Neutral Citation Number: [2021] EWHC 1573 (QB)

Case No: QB-2018-003981

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2021

Before:

MR JUSTICE FREEDMAN

- -

Between:

PHOENIX INTERIOR DESIGN LTD

Claimant

- and –

(1) HENLEY HOMES PLC
(2) UNION STREET HOLDINGS LTD

Defendant

- -
- -

Andrew Legg (instructed by **Warners Law LLP**) for the **Claimant**
Nicholas Broomfield (instructed by **Edwin Coe LLP**) for the **Defendant**

Hearing dates: 9, 10, 11, 12, 15 & 18 February 2021, with further submissions on 22 February 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be Wednesday 9 June 2021 at 10.00am.

MR JUSTICE FREEDMAN:

I Contents

SECTION NUMBER	SUBJECT	PARAGRAPH NUMBER
I	Contents	
II	Introduction	1-4
III	The parties	5-7
IV	The contractual relationship between the parties	8-29
V	Evaluation of the witnesses	30-41
VI	Expert evidence	42-48
VII	The issues	49
VIII	The identity of the contracting parties	50-53
IX	The terms of the Phase 1 Contract A. The Initial Brief, the documents that form the Phase 1 Contract and the terms thereof B. Contractual terms – incorporation of the Claimant's standard terms	 54-63 64-76
X	If the Claimant's standard terms and conditions were incorporated into the Phase 1 Contract, are they unreasonable for the purposes of the Unfair Contract Terms Act 1977? A. The statutory provision and the terms of Clause 8 B. The pleaded case C. Discussion	 77-78 79-84 85-86
XI	Did the Claimant owe the Defendants a tortious duty to act with reasonable skill and care?	87-89
XII	Did the Claimant "complete" the Phase 1 Contract causing the balance of the contractual monies to fall due and/or were the goods "accepted": the legal analysis	90-104
XIII	Did the Claimant act in breach of contract or its tortious duty of care? (1) Any matters relating to the negotiation and terms of the contract relevant to the alleged breaches	105 106-113

	(2) The history of the dealing as regards the signing off performance of the contract **(3) The effect of the continued use by the Defendants of the goods supplied**	**114-128** **129-135**
XIV	**Conclusions before considering specific defects**	**136**
XV	**Furniture** **(1) Introduction** **(2) The Defendants' case** **(3) The Claimant's case** **(4) Discussion**	**137-139** **140-149** **150** **155-166**
XVI	**Roman Blinds/Black-Out-Blinds**	**167-178**
XVII	**Curtains, Curtain rails and Curtain Rods**	**179-189**
XVII	**Glass topped coffee tables**	**190-194**
XIX	**Marble coffee tables**	**195-196**
XX	**Headboards**	**197-198**
XXI	**Damages/quantum**	**199-216**
XXII	**Did the Claimant "complete" the Phase 1 Contract causing the balance of the contractual monies to fall due and/or were the goods "accepted"?**	**217**
XXIII	**If the Claimant's standard terms and conditions were incorporated into the Phase 1 Contract, is the Claimant in breach of clause 8 of its standard terms and conditions?**	**218**
XXIV	**Conclusion**	**219-211**

II Introduction

1. The Claimant, an interior designer, claims unpaid invoices from the Defendants in a sum of £232,550.42. This arises out of goods supplied and services rendered in connection with the Dunalastair Hotel in the Scottish Highlands. One of the issues is whether the Claimant contracted with the holding company, the First Defendant ("Henley Homes"), or with its subsidiary, the Second Defendant ("Union Street"). Although in the end the correct defendant is only one of the two defendants, I shall use the terms "the Defendants" to refer to the Defendants or either of them.

2. The Claimant says that the balance outstanding comprises one half of the agreed contractual sum. The Defendants say that the last 50% of the price was payable only on completion, and that the performance was so defective that completion never occurred. As a result, the Defendants submit that the remaining half of the contractual sum never became due. Further or in the alternative, the Defendants say that the goods supplied were so defective that the Defendants are entitled to compensation which exceeds the amount unpaid. This forms the basis of a counterclaim.

3. It will be necessary for the Court to consider a number of issues, including who were the contracting parties, and what were the terms of the contract. This includes consideration of whether the Claimant's terms and conditions were incorporated into the contract and, if so, whether they satisfied the requirement of reasonableness. At the very heart of the dispute is the issue of whether the goods supplied and installed were of satisfactory quality and fit for purpose, and if not, what loss was suffered by the Defendants. In the course of the cross-examination of Susan White, the managing director of the Claimant, it was put to her "…this case is very much about quality, is it not", to which the response was "this case is about non-payment…" The Court did not at the time find it constructive for the parties to be trading the headlines of the case. Be that as it may, that inter-change essentially summarises the perceptions of the parties about the case.

4. More particularly, the Defendants say that they intended to create a five-star offering for their clients in what became a five-star hotel. They say that the Claimant supplied goods which were sub-standard and unsuitable for the deluxe market for which they were intended. There is a dispute between the parties about the specification of the hotel, which the Defendants say were supposed to be furniture, fittings and accessories suitable for a five-star hotel. The Claimant does not accept that characterisation of the contractual terms, but in any event, denies that the goods were not suitable for purpose. At the time of the hearing, about four years since the time of the supply of the goods, they have not been replaced, and indeed until the closures during the pandemic, the Defendants continued to use them. If and insofar as there were defects, the Claimant says that they can be rectified for less than £10,000: the Defendants claim sums which are greater than the sum claimed.

III The parties

5. The Claimant is a company which was incorporated in 2003. Its core business is the design and installation of show houses and sales and marketing suites. It has about 15 employees. The managing director of the Claimant is Susan White. She has a university degree in interior design and about 25 years' experience in the industry. The

Claimant engages sub-contractors as and when required. It provides interior design services and also supplies and installs furniture and fittings. Instead of charging separately for the advice about interior design, it takes an uplift on the cost of the goods supplied and installed. Its turnover is about £1.7 - £1.9 million per annum, according to Ms Granger who deals with the accounts of the Claimant.

6. Henley Homes is a property development group one of whose subsidiary companies is Union Street, which company was incorporated on 27 April 2007. One of the properties which was acquired by Henley Homes is the Dunalastair Hotel Suites, Kinloch Rannoch, Scotland ("the Hotel"). It is in the Scottish Highlands. In 2014, the property was transferred to Union Street.

7. The CEO of Henley Homes is Tariq Usmani. The director of hotels and leisure for the Henley Homes group of companies is Nassar Khalil: he has a master's degree in international hospitality management and has managed hotels throughout the world. He commenced work on the project in issue in about September 2015.

IV The contractual relationship between the parties

8. The Claimant and the Defendants worked together, with the Claimant providing interior design services over a period of 10 years prior to the instant contract on a frequency of about one contract per annum. There was therefore a long-standing relationship between Ms White on behalf of the Claimant and Mr Usmani on behalf of the Defendants. Evidently, they got on well, as evidenced by the Claimant extending payment terms when necessary, and Ms White providing some free advice for Mr Usmani in connection with his home in Beaconsfield. Later in the judgment, there will be reference to the way in which Ms White says that she drew to the attention of the Defendants its terms and conditions in the 10 years of prior trading.

9. In mid to late 2014, Mr Usmani and Ms White discussed a new Henley Homes project in Scotland. Henley Homes had acquired the Dunalastair Hotel Suites and transferred ownership to Union Homes in June 2014.

10. The Claimant had no prior experience in hotel interior design. Mr Usmani's evidence (his statement at para. 8) is that the Claimant claimed to have substantial hotel experience. Ms White's evidence (her statement at para.10) is that she made it clear at the outset that the Claimant had no experience in this sort of project, and she said that the Defendants were in the same position. When Mr Khalil became involved, he looked at the Claimant on the internet, and from a quick review of the Claimant's website it was clear that it had no experience of designing interiors of hotels or supplying furniture, furnishings and fittings to hotels. He mentioned this to Mr Usmani.

11. The concept formed the basis of initial discussions between the Claimant and the Defendants. On 18 December 2014 Union Street sent a briefing email to the Claimant (from Suze Jones to Susan White) and invited it to tender/quote ("the Initial Brief"). An "Initial Brief", a part of which read as follows:

> ""Please see attached a set of plans for the serviced apartment hotel I spoke to Justine about yesterday…

> We are seeking from you a scheme just for the rooms and suites themselves and not the communal areas, as these have been done….
>
> The building itself is Victorian but the look we are seeking is more stripped back than the original décor, which was all a bit 'scotch baronial tat'. We want sympathy for the original but modern in finish, maximising space and light. Definitely NOT tartan and stags heads, although modern use of traditional local colours, woods, metals, stone, etc is fine.
>
> **We definitely need hard-wearing and contract quality which is easy to clean, maintain and replace BUT with a luxurious 5-star feel. Easy, eh??**
>
> We would need to know from you furniture, softs, artwork, mirrors, lamps, wall and floor colour/coverings.
>
> The bedrooms must have hotel-style wall hung headboards, which contain built-in power outlets, lighting and bedside tables…
>
> The windows are likely to have a secondary glazing system with an integral sheer blind but there will need to be curtains within the room, probably with an acrylic pole/handle thing to pull them closed.
>
> …
>
> Ease of daily cleaning and maintenance is key and so, while we'd be fine with suggestions to vary décor colours and materials across different floors or wings (or perhaps for different room sizes or types), we would not want to unnecessarily complicate the daily management of the site. For example, if the housekeepers had to have a list to remind them what throws went in what specific rooms, this would become onerous.
>
> We would need handover info from you at the end of the job, to assist with replacement, maintenance and so on.
>
> **Pricing: please cost for each room type so we know what each studio, 1 bed and 2 bed apartment will cost."** [emphasis added]

12. The Initial Brief itself said **[10/710]**:

> "This Victorian building (1881) was purchased from administrators and is now being refurbished by Henley Homes into 32 contemporary serviced apartments, which will be finished in June 2015.

> The target market is visitors interested in the local walking, fishing, golf, etc in the surrounding hills, but who are seeking the independence, privacy and comfort offered by **high-end serviced apartments**. They are used to the best that the City can offer, but who are seeking some peace and quiet in the country. …
>
> **Accommodation will be £80-£120 per night.**
>
> **Interior design is luxurious, light and modern**, with a focus on detail and stripped-back use of natural colours and local materials. This is a large step away from the previous décor of tartans, antlers, baronial Victoriana, etc." [emphasis added]

13. Subsequent emails made clear that the budget was ambitious. Having encouraged the Claimant to "present to us as usual" and that "we have no fixed budget", with "Watchwords being 'cost-effectiveness', 'hardwearing/ easy to maintain or replace' and 'luxe-looking'", when the quote was provided, Henley Homes asked for the amount to be reduced by approximately 30% - to £300,000. In February 2015, the Claimant approached a company known as Top Brass Contracts Ltd ("Top Brass"). The focus of the inquiry was initially on the bespoke nature of the curtains: "these should be lined, pinch pleat on a pole (and Sue would like those Perspex rods you use to draw them and where it needs to be roman blinds then these are again lined and matching fabric pelmets on a system. Please quote total fabric quantities as well please going on a 140W no repeat. If you could get some figures to me for supply, measure and fit I would be grateful. There are 31 rooms in total".

14. Top Brass replied on 27 February 2015 stating:

> "Don't forget we also manufacture hotel beds and cased goods in our joinery department, products like bedside tables, wardrobes, credenzas etc for all the hotel industry … We've just fitted out the Ibis and Novotel hotels in Glasgow and Edinburgh so not a problem."

15. In February 2015, Ms White presented to Mr Usmani, explaining the scheme of the design concept and demonstrating how it met the brief. The parties subsequently obtained assistance from individuals with experience working in hotels, including high-end hotels: for the Claimant, Gavin Green was hired to join the team for the Hotel project, and for the Defendants, Mr Khalil became a part of their team. According to the evidence of Ms White, printed copies of the Claimant's terms and conditions were made available at the presentation.

16. During 2015 representatives of the Claimant liaised with representatives of Henley Homes to understand better the requirements of the project, obtaining drawings from the architects (working for Henley Homes' construction company, Reis Construct Ltd) and scoping the requirements of the project.

17. On 15 December 2015, the Claimant sent an itemised "cost of furniture per apartment" to Top Brass and invited it to quote for the furniture itemised therein. Top Brass provided two different costing options in an email dated 22 December 2015.

18. After initial proposals were sent by the Claimant, on 6 January 2016, a revised proposal summary was sent by email "*showing the breakdown for each apartment as requested along with our standard terms and conditions. Please also find attached the furniture plans for the Hotel*". The proposal summary was for 31 rooms/suites and was attached to the email, giving the option of including wallpaper or not and referring to terms and conditions overleaf. In fact, they were not overleaf because they were sent electronically and appeared in a separate file attached to the same email. Printed copies had been available at the time of the original presentation.

19. After a meeting with Henley Homes' architects on 5 February 2016, the proposal summary was amended to include Apartment 32 and re-sent by email on 10 February 2016. The revised proposal had slightly different pricing and was in an identical format to that sent on 6 January 2016 with the addition of Apartment 32. The option for wallpaper remained on the proposal. The reference to the terms and conditions was identical, stating that *"Accepted purchase/rental contracts are subject to terms and conditions overleaf"*. However, no terms and conditions were "*overleaf"* nor were they provided separately to the Defendants.

20. That document was signed by Mr Usmani on 11 February 2016 and sent to the Claimant on 12 February 2016. The wallpaper option was removed. The initial deposit amount was, by agreement with the Claimant, marked as reduced from 50% to 20%. The signature was under the words quoted above, stating the contracts were subject to terms and conditions overleaf. The acceptance did not contain terms and conditions overleaf nor was it accompanied by the Claimant's standard terms and conditions. A 20% deposit was paid on 24 February 2016.

21. The Phase 1 Contract was subsequently amended by agreement between the parties in June 2016. The Claimant provided the Defendants with a document headed "Revised Proposal Summary" which stated that it was *"subject to terms and conditions overleaf"*, but again no terms and conditions were *"overleaf"* nor did they accompany the document.

22. The contract having been signed, work commenced by the Claimant. Mr Green was hired by the Claimant. Top Brass was selected as main contractor, and a meeting was arranged at their premises in Hartlepool on 10 March 2016 to show furniture samples. At that meeting, the Defendants' representatives were impressed with the quality of the furniture, although they were disappointed that they could not use the photographs of the design concept as they had hoped would be possible.

23. Since Mr Usmani could not attend the meeting in Hartlepool and wanted personally to see samples of the furniture so that he could approve them himself, a further meeting took place at Henley Homes' head office on 24 March 2016. The minutes of that meeting, which were sent to Henley Homes by email, show Henley Homes making selections of laminate and some fabrics, indicating that other fabrics were needed to have a more premium feel, and a comment that they were "*pleased with the quality of the furniture*". The changes and additions required by the Defendants led to a higher set of pricing as stated in an email of 8 June 2016. After some discussion (focussed on

reducing price without "*loss of quality or quantities*"), there was agreed a revised summary proposal signed on 13 June 2016 and again sent by email (such that the terms and conditions were not physically on the back).

24. The Claimant was then asked to make up a sample room at the Hotel in advance (the costs of which led to a disagreement that was resolved). The sample room was prepared by 18 September 2016. Mr Usmani commented "*from the photos I've seen it looks really good. I will go up there this week.*" Following Mr Usmani's visit, he called Ms White and discussed further, as recorded in subsequent emails. The furniture was observed, inspected and approved.

25. Following this, the Phase Two Contracts were discussed and concluded. According to the evidence of Ms White, Henley Homes insisted that delivery and installation would be by 9 January 2017, and a Re-Revised Installation Schedule was circulated on that basis.

26. When the team arrived, the Hotel was not ready according to the evidence of Ms White. The heating was off, carpets had not been installed in main communal areas (until April 2017) and electrics were not ready. At that stage, Phoenix sent its invoice, claiming that the installation had been undertaken as required and any incomplete tasks were not their responsibility. Ms White's evidence was that all the items were installed by 20 February 2017. Nevertheless, she said that the Hotel was not ready and other contractors were in the Hotel, using the rooms and working.

27. There then commenced a long period of 'snagging'. This led to increasing tension between the parties, particularly around the time of the Hotel's opening in May 2017 and continuing thereafter.

28. The performance of the Phase 1 Contract was beset with delay and there were significant disputes between the parties over (a) the readiness of the Hotel for delivery and installation of the fixtures, fittings and drapery; (b) damage caused to the fixtures, fittings and drapery; (c) the quality and/or suitability of the services, products and design provided by the Claimant; (d) "snagging" and inspection of remedial works at the Hotel; (e) whether the works had been "signed off" and the fixtures, fittings and drapery thereby accepted by the Defendants; and (f) the remedial works required. This ultimately led to an irreconcilable breakdown in the relationship between the Defendants and the Claimant. This culminated in the breakdown of the relationship in July 2017 when Mr Usmani refused to release payment on the basis of alleged outstanding issues (which are the subject of the Amended Defence and Counterclaim ("AmDCC") and are considered in greater detail below).

29. The Claimant claims that it is has performed the Phase 1 Contract and that it is entitled to the balance of its fees. The Defendants dispute that the Claimant is entitled to any further fees under the terms of the Phase 1 Contract and counterclaims for damages (or to set off any sums owed to the Claimant) arising from the Claimant's breaches of the Phase 1 Contract and/or breaches of its tortious duty of care.

V Evaluation of the witnesses

30. Ms White was an impressive witness. She had an almost encyclopaedic knowledge of the case. Frequently, she would refer to an email, and without reading from it, she had a recall of what it said. She was intelligent in her answers to questions, adverting to a difference between a five-star feel and a five-star hotel. She also pointed to a difference between standards expected of serviced apartments and a five-star hotel. She was careful to deal with the questions and to answer precisely. She answered each of the complaints about individual items**.**

31. During the course of her evidence, she provided informative and reliable evidence. By way of example, she clarified the working practices undertaken by the Claimant and how they operate. She made the point that recommendations as to furniture choices and style are made right at the outset during the tender presentation. She explained the Claimant's consistent practice in respect of providing hard copies of summary proposals with terms and conditions overleaf at the presentation. Ms White explained that the installation room was set up in September 2016, giving the Defendants a further opportunity to inspect the goods, its design and the quality of manufacture, and all was approved. She was aware of the detail and requirements that hotel items had to be hard-wearing and suitable, and that she conducted research and liaised with suppliers familiar with hotel requirements when preparing for the Hotel project.

32. Mr Green gave evidence as to the design process undertaken by the Claimant in connection with room and spacing requirements, and some of the challenges faced working with the Henley Homes team, who did not appear to have a proper appreciation of (by way of example) electrical requirements, the importance of taking accurate and timely room measurements and difficulties caused by making late adjustments to plans. He explained why Top Brass was a suitable fit – it was experienced at producing "*some of the hardest working furniture in the hotel industry*" [T3/8/33], and since the design was a simple "*claw back design and actually was fairly basic*", they were considered "*more than capable*" [T3/9/1-4]. He came over to the Court as being knowledgeable and experienced, authoritative and reliable. He confirmed that he was happy with the quality of furniture provided to the Hotel. He explained that some of the snagging may have been through rough treatment during installation, but other snagging items identified could be indicative of a "*quality control issue at the factory*", such as some sharp edges which could be removed by gentle sanding and cleaning up [T3/15/34, T3/21/20 - 23, T3/23/16 - 26].

33. The scope of the evidence of Charles Gillmore, the supplier of the marble tables, James Maccallum, the husband of Ms White and Ms Susie Granger, the finance director was much smaller in its ambit. None of them gave evidence which undermined the Claimant's case.

34. I now refer to the Defendants' witnesses. I found Tariq Usmani to be an intelligent person. He was a tough negotiator. He was often prone to advocating his case rather than giving evidence of fact. Overall, I found his evidence less compelling than that of Ms White. He did not have her mastery of the documents, as was evidenced for example by his lack of recall of when he visited the site. From time to time, he gave evidence which I did not regard as credible. For example, he said that Ms White had told him she had worked on hotels. On his evidence, he did this without asking her which hotels she worked on or checking the quality of that work, which seemed by itself most unlikely.

35. Problems arose from his limited availability, his wish to delegate to Mr Khalil, and how he maintained ultimate control for himself, something that would have been more realistic if in fact he had been more hands on himself. It was difficult to follow what had moved the case on from the position left by Mr Khalil in June 2017 to the position adopted by Mr Usmani on 12 July 2017 to the counterclaim which is now a general complaint about cased goods, furniture, curtains and drapery.

36. Mr Usmani's evidence was unconvincing when he sought to explain how the items were used for about three years until the onset of the pandemic and still had not been replaced as at the time of trial, and yet the counterclaim was being made on the basis of a need to replace many of the items. He had no satisfactory answer for how the Hotel could function as a five-star hotel with fundamentally deficient furniture as he contended to be the case for such a long period of time. It also seemed doubtful that there was an inability to replace the furniture during the pandemic, when in fact the closure might have provided an opportunity to replace furniture if that were required.

37. Mr Khalil was a man who has a huge amount of experience in the hotel business, particularly at the upper end. His evidence suffered from the fact that he was not content about the steps taken before he arrived. Mr Khalil also gave evidence which seems unlikely because of the thrust of the contemporaneous documents. An example is that he spoke to Ms White by telephone after inspecting the sample room 3 at the Hotel in September 2016. He said that she promised him that the quality of the furniture would be improved for the other rooms, as it was done in a rush [T4/86/22, T4/87/33 and T4/96/4-33]. There is no support for this in the documents. It is contradicted by Chris Bassett, formerly of Top Brass, who gave evidence on behalf of the Defendants in connection with the sample room furniture: "*being a mock up room, you go over the items with a fine toothcomb prior to leaving the factory*" [4/65/25-26].

38. Further, he said that at the snagging walk-around with Ms White on 1 June 2017 he did not confirm the job was complete and promise payment, despite the documentary references to such promises and completed snagging lists that he could not explain. There will be set out below detail of his evidence about 1 June 2017. This is heavily at odds with the contemporaneous documents which suggest that he was appreciative about the work done by the Claimant. He passed on appreciation by way of praise to a trade magazine (for which businesses paid for articles about themselves) and in the context of obtaining five-star recognition and awards for the Hotel. Where there are contradictions between his account of details and contemporaneous documents, there is a need for caution.

39. Mr Bassett gave evidence in his witness statement that was and is heavily relied on by the Defendants, namely that the furniture provided was three-star graded rather than five-star graded. This was predicated on assumptions about the nature of what was specified in the contract: neither was he party to the contractual negotiations nor were they passed on to him at the time.

40. I regret to say that I found Richard Deak, the general manager of the Hotel, to be an unconvincing witness. Instead of explaining why he did not obtain the assistance of a French polisher or repairer with a skill in repairing such furniture, he gave a long rambling answer which avoided the question. He made allegations about furniture falling apart which went beyond anything previously alleged. Mr Deak also did not give credible evidence about complaints, maintenance and reviews, but rather he explained

his approach as follows: "*this is a court case when we are trying to prove that there are issues with the furniture*", and "*it is not in my position to fix these things, I am not the decision maker here. I just report to the owners…".* There were times when his evidence came over as intending to prove a point for the benefit of his employer rather than to answer the questions put to him.

41. The scope of the evidence of Suzanne Jones (Susie Jones), an executive assistant to Mr Usmani, was very limited and did not advance matters.

VI Expert evidence

42. The expert evidence was of some use in order to enable the Court to provide an additional understanding of the witnesses of fact. Not much of the evidence was about industry standards, and this was not a case where the evidence was so technical that it was essential for the Court to receive their assistance. It is important to be careful to recognise that they do not take the part of the witnesses of fact.

43. The Defendants' expert Daniel Englender has experience of working with interior designers and acting as a purchasing agent of furniture, fittings and equipment for hotels. At times, he argued the case on behalf of the Defendants, but did come to accept that faults he observed may have been the result of poor maintenance at the Hotel, rather than a result of defective items: see para. 3.3 of his report. Although at times he was definitive about various goods not being suitable for a five-star hotel, which begged the question as to the contractual specification, he tempered this significantly. He gave evidence about the dilution of the star system from the AA/RAC days to internet booking sites and tourism agencies. He referred to various furniture items being "both aesthetically and in finish quality, around the 3-star or 4-star quality". The reference to four-star quality is significant because in the various documents, there was reference to Top Brass having provided furniture to three and four-star hotels, and to an email of 10 March 2016 from Mr Khalil to the Claimant referring to four stars plus.

44. Likewise, whilst his thesis was that the quality of the furniture could not be put down to wear and tear, he also said that "some goods showed bad and unacceptable wear & tear that is premature although it is difficult to know precisely how each piece has been maintained since installation": see para. 3.3 of his report. This can be of indirect assistance to the adjudication in the case, but in the end, the evidence of the factual witnesses provided more direct assistance. He was initially resistant to the suggestion that snagging defects on laminate could be remedied, but did accept that that could be done [T5/48/15 - 25, T5/62/23-32]. This latter answer is that "*there are only a certain number of dents that have been repaired and matchsticks put into holes that one would happily allow your guests to stay in*". I agree with the submission that this answer may understate the essential role and skill involved of maintenance in a hotel.

45. Adrian Barrett has a great deal of expertise in the field of interior design. He himself is an interior designer and chartered builder with 57 years of experience in the construction and interior design/ decorating industries. In giving his evidence Mr Barrett candidly expressed the limits of his knowledge and where he was unable to give an opinion, he said so and he tried his best to help the Court. He explained clearly that the only defects there were in the Hotel, were those in his report. All other matters were fine. He said there is no such thing as five-star furniture [T5/77/5], and that the designer

of the furniture was responsible for its aesthetic and the quality of its components [T5/88/24].

46. Both experts were knowledgeable about the industry, coming to it from slightly different perspectives. A particular aspect of the background of the evidence of Mr Englender is having run a hotel furniture manufacturing business and more recently being involved as a purchaser of hotel furniture, fittings and equipment. Mr Barrett's experience was at first as a specialist in decorating works and interior design and small building works. Subsequently, he has been involved in interior design and project management both in France and in the UK.

47. The evidence was of more limited assistance when they came to deal with factual matters outside their own knowledge. Mr Englender sought to be definitive about whether the goods were suitable for a five-star hotel which begged the question as to what exactly was the specification. His evidence only added to the uncertainties about the specification in this regard, as he gave evidence about the dilution of the star system from the AA/RAC days to internet booking sites and tourism agencies. Once there was that dilution, and there was reference by him to the overall furnishings remaining at 3 to 4 star level, any conclusion on his part that the overall furnishings were not sufficient for what was required under this contract was too unspecific and removed from the facts to be useful. Much more useful were the actual words used in rather unspecific ways, the approvals that were made prior to orders and how the parties created snagging lists and the degree of approval thereafter. There were some telling lines of Mr Englender who referred to "the furniture items referred to immediately above are both aesthetically and in finish quality, around the 3-star or 4-star quality", but then he said that some items were unfit for use in a four-star or five-star hotel due to their initial quality or subsequent deterioration.: see para. 3.2 of his report. However, he also said that "some goods showed "bad and unacceptable wear & tear that is premature although it is difficult to know precisely how each piece has been maintained since installation: see para. 3.3 of his report. This can be of indirect assistance to the adjudication in the case, but in the end, the evidence of the factual witnesses provided more direct assistance.

48. Likewise, Mr Barrett would have been minded to have had legs made of hardwood, but he relied on evidence to the effect that Mr Usmani had insisted on a single colour laminate/Egger. Here he relied on the evidence of Ms White at paras 19 and 45 of her witness statement. This then begged whatever would be the findings of the Court as to what occurred. In fact, the satisfaction about the use of laminate was, as I find not only by Mr Usmani, but also by Mr Khalil (with his vast experience of hotels) in September 2016. In certain respects, Mr Barrett's evidence was more realistic as he stated that there was no such thing as specific furniture for a five-star hotel: see para. 6 of his report. However, he too descended into the facts of the effect of electricity and heating not having been in operation during the winter months following installation in January 2017.

VII The issues

49. The following issues arise for determination by the Court at trial (in the same terms as appear at para. 33 of the Closing Submissions on behalf of the Defendants):

A. The identity of the contracting parties
B. The terms of the Phase 1 Contract
   B1. The Initial Brief, the documents that form the Phase 1 Contract and the terms thereof
   B2. Were the Claimant's standard terms and conditions incorporated by reference into the Phase 1 Contract?
   B3. Were the Claimant's standard terms and conditions incorporated by course of dealing into the Phase 1 Contract?
C. Did the Claimant owe the Defendants a tortious duty to act with reasonable skill and care?
D. Did the Claimant act in breach of either the Phase 1 Contract or its tortious duty of care?
   D1. Furniture
   D2. Roman Blinds/Black-Out Blinds
   D3. Curtains, curtain rails and curtain poles
   D4. Glass topped coffee tables
   D5. Marble coffee tables
E. Did the Claimant "complete" the Phase 1 Contract causing the balance of the contractual monies to fall due and/or were the goods "accepted"?
F. If the Claimant's standard terms and conditions were incorporated into the Phase 1 Contract, is the Claimant in breach of clause 8 of its standard terms and conditions?
G. If the Claimant's standard terms and conditions were incorporated into the Phase 1 Contract, are they unreasonable for the purposes of the Unfair Contract Terms Act 1977?
H. Damages/Quantum

VIII The identity of the contracting parties

50. There is a pleaded dispute as to who was the relevant contracting counterparty with the Claimant. The Claimant says that it was Henley Homes, and the Defendants say that it was Union Street: see Amended Particulars of Claim paras. 1 and 3, AmDCC paras. 2.2 and 2.2A and Reply and Defence to Counterclaim ("Reply") para. 3.1. In the opening skeleton of the Claimant, it was stated that it was not clear whether anything would turn on this point at the trial, at least not from the Claimant's perspective. Both Defendants are part of the same group, and how those parties choose to pay any damages awarded is a matter for them: see the opening skeleton of the Claimant at para. 38. The Defendants' closing skeleton (para. 34) was to the effect that by the end of the case, there was broad agreement that "it was unlikely to have any practical effect on the outcome of the trial".

51. It is in my judgment more likely that the contracting party was Henley Homes than Union Street when all of the contractual documentation save for the invoices were from or to Henley Homes. If the Hotel was transferred by Henley Homes to Union Street without reference to the Claimant, this would be unlikely to affect this conclusion. In view of the broad consensus that the outcome of this issue should not have any practical effect, that suffices.

52. The Court was concerned about the possibility of any counterclaim having to be between the owner and the Claimant. The Claimant realistically concedes that whatever

the arrangements were between the Defendants, it was within the reasonable contemplation of the parties at the time of entering into the contract that the goods would be for use in the Hotel. It was accepted that any defect (even if the goods were passed from Henley Homes to another entity) could be the subject of recovery under the contract (subject to other terms and conditions, including the standard terms and conditions), by reference to the general principle set out in *Biggin & Co Ltd v Permanite Ltd & Others* [1951] 2 KB 314 at 318-319.

53. It is possible that the analysis as between Henley Homes and Union Street is different, such that between them there are rights express or implied of indemnity. That is not something which concerns the Claimant. It is an internal issue between the Defendants. In the circumstances, the Court finds that the claim is properly brought by the Claimant against Henley Homes, and that the Claimant contracted with Henley Homes. It was also proper for the Claimant to join Union Street in view of Henley Homes having taken the point that Union Street was the contracting party.

IX The terms of the Phase I contract

A The Initial Brief, the documents that form the Phase 1 Contract and the terms thereof

54. There is an issue between the parties as to the requisite contractual quality requirement. The AmDCC states the case, but it also tells a story. It is said as follows:

> "6. Following an initial telephone call, during which the Hotel refit was discussed with the Claimant, the Second Defendant emailed the initial brief to the Claimant on 22 December 2015 ("the Initial Brief"). The Initial Brief, upon which the Defendants will rely at trial for its full terms and effect, expressly required the Claimant to provide *"hard-wearing and contract quality which is easy to clean, maintain and replace BUT with a luxurious 5-star feel"*.
>
> 7. The Initial Brief attached and incorporated a document which set out background to the Hotel. The document explained that the Hotel was to be, inter alia, *"high end"* and that the interior was to be *"luxurious, light and modern"*.
>
> …
>
> 12…. The parties entered into a contract on the terms of the Counter Offer. The terms of the Counter Offer, which were accepted by the Claimant and formed the basis of the Phase 1 Contract, were accordingly:
>
> 12.1 The Claimant would, in accordance with the Initial Brief and the terms of the Counter Offer, supply, deliver and install

> high quality furniture, soft furnishings and accessories for the purpose of fitting out fifteen studio apartments, 15 one bedroom apartments and 2 two bedroom apartments to five-star standard in exchange for payment of £309,787.57.
>
> 12.2. The furniture, soft furnishings and accessories provided and/or procured by the Claimant would be fit for the purpose set out in paragraphs 6 and 7 above, namely for inclusion in a five-star hotel.
>
> …
>
> 12.4 Any furniture, furnishings and accessories provided by the Claimant would correspond with the description provided by the Claimant/third parties to the Second Defendant."

55. The evidence in support comprising the witness statement of Mr Usmani was at para. 10 that *"I was clear that the Hotel should be a high-end five star offering. I very much saw the Hotel becoming a niche product in amongst the more general lower quality competition."* He referred at para. 60 to the cost in support of the counterclaim for special damages as being *"the total cost of replacing the defective three star furniture items with five star equivalents."*

56. The Claimant denies this case that there was a term of the contract whether communicated orally or in writing that the furniture and furnishings would be to five-star standard or suitable for inclusion in a five-star hotel. The evidence on which they rely is not of a specification of five-star furniture or furniture suitable for a five-star hotel. The language is much looser and sometimes contradictory. At the heart of the Initial Brief is the following loose reference to five-star in the terms quoted above: *"hard-wearing and contract quality which is easy to clean, maintain and replace but with a luxurious 5-star feel. Easy eh!"* There are a number of features which indicate that five-star was not a contractual term, namely

    (1) a five-star feel is loose and unspecific;
    (2) it is not the same as a five-star standard;
    (3) the combination of hard-wearing and five-star feel is almost contradictory (the expression "easy eh!" bears this out);
    (4) in fact, there is no evidence of a specific five-star quality standard for furniture and finishings;
    (5) at the contractual stage, it was not intended that the Hotel would be a five-star hotel, but an apartment hotel, which is a very different concept.

57. The Defendants say that they reiterated their intention for the Hotel and its furnishings to be of "five-star" quality throughout the lifetime of the contract. They provide by way of example that Mr Khalil stated on 10 March 2016 in an email that was forwarded to the Claimant that *"We are aiming for a 4 stars plus product in star rating terms. This is the equivalent to a boutique hotel … it is NOT a 3 star product. This needs to be made*

clear to Phoenix." This does not bear out a five-star quality requirement. The following features are to be noted, namely

(1) the email does not refer to a five-star product;
(2) the reference is to aiming for a "4 stars plus product" is loose and unspecific;
(3) there is no evidence of a "4 stars plus product" for furniture and finishings;
(4) the reference is to a boutique hotel which is looser than and not the same as a five-star hotel, and appears to be something which is smaller and stylish, but does not lend itself to a specific standard;
(5) it comes in an email from Mr Khalil who was not engaged by the Defendants at the time of the contractual negotiation.

58. In a heavily documented case, the absence of specific reference to a five-star product is significant. So is the fact that such documents as are relied upon do not support the pleaded case. There is a conflict of evidence between the witnesses as to what was said. In my judgment, insofar as the recollection of witnesses for the Defendants is that there was a five-star specification, I reject it. It is not supported by the documents, and I prefer the evidence of Ms White to contrary effect. As noted above, I found her to be an impressive witness. Further, such documents as there are do not have the specificity and consistency to support the Defendants' case.

59. This finding is of significance. Other evidence is in part based on the assumption of a five-star specification. Mr Bassett gave evidence about not having been informed about the five-star specification and referring to the three-star offering which Top Brass had supplied without knowledge of the contractual specification of the Defendants. It is clear from his evidence that he has assumed that the contractual specification between the Claimant and the Defendants (to which he was not privy) was five-star. However, for the reasons above stated, that is not borne out.

60. Mr Bassett also assumed that the standard to which he was providing was three-star, but this is an assumption, and it is not borne out. There seemed to be some support from the fact that Top Brass supplied to Ibis and Novotel in Scotland, where some of the hotels were three-star, but there was evidence of a Novotel in Scotland being four-star. Further, there was no evidence that a star rating was applicable to furniture and fittings. The assumption that there was such a thing as three-star furniture was therefore without a basis. There was no evidence to show that the furniture supplied by Top Brass was anything other than hard wearing and easy to clean and replace.

61. The expert evidence in respect of that which was agreed was less probative than the contemporaneous documents and the evidence of those witnesses of fact who were parties to the contractual negotiations. Further, despite the expert evidence as to suitability or otherwise, there were a number of other points against the Defendants' case. First, it is that the approvals of the samples which were inspected (a) in Hartlepool, (b) subsequently provided to Mr Usmani at Henley Homes and (c) in September 2016 when there was a sample room installation and approval at the Hotel. Second, the Hotel had been awarded five stars, and acclaim in the press and in reviews to date including for the quality of the Claimant's work. Third, the Defendants have used the furniture and fittings for years. By the time of trial, about four years after supply, they had still not replaced the same.

62. In my judgment, the Defendants have failed to prove that there was a term or specification about a five-star standard. It was intended that the furniture would have a high quality look or feel, but the other terms and the budget imposed on the Claimant show that the starting point of the Defendants' case is not made out. A concern in the case has been the way in which the Defendants sought to achieve low prices for the highest quality. One answer to this might be that following commercial negotiation, a party to a contract may promise to provide the highest quality item for the lowest price, even where the deal is uncommercial. That might be so, but it needs to be specified clearly. In this case, it was not specified at all. The Defendants have been chasing a standard of finish for which they never contracted.

63. What then is added by the more general case about the Claimant having to act with reasonable skill and care designing the interior layout of the Hotel rooms and spaces as interior designer and selecting and installing furniture, furnishings and accessories (AmDCC para. 12(3))? The problem with this term is that it begs the questions as to what was the specification or standard to which the goods were supplied. This term is very much bound up by the discussion above as to the specification required.

B Contractual terms – incorporation of the Claimant's standard terms

64. The Claimant says that its standard terms and conditions are incorporated into the contract. This is an important issue because the Claimant submits that in the events which have arisen they exclude liability altogether to the Claimant. If they were incorporated into the contract, there is an issue as to whether the terms were ineffective under the Unfair Contracts Terms Act 1977 ("UCTA")

65. On the pleading this arises in the following way in summary. The Claimant says that on completion of the works, the Defendants failed to pay in full. The Defendants challenge this because they say that completion never occurred due to the defective nature of the goods supplied. If the Claimant is correct that payment became due and the Defendants failed to pay, the Claimant relies on clause 8.2.3 of its standard terms and conditions which provides that: "*the Seller shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price of the Goods has not been paid by the due date for payment*". On this basis, the Defence and Counterclaim would fail.

66. The first question then on this analysis is whether the terms and conditions were incorporated whether by express incorporation or by course of dealing. The second question is whether the terms satisfy the UCTA

67. The test for incorporation as a matter of law has been expressed as follows: *"Whether or not one party's standard terms are incorporated depends on whether that which each party says and does is such as to lead a reasonable person in their position to believe that those terms were to govern their legal relations. The Court has to determine what each party was reasonably entitled to conclude from the acts and words of the other: … The question is one of fact to which prior authority may form an uncertain guide."* per Christopher Clarke J (as he then was) in *Balmoral Group v Borealis* [2006] EWHC 1900 (Comm) at [348].

68. The editors of Chitty on Contract (33rd ed) set out the principles concerning the incorporation of standard terms into the contracts between the parties at paragraphs 13-013 and 13-014:

> "13-013. It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the court regarding notice in such circumstances are three in number:
>
> (1) if the person receiving the document did not know that there was writing or printing on it, he is not bound;
> (2) if he knew that the writing or printing contained or referred to conditions, he is bound;
> (3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.
>
> 13-014. It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient. Cases in which the notice has been held to be insufficient have been those where the conditions were printed on the back of the document, without any reference, on its face, such as "[f]or conditions, see back", where, on documents sent by fax, reference was made to conditions stated on the back, but those conditions were not in fact stated on the back or otherwise communicated, or where the conditions were obliterated by a printed stamp. It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given. Reference to standard terms may be found on a website may be sufficient to incorporate the terms on the website into the contract."

69. The evidence which I accept is that a hard copy was provided at the presentation in February 2015. Further, this was included with the Revised Proposal on 6 January 2016 by email, along with the summary proposal referring to them as 'overleaf' whereas they had been supplied by email attachment instead (and acknowledged as received). That document was not signed. The document which was signed was the revised proposal which accepted the terms and conditions overleaf, whereas nothing at that stage was

included overleaf. When there was a further revision in June 2016, the same words were again used, but no terms were included overleaf nor were the terms attached.

70. The Defendants submit that the terms were not incorporated for the following reasons, namely

> (1) they do not accept the evidence about the original presentations and say in any event that this was not sufficient to incorporate the terms into the specific contract at the offer and acceptance stage;
>
> (2) the offer of January 2016 which did attach terms and conditions (although they did not appear overleaf) was not accepted. It was not signed and was rejected by a counter-offer relating to the removal of the wallpaper and the amount to be left to be paid on completion, namely 50%;
>
> (3) the revised proposal in February 2016 which was signed did not have terms and conditions either overleaf or attached. A subsequent proposal in June 2016 likewise did not have terms and conditions either overleaf or attached;
>
> (4) in the absence of terms provided with relevant proposals, a reasonable person in the position of Mr Usmani/the Defendants would conclude that there were no applicable terms and conditions.

71. Both parties point to the oral evidence of Mr Usmani who said the following:

> " MR LEGG: Mr Usmani, there would not be any terms and conditions overleaf because this is something that your office printed off for you to sign. It was an attachment that was attached to an email. What I would suggest to you that in that context it must have been obvious that "overleaf" is referring to something else and that something else was the standard terms and conditions that had ordinarily been incorporated into your dealings with the Claimant?
>
> A. Yes, I agree. If I go back to the beginning, I did say terms and conditions were never a feature of our relationship either way. Did I consider them when Susan would have left her proposal? No. Did Susan point them out and say "please do consider"? No. Were they sent to me via email with terms and conditions because they are not going to be on the back, but will follow? They were not. The relationship was not based on terms and conditions, it was based upon mutual understanding, trust and that is maybe the reason we are where we are. [T3/68/20 – 31]"

72. The start of the answer appears to acknowledge that there were terms which had been incorporated into the dealings. However, the remainder of the answer is that terms and

conditions did not feature as part of the relationship, and that the relationship was not based on the same.

73. The Defendants rely on authorities including the following:

(1) Similar factual circumstances to those in issue in these proceedings were considered and addressed in a series of cases beginning with the Court of Appeal's decision in *Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd* [1996] 2 Lloyd's Rep 388. Leggatt LJ, with whom Waite LJ and Peter Gibson LJ agreed, held that:

> "This is not a case where a party declares that the terms are available for inspection, it is a case where, on documents sent by fax, reference is made to terms stated on the back, which are, however, not stated or otherwise communicated. Since what was being described as being on the back was not sent, it was a more cogent inference that the terms were not intended to apply."

(2) Mr Justice Coulson (as he then was) in *J Murphy & Sons Limited v Johnston Precast Limited* [2008] EWHC 3024 (TCC) considered a case of a fax of an order which stated *"Your attention is directed to the conditions overleaf"*, but the conditions were neither *"overleaf"* nor sent with the purchase order. Coulson J rejected the argument that Murphy's terms and conditions were incorporated into the contract between the parties:

> "99. I acknowledge at once that this means that I am effectively putting to one side the words at the bottom of the Murphy Order (paragraphs 62 and 63 above). However, I have concluded that it is appropriate to do so. There are a number of reasons for this. First, there is no evidence that anybody on either side paid any attention to whether or not the terms were actually attached to the Order when it was faxed on 21st April. Secondly, of course, no terms were in fact faxed, so the words were meaningless. Thirdly, I do not believe that these words amount to an effective incorporation of the Murphy terms in any event. They merely draw the reader's attention to the conditions; they do not say expressly that those conditions wholesale will be incorporated into any proposed contract. They do not say that the Order is 'subject to' those conditions, or even that the Order 'incorporates the conditions overleaf'. Fourthly, I am confirmed that this is the right approach by the decision in *Sterling* in which a similar (in fact, rather stronger) attempt to incorporate non-existent terms and conditions was rejected by the learned judge." (emphasis added)

(3) In an earlier case of *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2007] 1 Lloyd's Rep 8 where the defendant's acknowledgment of order stated that delivery was *"based on our general terms of sale"* but no terms of sale were provided until after the goods had been delivered, and the Court held that there was no incorporation. Accordingly, HHJ Havelock-Allan QC held that the relevant terms were not incorporated because insufficient notice had been given,

notwithstanding that wider words than *"on the reverse"* or *"overleaf"* had been used by the draftsman.

(4) *Sterling* was followed in *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), which concerned a trial of a preliminary issue to determine the terms of the contract made between the parties for the purchase of nitrile gaskets. The claimants and defendants both claimed that their standard terms applied, but Edwards-Stuart J concluded that neither set of terms was incorporated, setting out his reasons at paragraphs 43 – 50.

C Conclusion on incorporation

74. I am satisfied on the basis of the facts of this case that the terms and conditions of the Claimant were incorporated by reference. I reach that conclusion for the following reasons, namely

(1) I am satisfied that Henley Homes had been handed a hard copy of the standard terms and conditions at the presentation on the reverse of the quote, as Ms White testified. Mr Usmani and Ms Jones did not say anything to gainsay that evidence: Mr Usmani said he didn't look for terms and conditions on the back, and Ms Jones said she could not remember. On the basis of this evidence, I am satisfied that the hard copy with terms and conditions attached were provided to the Defendant at the meeting on 11 February 2015.

(2) Henley Homes was sent by email a copy of the terms and conditions on the proposal summary on 6 January 2016.

(3) The signed version returned on 11 February 2016 contained amendments to payment terms and crossed out the wallpaper option. Although the terms and conditions were not overleaf or attached, the acceptance of the order subject to the terms and conditions obviously referred back to the standard terms to which notice had been given to Henley previously.

(4) The revised version signed on 13 June 2016 was to be interpreted and understood in the same way – the revisions did not affect the standard terms.

(5) Bearing in mind that the terms had previously been provided at the presentation and on 6 January 2016, it was clear to a reasonable person in the position of Mr Usmani that his signing the revised proposals in February 2016 and in June 2016 that it was subject to those terms despite the absence of the terms overleaf.

75. This is reinforced by the following points, namely

(1) The acceptance was specifically to the accepted contract being subject to terms and conditions. This was a more specific incorporation than simply having terms overleaf or than a reference to terms overleaf, but an acknowledgment that the terms were subject to the terms and conditions.

(2) There was no attempt on the part of the Defendants to contract on their own terms such that a counter-offer could be interpreted as being a rejection of the terms of the Claimant for the terms of the Defendants. The cases of *Sterling* and *Transformers* were battle of the form cases, which was relevant to the outcome of those cases.

(3) The evidence of Mr Usmani that he did not believe that terms applied was not because of any assurance on the part of the Claimant but appears to have resulted from his inattention.

(4) The above would have sufficed, but in fact the position is stronger still on incorporation by reference because of the previous dealings between the parties when terms and conditions were sent, even if Mr Usmani did not pay attention to them. This included in 2013. On 19 March 2013, Mr Usmani signed a proposal summary with the same terms and conditions accepted. There are other examples of signed unamended cover sheets. There was also the evidence of Ms White which the Court accepts that the terms and conditions were presented in the course of pitch or tender meetings.

76. Having reached the conclusion that the terms were incorporated by reference, it is not necessary to consider whether the terms were incorporated by a course of dealing.

X If the Claimant's standard terms and conditions were incorporated into the Phase 1 Contract, are they unreasonable for the purposes of the Unfair Contract Terms Act 1977?

A The statutory provision and the terms of Clause 8

77. The incorporation of standard terms excluding or limiting liability does not suffice. It is common ground that the terms of the Claimant seek to exclude liability and that the UCTA applies. The relevant provisions include the following:

> "Section 3
>
> (1) This section applies as between contracting parties where one of them deals ... on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term—
>
> (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
>
> (b) claim to be entitled—

> (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

Section 6

(1A) Liability for breach of the obligations arising from—

> (a) section 13, 14 or 15 of the 1979 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);
>
> (b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire purchase), cannot be excluded or restricted by reference to a contract term except in so far as the term satisfies the requirement of reasonableness.

Section 11

> (2) ln determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.
>
> …
>
> (5) lt is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

Schedule 2

The matters to which regard is to be had in particular for the purposes of section [6(1)(A)] are any of the following which appear to be relevant—

> (a)the strength of the bargaining positions of the parties relative to each other, taking into account (among other

things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer."

78. The relevant term is Clause 8 which reads as a whole as follows:

"8 Warranties and Liability

8.1 Subject to the conditions set out below the Seller warrants that the Goods will correspond with their specification at the time of delivery (subject to the Seller's right under clause 3.3 to alter and amend any specification) and will be free from defects in material and workmanship for a period of 3 months from delivery.

8.2 The above warranty is given by the Seller subject to the following conditions:

8.2.1 the Seller shall be under no liability in respect of any defect in the Goods arising from any drawing, design or specification supplied by the Buyer;

8.2.2 the Seller shall be under no liability in respect of any defect arising from fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow the Seller's instructions (whether oral or in writing), misuse or alteration or repair of the Goods by the Buyer without the Seller's approval.

8.2.3 the Seller shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price of the Goods has not been paid by the due date for payment,

8.2.4 the above warranty does not extend to parts, materials, or equipment not manufactured by the Seller, in respect of which the Buyer shall only be entitled to the benefit of any such warranty or guarantee as is given by the manufacturer to the Seller

8.2.5 all lights, including fixed, floor, lamp bases and light bulbs are covered by a 1 month guarantee only

8.3 All warranties, conditions or other terms implied by statute or common law (save for the conditions implied by Section 12 of the Sale of Goods Act 1979) are excluded to the fullest extent permitted by law.

8.4 Where the Goods are sold under a consumer transaction (as defined by the Consumer Transaction (Restrictions on Statements) Order 1976, the statutory rights of the Buyer are not affected by these Conditions.

8.5 The Seller warrants to the Buyer that all upholstered furniture and furnishings sold to the Buyer comply with the requirements of the Furniture and Furnishings (Fire)(Safety)(Amendment) Regulations 1993.

8.6 Any Claim by the Buyer which is based on any defect in the quality or condition of the Goods or their failure to correspond with specifications **shall be notified to the Seller within a reasonable time after discovery of the defect or failure. If the Buyer does not notify the Seller accordingly, the Buyer shall not be entitled to reject the Goods and the Seller shall have no liability for such defect or failure, and the Buyer shall be bound to pay for the price of the Goods. Where any valid claim is notified to the seller in accordance with these Conditions, the Seller shall be entitled to replace the Goods (or the part in question) free of charge or, at the Seller's sole discretion, refund the Buyer the price of the Goods (or a proportionate part of the price), but the Seller shall have no further liability to the Buyer.**

8.7 Except in respect of death or personal injury caused by the Seller's negligence, **the seller shall not be liable to the Buyer by reason of any representation (unless fraudulent), or any implied warranty, condition or other terms, or any duty at common law, or under the express terms of the Contract, or any indirect, special or consequential loss or damage (whether for loss of profit or otherwise), costs, expenses or other claim for compensation whatsoever (whether caused by the negligence of the Seller, its employees or otherwise) which arise out of any connection with the**

> **supply of the Goods, except as expressly provided in these Conditions.**
>
> 8.8 The Seller shall not be liable to the Buyer or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of the Seller's obligations in relation to the Goods, if the delay or failure was due to any cause beyond the Seller's reasonable control including, without limitation, acts of God, governmental actions, explosion, flood, tempest, fire, accident, war or national emergency, riot, civil disturbance, strikes, lock-outs or other industrial actions or trade disputes (whether involving employees of the Seller or of a third party) or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials.
>
> 8.9 A person who is not a party to this Contract has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any terms of the Contract, but this does not affect any right or remedy of a third party which exists or is available apart from that Act."

B The pleaded case

79. The pleaded case is as follows. The Defendants raised the standard terms and conditions to deny their application. They also said in the event that the terms were incorporated, the clauses which purported to limit and/or exclude liability including clause 8 were unreasonable and/or unenforceable pursuant to UCTA. They claimed that the Claimant was in a stronger bargaining position, having greater knowledge and expertise in the field and that the conditions purported to permit the Claimant to render a contractual performance of a fundamentally different nature from the express purpose and requirements set out in the contract: see AmDCC at para. 16.3, and all denied at Reply at para. 11. The Defendants also relied (para. 17) on the warranty at Clause 8.1. In the Reply at para.16.4, the Claimant said that due to the non-payment of moneys due within 14 days of completion, pursuant to Clause 8.2.3, the warranty did not apply.

80. The Claimant also relies on Clause 8.2.1 in connection with the blinds and the curtains (Reply para. 17.3 and 17.7). It is reasonable to exclude liability for defects arising from a drawing, design or specification supplied by the buyer. The Claimant relies on Clause 8.2.2 of no liability for fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow Seller's instructions, misuse or alteration or repair without Seller's approval. For example, it is used in connection with the coffee tables (Reply para. 17.6).

81. The pleadings do not reflect the incidence of the burden of proof where UCTA applies. The terms and UCTA were raised by the Defendants and not the Claimant. In response, the Claimant did not plead in any detail the terms and conditions or the facts and matters relied on as to their reasonableness.

82. This was evident in the following respects, namely

(1) there has not been pleaded the whole of Clause 8, but only 8.2.1 - 8.2.3. For example, it has not been pleaded that the Counterclaim is limited by reference to Clause 8.6 (which has been mentioned in a note about UCTA provided on 22 February 2021).

(2) there are denials about the allegations of the Defendants that Clause 8 was unreasonable, but save for minor elaboration of the denial, there has not been an attempt to prove the reasonableness of the Clause as required by section 11(5) of UCTA (burden on the party relying on the clause) and see also *Sheffield v Pickfords Limited* [1997] EWCA Civ 984.

83. The main argument has focused on whether or not the Claimant can rely on Clause 8.2.3. The following points should be noted:

(1) The context of Clause 8 is a warranty to replace any implied conditions and warranties under statute or at common law. In other words, the effect of being in breach of this condition is that the Defendants revert to the state of affairs without the warranty in Clause 8.1 and subject to the blanket exclusion in Clause 8.3.

(2) The argument of the Claimant was as if this was an anti-set off clause, and in the skeleton arguments, the focus was that anti-set off clauses have often been upheld: see *F.G. Wilson (Engineering) Ltd v John Holt & Co* [2012] EWHC 2477 (Comm); [2012] 2 Lloyd's Rep 479 at [93]-[109] *("Wilson"); RÖHLIG (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18 at [8] and [16]; *University of Wales v London College of Business Ltd* [2015] EWHC 1280 (QB). These cases were distinguished from *Stewart Gill Ltd v Horatio Myer & Co* Ltd [1992] QB 600, which was a case about a set off clause despite the credits being admitted, which the Court did not find reasonable.

(3) The limited nature of anti-set off clauses was highlighted in the following cases:

(a) In *Wilson*, Popplewell J (as he then was) at [99(3)] said: *"I do not see anything essentially unfair or unreasonable in a seller in these circumstances requiring the buyer to pay in full, leaving any disputed cross-claim to be resolved by subsequent negotiation or determination rather than being used as a ground to withhold payment of the undisputed price of goods which the buyer has received many months previously."*

(b) In ROHLIG, Moore-Bick LJ at [8] said: "The meaning of clause 21(A) is clear on its face: it does not prevent the customer from pursuing claims against the supplier, but it does prevent him from withholding payment in satisfaction of a claim or (if his claim is unjustified) from withholding payment until the merits have been determined."

(c) In *University of Wales*, HH Judge Keyser QC said: at [98.2] *"Clause 5.1 was not ambiguous, unclear or complicated"*, and at [98.3] *"no set-off" provisions are very common in business contracts. They do not affect the substance of the parties' obligations; they only affect the question of who has to take the initiative of bringing proceedings in the event of a dispute. (Cf. the dicta of Rix LJ in the Axa Sun Life Services case, at [108].) Put another way, they are about cash flow."*

(4) As a result of the Court's concerns regarding the differences between an anti-set off provision and the instant Clause 8.2.3, the Court invited further argument regarding the provision. This led to a note of 22 February 2021 from the Claimant to the effect that no authority directly in point had been found. It pointed by way of analogy to cases where time bar provisions had been construed in favour of the bar. It also drew attention to the case of *Goodlife Foods Limited v Hall Fire Production Limited* [2018] EWCA Civ 1371, where the Court of Appeal considered and upheld the reasonableness of a standard term excluding all liability for a defective fire suppression system, save for the replacement of faulty components. It was said that just as in that case there was not a blanket exclusion clause (liability remained to replace faulty components) [45], [109] (ii), so cl 8.2.3 does not apply where the bill is paid.

84. There are arguments between the parties as regards the various statutory factors set out in Schedule 2. The Claimant submits that it is less powerful in terms of equality of bargaining power with a smaller turnover and relies in particular on the way in which Henley Homes was able to negotiate changes to payment provision in the contracts. Henley Homes was regularly provided with copies of the terms and conditions in its dealings with the Claimant. It was reasonable to expect prompt payment where such a large sum as 50% was being withheld, and where cashflow was a significant matter for a company like the Claimant.

C Discussion

85. I have taken into account all of the arguments of the parties. In the end, the Claimant has failed to discharge the onus of showing that Clause 8.2.3 satisfies the requirement of reasonableness. I have reached this conclusion for the following reasons, namely

(1) The researches of Counsel do not indicate that there is anything common about this clause. It is very different from an anti-set off clause, which is common, but whose rationale and effect are to be distinguished from the instant clause. There is no good explanation why an anti-set off clause would not have sufficed.

(2) This apparently unusual clause is tucked away in the undergrowth of the Standard Terms and Conditions without any particular highlighting of the consequences of even the slightest delay in payment. This has to be balanced against the opportunities in a course of dealing for consideration of the clause, but this factor is still a consideration in the context of the Schedule 2 consideration of whether the customer ought reasonably to have known of the existence and the extent of the term. Even if there was detailed consideration of the term, its consequences are not obvious, and the Court has to be careful not to confuse the kind of knowledge referred to in Schedule 2 with the knowledge which appears after hours of forensic examination in contested litigation.

(3) The clause is potentially exorbitant in that the consequence of the slightest delay or deduction might bar all rights of redress against the Claimant relating to the quality of the goods supplied.

(4) The clause creates real difficulty in its application. The payment has to be made on its due date. However, in this case, as regards the last 50%, there is not a due calendar date. It is the date of an event, namely completion. That gives rise to a problem because it is not like having to pay on the first day of a month, where there is certainty. As this case and many other cases demonstrate, it is very often not easy to say when completion has taken place. It may be possible after a court case to rule whether completion has taken place despite unresolved snagging items, but it is a question of degree and evaluation. This would mean that a customer would often not know whether there had been completion. In order to protect its position under this clause, it might have to consider paying the final amount under protest at a time when payment was not due because completion had not taken place.

(5) It is not an answer to say that there are limited rights under Clause 8.6 to the replacement of goods or to a refund, following payment in full. The danger for the customer is twofold. First, it would forgo the right to withhold payment until completion if it paid before the time of completion. Second, the seller or supplier might not perform under Clause 8.6 once paid (or might regard the work as not being required), and so the customer would not only pay early, but also lose the lever to encourage the seller or supplier to complete.

(6) It is necessary to consider these matters at the time of the contract, although theoretical concerns will be ignored: see *Stewart Gill v Horatio Myer* above. The question about what might amount to completion is not a theoretical concern or construct, as this case amply demonstrates. It does not mean that the term is too uncertain to be enforced or that the Court in this case with all the evidence before it cannot determine when completion has occurred in each case. However, it is very difficult for a customer without an independent certifier to say when there has or has not been completion, or in the instant case when the date of completion has arrived for payment to be made.

(7) Technically, the position is even worse because the payment is supposed to be on the date of completion as opposed to a number of days following completion.

(8) One of the criteria in Schedule 2 is either in point or analogous, namely *"where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable".* The matters set out above or any of them (including the difficulty of identifying the precise moment of completion and the timing of the payment) might render it unreasonable at the time of the contract to expect that compliance of payment of the balance on the day of completion impracticable.

86. In all the circumstances, the Claimant has failed to discharge the onus under section 11(5) of UCTA to show that Clause 8.2.3 satisfies the requirement of reasonableness.

XI Did the Claimant owe the Defendants a tortious duty to act with reasonable skill and care?

87. There is an issue between the parties on the pleadings. The Defendants claim that the Claimant owed a tortious duty of care concurrent with its contractual obligations. The Defendants relied upon *Robinson v PE Jones (Contractors) Limited* [2012] QB 44, especially per Jackson LJ at paras. 74-76 who referred to the scope for concurrent liability in contract and in tort owed by professionals resting on an assumption of responsibility. It was stated that the Defendants were entitled to and did rely upon the expertise, knowledge and advice of the Claimant for the purpose of selecting and procuring furniture, furnishings and fittings for the Hotel, as well as designing the layout of the rooms. The Claimant said that that might not apply to simply a construction contract for the erection of a building: see *Robinson* at para. 92.

88. In the instant case, in its capacity as interior designer, the Claimant was selling items of furniture and fittings, but also assuming a responsibility to advise as to the interior design. The Claimant admits that it was required to provide interior design services pursuant to the Phase 1 Contract including "proposing and/or selecting (as appropriate) certain items of furniture, furnishings and accessories to fit in with the style and colour scheme required by the Defendant, supplying and installing the same": see Reply para. 9.2. The duties as seller were strict duties about the supply of goods and not dependent upon the exercise of skill and care. In fact, although there has been scope for some argument about the duties as interior designer, the major part of the argument in this case has been the Claimant's obligation as seller.

89. As interior designer, the Claimant had a duty to act with reasonable skill and care in the above duties alongside its duties as seller. In respect of its duty as interior designer to propose and select as appropriate goods, it assumed a responsibility to the Defendants. There was therefore a concurrent duty in tort in addition to the duty of contract in that regard. In another case, there may be a critical aspect where the duty as interior designer will be determinative of the case. However, neither Counsel submitted that any

question of whether there was a concurrent duty in tort made any significant difference on the facts.

XII Did the Claimant "complete" the Phase 1 Contract causing the balance of the contractual monies to fall due and/or were the goods "accepted": the legal analysis

90. The Claimant says that it did complete the Phase 1 contract as a result of which the remaining 50% of the contractual monies fell due. The contract expressly stated, "Balance due on completion". The Defendants says that the term "completion" is not defined. The clause therefore falls to be construed in accordance with the well-established rules of contractual construction recently laid down by the Supreme Court in *Arnold v Britton* [2015] AC 1619.

91. The Defendants submit that in accordance with the aforementioned rules "completion" should be given its normal linguistic meaning. Accordingly, if the Defendants successfully establish that the Claimant is in breach of the Phase 1 Contract the Claimant cannot be found to have "completed" the Phase 1 Contract and is not entitled to its claim for the 50% balance.

92. As regards the meaning of completion, the Claimant relies on authorities including the case of *Mears Ltd v Costplan Services (South East) Ltd* [2019] 4 WLR 55 (CA) [62]-[74], in which the meaning of completion was summarised at [74](d)-(e) "*as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling*", which itself was "*a matter of fact and degree, to be measured against "the purpose of allowing the employers to take possession of the works and to use them as intended""*.

93. In support of the submission about the meaning of completion, the Claimant derives support from cases addressing entire obligations to release payment (see Chitty 33rd Ed. at para. 21-028). In a scenario where "*the part performer has substantially performed or substantially completed an entire obligation but has not completed full performance*", the authorities confirm "*the proposition that a doctrine of 'substantial performance' can be applied so that the part performer is entitled to bring an action to recover the price, subject to a counterclaim for damages which will go in diminution of the price*" (Chitty at para. 21-033).

94. The meaning of *"substantially performed"* turns on *"the nature of the contract and all the circumstances"* (Chitty at para. 21-034). For instance, *"if the contractor abandons performance, or does work entirely different in kind from that contracted for, it is clearly a case of substantial non-feasance and the contractor may recover nothing"* (Chitty at para. 21-034). However, *"if the work is substantially completed, and it is only in some minor details that the workmanship falls below the contractual specifications, the builder may recover the agreed price, less a deduction based on the cost of making good the defects or omissions"* (Chitty at para. 21-034).

95. The Claimant submits that completion needs to be understood in the context of a delivery and installation arrangement where there was no contractual retention to be held back for snagging works. In this context:

(1) The contractual trigger of payment of the balance due under the contract had been satisfied in that the goods had been delivered and installed: alternatively, once initial (or even final) snagging was, objectively, complete.

(2) The Claimant considers that this took place by 21 January 2017, if not then by 20 February 2017 when the goods were delivered and installed as far as they could be given the state of unreadiness of the Hotel. At latest, the goods were installed and indeed all snagging was done by 20 June 2017 after the agreed snagging list was complete.

(3) Any remaining matters, if there were any (which is denied) were trifling only and/or not sufficiently substantial to withhold payment. All the goods were kept in the Hotel and have been in use at least until the closures for the current COVID pandemic.

(4) The Claimant points to Mr Usmani's email of 12 July 2017 referring to the works as completed in the second paragraph ("*Notwithstanding the inordinate length of time it took to complete the works…"*), with some issues outstanding which were then listed and which the Claimant characterises in context as trifling: payment should therefore have been released.

96. The Defendants' submission is that completion should be given what it calls its *"normal linguistic meaning"* so that if there is any breach of contract, then the work is not completed. In any event, they say that the breaches amount to a fundamental failure to perform the contract. They submit that this is not a case in which there has been substantially complete performance to a satisfactory standard, subject to some snagging or trivial/insignificant works to be completed or remedied at a later date. On any construction of the word "completion", it has not occurred and so the Claimant is not entitled to the last 50%.

97. The Claimant has an alternative case arising out of acceptance of the goods delivered. The Claimant draws attention to the following, namely that "*Sale of goods is an example where the buyer need not accept goods which are defective or insufficient in quantity; if, however, the buyer does accept delivery, it must pay for them at the agreed rate*" (Chitty at para. 21-036 referring to *Hoenig v Isaacs* [1952] 2 All ER 176, 179-180 where *"[the] defendant used defective furniture made by [the] plaintiff*". In this case, the submission is that the Defendants accepted the goods in that the Hotel was open for years from May 2017 with the goods supplied and installed by the Claimant. Reliance is placed on Section 35(1)(b) and 35(4) of the Sale of Goods Act 1979 are to this clear effect:

"(1) The buyer is deemed to have accepted the goods…

(b)when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.

…

> (4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.
>
> …
>
> (6) The buyer is not by virtue of this section deemed to have accepted the goods merely because --
>
> (a) he asks for, or agrees to, their repair by or under an arrangement with the seller."

98. Reference is also made to the case of *Jones v Callagher (Trading as Gallery Kitchens and Bathrooms)* [2004] EWCA Civ 10 at [29] where Thomas LJ (as he then was) said on the facts of that case (obviously each case has different facts, but the quotation may have wider application):

> "The judge also referred to the fact that the appellants had accepted the goods by using them. Had that been the only matter and no lapse of time, I am not persuaded that that would have been sufficient. But it is not necessary for me to consider that matter further because there was sufficient in the lapse of time that had occurred for the judge to have been entitled to find that a reasonable time had elapsed before the intimation of rejection was made."

99. The Defendants point to section 35A (1) of the Sale of Goods Act 1979 which refers to a right of partial rejection and reads as follows:

> "(1) If the buyer— (a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but (b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods, he does not by accepting them lose his right to reject the rest."

100. They submit that they only accepted those goods which were not affected by breach of contract, but not the remainder. Thus, this was a case of partial rejection. Further, their attempts to have the defective goods rectified does not give rise to an acceptance as a consequence: see section 35(6). The defective goods were raised as an issue in early 2017 and thus, there has not been an acceptance.

101. In a helpful post-hearing note on 22 February 2021, Mr Broomfield on behalf of the Defendants said the following:

> "A helpful statement of the law is set out in the judgment of Mr Justice Evans in *Graanhandel T. Vink v European Grain* [1989]

> 2 Lloyd's Rep 531, in which he expressly considered acceptance and rejection for the purposes of section 35 of the Sale of Goods Act 1979. Following consideration of *Morton v Chapman* (1843) 11 M&W 534, *Tradax Export SA v European Grain & Shipping Ltd* [1983] 2 Lloyd's Rep 100 and *Vargas Pena Apezteguia* [1987] 1 Lloyd's Rep 394, Evans J explained at 533 that:
>
> > "In my judgment, these authorities show, first, than (sic) an unequivocal rejection prevents a subsequent acceptance of the goods whether that be called an affirmation of the contract or otherwise. Similarly, an affirmation of the contract prevents a later rejection of the goods. It follows, logically, as Mr Justice Saville said in the third of those cases, that a subsequent resale by the buyer is a wrongful conversion of the goods. I would observe in passing that if the seller has refused to accept the rejection, it would seem difficult for him to complain that a subsequent sale is a conversion. It may be – I do not need to decide this – that the effect of the seller's refusal of the rejection is to give a locus poenitentiae to the buyer, which would mean that the subsequent sale would not be wrongful but, of course, would be regarded as affirmation of the contract. Secondly, an unequivocal rejection does not necessarily depend upon the terms of one communication alone. It is necessary to consider the whole of the relevant communications and also the buyer's conduct generally. It is noteworthy that s.35 of the Sale of Goods Act, by reason of which subsequent inconsistent dealing with the goods is deemed to be an acceptance of them, does not depend upon communications of any fact to the seller. It of course remains true that once goods have been rejected there can be no subsequent acceptance of them…"" (emphasis added)

102. Evans J identified two factors in *Graanhandel* that (on the facts of that case) he considered to be relevant to determining whether or not the goods have truly been rejected. As set out in the passage above, this remained an important question because once rejected, the goods could not subsequently be accepted absent separate agreement between the parties. The finite nature of a rejection means that it cannot be withdrawn or rescinded by conduct alone. However, subsequent conduct may cast doubt upon whether the buyer's rejection was, in fact, genuine and/or whether it can be relied upon. In *Tradax Export* (considered by Evans J in *Graanhandel*) Mr Justice Bingham explained at 107 that:

> > "A finding that the buyers clearly rejected the goods and claimed arbitration does not in my judgment conclude this question in their favour. It might emerge, as it did in *Chapman v Morton*

> (1843) 11 M&W 534, that the buyers were saying one thing and doing another, so as to invalidate their written statements or throw doubt on the bona fides or the unequivocal nature of their rejection. Or they might act in such a way as to create an estoppel against themselves. Or they might enter into a new agreement with the sellers involving an express or implied withdrawal of their rejection or a retransfer of title to them. It does, however, seem to me quite plain that once the buyers have proved what, on its face, amounted to a clear and unequivocal rejection of the goods and claim for arbitration, it is for the sellers to prove, if they can, that the apparent effect of the buyer's conduct was destroyed by other conduct having a different and inconsistent effect and not for the buyers to establish the negative case that they did nothing subsequently to disentitle themselves from asserting their rejection."

103. As set out above, an unequivocal rejection prevents acceptance absent further agreement between the parties. The question for the Court's determination is therefore whether there has been an unequivocal rejection of all or some of the goods (see s.35A of the Sale of Goods Act). The Court should take into consideration all of the buyer's conduct, including (but not limited to): (a) the nature of any communications between the parties; (b) whether the buyer's rejection was accepted or refused by the seller; and (c) whether, on the facts of the case, the buyer acted inconsistently with the seller's ownership of the goods by his subsequent conduct (regardless of whether this was known to the sellers at the time or not). The weight of these factors will turn on the facts of each individual case."

104. In my judgment, there has not been an unequivocal rejection of any of the goods in this case. Alternatively, if and to the extent that there might have appeared to be a rejection, the use of the goods over many months thereafter casts such doubt upon whether any rejection was, in fact, genuine and/or whether it can be relied upon. Whichever of the two it is, I am satisfied in this case that there has been no rejection of the goods on which the Defendants can rely and that the goods have been accepted, such that it has been too late to reject for a number of years.

XIII Did the Claimant act in breach of contract or its tortious duty of care?

105. Before considering the specific allegations of breaches of contract and/or breach of duty of care in tort, it is necessary to consider various more general matters, namely

(1) any matters relating to the negotiation and terms of the contract relevant to the alleged breaches;

(2) the history of the dealings between the signing off performance of the contract;

(3) the effect of the continued use by the Defendants of the goods supplied.

(1) Any matters relating to the negotiation and terms of the contract relevant to the alleged breaches

106. There was evidence given by Mr Usmani to the effect that Ms White had represented that the Claimant had experience in providing services to hotels. This was contained in his witness statement at paras. 7 and 8. In order to allay concerns as to the ability of the Claimant to carry out the project, Ms White assured Mr Usmani that "the Claimant would have no difficulty in managing the project as they had substantial hotel experience."

107. Ms White said in evidence that she did not have hotel experience. She believed that the Claimant would be able to manage the project. She was not cross-examined as to whether she had previous hotel experience, but it is to be inferred that she would have denied this if it had been put.

108. Mr Usmani was cross-examined upon his assertion. He said that he did not ask about the previous experience of the Claimant in hotels, because the assurance was good enough from someone he trusted.

109. I find that Mr Usmani is mistaken when he contends that Ms White made the alleged representation. I reach that conclusion for the following reasons, namely

(1) I found Ms White an impressive and truthful witness. If she had made such a representation, it would have been untrue, and she would have been untrue. I formed the view that Ms White was an honest witness and that therefore such a statement would have been unlikely.
(2) In any event, it made no sense for Ms White to lie in this regard, since such a statement would obviously have been contradicted by the absence of hotel experience on the Claimant's website, as Mr Khalil would notice. This would then leave Ms White without any explanation if taken up on such a statement and unable to provide details of the names of the hotels designed by the Claimant.
(3) The evidence of Mr Usmani that he did not ask for details about the Claimant's experience in respect of hotels also makes no sense. He said that it was because he trusted the Claimant. Far more likely than the explanation for not doing so is that his recollection is mistaken.
(4) When subsequently Mr Khalil became involved, he noticed that the Claimant did not have relevant hotel experience from the absence of reference to the same on the hotel website. This did not lead to Mr Usmani going back to Ms White to challenge her about apparently having been misled by her. The only probable explanation for that is that the representation was not made. Indeed, despite considerable contemporaneous written communications between the parties, there was no accusation of the Defendants before the dispute arose that Ms White had misled Mr Usmani about her experience.

110. In my judgment, no misrepresentation was made. Ms White believed that the Claimant could carry out the project, but that did not mean that she represented that the Claimant had hotel experience. From everything which I have read and observed in the trial, there is no reason to conclude that Ms White did not have that belief.

111. There is a consequence about the foregoing, which is that it undermines in a significant respect the reliability of the evidence of Mr Usmani. This is something to be borne in mind in appraising other parts of his evidence.

112. I have referred above to the evidence relating to whether there was a contractual term requiring the Claimant to obtain furniture, furnishings and fittings suitable for a five-star hotel. There was some loose reference to a "five-star feel" in the Initial Brief. However, there was no specification of goods suitable for a five-star hotel. There are obvious problems entailed in such a case including the following:

(1) Until March 2016, that is after the making of the contract for Phase 1, the goods were required for hotel apartments and not for a hotel, which is a very different proposition from a five-star hotel. When the Defendants decided to open a hotel instead of apartments, there was no relevant change of specification on the part of the Defendants.

(2) There was no specificity of requiring five-star goods, but much more equivocal language as evidenced especially by the line "hard-wearing and contract quality which is easy to clean, maintain and replace but with a luxurious 5-star feel. Easy eh!" with all the attendant contradictions and lack of specificity to which attention has been drawn above.

(3) There is no such concept as five-star furniture or furnishings in any event.

113. It became apparent from the evidence as a whole that when Mr Khalil became involved in the project after the contractual stage between the Claimant and the Defendants, he had serious misgivings about the contract. He would not have entered into such a contract, bearing in mind the absence of hotel experience of the Claimant. It is to be inferred that he would have required a much more precise specification.

(2) The history of the dealing as regards the signing off performance of the contract

114. The furniture, furnishings and fittings were delivered to site in January 2017. The evidence is that neither Mr Usmani nor Mr Khalil attended in January 2017 for a sign off and there was no-one else authorised on behalf of the Defendants authorised to sign off delivery and installation. It follows that when as a part of the Defendants' case, it is said that completion did not take place in January 2017, that was without a relevant person being able to check the same.

115. The Claimant's case, which I accept, is that the rooms were not ready in January 2017. There were numerous workmen at site, apparently about 45 of them. The central heating was not operating, although there was temporary heating to some parts of the building. There was a visit to site by Mr Usmani in about late March 2017. It follows

that the Defendant was withholding payment without having an authorised check of the premises for several weeks after delivery of the goods. In an email of 21 March 2017, Ms White wrote to Mr Khalil saying that she was in agreement with Kashif, the brother of Mr Usmani, that *"the rooms are looking lovely"*, but Mr Usmani did not attend. Shortly thereafter, he did attend. There was an email of 3 April 2017 from Ms White that she had spoken to Mr Usmani who had made various points including about table leading edges being higher than the top, curtains not shutting completely, headboard upholstery not being square, handles being scratched on the bedsides and a French polisher being required. Mr Usmani had evidently only visited 6 rooms.

116. In April 2017, there had been a scheduled meeting for 12 April 2017 so that Ms White could meet Mr Usmani on site. In the event, Mr Usmani did not attend, but Mr Khalil did. The Claimant prepared a detailed snagging list, sent with an email of 13 April 2017 to Mr Khalil and others, setting out general items (including *"on the furniture, a gentle sanding on sharper edges, removing glue marks, et cetera"*) and then identifying work done in individual rooms. On 18 April 2017, Mr Khalil sent a revised list combining the Claimant's comments with those of Henley Homes. In late April 2017, Ms White went to Jordan on an unrelated work assignment, and Mr Usmani became agitated about this. The Claimant's perspective was that it had been trying to make progress since January 2017 and Ms White could not be expected to keep her diary free indefinitely. In fact, she monitored matters closely by email. On 7 May 2017, Mr Usmani threatened involving third parties in completing the work where it can be remedied and replacing items which could not be remedied. There was an immediate reply from Ms White that the solution was for the team to return the next week to finish outstanding snagging. Mr Usmani believed in the first instance that any meeting could take place in London, which is what happened. Ms White confirmed an intention to go to site to complete the works on 30 May and 31 May with a view to walking the rooms with Mr Khalil on 1 June. There were various snagging lists being circulated at this time, notably one from the Claimant sent on 12 May 2017 including the Claimant's and the Defendants' comments.

117. The evidence of Ms White is that she and her husband Mr Maccallum attended on 31 May 2017 and inspected on a room-by-room basis and worked through the list ready for sign off. There were present Chris Bassett and Rob Aris of Top Brass with their upholsterers, curtain makers, joiners and a French polisher hired by the Claimant. There was a sign off on 1 June 2017 at which Mr Khalil was present with Mr Huntley, the then manager of the hotel. There was an outstanding item, namely some of the glass coffee tables which needed supplied rubber pads/stoppers to prevent the glass from slipping. That was resolved on 15 June 2017 by Mr Aris. Ms White's evidence was that on 1 June 2017, Mr Khalil said that the payment would be made, and he shook hands to this effect. He could not understand why Mr Usmani had an issue with the Claimant. A request for payment was sent on 20 June 2017 with an updated snagging list, containing ticks of the items completed.

118. Mr Khalil did not accept Ms White's account of the meeting of 1 June 2017. He said that he was very unhappy with what had been delivered so it would make no sense for him to have promised payment regardless of items outstanding. He said that he was not comfortable approving matters because he was not happy with the works, and if Mr Usmani wished to do so, he could. In his witness statement, he said that Ms White's husband, Mr Maccallum was very aggressive and threatening in tone, after Mr Khalil

had told him that a lot of the furniture remained unsatisfactory and that he was not in a position to recommend sign off to Mr Usmani. He says that Mr Maccallum started shouting, pointing his finger and hitting the wall saying that the Defendants were being unreasonable. He urged Ms White to stop work. Mr Maccallum was not cross-examined about this, but he did express his belief that the baton was simply being passed between Mr Khalil and Mr Usmani. He expected Mr Khalil to sign off since he was the expert in hotels, and he was the only person who attended on 1 June 2017.

119. I prefer the evidence of Ms White to that of Mr Khalil. I reach that view not simply because I found Ms White to be an impressive and reliable witness, whereas I had concerns about Mr Khalil's evidence. As regards the meeting of 1 June 2017, Mr Khalil said that Ms White should have produced notes that were taken of each of the rooms where he had made comments about where he was not happy, which would tell a different story. The existence of such notes did not feature in Mr Khalil's witness statement, and there was no good reason for its omission if it was true. On the contrary, a snagging list sent at the time have comments "approved with Nassar and Mark", referring to the walk round on 1 June 2017.

120. Mr Khalil's account is entirely inconsistent with the documents written within hours of the 1 June meeting including:

(1) At 18.26 on 1 June 2017, Mr Khalil wrote *"Hi Susan, Hope you got to the airport without any issues."* He then said that he would provide an update on his audit to Mr Usmani and referred to the issue of the glass top of the coffee table. There was another email about the same at 18.50 on 2 June 2017 in which Mr Khalil said that his concern was about safety. This is not consistent with wide ranging defects and unhappiness or about Mr Maccallum acting very aggressively.

(2) Later on 2 June 2017 at 21.57, Ms White provided an updated snagging list, and referring to the coffee table issue. She finished with the words *"thanks again for your kind words on Wednesday [31 May] & look forward to receiving all outstanding invoices."* It was put to Mr Khalil that this was consistent with his overall satisfaction and with his passing on the matter to Mr Usmani in the expectation that the invoices would be paid. He said that he would not have discussed payment because it was between Ms White and Mr Usmani. He said that he was not prepared to put his name on approving the furniture because it would fall apart before too long. In my judgment, the tone of the correspondence at the time is to contrary effect. In particular, the reference to kind words and to the receipt of invoices (meaning in the context payment) bear out the account of Ms White and are inconsistent with that of Mr Khalil.

(3) On 5 June 2017, Ms White wrote to Mr Khalil to confirm that the French polishers were returning to the hotel on 6 June 2017. In the context of the snagging list which had been sent, this is not consistent with wholesale rejection of furniture or many items of furniture. Mr Khalil wrote on 6 June 2017 timed 12.30 which is set out in full because it is entirely consistent with the account of Ms White and inconsistent with the evidence of Mr Khalil. It was in the following terms

> "Hi Susan
>
> Your suggestion on the glass top is not acceptable to Henley. The glass top should be no thinner than what we have in the rooms at present and would have to be levelled, not above the sides of the table at all.
>
> As I have already noted, once you confirm that the French Polisher has finished his job, I will organise for the rooms to be rechecked next week as I am not on site this week and then revert but the matter of the coffee table needs to be resolved quickly.
>
> I would also strongly suggest that Phoenix please ensures all outstanding items are resolved before we do further checks as this would be the fifth time we are re-checking the rooms.
>
> The next few days are pretty hectic for me hence hope the above sets the position of the next steps.
>
> As I have already noted to Susan previously, I do not deal with the accounting side of things hence I would not be able to assist in that regard. All I am able to is confirm what has been done and what is outstanding once rechecked.
>
> Best wishes,
> Nassar"

121. The next communications also bear out the account of Ms White, and are to be read against the background of the snagging lists referred to above. On 9 June 2017, Ms Granger wrote to Mr Khalil confirming that the team was returning on 15 June 2017 to rectify the snagging issues which were identified. There was further correspondence from Ms Granger on 16 June 2017 and 20 June 2017 referring to the completion of snagging works and ending with the words on 20 June 2017 *"the job is now complete and we look forward to payment by return as promised during our last meeting with you* (emphasis added)*."* This is also consistent with the account of Ms White of the meeting of 1 June 2017.

122. The next part of Mr Khalil's evidence stretched credulity. His evidence in cross-examination was that there had been an approach for a paid article from Mr Damian Glennon of Premier Hospitality Magazine. Mr Legg was cross-examining and Mr Khalil was responding (Day 5 pp. 15-17):

> "The page before, Mr Khalil, page 5, please. He then - he is asked to send the detail of the lovely words that you said about Phoenix to him and he writes saying, "Yes, of course, when discussing the feature in Dunalastair Hotel suites, it was Nassar Khalil that advised me that this feature may be of interest to Phoenix to lead with a position to advertise. Due to your major involvement and fantastic job you have done as lead designer, he

thought you would be interested in leading". So are you suggesting that he is making that up, Mr Khalil?

A. I am suggesting that these are his words to get paid advertising. They are not my words.

Q. Well, let us have a look at the article itself. It is page 16 - if we could look at 16 to 18, just a couple of comments that you make and are quoted as saying. So it starts at 14 and over the page at 16 you are quoted as explaining your ambition for the project and, then, in the middle paragraph, "It is a great achievement to have opened the hotel after two meticulous years of dedicated attention to detail, drive and hard work. We didn't want to leave any aspect of the design out of sync with our luxury vision". This is what you said, Mr Khalil?

A. I do not recall but, yes, it would have been something that I would have contributed to, yes.

Q. And, therefore, in short, every corner of the hotel oozes attention to detail from colours to moulding to individually designed pieces of furniture, fixtures and fittings". Those these are your words?

A. Yes, yes.

Q. And, over the page, underneath the picture of the bathroom, you comment on Phoenix Interior Design and say, "We involved Phoenix Interior Design because we wanted the interior design to be unique. In line with our concept, I wanted a company that would transmit that into what I envisaged from the outset. We brought Phoenix Interior Design on board having previously worked with them on a number of separate projects. They were particularly helpful sourcing some of the bespoke furniture pieces". So this is twice in the same article, Mr Khalil, that you are singling out the bespoke furniture for comment?

A. Bespoke furniture is what we wanted in a five star hotel. This is an advertising pitch that can only help the standing of the hotel. It is not a piece where I was going to ascribe my hotel and its interior as not in line with what I would want my guests who have come to expect the highest standards to see.

Q. Well, what I would suggest, Mr Khalil, is that the furniture was something to be proud of and that is why you mentioned it twice?

A. Well, let me just explain that the furniture of the hotel does not just involve the rooms. The reception desk, the common path, the boutique consoles that we have bespokely sought one-off pieces that you would find in the hotel. So when you talk

> about presentation of the hotel, it was not just the bedrooms, Mr Legg, it was the entire hotel on its own and we had very many pieces there. I mean, we got chandeliers that cost in the region of £12,000 in the hotel, so you would understand why I am very proud of the hotel as a whole."

123. The explanations of Mr Khalil are, I regret to say, tailored to the Defendants' case. He did not have to pay tribute to the Claimant, nor would he have done so in the event that it had performed so badly as he contends. He gave fulsome praise to them. It is not a sensible answer that this was an advertising pitch or that he was referring to the hotel as a whole. He would simply have missed them out altogether if at the time he was so dissatisfied with them. Similarly, the suggestion that the journalist made up the words attributed to Mr Khalil might have been just about credible but for the praise which did come from Mr Khalil directly. All of this is corroborative evidence of the "kind words" of Mr Khalil when he met with Ms White at the hotel on 31 May/1 June and that he was indeed recommending payment.

124. It is to be noted that Mr Khalil was the senior person within the Defendants with a specialist knowledge of hotels. He was therefore centrally involved in dealing in collaboration with the Claimant with the snagging list. As regards Mr Khalil, it is evident from the documents that:

(1) there was a very detailed process of providing a detailed snagging list, of agreeing matters with Mr Khalil;

(2) the Claimant involving a number of people including Top Brass and a French polisher attended to the snagging and rectified almost everything;

(3) Mr Khalil was satisfied by the attendance of the Claimant and was complimentary to Ms White and expressed his expectation that the Claimant would be paid, albeit that the ultimate decision was a matter for Mr Usmani;

(4) Mr Khalil was fulsome in his praise about the Claimant to Premier Hospitality Magazine, evidencing his satisfaction with their work.

125. On the basis of this evidence, by 20 June 2017, the work was completed within the normal meaning of the word "completion". Any defects were trivial in the context of the work as a whole. Alternatively, if the test were that of substantial performance as understood in entire contracts or in construction contracts, it was amply satisfied by 20 June 2017. It may have been satisfied at an earlier stage, but that is not a material issue for the purpose of this case, save as regards identification of any earlier time when payment became due. It suffices at this stage to find that completion took place not later than 20 June 2017.

126. This conclusion needs to be stress tested against the subsequent complaints of Mr Usmani and the expert evidence in this case. Instead of approval, Mr Usmani sent an

email dated 12 July 2017 from Mr Usmani to Ms Granger of the Claimant in the following terms, namely

> "Dear Susie,
>
> I have now had the opportunity to properly consider the furniture and associated fittings, to include window dressings at the Dunalastair hotel.
>
> Notwithstanding the inordinate length of time it took to complete the works and the unnecessary level of inconvenience and disruption experienced, I set out for you the issues that remain outstanding. When writing I want you to note that whatever I have been able to accept I have done so in order to avoid lengthy discussion however the following list is comprised of those items identified that are unacceptable:
>
> 1. Curtain tracks: as previously identified and discussed are of a poor quality and with the constant usage that would be experienced in a commercial property these will have a limited life span. lt is difficult to pull the curtains across, it requires such force that either the tracks will be irreparably damaged or guests will start handling the curtains themselves. Neither is acceptable. When I raised this previously I was told it was due to the dust and building grit, the hotel has been operating for some 10 weeks or so. You have reported that you have cleaned and oiled the tracks, there is no dust or building grit, yet the problem persists. The new metal wands used to pull the curtains in to an open or close position have started bending as a result. please advise.
> 2. Blackout blinds: These are not fit for purpose. They do not allow the guest to sleep in a room without light flooding through. There is a possible solution but that needs discussion as there is a cost associated.
> 3. Coffee tables: The solution provided isn't acceptable. The original concept of having a piece of glass which sat proud of the frame itself and also with nothing to stop the glass from sliding off was clearly a design fault, this you have accepted. The remedy now being provided doesn't do much to rectify the design fault, the glass still sits proud of the frame.
> 4. Damaged Coffee table glass: There is a chip to the glass in Room 202. This has been previously identified. As it is your operatives that have attempted to
> 5. There are headboards which have not been adjusted to their correct positions, as agreed. Namely Room nos.: 200,207. Reducing the volume of the curtains that we have paid for is not an acceptable solution. The headboards should be set in their correct position as clearly set out on the plan. Please advise.
> 6. Poor stitching to headboard panel Room 215: This panel needs to be replaced, as agreed. It appears on the final list but has been omitted. please advise

7.Curtains to Room 215,2nd bedroom. As agreed the blinds were to be replaced with curtains, this has been done in bedroom 1 but not in the 2nd bedroom. This appears on the list but has not been done. Please advise.
8. Window blinds Room 111: The chains used to control the blinds are all cut to different lengths. The windows are in close proximity to each other, this looks unsightly and shows disregard for detail
9. Wall lights in restaurant area and Lounge: These are of poor quality and are completely inadequate in terms of size relative to the area of wall. We have discussed this and l have replaced with more appropriate size and quality. These will need to be credited to our account
10. Marble top coffee tables in lounge: These are completely inappropriate for the location. These are now badly stained with coffee and tea stains. Please advise.
11. Side table, glass top: This has been invoiced but never delivered. There is no proof of delivery nor can we find it on site. please credit this invoice.
12. Expenses: lnvoice no. L36101 £1,219.80. This has never been agreed. Please credit.

There are some anomalies which I have asked our accounts department to clarify, I will let you know if these are not resolved in the next day or two.

I think it is fair to say that Phoenix haven't taken on a project of this size or type. lt would have been better for both parties if Phoenix had declared that position rather than us finding out through very hard experience.
As a specialist supplier you are there to advise and unfortunately this hasn't happened. There has been gross overcharging on a number of items however I agreed the price so difficult to argue that point but it leaves a bitter taste. The overall cost of the interior furnishing has been disproportionately expensive and we did not receive a complete solution. We had to source many items ourselves and adjust much of the furniture especially in the lounge as it simply didn't fit. lt has created a great deal of work in my office and numbers of unnecessary trip at short notice to and from Dunalastair. However, we are where we are. We need to find an amicable solution to the issues outlined above. I am happy to talk it through, provide further back up information should you require.

I look forward to receiving your response at your earliest convenience”

127. In a solicitors' letter from Warners in response on 14 July 2017, the Claimant responded by denying the allegations of overcharging. It also responded to the numbered points as follows:

> "1. Curtain tracks not of satisfactory quality: Contrary to what you assert, the curtain tracks are of contract quality. This is an item which was on the snagging list and was completed and subsequently approved by Mr Khalil and Mr Huntley at the "walk around" on 1 June 2017.
> 2. Blackout blinds not sufficiently opaque; During the compilation of the snagging list you (via Gregor Ritchie, Managing Director of Optimum Hotel and Leisure Management, who are responsible, we understand, for managing the hotel) raised the issue of blinds in relation only to one room (number 215). He suggested that the blinds be changed to curtains which our client did without charge. lf you want the blinds in other rooms to be changed as well then that work would fall outside the scope of the agreed contract and you would need to pay for all the work associated with that.
> 3. Coffee tables wrongly designed: Our client rejects entirely your allegation that there is a design fault in relation to these tables - there is nothing wrong with the tables.
> 4. Damaged coffee table glass: You have alleged that there is a chip to the glass in room 202, but your sentence is incomplete and so we do not know what the criticism is - our client believes that this problem was resolved as part of the snagging issues.
> 5. Headboards not adjusted to their correct positions: This problem was resolved as part of the snagging works and completed to the approval of Mr Khalil and Mr Huntley at the "walk around" on 1 June 2017.
> 6. Poor stitching to headboard panel in room 215: Again, this was on the snagging list and put right, to the satisfaction of Mr Khalil and Mr Huntley at the "walk around" on 1 June 2017
> 7. Lack of curtains in the second bedroom of room 215: Contrary to what you state, this was done and approved by Mr Khalil and Mr Huntley on 1 June 2017.
> 8. Chains controlling window blinds in room 111 cut to different lengths and windows too close to each other: Again, these problems were resolved as part of tire snagging process and approved by Mr Khalil and Mr Huntley on 1 June 2017.
> 9. Wall lights in restaurant area and lounge of poor quality and too small: These lights were approved by you in September 2016. Our client delivered them on 29 March 2017 and, during compilation of the snagging list of 12 April, you raised the issue, but our client pointed out that these were the lights which you chose.
> 10. Marble top coffee tables in the lounge now stained with coffee and tea and inappropriate for the location: Our client wrote to you with a solution on 23 May 2017 (offering a change in the surface from marble to glass) but did not hear back.

> 11. Side table with glass top invoiced but never delivered: ln fact, there are four of these tables on site and we attach photographs which prove this. The only problem was that one side table was missed off our client's delivery listings, but you have the tables which you ordered and they have been installed on site.
> 12. lnvoice number 136101 for £1,219.80 was never agreed: This item was approved by your Suze Jones via email to our client's Justine Webber."

128. As regards Mr Usmani's email of 12 July 2017, I make the following findings, namely:

This was out of step with the communications of and with Mr Khalil referred to above. It was out of order for Mr Usmani to be so busy that he could not attend to matters personally, leaving it to Mr Khalil, and then for him to write in terms which depart from the process in the snagging lists.

(1) Mr Khalil was entrusted with dealing with the Claimant for months. He was the specialist in hotels, and not Mr Usmani, so any departure from Mr Khalil's satisfaction has to be treated with caution.

(2) Mr Khalil had been through a process of the creation of and working through snagging lists, so the subsequent email of 12 July 2017 has the appearance of a construct not based on reality.

(3) The criticisms of overcharging say more about the animus of Mr Usmani than they do about the contractual relationship. The prices had been agreed under the contract. If the prices had been too steep, Mr Usmani could have refused them at the time or negotiated. In fact, the evidence is that he required a reduction in the price by 30%, and it has never been explained how this came about. There was a suggestion that the practical effect may have been only a £8,000 reduction: if this is true, it has not been demonstrated how this was the case. In any event, the point here is that there is no rational basis for this complaint (it has not been run as an issue in the case). The allegation provides a context for considering the other complaints.

(4) There is no general complaint about the quality of the cased goods or the furniture and nor is there a complaint about the curtains or the drapery. There are two very specific complaints, but the email does not provide an evidential foundation to the counterclaim which is to the effect that every item of cased goods or the furniture should be replaced and every item of drapery, curtains and blinds should be replaced.

(5) The email does not contain a rejection of the goods supplied. It does not indicate that the balance of the moneys will not become due, if they are not by then due.

(6) The email has the language about completion of the works saying *"Notwithstanding the inordinate length of time it took to complete the works*

and the unnecessary level of inconvenience and disruption experienced, I set out for you the issues that remain outstanding." In other words, it has in mind completion having taken place, and it has in mind work of rectification or compensation.

(7) As regards the specific complaints, they were answered by return in the response of the solicitors for the Claimant, but they will be considered in greater detail below.

(3) the effect of the continued use by the Defendants of the goods supplied

129. Not only was there no rejection of the goods, but they have been used for years. The chronology can be summarised as follows.

January 2017: delivery and installation of the goods.

March 2017 – June 2017: preparation of snagging list and rectification works carried out.

May 2017: opening of the hotel and continuous use of the goods until closure for COVID.

May 2017: numerous customer reviews such as *"our suite was beautiful and yes it's just been refurbished and so was all new but the luxury and attention to detail is exceptional."* And *"our suite was the best we have stayed in"* and *"the rooms are remarkably well appointed."*

27 March 2018: award of 5-star grading from VisitScotland. The literature accompanying the award states *"All suites have been designed with sumptuous, five-star comfort and use the finest fabrics and furniture created by Phoenix Interior Design".*

1 June 2018: Dunalastair Hotel Suites wins Boutique hotel of the Year at the Scottish Hospitality Awards 2018.

2018/19: Best Hotel Interior awarded by Best Loved Awards Bo-Ho winner for UK Country & Coastal 21-50 rooms *"Everything in the building was renovated to five-star standard"* Nassar Khalil.

28 June 2019: Amended Defence and Counterclaim based on Contessa quote: £298,544.23 plus VAT and costs incurred of £19,725 plus VAT.

March 2020: first closure of the hotel due to COVID (evidence is that the hotel was open for 2 months).

June 2020: quote from FYR projects to do the rooms again £212,372.00 plus VAT.

130. Despite the goods being said to have been so defective and not being replaced, as is apparent from the above, the hotel has received various awards and accreditations. It has received reviews from clients, and there has been very good feedback about the suites/rooms. Mr Khalil referred to the furniture created by the Claimant in the literature accompanying the award of five-star grading by VisitScotland.

131. In my judgment, if the furniture was so poor that it required replacement, then the following would have occurred, namely

(1) the Defendants would have been bound as a matter of commercial necessity and plausibility to have replaced the furniture and furnishings years ago rather than use allegedly sub-standard goods in a five-star hotel;

(2) Mr Khalil would not have praised the quality of the work done and goods provided by the Claimant in the context of five star accreditation;

(3) reviewers would have been very critical whereas in fact they were fulsome in their praise.

132. There was evidence about the limited number of years that such furniture would last, especially for the high-end market. Four years of use to date might represent more or less a half of the time expected for the use of the furniture. In the case of a five-star hotel, it might be a higher fraction than a half since the higher the class of hotel, the more frequent the replacement of furniture and fittings. The position therefore is that the Defendant accepted the furniture and now seeks repayment of the value of the goods, having benefited from them for about a half of their expected lifetime.

133. In order to meet this case about replacing the furniture, it was stated that the Defendants had agreed to replace the same by FYR in June 2020. However, there was no evidence that terms of payment were ever agreed. It was suggested that the COVID pandemic and lockdown had prevented them from taking delivery. That is a bare assertion, and the Court has some difficulty in accepting the same without more. If it really was an order, then the time of the pandemic might have been the best time for the work to take place whilst the hotel was unoccupied. Besides, for a period of two months, the hotel was able to function, but nothing appears to have happened as regards proceeding with an order with FYR.

134. Whilst dealing with general points, it should also be added that the Court heard evidence from Mr Richard Deak, the general manager. In cross-examination, it emerged that there was not an overall system of checks for ensuring that furniture and furnishings were well maintained. His written evidence did not indicate that he had a system for maintenance at the hotel to deal with the defects of the furniture. It was not for his general maintenance person, nor did he ever engage a French polisher. The

maintenance logs, which were from May 2018, showed problems including furniture. The fact that there were no logs before May 2018 tells a story of its own about a lack of system of maintenance. The quality of the record keeping was poor containing a lack of detail and not matching the narrative of Mr Deak's evidence.

135. In those cases where there was a fault with a coffee table with damaged laminate, there was a responsibility on the part of the hotel to attend to the same in order to deal with wear and tear. However, Mr Deak did not accept this responsibility, leading to the inference that the hotel was not addressing adequately such issues. In the end, his evidence descended to the following *"As I said, your Honour, it is not in my position to arrange to fix these things, I am not the decision maker here. I just report to the owners (inaudible) in my job description about the furniture since when I became the general manager in 2018 in the Spring and that is all I can do at this stage. I am not in a position to refit the whole Hotel."* [T5/33/31-34]

XIV Conclusions before considering specific defects.

136. The conclusions are as follows:

(1) The Defendants did not reject the furniture and fittings but retained the same and used them. If there was a possibility that they might have rejected the same, their subsequent conduct in continuing to use the same shows that there was no rejection. This is not a case where there was a rejection followed by acceptance: it is a case where there was no rejection, and where if there was any ambiguity or any possibility there might be a rejection, this came to an end because of the continued use of the furniture and furnishings over the years which ensued.

(2) There was a process for dealing with the defects through the snagging list. This was managed poorly by the Defendants in that there was no attendance by decision makers at site for several weeks after delivery and installation until March 2017. Mr Khalil became involved, and in the end, he was broadly satisfied. He denies vehemently that this was the case in his evidence, but the contemporaneous documents provide a consistent and strong picture to contrary effect. The more he says that he was expressing his dismay to the Claimant and that the Claimant was behaving in an aggressive way, the more the correspondence shows a very different picture. He was complimentary to and about the Claimant and he collaborated towards the ways of sorting out the snagging and facilitating payment.

(3) Payment was ultimately left for Mr Usmani. His position was generally distant for months, leaving the position to Mr Khalil. By May 2017, he appears to have become annoyed with Ms White, despite the talk about trust and high regard. Whatever it was, it has led to his believing that Ms White made a representation about hotel experience, whereas I have found that she did not make any such claim. It has led to his going out on a limb of his own in his email of 12 July 2017 making unsubstantiated claims about excessive charges and complaints which have ignored the whole sequence

of the snagging lists and the steps taken by the Claimant to address the same.

(4) The evidence of the Defendants has been badly anchored. It has at its source an order of five-star furniture for a five-star hotel. In fact, the documents do not bear this out. First, the order was for a high-end apartment hotel at the time of contract, which is a different concept from a five-star hotel. Second, there is no evidence of a star rating system in respect of furniture. Third, as noted above, the language relating to specification is contradictory, inconsistent and imprecise.

(5) In my judgment, the evidence given for the Defendants about the quality of the goods is out of step with contemporaneous documents. I have made criticism especially of key witnesses for the Claimant, namely Mr Usmani and Mr Khalil. The evidence of Mr Deak has been unimpressive. The evidence of Mr Bassett was based on the assumption that the contract was specific and precise.

(6) The Defendants' retention of the goods in the hotel and use of the same for years is completely at odds with the extent of the complaints which are being made. If in fact the goods had been as defective as the Defendants relate, they would have been bound to have replaced them years ago. The fact that they did not do so is a telling feature against the Defendants' case.

(7) Further, it was vital for a hotel to have a system for maintenance of the damaged items in the hotel. The evidence is that apparently respectable customers can treat a hotel room in a way that they would never treat their own home. That is why the furniture had to be hard wearing, but also why the hotel would have to have in place a way for dealing with wear and tear and rough treatment by customers. The evidence of Mr Deak revealed that there was no adequate system for maintenance in place, and the Defendants have no ground for complaint to the extent that the problems arose out of their failure to maintain the furniture, furnishings and fittings. The fact that Mr Deak had not engaged the services of a French polisher or the like was also revealing.

(8) Before reaching any final conclusion, it is necessary to consider the individual complaints and it is to this that the attention of the judgment now turns.

XV Furniture

(1) Introduction

137. In the AmDCC the Defendants allege that the Claimant was under a contractual obligation to supply, deliver and install high quality furniture that was fit for the purposes specified in the Initial Brief and would comply with its description: AmDCC paras. 12.1 – 12.3. The Defendants allege that in breach of that contractual duty the Claimant instead supplied, or procured, a significant amount of furniture that (a) is of

insufficient quality and was only suitable for a three-star hotel (i.e. was not of sufficient quality for use in the Hotel); (b) does not comply with the purpose set out in the Initial Brief; and (c) is insufficiently hardwearing for use in a hotel: AmDCC paras. 23.2, 23.3 and 23.22.

138. The Defendant does not claim in respect of all furniture, but seeks damages to replace defective items of furniture with equivalent items of the quality specified in the Initial Brief (i.e. damages to put the Defendants in the position that they would have been in if the Phase 1 Contract had been properly performed). Two quotes have been obtained for the replacement items: (a) a quote from Contessa; and (b) a quote from FYR Project Management Services Ltd ("FYR") dated 22 June 2020.

139. The Claimant denies liability and says that

(1) the Defendants' case is based on an erroneous characterisation of the specification in the case;

(2) the furniture and cased goods were approved in advance by the Defendants, and the Claimant acted on their approval;

(3) the furniture and cased goods were of sufficient quality and were hard wearing and suitable for a high end establishment;

(4) the furniture and cased goods were approved by the Defendants in the inspections following delivery and culminating in an inspection by Mr Khalil on 1 June 2017 and later in the month;

(5) the same were not the subject of criticism even by Mr Usmani on 12 July 2017;

(6) the Defendants are responsible for the way the premises were not in a fit state to receive the same when the same were delivered and installed in January 2017;

(7) the Defendants failed to maintain the same adequately or at all and failed to maintain any system for such maintenance;

(8) if the furniture and cased goods had not been fit for purpose, they would not have been used for years following opening in May 2017 until lockdown in March 2020 and again during the times when the Hotel was open.

(2) The Defendants' case

140. At the heart of the Defendants' case was that the furniture did not comply with specification. This is said to have been the result of the Claimant not passing on the Initial Brief to Top Brass and of failing to provide information concerning the intended quality or specification of the furniture, to Top Brass: see paras. 7 - 8 of the witness statement of Mr Bassett. He said that for the prices quoted, the furniture supplied was

three-star furniture and not high end or high-quality furniture which was hardwearing and easy to maintain. He said that Top Brass did not have a track record of providing for higher end hotels but provided furniture of "three star" quality for mid-range or "budget" hotels. Had he been asked to manufacture furniture to a higher standard he would have used better quality materials [T/4/71/17 – T/4/72/30]. The Defendants and their expert Mr Englander submitted that the views of the designer/manufacturer who is not affiliated to either party should be given particular weight since he had first-hand knowledge of the quality of the product and how it should have performed:

141. In particular, it was submitted that it was not appropriate or conventional to use laminate for the legs of chairs and tables. Mr Englender did not think that he had ever seen this before (other than on one piece of sculpture), and he thought that this had "contributed to the poor wear of the product": see [T/5/47/4] – [T/5/47/14]. Mr Barrett did not understand why the legs were not made of hardwood, describing a preference for hardwood and veneer over laminate: see [TB/5/187].

142. The furniture's unorthodox design has undermined the "hardwearing" nature of the laminate used. The use of laminate for the legs of chairs and tables was at best novel and at worse misguided. The experts were unanimous in their criticism of this particular element of the design.

143. The Defendants say that their approval of laminate for the cased goods is because they were neither professional interior designers nor furniture designers and they retained the Claimant to advise on (amongst other things) furniture for inclusion in the Hotel. The Defendants made decisions based on advice and aesthetics. The Claimant should have advised that the use of laminate on vertical surfaces such as chair legs was unusual and should have explained the risks of using the same and/or advised against the same. It was also the case that the furniture was badly manufactured. Mr Bassett was cross-examined on the quality of the furniture manufactured for the Claimants. He said that laminate edging should not come off as easily as it appeared in the photographs. He did not know why because he does not get involved in the manufacture: see [T4/68/24].

144. Mr Green was shown the Claimant's April 2017 snagging list and was cross-examined on the Claimant's contemporaneous observations that *"All Furniture"* needed *"gentle sanding on edges"* and *"all glue/white marks to be removed"*. His evidence was that there may be a quality control issue from the manufacturer of the furniture, but he questioned whether the environment was not suitable for the furniture because the rooms were not heated: see T3/18/10-18. Mr Green had left the employment of the Claimant by the time of the snagging list of April 2017.

145. In his report Mr Englender, the expert for the Defendants, referred to the *"inelegant covering of cased goods in laminate."*: see his report at para. 2.2(viii). He elaborated upon this opinion under cross-examination on day 5, stating that:

> " … the laminate has been inelegantly and poor quality application of that laminate to provide a protrusion of laminate at the same time, there that inelegance – when I talk about inelegance I am not talking about inelegance simply from a design perspective, but in terms of the manufacturing quality – the poor application of the laminate and the rather strange use of physical location of the laminate has meant that the laminate has

> become easier to break, so it is very rare. It is very common to see laminate used on a horizontal surface, a table top, a bedside table, coffee table, and it is very rare, in fact, I do not think that I have ever seen it before, other than in one piece of sculpture, where laminate has been used for vertical surfaces of table legs and I think this rather strange use of laminate has contributed to the poor wear of the product." [T/5/47/4 – 14]
>
> "… I said I have never seen [laminate] used on legs before, ever, okay, and secondly, the protrusion of laminate is unusual, I believe is poor quality manufacturing and the third part is, what I cannot tell is how well the laminate was bonded on to the substrate, be that MDF or chipboard. I cannot tell you how well that has been bonded, but the damages that I am seeing are highly unusual." [T/5/47/24 - 28]

146. The poor quality of the furniture and its unsuitability was also commented upon by Mr Barrett. When cross-examined, Mr Barrett explained that the furniture showing the defects identified by the experts (i.e. a 1.5mm protrusion of laminate over the edge of the chair/table legs) or by the Claimant in its snagging list (i.e. sharp edges in need of sanding and glue spots) was not suitable for any hotel: see [T/5/88/19 – T/5/89/6]**.**

147. Further, he opined that the damage to the furniture identified by the Defendants in February 2017 (i.e. before the Hotel had opened in May 2017) was indicative of poor quality furniture manufacturing, not as a consequence of poor maintenance or mistreatment following its installation: see [T/5/92/24 – T/5/93/33]

148. There were some problems about the quality of the furniture which were raised by the Defendants from a very early stage. The cased goods were delivered to the Hotel in January 2017, some four months before the Hotel opened. Despite this, the furniture began to show signs that it was insufficiently manufactured and/or insufficiently hardwearing at a very early stage:

    (1) On 10 February 2017, Mr Khalil emailed the Claimant saying *"Veneer is coming off some of the furniture and there are quite a few chips in others…"*

    (2) In an email dated 3 May 2017, Mr Khalil stated that sharp edges remained on some of the furniture.

    (3) The snagging list compiled by the Claimant in April 2017 expressly recorded that (i) various items of furniture needed to be repaired/replaced; and (ii) "All furniture" was recorded as needing sharp edges sanding and glue spots removing. This became the "agreed" list after the 15 May 2017 meeting (following additions from the Defendants).

149. The Defendants' case was that hardwearing contract quality furniture should last 7+ years, according to Mr Englender's report and should not have deteriorated as quickly

as it has through use in the Hotel. Mr Deak suggested at paragraph 13 of his statement that it would be necessary to replace the furniture before its replacement cycle of a minimum of 7 years. Despite the Claimant's various attempts to explain this damage as "wear and tear" or "misuse", the only reasonable explanation for the endemic nature of the damage is that the furniture supplied is both insufficiently hardwearing and unsuitable for its stated purpose.

(3) The Claimant's case

150. The Claimant relies upon

(1) the absence of a categorisation of five-star furniture and the fact that at the time of the order, the furniture was for an apartment hotel and not a five-star hotel. This has been set out in some detail above and does not require repetition;

(2) the approval by the Defendants of the furniture by inspections in particular (a) On 10 March 2016 in Hartlepool, (b) at Henley Homes' head office on 24 March 2016; and (c) the sample room at the Hotel on 18 September 2016;

(3) the way in which there was a snagging list which was worked through until satisfaction in June 2017 subject to the ultimate decision of Mr Usmani;

(4) Mr Usmani's document of 12 July 2017, which makes very limited and specific criticism of the furniture and cased goods;

(5) The use of the furniture and cased goods for years without replacing the same in the period between May 2017 on opening and March 2020, the first closure for the COVID pandemic and thereafter open for two months during the pandemic;

(6) The fact that the premises were not ready to accept the furniture and cased goods in January 2017 and for weeks thereafter, with no heating there and numerous contractors working there and living there prior to the official opening in May 2017;

(7) The absence of any system for maintenance of the furniture and cased goods, as evidenced by Mr Deak.

(4) Discussion

151. In my judgment, this part of the case rests in part upon the assumption that the furniture delivered was not five-star furniture, and that that was part of the contractual specification. I have concluded that

(1) the specification was imprecise and did not include that the furniture was five-star furniture;

(2) there is no categorisation of five-star furniture or indeed stars for furniture;

(3) the furniture was provided contractually for an apartment hotel and not for a five-star hotel, which is a different concept: it was not for the Claimant to start again when the Defendants decided belatedly to have the hotel ascribed as a five-star hotel;

(4) the furniture had to be hard-wearing and have a high-end feel. It has broadly fulfilled that requirement as evidenced by the reviews of customers which have been positive and by the ability of the Hotel to obtain five-star rating. The latter has not been due solely to the furniture, but this has not held it back, and on the contrary, the relevant furniture and the appearance of the rooms have been singled out for particular praise as set out above.

152. To the extent that this part of the case has relied on Mr Bassett, where it is said that his evidence is of significant standing as he is impartial between the parties and with the authority of someone who was employed by the manufacturer, I conclude the following. His involvement does not have the depth required for his evidence to be particularly helpful. He was not a party to the contractual negotiations in the contract between these parties nor were they passed on to him at the time. Contrary to the tenor of his present evidence, at the time of his email of 16 April 2016, he was able to give the assurance that *"products are manufactured to a high contract quality and are guaranteed for 12 months…"*

153. Beyond that, he admitted in cross-examination, he *"never got involved with the physical manufacturing of the furniture"*: T4/68/32-33. He believed that the specification was five-star furniture, but he was wrong that that was specified and that there was such categorisation. He says that the furniture provided was for a three-star hotel, whereas Top Brass has supplied at least in the case of the Novotel in Scotland to a four-star hotel. Since he was not involved in the contractual negotiation, he may not have known about the fact that the Hotel was at the time of the contract intended to be an apartment hotel. The reference to a five-star feel was in the expression *"hard-wearing and contract quality which is easy to clean, maintain and replace but with a luxurious 5-star feel. Easy eh!"* It is apparent that Mr Bassett's evidence is based on assumptions which do not adequately reflect the position.

154. Mr Bassett did not know that the cost to the Defendants was a combination of the price of the goods and the cost of providing interior design services. Thus, he compared what was charged for the supply of the goods by the Claimant to the Defendants with the amount at which they had been supplied by Top Brass. He believed that differential should have been used for superior goods. He therefore helped to fuel Mr Usmani's belief that the Defendants had been overcharged. That was based on a false premise because it did not take into account the uplift for the interior design charges. It also ignores the fact that Mr Usmani had imposed a tight budget on the Claimant, having procured a reduction of 30% from the sums originally charged.

155. As regards Mr Bassett's independence, Top Brass had become insolvent and a part of its business was acquired by a company trading as Contessa Contracts Limited ("Contessa"). Although Mr Usmani says that he has no intention of using Contessa for remedial works, Contessa was asked to quote for remedial works, and this was relied on in the Counterclaim and in the evidence of Mr Bassett as to the cost of the same.

There is no suggestion of impropriety in this or actual bias on the part of Mr Bassett, but without any impropriety at all, going to the lengths of quoting for the work (even if it was said that there was no possibility of Contessa getting the job) opens up the possibility of a "subtle influence" or unconscious desire to assist the case of the Defendants as referred to in *Gestmin SGPS SA v Credit Suisse (UK) Limited and another* [2013] EWHC 3560 per Leggatt J at para. 19.

156. Mr Bassett's attempt to provide prices for three-star furniture and five-star furniture for the purpose of the claim was all part and parcel of his lack of familiarity with the contractual specification in the case. His evidence was that for a five-star furniture, there should be provided real wood with a veneer. In my judgment, this itself reflects a further aspect of confusion in the case between the need for the furniture to be hardwearing (which was specified) and some particular specification of quality for a five-star hotel. In principle, laminate could be harder wearing than wood. There was no requirement for the furniture to be of wood: had there been, that might have detracted from the hardwearing specification. In my judgment, there is no reason to criticise the decision to provide a laminate finish. Separately from that is the question whether the particular laminate finish was of poor quality not because it was laminate, but because of the particular laminate supplied. The allegations in para. 23.22 of the AmDCC are that it began to peel, crack and chip at the edges, it had dangerous sharp edges and the black stain/varnish on the legs of chairs in the guest bedrooms deteriorated, becoming patchy and unsightly.

157. In my judgment, this evidence has to be viewed with caution. Whilst the Claimant is an interior designer with particular expertise, the client was not a consumer, but a business with significant property experience, albeit not of hotels. When the inspections took place in Hartlepool, at Henley Homes and at the Hotel, there was enthusiastic approval. That evidence is relevant to whether the goods inspected were appropriate and fit for purpose. It is to be borne in mind that the approval in September 2016 was in part by Mr Khalil who had considerable experience in the hotel industry.

158. Likewise, although there was evidence of dissatisfaction in the early preparations of the snagging list (as to which there was a question whether this was caused or contributed to by the absence of heating in the Hotel following installation and also manhandling by the many workmen at the Hotel in the weeks thereafter), the evidence was of the items being corrected so that by June 2017, there was satisfaction. Further, I have found the above contrary to Mr Khalil's oral evidence that he was satisfied, and he expressed it to Ms White as well as thereafter within the trade in connection with accreditation of the Hotel. Further, the complaints of Mr Usmani in his email of 12 July 2017 were largely not about the condition of the furniture and cased goods.

159. Mr Usmani says that their defective nature mainly became apparent later. There are many further problems about that suggestion. I refer again to the evidence of Mr Deak, the general manager. At first, a company called Optimum had been engaged to carry out management, but that was terminated for poor performance in October 2017. Shortly thereafter, Mr Deak became the General Manager. As set out above, he appears to have had no or no adequate system to deal with the maintenance of the furniture and cased goods. The system of recording these matters was poor, as was apparent from maintenance logs. If and to the extent that it was the case that dissatisfied customers were given free drinks or meals, that was no way to address serious quality problems if they really existed. I referred above to the failure to engage a general maintenance

person or a French polisher or to make arrangements to fix the furniture. This indicates that the problems could not have been as serious as alleged, and to the extent that there were problems, the Defendants failed to address them adequately or at all.

160. Further, the case that furniture and cased goods were so defective and that this was not put right over years is fundamentally inconsistent with the fact that the Hotel operated for years with them, obtained 5-star and other complimentary ratings, and had customers giving excellent reviews about the rooms. If and to the extent that in this case there is some evidence about defects of the furniture, there is good reason to believe that this was the result of failure to address the wear and tear of and damage caused by customers, particularly having regard to the way in which some customers conduct themselves and the extent to which the Hotel was used (unsurprisingly by its location at the Scottish Highlands) by people engaged in heavy outdoor activity.

161. I refer again to the expert evidence. Whilst this helps explain the factual evidence, it does not alter the picture fundamentally. In particular, the notion that the goods or some goods supplied were so fundamentally defective as to require replacement has to be seen with caution. At this stage, years after installation and with the furniture being in continuous use for a long period of time, the furniture has indeed been broadly of hardwearing quality. Mr Englender's evidence began with a view that much of the furniture and the cased goods needed to be replaced, but he was willing to consider his position in cross-examination. He accepted that there were occasions when the supplier could be given an opportunity to put the goods in order: see T/5/48/15-30.

162. Mr Barrett took a different view in respect of the ability to cure the defects in respect of the furniture, being adamant that it could be done cheaply. If there were manufacturing issues in this case, such as laminate extending over edges [T5/88/24], or veneer being off in February 2017 [T5/93:11-33], then they could be remedied easily as part of any snagging, and at a cost (£7,000-£8,000) [T5/108:10 - T5/109:16]. His report says "*in order to rectify this, it would only take a few minutes with each chair or table leg to smooth off the slight protrusion with fine sandpaper which would not damage the legs*" (end of para. 8 of his report], and he valued the entirety of any repair or correction work as £7,000-£8,000 (para. 7 of his report), based on what he would need to put the issues right [T5/108/17 – 18]**.**

163. He said with his experience particularly of decorating: *"…if I am allowed to blow my own trumpet for five minutes or two minutes, if I had that, I could match that with paint and it would not look wrong, those legs, I could do that, I could fill it and match it with paint and it would not look wrong*" [T5/108/23-26].

164. Mr Barrett's evidence in that regard was the more plausible because he frequently did not argue against the points put to him. I did not understand that as being his conceding the case of the Claimant, rather his recognising the limitations of his role as an expert. At one point, having taken the view that most matters were due to wear and tear for which the Defendant was responsible, he changed his position to admit that some of the quality issues might be more the responsibility of the supplier than wear and tear which might be 40%.

165. Having considered all of the evidence and the written and oral arguments, I have come to the conclusion that a large part of the problem has been the failure to receive the goods properly on installation and the absence of any or any adequate system for the

maintenance of the goods. I am also satisfied that the fact that the Defendants have not replaced the goods in the years since installation but have continued to use them for about 3 years until the pandemic and even then, have not changed them evidences that the goods have been largely suitable and fit for purpose. The evidence relating to peeling, cracking and chipping of the laminate and sharp edges and stain/varnish on the legs of the chairs means that the Claimant must take some responsibility for quality issues. Nonetheless, I am satisfied that in view of the evidence as a whole, I reject the case that any of the goods require replacement. The solution is the one of Mr Barrett about rectifying the same in the manner which he contended. It does not mean that the Claimant must compensate by reference to all or any of the wear and tear not down to the quality of the goods whether before or after the Hotel opened.

166. I accept the evidence of Mr Barrett that such quality defects as there were in respect of the furniture and the cased goods could have been dealt with in the manner indicated by Mr Barrett. He gave his evidence of £7,000-£8,000 based on his experience and expertise. I shall return to this in the section about quantum and remedies below.

XVI Roman Blinds/Black-Out-Blinds

167. In the Amended Defence and Counterclaim the Defendants allege that the Claimant was under a contractual obligation to supply, deliver and install black out blinds that were properly fitted to the windows and thereby excluded daylight. Alternatively, if this could not be achieved (either because the Hotel's windows opened inwards or otherwise) the Claimant was under a duty to advise the Defendants that Roman blinds were not an appropriate solution and to propose a more appropriate method of excluding light from the bedrooms: see AmDCC paras. 23.5 – 23.7.

168. The Defendants submit that the black-out blinds failed to keep out daylight and were mentioned in snagging lists. Mr Deak gave written evidence to the effect that there were problems with the Roman blinds due to failing to provide black-out coverage and that there were poor quality mechanisms, and that they needed to be re-fixed: see his witness statement at paras. 4 and 9(c). Mr Khalil and Mr Usmani said that blinds were unsuitable when many of the windows opened inwards, and that fitting blinds rather than curtains meant that the window could not be opened. Further, the blinds allowed light streams in gaps at each side.

169. The Claimant submits that the blinds provided were of adequate and/or suitable quality. The plans provided by the Defendants to the Claimant did not say that the windows opened inwards. Accordingly, pursuant to Clause 8.2.1 of the Claimant's standard terms and conditions, no warranty was given because this arose from a drawing design or specification supplied by the Defendants.

170. The Claimant submits that the issue of the suitability of the blinds was raised in correspondence after installation. They point to an email of 15 May 2017 about the "need to provide an alternative solution to the Roman blinds – suggested that Chris the upholsterer will have to come up with a solution".

171. In fact, in the snagging list completed on 15 June 2017 the following appears as an item *"ensure all blinds are black out"*. In the comment column, it is stated *"all curtains and blinds have black out lining. During the compilation of this snagging list with*

Nassar/Gregor/James & Susan it was agreed RM (Room) 215 was requested to be (meaning to) change the bedroom blinds into curtains. Invoice has been sent." In the column headed "Discrepancy", it is written *"approved with Nassar & Mark"*.

172. As noted above, Mr Usmani complained about the blinds in his email of 12 July 2017 about the light flooding through. In the Claimant's solicitors' response of 14 July 2017 referred to above, the snagging list was referred to. In fact, the blinds in Room 215 were replaced by curtains without charge. Anything else fell *"outside the scope of the agreed contract"* and therefore there would be a charge.

173. In this regard, there was an option of building around the outside of the window frame a box arrangement covered in fabric, but that would be a more expensive solution for blocking out light than a Roman blind with black out curtaining. That option was at a higher cost and was rejected by the Defendant. As noted above, there were discussions about cost as the Claimant sought to accommodate the requirement of the Defendant to reduce its initial quotation by 30%.

Discussion

174. In my judgment, the complaint about the blinds whether in contract or in tort is not made out by the Defendants. The blinds followed a specification and/or plans provided by the Defendants, that is an answer by itself. In any event, Clause 8.2.1 provided an answer. In my judgment, that was a reasonable exclusion or limitation of the warranty on the basis that the Claimant would work towards and around the specification supplied by the Defendants.

175. Ms White gave evidence which refutes this criticism at T2/74/31 – T2/77/10. She spoke about the snagging list process, and that there was no issue with the curtaining or the light bleeding through. She referred to Mr Khalil being a leading lighting hotel designer. At T2/77/1-10, she said the following:

> "Well, the thing is, it is impossible. As I said before, you need an allowance for the roller mechanism to work. So, there is always going to be some form of light spillage. As I said, it never came up in the snagging and we did offer a solution. The solution was – because the solution for anything like this is you would put in a casement, like they were going to do in part of the brief. The original brief was the new windows were going to have the sheer inside for that purpose. These were not fitted, they asked us to add sheers in 2016, they had the list and the images of every single window treatment, so the client knew what they were getting and as I said, there is blackout lining in the curtains and the roman blinds. There is no way of getting around light spillage but as I said before, the photographs that are in there are from daylight hours you can see."

176. The evidence of Mr Deak does not alter the conclusion. If these matters were as substantial as he suggests they would have been dealt with as part of the snagging process and the result would have been that satisfaction would not have been expressed. Further, the criticisms above regarding the failure to have any adequate system of maintenance is such that Mr Deak's criticisms of the quality mechanisms of the blinds

and the need for them to be refixed are to be discounted. I am not satisfied from his evidence that these were not matters of routine maintenance expected in a hotel.

177. Mr Barrett in his report noted that if black out blinds were fitted to the windows, they would have to be sealed around the exterior of each blind which would affect ventilation in the room (see para 23.8 of his report).

178. It follows from the above that the blinds were the subject of the Defendants' specification and/or were subject to collaboration before the work was carried out. Thereafter, the blacking out from the blinds was discussed in the snagging process. The matters were then approved by June 2017, and in particular with Mr Khalil set out in detail above. In my judgment, the Claimant has been entitled to reject the belated criticism of Mr Usmani in his email dated 12 July 2017 and to have responded by solicitors saying that a change to the blinds would fall out of scope of the agreed contract.

XVII Curtains, Curtain rails and Curtain Rods

179. At paragraph 23.4 of the AmDCC the Defendants allege that the Claimant acted in breach of the Phase 1 Contract and/or the tortious duty of care owed to the Defendants by failing to procure and/or provide curtain rods and tracks of adequate and/or suitable quality. The curtain rods and/or tracks by the Claimants were not sufficiently hardwearing and/or were not fit for the specified purpose, causing the curtain tracks to break and curtain rods to buckle and bend.

180. Mr Khalil, stated in his witness statement at para 26 that *"it was not the case that the [curtain] tracks needed to be re-oiled; the tracks were simply defective as they were of an inferior quality and would not therefore glide smoothly."* Mr Usmani stated in his witness statement at para 57(a) of his witness statement, *"the curtain tracks installed and supplied by the Claimant are stiff, to the extent that the metal rods used to pull them are bending under the strain of normal use. This is due to the cheap and inferior quality used in the Hotel."*

181. Mr Deak said in his witness statement at 9(d) that the curtains *"appear to be too heavy for the tracks and are therefore too heavy to pull closed."* Further, *"the tracks are very prone to getting stuck, leaving the curtains partially open. None of the curtains provide adequate black-out coverage ..."* He also said that *"We have also had Hotel guests apologising at checkout for breaking a curtain as the tracks could not support them."*

182. Similar evidence is given by Mr Usmani at paragraph 57(a) of his witness statement, who explains that *"the curtain tracks installed and supplied by the Claimant are stiff, to the extent that the metal rods used to pull them are bending under the strain of normal. This is due to the cheap and inferior quality used in the Hotel."*

183. Both experts' evidence was that the mechanism in place at the Hotel is unsuitable for its intended purpose. Mr Englender said that the quality of the drapery tracks was insufficient [T5/45/19-21]. Mr Barrett referring to rooms with high ceilings requiring a better coping track or more robust wands [T5/103/28 – T5/106/15].

184. Mr Bassett suggested that the quality of the tracking had been downgraded due to budgetary constraints. Nevertheless, Mr Bassett gave oral evidence [T4/67/7-13 and T4/67/23-26] that the draw rods and curtain rods were up to the standards specified by the Accor Hotel Group. In an email dated 2 May 2017, he said *"the draw rods we have supplied is (sic) the same that we use in all the Mercure and Novotel Hotels throughout the UK over the past 12 years and as specified by Accor Hotel Group".*

185. Ms White stated that the curtains were not on the snagging list. In connection with the curtain rods being bent, she said that *"the curtain track needs to be regularly oiled...they need to be sprayed with a lubricant on a regular basis."* [T2/78/11-13]. She said that it was a maintenance issue *"you have to maintain things on a regular basis. They do not last for life. They have just got to be maintained. You do not know what happens inside this room, as I said, but it needs to be maintained on a regular basis"*. There was a collaboration with the client who wanted "curtain wand swingings" giving a Victorian feel, and she was adhering to their brief.

186. Mr Englender said about maintenance that the hotel owner is responsible to ensure that the goods are maintained according to the supplier's instructions. He said the following at T5/62/15-22:

> "Q. Would you expect there to be a high quality maintenance team to ensure that these goods are kept in a state of repair that otherwise the deterioration that you are seeing could be a lack of maintenance, for example?
>
> A. Correct. I would agree wholeheartedly with that, my Lord, and I would have expected to see the operating and maintenance instructions for each product, each fabric, each light, the carpet, the drapery tracks, the furniture, every single item to be in an operating and maintenance manual provided to the Hotel so that they knew, as you say, Mr Legg, how to maintain that property effectively."

187. The evidence of Mr Usmani was revealing in this regard at [T4/43/29 – T4/44/5]. That response is symptomatic of the scattergun approach of Mr Usmani looking for defects in this case. Instead of commenting on the curtain tracks, he proceeded to make a complaint about the quality of the curtains which did not form part of his witness statement. As regards the curtain tracks, he did not address the point that curtain tracks could be replaced simply with other tracks. That begs the question as to why, if it really was such a serious problem, the curtain tracks had not been replaced but have been used over the years since installation.

Discussion

188. In my judgment, the Defendants have not proven the bulk of this part of the case. The following features are of particular importance:

(1) Top Brass was using items which had satisfied the Accor Groups Hotels over a period of 12 years. It makes no difference for this purpose that those

hotels were three or four star hotels and not five star hotels. It follows that the curtain tracks were of hotel quality and suitable.

(2) the wands were specified by the Defendants and if and to the extent that they might have needed replacement more often than more robust and less aesthetically pleasing ones, there was no reason for the Claimant to advise against the selection. If these were defects, they were due to the drawing, design or specification supplied by Henley Homes, and Clause 8.2.1 applied. It was a reasonable exclusion of liability insofar as there was any liability.

(3) the snagging process was over a period of time and these alleged defects did not feature and the Defendants particularly by Mr Khalil, expressed their satisfaction.

(4) the complaints made by Mr Usmani made in his email of 12 July 2017 about the curtain tracks were properly answered by the Claimant by reference to the snagging process. Further his oral evidence was unsatisfactory as set out above. If there really had been a problem with curtain tracks, and the Claimant had not addressed it, then there was no reason for the Defendants to replace the same over the years that have since elapsed.

(5) the failure of the Defendants to have any adequate system of maintenance is of particular concern in this regard. This was at two stages. First, on delivery and installation, there was poor use during installation and dust from workmen. This was all sorted during the snagging process. Thereafter, there was poor maintenance and in particular there was a failure to keep the curtain rails silicone sprayed on a regular basis. The observations above concerning Mr Deak's evidence are of a failure to have any or any adequate system of maintenance with poor records and failing to attend to matters in a way designed to keep the Hotel to a high standard. There were notes about providing customers with compensatory meals or drinks or the like, but this was not a substitute for attending to the maintenance issues in a professional manner by making such repairs and improvements as required with a skilful and designated staff ready to implement the same. The Defendants' case emphasises repeatedly the failure of the Claimant to supply a service fit for a five-star hotel. This judgment has addressed that above. However, it is noteworthy, that the approach to maintenance falls far short of what would have been expected for a five-star hotel or a less rated establishment.

189. I take into account the evidence of Mr Barrett and Mr Englender, however this has to be seen in the context of the primary factual evidence. In my judgment, the Claimant provided goods in conformity with the Defendants specification. The alleged defects did not form part of the snagging process. There is an endemic problem about maintenance at the Hotel, which is not the responsibility of the Claimant, and there appears to have been a failure to address the problem in that context. The fact that the

Defendants have not replaced the curtain tracking after all these years is telling. The highest that the case can be put in respect of the curtain rails is that in respect of 6-8 rooms, where the ceilings were particularly high and the curtains were heavy, the track and/or rod system might have needed to be replaced. Such evidence appears to be that this is at a modest cost. The problem with making any allowance here is that the Defendants have failed to identify an amount in respect of these particular rooms and confined to the track and/or rod system. In the quotation of FYR, there has been included items in each room for window dressings, but in each room is about curtains and the pelmets and goes far beyond the track with roller runners and cord operation in the rooms with particularly high ceilings. Whilst denying liability, there is a figure in respect of replacing curtain tracks of £1,274 plus VAT in a letter dated 26 July 2017 from Warners solicitors on behalf of the Claimant, but it is not apparent from where that figure is derived. The question as to whether there is any confined evidence in the papers to support a minor amount relating to the roller runners and cord operation in the 6-8 rooms is a narrow matter on which the Court was prepared to receive brief comments before the finalisation of the judgment, but entirely realistically, it was confirmed that there was no further evidence to be provided. Accordingly, this complaint is rejected.

XVIII Glass topped coffee tables

190. The Defendants complain that the coffee tables are poorly constructed and the glass tops can easily become detached and are at risk of smashing. Further, the various remedial work carried out to the coffee tables has not remedied the problem and has left the glass tops sitting proud of the frame with unsightly glue spots: See AmDCC paras 23.10 and 23.11.

191. Mr Khalil at para 34(b)(i) of his witness statement says that the attempt to rectify the problem with glue dots was not acceptable and resulted in further damage to the coffee tables. Mr Deak in his witness statement at para 9(a) says that the glue dots have raised the glass above the lip of the frame and it slides causing the laminate to chip.

192. The Defendants say that the coffee tables are of poor original design and should not have been recommended for use in the hotel.

193. Ms White in her oral evidence referred to the way in which the concern about the coffee table had been addressed in the snagging process and how the glass ended up not completely flush. That led to the solution of gluing down.

Discussion

194. There is no suggestion that all the tables should be returned and replaced. There was a discussion to be had about whether the glue dots be removed, or the table should sit half a millimetre or less higher than the edge. I accept the submission of Mr Legg on behalf of the Claimant that the choice that the Defendants has is “a trifling matter”. It does not form a basis with or without any other allegations that the contract has not been completed. In the circumstances, if and to the extent, that there has been a defective performance in connection with the coffee tables, it is minute and does not give rise to any substantial damages. It is not apparent whether the sum of £7,000 - £8,000 provided

by Mr Barrett includes the removal of the glue dots, but either way it will have no significant impact on any damages or reduction on the contract price. There are other figures referred to in respect of coffee tables in the above-mentioned letter from Warners of 26 July 2017 of £9,987 plus VAT, but this does not appear to be substantiated in the evidence. The Defendants have not made out a case for replacement of coffee tables as opposed to remedial works.

XIX Marble coffee tables

195. The allegation of Mr Khalil in his witness statement at paragraph 34(e) is *"the porous nature of the marble tables sourced by the Claimant renders them entirely impractical and unsuitable for use in an environment where they will be exposed to spilled drinks."* It was therefore then said that the marble coffee tables were unsuitable for use in the hotel.

Discussion

196. There was only evidence of one table being the subject of any staining complaint. The tables are still being used in the hotel. It is unreasonable to suggest that the marble top coffee tables should be replaced. There is no evidence of any diminution in value. Here too, it is not clear whether Mr Barrett included any allowance for the staining of the marble top coffee table within his estimate of £7,000 - £8,000. If he did not do so the amount involved appears to be minimal and the Defendants have not adduced any evidence in relation to such minor remedial work. There is a figure referred to in respect of marble coffee tables in the above-mentioned letter from Warners of 26 July 2017 of £2,726 plus VAT, but this does not appear to be substantiated in the evidence. The Defendants have not made out a case for replacement of coffee tables as opposed to remedial works.

XX Headboards

197. The allegation is that the Claimant failed to fit headboards in 16 of the rooms with reasonable care so as to ensure that they were centred over the beds. They also say that the headboard from Room 215 suffered from poor stitching: see AmDCC paras 23.14 and 23.15. The Claimant says that the headboards were contractually compliant: see reply at para 17.7. This has not featured in the closing written or oral submissions on behalf of the Defendants. It appears therefore not to be pursued.

198. In the course of the hearing, the Defendants said by counsel that the thrust of the complaint was that the fabric on the headboards did not match. There were two different shades of blue being used which was not acceptable. That was not a pleaded allegation. Mr Barrett said that any headboard issues were de minimis, and Mr Englender did not see any problems with headboards. The replacement quotes suggest that headboards should be replaced in every room. In my judgment there is no basis for that and the complaint about headboards is rejected.

XXI Damages/quantum

199. I have concluded that this is not a case where there was a rejection either because there was nothing even approaching a rejection of the furniture or because if it did approach to that, the subsequent conduct of using the same in the business of the hotel thereafter showed that there was no intention to reject the goods. It is common ground that the Defendants have the burden of proof to establish loss. Their primary case is that there is no money to pay because completion did not occur. I shall revert to that after I have considered the quantum of the Counterclaim.

200. The AmDCC is based on a quotation of Contessa (future work of £298,544.23 plus VAT). In large part, it relates to the costs of replacement of furniture, fittings and equipment supplied and used for years. As noted above, Mr Usmani said that he had no intention of proceeding with Quintessa. More recently, the Defendants received a quotation from FYR dated 22 June 2020 in a sum of £212,372.00. There is nothing in that quotation which says when the work would start. The payment terms were said to be discussed and agreed.

201. There are a number of problems about the foregoing quotations irrespective of whether the claims are proven. The primary problem is how it is that not only were the goods not rejected, but they have been used between the time of the soft opening of the Hotel in May 2017 and the first closure for COVID in March 2020 and at the times when the Hotel has been opened since then. The problems here include the following:

(1) If many of the goods have been so bad as to require replacement (particularly the allegation that they are not fit for a five-star hotel), this begs the question why the Defendants have been prepared to go on running the Hotel without replacing the same for years. There is evidently no issue of impecuniosity. None has been suggested: on the contrary, the financial strength of Henley Homes has been mentioned in the evidence. If the allegations were well founded, then the continued operation of the Hotel parading its five-star accreditation in its sales literature would appear to be irresponsible. Customers would be booking and attending when the Defendants on their case believed that much of the furniture was not fit for purpose, and especially not of the standard fit for a five-star hotel. Instead, the failure to replace the goods is evidence that the complaints are not made out.

(2) Not only has there been delay in replacing faulty goods, but there is a lack of clarity as regards the quotation from FYR. The Defendants' case is that they have accepted the quotation of FYR. The reason, it is said, that they have not proceeded with the works is due to the COVID pandemic which has delayed the commencement of the work. This requires some consideration.

(3) If the Court were to allow the Counterclaim based on the replacement of so many of the goods supplied, then the Defendants would receive a significant betterment. The goods only have a life on the evidence of very approximately eight years, and the replacement would be after the goods supplied had been used for over three years. It is not suggested that there should not be an allowance for use or a reduction on account of the

betterment that flows from the combination of the use and the receiving of money for the replacement of goods. No figures are advanced to reflect this.

(4) There are some relatively modest figures said to have been spent on some items to which this judgment will return. However, there is no evidence to value the losses in the event that the Court does not accept the argument of damages of a scale of hundreds of thousands of pounds but is more in the territory of Mr Barrett's figures. In short, there is no financial response to Mr Barrett's evidence about the remedial work which he said would cost about £7,000 - £8,000. In short, the Defendants have concentrated their fire on the case of no completion and/or defective work giving rise to the requirement to replace much that has been supplied and installed giving rise to a claim in the hundreds of thousands of pounds.

202. As regards the first of the above points (why not replace goods much earlier), this has been a significant part of the reasons why in my judgment the scale of the complaints is not made out. It is unthinkable that a responsible Hotel would stay open with the goods if the defects had been of the magnitude advanced by the witnesses for the Defendants. It is one of the matters which has led this Court to reject the notion that the contract was not completed, in addition to preferring the evidence of the Claimant's witnesses to the Defendant's witnesses for all the reasons set out above.

203. As regards the related second point (the date of the acceptance of the FYR quotation), Mr Usmani's evidence was that in June 2020 it was agreed to proceed with FYR, and *"the only thing we need from them is date when they can actually deliver and a schedule. They have been unable to do that just, I think, because of the COVID situation…We have agreed pricing, we have agreed everything, we just need to schedule and dates and then we, you know, we just want to replace the furniture."* [T4/48/11-18]. He also gave evidence as to why he had not proceeded to replace the furniture at an earlier stage given the need to provide on his case furniture suitable for a five-star hotel:

> "Yes. Yes, I see the point that you are making. The issue that we had is that if we, if we removed this furniture we have to put into storage. What it is actually doing for us is just increasing our costs. So, one, one element of it is costs and I felt at the time, and maybe wrongly so, that this whole – we would get a resolution to this problem, not, you know, not too far in the future, and of course what has transpired since is that it has been a long journey. But I think I would still be holding onto the furniture in some storage facility, and would I be able claim for that even if I was successful in anything else, then that is quite questionable.
>
> So, what it was doing for me was just increasing costs and increasing costs. Ideally, what I would like to have done was just remove the furniture. If there was no other issue to discuss we would have just removed the furniture, but I felt morally that

> there is a responsibility in the way that the furniture has been supplied and that people are just not prepared to take that responsibility. I mean, it is unfair that, you know, we have ordered brand new furniture, bespoke furniture, and this is what I have ended up with [T/4/49/26 – T4/50/4]."

204. Whilst the storage costs are a consideration, it is difficult to see how that consideration is greater than providing suitable accommodation for the guests of a five-star hotel on the basis of the case run by the Defendants. The fact that the old furniture continued to be used is a pointer against the case being run by the Defendants. Further, without having to make a positive finding, there is reason to doubt whether there was a final and binding commitment of the Defendants to acquire the furniture fittings and furnishings from FYR. There has been no corroborative evidence to the effect that the pandemic prevented FYR from proceeding with manufacturing the goods required and proceeding with the order, even if it were the case that the time period required may be longer during COVID times. If it could not proceed, then it begs the question as to why the Defendants did not find a manufacturer who could supply the goods earlier. The delay as a whole since rectification of the snagging list is indicative that the problems of the furniture has not been in an objective sense as serious as has been claimed.

205. As regards the third and fourth points, there is a problem for the Defendants in that they have not provided figures making an allowance for betterment or reducing the damages to take into account the value of the continued use of the furniture. Likewise, there are no computations to respond to the evidence of Mr Barrett as regards the cost of French polishing and other minor remedial works. On the premise that only minor remedial works are required, the finding would be that such defects did not prevent completion or substantial completion from occurring. In that event, the Defendants would have to prove the losses in order to rectify that which was performed inadequately.

206. Earlier in this judgment, the Court said that it would return to the question of whether completion had taken place in the context of the analysis of remedies. For the reasons already given, but as tested upon seeing the figures of Contessa and FYR that these do not represent losses of the Defendants to the extent that it has a case. What then are the figures to consider? In my judgment, there are the following, namely

    (1) The figures set out in the witness statement of Mr Khalil in respect of costs said actually to have been incurred; and

    (2) The figures referred to by Mr Barrett, and whether that throws open some other sums of money.

207. As regards the figures set out by Mr Khalil, the following appears at para. 37a of his witness statement comprising a total remedial cost of £19,725 plus VAT:

    (1) A sum of £4,410 plus VAT in respect of remedying various works set out in job sheets;

    (2) A spreadsheet detailing electrical works carried out by MP Electrical accompanied by relevant invoices to rewire headboards (£2,635 plus VAT)

and to move wall lights, freestanding lamp sockets and make good and redecorate walls (£12,680 plus VAT).

208. The Defendants have not substantiated that these costs have been incurred as a result of any breach of contract or breach of duty of care on the part of the Claimant in that:

(1) There is not enough detail in order to identify with particularity the work in the job sheet with any fault on the part of the Claimant (as opposed to say normal maintenance). In any event, it appears to have been more than one year from the opening of the hotel, adding to the likely inference that it was either customer damage or a failure to carry out early maintenance on the part of the Hotel exacerbating any difficulty. If case, there was something which connected these costs with the job sheets in an intelligible way, the Defendant was given the opportunity to refer to any relevant documents before the judgment was finalised, but entirely realistically, it has been confirmed that there is no further evidence to be adduced.

(2) The commentary above in respect of the headboards shows that this head of claim has not been advanced. This then applies both to the costs of £2,635 plus VAT and of £12,680 plus VAT. It is noted that realistically it does not appear in the closing skeleton on behalf of the Defendants. It is also difficult to work out whether the sums were paid, and when it took place. There is reference in the documents of MP Electrical to April 2017 which would coincide with the time of the snagging works, making it the more difficult to correlate this with the time when remedial works were being carried out by the Claimant. If there had been a claim being pursued in respect of headboards, there is not sufficient information in any event from which to make out this alleged head of loss.

209. There are also figures referred to in a letter from Warners solicitors for the Claimant of 26 July 2017 relating to information provided by the Defendants and comprising a sum of £22,078 plus VAT. It is not apparent from the evidence from where these figures are derived. In case there was something in the papers which connected these figures with invoices or the like in an intelligible way, then the Defendant was given the opportunity to refer to any relevant documents before the judgment was finalised, but it was confirmed, and again realistically, that there is no further evidence to be adduced.

210. It then remains to consider the figures provided by Mr Barrett of £7,000 to £8,000 for appropriate remedial work in connection with the matters complained of by the Defendants. The Defendants cross-examined the Mr Barrett on the basis that he had not had these items costed by a relevant contractor with the suggestion that they were figures pulled out of the air. Likewise, he had not broken down those sums in a way which could be broken down. However, I found the responses of Mr Barrett convincing, bearing in mind that the foundation of his varied career was in decoration, and so he was able to give authoritative evidence of how he would have tackled the problems. It is worth setting out the exchange in full:

"MR BROOMFIELD: Mr Barrett, thank you. I have just got one final question. Right at the end of your report you put a price of £7,000 to £8,000 on the remedial works. You have not provided a breakdown of that figure, have you?

A. No. I was just thinking about the things that are chipped and basically that was it.

Q. Have you, have gone to or have you approached or enquired of somebody who fixes laminate surfaces for the purposes of that quote or is it a figure that you have plucked out of the air?

A. I do not pluck it out the air. I mean, I look at it and think well, this is what I would do with it and that is how I would do it. And it could be done I am sure.

Q. But you have not had the works priced?

A. No. But I mean, as far as that – as far as those legs are concerned, it would not be – I mean, I know that some people today have been saying it is all very difficult, impossible, cannot do it, that sort of thing, but it can be done. I mean, I, I do not like shouting my – blowing my own trumpet, yes, I do. No, but if I, if I am allowed to blow my own trumpet for five minutes or two minutes, if I had that, I could match that with paint and it would not look wrong, those legs, I could do that, I could fill it and match it with paint and it would not look wrong. No, but, you know, so, because I was explaining to Andrew Legg last week that ---

Q. Well, Mr Barrett, do not – if you are about to ---

A. No, no, no, this is nothing, nothing secret, about graining. It is something that I learnt to do when I was a small boy really, because my father taught me, but I learnt it as, as a decorator. It is making any surface look like wood by – with using paint. Do you know about it?

Q. No, I do not.

A. No. And do you know, my Lord? Do you know about it?

MR JUSTICE FREEDMAN: No, please go on.

A. It is basically use of paint or a particular type of paint called scumble which you use with stain to – over a particular undercoat to make any flat surface look like wood and you can imitate all wood grains and – if you know how to do it – and it is easy to do, well, easy once you know how, and it is – I could use that method to match that and it would not, would not show. Still, that is – but would need somebody who knows what to do and

how to do it. And I am not volunteering to go to Scotland to do that.

Q. Well, Mr Barrett, those sorts of fixes simply are not suitable for a high end Hotel of this nature are they?

A. Whose – if you do not know what it is and you cannot see it, what is the problem? It, you know, just because it is, because it is done with paint and not with, and not putting another piece of laminate on, does it – is there any – is paint any worse than laminate? I do not think so.

Q. Well, it is less, less hard wearing, is it not?

A. Possibly. But then what wear is it going to get apart from getting chipped off? I mean, it is, it – I do not agree. It is – but anyway, that is – it can be done but you would have to find the right people. But it is ---

Q. Mr Barrett ---

A. --- it would be not be a polisher, it would not be a polisher, I mean, the only other person who could, who could it possibly would be a, I was thinking about it this morning, it was a cabinet maker. Somebody who does cabinet making who is used to using veneers. That would be a better, probably a better, better option.

Q. You just said that there that it would not be a French polisher?

A. No. No. Because they only deal with polish basically whereas if you, if you have a, if you had a cabinet maker they deal in French polish as well and they also deal with veneers.

Q. Because in fact a French manufacturer or a cabinet maker like Top Brass do not do the work on site, do they? They take it back to their, they take it back to the warehouse and fix it there.

A. Yes, yes, of course."

211. One possible approach would be to accept the thrust of the Defendants' cross-examination and to reject any figures from Mr Barrett. The problem for the Defendants with that approach is that in the event that the Court acted in that way, whilst finding that the works required were minor and not the major works as quoted for by Contessa and FYR, there would be no figures before the Court. One possible approach would then be to say that the burden being on the Defendants to prove these losses, the Defendants could make no recovery absent any proof. However, in the event, the Court accepts the evidence of Mr Barrett and found his evidence illuminating and reliable despite the failure to condescend to particularity. It was illuminating to hear about the

particular method not of a French polisher, but of a cabinet maker who habitually uses veneers.

212. I accept the evidence of Mr Barrett that such quality defects as there were in respect of the furniture and the cased goods could have been dealt with in the manner indicated by Mr Barrett. He gave his evidence of £7,000-£8,000 based on his experience and expertise. He did not get a quote, but the Defendants have not provided any evidence. One possibility is to award nothing because the Defendants have not adduced such evidence, but the evidence of Mr Barrett, albeit without a quotation, is before the Court, and this can be used to the benefit of the Defendants.

213. I accept the submission of the Claimant that the suggestion that the entirety of the furniture should be replaced is unreasonable, particularly where the Hotel has had use of the goods for almost 4 years thus far: see *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC) at [263 - 264] (by reference to *Ruxley Electronics and Contractors Ltd v Forsyth* [1996] AC 344 and other authorities on this area) where Ramsey J said as follows:

> "[263] Those cases seem to me to lead to the following general principles when considering an award of damages for defective premises:
>
> (1) There will generally be an award of the cost of reinstatement provided that reinstatement is reasonable: *East Ham v Bernard Sunley* at 434, 445; *Ruxley* at 358D, 360E, 367B.
>
> (2) Reinstatement will be unreasonable if the cost of reinstatement would be out of all proportion to the benefit to be obtained: *Ruxley* at 367B.
>
> (3) The question of reasonableness has to be answered in relation to the particular contract: *Ruxley* at 358D.
>
> (4) It is not necessary for recovery of the cost of reinstatement to show that the claimant will reinstate the property but the intention to reinstate may be relevant to reasonableness: *Ruxley* at 359C to D and 372A to 373E.
>
> (5) If reinstatement is unreasonable then the measure will generally be diminution in value: *East Ham v Bernard Sunley* at 434, 445; *Ruxley* at 360E, 367B.
>
> (6) Where reinstatement is unreasonable and there is no diminution in value, then the court may award damages for loss of amenity: *Ruxley* at 354D, 360H, 374.
>
> (7) There is a general rule, subject to exceptions, established in *Addis v Gramophone*, that a claimant cannot recover damages for injured feelings for breach of contract: *Watts v Morrow* at 1445; *Ruxley* 374 A to B; *Farley v Skinner* 747D.

> (8) One of the exceptions, explained in *Watts v Morrow* and *Farley v Skinner* and applied or adapted in *Ruxley* and applied in *Farley v Skinner* is that where the object of the contract is to afford pleasure, relaxation, peace of mind or freedom from molestation such damages are recoverable: *Ruxley* 374B to D; *Farley v Skinner* 747D.
>
> (9) In cases not falling within that exception, damages may be recovered for physical inconvenience and discomfort caused by the breach and mental suffering directly related to physical inconvenience and discomfort: *Watts v Morrow* at 1445F.
>
> (10) That for physical inconvenience or discomfort, the cause of that inconvenience or discomfort must be a sensory (sight, touch, hearing, smell etc) experience: *Farley v Skinner* at 768D to E.
>
> (11) That any damages under either of the heads are modest: *Ruxley* at 374C to D; *Watts v Morrow* at 1443, 1445; *Farley v Skinner* at 751.
>
> [264] Whilst in those cases the courts have treated the various heads of damage as distinct and alternatives and whilst I accept that in many circumstances that will be so, there will be circumstances where, for instance, there may be remedial works which will still give rise to diminution in value and there might be some reasonable minor remedial works whilst the loss is properly compensated by diminution in value. In each of those cases both the costs of remedial works and diminution in value may be required properly to compensate a party. In addition whilst usually either the cost or remedial works or diminution in value will be sufficient, there might be a case where lesser remedial works still leave an element of loss of amenity. Whilst in *Farley v Skinner* at 109 Lord Scott indicated that diminution in value and damages for discomfort would not be recoverable that was on the basis that there would otherwise be double recovery. I consider that this forms the basis of the principle for not allowing recovery under one or more heads, not some principle that divides the heads of damages so that there is not proper recovery once."

214. In my judgment, the instant case is not one where replacement of goods or the installation of goods of a different class or quality is reasonable. The Claimant followed the specification and provided laminate furniture which was approved and was suitable. There were problems due to the way in which they were received into premises without heating and electricity and with numerous contractors there for months for which the Claimant was responsible. The Claimant worked through the snagging list and there was satisfaction and completion by not later than 20 June 2017. Thereafter, the Defendants did not have any or any adequate system for the maintenance of the

furniture. I have some reservation as to whether the Defendants have proven the case on quality but having regard to the evidence particularly of the experts, I have come to the conclusion that some of the furniture required some minor remedial works of the kind referred to by Mr Barrett. There was not a loss of amenity or any diminution in value. Notwithstanding these remedial works being required, completion had occurred as set out above. The fact that the problems have not been attended to has been caused by the Defendants refusing to pay for the completed works, by a claim based on replacement of many of the goods. The Defendants never attended to the matter by engaging a cabinet maker of the kind described by Mr Barrett and in the proportionate way recommended by Mr Barrett, and it is unreasonable for the claim to be any greater.

216. It is clear that Mr Barrett had in mind the work required in respect of furniture and closed goods: it is not apparent whether he had in mind the work in respect of the coffee tables, but he may have done so. It seems doubtful that he had in mind the curtains, curtain rails and poles. In my judgment, the appropriate course to take in view of the Court accepting that some part of the furniture and closed goods needed to be addressed by way of minor remedial works in the manner set out by Mr Barrett is to make a full allowance of £7,000 - £8,000 and to add to that an additional sum to take into account an uplift for supervision/interior design to allow a total of £10,000 plus VAT. There are some minor and confined queries which I have raised before completing the assessment as to how much to allow by way of set off against the claim or by way of damages.

XXII Did the Claimant "complete" the Phase 1 Contract causing the balance of the contractual monies to fall due and/or were the goods "accepted"?

217. Reference is made to paragraph 125 above in which it was found that completion took place by not later than 20 June 2017, subject to considering the nature and extent of the defects thereafter identified which might lead to a conclusion that there had not been completion or substantial performance of the contract. In view of the rejection of most of the allegations and confining any damages to relatively minor remedial works, it can now be confirmed that there was completion of the contract by not later than 20 June 2017. Not only is the scale of any defects minor, but so is cost of remedy relative to the contract as a whole. Applying the law set out above in connection with the meaning of completion and bearing in mind the absence of rejection of the goods, the balance of the claim became due at latest by 20 June 2017. Accordingly, the claim succeeds subject to the sum of £10,000 plus VAT referred to in the section above in respect of quantum/remedies. There are also some relatively small sums to be considered further prior to the finalisation of the judgment indicated in this draft judgment.

XXIII If the Claimant's standard terms and conditions were incorporated into the Phase 1 Contract, is the Claimant in breach of clause 8 of its standard terms and conditions?

218. The Court has found that the standard terms and conditions were incorporated into the Phase 1 Contract. In the limited respects indicated, the Claimant has been in breach of

the warranty. Save for this, the claim in respect of breach of quality of the goods is dismissed. Likewise, the Claimant has not been in breach of its duty of care to the Defendants.

XXIV Conclusion

219. It follows that there will be judgment to the Claimant in the sum claimed less the sum of £10,000 plus VAT. There is scope for consideration before finalisation of this judgment of some specific items where other sums may be allowed. I have identified a small number of specific items above where assistance may be provided.

220. It may be helpful if I state some preliminary observations in respect of interest in the hope that this will either lead to agreement about interest or more confined submissions than might otherwise have been the case. It will be noted that there is a provision about contractual interest in the terms and conditions which have been found to have been incorporated into the contract. Clause 5.2.3 allows for unpaid sums to be the subject of interest at 5% per annum above lending rate from time to time, a part of a month being treated as a full month. The Court needs assistance as to the meaning of lending rate. It might mean the cost to retail customers in obtaining a loan from a bank (where there is nothing which is fixed) or it might mean base rate (which might be relevant for a one-day loan from the Bank of England to a bank, but not to the costs of a bank loan to a customer which is commonly a percentage over base rate). It may be that whether under contract or if it is too uncertain under statute, the appropriate rate would be 5% above base rate from time to time. What would be the time from which interest would be calculated? There is an argument that it would be from delivery and installation in January 2017, but the Court would require considerable persuasion that the time of completion ought to be calculated before 20 June 2017 upon substantial completion of the snagging lists. If this part of the case cannot be the subject of agreement, the Court will consider consequential submissions in respect of interest.

221. It remains to thank both Counsel for their very helpful oral and written submissions, and for the clarity and skill of their advocacy and presentations of their respective clients' cases.