Case No: HT-2021-BHM-000018

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

Neutral Citation Number: [2024] EWHC 840 (TCC).

Birmingham Civil and Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 16 April 2024

Before :

HHJ SARAH WATSON

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Between :

Miss Perdita Martell	**Claimant**
- and –	
Mr Grzegorz Roszkowski	**First Defendant**
Mr Slawomir Walczak	**Second Defendant**
Martin Gustyn & Associates Ltd	**Third Defendant**

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James Fairbairn (instructed by **Nexa Law**) for the **Claimant**
Barry Cawsey (instructed on a direct access basis) for the **First and Second Defendants**
Ruth Keating (instructed by Beale & Company Solicitors LLP) for the **Third Defendant**

Hearing dates: 15 January 2024 to 19 January 2024

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JUDGMENT

HHJ SARAH WATSON:

BACKGROUND

1. The Claimant, Miss Perdita Martell, seeks damages for the cost of remedial work to her property that she claims was required as a result of the Defendants' breaches of contract and/or breaches of tortious duties. The First Defendant, Mr Grzegorz Roszkowski and the Second Defendant, Mr Slawomir Walczak, who traded together as GS Building Services (GSB), are builders. The Third Defendant, Martin Gustyn & Associates Limited (MGA), provided structural engineering services to Miss Martell.

2. GSB counterclaim for lost profit resulting from what they claim was Miss Martell's repudiatory breach of contract.

3. Miss Martell owned 95A Percy Road, London ("the Property"), which was the ground floor and basement of a terraced house. She also owned the freehold of the building. The first floor was subject to a long lease owned by others. She intended to develop 95A by refurbishing and extending the ground floor and converting and extending the basement to form living accommodation. She had some previous experience of refurbishing properties. On previous projects, she had used MGA for structural engineering work. She had a good relationship with its proprietor Mr Martin Gustyn. She consulted him at the early stages about her plans for the Property, to advise on the feasibility of her ideas.

4. The project involved excavating the basement to create more headroom, underpinning the existing house walls and foundations with reinforced concrete, building new reinforced concrete walls for the extension to the basement and building a ground floor extension above it. The basement extension, like the existing basement, was underground and the basement extension walls were therefore also retaining walls supporting the surrounding ground.

5. Miss Martell did not employ an architect. She engaged MGA as her structural engineer for the project and to prepare the plans for planning permission that would more usually be prepared by an architect. She also appointed Mr Gustyn of MGA as the party wall surveyor for the works.

6. MGA applied for and obtained planning permission for the works on Miss Martell's behalf. On MGA's advice, the planning process was in two stages. Separate applications were made for the ground floor rear extension and for the work to the basement, with the permission for the ground floor extension being obtained first.

7. The builders Miss Martell had used on previous projects did not wish to undertake the work, as they were not experienced in basement conversions. Mr Gustyn recommended GSB, with whom he had previously worked. Miss Martell appointed GSB to carry out the work under a written contract prepared by GSB ("the Building Contract").

8. Consistently with its previous work for Miss Martell, MGA did not issue any engagement letter specifying the scope of its work or its fees. The scope of MGA's responsibilities is in dispute.

9. After the work had begun, Miss Martell was called away to Northumbria to look after her uncle, who was unwell. She was away between mid-March and August, making very infrequent visits back to London, as she was rarely able to leave her uncle. During that time, Mr Gustyn visited the site and communicated with Miss Martell as to progress.

10. Miss Martell claims that there were two principal problems with the work. The one that was most immediately apparent was that a large amount of water penetrated the basement. The second was not immediately apparent to her. It was discovered when she sought advice as to the remedial work required to address the ingress of water, when she was advised to test the concrete. The results suggested that the concrete used in underpinning the existing house and building the walls of the basement extension was not of the required specification, in that it did not reach the required compressive strength (RC35).

11. Against GSB, the Claimant's case is that they were in breach of the Building Contract for failing use concrete of the correct specification for the underpinning and basement extension works and for failing to design and construct a suitable waterproofing system, so that it was necessary for the concrete to be replaced and for a properly designed waterproofing system to be installed.

12. Against MGA, her case is that MGA was in breach of its contractual duty to her by failing to monitor the works and ensure that it was built to the contractual specification. In

particular, she alleges that MGA failed to notice or notify her that the concrete was not of the correct specification and that, had it done so, the failure of the concrete to meet the contractual specification would have been noticed at an early stage, avoiding the loss she sustained. In relation to the waterproofing issue, her case is that MGA was in breach of its duty to advise her to obtain advice from a competent expert in waterproofing, rather than leave the design of the waterproofing scheme to GSB.

13. Miss Martell's case is that the concrete issue alone justified the remedial work she undertook and that the issue of whether the waterproofing system was also defective is not material, since the remedial work for the concrete issue destroyed any existing waterproofing system in any event. Her case is that, if she is right, there is no need to consider whether GSB and/or MGA's work in relation to the waterproofing system was also in breach of contract. Her alternative case is that, if the concrete did not breach the specification, so she is not entitled to the remedial costs to remedy the concrete issue, remedial work would have been required to remedy the waterproofing system.

14. She claims £394,686.12 for the cost of remedying the defects, including the costs of advice and assistance from professionals. In addition, she claims finance costs on money borrowed to finance the remedial works, to be assessed.

15. All the Defendants deny liability. They also dispute quantum on the basis that Miss Martell failed to mitigate her loss and incurred costs that were not reasonable.

REPRESENTATION

16. The Claimant was represented by Mr Fairbairn, a Solicitor Advocate. BSG were represented by Mr Cawsey of Counsel. MGA was represented by Miss Keating of Counsel. I wish to thank the advocates for the cooperative and efficient way the trial was conducted, and for their helpful and focussed submissions, which meant the trial was completed within what was thought to be an optimistic timetable.

THE ISSUES

17. The issues between the Miss Martell and GSB are:

17.1. What was the specification for the concrete?

17.2. Did the concrete meet the specification?

17.3. If not, did that cause Miss Martell's loss?

17.4. Were GSB responsible for the design and installation of the waterproofing system?

17.5. If so, did they carry out their design obligations and/or their installation obligations with reasonable skill and care?

17.6. If not, did their breach of contract cause Miss Martell's loss?

17.7. Are Miss Martell's claimed losses recoverable or did she fail to mitigate her loss?

17.8. Was Miss Martell in repudiatory breach of contract so that GSB were entitled to treat the contract as at an end when they left the project?

17.9. If so, are GSB entitled to damages for their lost profit?

18. The issues between Miss Martell and MGA are:

18.1. Did MGA's duties to Miss Martell include inspecting the works as they progressed to check whether the work, including the concreting, was carried out in accordance with the contractual specification?

18.2. If so, did MGA carry out those duties with reasonable skill and care?

18.3. If not, did the breach of duty cause Miss Martell's loss?

18.4. Did MGA owe Miss Martell a duty to advise her to obtain specialist advice as to the design of the waterproofing system?

18.5. If so, did it breach that duty?

18.6. If so, did the breach cause Miss Martell's loss?

18.7. Are Miss Martell's claimed losses recoverable or did she fail to mitigate her loss?

19. There are no contribution proceedings or Part 20 Claims between the Defendants and the issue as to apportionment of any liability between GSB and MGA is not before me. Despite some of the focus of GSB's and MGA's closing written submissions being on the others' responsibility for the problem, I am only concerned with the issues of the Defendants' liability to the Miss Martell.

EVIDENCE

20. There is a substantial volume of contemporaneous correspondence, including emails, in the trial bundle.

21. I had the benefit of expert evidence on the structural engineering issues from Mr Kevin Short for Miss Martell, Mr Nick Barham for GSB and Mr Andrew Hardy for MGA. I had the benefit of expert evidence on quantity surveying issues from Mr David Emin for Miss Martell, Mr David Drljaca for GSB and Mr Michael Ulyatt for MGA. I am indebted to the experts for their assistance and their cooperative approach. I am satisfied that all the experts fully understood their professional duty to the court as expert witnesses. Much of their evidence was agreed.

22. I heard evidence from Miss Martell, Mr Walczak and Mr Roszkowski for GSB and Mr Gustyn for MGA.

23. Miss Martell struck me as an entirely honest and straightforward witness. She made appropriate concessions. Her evidence was consistent and also consistent with the documentary evidence. Mr Roszkowski was not as involved in the day-to-day work on the project as Mr Walczak. His evidence was principally to confirm his agreement with Mr Walczak's evidence. Mr Walczak gave the substantive evidence for GSB. He struck me as a witness who was doing his best in what he found to be the very stressful situation in which he found himself. He was clearly proud of his skills and reputation and had difficulty in accepting that GSB's work was not to the required standard. Nonetheless, he made concessions, even when it was not in GSB's interests to do so, and volunteered information on the basis that he wanted to explain what had actually happened. He struck me as an honest witness who felt he had been let down by Mr Gustyn. Mr Gustyn was not an impressive witness. His evidence was at times implausible and frequently inconsistent with the documentary evidence and his own evidence.

24. I will consider the evidence in more detail by reference to the issues below.

MORE DETAILED FACTUAL BACKGROUND RELEVANT TO THE ISSUES

25. To avoid too much repetition as I consider the issues relating to the separate Defendants, is it is convenient for me to set out the chronology of events during the project.

26. Miss Martell first involved Mr Gustyn in the project in February or March of 2014, when she sought his advice as to the feasibility of her plans. She had been advised that the Property needed to be underpinned in any event and she discussed with Mr Gustyn the feasibility of converting and extending the basement at the same time. Mr Gustyn's advice was that it would be preferable for planning permission to be obtained in two stages, the first being to obtain permission for the rear ground floor extension and the second being to obtain permission for the basement conversion work. MGA submitted a planning application for the rear extension on Miss Martell's behalf on 16 April 2014, which included plans it had prepared. On 14 May 2024, Mr Gustyn notified the adjoining owners that he had been appointed as Miss Martell's party wall surveyor.

27. On 25 May 2014, Miss Martell sent to GSB the preliminary drawings of the project that had been prepared by MGA to see whether they were interested in doing the work. They were interested but unable to provide a quotation at that stage as the plans were not sufficiently detailed.

28. On 9 June 2014, MGA instructed Chelmer Site Investigations (Chelmer) to prepare a report on the ground conditions, which was required for the design of the foundations of the proposed basement conversion and extension.

29. On 19 June 2014, Miss Martell asked MGA for calculations and plans for the basement, as she needed them to obtain quotations from builders.

30. On 26 June 2014, planning permission for the rear extension was granted.

31. On 28 August 2014, having received the report from Chelmer, Mr Gustyn emailed Miss Martell summarising the main points and adding: "*there are many more other comments and observations but these are very technical which are mainly needed by us, engineers to progress a design.*"

32. On 3 September 2014, Mr Gustyn sent Miss Martell structural plans and a temporary work sequence for use in the planning application for the basement conversion and extension. He advised her that these could be sent to contractors to obtain quotes. The plans and detailed drawings, including sections, contain notes. On the sections showing the concrete slab, walls and underpinning are notes as follows:

"This drawing is to be read in conjunction with all the architect's and engineer's drawings and the specifications.

Temporary works are to be to the contactor's details.

All waterproofing, insulation and finishes to floors walls and roofs to architects details.

Concrete grade to be RC35 to BS 8500 Part 2 and BS EW 206"

33. On 5 September 2014, MGA applied on Miss Martell's behalf for planning permission for the basement extension. Permission was granted on 30 October 2014.

34. On 16 November 2014, MGA invoiced Miss Martell for work to date on the second application. The email breaks down its fees and includes the following work:

"Structural drawings, preliminary calculations, temporary works design for planning application submission £4,500 + VAT (60% of Structural Engineering work completed)

....Additional involvement:

- *Structural drawings, details, calculations, specification for construction, party wall and building control purposes: £3,500 + VAT. Please confirm that you wish to me to proceed"*

35. On 17 November 2014, Miss Martell forwarded to GSB the email dated 3 September 2014 from MGA under cover of an email as follows:

"Please find attached all the structural calculations and specifications from Martin which you had requested in order to complete the quote.

I'd be very grateful if you could complete the quote and send it to me as soon as possible....."

36. On 21 November 2014, MGA informed Miss Martell that MGA would require six working days to complete the design work on the Property so she should expect the complete structural engineering package by Monday 1 December 2014.

37. During the morning of 23 November 2014, GSB sent to MGA (and not to Miss Martell) a quotation for the work. In the afternoon of 23 November, GSB sent a quotation to Miss Martell. Mr Walczak's evidence, which I accept, is that the reason GSB sent the quotation to Mr Gustyn before sending it to Miss Martel was so that Mr Gustyn could look at it and let him know if there was a problem, such as the price being higher than the client's budget so it needed to be reduced.

38. On 8 January 2015, Miss Martell notified Mr Gustyn that she would probably instruct GSB to do the work as she felt more comfortable knowing that Mr Gustyn knew them.

39. On 11 January 2015, Miss Martell asked GSB to accept the job and advised them *"Martin Gustyn is working on the detailed specifications and completing the party wall awards, and will send them thorough to us as soon as he has completed them."*

40. On 20 January 2015, MGA sent to GSB the temporary works design for the project and asked for any comments.

41. On 23 January 2015, GSB sent to Miss Martell a method statement, which was in fact the same as Mr Gustyn had sent to them a few days previously.

42. On 30 January 2015, Miss Martell and GSB entered into the Building Contract, which had been prepared by GSB. The Building Contract referred to GSB's quotation.

43. On 9 February 2015, Mr Gustyn wrote to the party wall surveyor for one of Miss Martell's neighbours, Notting Hill Housing Association, confirming that MGA would change the status of the drawings to "construction" and saying *"I confirm that we have been appointed as the Project Structural Engineers and the temporary works Engineers. We will be visiting a site (sic) approx 2-3 times per month to monitor progress of the construction works. I will send you a plan drawing shortly with a sequence of underpinning work…"*

44. On 14 February 2015, MGA sent GSB "*drawings (plan and section) for the reinforced concrete underpinning under the party wall for the extend shown in green (sic). That*

should keep you going for the next week or more. I will send you the rest of the plans by the end of the week." Notes on the attached plans include a note *"Concrete grade to be RC35 to BS:8500: Part 2 and BS EW 206*".

45. A Party Wall Act award was completed with the owner of No 97 Percy Road on 17 February 2015.

46. On 16 March 2015, Mr Gustyn reported to Miss Martell that he had visited her site "*20 minutes ago and discussed everything with Slawek*".

47. On 18 March 2015, Miss Martell notified Mr Gustyn that she had to go north for a few days to see her uncle. Miss Martell's evidence, which I accept, is that, although she did not initially expect to be spending a long time away from London, she was unable to leave her uncle due to his condition and her stay became protracted and she remained principally in Northumbria until August, with only brief and infrequent visits to London.

48. On 27 March 2015, the Party Wall Act award with the owner of no 93 Percy Road was completed.

49. On 31 March 2015, Mr Gustyn made visited the site and sent photographs of the site to Miss Martell.

50. On 9 April 2015, Mr Gustyn visited the site and reported on progress to Miss Martel by email. He sent photographs from "*today's site inspection*". He stated that the shallower underpinning under party wall with no 93 was nearly completed with one remaining section which should be ready by the end of the week, that the excavation and underpinning of the front lightwell would be completed towards the end of the excavations to allow room for the conveyor belt and dumper, and that GSB would be knocking down the rear walls and old extension and excavating for the rear underpinning and new foundations. He said that there were "*generally no issues on site; minor issues and queries are being resolved on site level.*"

51. On 15 April 2015, Mr Gustyn sent to Mr Martyn Janzemin of London Building Control (the private Building Control inspector appointed for the project) and copied to Miss Martell and GSB "*the complete structural package for this project*", including the drawings that had been provided previously to GSB and Miss Martell but which were

now marked "*construction*" and a document entitled "*Structural Specification*" dated 13 April 2015 ("the Structural Specification"). The Structural Specification included the following:

"MG08 Underpinning

20 WORKMANSHIP The work shall be carried out in accordance with the Engineer's drawings and instructions and to the approval of the Architect and the Building Control officer. This inspection is intended to be used for mass concrete underpinning.

……

CONCRETE GRADE on works where a full specification has not been provided a FND2 mix should be used. This has a characteristic 28 day strength of 35N/mm^2 and *is suitable for Class 2 sulphate soils.*

…….

MG10 INSITU CONCRETE

10 MATERIALS and Workmanship are to comply with BS 8110

20 CONCRETE for reinforced concrete structures is to be designated mixed RC35 to BS 8500 Part 2.

…….

50 READY mix concrete is to be used unless otherwise allowed by the Structural Engineer. This must be obtained from a plant which holds a current Certificate of Accreditation under the Quality Scheme for Ready Mix Concrete. Details of cement type, aggregate grading and sources, with chloride and sulphate content of mixes to be submitted to the Structural Engineer for his approval prior to ordering any concrete.

60 THE use of site mixed concrete for structural elements may only be used following the written approval of the Structural Engineer. Batching and mixing equipment will need to comply with BS1035 and BS 4251

130 THE rate of sampling for compressive testing of concrete is to be agreed with the Structural Engineer prior to commencement of any concrete works."

52. On 27 April 2015, MGA emailed GSB. Among the issues mentioned was the requirement to correct some underpinning near the rear party wall with 93 Percy Road and to install some props. The email stated that Mr Gustyn would be on site the following day to inspect the erection of the temporary plywood hoarding and removal of the boundary wall.

53. On 6 May 2015 Mr Gustyn reported to Miss Martell that he had had a meeting with the Enforcement Officers which had gone well and there were no negative comments, and that he had "*assured them that all works are carried out as per agreed planning drawings, party wall agreements and building control requirements*."

54. On 26 June 2015 Mr Gustyn sent a WhatsApp message to Miss Martell to say that a meeting had taken 1.5 hours "*but all under control*".

55. On 31 July 2015, Miss Martell asked Mr Gustyn when he was next visiting site because she needed to move in in 5 weeks and was getting anxious and had no idea what the work looked like, as Mr Walczak had sent some photographs, but they were not as good as the ones that Mr Gustyn sent. Mr Gustyn responded two minutes later that had visited site the previous day and sent photographs as requested. He said "*the rear basement slab is completed but the water is still going through the joints. G&S are undertaking some remedial works to stop the water*". The attached photographs showed a considerable amount of water on the basement floor. Whilst it appears that Mr Gustyn provided this information to Miss Martell in response to her request, it is clear that the site visit had already occurred and Mr Gustyn already had the photographs and had discussed the problem of water ingress with GSB.

56. Miss Martell responded "*Oh my god that's a lot of water still coming in.. are you worried??*" and a further message "*And how do you feel about the schedule?*"

57. Mr Gustyn responded "*The guys have asked for a 4 weeks EoT. They have not mentioned to me since about additional delays etc. I will visit a site (sic) again next week to see if they manged to control the water*". From that, it appears that Mr Gustyn had already

discussed with GSB a possible extension of time but had not yet reported it to Miss Martell.

58. Miss Martell responded "*Thanks so much Martin.. I'm worrying (as usual!) but it does look like that water is significant… are the guys confident they can stop it? Look forward to your update next week. …. I'm hoping to be back on Monday/Tuesday*".

59. There are various further messages between Mr Gustyn and Miss Martell in which Miss Martell expressed concern about the water in the basement. On 28 September 2015 she sent a message saying she had been told that the water on the floor was from a bucket but she was watching the water coming up under the wall. Mr Gustyn asked her to send him a request that he could pass on to the effect that the membrane should not be put on top until both she and he were happy with the bottom slab, and suggested she give GSB the chance to put things right.

60. At the end of September and start of October 2015, relations between Miss Martell and GSB became strained. Miss Martell, who had planned to move into the Property with her furniture on completion of the sale of another flat, was clearly frustrated and anxious with the delay to the project and the ingress of water into the basement and what she saw as errors in some work (such as bathroom tiling) which she considered had not being done as she had instructed. Both Mr Walczak and Miss Martell say the other swore at them.

61. On 2 October 2015, Miss Martell asked GSB to halt works to the basement until Building Control visited the following week and were satisfied.

62. On 4 October 2015 she told them that a specialist colleague of Mr Janzemin was coming to inspect the ingress of water the following day, so no work should be carried out on the basement. She asked them to proceed with the tiling of the garden. She added "*If you have in fact quit, as Slawek informed me last week, at least do me the courtesy of informing me so that I can make alternative arrangements and will provide access so that your team can retrieve their equipment. I look forward to hearing back from you with these confirmations*."

63. On 5 October 2015, Mr Walczak emailed Miss Martell as follows : *"We would like to inform you that due to the bad situation on site we are not going to proceed with any more works for you. We have secured our works on site at this stage and are not going to*

continue. As you are aware the situation has been bad for the last few weeks. As you know your behaviour was out of control many times. You were very rude, argumentative and aggressive towards us and our employees. As a company with years of experience and good reputation we cannot accept that. All our payments were up to date and the money which is left unpaid from this project is enough for you to carry on and finish all the works which are included in our quote. We hope you will find another contractor to finish your project….."

64. Miss Martell sought advice as to the state of the work and possible remedies. Mr Gustyn remained the Party Wall Surveyor for the project but was not otherwise involved.

65. On 31 May 2016, MGA sent to Miss Martell an invoice for "*our structural engineering involvement on your project. … due to the multiple inspections, I have reduced a standard site visit free from £250 to £100 per visit on this project* ….". The attached invoice identified 25 site visits.

GSB'S RESPONSIBITY FOR THE CONCRETE ISSUE

The specification

66. The Building Contract was a short and simple document, which defined the works by reference to the quotation GSB had provided. The quotation referred to the earlier, indicative, plans provided to GSB early in 2014 that had been prepared for the planning applications and not to the more detailed plans provided on 17 September 2014. However, it is clear that GSB had the detailed plans before they quoted for the work and before the parties entered into the Building Contract. The correspondence to which I have referred above makes clear that GSB were waiting for those plans before they could provide a quotation. The plans were sent by Mr Gustyn to Miss Martell to be provided to the contractors for quotation purposes. They were forwarded to GSB by Miss Martell "*in order to complete the quote*". Although Mr Walczak stated in his witness statement that the quotation was based on the earlier plans that did not include the concrete specification and therefore GSB had assumed a standard mix, he fairly accepted in his oral evidence that they had waited for the detailed drawings before quoting as the drawings were needed before they could quote for the work.

67. When it was issued, the quotation bore the date 28 May 2014, though GSB accept that it was not provided until 23 November 2014, which was shortly after the detailed plans had been received. It appears that GSB had probably prepared an earlier draft of their quotation which they were unable to complete until they received the detailed plans, and that they did not update all the details on the draft quotation before they sent it to Miss Martell, possibly because Miss Martell was asking for a quotation as soon as possible.

68. It is clear the quotation and the Building Contract were based on the drawings provided on 17 September 2014, despite them not being expressly mentioned in the quotation. I find those drawings were incorporated into the quotation and into the Building Contract. Those drawings specified concrete of grade RC35, which means that it has a compressive strength that will withstand 35N/mm^2 after 28 days. I find it was a term of the Building Contract that the concrete should meet the specification of RC35 concrete.

69. Miss Martell also claims that the Building Contract required the concrete to be ready mix concrete. Her case does not depend on this, since her case is that the requirement of RC35 was not met in any event. However, for the sake of completeness, I will consider this allegation.

70. GSB do not accept they were obliged to use ready mix concrete. Their case is that Mr Gustyn knew at all times that they intended to and did use site mixed concrete, and that he approved that on behalf of Miss Martell.

71. The requirement to use ready mix concrete is not referred to in the drawings sent to GSB before the Building Contract was formed. The requirement was in the Structural Specification which MGA issued to all parties, including the Building Control inspector, on 15 April 2015. By that time, at least a good proportion of the underpinning work beneath the existing house had been done, but the basement extension walls had not yet been constructed.

72. As mentioned above, when Miss Martell informed GSB she would like them to do the work and before the Building Contract was formed, she told them that "*Martin Gustyn is working on the detailed specifications and completing the party wall awards, and will send them through to us as soon as he has completed them."* From this, it is clear that all parties understood that more detailed specifications would follow from MGA, so the plans did not contain all the relevant specifications.

73. The experts are, unsurprisingly, agreed that the Structural Specification should have been issued before the work began, and preferably before the Building Contract was formed.

74. The correspondence shows that Mr Gustyn told Miss Martell she could expect the complete structural engineering package by 1 December 2014. There is no explanation as to why it was not in fact produced until 13 April 2015 and issued to the parties on 15 April 2015, by which time at least some of the concreting work had been done, as MGA knew, having issued drawings to GSB on 14 February 2015 so they could start work.

75. When the Structural Specification was issued, there was no complaint from GSB that its terms differed from their expectations or that it added to the cost of the work for which they had quoted. In his oral evidence, Mr Walczak very fairly conceded that he may have seen it, that it was the sort of specification he would expect to receive and that, if it told him to do something in a particular way, he would follow it. However, he maintained that Mr Gustyn knew they were site mixing concrete and that Mr Gustyn had permitted it, otherwise they would not have mixed on site. His evidence was that the same method of mixing was used as they had used on a previous basement job involving Mr Gustyn.

76. Based on the contemporaneous correspondence and the evidence of Mr Walczak, I find that all parties knew and expected MGA would issue a complete Structural Specification and that the Building Contract required GSB to comply with it, provided it did not significantly alter the nature or cost of the work from what the parties had understood it would be when they made the Building Contract. In that event, the Structural Specification might amount to a variation to the Building Contract, entitling GSB to seek a variation in the price. I find that, once the Structural Specification was issued, GSB were required by the Building Contract to comply with it. It might have been open to them, had they considered that the requirement to use ready mix concrete amounted to a variation, to seek a price variation. They did not do that.

77. However, GSB could not be expected to comply with any details in the Structural Specification that had not already been communicated to them before the Structural Specification was issued to them.

78. Mr Walczak's evidence as to what was agreed with regard to the Structural Specification contradicts that of Mr Gustyn.

79. Mr Gustyn's evidence was that he never supported the use of site mixed concrete as the quality and strength cannot be assessed until the relevant tests are carried out. His evidence was that this was outlined in MGA's structural specification, which was sent to Miss Martel and GSB. His evidence was that he was reassured on numerous occasions by GSB not to worry about the strength of the concrete, and that Mr Walczak had told him it would be stronger than 35N/mm^2 and he should not panic. His evidence was that he "*reminded [GSB] that they should let [Miss Martell] know that concrete was being mixed on site and was told by them that they had in fact told [Miss Martell] and she would not agree to the additional costs of pre-mixed concrete delivered to site as apparently it was cheaper to mix the concrete at site*" .

80. Mr Walczak denies that conversation ever took place. I accept Mr Walczak's evidence that the conversation did not take place and that at all times Mr Gustyn was aware that site mixed concrete was being used, and did not tell GSB before issuing the Structural Specification that ready mix concrete was required. I accept Mr Walczak's evidence that it had not been used on the previous basement conversion project that GSB and MGA had worked on.

81. Mr Walczak's evidence also differs from Mr Gustyn's evidence as to the requirement to test the concrete. Mr Gustyn's evidence is that he verbally requested this of GSB in around February 2015, but had never seen the results of the tests despite being advised by a labourer on site that they were at the laboratory. Mr Walczak's evidence was that GSB had never been asked to test the concrete, and that any of the 6 or so employees who worked on the site would not get involved in discussions with Mr Gustyn. I prefer the evidence of Mr Walczak to that of Mr Gustyn. It is implausible that, if asked to test the concrete, GSB would not do it. It is also implausible that Mr Gustyn would have followed it up only with a labourer, whom he cannot name, and have been satisfied to know the test samples were in the laboratory but not expect to see the results of the tests. Further, there is no evidence that the sort of receptacle that would be needed to carry out concrete cube tests was ever seen on site.

82. I find that, whilst the Structural Specification required GSB to agree a testing regime with Mr Gustyn once it was issued, the requirement to do so had not been communicated to GSB before 15 April 2015.

83. I find that, as between Miss Martell and GSB:

    83.1. The Building Contract required compliance with the Structural Specification;

    83.2. The Structural Specification was received by GSB on 15 April 2015 (but not before);

    83.3. The Structural Specification required ready mix concrete unless agreed otherwise with the MGA;

    83.4. The Structural Specification required GSB to agree a concrete testing regime with MGA;

    83.5. No written approval from MGA to the use of site mixed concrete having been obtained, GSB were obliged, with effect from 15 April 2015, to use ready mix concrete and mixing on site was a breach of Building Contract

    83.6. The Structural Specification required GSB to agree a testing regime to test the quality of the concrete and failure to do so was a breach of the Building Contract.

84. Therefore, as between Miss Martell and GSB, I find that the additional requirements in the Structural Specification did not bind GSB until 15 April 2015. Before that date, the requirement was only for RC35 concrete, however that was achieved. After that date, the requirements were that it was RC35, that ready mix concrete be used, and that GSB agree a testing regime with MGA.

Did the concrete meet the specification?

85. Mr Walczak's evidence was GSB used a 3:1 mix (ballast to cement). He maintained, and clearly believed, that a 3:1 mix would achieve the required standard of RC35, based on his experience and that of his workers, who also had many years of building experience. In cross examination, it was put to him that he could not know the compressive strength of the concrete because it had not been tested. He said that he knew his job, and the men on site with 40 years' experience knew how to mix concrete and that it was good and proper concrete. He said they used good quality materials and did not cheat. He gave clear oral evidence that, in his opinion, a 3:1 mix would achieve RC35 standard.

86. The results of testing undertaken on behalf of Miss Martell by Holliday Concrete Testing Limited show mixed results for the concrete. Ten core samples were taken, of which 6 were taken from the walls and 4 from the floor slab. Three were above or very close to 35N/mm^2. Seven were below it, with results of 19.4N/mm^2, 20.6N/mm^2, 25.5N/mm^2, 10.2N/mm^2, 8.2N/mm^2, 18.6N/mm^2 and 20.1N/mm^2.

87. The structural engineering experts are agreed that the concrete did not meet the specification of 35N/mm^2 and that it was not adequate for the purpose. Although GSB question the accuracy of the test results and the quality of the samples, the experts do not share GSB's concerns and could not identify any fault with the samples.

88. The experts are also agreed that, although even the reduced strength concrete may be sufficient to withstand the vertical loads imposed on it by the structure it supports, it was not sufficiently strong to meet the horizontal loads on it imposed on it. The experts are also agreed that remedial work was required.

89. Possible reasons were put forward for the failure to achieve the required strength. Whilst Mr Walczak was clear in his evidence that a 3:1 mix would achieve 35N/mm^2, the experts did not agree. Mr Short's evidence was that a 3:1 mix would contain 225Kg/m^3 of cement whereas RC35 would contain 280Kg/m^3. Mr Barham's evidence was that he would expect a 3:1 mix typically to achieve a strength of 25N/mm^2. From this evidence, it is clear that a 3:1 mix would not routinely achieve the specification of RC35.

90. Also, adding too much water can cause the concrete to be weaker. Miss Keating put to Mr Walczak that adding additional water to the mix would save money, which he denied. Whilst I was not persuaded that it is likely that GSB would have added water to save money, a wetter mix is easier to pour and handle, particularly around reinforcement bars and in areas where it is difficult to access to the concrete to vibrate it to remove the air in it.

91. In any event, whatever the cause, I am satisfied, based on the test results and the expert evidence, that the concrete did not meet the requirements of RC35, that it did not meet the contractual specification, and that it was not fit for purpose because it could not be expected to withstand the lateral loads on it, so that remedial work was required.

Did GSB's breaches of duty in relation to the concrete issue cause Miss Martell's loss?

Plainly, the need to replace the concrete was the result of failure to meet the specification of RC35.

MGA'S RESPONSIBILITY FOR THE CONCRETE ISSUE

The scope of MGA's responsibilities

92. MGA did not send to Miss Martell an engagement letter setting out the scope or limits of its work. The scope of its work was discussed and agreed between them. This rather unusual way of working was the way in which they had worked on previous projects. Miss Martell's case is that MGA's role was akin to that of a project manager, or at least that MGA was responsible for monitoring work on site to ensure compliance with the drawings and specifications and advising her of any issues as they arose.

93. MGA denies liability for general monitoring of the work and alleges that its duty to visit site was limited to addressing specific queries as requested. The Amended Defence includes the following:

> *"MGA's scope of contractual service and concurrent duty was limited to (i) planning, party wall and structural design services; and (ii) site visits to address specific queries from the Claimant and GSB as and when requested"*
>
> "*MGA's scope of contractual service did not extend to a general duty to monitor or inspect the works or contract administration duties or agency (including regarding testing,…) under the building contract"*
>
> *"the Claimant engaged MGA to provide structural engineering services and to prepare documents for planning application*",
>
> "*MGA's appointment was confirmed by email on 14 May 2014 as covering planning and structural engineering design*".

94. The email stated as follows:

> *"Please see below a breakdown on our fees to date on your project:*
>
> *Measured survey of the house, preparation of accurate existing survey drawings in CAD…..*

Meetings, consultation, preparing of architectural drawings for the basement and ground floor extension, flood risk assessment, project review with the client submission of planning application for ground floor extension to H&F Planning Department…

After our meeting with the Planning Officer I will send you a detailed fee break-down for our involvement on the basement project and submission of a new planning application."

95. The first thing to note is that the email is not a definition of the scope of MGA's future involvement in the project. It is no more or less than a breakdown of the work already done. The second thing to note is that much of that work is work that would not typically be the work of a structural engineer. It includes site surveying, preparation of architectural plans for planning purposes and making the application for planning permission. It is clear that the scope of MGA's work was not limited to the services typically offered by structural engineers but extended to a more holistic service, including aspects of the development that would typically be done by other professionals, such as surveyors or architects.

96. Miss Martell's evidence was that she had complete faith in Mr Gustyn, who had advised her in relation to the three projects she had previously undertaken, albeit that they had been more minor projects. Her evidence was that he guided her though the entire process from the kernel of her idea to the end, and the issues were dealt with chronologically solely in accordance with his advice, with him initiating reports, surveys and permissions. She also said that she had such faith in him that she had introduced him to five of her friends who were in need of a structural engineer. Her evidence was that he had never quoted in advance for the work he undertook or issued her with any contract or terms and conditions.

97. As far as MGA's responsibility for monitoring GSB's work on site is concerned, MGA's pleaded case is contradicted by a considerable amount of evidence.

98. Mr Gustyn's evidence in his second witness statement was that the purpose of his site visits was to check that works were done in accordance with the structural engineering drawings and that his role included the ad hoc inspection of the structural works. Despite the pleaded case, therefore, he accepted that his role included ad hoc inspections of the

works to check it complied with the drawings. The drawings included the specification of RC35 concrete.

99. The Structural Specification issued by MGA on 15 April 2015 expressly required GSB to agree the rate of sampling for compressive testing of the concrete with MGA, and not to use site mixed concrete without MGA's written agreement. The specification that MGA itself prepared and issued therefore made it responsible for agreeing with GSB the process for checking the quality of the concrete.

100. In re-examination, Mr Gustyn was reminded that he had said that his practice was to respond to specific questions and was asked about the kind of specific questions he recalled going to site to address. Mr Gustyn was unable to identify an example of when he was asked to go to site in response to a specific question. Tellingly, his initial response was "*So when I was there in the presence of the main contractor, I basically carried out my inspection and then I ask them the questions, and I let them ask me the questions*." That suggests that, far from attending site only in response to specific questions, he was there to inspect the works and ask questions of GSB and, while he was there, he would answer their questions. That is entirely consistent with Miss Martell's case as to MGA's monitoring obligations.

101. Mr Gustyn did then go on to identify the sort of questions that GSB might raise, such as details for steelwork connections, and the sort of questions Miss Martell might raise, such as "*are the dimensions correct, can we do this in a different way….. I mean, she was mainly interested to just making sure that the project is going to plan. It is very difficult for me now to memorise like the specific questions because there was always the questions there on site, because otherwise I would not be attending the site. But those questions were pretty much all related to daily progress of works.*" Again, that is consistent with Miss Martell's case that MGA's role was to monitor and report on progress on site.

102. On 9 February 2015, Mr Gustyn confirmed to an adjoining owner's party wall surveyor: "*I confirm that we have been appointed as the Project Structural Engineers and the temporary works Engineers. We will be visiting a site (sic) approx 2-3 times per month to monitor progress of the construction works.*" That statement is inconsistent with MGA's case and consistent with Miss Martell's case that MGA had agreed to

monitor the work on site for compliance with the specification. In the absence of any engagement letter defining a narrower scope of work, Miss Martell was entitled to understand from that confirmation that MGA considered itself to be responsible for that monitoring work.

103. Miss Martell's evidence was that, in the middle of March, she left for Northumbria to look after her uncle and make arrangements for his care. However, she realised that, pending that care being available, she needed to remain with him and she telephoned Mr Gustyn to explain the situation, which came at a critical time for the project. She said she asked him to make regular visits and check that GSB were following the specification and were doing everything correctly.

104. The contemporaneous correspondence, including numerous emails and texts, including photographs, shows that Miss Martell was relying on Mr Gustyn to inspect the site and keep her informed of progress and any issues that arose.

105. MGA's case is also inconsistent with the frequency of site visits. MGA's invoice included with its email of 21 May 2016 identified 25 site visits for which Miss Martell was invoiced, of which 16 visits occurred between mid-March and the end of July 2015, which was the key period during which concreting was taking place.

106. Mr Walczak's evidence was that Mr Gustyn was on site 2 or 3 times a week, and certainly more often than the occasions identified in the invoice. However, during the course of his evidence, he revealed that GSB had paid Mr Gustyn £10,000 in cash for recommending them to the job and for assistance with GSB's queries. Although I accept Mr Walczak's evidence that Mr Gustyn was on site more often than the occasions for which MGA invoiced Miss Martell, I am unable to make any findings that those visits were required to fulfil MGA's contractual duty to her, as opposed to providing assistance to GSB. Nonetheless, even based on the invoiced visits, it is clear that Mr Gustyn visited site regularly, and nearly once a week, during the key period.

107. It is clear that Miss Martell relied on, and Mr Gustyn encouraged her to rely on, his expertise in construction and engineering matters. For example:

107.1. She consulted him at the very outset, before she had completed on the purchase, for advice as to the feasibility of the project. Mr Gustyn advised her to apply for

planning permission in two stages.

107.2. MGA prepared all the plans and applied for planning permission on Miss Martell's behalf.

107.3. MGA carried out the site survey.

107.4. MGA instigated the commissioning of the necessary reports, such as Chelmer's report on ground conditions.

107.5. When Mr Gustyn reported to Miss Martell the results of the report on ground conditions, he said: *"there are many more other comments and observations but these are very technical which are mainly needed by us, engineers to progress a design."*

107.6. MGA provided detailed construction drawings, which Mr Gustyn sent to Miss Martell, and told her she could provide them to contractors for quotation purposes. From that, she clearly understood that they contained the details that the contractors would require.

107.7. When she was unable to get to site as she was looking after her uncle in Northumbria, Mr Gustyn sent her photographs and updates on the progress at site.

107.8. In April 2015, Mr Gustyn emailed Miss Martell saying "*generally no issues on site; minor issues and queries are being resolved on site level"*

108. I prefer Miss Martell's evidence to that of Mr Gustyn. I find that she did agree with him that MGA would monitor the work for compliance with the contractual specification and that included the quality of the concrete and the method of construction. I find MGA's role was not limited to visiting site to address specific queries. I also find that, with effect from mid-March 2015, MGA had agreed with Miss Martell that it would also provide a wider service of monitoring the progress on site and reporting to her progress and any issues of which she should be aware that she would not be able to see for herself, given she was unable to visit site herself for long periods of time between mid-March and August.

109. I find that MGA was responsible for monitoring the quality of the concrete used and notifying Miss Martell if the concrete was not to the specification of RC35, as required by the Building Contract as a result of the drawings that I have found were incorporated in it that specified RC35 concrete.

110. I have already found that the late issue of the Structural Specification meant that GSB were not obliged to comply with its terms before it was issued to them, but were obliged to comply with it once it was issued. At least from the time it was issued, given its terms, I find that MGA was under a duty to monitor GSB's compliance with it and to take the steps identified in it for the Structural Engineer.

111. Those included:

111.1. checking GSB were using ready mix concrete from a supplier that was appropriately accredited;

111.2. agreeing with GSB the rate of sampling for compressive testing of the concrete before the work began;

111.3. checking the test results and notifying Miss Martell if the concrete did not meet the contractual standard;

111.4. if site mixed concrete was being used without MGA's express written authorisation, notifying Miss Martell of the breach of specification; and

111.5. if site mixed concrete was being used with MGA's written consent and it was apparent that batching and mixing equipment did not comply with the specified British Standards so that it might affect the quality of the concrete, making Miss Martell aware of the breach of specification.

Breach of duty

112. As I have mentioned above in the context of GSB's duties, I do not accept Mr Gustyn's evidence in his witness statement was that he never supported site mixing concrete, that GSB had told him that this was not their first basement project and they knew how to mix concrete in the right proportions and they were confident that the concrete would be even stronger than the specified 35N/mm^2, based on their experience on other projects. I have

found that he did not orally request that GSB carry out cube tests in around February 2015, and that he was not told by a labourer on site that the tests were at the laboratory.

113. In his witness statement, he also stated that he was reassured on numerous occasions that he should not worry or panic about the concrete strength and that "*I reminded the First and Second Defendant that they should let the Claimant know about the fact that the concrete was being mixed on site and was told (by them) that they had in fact told the Claimant and that she would not agree to the additional cost of premixed concrete to the site as apparently it was cheaper to mix the concrete at site".*

114. That contradicts Mr Walczak's evidence and Miss Martell's evidence. Mr Walczak's evidence was that Mr Gustyn was aware they were mixing concrete on site and never raised the issue with them or suggested they should use pumped concrete or ask why they were not using it. Miss Martell's evidence was that she was not advised of any variation from the specification.

115. As I have said, I did not find Mr Gustyn's evidence on this issue to be credible. If Mr Gustyn had asked for or expected test results, it is not credible that he would have relied on the word of an unnamed labourer on site that they were in the laboratory and not have followed the request up with Mr Walczak or asked what the results were. Nor do I consider it likely that a structural engineer would rely on a builder to self-report a breach of the specification to the client without discussing it with the client himself. I prefer the evidence of Miss Martell and Mr Walczak. I find that Mr Gustyn did not raise with GSB the issue of using ready mix concrete or the need for testing of the concrete. I find that MGA knew that GSB were mixing concrete on site and were not testing it and that there was therefore no way of knowing whether it was to the specification as a result.

116. The experts are agreed that the Structural Specification should have been issued before work began on site. Rather than issue it in a timely fashion (and despite having told Miss Martell it would do so by 1 December 2014) MGA issued drawings to GSB on 14 February 2015 bearing the RC35 requirement but not bearing the additional requirements of the Structural Specification that it must have known it intended to issue. When it sent those drawings, it made clear that GSB were expected to start work based on the drawings provided.

117. I find that MGA breached its duty to Miss Martell in relation to the concrete issue in the following ways:

117.1. It failed to monitor the quality of the concrete to satisfy itself that it was RC35 concrete.

117.2. If failed to notify Miss Martell that the concrete was not RC35 concrete, or even that it was not in a position to know whether it was RC35 concrete because it was not being tested.

117.3. In issuing drawings to GSB on 14 February 2015 for GSB to start work on the underpinning, but without notifying GSB of the requirements that were contained in the Structural Specification, MGA did not act with the reasonable skill and care expected of a structural engineer. It knew that Miss Martell was relying on MGA's specification for the work as the basis of her contract with GSB and did not communicate any part of the specification when it issued plans for work to start.

117.4. It failed to take any steps to require GSB to agree a testing regime to check the quality of the concrete.

117.5. It failed to notify Miss Martell that no testing regime had been agreed and that GSB were in breach of the Structural Specification by using site mixed concrete.

117.6. When it was aware that site mixed concrete was being used, particularly after the Structural Specification had been issued, it failed to advise Miss Martell that GSB were not complying with the obligation to use ready mix concrete.

118. Further, whilst there is no pleaded issue on this point, it is right that I should address an issue that arose unexpectedly during the trial. I have mentioned, during his evidence, Mr Walczak revealed that GSB had paid Mr Gustyn £10,000 in cash. He said that, for every single project, Mr Gustyn asked for about £10,000 in cash, for the recommendation to the project and "*just if we need some advice on the project we can ways call him and we can get him in*". The cash payment had not been previously disclosed. Miss Martell was, of course, unaware of it during the project. She only became aware of it during the trial.

119. One of the documents in the bundle, which was in Polish and had not been translated, was relevant to this issue. A Google translation of it was made available. On 10 July

2015, at 12.20, Mr Gustyn texted Mr Walczak, saying "*in the additional quote, include 8% for me OK?"*

120. The documents show that, on the same day, Mr Gustyn sent a message to Miss Martell saying "*The guys mentioned about 4 weeks of extension of time, not completing in 2 weeks. Please let me know when you want to meet*". They then arranged to meet at 4.30 that day.

121. Miss Martell sent a message to Mr Gustyn after the meeting as follows "*Thanks so much for meeting today… a bit shocked by that extra cost…everything is going to be very stressful now….."*. From that, it is clear that there has been a discussion about additional costs at the meeting on 10 July, which was the same date as Mr Gustyn's message asking for 8% to be included in the quote for him.

122. It was clear from his evidence that Mr Walczak felt very badly let down by Mr Gustyn. He commented that the worst mistake of his life had been to trust him. He was clearly upset that he found himself the subject of a claim in relation to the quality of the concrete when he considered GSB had done what was expected of them by Mr Gustyn.

123. In the light of the identification of the message asking for 8% to be added to an invoice for him, Mr Gustyn was recalled to give further evidence. He accepted he had received a cash payment, which he said was close to around £8,000 but no more. He said that was for drafting the temporary works for the contractor. It was put to him that, at the meeting on 10 July 2015, a bill for extras had been presented to Miss Martell and he had advised her to agree to pay the extras. He said he recalled Miss Martell was cross about the additional costs but that he did not advise her to agree the extras. He was asked why he had not told her that he had asked for 8% to be included in the extras quote for himself. He said that was not his recollection and that, at the time, they were running three other jobs, and the message might have related to another job. He pointed out that the invoice for the extras was the dated 9 July not 10 July. He suggested that the text related to another job.

124. I found his evidence implausible. The timing of the message asking Mr Walczak to include 8% in the quote for him was shortly before the parties met on site and Miss Martell was presented with a request to agree a substantial amount for extras.

125. Nor do I accept Mr Gustyn's evidence that the cash he had received was about £8,000 for designing the temporary works for GSB. Miss Martell had been invoiced for the design of those temporary works. The temporary works design eventually sent by GSB to Miss Martell was identical to the designs MGA had already produced, save that they bore GSB's logo. It is inconceivable that a payment of £10,000 or even £8,000, could have been for that work. Nor would it have been paid or payable in July, long after the temporary works design had been produced.

126. Further, there is no explanation as to why, if the payment was for design work for GSB, Mr Gustyn received the payment in cash and without MGA raising an invoice.

127. Mr Gustyn accepting a payment from GSB for the referral to the work and for advice is consistent with the fact that GSB sent their quotation to MGA to be reviewed before sending it to Miss Martell, so Mr Gustyn could let them know whether it should be altered in any way to increase the chances of the tender being successful, for example, by lowering the price.

128. I prefer the evidence of Mr Walczak to that of Mr Gustyn. I find that GSB did pay Mr Gustyn £10,000 in cash for introducing the project to GSB and for his assistance during the project, and that Mr Gustyn's practice was to ask for payments of that type from GSB on projects he introduced to them. I find that Mr Gustyn also asked for 8% of any extra costs that GSB charged to Miss Martell at the time when MGA was acting as her adviser on the project.

129. It is clear that Miss Martell was unaware that MGA was acting for GSB in any way or receiving cash payments from them. She understood that MGA was protecting her interests and giving her impartial advice.

130. Given that none of the parties' counsel had anticipated this issue arising, the precise terms of any agreement between GSB and MGA were not fully explored. It would not be right for me to make any detailed findings in this judgment as to the precise terms of any agreement between GSB and MGA, which may affect later claims between the Defendants. GSB's case as to the payment and the help they expected from MGA in exchange for it has not been pleaded. It is not clear whether all relevant documents have been disclosed. It has not been dealt with in the witness statements or fully in cross

examination. The precise terms of the agreement are not directly relevant to the issue before me now.

131. However, the fact that (as I have found) Mr Gustyn received at least one payment from GSB of £10,000 for the introduction and for some kind of assistance from him and that the arrangement was not disclosed to Miss Martell, and the fact that Mr Gustyn was requesting a further 8% of any increase in costs, calls into question whether MGA was acting at all times in Miss Martell's interests rather than MGA's, Mr Gustyn's and/or GSB's interests. It is likely that MGA would have faced conflicts of interest, for example, in relation to pointing out defects in GSB's work to Miss Martell, particularly if he had advised GSB on any of the work.

Did MGA's breaches of duty in relation to the concrete issue cause Miss Martell's loss?

132. Had MGA fulfilled its duties, it would have:

132.1. ensured when it issued its drawings to GSB for them to start work in on 14 February 2014 that the drawings included the whole specification that it knew it intended to issue;

132.2. agreed an appropriate testing regime with GSB to test the quality of the concrete before the concreting work began;

132.3. checked the concrete met the requirements of RC35;

132.4. at least once the Structural Specification had been issued, checked that ready mix concrete was used, in the absence of any written agreement to use site mixed concrete;

132.5. insisted on concrete being tested and checked the test results when they were received; and

132.6. notified GSB and Miss Martell if the results showed the concrete did not meet the RC35 grade, or if testing was not taking place to check the quality of the concrete.

133. There is no dispute between the parties that, if ready mix concrete had been used, it would have been less likely that it would have been below the specified compressive

strength. All parties are agreed that it is harder to achieve the required and consistent results with site mixed concrete.

134. The experts agree that, had an appropriate testing regime been established, the fact that it did not meet RC35 standard would have been established early in the course of the work. Mr Barham's evidence was that, bearing in mind not all the concrete was defective, and taking account of the fact that some results would have been available from samples tested 7 days after the concrete was poured (with further results being available after 28 days) his opinion was that it is likely that the issue with the concrete not meeting RC35 standard would have been discovered within two to three weeks of the concreting work beginning.

135. Mr Walczak accepted that, if GSB had made a mistake, they would have corrected it. He struck me as a man who was proud of GSB's work and reputation and I accept his evidence that GSB would have corrected any defective work if it was drawn to their attention. It is clear that, even to this day, he believes that a 3:1 mix should achieve the required strength. I am satisfied that GSB were not seeking provide sub-standard work or to cut corners. They simply did not know that the 3:1 mix they were using did not meet the specified standard of RC35, or that some of the concrete was below what would usually be expected from a 3:1 mix.

136. I find that it is likely that the defects in the concrete would have been discovered within two or three weeks of the concreting work starting. This would have been before most of the concreting had been done, and would have meant that it would have been possible for any defective concrete that had been poured to be replaced before the entire basement had been built. In addition, I find it is likely that it would have been corrected at GSB's cost, not at Miss Martell's cost.

137. If, for any reason, GSB refused to correct their work, which I find to be unlikely, MGA or Miss Martell could have halted the work and replaced GSB with another contractor, avoiding most of the remedial costs that have been incurred.

138. I find that MGA's breaches of contract caused the loss that Miss Martell suffered as a result of having to undertake the very substantial remedial work she did.

GSB'S RESPONSIBILTY FOR THE WATERPROOFING ISSUE

139. I have found that GSB were responsible for the concrete issue. The question of responsibility for the waterproofing issue is therefore academic, except possibly to the question of whether all Miss Martell's claimed losses are recoverable from GSB. For completeness, I will deal with it briefly.

140. The drawings that formed part of the Contract stated "*all waterproofing…… to architect's details"*. There was no architect employed on the project, as all parties knew. MGA provided the architectural drawings for planning and all the construction drawings. GSB's quotation stated they would engage "*a separate specialist company to design and install the waterproofing system*".

141. Mr Walczak fairly accepted in his oral evidence that GSB were responsible for the design of the waterproofing, by subcontracting it to a subcontractor.

142. GSB's case is that the waterproofing system consisted of a Sika membrane and a proprietary drained cavity system. The word "membrane" is slightly misleading, since it meant applying render containing Sika waterproofing in it to the inside face of the concrete walls. By the time the Building Contract came to an end, some of the proprietary drained cavity material had been applied but no render had been applied underneath it. Mr Walczak's evidence was that GSB had applied the drained cavity material at Mr Gustyn's request or suggestion, to keep Miss Martell happy, and it was not intended to remain in place without the render beneath it. I accept his evidence. I do not consider it likely that GSB intended to omit the Sika render from their work. I accept that, at a difficult time, when the adequacy of the waterproofing was in question Miss Martell was questioning whether the work could continue, GSB thought it would help the discussions if some of the drained cavity material was in place.

143. The experts are agreed that, for a basement of this type, the types of waterproofing systems that can be used are: Type A – a barrier system, Type B – structurally integral protection and Type C – a drained system. These systems are often used in combination. They agree that the Property was "high risk" in accordance with the relevant code of practice, and that the designer should have considered a combined solution, ie some combination of Types A, B and C. They agree that the waterproofing as built appears to have consisted only of a drained cavity system, which is a Type C solution, and that the

design and/or detailing of the reinforced concrete elements of the basement would not have been adequate with a Type C solution only.

144. The reinforcement in the concrete was adequate to limit the crack widths between the separate sections of concrete, but there were no water stops at the construction joints, so water could penetrate between the sections of concrete. Reliance on a layer of internal waterproof rendering would not be likely to be sufficient in the absence of water stops preventing water penetrating between the concrete sections, because the pressure of the water coming through the cracks behind the render would be likely to cause the render to fail.

145. From his oral evidence, it appeared that Mr Walczak was not familiar with the sort of bars or water stops that the experts consider should have been used between the sections of concrete as they were built, to prevent water at pressure penetrating the cracks between the concrete sections.

146. In their evidence, GSB made the point that, although MGA had commissioned a report into the ground conditions, which referred to there being a relatively high water table, that report was not provided to them. However, I am satisfied that they were aware of its existence and could have requested sight of it before quoting for the work if they wished to know the detailed ground conditions. Also, they excavated part of the cellar floor at an early stage, and did not suggest that the water table they found was unexpected or would cause them difficulty.

147. By the time the Building Contract was brought to an end, GSB's work was not complete. Miss Martell had asked them to stop work on the basement while she obtained advice, given the amount of water that was entering the basement. GSB's case is that their work was unfinished. The experts are critical of the installation of such of the drained cavity system as had been installed. However, I have accepted GSB's evidence that it had not been finally installed and they intended to apply the Sika render and then apply the proprietary drained cavity system.

148. Even taking into account the fact the work was unfinished, I find that the design was inadequate, as it relied on a waterproofed render and an internal cavity drainage system and did not contain a sufficient barrier to prevent the water penetrating the through the cracks. It was not sufficient to rely on internal render to stem the pressure of water

between the gaps in the concrete, in the absence of water stops. The proprietary system that GSB had begun to install would not have been sufficient to stem the water ingress or, alone, provide an adequate system.

149. I find that GSB's design and (insofar as it had been completed) their construction of the waterproofing system was not carried out with reasonable skill and care,

150. I find that Miss Martell was right to call a halt to the work when she did, to enable investigations to be carried out into the cause of the continuing and significant ingress of water.

151. The experts are agreed that, had there been no issue with the adequacy of the concrete, it is likely that it would have been possible to find a remedial solution to the waterproofing issue without removing all the concrete and replacing it. Probably, a combination of retrofitting water bars, some sort of membrane or waterproof render and the proprietary cavity drainage system would have been an adequate remedial scheme.

MGA'S RESPONSIBILITY FOR THE WATERPROOFING ISSUE

152. The experts are agreed that, if MGA was not responsible for the waterproofing strategy, it should have advised Miss Martell of the need to appoint an architect or waterproofing specialists to formulate a waterproofing strategy and design a waterproofing system. strategy. Mr Short's view is that BS8102:2009 provided that a risk assessment should have been carried out by a suitably qualified and experienced person. Mr Barham's view is that a waterproofing strategy should have been prepared at the outset of the project and, in the absence of an architect, MGA should have designed and specified a waterproofing strategy. Mr Hardy's view was that MGA should have advised Miss Martell of the need to appoint a suitably qualified and experienced person to carry out the risk assessment and/or design the waterproofing.

153. Despite knowing that Miss Martell had no architect, MGA marked the drawings for the waterproofing to be in accordance with the architect's design. Despite effectively adopting the role of the architect in this project, it did not design the system or advise Miss Martell that it was not designing it and that she should engage a suitably qualified person to do so. I note from the correspondence in the trial bundle that, after GSB had left site, Miss Martell asked Mr Gustyn who had designed the damp proofing, and

whether GSB had just done it to their own design. It is clear from that that Miss Martell was not clear whether MGA had designed it or whether GSB had done so. Mr Gustyn responded: *"the drainage, waterproofing, insulation etc has not been detailed on our Engineering drawings. This is usually to the Contractor's design and to Building Control satisfaction. At the end of the project [GSB] should provide to us (me, you and Building Control) a certificate from the registered installer with min 10 years of guarantee. That's normally what they do and other contractors do on similar project to this."*

154. Before this time, MGA had not advised Miss Martell of the need require from GSB a guarantee, which requirement should have been included in the Building Contract.

155. By noting "to architects' details" and taking no steps to advise Miss Martell to ask an architect or another suitably qualified person to carry out the design before the work begin, as the experts agree, MGA's work was not to the standard of a reasonably competent structural engineer.

156. I find that MGA was in breach of its contractual duty to advise Miss Martell that its designs were not complete and that she should seek assistance from a suitably competent person to design of the waterproofing system before work began.

157. Had it done so, Miss Martell would have had the benefit of expert advice and would have been able to ensure that the work that GSB carried out would be likely to be sufficiently water-tight.

158. As a result, MGA's breach of contract caused Miss Martell's loss in respect of the waterproofing issue.

ARE THE REMEDIAL COSTS REASONABLE OR DID MISS MARTELL FAIL TO MITIGATE HER LOSSES?

159. Miss Martell sought advice promptly after the Building Contract came to an end. She was, understandably, extremely stressed and depressed at the situation she found herself in, with a defective property and without the knowledge or financial resources to be able to remedy it. Although she had undertaken some modest refurbishment projects previously, she was not a construction professional and needed advice and assistance in

navigating the decision making involved in finding a remedy to the problems. She contacted the builders she had used in her previous projects, Hetman. They put her in touch with a company called Smart Commercial Ventures Ltd ("SVC"), which Miss Martell described as a mediation and conflict resolution firm, who had assisted Hetman in the past. The precise professional expertise of SVC remains unclear. I understand they are not solicitors, though they clearly had an understanding of the litigation process and the importance of preserving evidence, giving GSB an opportunity to inspect and participate in any tests, and ensuring that evidence she may obtain might be suitable for use in court as CPR part 35 compliant. They assisted Miss Martell by notifying a claim to GSB, obtaining experts' reports, including the testing of the concrete, instructing an expert Structural Engineer to advise on the appropriate remedies and researching appropriate contractors. They also assisted her in relation to the party wall issues related to the remedial works.

160. On SVC's advice, Miss Martell instructed Mr Short to report on the structure and possible remedies. On Mr Short's recommendation, Miss Martell contacted City Remedials Limited to quote for redesigning a drainage system.

161. Mr Short advised testing the concrete before deciding on a remedial scheme. The test results revealed the issues with the compressive strength of the concrete. Once this was apparent, it was clear that the remedial scheme would have to be more comprehensive than had originally been thought. It was now understood that the problem was not only the waterproofing system, but the structure of the basement. There were two options for remedy:

161.1. completely replacing the concrete, by removing it and replacing it, and installing a suitably designed waterproofing system; or

161.2. leaving the existing concrete in place, but building an internal "box" within the existing basement structure. The walls of the box could be used to provide support to the existing walls to resist the lateral loads on them.

162. Although the box solution was cheaper, this option involved a loss of about 150 square feet of internal floorspace and head height, which would obviously negatively affect the living accommodation, aesthetics, and value of the Property. The reduced floor space

would eat into the corridor and room space, and also meant that there would not be room for the staircase or the understairs WC, and it was not possible to relocate stairs.

163. Miss Martell was advised by City Remedials Ltd and Glasspool and Thais (their structural engineers) that, due to the overall poor condition of the walls and slab, the replacement of the walls, the underpinning and the slab would provide a more comprehensive solution, maintaining the overall headroom and internal space. She had been advised that the box system may not be able to provide sufficient support for the Property. She was also concerned that the existing walls did not comply with the Party Wall Act awards and would be unacceptable to the adjoining owners. She also had concerns as to the insurance implications of the internal box solution.

164. She therefore decided on the remedial solution that involved replacing the defective concrete and resolving the waterproofing issues at the same time. In my judgment, that was a reasonable decision.

165. I had the benefit of evidence from Quantity Surveying experts for all parties, being Mr Emin for Miss Martell, Mr Drljaca, for GSB and Mr Ulyatt for MGA. There was a large measure of agreement between them, and I shall confine my judgment to the points that were in dispute. Those items not in dispute were agreed in the sum of £247,404.24.

SVC's invoices

166. Miss Martell claims a total of £27,590.36 for SVC's work in assisting her deal with amendments to the party wall awards for the remedial process. She claims £81,288.16 for their work in advising and assisting her in relation to the remedial work that is not related to the party wall work.

SVC's party wall work

167. Mr Gustyn remained Miss Martell's party wall surveyor for the remedial work. Miss Martell also paid MGA £19,487.48 for party wall services provided by MGA and the adjoining owners' surveyors.

168. SVC were not structural engineers. It appears that their involvement in the Party Wall Act process was acting as an intermediary between Miss Martell and Mr Gustyn and in

corresponding with neighbours in relation to party wall issues, to reduce Mr Gustyn's involvement.

169. Mr Drljaca had reviewed the correspondence relating to the work that is the subject of the invoices for party wall work. He noted that some of the correspondence appeared to relate to liaison with Primas Law and other work that did not appear to relate to Party Wall Act work. It was impossible for him to work out from the correspondence how long the work should have taken. He therefore decided that it would be more appropriate to include this work within his assessment of other work by SVC rather than consider it separately.

170. Mr Ulyatt calculated that Mr Smart of SVC and a senior paralegal within SVC carried out a total of 146.8 man hours in party wall related work. He noted that Mr Gustyn remained engaged as the party wall surveyor and did not consider it reasonable to involve another professional in the party wall work. He made no allowance for it.

171. Miss Martell explained that it was thought it would avoid complication to retain Mr Gustyn. I am also mindful of the fact that it is not possible to replace a surveyor appointed under the Party Wall Act except in very limited circumstances. Miss Martell therefore had to continue to use Mr Gustyn, in whom she had lost confidence and whom she was considering suing. It is understandable therefore that she would wish to keep his involvement to the minimum required to comply with the Party Wall Act and also that she was wary of dealing with him directly. I also understand why Miss Martell, who was very stressed as a result of the situation in which she found herself, and who had previously relied on Mr Gustyn's advice to guide her through the project, needed the assistance of other professionals. In the circumstances, I consider it was reasonable for Miss Martell to use the services of a professional to advise and assist her in relation to Party Wall Act matters, including corresponding with her neighbours and liaising with Mr Gusytn. However, SVC's qualifications to do so are unclear. They were not acting as solicitors or as Structural Engineers. They do not appear to have any particular expertise in construction. Whilst I have no doubt that Miss Martell found their work and advice helpful, I consider that £27,590.36 is too high figure for their assistance in Party Wall Act matters. In the absence of a detailed breakdown of the time spent on specific tasks, I can do no more than adopt a broad-brush approach to the assessment of a reasonable figure for this work. I will allow £15,000 for SVC's assistance with party wall matters.

SVC's work in relation to remedials

172. Miss Martell claims an additional £81,288.16 for SVC's work in relation to remedial work. In broad terms, this was for their work in trying to resolve issues with GSB, procuring the relevant tests and investigations to inform the decisions as to remedial work, and assisting with the appointment of contractors.

173. The experts have considered the documentary evidence in support of claim. They all agree that it is not possible to attribute the time invoiced to the specific work evidenced by the correspondence and documentation. They also agree that the work is a mixture of managing and coordinating the remedial works as well as works in relation to the disputes between the parties. Mr Drljaca noted that some of the work appeared to relate to providing information to solicitors and reviewing their advice. Mr Ulyatt noted that the work including dealing with statutory demands.

174. The experts have therefore all made their own assessments of a reasonable sum for the work of planning and coordinating the remedial scheme, which included seeking expert advice, arranging tests, assisting in obtaining quotations and acting as managers. However, as I have said, SVC were not construction professionals and were not in a position to take on the formal role of contract manager.

175. Mr Emin's view is that a reasonable figure for this work is 20% of the value of City Remedials Limited's work, being £42,732.87.

176. Mr Drljaca included in his assessment the party wall work referred to above. He considered SVC's invoices in detail. He considered a reasonable figure to be 15% of the costs of all the remedial work, including the testing and survey work, being £34,174.69.

177. Mr Ulyatt considered a reasonable cost of a construction professional undertaking contract administration duties to be in the range of 15-20% of the cost of the work. He applied 17.5% in his assessment, giving a figure of £38,879.18, though he accepted in principle that 20% would be a reasonable proportion, representing the top of the appropriate range.

178. Based on the experts' opinions, I consider that 20% of the costs of the remedial work is within the reasonable range of costs to pay for the work that SVC carried out. I will

allow £42,732.87.

179. The total allowed for SVC's work is therefore £57,732.87.

Acoustic material and its installation

180. Miss Martell claims £2,769.60 for the cost of acoustic insulation and £1,740 for its installation.

181. Both the Defendants' experts question whether this is a cost of the remedial work as it was not directly required as part of the remedial work and have made no allowance for it.

182. Miss Martell's evidence is that she agreed to provide this insulation as her upstairs neighbour had a child who was sensitive to noise and found the noise of mechanical demolition tools distressing. She accepts that she was not contractually obliged to do so but, as a gesture of goodwill to her neighbours who would otherwise suffer from the noise of the demolition of the concrete, and to avoid the need to use hand tools for this work, she agreed to provide an acoustic barrier to reduce the sound for her neighbours.

183. The Defendants argue that she was under no legal obligation to do so and the cost is not recoverable.

184. The cost is not significant in the context of the overall costs of the remedial work. Miss Martell reasonably acted as a good neighbour in trying to protect her neighbour from a noise nuisance and to protect her neighbours' child from sounds he would find distressing. They had tolerated a long period of disruption already and the disruption of the noise of the cutting tools, drills, grinders and breakers that would be required to remove a large quantity of reinforced concrete would be significant. Not only were her actions the kind actions of a good neighbour and freehold owner, but they were also probably a sound commercial decision, to avert the possible problem that otherwise may arise from complaints, or a request to limit the work to hand tools, which would have considerably delayed the project. I consider this to be a reasonable cost of the remedial work and that it is recoverable.

Supervision costs paid to City Remedials Ltd

185. The main contractor for the remedial works was City Remedials Limited. Their costs have been agreed by the experts, with the exception of the sum of £21,000 for the cost of appointing Mr John Butcher, a Director of City Remedials Limited, as Project Manager of the remedial works. SVC were not construction professionals. Their role was administration of the remedials process but not project managing the remedial work on site.

186. Mr Emin and Mr Drljaca's both consider £21,000 to be the appropriate cost of this work. Mr Ulyatt's opinion is that nothing should be allowed for this, alternatively that, if it is allowed, it should be reduced to £15,600 to take account of overlap in the supervision of the remedial work and supervision of the fit out work, which does not form part of the claimed remedials.

187. Mr Emin's opinion is that the appointment and cost was part of the contract with City Remedials and that it was reasonable for Miss Martell to incur this costs. The only other quotation that Miss Martell had obtained for the remedial work that was satisfactory was from Trench Co, which was for £655,651.40, which was very significantly higher than the cost of the work of City Remedials, including the costs of project management.

188. Mr Emin's understanding was that it had been realised that there would otherwise be no oversight or project manager, as Miss Martell had not appointed an independent project manager or surveyor to oversee the work. The contemporaneous correspondence makes clear that this was a concern, particularly as Miss Martell did not have the expertise to manage the works and check it was being carried out correctly.

189. Mr Ulyatt's opinion is that it is not clear why it was necessary to pay City Remedials Limited to supervise itself and its two subcontractors.

190. Whilst I note Mr Ulyatt's comments and note also that it is unusual for a director of the main contractor to take on a project management role in this way, it is clear that Miss Martell, SVC and City Remedials Limited considered this a cost-effective way of ensuring that Miss Martell would have an individual with overall responsibility for project managing the work on site, including that of the subcontractors. Particularly in

the light of her previous experience, I consider it was reasonable for Miss Martell to make use of a project manager to oversee the work on site.

191. Mr Ulyatt was also of the opinion that any allowance for this work would duplicate the allowance made for the management costs of a construction professional overseeing the work and it should not be allowed in addition to allowing a percentage of the remedial work for SVC's fees.

192. Mr Drljaca's view was that it was appropriate to allow this, but he had suggested allowing a lower sum for SVC's work to take account of the fact their involvement would be light given they were not acting as project managers.

193. In my judgment, allowing 20% for SVC's work and £21,000 for project management is reasonable overall. Miss Martell had relied on MGA and been badly let down. She clearly needed sound professional advice in relation both to the process of identifying the appropriate remedial work, then obtaining tenders for it, dealing with contracts and continuing administration as well as on-site supervision and oversight, to ensure that what was no doubt a difficult remedial process was successful. She could not afford to do otherwise.

194. Finally, Mr Ulyatt suggested that this claim should be reduced to reflect any oversight of fit-out works, on the basis that the fit-out works overlapped in time with the remedial works. However, I have not seen any evidence that the fee of £21,000 claimed relates to fit-out works.

195. I will allow the claimed amount of £21,000 in addition to the amount I have allowed for SVC's invoices.

Invoices of Peter Dann Ltd and GO5

196. Miss Martell claims £6,840 for fees of Peter Dann Ltd, which relate to Mr Short's work. He was consulted on the advice of SCV at an early stage and advised on possible remedial solutions. His reports were, at SCV's request, CPR Part 35 compliant, though his work was not solely for the purposes of litigation but was to also to identify and advise on the appropriate solution to the problems. Sensibly, SVC sought CPR part 35 compliant reports, no doubt mindful that they might be needed later.

197. There is also a claim for £5,241.60, which is for the work of Mr Paul Carter of GO5, an engineer with expertise in waterproofing. He also produced a CPR Part 35 compliant report when he was asked to inspect the work and advise. He was not called to give evidence but the report he produced on the problems and remedial works was in the trial bundle.

198. Both Mr Drljaca and Mr Ulyatt disallowed Peter Dann Ltd's invoices and GO5's invoices, on the basis that they should form part of the costs of the claim rather than damages.

199. Mr Emin's opinion is that it was not possible to separate out the work done for the different purposes and he adopted the pragmatic approach of allocating half the invoices to remedials. I adopt his approach. I will allow half the total of the invoices as damages relating to the remedial work, on the assumption that the reports served a dual purpose. The balance may prove to be recoverable as costs in due course, as costs of the litigation.

Rent

200. Miss Martell claims £45,283.27 for rent for a 19 month period between June 2016 and January 2018 when she did not live in the Property. She remained in the Property for a period after the Building Contract came to an end, but it was not fit for habitation. She then took advantage of a friend's offer to stay rent free in a flat while it was being sold. After that, she rented a flat. The experts agree on the monthly costs of Miss Martell's rent when she was forced to rent a flat until the Property was habitable. They do not agree the period for which rent should be allowed.

201. Both Mr Drljaca and Mr Ulyatt are of the view that rent should be allowed until the property was fit for habitation, which they suggest was in mid-February 2017, which is about 2 months after the remedial work was completed.

202. Miss Martell's oral evidence was that she understood the terms of the loan she had taken out did not permit the Property to be inhabited, though this was not dealt with in disclosure or her witness statement. She also gave evidence that she would not have wanted to live in the Property while the refurbishment work was continuing after the remedial work had been completed, as the Property would be dirty and dusty. It is clear that the fit out works after the remedials had been completed were continuing at least

until February 2017. Miss Martell's evidence was that, as soon as the Property was finished, she put it on the market. The Estate Agent's brochure was produced in mid-March 2017. Miss Martell explained she received a prompt offer for the Property and therefore there was no point moving back in, but the eventual sale of the property took longer than expected.

203. Whilst I understand her reason for not moving back into the Property, the costs of that decision are not costs that I consider it is reasonable for the Defendants to bear. I find that that the Property was habitable from mid-March 2017. However, I do not consider it reasonable to expect Miss Martell to have given notice on her rented flat until the Property was actually ready for habitation. She had to give two months' notice. I find she is entitled to recover her expenditure on rent until May 2017, which is a total period of 11 months, being £26,216.63.

Interest/finance costs

204. The issue of interest and finance costs were the subject of debate at the Pre-Trial Review. The Particulars of Claim claimed as damages "*Extra finance costs on monies borrowed to finance the works and remedial work – To be assessed*". There is therefore a pleaded claim for damages for the costs of Miss Martell's actual borrowing to finance the remedial work. No figure has been pleaded for those costs. In addition to the claim for damages, there is a claim for interest under s35A Supreme Court Act 1981 at such rate and for such period as the Court thinks fit.

205. In her witness statement, which was prepared by Miss Martell when she was not represented, Miss Martell set out in a table her claims for damages, which echoed the terms of the Particulars of Claim. However, in her witness statement, she gave a figure of £144,078.00 for "*extra finance costs on monies borrowed to finance the works and remedial work*". There was no detailed breakdown showing how that sum was calculated.

206. At the pre-trial review, Miss Martell sought permission to amend the Particulars of Claim by adding to the table of damages particulars of the loan agreements she had entered into. Those loan agreements had been disclosed, so the Defendants were already aware of the sums borrowed and the interest rates and charges. The proposed amendment did not set out the precise figure claimed as damages or how it was calculated. Mr

Fairbairn submitted that the calculation of the sums claimed by way of damages was a matter of arithmetic and did not need to be set out in detail in the Particulars of Claim or in Miss Martell's witness statement and that it was premature to do that arithmetic before the court had awarded damages for the remedial costs so the capital sums on which the calculation was to be done were known.

207. In addition, the draft Amended Particulars of Claim included an allegation that the rates charged and fees incurred were typical of the costs of borrowing for a person in her position at the time. Mr Fairbairn applied in the face of the court for an order for further expert evidence as to the costs of borrowing applicable to persons in Miss Martell's situation at the relevant period, on the basis that the case of *West v Ian Finlay and Associates* [2014] EWCA Civ 316 suggested that such evidence would assist the court in assessing a fair rate of interest, adopting a broad brush approach, but informed by evidence as to borrowing costs. The Defendants opposed the application.

208. I refused permission to amend, on the basis that the proposed amended pleading was confused and appeared to mix two different bases of claim, being the assessment of a claim for damages for actual loss incurred by actual borrowing to finance the remedial work, and the assessment of interest by the court exercising its discretion pursuant to s35A Supreme Court Act 1981. The proposed amendment did not contain any figures or calculations and did not add clarity to the existing pleadings. I made clear that I was not precluding the possibility of allowing an amendment that did add clarity, if it was promptly made. However, I said that I considered that it would be helpful, before trial, if the parties' positions as to interest could be made clear. I suggested that it would be helpful if the Claimant could explain how she calculated her claim for additional finance costs of £144,078, whether in correspondence or by providing a spreadsheet showing the Claimant's calculations. Whilst it was correct that it would have to be amended once judgment was handed down to calculate any award of finance costs on the basis of damages awarded rather than the full claim, it would assist the parties' understanding to have that calculation before trial.

209. Whilst expert evidence may have assisted in the exercise of the court's discretion pursuant to s35A Supreme Court Act 1981, the very late application for further expert evidence was opposed by the Defendants on the ground it might jeopardise the trial. The

scope of the instructions to an expert were not clear. I refused the application for additional expert evidence.

210. I mention this background because Mr Cawsey objected to the fact that the trial bundle included the Claimant's voluntary particulars, for which he argued there was no permission. Whilst there was no permission for an amended pleading or a supplementary witness statement, the voluntary particulars do no more than set out the terms of the loans that had already been disclosed and which were available to the Defendants from the disclosed documents and set out the Claimant's method of calculation that Mr Fairbairn had explained at the PTR he would ask the court to carry out following the award of damages. It was broken down between the sums claimed on those elements of damages that were agreed, subject to liability, and those that were not. Of course, that had to be by reference to the total sums claimed rather than the damages awarded, which could not be known. It appears that this document was produced following my suggestion that it would be helpful so all parties understood in advance of trial what interest Miss Martell argues should be allowed.

211. In fact, the calculation in the voluntary particulars is very slightly lower than the sum identified in her witness statement, being £138,341, rather than £144,078.

212. Miss Martell was cross examined on her claim for interest. She explained she had no other assets and the Property had been condemned, so she could only borrow at a high rate of interest. She explained each loan replaced the previous one. It was put to her that there was no evidence of her having tried to borrow from a mainstream lender. She said she used a broker, P J Kelly, who had gone out into the market and had tried everything. She said he had personally lent her some money as "*it was at the end of the road*". The contemporaneous emails between Miss Martell and her broker show that she had no funds at all available to her even to pay for diesel or her dog's medication.

213. She said she had tried to sell the Property at auction but was told buyers would not touch it, even at auction. She accepted she did not know what her broker had discussed in his phone calls with potential lenders, and she could not prove a negative, but he had tried everything.

214. She took out expensive loans to finance the remedial work. She claims as damages the actual cost of those loans, insofar as they were spent on remedial work which I find she is

entitled to recover from the Defendants, for the period between the time the individual items of costs were incurred to the time she repaid the loans when the Property was sold.

215. I am satisfied on the evidence that borrowing at normal domestic mortgage rates from a mainstream lender was not open to Miss Martell for the project she was undertaking, and particularly when borrowing was required for remedial work to remedy a building that had significant issues. I do not find it surprising that the rates were high.

216. No evidence was adduced by the Defendants as to the availably of finance at better rates. Miss Martell had the benefit of a professional mortgage broker and I am satisfied that she sought to mitigate her losses by borrowing at the best rates reasonably available to her. There is no evidence that she failed to mitigate her loss. She has limited her claim for damages to the proportion of the loans she took out which is attributable to her expenditure on the elements of the costs allowed as damages. I consider she is entitled to damages for the additional loss she incurred by having to finance the remedial works between the time she incurred the remedial costs to the time when those loans were repaid, when the Property was sold.

217. After that time, I consider she is entitled to interest pursuant to s35A Supreme Court Act 1981 and will hear submissions as to the appropriate rate after this judgment is handed down.

GSB'S COUNTERCLAIM FOR REPUDIATORY BREACH OF THE CONTRACT

218. GSB counterclaim for their lost profit as a result of failing to complete the job, they say, as a result of the contract ending following Miss Martell's repudiatory breach of contract by being aggressive and rude and by telling them to leave her house.

219. Miss Martell presented as a warm, expressive and talkative person, who viewed her advisers (including Mr Gustyn) as friends and treated them in that way. That is clear from her text messages. She told me her friends called her "Tigger" because she always sought to be optimistic and see the positives. However, she admitted she was stressed and anxious as a result of the fact she had sold her other flat, which contained her furniture, she needed to move into the Property and she could see that it was unlikely that

it would be ready in time. Her evidence was that she wanted GSB to focus on work that would enable her to move in, such as completing the bathroom. It is clear from the WhatsApp and text messages passing between her and Mr Gustyn that she was frustrated. I have no doubt that GSB found her presence on site an irritation, whether because she was picking them up on what she believed were their errors or whether simply because it is harder and less congenial to work under the critical eye of clients. I have no doubt that the parties irritated each other towards the end of the contract and that cross words were exchanged.

220. Both parties accuse the other of swearing at them. In the context of what was happening on site and the fact that Miss Martell was extremely worried and upset that the work would not be finished in time for her to move in when she needed to, I do not consider that, even if she did swear at them, and even if she showed her frustration in her dealings with them, that would amount in itself to repudiatory breach of contract entitling GSB to treat the Building Contract as at an end.

221. GSB claim that Miss Martell told them to leave her house and that amounted to repudiatory breach of contract.

222. The contemporaneous correspondence shows that Miss Martell emailed GSB on 2 October 2015 to instruct them to halt work on the basement until Building Control had visited and were satisfied. On 4 October, she emailed them suggesting other works they could do, including tiling the garden, and pointing out she could no move in without the mega flow boiler being installed. She said *"if in fact you have quit as Slawek informed me last week, please do me the courtesy of informing me so I can make alternative arrangements*."

223. GSB sent Miss Martell an email on 5 October 2015 to say they were not completing the work. In that letter, GSB said Miss Martell had been rude, argumentative and aggressive. I note they did not say that she had told them to leave site or that the contract had come to an end as a result.

224. I find Miss Martell's recollection of the events is more accurate than Mr Walczak's on this point and that she did not instruct them to leave site or otherwise indicate that she did not intend to be bound by the Building Contract. I find that Miss Martell was not in

repudiatory breach of contract and it was GSB, not Miss Martell, who brought the contract to an end.

225. In any event, there was no evidence to support GSB's claimed lost profit.

226. The Counterclaim is dismissed.