture.

242. I regard the criticism of Mrs Vainker in this respect as unfair. The defendants approach appears to be that, once she was offered remedial solutions (in however general terms), she was either obliged to accept one of those solutions or the burden passed to her to ascertain whether they were appropriate solutions. That is too simplistic and pays no regard to the fact that Mrs Vainker is, for these purposes, a lay person who found herself in the position of having commissioned a modern, aesthetically pleasing house, having lived through and paid for its construction, but not receiving what she had expected. I cannot see that wanting, as I have put it, to have the full picture, including the underlying

cause or causes of the condition of the brickwork, before opting for a remedial solution was unreasonable and either broke the chain of causation or amounted to a failure to mitigate.

243. There may be more merit in the submission that there is a lacuna in the claimants' case because, even after the appointment of Ms Hoey, the claimants do not appear to have considered any of these options and that is so despite a positive averment in the pleadings that none of these options would work. The converse of that argument, however, is the complete absence of any evidence on the defendants' part that any of these options would work. The defendants' evidence was, in effect, limited to the correspondence from the Brick Development Association and the report of Powell Williams (who did not give evidence).

244. In a sense, the high point of the defendant's case was the evidence of Ms Hoey in cross-examination. In the course of cross-examination Ms Hoey agreed that the insertion of a 30 or 40mm drip detail would throw some water off the face of the brickwork and she ultimately agreed that it might prevent further saturation of the brickwork by doing the job that the cavity tray was not doing – although that itself would depend on how far the drip went in to the brickwork. Without knowing how far the dpc was set back at every location, how, she asked rhetorically, could you possibly detail a remedial solution that was going to be effective. She added that the drip would not address damage to mortar and cracking (which on her evidence could be seen on the buff brickwork elevation) and that it would not preclude the risk of failure of the brickwork if placed on top of something that was already potentially unstable. As she also said, it would not remedy the other defects identified and nor would it remedy the staining that had already occurred.

245. This line of questioning and this evidence was, of course, focussed on the risk of failure of the brickwork and the remedial works that might be appropriate to render the House fit for habitation. I have concluded on the evidence that this issue does not arise but that the defect in the brickwork is an aesthetic one and one for which Marbank is liable in that its workmanship defects were causative of the damp appearance of the walls. It is obvious that the installation of a drip would at best mitigate the risk of further discolouration. It could not restore the appearance of the brickwork so that it no longer looked permanently damp and there is no evidence that it would address the risk posed by other defects in construction which I have found contributed the damp appearance of the walls.

246. In my judgment, the proper remedial scheme is one that restores the House to the condition that it ought to be in, that is, without the permanent appearance of damp and without the risk that that will recur in future. Although the claimants fairly offered an Option A which involved only, in effect, cleaning the brickwork, there was no evidence as to how effective that might be and it would leave the brickwork with the set back cavity trays and other matters which have led to the discolouration in the first place so that there would inevitably be a risk of recurrence. The addition of a drip detail might mitigate that risk but the best that can be said of the evidence is that it was a possible solution addressed in the most general terms.

247. The appropriate remedial scheme in respect of item 1 in the Scott Schedule must, in my view, be the replacement of the discoloured brickwork. In the second joint statement, Mr

Finn and Mr Johnson agreed the cost of the works at **£70,566.57** and that is the amount of damages for breach of contract that I award to Mrs Vainker as against Marbank.

248. There is a distinct claim for damages in respect of item 2 (copings). Little or no argument was advanced at trial as to the appropriate remedial scheme. Mr Finn and Mr Johnson agreed a cost for the remedial works allocated to this item at £31,938.57. However, they also agreed that if the removal and replacement of the brickwork (item 1) was carried out at the same time as the remedial works in respect of item 2, an adjustment would be necessary to avoid the duplication of scaffold costs. They agreed that that adjustment would reduce the cost of remedial works in respect of the copings to **£19,311.60**. I also award that sum in damages for breach of contract to Mrs Vainker as against Marbank.

Marbank's claim for contribution

249. In his submissions, Mr Clay made general reference to a claim by Marbank against SCd for contribution in respect of all defects where both faced a claim, noting that that was contingent on Marbank and SCd failing on their primary case that there was no defect, no causation and no loss. The claim was, he said, particularly pressed in relation to Scott Schedule items 8 and 9 but the general reference implied that such a claim was intended in respect of the brickwork items as well. The fact that any claim in contract against SCd is time-barred does not preclude a claim for contribution – see section 1(3) Civil Liability (Contribution) Act 1978. There are, however, no Part 20 claims in these proceedings and SCd resists any claim for contribution on the grounds that there are no such claims.

250. CPR Part 20.6 provides:

"(1) A defendant who has filed an acknowledgment of service or a defence may make an additional claim for contribution or indemnity against a person who is already a party to the proceedings by filing and serving on that party a notice containing a statement of the nature and ground of the additional claim.
(2) A defendant may file and serve a notice under this rule -
(a) without the court's permission, if the defendant files and serves it –
(i) with the defence; or ....
(b) at any other time with the court's permission."

251. Mr Clay submits that, before the CPR, there was an established practice of claims for contribution being dealt with without any formal notice. He submits that for the court to do so, in a case such as this, would be in accordance with the overriding objective because the court has already made all the findings relevant to an apportionment of liability and is best placed to make it. He relies on paragraph 4-28 in Clerk & Lindsell on Torts 24th edition which states that *"... questions of contribution between parties joined as co-defendants can be disposed of at the end of proceedings in which judgment is given against them, even if separate proceedings for contribution have not been instituted."* All the authorities cited for this proposition precede the Civil Procedure Rules and, as Mr Clay fairly points out, no reference to such a practice is made in the White Book.

252. Whilst I can see the practical merits of Mr Clay's argument, the rules are clear as to the basis on which a claim for contribution can be made against a co-defendant – that is, in accordance with Part 20.6. It seems to me relevant that that rule places a time limit on

the bringing of a claim for contribution in existing proceedings as of right and, thereafter, requires the permission of the court. If a claim for contribution between co-defendants could simply be made by submissions at the conclusion of proceedings, the rule and the requirement for permission would serve no purpose. I am not persuaded that it would be right for me to deal with claims for contribution other than in accordance with the Civil Procedure Rules.

253. Having said that, had such an application been made to me, it is likely that I would have granted permission, even belatedly, to bring Part 20 proceedings, as all the relevant evidence had already been adduced, to the extent that on items 8 and 9, SCd has already made submissions as to the appropriate percentage allocation of responsibility. Free-standing proceedings for contribution would serve no purpose other than the incurring of further costs. I, therefore, propose to deal with this matter by inviting Marbank to make any application it thinks fit, to be heard at the hearing of consequential matters. Both Marbank and SCd can address the court as to whether that application should be allowed and, if allowed, as to the percentage contribution of each, and the matter can be dealt with as part of the further judgment on consequential matters.

Brick slips (Scott Schedule item 6)

254. Scott Schedule item 6 described this alleged defect as cracked external brickwork slips and/or cracked mortar above brickwork slips and alleged that if left unrepaired there was a risk of falling masonry. There was a claim for remedial works distinct from the other brickwork items and Mr Finn and Mr Johnson agreed the cost at £3,287.77.

255. In the Particulars of Claim, the claimants' case was put on the basis that Marbank failed, contrary to clause F10/810 of the NBS Specification, to fix the brick slips individually to the lintels with epoxy resin. SCd, it was said, failed to instruct Marbank to comply with that Specification. F10/810 provided that the brick slips should be fixed with BBA certified epoxy resin and fully bonded.

256. It was not apparent from the Scott Schedule where the brickslips were installed and cracked but in submissions and reports reference was made to specific locations above the doors to the first and second floor terraces and windows to the bedrooms which opened onto the terraces.

257. The first reference was to the brickwork above the door to the first floor terrace at the rear of the House. Mrs Vainker's evidence was that this defect had been identified shortly after practical completion and apparently repaired by Mr Braggins in 2014 but that the damage had reappeared and deteriorated. References were given to photographs some of which did indeed seem to support Mrs Vainker's evidence, although for some of the close up photographs, no indication was given as to their location.

258. In his report, Mr Smart identified that SCd's drawings showed three courses of brick slips bonded to a steel lintel over opening FW2 to bedroom 1 and over opening FW1 to bedroom 2. He said that in August 2021 he had seen cracked mortar joints over these first floor windows but no loose or cracked bricks. He did not accept that this was Marbank's responsibility and considered it more likely that the lintel had deflected such that this was a structural or maintenance issue. He did not refer to the second floor.

259. I note that in an e-mail sent on 6 August 2014, Mr Fitzgerald had informed Mr Dow that a crack had opened up along the master bedroom lintel and he forwarded a photograph showing that crack. The claimants relied on an e-mail dated 7 August 2014 from, Elliott Wood, structural engineers, to Mr Fitzgerald as "ruling out" structural movement as a cause of this cracking. From the e-mail chain it appears that Mr Fitzgerald had informed Elliott Wood of cracking above the window and door openings to the master bedroom and asked them to advise on the integrity of the brickwork and whether investigation was required. Elliott Wood's response was this:

"Had a look at this, don't think this can be related to structural movement assuming our detail (attached for info) is what was built.
Not sure why the crack would have formed on only the first mortar joint, this should have no way of moving differently from the next two above it.
Also not sure how this could be investigated assuming the slips have been bonded to the steel as it will be difficult to remove them without breaking the brick. Suggest this is re-pointed and reviewed again in a few months.
Hope this helps"

260. This is not evidence that the cause of the crack was not structural movement or that structural movement was ruled out. It was simply Elliott Wood's quick response. The response that they did not think that there would be structural movement if their design had been followed was hardly surprising. It was, in any event, not a definitive response as Elliott Wood's advice was to repair and monitor. No evidence was adduced that that advice was followed and the situation monitored. By e-mail dated 7 August 2014, Mr Dow instructed Mr Roffey to arrange for the joint to be scraped out and repointed. If that was done and the crack has recurred, that could be caused by movement or by the inadequate fixing of the brick.

261. In cross-examination, after Mr Smart had been taken to photographs and a video, it was put to him that the movement of the brick slips was likely to have been caused by the inappropriate application of the resin. He agreed that it was one option. He was pressed about that on the basis that, in light of the views of the structural engineers in the e-mail considered above, the likelihood was that the inappropriate application of the resin was the cause. His response was that he did not know. His lengthier response was frankly unclear but, in short, his point was that, in the video, the bricks appeared to have expanded outward from the beam which he would not have expected without movement.

262. Mr Satow referred to cracking above both the first floor and second floor terrace. He had also observed cracking above bedroom 1. His stated that neither of the cracks related to areas where the lintel is covered by a soldier course type brick extending through three courses. Whilst recognising that he had not been able to inspect closely, he said it was not apparent that there had been any outward movement of the bricks which suggested that they had not debonded. That led him to the conclusion that the cause of the cracking was differential movement between the steel angle and the timber frame carrying the brick slips.

263. In cross-examination, having been taken to photographs, again of the bedroom location, he agreed they showed that a brick had slipped. It was put to Mr Satow, as it had been to Mr Smart, that that was likely to have been caused by Marbank's inappropriate use of the epoxy resin. His response was that it was possible but he could say no more than that.

264. There has been no opening up to establish that the cause of the cracking is that the brick slips have not been properly bonded as alleged so it is an inference only that that is the cause. There is evidence that cracks were repaired in 2014 – although Mrs Vainker was not specific as to where – but have reappeared and that is at least consistent with damage through movement and with the opinions of Mr Smart and Mr Satow. Mr Smart's agreement that inappropriately applied resin, which itself was not defined, was an option and Mr Satow's agreement that "inappropriate use" of the epoxy resin was a possible cause takes the matter no further. I cannot be satisfied on the balance of probabilities that Marbank failed to fix the brick slips in accordance with the specification.

265. It follows that the claim against SCd on this item would also fail. In any event, and for the same reasons I have given in relation to other brickwork defects, any claims against SCd in contract and tort are time-barred. Nor could there be any claim for breach of the duty owed under the DPA, even if there was any failing on SCd's part. Irrespective of any long term risk of falling masonry, these were minor defects which did not render the House unfit for habitation whether alone or in conjunction with other defects.

Other defective brickwork/ render (Scott Schedule item 7)

266. This was a further Scott Schedule item which captured further miscellaneous brickwork issues and in respect of which a distinct claim for the cost of remedial works was made. The cost was agreed by Mr Finn and Mr Johnson at £2,644.26.

267. The miscellaneous defects complained of included: (i) wide mortar joints; (ii) non-matching coloured mortar and mastic; (iii) mortar staining; (iv) impact damaged brickwork; (v) scaffold bolts left in brickwork; (vi) small openings to the render at low level allowing insects/ water to enter and compromising energy performance. These are all alleged to be workmanship defects on the part of Marbank and the case against SCd was one of failure to instruct Marbank to remedy these defects.

268. These defects were largely dealt with at trial as a matter of written submission rather than oral evidence. It is sufficient to say that the claimants relied on photographs which I accept did show the issues complained of, although on any view, they are relatively minor defects and mostly purely aesthetic.

269. Mr Smart's evidence was that, on the inspection in August 2021, the claimants and Ms Hoey had the opportunity to identify the alleged defects and none was identified. It was, therefore, unclear to him whether the alleged defects had existed at all or had been rectified. That evidence has to be seen against the background that Mr Smart's approach appeared to have been only to comment on what had been pointed out to him and not to carry out any kind of independent inspection. He had not, he said, been instructed to go round and check a list of all the defects against what was on site. It is wholly unclear to what extent he had asked to be shown these specific defects rather than waiting to be shown them but generally his approach appeared to have been to wait for something to be pointed out to him.

270. Mr Smart, in his report, did accept that some photos showed non-matching mortar and mastic at roof level although he thought that was where the rooflight was replaced. He

accepted that there were about five locations where minor damage had been caused by scaffold poles which could be rectified by brick tinting. He also accepted that there were two small holes in render at ground level which allowed access for water and insects or vermin. I note that there was no evidence that they had, in fact, done so and no evidence of any impact of energy performance. Mr Smart accepted that Marbank was responsible for both the scaffold damage and the holes.

271. Taking the photographs and this evidence as a whole, in my view there is sufficient evidence for me to be satisfied that these defects exist and are caused by Marbank's failure to carry out the works in a proper and workmanlike manner. I, therefore, award Mrs Vainker damages in the sum of **£2,644.26** in respect of this Scott Schedule item.

272. Although a claim was pleaded against SCd, I can see no basis on which this can succeed and I repeat the reasons I gave in respect of item 6.

Defective glass panels and wobbling staircase balustrades (Scott Schedule items 8 and 9)

The defects

273. Glass balustrades were installed in a number of locations in the House: (i) to the first floor terrace at the rear of the House; (ii) to the second floor terrace/ balcony; (iii) to the internal staircase from the basement up to second floor level and along the landings; (iv) to the external lightwell at the front of the House.

274. The first element of the claimants' case is, in short, that throughout the house, Marbank installed toughened glass rather than toughened and laminated glass. For the glass balustrades to staircases, specification clause L30/552 provided for "15mm toughened and laminated glass, Class A to BS 6206". For glass balustrades for external terraces, specification clause L30/554 provided for "15mm toughened and laminated glass, Class C to BS6206". Clause L30/553 made similar provision for the glass balustrades to the front elevation lightwell. The claimants also rely on the fact that toughened glass without a handrail was contrary to the Building Regulation K2.

275. Save in the limited respect addressed below, it was not suggested that this aspect of SCd's design was in any sense defective but the claimants' case was that the use of the wrong type of glass was a patent defect which ought to have been observed by SCd carrying out inspections with reasonable care and skill.

276. In their joint statement, the experts:
    (i) agreed that 15mm toughened (and not laminated glass) was installed to the staircase and landing balustrades which was contrary to SCd's specification and the Building Regulations.
    (ii) Agreed that 15mm toughened (and not laminated glass) was installed to the external balustrades and that was contrary to SCd's specification and the Building Regulations in the location of the second floor balustrade and the front lightwell.
    (iii) Were unable to agree whether toughened and laminated glass was specified and/or required by the Building Regulations on the first floor terrace balustrade.
    (iv) Agreed that, in all these locations, a reasonably competent architect with inspection duties would have identified that the installed glass was not laminated.

277. The lack of agreement in relation to the first floor terrace balustrade arose in this way. As I have said, clause L30/551 referred to toughened and laminated glass for the external balustrades. However, clause L30/554 entitled "Glass Screen to Rear Elevation Terrace" required "15mm toughened opaque glass" and made no reference to laminated glass. The experts agreed that this was possibly intended to refer to the end panels only. However, a note on drawing A21/216 rev R1 referred to specification clause L30/551 for the first floor balustrade end panel. There was, therefore, some potential lack of clarity in the design.

278. The Building Regulations might have put that beyond argument because they required toughened and laminated glass (or toughened glass with a handrail) where there is a drop of more than 600mm but the experts were unable to agree whether this applied to the first floor balustrade. BS 6189, paragraph 8.5.2 also provides:

"Where the barrier presents a difference in level greater than 600mm a handrail should always be used unless a laminated toughened glass construction is used that would remain in situ if a panel fails."

279. The basis for the experts' disagreement seems to have been a disagreement as to whether there was a direct drop of 600mm. At various points on the terrace there is a fall to an area of flat roof covered with stones and/or on to the brise soleil – after which there would be a fall to ground level – or a direct fall to ground level. At trial, there was little or no consideration of the meaning of the Building Regulations, but it seems to me more likely that they would require laminated glass or a handrail in such circumstances, since any failure of the glass would create the risk of a fall to ground level.

280. In Marbank's Defence and in its Response to the Scott Schedule, Marbank advanced a case that Mrs Vainker and SCd had rejected a sample of toughened and laminated glass and instead selected toughened glass. In written opening submissions, the claimants set out in some detail why that case was factually wrong and not supported by Marbank's own evidence. In the event, that case of Marbank's was not pursued. As Mr Clay put it, how the wrong glass came to be installed was obscure but Marbank accepted that it should have identified that the glass was not laminated. In any event, in my view, on the proper construction of the specification and the drawings, the Contract did call for toughened and laminated glass in all the locations referred to above.

281. It is, therefore, clear that Marbank failed to carry out the works as specified and in breach of contract.

282. The case against SCd is one of failure in inspection. Whilst SCd maintained its case that it was not in breach, the weight of the agreed expert evidence is firmly in favour of the conclusion that it is visually obvious that the glass was not laminated – since laminated glass is formed of two or more layers held in place by an interlayer which is visible at its edge - and that that is something that SCd, exercising reasonable care and skill, ought to have observed at some point either during the course of construction or on practical completion.

283. I referred above to the case, not in the event pursued by Marbank, that there had been some agreement to change the glass from toughened and laminated to simply toughened.

SCd's case was that that was wholly contrary to the documentary record. The documents demonstrated that in May 2013, Marbank raised the possibility of changing to toughened glass. On 30 May 2013, Mr Clifton contacted the building control officer explaining that the question was being asked because it was thought that "a single 15mm sheet of toughened glass will look considerably better". It was confirmed that laminated glass was required and Mr Clifton passed that confirmation on to Mr Dow. On 31 May 2013, Mr Dow informed Marbank's sub-contractor and on 4 June Mr Dow confirmed to SCd that the glass would be laminated.

284. SCd relies on this sequence of e-mail correspondence not merely to demonstrate that Marbank's pleaded case was wrong but also to excuse SCd's failure to observe that toughened glass had been installed. Mr Fowler submitted that SCd's failure to spot that the glass was not laminated was an innocent error and that, having had firm confirmation that laminated glass would be installed, SCd should be forgiven for failing to look for this during routine inspections. Accordingly, he submits, if SCd is found liable, its share of responsibility should be small and in the region of 20%.

285. I cannot accept that submission and the sequence of correspondence seems to me to point in the opposite direction. The fact that there had been queries about the possibility of using toughened glass, resolved in favour of the need to use laminated glass, seems to me to point to the type of glass being something that SCd should particularly have observed. In his cross-examination, Mr Clifton's evidence was that he was unable to say whether in 2013 he would have recognised what laminated glass looked like. The reference to the better appearance of a single layer of toughened glass makes it plain that Mr Clifton at least understood the difference in appearance of the types of glass.

286. It is also, in my view, clear that the use of toughened but not laminated glass without a handrail is a matter that renders the house unfit for habitation. The point is that if it is damaged or fails there is nothing else to hold on to or inhibit a fall. If laminated the risk would be minimal to non-existent. If further evidence were needed of that, it would be found in what happened in 2017.

287. The glass to the first floor terrace balustrade forms the second aspect of the Claimants' case in these two Scott Schedule items. In the spring of 2017, one of the glass panels on the first floor external terrace "exploded". Another panel exploded shortly afterwards, then two in 2018 and one in 2020. The glass shattered and fell on to both the first floor and ground floor terraces.

288. SCd's specification at clause 551 required neoprene gaskets:

"Fixing: Brushed stainless steel clamp system with associated neoprene gaskets or wedges"

The experts were agreed that what was specified was not what was installed and that "steel or nylon shims and wedges had been used for packing the glass in the bottom channel". The Claimants pointed to an e-mail dated 5 September from Weldtec, Marbank's sub-contractor, in which they noted that the glass clamping system was suspect because isolators had not been fitted and the glass was in direct contact with the aluminium which might cause it to break.

289. Ms Hoey considered that the absence of a neoprene fitting was a possible reason for the glass "exploding". She pointed to the provisions of BS 6080-2011 at clause 8.2.3 which advises against fixing glass so that there is contact between the glass and any other hard material.

290. In my judgment, Marbank failed to comply with the specification both in terms of the type of glass and the fixing, whatever the cause of the shattering of the external glass may have been. In any case, it is more likely than not that the manner of fixing was the cause of the exploding glass.

291. As expressed in the claimants' opening submissions, its case against SCd in respect of the fixing was firstly that SCd failed to provide sufficient information or detail for the design of the base of the glass. That case does not appear to me to have been pleaded or to be supported by any expert evidence.

292. The second aspect of the case against SCd was that SCd failed to observe the missing gaskets. It is, of course, not the case that SCd is liable in respect of any defect simply on the basis that it failed to observe the defect. Consideration must be given to what SCd could reasonably have been expected to observe on reasonable inspection within the scope of their services. In that context, SCd, and Mr Satow, make the point that if the installation was completed between inspection visits and the stainless steel plate covers to the channels installed, the packing pieces would not have been visible. Further is it submitted that the photographic evidence is consistent with this – the first photographs showing the glass, taken in February 2014, shows it either fully installed with the channels covered or not installed at all. There was no other factual evidence about this. The claimants have not, in my view, made out any case that SCd was in breach of contract or duty of care in this respect.

293. The third aspect of the claimants' case is the so-called wobbly balustrade to the staircase (which is Scott Schedule item 9). The Scott Schedule item included the allegations in relation to the use of toughened glass which I have already addressed. There was, however, no suggestion that the use of toughened glass caused the balustrade to be wobbly.

294. It was not in question, however, that there was an issue with the glass staircase balustrades wobbling or deflecting. In the joint statement, the experts are agreed that, when they inspected in August 2021, "the top of the installed balustrades were permitted to deflect under load by up to 25mm without being defective" and that "the balustrades on the landings deflected noticeably when subjected to pressure." The experts continued:

"but no systematic test results have been provided to indicate if the deflection was in excess of 25mm".

295. On the claimants' case, the cause of the deflection was the failure to use rubber gaskets or a similar protective layer in the channels into which the glass was placed, and further that within the channel system the fixing points for the base clamping plate were insufficient.

296. The specification at clause L30/552 provides

"Fixing: Brushed stainless steel clamp system with associated neoprene gaskets or wedges".

Ms Hoey identified SCd's drawing no. 09.003.A(24)240 R1 **(**Stair Setting Out) which she described as indicating the glass balustrade notionally in two sections. A single balustrade fixing point to the side of each tread was indicated. It was patently an indicative drawing and no more and neither Ms Hoey not Mr Satow, who also addressed this point, was able to identify any other relevant drawing.

297. The staircase was, however, part of the Contractor's Designed Portion set out in the Ninth Recital to the Contract: "Main staircase from basement to second floor".

298. The joint statement recorded that the experts agreed that the staircase was a CDP item but that they were unable to agree that the glass balustrade design was included in the CDP. This is a matter of construction of the contract and I find it difficult to see how the design of the glass balustrade, to the extent not already specified, could fall outside Marbank's responsibility for the design of the main staircase. The design of the fixing of the balustrade must be part of the design of the staircase. That that was Marbank's contractual responsibility is made all the clearer by the absence of any detailed design in SCd's specification and drawings.

299. I will summarise by saying that Ms Hoey reviewed drawings by Fivestar Ltd. and structural calculations by I W Price and Partners, that related to the design, and concluded that she was unable to determine the design of the fixings of the glass balustrades at first and second floor landing level and she was unable to comment on whether the fixings as installed were adequate.

300. It seems to me that the balance of the evidence is that the balustrade deflects or wobbles more than the experts agree is permitted, even if the extent of this has not been systematically determined. It was something Mrs Vainker warned her family about in 2014, although she was unclear as to whether that was before practical completion. It follows that Marbank must be liable in respect of the wobbling balustrade whether that was caused by a failure to design or a failure to install the balustrade so that it did not wobble.

301. The case against SCd in this respect is obscure. The Scott Schedule variously refers to a failure to specify rubber gaskets or a similar protective layer or to notice on inspection that they were missing, yet it does not appear to be the case that any expert suggests that the absence of such gaskets is causative of the wobbling. I find no breach of contract or duty of care established as against SCd.

302. Taking these three aspects of the glass installation together, my conclusion is that Marbank is liable in contract in respect of all three aspects of the claimants' claim under these Scott Schedule items. Marbank would similarly be liable under section 1 of the DPA as the risk posed by each of these defects rendered the House unfit for habitation. SCd would be liable, whether in contract, tort on under the DPA, in respect only of the failure to notice that toughened but not laminated glass had been installed.

SCd's limitation defence

303. SCd advanced a limitation defence. So far as any claim in tort was concerned, and in respect of the glass defects generally, SCd averred that the claimants had the requisite knowledge of damage before 4 May 2017 and relied on the fact the first glass panel exploded on 1 April 2017. The claimants' Reply said simply that the claimants did not have the requisite knowledge in respect of SCd's design and/or inspections of the glazing before 4 May 2017. In their Response to a Request for Further Information, the claimants relied on:
    (i) An e-mail from Mrs Vainker to Mr Clifton on 15 June 2017:
    "I would also be grateful for any views that you might have about the shattered glass panels on the first floor terrace. Marbank and the subcontractor came to site yesterday and their view seemed to be that the glass had been there for three years and so it is an accident for which I will have to pay (indeed, trevor [Roffey] kept talking about the glass having been banged which is ridiculous). I would have thought that I was entitled to expect that the panels would last longer than three years."
    (ii) Mr Clifton's reply the same day quoted the specification and said:
    "with regards to the terrace glass, I would recommend checking the installed glazing against the specification. All the glass is required to be 15mm as below. The glass handrails are also laminated due to the additional load placed on the glass … When you check, laminated glass usually appears as two sheets bonded in the middle as the attached image."

304. I have set out how this was pleaded because, as Mr Crowley submitted, despite the importance of the limitation issues, they were barely explored at trial. So far as the exploding glass was concerned, no further argument was advanced in relation to the matters relied on by the claimants, except for the submissions of law made by Mr Fowler.

305. SCd's position, therefore, was that when the glass panel exploded, that indicated a defect in the House which would be either a matter of design or construction and/or inspection and, therefore, the responsibility of either or both of SCd and Marbank. That was enough for it to be reasonable for the claimants to begin to investigate further and the claimants, accordingly, had the relevant knowledge.

306. It does not seem to me to follow from the authorities that in every case where, to put it broadly, a problem becomes apparent in a property, that will give rise to sufficient knowledge. It may not be apparent that the problem, as I have called it, is a defect in the sense of the outcome of some failing in the works carried out (whether of design or construction). A problem may appear to be the result of wear and tear or the action of some external agency.

307. In this case, Mrs Vainker clearly had sufficient knowledge to commence some investigation as soon as the glass exploded. That is at least apparent from the fact that she had contacted Marbank about it which implies that she had actual knowledge that the cause might be either a defect in goods or workmanship which in turn might be capable of being attributed to a breach of SCd's inspection duty. From her e-mail, it appears that she had already dismissed accidental mechanical damage as the cause and already formed the view, albeit she was seeking Mr Clifton's advice, that the glass ought not to have failed within 3 years. It is for the claimants to prove that they did not have the requisite

knowledge and, on these facts, they have not done so and I accept SCd's submission and find that any claim that Mrs Vainker had in tort was time-barred.

308. In the case of this defect, however, that is not an end to the matter. SCd's failure to notice that laminated glass had not been installed rendered the House unfit for habitation because of the inherent risk posed to health and safety and there was, therefore, a breach of the duty under section 1 of the DPA. No party has identified the date by which it contended that the dwelling was in fact completed so as to start time running under section 1(5) of the DPA but equally it is not in dispute that the House was not, in fact, completed by the date of practical completion and that any claim under the DPA is not time-barred.

Remedial works

309. The claimants' claim is for £61,468.75 plus VAT paid to Urban Living Constructions Ltd. to carry out remedial works in 2021. The remedial works comprised the removal and replacement of all the glass balustrades. Although this total sum exceeded the figures in the Scott Schedule for items 8 and 9, the claimants case was clearly both opened and closed on the basis that the sum paid was claimed and no objection was taken. Despite the remedial works having been carried out, Mr Finn and Mr Johnson also agreed the estimated cost of remedial works. The figures agreed were £31,700.32 in respect of item 8 (external glass) and £19,459.00 in respect of item 9 (staircase balustrades).

SCd's causation argument

310. SCd advances an argument that the claim against it must fail, in any event, on causation grounds. Mr Fowler submits that, if SCd had noticed the absence of laminated glass at the time of construction, Marbank would have had to replace the glass at its own cost. The claimants' only conceivable loss, therefore, would be the loss of the chance to pursue Marbank for this loss if, for example, Marbank had become insolvent. Since nothing of that nature has happened and the claimants are able to, and do, pursue Marbank, they have suffered no loss.

311. This argument is wrong in principle and as a matter of common sense. Standard form construction contracts commonly contain provisions which, on specified conditions or for a specified period, require the contractor to remedy defects at its own cost. Even where there are no such provisions or they are not applicable, a contractor who carries out works in breach of contract is liable in damages. If Mr Fowler's argument were right, it would have the effect that, in any case where a party had a duty to inspect and failed in that duty, that party would be able to say that the employer/client had suffered no loss because the contractor would be liable to remedy the defect at its own cost or compensate the employer/ client in damages. Except in the loss of a chance scenario that is postulated, the breach of the inspection duty would never sound in damages. That is the common sense objection to the argument.

312. The flaw in principle in the argument is in the approach to consideration of the position that Mrs Vainker would have been in had the services been properly performed. Had the wrong glass been noted on inspection prior to practical completion, it is right that Marbank could have been instructed to replace it and would have been obliged to do so at its own cost. Mrs Vainker would then have had a House with glass, where specified,

that was both toughened and laminated. In any event, she did not. The cause of her not being in that position is both the failure to install the specified glass in the first place and the failure to notice that that had not been installed with the consequence that remedial steps were not undertaken. Damages referable to the expectation loss are to put her into the position she should have been in – that is, having a House with toughened and laminated glass where specified. The flaw in SCd's causation argument is to look at the consequence of the breach only from the perspective of the steps that ought to have followed if SCd had not been in breach rather than to look at the end result that flowed from that breach, namely the wrong type of glass remaining in place.

Offers to replace the glass

313. The possibility of Marbank's replacing the glass free of charge, however, also comes in to play in another way. Marbank's position is that it offered to replace the glass free of charge in 2017 and 2018 but was not given the opportunity to do so. Marbank relies on this, and specifically on the offer in 2017, as a failure to mitigate. SCd goes so far as to contend that this amounts to a break in the chain of causation but, in the alternative, also relies on a failure to mitigate.

314. By e-mail dated 30 June 2017, from Ms Lawton (on behalf of Mr Woods) of Marbank to Mrs Vainker, Marbank undertook to attend to the installation of new laminated glass:
"Turning to the glass itself, Marbank's failure to notice that the glass was not laminated is regrettable, and I apologise ..... However, we will attend to the installation of new laminated glass, in co-ordination with you, as we have for other issues that are our responsibility."

315. Marbank's solicitors' letter dated 3 July 2017 then said :
"Our clients accept that their operative erroneously failed to install laminated glass panels in the internal stairs and on the external balcony and had previously confirmed that they would arrange for this subcontractor to replace these glass panels at their own cost."

316. By further solicitors' letters dated 23 August 2017, 5 September 2017 and 7 November 2017, Marbank stated that it had instructed its sub-contractor, Weldtec, to replace the glass, that Weldtec required access to do so but that Mrs Vainker had refused access.

317. Mrs Vainker's evidence was that she was insistent that the fixings should also be inspected. As she saw it, the reason for the panels' collapse could not have been the failure to install laminated glass alone. She wanted to know the cause of the collapse and wanted to ensure that the entire installation was safe. In cross-examination, she added that it had taken her two months to get Mr Woods to accept that the glass was not laminated and, then, she thought that if the installer could make a mistake about the glass, *"how could I know that he hadn't made a mistake about the fixings?"*. I do not regard Mrs Vainker's stance as having been an unreasonable one for her to adopt. Her view that the panels not being laminated could not alone be the reason for the glass to shatter as it did was a sensible one and the only other likely cause was the way in which the panels were fixed.

318. In an e-mail dated 22 June 2018, Marbank's solicitors repeated their position. They further said that Marbank did not accept that the fixing method was incorrect but that, to

alleviate Mrs Vainker's concerns. Marbank was prepared to ensure that "the replacement glass panels are fixed in compliance with the report prepared by I W Price dated August 2013 that you have forwarded to them."

319. Shortly afterwards, Marbank's solicitors sent a Pre-Action Protocol Letter dated 4 July 2018 in respect of the Final Account claim. In that letter, they said:

"Our clients have repeatedly offered to replace the toughened glass installed in the property with laminated glass. However, you have repeatedly refused access to our client's specialist contractor in this regard. Our client's position is that you have therefore failed to mitigate your loss in this regard and that our client has no further obligation to you in respect of the glass panels …"

There was no reference to the fixings and, whilst it was not obvious that the offer in respect of the fixings was being withdrawn, the letter was less than clear in that respect. Further, the final account included both the value of the contract works for the glass balustrades and an additional sum of nearly £20k for a change in the specification of balustrade glazing and the cost of supplying and installing toughened heat soaked glass balustrades.

320. At the time, that letter had a significant impact on Mrs Vainker. She said this:

"The thing is that threw me into a terrible panic because, having finally convinced Marbank, Mark Woods in particular, that it was important to check the fixings, the letter of claim stated that because I had failed to mitigate my loss by allowing Marbank in to replace the panels, they had no liability to do so, and then attached to it was a final account, which … charged me £19,000 and something plus OHPs for variation in toughened glass. I read that and thought what to do and launched into a very painful series of e-mails with Healys …."

As I have indicated, I have some sympathy with Mrs Vainker's reaction, at least to the extent that the letter was unclear as to what Marbank's position now was and that, after the time that it had taken to reach a position in which Marbank was offering to address the fixing of the panels, that offer was now withdrawn.

321. In any event, arrangements were made for Weldtec to visit on two occasions in August 2018. On 5 September 2018 Kevin Burgess e-mailed Steven Brown to report on that visit. I set out that e-mail almost in full:

"Having now spoken to Trevor Roffey about the landing balustrade I think we need to dig deeper
From what i can see the glazing channel is only fixed in 2 places when it should be continuously fixed every 200 mm to a steel fixed to the concrete floor.
So the flooring would need to be lifted locally to see how it is fixed before i could give you a price
You could go back to Five star ltd and get them to put right what they have done as this is not built as per structural eng details.
The actual stairs is ok apart from the glass
The external first floor balcony also has some issues. Bolts are missing that connect the glass channel to the steelwork frame.

The glass clamping system is also suspect as isolaters have not been fitted, this means the glass is in direct contact with the aluminium which may cause it to break.
....”

322. Mr Clay rightly notes that there is a difference between the fixing of the glazing channel and the fixing of the glass and Weldtec addressed both. He submits that this is good evidence that, had Mrs Vainker accepted Marbank's offer and permitted access whether in 2017 or 2018, Weldtec would have addressed the issue of fixings and that this demonstrates that any issue about the fixings was not a sufficient reason to refuse Marbank's offer. I do not accept that submission. If anything, the issues that Weldtec identified confirm that Mrs Vainker was right – and not unreasonable – to be concerned about the fixings. She could not presciently know that Marbank's sub-contractor would, if given access to replace the glass, also remedy any defects in how the glass was fixed, particularly in circumstances where Marbank did not accept that there was any defect in fixing.

323. In an e-mail dated 10 December 2018 to Marbank's solicitors, Mrs Vainker pointed out that Weldtec had not returned to carry out any work. She received no response on this point.

324. Mr Burgess' evidence was that Weldtec submitted its design proposals to Marbank on 13 September 2018 but heard nothing further. No-one gave evidence for Marbank to the effect that Marbank had taken any action, having received those proposals, to accept them or to provide them to or discuss them with Mrs Vainker or to arrange for Weldtec to return to replace the glass.

325. In his witness statement, Mr Brown said that Mrs Vainker had not contacted him or anyone else at Marbank to confirm that they could instruct Weldtec to replace the glass panels. However, in his cross-examination, he agreed that he was aware that Mrs Vainker had chased through solicitors in December 2018, that he was aware that she was happy for Weldtec to return, and that Marbank did not contact Mrs Vainker in 2019 or later to arrange for further work to be done.

326. Weldtec later provided to Marbank a quotation dated 1 September 2021. Mr Crowley rightly pointed out that the quote did not cover the lightwell and the second floor terrace and did not meet the specification on the thickness of glass. In any event, there was no evidence that this quotation was accepted by Marbank or conveyed to Mrs Vainker or that access was requested to carry out this work. At best, Mr Burgess thought that there was a verbal agreement with Marbank to do the work when they had access but they were never asked to attend.

327. As I have said, Marbank rely on this sequence of events as a failure to mitigate on the basis that if Mrs Vainker had accepted Marbank's 2017 offer to carry out remedial works, the remedial works would have been done at no cost to her.

328. The principles that apply in respect of a failure to mitigate are not controversial and are summarised in Chitty on Contracts 35th edition at paragraph 30-98 et seq as comprising three “rules”. The first rule, which is relevant in the present case, is that the claimant cannot recover damages for any part of his loss consequent upon the defendant's breach

of contract that the claimant could have avoided by taking reasonable steps. At paragraph 30-100 that rule is expressed in this way:

"It is not strictly a "duty" to mitigate, but rather a restriction on the damages recoverable, which will be calculated as if the claimant had acted reasonably to minimise his loss. The onus of proof is on the defendant, who must show that the claimant ought, as a reasonable man (sic), to have taken certain steps to mitigate his loss, and that the claimant could thereby have avoided some part of his loss. Any loss which is directly caused by a failure to meet this standard is not recoverable from the defendant."

329. Marbank relied on the decision in *Woodlands Oak v Conwell* [2011] EWCA Civ 254. That case concerned a simple oral contract to carry out building works at the Conwells' house. At first instance, the Recorder found that the Conwells were aware of snagging items but did not notify the contractors, that the contractors had the resources to rectify them but were not given the opportunity to do so, and that the Conwells had, therefore, failed to mitigate their loss. They recovered nothing because there would have been no cost to them if they had given the contractor the opportunity to rectify the defects. That conclusion was the subject matter, in part, of the appeal and the Recorder's decision was upheld on the basis that he had materially applied the correct law to the facts. So far as the law was concerned, Lord Justice May said the following:

".... The Recorder was well aware that the mere fact that an employer does not give the contractor an opportunity to rectify defects in the works will not always amount to a failure to mitigate the losses. There may well be circumstances in which it is entirely reasonable not to give the contractor the opportunity, and the Recorder so found so far as the roofing defects were concerned." At [22]
"[the Recorder] is simply indicating that the consequences of not giving the contractor an opportunity to rectify defects, when for one reason or another he should have been given that opportunity, would be that the defendants are not entitled to recover more than the amount it would have cost the claimant to rectify the defects. That is a proposition which applied just as much to a contract with an express defects liability clause as it does to consideration, which I am satisfied the Recorder was undertaking, of whether or not the Conwells had failed to mitigate their loss." At [24]

330. It is, to my mind, important to bear in mind that there is no special rule in relation to construction contracts that a failure to give the contractor the opportunity to rectify defects is a failure to mitigate. The issue, on which the defendant has the burden of proof, is whether the claimant has failed to take reasonable steps to mitigate his or her loss. That principle when applied to a construction contract may lead to the conclusion that a failure by the claimant to afford a contractor the opportunity to rectify defects is a failure to take reasonable steps to mitigate the loss but, as the decision in *Woodlands Oak* makes clear that is not always or necessarily the case.

331. I take a different view of the facts of this case from that put forward on behalf of Marbank and I do not accept that Mrs Vainker failed to take reasonable steps to mitigate her loss. When Marbank offered to replace the glass in 2017, Mrs Vainker did not bluntly refuse to accept the offer or refuse to allow Marbank to do so. She was concerned to be assured that Marbank would also address any defects in the fixing of the glass and I do not consider that that was an unreasonable stance for her to adopt. Her willingness to allow Weldtec to carry out their inspections in August 2018 makes it clear that she remained

willing to give access to carry out the works once the issue of the fixings was addressed and she later chased for the work to be done. Marbank did not respond. Marbank now tries to turn that on its head and place the burden on Mrs Vainker to have continued to press Marbank to carry out the remedial works. That is quite different from not giving a contractor the opportunity to carry out remedial works. It cannot be known what would have happened if Marbank had, after Weldtec's inspection and Mrs Vainker's chasing in December 2018, offered to return to carry out remedial works but there was no such offer.

332. As I have indicated, SCd went further and argued that had the glass been replaced at Marbank's cost in 2018, there would be no claim against SCd so that the failure to replace the glass then (whether that was down to Marbank or Mrs Vainker) was a break in the chain of causation. That submission is hopeless. It involves the proposition that in any instance of a failure in a duty of inspection, the fact that the contractor has not remedied the defect breaks the chain of causation. That proposition cannot be right for the same reasons that I have given in respect of SCd's first causation argument. Further, if the acts or omissions of Mrs Vainker do not amount to a failure to mitigate, they cannot break the chain of causation.

Is the replacement of the glass a disproportionate remedial scheme?

333. SCd then advances a further argument that the wholesale replacement of the glass balustrades is out of all proportion to the benefit; that an alternative remedy was available in the addition of a handrail; and that no steps were taken to see whether this could be fitted retrospectively – which appears to be another submission on failure to mitigate. Marbank adopts a similar position that "a handrail is a good substitute for full replacement."

334. Mr Smart, in his report, said that a handrail could have been added to the top of the glass balustrades to prevent falling and ensure compliance with Building Regulation K2. That was the extent of his evidence.

335. In his report, Mr Satow expressed the opinion that:

"The installation of a handrail along the top of the balustrade would be an alternative way of securing the glass and would mean that full replacement would not be required."

He too had gone into no further detail as to how this would be done.

336. In cross-examination, both Mr Smart and Mr Satow accepted that a handrail would not have solved the fixing problems with the lack of neoprene gaskets or the glass being hard up against the steel or would have stopped the internal staircase balustrade from wobbling. Mr Satow agreed that a handrail would not have stopped the glass on the terrace shattering. Mr Smart was unable to comment.

337. It is right, however, that these are issues on which I have not found SCd liable. So an issue remains as to whether the installation of a handrail would have been the appropriate remedial scheme in respect of SCd's breach because it would have made the balustrades in toughened glass compliant with the Building Regulations

338. The short answer is that it would not because it would be wholly contrary to the design intent in the House. Mr Fowler submitted that there is no evidence that a handrail would materially impact the aesthetics of the stairs or external balustrading but it does not need expert evidence to establish that the clean lines of the glass would be affected and, in any event, Mr Satow offered no evidence of the design of the handrail he had in mind.

339. Mr Fowler's further submission on this issue is that the design intent or appearance of the balustrades is not a proper consideration if the only claim that can now be brought against SCd is one under the DPA. SCd's contention is that the claimants can only be entitled to the cost of remedial works necessary to make the House fit for habitation, that is to comply with the Building Regulations. No authority was cited for this proposition and the DPA itself says nothing about recoverable damages. In my judgment, the proposition is wrong. Although the duty under section 1 is construed as a duty to achieve the outcome that the dwelling is fit for habitation, there is a constituent element of the duty which is to see that the work that is undertaken is done in a professional manner. Where the defendant has failed to see that the work is done in a professional manner and the result is that the dwelling is not fit for habitation, there is nothing in the statute to limit the damages recoverable in respect of the failure to see that the work is done in a professional manner to the minimum necessary to put the dwelling into a habitable condition. The damages should more naturally reflect the failure to see that the work was done in a professional manner. In this case, that failure resulted in the installation of toughened rather than toughened and laminated glass – and if the latter had been installed the House would have been fit for habitation. The recoverable damages should, therefore, be the cost of making the dwelling fit for habitation in the way it would have been had the services been supplied in a professional manner.

Marbank's liability

340. Having rejected Marbank's case on failure to mitigate and the case on the handrail as an alternative remedial scheme, I find that Marbank is liable to the claimants, whether for breach of contract or breach of the duty under the DPA in the total sum of **£61,468.75**, that is the sum paid to Urban Living. In his first report, Mr Finn identified possible differences between the scope of works in the Schedule of Remedial Works and the works in fact carried out. One matter was the number of metres of glass installed. Mr Finn was not able to say that the number of metres installed was the same as that allowed in the Schedule because the contractors referred to numbers of panels rather than metres. There was no explanation for why the number of metres of glass installed might have differed from the existing and it was simply the case that Mr Finn could not confirm that the meterage installed was the same as that in the Schedule. Mr Finn also identified that the thickness of glass differed from that in the Schedule. There was no evidence that it was unreasonable to use this glass or that it amounted to some form of betterment. There was no consideration of the additional cost of supplying this thickness of glass, beyond the fact that the actual cost of the whole of the works was greater than Mr Finn's estimate. In the subsequent joint statement, Mr Finn agreed the figures which Mr Johnson, in his report, said were a reasonable estimate of the cost of remedial works – these were the figures in the Scott Schedule. Despite the claimants clearly claiming the sum actually paid, no submissions were made by either Marbank or SCd as to why the experts' lesser figures should be preferred and, in my view, the proper measure of damages should be the cost of the remedial works actually and, I infer, reasonably incurred.

SCd's liability and the net contribution clause

341. The total sum paid for the remedial works is not broken down as between the replacement of the glass and the remedial works to the fixings. However, the removal and replacement of the glass would inevitably have involved re-fixing it and doing so properly. Therefore, but for the net contribution clause, I would find SCd liable for the same sum in damages.

342. SCd, however, relies on the net contribution clause which I have found to be incorporated into the contract and it is submitted that its responsibility for the wrong glass should be no more than 20%.

343. Clause 7.3 was set out in SCd's Defence as a material express term and, contrary to the claimants' submission, it is clear that the term was pleaded as a material term because SCd intended to rely on it so far as relevant.

344. In opening submissions, the claimants then raised three further issues in respect of the application of the net contribution clause: (i) the clause cannot exclude or restrict liability under the DPA (see section 6(3)); (ii) the clause does not apply on its proper construction; and (iii) in any event, it requires a notional apportionment of liability on the principles in the Civil Liability (Contribution) Act 1978 and SCd has not sought apportionment of liability by Part 20 proceedings. Mr Fowler submits that, properly construed, clause 7.3 applies to liability under the DPA. He submits that section 6(3) operates to void contractual clauses which restrict the operation of the DPA and is not concerned with joint and several liability at common law. Further the clause limits SCd's liability to the sum which it is just and equitable for SCd to pay having regard to the extent of its responsibility, (a) whether or not other parties arguably responsible have been brought before the court and/or (b) whether or not SCd has made a claim for contribution and/or (c) whether or not SCd has defined (let alone proved) what the appropriate division of responsibility is.

345. It is helpful to address the latter group of arguments first because they inform my decision on the former. The purpose of a net contribution clause of this nature can easily be seen. Taking the present case as an example, in a scenario where the contractor has made an error – installed the wrong glass – and the architect has failed to notice the error, both may be liable and the damages recoverable from each of them would be, for example, the cost of replacing the wrong glass with the specified glass. The claimant could recover that cost from each of the contractor and the architect. Either of them could, however, seek a contribution from the other under section 1 of the Civil Liability (Contribution) Act 1978. Under section 2(1) the amount of the contribution recoverable is *"such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."* If, say, SCd sought a contribution from Marbank and the court found, reflecting Mr Fowler's submission, that Marbank was 80% responsible, the net result would be that SCd paid 20% of the damages only.

346. The purpose of clause 7.3 is to achieve that result for the architect so far as his employer is concerned irrespective of whether the employer also sues the contractor and irrespective of whether or not there are any contribution proceedings. That can be seen from the assumptions set out in clauses 7.3.1 to 7.3.3. In particular clause 7.3.3 provides the assumption that any other liable contractor or consultant has paid to the client such sums as it is just and equitable for them to pay having regard to the extent of their

responsibility for the loss and damage. That is the position that would pertain if these parties had been sued; there had been claims for contribution under the 1978 Act; there had been, in effect, an apportionment of liability under the Act; and the net sums due to the client had been paid. I do not accept the claimants' submissions to the effect that any of these things need actually to have happened or be in prospect.

347. The clause is framed in terms of the liability of the Architect. There is no express limitation of the basis on which liability arises and the clause would apply to concurrent liability in tort. If it did not, the clause would be ineffectual. I can see nothing in the clause which would distinguish liability for breach of the DPA and, as a matter of construction, it would apply to that liability.

348. Section 6(3) of the DPA then provides:

> *"(3)Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void."* (emphasis added)

349. In the absence of clause 7.3, SCd's liability under the DPA in respect of the non-laminated glass would be for the whole of the recoverable damages (however they may be calculated or assessed). Clause 7.3 seeks to limit that liability to a lesser amount if that is the sum that it is just and equitable for SCd to pay having regard to the extent of its responsibility. That is a restriction on SCd's liability arising out of the DPA. Mr Fowler's submission focuses on the part of section 6(3) that is concerned with the effect on operation of the DPA and does not address the part of the section that is concerned with restriction of liability. I accept the claimants' submission, albeit briefly made, that clause 7.3 falls foul of section 6(3) and cannot be relied upon by SCd in respect of liability under the DPA.

Marbank and claims for contribution

350. As I observed above, these items were ones on which Marbank particularly pressed for contribution although no submissions were made as to the relevant percentage. I will deal with any claim for contribution in the manner already set out.

Stained and damaged Accoya (Scott Schedule item 10)

351. In the Scott Schedule, this was one of the larger claims and the estimated cost of remedial works was put at "£25,601.99 + TBA". The remedial works contemplated were the replacement of all the Accoya and the estimated cost did not cover all items, hence the addition of "TBA". By the time of their first joint statement, Mr Finn and Mr Johnson had agreed the cost of £43,741.32 based on the claimants' Schedule of Remedial Works.

352. Accoya is a trade name for a modified pine wood which has been treated by a process called acetylation to improve durability. Accoya is widely used externally.

353. Given some of the issues that have arisen, I set out first the specification clauses that identified where Accoya was to be used and what was said about finishes to the wood:
    (i) Clause H21/111 related to the timber weatherboarding at the front of the House and expressly stated no finish.

(ii) Clause H21/112 related to the planter at the front of the House and stated that the finish was "to be confirmed following discussions with TRADA and the timber merchant".
(iii) Clause L10/610 (The wood louvres) stated "Finish as delivered: none."
(iv) Clause L20/440 (External wood doorsets and front garden gate" stated "Finish as delivered: Fully varnished for external use. Final finish to be confirmed following discussions with TRADA and the timber merchant".
(v) Clause L20/681 (Up and over garage door) stated "Full finish varnish for external application. Final finish to be confirmed following discussions with TRADA and the timber merchant".
(vi) Further clause L20/730 stated "Wood surfaces inaccessible after installation: Primed and sealed as specified before fixing components."

354. Mr Clifton's explanation of the design intent was that where the wood could not be easily accessed to reapply a finish none was required – for example, the brise soleil. But where it could be more easily accessed, there was to be a finish which was to be agreed.

355. The claimants' case was that Accoya had been specified by SCd without consultation with Mrs Vainker. No information was given to Marbank's sub-contractor, Westgate Joinery, about a finish. In December 2013, Westgate informed Marbank that they were unable to supply the Accoya without "surface protection". It was agreed that Mrs Vainker would select a colour. There was no discussion with her about maintenance. In 2014, she visited Westgate and selected a clear varnish or finish, Induline OW-815, manufactured by Remmers, which was stated to be suitable for use at the House and would require re-application every 2-3 years after the wood had been lightly sanded.

356. In the Particulars of Claim, the claimants pleaded that the Accoya was weathering very poorly, and that there was extensive mould growth and widespread staining, adding "Not all the Accoya has deteriorated so far but all the Accoya needs to be replaced to ensure a uniform finish." The case was opened on a similar basis – each of the locations where Accoya was used was set out and it was said that there was widespread black mould, staining and discolouration throughout the Accoya installed in the House.

357. As against SCd, the particulars of negligence were:
(i) that they had failed to consult Mrs Vainker in respect of the external timber and/or the finish to be applied;
(ii) that they had failed to specify a treatment for the Accoya;
(iii) that despite Mrs Vainker's wish not to have to carry out frequent maintenance, they specified Accoya and specified it without any finish;
(iv) that when Mrs Vainker was belatedly consulted about the finish, they gave consideration only to colour and appearance and not maintenance of the finish; and
(v) in the circumstances, they failed to pay sufficient consideration to the likely effects of leaving the Accoya unfinished.

358. Drawing the threads of SCd's substantive defence together it was that any timber is vulnerable to weathering and requires maintenance. SCd chose Accoya because it had lower maintenance requirements, greater stability and a 50 year guarantee. Mrs Vainker was consulted. Mr Clifton's evidence was that she was made aware of the proposed materials during the planning process. Mrs Vainker visited the supplier, Westgate, and

chose the surface treatment. Westgate insisted that the timber had to be supplied with a finish and Mrs Vainker chose the finish.

359. The particular allegation against Marbank was that they had failed to apply a proper finish to the Accoya or to notify SCd that a finish was required. In the Scott Schedule, that allegation was expanded to include a failure to advise the claimants of the finish to apply or how to apply it. It was alleged that a three part system, including an anti-fungicide should have been applied. Marbank denied liability, denied any defect in the Accoya, and averred that the mould was natural and could be cleaned off.

360. In the joint statement:
    (i) The experts agreed that the specification did not require any preservative treatment to the Accoya. None of them suggested that it should have done.
    (ii) They agreed that, in the specification, the finish to the planter, weatherboarding and louvres and brise soleil was to be confirmed. They understood that a finish may have been selected by the claimants but they could not reach agreement on what the finish was. They said nothing further about the choice of finish.
    (iii) They agreed that the external door sets, front garden gate and garage all required a full finished varnish for external use.
    (iv) The experts agreed that there was evidence of black mould in two locations – the brise soleil over the external terrace and the horizontal louvres to the rear windows. I note that Mr Satow in his report at paragraph 6.6.23 also observed a bloom of back mould on the side gate, front door and adjacent weatherboarding. The photographs to which the claimants referred the court were almost all of the louvres – there was one of the garage door, one of the front of the house and some of a back door – all of which had some black-ish marks on them.
    (v) The experts also agreed that there was no evidence of decay.
    (vi) The experts agreed that redecoration <u>may</u> be required. Mr Smart and Mr Satow considered that complete replacement was not necessary.
    I add that, when Ms Hoey's second report was served, she too agreed that the Accoya should not be replaced and identified the appropriate remedial works as stripping back and re-finishing the Accoya.

361. At this point I note simply that the agreement would seem to be wrong in relation to the louvres and the brise soleil where no finish was specified and none was to be confirmed. That was, in fact, reflected in the experts' reports.

362. In opening the case, Mr Crowley submitted, by reference to the joint statement, that it was not in dispute that SCd had "failed" to specify a finish as if that were an agreement as to, or an admission of, liability and as if that was a failing in respect of the Accoya generally. Neither of those is right.

363. Ms Hoey said that she had considered the issue of finishing to the window louvres and brise soleil elements only – that is where the experts had agreed there was mould. She said that the design for these items was for unfinished Accoya and there were no performance or maintenance specifications in the design. She therefore considered the design "defective/ incomplete". She did not say why or what she considered the specification ought to have included. Later in her report she said that she considered that an architect acting with reasonable care and skill would (a) specify an appropriate finish

and (b) co-ordinate this with the requirements of the client both in terms of appearance and maintenance.

364. So far as the first aspect is concerned, there was no explanation and expert opinion as to why not specifying a finish was negligent. Mr Clifton gave an explanation for that specification. It was put to Mr Clifton that Accoya was specified unfinished to which he replied that there was a combination of finished and unfinished. That was clearly right and in accordance with what was specified. It was not put to him that it was negligent to have specified some of the Accoya as unfinished. As I have said, there was no evidence as to what ought, in the alternative, to have been specified and why. Ms Hoey was not able to comment on whether Accoya was commonly supplied with or without a protective coating. Elsewhere the wood was either to be delivered with a full varnished finish or a finish was to be confirmed.

365. In any case, whether the fact that no finish was specified was of any relevance was completely unclear. Firstly, the suppliers said in their e-mail dated 11 December 2013 that they could not supply the joinery without "surface protection" and the inference is that they did, therefore, supply the Accoya with such protection. There was no consideration of whether the wood as supplied was, therefore, in fact, supplied with a finish and it appears to have been Ms Hoey's assumption in her report that the wood was supplied and/or installed with the Induline finish. Mr Clifton also believed that the wood had been factory finished. Secondly, there was no evidence that the absence of a finish, or the finish applied, was causative of the black mould appearing on the louvres and brise soleil.

366. The real complaint was that the louvres and brise soleil required maintenance. At highest, Ms Hoey's opinion (at paragraph 2.5.32) of her report was:

"It is not clear to me whether sanding and resealing all the brise soleil louvres and those to the windows to the front and rear elevations represented feasible maintenance for Mr and Mrs Vainker, but I consider that SCd should have discussed this with Mrs Vainker so that she was able to make an informed decision."

367. Mrs Vainker had made it clear that she wanted a property which required little maintenance and I have accepted that that is a consideration that may be relevant to the exercise of reasonable care and skill in design. An email from Mr Strike of SCd to Marbank dated 11 December 2013 expressly makes reference to Mrs Vainker's wish not to have to carry out maintenance every 2 years but there is no basis or evidence on which I could conclude that it was negligent to specify, or agree to the application of, a finish which would require re-application every 2-3 years. Further, on the facts, Mrs Vainker was aware that the Induline finish would require reapplication at such intervals. There is no suggestion that she expressed any concern about that. Ms Hoey did not suggest what might have been specified in the alternative if she had done and, in cross-examination, Ms Hoey was unable to say whether there was any product available at the time that might have been regarded as more appropriate in the sense of requiring less regular application of any treatment.

368. Further, it was not, in any sense, a term of SCd's engagement that they should design the House or any particular aspect of the House so that any maintenance that was required could be carried out by Mr and Mrs Vainker personally.

369. So far as the brise soleil and the louvres are concerned, I do not find that there was any breach of contract or duty on the part of SCd. The claimants' case on the Accoya, as pleaded and as opened, did not limit the case to the louvres and the brise soleil. However, the only possible complaint could be that SCd, having specified that the finish was to be confirmed, acted negligently in respect of the later choice of finish. The only complaint advanced in that respect is that the finish required re-application every 2 - 3 years. That complaint has even less merit than that in relation to the louvres because these other areas are ones that can be easily accessed and maintained even by the householders.

370. I observe at this point also that Mr Satow was cross-examined principally on a paragraph in his report in which he said that he would expect an architect to discuss the choice of materials with the client and that, since Mrs Vainker has access to relevant documents, it was open to her to interrogate SCd about the choice of this material. It was put to him, and submitted, that that was unrealistic. Whatever the position, this has no relevance as there is no case advanced by the claimants that the choice of Accoya was negligent per se.

371. Even if I were wrong about that, any claim against SCd is time-barred:
    (i) The latest date at which any cause of action in contact accrued would be when SCd failed, on the claimants' case, to advise and/or consult with Mrs Vainker about the choice of finish and that was well before practical completion.
    (ii) The claimants' case is that the Accoya was starting to deteriorate by October 2015 and that, in a report dated 12 October 2015, Westgate referred to the need to clean and down and recoat the wood to ensure continued durability. It was also Mr Vainker's evidence that by June 2016 the brise soleil looked awful. He tried to undertake some maintenance but was disappointed with the result. It occurred to him that the Accoya might not have been "properly treated with fungicide or a sufficiently efficacious protective coat". It follows that the claimants must have had the requisite knowledge, for the purposes of section 14A, by June 2016 at latest and proceedings were not commenced until nearly 4 years later.
    (iii) The only complaint about the Accoya is an aesthetic one and its condition could not in itself either render the House unfit for habitation or contribute to its being unfit for habitation so no question of a claim under the DPA could arise in any event.

372. So far as the claim against Marbank it concerned, it fails for similar if not identical reasons. Marbank was not contractually obliged to supply the Accoya for the louvres and the brise soleil with any finish at all and, elsewhere, the finish was either fully varnished (as to which there is no complaint identified) or the finish was to be confirmed. As I have already indicated there was some lack of clarity in the evidence as Mr Woods said that the Contract did not require Marbank to "seal" the Accoya, so they did not. However, other evidence leads to the conclusion, which was also Ms Hoey's assumption, that the finish was confirmed and applied by the supplier and that that was done even where not required by the specification.

373. In her report, Ms Hoey identified a number of documentary references, including Mr Vainker's description of the brise soleil, from which she concluded that it was likely that the Accoya had not been properly finished. This opinion did not appear to be based on any observation of her own. Her conclusion was that <u>if it could be demonstrated that</u> (a)

the application of finish to the Accoya by Westgate was insufficient and/or not properly applied and/or (b) the finished Accoya was cut and/or repaired on site and the finish was not re-applied to those areas affected and/or (c) the finished Accoya was cut and/or repaired on site and the finish was poorly and/or ineffectively re-applied to those areas affected, then she would consider that Marbank did not carry out and complete the works in a proper and workmanlike manner. None of those matters was established at trial and, so far as the brise soleil and louvres were concerned, there was never any contractual obligation to supply them with a finish.

374. In closing submissions, the claimants submitted that two of three sets of louvres had been replaced after practical completion and quickly deteriorated again. Mr Crowley referred to the cross-examination of Mr Braggins. There was reference in a Marbank e-mail dated 2 October 2014 to Mr Braggins painting the ends of the louvres which Mr Braggins was asked about. He had suggested that, in the end, the replacement louvres were dip coated at the manufacturers. It was submitted that there was no documentary evidence to support that suggestion and that the fact that they deteriorated so quickly contradicted that suggestion. However, Mr Braggins' evidence was consistent with the earlier position of Westgate that they would not supply the Accoya without a finish and with Mr Clifton's evidence. As I have said, Marbank in any event had no contractual obligation to supply these louvres with a finish. The deterioration relied upon is the black mould and there is no evidence of a causal relationship between the presence or adequacy of a finish and the mould and, in any event, the finish required maintenance.

375. In my judgment, there is insufficient evidence for the case identified in Ms Hoey's report to be made out as against Marbank.

376. The case against Marbank which appeared in the Scott Schedule and complained of a failure to advise the claimants about maintenance became, in Ms Hoey's report, a case about lack of information in the O&M manuals which deprived the claimants of the opportunity to carry out appropriate maintenance. No particulars of the obligation to provide this information or as to what information ought to have been provided were set out. The claimants were aware that the finish needed to be re-applied and, if mould appeared, it was easily open to the claimants to have that mould removed in the interim or on the re-application of the finish. If the complete refinishing of the Accoya is now required, that must be the consequence of the failure to carry out routine maintenance and cannot be laid at Marbank's door.

377. For completeness, I repeat that this Scott Schedule item was initially presented at trial as one of the larger individual items. However, it became common ground that the appropriate remedial works were at most the re-decoration or re-finishing of the Accoya. On the basis of complete redecoration – that is redecoration not limited to the brise soleil and louvres – Mr Johnson's estimated cost of the remedial works was £4,899.97. Mr Finn agreed with that as a provisional assessment. Thus, even if I had reached different conclusions as to liability, the damages recoverable in respect of this item would have far less than the sum claimed.

The Bauder Green Roof (Scott Schedule Item 11)

378. Bauder is a manufacturer of roofing including so-called green roofs. The House has a green roof, formed of sedum and herbs, over the lower part of the northern part of the House.

379. As set out in the Scott Schedule, the complaint about this part of the roof is one of defective design and the claim is made only against SCd. The defect is alleged to be that the green roof has been situated on a sloped roof without provision for water and/or access for maintenance. The Particulars of Claim also complained that the green roof was sited on a sloped roof and that it could not be seen or appreciated by the occupier of the House. Neither of these matters featured in the trial.

380. In relation to the green roof, the Specification, at clause 715A, provided:

"....
Watering/irrigation: Adequate provision for watering the installed any (sic) form of planting must be in place on site before the product is installed. Irrigation systems if fitted should be operational. Initial watering should be by surface sprinklers to water in the fertilizer, where this is specified. All watering should be carried out in strict accordance with the Bauder watering requirements and guidance document."

381. The nature of the case appears to be that despite these provisions of the specification, SCd did not design adequate provision for watering. The case set out in the Particulars of Claim, paragraph 127, was that:

"There is no safe access for regular watering and maintenance. In order to water the green roof, which must be watered in very hot weather, Mrs Vainker has to climb a ladder from the first floor terrace, dragging with her a hose connected to the only external water supply, on the ground floor on the other side of the house, approximately 35 to 45 metres away."

382. The factual evidence on this item was somewhat sketchy. Mrs Vainker's evidence, in her witness statement, was that during the course of the works, she was sent, by Mr Strike of SCd, an information sheet about maintenance costs and recommending provision for water and maintenance access. She believed that was in about July 2013. She also described what she had to do to water the roof in the terms set out above which she characterised as frightening to do.

383. In cross-examination, she was taken to an e-mail dated 19 February 2014 sent by Mr Strike to Mr Fitzgerald attaching documents sent by Bauder following an inspection of the green roof. There were three attachments with the titles "Green Roof Services", "Bauder Green Roof Letter" and "Bauder Extensive Green Roof Maintenance." The first of these three documents appeared in the trial bundle. It advocated and advertised Bauder's maintenance services – these services did not expressly include watering but did include maintenance of any irrigation system. The last of these documents is identified by Ms Hoey as forming part of the O&M manuals. It describes extensive green roofs as low maintenance but says that routine maintenance is generally carried out in the springtime and should be recognised by the client and included as part of the running costs of the building. Under the subject of irrigation, the document says: *"... it is generally not considered necessary to irrigate extensive substrate green roof systems. It is, however, always advisable to ensure that there is a water supply point adjacent to the*

green roof, both to assist with general maintenance and as a precaution against extreme drought conditions."

384. Mrs Vainker was firm in her oral evidence that she had not been sent these documents by Mr Fitzgerald but that she had been sent the Bauder Extensive Green Roof Maintenance document separately by Mr Strike and that, after that, she had had Bauder to attend and maintain the roof at a cost of £660 per year.

385. Mrs Vainker was also taken to an e-mail she had sent to Mr Fitzgerald dated 20 August 2014, in which she said that she had not been told that the roof needed to be watered and pointed out the difficulty for her of access. In her cross-examination, Mrs Vainker then said this:
"The question about water arose in 2018, when I heard from Bauder that I needed to be watering the green roof regularly and I believe that I ... had correspondence, e-mail correspondence, with Mr Clifton about it because .... it would have been very hard for me to get a hose up to water it. And I had had no warning that in the Bauder extensive green roof maintenance document it said there should be water supply nearby."

386. Although not mentioned in her witness statements, Mrs Vainker, it would seem, was referring to an e-mail sent to her on 29 June 2018 by Bauder which said that, due to the prolonged dry hot weather, they were writing to all customers to advise about watering green roofs. The advice in respect of sedum systems was that they should be thoroughly soaked once a week until the weather broke. Guidelines were attached. The e-mail attachment was a document entitled "Watering Guide" and said the following:

"The following is meant as a simple guide as the requirements for watering and irrigation for green roof systems. ***All roofs require watering at installation and in hot, dry weather.***
...
Bauder XF301/XF300/Sedum Plugs
Sedum is a very drought resistant plant and will survive even long periods of drought, however it will benefit from the occasional soaking in prolonged hot, dry weather (2-3 weeks without rain in the summer months) Sedum turns red when stressed through lack of water.
Advise: Once every week, water the sedum until the vegetation and substrate are totally soaked.*"*
The document also advised regular watering for roofs with British native seed mixes or wildflowers which were not as drought resistant as sedum.

387. As I read the Watering Guide, it was offering advice on watering of the sedum during prolonged hot dry weather and not advocating regular watering at any other time. The contrast with the advice in respect of other plants supports that, as does the context in which the document was provided.

388. In his first witness statement, Mr Clifton, explained that sedum was selected because it did not require regular watering, that regular watering could encourage weeds, and that the green roof was expressly located on the north facing side of the property so that it would be sheltered from the sun. He anticipated, however, that the roof would require annual maintenance. In part for that reason, the specification included provision for a mansafe which would be used by trained operatives. He made the point that if the roof

could be easily accessed by the occupants of the property, access from within or outside the property would be required, together with handrails, turning the green roof into an external terrace for which planning permission, in his view, would have been refused.

389. Much of this evidence was unchallenged or barely challenged in cross-examination. Mr Clifton was simply asked whether he accepted that SCd had not made any adequate provision for watering. He agreed that the closest tap was on the other side of the building and not specifically for the green roof. He repeated the evidence about the choice of sedum and the expectation of annual maintenance only and the expectation that a specialist would undertake maintenance and watering. His evidence was that a decision was taken to provide one tap for watering of the front and rear gardens which would also enable watering of the sedum roof if needed.

390. When Mr Clifton was asked about the 2018 e-mail and the Watering Guide, he said that it was not the guidance given to SCd by Bauder in 2013 and that SCd's understanding was that sedum was drought tolerant and did not require regular watering. That does not seem to me to be inconsistent with the watering advice given in 2018 which was directed at periods of prolonged hot weather.

391. The experts agreed that SCd's design was consistent with the Bauder recommendations apart from the location of the water supply for maintenance purposes. They further agreed that adequate arrangements were made for safe maintenance by appropriately trained professionals but that "an adjacent water point <u>is required</u> as recommended by Bauder" (my emphasis).

392. Ms Hoey's opinion was that the failure to follow that recommendation amounted to a failure to exercise reasonable care and skill. In cross-examination, she agreed that her only criticism was that the tap was not closer to the roof. She accepted that Bauder had given guidance as to what was advisable rather than stated a requirement and that she had no information to the effect that they could not carry out their maintenance.

393. Mr Satow expressed a more qualified opinion. He regarded Bauder's advice as a convenience rather than an absolute requirement, adding that it was clearly possible to use a long hose to supply water from elsewhere in extreme drought conditions. He considered that this ought to have been discussed with the client. However, his overall opinion was that the design was adequate but could have been improved by the provision of a water supply point more closely adjacent.

394. Drawing the threads together, in my judgment, the position is as follows:
    (i) In designing the green roof and having regard to its maintenance, there was no failure on the part of SCd to exercise reasonable care and skill.
    (ii) It was reasonable for SCd to anticipate that only annual maintenance by Bauder or another specialist would be undertaken and not that the roof would require regular watering by anyone and certainly not by Mrs Vainker. Mr Clifton's reasoning for having a sedum roof, his expectation that it would require no or only occasional watering, that that could and should be done by a specialist, and that that person would access the roof using the mansafe were all reasonable propositions on which to base the design.
    (iii) In all those circumstances, the provision of a tap on the other side of the building, which could be used for occasional watering by such a specialist, was adequate. It

was not strictly in accordance with Bauder's recommendation that a supply point adjacent to the roof should be provided. But that was advice from Bauder only, as Ms Hoey accepted, and, in my judgment taking account of the matters I have referred to, a reasonable design decision was taken not to include that additional tap. I prefer the conclusion of Mr Satow that the design was adequate, albeit could have been improved. I find support for the view that the design was adequate in the fact that, as Mr Fowler submitted, Bauder has been responsible for maintaining the roof and there is no evidence of any concern expressed by Bauder that there was no adequate provision for watering or access.

(iv) Although Mrs Vainker gave evidence that she had watered the roof on an unspecified number of occasions, it could not have been a failure to exercise reasonable care and skill for SCd not to base their design on the assumption that she would. On the contrary, Bauder recommended that the client should see maintenance as part of the running costs. Ms Hoey agreed that she would expect annual maintenance to be carried out and she expressed no view about additional watering.

(v) It is simply unclear whether the guidance given by Bauder in 2018 was different from that given in 2013 and referred to in the Specification as "the Bauder watering requirements and guidance document". Given Mrs Vainker's reaction to the document she saw in 2013 or 2014, the guidance may well have been the same but, in my view, it makes no difference. In 2018, Bauder advised weekly watering during prolonged hot and dry periods (of 2-3 weeks). Assuming that the same guidance was given in 2013, it does not at all follow that SCd ought to have provided a tap and a means of access for Mrs Vainker to water the roof with ease in those particular and occasional circumstances.

395. Accordingly, I do not find that there is any liability on the part of SCd in respect of this Scott Schedule item.

396. I would add that, if I were wrong about that, I would only have awarded Mrs Vainker – there being no basis in law for any claim by Mr Vainker - the agreed cost of the installation of a further tap. The claim set out in the Scott Schedule is, in fact, one for the annual cost of maintenance over a period of 50 years. That claim could only have been advanced on the basis that SCd's design ought to have provided either a green roof that never required any maintenance or one that could be maintained by the occupants of the House at no cost – in other words that the adequate provision of means of watering and access would have obviated the need for any professional maintenance. There was no evidence to that effect and there would have been no basis for such a claim.

397. For completeness, I add that there was no limitation defence pleaded in respect of this item. By the time of closing submissions, however, Mr Fowler argued that it had become apparent that a limitation defence was available because, it was submitted, given Mrs Vainker's complaint in August 2014 that she had not been told that the roof required watering, she had by that time the requisite knowledge for the purposes of section 14A of the Limitation Act 1980. There was no application to amend to plead a limitation defence; no explanation of why the significance of this disclosed document had not previously been identified; and it would, in my view, have been wholly unfair to allow the defence to be raised at such a late stage.

The Stairwell Rooflight (Scott Schedule Item 12)

398. It is convenient to start by setting out the description of the nature of the defect given in the Scott Schedule which fell into four parts:

> *"(i) Gaps between rooflight and internal lining which have led to water ingress, which in turn damaged the wall and/or skirting.*
> *(ii) Insufficient angle on the pitch of the rooflight to ensure that the self-cleaning design functions properly.*
> *(iii) A lack of safe access to the rooflight. Since the rooflight cannot be cleaned it has developed green growth on the surface.*
> *(iv) A lack of sun protection on the rooflight."*
> In their joint statement, the experts stated that they had not considered the last of these items as no evidence had been provided to support the claim. This issue featured no further in the trial.

Water ingress

399. The first of these allegations – gaps leading to water ingress – is principally an allegation of defective workmanship against Marbank. There was a pleaded case as to failure of inspection against SCd but that did not feature in any submissions made at trial and I regard this as, realistically, a claim against Marbank only.

400. It is common ground that the rooflight initially installed was scratched and was replaced by Marbank in 2015. In an e-mail dated 12 February 2018, Mrs Vainker reported water ingress around the rooflight, noting that flaking plaster had already been repaired in that area in 2016 when she had suspected the presence of damp.

401. Ms Hoey's evidence was that when she inspected in November 2019, she observed evidence of water staining to the internal lining and gaps between the rooflight and lining. When she inspected in August 2021, she observed gaps and staining at a further location. Her report included a photograph of obvious blistering and, in their joint statement, the experts agreed that there was a small patch of blistered plaster below the north-east corner of the rooflight. Mr Smart's evidence was that when he visited the House in August 2021, no gaps were identified to him and he did not see any gaps. That was an example of Mr Smart's approach of waiting for defects to be identified to him. He accepted that, if there were gaps which had caused the blistered plaster, that was likely to be Marbank's responsibility – no doubt because there is no other plausible explanation for that damage.

402. I am entirely satisfied, on the basis of Ms Hoey's evidence and the photographic evidence that there are gaps which have allowed water ingress and caused damage. Having said that, it is obvious, as Mr Smart said in his report, that the gaps can be sealed and the damage repaired. Marbank's case in its Response to the Scott Schedule is that these works could be carried out for about £150. Mr McGee said nothing more about this figure other than to refer to it under the heading "Opinion on Quantum". This minor defect of itself is no reason to replace the rooflight but the claimants' only pleaded case is for the remedial works comprising the complete replacement of the rooflight.

403. As I will come to, the other defects alleged are matters of design only. If the rooflight requires replacing because of these issues, the issue of the gaps will necessarily be

addressed and there is no further loss attributable to Marbank. If there is any loss attributable to Marbank, it can only be the cost of remedial works to seal the gaps and repair the damage already caused. In the absence of any other evidence of the cost of such remedial works, I adopt Marbank's figure of **£150**.

Pitch

404. SCd's specification at clause L10.462 (Roof Window Stairwell) specified a fall of 7 degrees and provided that the glass was to be self cleaning glass. The specification at clause N25-210 also provided for a mansafe, or fall restraint system, for manual cleaning.

405. The rooflight was, however, a CDP item, as set out in the Ninth Recital to the Contract, which required completion by Marbank. Marbank engaged sub-contractors, Ridlands Ltd., who designed the bespoke rooflight. On Ridlands' drawing 818-P466-GA-215, they noted:

"Roof pitch below 15 degrees may suffer from
- *Water ponding and subsequent dirty residue*
- *Ineffective self cleaning by virtue of rainwater*
- *Condensation dripping"*

406. SCd reviewed that drawing on 15 August 2013 and alongside that note added the annotation "Self cleaning glass as per SCd spec". No steps were taken to revise the designed pitch.

407. The experts are agreed that: *"The optimum pitch recommended for self cleaning glass is 30º, and the Glass and Glazing Federation recommends a minimum pitch of 10º."* The Glass and Glazing Federation document referred to is entitled "Surface modification of Glass for Ease of Maintenance on Externally Installed Glass" (2008) and provides:

"Self cleaning glass is suitable for glazing angles of 10 degrees from horizontal and greater to ensure sufficient flow of water across the surface. Angles of 30 degrees and steeper are ideal."
The experts are also, however, agreed that a planning application and significant alterations would be required to achieve a steeper rooflight pitch.

408. It is, in my view, important to recognise firstly – and I refer to the evidence further below – that SCd did not design and were in no sense required to design a rooflight that was entirely self-cleaning and wholly maintenance free. The design specified the use of self cleaning glass but also made provision for access for manual cleaning. Secondly, and in any event, it is agreed by the experts that so-called self-cleaning glass is not wholly maintenance free and needs manual cleaning "on occasion".

409. The experts are similarly agreed that a reasonably competent architect would have advised his client of that fact. It is, however, difficult to see how that could result in any recoverable loss. There is no suggestion that, had Mrs Vainker been given such information, she would have elected not to have self-cleaning glass or to have some wholly different design, or that, if she had, it would have reduced or avoided the maintenance costs. I recognise that Mr Clifton accepted that he had misleadingly told Mrs Vainker, in an e-mail dated 27 August 2013 that the self cleaning glass would avoid

the need for a window cleaner to have access but that makes no difference to the position. The design provided for access for cleaning.

410. Ms Hoey's opinion in her report was that, in specifying a fall of 7º, SCd failed to exercise reasonable care and skill. So far as I can see that opinion is expressed solely on the basis that the specified pitch was less than the agreed optimum or perhaps the noted minimum or perhaps the 15º referred to by Ridlands. Since the specified pitch was less than all of these, there is some obvious attraction in Ms Hoey's opinion. Further, Mr Satow regarded the configuration of the rooflight as incompatible with the "specification of the rooflight to be self-cleaning" and, in his report, was unable to identify any geometric constraints that would have prevented the rooflight from being installed at a steeper angle. The angle appeared to him to be an aesthetic decision to keep the angles of the roofs more or less consistent.

411. In his witness statement, Mr Clifton's evidence was that the pitch of the roof where the rooflight was located was shallow and would require intermittent cleaning. The self cleaning glass was specified to reduce the regularity of the cleaning. Provision was, therefore, made for a mansafe for the purpose of cleaning the roof. In cross-examination, Mr Clifton agreed that the optimum pitch would be 30º if you were wholly reliant on self cleaning. He was not aware of the recommendation of the Glass and Glazing Federation. He expanded on the evidence in his statement by saying that the 7º pitch had come from a specialist glazing manufacturer, Alco Glass. SCd had wanted the pitch to be as shallow as possible but still "technically correct" and that was the angle advised by the specialist manufacturer. The evidence that SCd wanted the pitch to be as shallow as possible is at the least consistent with Mr Satow's inference that an aesthetic design decision was involved.

412. As I have already said, I regarded Mr Clifton as an honest and straightforward witness. who gave his evidence in a wholly professional manner. He was prepared to make concessions and accept where mistakes had been made. In this instance, I have come to the conclusion that the decision to adopt a pitch of 7º was not one that in itself involved a failure to exercise reasonable care and skill. I do not read the specification as requiring the glass to be self-cleaning but rather that glass of that type was to be installed. That ought to have reduced the need for manual cleaning but it did not follow that no reasonable architect would have specified a pitch less than 30º or 15º or 10º, when coupled with provision for access for cleaning. It was a considered decision to adopt a design which was less than optimum for self-cleaning glass but balanced by provision for access for cleaning.

413. Even if I am wrong about this, SCd raises a limitation defence. In short, SCd relies on Mr Clifton's e-mail dated 15 April 2015. Mrs Vainker recalled being told that the glass was self-cleaning and wanted to know which glass was self-cleaning because the glass "at the top" was impossible to reach. Mr Clifton responded quoting the specification for two areas including the rooflight and explained to Mrs Vainker that, in addition to specifying self-cleaning glass, SCd had specified a mansafe so that when maintenance was required a workman could attach himself securely and safely. The complaint about the pitch of the roof is, in effect, a complaint that the pitch does not allow the roof to be entirely self-cleaning. Mr Fowler therefore submits that by the date of that e-mail Mrs Vainker was aware that the glass might need cleaning and was not entirely self-cleaning and that it follows that, by that date, she had the requisite knowledge for time to start to

run under section 14A of the Limitation Act 1980. I accept that submission. Even if Mrs Vainker did not know exactly why the glass required cleaning that she had not anticipated, she knew that material fact and that any resultant loss and damage was attributable to SCd. It is not in issue that any claim in contract is time-barred and I would have found that any claim in tort was also time-barred. Lastly, the pitch of the roof has no possible relevance to a claim under the Defective Premises Act 1972.

414. I have focussed in this respect on the performance of SCd and not Marbank. It seems to be that it was the completion of the design for which Marbank was responsible and that they could not be responsible for the decision as to the pitch of the roof.

Access

415. The final aspect of the complaint about the rooflight is the allegation that there is a lack of safe access to the rooflight. I cannot see that this allegation could be advanced against Marbank who did not have design responsibility for means of access to the rooflight and I treat it as concerning SCd only.

416. The experts are agreed that:

"Maintenance access is not adequate and could be improved via the addition of permanent access equipment.
Complete replacement of the rooflight is not considered necessary for maintenance purposes."
The relevance of that last point, it seems to me, is, in part, that any failure of design in respect of access to the rooflight is a free-standing allegation.

417. Ms Hoey in her report recognised that the specification included a mansafe. She expressed the opinion that the mansafe installed to the wall behind the green roof and below the rooflight was not adequate for safe cleaning and maintenance and, accordingly, that SCd's siting of the mansafe had not been undertaken with reasonable care and skill.

418. Mr Satow said this (at paragraph 6.8.17 of his report):

"Since the agreement of the Experts' Joint Statement, I have considered further the means of access for cleaning of the rooflight. While I am not a cleaning expert, my provisional view is that the rooflight could be cleaned from below using a short ladder from the lower (Bauder) roof in combination with the latchway at the floor of the wall on the north side of the rooflight. There would be no need for a cleaning worker to be more than 2.0m above the sedum roof, and if such a method were adopted I believe that it would be considered adequate."

419. No point was taken that Mr Satow was seeking to resile from the experts' agreement and/or that I should not take account of this modification in his opinion. His conclusion, on this basis, was that SCd was not at fault in the siting of the mansafe. His opinion as to the manner in which the rooflight could safely be cleaned was put to Ms Hoey in cross-examination and her answers led to further questions from me. The point that was put was that a window cleaner could use a ladder from the green roof to clean the rooflight – the window cleaner could be properly attached to the mansafe provided and would only risk falling back (while attached to the mansafe) 2m on to the sedum roof. As Ms Hoey

said, she is not a window cleaner and she was not able to say whether that would provide sufficient, and I infer safe, access.

420. I accept that the rooflight was not designed to be cleaned by the owners of the property personally and was a feature that would require professional cleaning. In my view, Ms Hoey was not able to explain why the mansafe did not provide a safe means of access for a window cleaner and I am not satisfied that the claimants have established that SCd were in breach in this respect.

421. Despite the measure of agreement between the experts and taking account of the evidence at trial, I am unable to conclude that no reasonable architect would have designed the access to the rooflight as SCd did and I find no relevant breach in this respect.

422. For completeness, I observe that the case was opened on the basis that this was a Scott Schedule item to which a significant claim for damages attached. The estimated cost of remedial works in the Scott Schedule was "£37,100.57 + TBA" which assumed the complete replacement of the rooflight. Mr Finn and Mr Johnson agreed the estimated cost as £32,412.99. However, in their second joint statement, and on the basis that the liability experts had agreed that complete replacement was not necessary, they revised that estimate to nil. They noted the agreement of the liability experts that access could be improved by permanent access equipment; Mr Johnson estimated the cost of that work at £4,454.52; and Mr Finn agreed with that provisional assessment.

The woodburning stove (Scott Schedule item 13)

423. The Claimants' case is that the woodburning stove has been unusable since practical completion. The claim is advanced against Marbank only, on the basis of defects in workmanship, namely:
    (i) Cracked and defective plaster around the stove.
    (ii) An opening in the wall beneath the fireplace which has been crudely filled and ought to have been an access hatch for the concealed rainwater drainage.
    (iii) Irregular and/or misshapen alcoves either side of the fireplace.

424. This is one of the smaller claims: the cost of remedial works which are intended to address the defective plaster, create straight edges and install the access hatch is agreed in the second joint statement as £1,541.29.

425. The Claimants' evidence was that when the stove was commissioned in January 2018, after the MVHR system had been replaced, the plaster around the stove started to overheat, crack and fall away. Marbank agreed that the plaster was not heat resistant and that remedial works would be carried out. That apparent admission was made in a solicitors' letter dated 22 June 2018 in which it was said that it had been noted that the plasterboard was not of the correct type and that Marbank would replace it free of charge.

426. That was not a formal admission and Marbank did not admit liability. In the Scott Schedule, Marbank's case was that the fireplace and its surrounds were designed by SCd and constructed by Marbank in accordance with the contract using heat resistant plaster and the float and set method. That was supported by the evidence of Mr Woods.

427. The experts were agreed that there was evidence of blown plaster seen during their 2021 site visit.

428. Ms Hoey relied on the apparent admission and offered no further opinion on the cause of the alleged defect. Mr Smart's opinion was that the plaster was likely to have failed from heat build up which was caused by a lack of void ventilation which was a design issue. Although not going so far to agree with that cause, the experts agreed that the wood burning stove needs an independent air supply in a property with a MVHR system and that the lack of a vent was a design coordination issue. Taking this evidence together, I am not persuaded that the Claimants have established any relevant breach by Marbank.

429. So far as the second aspect of this item is concerned, Marbank's case is that no access panel was required by the contract. I have seen no evidence to the contrary and again I do not consider that the claimants have established any breach on the part of Marbank.

430. So far as the alleged misshapen alcoves are concerned, the only evidence I have seen is an item included in a snagging list Rev G as "Corners to fire" and a number of photographs. Mr Smart's view was that the alcoves were very narrow which presented issues for the plaster finish but that Marbank had carried out an adequate job. Having considered the snagging item and photographs, I agree with Mr Smart's view and find it difficult to identify any defect.

431. It follows that the claim in item 13 fails.

Defective and/or stained and/or unusable Jura bathroom worktops and chipped/ damaged or stained floor and wall tiles (Scott Schedule items 14 and 23)

432. Under item 14, the claimants' case is that, in all the bathrooms, the worktops or vanity unit tops which are Jura grey stone have never been sealed or finished and that, as a result, they became stained in everyday use. The nature of the defect is said to be that the worktops were unsealed. The Scott Schedule refers to the bathrooms on the second floor, the first floor front bedroom en suite shower room, the first floor back bedroom en suite shower room and the master bathroom. The evidence includes a number of photographs of staining.

433. Mrs. Vainker's evidence was that the staining occurred the first time she placed anything on a surface and that she had, therefore, prevented anyone from putting anything on the surfaces. She said that, in about June 2014, the installer had agreed to seal the tops; she had selected a Stainstop sealant and told Mr Roffey. In 2017, she had repeated this to Mr Woods who said he would arrange for the sub-contractor to return. But the tops had never been sealed. The experts agreed that they had seen some evidence of staining in a first floor en suite bathroom. That is at least consistent with Mrs Vainker having prevented the use of other surfaces. The experts are agreed that the staining is consistent with missing or inadequate surface sealer or a lack of cleaning but are not agreed as to the cause.

434. Marbank's position is that the choice of material was a design matter, that they installed what was specified by SCd, which is a limestone susceptible to staining, and that Marbank was not required to seal the worktops. Mr Smart, in his report, identified that there was no specification of the worktops in the contract and that was not in dispute.

435. In submissions, Marbank said that they were given a quote for Jura limestone which was originally made to SCd (by a quotation dated 3 April 2013) and then repeated to Marbank in a quotation dated 3 December 2013, and Marbank bought Jura limestone from that supplier, Stoneworks. Further Marbank emphasised that no contractual requirement to seal the worktops was identified. Ms Hoey, in her report, agreed that there was no sealant specified. She argued, however, that in carrying out the works in accordance with clause 2.1 of the Contract, Marbank ought to have raised a query and she appeared to infer from that a breach of contract.

436. In Opening Submissions, the claimants relied on documents that they said showed that Marbank and SCd were aware that the stone was supplied unfinished. In particular:

    (i) On 8 November 2013, Mr Dow emailed Mr Fitzgerald, copying in other members of the Marbank team, as well as Mr Clifton and Mr Strike of SCd, stating:

        "*we note that further to the Stone and Ceramic order being instructed a note is on the drawings stating that any Jura used as a counter should have an edge profile. Does this mean you are after the stone being polished as the stones are not ordered or supplied as such so this will need to be carried out as additional works for which we need to price and allow time"* (claimants' emphasis added)

    (ii) The quotation to Marbank from Stoneworks dated 3 December 2013 provided "*Sealer, if required, will be provided at a provisional rate of £9.50m^2, (Subject to full details of particular requirements). A minimum fee of £70.00 per site visit will be charged*".

437. Neither of these documents assists the claimant in the case against Marbank. The complaint made is not that the worktops were not polished and, in any case, there is no evidence that Marbank was instructed to have the worktops polished. The quote includes, as part of what would appear to be standard "Exclusions/Qualifications", a rate for the provision of sealer, if required, but that does not in any way demonstrate that Marbank was required to seal the surfaces or indeed any breach of clause 2.1 if they did not. The quote had previously been provided directly to SCd and there is no suggestion that SCd had, in consequence, required the stone to be sealed.

438. The claimants also rely on the evidence I have referred to above as to Marbank undertaking that the sub-contractor would return to seal the surfaces. That does not, however, amount to an admission of breach. Whilst it might have been helpful for Marbank to have arranged for the sub-contractor to seal the surfaces, it is not evidence that it was their contractual responsibility to do so.

439. I should add that Ms Hoey also drew attention to the Lithofin Method Statement no. 48 which was included in the O&M Manuals issued in December 2015. The document states that surfaces should be protected with a special impregnator such as Stainstop. Lithofin is a manufacturer of products for the cleaning, protection and maintenance of stone products. Mr Clay, therefore, submitted both that this is not a contract specification for the installation of the Jura limestone but also that it is a guide to products suitable for maintaining the stone supplied. I agree and, to my mind, the only relevance of this document is that it serves as an indicator that the issue is one of maintenance.

440. Accordingly, whatever the cause of the staining, I find that there was no breach of contract on Marbank's part in relation to this Scott Schedule item.

441. Item 23 is a related alleged bathroom defect but, as pleaded, is confined to the walls and floors of the master bathroom. Nonetheless, it was one of the larger Scott Schedule items with the cost of remedial works estimated at £63,183. The sum now claimed, as agreed in the second joint statement, is £17,016.82.

442. As set out in the Scott Schedule, the nature of the defect is said to be poor repairs using cement in 2014; scratches and chips prior to practical completion; sanding down after practical completion which left a poor finish; and brown staining including adjacent to the grouted joints. Alongside a series of general allegations of breach, the particular breaches alleged are that the flooring and wall tiling are defective, the Jura tiles were not sealed and the grout was not fit for purpose. This mish mash of allegations and alleged breaches requires disentangling.

443. The complaint that the Jura tiles were not sealed is similar to the issue raised in item 14. In the joint statement, the experts agreed that the SCd tiling specification (M40/110A and 112A) indicated only that the finish was to "TBC". Mr Smart in his report identified that the use of Jura limestone tiling to floors and walls was instructed by CAI no. 21, which simply issued a tiling schedule. Mr Smart had been unable to identify the tiling schedule but there is no evidence that it contained any express requirement for sealing. I reach the same conclusion that I did in respect of item 14, namely that the claimants have not established any breach of contract by Marbank in this respect.

444. So far as chips to the floor are concerned, the experts agreed that there may be evidence of floor tile chips having been repaired and they agreed that these are de minimis. There is no evidence from which I could find any breach by Marbank or identify any relevant remedial works.

445. The complaint in respect of grouting arises, on the claimants' case, as follows. It appears to be common ground that the wrong colour grout was initially used. Mr Roffey accepted in his witness statement that some, at least, of the tiling grout was the wrong colour and had to be cut out and replaced.

446. The claimants pointed to an e-mail from Mr Dow to Surrey Ceramics on 17 and 18 September 2014, that is after practical completion, in which Mr Dow said:

> "*I have a real problem on a ressie scheme in Twickenham where the tiling grout has come up terribly and been condemned by the Client Team. We have had Mapei out to review and they have identified an issue with the quality of workmanship in the mixing and prep of the works*…"
>
> and
>
> "*Its patchy, two tone. Looks shocking in places*"

447. It is unclear whether this referred to the grout originally installed or the replacement but it was clear evidence of poor workmanship.

448. Mrs Vainker commissioned a report from the firm of Harrison Goldman (dated 25 June 2015). I do not propose to set out the contents of this report at length. The report referred to the susceptibility of limestone to staining. With specific reference to the grout, the report said:

> *"Also by its nature the stone is vulnerable to staining from grouts or adhesives that have a strong alkali content.*
>
> *The complaints investigated relate to:*
>
> *A line of horizontal brown staining above and below the horizontal joint to the wall lining and similar staining to the floor slabs (see photos 1, 4, 5 & 6). This is caused by the use of grouts that contain high levels of alkali, or are not specifically formulated for use with natural stone.*
>
> *The British Standards require the use of grouts and adhesives that are specifically formulated with natural stone and suggest that sampling should be carried out to ensure that the grout and adhesive does not stain the stone being installed. An experienced and competent stone mason may be able to remove the brown staining and re-polish the surface.*
>
> *…"*

449. The experts agreed that there was some evidence of linear stain marks to some of the wall tiles. I note that they made no reference to the floor tiles.

450. The only evidence, therefore, that the grout was not fit for purpose and caused the staining identified is the report of Harrison Goldman who were not called to give evidence.

451. Ms Hoey's evidence was, at best, equivocal. She considered that the staining was consistent with the use of coloured grout but recognised that there had been no testing to establish this. As both Ms Hoey and Mr Smart said, the specification at clause M40/885 referred to coloured grout, stated that staining of tiles was not permitted, required a small trial area, and said that "if discolouration occurs apply a protective sealer to tiles and repeat trial". Mr Smart surmised both that SCd had failed to issue adequate instructions as to the grout to be used but also said that the staining was not widespread as he would expect if there was leaching from the grout.

452. Drawing the threads together:
    (i) There is no basis on which Marbank could be liable for the cost of replacing the floor. Indeed and in any event, Ms Hoey's position in her second report is that she would not include that in the remedial works.
    (ii) There is no explanation for the staining to the wall tiles other than discolouration, however caused, from the grout. Marbank and its sub-contractors ought to have tested the grout and the most likely inference from the staining is that this was not done or appropriate steps were not taken to prevent staining. The other evidence of poor workmanship in respect of the grouting supports this inference. On the balance of probabilities, the staining was caused by a breach of contract by Marbank.
    (iii) The extent of the staining is unclear.

(iv) Mr Smart makes the point that the claimants have not tried specialist cleaning and, therefore, not established that wholesale replacement is appropriate. Whilst the claimants clearly have the burden of proof, Mr Smart does no more than make a suggestion which is not supported by any further evidence or detail as to the proposed remedy. At most there is the brief reference in the Harrison Goldman report to what an experienced stone mason may be able to do.

(v) On the other hand, in the general statement in her second report, Ms Hoey in effect supports the replacement of the wall tiling as the appropriate remedial scheme. Although, as I have said, her evidence in relation to remedial works was extremely limited, her general approach was one of making reasonable concessions, as she did in respect of the floor tiling and I attach real weight to her view that the wall tiling should be replaced.

(vi) On balance, I am satisfied that the appropriate remedial scheme is the replacement of the wall tiling.

453. That leaves the issue of the cost of remedial works and an issue which I raised in the course of the trial as to the make up of the agreed figures in the joint statements. I was told that the figures could be seen from Appendix 1 to the second joint statement and, at a high level, that is right. However, it does not seem to me possible to tell from that Appendix what elements of the remedial works have been included in that figure and at what cost. The total agreed cost of remedial works under item 23 is £17,106.82 but that is the figure for the replacement of both the floor and walls tiles. At the hearing in respect of consequential matters, and before any final order is made, I will give the parties the opportunity to make further submissions limited to the evidence already contained within the expert reports and the joint statements as to the appropriate sum for the replacement of the wall tiling only. If that cost cannot be identified and/or agreed, I will do the best I can to make an appropriate assessment.

Damaged shower trim (Scott Schedule item 15)

454. The claimants' case is that Marbank re-did much of the grouting in the master bathroom because it was uneven. The evidence of Mr and Mrs Vainker is that, when Marbank did so, they caused damage to the trim to the shower tray. In an e-mail to Mr Woods dated 27 June 2016, Mrs Vainker described the damage as scratches. Her evidence was that Mr Woods agreed orally to replace the shower frame but that that was not done. There was some attempt by Mr Braggins in cross-examination to say that this damage had been rectified because the snagging lists had been worked through. I have no doubt that that was wrong in light of the e-mail correspondence.

455. In the joint statement, somewhat surprisingly, the experts say that they have no knowledge of this item and have not seen it, that it was not on a snagging list and that there is no evidence that the shower trim was damaged as part of the original works. There was a belated attempt to adduce evidence in the second report of Ms Hoey that her colleague had noticed a scratched shower trim. I refused permission to adduce that evidence for the reasons I gave at the time. However, a photograph taken on 22 September 2022 remained in the trial bundle and showed a scratched shower trim.

456. I have no reason to doubt Mrs Vainker's evidence as to how this damage was caused. At the time, although again not a formal admission, Marbank accepted they were at fault

and should replace the trim. The agreed cost in the second joint statement is **£904.32** which is the sum I find due to Mrs Vainker.

Defective shower mixer (Scott Schedule item 16)

457. As set out in the Scott Schedule, this is an item in the first floor front bedroom en suite bathroom.

458. The only factual evidence is (i) from Mrs Vainker who referred to this as a defect and (ii) from Mr Vainker who said that he told Mr Roffey that the thermostat in the mixer did not work properly as the water never got hot. The experts in their joint statement say that they have no knowledge of this item and have not seen it and that there is no evidence that it was damaged as part of the original works. As I understand it, the allegation is that a defective mixer was installed rather than that it was damaged.

459. If such a faulty item was installed, that could have been easily identified by the experts, since it is not suggested that anything has been done to replace this allegedly faulty mixer. Mr Vainker's assertion that the water never got hot is not enough to establish any breach of contract.

Plaster finishes (Scott Schedule item 17)

460. In the Scott Schedule, the nature of this defect is described as cracks, fractures and open joints to the plaster finishes and this defect is said to occur throughout the House and particularly in the living room and front ground floor sitting room. Further the claimants contend that cracks have not been appropriately rectified. Marbank deny any breach of contract and plead that they returned to rectify minor shrinkage cracks after practical completion and left the house in good condition.

461. The experts agreed that some cracks were noticed on their August 2021 site visit but that it was difficult to ascertain which may have been unresolved from the time of practical completion or the defects liability period and which were subsequent natural shrinkage and/or wear and tear.

462. Ms Hoey gave no further evidence. Mr Smart essentially repeated the view set out in the joint statement and said that he could not offer an opinion as to whether cracks were caused by any breach on the part of Marbank.

463. To meet this difficulty, the claimants set out in their closing submissions references to defects or snagging lists from June 2015, March 2016 and September 2016 all of which included photographs of cracks throughout the House. Although the references do not make good the claimants' case as to the primary location of cracking, they do demonstrate, in my view, that there were numerous examples of cracks which were apparent relatively soon after practical completion. None of these was referred to by the experts in expressing their joint opinion. Mr Smart was shown in cross-examination a photograph of one crack which he accepted was not minor cracking or wear and tear.

464. Despite the fact that it is not possible to identify the precise cause of each crack, there is sufficient evidence in my view of cracking caused by poor workmanship and not by wear and tear. There are no specific issues raised as to the proposed remedial works and the agreed cost is **£7,399.01** on which I find in Mrs Vainker's favour.

Defective window (Scott Schedule item 18)

465. Although described as a defective window (in the first floor dressing room), it is agreed between the experts, and I accept, that the defect is, in fact, in the plasterboard bulkhead, which is too low, and not the window itself. Marbank admitted liability for the defective bulkhead by letter dated 22 July 2022 and "accepted" the sum of £128.01 as the cost of remedial works, as assessed by Mr McGee. For the reasons I have given, I prefer the figures agreed in the second joint statement and find Marbank liable in the sum of **£549.12**.

Scratched rooflight (Scott Schedule item 19)

466. This item relates to the rooflight above the dining room. It is a distinct item from item 12.

467. The experts agreed that they had seen an X shaped scratch mark about 75mm in dimension in the south west corner of the rooflight. They further agreed that this item was included in the first snagging list (rev B) dated 5 September 2014. I note that this is contrary to Marbank's pleaded position that this item had never previously been mentioned.

468. The experts further agree, however, that they cannot say how the scratch was caused. The pleaded position is that it was caused during cleaning. Mrs Vainker's evidence and explanation is that when remedial works were carried out at parapet level, the glass was spattered with mortar. It was scratched when the mortar was scraped off. Other damaged glass was replaced but not this rooflight.

469. This evidence was not challenged and I have no reason to doubt it and it follows that the scratch was caused by Marbank's failure to carry out the works in a proper and workmanlike manner which would necessarily involve avoiding causing damage.

470. The proposed remedial works are the replacement of the scratched glass and the agreed cost is £4,618.85.

471. In the joint statement the experts agreed that if the small scratch can be polished out the glass may not require replacement as claimed. Mr Smart contends that it is barely noticeable and that it is likely to the able to be polished out at much lower cost. This is a further instance where the possibility of an alternative remedy is raised but not supported by any evidence. Moreover, when Mr Smart was cross-examined on this issue, I formed the view that he was not really in a position to say whether the scratch could be polished out or not. It is also not an item where Ms Hoey does not support the proposed remedial scheme despite, fairly, agreeing that there may be another possibility.

472. The claimants are entitled to have this damage rectified and, in the absence of any evidence that this could, in fact, be achieved by polishing out, in my view, the appropriate remedial scheme is replacement. I find in Mrs Vainker's favour in the sum of **£4,618.85**.

Skirtings and architraves (Scott Schedule item 20)

473. In the Scott Schedule, the nature of the defect is said to be "poor and untidy repairs to gaps in skirtings and architraves". These are said to occur "throughout". Remedial works

are proposed to 3 locations where the architrave is poorly finished; 3 locations of poorly finished skirting; and 3 locations where mastic is to be removed from poorly finished skirting. The locations are not identified in the Scott Schedule.

474. In closing submissions, however, the claimants identified the locations relied upon taken from snagging or defects lists as follows (including the references to the electronic trial bundle):

"Poorly finished architraves

- 25 March 2014: Basement cinema room "*gaps to skirting / door architrave*" (p9/17) **TV-300-4879**
- 15 June 2015: Issue 5 (on p4/6) **TV-300-6738**
- 1 September 2016 (additional snagging as a result of Marbank's snagging works): Issue 55 **TV-300-9746**

Poorly finished skirting needing repair by caulking and painting

- 25 March 2014: Front bedroom "*Decorate the edge detail*" and "*Skirting and redecorations*" (p5/8) **TV-300-3610**
- 13 June 2014: Issue 29 **TV-300-9246**
- 15 June 2015: Issue 2 **TV-300-1442**

Poorly finished skirting needing repair by removing and replacing mastic

- 15 June 2015: Issue 3 **TV-300-1442**
- 21 March 2016 (Reinspection of making good defects, supplementing existing lists): Item 14 **TV-300-4248**
- See photograph at **TV-300-4834** (15 June 2015), not on any snag list."

475. The experts agreed that a number of examples of this item were observed in August 2021 and that some were included in the snagging lists, indicating that they were identified during the defects liability period. At the same time, the experts agreed that many of these examples were de minimis and that it was not possible to provide an opinion on responsibility for each item. No expert gave any further evidence or even identified in any greater detail what examples they were referring to.

476. The only relevant factual evidence to which the claimants referred was that of Mrs Vainker who said that, on Mr Braggins' last visit around March 2017, she saw him and a carpenter gluing slivers of wood to the bottom of architraves. Mr Braggins accepted that this was done in one location to remedy "a snag", that Mrs Vainker was unhappy with the result, and it was not done elsewhere.

477. In the Response to the Scott Schedule, Marbank accepted that they returned on a number of occasions to rectify minor blemishes and said that they left the house in good condition. As in respect of many of the Scott Schedule items, Marbank put the claimants to proof that any defects were not caused by further works or the occupation of the property since 2014 or failure to carry out maintenance.

478. The evidence needed to be pieced together and it is unfortunate that it was not presented more accessibly. However, on balance, I am satisfied that the claimants have identified the evidence of the defects relied upon which have been seen by the experts. The

evidence of Mrs Vainker and Mr Braggins as to attempts to address gaps is consistent with these being caused by poor workmanship on the part of Marbank. The types of defects described are not consistent with wear and tear. I find in favour of the claimants on this issue. The cost of remedial works agreed in the second joint statement is **£1,944.78** and that is the sum I find payable by way of damages.

Oak stairs and landings (Scott Schedule item 21)

479. As set out in the Scott Schedule, this item comprised two elements. One was a complaint that the oak landing was bowed and split. This defect had been rectified. The other was that steps had been chipped, scratched or otherwise damaged by Marbank in the course of the works. By the time of the Scott Schedule (in August 2021) this damage had not been rectified. The total sum claimed was £13,352.47 for treating and resanding the non-slip edge and removing "the mastic finish to walls/ floors to structural elements and clean, if gaps remain larger than 5mm apply new bead of sealant to colour match steelwork". These works, therefore, seemed principally intended to address gaps in the timber which overlaps with the subject matter of a further Scott Schedule item.

480. It appears, however, that in September 2021, remedial works, at a cost exceeding that claimed in the Scott Schedule were carried out and that these works did not reflect the remedial works set out in the Scott Schedule. In his report, Mr Finn noted that the Schedule of Remedial Works was based on (i) the removal and replacement of 5 no. oak goings (or treads) and the treatment of 48 no. oak goings and (ii) works to the second floor oak landing which was to be retreated with the non-slip edge reinstated on the stair where sanded away. On the face of the invoices he had seen, the extent of the work carried out by Folde Systems Ltd. on behalf of Urban Living Constructions Ltd. was greater and consisted of the removal of 42 steps and the treatment of 4 landings. In the second joint statement, he and Mr Johnson agreed that the sum set out in the Scott Schedule was an appropriate estimate of the costs which I take to be for the works identified in the Schedule of Remedial Works rather than the greater scope actually carried out.

481. The liability experts said nothing about this item in the joint statement apparently on the understanding that it was an item which had been rectified. Ms Hoey said no more about it. Mr Smart said that, on his visit in August 2021, he could see no obvious damage to the oak treads; that they were in an acceptable condition after 8 years use; and that there was no defect.

482. The claimants' evidence was that Marbank personnel showing a lack of care when using the stairs in the period after practical completion, and that this caused damage to the oak steps and landings.

483. Mr Vainker was taken to items on a snagging list dated 1 September 2016 which identified a handful of locations where damage had been poorly remedied by plastic filler. One example referred to the treads not being oiled and scuff marks not being cleaned off. His response was simply that after 2 years the stairs were in poor condition and the top landing was bowed and looked awful.

484. As to the cause, Eleanor Vainker gave evidence that she had seen workmen carrying heavy slabs up and down the stairs wearing heavy boots. Only Mr Roffey had blue plastic covers on his boots and there was no protective covering on the stairs. She noticed many

fine scratches on the stairs which made them look dull and aged. It was put to her, by reference to a snagging list rev F dated 15 September 2014, that the issue was no more than that the stairs were scuffed and she maintained that she was providing her recollection from July/August 2014. Mrs Vainker's evidence (on which she was not challenged) was that, when she returned from a trip in July 2014, she found the oak treads badly scratched and she was told about how the workmen had been using the stairs by her daughter. Ms Vainker's observation that only Mr Roffey wore covers on his feet was reported by her mother to Mr Dow in an e-mail dated 6 August 2014. The following day, Mr Dow passed this comment on to Mr Roffey stating, "*I have no way of proving [whether this caused damage]… I would assume as there were black scuff marks up the wall she was probably correct*".

485. Mr Dow then arranged for the stairs to be French polished and, as set out in e-mails dated 6 August 2014, arranged a visit from the French polisher. In a further e-mail dated 9 September 2014, Mr Dow told Mrs Vainker that the stairs would be polished tomorrow. The claimants' case is that Mr Braggins cancelled the visit and it was never re-arranged. In an e-mail sent on 21 October 2015, Mrs Vainker said:

> "*I am forwarding you this email thread, in which Graham states that 'the stairs will be polished tomorrow'. Graham has obviously forgotten, and as you see it was over a year ago now. If you check with Gary, he may remember that he cancelled it when the French polisher told him that no-one would be able to walk on the stairs for 24 hours. Consequently, it remains to be done.*"

486. The French polishing was not carried out and there is some evidence that further damage was caused to the stairs in the course of other remedial works being undertaken. Mrs Vainker gave evidence of a particular incident in 2016 or 2017 when Mr Braggins balanced a scaffold board on a tread and a nail gouged a hole in the tread which he then tried to fill. Her statement (at paragraph 145) continued:
"By this time, the stair treads were in a parlous state, and without discussing it with me GB took it upon himself to sand them. He then confessed to me that he seemed to have sanded away the non-slip covering on the edge of the stairs."

487. Mr Braggins denied vehemently that any damage had been caused by Marbank. He claimed that the stairs were protected whenever he was on site. He denied that he had carried out any filling to the stairs and had only repaired light scratches with sandpaper. The damage said to have been caused by the scaffold was, he said, caused by a blind falling on the stairs. He denied that he had sanded the non-slip edge away. Mr Braggins asserted that any damage was caused by the people living in the house and he mentioned finding children's toys on the stairs.

488. Mr Braggins agreed that the stairs needed to be French polished. His evidence was that that was done a number of times, the French polishers had done the entire stairs by the time Marbank left in 2017 and the stairs were "like new".

489. Mr Dow's evidence, in his second witness statement, was this:

> *"I may have agreed initially to investigate having the treads French-polished. However, after discussing the matter with Mr Braggins, I was satisfied that the damage was not caused by Marbank's subcontractors but by the inhabitants of The Croft. I therefore did*

not wish to proceed with instructing further expensive works without an instruction from Mrs Vainker and confirmation that she would pay for this additional work."

490. In his oral evidence, he said that the stairs were French polished "as arrived" but agreed, in the light of this passage from his witness statement, that they were never further French polished as a repair. He said he could not recall whether he had arranged for this to be done only for it to be cancelled by Mr Braggins. He thought that Marbank's sub-contractors would have protected the stairs when working in the house after practical completion but he had no personal observation to support that view.

491. On this topic, I prefer the evidence of the Vainkers. Eleanor Vainker's observations were confirmed in writing. At the time, Mr Dow did not simply agree to investigate French polishing. Rather he agreed to have it done. Contrary to the evidence of Mr Braggins it was not done. I am satisfied that in 2014, damage was caused to the stairs by Marbank to the extent that Marbank accepted that it needed to be re-polished. I was not directed to any documentary evidence which would support Mr Dow's recollection of his change of heart, there is no evidence of his seeking Mrs Vainker's instruction to carry out further French polishing at her expense, and, in my view, this explanation was an unsatisfactory attempt to explain away Mr Dow's clear acceptance in 2014 that the stairs required re-polishing as a result of damage caused by Marbank. If there was any change in Mr Dow's view, it was the product of what he was told by Mr Braggins. Mr Braggins' evidence was, at least in respect of the French polishing, wrong and, in other respects, exaggerated. It was clear that there was no love lost between Mr Braggins and Mrs Vainker – he described her as two-faced, praising him to his face and complaining about him behind his back – and it seems to me that his animosity towards her coloured his evidence which I do not accept.

492. I am also satisfied that there is evidence of further damage as other remedial works were carried out and I again prefer the Vainkers' evidence in this respect to that of Mr Braggins.

493. It is no answer to say that the stairs are in an acceptable condition after 8 years of use. Although they may have experienced wear and tear, Mrs Vainker did not get what she had contracted for in the first place – that is undamaged stairs. It follows that I find Marbank liable to Mrs Vainker for the cost of remedial works in the sum agreed by Mr Finn of **£13,352.47**.

Poor and untidy repairs to timber in property (Scott Schedule item 22)

494. This defect is said, in the Scott Schedule, to occur throughout the ground and first floors but four particular locations are identified: (i) the timber planter to the right hand side of the front door; (ii) the bottom right hand corner of the garage door; (iii) doors to the ground floor WC and sliding door between living room and kitchen; and (iv) oak flooring to the ground floor.

495. There was little factual evidence about these alleged defects. The snagging list dated 15 June 2015 identified the door to the WC as poorly planed. Mr Finn's Schedule of Remedial Works stated that the oak floor had been crudely patched where the skirting had been cut away to allow for the installation of a sliding door (which I take as a factual observation by someone else made for the purposes of producing the Schedule).

496. The experts agreed:

> *"A number of examples were observed on the August 2021 site visit and it is noted that some are included in snag lists that indicate they were identified during the Defects Liability Period.*
> *The experts agree that many are de minimis and note that it is not possible [to] provide an opinion on the existence of or responsibility for each item."*
> In other words, their opinion was the same as in respect of item 20 and was again not related to specific locations. No expert gave any further evidence.

497. Given the general view the experts expressed as to examples seen, however, together with the available evidence of poor repairs, the claimants have, in my judgment, established on the balance of probabilities that there are poor and untidy timber repairs in the locations identified or otherwise and there is no likely cause other than a failure of Marbank to carry out the works in a proper and workmanlike manner. The agreed cost of remedial works in the second joint statement is **£956.18** and I find in the claimants' favour in this amount.

Unusable power socket (Scott Schedule item 24)

498. As set out in the Scott Schedule, this is an alleged defect in the utility room. The claimants' case is that pipework to the rear of the washing machine has been installed so as to clash with a socket and make it unusable.

499. The claimants rely on the evidence of Mr Vainker who says that he had concerns about, and discussed with his wife, a power socket located close to an open drain pipe behind the washing machine. This is how the defect was described in the claimant's opening submissions but it bears no obvious relationship to the description in the Scott Schedule or the proposed remedial works. Mrs Vainker, on the other hand, describes the issue as "the pipes for the washing machine close to the power socket" and says simply that the issue has not been remedied. The experts say no more than that this item was not identified on their August 2021 site visit.

500. Although the differences between the pleaded case and the witness evidence may seem minor points of detail, in circumstances where the experts were not able to identify the alleged defect, I am not persuaded that the claimants' have discharged their burden of proof that there is any defect for which Marbank is contractually responsible.

Crudely formed access hatch in front wall on second landing (Scott Schedule item 25)

501. As the case was opened by the claimants, their case is not only that the access hatch was crudely formed, as set out in the Scott Schedule, but also that it was not properly fixed.

502. The experts are agreed that this defect could be observed on their site visit in August 2021 and appeared on a snagging list (dated 15 June 2015). The snagging list contains a photograph of the access hatch. The experts further agreed that if the hatch has simply fallen out, it requires re-fixing. That appears to reflect what can be seen in a photograph in the report of Mr Satow where the cover is missing.

503. Mr Smart, in his report, says that the plastic access hatch appeared to have fallen out which was a maintenance issue; that the description of the crude installation is not explained; and that the appearance of the access hatch is a design issue.

504. As I have said, the pleaded case is that the access hatch is crudely formed. I do not accept Mr Smart's view that that is not explained as it can be seen in the photograph in the snagging list – the opening which the hatch covers is roughly formed and the word "crudely" readily describes what can be seen in the photograph and which the joint statement records the experts observed. The formation of this opening was undertaken by Marbank and is not a design issue. The crude formation is a failure to carry out the works in a proper and workmanlike manner.

505. The agreed cost of remedial works in the second joint statement is **£267.54** and I find in the claimants' favour in this amount.

Defective, open, untidy and/or crudely filled joints between steelwork and flooring and/or flooring or skirting (Scott Schedule item 26)

506. The alleged defect, as described above in the Scott Schedule, is said by the claimants to be present throughout the basement, first floor and second floor. Despite this description of a widespread defect, this is a small value item with the cost of remedial works put at £560.24 in the Scott Schedule. That cost is for a mastic specialist to attend for 2 days and carry out remedial works.

507. In closing submissions, the claimants gave one reference to an item in the Internal Snag list rev H dated 16 March 2015 – "skirting/ floor junction. Apply mastic." The experts are agreed that they observed the junction between the staircase steelwork and the timber floor at ground floor level but were unable to agree whether this was a defect. In his report, Mr Smart considered this unsightly but not a defect because the timber flooring had to be cut around the steelwork in a confined space.

508. In her oral evidence, Ms Hoey agreed that she would not expect the timber to be hard up against the steel but that: (i) *"I would say that the gaps we saw were possibly a little bit larger than they needed to be, but I think really what was noticeable was that they were rather crudely filled with big toothpastey mastic really"* and (ii) it was *"quite crudely filled with mastic."* It was put to her that the options to fill the gap were a "clever cover piece" or mastic but that seems to me to miss the point that the complaint and the proposed remedial works relate to the quality of the application of the mastic, rather than the presence of a gap.

509. The focus of the evidence at trial was on this one location but photographs were provided which showed similar issues with the quality of filling elsewhere. Where this filling has been carried out poorly, that evidences a failure by Marbank to carry out the works in a proper and workmanlike manner.

510. The cost of remedial works was not agreed in the second joint statement. Mr Finn and Mr Johnson recorded that the remedial works had not been identified in the Schedule of Remedial Works and so the cost had not been considered by the experts for the purposes of the first or second joint statement. Mr Finn, however, considered the sum claimed to be reasonable for the attendance of a mastic specialist for two days. Given the nature of

the work that will need to be done to carefully remove the existing filling and refill and the extent of the crude filling evidenced in the photographs, I am satisfied that that is a reasonable estimate of the cost of remedial works. I find in Mrs Vainker's favour in the sum of **£560.24**

Defective light switch (Scott Schedule item 27)

511. This is a minor item for which the agreed cost of remedial works in the second joint statement is £139.38.

512. The alleged defect is in a light switch in the kitchen. The allegation in the Scott Schedule is that the switch is not installed flush with the surrounding plate and is difficult to operate. Both Mrs and Mr Vainker gave evidence that this occurred after the replacement in October/ November 2017 of the sliding door between the dining and living rooms. This replacement was undertaken because the solid factory lacquered door specified had not been installed. This is item 52 in the Scott Schedule which falls within the Scott Schedule items already remedied. Mrs Vainker said that, in order to fit the replacement door, part of the kitchen wall had to be removed and, after that, Marbank failed to refit the light switch properly.

513. The experts agreed that the switch was stiff but not defective. Mr Smart expressed the view that the stiffness might be from debris in the back box and regarded it as a wear and tear issue. In any case, the experts agreed that the stiffness should be remedied.

514. There is no reason for me not to accept the straightforward evidence of Mr and Mrs Vainker that the light switch has not been restored correctly following the carrying out of remedial works that were Marbank's responsibility. Even if the cause is debris in the back box, it would seem to me that that ought to have been cleared when the switch was re-fitted.

515. It follows that Marbank is liable in respect of the minor remedial works to the light switch and I find in favour of the claimants on this issue in the sum of **£139.38**.

Brise Soleil (Scott Schedule Item 28)

516. This Scott Schedule item relates to the brise soleil above the rear terrace. It was one of the larger value items in the Scott Schedule. Two allegations were made against Marbank: (i) that there was an inappropriate steelwork connection and (ii) that there were chipped paint columns which had been retouched with mismatching paint. The "inappropriate steelwork connection" was referred to at trial as the ugly flange. Ms Hoey described it as a prominent bolted connection. Marbank was said to be in breach of clauses 2.1, 2.3.1 and 2.3.2 of the Contract – in summary in failing to carry out the works in a proper and workmanlike manner or in compliance with the Contract Documents and in supplying goods and workmanship that were not in accordance with the specification. The pleaded claim for remedial works was for £21,821.49 to design an alternative and to remove and replace the steelwork connection, together with repairs to the columns to match the paint. The sum set out in Mr Finn's first report was in excess of £47,000.

517. In the Response to the Scott Schedule, Marbank denied liability asserting that it had constructed the brise soleil in accordance with SCd's design drawings and specification, the design for the steelwork connection having been prepared by Elliott Wood

Partnership, structural and civil engineers. Marbank said that the only complaint was an aesthetic one for which it was not contractually responsible. No claim was advanced against SCd.

518. In the experts' joint statement they set out the following scope of agreement:

> *"20.1 The bolted connection and touched up paintwork were both observed on the August 2021 site visit.*
> *20.2 The experts are unable to agree as to whether the bolted connection was an approved design amendment.*
> *20.3 The experts consider that the mis-matched paintwork is a workmanship issue and should be remediated.*
> *20.4 Regardless of liability the experts agree that it may be reasonable to carefully cut and weld and refinish the flanged joint to achieve a satisfactory appearance."*

519. The issue which the experts referred to as one of whether there was an approved design amendment arose as follows.

520. Ms Hoey said that she had not seen any drawing of the overall brise soleil prepared by SCd. Drawing A(37)374 RA (Roof Detail Flat Roof Fascia – Grid G) indicated the brise soleil louvres and referred to specification clause L10/670. That clause contained no information about joints or visible fixings.

521. The connection was not, therefore, designed by SCd. The brise soleil was not itself a CDP item. However, it consists of Accoya slats in a steel frame. "Steel connectors" is a CDP item and Mr Clay anticipated that that would be the basis on which the claimants argued that the connection in issue was Marbank's design responsibility. In the event, no such case was developed by the claimants. Nor, as Mr Clay submitted, was any case articulated that Marbank had failed in its design co-ordination obligations as set out in Schedule 1 to the Contract.

522. What, in fact, happened was that Hawk Structures produced drawings for Marbank and those drawings were provided to SCd and Elliott Wood. It was the Hawk Structures drawing G2 which showed the bolted connection (at Section N-N). That was not shown on the original drawing or Rev A. It was added at Rev B, also shown on Rev C and included in Rev D. The issue table on the drawing records that Rev C was issued on 10 May 2013 and was "for construction".

523. In an e-mail dated 1 May 2014, from Mr Clifton to Mr Fitzgerald, SCd set out a table which showed that they had not received Revs B and C but had received Rev D on 3 June 2013. The table indicated that Rev D was the revision issued "for construction" but that was not consistent with the table on the drawing itself. The e-mail said that Rev A had not shown the bolted connection but that SCd had commented that all bolted connections were to be welded. Mr Clifton contended that since neither SCd nor Elliott Wood had seen Revs B and C, the fabrication drawing had been *"raised to construction status with comments still pending. Therefore the design team had not been able to agree the connection detail given that we had not been privy to the previous issues to provide*

comment." In cross-examination, he repeated that SCd did not receive Revs B and C and that, although they received Rev D, the brise soleil had already been built.

524. Ms Hoey did not consider that she had sufficient information to offer a definitive opinion. Her view was that if Marbank had issued Revs B and C to SCd showing the bolted connection, and SCd had not made any comment, Marbank had carried out the works in a good and workmanlike manner. But if Marbank did not provide the relevant drawing to SCd, depriving SCd of the opportunity to comment, she would take a different view. This approach was not one that relied on any consideration of contractual responsibilities.

525. Mr Smart referred to the mark up of Rev D by Elliott Wood which made a number of comments but said nothing about the connection. He took the view that the connection was effectively approved by the structural engineer and, therefore, not a defect. Marbank had installed what was shown. He agreed that Marbank was responsible for the incorrect application of paint to one column which could be repainted at minimal cost.

526. Mr Clay submitted that the pleaded case was one of a workmanship defect and that there was none. On the facts, he submitted that what occurred was a co-ordination failure. What was built was what was shown on the shop drawings which (as Rev D) were sent to the architect and engineer. Any earlier failure to circulate the drawings was cured at Rev D. To say simply that SCd was deprived of the opportunity to comment earlier and that that was a causative breach involved too many assumptions as to what SCd would have said had they seen the section earlier, when production of the flange began, and whether it could have been amended. Mr Clifton's evidence was that by the time of Rev D, the brise soleil had been built or the steelwork manufactured but that is far from clear.

527. On this issue, I agree to a large extent with Mr Clay's submission. The "ugly flange" is not properly characterised as a workmanship defect. Leaving aside any pleading point, it could be characterised as a defect in design. The experts impliedly agree that the appearance of the flange was unsatisfactory. But there is no evidence that it was negligent. The nature of the negligence is the apparent failure to send the Rev B and C drawings to SCd – the purpose of which could only have been for comment and approval. There has been no identification of any contractual obligation to seek that approval. Even if that can be implied, it leaves open the question of causation. As Mr Clay submitted, there has been no proper investigation of causation on the facts. When SCd (and Elliott Wood) did receive Rev D showing section N-N, neither made any comment on that design detail. In reality, Marbank constructed something that had attracted no adverse comment from the architect or the structural engineer. The fact that Elliott Wood did comment on the drawing calls into question whether the works shown had already been done and/or to what extent. Mr Clifton's evidence was not, for example, that SCd regarded the design as unsatisfactory but did not comment because it was too late. It is, therefore, as Mr Clay submits wholly unclear what would have happened if the earlier revisions had been sent to SCd.

528. So far as the flange is concerned, I do not, therefore, find Marbank to have been in breach of contract and, if I had, I would not have found that causative of any loss and damage. Had I reached a different conclusion, it would have been very difficult to make any assessment of damages as no remedial scheme was developed. Mr Finn and Mr Johnson agreed a sum of £2,230 (plus add ons, totalling £4,181.53) which appears to have covered

an engineer's inspection and repair and the repainting but without any identification of the works to be carried out. No more than that could have been awarded as damages.

529. It is common ground, however, that the paint work to the columns requires repair and that this was a workmanship defect for which Marbank was responsible.

530. In the first joint statement, Mr Finn and Mr Johnson agreed a total cost for remedial work for this item at £47,485.95. The cost of repainting must be within this figure but I have been unable to identify from the reports of Mr Finn and Mr Johnson what that figure might be, although Mr Clay submits that the cost of repainting is claimed at over £1000. Mr McGee allows only £150 but, for the reasons I have given, I regard his figures as underestimates. Doing the best I can, I award **£1000** as damages in respect of this element.

Defective termination bar to rear flat roof (Scott Schedule item 29)

531. The defect in this instance is alleged to be that the termination bar is the wrong colour and should match colour RAL 7024. SCd's drawing A(37) 372 "Roof details, Flat Roof Fascia – Grid G" describes the termination bar as "GRP termination bar mechanically fixed in RAL 7024".

532. The claimants, in their submissions, describe the colour of the termination bar installed as "off white" rather than charcoal grey to match the Brise Soleil.

533. The experts in their joint statement said no more than that they had been unable to agree this item.

534. Ms Hoey's report includes a photograph which clearly shows the bar to be an off white colour and one that contrasts with the brise soleil. RAL 7024 is a graphite or charcoal grey and there is, visibly, a distinct difference in the colours.

535. Mr Smart in his report said that he did not see the mismatched edging on inspection but accepted that he had misunderstood what was referred to and missed it. In his report, he referred to the specification clauses J41/111, 112,113, 114, and 116 all of which referred to an edge trim "to match RAL 7024 as closely as possible ie slate grey". He suggested that if the 44mm trims specified were only available in black, Marbank had complied with the terms of the contract. That reflected Marbank's pleaded defence.

536. It is not clear to me where the specification of a 44mm trim is derived from but, in any event, Marbank's case proceeds on the premise that a black trim was fitted when it was not. Mr Clay also submitted that the difference in colour was a preference about which nothing had been done for 8 years. It is clearly not a preference since the colour was specified and the fact that the claimants have tolerated the mismatched colour for 8 years could not relieve Marbank of liability.

537. In my view, in fixing the off white termination bar, Marbank failed to comply with the terms of the contract. The agreed cost of remedial works to replace the termination bar is **£777.91** and I find in the claimants' favour in that amount.

Defective vent (Scott Schedule item 30)

538. This vent is located on the left flank elevation. In short, what is alleged is that it has been incorrectly fitted and does not stay in place.

539. The experts observed this defect in August 2021 and agreed that the vent cover should be replaced and re-fixed. Mr Smart in his report explained that he agreed with the claimants that the fault seemed to arise from Marbank's application of an additional render coat. Marbank then admitted this item by its solicitors' letter dated 22 July 2022 and "accepted" the sum put forward by Mr McGee namely £22.50.

540. The agreed cost of remedial works in the second joint statement is **£194.48** and, for the reasons I have already given, I accept this – and not Mr McGee's estimate - as the reasonable estimated cost of remedial works and find in Mrs Vainker's favour in this amount.

Wetherby render (Scott Schedule item 31)

541. In closing submissions, the claimants confirmed that they no longer pursued this item. It nonetheless merits a brief explanation.

542. The item concerned the coloured render applied to some of the walls. The render had been replaced in 2016 on the ground floor left flank wall where it was not of the specified thickness. The claim in the Scott Schedule was put on the basis that "The remaining render may not be the specified thickness."

543. In their joint statement, the experts agreed that they were unable to consider this item as no evidence was available. As I observed at trial, that appeared to be because no invasive investigation had been carried out.

544. Ms Hoey's first report did not address this alleged defect at all. Shortly before trial, the claimants sought to rely on a second report of Ms Hoey from which it appeared that further investigation had eventually been carried out in September 2022. Not only did the claimants seek to rely on that belated evidence in support of the claim but, based on the report, they also sought to introduce a wholly new allegation as to the thickness of insulation brick.

545. For the reasons I gave in my ruling on 6 October 2022, I refused permission to rely on this evidence and the claim was not then pursued.

Paint stains (item 32)

546. The claimants' case is that there are paint stains on the door from the house to the garage caused, on Mrs Vainker's evidence, by Mr Braggins splattering paint on the door.

547. Ms Hoey and Mr Satow observed these paint stains on their visit in August 2021 and noted that some paint stains were included in snagging lists indicating that they were identified during the defects liability period.

548. Although regarded by the experts as de minimis, I accept Mrs Vainker's evidence about the cause of the paint splatter and thus as to Marbank's liability. The cost of making good

falls to be paid as damages by Marbank, and the agreed cost in the second joint statement is **£324.13**.

Defective door head (Scott Schedule item 33)

549. This is another low value item in the Scott Schedule. The claimants' case is that the door of the coat cupboard catches on the frame when used.

550. The experts' joint statement records that this was noted by Ms Hoey and Mr Smart on the August 2021 site visit and that it is included in a snagging list. The claimants give the reference to item 19 in a snagging list dated 15 June 2015. The experts are, however, unable to agree whether this is a workmanship or a maintenance issue. In his report, Mr Smart opines that timber doors can expand and contract in different environmental conditions and that, after 8 years, this is likely to be a maintenance issue for which Marbank has no responsibility.

551. Given the identification of this issue in a snagging list in 2015, it seems to me far more likely that the door catching is the result of the door frame or the door being poorly installed in the first place and that Marbank is liable for the small cost of adjustment. The cost of remedial works agreed in the second joint statement is **£162.06**.

Defective sump pump (Scott Schedule item 34)

552. This Scott Schedule item relates to a pump in the basement plant room. It is alleged that there was repeated flooding in 2015 and 2017 and that "the float switch to the basement sump pump was modified in such a way that it does not operate properly."

553. As opened by Mr Crowley, the claimants case is that, following flooding in April 2015 and some work on the sump pump in 2016, the flooding recurred repeatedly until 2017, when an air valve was inserted into the system to prevent flooding. The float switch to the basement sump pump was modified to reduce the cable length to stop the float snagging on the sump pit lip. Nonetheless, he submitted that the float switch now does not operate properly, as a result of Marbank's defective installation and/or workmanship.

554. Both Mr and Mrs Vainker gave evidence in their witness statements about the flooding. Mr Vainker said that it was not until December 2016 that the flooding problem was resolved by the installation of an automatic air valve. He, therefore, gave no evidence that any issue persisted or that the float switch still did not operate properly. Mrs Vainker's evidence as to the present position was simply that the sump pump requires replacing.

555. The experts agree that this is a Mechanical, Electrical and Plumbing (MEP) issue and outside the scope of their expertise and, therefore, did not consider it further.

556. The upshot is that there is, in my view, a dearth of evidence as to the alleged defect and liability for it even before any consideration is given to Marbank's response which is that the pump was inspected and was operating properly and has, in any event, been serviced on an annual basis by Stonehouse Property Care.

557. The claimants have not offered sufficient evidence on this item and established any breach of contract on the part of Marbank and/or any breach which has not already been remedied.

Defective Megaflo unit (Scott Schedule item 35)

558. The claimants' case is that the thermostat mounted on the Megaflo is very loose and that that prevents safe use. That is said to be the result of Marbank's defective installation.

559. Mr Vainker addressed this item in his witness statement in the context of an issue in the basement plant room. Having referred to the flooding in 2016, he said that a further issue discovered later was that the thermostat was not attached and posed a safety risk. Mrs Vainker, in contrast, refers to this in her witness statement as a mechanical issue which existed at the time of practical completion.

560. The experts agreed that this was an MEP issue outside the scope of their expertise. However, they also recorded (i) that they had seen no evidence that this alleged defect was present at the time of practical completion and (ii) that it had not been mentioned in any snagging list.

561. In an effort to prop up this claim, it was submitted in closing submissions that it was not suggested that the Megaflo was not installed by Marbank's sub-contractors. That misses the point that there is again a dearth of evidence as to when the thermostat was or became loose, why, and the consequences. Given the paucity of the evidence in this respect, I am not satisfied that the claimants have discharged the burden of proof that the loose thermostat was caused by any breach on the part of Marbank or its sub-contractors and, certainly if it was not discovered until later as Mr Vainker says, it is as likely to be a maintenance issue.

Defects in the boiler cupboard (Scott Schedule item 36)

562. It is sufficient to say that in opening, the claimants stated that they no longer pursued this item.

Warm water to WCs (Scott Schedule item 37)

563. The claimants' case is that, soon after practical completion, it became apparent that the water to the toilets in the downstairs cloakroom and three bathrooms above was warm and not cold. Mrs Vainker's evidence was that this occurred when the underfloor heating and hot water were turned on. The claimants say that this caused them concern about Legionnaires' disease.

564. Mr Vainker's evidence was that he had pointed this issue out to Mr Roffey during a post practical completion visit. Mr Roffey did not dispute this. Further, in an e-mail to Mr Dow on 14 June 2016, Mrs Vainker said:

> *"2) I have been complaining since moving in about there being warm water in the toilets when they are flushed, whenever the boiler is heating the water. Dean Gibbons has repeatedly told me it was fine, but it does not seem right to me and I would like the plumber to look at it.*"

565. The claimants also drew my attention to an e-mail between Mr Cordey of Chalbrook and Mr Dow dated 7 January 2015. Mr Dow said that Mrs Vainker had discovered warm

water in the toilets and was concerned that she was paying to heat the water. In reply, Mr Cordey said:

"*I have discussed the issue with the warm water in the toilets with Ekotherm, and it sounds like a case of water getting heated with ambient temperature in the voids from adjacent pipes. If these toilets are not flushed for long periods, then you will get a dead leg of water feeding the toilet that will warm up."*

566. There was again no expert evidence on this alleged defect because the experts agreed that this was an MEP issue outside the scope of their expertise.

567. The position, therefore, seems to me to be that there is no dispute that there is warm water in the toilets and that this had been, at the least, observed in 2015 but not actioned. Since there should plainly not be warm water in the toilets, the obvious inference is that there is a fault of some nature that causes warm water to be flushed through the system.

568. The claimants again make the point that the installation was carried out by Marbank's sub-contractor and that it is not suggested otherwise. For Marbank, Mr Clay submits that until a heating engineer has identified the cause, it cannot be said whether this is a matter of design or installation and, therefore, the court cannot be satisfied that Marbank is liable. No suggestion is advanced, however, as to what the design issue might be.

569. The claimants are in the position that they have asked for this issue to be addressed but it has not been and, absent any suggestion of why this might be a design issue, it is in my view far more likely that it is an installation issue and that Marbank has failed in some respect to carry out the works in a proper and workmanlike manner.

570. The sum claimed in the Scott Schedule was over £6000 but the agreed cost of remedial works from the second joint statement is **£1,620.65** and I find in the claimants' favour in that amount.

Damaged screed to garage floor (Scott Schedule item 38)

571. It does not appear to be in issue that Marbank replaced part of the screed to the garage floor in the course of snagging following practical completion. The claimants' case is that the screed has failed and that the screed is blistered.

572. In opening, the claimants also submitted that the floor has no slope towards the external channel/drain so that any liquid sits on the surface. Although mentioned in the statements of Mr and Mrs Vainker, this was not a pleaded defect and featured only in the Scott Schedule in so far as the remedial works included ensuring that the replacement screed was laid to a fall of 1 in 25 towards the external drainage channel.

573. The experts, in their joint statement, agreed that the bubbling/blistering was located near the front garage door and was "fairly evident". But they also agreed that, from a visual inspection, there was no damage evident to the underlying screed and that any damage appeared to be limited to the floor finish. Accordingly, they agreed that local refinishing was required and that there was no evidence that the screed required replacement. Lastly, they agreed that there was no evidence of the cause of the bubbling/blistering and, in particular, noted that they had not seen a SCd threshold detail drawing to assess design and/or workmanship.

574. The relevance of this reference to the threshold detail is that, in his report, Mr Smart expressed the view that the blistering indicated that water was getting into the floor screed and that it was likely that there was inadequate water and weather protection to the garage threshold. He regarded that as a design issue.

575. This is not an instance in which I can infer from the limited evidence that the bubbling/blistering was caused by any breach by Marbank whether in the original works or the remedial works. The experts' agreement in itself implies that the cause may be a design issue. I am unable to say on the balance of probabilities that this is a matter for which Marbank is liable.

Incomplete ACO drains (Scott Schedule item 39)

576. This is a defect for which Marbank accepted liability in the letter dated 22 July 2022. Marbank also accepted the sum of £425 as the cost of remedial works being the estimated cost put forward by Mr McGee. For the reasons I have given, I prefer the figures in the second joint statement and I find in the claimants' favour in the sum of **£548.82**.

Defects to the MVHR cupboard (Scott Schedule item 40)

577. The claimants' case is that a large gap was left beneath the door to the MVHR cupboard on the second floor balcony which created the risk that the MVHR unit would freeze in winter. This was included on a snagging list dated 15 June 2015, as issue 1, as follows "*Door to Plant Room. Door and finish to line up. It should be possible to lift the stone floor such that there is no large gap under the door*". Marbank then installed an oak threshold piece and the claimants' complaint is that it does not match the Accoya.

578. Marbank's case in the Response to the Scott Schedule was that this was a design issue. The MVHR unit was specified to be housed in an external store and is shown on the drawings as uninsulated. Instructions were given to reduce the gap but no instruction to use Accoya or to match the door. Mr Clay submitted that this was, therefore, a claim for re-finishing something that had been left unfinished for years and that, as exterior woodwork, it should have been, but had not been, maintained.

579. The experts did not agree whether the threshold piece should reasonably have matched the door or whether the unmatched piece was a defect. Ms Hoey's view was that the threshold was fixed because Marbank should not have left a large gap, which was itself a failure to carry out the work in a proper and workmanlike manner, and that the threshold should reasonably have matched the door. Mr Smart's evidence supported Marbank's case and noted that there was no detailed design of the door and no reason that a threshold should have been fixed.

580. I prefer the evidence of Ms Hoey on this issue. In my view, even if there was no risk of the unit freezing, the installation of the door in a proper and workmanlike manner would require a reasonable fit and not what is agreed to be a large gap under the door. Despite the pleading that this was a design issue, Mr Smart's own evidence is that the door was not specifically designed and there is no evidence that, at the time, Marbank disputed that this was a snagging item for which they were responsible.

581. The threshold was fixed to remedy the large gap and, bearing in mind the style and quality of this House, it ought to have matched, as far as possible, the door. Contrary to Marbank's submission, replacing the threshold now with something that matches is not a maintenance issue but a matter of what should have been fixed in the first place. I, therefore, find in favour of the claimants on this item so far as liability is concerned.

582. In the second joint statement, Mr Finn and Mr Johnson estimated a cost of **£648.26** for this work to the threshold and that is the sum I find due to Mrs Vainker.

583. There is, however, a further issue in relation to remedial works. In the Scott Schedule, under the remedial works column, it is also alleged that the claimants have not received a comprehensive set of H&S files or O&M manuals/information covering the operation of the M&E system and the remedial works set out included the supply of these documents covering all aspects of the works including the M&E system. No basis for relating this to the gap under the door or the mismatching threshold was articulated and, in the joint statement, the experts noted that they could not see the relevance of the O&M manuals to this item.

584. The claimants rightly submitted that there was a pleaded allegation that Marbank had failed to supply a full set of O&M manuals and that that did not seem to be seriously disputed. Mr Crowley said nothing more about how this was related to item 40 and it seems to me that the cost of providing these manuals had simply been placed against this item because it had something to do with M&E. Despite this paucity of detail and evidence, Mr Finn and Mr Johnson were able to agree a sum of **£6,239.50** as the estimated cost of providing the relevant manuals. The only real answer to this claim is where this breach has been placed in the Scott Schedule and, in the absence of any case that all the manuals which Marbank was obliged to provide were provided, I award this sum as damages.

Access Hatch (Scott Schedule item 41)

585. This item concerns an access hatch in the front ground floor left hand sitting room. The Scott Schedule alleges that the access hatch is "defective" and "not fit for purpose".

586. The experts agreed that the defective access hatch was not identified and that it was not in any snagging list.

587. The claimants' opening submissions did no more than refer to a frankly uninformative photograph. However, the claimants then related that photograph to item 7 in a snagging list dated 15 June 2015 which noted "Access panel is not a correct solution as a plasterboard panel. Please provide a proper access panel."

588. The nature of the alleged defect is obviously somewhat generalised but, given the inclusion of this item in a snagging list, and absent any evidence of a dispute at the time about its inclusion, it seems to me that this is more likely than not an example of poor workmanship and a failure to carry out the works in a proper and workmanlike manner, for which Marbank is liable.

589. The agreed cost of remedial works in the second joint statement is **£283.61** and I find in the Mrs Vainker's favour in this amount.

Scott Schedule items 42 to 64

590. Before turning to the remaining Scott Schedule items, I note that these have all been remedied and, accordingly, were not considered by the liability experts for the purposes of the joint statement and were similarly not considered by the quantum experts. In relation to items 42 to 45, the claimants claim the actual costs incurred in carrying out remedial works. The position in relation items 46 to 64 is different and is addressed below.

Scott Schedule items 42 to 45
Defective towel radiators (Scott Schedule item 42)

591. The claimants' case and evidence is that the towel radiators in two bathrooms leaked as a result of faulty valves. E-mails dated 5 January and 13 January 2015, relied on by the claimants, demonstrate that Marbank was aware that there was an issue with the rails not heating up. Further, an e-mail from Ekotherm to Mr Dow recites that an attempt was made to resolve this issue by venting the air from at one of the towel rails.

592. It is unclear whether the leaking and the failure to heat up properly are related but I accept the evidence of Mr and Mrs Vainker that the valves leaked shortly after practical completion, which implies that they were defective or poorly fitted, and, in either case, that evidences a breach of contract by Marbank.

593. I take the cost of remedial works undertaken and paid for from the claimants' closing submissions (supported by the relevant invoice) and find in the claimants' favour in the sum of **£340.**

The kitchen nib (Scott Schedule item 43)

594. The nature of the defect alleged in the Scott Schedule is that part of the wall – the nib – at the end of the kitchen units was unsightly and partially blocked the window. The claimants claim the sum of £1,903.00 paid in 2015 for the installation of a window with a wider frame. This amount is part of an invoice from Ridlands, the balance, on the claimants' case, having been settled already by the settlement with CBG.

595. In opening submissions, the claimants set out a number of e-mails which, in the interests of proportionality, I will not set out but which demonstrated that this issue was first identified by Mrs Vainker in April 2014 and that there was a dispute between Marbank and SCd as to responsibility. In short, Marbank argued that they had built in accordance with the drawings and that this was a design co-ordination issue. SCd argued that the failure was in Marbank's setting out.

596. This dispute culminated in the following exchanges:
    (i) On 3 December 2014, Mr Dow reiterated his position to Mr Fitzgerald that the defect was "*a co-ordination issue within the Design Team*". He stated "*We have built to SCD drawings and then installed the kitchen as signed off. We then put in the nib as per SCD drawings. This is what pushed the nib past the window frame*". Mr Fitzgerald responded the same day stating "*We have received a very clear*

statement from SCD that the kitchen was co-ordinated but has not been installed in accordance with the drawings. Could you therefore direct us to the drawing that shows the nib extending beyond the window".

(ii) On 4 December 2014, Mr Clifton emailed Mr Fitzgerald explaining that:

"*Our drawing A(73)370 C2 is coordinated with the Poggenpohl drawings (both attached) as you will see that the coordinating dimensions tally, Poggenpohl 3900mm, SCD 3910mm allowing for a 5mm trim to each side. The end dimension was left as a 'site' dimension 'to be confirmed', because it would be subject to site/installation tolerances as we were concerned that showing a specific dimension (84mm on issue C1 but can still be seen on rev C2 on detail D2) ran the risk of the nib being out of place, only to then be told that it had been installed to our drawing. Please note that the nib does not pass the window on our setting out drawing.*

The site agent kindly provided us with site dimensions of the installation for our record drawings. This is shown on the attached drawing A(73)730 R1. This indentified [sic] *that the nib (closest to the utility room) is 115mm from the wall (110mm on SCd detail) and the run installed is 3935mm moving it closer to the window resulting in reduced space for the nib*." (emphasis added)

597. Mr Clifton did not recall any response to Mr Fitzgerald supporting Marbank's position and nor did Mr Dow.

598. Marbank made no further submissions on this item. Mr Smart did, however, address it in his report by reference to the nib as shown on SCd's drawing L(03) 031 rev C1. He expressed the views that (i) the construction of the nib was dependent on SCd's setting out information allowing necessary space to accommodate the kitchen design; (ii) SCd failed to include any tolerance; and (iii) SCd failed to dimension or detail the nib wall construction.

599. To my mind these are all general points which do not engage with or respond to the explanations given by SCd in the e-mails referred to above.

600. In the absence of any further response to the position adopted by SCd and Mr Fitzgerald, I find it more likely than not that the fault lay with Marbank's setting out as SCd contended and, subject to the issue of the settlement with CBG, I would find Marbank liable for the cost incurred by the claimants in remedying this defect in the sum of **£1,903.**

Defective kitchen floor (Scott Schedule item 44)

601. On the ground floor of the house there is an open plan kitchen and dining room. The flooring was specified so that the kitchen was tiled but the dining room was laid with oak floorboards. SCd's drawing (in section) S(02) 026 showed a finished floor level of 20.150 throughout: there was not intended to be any difference in levels. The specification clause (C1) M40/116 provided for Stonell basalt natural stone for the floor tiles with a 15mm thickness and laid on a screed base.

602. The claimants' case is that the tiles for the kitchen area were chosen by Mrs Vainker in the summer of 2013 after she visited a showroom with Mr Clifton. Mrs Vainker was not advised that the tiles she chose were thinner than the tiles included in the specification

and/or that when they were laid, there would be a difference in floor level between the tiles and the floorboards.

603. Marbank raised RFI 31 on 15 October 2013, requesting details of how the floor level was to be raised. It appears that by this time Marbank had already laid the floor. Mr Strike of SCd responded by email confirming that SCd were not seeking to alter the finished floor level. Mr Dow responded immediately, stating "*Don't be so bloody stupid. You've changed the thickness of the tile and not specified anything under it. Do you want it taken up or not. If so please instruct otherwise it's staying where it is*".

604. The more formal response from SCd, dated 16 October 2013 then provided:

> *"Kitchen / Larder / Laundry.*
>
> *Leave floor tiles as installed. Substitute stainless steel Gradus SFBT29/AFT3916 cover strip (as clause K21/116) with profiled / lipped Oak trim as Smart Tiles 21mm thick Oak edge Section (http://www.smart-naturalcollections.co.uk/flooring-trims.php) or similar agreed. Use the projecting 6mm lip to cover expansion joint between timber floor and tile to allow for variation in tile/timber level. Oak trim to be finished as surrounding oak floor finish ie oiled to match.*
>
> *All other ceramic flooring areas.*
>
> *Please refer to specification clause M40.720 and allow for appropriate thickness of bedding according to tile thickness.*"

605. Mr Clifton informed Mrs Vainker that there would be a difference of 5mm and that this could be remedied by a wooden trim, which Mrs Vainker reluctantly agreed to. Subsequently, in about May 2014, when the floor coverings were removed, the claimants say that it became apparent that the difference in levels was 10mm (not 5mm), constituting an unsafe/ dangerous trip hazard. Therefore Marbank was ordered to lift the tiles and level the floor. The tiles were replaced with timber flooring. The work was carried out in May 2014 and the claimants claim the cost of doing that work in the sum of £9,150.00.

606. I accept the claimants' submission that it was Marbank's contractual obligation to ensure that the finished floor level was as provided for on the contract drawings. It is not right to submit, as Marbank does, that the only dimension Marbank was given was an overall 100mm between the structural slab level and finished floor level. The specification of a 15mm tile – and in the event a change to a thinner tile – does not change the obligation as to finished floor level and nor does the absence of any express instruction from SCd as to how to achieve that finished floor level with a thinner tile.

607. The Scott Schedule included an allegation that SCd had failed properly to advise Marbank as to the tiles and levels. Nothing further was said about this at trial and any claim against SCd would have been time barred. In any event, and for the avoidance of doubt, I do not consider that the fact that SCd did not give Marbank an instruction as to how to achieve the finished floor level would have amounted to a breach of contract on the part of SCd.

608. What Marbank, in fact, did, which I consider amounted to a breach of contract, was lay the tiles so that they were at a different level from the oak floor and they then raised the issue with SCd after that was done.

609. That is not, however, an end to the matter as SCd first agreed with Mrs Vainker that the difference in levels could be remedied by the provision of the threshold which was, in effect, instructed in the response to the RFI set out above.

610. As I have said, the claimants' case is that when the floor coverings were removed it was apparent that the difference in floor levels was 10mm not 5mm. In cross-examination, Mrs Vainker said that the difference in levels was greater than she thought, that she was concerned about tripping, and she wanted it remedied whatever the cost.

611. It is not necessary to set out the correspondence that led to the instruction to install an oak floor but there is no doubt that such an instruction was given by the Contract Administrator dated 30 April 2014 (which was issued under clause 5.1 as a variation). The instruction included the following

"This instruction is therefore in relation to the detail that has been deemed unacceptable by the client whereby the tiled floor area in the kitchen has been installed at a different level to the surrounding engineered board floor and you were instructed to introduce a chamfered oak division strip between the two floor finishes. We would note that this division strip has never been fitted in an acceptable manner. The instruction now is however, to omit this division strip."

The instruction went on to instruct the introduction of engineered board flooring in the kitchen and the omission of the tiling.

612. Mr Clay submits that this raises two questions – (i) whether this was a solution to the threshold or simply a change of preference and (ii) how much of this work should be treated as a variation and how much as the cost of remedying a defect. He submits that the answers to these questions is clear since it is now accepted that the threshold solved the tripping hazard.

613. I do not accept that submission. All that Ms Hoey agreed was that the response to the RFI "would appear appropriate for a 5mm level differential." In her report, she next stated that she had been informed that the differential was 10mm – which has not been seriously challenged - and she agreed with Mrs Vainker's view that that was a trip hazard. I take Mrs Vainker's evidence that she just wanted the work done whatever the cost to indicate her concern about that. In other words, in my view, the instruction to carry out works to level the floor, and not merely add the threshold, was the direct consequence of Marbank's failure to lay the floors to the contractually specified level in the first place.

614. Having said that, there is no evidence that the change to timber flooring was a necessary consequence of levelling the floors. As will be in seen in relation to the final account claim addressed below, the valuation of the variation (the total of which is claimed as damages) included a sum of £3705 in respect of the oak flooring. In my judgment, the claimants are entitled to recover the balance as damages, that is the sum of £9105 less £3705, namely **£5400.**

Uneven slabbing (Scott Schedule item 45)

615. This item is concerned with paving slabs in the front and back gardens which are said to have been installed so that they were uneven and a trip hazard. Re-laying was carried out by Beaux Arts Landscaping Ltd. and the claimants claim the total cost paid as damages in the sum of £36,088. I note that the introduction to the Scott Schedule states that estimated costs do not include VAT which will need to be added to the sum awarded. The position, therefore, appears to be different where the costs are ones already incurred. The sum of £36,088 is presented as an incurred cost. Beaux Arts Landscaping quote, by e-mail dated 2 July 2014, from which this figure is taken also makes no reference to VAT. A further sum of £7,354 (this time plus VAT) was claimed for works that have not yet been undertaken, namely the re-laying of the garage driveway.

616. It is common ground that the slabs specified in the Contract were Kota blue limestone laid with a butt joint. In early 2014, this was changed to Kota brown slabs. An e-mail from Mr Fitzgerald dated 1 December 2014 stated that this was because Kota blue slabs would not be available in time. Marbank's evidence is that they were told by SCd to lay the slabs with a butt joint even though that was not good practice.

617. Mrs Vainker did not regard the quality of the laying as acceptable and Marbank agreed to re-lay the slabs, apart from in a small area in front of the summer house. It is the claimants' case that the results of the re-laying were similarly poor; that many of the slabs were defective and should have been rejected; that they were smeared with mortar; and that they were again laid unevenly.

618. In an e-mail dated 20 June 2014, Mr Dow recognised the poor quality of the paving:

"… some of the paving isn't the best, although visually at the rear I could live with it just, the type of paviour doesn't help, nor the grout colour. The pointing is full of over spills and the levels are up and down with evidence of ponding. At the rear of the garage it is worse and out the front majority is poor. …

… the result is poor and unacceptable in places, and were again laid very unevenly."

619. On 1 July 2014, Mrs Vainker emailed Mr Fitzgerald, stating that she did not accept that the terracing at the back of the house and outside the summer house was acceptable. Mr Fitzgerald replied the same day, stating:

"I think the note I sent earlier expressed the views yesterday. The Defects are: 1. Poor pointing and jointing, inadequate falls and cross falls that allow water to collect in puddles on the paving, dirty paving with mortar rubbings not cleaned off, poor selection of paving slabs that have allowed poor quality and reject slabs to be laid, inadequate bedding on paving particularly around the summer house.

It appears that Marbank have accepted that the front garden areas, and the area behind the garage are unacceptable and they would contribute to them being relaid by Ewen, using a new stone that you have selected. My note earlier to Marbank asks that they revert back on the other areas."

On the same day, Mr Fitzgerald e-mailed Mr Dow confirming that Marbank acknowledged that the paving to the front garden and the section behind the garage was

unacceptable and setting out the nature of the clients' criticisms. In cross-examination, Mr Dow agreed the e-mail was a fair summary.

620. On 7 July 2014, Mr Fitzgerald emailed Mr Dow, stating:

"*We have now reviewed the rear terrace paving and the summer house paving against the level of quality that would be reasonably required. We therefore attach for your attention the schedule of defects prepared. It is noted that the front paving and the section at the rear of the garage is to be taken up and be re-laid.*"

The claimants rightly summarised M&M's schedule of defects as setting out the extensive issues with the paving.

621. Mr Dow responded on 25 July 2014, stating:
"We await instruction of what to do with the various areas of paving. We are fully in agreement to remove the front path, drive, and rear of garage only. The rest is minor snags, a lot stemming from levels when you will recall there was only one level on the whole job despite our repeated requests for a proper design. This was never forthcoming. Furthermore, the paving is as spec, the pointing has already changed from a butt joint that was deemed unacceptable, despite being as spec on a traditional contract, to a 1.0mm point. Just advise us whether we are taking everything up or not, when you want it done and we will act accordingly."

This was a shift from his previous position in what had now become a more contentious scenario and I place greater weight on his original views. Mr Dow's evidence at trial did not assist – he said he did not recall agreeing that all the paving was unacceptable and otherwise largely answered questions by saying that he would have to look at the correspondence.

622. Rather than instruct Marbank to re-lay the paving again, Mrs Vainker engaged Beaux Arts to do so and her position is that, because the slabs were now so heavily marked and chipped, having been re-laid twice, Beaux Arts used new slabs. The new slabs were York stone.

623. There is no serious challenge from Marbank to the claimants' case that the slabs were not laid in a proper and workmanlike manner and there is ample evidence in the e-mail correspondence that they were not. Mr Clay submitted that Marbank should not be charged for the cost of relaying areas that were not defective or had not yet been carried out but no detail is offered of the areas in question (other than perhaps the summerhouse) and nor is any assessment of the cost of the works to these areas identified.

624. Mr Clay then submitted that, since Marbank was willing to re-lay the paving, the cost of engaging a different contractor ought not to be recoverable. It is not argued that there was a breach in failing to give Marbank the opportunity to remedy its own defects but rather, as I understand it, that there was a complete failure to mitigate. I do not accept that submission in circumstances in which Marbank had already carried out the work twice and done so inadequately. It cannot have been unreasonable in those circumstances for Mrs Vainker to instruct another contractor to carry out the works.

625. Mr Clay's further submission was that the use of York stone amounted to betterment for which some allowance should be made.

626. Valuation no. 12 included a section entitled "Incomplete Works/ Defects/ Works Not Properly Executed" and set out a series of deductions from the valuation. Item 8 was in the following terms:

"Paving slabs – we would record that the total installation of the paving slabs undertaken by Marbank using the Riven limestone paving selected by the client was not acceptable. As a result the paving slabs that have been removed by Ewen have been lifted and stacked on site. Marbank consider that they are the client material and must be paid for. The current situation is that those slabs are mortar stained and are not in pristine condition and have no value."

627. A deduction of £15,375 was then set out, made up of the cost of taking up and removal. Mr Clay established with Mr Bowler that the deduction was for lifting and re-laying paving but not for the York Stone. Mr Clay relied on that as evidence that the contemporaneous view was that the use of Work stone was betterment. He further submitted that Mr Finn had accepted in his evidence that the cost of the York Stone, paid to Beaux Arts Landscaping, was £21,000.

628. I infer from that that Mr Clay was inviting the court to deduct the entire cost of the York Stone from the total paid to Beaux Arts. I am, however, satisfied that the slabs that had been taken up twice already were not in a condition to be relaid again. That was not only Mrs Vainker's view but also Mr Bowler's as set out in valuation no. 12. Therefore, the recoverable cost of remedial works ought properly to include the cost of replacement slabs, albeit the use of York Stone was betterment.

629. In his second report, Mr Finn made an assessment of the cost of remedial works as £29,248.00 excluding VAT if Kota Brown stone was used as a replacement rather than the York Stone. The total after the addition of VAT would be almost as much as paid to Beaux Arts, so Mr Finn's figures offer little or no assistance in valuing the betterment. Doing the best I can on the evidence, I award **£29,000** which includes approximately two thirds of the cost of the York Stone.

630. The only evidence in respect of the pleaded estimated cost of further work is the evidence of Mr Finn in his first report. He notes that he had not seen any details or specification for these works. What he has done, however, is first estimate the area of the driveway at 34.85m^2. Beaux Arts charged £36,088 for the paving works to an area of 171m^2. He has then carried out a pro rata calculation for the area of the driveway (giving a figure of £5,941.92) and added an uplift for inflation of £2,335.15, giving a total of £8,277.07. By reference to that last figure, he then expresses the view that the claimed amount of £7354.00 (excluding VAT) is reasonable.

631. For the same reasons that apply to the works already carried out, it seems to me entirely reasonable for these further remedial works to be carried out at similar cost. Mr Finn's pro rata assessment, however, makes no allowance for betterment from the use of the York stone. Doing the best I can, I assess the damages at **£5,941.92**. In other words, I take the pro rated figure without any addition for inflation so as to make some allowance for betterment.

Scott Schedule items nos. 46 to 64

632. The remaining items in the Scott Schedule have been remedied by Marbank or others and no sums are claimed for remedial works in respect of any of these items.

633. The claimants nonetheless set out in the Scott Schedule their case as to breach by both Marbank and the second defendant, Mercer and Miller, and some of these items were addressed in the evidence of Mr and Mrs Vainker. The claimants' position as to the relevance of these items, as explained in opening submissions, is that they contributed to the fact that the House was unfit for habitation long after Practical Completion, compelling Mrs Vainker and her son to move out and contributing to a loss of rent in respect of their alternative properties. Items 46 to 64 are, therefore, relied on in respect of the claims for (i) alternative accommodation, (ii) loss of rent, and (iii) general damages for distress and inconvenience.

634. Since these items were not addressed in any expert evidence, the claimants' position is, therefore, that the court should simply assume that these defects were the contractual responsibility of Marbank or amounted to a breach by Marbank of section 1 of the Defective Premises Act and should sound in damages. That is not an assumption that can properly be made.

635. So far as I can see, these defects did not feature in the Particulars of Claim and were first set out in the Scott Schedule. In the Response to the Scott Schedule, Marbank either denied liability or said that, since no cost was claimed, it did not see any good reason why it should plead to the item. Accordingly no admissions were made even where Marbank had remedied a defect.

636. Some of the defects are minor – for example a defective shower tray or shaver socket – and could not conceivably be material to the occupation of the property and the claims for damages to which it is sought to relate them. Others could similarly not be relevant – for example, scratches to windows or leaving the skip and other rubbish on site.

637. The two most significant items are nos. 46 and 47:

(i) Item 46: defective MVHR (Mechanical Ventilation Heat Recovery) system
Between August and November 2017, the entire MVHR system was replaced. The case against Marbank was put on the basis that the system was "installed in such a way that it did not work properly and was dangerous". Marbank's response was that that case was wholly unparticularised, which was plainly right. Marbank inferred from that that the issues were ones of design for which they were not responsible. Marbank alleged that the design specified inadequate fans, the wrong control units, failed to take into account acoustic performance, and failed to specify acoustic insulation. Marbank further relied on the fact that the claimants had received a substantial sum of £122,000 by way of settlement of their claim against CBG, the designers of the MVHR system.

(ii) Item 47: defective underfloor heating.
The claimants' case was that the House could not be properly heated until this defect was remedied in November 2017. The case against Marbank was put on the basis that "the underfloor heating had not been commissioned and tested and was

defective". Marbank again denied liability and responded that the issues were ones of CBG's design and that they understood that the remedy had been to move the thermostats to positions different from those shown on CBG's drawings.

638. Two specific points arise from these two items. Firstly, in my view, these are the only items that could have had an impact on the occupation of the House. The claimants' position is that Mrs Vainker did not occupy the House for a period because of the MVHR defects and the remedial works but, rightly, no claim is made in respect of that period. Secondly, not only has no case been made out against Marbank as to liability but the settlement with CBG is strong evidence that Marbank's assertion was right and that these were design issues and not the responsibility of Marbank.

639. In my judgment, there is no basis on which the court could take any of items 46 to 64 into account in the manner in which the claimants contend either in terms of liability or materiality and I do not do so.

Additional costs

640. The claimants claim the following costs of investigations/ reports:
    (i) **£4290** for intrusive investigations. The references given by the claimants are to 2 invoices from Urban Living (i) for 2 men opening up and sealing (plus scaffolding) and (ii) for the supply and installation of 3 waterproof copings. These would appear to be related to the investigation of the brickwork defects and attempts to remedy them and I award them as damages.
    (ii) Similarly a sum of **£1,458** for the report of Powell Richardson which is also recoverable as damages.
    (iii) A claim is also made in respect of the report of Harrison Goldman. Since this relates to the Jura stone on which I have not found in the claimants' favour, the cost of this report is not recoverable.

The claim for alternative accommodation

641. The first element of this claim is for the cost of accommodation for Mrs Vainker at 19 Becketts Place, Hampton Wick from 4 June 2019 to 30 September 2021 in the sum of £52,576.00.

642. In her evidence, Mrs Vainker described the issues with the glass (Scott Schedule items 8 and 9) as those which had affected her life most since 2017 when the first panel shattered. She said that she became pre-occupied with a fear of accidentally falling against a stair balustrade. Eventually, in June 2019, she moved out of the House on medical advice feeling as if the House had become toxic. At that time, the rental for her alternative accommodation per calendar month was £1,897 and it did not increase until December 2020.

643. Mr Clay submitted that this claim relies on a most unusual chain of causation. By June 2019, many of the defects complained of had been remedied whilst Mrs Vainker was in occupation. The only specific defects she relies on as a reason to leave the House are those relating to the glass but she had remained in occupation even after the terrace glass had shattered and the issues with the staircase had been identified. Mrs Vainker relied on a letter dated 18 April 2019 from Dr McIvor, a consultant psychiatrist. To respect Mrs Vainker's privacy, I do not quote that letter but I observe that it recorded that the

"ongoing structural problems" with the new property had given rise to ongoing and significant distress and the doctor recommended intervention. There was no express recommendation that Mrs Vainker should move out.

644. Mr Clay's submission was that damages under the first limb of *Hadley v Baxendale* for defects should not include the costs of accommodation because an inhabitant of a house who has lived with the defects for 5 years finds in the 5th year that, on the advice of a therapist, she can no longer live there.

645. That submission is, in my view, exaggerated. As a matter of fact, the glass issues were not known about until 2017. I have accepted that these defects did make the House unfit for habitation from the date of practical completion – they posed a positive danger and the fact that Mrs Vainker was able to live with that danger for around two, and not five, years does not change that position. Had she moved out when that danger first presented itself, Marbank's causation argument would be unsustainable. It does not make any difference that what eventually caused Mrs Vainker to move out was the toll taken on her mental well-being from living with this risk. She does not rely, and does not need to rely, on the psychiatrist's letter as specifically advising her to move out because of these particular defects. It simply provides support for her own evidence as to the reason she moved out in June 2019.

646. Further, during this period, she was, as set out in her evidence, faced with a dispute as to responsibility. As I have already said, the evidence as to Marbank's offers to replace the glass is unsatisfactory and in my view Mrs Vainker did not act unreasonably.

647. I do not consider, however, that it was then reasonable to take over 2 years to carry out the remedial works to the glass that would have, on the claimants' case, enabled Mrs Vainker to return to the property – all the more so, given that there was a temporary solution to the safety issue available in respect of the staircase balustrade from the fixing of a handrail. Doing the best I can on the evidence, I would allow a period of 6 months alternative accommodation costs which, on the basis of the original rent, would amount to **£11,382** and for which both Marbank and SCd are liable.

648. The second element of this claim is for £110,000 over a period from May 2017 to July 2021. This sum relates to a property at Wolverton Gardens. Mrs Vainker's case is that the property was occupied by her son, Stephen, and his family, who would otherwise have occupied the House and that, as a result, she lost the rental income on this property at a rate of £2,200 per calendar month.

649. Stephen Vainker's evidence was that he and his family moved into this flat, owned by his mother and brother, in about March 2017 because of the ventilation issues in the House. They intended to move into the House once those defects were remedied but did not do so because of concern about the risk of glass shattering. After the glass remedial works were carried out, he and his family moved in for 6 months to save money to buy their own property and later moved out.

650. In short, this claim is too remote. The client, so far as both Marbank and SCd were concerned, was Mrs Vainker. It was not reasonably foreseeable that the House was intended to accommodate not only her or her and her husband but also the entire family of an adult child. I set out in earlier in this judgment the evidence in this respect. There

is no evidence that Mrs Vainker conveyed any particular intentions with regards to occupation of the House to Marbank. So far as SCd is concerned, I take account, in particular, of the fact that, at the time Mrs Vainker first discussed her requirements for the property with Mr Clifton, she had two children who were still students. Mr Vainker refers to all three children being students and his evidence was that he anticipated that they would live with his wife until they found their way in the world.

651. One of those children was Stephen Vainker who had no children until 2015. There was no specific evidence as to the other child save that he is the joint owner of the rental flat. Eleanor Vainker's evidence indicated that from 2014 at least she and her family lived abroad and only visited the House. The cost of accommodating a further family – or in this case the loss of rental income from doing so – was not reasonably foreseeable.

Distress and inconvenience

652. This is a claim for general damages. The claimants claim £1500 per annum in respect of Mr Vainker and £3,000 per annum in respect of Mrs Vainker. This is claimed over a period of 9½ years, that is for a period which is longer than the period from practical completion to the date of trial and, therefore, appears to contemplate consideration of further remedial works.

653. The basis for the particular figures are the awards made by Edwards-Stuart J in *Rendlesham Estates plc v Barr*. In that case, the judge was concerned with distress and inconvenience to those claimants who occupied or had occupied their apartments. His decision includes the following:

"302. It seems to me self-evident that any award of general damages for distress and inconvenience must reflect the period over which it was suffered. By contrast, I consider that it would be both difficult and invidious to make individual assessments of the level of distress caused by, say, a leaking shower tray according to whether a particular individual was particularly robust or unduly sensitive. I propose therefore to award damages on the basis that each claimant is a reasonably robust individual: indeed, from what I saw of the witnesses that was in fact my general impression. So to that extent, a fairly broad brush approach is called for.
303.The Claimants submit that an appropriate sum under this head would be £2,500 per annum, increasing to £3,000 per annum during the course of any actual remedial works. …in this case the inconvenience caused by the malfunctioning intercom was clearly fairly serious and the inconvenience, discomfort and distress caused by the damp and mould, in particular from the leaking shower trays, was in my judgment very significant.
304. In the recent decision of the Court of Appeal in West v Ian Finlay & Associates [2014] BLR 324, the court said that awards of this type should be modest and subject to a maximum of about £3,000 per annum (at current prices). That case involved the failure of damp proofing work and whilst the remedial work was carried out the claimants lived in a nearby rented house. The court considered that £2,000 per annum would have been an appropriate rate for Mrs. West and £1,500 per annum an appropriate rate for Mr. West. The stress and anxiety suffered by Mrs. West was described by the court as "undoubtedly significant", but not at the top of the scale.
305. I consider that the defects that have caused the most distress and inconvenience in this case are the problems with the shower trays (and consequent mould and damp), the presence of mould and damp from other causes and the problems with the intercom system. However, it has to be borne in mind that there are a number of defects for which

Barr is not liable under the Act (for example, the cracking of the render) and these have to some extent added to the overall stress suffered by the occupiers. For this reason, I do not consider that an award at the top of the range would be appropriate for any of the Claimants in this case, even though it is clear that many of them have suffered a great deal of stress and anxiety to an extent that would otherwise call for an award at or close to the top of the range.

306. I consider that the distress and inconvenience caused by the damp and mould was very significant and, of course, in some cases and for some periods occupiers had to put up not only with that but also with the inconvenience caused by the malfunctioning intercom. Where that occurred, I consider that the degree of distress and inconvenience was greater than that suffered by Mr. and Mrs. West (even after making due allowance for the matters I have mentioned above).

307. Doing the best I can with all these considerations in mind, I consider that the appropriate levels of award are as follows. For periods when the only real sources of inconvenience or annoyance were the non or malfunctioning intercom and the hazardous walkways, I consider that the appropriate level of award is £750 per annum. Where, at the same time, an occupier also suffered from damp and mould, I consider that the appropriate figure is £2,250 per annum. …"

654. I take from this the following propositions:
   (i) The top of the range (10 years ago) was £3000 per annum.
   (ii) It is relevant whether or not the claimant occupies the property and/or has had to move out while remedial works are carried out.
   (iii) The claimant is to be treated as a person of reasonable robustness. A particular characteristic of the claimant may be material when, for example, the distress is caused by the presence of children in the defective property.
   (iv) It is relevant to consider both the impact of distinct defects and the period of time over which that defect cause distress and inconvenience.
   (v) Nonetheless, the court is entitled to take a broad brush approach.

655. The claimants' broad submission is that the distress and inconvenience suffered by both claimants is greater than in the *Rendlesham* case and that there should be a further uplift for inflation. That is the basis of the per annum figures claimed. There has been no attempt to break down or build up these figures by reference to specific defects or periods of impact.

656. Mr Vainker does not live at the property. His witness statement gives his address in France. He is not a party to either contract and his only claim could be under the Defective Premises Act. As I have said, the only matter which in my judgment could be relied upon as a breach of that Act are the glass defects for which I find both Marbank and SCd liable. These were apparent from 2017 to 2021. I have no doubt that Mr Vainker would have been concerned about his wife's occupation of the House until she moved out but I have no evidence as to the extent to which he visited the House during this period. I have also concluded that there was a failure to mitigate in taking over 2 years from the time that Mrs Vainker moved out to remedy these defects. Doing the best I can, I make a small award to Mr Vainker of **£1500** in total for which both Marbank and SCd are liable.

657. So far as Mrs Vainker is concerned, the position is different. There were defects in the glass for which SCd and Marbank were both liable and numerous other defects, albeit

some of which were minor, for which Marbank was contractually liable. Not only did the presence of defects cause her distress – and that was particularly the case in relation to the glass – but there was inevitably distress caused to Mrs Vainker in having to deal with defects and seeking to have them remedied. There were periods of disruption to her occupation of the House when works were carried out – generally in terms of workmen attending the House and more significantly when works such as the relaying of the kitchen floor were carried out. Many of the defects were purely aesthetic but it seems to me right to take into account the cumulative impact of having to live with and deal with these defects.

658. The major claims in financial terms on which I have found in Mrs Vainker's favour are the brickwork and the glass. The brickwork defects, although extensive, are also primarily aesthetic and have not impacted on physical occupation of the property. I do not find that they were the cause of any recent water ingress to the House and/or that any such problem persists. In respect of the glass, I repeat what I have said above.

659. Comparing the position with that in *Rendlesham,* I do not accept the broad submission that the defects were worse; they were more extensive; but they did not all persist for a period of over 9 years. Balancing these factors out, it seems to me that an appropriate and modest award would be the sum of £2000 per annum giving a total of £19,000 over the period claimed which, subject to the issue of the settlement with CBG, is the sum that I would award as general damages.

660. Some allocation of that amount needs to be made between Marbank and SCd. The defects for which Marbank is liable are more extensive than those for which SCd is liable. I have only found SCd liable in respect of one aspect of the claim in respect of the glass but that was one of the matters that understandably caused Mrs Vainker the greatest distress. It seems to me, in this instance, therefore appropriate to distinguish between the damages payable by each of these defendants, rather than treat this as a matter of contribution. I find Marbank liable to Mrs Vainker in the sum of **£12,000** and SCd in the sum of **£7,000**.

The Settlement with CBG

661. The settlement agreement between Mrs Vainker and CBG was dated 5 April 2018 and was in a total sum of £122,000. The settlement agreement recited that CBG had provided Mrs Vainker with full design for M&E services and that Mrs Vainker had claimed that CBG's performance was negligent. The sums claimed as "the M&E losses" were set out in Appendix A to the agreement and amounted to more than the settlement sum. The sums claimed included a claim for £48,220 for "Inconvenience, Distress, and Loss of Residential Amenity and for Pain, Suffering and Loss of Amenity". In light of the settlement sum, it is clear that Mrs Vainker recovered a substantial sum, albeit not the entirety of her claim, which therefore included a substantial recovery for general damages.

662. Recital no. 4 to the Settlement Agreement was in the following terms:

"The sums claimed by the claimant in relation to the services are set out in Appendix A to this Agreement ("the M&E Losses"). The Claimant has claimed these sums from both Marbank and the Defendant. The Claimant and the Defendant agree that this Agreement settles all the M&E losses."

663. The claimants' position is that, save for general damages, there is no overlap between the claims made against CBG and the claims in this action. That is not in issue. So far as the claims for general damages are concerned, it is argued that no credit should be given because of the seriousness of the distress and inconvenience which Mrs Vainker suffered. Alternatively, credit needs only be given for the period of distress and inconvenience which CBG caused.

664. Marbank submits firstly that the main inconvenience was during the period when the MVHR was unremedied, so that it was caused by CBG alone, and Mrs Vainker has already been fully compensated. Mr Clay, however, went further and submitted that the effect of recital no. 4 was that Mrs Vainker undertook to CBG that she would not seek to recover any sums from any other party for the heads of loss in the Appendix. The logic of this position is that, if it were otherwise, CBG might be exposed to a further claim for contribution from Marbank if Marbank were also in due course found liable. Mr Clay relied on the decisions in *Heaton v AXA* [2002] UKHL 15 and *Schofield v Clyde and Co LLP* [2022] EWHC Civ 824:

665. In H*eaton* at [9], Lord Bingham explained the principle as follows:

> *"If B, on compromising A's claim, wishes to protect himself against any claim against him by C claiming contribution, he may achieve that end either (a) by obtaining an enforceable undertaking by A not to pursue any claim against C relating to the subject matter of the compromise, or (b) by obtaining an indemnity from A against any liability to which B may become subject relating to the subject matter of the compromise."*

In *Schofield*, this sort of further contribution claim was vividly referred to as a ricochet claim.

666. I deal with this submission shortly. In my judgment, Mr Clay is right on the construction of the Settlement Agreement but the issue only arises in respect of one issue.

667. As Mr Clay recognises, although items 46 and 47 in the Scott Schedule were pleaded against Marbank and Mercer and Miller, no claims for remedial works are, in fact, made in these proceedings and the issue does not arise.

668. The only other overlapping defect is the kitchen nib (item 43) where the remedial works were the installation of a new window. In cross-examination, Mrs Vainker agreed that the installation of the new window was a mitigation measure for the ventilation issues. She said that a proportion was claimed from CBG and the remainder from Marbank because she had been led to believe that it was Marbank's responsibility. The evidence as to the amount paid is an invoice dated 13 June 2015 from Ridlands in the sum of £5,322. The Appendix to the Settlement Agreement includes a claim for the cost of installing 3 tilt and turn windows and one door and the total claimed is £6,322. It is impossible to discern from this that there was a proportion only of the cost of installing the kitchen window claimed from CBG. The matter cannot be addressed purely as a matter of construction because the Appendix does not identify the individual windows but, taking it together with the factual evidence, in my judgment, the claim against CBG in respect of this window was not for a proportion of cost and the settlement with CBG did settle the claim for the window in issue in item 43. No further sum can, therefore, be recovered from Marbank.

669. The remaining overlap in claims is in respect of accommodation and distress and inconvenience. No claim is made in these proceedings for alternative accommodation for Mrs Vainker prior to 2019 and, therefore, after the MVHR system was replaced. The further claim is not concerned with the MVHR system. The only overlap is in the claim in respect of loss of rent as the period of that claim starts in March 2017. I have, however, concluded that that claim is too remote and fails.

670. So far as the claim for distress and inconvenience is concerned, it is no doubt right that the defects in the MVHR system will have had a significant impact until remedied but, in assessing the appropriate amount to award I have taken account of the other defects present in the property (and not the MVHR system) and the impact of dealing with these, so that there is no overlap. There is also no question of any further potential claim against CBG.

The settlement with the Second Defendant

671. On 22 August 2022, the claimants entered into a settlement agreement with the Second Defendant. The settlement agreement included agreement to pay a sum of £35,000 in respect of "sums claimed against M&M in respect of remedial works, alternative accommodation and expenses and general damages for distress and inconvenience." The settlement agreement contained express provisions that it did not settle any part of the claimants' claims against the First and Third Defendant and that these could be pursued at trial, as they were.

672. The claimants accept that they should give credit for the sum of £35,000. Marbank describe this as a windfall but, since credit is to be given, there is no more to be said about it.

673. The settlement agreement also included a payment of £80,000 in respect of liquidated damages. This was a claim advanced in these proceedings against M&M only on the basis that they had negligently certified practical completion. Mrs Vainker's pleaded case was that the estimated time to properly complete the Works would have been a further 42 weeks during which Marbank would have been liable for liquidated damages. A claim was, therefore, advanced for liquidated damages for 42 weeks at the contractual rate of £5,000 per week, giving a total claim for £210,000. Mr Clay submitted that the allocation in the settlement agreement of £80,000 against this claim was self-serving, particularly in the circumstances that further claims against M&M exceeded £500,000, and that greater credit ought, therefore, to be given. He submitted that the claimants could not bind other parties by the allocation in settlement agreement and that the court should, instead, undertake a rough and ready pro-rating.

674. I do not accept that submission. There is no legal basis articulated for challenging or undoing the settlement agreement. Even if there were, the claim for lost liquidated damages was only advanced, and could only be advanced against M&M, as the Contract Administrator. There is nothing overtly unreasonable in having allocated a greater proportion of the settlement with M&M to that claim, nor was there any basis on which it could be submitted that the allocation lacked bona fides and was somehow open to challenge.

Marbank's Counterclaim

Pleadings and claims: the final account claim

675. Marbank pleaded a counterclaim in the total sum of £197,372 plus VAT. That sum was derived from the original contract price of £1,200,225 plus sums in respect of (i) expenditure of provisional sums, (ii) variations and changes instructed by Contract Administrator's Instructions (section 3) and (iii) other instructed variations and changes (section 4). That gave a total of £1,365,961, less the sums paid by the Claimants (namely £1,168,589).

676. This claim accorded with a Final Statement submitted by Marbank on 6 October 2017 to Mr Fitzgerald of M&M and Mr Bowler of Consol Associates and which, therefore, provided a breakdown of the sums claimed, although as the claimants pointed out no other supporting information or documentation was provided. I shall refer to this as Marbank's Final Account, although I recognise that that is not strictly contractual terminology.

677. In the Amended Defence and Counterclaim, Marbank made reference to valuation no. 13 dated 8 December 2014, valued by Consol (Mr Bowler) for the claimants in the sum of £1,308,595, and sought a re-valuation as necessary. Valuation no. 13 as it appears in the trial bundle was in the gross amount of £1,250,470.83 and that appears to have been the amount certified by M&M. On either basis, the total certified had not, in any event, been paid. At trial, Marbank placed greater emphasis on valuation no. 12, in the lesser amount of £1,231,970.83, as evidence of the contemporaneous valuation of Marbank's works and the view the claimants' professional advisers took of Marbank's claims at the time.

678. Marbank further claimed sums (i) for wasted management and staff time addressing unfounded complaints and arranging betterment works and (ii) maintenance and betterment works carried out on the instructions of Mrs Vainker or her professional advisers.

679. In response to a Request for Further Information, Marbank served a Schedule of the First Defendant's Wasted Management and Staff Time. Between May 2014 and February 2017, the Schedule gave times spent reviewing a variety of issues including the MVHR system and discussing and responding to e-mails. The claimants responded to this schedule in Appendix 4 of the Reply.

Contractual arguments

680. The claimants submitted that, at the time of Marbank's submission of a Final Statement, M&M gave a number of "unassailable" reasons for its rejection, which were then adopted by the claimants in the Defence to Counterclaim as reasons why the Final Statement was "invalid". It is convenient to address some of the contractual arguments at this point.

681. The first matter pleaded and repeated in submissions was that the Final Statement was incorrectly issued as it was submitted to Mrs Vainker's consultants "outside the terms of the agreement reached in writing between Mrs Vainker and Mr Woods of Marbank that all documents and communications are to be distributed through each other's solicitors." The claimants relied on an e-mail dated 5 September 2017, in which Mr Woods asked

Mrs Vainker to communicate through her solicitors, and her reply on 7 September 2017 stating that she would do so. There is no merit in the argument that that exchange of e-mails had any contractual effect. This was no more than a routine request about lines of communication which cannot amount to some kind of enforceable agreement. An agreement to communicate through solicitors does not somehow "invalidate" other communications.

682. The second matter related to the nature and timing of the Final Statement. Clause 4.5.1 of the Contract deals with the Final Adjustment and provides:

> *"4.5.1 Not later than 6 months after the issue of the Practical Completion Certificate …., the contractor shall provide the Architect/ Contract Administrator …, with all documents necessary for the adjustment of the Contract Sum.*
>
> *4.5.2 Not later than 3 months after receipt of the document referred to in clause 4.5.1:*
>
> *.1 the Architect/Contractor Administrator, or, if he so instructs, the Quantity Surveyor, shall (unless previously ascertained) ascertain the amount of any loss and/or expense under clause 4.23; and*
>
> *.2 the Quantity Surveyor shall prepare a statement of all adjustments to be made to the Contract Sum under clause 4.3, other than any loss and/or expense then being ascertained*
>
> *And the Architect/ Contract Administrator shall within that 3 month period send to the Contractor a copy of that statement and (if applicable) that ascertainment."*

683. Clause 4.15.1 provides that the Architect/ Contract Administrator shall issue the Final Certificate not later than two months after whichever of the following occurs last: the end of the Rectification Period; the issue of the Certificate of Making Good Defects; the date on which the Contractor is sent copies of the statement under clause 4.5.2. The content of the Final Certificate is set out in clause 4.15.2 – in short, it should state the Contract Sum as adjusted and the sums already certified in Interim Certificates and the difference between the two as a balance due to the Contractor or the Employer.

684. This standard form of contract, therefore, makes no reference to a Final Statement. The claimants plead that the document cannot be classified as an application for payment as it purports to be a Final Statement. That argument is unsustainable – its title is immaterial. However, the claimants make the point that, if Marbank's Final Statement is relied on as its submission of all documents necessary for the adjustment of the Contract Sum under clause 4.5.1, it was provided well outside the 6 month period stipulated in the Contract. That appears to be relied upon as a complete defence.

685. That argument is, in my judgment, wrong. The provision of that documentation is the trigger for the final adjustment under clause 4.5.2. Failure to submit the relevant documents within the prescribed timescale is a breach of contract that may sound in damages. But there is nothing in these clauses that makes the final adjustment conditional on the submission of documentation within 6 months. If that were the case, it would have the result that any failure would mean that a Final Certificate could never be issued because the sending of the statement under clause 4.5.2 would never occur and thus no payment of the adjusted Contract Sum would ever occur. That would be a surprising outcome without clear words to that effect and no authority to that effect was relied upon.

686. The claimants further plead and submit that "A Final Statement cannot be claimed until the Certificate of Making Good Defects is issued". This makes no sense but may be intended to be a reference to the Final Certificate. It is yet further submitted that no Certificate of Making Good Defects could ever have been issued.

687. The effect of the absence of the Final Certificate is that no sum becomes due under clause 4.15. However, in assessing any claim by Mrs Vainker for damages for breach of contract, it is necessary to take into account the sums that would have been due had a further interim certificate or Final Certificate been issued. If that were not the case, it would have the potential effect that an employer in the position of Mrs Vainker could recover the cost of carrying out remedial works but not pay for the works in the first place. That would not reflect the loss actually suffered.

688. The claimants relied on a further item specific point in relation to variations. As I have indicated above, section 3 of Marbank's Final Account related to variations for which there was a Contract Administrator's Instruction. Section 4, however, claimed variations where there was no such CAI.

689. Clauses 3.10 to 3.22 all appear under the heading "Architect/ Contract Administrator's Instructions". Broadly speaking, the Contractor is obliged to comply with instructions issued to him which the Contract Administrator is expressly empowered to give. Under clause 3.14.1 the Contractor Administrator is expressly empowered to issue instructions requiring Variations. Under clause 3.12, if any instructions are given otherwise than in writing, there is provision for either the Contractor or the Contract Administrator to confirm in writing.

690. Clause 4.2 provides that:

"The Contract Sum shall not be adjusted or altered in any way other than in accordance with the express provisions of these Conditions ...."

691. Clause 4.3.2 provides that there shall be added to the Contract Sum the amount of the Valuation of any Variation. The Valuation of a Variation is the subject of clause 5.2.1 which provides that the value of "all Variations required by the Architect/ Contract Administrator's Instructions or subsequently sanctioned by him in writing" shall be such amount as is agreed by the Employer and Contractor or, where not agreed, valued by the Quantity Surveyor.

692. It is, therefore, in my judgment, the case that only Variations instructed in writing or confirmed in accordance with clause 3.12 fall to be valued under clause 5.2.1 and the value added to the Contract Sum. There are no other provisions in the Contract which would permit adjustment of the Contract Sum.

693. If that were not sufficiently clear, it is repeated in the Preliminaries which are themselves a Contract Document. Clause 445 provides that "In accordance with the Contract Conditions, Variations will only be recognised if instructed or authorised by the CA and if confirmed in writing." Clause 490 in respect of Variations provides that "The Employer shall not be liable for the costs of any additions unless instructions for these are given by the Contract Administrator in writing."

694. Having said that, in my view, Mr Clay is also right in his submission that the written instruction or confirmation of an instruction does not have to be in any particular form. It is a fact sensitive question in each instance but an e-mail or the issue of a drawing may be sufficient writing. There may also be circumstances in which an estoppel arises.

695. Mr Clay came close to that last possibility in his submission that where sums were accepted as due in interim valuations, the lack of an instruction was "cured" and, if any issue had been raised at the time about a lack of an instruction, Marbank could have requested an instruction to cure the formalities. In other words, if an item had been included in an interim valuation by Consol and/or certified by M&M, it was not now open to the Claimants to argue that no written instruction had been given.

696. This submission was made against the factual background of both valuations no. 12 and no. 13 and the annotations and response made by Mr Bowler on Marbank's 2017 Final Account. I will refer to these annotations and Mr Bowler's evidence further below but, in summary, Mr Bowler had included in his response a figure of £24,123.79 in respect of variations for which there was not a Contract Administrator's Instruction.

697. In my view, the submission goes too far and ignores the fact that interim valuations are interim and are open to adjustment in future interim valuations and the final adjustment. Such adjustments are not limited to adjustments in value and the interim valuation of a claimed variation does not amount to an admission of liability on behalf of the Employer and still less does the inclusion of an amount for a claimed variation in brief annotations on a final account document.

698. It follows, in my judgment, that where Marbank has not adduced any evidence of a written instruction to carry out varied work, there is no basis for its claim under the Contract, and each instance where there is no Contract Administrator's Instruction needs to be addressed to determine whether there is a sufficient written instruction. There is no single answer that the claims fail if there is no such CAI and similarly no single answer that the claim is good in principle if a value was included in an earlier valuation.

Factual evidence

699. Marbank's 2017 claim was produced by James Haffenden. In his witness statement, he explained that Marbank's Quantity Surveyor on the project had been Scott Fitzgerald who had left Marbank in November 2013. His responsibilities were taken over by Mr Dow until, in 2017, Mr Brown asked Mr Haffenden to prepare the Final Account. Mr Haffenden's evidence was that Mr Dow had commenced work on sections 2 and 3 of the Final Account (Provisional Sums and Variations), so that he was not working from scratch, but he completed the compilation.

700. Mr Haffenden's evidence in his statement was that he checked some points with Mr Roffey. In cross examination he said that he had no direct contact with Mrs Vainker, SCd, M&M or Mr Bowler and he put the Final Account together from documents. Mr Haffenden could not recall all the documents he looked at but he produced an Excel workbook that included some document references. In cross-examination he said that he took on what Graham Dow had started and that Mr Dow would be the person to ask for more detail. Neither Mr Roffey nor Mr Dow gave any further evidence about the preparation of the Final Account. The claimants were right to submit that, apart from

where the Final Account claim overlapped with the claimants' claims, there was very little evidence from Marbank's witnesses of fact on the Final Account.

701. Also in 2017, Mr Bowler undertook an assessment of the sums due which he valued at £1,273,121.79 before various deductions. It is not necessary for me to address those deductions at this point but he gave a net figure of £137,946.03 due from Marbank to Mrs Vainker. This assessment was relied upon by the claimants as more likely to be an accurate assessment of the Final Account than Marbank's claim.

702. Mr Bowler made a witness statement which said nothing about this assessment but did describe the extent of his involvement which began in 2010. He provided pre-construction services. Then during the course of the contract, he acted as the Quantity Surveyor under the JCT contract. His services included reviewing valuations, reviewing contractor's accounts, preparing monthly valuations and costs reports, and preparation of the Final Account. His evidence was that he would usually attend site once a month for a site meeting. He would go around the site with Marbank's surveyor and assess progress and financial value. He would then seek to agree a valuation which would be sent to Mr Fitzgerald of M&M to issue a certificate.

703. Mr Bowler was called to give oral evidence by SCd and was cross-examined by Mr Crowley and Mr Clay about his assessment in 2017.

704. Mr Bowler's evidence was that he would have had his previous valuations on file and been able to refer back them if needed. In his annotations on section 4 of the Final Account which claimed for variations where there was no Contract Administrator's Instruction, his annotations in many instances queried whether there was an instruction. He was asked whether he checked for an instruction on the items he <u>had</u> included but he could not remember. It would seem that this line of questioning was intended to suggest that Mr Bowler was, as it was put, alive to the question of whether or not there was a written instruction and/or to invite the inference that, if he had allowed a sum in this assessment, he was satisfied that there was such an instruction. That seems to me an inference that simply cannot be drawn and nor does it answer the question as to whether or not there was any instruction in writing. I have already said that I reject any argument that the mere inclusion in Mr Bowler's 2017 assessment of a value against a claimed variation is an admission of liability or binds the claimants to accept liability.

705. In any event, in his report, in respect of some items, Mr McGee identified documents which were relied as written instructions, and, in closing submissions, Mr Clay provided an Attachment no. 4 which sought to identify by various document references the source of the written instruction for other items in Marbank's Section 4. It is unsatisfactory that this exercise was done through an expert report in part only and then in closing submissions and only by document references leaving the court the task of working through all the references and forming a view. Nonetheless, Attachment 4 has enabled me to undertake that detailed task.

706. Drawing the threads together, it seems to me that Mr Bowler was the one witness who had been engaged throughout with the issue of valuation of the works. He gave evidence as a professional person and he gave the evidence of a careful and straightforward witness. However, at this remove of time, he had very little recollection of what he had done. He had made a contemporaneous valuation (no. 13) in December 2014 and there

was no evidence that that was disputed at the time. In cross-examination, as I have said, he was taken to his valuation no. 12 in November 2014. He was able to rely on his previous valuations in making his annotations on Marbank's Final Account in 2017. Marbank's Final Account or Final Statement was submitted nearly 3 years later and was to a large extent a paper-based exercise by someone who had not been involved in the project. Where Marbank's claim is not clearly supported by the documentation or other evidence, therefore, I generally prefer the more contemporaneous views of Mr Bowler.

Expert evidence

707. In his first Report, Mr Finn did not address the counterclaim at all. The only expert evidence was, therefore, that of Mr McGee for Marbank. At the start of the trial, a second report of Mr Finn (dated 4 October 2022) was served and the claimants sought permission to rely on it. That report for the first time addressed the Counterclaim. In the course of the trial, Marbank agreed to the admission into evidence at least of that part of Mr Finn's report that addressed the Counterclaim (subject to the removal of passages that relied on evidence of Mrs Vainker that had not been permitted). That was a sensible and helpful approach as Mr Finn's report narrowed and focussed the issues and assisted in providing a route to addressing the multiple elements of the claim.

708. I should add, for the avoidance of doubt, that Mr Finn's report originally made reference to the third witness statement of Mrs Vainker. In that statement, served shortly before trial, she had sought to given evidence about items in the Marbank Final Account. In my judgment that evidence was tendered far too late and those aspects of the third witness statement were not admitted into evidence. All such references were, accordingly, struck through in Mr Finn's second report and I have not had regard to them.

Provisional sums

709. It is not in dispute that the Contract Sum was £1,245,725.00 which forms the starting point for any adjustments. It is also common ground that the Contract Sum included an amount for Provisional Sums.

710. There had been a dispute between the claimants and Marbank as to the amount included for Provisional Sums and, accordingly, the amount to be omitted before the addition of the Provisional Sums expended. The claimants' figure was £60,500 and Marbank's figure was £45,500.

711. Section 7 of the Contract Documents, being the Contract Sum Analysis, gives a figure of £60,500 for "Provisional Sums inc M&E Provisional Sums". The preceding breakdown, under the heading Plumbing and Mechanical Installations contains an item for M&E Provisional Sums. Section 8 (PC & Provisional Sums) included provisional sums totalling £45,500. Broadly speaking, the reason for the lower amount was that the "M&E Provisional Sums" were not included although a provisional sum of £10,000 was included for the supply and installation of external lighting. Section 9 of the Contract Documents included an e-mail from Mr Bowler to Marbank dated 15 November 2012 which concluded "Please also note that the contingency amounts included within the M&E specifications (a total of £15,000.00) are to be excluded from your tender." The attachment to that e-mail was a file named "Section 8 – PC & Prov Sums Rev 2.pdf".

Marbank responded on 19 November with a revised tender in the sum of £1,245,725 and confirmed that they had included the provisional sums "as your revised summary".

712. In respect of valuation no. 12, Mr Bowler omitted the figure of £45,500 for Provisional Sums, whereas in his 2017 annotations he omitted the total of £65,500.

713. Having reviewed the contract documents, Mr Finn's opinion was that the proper deduction was £45,500, as Marbank had contended. It is, of course, a question of construction and not expert evidence, but I agree. Although the Contract Sum appears to include Provisional Sums of £60,500, reading the documents as a whole, it is equally clear that the M&E items were not included and that the total was **£45,500**.

714. In terms of the additions to be made for Provisional Sums expended, subject to one item, Mr Finn and Mr McGee agree that the correct figure is **£34,969.16**. Mr Finn's opinion in his report was qualified by the fact that he had seen quotations for amounts but not proof of payment. There is, however, nothing to suggest that the works have not been undertaken for the quoted amounts and the total figure is within £300 of the figure included in Mr Bowler's 2017 assessment. I, therefore, find that this is the sum that should be added for Provisional Sums before consideration of the one item that remained in issue between the experts.

715. The one contentious issue is the expenditure in respect of external lighting. Marbank claimed the sum of £8,703 based on a quotation from Chalbrook Services Ltd. dated 3 April 2013 together with sums for builders work in connection and overheads and profit. It is unnecessary for me to set out the breakdown more fully. In his report, Mr McGee stated that he had seen no Contract Administrator's Instruction and nothing had been included in valuation no. 12 for external lighting. In Mr Bowler's 2017 annotations, he noted that the external lighting was "not undertaken by Marbank" and attached no value to the item. However, Mr McGee had observed that the installation of external lighting was complete on site and, therefore, included the total sum claimed in his valuation.

716. In his second report, Mr Finn identified e-mails which he had been provided with which omitted some of the external lighting works, namely the terrace or garden wall lights (£1,749) and the "miniwalki" (£1,083.71) lights. I note that the e-mail from Chalbrook dated 2 May 2014 which refers to these omissions refers to adjusting the Lighting cost by the omission of the terrace lights and adjusting the External Lighting variation by the omission of the 5 no. miniwalki lights. It appears to be common ground that the sum for the terrace lights was based on 11 lights at £159 per light. Mr Finn noted, however, that this sum was not included in the quotation and build up referred to above. In Marbank's closing submissions, a reference was also given to Chalbrook's final valuation no. 9 dated 7 July 2014 which includes an item for "Lighting (less 11 No. Terrace lights @£159 ea)".

717. On the basis that (i) the appropriate starting point was the quotation referred to above with additions for BWIC and overheads and profits, (ii) the only omission should be for the miniwalki lights and (iii) on the assumption that all other works quoted for (and not including the 11 no terrace lights) had been carried out by Marbank's sub-contractors, Mr Finn calculated a figure of £7,280.48.

718. Mr Clay submitted that that that sum was an agreed sum and that there was no viable defence given that the work had plainly been instructed and had been done. He gave

references in his Attachment 4 to the written Closing Submissions which it was submitted showed that the work was done with Mr Fitzgerald's apparent approval. Those references are (i) to an e-mail exchange dated 25 July 2014 in which Mr Fitzgerald states that the iGuzzini lights on the terrace have been damaged and Mr Dow responds, in effect, that Mr Fitzgerald has misunderstood what has been done, and (ii) to the Chalbrook valuation no. 9.

719. Drawing this information together, it seems to me, on the balance of probabilities, most likely that at some point it was contemplated that Chalbrook would install the 11 no. terrace lights and that these may well have been included in a quotation for lighting (not including external lighting which was the subject of a Provisional Sum in Marbank's Contract). Chalbrook provided a distinct quotation for external lighting which did not include any provision of the 11 no. terrace lights. Except for the miniwalki lights, Chalbrook carried out the works quoted for. The appropriate addition for the expenditure of this Provisional Sum is, then, the figure calculated by Mr Finn of **£7,280.48**. Indeed, in cross-examination, Mr McGee agreed this figure.

720. There may have been some defect in the installation of the iGuzzini lights and some potential claim, albeit disputed by Marbank, in that respect but there is no such claim in this litigation and no reason to make any further deduction from the amount to be added for external lighting.

721. It follows that the total addition for Provisional Sums is **£42,249.64**

Variations: CAIs

722. As I have said, Mr Finn's report provided a helpful route map for addressing the Final Account claim. In particular in his table no. 7 he set out the differences between the claimants' assessment of items and that of Mr McGee. Subject to two exceptions, he showed the total for variations which are the subject matter of CAIs as agreed at **£29,081.71** and I do not understand that to be in dispute. There is a £1 difference between that figure and that in Mr Bowler's 2017 assessment but that is de minimis.

723. The two items that remain in issue are as follows.

724. *CAI no. 5*: This instruction, dated 19 February 2013, is the issue of CBG's mechanical construction issue drawings. The issue here is not whether there was a written instruction but whether the effect of the issue of construction drawings amounted to the instruction of a variation in specific respects.

725. Marbank's 2017 Final Account included a number of items against which Mr Bowler placed question marks and the comment "provide as builts". Mr McGee's evidence was that he had examined the revised drawings and compared them against the specification and was of the opinion that the drawings were a variation. That was the extent of the evidence and there was no further detail. He placed a value of £1,840.13 against these items.

726. The Final Account also included a specific item for the provision of WC pan supports. Against this item, Mr Bowler's annotation was *"suspended pans shown on bathroom layouts on Architects"*. That would appear to be a reference to the architect's drawings.

Mr McGee again said that he had examined the contract specification and was of the opinion that the WC pan supports were a variation. He said that M&M had agreed to the variation by e-mail on 16 April 2013 but, whilst there is an e-mail of this date, it says simply "Herewith below the last of formal instructions issuing the drawings and any formal instruction changes to date" and lists CAI nos. 1 to 21. There is nothing that expressly agrees that this item was a variation. Mr McGee placed a value of £1,230.88 against this item.

727. I take into account the query raised by Mr Bowler and the views he expressed in his 2017 annotations. The only other evidence is Mr McGee's opinion which is wholly unsupported by any identification of what he has looked at and taken into account. I am not satisfied that there is any credible evidence that these items were additional varied work.

728. Secondly, CAI no. 21 issued the tiling schedule and stated on its face that the fixing costs were already included in the contract. Marbank's final account included all of the tiling costs as a variation. Mr Bowler noted that the tiling was a Prime Cost sum which had not been omitted before any additional cost was claimed and that "all other associated costs are included elsewhere", the latter reflecting what appeared on the face of the CAI.

729. Mr McGee agreed that the PC sum should have been omitted and had no information from which to ascertain any additional costs. Mr McGee did, however, include in his valuation a sum of £1,083.71 for levelling the screed to the kitchen and bathroom floors. He expressed the opinion that the contract specification did not allow for levelling the screed but that that would be required to provide a firm sub-base for floor tiles. He did not identify the specification clause relied upon.

730. From the documents provided to him, Mr Finn was able to say that the screed was a latex screed and that he had seen invoices and dayworks sheets in respect of the works. Although he could not verify the cost from this information, he considered he value claimed "not unreasonable".

731. The claimants submit that making the floors level is part and parcel of laying a floor. That in my view is right and, in the absence of any specification as to how the floor was to be levelled, that was a matter for Marbank. In the absence of any reference to an aspect of the specification that might lead to a different conclusion, I am not satisfied that there was any further variation to be valued.

Variations: no CAIs

732. In written submissions, Marbank referred to the Claimants' Response (dated 25 May 2021) to the First Defendant's Request for Further Information – I shall refer to this as the Claimants' Response or simply the Response. Marbank submitted that the Response made important admissions including as to the validity of certain variations. The Request was made by reference to paragraphs of the Claimants' Re-Amended Reply and Defence to Counterclaim. At paragraph 41(v), the claimants denied Marbank's claim for variations not instructed in writing by the Contract Administrator. At paragraph 41(vi), the claimants said that in any event the QS had valued the other variations and charges at £24,123.79. In the following paragraph, and without prejudice to paragraph 41(v), the claimants set out the "correct" position on the Final Account which reflected the QS's

valuation. The requests of this paragraph to which the claimants responded included a request for a breakdown of the sum of £24,123.79. The claimants' response identified numbered items in Marbank's Section 4 and the value that went to make up the total.

733. Contrary to Marbank's understanding, I do not regard either the Reply or the Response as an admission that these sums were due or that these items were variations or that there were instructions for these items as variations. However, the items identified were those to which Mr Bowler had attached a value and, although not an admission of liability, that is at the least strong evidence that the items are properly to be regarded as variations to the works, subject to the argument in relation to instructions.

734. The relevant items as set out in the Response are 4.06 (lintels to 1st floor); 4.09 (access panels); 4.10 (curtain tracks); 4.17 (additional side gate); 4.18 (all pavings and paths to have Pro Edge); 4.23 (addition of slab under paving); 4.24 (kitchen design amendments); 4.25 (water softener); 4.26 (window/door handles; actuator); 4.27 (kitchen pendant and internal door sensors); and item 4.28 (audio entry system).

735. There is some confusion over item 4.10. In Section 4 of Marbank's Final Account, item 4.10 is for carpentry, which is described elsewhere as soffit panels, and the amount claimed of £285 is for carpentry and materials. Additional Curtain Tracks is item 4.11 and the claim was said to be "as per the attached order confirmation". The sum claimed was £835.28. Mr Bowler noted that nothing was attached and put a question mark against this item. However, in the summary sheet of "Variations Instructed by the Project Team", these items were swapped over so that curtain tracks was item 4.10 with a value of £285 and soffit panels was item 4.11 with a value of £835. The soffit panels were said to have been re-made because the SCd drawings were incorrect and Mr Bowler's annotation was "no – drawings were not read correctly." The item and figure in the Response appears to have been taken from this summary sheet.

736. Mr McGee in his report addressed all of the items in Section 4 which Marbank regarded as not admitted. As mentioned, in Attachment no. 4 to its closing submissions Marbank provided document references for instructions in respect of these items. I have considered the references given. I do not propose to set out every reference in this judgment but, having reviewed them, I am satisfied that where the item was valued by Mr Bowler, there is a sufficient written instruction or confirmation in writing. I also have regard to Attachment 2 to Marbank's closing submissions which sought to identify what remained in dispute.

737. Mr Finn said that, in the interests of proportionality, he addressed only the items with a value greater than £1000. The claimants made submissions in respect of some only of these lesser value items.

738. As I have said, having been provided with the references in Attachment 4, I address below both the issues of whether there was a written instruction of a variation and the valuation.

Item 4.01

739. This was a claim for brick specials. It is conceded by Marbank and no claim is pursued.

Item 4.02

740. This was a claim in respect of aluminium fascias. Mr McGee's valuation is £657.94. Against this item in the Final Account, Mr Bowler commented "65mm error by window manufacturer not a client issue".

741. The claimants relied on e-mails between 30 September 2013 and 2 October 2013, in which SCd said clearly that the problem arose from a change in the drawings produced by Ridlands for Marbank which was highlighted by SCd and not corrected. Mr Dow's e-mail on 2 October 2013 did not, as the claimants suggest, go so far as accepting that there was an error for which the claimants were not contractually responsible but it is entirely consistent with that.

742. McGee's evidence was that there was clearly a variation detailed on drawing A(36)361 C1 and that it was agreed as such in an e-mail dated 11 October 2013. The e-mail to which he refers, however, merely issued drawings for construction and the preceding e-mail from Mr Strike of SCd to Mr Fitzgerald said that the revised dimensions were to allow for the 65mm variation in size.

743. There is insufficient evidence for me to find that this issue of drawings instructed a variation and it seems more likely that the revision was made to correct an error for which the claimants were not contractually responsible.

Item 4.03

744. This item relates to a ceiling bulkhead. Mr Bowler also attributed this item to the 65mm error made by the window manufacturer and the claimants made the same submissions.

745. Mr McGee valued this item at £1,394.58. He relied on the e-mail dated 11 October referred to above and Attachment 4 gave the same reference. Mr McGee also noted that a sum of £600 was previously included in valuation no. 12. Although he gave no reference, this appears to be item no. 39 in that valuation, which is an estimated amount, and is cross-referenced to an e-mail from Mr Fitzgerald dated 22 April 2014 which confirms an instruction to extend the bulkhead in the kitchen to meet the downstand of the suspended ceiling. The same item is referred to in Attachment 2. In short, this does not seem to be a relevant reference and, at the least, casts doubt on what Mr McGee has considered and valued.

746. I take the same view that I did in relation to item 4.02 and I include nothing for both these items in the final account.

Item 4.04

747. As set out in the Final Account, this item was for removal of blockwork/brickwork and the reinstatement of red bricks. Marbank said:

> *"Trevor and Graham confirmed that there was no lintel on the design drawings that was able to support the brickwork on the glass roof, this was not noticed until 3/4 built."*
> Mr Bowler put question marks against this and the comment "who instructed? drawing? e-mail?"

748. In his report Mr McGee expressed the opinion that the work was clearly a variation and was instructed by the drawings issued by e-mail on 9 September 2013. Attachment 4 supplied a reference to that e-mail which is from Mr Strike to Mr Dow and Mr Lamb of Ridlands, with Mr Fitzgerald, amongst others, copied in. The e-mail says:

"Top of the frame should be 28,270 and as our detail 1 on drawing A(31)309. As Steve's response to RFI021 states there is still brick work to be installed to the return wall, this will push the window away from the roof rafters."

749. Mr McGee also relied on the inclusion in valuation no. 12 of £600 on account of this item. Again no reference was given and the closest item I can identify is item 14 "Additional lintels" to which a value of £500 is attached "on acc". I note that there is also a claim for additional lintels in item 4.06 below and that, in Attachment 2, Marbank gives the same reference to item 14 in valuation no. 12 against both items.

750. Without more it is impossible to relate the e-mail to the item claimed or to relate that item to valuation no. 12 and I am not satisfied that there is sufficient evidence to conclude, on the balance of probabilities, that there is any instruction in respect of this alleged variation. I do not include any value in the final account.

Item 4.05

751. This is a claim for an extra over cost for the edge detail of a gutter and an additional section of gutter which Mr McGee has valued at £485.58.

752. Mr Bowler did not include any value against this item in 2017 and made the annotation "instruction?". The claimants maintain that there is no evidence of any instruction in writing.

753. Mr McGee expressed the opinion that this was a variation which was shown on drawing S(31) 316 rev C2 issued by e-mail dated 24 September 2013 in response to an RFI. As with other items, he appeared to rely on that as agreement by the Contract Administrator that this was a variation.

754. Marbank's RFI no 24 asked: "Please advise how the PFC gutter on grid 4 over the stair should be finished, lined, what outlet is required to enable us to complete these works." By an e-mail dated 23 September 2013 (mistakenly dated by Mr McGee, and mistakenly referred to in Attachment 4, as dated 28 September 2013), Mr Strike provided the drawing of a revised gutter detail in response to that RFI. Taking these points together, it seems to me that this was a varied detail in response to the request. The e-mail was copied to, amongst others, Mr Fitzgerald and no issue appears to have been raised that this was not a variation. I regard that as sufficient written instruction and I include the sum of **£485.58** in the final account for this item.

Item 4.06

755. This is a claim for an extra over cost of £330 for lintels. Marbank treats this as admitted in the Claimants' Response.

756. Mr Bowler did indeed annotate this item with the comment that there were additional lintels and included the sum of £330 in his assessment. As I have noted above, a sum of £500 was included in valuation no. 12 on account of additional lintels.

757. In Attachment 4, Marbank gave further references to documents which they relied upon as a written instruction. As I indicated above, I do not propose to set these out in any detail where the item was one included in Mr Bowler's 2017 assessment. I have, however, reviewed them and I regard them as sufficient evidence in writing of the confirmation of an instruction and I include the sum of **£330** in the final account.

Item 4.07

758. This is a claim for the "Balcony upstand". In the 2017 final account, Marbank gave no description to this item but claimed a sum of £284.99 (being £265.11 plus overheads and profit) for a carpenter foreman and materials. Mr Bowler simply put a question mark against it.

759. Mr McGee's report contains at Appendix C his Spreadsheet Analysis of Marbank Final Account. He includes the net figure as he has a separate item for overheads and profit. Attachment 2 replicates the net figure. Other than that, Mr McGee says nothing about this item and Attachment 4 gives no document references.

760. There is no evidence to support this claim and I include nothing for it in the Final Account.

Item no. 4.08

761. This claim is for bulkheads and boxing. Marbank's Final Account claimed a sum of £2,578.22 (including oh&p). Mr Bowler's annotation was "instruction? drawing?".

762. Mr McGee says that Marbank's position is that this work was instructed by SCd on site. He recognises that that is not a written instruction of the Contract Administrator. From his own site visit, he noted that a bulkhead and ducting had been installed in bedroom no. 5 but did not record the other work referred to in the Final Account. He also noted that the specification included for BWIC which would include boxing and bulkheads to hide pipework and ducting. He did not explain why that would not include what he had observed in bedroom no. 5. Nonetheless, his opinion was that Marbank was entitled to be paid for the work in bedroom no. 5 which he valued at £486.00.

763. In Attachment 4, Marbank relies on a Marbank e-mail dated 17 October 2013 (also referred to by Mr McGee). The preceding e-mail dated 19 September 2013 from Mr Dow to Mr Fitzgerald noted that there might be some additional timber work and that Mr Roffey was keeping a note of this. Mr Fitzgerald asked Mr Roffey to ensure that additional timber items were on his list – it would appear for a meeting in October – and the e-mail of 17 October 2013 was Mr Roffey's list including the bulkhead in bedroom no. 5. There is no evidence as to Mr Fitzgerald's response and whether he agreed that this was a variation or not. Attachment 4 also gives a reference to an e-mail from M&M dated 22 April 2014. This is the same e-mail as was relied upon under item 4.03. It concerns a bulkhead in the kitchen. This is not claimed in item 4.08 and has no relevance to what Mr McGee has valued.

764. There is simply insufficient evidence that the provision of a bulkhead in bedroom no 5 was a variation even if the e-mail of Mr Roffey could be construed as confirmation in writing and I include nothing in respect of this item in the final account.

Item 4.09

765. This was a claim in respect of access panels and an item which was included in Mr Bowler's 2017 assessment, and the Claimants' Response, in the sum of £355. I have reviewed the documents referred to in Attachment 4 and I am satisfied that the issue of a revised drawing was sufficient instruction in writing. I include the sum of **£355** in the final account.

Item 4.10

766. This was a claim in respect of soffit panels. In Marbank's Final Account there was a claim under this item for a carpenter foreman and materials in the sum of £284.99 which, as I have said above, was included in Mr Bowler's assessment. The documents referred to in Attachment 4, however, indicate that there was a dispute as to responsibility for this work as set out in Mr Fitzgerald's e-mail dated 13 November. That is consistent with Mr Bowler's comment referred to above. There is no evidence from which I could resolve this dispute and I certainly cannot conclude that there was a written instruction to carry out varied work. I do not, therefore, allow anything for this item in the Final Account.

Item 4.11

767. In the Final Account, this was a claim in respect of curtain tracks. As I noted above, this was an item which was included in Mr Bowler's 2017 assessment but in the amount of £285 rather than the amount of £835 which was claimed in the more detailed variation account. A sum of £311 was included in valuation no. 12 for additional curtain tracks in bedroom 3 and the master dressing room.

768. Mr McGee's view is that the proper valuation is £835.17 which is based on a quotation from a supplier but no reference to the quotation is given.

769. In Attachment 4, Marbank relied upon (i) an e-mail from Mr Strike dated 17 October 2013 which referred to Mrs Vainker's request for a double curtain rail in bedroom 3 and the master dressing room and provided a drawing for the updated detail and (ii) Mr Fitzgerald's subsequent e-mail dated 24 October 2013 instructing the provision of these curtain rails.

770. I am, therefore, satisfied that there was a written instruction for this additional item but, in the absence of any documentation to support the sum claimed, I include the sum taken from valuation no. 12 of **£311.**

Item 4.12

771. This item relates to a shower tray. Although not referred to in the Response, a sum of £672.79 was included in Mr Bowler's 2017 assessment. The sum claimed of £723.15 is that amount with the addition of overheads and profit. There is an express instruction from Mr Fitzgerald by e-mail dated 13 November 2013 to install a new shower tray and an express acceptance that this is a variation resulting from a discrepancy between the specification and a drawing. I include the sum of **£723.15** in the final account.

Item 4.13

772. This item appears to relate to works carried out by sub-contractors, Stoneworks. The Final Account included a sum of £2,922.12 (including oh&p) for "Stone Works Polished edges as per the attached quote and instruction." Mr Bowler's comment was "no - part of original Stoneworks quotation".

773. Mr McGee asserted that this was clearly a variation detailed in drawings issued by e-mail on 21 November and agreed by the Contract Administrator. He noted that the sub-contractor's estimate was not dissented from by the QS or the CA.

774. Further references were given in Attachment 4. These were, firstly, to an e-mail dated 21 November from SCd providing drawings amended to show the extent of polished edges to counter tops and shelf and, secondly, to a quote from Stoneworks dated 3 December 2013 giving "revised estimate now including the shelves by the bath in en suite 1". The estimate was based on revised drawings, the breakdown including the edges. This estimate is in the sum of £2,718.25 which with overheads and profit gives the total claimed by Marbank.

775. However, as the claimants submit, the previous estimate dated 3 April 2013 was in the sum of £5,138.32 and also included edges. No analysis appears to have been undertaken of the differences and any additional cost. The claimants submit that the difference in the estimates was the result of SCd deciding to reduce the amount of Jura stone used and the consequent revised drawings. There was no evidence adduced to support this submission. However, by the same token, there is no evidence as to the extent of any variation or why the total of the second Stoneworks quotation might be additional work under the Contract. There is not sufficient evidence that this item is a variation and I do not include anything for it in the final account.

Item 4.14

776. This was a claim in respect of wet room tanking. Mr McGee could not identify any documentation relating to this item and any work done could not be seen without invasive investigation. Marbank now concede this item and no sum is claimed.

Item 4.15

777. This is a claim for £280.58 for an additional light fitting and labour. Mr Bowler's comment in 2017 was "where? who instructed?".

778. Mr McGee noted that this item was valued at £300 in valuation no. 12. Attachment 2 relates this item to item 10 in that valuation which is described as "Tilt light fittings as discussed at site meeting 10/9/13" and the value is given as "say" £300. There is no evidence about this meeting and it is not at all clear that this is the same item.

779. Mr McGee further expresses the view that this item is clearly a variation which is detailed on drawings issued by e-mail dated 20 November 2013 and agreed by the Contract Administrator. The e-mails on this date show a revised drawing provided by CBG with an updated terrace lighting layout and an instruction by Mr Fitzgerald: "Light fitting on the terrace to proceed".

780. The claimants submit that this appears to be a claim in respect of terrace lights which are covered elsewhere. Whilst the references provided by or on behalf of Marbank do indicate that the light fitting referred to is a terrace light, there is no explanation of how it is covered elsewhere. It seems to me that there was clearly an instruction to proceed with the updated layout and it is inherently unlikely that Marbank would claim in respect of a single additional light fitting if there were not one. I include the sum of **£280.58** in the Final Account for this item.

Item 4.16

781. In the Final Account this was a claim for £2,864.88 (including overheads and profit) for the removal of a wall including cleaning, sorting and disposing of the same. Mr Bowler took issue with the time attributed to this work and commented that Marbank would need to provide timesheets signed by the Contract Administrator.

782. Firstly, it appears from this that no issue was taken with whether this work was instructed by the Contract Administrator or as to whether it was a variation. In Attachment 4, Marbank relies on an e-mail dated 19 December 2013 from Mr Fitzgerald in the following terms:

"I would confirm the verbal instruction from yesterday that you are to carefully lower the boundary wall towards the left hand rear of the property to a safe height. Please keep the bricks for later re- use. Store the bricks in a suitable location."

I note that Mr McGee relied on an e-mail dated 19 October 2013 but that would appear to be typographical error.

783. There was clearly an instruction in writing from the Contractor Administrator for this work. It is not a contractual requirement for the valuation of additional work that the contractor should provide signed timesheets. Mr Finn relies on an RICS Guidance Note to that effect in respect of "Final Account Procedures" but, whilst this may represent good practice, it is not incorporated into the Contract. Mr Finn's view is that the rates do not seem unreasonable and that, on a "figures as figures" basis, the sum claimed does not seem unreasonable.

784. In their closing submissions, the claimants point out that this item has already been paid for in valuation no. 13. It is right that valuation no. 13 includes a sum of "circa £450" as an allowance for the removal of bricks to the existing garden wall. This was an interim valuation and the inclusion of an allowance in the interim valuation does not preclude the inclusion of a greater sum in the final account.

785. In light of Mr Finn's opinion that the sum claimed is not unreasonable, I include the sum of **£2864.88** in the Final Account.

Item 4.17

786. This is a claim for an Accoya gate. This is an additional side gate for which Marbank claimed £3,102.45 including overheads and profit and which was allowed for in Mr Bowler's 2017 assessment and listed in the Claimants' Response. Marbank, therefore, treats it as an agreed item.

787. This amount was included in both valuations nos. 12 and 13 and is said to have been instructed by Mrs Vainker's e-mail dated 24 February 2014. I have reviewed the relevant e-mail chain and it is clear to me that Marbank quoted this price for the side gate; there was some discussion about a cheaper option; but ultimately Mrs Vainker and Mr Fitzgerald instructed Marbank to proceed at the originally quoted cost.

788. I, therefore, include the sum of **£3,102.45** in the Final Account.

Item 4.18

789. This item relates to edging to the pavings and paths. In the final account, Marbank omitted timber edging and added Pro Edge edging and claimed the total of £1,465.23. This is a further item that was allowed for in Mr Bowler's 2017 assessment and listed in the Claimants' Response. The same sum was also included in valuation no. 12.

790. Mr Fitzgerald's e-mail dated 20 January 2014 confirms the client's authorisation for the revised edging to proceed "as a variation" and amounts to a written instruction.

791. I, therefore, include the sum of **£1,465.23** in the final account for this item.

Item 4.19

792. This item is described as bricks to lightwell. In Marbank's Final Account, this was a claim for materials and a day's work by a bricklayer. The total claimed was £729.93. Mr Bowler's annotation was "Please provide further details together with instruction". The claimants submit that work does not appear to have been instructed by the Contract Administrator or confirmed in writing.

793. Mr McGee, in his report, expresses the opinion that this work was clearly a variation detailed on drawings issued by e-mail on 15 January 2014 and agreed by the Contract Administrator. Attachment 4 provided a reference to the e-mail apparently relied upon. There is, in fact, a chain of e-mails from which it appears that there was potential long lead in time and delay in the provision of brick "specials" by Marbank's sub-contractors, Litespeed. Mr Dow's position was that that was a result of SCd signing off the drawings in the wrong brick colour. The solution was to obtain replacement standard bricks to which there would be an additional cost. The response of Mr Strike of SCd by email dated 15 January 2014, sent to Mr Fitzgerald and Mr Bowler but not to Marbank, was as follows:

"Further to Grahams email with regards to the bricks to the light well please see attached tender detail drawing showing the brick specials required ie there has been no change to the tender design. However it would appear that Marbank don't have these specials and as such now appear to be blaming SCd and claiming it to be an additional cost.
Given the complications that Marbank have experienced with the brick specialist fabricator, Litespeed, we have now developed a revised detail enabling the use of standard bricks in order to assist Marbank by avoiding costs for specials and also delays. The drawing just issued to Marbank reflects that change."

794. There was, therefore, clearly no written instruction from the Contract Administrator to carry out this work contained in any e-mail of this date, although there was no dissent

from the Contract Administrator to the instruction, in effect given by SCd, to carry out this work. Even if that were sufficient written instruction, it is equally clear that the Contract Administrator did not agree this was a variation. There was clearly a dispute as to the responsibility for any change and there is no evidence from which I could resolve that dispute. Further the additional item claimed by Marbank makes no provision for the work that was necessarily omitted and appears to claim the whole of the work done and materials supplied as an addition.

795. I do not consider that Marbank has provided sufficient proof or explanation as to why this amount should be payable as a variation and I do not include anything for this item in the Final Account.

Item 4.20

796. In the Final Account, this was a claim for a boiler gas connection and was for a day of the time of a plumber and electrician in the total sum of £863.23. Mr Bowler's annotation was "who instructed? details?". The claimants say that they have seen no evidence that this was instructed or authorised.

797. Mr McGee recognises that this connection was necessary for the system to work but asserts that it was not included in the mechanical and electrical specification or the drawings. He gave no reference to any instruction. In Attachment 4, Marbank relies on an e-mail dated 12 December 2013 from Marbank to M&M. The e-mail forwards another e-mail which simply says that the gas has been connected and raises an issue about delay in the installation of the gas meter.

798. It would seem to me self-evident that a gas boiler needed to be connected to the gas supply and I am not persuaded that the fact that this was not expressly stated in the specification, as Mr McGee asserts, is sufficient reason to regard it as additional work. There would clearly be an argument that it was part and parcel of the work specified. Without further reference to the detail of the specification, this is not an issue that can be resolved. In any event, Marbank has been unable to refer to any instruction to carry out additional work or any document that even suggests that this was additional work.

799. In the circumstances, I do not include anything for this item in the Final Account.

Item 4.21

800. This item for rendering was not allowed by Mr Bowler in his 2017 assessment. Based on valuation no. 12, Mr McGee noted that liability for this work was clearly disputed; that no variation had been issued; and that the scope of the works was unclear. Marbank now concedes this item and no claim is pursued.

Item 4.22

801. This item was described as kitchen lipping. It was not allowed by Mr Bowler in his 2017 assessment. His comment was that the works were to remedy the incorrectly installed edge trim and were not a client issue. Mr McGee again recognised that there was a dispute which he could not resolve; that no variation had been issued; and that the scope of the works was unclear. Marbank now concedes this item and no claim is pursued.

Item 4.23

802. This item is described as addition of slab under paving. It was included in Mr Bowler's 2017 assessment in the sum claimed of £2,088.24 and listed in the Claimants' Response. The e-mail from Mr Fitzgerald relied upon by Marbank and dated 1 December 2014 is a clear written instruction to carry out this work as varied work. I include the sum of **£2,088.24** in the final account in respect of this item.

Item 4.24

803. In the 2017 Final Account, Marbank claimed a total of £24,039.87 under the headings Tiling Amendments, Timber Flooring Amendments and Removal of Kitchen to facilitate works. Mr Bowler allowed only £9,137.50 including £3,750 for the oak floor, £3,750 for kitchen adjustments and £1,000 for builders work. This item was listed in the Response in this amount but in the Scott Schedule the total was rounded up to £9,150. Mr Bowler was cross-examined in respect of his figures and he explained that they came from valuation no. 12. In his view, the figure in the Final Account had been "flowered up".

804. The claimants point out that this item raises the same issue as Scott Schedule item 44. They submit that £9,150 was included in valuation no. 12 and duly paid and that nothing more is due.

805. It is not in issue that Marbank was instructed to carry out works to the kitchen floor and to change the tiled area to timber. The instruction is set out under item 44. The instruction was expressly issued under clause 5.1 of the Contract as a variation. That does not, however, preclude a claim by the claimants on the basis that the variation was instructed as a result of a breach on the part of Marbank. The effect is that the contractor may be entitled to be paid but that the employer may be entitled to the same amount as damages – setting off the two sums would give a nil result. Accordingly, Mr Clay rightly summarises the issues arising on this variation as responsibility – whether Marbank is entitled to be paid and how much and whether the claimants are entitled to recover any sum already paid. It follows from my decision on item 44 that Marbank is entitled to be paid for the varied work as instructed in the rounded total of **£9,150** but that the claimants are entitled to recover the sum of £5,400. That will leave a net balance due to Marbank of £3,750 in respect of the change to oak floorboards.

Item 4.25

806. This item for a water softener was included in Mr Bowler's 2017 assessment in the sum of £2,248.90 and again listed in the claimants' Response. This is the sum now claimed in Attachment 2. Mr Fitzgerald's e-mail dated 10 September 2013 instructs the carrying out of this work as a variation, omitting in line softeners. He states that he understands the net addition to be £2,289. I include the sum of **£2,248.90** in the Final Account.

Item 4.26

807. This item is described as Miscellaneous and includes window/door handles and an actuator. Mr Bowler included the sum of **£1,387.27** in his 2017 assessment and Marbank claims this amount. There is a clear written instruction for these works in an e-mail from Mr Fitzgerald dated 10 September 2013 and I include this sum in the Final Account.

Item 4.27

808. There are two items with this item number: a pendant which Mr Bowler included in his assessment in the sum of **£670.72** and a sensor for which he included the sum of **£322**. The instruction of both these items was confirmed in an e-mail from Mr Fitzgerald dated 21 January 2014 and I include these sums in the Final Account.

Item 4.28

809. Mr Bowler included a sum of £2,732.40 in his 2017 assessment for this item (Audio entry system). By an e-mail dated 2 February 2014 to Mr Dow, Mrs Vainker confirmed that she authorised Mr Fitzgerald to instruct this work. This direct instruction from the employer is sufficient written instruction. I include the sum of **£2,732.40** in the Final Account.

Summary

810. The final account total is, therefore, £1,300,073.75.

811. From this amount, Marbank accepts that the sum of **£50,000** by way of liquidated damages for delay should be deducted. This was the subject of a pay less notice and there is no dispute about it. The total due to Marbank is, therefore, **£1,250,073.75,** against which Mrs Vainker has paid **£1,168,589**. I understand that to be exclusive of VAT and will address any submissions on VAT at the hearing of consequential matters.

Marbank's further claims

812. Marbank pleaded and claims a sum of £19,227 for "wasted management and staff time in addressing unfounded complaints and arranging betterment works". There is no legal basis for this claim and Marbank had made no attempt to articulate one.

813. In closing submissions, Mr Clay valiantly put this case on the basis that it should have been presented as a claim for payment for services requested. He submitted that after the end of the defects liability period, Marbank provided an extended service from goodwill and to keep the customer happy. But, he said, if one calls out busy people again and again, one cannot expect it always to be free. That may be so but there must be a basis for any claim for the busy person's time whether by agreement or as damages for breach of contract. There is none.

814. Marbank's further claim is for additional works which it contends were carried out at the claimants' request during the defects liability period but which it is contended Mrs Vainker should pay for. Only two matters are now pursued.

815. The first is a claim for £365 for window cleaning. By letter dated 8 August 2016, Marbank told Mrs Vainker that they would carry this out under the supervision of Mr Braggins. There was no mention of payment and there is, in my view, no basis for this claim.

816. The second claim is for £5,500. In short a dispute arose between Mrs Vainker and Marbank in respect of the sliding door and responsibility for its suitability, Mrs Vainker's position being that it was not in accordance with the specification. There is a Scott Schedule item no. 61 which alleges a defective trim to the sliding door rectified in 2014.

Nothing more was said about the alleged defect in the door at trial and there was no other claim in respect of it.

817. By a solicitors' letter dated 23 August 2017, Marbank offered to order and install the door "ex gratia". Mr Clay points out that the letter then said that Marbank's position in regard to the cost of the works remained reserved. The two are inconsistent. What is, however, clear is that Marbank, by its later solicitors' letter dated 5 September 2017, offered to replace the door "ex gratia" saying that if the offer was not accepted it would be withdrawn. Whether or not Marbank was liable for replacing the door, it did so and agreed to do so ex gratia – the agreement to do so ex gratia was clearly intended to convey that it would be done free of charge. There was no agreement on the part of Mrs Vainker for pay for these works and there is no basis for this claim by Marbank.

Next steps

818. Further matters including the further submissions I have invited in the course of this judgment, the total sums due amongst the parties, VAT and interest are to be addressed at a further hearing.

APPENDIX 1

[Appendix 2 to claimants' Opening Submissions]

Guidance

(i) The following guidance was in force at the time of the design and construction of the House, and is relevant to the brickwork defects (underlined emphasis provided throughout).

(ii) The Brick Development Association ("BDA")'s Design Note 7, 'Brickwork Durability' (January 2011) ("BDA Design Note 7") provides:

> *"**1. MODERN BRICKWORK AND TRADITIONAL DURABILITY***
> *…*
> *Saturation by water is the commonest potential enemy of brickwork, but recognition of this by appropriate design, specification and workmanship will ensure that modern brickwork will remain effectively maintenance free.*
>
> ***2. CAUSES & PREVENTION OF DETERIORATION***
> ***Saturation – the main cause***
> *Saturated brickwork may deteriorate for two reasons. Firstly, both bricks and mortar may be susceptible to damage by freezing when saturated. Secondly, if brickwork remains saturated for long periods, sulfate attack may disrupt the joints unless a suitable mortar is used.*
>
> ***Protection from saturation by design***
> *Brickwork is unlikely to become saturated where projecting features shed run-off water clear of the walling below. Roof overhangs or copings, projecting and throated sills at openings, bellmouths to renderings and similar features at the bottom of tile hanging and other claddings may provide such protection to wall heads. Protection is also afforded to brickwork by damp-proof courses, flashings and weatherings, as discussed in PD 6697.*
>
> ***Exposed conditions***
> *The frequency and extent of saturation of brickwork also depends on the degree of exposure to the weather. In areas of high exposure to driving rain, it is particularly important to give consideration to architectural features that minimise saturation and to note that elements and details in the same building may be subjected to different degrees of exposure.*
> *…*
>
> ***Vulnerable details & locations***
> *If, for functional or aesthetic reasons, protective features are omitted, particular attention should be paid to the choice of bricks and mortar.*
>
> *The following are locations where brickwork is likely to remain saturated for long periods:*
> - *Near ground level below dpc and in foundations.*

- *In free-standing walls, retaining walls, parapets and*
- *In cappings, copings, sills, and chimney terminals.*

…

Workmanship
The quality of workmanship, both in the preparation of the mortar as well as in bricklaying, is a vital factor in achieving the long-term durability of brickwork.

3. FROST ACTION
The mechanism
The destructive effect of frost is due to the 9% increase in volume that occurs when water at 0°C is converted into ice at the same temperature. When bricks and mortar are saturated and frozen, expansion within the pore spaces may set up stresses that cannot be withstood. With some bricks and mortars, accessible space within the pore structure, in which expansion can take place, greatly reduces the risk of frost damage.

It is not necessarily the coldest or wettest winters that lead to frost failure, but rather recurring freeze/thaw cycles of saturated brickwork. When failure occurs, brick surfaces may flake or spall, while the mortar joints may crumble.
…

4. SULFATE ATTACK
…
Vulnerable situations
Parapets and free-standing walls without effective copings and dpcs, and other exposed brickwork, may remain wet long enough for sulfate attack to occur if the other conditions are present.

5. EXCLUSION OF WATER FROM BRICKWORK
…
Copings & cappings: Definitions
Copings provided at the top of chimney stacks, parapet walls, free-standing walls and retaining walls will minimise the risk of saturation of the brickwork. For the purpose of this document a coping is defined as a unit or assemblage which sheds rainwater falling on it clear of all exposed faces of the walling it is designed to protect. A capping, on the other hand, whether flush or projecting, does not incorporate a throating or similar device designed to shed water clear of the walling below. In the case of a coping, PD 66971 recommends that the drip edge of the throating should be at least 40mm from the face of the wall.

A continuous sheet dpc should be provided beneath jointed copings and cappings, in order to prevent downwards percolation of water into the wall should the joints fail. The dpc will normally be positioned immediately underneath a [coping]. With a capping, in order to obtain greater mass above the dpc, it may be positioned one or more courses lower down. The risk of a coping or capping being displaced will be

minimised by the use of a dpc designed to give a good bond with the mortar…

…

7. MORTARS

…

Mortar joints

Recessed joint profiles in external brickwork will increase the level of saturation along the upper arrises of the bricks, with a consequent risk of frost damage.

Such joints should only be used with frost resistant clay bricks, and the depth of the recess should take into account the proximity to the exposed face of the brickwork of perforations in the brick.

…

9. SELECTION OF BRICKS & MORTARS FOR DURABILITY

…

Unrendered parapets (excluding the coping or capping)

Irrespective of the climatic exposure of the building as a whole, the brickwork in parapets is likely to be severely exposed, particularly if the parapet has no coping.

There has been an increasing tendency in recent years to use flush cappings at the head of brickwork parapet walling, in the form of brick-on-edge, brick-on-end, bonded brickwork or a purpose-made capping unit. Such cappings give relatively little protection to the brickwork beneath, which may become saturated for several courses below the capping level.

Serious consideration should be given to the protection of parapets by adequate copings and dpcs. If, for aesthetic or other reasons, this is unacceptable, the choice of bricks and mortar for the parapet becomes critical and may, of course, govern the choice for the whole building.

Unrendered chimneys (excluding capping or terminal)

Because chimney stacks are normally exposed on all four faces and the top, they may be more liable to saturation and frost attack than other parts of the building, especially when an effective coping has not been provided at the terminal

Cappings of brickwork… cannot be relied upon to keep out moisture indefinitely and require an effective dpc beneath them. Where possible, a precast concrete coping in one piece, with a weathered top, ample overhang and properly throated, is preferred.."

(iii) The BDA's 'Guide to Successful Brickwork' (Third edition, 2005) provides:

*"**4.3 DAMP-PROOF COURSES***
DAMP-PROOF COURSES – BEDDING IN MORTAR

…

Care should be taken to use the correct DPC for the width of the wall. The DPC should extend through the full thickness of a solid wall and through each leaf of a cavity wall and should not be covered by pointing or rendering.

5.2 CAVITY PARAPET WALLS
BUILDING OPERATIONS
DPC trays

…
2. … Trays should also be sloped down to the outer leaf in highly exposed conditions as otherwise water may track across the underside of the cavity tray after penetrating under the DPC. Failure to achieve good adhesion by bedding the DPC on fresh mortar will increase this risk.
…
4. Bed DPC trays on fresh mortar followed by the next course as soon as possible to achieve good adhesion between mortar and DPCs. DPCs should project 5 mm, or be flush as instructed. ***Never*** *position the DPCs so that the edges are covered with mortar…"*

(iv) The BRE Guidance documents on parapet walls, 'BD2452 – Safety of Masonry Parapets' ("BD2452") provides:

*"****Construction guidelines***
…
Damp proof courses and cavity trays
Damp proof course and cavity trays must have good bonding properties to the masonry.
…

Placement of components
The primary aim should be to prevent water from entering the parapet wall. If the parapet wall is continually damp, problems from sulfate attack may follow.
…
Consider alternatives to using a parapet because of the high risk of failure when compared with other possible options, if this guidance is not followed. A well designed roof overhang is much less likely to lead to rain penetration and will offer better weather protection to the underlying wall.

Prevention of the penetration of rainwater requires the use of:

- *Copings with an adequate overhang;*
- *Support of the damp proof course below the coping;*
- *Adequate lapping and sealing of the damp proof course below the coping;*
- *Correct installation of cavity trays;*

Damp proof course
…

- *The damp proof course and its support should be bedded on fresh mortar.*
- *Damp proof course membrane should extend at least 5mm beyond each face of the parapet wall, see Figure 3*

Cavity trays

…

- *… The cavity tray should project at least 5mm from the finished surface of the wall in order to provide an adequate drip detail…*
- *…*
- *Cavity trays must be laid on a bed of fresh mortar*."

Adjacent elements

…

Flat roofs

…

- *Flashings associated with the roof should lap under the parapet wall damp proof course…*
- *Roof cover flashings should be well lapped by the cavity tray.*
- *Flashings associated with adjacent roof coverings should be set under the damp proof membrane.*"

(v) British Standard EN 998-2:2003, 'Specification for mortar for masonry' ("BS EN 998-2:2003"), which was referred to by SCD in clauses F10/110 and F10/111 of the Specification provides:

"***Annex B***
(informative)

Use of masonry units and masonry mortar

…

The following examples are given for masonry or masonry elements subjected to severe exposure:

- *…*
- *Unrendered parapets where there is a high risk of saturation with freezing, e.g. where the parapet is not provided with an effective coping;*
- *Unrendered chimneys where there is a high risk of saturation with freezing;*
- *Cappings, copings and sills in areas where freezing conditions may occur;*

…

The following suitable measures to prevent saturation of the masonry are given:
1) protection to wall heads by roof overhangs or copings;
2) projecting throated sills;
3) damp-proof courses at the top and base of walls;

(vi) British Standard 8215:1991, 'Code of Practice for Design and installation of damp-proof courses in masonry construction' ("BS 8215:1991") provides:

> *"**3. Basic principles***
> *…*
> *The function of a DPC is to prevent moisture or water passing from one part of a construction to another. DPCs should be designed in conjunction with flashings and damp-proof membranes to ensure a continuous barrier. Not only should they form a barrier to the passage of water but they should also deflect such water to the exterior of the building where it can safely drain.*
> *…*
> ***5. Design***
> ***5.1 Exposure conditions***
> *The designer should first determine the degree of exposure, the risk of penetration from any direction (upwards, downwards or horizontally) and the consequences of water penetration.*
> *…*
> ***5.2 Primary protection***
> *Careful design, including the provision of weathered copings, sills, overhangs and projections, should provide primary protection which will eliminate or greatly reduce the risk of damage to building fabric and help to prevent water penetration to the interior of the building.*
> *…*
> ***6. Sitework***
> *…*
> ***6.3 Functional Requirements***
> *…*
> *It is essential that a DPC should extend the full width of the wall, including any surface finishes (see Figure 12)[1]. It is vitally important that the barrier should be continuous."*

(vii) The BRE Good Building Guide, 'Building damp-free cavity walls' provides:

> "***Defects in the outer leaf***
> *Most of the leakage through the outer leaf is at fully or partly filled joints between the bricks and the mortar. Good workmanship can help to prevent this; it is especially important to fill the perpends properly, although this is frequently not achieved in practice. This is particularly pertinent in areas of high exposure, where driving rain can be blown through wide joints and across the cavity via bridging features such as wall ties, mortar, displaced insulation batts or brick fragments to wet the inner leaf. The type of pointing also has an effect: 'bucket handle', weathered or struck pointing have the best resistance to driving rain (Figure 2). Recessed pointing, which allows water to pond on the exposed upper face of the brickwork, can result in extensive rain*

[1] Figure 12 is a diagram showing a DPC extending beyond the face of the wall, marked *"(a) Preferred*" and a DPC which does not extend beyond the face of the wall / the surface finish on the wall, marked *"(b) Deprecated*".

penetration and should only be considered for use on buildings in sheltered locations.

…

Installing damp-proof courses

A DPC in masonry must be laid on a full, even bed of fresh mortar. Lay a full bed of mortar over the DPC and then a further course of masonry. Poor bedding of DPCs in masonry joints can lead to rain penetration, particularly at the heads of openings, with water entering below the edge of a cavity tray.

…

The DPC must cover the full width of the masonry and project about 5 mm beyond any external face. Horizontal joints in DPCs should be lapped by a minimum of 100 mm and must be sealed where they have to resist the downward movement of water, for instance in parapets."

Appendix 2: Inspections

A November 2019	South / side elevation, towards East / front (red brickwork)	• Dampness / staining to capping bricks and 16 courses of brickwork <u>Capping bricks</u> • Flush to front and back, with no overhang / drip • Slope towards building elevation • 'Composite', formed of three cut bricks 'stuck' together • Insufficient mortar between capping bricks <u>DPC / cavity trays</u> • Upper DPC / cavity tray stopped short of outer face of brickwork by approx. 25mm • Underside of upper DPC was wet • Lower DPC / cavity tray stopped short of outer face of brickwork by approx. 10mm • Both DPC / cavity trays sitting directly on brickwork, and not on mortar bed • No recessed mortar joint
B November 2019	North / side elevation, towards East / front (buff brickwork)	• Dampness / staining to capping bricks and 20 courses of brickwork • Extensive evidence of moss to mortar joints at capping level <u>Capping bricks</u> • Flush to front and back, with no overhang / drip • Slope towards building elevation • 'Composite', formed of three cut bricks 'stuck' together • Insufficient mortar between capping bricks <u>DPC / cavity trays</u>

		• DPC / cavity tray stopped short of outer face of brickwork by approx. 45mm • DPC / cavity tray sitting directly on brickwork, and not on mortar bed • No recessed mortar joint <u>Flashing</u> • Higher end of DPC / cavity tray to the inner leaf of parapet wall was dressed <u>over</u> by the lead flashing to the inner leaf • Flashing to inside corner of parapet poorly executed with significant cracking to the mortar • Sealant used on top of flashing, which was cracked <u>Weepholes</u> • No weepholes along cavity tray line to East / front elevation
C November 2019	North / side elevation, towards West / rear (buff brickwork)	• Dampness / staining to capping bricks and 15 courses of brickwork <u>Capping bricks</u> • Flush to front and back, with no overhang / drip • Slope towards building elevation • 'Composite', formed of three cut bricks 'stuck' together • Insufficient mortar between capping bricks <u>DPC / cavity trays</u> • DPC / cavity tray stopped short of outer face of brickwork by approx. 45mm • DPC / cavity tray sitting directly on brickwork, and not on mortar bed • No recessed mortar joint <u>Flashing</u>

		• Lead flashing to the inner leaf of the parapet dressed over the DPC / cavity tray • Flashing to corner poorly executed with significant cracking to the mortar / sealant
C2 August 2021	North / side elevation, towards West / rear (adjacent to Area C) (buff brickwork)	• Dampness / staining to 40 courses of brickwork • Damp and discolouration of brickwork had significantly extended since November 2019 • Evidence of moss, cracking and erosion to mortar joints at capping level, with possible displacement of the capping bricks • Erosion of brickwork mortar on West / rear elevation for over 16 course of brickwork. Capping bricks • Flush to front and back, with no overhang / drip • Slope towards building elevation • 'Composite', formed of three cut bricks 'stuck' together • Insufficient mortar between capping bricks DPC / cavity trays • DPC / cavity tray installed to the corner in various layers, none of which were sealed to one another • DPC / cavity tray to North / side elevation stopped short of outer face of brickwork by approx. 20mm • DPC / cavity tray to West / rear elevation stopped short of outer face of brickwork by approx. 25mm • DPC / cavity tray sitting directly on brickwork on North / side elevation, and not on mortar bed • No recessed mortar joint Flashing • Lead flashing to the inner leaf of the parapet dressed over the DPC / cavity tray

		• Flashing to corner poorly executed with significant cracking to the mortar / sealant <u>Weepholes</u> • No weepholes along cavity tray line to West / rear elevation • No weephole allowance at corner of West / rear elevation to allow for discharge of moisture
D November 2019	North / side single-storey elevation, below first floor terrace (buff brickwork)	• Dampness / staining to capping bricks and seven courses of brickwork <u>Capping bricks</u> • Flush to front and back, with no overhang / drip • No slope <u>DPC / cavity trays</u> • DPC / cavity tray stopped short of outer face of brickwork by approx. 35mm • DPC / cavity tray protruded from under the capping brick to the inner leaf of the parapet wall (one brick course above the lead flashing) • DPC / cavity tray sitting directly on brickwork, and not on mortar bed • No recessed mortar joint <u>Flashing</u> • Lead flashing to the inner leaf of the parapet was located a full brick course below the upper level of the DPC / cavity tray, leaving a brick course exposed between the DPC / cavity tray and the flashing
D2 August 2021	North / side single-storey elevation, below first floor terrace (adjacent to area D)	• Entire elevation shows extensive discolouration and/or staining • Concrete lintel with brick slip was visible • Mortar damaged at high level <u>DPC / cavity trays</u>

	(buff brickwork)	• DPC / cavity tray stopped short of outer face of brickwork by approx. 65mm • DPC / cavity tray sitting directly on lintel / brick slip, and not on mortar bed • No recessed mortar joint
E August 2021	West / rear elevation (red brickwork)	• Extensive evidence of moss and erosion to mortar joints at capping level • Discolouration / staining was evident below the weepholes <u>Capping bricks</u> • Insufficient mortar between capping bricks <u>DPC / cavity trays</u> • DPC / cavity tray stopped short of outer face of brickwork by approx. 30mm • Cavity tray did not fall towards outer leaf, but formed a channel inside the cavity • Cavity above cavity tray blocked by a piece of brickwork fixed into place with mortar • No recessed mortar joint