Neutral Citation Number: [2019] EWHC 140 (TCC)

Case Nos: B50MA033 & D50MA041

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ
Date: 30 January 2019

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

ZAGORA MANAGEMENT LIMITED & OTHERS	**Claimants**
- and –	
(1) ZURICH INSURANCE PLC **(2) ZURICH BUILDING CONTROL SERVICES LIMITED** **(3) EAST WEST INSURANCE COMPANY LIMITED**	**Defendants**

Jonathan Selby QC & Charlie Thompson (instructed by **Walker Morris, Leeds**) for the **Claimants**
Nicholas Baatz QC & Nicholas Maciolek (instructed by **Kennedys, Birmingham**) for the **First & Third Defendant**
Tom Asquith (instructed by **DAC Beachcroft, London**) for the **Second Defendant**

Hearing dates: 1 - 4, 8 - 11, 15 - 19, 22 - 25 October, 12 - 13 November 2018
Judgment circulated in draft: 13 December 2018

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Stephen Davies

This judgment is divided into the following sections:

1	Introduction and summary of decision
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4	ZBG's involvement in the supervision and certification of the development
5	The evidence relating to the individual claimants
6	The terms and proper construction of the leases
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8	Zagora's claim under the alleged agreement to rectify
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10	The leaseholder claims under the policies
11	The claim against ZBC

1 Introduction and summary of decision

1.1 This case is about a development of two blocks of flats in Hulme, Manchester, collectively known as New Lawrence House[1]. In short, the claimants are: (1) the freeholder, Zagora Management Ltd ("Zagora"); and (2) some (but not all) of the long leasehold owners of individual flats within the development. They all complain of serious defects in the development as built which they say make the flats un-occupiable due, amongst other things, to major fire safety related defects in respect of which a prohibition notice has been issued by the Greater Manchester Fire & Rescue Service ("the Fire Service").

1.2 As against the first defendant, Zurich Insurance plc ("ZIP") trading as Zurich Building Guarantee ("ZBG"), which issued building warranties known as "Standard 10 Year New Home Structural Defects Insurance Policies" to cover structural and other major defects in the development, the claimants seek their assessment of the cost of remedying these defects, pleaded at £10.9M plus VAT, together with awards to cover the cost of alternative accommodation whilst the remedial works are undertaken. As against the second defendant, Zurich Building Control Services Ltd ("ZBC"), which inspected and certified approval of the development under the Building Regulations ("Bldg Regs"), they seek damages representing the diminution of their respective interests in the development.

1.3 Although ZIP and ZBC are separate limited companies that separation was solely for regulatory compliance reasons and did not reflect any substantive separation between the two businesses. The building warranty and building control teams worked closely together in one department under the

[1] One block is formed by blocks A/B, C and D and another smaller block by Block E.

ZBG name, the employees of both businesses were employed by ZIP and the administrative and other support functions were also provided by ZIP. Throughout this judgment I refer to them collectively as ZBG save where necessary or appropriate to refer to them under their separate legal identities.

1.4 In July 2018 ZIP amended its defence so as to plead that pursuant to a transfer scheme sanctioned by order of the High Court of the Republic of Ireland dated 16 March 2018 it has transferred its business to the third defendant, East West Insurance Company Limited ("EWIC"). It contends that as a result of the transfer any of the claims made in this action, whether brought under the building warranties or otherwise, fall to be dealt with by EWIC. The claimants accept that EWIC is the appropriate defendant for the claim under the building warranties, although there remains a question as to whether or not the claim brought by Zagora under what is referred to as "the agreement to rectify" is also subject to the transfer. Sensibly, the parties have agreed that any outstanding issue in that respect can be determined once I have given judgment on the substantive claims.

1.5 There are 27 claimants making claims against ZIP. Of these 26[2] are the owners of long leasehold interests in a total of 30 individual flats. These are referred to as the individual leaseholder claimants. Of these individual leaseholder claimants only two purchased the flats for their own or a family member's occupation; the remainder purchased as buy-to-let investments. Some live overseas, although the majority are UK residents.

1.6 The other claimant, Zagora, is the freehold owner of New Lawrence House. It pursues a claim against ZIP under what has been referred to as the agreement to rectify. In short, Zagora contends that an agreement was reached between itself and ZIP on a commercial basis under which ZIP agreed to fund works to resolve certain agreed defects regardless of the strict position under the building warranties. Further or in the alternative it pursues a claim against ZIP on the basis that it is – or is to be treated as – an insured under a building warranty. ZIP vigorously disputes both of these claims.

1.7 Whilst ZIP accepts that the individual leaseholders are insured under individual Standard 10 building warranty policies they dispute their claims on a number of grounds. In short, ZIP's position is that this is a complex insurance claim in respect of which the individual defects require separate and careful consideration in the light of the conflicting factual and expert evidence and the applicable policy coverage and exclusions.

1.8 One complicating feature in relation to all of these claims is that a significant number of the total flats in the development, 66 out of a total of 104, were acquired by a limited liability partnership known as CJS Investments LLP ("CJS"), the individual partners in which were connected with the company, JCS Homes Ltd ("JCS"), which built the development. Of the remaining 8, 7 were acquired by individuals connected with JCS. Neither CJS nor the connected individual leaseholders nor the remaining one unconnected individual leaseholder has played any active part in this case.

[2] In fact there are more than 26 claimants, since for convenience where flats are owned by more than one person they are nonetheless treated as being, effectively, the one claimant. A small number of claimants purchased more than one flat, which is why there are more flats than claimants.

However, the role played by the financer of both JCS and CJS, the Bank of Ireland ("the Bank") has been the subject of considerable debate. JCS went into liquidation in December 2012 and CJS went into administration in November 2014. CJS was originally a party to the claim but discontinued its claim once it became apparent that the connection between CJS and JCS would prevent it from successfully making a claim under the building warranties as a result of a clause in the policies which effectively excluded persons or companies connected with the developer from claiming under any building warranty. The consequences of this in terms of the claimants' ability to recover in full the cost of remedial works to the common parts under the policies requires careful consideration, as does the inter-relationship between the respective rights and obligations of: (a) the individual leaseholder claimants; (b) Zagora as the freehold owner; and (c) the management company which was established to manage the development, Lawrence House Management Company (City Road) Limited ("LHM") – which is not an insured and which makes no claim of its own against ZIP.

1.9 The Bank has funded and continued to fund the claim until very recently, when a third party funder known as 123 Pay Limited ("123 Pay") took over the funding, under arrangements which have been the subject of some controversy and which may require careful consideration, given the arguments raised by ZIP as to the impact of those funding agreements upon the claimants' right to recover. These arrangements and arguments extend to the position of Walker Morris as the claimants' solicitors.

1.10 From any sensible perspective it is regrettable that in 2013, at a time when – to put it neutrally – Zagora and ZIP were engaged in a productive dialogue as to a way forward in terms of agreeing and undertaking remedial works to resolve the undoubted problems with the development, a dispute arose between Zagora and CJS as to whether Zagora or LHM – which CJS claimed to control – was entitled to manage the development. This dispute led to LHM obtaining an interim injunction in the County Court restraining Zagora from seeking to manage the development. This injunction had the unfortunate effect of preventing the dialogue between Zagora and ZIP from proceeding to what both parties hoped would be a satisfactory conclusion. The litigation between Zagora and LHM was transferred to the Manchester TCC ("the TCC action") where it proceeded to a trial before HHJ Raynor QC. Separately, a further action was brought in the Manchester Chancery Division ("the Chancery action") to establish who controlled LHM. The Chancery action also proceeded to a trial before HHJ Raynor QC.

1.11 Although HHJ Raynor QC found in favour of LHM in the TCC action and CJS in the Chancery action his decision in the Chancery action was overturned on appeal, the Court of Appeal concluding that on their true construction the – undoubtedly poorly drafted - voting provisions of LHM had the perhaps surprising effect that the individual leaseholders, as the owners of the minority of the flats, rather than CJS as the owners of the majority of the flats, were entitled to control LHM. It followed that CJS had instigated and prosecuted the TCC action by LHM without authority from those who were entitled to control LHM and that the judgment obtained by LHM against Zagora in the TCC action was a nullity. The ultimate outcome was that Zagora and the individual leaseholder claimants in this action, who had all sided with Zagora, succeeded in the litigation and CJS failed, the adverse financial consequences of which led to its administration.

1.12 Turning to the claim against ZBC, thirteen of the claimants including Zagora ("the ZBC claimants") make claims against ZBC which undertook the role of building inspector at the development and which issued final certificates under the Building Regulations ("the Bldg Regs final certificates"). The claim is pleaded in deceit on the basis that the relevant inspector – Mr David Mather – knew that the statements made in the Bldg Regs final certificates were not true or knew that there were no reasonable grounds for believing the truth of the statements or was reckless as to their truth. The ZBC claimants contend that they would not have acquired the individual flats (or freehold interest in Zagora's case) had they known the true position and that the flats and the freehold interest are at best worth much less than what was paid and at worst worthless. The ZBC claimants seek a refund of all amounts paid out on the purchase and subsequently less (where applicable) their true value and any income received, together with an indemnity against any liability they may have under the leases for repair costs.

1.13 It will be appreciated that the claim against ZBC has to be pursued on the basis of deceit since under the existing law negligence alone will not suffice. ZBC vigorously denies that Mr Mather was deceitful and also contends that in any event none of the ZBC claimants relied on the Bldg Regs final certificates, in circumstances where they were not issued to the ZBC claimants directly by ZBC. The issues of deceit and of the ZBC claimants' knowledge of and reliance upon the Bldg Regs final certificates, whether prior to exchange or completion, have thus been the subject of considerable investigation and debate at trial. Furthermore, because the original claim issued in 2015 pleaded the claim against ZBC in negligence rather than deceit and because I refused the ZBC claimants permission to amend that claim (save in relation to Zagora, where no arguable limitation issue arose), the individual leaseholder ZBC claimants were forced to issue a separate action in 2017 and to plead reliance on s.32 of the Limitation Act 1980 in order to enable them to defeat ZBC's accrued limitation defence.

1.14 Finally, the quantification of the claims against ZBC is disputed. In particular, issues arise as to whether or not the value of the insurance policies issued by ZIP and/or the value of any recovery against ZIP must be brought into account and, if so, how and in what way.

1.15 These factors, individually and collectively, explain why the case has been so vigorously contested, both throughout the interlocutory stages and at trial. As well as numerous witnesses of fact there were expert witnesses in 8 separate disciplines. After pre-reading the written opening submissions and a day of oral openings the evidence was heard over 16 days. There was then a pause for written closing submissions to be produced and a further 2 days allowed for oral closing submissions after which I received some short supplemental written submissions. I have taken all of this material into account when producing this judgment. Having produced my judgment in draft and after some time had elapsed both ZIP and ZBC invited me to clarify and supplement my judgment in certain respects. I allowed the claimants to respond and, where indicated in this judgment, have either accepted those invitations to the limited extent it appeared to me to be appropriate or explained why I have declined to do so.

1.16 I would like to express my appreciation for the immaculately prepared trial bundles produced by Walker Morris, both in hard copy with a copy also being made available for me in electronic format, and my gratitude to the legal representatives for all of the parties who co-operated to enable the trial to be concluded within the time allocated notwithstanding the volume of material in the

case. The case was skilfully and vigorously presented by leading and junior counsel for the claimants and for ZIP and by junior counsel for ZBC, to all of whom I am greatly indebted.

1.17 In summary, my judgment is as follows:

(a) Zagora fails against ZIP, on the grounds that the agreement to rectify was not a legally concluded agreement and that Zagora was not, and was never treated as if it was, an insured under a building warranty.

(b) The individual leaseholder claimants succeed against ZIP (or more accurately, EWIC) on the grounds that the building is seriously defective and requires major and expensive repairs which fall within the cover afforded by the building warranties, which on their true construction are reinstatement policies under which the claimants are entitled to cover regardless of the arguments as to whether or not they will be financially able to undertake the remedial works. They would have secured a very substantial judgment in their favour but, due to the application of the maximum liability limitations in the building warranties, their claim is limited to the total of the purchase prices of their flats as declared to ZIP which, subject to final clarification, is £3,634,074, significantly less than they would otherwise have been entitled to.

(c) Both Zagora and the individual leaseholder ZBC claimants fail against ZBC. Although I am satisfied that they have proved their case on deceit: (a) Zagora failed to satisfy me that ZBC intended it to rely on the Bldg Regs final certificates it issued; (b) the individual leaseholder ZBC claimants failed to satisfy me that they relied on the Bldg Regs final certificates.

1.18 The structure of this judgment is that I will begin by referring to the witnesses and recording and briefly explaining my conclusions as to the weight which I can place on their evidence where necessary to do so, including making some reference to the paucity of the documents produced by ZBC. I shall then refer in summary to the history of the development and to subsequent relevant events. That includes separate, but necessarily rather more detailed, sections relating to: (a) the way in which ZBG performed its building warranty and building control roles in inspecting and in issuing certificates in relation to the development; and (b) the circumstances in which each individual claimant acquired their flat (or in Zagora's case, its freehold interest), the question of their reliance on the Bldg Regs final certificates and their knowledge of defects in the development. I shall then turn to address issues as to the terms and the construction of the leases and the insurance policies. I can then proceed to consider in order: (a) the claim by Zagora against ZIP under the alleged agreement to rectify; (b) the claim by Zagora against ZIP under the alleged building warranty; (c) the claims by the leaseholder claimants against ZIP under the building warranties; (d) the claims by the ZBC claimants against ZBC.

2. The witnesses

The witnesses of fact

2.1 I do not propose to refer separately to each and every one of the witnesses of fact who gave evidence in this trial; that would take far too long and be unnecessary.

2.2 Mr Andrew Broadhurst and Mr Russell Robinson are both directors of and were the two primary witnesses for Zagora. Mr Broadhurst is also an important witness for the claimants as a whole, given his particular involvement in relation to the alleged agreement to rectify. The defendants contend that they were unreliable and, in particular, they invite me to reject their evidence as to the extent of their knowledge of the existence of defects in the development prior to their purchase of the freehold. In his previous judgment in the TCC action HHJ Raynor QC found both of them to be truthful and generally reliable witnesses. That evaluation was subject to one caveat, which was that he noted a discrepancy between their first and their second witness statements as to their motives when acquiring the freehold of the development. Having heard both men cross-examined I share Judge Raynor's assessment, shrewd as always, as to their truthfulness and general reliability. In general, I consider them truthful and reliable historians. Whilst there were undoubtedly times in the cross examination of both men when they sought to argue the case or to avoid answering difficult questions, when compelled to give a direct answer or a direct question they generally answered honestly and reliably in my view. However, the discrepancy identified by Judge Raynor also illustrates that both men were susceptible to giving evidence, both in their witness statements and in cross-examination, which was partisan and which made me doubt the reliability of their recollection on certain key issues where unsupported by contemporaneous documentation or other reliable evidence. That is perhaps not surprising in circumstances where they have been involved in dispute and costly litigation ever since they acquired the freehold in 2013.

2.3 As regards the individual leaseholder claimants, all were honest people in my view. However, many of them were partisan witnesses who, whilst not setting out to lie, sought both in their witness statements and under cross-examination to argue their case and to make assertions which were clearly contrary to the contemporaneous documentation. Their witness statements in my view suffered from the vice of having been drafted so as to advance their case by reference to what they now believed to be their understanding of events, making selective reference to the contemporaneous documentation which supported their case, rather than by setting out their genuine and unadorned recollection in 2018 of what they had done, said and thought many years earlier. To take an important example, many claimed to have read and formed a certain understanding of the terms of the sale contracts under which they agreed to acquire their flats from JCS which supported their claim against ZBC when, in my view, most of them had no such genuine recollection and had not done so. Many of them sought to maintain this evidence to support their case under cross-examination even when demonstrated to be inconsistent with the contemporaneous documentation or when it became apparent that in truth they had no real independent recollection of events after the lapse of time. They all struggled at times to provide a clear and detailed recollection of events, not surprisingly given the lapse of time. I give their evidence due weight but make my decision largely by reference to the contemporaneous documentation which, fortunately, is voluminous as well as my assessment of the inherent probabilities.

2.4 As regards the witnesses called by ZIP Mr Parvin was the most senior witness called. At the time he was the team leader for major loss claims in the UK, with a background in structural engineering and loss adjusting. He came across as honest and generally reliable. However, his view of what he

believed he had agreed to some extent affected his recollection of events which, I am satisfied, was relatively poor save where aided by contemporaneous documents. That is not surprising since the events in question are now 5 years old and I did not gain the impression that these events had particularly stuck in his mind, not surprisingly given that he had dealt with many similar claims during his time with ZIP and has since moved to a new and equally if not more demanding role.

2.5 Without advancing any explanation ZIP chose not to offer a witness statement from or to call Mr David Robinson, a loss adjuster with Cunningham Lindsey, who had worked closely with Mr Parvin in relation to the events relevant to the alleged agreement to rectify and who had written a key letter to record ZIP's position following the meeting at which Zagora say the agreement to rectify was reached. I am satisfied that when making findings as to what happened I should bear in mind that ZIP failed to call David Robinson as a witness who it must have known had material evidence to give. The significance of this however is much reduced in the particular facts of this case because there is little disagreement between those witnesses who were called as to what happened at the meeting and by the fact that his subsequent letter essentially speaks for itself.

2.6 ZIP also successfully asserted litigation privilege in relation to its internal documents – as well as those of Cunningham Lindsey and its engineering consultant adviser Mr Brown of Thomasons - relating to the alleged agreement to rectify. It was perfectly entitled to do so and I have reminded myself that I must not speculate about what those documents might have said. However, I bear in mind that whilst Zagora's case and evidence has been tested against its contemporaneous internal documents as well as the external documents, ZIP's case and evidence has not been tested in the same way.

2.7 As regards the witnesses called by ZBC, I should begin by noting that they all had the disadvantage of being unable to refer to the full complement of contemporaneous documents for two reasons. The first is because at some stage after 2013 the box which contained ZBG's files relating to New Lawrence House (known as box 54) had been lost and cannot now be found. The reason, it appears, is that after Mr Parvin retrieved it from storage in 2013 it was left in a filing cabinet from where it has disappeared. It cannot be found in the archive maintained by ZIP and there is no evidence or explanation as to whether it was ever sent to archive and has become lost there or whether it remained in the filing cabinet and at some unknown point disappeared from there. In any event it appears from Mr Parvin's evidence that when he inspected box 54 there was only a limited amount of paperwork within it, principally the approved drawings, and no documents of the kind which he would have expected to see, such as a plan check or copies of electrical and other test certificates, let alone copies of any internal or external correspondence. It appears that there would also have been a site folder kept on site at the development which would have contained relevant documents or copy documents, either those produced by JCS to satisfy the ZBG surveyors that the construction accorded with the Bldg Regs and/or the Zurich technical manual, or those produced by ZBG such as requests for information or cover notes. ZBC's witnesses accepted that there was no proper system for ensuring that the site folder was retrieved from site at the end of a job and that it often went missing when the contractor or developer demobilised from site at that stage.

2.8 To compound the absence of hard copy documents, when a search was undertaken of the backup of the electronic mailboxes of the relevant ZBC personnel and of the ZBC folder on an electronic

shared file server only very limited readable documents were located such that, for example, only 3 documents were found on Mr Mather's mailbox, all irrelevant.

2.9 Given that a claim was first intimated against ZBC in April 2013 and that ZIP involved both a dedicated financial claims team and in-house lawyers to consider the specific claim against ZBC at that stage it is extremely unimpressive, to say the least, that relevant documents, both hard copy and electronic, were not obtained, copied and secured for later use, especially since on any view matters were not finally resolved at that point in time.

2.10 However, in the absence of grounds for concluding either that the box and its contents or the site folder were disposed of deliberately, recklessly or carelessly in the full knowledge that it ought to have been preserved for anticipated litigation, or that any relevant electronic material was lost or rendered unreadable in similar circumstances, I do not consider that it would be proper for me to draw any adverse inferences against ZBC as a defendant to a claim in deceit arising from the absence of such documents. Still less would it be appropriate to draw any adverse inferences against Mr Mather who, on any view, bears no responsibility for the loss of these files. The only caveat is that in the absence of positive evidence from ZBC as a defendant or from Mr Mather or Mr Nicholls or Mr Eadsforth personally that there was a much larger quantity of email traffic generated between the three of them in relation to their inspections or general communications as regards the development and its state of completion which cannot now be produced I consider that I am bound to conclude that the email traffic which actually passed between them relating to such matters was in fact extremely limited. That does not of course, I should add, mean that there were no oral conversations between them concerning the same subject matter.

2.11 Furthermore, and fortunately, there is some remaining contemporaneous evidence, both from correspondence obtained from other sources and in the form of entries on ZBG's "Live 27" database (onto which surveyors were able to enter information relating to their inspections of properties such as New Lawrence House for building warranty and building control purposes and which generated cover notes and insurance certificates).

2.12 As to the ZBC witnesses themselves, none of them are still employed by ZIP in any capacity. Mr Cairns was the most senior former employee called to give evidence. He had no direct involvement with New Lawrence House. He was a reliable and convincing witness. Mr Nicholls was a senior surveyor employed in the building warranty side of the ZBG business and had been involved in inspections at New Lawrence House. He was clearly somewhat reluctant to be involved in giving evidence in this case and, not surprisingly, willing to be led to agree with the thrust of Mr Selby's cross-examination which, happily for him, had the effect of allowing him to minimise any personal responsibility which might otherwise attach for the inadequate way in which ZBG performed its functions in relation to this development and to throw it onto Mr Mather. Mr Eadsforth joined ZBG as a trainee site surveyor in December 2008 and worked under the supervision of Mr Nicholls on building warranty inspections until he was made redundant in December 2009. He was also willing to accept Mr Selby's invitation to minimise any personal responsibility on his part for the failures.

2.13 Mr Mather was the most important witness called by ZBC. It is he against whom the claimants allege dishonesty in relation to the issue of the Bldg Regs final certificates. He is now retired but has spent most of his professional life undertaking building control work. Before joining ZBG in

2001 he had been employed by Warrington Borough Council for 20 years, working as a senior building control officer. He joined ZBG as a building warranty inspector but in 2005 transferred to become a building control inspector, continuing to perform that role until he was made redundant in September 2012 once all of the building control run-off work to be done within his area was complete. He was well-regarded and knowledgeable about building control issues.

2.14 ZBC has to and does accept the view of its own building control expert that it acted negligently in relation to the issue of the three Bldg Regs final certificates for this development, given the nature and extent of the serious defects which were present and which ought to have been discovered by a reasonably competent building control inspector and which ought to have led to Mr Mather's refusing to issue a Bldg Regs final certificate unless and until remedied. It also has to accept that by issuing the Bldg Regs final certificates Mr Mather represented that reasonable steps had been taken by ZBC to satisfy itself that the Bldg Regs had been complied with and that this representation was untrue. The key issue which I have to decide is whether or not that was an innocent misrepresentation or whether Mr Mather either knew that reasonable steps had not been taken or was reckless as to whether or not they had been taken. The answer to that question requires me to reconstruct the state of Mr Mather's mind in December 2009 and again in November 2010. That involves an assessment of his witness evidence when considered in the context of the evidence overall, including the contemporaneous documentary evidence and the likely realities.

2.15 This is not a case where Mr Mather was cross-examined on the basis, or there was otherwise evidence, that he was acting in a deliberately dishonest way, with a view to financial or other personal gain. There is no evidence or basis for any suggestion that he was being bribed by JCS to issue Bldg Regs final certificates which he knew full well he ought not to have issued. Moreover, the Bldg Regs final certificates in themselves were of no use to JCS without ZBG also issuing building warranty certificates. It followed, as Mr Asquith submitted, that if bribery was the motive it would have to have involved Mr Nicholls at the very least, and probably Mr Eadsforth as well, as the building warranty surveyors who signed off the individual flats as complete so that the building warranty certificates could be issued. Yet the claimants have not pleaded or set out to prove that these witnesses were also dishonest.

2.16 It follows, in my view, that the crucial question is whether or not Mr Mather was genuinely unaware that ZBG as a whole had not taken reasonable steps to satisfy itself that the Bldg Regs had been complied with at the time he issued the Bldg Regs final certificates. I have to be satisfied that he positively knew that reasonable steps had not been taken or, alternatively, suspected that reasonable steps had not been taken but consciously chose not to investigate further.

2.17 Mr Mather disclaimed any knowledge of any inadequacy on the part of the ZBG warranty surveyors in the performance of their role. His evidence was that he relied upon their having properly discharged their role when issuing the Bldg Regs final certificates. His evidence was also that he relied upon the accuracy of what he was told by the representatives of JCS with whom he had dealings. In so far as it was put to him that he was also personally at fault his overall approach tended to be to deny any personal blame.

2.18 As Mr Selby QC submitted, there were many occasions during his evidence when he was unable to give any sensible explanation for specific matters which were put to him. There was a dogged

refusal to accept personal responsibility rather than an ability to put forward positive explanations or a present acceptance that he had been at fault but an assertion that at the time he had not appreciated his errors. As the claimants submitted, it was a little surprising that he had failed to take positive steps to engage in the defence of the claim beyond the bare minimum. Whilst I appreciate that he is now retired and that these events are some distance away, nonetheless I would have expected him to have made more effort to involve himself in the defence and to familiarise himself with the issues. In my view that is because he is still in denial as to the true extent of his role in and responsibility for the plainly wrongful issue of Bldg Regs final certificates in the circumstances which obtained in 2009 and 2010.

2.19 Moreover, it was clear that he was not always completely candid, whether in his contemporaneous actions or in his evidence in this case. His explanations to Mr Cairns in relation to his involvement with flat 126 in January 2010 and his letter to Manchester Building Control in the same month seemed to me to be less than candid. His evidence as to his never issuing cover notes manually was in my view untrue. His evidence as to whether or not he had physically inspected the development in September 2010 varied. Whilst I am not suggesting for a moment that he was a thoroughly dishonest witness I do not consider that I can rely upon him as a convincing or reliable witness in relation to key issues in the case.

The expert witnesses

2.20 I heard from all of the experts who had produced joint and separate reports with the exception of ZIP's fire expert, Mr Pagan, who ZIP elected not to call, and both the ZBC claimants' and ZBC's building control experts, Mr Conlon for the claimants and Mr Easton for ZBC. The ZBC claimants decided that they did not need to call Mr Conlon or to cross-examine Mr Easton on matters of remaining disagreement because they did not consider it necessary for me to make findings in their favour on those disputed issues, relying instead upon the large measure of agreement reached between the experts in their joint statement and upon what Mr Easton said in his report. That was a sensible approach which Mr Asquith rightly did not criticise in any way.

2.21 I accept the claimants' submission that it is not necessary or appropriate for me to make findings in relation to the remaining expert witnesses as to whose evidence I prefer in general, as opposed to in relation to whose evidence I prefer on the specific items in dispute. That is because, as Mr Selby submitted, it was apparent that all experts who gave evidence had genuine expertise, were genuinely independent and generally were doing their best to assist the court. As is always the case, some of the experts were more familiar than others with the whole process of acting as an independent witness including giving oral evidence and, as a result, were more polished both in their written expositions and in oral evidence. However, it would be wrong to conclude that as a result their expert evidence on the substantive issues was to be preferred, rather than engaging with the merits of the evidence which they gave. Some of the experts were also more argumentative than others and, at times, needed to be reminded to answer the question and to refrain from unnecessary comment or advocacy. That is always more concerning, but I did not think that any of the experts crossed the line in a serious or persistent way into arguing their client's case or forgetting their overriding duty to the court. Whilst I have taken that where appropriate into account when considering their evidence on the individual issues it is not in my view a reason for preferring the evidence of one over the other wholesale.

2.22 Finally, I thank all of the experts for participating so fully in the joint discussions and the production of joint statements which made my task and, I am sure, that of the parties much easier. In particular both the parties and I owe a debt of gratitude to the quantity surveying experts, who put in a huge amount of time and effort in the run-up to trial and at trial itself in order to reach a large measure of agreement on figures as figures, without which it would have been very difficult to see clearly the financial wood from the trees.

3. History of the development and subsequent relevant events

3.1 JCS was a company which undertook a number of residential developments in the Greater Manchester area. Its active shareholder was a Mr Jason Alexander and its two funding shareholders were Mr Chandravadan Mehta and Mr Sunil Mehta. In December 2003 it obtained outline planning permission for the development to be known as New Lawrence House. In summary, the plan was to build around 150 separate flats in 5 four-storey blocks on a site fronting City Road, in a location approximately a mile from the Manchester city centre on the borders of Hulme in Manchester and Stretford in Trafford. Although the area was less immediately attractive than other development areas closer in to the city centre, particularly given its relative distance from the city centre and its immediate location, which estate agents might somewhat optimistically have described as "up and coming", nonetheless it was sufficiently close to further education facilities to attract students looking for flats to rent and the cheaper land values in the area permitted two bedroomed flats to be constructed and marketed for sale, with the benefit of car parking facilities in an undercroft type semi-basement area and some associated green space, at similar prices to one bedroomed flats with fewer facilities in more desirable areas.

3.2 After securing planning permission nothing of any significance happened until 2006, when JCS secured funding from the Bank to construct the development and was able to start making detailed preparations.

3.3 JCS assembled a team of professionals to design and manage the development. The project team assembled by JCS included a firm known as Halliday Meecham as the project architects, a firm known as ROC Consulting as the project structural engineers and a firm known as Williams Engineering as the project M&E consultants.

3.4 JCS also needed to secure an insurance company which would provide building warranty type insurance policies without which no mortgage company would lend on the security of the flats. At this stage ZBG was still offering its Standard 10 product to developers and builders such as JCS and was also still offering an approved building inspector service. JCS decided to use ZBG both to provide building warranty insurance policies and also building inspection services for Bldg Regs approval purposes. ZBG was only prepared to issue policies in respect of developments constructed by approved builders and so JCS applied for and successfully achieved membership status with ZBC as an approved builder in June 2007. ZBC was also duly appointed the approved inspector for the development, giving an initial notice to Manchester Building Control in September 2007. I refer further to the activities of ZBG below and in more detail in section 4. JCS marketed the flats on the basis that on completion it would provide a new home warranty from ZBG and this was written into the sale contracts, which provided by clause 14 that: "the property is covered by Zurich

Municipal New Build Building Guarantee Scheme. The seller undertakes to deliver to the buyer's solicitor relevant Zurich documentation on or as soon as practicable after the date hereof".

3.5 The Bank instructed a firm of quantity surveyors known as Watts to provide monthly progress reports. Their first report dated September 2007 referred to the commencement date as June 2007 and the planned completion date being October 2008. The reports provide a valuable monthly snapshot and some useful photographs of the construction process from month to month.

3.6 Before all this happened JCS also made arrangements with a number of agencies which specialised in securing buy-to-let investors for developments such as New Lawrence House. One such was an agency known as Assetz which introduced a number of the individual leaseholders to the development. As was common, JCS planned to sell individual flats off-plan well before the development was completed. The agencies explained that the flats would come with a letting agent in place, being an associated company of JCS, and also with a tenant already found and, as a result, would achieve a guaranteed rental from the outset. Assetz was also in the habit of recommending a Manchester firm of solicitors known as Birchall Blackburn to undertake the conveyancing for their clients and many, although not all, did so.

3.7 In preparation for achieving off-plan sales JCS used the services of a firm of solicitors known as Ramsdens, based in Huddersfield, to undertake the conveyancing process. As early as October 2006 they produced a general information sheet which was intended to answer the standard enquiries before contract without the need for a specific request. It included a copy of the draft sale contract and a copy of the draft 125 year lease to be entered into on completion. It stated that JCS had applied for registration with ZBG and explained that the draft sale contract made provision for the production of the cover note and certification. It did not however make express reference to Bldg Regs approval or to the appointment of ZBC in that respect.

3.8 It appears that a revised version was produced in November 2009 which stated as follows:

"4. Guarantees:
The seller has registered the development with Zurich Municipal, and the production of the necessary cover note and certification is covered in the draft contract supplied.
…
6. Planning and Bldg Regs Approval:
…
Zurich Municipal has been appointed as an approved inspector for the purpose of the building regulations. The issue of the cover note will accordingly provide confirmation of compliance with these regulations."

3.9 In my judgment, it is clear that the "certification" referred to in section 4 is the building warranty documentation, not a Bldg Regs final certificate. Furthermore, section 6 referred to the cover note as providing confirmation of compliance with the Bldg Regs. Whether or not that was strictly correct, since the cover note simply provided confirmation that cover would be provided under the building warranty, what is clear is that it made no reference to any Bldg Regs final certificate.

3.10 Whilst I shall refer to the leases in more detail at section 6 below it is convenient to refer to the sale contracts at this stage.

3.11 Taking the example of Dr Ikpeme and flat 66, where contracts were exchanged in January 2007, the sale contract provided, as relevant, as follows:

(1) The contract began with a definitions section. Of particular relevance is the definition of "completion date" which in its unadulterated form stated: "means the … date of 2007 or the date which is 10 working days after the date upon which the seller's solicitors serve copy Zurich cover note upon the buyer's solicitors". In this contract the opening words "means the … date of 2007 or" were deleted by being struck through, so that the completion date was fixed by reference to the date of service of the Zurich cover note.

(2) Clause 4.2 provided that:
"The seller shall be deemed to have completed the property notwithstanding the non-completion of items of a minor nature not being such as would reasonably inconvenience the buyer in the use and occupation of the property which items the seller would endeavour to complete with reasonable dispatch and the buyer shall not be entitled to delay completion by reason of such items which for the avoidance of doubt shall include the non-completion of any external landscaping works".

(3) Clause 11.1 provided that:
"The seller will at its own cost and… with reasonable dispatch:
11.1 construct or procure the construction of the Building [*this was defined as, in effect, the development*];
11.2 reasonably in accordance with the Drawings [*these were defined as "the approved planning drawings and specifications"*];
11.3 in accordance with the Planning Consent and Building Regulations Approval [*neither of these were defined terms, despite being capitalised*] relating thereto (provided that the seller shall be deemed to have complied with the provisions of this subclause where the building has been inspected and approved by the building inspector of the appropriate local authority)".

(4) Clause 11.2 is clumsily drafted, conflating as it does a reservation of a right on the part of the seller to substitute or vary the design, construction and materials of the development, subject to certain limitations, and a positive obligation on its part, as specified at 11.2.3, to "erect and complete the property in accordance with the terms of the relevant Planning Permission and Building Regulations Consent [*again neither being defined terms, despite being capitalised*]".

(5) Clause 14 provided that:
"The property is covered by Zurich Municipal New Build Building Guarantee Scheme. The seller undertakes to deliver to the buyer's solicitors the relevant Zurich documentation on or as soon as practicable after the date hereof".

3.12 In contrast, in those sale contracts which were entered into later, such as Mr and Ms Dickie who exchanged and completed simultaneously in August 2010, the completion date was defined so that it simply stated: "means the 16 day of August 2010", with the further words appearing in the definition in the earlier sale contracts excised. This change is explained by the fact that by this later stage in the development the cover notes for the flats had already been issued, in his case on 11 December 2009, and had already been provided to his conveyancing solicitors as part of the pre-contract information supplied to them[3].

3.13 There has been some debate in the context of the claim against ZBC as to the proper interpretation of these provisions of the sale contracts. What is clear on any view is that as regards the earlier sale contracts it is the service of the cover note rather than the issue or provision of either the final insurance certificate or a Bldg Regs final certificate which triggers the completion obligation. Moreover, clause 4.2, which circumscribes the ability of the buyer to resist completion by contending that the property had not been physically completed, says nothing about any linkage between the obligation to complete and the issue of a Bldg Regs final certificate. Whilst clause 11.1.2 does specifically refer to inspection and approval by the building control inspector, the only relevance of that approval in that clause is that it deems the seller to have complied with its obligation to construct the development in accordance with the initial Bldg Regs approval. Whilst there is also an obligation in clause 11.2.3 upon the seller to complete the flat in accordance with the terms of the Bldg Regs consent, that is not in any way linked to the obligation to complete. Finally, whilst clause 14 imposes an obligation on the seller to deliver "the relevant Zurich documentation", there is no basis for any suggestion that this could be construed so as to include the relevant Bldg Regs final certificate.

3.14 In short, the position in my view is that the Bldg Regs final certificate has no particular contractual relevance under the sale contracts entered into between JCS and the individual leaseholders. It is the cover notes and the final insurance certificates which have contractual relevance, the former in relation to the completion obligation under the earlier sale contracts and the latter in relation to the post completion obligation to deliver those certificates to the buyer.

3.15 It is true, of course, that the presence or absence of a Bldg Regs final certificate would be of evidential relevance in relation to the obligation undertaken by the seller under clause 11.1.2. Furthermore, even though not expressly referred to in those clauses, it is evident that the presence or absence of a Bldg Regs final certificate would be of some evidential relevance in relation to the obligation undertaken by the seller under clause 11.2.3. Perhaps more pertinently, it is evident that the presence or absence of a Bldg Regs final certificate would be of some evidential relevance if and insofar as there was a dispute as to whether or not the buyer was obliged to complete the lease on the basis of a dispute as to whether or not the seller had complied with its obligation as qualified by clause 4.2 to complete the flat.

3.16 As will be considered in more detail when I address the claim against ZBC in section 11 below these points are of some relevance when addressing the issue as to whether or not the individual

[3] See the pre-contract report at [H7/21].

leaseholder claimants relied upon the Bldg Regs final certificates issued by ZBC either prior to exchange or prior to completion.

3.17 Returning to the chronology, as early as April 2007 individual claimants such as Ms Goldman were reserving individual flats with the agency through whom they were dealing, paying a reservation fee to JCS. Using Ms Goldman as an example, of course there was nothing physically in terms of a development for her to see had she travelled to view the site, other than the general location and the existing buildings prior to demolition. As early as May 2007, again taking Ms Goldman as an example, her solicitors wrote to her enclosing a draft contract and reporting on various matters relevant to the proposed transaction. Putting the matter in general terms at this stage, whilst many of the purchasers' conveyancing solicitors made reference to the fact that ZBG was providing a building warranty, none referred specifically to the building control function which ZBC was also to provide, perhaps not surprisingly because they would not have known from the information provided by Ramsdens that such was the intention. As early as June 2007 Mrs Goldman's solicitors had exchanged contracts on her behalf, so that she was buying off-plan.

3.18 The impact of the financial convulsions beginning with the collapse of Northern Rock in summer 2007 inevitably had an effect on the attractiveness of the development, as it did with developments nationwide. Buy-to-let investors, who had previously been willing to proceed in the confident knowledge that they could obtain mortgage finance up to a high percentage of the purchase price with relative ease, began to find it more difficult to do so and the appetite for speculative buy-to-let investments began to wane, with a consequential depressing impact on off-plan sales and on the prices which potential purchasers were willing to pay.

3.19 Nonetheless the construction of the development proceeded through 2008. There were communications from JCS and their solicitors to those who had already exchanged, suggesting that the first completions could take place in around November 2008. However, by September 2008 Watts was already reporting that the development was in delay and that completion was not expected until March 2009.

3.20 LHM as the management company was incorporated on 27 January 2009 with a view to undertaking the management of New Lawrence House once the development was completed and the flats sold off. As provided for by the draft leases and by the articles of association of LHM the intention was that each flat-owner would be a shareholder in LHM and that collectively they would own and run LHM for their mutual benefit. However, no steps were taken by JCS as the developer and freehold owner to set LHM up to manage the development so that it was and remained effectively a dormant company from incorporation onwards.

3.21 JCS continued to progress the development towards practical completion throughout 2009, albeit at a rather desultory pace.

3.22 Site surveyors working for ZBG conducted inspections in order to confirm that the development was being undertaken in accordance with the ZBG Technical Requirements. Mr Mather also attended on site on at least some occasions. Although I shall address this in more detail in section 4 below ZBG issued cover notes and final insurance certificates in respect of the individual flats, with separate insurance certificates following for the common parts. It appears that the cover notes and

certificates were sent to JCS who forwarded them on to the purchasers' conveyancing solicitors. They were issued at various times reflecting, in general terms, the progress of completion of the development from block to block.

3.23 The first Bldg Regs final certificate was issued by Mr Mather for ZBC to Manchester Building Control on 15 December 2009, with a further final certificate following on 21 December 2009. These two certificates included the vast majority of the flats the subject of the development and, remarkably, including some which had not in fact been built. Subsequently, on 8 November 2010, a third Bldg Regs final certificate was issued in respect of a further 18, including three the subject of this case. Copies of all three Bldg Regs final certificates were provided to JCS.

3.24 Nonetheless, and although I shall have to consider this in more detail later, it is common ground that the development was far from being fully completed in December 2009, particularly as regards the common parts. Moreover, by November 2009 Manchester Building Control was in communication with ZBG expressing its concern as to reports of problems with the development. ZBC's own building control expert agrees that no competent building inspector could properly have issued Bldg Regs final certificates for this development either in 2009 or in 2010.

3.25 By May 2010 the development had still not been fully completed. Mr Tarasov first visited the development at this time and described it as "in effect an unfinished building site" as regards the communal areas. As he says in paragraph 24 of his main witness statement the principal issues included the absence of any lifts, even though the development had been constructed with lift shafts to take lifts, the absence of secure access arrangements either to the blocks or to the car park, areas of unfinished render to the external elevations, a general lack of finishing off to the common parts both within the blocks and to the external areas, a lack of glazing in some of the windows in the common parts, electricity cables left exposed outside and rainwater pipes not connected up in the basement. Nonetheless there is no evidence that valuation reports commissioned by the lender in respect of claimants who were purchasing their flats with the aid of a mortgage revealed any fire safety or structural defects with the development such that the lenders either declined to proceed or imposed conditions on their funding or otherwise alerted the claimants to serious problems in those respects.

3.26 By October 2010 the last of the leaseholder claimants entered into 125 year leases relating to the flats. Whilst I shall need to refer to the leases in more detail later, it suffices to say at this stage that they were all in the same terms, relatively standard for developments such as this, so that the individual flats as conveyed did not include the structural parts or service installations or common parts but provision was made for LHM as the management company to be responsible for the maintenance and repair of those common elements with individual tenants paying their specified proportion of the service charge. A ground rent was also payable by the individual leaseholders to the freeholder.

3.27 Whilst again I shall need to refer to the building warranty policies in more detail later, in general terms the intention of the policies was to provide cover for the purchasers of new homes of a similar nature to an NHBC guarantee. In very broad terms section 2 of the policy provided one level of cover for the first two years and section 3 provided another level of cover for the next eight years.

3.28 By October 2010 it had become clear to JCS and the Bank that there was no immediate prospect of selling the remaining unsold flats. Accordingly, the Bank agreed to JCS' proposal that the flats should be rented out to generate income. The transaction was structured by JCS selling the remaining 66 flats to the newly formed CJS, the designated members of whom were Mr Alexander and the two Mehta brothers, with the aid of secured funding from the Bank. Effectively, the Bank lent CJS money which it paid to JCS to acquire long leasehold interests in the flats on the same terms as granted to the individual leaseholders and which enabled JCS to pay off its liability to the Bank.

3.29 A further 6 of the flats were leased by JCS to Mr Alexander and the Mehta brothers as joint owners. Another was leased to another connected party and the final flat was leased to a Mr Grove, who gave evidence for CJS in the previous litigation but who has otherwise played no part in the matters in dispute.

3.30 The state of completion by late 2010 was no better than it had been in May 2010. There were also problems which particularly affected those occupying the flats in the development. In particular, there was a problem with providing a permanent electricity supply and subsequently, once it was provided, a complaint that those connected with JCS and CJS, in particular Mr Alexander and his associate a Mr Jordan, were profiting from the supply by selling tokens for prepayment meters at inflated prices.

3.31 There was also a complaint that the development was not being properly managed, with inadequate provision of security and cleaning, so that there was access by unauthorised persons and problems with antisocial behaviour as well as dumping of rubbish and a general deterioration of the common areas. A number of the individual leaseholders complained about this to Mr Alexander and Mr Jordan, who held themselves out as in charge of the development, with no success.

3.32 However, the overall tenor of the claimants' evidence is that by and large, so long as their flats were tenanted and they were receiving rents, they were not too unhappy and they were unaware of any serious issues with the construction of the development at this time.

3.31 The Fire Service had written to JCS in January 2010 following an inspection, enclosing an enforcement notice under what is known as the Regulatory Reform (Fire Safety) Order 2005, with a schedule of fire safety matters which required to be rectified. It sent a further schedule in March 2010 and in September 2010 it wrote to JCS requesting to be provided with a fire strategy document for the development. JCS instructed the well-known engineering consultancy Arup to prepare a fire safety and management strategy document in order to meet this requirement, which was produced in December 2010. It noted that the current arrangement did not comply with Approved Document B to the Bldg Regs in a number of respects [4.3.2] and required specific steps to be undertaken as requested by the Fire Service, including the provision of permanent open vents to the building facade to prevent the staircase and common areas from becoming smoke logged, fire retardant treatment of the timber staircases and self-closing devices to all apartment doors. It did not however address either the fire protection of the structural steelwork or the adequacy of the fire compartmentation separating flats and common areas.

3.32 There is no hard evidence that any steps were taken by JCS or anyone else to implement these requirements, save only insofar as the absence of glass panes in window openings in the common areas effectively provided permanent open vents. There is also no evidence at all that JCS ever provided a copy of the Arup documentation to any of the individual leaseholders and I am satisfied that it did not.

3.33 On 11 March 2011 JCS transferred the freehold of the development to an unconnected company known as Freehold Managers (Nominees) Ltd ("Freehold Managers") for £313,000. In the same way as Zagora subsequently, Freehold Manager's motivation was to earn income from the ground rent provisions in the leases. Nonetheless Mr Alexander and Mr Jordan appeared to remain on site, claiming to be responsible for the management of the development on the basis that CJS as the owner of the majority of flats was effectively in charge.

3.34 In the action tried by Judge Raynor in the Chancery Division which proceeded to judgment in August 2014 he found that although CJS contended that it had been formally appointed by LHM to manage the development in January 2011, that was untrue and that in fact LHM had not undertaken any action whatsoever in relation to the management of the development, whether direct or by appointing others to do so. That inactivity led to LHM being struck off the Register of Companies and dissolved on 27 December 2011 on the basis that it was neither carrying on business nor in operation.

3.35 By March 2012 a number of the individual leaseholders, including Mr Tarasov and Ms Bedi, had been put in contact with each other by their common letting agent with a view to taking steps to address the complete absence of any management of the development, whether by LHM as the management company or otherwise. There is no evidence, however, that by this stage there was a group email including all of the individual leaseholders. Moreover, it is clear that continuing communications were limited to a relatively small number of individual leaseholders.

3.36 In May 2012 Mr Tarasov contacted Freehold Managers with his concern as to the lack of any active management company and requested that it step in to take over the management under clause 9.9 of the lease (referred to in section 6 below). He referred to the still unfinished state of the common parts, including the lifts, together with evidence of leaks in the car park.

3.37 In July 2012 Freehold Managers confirmed to the leaseholders that it was exercising its rights under clause 9.9 to take over the maintenance of the development and that it was going to appoint a company known as Mainstay Residential Limited ("Mainstay") to act as management agent to undertake the necessary management services including the collection of service charges. On 23 July 2012 Mainstay notified all flat owners that it had been appointed to manage the communal areas of the development and on 26 July 2012 various representatives from Mainstay, including its area property manager Kate Magill, met with a number of individual leaseholders including Mr Tarasov at the development. This, I am satisfied, was a general meeting to which all of the individual leaseholders (although not the tenants in occupation) were invited. I am satisfied that no more than a handful attended personally or via their letting agent. Mainstay introduced itself to those who had attended and matters of general concern were shared. It was not, nor was it intended to be, a detailed inspection of the development to identify or to ascertain the cause of all outstanding issues. Nonetheless it is also clear that individual leaseholders such as Mr Tarasov

would have shared his concerns at the meeting. These would have included, I have no doubt, matters of the kind mentioned by him in his email of 31 July 2012, including the continuing problems with access, the continuing absence of windows to the upper floor communal areas and, as he says in paragraph 49 of his witness statement, an absence of stop gaps on the steps and some blank emergency fire alarm boxes, which he considered to be a safety issue.

3.38 I am also satisfied that Mainstay would have referred at the meeting to the apparent lack of any risk assessment in relation both to general risks and fire risks and informed those attending that it was its intention to commission risk assessments. That is because Mainstay did indeed instruct a practice known as BWP Surveyors to produce a Fire Risk Assessment and a General Risk Assessment. The fire risk assessment, issued on 7 August 2012, identified a number of concerns with the development including matters of fire safety, such as a lack of intumescent strips to fire doors, inadequate compartmentation to prevent the spread of smoke and fire, a lack of fire resistant sealing of service pipes and a lack of emergency lighting in the car park and a lack of smoke ventilation. There was no explicit reference to a lack of protection of structural steelwork, although there was a recommendation under the heading "building compartmentation" that "intumescent materials be used within the voids to reduce the risk of smoke or flames spreading to other parts of the property".

3.39 Mainstay copied these reports to Mr Tarasov on 16 August 2012. This was clearly on a confidential basis, because it specifically instructed him not to share the reports with anyone else. The reason why Mainstay was sharing the reports with Mr Tarasov and no-one else was, as is clear from the correspondence, that a good working relationship had developed between Kate Magill of Mainstay and Mr Tarasov. There is no evidence that Mr Tarasov breached this confidence and shared these reports with anyone else, and I am satisfied that he did not.

3.40 It is clear from the evidence that by this time Mainstay and Freehold Managers were experiencing difficulties with CJS, which was claiming that it was entitled to control the management of the property on the basis that it was the entity which owned the majority of flats in the development. However, despite raising protests CJS took no active steps to seek to have LHM reinstated to the Register of Companies, so as to seek to undertake the management of the development through LHM, nor did it take any active steps to seek to manage the development itself.

3.41 Moreover, it is clear that Freehold Managers was concerned about incurring significant expenditure on the development if CJS was not prepared to contribute its proportionate share by way of service charge. In the email of 16 August 2012 referred to above Mainstay stated that Freehold Managers would be discussing what to do in relation to New Lawrence House once it had had an opportunity to consider matters on its managing director's return from holiday on 28 August 2012 and that Mainstay would be in contact with Mr Tarasov subsequently to "discuss the plans going forwards".

3.42 On 4 September 2012 Mr Tarasov emailed Mainstay asking for an update and also asking for clarification in relation to the position concerning a possible insurance claim. He said: "Given I had the building cover insurance (I think) I'm led to believe that the insurance company should pay up some of the costs, but I don't want to initiate the official legal action against the insurance company if the freeholder is already doing it". Mainstay replied that day, saying that they had not heard anything from Freehold Managers. Accordingly, on 10 September 2012 Mr Tarasov emailed

Freehold Managers directly enquiring of progress and asking whether it had made any contact with Zurich in relation to a possible insurance claim. On 13 September 2012 Mr Tarasov emailed Mainstay complaining about the lack of action from Freehold Managers and saying: "If this won't resolve soon I'm afraid (from talking to various leaseholders and hearing rumours et cetera) there will be either individual or class action legal claims against a number of parties".

3.43 On 10 October 2012 Mainstay wrote to the individual leaseholders providing an update and reporting that it had engaged a building surveyor to undertake a complete survey of the building and to speak "to Zurich regarding the long-term guarantee on the building to make them aware of the issues and to engage with them to find out if they can be of assistance in remedying the problems". However, it would appear that Mainstay were unable to make progress, because Freehold Managers was clearly unwilling to expend monies on what they had begun to consider as a problem acquisition. In the event, therefore, neither Freehold Managers nor Mainstay responded with any constructive proposals and matters lapsed.

3.44 In around March 2013 Freehold Managers decided to sell the freehold on the basis, according to evidence given by it in the previous action, that the management of this development had become too problematic. It marketed the freehold through commercial agents and managed to sell it at auction to a company known as Western UK Estates (NW) Limited who, in turn, sought to sell it on immediately with the result that it came to the opportunity of Zagora who acquired the freehold for what was eventually a price of £380,000, completion taking place on 10 April 2013.

3.45 As described in Mr Broadhurst's evidence this acquisition fitted Zagora's general business plan, which was to identify freeholds which could be acquired at favourable prices and then to acquire them using bridging finance from secondary lenders at relatively high interest rates. It would then ensure that ground rents were collected promptly and efficiently. Where possible, it would also take over the wider management of the building and generate additional income in various ways from performing that management role. Its strategy was then, having demonstrated that the development was a sound investment, proceed to re-finance the bridging finance with a primary lender at a much reduced interest rate and either retain the property as a profit generating asset or seek to sell it on at a profit.

3.46 Zagora undoubtedly believed that it was entitled to manage the development in this case given that this is what Freehold Managers said that they had already done. It is Zagora's case that it acquired the freehold without a survey on the basis that it was unnecessary to do so, given that it was acquiring the freehold on the basis that the freeholder had no repair or maintenance obligations and relying on the Bldg Regs final certificates as evidence that the development had been properly constructed. The question of reliance is hotly disputed by ZBC and has led to close examination at trial on this point, including reference to the conveyancing file of the solicitors instructed by Zagora, Robert Meaton and Co, who acted by their senior partner, Mr Andrew Davies. It is an unusual feature of this case that Mr Davies, who continued to advise Zagora and to represent it initially in the subsequent litigation, was subsequently discovered to have forged a number of documents in connection with this case and, as I understand it, was later convicted and sentenced to a term of imprisonment as a result. In his judgment in the previous TCC action Judge Raynor expressly acquitted Mr Broadhurst and Mr Robinson of participation in or knowledge of those forgeries and the contrary suggestion has not been advanced before me.

3.47 It is Zagora's case that it was only on 11 April 2013, when Mr Broadhurst attended New Lawrence House for the first time after completion to undertake an initial assessment, that it came to appreciate the true nature and extent of the serious defects in the development and, in particular, the fire safety defects which went far above and beyond what Mr Robinson says he observed when he met the vendor's representative at New Lawrence House shortly before sale. The extent of Zagora's knowledge pre-purchase is disputed by the defendants. In short, it is suggested that Zagora acquired the freehold in the knowledge that there were significant unfinished and defective works and that there was a potential claim against ZBG, whether under the policy or as a negligence claim in relation to the building control function, which had the potential of generating significant income for Zagora or associated companies in managing the conduct of any insurance claim and/or claim against ZBG and in procuring, managing and undertaking any remedial works. I shall address these issues further when dealing with the position of Zagora in section 5 below.

3.48 Mr Broadhurst wrote a letter to the leaseholders dated 18 April 2013 on behalf of Premier Residential Management Limited ("Premier"), a company owned and controlled by Mr Broadhurst and Mr Robinson, introducing Premier as the new managing agents acting on behalf of the new freeholder Zagora which, he said, was responsible for the management of the common parts. He notified them of the need for urgent works to the development and further works to complete the development, such as the installation of the lifts. He explained that this would have to be funded by the leaseholders. He suggested that some but not all costs might be covered by the ZBG guarantee and said that all other potential remedies would be looked at. He also requested payment of a service charge of £1,403.07 in relation to each flat which, not surprisingly, provoked some leaseholders to make contact with Zagora to outline their concerns both about the previous problems and lack of management and also Zagora's future intentions.

3.49 On the same day, 18 April 2013, Mr Broadhurst also wrote to ZBG in the name of Cobe Consulting Limited ("Cobe"), a company owned and controlled by Mr Broadhurst alone, which undertook project management services. The letter was written ostensibly on behalf of "the freeholder and individual tenants" of New Lawrence House, notifying it of a claim for negligent certification of the development works. This email was the beginning of a series of communications and site inspections and meetings involving Zagora, ZIP and Cunningham Lindsey as well as the engineering consultancies Arup, which Zagora retained to advise in relation to fire safety issues, and Thomason, who was similarly retained by ZIP. Over the period from April to June 2013 the Manchester Housing Department and the Fire Service were also involved and took steps to require the fire safety problems which were on any view by then evident to be resolved at least temporarily. I shall have to refer to these exchanges in some detail later in this judgment because they culminated, according to the claimants, in the agreement to rectify, under which it is contended by Zagora that it was agreed that ZIP would investigate and pay the cost of carrying out the remedial works necessary to rectify the "common" defects in the development on an agreed basis. The claimants contend that subsequently ZIP failed to act in accordance with its obligations under the agreement to rectify. As I have said, ZIP vigorously denies that any such agreement was reached and also denies that any agreement as was reached had any legal effect and I shall have to deal with the agreement to rectify in detail later in this judgment.

3.50 What is, on any view, regrettable is that the further steps which it is common ground had been agreed should be taken by Zagora and ZBG to investigate the issues at New Lawrence House could not be undertaken as planned due to the intervention of what became the bitter and protracted dispute between Zagora and CJS. As I have said it is Zagora's case that it believed that it was entitled to perform the management company functions for the development because there was no management company exercising that role. However, as early as 19 April 2013 Zagora and CJS had fallen out, solicitors were involved and correspondence ensued and by June 2013 Mr Broadhurst had become aware that LHM had been restored to the Register of Companies by CJS, which was contending that LHM, acting under its control, was entitled to manage the development. Both Zagora and CJS through LHM were communicating with the individual leaseholders to assert that each was responsible for managing New Lawrence House. However, the triggering event occurred on 10 July 2013 when CJS caused LHM to apply for and obtain an interim injunction on a without notice application restraining Zagora from managing New Lawrence House until the dispute was finally resolved. That interim injunction was continued on the return date on 19 July 2013 (by me, as it happens) and the action then transferred to the TCC with directions later being given with a view to a trial taking place the following year.

3.51 In 2014 the question of entitlement to control LHM came into sharp focus in the context of a notice of meeting purportedly convened by CJS on its behalf. The essential dispute was as to whether CJS was entitled to one vote per flat and thus to 66 votes in total or to only one vote in respect of the 66 flats. This dispute turned on a proper interpretation of the articles of association of LHM which, due to deficiencies in drafting, was not at all straightforward. The majority of the individual leaseholders, allying themselves with Zagora, contended that since CJS only had one vote it was not entitled either to control LHM or to authorise or continue the proceedings against Zagora. That dispute became the subject of the Chancery action, which Zagora funded on behalf of the individual leaseholders and which was determined in favour of CJS by Judge Raynor in May 2014. Subsequently Judge Raynor gave judgment in August 2014 against Zagora in the TCC action on the basis that CJS was entitled to 64 votes and, hence, to control LHM and that Zagora had no basis for contending that it was entitled to undertake the management function once LHM was reinstated. However, there was then a successful appeal to the Court of Appeal against his earlier ruling in the Chancery action so that in September 2014 the Court decided – *Sugarman & others v CJS & others* [2014] EWCA Civ 1239 - that CJS only enjoyed one vote and, hence, was not as it had claimed entitled to control LHM. The end result was that LHM's success in August 2014 was rendered pyrrhic and the judgment obtained by it against Zagora set aside as a nullity on the basis that the action had not been validly authorised by those validly entitled to authorise it in LHM's name. Moreover, control of LHM passed to the individual leaseholders who had appointed 3 of their number as directors.

3.52 In the meantime the litigation had effectively prevented any progress being made as regards the resolution of the issues which had previously been discussed and, putting it neutrally, the subject of some agreement at least as between Zagora and ZIP.

3.53 The eventual outcome of the litigation was also disastrous to CJS, which was in arrears with its loan repayments, and on 4 November 2014 the Bank exercised its right to appoint administrators over CJS. The administrators' proposals were to continue letting out the 66 apartments with a view to

disposing of them for maximum value in due course. The Bank agreed to fund any shortfall in their costs and expenses.

3.54 By November 2014 LHM had appointed another property management company known as Revolution to manage the development. Although they undertook steps to address the general problems with the development in relation to security and cleaning and minor maintenance their strategy was, and continued to be until the building was vacated in 2017, not to undertake any remedial works in relation to the more major issues until matters were resolved with ZBG.

3.55 Although Zagora and David Robinson of Cunningham Lindsey resumed discussions after September 2014 there appeared to me no appetite on either side to revert to the previous position and nothing concrete was achieved. There was one without prejudice meeting held in July 2015 but that did not result in a successful outcome.

3.56 The first claim form was issued in 2015 on a protective basis by Paul Ross & Co, the solicitors who represented Zagora in the previous action. The claimants were Zagora, the individual leaseholders and CJS and the defendants were ZIP and ZBC. However, no further steps were taken by agreement between the parties whilst negotiations took place and the pre-action protocol was complied with until March 2017 when, it becoming clear that nothing could be achieved, the action became live again and became the subject of case management.

3.57 By late 2016 the Bank had agreed to fund the action and various legal documents, known collectively as the funding agreements and to which more reference will be made in section 10 below, were entered into in September 2016.

3.58 It appears that in 2016 it was decided by LHM that it would be necessary to empty the development of occupiers due to the fire safety risks and the need to undertake extensive and expensive works to make the development safe which it was unable to afford unless or until monies were received from ZBG. There had been discussions involving the Fire Service as to whether or not a notice prohibiting occupation should be issued due to the fire safety risks. Despite pressure exerted by Zagora the Fire Service declined to do so until shortly after the occurrence of the Grenfell Tower tragedy in June 2017. Once that notice was issued the remaining occupiers moved out of the development, which has stood empty sealed up ever since.

3.59 The original Particulars of Claim was produced in June 2017 which, as ZIP emphasises, is when the first open mention was made of the alleged agreement to rectify. Thereafter, the action proceeded in accordance with the timetable set at the first substantive case management conference held in September 2017, albeit with numerous interlocutory applications being made over that period. As I have already said, a second claim form was issued in 2017 in order to enable individual leaseholders to bring claims against ZBC, with that action being consolidated with the first action.

4 ZBG's involvement in the supervision and certification of the development

4.1 I have already referred in section 1 to the inter-relationship between ZIP and ZBC. ZIP offered building warranty insurance through what was known as its ZBG Building Guarantee department,

which was an integral part of ZIP as a company. ZBC was formed as a separate company to undertake the approved building control function in order to comply with the requirements of the Construction Industry Council, the organisation which was responsible for the registration of private approved building inspectors. However, as I have said organisationally ZBC fell within the ZBG department, so that its employees were employed by ZIP through the ZBG department and functions such as finance and administrative support were all provided by ZIP through the ZBG department.

4.2 Nonetheless there was a separation as between the building warranty function and the building control function, both organisationally and functionally. Organisationally, as an organogram to which I was referred illustrates, ZBC sat alongside and apart from the key ZBG building warranty function. ZBC had its own national manager, a Mr Van Schalkwyk, who reported directly to the overall head of ZBC, Mr Horsler. Reporting to Mr Van Schalkwyk were the two building control surveyors, Mr Mather and a Ms Allery. Separately reporting to Mr Horsler on the building warranty side were Mr Cairns as the ZBG regional manager for the southern area and Ms Armstrong as the ZBG regional manager for the northern area. Reporting to the regional managers were regional surveyors and reporting to the regional surveyors were senior surveyors including Mr Nicholls and, finally, reporting to them were site surveyors including, from 2009 onwards, Mr Eadsforth. Functionally, only building control qualified surveyors were authorised to undertake the specific building control function which was the subject of prescription under the Building Act 1984, the Building Regulations 2000 and 2010, the Building (Approved Inspectors etc.) Regulations 2000 and the Approved Documents – to which I shall refer in more detail later.

4.3 However, it was also recognised that in reality there was a close connection between the building warranty functions and the building control functions. That is because the cover provided by the building warranty policies was very substantially aligned with the requirements of the Bldg Regs, both because: (a) the cover in respect of present or imminent danger to health and safety applied where the danger resulted from the developer's failure to comply with the Bldg Regs; (b) the major physical damage cover applied where the damage resulted from the developer's failure to comply with ZBG's requirements as contained within its technical manual ("the technical requirements") which itself was in many respects closely aligned with the requirements contained in the Approved Documents issued under the Bldg Regs. It followed that the inspections undertaken by the building warranty inspectors were either identical to or at least very similar in terms of their purpose, scope and performance as the inspections which would be undertaken by a building control inspector for building control purposes. It also followed, particularly after the organisational changes which occurred in late 2008, that a building warranty inspector was able to undertake much of the work which a building control inspector might otherwise have to do, and vice versa, thus allowing time and cost savings to be made.

4.4 The changes which occurred in late 2008 involved an extensive redundancy programme under which around 30% of the surveying staff left ZBG and were not replaced. The justification for the staff reduction was the planned introduction of a website which could be accessed by approved builders who could upload photographs and other documents to demonstrate compliance with the technical requirements or instructions given by inspectors, thus reducing the need for inspectors to undertake physical inspections with the same frequency as before. However, the witnesses all agreed that the development of the website did not proceed in sufficient time and, ultimately, was

quietly shelved with the result that the remaining inspectors had to undertake the same workload as had previously been undertaken by the previous larger staff complement.

4.5 In May 2009 Mr Cairns first became aware of a proposal by ZIP senior management to exit the building warranty business completely and to cease taking on new developments, whether for building warranty purposes or by undertaking a building control role. The decision was made and announced to staff in September 2009 and to the public in October 2009. By autumn 2009 all ZBG employees knew that eventually they would be made redundant. At the end of December 2009 Mr Horsler left and Mr Cairns replaced him as head of ZBG.

4.6 Although the oral and documentary evidence revealed differing perceptions as to the impact of these developments on individual workloads and morale there is no doubt in my view that there was an increase in workload and a negative effect on morale. As regards New Lawrence House Mr Buck, the building warranty surveyor who had previously been principally responsible for the development, left ZBG by the end of 2008. The only available inspectors to take his place were Mr Nicholls, who had a significantly increased workload, and Mr Eadsforth as an incoming untrained inspector who required to be accompanied and supervised by Mr Nicholls on all but the most basic inspections. In January 2009 Mr Nicholls, having taken over responsibility for New Lawrence House, emailed his regional manager expressing his concern that the departures had led to having to employ a "fire-fighting" strategy which, he was concerned, was not "fully accommodating ZBG's commitment to its building control status". There is no evidence which indicates that his regional manager or anyone else disagreed with this assessment or that any steps were taken to address the concerns raised other than for him to rely more on Mr Eadsforth for site inspections. Indeed, a rather brusque email from Mr Horsler made it clear that the building control function would have to make do with the resource it had.

4.7 It appears that ZBG always envisaged that the primary building control inspection function would not be performed by the building control inspectors such as Mr Mather but would instead be undertaken by the building warranty inspectors such as Mr Nicholls. This it appears was on the basis that liaison between the building warranty surveyors and the building control inspector would ensure that any potential issues were picked up by the former and reported to the latter, who would then take such action as was appropriate. It is apparent from ZBG's surveying internal procedures as effective from March 2008 that even in relation to the final completion stage the building control inspector would not necessarily inspect site before issuing a Bldg Regs final certificate, although the procedure required liaison as between the building warranty surveyor and the building control inspector to ensure that all appropriate steps had been taken in terms of the inspections and information provided relating to the issue of a Bldg Regs final certificate. Mr Nicholls' evidence was that if he was inspecting for both building warranty and building control purposes he would liaise with Mr Mather and keep him up to date. Mr Mather's evidence was that he would not normally undertake site inspections as a matter of course, not even a final inspection, nor would he access the ZBG "Live 27" system in order to check on progress, because he would rely upon his contact with the building warranty surveyors, his contact with the developer and his ongoing knowledge of the site through being contacted by both and through undertaking site visits as and when necessary.

4.8 As I have said in section 2 above, a site folder was kept on site on which entries were made by the ZBG surveyors and by the developer's site agent and in which documents were placed and left for reference, including printouts from Live 27 and documents provided by the developer. So, for example, if a surveyor visited site and raised a query which the site agent could not immediately answer the surveyor might enter on the site folder that he had asked the developer to provide the required information and subsequently the site agent might then record that he had done so and, if that information was in the form of a document such as a certificate of suitability of a particular product being used in the construction process, leave a copy of the certificate in the site folder. It appears from Mr Mather's evidence that there was no system in place to ensure that the site folder did not simply disappear at the end of a project and that it often tended to disappear at the same time as the developer demobilised and the site cabin was removed. Even if it had been retained on this project it would presumably have been placed into the project box which as I have said has since disappeared.

4.9 The evidence of both Mr Nicholls and Mr Mather was that Mr Nicholls would keep Mr Mather updated about, and liaise with him regarding, progress on developments such as New Lawrence House either by emails or telephone calls. Their evidence was that Mr Mather was always available to inspect site, either alone or in conjunction with the building warranty surveyor, or to discuss matters relevant to Bldg Regs compliance. Unfortunately, no record of these contemporaneous communications is now available.

4.10 Mr Mather's evidence was that he would know from his own involvement and from being contacted by the building warranty surveyor when the surveyor had completed the final inspection which would permit Mr Mather to issue a Bldg Regs final certificate. His evidence was that he did not feel it necessary to interrogate the detail of what was recorded on Live 27 for this purpose, firstly because he trusted and relied upon the building warranty surveyors and secondly because the very fact that a building warranty cover note and final certificate had been issued meant that the building warranty surveyors had satisfied themselves that any recorded defects had been remedied.

4.11 It is necessary to provide some further explanation as to how the Live 27 system worked. It is important to note that it was intended to operate only for building warranty purposes and not for building control purposes, although Mr Mather was given his own surveyor code and could both input and access information into the system in relation to building warranty matters.

4.12 Each flat in New Lawrence House had its own separate record into which data could be input on a linear basis by reference to the set inspection stages moving from stage 1 (commencement) through stages 2 (foundations), 3 (superstructure), 4 (upper floors to roof), 5 (roof structure), 6 (pre-plaster) and 7 (post-plaster) to stage 8 (completion). I should record that pre-plaster was seen as a particularly important stage, particularly in relation to structural and fire safety issues, because of course once plasterboard was applied it would be difficult if not impossible to inspect the underlying structure and confirm the adequacy of matters such as fire proofing and compartmentation without invasive investigation.

4.13 For example, the first entry relating to flat 1 identified that on 18 December 2007 surveyor code number 0710 (this was Mr Buck, each surveyor being assigned his/her own unique surveyor code number[4]) undertook a stage 3 inspection and noted a defect code 400 (particular defect types were allocated unique defect code numbers) with the additional comment "cavity ties in retaining wall should achieve min 50mm into each …" (the entry on the document in the trial bundle is incomplete only because not all of it is visible on the printouts provided). Finally, under the "date of remedy" column appears the date "29/10/08", which demonstrates that on that date a surveyor recorded that the defect had been remedied. By scrolling down the entries on Live 27 it can be seen that on 29 October 2008 the same surveyor undertook a stage 4 inspection and, it may be inferred, was satisfied that on that date the cavity wall defect had been resolved.

4.14 The last entry records that on 24 November 2009 surveyor code number 0312 (Mr Eadsforth) undertook the final stage 8 inspection and recorded "contractor on with snagging work". This entry was not marked as being a defect, reflecting the surveyor's opinion that such snagging items as there were did not amount to defects such as would prevent the flat as being regarded as completed for building warranty purposes. Furthermore, since all previously entered defect code entries had been recorded as having been remedied, the system automatically entered the comment "Completion date 24/11/09".

4.15 Although the evidence given by the witnesses about this was not entirely clear or consistent, it is my understanding that once that happened: (a) it was possible for surveyors to input a command for the system to generate a cover note which could then be produced in hard copy form (either by the surveyor using a printer which he carried with him and given to JCS on site, or printed out and sent out by head office); (b) the system proceeded to generate a building warranty final certificate without the need for a command, which was printed out and sent to JCS by head office.

4.16 In relation to flat 1 there is no evidence of a cover note being issued. It is not clear whether this is because no cover note was issued or because for some reason it cannot now be located. There is no obvious reason why not. Exchange took place in 2007 and completion took place in May 2009. It appears from the correspondence in relation to flat 1 that in January 2009 JCS was stating that completion was expected to take place on 13 March 2009 and that, following some exchanges about the buyers' financial difficulties, an accommodation was reached and completion rescheduled for May 2009. Since Mr Nicholls issued cover notes for the adjacent flats 2 and 3 on 9 March 2009 the conclusion I draw is that ZBG was informed by JCS that there was no need to issue a cover note for this property since a specific completion date had already been agreed. I accept that this is inference but it is supported by the fact that there is evidence that there was close liaison between JCS and ZBG about issuing cover notes and completion certificates because until this happened it would not be possible for JCS to market the flat as certified complete and insured or to require or enforce the completion obligation.

4.17 From the agreed schedules produced by the parties after closing submissions it appears that in all of the individual leaseholder cases save for 5 (flats 1, 8, 20, 56 and 68) cover notes were issued. Even in relation to these 5 cases final insurance certificates were issued and, therefore, I am satisfied that

[4] Mr Nicholls was 0305, Mr Eadsforth was 0312 and Mr Mather was 0704.

cover notes were either not issued in these 5 cases for some good reason, as I infer in the case of flat 1, or possibly through inadvertence. A large number of cover notes were issued by Mr Nicholls on 13 February 2009 both in relation to individual leaseholder flats and also in relation to some of the CJS flats, all of which were within blocks A/B ground and first floors numbers 47 - 63. Since there would appear to have been no obvious need for cover notes to be issued in relation to CJS flats the most likely explanation I infer is that since he was already issuing cover notes for flats in that area anyway he was asked by JCS to issue cover notes for others on the basis that there may have been purchasers – actual or anticipated – for those flats at that time. What is rather surprising about all this is that, as is common ground, Live 27 does not record any stage 08 inspection being undertaken on any of the flats on or by 13 February 2009, so that it is not entirely clear why Mr Nicholls was issuing cover notes in relation to these flats at this time anyway.

4.18 It was common ground between the witnesses at trial that it was possible to issue cover notes, even though stage 08 inspections and completion of all inputted defects had not been entered onto Live 27, by bypassing the Live 27 system. This was because surveyors had access to template cover notes in word form which they could use to create a cover note which they could then issue to the developer even though the Live 27 system was still showing outstanding defects. Mr Cairns said that he was aware of this practice and did not encourage it, although it is clear that no active steps were taken by ZBG management to prevent it from happening. Mr Mather said that he had never issued cover notes in such circumstances. However I am satisfied that he did do so in relation to this development, in circumstances and for reasons which I state later.

4.19 Finally, so far as Live 27 is concerned, as well as separate records for each separate flat a further separate record was created for the common parts of New Lawrence House, known as "plot number 99C". This adopted the same system in relation to inspections of the common parts. It recorded the final inspection and date of remedy of all outstanding defects as being 10 September 2010, which is the date when the separate insurance certificate for the common parts was then issued.

4.20 With that background I shall now address the evidence as to what was done by ZBG in relation to New Lawrence House.

4.21 Upon being provided with the scheme details on 3 September 2007 ZBC produced and sent to Manchester Building Control an Initial Notice giving the appropriate details of the development. Under the building control regime unless Manchester Building Control rejected the Initial Notice, which it did not, ZBC would then formally assume the role of Approved Inspector in relation to the development.

4.22 The evidence of Mr Timperley, a business manager with Manchester Building Control, shows that he was concerned from an early stage as to JCS' ability to complete the development to a satisfactory standard. He says that on receipt of the Initial Notice he spoke to Mr Van Schalkwyk to inform him of his concerns and suggest that JCS' work was monitored more closely. In cross-examination Mr Mather accepted that Mr Van Schalkwyk would have passed information of this nature on to him. I do not consider this to be particularly significant in itself.

4.23 It is common ground that once ZBC formally assumed the role of approved inspector Mr Mather, as the building control inspector with responsibility for the development, would have been expected to

undertake a check of the plans submitted by JCS. His evidence is that he believed that he did so, although he is unable to recall the details. ZBG's internal procedure required a plan checking form to be used and maintained but no record of it remains. It would also appear from Mr Mather's oral evidence that his practice was to send a letter to the developer to confirm that the plans had been checked and considered satisfactory but again there is no record of this. Some criticism is made of Mr Mather as regards the adequacy of his plan check. In his report Mr Easton said that: "there were a number of rather basic breaches of Fire Regulations noted by the experts that should have been identified at design stage i.e. plan check". In their joint statement the building control experts agreed that the failure to carry out a proper plan check significantly contributed to the production of an inadequate building. However, insofar as it is pursued, I do not consider that the evidence is sufficient for me to conclude either that Mr Mather did not undertake any plan check at all or that he was consciously aware that his plan check was manifestly inadequate.

4.24 In December 2007 Mr Mather wrote to the Fire Service, enclosing plans for consultation, as he was required to do under reg. 12 of the Approved Inspector Regulations. The Fire Service were allowed 15 working days to respond. There is no evidence that they did so. Some criticism is made by Mr Conlon of Mr Mather's failure to ask the Fire Service to address certain specific items and failure to make contact or at least chase up a response before issuing the Bldg Regs final certificates. I do not consider that I am in a position to conclude on the evidence that Mr Mather was consciously aware that he had failed to comply with his duties as a building inspector in relation to his contact with the Fire Service. When he was asked about this he said that he only ever gave one notice, unless there had been a material change, on all of the projects on which he had been involved, and did not regard it as his obligation to chase a reply. He did add: "in fairness, I might be digging a hole for myself here", which seemed to me to indicate a willingness to accept that he might have been wrong in adopting that practice. That willingness notwithstanding, it is clear to me that under the Regulations there is no express obligation to chase a response; the only express obligation is not to issue a final certificate until 15 working days have elapsed from the date on which the inspector consulted with the Fire Service.

4.25 ZBG's internal procedures required the building warranty surveyor to produce an inspection plan and the building control surveyor to produce what was known as an individual notification framework ("INF") which would enable the building warranty surveyor and the developer's site agent to know at what stages the building control surveyor wished to attend to inspect. Mr Mather said that he believed that he had in fact produced both documents, although he accepted that the inspection plan would have been "fairly generic". Again no such plan has been disclosed, although the INF has been located. I do not consider that the evidence is such as to satisfy me that no plan was produced nor, insofar as it is alleged, that Mr Mather was consciously aware that any such plan or INF was wholly inadequate.

4.26 The Live 27 records reveal that Mr Mather did visit site on a number of occasions. His evidence was that he would also have visited with Mr Nicholls and possibly Mr Eadsforth and that if he did then only the building warranty surveyor would enter his code as having been present. Nonetheless his evidence was that he attended on only 6 to 10 occasions. In context, there are 444 inspections recorded on Live 27, although these include inspections on separate flats undertaken on the same visit.

4.27 Nothing of any significance for present purposes occurred in 2008 but in early 2009, at the same time as Mr Nicholls took over as building warranty surveyor, the architect and structural engineer appointed by JCS ceased acting and the architect informed ZBG of this fact. Although the claimants seek to place reliance on this as showing that ZBG ought to have been on notice of a heightened risk of non-compliance with Bldg Regs I accept Mr Mather's evidence that although this would have been a concern it was not of such obvious importance as to raise a red warning flag, in circumstances where there had been no established pattern of liaison with the project consultants nor warning that their departure might impact on JCS' willingness or ability to comply.

4.28 A question has arisen as to by what stage in the history of the development Mr Mather's relationship with and trust in JCS had declined to such a stage that he was not placing any reliance upon any assurances given by JCS in relation to its compliance with the requirements of the Bldg Regs. In cross-examination his evidence was that towards the end of the project he recalled that ZBG were not being informed by JCS of inspections that needed to be carried out so that things did slip away by that stage. He was asked precisely when this started to happen. He was unable to give a clear answer, not surprisingly given his generally poor recollection of the development, but in my view he was referring principally to events from late 2009 and in 2010 rather than in mid 2009 or earlier. Indeed, one of the surprising features of the evidence is that Mr Mather appears to have continued to accept at face value what he was being told by JCS even at these later stages and even in circumstances where he must have been aware that they were not providing him with accurate information. My assessment of Mr Mather is that he chose to continue to believe JCS' assurances because, frankly, it was easier and simpler to do so than for him to spend time which he did not have in seeking to chase things up.

4.29 Mr Mather was cross-examined as to his knowledge of the absence of a vapour control layer ("VCL") to the roof and external walls of the development. Mr Easton agreed in the joint statement that the absence of a VCL represented a defect and a breach of Bldg Regs and ought to have been observed by a reasonably competent building control officer. When this was put to Mr Mather he said that he would expect the roof to be inspected by the building warranty surveyor and for him to be notified if there was no VCL. Insofar as it is suggested that there is evidence that Mr Mather either: (a) knew that there was no VCL; (b) knew that neither Mr Nicholls nor any other building warranty surveyor had inspected the roof or the walls; (c) knew that he ought personally to have inspected the roof and walls to check that a VCL was present but had consciously chosen not to do so, I do not accept any of these allegations.

4.30 I reach the same conclusions in relation to the other criticisms of the construction of the external walls on which he was cross-examined. Nonetheless it is apparent from the nature and extent of the defects to the external walls that neither Mr Nicholls nor Mr Eadsforth nor Mr Mather can have undertaken a careful or detailed inspection of the building exterior. This is particularly evident in relation to an area where the external render layer had simply not been applied and where Mr Mather accepted in cross-examination that he ought to have seen this and, had he done so, would have refused to issue a Bldg Regs final certificate in relation to the affected flats. The same is true in relation to the balustrades, where Mr Mather accepted that he would have tested them for their strength had he undertaken a final inspection of a flat with an accessible balustrade. Mr Easton as ZBC's building control expert is of the view that Mr Mather did not act with reasonable competence in missing these defects. However in my view it has not been demonstrated that the

nature and extent of these defects are such that Mr Nicholls or Mr Eadsforth and Mr Mather must have been aware of them but consciously chose to ignore them. As Mr Asquith submits, such a conclusion would be inconsistent with the evidence in Live 27 that the surveyors were aware of and did note a number of relevant defects. If they did fulfil their duties in relation to those defects it is not credible that they would have seen but consciously chosen not to raise these equally serious defects in the external walls. It seems to me that the picture is more consistent with negligence by Mr Nicholls or Mr Eadsforth and Mr Mather.

4.31 Issues also arise in relation to the absence of some items. In particular, Mr Mather was cross-examined about the failure to take any action as regards the absence of lifts, in circumstances where the original design had clearly included provision for lifts and where lift shafts had been constructed but no lifts installed. Mr Mather accepted that he was aware of this, saying that Steve Jordan of JCS had told him that JCS was not going to install the lifts until later on because it would cost JCS £35,000 to do so and JCS had left lifts uninstalled on a previous block inspected by Manchester Building Control without problem. Mr Mather said that he accepted this because there was no requirement in the Bldg Regs to provide a lift to a block of flats and, thus, no way for an approved inspector to force a developer to put in a lift or to change the entrance to a more wheelchair friendly design. He was cross-examined about this and accepted that in relation to Block C the entrance was plainly not accessible to disabled persons. However, he maintained that there was nonetheless no breach of Bldg Regs. Whilst it would no doubt be possible to reach a conclusion as to whether that view is correct the position is not altogether straightforward nor clear on the evidence before me. Thus although ZBC admitted that a failure to provide adequate lifting devices for wheelchair users and disabled residents would be contrary to the recommendations of the relevant paragraphs of the relevant Approved Document, compliance with the specific requirements of the Approved Documents is not mandatory. Moreover, the relevant experts have not opined on the issue, since the claimants have not pursued a substantive claim against ZIP as regards the absence of lifts given that they are the subject of an express exclusion in the policies.

4.32 The real question for me is whether I can be satisfied that Mr Mather knew that the lack of lifts meant that the Bldg Regs were not satisfied and, therefore, that Bldg Regs final certificates ought not to be issued in relation to flats affected by the lack of a lift. I am unable to be satisfied that this was the case. It is inconceivable in my view that Mr Mather would have issued the Bldg Regs final certificates had he known or believed that the lack of lifts constituted a flagrant breach of the Bldg Regs, in circumstances where he knew that JCS was not intending to install the lifts at least in the short term. If it was such an obvious non-compliance then one would have expected Mr Nicholls or Mr Eadsforth to have picked it up as well, yet there is no suggestion that it prevented them from issuing cover notes or final insurance certificates. There is no evidence that Watts were sufficiently concerned to raise it in their reports as a serious contravention which, if true, would doubtless impact on the value of the Bank's security.

4.33 Mr Mather was also asked about the use of timber staircases which, it was said, would have been unacceptable as they would have compromised the safe means of escape in the event of fire. In his witness statement he said that he had raised this with JCS who had agreed with his alternative suggestion of treating the timber with a non-combustible paint treatment. He accepted that he had relied upon JCS' assurance that it had done so, in circumstances where it was his evidence that it would not necessarily have been easy to identify from a visual inspection whether or not it had been

applied. It was suggested to him that he ought not to have accepted an assurance from JCS in circumstances where there was evidence that it could not be trusted to do what it said it would. However, there is no requirement under the Bldg Regs or otherwise which prohibits a building inspector from proceeding on the basis of information provided by the developer, and it is obvious that in many cases that will be the only way to proceed in the absence of the inspector being present at every stage or there being some independent certification. Whilst there will be room for argument in an individual case whether or not the building inspector acted reasonably competently in accepting an assurance in a particular case, in my view it cannot be said on the facts of this case that accepting an assurance as to the application of the timber treatment is evidence of Mr Mather consciously signing off Bldg Regs final certificates in the knowledge either that no timber treatment had been applied or that he had not taken the steps which he ought to have taken in order to satisfy himself on the point.

4.34 The absence of balconies to 4 flats is also a matter which was raised in cross-examination both of Mr Nicholls and of Mr Mather. In February 2009 Mr Nicholls had issued cover notes relating to 4 flats in circumstances where it is clear that no balconies had been installed and therefore in circumstances where there was clearly a risk of injury through someone exiting the French doors without appreciating the risk of falling. The cover notes recorded that this was a final inspection and that the contractor was "on with snagging works". Mr Nicholls agreed that the absence of balconies went beyond mere snagging works and he was at a loss as to how he had come to issue these cover notes in such circumstances, especially since there was no record on Live 27 as to his having undertaken a final inspection at this time. I shall return to Mr Mather's evidence on this point later in connection with flats 126 and 127.

4.35 The Live 27 records indicate the number of flats which were inspected at stages 06, 07 and 08. As I have said stage 06, the pre-plaster stage, was obviously an important stage, particularly in relation to fire safety related matters. It is a matter of record from the Live 27 notes that as regards stage 06: (a) there had been no stage 06 inspections at all in blocks C and E; (b) only 36% of the flats in block D had been inspected; (c) only 61% of the flats in blocks A and B had been inspected. Mr Nicholls agreed that this was unacceptable, both because of the lack of flats inspected and because of the presence of recurring fire safety related issues such as a lack of beam fill insulation. He did not say that he was conscious of this at the time and, as Mr Asquith submitted, it is more likely than not that he was unaware of just how few stage 06 inspections he was undertaking and that the lack of inspection was due to oversight due to pressure of work. When asked by Mr Selby, he said that he believed that he must have commented on this to Mr Mather. When the statistics were put to him, Mr Mather said that he was surprised and shocked to hear of the position in relation to blocks C, D and E and that even the inspection rate in blocks A and B was "not good". He said that he had no recollection of being told this by Mr Nicholls.

4.36 More generally, Mr Nicholls was asked whether or not he had shared his concerns with Mr Mather, as expressed in his January 2009 email (which was not copied to Mr Mather), about the lack of resource to perform the building control function. His answer changed from saying that he assumed so to saying that he was sure he would, although he also accepted that he did not really remember very much about the development.

4.37 The question arises as to whether or not Mr Nicholls did tell Mr Mather both about the poor inspection rate for stage 06 and more generally about the pressures on his time and consequent inability to do a thorough job in relation to his inspections of New Lawrence House. In my judgment it is unlikely that Mr Nicholls did tell Mr Mather about the poor inspection rates or, other than in the most general of terms, about the time pressures upon him. It did not seem to me from hearing the two men give evidence that they had a particularly close working relationship: since they were both home and site based rather than being based at the same office and since they did not know each other particularly well on a personal level they did not have the sort of working relationship whereby they would have regularly had general discussions about the way things were going in relation to particular developments or within ZBG more generally. Nor did Mr Nicholls have any clear or specific recollection of telling Mr Mather about these events. Although the evidence shows that Mr Nicholls attended New Lawrence House for the first time on 20 January 2009 and picked up various items, including fire safety matters, there is no evidence to indicate that Mr Mather was present at the same time, and no particular reason to believe that he would have been.

4.38 Looking at matters more widely, it is clear in my view that the only reason why Mr Nicholls inspected an unacceptably low number of flats in these blocks was due to pressure of time. He had already expressed his concerns about time pressures in January 2009 and received no constructive response. There is no evidence that he raised his inability to inspect a sufficient number of flats in this development to his superiors. There is no obvious reason, therefore, why he should have shared it with Mr Mather since there is no suggestion, for example, that he asked Mr Mather to undertake inspections for him in order to compensate for the lack of his own inspections. Nor is there any evidence that Mr Nicholls would simply have wanted to confide in Mr Mather for the sake of confiding with someone. It seems more likely to me that Mr Nicholls would have just kept quiet about it. Moreover, there is no reason to believe that Mr Mather would have become aware of the situation other than through being informed by Mr Nicholls. I accept his evidence that he was not in the habit of interrogating Live 27. His reaction at being informed of the low number of inspections under cross-examination seemed to me to be plausibly surprised and consistent with his not being previously aware of the fact.

4.39 On 23 June 2009 the Live 27 records show that Mr Nicholls had apparently inspected and was concerned as to a number of fire safety matters, including the following: the intumescent paint applied to the steelwork being incomplete and needing rectification; inadequate firestopping to party wall / ceiling junction; steelwork requiring repainting; party walls between common areas and flats not being fully fire stopped; handrail to entrance stairs outside block C requiring fixing; missing fire stopping in riser cupboards; incorrectly sealed soil pipes in the car park where they passed through the ceiling; missing intumescent strips on riser doors; and inadequate smoke ventilation to corridors. He agreed that these were serious matters and believed that he would have notified Mr Mather of these issues. He agreed that the Live 27 records showed that they had not been entered as remedied until September 2010. This is a point to which I shall return.

4.40 On 12 November 2009 Mr Timperley of Manchester Building Control wrote to Mr Van Schalkwyk, copied to Mr Mather, to advise them that he had been informed that New Lawrence House had been partially occupied for over 2 months notwithstanding the absence of any Bldg Regs final certificate and the reported presence of a number of complaints, including some building control related

defects. In particular, he referred to concerns in relation to fire protection of the structural frame with exposed steelwork in parts and concerns as to the means of escape, including the lack of action to complete the stair cores and communal corridors, with unguarded stairs, and possible holes in fire resistant floors with no visible sign of fire stopping. It is clear that Mr Timperley was extremely concerned that the building was being occupied in such circumstances. Mr Van Schalkwyk replied on 17 November 2009 to say that ZBG would investigate fully and revert. Mr Cairns was clear in his evidence that he would not have expected an experienced building control inspector such as Mr Mather to have issued a Bldg Regs final certificate in relation to specific flats if such matters were present on inspection and had not been addressed, since they were plainly material to the safety of the means of escape from such flats.

4.41 On 13 November 2009, the Live 27 records indicate that Mr Eadsforth had inspected and noted a substantial number of defects in relation to the common parts, including a substantial number of fire safety related defects echoing or adding to those already recorded in June 2009, which had not been marked as remedied, and including: inadequate fire stopping to party walls; inadequate fire stopping in riser cupboards; incomplete curtain walls; missing seals around soil pipes in the car park where they passed through the ceiling.

4.42 It is of significance that the Live 27 records showed that all of these items had not been entered as remedied until September 2010, by which time Mr Eadsforth was no longer with ZBC, having left its employment on 31 December 2009.

4.43 Mr Eadsforth said that it was likely that he would have inspected the common parts either with Mr Nicholls or Mr Mather or possibly with both of them, albeit that the inspection was recorded as having been made only by him. He agreed under cross-examination that they included a number of fairly serious items and he assumed that if he had attended only with Mr Nicholls then Mr Nicholls would have passed this information on to Mr Mather. Mr Nicholls agreed that if he had been present or if Mr Eadsforth had notified his findings to him he would have relayed this information on to Mr Mather. Mr Mather said that he thought it was "more likely" that he attended with Mr Eadsforth on that occasion and inspected with him to satisfy himself that, for example, the steelwork was fire protected. The Live 27 records also show that Mr Eadsforth attended again on 27 November 2009 and recorded that the smoke ventilation to the corridors was inadequate. Again it seems to me to be likely, as Mr Eadsforth suggested, that he visited with one or both of Mr Nicholls or Mr Mather on that occasion.

4.44 In my view the strong likelihood is that it was Mr Mather, rather than Mr Nicholls, who attended with Mr Eadsforth on at least one if not both of those occasions. In my view the evidence indicates that by this stage Mr Nicholls had little if any ongoing involvement with this development. He is last recorded in the Live 27 notes as having carried out an inspection on 27 June 2009. It appears that Mr Eadsforth's first recorded inspection was in September 2009. It seems plain to me that by November 2009 it had been decided that Mr Eadsforth – with access to Mr Mather if needed - would finish off what needed to be done on New Lawrence House, leaving Mr Nicholls to concentrate on other developments. Whilst I appreciate that none of the three witnesses were clear as to when Mr Nicholls stopped attending site and whilst Mr Eadsforth did not say that Mr Nicholls was not present at the inspections in November and December 2009, it is noteworthy that Mr Nicholls is not recorded as having issued any cover notes in November or December 2009, whereas

Mr Mather and Mr Eadsforth are both recorded as having issued them at this time. In the context of ZBG being undoubtedly stretched at this time and Mr Mather being directly involved it seems unlikely that all three men would have been on site at the same time. Indeed, if Mr Nicholls was still undertaking inspections of New Lawrence House with Mr Eadsforth it would make no sense for Mr Mather to be there as well, given the former practice whereby he would rely on Mr Nicholls to provide the necessary confirmation before issuing the Bldg Regs final certificates. In my view it was assumed that Mr Eadsforth would be able to complete the building warranty surveying function, with access to advice from Mr Mather if required. However, at this time Mr Mather was undoubtedly busy himself. As appears from an internal email of 11 November 2009 the plan was that Mr Mather would take on all building control jobs once Mr Van Schalkwyk left ZBG on 9 December 2009. There is no doubt that this substantially increased the pressure on Mr Mather as the sole remaining building control inspector. He accepted in cross-examination that it was a "busy time".

4.45 In the letter Mr Timperley noted that if the development had been occupied without a Bldg Regs final certificate having been issued that might engage reg. 18(2)(b) of the Approved Inspectors Regulations. The impact of this was that the initial notice would cease to be in force unless a Bldg Regs final certificate was issued within 8 weeks of the date of occupation, with the consequence that ZBC would be unable to act as approved inspector or thus issue any Bldg Regs final certificate subsequently. There is no evidence that Mr Van Schalkwyk conducted any investigation into the concerns raised by Mr Timperley before he left ZBG and it is clear that the matter was left to Mr Mather to deal with. Under cross-examination Mr Mather said that this did not matter in practice since the initial notice was not in fact cancelled and ZBC just carried on. In my view Mr Mather was probably right in thinking that whatever the Regulations might provide in practice this would not be a problem unless or until Manchester Building Control took positive steps to take back the building control role.

4.46 I am satisfied however that Mr Mather, as a vastly experienced building control inspector, knew enough about the procedures to be concerned that unless action was taken by him to resolve matters sooner rather than later the problem would not go away because Mr Timperley was unlikely just to give up. I am also satisfied that of the two options, the first being to undertake a full investigation, with all the potential time and effort and negative consequences that might entail, and the second being to press on to issue Bldg Regs final certificates as soon as possible so as to get the job completed and off his desk, the second option would have been far more attractive to him. Although under cross-examination Mr Mather rather downplayed the seriousness of the letter he did agree that a number of the matters raised in it were relevant to Bldg Regs compliance and that he would have wanted to investigate. He said that he recalled visiting site and discussing matters with JCS, although he was unable to recall any details. This is consistent with the internal email which he sent on 7 December 2009 where he recorded that he had visited site that day and that he was planning to visit again on 11 December 2009. He said that "we have had a couple of problems, all now being resolved". The clear implication, I am satisfied, is that he had been re-assured that JCS would be taking sufficient steps in a short time period to enable him to sign off the development. Equally clearly, in my view, it would not have been possible for Mr Mather to have relied upon those assurances when signing off the Bldg Regs final certificates later that month, as he did, without having satisfied himself, either from his own inspections or from information provided by the building warranty surveyors, that the Bldg Regs were complied with in all

substantive respects in relation to the individual flats and the means of escape from those flats by that point.

4.47 On 11 December 2009 Mr Mather issued an unqualified cover note with the comment "final" for flat 131. This was the subject of some investigation in his cross-examination. He accepted that in order to issue this cover note he would have had to be satisfied as to the safety of the means of escape from this flat. However, it would have been apparent from Live 27 and indeed from a visual inspection that there were unremedied issues relating to the fire safety of the common areas, which in Live 27 were recorded as dating from the inspection of 13 November 2009 and which were not marked as remedied as at 11 December 2009. Mr Mather accepted that he would have checked the Live 27 system in order to issue the cover note, not just in relation to the particular flat but also in relation to the common parts in 99C to ensure that there was a safe means of escape. He suggested that the defects might have been remedied in December 2009 but not entered in Live 27 as remedied until September 2010. There was no evidential basis for this suggestion, which is wholly inconsistent with all of the other evidence. The fact that Mr Mather was prepared to make that suggestion, albeit under the pressure of cross examination late in the day, was concerning, especially because the explanation he gave appeared to be that a surveyor would have been prepared to accept the assurance of Mr Jordan of JCS alone that one of the defects identified, that the intumescent paint to steelwork was incomplete and needed rectifying, had been rectified without inspection or the provision of sufficient documentary evidence (such as the provision of invoices for the supply and/or application of intumescent paint).

4.48 Moreover, although Mr Mather is recorded as having issued the cover note in relation to flat 131 the surveyor code for the final inspection on 11 December 2009 is 0312, Mr Eadsforth's reference. It is apparent, therefore, that he must also have been present at the inspection on that date. In relation to flat 131 there were no unremedied defects registered against the flat and, it follows, no impediment to the system being used to issue a cover note. However, Mr Mather could not explain why the cover note had been issued in his name if the entry had been made by Mr Eadsforth. The only sensible explanation in my view is that which was put to Mr Mather, which is that he had created the cover note manually, using the Word format version to which he would have had access. That is consistent with the fact that the cover note in relation to flat 139, issued on the same date, has content which differs from the content generated by Mr Eadsforth on Live 27 when the system records him as having inspected that day.

4.49 Whilst I accept that there could be an innocent explanation for this, because there would have been no need to create a Word cover note when the system could just as easily have done so, nonetheless it demonstrates in my view that Mr Mather must have been present on 11 December 2009 and must have been undertaking an inspection along with Mr Eadsforth which must have involved him inspecting specific flats as well as considering the particular points in relation to the common parts, and in particular fire safety and safe means of escape, raised both by Mr Eadsforth in his November 2009 inspection and by Manchester Building Control in its November 2009 letter.

4.50 Moreover, the use by Mr Mather of the Word option to generate cover notes was not limited to flat 131. That is because he also manually issued cover notes on 7 December 2009 in relation to flat 134 and on 11 December 2009 in relation to flat 139 in similar circumstances. A manual cover note must also have been used in relation to flat 126, a ground floor flat in Block E, where a cover

note was issued by Mr Mather on 29 January 2010 despite the absence of render and where in January 2010 there was an unremedied defect dating from June 2009, so that this cover note could not have been issued through the system.

4.51 It follows, I am afraid to say, that I am satisfied that Mr Mather's initial evidence in cross-examination, that he could not remember having done that, that he could not think why anyone would want to do it, that he never did it whilst a warranty surveyor and that he would not issue one, was simply not true and that at least in relation to flat 126 I am satisfied that he consciously manually issued a cover note knowing that he could not have issued it through Live 27. I reach this conclusion because it is apparent that Mr Mather must have attended site on this date, even though he had not recorded this attendance in the Live 27 system. Since he was undertaking a building warranty function and not a building control function, he must have needed to access Live 27 to see what defects were marked as unremedied. Moreover, he could not simply have missed the absent render unless he was aware that he had not done anything like a proper inspection.

4.52 In his closing submissions Mr Asquith submitted that it was unfair to make adverse findings against Mr Mather in relation to the cover notes, because they did not form part of the pleaded case as against ZBC. I accept that there is no pleaded allegation against Mr Mather in relation to the cover notes. However in my view the circumstances in which he came to issue the Bldg Regs final certificates in December 2009 cannot be divorced from his overall knowledge of and dealings with the development in this period and it does not seem to me to be unfair to him to consider how his evidence overall is consistent with the clear documentary evidence in relation to the production of these cover notes, particularly in circumstances where he began his evidence by denying that he had ever produced manual cover notes.

4.53 Moreover, although I am reluctant to make adverse findings against Mr Nicholls when they were not expressly put to him, it is clear from the documentary evidence that he was also prepared to manually issue cover notes at a time when the stage 08 inspection had not been undertaken.

4.54 The inevitable inference it seems to me is that both Mr Mather and Mr Nicholls were prepared to do so in the face of – I have no doubt – pressure from JCS in order to achieve completions on the basis of assurances from JCS that any outstanding items would be attended to. I am satisfied that by December 2009 Mr Mather was so desperate to be finished with this development and so pressured by JCS to issue cover notes so that they could get on and complete their sales that he was prepared to issue cover notes manually even where there were unremedied defects on the system in the hope that JCS would remedy all items within a short timeframe so that they could be signed off and final building warranty certificates issued.

4.55 More concerningly, in the light of the references to the lack of protection to exposed steelwork within Live 27 in relation to the common parts, he was asked whether he would have checked this before issuing a cover note. He replied that he would have if it had been brought to his attention. It plainly had been brought to his attention by the letter from Manchester Building Control. As I have said the Live 27 records an entry for the common parts for 23 June 2009 which states: "Repaint all steelwork exposed as discussed". There is no evidence that this had been attended to prior to 11 December 2009 and, as I have said, the defect was not marked as rectified until September 2010. He admitted that the lack of protection was obvious and that he also knew in December 2009 that

the exposed steelwork was not protected. Similar questions were asked in relation to the entries in Live 27 in relation to the compartment floor above the car park, the unsatisfactory state of the ventilation and compartmentation and the absence of render in block E. As to the render Mr Mather would have had to visit Block E had he inspected flats 131 and 139 along with Mr Eadsforth, which I am satisfied he would have done. In such circumstances the missing render would have been obvious to him, as he agreed in cross-examination. The conclusion I am driven to reach is that Mr Mather was prepared to issue cover notes in circumstances where he must have known that he had not undertaken a proper check to see if these items, significant in relation to Bldg Regs and – as regards fire safety - for the safety of those occupying these flats, had been satisfactorily completed.

4.56 Although Mr Asquith submits that Mr Mather should be believed when he said that he would never have signed off the Bldg Regs final certificates had he known of the inadequate fire safety provision with the consequential risk to the safety of occupants, I am afraid that I am unable to accept this. Apart from anything else it is clear from his email of 29 January 2010, referred to below, that he was aware of the inadequate fire safety provision by that stage yet, as I am satisfied, did nothing about that other than to repeat an assurance given to him by JCS. In my view the position is that Mr Mather was aware by this stage of the inadequate fire safety provision and that this represented non-compliance with the Bldg Regs but that a number of the flats were being occupied anyway. Despite this knowledge I am satisfied that Mr Mather yielded to pressure from JCS to issue the Bldg Regs final certificates, in circumstances where he was willing to accept their assurances that adequate fire safety provision would be made, probably using the services of a specialist fire consultancy and subject to liaison with and approval from the Fire Service, which is of course precisely what JCS was saying and doing in January 2010. It must have seemed to Mr Mather at the time as the least worst option in a very unsatisfactory state of affairs.

4.57 That conclusion is reinforced by the evidence in relation to flat 126, which is a flat included in the Bldg Regs final certificate issued on 15 December 2009 where the evidence is that both at that date and as at the date of the cover note on 29 January 2010 no balcony had been fitted notwithstanding that there was a drop down from the opening French window to the ground below. Mr Mather had given evidence that he had been prepared to sign off the flat because JCS had agreed that the door was to remain locked until the balcony was fitted. When the prospective purchaser's solicitor wrote to ZBG to protest about the cover note being issued in such circumstances it is clear that Mr Mather informed Mr Cairns that he had agreed to issue a cover note on the basis that JCS would retain ownership of the flat and the French doors would be locked until the balcony was fitted. By this stage Mr Mather was, as he admitted, aware that JCS had lied to him about their intentions in relation to the flat. Nonetheless the evidence indicates that even after this Mr Mather was prepared to support the position by referring to JCS' assurance that a screw would be placed into the door mechanism to prevent it from being opened wide enough to allow anyone to pass through it. It was plain from Mr Cairns' evidence that he would not have been prepared to issue a Bldg Regs final certificate on that basis.

4.58 It seemed to me from Mr Mather's evidence that he knew that JCS were pressing for ZBG to issue a final building warranty certificate as regards this flat and, in my view, he was prepared to support them in this notwithstanding that there was a plain and obvious problem with the flat. Although a cover note cannot be located it is evident in my view from the correspondence that Mr Mather must

also have issued a cover note for the adjacent flat 127 at a time when it also had no balcony, the effect of which was to enable JCS to demand that the purchaser of flat 127, Ms Goldman, should complete the purchase.

4.59 Returning to the chronology, on 15 December 2009 Mr Mather issued the first final certificate under the Bldg Regs. Mr Mather confirmed that the Bldg Regs final certificates could not simply be printed out through Live 27 and had to be created by him in Microsoft Word format, albeit in a standard format which complied with the relevant Regulations. This first certificate related to 115 flats. The flats included flats 13 and 91 to 125 whereas it is common ground that in fact there were no such flats in existence. In reality, therefore, the certificate related to only 79 flats. Mr Mather explained that this was a simple mistake, because JCS never intended to number a flat 13 (the reason being that many prospective purchasers would not wish to buy a property numbered 13 for superstitious reasons) and because flats 91 to 125 were the intended numbers for the flats to be included within a separate block which had not at that point been constructed (and in fact never was). I readily accept that this was a simple error which was later corrected by Mr Mather when the point was picked up by Manchester Building Control in October 2010.

4.60 However, it is still relevant to consider how this basic and fundamental error could have been made. By this point in time Mr Mather had inspected the development on a number of occasions within the last days and weeks, as had Mr Eadsforth. Mr Nicholls was no longer involved and Mr Eadsforth was effectively therefore working without supervision. If the system had been working as previously and as intended, with Mr Mather as the building control inspector relying on confirmation from an experienced building warranty surveyor that the surveyor had conducted a satisfactory stage 08 final inspection of specified flats and issued final insurance certificates in respect of those flats, then it is inconceivable that this mistake could have been made.

4.61 I have no doubt that Mr Eadsforth, however inexperienced, would never have communicated to Mr Mather that these particular flats had been inspected and passed and final insurance certificates issued when they plainly had not. Indeed, it is apparent that a large number of the flats included within the certificate issued on 15 December 2009 were the subject of stage 08 inspections and building warranty final certificates issued on 23 November 2009 and 11 December 2009. It follows, in my view, that if Mr Eadsforth was conducting stage 08 inspections and arranging for building warranty final certificates to be issued in relation to these particular flats at this stage it is simply not credible to consider that he could or would have done likewise in relation to what were plainly non-existent flats. Thus I have no doubt that Mr Mather could not simply have relied on information passed to him by Mr Eadsforth that specifically referred to these non-existent flats as having been inspected and certified complete for building warranty purposes. I am also satisfied that it was not possible for Mr Mather to believe with confidence in relation to the flats covered in the December 2009 certificates that they had all been inspected by Mr Nicholls as an experienced building warranty surveyor in the run-up to 15 and 21 December 2009 who had satisfied himself that all works had been completed in accordance with ZBG's technical manual and all defects remedied so that a final building warranty certificate had properly been issued in relation to each one.

4.62 It follows, in my view, that the only possible explanation is that Mr Mather included these flats in the certificate because he was operating under time pressure and keen to get the job finished and

had neither received individual confirmation from the building warranty surveyors relating to all of the individual flats included in the certificate nor undertaken his own separate flat by flat inspection process. The only possible explanation in my view is that Mr Mather wanted to get the job done before the Christmas break.

4.63 On 21 December 2009 a further 18 flats were certified by Mr Mather. Some - but not all - of these were only inspected by Mr Eadsforth for stage 08 purposes and issued with a building warranty final certificate after 15 December 2009. Mr Asquith relies upon this fact as showing that Mr Mather must have been looking at each flat separately before issuing the Bldg Regs final certificates, otherwise these would have been included in the 15 December 2009 certificate. This is a fair point. In my view the most likely explanation, which I accept is an inference but which accommodates the error in relation to the non-existent flats as well as this point, is that Mr Mather and Mr Eadsforth must, prior to 15 December 2009, have identified those flats which had not been signed off as complete, and Mr Mather then proceeded to issue the final certificate on 15 December 2009 in relation to all of the rest, including the non-existent flats, and was subsequently notified by Mr Eadsforth of the further specific flats which had been signed off between 15 December and 21 December (or previously signed off but, probably, just missed).

4.64 Thus, by 21 December 2009 a total of 97 were certified, leaving only a further 7 to be certified. These were flat 11 on the 2nd floor of Block D, flats 23, 25 and 26, on the 4th floor of Block D, flats 57 and 58 on the first floor of Block A/B and flats 126 and 127 on the ground floor of Block E. No one has been able to offer any explanation as to why these remaining 7 were not certified in December 2009. By reference to the Live 27 entries for these particular flats there is nothing obvious about them recorded which indicates why they were not signed off in December 2009, when flats in the same areas in the same blocks were being signed off at that time. It cannot be said by ZBC that there was some substantive reason, such as a particular problem with the means of access which affected only these individual flats, which justified their not being signed off until later. The known explanation relates to the missing balconies to flats 126 and 127 but this is not recorded in Live 27.

4.65 In my judgment, therefore, the only sensible explanation is that this was again an oversight. It is possible, although no more than inference, that Mr Eadsforth simply did not get around to inspecting these flats prior to the Christmas break and his then leaving ZBG's employment. In his email of 29 January 2010, referred to below, Mr Mather informed Mr Timperley that he had informed JCS that it was his "intention not to issue any further completion certificates to individual apartments, both Building Regulations and Zurich Warranty, until such time that all works to the common areas, external fabric et cetera have been completed". This statement may explain why nothing more was done until September 2010, when Mr Mather made entries in the Live 27 notes recording that the outstanding unremedied defects had been remedied, so that building warranty final certificates for these remaining flats were issued as well as common parts certificates for all of the flats, even though he did not issue the final Bldg Regs final certificate until November 2010, and then only after having "carried out a detailed audit" after having being reminded of the discrepancies in the number of flats covered by the Bldg Regs final certificates by Manchester Building Control in its letter of 22 October 2010.

4.66 This picture of general lack of care and attention probably also explains the mystery of flat 126, which was included in the certificate of 15 December 2009 even though no cover note was issued until 29 January 2010 and no stage 08 inspection or building warranty final certificate was issued until 10 September 2010. It would appear likely that it would have been intended to have been left out as an incomplete flat for some reason, but then included by mistake.

4.67 More generally, the claimants invite me to make a specific finding that no certificates relating to the mechanical and electrical systems were provided to Mr Mather at this stage or, indeed, subsequently, so that Mr Mather could not properly have issued these Bldg Regs final certificates in December 2009. This is relevant because, as Mr Mather accepted in cross-examination, he could not sign off on any given flat unless he had all of the necessary test certificates and that this was an obvious requirement which he could not simply have forgotten to check.

4.68 Mr Mather was unable to recall receiving any such certificates. However, that is not surprising, given the passage of time, and I place no reliance on that. More significant is the evidence that no certificates appear to have been present within box 54 when inspected by Mr Parvin in 2013. Mr Mather's evidence was that he sent all of his existing project files back to the Zurich Farnborough office. However, Mr Mather was unable to say whether or not the certificates were left in the site folder which, as he said, had a tendency to go missing. He also said in cross examination that it would have been sufficient for him to have been told by one of the building warranty surveyors that they had seen the relevant certificates so that he might not necessarily have seen them personally or been provided with copies.

4.69 Whilst the absence of certificates or evidence that they were ever provided is concerning, I do not consider this evidence to be sufficient to enable me to conclude either that the necessary certificates were never in existence or, more pertinently, that Mr Mather knew that neither he nor any of the building warranty surveyors had seen the necessary certificates as at the time he signed off the Bldg Regs final certificates. Although Mr Selby invites me to conclude that the necessary certificates were never in existence because the claimants' expert evidence is that the state of the M&E installations was such that they could not have been certified, I do not consider that this evidence is sufficiently compelling to alter the position. The experts can only give expert evidence as to whether or not the necessary certificates could properly have been issued or accepted given their view as to the state of the M&E installations. Whilst that is of course relevant, it is not decisive of the question as to whether or not such certificates were actually issued and accepted.

4.70 By January 2010 Mr Eadsforth had left ZBG and there is no record of Mr Nicholls inspecting the development at all in 2010. It is clear therefore that Mr Mather was in sole charge of the development both for building control and building warranty purposes.

4.71 On 9 January 2010 Mr Timperley chased Mr Mather for a response to his previous email to Mr Van Schalkwyk. He also queried whether the final certificates issued so far related only to the flats themselves or also to the associated common areas and repeated his threat to treat the building control function for the development as reverting back to Manchester Building Control in the event of not receiving a satisfactory reply. Mr Mather replied later that month on 29 January 2010, recording that he had met with JCS and the Fire Service to discuss the fire safety implications of the development and had also attended site again on that day. He stated that: "A fire risk assessment

had been prepared which includes a series of remediation works to improve the fire safety provision within the common areas, this is to be submitted to the fire authority by JCS and, if agreed, the works implemented as soon as possible". This appears to me to be an implicit acknowledgement by Mr Mather that the fire safety provision within the common areas was not acceptable. In fact, it is clear from the later evidence that no fire risk assessment had been obtained by this stage. It is clear that Mr Mather could not, therefore, have seen a fire safety assessment but was still prepared to believe what he was being told by JCS without obtaining any independent confirmation.

4.72 Mr Mather also said that: "All service risers have now been inspected and remedial works completed to fire stopping etc". This clearly infers that either he or one of the building warranty surveyors had inspected the service risers and observed that the remedial works had been completed. That statement is not supported by any entry in the common parts section of Live 27 and is wholly inconsistent with the view of the building control experts. Nonetheless Mr Mather insisted when asked that he could only have written it if he had inspected the service risers himself or had been informed by a colleague that they had done so. I am satisfied that this cannot be true. They could not have been inspected by Mr Eadsforth, who had left ZBG by then. There is no evidence or reason to believe that Mr Nicholls, who as I have already said I consider had effectively divested himself of responsibility for the development by this stage, would have attended on the same day as Mr Mather and, if he had, one would assume he would have entered up his inspection on Live 27. If Mr Mather had personally inspected the service risers then he would have seen that what he was reporting was not true. If he had negligently inspected and genuinely believed that the work had been done there would have been no reason for him not to have updated Live 27 accordingly. In my view the only credible explanation is that he had been told by JCS that it had been done and was prepared to repeat that assertion without conducting his own enquiry.

4.73 Furthermore, in his letter Mr Mather said: "all final certificates issued to date relate solely to the individual flats and none of the common areas are considered to be fully complete at this stage". However he accepted that when he had issued the previous final certificates he had done so on the basis that in his view he was satisfied that the means of escape through the common parts serving the individual flats complied with Bldg Regs.

4.74 In July 2010 Mr Timperley pressed Mr Mather once again for an update in relation to the remaining flats in respect of which there was no final certificate and in relation to the common parts. (I should observe at this point that Mr Timperley is plainly to be congratulated for his diligence and perseverance and would ask that the claimants' solicitors convey my opinion in this respect to him if they still have his contact details from when they took witness statements from him.) He attached a complaint which raised concerns in relation to the safety of the means of access. Mr Mather appears to have done nothing until 10 September 2010 when entries were made in the Live 27 notes recording that the outstanding unremedied defects had been remedied and when Mr Mather issued building warranty certificates for the common parts. However, Mr Mather's evidence was inconsistent as to whether or not he physically attended site to satisfy himself that all outstanding matters, including the defects remaining in Live 27 and the matters raised in the July 2010 correspondence, had been remedied. In paragraph 36 of his second witness statement he said that he did not re-inspect and relied on JCS' assurances that all identified defects in the common areas had been rectified, whereas in evidence he suggested either that he or another surveyor had inspected and had referred to the site folder. Given that the outstanding defects in Live 27 related

to serious fire safety related matters and given the seriousness of the matters complained of in the July 2010 correspondence and given that by this stage no other surveyors were available to inspect and given that he must have known full well that he could not trust anything he was told by JCS it seems to me to be inconceivable that Mr Mather could have recorded the defects as unremedied and issued the common parts certificate without physically attending site and undertaking a detailed and conscientious inspection himself and yet I am satisfied on all of the evidence that he did not do so, relying instead on JCS' worthless assurances. I am satisfied that by this stage Mr Mather had effectively washed his hands of the development and simply wanted the problem to go away.

4.75 It is also the case that Mr Mather signed off flats 126 -127 at a time when they still had no balcony. Even though I accept that he may genuinely have believed that the safeguards introduced by JCS pending balcony installation meant that it was appropriate to sign off the flats, nonetheless the abject failure by JCS to provide balconies over 6 months after the problem was raised must surely have caused him concern.

4.76 In October 2010 Manchester Building Control wrote to JCS and to ZBG asking for an explanation why the final certificates referred to 132 flats when only 104 flats had been constructed. Mr Mather responded on 8 November 2010, saying that it was due to incorrect information provided to him by an unspecified "site surveyor" and enclosing an amended final certificate stating the correct number together with the further final certificate for flats 11, 23, 25, 26, 57, 58, 126 and 127. Again, I am satisfied that he did not undertake any further inspection before issuing these certificates and, insofar as relevant, I am also satisfied that there was no basis for him to seek to blame any site surveyor for this error, which was his alone. Again, I am satisfied that by this stage he simply wanted to do what was necessary to make the problem go away.

5 The evidence relating to the individual claimants

5.1 I shall refer to the individual claimants in the order in which they gave evidence and address Zagora, as the last and latest of those acquiring an interest in the development, at the end.

5.1	Mr Tarasov
5.2	Dr Ikpeme
5.3	Mr Gledhill
5.4	Mr Kennedy
5.5	Mr Hussain
5.6	Ms Horley
5.7	Mr Sugarman
5.8	Ms Whale
5.9	Mr Roberts
5.10	Mr Kraftman

5.11	Mr Spadaro
5.12	Mr Manchikalapati
5.13	Mr Montgomery
5.14	Mr Mills
5.15	Mr Creber
5.16	Mr Husain
5.17	Ms Tanti-Apichart
5.18	Mr Bartlett
5.19	Mr Emin
5.20	Ms Goldman
5.21	Ms Bedi
5.22	Mr Dickie
5.23	Other individual leaseholder claimants not called
5.24	Zagora

5.1 Mr Tarasov

5.1.1 Mr Tarasov claims against ZIP and ZBC. He is an Australian who trained as an accountant and is employed in a consultancy role. He is obviously intelligent, familiar with matters of business and finance and careful in his dealings. He had previously acquired a buy-to-let property in Australia.

5.1.2 He was introduced to the development through Assetz and was interested in buying a flat as a buy-to-let investment at a time when he was in the process of moving to the UK to work. He was attracted to New Lawrence House as a new build development with anticipated low maintenance costs, situated in what he believed was a good location for letting purposes and being marketed as ready tenanted.

5.1.3 He completed a reservation form in January 2010 and, using the services of Birchall Blackburn of Manchester (as noted in section 3, a firm introduced by Assetz who acted for a number of the individual leaseholder claimants on the same basis), simultaneously exchanged and completed on flat 41 on 19 March 2010.

5.1.4 Flat 41 was included in the Bldg Regs final certificate issued on 15 December 2009. However, he accepts that he was not provided with a copy at any time before exchange or completion. Nor does he – or any other individual leaseholder claimant - suggest that the valuation which was procured by his mortgage company (and which he did not see in any event at the time) made any reference to the Bldg Regs final certificate.

5.1.5 He has disclosed his conveyancing solicitors file, which makes no reference to a Bldg Regs final certificate. Included in the file is the report on title produced and sent to him by solicitors which, although it makes reference to and encloses important documents such as the draft sales agreement and draft ZBG policy documents, makes no reference to the Bldg Regs final certificate. That is so

even though the sale agreement, as I have said, made express reference to such a certificate in clause 11, referred to above. After completion his solicitors received the ZBG building warranty policy documentation.

5.1.6 In his main witness statement he claimed at [17] that on reading the documents provided by his solicitors he "understood that as the apartment was tenanted the development must have been inspected and approved by the building inspector and ZIP under the new build guarantee scheme and relied upon these facts when proceeding to purchase". However, it is clear from his witness statement and cross-examination and I am satisfied that any such assumption was based solely on some general understanding of how the building control system worked in Australia rather than upon any knowledge of the system in the UK or any reading of the documents provided by his solicitors.

5.1.7 Under cross-examination he maintained that he had read the sale agreement before exchange and completion, had seen the reference in clause 11 to the Bldg Regs final certificate and had assumed that this was something which had been suitably addressed by his conveyancing solicitors upon whom he had relied when proceeding to exchange and complete. I am afraid that I was unable to accept this evidence which, in my view, was an attempt by him to support a case which he could see was disintegrating in the face of the cross-examination which showed that he had not seen the Bldg Regs final certificate before exchange or completion. I am prepared to accept that he is a careful man and would have looked at the documents supplied by his solicitors. However, I am quite satisfied that nothing about clause 11 or the reference in it to the Bldg Regs final certificate would have had any particular significance to him as a layman. As I have already said it does not even say that a Bldg Regs final certificate has already been issued. Nor does it say that it will be provided at any time, whether before or after exchange or completion. Its only importance is that once issued it prevents the purchaser from maintaining any claim against the buyer in respect of the obligations imposed by clause 11.

5.1.8 Moreover, as Mr Tarasov had to accept when taken through the documents, even though he was heavily involved in dealing with the complaints about the defects in the development and even though he eventually made a claim against ZIP and separately instructed solicitors to make a claim against Assetz, he never referred to or advanced any claim against ZBC nor did he ever suggest that he had seen or relied upon there being a Bldg Regs final certificate when deciding to purchase the flat. If he had indeed relied on the existence of the Bldg Regs final certificate when exchanging and completing it would have been natural for him to have done so. The most that Mr Selby could do in re-examination was to draw attention to the fact that when, in September 2012, it was (wrongly) suggested to him by Mainstay that there was no Bldg Regs final certificate he clearly regarded its absence as of importance. But that does not assist him, given that he knew nothing about and hence could not and did not rely upon the existence of such a certificate when he did exchange and complete.

5.1.9 Mr Tarasov has not called his conveyancing solicitor to give evidence as to what, if anything, she knew or did or believed in relation to the existence or content of any Bldg Regs final certificate. There is no evidence of any steps being taken by Mr Tarasov or his lawyers to investigate this point with his conveyancing solicitors. As I have already said, there is no reference whatsoever to the Bldg Regs final certificate in the conveyancing file and there is no reason from the content of the

conveyancing file to consider that the solicitor concerned did have any conscious knowledge or belief at all in relation to any Bldg Regs final certificate.

5.1.10 As I have said, Mr Tarasov was fully aware from May 2010 onwards of the unfinished state of the development as regards the common areas. His evidence both in his written statement and under cross-examination was that he reported his concerns to Assetz who assured him that JCS was attending to them and, in the absence of information to the contrary, believed that they had been resolved. His evidence was that his tenants continued to occupy and pay rent and that on that basis he was reasonably satisfied. His evidence was that he believed these to be completion and maintenance issues rather than more fundamental structural or fire safety issues. I accept this evidence as consistent with the contemporaneous documentation.

5.1.11 I am satisfied that this remained the position so far as Mr Tarasov is concerned until August 2012, once he had been in contact with Freehold Managers and Mainstay and - as referred to in section 3 above - had received the risk assessments produced by BWP which clearly indicated problems with fire safety. Nonetheless I accept, as he said, that he still did not know the full extent of the fire safety or structural issues which are the subject of this case at this point. That information did not fully emerge until after Zagora became involved in April 2013.

5.1.12 Furthermore, although it is clear that by September 2012 he was considering making a claim against ZIP under the insurance policy he was also – perfectly sensibly - deferring taking any immediate action until he knew whether or not Freehold Managers were intending to take any action in that respect. Although it may be said that it is now apparent to all involved that neither the freeholder nor the management company would have been entitled to make a group claim on his behalf without his consent there is no reason to attribute that knowledge to him as at that time. Although he consulted a firm of solicitors also instructed by Ms Bedi, a firm known as Bhogal and Partners, to advise him in relation to his possible claims, it does not appear from the correspondence that he provided copies of the risk assessment reports to those solicitors, again I am satisfied on the basis that Mainstay had requested him not to pass them on. It was not until November 2012 that the solicitors wrote to "Zurich Commercial Claims" on his behalf to enquire whether or not the building warranty covered claims in relation to the unfinished state of the communal area, the insecure car park and the building not being finished to a reasonable standard. No reference was made to fire safety issues. They appear to have received no response from Zurich. There is no suggestion that they advised in relation to any potential claim against ZBC.

5.1.13 In January 2013 he obtained a report and valuation from a firm of surveyors, John Kershaw, which identified various defects to the common parts including reference to both fire safety and structural defects and which advised that the flat was un-mortgageable and saleable only to cash buyers. It did not, however, make any reference to the possibility that the Bldg Regs final certificate ought never to have been issued. In February 2013, having decided to pursue an insurance claim without the further involvement of solicitors, he made a claim against ZBG under the policy, submitting a formal claim form in March 2013. This [G8/101] referred to the building as never completed to a proper manner or standard, and included fire and health and safety issues such as a lack of compartmentation. It was dealt with by Mr Scott, who was employed by ZBG within its claims department and who instructed Cunningham Lindsey loss adjusters to investigate on its behalf and who inspected the development in April 2013. Thereafter, Mr Tarasov's claim appears to have

proceeded in concert with the discussions involving Zagora and ZIP and Cunningham Lindsey, to which I shall refer in more detail when dealing with the alleged agreement to rectify. For present purposes, it suffices to say that there was never any substantive response to his claim prior to the issue of the current proceedings in 2015.

5.1.14 Mr Tarasov advances a claim under section 2 of the Policy in respect of the render to the external walls of flat 41, the exposed electricity cables and a failure to provide proper smoke ventilation to the landing areas (see paragraph 58.2 of the Amended Consolidated Particulars of Claim).

5.2 Dr Ikpeme

5.2.1 Dr Ikpeme claims against ZIP and ZBC. He is a medical consultant who lives and works in the South-East and who acquired two flats as a buy-to-let investment, one jointly with a friend, through a property agency known as Property Traders. He entered into sale agreements in January 2007 and, hence, well before the development was anywhere near completed.

5.2.2 On 16 February 2009 Ramsdens wrote to his conveyancing solicitors, enclosing the cover note, requiring completion on 2 March 2009 pursuant to clause 4.1 of the contract, and adding these words: "Zurich acts as the approved inspector for the purpose of the Bldg Regs, so that the cover note is confirmation that a completion certificate will be issued". However, those solicitors had previously written to Ramsdens on 26 January 2009 saying that they were not instructed. Thus, on 3 March 2009 Ramsdens sent a formal notice to complete to the claimant direct, which he says led him to visit the development in April 2009, when he noticed the general lack of completion, including the lack of a lift and any electricity connection. Having notified JCS that he was unwilling to complete in such circumstances JCS issued proceedings against him to force him to complete. The Particulars of Claim made reference to the cover note, but not to any Bldg Regs final certificate. In their letter to the claimant of 22 April 2009 Ramsdens asserted that he was obliged to complete because of the issue of the cover note and not because of the issue of any Bldg Regs final certificate. The claimant then instructed new solicitors, who corresponded with Ramsdens from July 2009 onwards. No reference was made in that correspondence to any Bldg Regs final certificate. The argument which they raised appeared to be a denial that he had signed the sale contract or that he had authorised his then solicitors to do so on his behalf. The only other matters raised was a complaint about delay and a complaint that the flat had only one as opposed to two bathrooms. Ultimately, the claimant accepted advice that he had no defence and completed on flat 60 on 24 August 2009 and entered into a Tomlin order on 20 November 2009 and completed on flat 66 on 22 December 2009 without further inspection and assuming, so he said, that the development had been completed in the meantime.

5.2.3 It became clear under cross-examination that Dr Ikpeme had left everything to his solicitors during the course of the acquisition of the flats and during the course of the subsequent litigation with JCS resulting in his completing on the flats. He had no genuine understanding or recollection of any of the legal processes by which he had come to acquire the flats. Contrary to the assertions in his witness statement, which I am afraid to say had plainly been drafted on his behalf so as to support his case and which he had not properly read or understood before signing it, I am satisfied that he had never read the sale contract prior to exchange nor had any knowledge or understanding of anything to do with the Bldg Regs final certificate whether before exchange or before completion.

Insofar as he relied on anything in relation to ZBG he relied on the fact that ZBG were insuring his flats but he knew nothing of the inter-relationship between ZBG as insurer and the fact – as to which he was entirely ignorant – that ZBG had also undertaken the building control function or that there was a relationship between the insuring obligations undertaken by ZBG and JCS' compliance with the Bldg Regs or the certification of compliance by the Bldg Regs approved inspector.

5.2.4 In closing submissions the claimant invited me to infer that his conveyancing and/or litigation solicitors must have relied upon the existence of the Bldg Regs final certificate. Given the evidence referred to above, I am unable to accept that argument. Although passing reference was made to the fact that a Bldg Regs final certificate would be issued in the letter of January 2009, there is no evidence that this operated on the mind of anyone, not least because it was received by his former solicitors who were no longer acting for him, and there is no evidence that the claimant himself received a copy or that his litigation solicitors did so either. Moreover, there is no evidence that a copy of the Bldg Regs final certificate was ever provided to him or to his solicitors prior to completion or that he was ever advised that the issue of the Bldg Regs final certificate precluded him from defending the claim on the basis that the flat was not completed. Of course this is not surprising, since the chronology as referred to above showed that everything other than formal completion of flat 66 occurred prior to the issue of the relevant Bldg Regs final certificate anyway. As Mr Asquith said in closing, if his litigation solicitors had believed that the absence of a Bldg Regs final certificate afforded a ground for refusing to complete they would have included that as a defence to the specific performance claim, but they did not.

5.2.5 Post-completion he became aware through complaints from his tenants about defects in the flats and he also observed that the lift had still not been installed. However, he arranged for the defects in the flats to be repaired at his expense and made no complaint or took no action either against JCS or ZBG or anyone else. It is clear that so long as the flats were tenanted and he was receiving rental income he was reasonably content. It is also clear that he had no knowledge of the serious fire safety issues until a much later stage.

5.3 Mr Gledhill

5.3.1 Mr Gledhill claims against ZIP and ZBC. He lives in the North-West, where he owns a small business, and purchased flat 65 with his business partner and co-claimant Mr Bell as a buy-to-let investment, having been introduced to the development through Assetz. He inspected the development in early 2010 before purchasing and could see that it was not completed but was unaware of any specific defects.

5.3.2 His solicitor, Ms Sullivan, who was introduced to him by Assetz, asked as part of a series of standard enquiries for a copy of "Building Regulations approval". Under cover of an email dated 4 March 2010 she was provided by Ramsdens with a copy of the Bldg Regs final certificate for his flat. However, there is no documentary evidence that she passed on the certificate to him or otherwise advised him about it or otherwise that he had any knowledge of its existence before exchange or completion. In his witness statement he said that he relied on his solicitors to make sure everything was in place, but there is no evidence from his solicitors, whether from the conveyancing file or in witness statement form, which explains what their purpose was in requesting the Bldg Regs certificate or what, if any, reliance they placed on it. It is plain to me that

it was part of a standard form request rather than being specific to this particular transaction. The report on contract and lease referred to the ZBG building warranty but made no reference to the Bldg Regs certificate or there being any inter-relationship between the two. He accepted in his witness statement that his knowledge of Bldg Regs was "incredibly limited".

5.3.3 He exchanged and completed on 15 April 2010. Despite his evidence as summarised above his witness statement, whilst muddled and confusing in its chronology, appears to have been drafted to seek to give the impression that he had read the sale agreement at that time before committing himself and that as a result he had formed some impression that the Bldg Regs final certificate was in place. I regret to say that Mr Gledhill, rather than admit under cross-examination that this was plainly wrong, attempted to argue his case up hill and down dale so as to seek to maintain his case against ZBC. In particular, he appeared to suggest at times in his written and oral evidence that he had spoken to the solicitors before exchange and completion and that reference had been made to a final certificate as being outstanding but, insofar as he sought to suggest that this was a reference to a Bldg Regs final certificate or even that he had subsequently been shown or told about documents which included the Bldg Regs final certificate, I am unable to accept that evidence. In my view it is retrospective reconstruction which is not supported by any convincing contemporaneous documentary evidence or by any reliable oral evidence or, indeed, by the inherent probabilities. The analysis conducted by Mr Asquith in his written closing submissions and based upon a close examination of the documents and the evidence is to be preferred.

5.3.4 The claimants invite me to infer that Ms Sullivan must have relied upon the Bldg Regs final certificate because she asked for and was provided with a copy. In the absence of any evidence from her file or from her personally to support that inference I am unable to do so. As I have said, the request was part of a standard form request rather than one which was made after consideration of the particular sale contract or other documentation provided in this case. Moreover, despite the submission made by the claimants, I simply do not accept that it can be inferred from the terms of the sale contract that Ms Sullivan must have considered that the Bldg Regs final certificate was relevant to the matters which she had to consider as part of performing her professional function.

5.3.5 After completion he visited his tenants from time to time and observed the lack of completion, in particular problems with the electricity supply and the lack of a lift, and snagging type problems with the flat. He says he was reassured by JCS that these matters would be attended to but in the end attended to the works in the flat himself. Through 2011 his tenants complained about the deteriorating state of the common parts and he took these complaints up with JCS but without success, subsequently referring to them as cowboys.

5.3.6 He was in contact with Freehold Managers and Mainstay from July 2012 onwards, attending site with the Mainstay representative. He was informed about, but did not receive a copy of, the fire and general risk assessment which they commissioned, although he accepted in cross-examination that he was told that it revealed health and safety issues. I accept his evidence that although he was aware in general terms by this stage that the problems with the lack of completion included fire and health and safety related issues he knew no more than that. In August 2012 he was in discussions with Mainstay about one or other or both of them making a claim against ZBG in relation to the incomplete common parts but says, and I accept, that on contacting ZBG he was informed, incorrectly, that no common parts certificate had been issued so that no claim could be made in

relation to the common parts. In January 2013 he was informed by Mainstay that they were seeking to arrange a site meeting with ZBG with a view to making a claim against ZBG, but nothing further happened prior to Zagora taking over. He met Mr Broadhurst on site in May 2013 and became aware of Mr Broadhurst's views as to the seriousness of the defects and he was happy for Zagora to deal with any claims against ZBG on his behalf and, on that basis, took no action directly.

5.3.7 Mr Gledhill agreed to and did become one of the three directors of LHM and thus was one of the successful claimants in the Chancery action. It was on his recommendation that in November 2014 LHM brought in a company known as Revolution Property Management to manage the development on its behalf.

5.4 Mr Kennedy

5.4.1 Mr Kennedy claims only against ZIP. He is an Australian based project manager with a degree in economics who with his partner purchased flat 37 through Assetz, exchanging on 13 June 2008 and completing after some delays on 20 October 2009. I accept him as a reliable witness notwithstanding the criticisms made by ZIP of some aspects of his evidence which, in my view, are minor matters which do not affect his general credibility.

5.4.2 He was aware prior to completion of some snagging issues relating principally to the flat and generally to the unfinished state of the development, but not of anything more substantial. After completion he became aware of the lack of a mains electricity supply and on a visit in July 2010 became aware of the general problems with the communal areas, including the poor security, missing windows and absence of a lift. He chased JCS to address these issues, but without success. In 2011 he moved back to Australia, using letting agents to manage the flat on his behalf.

5.4.3 In October 2012 his solicitors were informed by Mainstay as to the poor state of repair of the development and its estimate of around £200,000 to bring it up to standard. He was not provided with a copy of the reports obtained by Mainstay and I accept his evidence that he was not made aware at this stage of any issues with fire safety. As suggested by Mainstay he asked his solicitors to contact Zurich on his behalf but there is no evidence that they did so prior to the involvement of Zagora. His evidence was that he believed that Zagora would be contacting Zurich on his behalf and he was happy for them to do so.

5.5 Mr Hussain

5.5.1 Mr Hussain is the owner of flat 126 and claims against ZIP and ZBC. Although he is the legal owner of the flat he has lived in Iran since 2011 and entrusted the purchase and the management of the flat to a Mr Syed to whom he is related by marriage. Mr Syed works in the residential lettings sector and gave evidence. The picture I must say is thoroughly confused and confusing as to why and on what basis Mr Hussain agreed to purchase the flat. It does not appear to have been his idea. One explanation has been that it was to assist his brother in law, Mr Zaidi, who is Mr Syed's brother and who was the initial contracting party. Another explanation has been that it was intended to provide accommodation for Mr Syed. Whatever the true explanation, it is clear that the flat was conveyed into his name and that since completion the flat has been managed by Mr Syed

who has found tenants and that some arrangement satisfactory to all concerned has been made in relation to the rent and the payment of the monthly mortgage instalments.

5.5.2 So far as the details are concerned, it is clear that Mr Hussain has little if any detailed recollection of events, and his evidence was limited to recording what he had been informed about either Mr by Syed or through correspondence.

5.5.3 Contracts were exchanged on or around 19 July 2007 but completion did not take place until 2 July 2010. In December 2009 JCS began to press for completion to take place. In February 2010 Mr Syed asked for inspection facilities. On 17 February 2010 Ramsdens as JCS' solicitors sent the claimant a notice to complete. By March 2010 Mr Syed was aware that there were unfinished works within the flat from his visits between exchange and completion. One particularly serious problem was that there was no balcony and it was apparently possible to open the french doors and step out and fall to the external ground below, which was an obvious source of danger. Mr Syed complained both to Manchester Building Control in what must have been February 2010. They responded on 1 March 2010, explaining that ZBC had certified the flat and suggested he obtain a copy of the Bldg Regs certificate to confirm that it related to the same flat. They also suggested that he should consider obtaining a survey and seeking legal advice in relation to the obligation to complete. Mr Syed said in cross-examination that he was not in a financial position to obtain a survey and JCS re-assured him that alternative fixed frame windows with opening frames would be provided to assuage his concerns.

5.5.4 On 15 March 2010 JCS' solicitors emailed Mr Hussain's solicitors saying that they understood that an issue had been raised regarding building control and attaching "for your information a copy of the final certificate issued by Zurich on 15 December 2009 which includes this apartment". It is clear that this was sent in the context of the question raised by Building Control as to whether the certificate related to the same flat. The solicitors forwarded the email on to Mr Syed.

5.5.5 On 17 March 2010 Mr Hussain's solicitors responded, suggesting that it should be possible to reach an agreement, but inviting JCS to agree to "obtain confirmation from Zurich that the certificate has been properly issued. All correspondence from Zurich tells us that the certificate was issued on the basis that your clients were going to retain ownership. Obviously we need to be certain that the certificate has been properly issued and not under some misinterpretation of your client's intentions". This statement, at first blush puzzling, appears to relate to the fact that as I have said in section 4 above Mr Mather said that he had initially been reassured by JCS that they were not going to sell this flat until the balcony issue had been resolved. On 29 March 2010 Ramsdens said that JCS was contacting the Zurich inspector. Nothing further or specific was said in relation to the issue of the certificate.

5.5.6 Mr Syed's evidence was that he agreed on behalf of Mr Hussain to complete on the basis that he was informed that Mr Mather as the building inspector was content with the revised detail. However, on the day after completion, he arranged for Mr Hussain to email Mr Mather in the following terms:

"I have been compelled to complete the purchase of 126 Lawrence House because a certificate was issued by your office. Out of 3 openable windows only one have been changed. The remaining 2

openable windows open in the air and are very dangerous. Could you please make sure that JCS changes the other 2 windows or provides a balcony. I was in touch with Manchester City Council and they are of the view that the 2 French windows are against the building regulations but as you are looking after the building control they cannot do anything. If there is any accident in future I would hold you and JCS responsible for it".

5.5.7 Mr Mather responded two days later stating that in his opinion the revised arrangement was satisfactory and to assure him that the modifications to the opening windows to prevent them from being opened more than a specified distance meant that they were not unsafe and complied with Bldg Regs. Neither Mr Syed nor Mr Hussain took further steps to contest the matter. In cross-examination Mr Syed said that even though he still believed that ZBG were wrong about the opening windows nonetheless he relied upon ZBG in relation to the Bldg Regs certificate.

5.5.8 In their respective closing submissions the claimant and ZBC referred in some detail to the evidence of Mr Hussain and Mr Syed in cross-examination in order to bolster their respective cases. I have read and considered those submissions but do not propose to refer to the detail in this judgment. In my view it would be unsafe to place too much reliance on the evidence either of Mr Hussain or Mr Syed save in so far as consistent with the contemporaneous correspondence given that I did not regard either to be wholly convincing witnesses, both due to the lapse of time and also as regards Mr Hussain because of his lack of contemporaneous involvement and as regards Mr Syed because he seemed to me to be overly minded to mould his evidence to support the claim.

5.5.9 In November 2012 Mr Syed identified in an email to Mainstay a number of issues, including a leak from a rainwater pipe into the flat, which had apparently been fixed a number of times but had started to leak again. In April 2013 he was made aware of the action taken by Zagora, which he did not expressly authorise on his behalf, but was content to leave matters to it to progress.

5.6 Ms Horley

5.6.1 Ms Horley claims only against ZIP. She purchased flat 49, initially with the intention of living there following a planned relocation to Manchester but then, when that did not happen, as a buy-to-let investment. She exchanged in July 2007 and completed in March 2009. Before completion she inspected the development in December 2008 and again in February 2009 and saw its unfinished state. On legal advice she completed despite her reservations. Post completion she was able to rent out the flat, using local estate agents, and had no further particular concerns. She made contact with Freehold Managers in June 2012 and her estate agent attended the meeting in July 2012 but there is no evidence that she became aware of any specific issues other than the general statements made by Mainstay in its letter of October 2012 before Zagora became involved.

5.7 Mr Sugarman

5.7.1 Mr Sugarman acquired flat 28 as a buy-to-let investment, exchanging contracts in and completing in July 2009. He claims only against ZIP. His evidence is typical of and consistent with the evidence of the majority of the other individual leaseholder claimants in that he was aware of the unfinished state of the development both before and after completion but unaware of any particular matters relating to fire safety or structural defects until Zagora were involved. He did make contact

with ZBG in June 2011 on the recommendation of Manchester Building Control to check the position in relation to whether or not a Bldg Regs certificate had been issued and says that he was told by ZBG that it had not signed off the common areas. He sought legal advice in July 2011 and was advised as to his potential claims against JCS and against the management company. He was also advised that he might have a claim against ZBG under the insurance policy if there were structural defects but his evidence, which I accept, was that he did not pursue further investigations because: (a) he still believed what he had been told about there being no cover for common parts; (b) he did not think that there were structural defects as opposed to unfinished work; (c) he was experiencing significant problems with his business at the time, which was taking up most of his attention.

5.8 Ms Whale

5.8.1 Ms Whale acquired flat 10 with her partner Mr Allen as a buy-to-let investment, exchanging in March 2007 and completing in May 2009 and makes a claim solely against ZIP. In the same way as with Mr Sugarman her evidence is typical of and consistent with the evidence of the majority of the other individual leaseholder claimants in that she was aware of the unfinished state of the development both before and after completion but unaware of any particular matters relating to fire safety or structural defects until Zagora were involved.

5.9 Mr Roberts

5.9.1 Mr and Mrs Roberts live in Australia and decided to buy flat 134 as a buy-to-let investment through Assetz, exchanging and completing on 18 June 2010. They claim both against ZIP and ZBC.

5.9.2 Mr Roberts accepted that he had no recollection of and had not read the sale agreement before purchase. His witness statement contained the same unhelpfully drafted section, seeking to make a case on reliance in a confused and chronologically imprecise manner, as found in the statements of Dr Ikpeme and Mr Gledhill as referred to above, and again I am unable to accept his evidence that he had any positive understanding or belief in relation to the existence or relevance of any Bldg Regs final certificate prior to purchase. Again there is no evidence as to what, if any, understanding or belief his solicitor may have had and there is no reason to believe that the solicitor relied on any Bldg Regs final certificate any more than did those of the other individual leaseholder claimants.

5.9.3 They did not visit the development before inspection and had no knowledge of any issues in that regard. In the same way as the others they became aware after completion of the lack of completion but again I am satisfied that they had no knowledge of serious fire safety or structural matters before Zagora became involved. There is evidence that in September 2010 they were aware of an issue with the balcony not having all of its railings fitted and suggesting that this might be a breach of Bldg Regs, but this is clearly a minor snagging type issue in context, and there is also evidence that he made a claim on the ZBG policy in relation to some moisture issues in the flat in early 2012 but it appears that this claim was rejected and not pursued.

5.10 Mr Kraftman

5.10.1 Mr Kraftman acquired flat 56 as a buy-to-let investment through Assetz, exchanging in September 2009 and completing the following month and he pursues a claim against ZIP only. His evidence is similar to the majority of individual leaseholders in terms of his knowledge and I need say no more about it.

5.11 Mr Spadaro

5.11.1 Mr Spadaro and his wife, who live in Australia, purchased flats 68 and 77 as buy to let investments, having been introduced to the development through Assetz. They make claims both against ZIP and ZBC.

5.11.2 Having decided to purchase the flats in March 2010, exchange and completion took place simultaneously on 6 July 2010. On 5 May 2010 their conveyancing solicitors Birchall Blackburn asked JCS's solicitors for the buildings insurance policy and cover note but did not at this time request or obtain any Bldg Regs final certificate. There is no evidence that they were asked to or did sign the sale agreement and Mr Spadaro was clearly wrong in his witness statement when he said that he had done so. There is no evidence that they were shown or read the sale agreement prior to exchange or completion and again Mr Spadaro was clearly wrong in his witness statement insofar as it gave the impression that he had done so or that he had acquired any knowledge or opinion as to the significance of Bldg Regs approval at that time. There is no evidence whatsoever that he received a copy of the Bldg Regs final certificate prior to exchange or completion and his witness statement was particularly unhelpfully drafted insofar as it appeared to me to be equivocal as to whether he was saying that he had or had not done so. I am quite satisfied that he did not. Whilst he says, and I accept, that he relied on his conveyancing solicitors to protect his interests in relation to the acquisition of the flats, in reality that is as much as he can say.

5.11.3 There is no evidence from his conveyancing solicitors, whether in such of the documentation as is available or otherwise, as to what if anything they knew or believed so far as any Bldg Regs final certificate is concerned. In closing submissions the claimants invited me to infer that the Bldg Regs final certificate was sent to the conveyancing solicitors in August 2010 as part of the "Zurich papers" but: (a) there is no reason in my view to believe that this is the case, since the contractual obligation was to provide the building warranty policy documentation not the building control documents; (b) even if it was, there is no basis for inferring, as the claimants seek to persuade me to do, that being sent the Bldg Regs final certificate unsolicited shows that the conveyancing solicitors were aware of and relied on the Bldg Regs final certificate prior to completion.

5.11.4 Neither Mr nor Mrs Spadaro have ever visited the development. They appointed agents to manage the flats on their behalf and there is no evidence that they were aware of any issues other than that in the most general terms there were works still to be completed and snagging issues and, subsequently, about the problems with security and the electricity supplies which were affecting their tenants. They received communications from Mainstay in the same way as did the other individual leaseholders and, subsequently, from Zagora as well. Mr Spadaro has been unable to produce much by way of the documentation in relation to his dealings with the property. He explained that most correspondence had been conducted by email and that emails dating from that period had been lost when he changed computer and I accept that evidence. He did not believe that

he had been in contact with any other of the individual leaseholders in 2012 and I accept that evidence.

5.11.5 When initially contacted by Mr Broadhurst in April 2013 it is clear from his correspondence that he was suspicious and questioned in forceful terms both Mr Broadhurst's approach and his obligation to pay further service charges to Premier, in circumstances where previous service charge had been paid without details being given as to how it had been used. I am satisfied, having heard him under cross-examination and seen his correspondence, that had he believed that there were serious defects with his flats or the development as a whole he would not have hesitated to communicate with JCS or with ZBG in trenchant terms at the time. Whilst it is clear from the correspondence that he did not expressly authorise Mr Broadhurst or his companies to represent him in any negotiations with Zurich in 2013, it is equally clear that he is now fully supportive of Zagora and the instant claims.

5.12 Mr Manchikalapati

5.12.1 Mr Manchikalapati (also known as Mr Prasad) and his wife, who live in Bristol, purchased flat number 34 as a buy to let investment in August 2010 through Assetz. They pursue claims both against ZIP and ZBC. Mr Manchikalapati is an electrical engineer and clearly a careful and thorough man.

5.12.2 They reserved the flat in around April 2010 and also instructed Birchall Blackburn as their solicitors. Mr Manchikalapati wrote to his solicitors on 25 April 2010, enquiring: "Since the development is still under construction…I would like to have the development completed before the completion and thinking about a long stop date. Ideally, all the external work should be complete before the sale completion. Please give your thoughts on this based on your experience". Birchall Blackburn responded the following day as follows: "I was under the impression that the apartment was build complete but am yet to receive any details. As a matter of practice legal completion cannot take place until the apartment is structurally complete and fit for human habitation – a completion certificate from Zurich would be handed to me prior to completion to this effect (and this is a requirement of your mortgage lender that this is in place before completion can take place)".

5.12.3 The claimants contend in their written closing submissions that the reference to a "completion certificate" must be a reference to the Bldg Regs final certificate, as opposed to a cover note or building warranty certificate. I am unable to accept this argument. There is no direct evidence from the solicitors to this effect. The general information sheet dated November 2009, which Birchall Blackburn had received, did not make express reference to a Bldg Regs final certificate being provided. The sale contract was explicit that only a cover note would be provided prior to completion and made no linkage between Bldg Regs approval and completion. The claimants have been unable to demonstrate, whether by documentation from the mortgage lender or evidence from the conveyancing solicitors, that the mortgage lender required sight of a Bldg Regs final certificate before completion can take place. It appears to me to be far more likely that they were referring to the cover note as being the equivalent of confirmation of completion and that a building warranty final insurance certificate would be issued.

5.12.4 Subsequently, Mr Manchikalapati read through the draft information which the conveyancing solicitors had provided and raised a number of questions, including a request for explanation as to clause 11 of the sale contract. The explanation given referred to JCS' obligation to construct the building in accordance with the relevant planning consents and Bldg Regs, but made no reference to the impact of obtaining Bldg Regs approval upon JCS' obligation under that clause. Although Mr Manchikalapati suggested in cross examination that he understood this to mean that a Bldg Regs certificate would be provided on completion, I am unable to accept that evidence. That is not what the sale agreement says, nor what the solicitors explained it said and, since he wrote to his solicitors asking for an explanation of clause 11, it is inherently implausible in my view that he could have reached this understanding from his own reading of it. It seems plain to me that whilst this is his belief now it was not his belief at the time and, in reality, he had no particular understanding or belief one way or another.

5.12.5 Whilst I accept that he did, through his previous construction of a home extension, have a general understanding of Bldg Regs and Bldg Regs approval, that is very different from his having an understanding, prior to exchange and completion, that a Bldg Regs final certificate had already been issued in relation to this development. There is no evidence from the conveyancing file that his solicitors obtained a copy of the Bldg Regs certificate before exchange or completion. Furthermore, on 18 June 2010 his solicitors wrote to him, addressing various discussions in relation to the terms of the sale agreement, to say that JCS's solicitors had "advised that the apartment is complete and we have the Zurich cover note confirming this". It is clear, in my view, that if Mr Manchikalapati was relying on anything at the time, it was the cover note and not any Bldg Regs certificate.

5.12.6 Contracts were exchanged on 12 July 2010 and completion took place on 16 August 2010. Mr Manchikalapati accepted during cross-examination that he was not specifically aware that ZBC had signed off his flat until after completion on 16 August 2010.

5.12.7 At this time Mr Manchikalapati was aware of the general lack of completion of the development, including the lack of installed lifts, although he says, and I accept, that he was not aware of any defects as such in the development. By September 2010 he was aware from discussions with his letting agents that there were continuing problems, both with the flat itself, which was suffering from various problems including external leaks from gutters, and the continuing lack of completion of the common parts. He arranged for an inspection to identify the necessary works to his flat to be carried out. On 13 October 2010 he notified initial claims to ZIP in respect of unfinished items and to what he referred to in correspondence as "structural leaks". He was also concerned that the absence of lighting in the corridors and car park contravened health and safety regulations. He says that ZIP did not accept the claim as JCS had said that it would address his complaints. I accept that there is no evidence of his being aware more generally of structural or fire safety defects until the involvement of Zagora.

5.13 Mr Montgomery

5.13.1 Mr and Mrs Montgomery are from Northern Ireland and purchased flat number 1 as a buy to let investment in May 2007, completing in May 2009. They pursue a claim against ZIP only. They did

not visit the development and their knowledge as regards any defects is the same as that of the other individual leaseholders generally.

5.14 Mr Mills

5.14.1 Mr Mills is an accountant and business adviser from Essex who purchased flat number 24 as a buy to let investment in March 2007, completing in July 2007. He pursues a claim against ZIP only. Again his knowledge as regards any defects is the same as that of the other individual leaseholders generally.

5.15 Mr Creber

5.15.1 Mr and Mrs Creber are from Salisbury. Mr Creber was an insurance underwriter who subsequently became a self-employed photographer. They purchased two flats, 84 and 139. Their original intention was to purchase with a view to re-selling once the value had appreciated in order to accumulate equity to assist their daughters in purchasing their own dwellings in the future, although they also intended to rent out the flats in the meantime. They exchanged contracts in September 2007 and completed in May 2009 and September 2010 respectively, by which time the financial crash had intervened and their hopes of reselling quickly at a profit had evaporated. They visited the development in June 2009 and became aware of its general lack of completion. Their knowledge as regards any defects in the development is the same as that of the other individual leaseholders generally.

5.15.2 As well as pursuing a claim against ZIP they also pursue a claim against ZBC but in respect of flat 139 only. As Mr Asquith observed, the fact that they only make a claim against ZBC in respect of flat 139 is explained by the fact that they completed on flat 84 before any Bldg Regs final certificates had been issued. However, at a more fundamental level, the fact that, advised by their conveyancing solicitors, Shoosmiths, they were perfectly willing to complete on flat 84 without any such final certificate having being issued is itself wholly inconsistent with their case and Mr Creber's evidence that he relied upon the Bldg Regs final certificate in relation to flat 139. It was quite clear to me from reading his witness statement and listening to his cross-examination, when compared with what was revealed by the contemporaneous conveyancing file, that he had no real recollection of what he was shown or what he believed at the time contracts were exchanged or when they completed. It is also clear, I am satisfied, that he was never provided with a copy of any Bldg Regs certificate prior to exchange or completion and that he had no understanding at any such time of the relevance or significance of any such certificate. He was content to leave all matters to his conveyancing solicitors. He had no knowledge as to what, if any steps, they took in relation to any such certificate. I was unable to accept his suggestion in cross-examination that he had been told by Shoosmiths that a Bldg Regs final certificate had been issued before he completed on flat 139. When he was pressed he admitted that he could not specifically recall this conversation and such suggestion has no support from the conveyancing documents.

5.15.3 The conveyancing file reveals that on 13 July 2007, Mr Creber's solicitors sought further information from JCS' solicitors in respect of a number of matters, including the following:

"5. Please indicate when the property is likely to be structurally complete.

7. Please confirm that on exchange of contracts/services of notice to complete you will supply a new home warranty provider's cover note. Please supply a draft of the cover note for our approval."

5.15.4 It is suggested by the claimants that this shows that Mr Creber's solicitors were considering the question of the Zurich cover note and structural completion separately. I agree with ZBC that it is impossible to read the questions in this way. Moreover, there is no reference to Shoosmiths expecting to receive anything other than a cover note; there is no reference to a Bldg Regs final certificate.

5.15.5 JCS' solicitors, Ramsdens, wrote to Shoosmiths on 30 April 2009 in relation to flat 84, enclosing the cover note and stating that: "Zurich acts as the approved inspector for the purpose of the building regulations, so that the cover note is confirmation that a completion certificate will be issued. These are, however, issued at the end of the scheme and not on a plot by plot basis.". This appears to have been a standard form of letter written by Ramsdens in relation to completions which took place before the Bldg Regs final certificates were issued. It is not entirely clear whether Ramsdens were referring to the building warranty final certificate or the Bldg Regs final certificate as the "completion certificate". In any event there is no evidence as to how Shoosmiths understood it; their subsequent file note indicates that Shoosmiths advised Mr Creber about the fact that a cover note had been issued by ZIP but there is no indication of any advice being given in relation to what was referred to as a completion certificate. Furthermore, whilst the conveyancing file shows that in November 2009 Zurich sent Shoosmiths what is referred to as the "Building Guarantee Final Certificate", that is clearly a reference to the insurance certificate and not a reference to a Bldg Regs final certificate, which was not issued until the following month in December 2009.

5.15.6 Contracts were exchanged for the purchase of flat 139 on 24 September 2007. This provided that the completion date was 10 working days after the date on which the cover note was provided to Mr Creber's solicitors. The cover note for flat 139 was issued on 11 December 2009. On 14 December 2009, JCS' solicitors wrote to Mr Creber's solicitors stating, as previously, that: "As you already know, Zurich acts as the approved inspector for the purpose of the building regulations, so that the cover note is confirmation that a completion certificate will be issued in due course". Mr Creber did not proceed to complete the purchase of Flat 139 until 2 September 2010.

5.15.7 The claimants invite me to infer, in the light of: (a) Mr Creber's solicitors' separate consideration of the Zurich cover note and the question of completion; (b) the fact that completion did not occur until September 2010; and (c) the fact that the Bldg Regs final certificate was issued between the date of exchange and completion, that in proceeding to complete, Mr Creber's solicitors relied on the Bldg Regs final certificate.

5.15.8 I am unable to accept this invitation. I do not consider that the evidence shows that Shoosmiths were separately considering the cover note from completion. The fact that completion did not occur until September 2010 and in the meantime the Bldg Regs final certificate was issued proves nothing – especially in the absence of any evidence that a copy was provided to Shoosmiths or that they gave any consideration to the Bldg Regs final certificate in the context of exchange or of completion.

5.16 Mr Husain

5.16.1 Mr Husain is an accountant and businessman who purchased flat 52 together with his wife, exchanging contracts in July 2007 and completing in August 2009. They pursue a claim only against ZIP. In the same way as with Mr Hussain he left matters largely to Mr Syed, who is his cousin. Initially he had contracted to purchase flat 53 as well, however by 2009 was unable to finance the funds to complete on both. He introduced his business partner, a Mr Sagerwala, who agreed to purchase flat 53 for cash. However, Mr Sagerwala was unable to make all the payments due to JCS under a loan agreement for the cash balance, so that JCS forfeited the lease and took back flat 53. This is only relevant insofar as Mr Husain contends that as part of the settlement agreement with Mr Sagerwala JCS wrote off the loan agreement with him as well. There is no supporting evidence of this and I reject his account on this point.

5.16.2 Before completion Mr Husain visited the development and became aware of the lack of completion of the common areas and some minor maintenance issues within the flat itself. After completion he became aware that the common areas were still unfinished and received reports from My Syed as to the continuing problems with lack of security, but otherwise had little direct involvement. Their knowledge as regards any defects in the development is the same as that of the other individual leaseholders generally.

5.17 Ms Tanti-Apichart

5.17.1 Ms Tanti-Apichart is a resident of Singapore who purchased flat 38 as a buy to let investment through Assetz, exchanging on 22 March 2010 and completing four days later on 26 March 2010. She makes a claim both against ZIP and against ZBC. She is a company director and obviously intelligent and financially astute. Not surprisingly, given her place of residence, she did not visit the development and appointed agents to deal with lettings and other matters on her behalf. By August 2011 she had been made aware of the poor state of the communal areas and that this was affecting rental values, but there is no evidence that she was aware of any particular defects or structural issues at this point in time.

5.17.2 In her witness statement she said that she was provided with and read an information sheet produced by JCS in November 2009, including the statement that: “Zurich Municipal has been appointed as an approved inspector for the purpose of building regulations. The issue of the cover note will accordingly provide confirmation of compliance with these regulations”. Her evidence that she had read and noted this at the time was inconsistent with her evidence later in her witness statement that in March 2010, when she received a report on lease and a report on contract from her conveyancing solicitors, it made reference to the insurance policy issued by Zurich, who she said she had not heard of at that time. In my judgment she is mistaken when she now claims that she can specifically remember the statement in the information sheet or that she relied upon it when deciding to purchase the property. The same is true, in my judgment, of her evidence that she read the sale agreement before exchange, since her basis for saying so initially was founded upon her assumption that she had signed the contract before exchange when, as the conveyancing file makes clear, in fact she had not done so. There is no confirmation in the conveyancing file that the sale agreement was forwarded to her by her conveyancing solicitors and no indication that any advice as to its terms, specifically any reference to the issue of any Bldg Regs final certificate, was provided

to her by her conveyancing solicitors. Nor is there any evidence that the Bldg Regs final certificate was obtained by her conveyancing solicitors either, let alone that they sent her a copy. In my view she has convinced herself now that she was provided with and carefully read all of these documents in order to establish or support her case on reliance, when the facts simply do not bear out her evidence on this point.

5.17.3 The claimant relies on the statements by her conveyancing solicitors in the report on contract to the effect that: "the builder is under an obligation to build the property in a proper and workmanlike manner… we understand the property is completed…the seller is considered to have completed the build of the property despite any works to be carried out of a minor nature" as demonstrating they had specifically considered the question of compliance with the Bldg Regs. I am unable to accept this submission; in my judgment the solicitors are simply referring to the relevant provisions of the sale contract in the context of their understanding that the flat has been completed.

5.17.4 The claimant submits that when, on 23 March 2010, JCS' solicitors sent across the signed counterpart of the Sale Agreement "together with the Zurich documents", since the cover note had already been provided by JCS' solicitors on 9 February 2010 the "Zurich documents" were likely to have contained the Bldg Regs final certificate covering Flat 38. She submits that it is more likely than not that this was pursuant to a request by her solicitors who relied upon the existence of the Bldg Regs final certificate in continuing to complete on 25 March 2010. I have no doubt that the document would have been the building warranty final certificate and not the Bldg Regs final certificate.

5.18 Mr Bartlett

5.18.1 Mr Bartlett, who lives in Loughborough, purchased flat number 44 to provide accommodation for his son, who was studying in Manchester at the time. He exchanged in November 2009 and completed on 15 December 2009. He does not make a claim against ZBC. He accepts that he was fully aware, both through his son and from his own visits, of the incomplete state of the development both before and after his purchase and of various problems, including dampness and a lack of cladding to the balcony, with his flat. I accept, however, his evidence that he regarded the issues as either issues of completion or snagging, rather than anything more serious which might justify him making a claim under the building warranty insurance policy. As with the other individual leaseholders, he became aware of the acquisition of the freehold by Freehold Managers and their subsequent appointment of Mainstay as managing agents, but I accept his evidence that he had no particular knowledge of any more serious fire safety or structural defects than was communicated to him by them.

5.19 Mr Emin

5.19.1 Mr and Mrs Emin, who live in Kent, decided to purchase a flat as an investment. It was conveyed into Mrs Emin's name, although Mr Emin was more involved with the transaction and hence gave evidence on her behalf. Contracts were exchanged in March 2007 and completion took place in July 2009. No claim is made against ZBC.

5.19.2 Mr and Mrs Emin made an agreement with JCS to defer part of the consideration and pay the balance by instalments. His evidence, which I accept, is that because JCS did not account to him for the rental income on the flat, he stopped paying the monthly payments. His evidence was that despite his best efforts he was unable to obtain any information from JCS in order to enable him to undertake a reconciliation as to what amounts it had received and, hence, whether or not the balance of the purchase price had been repaid. I accept his evidence that over the period in question the probability is that the outstanding balance was repaid.

5.19.3 His knowledge of the state of completion and condition of the development was, I am satisfied, similar to that of the other individual leaseholders.

5.20 Ms Goldman

5.20.1 Ms Goldman purchased three flats in the development, flats 2, 54 and 127, as buy to let investments. At the time she lived in London, now she lives in Spain. She exchanged on all three in June 2007 and completed on the first two in March 2009 and on the third in March 2010. She makes no claim against ZBC.

5.20.2 Her knowledge of the state of completion and condition of the development was similar to that of the other individual leaseholders. She only visited the development twice, once in 2008 and once again in March or April 2009. In cross-examination she was referred to correspondence from her tenant in January 2012 in connection with a claim which he had issued against her for recovery of a deposit, in which he referred to problems with the flat including "structural problems", but it is clear to me from the context that he was referring to problems with dampness and mould due to problems with a boiler and a leak from the flat above rather than problems relating to the structure of the building. Furthermore, although flat 127 is one of the flats in the development which was not provided with a balcony, there is no evidence that she became aware of that until a subsequent stage.

5.21 Ms Bedi

5.21.1 Ms Bedi, who lives in London, purchased flat 135 as a buy to let investment through Assetz, exchanging in June 2008 and completing in February 2010. She makes claims against ZIP and ZBC.

5.21.2 She was aware prior to completion that the development had not been completed and she was also unhappy that the flat could not be tenanted until later due to JCS still not having completed the works. Because of this she was not willing to pay the monthly payments which she had agreed to make to JCS, who had agreed at the time of completion to a 12 month interest-free loan of £14,186 due to difficulties she was experiencing in obtaining sufficient mortgage finance. This dispute led to JCS serving a statutory demand in March 2011. That then led to Ms Bedi bringing an action in July 2011 in which she claimed against JCS and also against Assetz and her conveyancing solicitors in relation to the incomplete state of her flat and the common areas. Ms Bedi pleaded the existence of certain defects noted in April 2011 none of which forms part of the defects in these proceedings (with the exception of the missing render). The claim against JCS was settled on the basis that Ms Bedi withdrew her claims against JCS and JCS withdrew its claim for the loan.

5.21.3 In February 2012 she was in contact with Mr Tarasov and others and in May 2012 her solicitors obtained what was described as a report and retrospective valuation from a local surveyor. This identified that the instructions were "to prepare a retrospective valuation of the subject property as at 10 February 2010 to reflect the fact that as at the date of conveyance the development was incomplete" and made it plain that it was not intended to be a building survey. It identified that there were "substantial elements of the development incomplete", including unfinished rendering, a lack of lifts and a lack of working security arrangements. Problems with water leaking into the basement were also reported. As regards fire safety all that it said was as follows: "Whilst there is some paraphernalia associated with fire detection and some fixtures and fittings associated with means of escape it is not clear that these arrangements are in full working order. Some of the fixtures and fittings associated with this are evidently broken".

5.21.4 As a result of obtaining this report at that time Ms Bedi notified a claim against ZIP under section 2 of the policy in respect of unfinished render, rainwater pipes discharging into the basement floor and the open window in Block D letting in water into the communal areas.

5.21.5 By December 2012 Ms Bedi had reached a settlement with Assetz and her conveyancing solicitors, receiving a net sum of £23,500 after deduction of all legal costs.

5.21.6 Ms Bedi was, I am afraid, another unreliable witness as regards her evidence as to what, if anything, she was told or understood about any Bldg Regs final certificate prior to exchange or completion. It was clear to me that she had no real recollection as to what she had read and what she had signed at the different stages of the transaction. It is quite clear in my view that she did not read the sale contract nor form any understanding of clause 11 as regards Bldg Regs inspection or approval either before purchase or completion. As with many of the other of the individual claimants, it is clear that she had not properly appreciated the difference between the cover note or insurance certificate issued by ZIP in relation to the building warranty and the Bldg Regs final certificate issued by ZBC in relation to the statutory approval process. There is no evidence that her conveyancing solicitors had obtained a copy of the Bldg Regs final certificate before either exchange or completion, still less that they provided her with a copy. I quite accept her evidence that she relied upon her conveyancing solicitors in a general sense to ensure that everything was in place, but I am also quite satisfied that she had no knowledge, belief or reliance specifically in relation to the Bldg Regs final certificate.

5.21.7 There is no evidence that her conveyancing solicitors received a copy of the Bldg Regs final certificate at any stage or that they relied upon its existence in any way.

5.22 Mr Dickie

5.22.1 Mr Dickie purchased flat 131 with his daughter in order to provide her with accommodation, exchanging contracts and completing simultaneously in August 2010. He makes claims against ZIP and ZBC.

5.22.2 The conveyancing file shows that he was provided by his conveyancing solicitors with a copy of the cover note in March 2010 and that he signed the sale contract in May 2010 although completion

did not take place for a further three months. As with many of the other individual claimants, I am satisfied that he does not now have the recollection which he believes he has as to what he read or understood in relation to any Bldg Regs final certificate or its effect. In particular, I am unable to accept his evidence that he read the sale contract clause by clause before signing it or that he read and formed an understanding of clause 11 of the sale contract to the effect that, as he put it in his witness statement, inspection by an approved inspector would be confirmation that JCS had completed its works in accordance with the Bldg Regs.

5.22.3 It is clear that he is also mistaken in his recollection in his witness statement that he was provided, whether directly or through his conveyancing solicitors, with a copy of the Bldg Regs final certificate applicable to his flat, as opposed to the insurance cover note and final certificate. I reject the claimants' invitation that I should infer that he was sent a copy of the Bldg Regs final certificate because pre-exchange they had written to him saying: "Details of the cover are set out in a comprehensive but straightforward manner in the package of documents relating to the scheme which will be sent for your attention shortly".

5.22.4 Whilst I am prepared to accept that he had a general understanding of the Bldg Regs scheme and that the development would need to be signed off by a building control inspector, I do not accept that he had any more detailed a recollection than that.

5.22.5 He accepted that he had no knowledge as to what, if anything, his solicitors knew or understood in relation to any building regulations final certificate. The conveyancing file does not provide any evidence in that regard. I reject the invitation to infer from the most slender of evidence that his conveyancing solicitors "did appear to have in mind that completion certificates needed to be provided before completion", if that is intended to be a reference to a Bldg Regs final certificate, or to infer Mr Dickie's solicitors were reliant on a Bldg Regs final certificate being provided.

5.22.6 By late 2010 Mr Dickie was in communications with JCS about his concerns in relation to the lack of completion of the development and of issues in relation to the flat itself including a broken double glazed French door. In December 2010 he gave notice to ZIP of a claim under section 2 of the policy due to the outstanding issues with the communal areas. ZIP responded, rejecting the claim, and in February 2011 Mr Dickie wrote again, contesting its response, suggesting that in some respects the Bldg Regs had not been complied with. I accept that this assertion was made in the context of Mr Dickie seeking to advance his claim against ZIP under the insurance policy, rather than because he positively believed that the relevant building control inspector had failed to identify non-compliances with the building regulations. Nonetheless, it is apparent that if Mr Dickie had given the matter any thought at that time he would have appreciated that the effect of what he was asserting was that the development had been signed off by the building control inspector when it ought not to have been.

5.23 Other individual leaseholder claimants not called

5.23.1 I merely need to record at this stage that the other individual leaseholder claimants were not required to attend for cross examination although, as Mr Baatz made clear, that was not because the content of their witness statements was agreed, but simply that the view was taken that such factual issues as existed were not regarded as sufficiently important to justify requiring those claimants to

attend to be cross-examined upon their statements or to justify duplicating cross-examination of other witnesses already called.

5.24 Zagora

5.24.1 I have already referred above in section 3 to Zagora and its ownership and business model.

5.24.2 There is no documentary evidence as to the circumstances in which Zagora was introduced to the opportunity to acquire the freehold of New Lawrence House or agreed to do so in principle. However I accept that Mr Robinson, who was principally involved on behalf of Zagora in the purchase of properties, agreed in principle to acquire the freehold for £416,000 on the basis, as referred to in the heads of terms submitted on 2 April 2013, that it produced an annual ground rent income of £26,000 and that there was an opportunity to earn further income from managing the development because the "lessee owned management company" had defaulted. I also accept that Mr Robinson regarded the agreed purchase price as competitive, compared to comparable prices being paid for properties with a similar ground rent income, but was also aware - as was stated in the heads of terms - that there was a dispute with CJS as the majority flat owner in relation to payment of ground rent, which would clearly have affected the value of the freehold.

5.24.3 It is also clear, I am satisfied, that Zagora was aware that it was taking something of a commercial risk in acquiring the freehold in these circumstances, but was prepared to proceed on the basis, firstly, that Mr Broadhurst had made informal contact with the Bank as CJS' lenders and was reassured that they were actively involved in managing the problem and, secondly, that Zagora was confident that by exercising a firm approach they could force CJS and any other defaulting leaseholders to comply with their obligations in relation to payment of ground rent and service charge.

5.24.4 Zagora exchanged and completed on 10 April 2013. The final purchase price was £380,000, which represented a multiplier of approximately 15 times the annual ground rent yield, compared to a going rate at the time of around 25 to 30. One reason for the discount was obviously the difficulties experienced with CJS in relation to collecting ground rent.

5.24.5 The pre-contract exchanges between Zagora and its solicitors also demonstrates quite clearly that they were both aware of the need to see the Bldg Regs final certificates before exchange. They were requested and supplied to their solicitors on 4 April 2013. Mr Broadhurst asked for copies on 10 April 2013 and was provided with copies on 12 April 2013. It is clear that he already knew by 10 April 2013 that they had been provided by ZBG. I am satisfied that he knew both of the existence of the certificates and that they had been provided by ZBG before exchange and completion.

5.24.6 There was some question as to why Zagora wanted to know that Bldg Regs final certificates had been issued. The reason given in the exchanges with its solicitors was that both Zagora and their solicitors knew that without it Zagora's prospects of obtaining refinancing on more favourable terms from RBS would be prejudiced. It was suggested by ZBC that this was the only reason. Mr Broadhurst gave as a further reason that he would not have wanted Zagora to acquire the freehold of a property which did not have a Bldg Regs final certificate because that might expose both

Zagora and also, potentially its directors, to civil, statutory and even criminal liabilities in certain circumstances which he would not have been prepared to countenance.

5.24.7 It was pointed out by ZBC in closing submissions that both of these reasons only required that there be a Bldg Regs final certificate in existence, not that it gave comfort that the building control inspector had done a proper job. I accept this argument. However, Mr Broadhurst said that he also wanted to have the assurance that the development had received Bldg Regs approval for re-assurance that it was soundly constructed and safe. I accept this evidence. I am also satisfied that he wanted the reassurance that the development had been constructed in accordance with Bldg Regs and thus that it was, effectively, structurally sound. It is safe to infer that RBS would have wanted to see the certificates for this same reason as well. Even knowing that the leases obliged the tenants to pay for any necessary repairs, and even believing that it might be profitable to undertake and manage such repairs, a prospective freeholder would not want to take the risk of having to deal with a very seriously structurally defective or unsafe building which might – as has happened in this case – represent a real risk and a time and money consuming distraction in the real world.

5.24.8 It is apparent from Zagora's evidence, including the contemporaneous documents, that it would not have been willing to exchange or complete without knowing that Bldg Regs final certificates had been issued, even if the primary reason was that without them it would not have felt confident that it could refinance, when that was an intrinsic part of its commercial strategy for proceeding.

5.24.9 It is common ground that Mr Robinson visited New Lawrence House before exchange. His evidence is that this was not because he wanted to physically inspect the development before Zagora committed itself to acquiring the freehold, but because the representative of the vendor wanted to meet him there to discuss this and other opportunities. Mr Broadhurst and Mr Robinson emphasised that since they were interested in acquiring the freehold solely in order to obtain an income stream from the ground rent and since they were confident that the management company and through it the leaseholders would be responsible for any repair and maintenance works the physical condition of the buildings was of little interest to them, so that there was no need for Zagora to commission a survey nor to conduct a thorough physical inspection. I accept this evidence, in circumstances where it is clear that Zagora did not commission a survey and nor did it ask for inspection facilities. If Zagora had considered it essential to conduct a thorough physical inspection before committing itself to a purchase I have no doubt that Mr Broadhurst, as the more experienced surveyor, would have attended instead of or as well as Mr Robinson. However, I also have no doubt that Mr Robinson, as an experienced property investor, would have seen the poor state of the development even from the relatively cursory inspection which I am satisfied that he did carry out. Indeed, he accepted that he saw that the lift was not installed in the block he visited and that he saw the missing external render.

5.24.10 The defendants suggest that Mr Robinson must also have been aware that this represented an opportunity to make a claim against ZBG, whether under the insurance policy or by suing for negligent certification, given the way he expressed himself in an email on 10 April 2013 to Mr Broadhurst where he said: "the ZBG claim could be very interesting. They signed off building regulations so they must be wide open". Mr Broadhurst explained that this email referred to an existing discussion on the basis of his having already been informed by the Bank that there was an existing insurance claim against ZBG for the unfinished state of the development, in particular the

lifts and the external render, which was apparently considered to be in the region of £200,000. I accept this evidence and reject any suggestion that Mr Robinson could have reached this conclusion solely from his inspection. Mr Broadhurst accepted that he knew that the absence of lifts and render might well amount to a breach of the Bldg Regs, although as he said I accept that whether or not this was the case would depend on the particular circumstances, of which he was unaware until he inspected on 11 April 2013.

5.24.11 I do not accept that Mr Robinson or Mr Broadhurst positively knew before exchange or completion that there were further substantial claims which could be made against ZBG under the structural damage or present or imminent danger sections of the insurance policy or for negligent certification under the Bldg Regs. However, I am satisfied that they envisaged that further items of unfinished or defective work might emerge on further inspection which would increase the value of any claim there might be against ZBG and, hence, the potential revenue which that might represent to Zagora and its associated companies. Zagora's thinking in this respect emerges clearly from an email on 11 April 2013 from Mr Robinson to Mr Broadhurst where he referred to the claim against ZBG as potentially "huge" on the basis that "there are no doubt other things that could be deemed to be unfinished" and "if we can win a lump sum settlement with us doing the works there will be a sizeable chunk left". What he meant, I am satisfied, was that there was the scope for Zagora or its associated companies to earn income in a number of ways, whether by Premier as the managing agents adding a percentage onto the service charge, Cobe charging a percentage for project managing the remedial works and/or the remedial works being awarded to Mr Broadhurst's construction company.

5.24.13 It follows, I accept, that when Mr Broadhurst visited New Lawrence House on 11 April 2013 and spent around two hours at the site, this was clearly on the basis that he was already looking for unfinished and/or defective work which might form the subject of a claim against ZBG. His email to the Bank of Ireland of 12 April 2013 shows that he had already identified a number of building works issues, including fire protection issues and issues with the existing roof and elevations which required further investigation which, he expected, would exceed the figure of £200,000 previously "banded around".

5.24.14 I also accept Mr Broadhurst's evidence that having heard of the absence of lifts and render pre-exchange and completion and being aware of the possibility of further potential breaches of Bldg Regs he was not particularly troubled, because he believed that Zagora would be able to ensure that any non-compliant elements of the development could be remedied without undue difficulty and the cost recovered, whether by way of service charge against the individual leaseholders or against ZBG under the warranty or in a claim for negligent certification. Indeed, the view of Zagora pre-exchange and completion was that this was, if anything, a positive discovery, given the opportunity to generate more revenue from such matters.

5.24.15 ZBC's case is that Zagora could not have relied upon the Bldg Regs final certificates in circumstances where it already knew, pre-purchase, that the lifts had not been installed and the render was incomplete. However, I do not accept that Zagora positively knew that the absence of lifts and/or render meant that in the circumstances no reliance could sensibly be placed on the adequacy more generally of the inspections undertaken by ZBC which had led to its signing off the Bldg Regs certificates. In particular, Zagora would have had no reason to consider that ZBC had

failed to perform its inspection obligations in such a wholesale manner as to miss evidence of widespread non-compliance with Bldg Regs in relation to fire safety and structural integrity. I am satisfied that if Zagora had genuinely believed that this was the case it would not have purchased the development without further inspection, not least because it would have been concerned about its exposure as freeholders if the relevant authorities came to learn of this and took enforcement action.

5.24.16 I will address Zagora's further investigations and dealings in relation to these matters in the section dealing with the alleged agreement to rectify, having already summarised the position and the subsequent difficulties caused by the intervention of CJS and the subsequent legal proceedings above.

6 The terms and proper construction of the leases

6.1 All of the leases granted by JCS to all of the leaseholders, including the leaseholder claimants, were in the same form. Each lease was made between JCS as the landlord, the individual leaseholder as the tenant and LHM as the management company. The lease comprised an introductory part, containing the details to be filed at the Land Registry, the substantive lease, three plans and four schedules. They contained the following material provisions:

(a) The landlord granted the tenant a 125 year lease of the flat from the date specified in the lease on payment of the specified purchase price, but subject to early determination by re-entry upon notice in the event of any breach of covenant by the tenant.

(b) The flat was defined by reference to the first schedule and the second plan. It included the internal parts of the flat as specified in the first schedule (thus the floor and ceiling surface finishes were included, but not the floor and ceiling "joists, beams or slabs") but excluded the structural parts (which were separately defined – see below) and the service installations (also separately defined, other than those exclusively serving the flat) and "the walls (other than the linings and surface finishes) which are load bearing or which enclose the flat".

(c) Rights were granted to the tenant by part 2 of schedule 1 to the lease. These were conditional on paying the service charge and included: (a) the right to enter other parts of the development to undertake repairs etc to the flat "causing as little disturbance as possible and making good all damage caused" (paragraph 2); (b) "all other rights easements quasi-rights and quasi-easements … as are now enjoyed by the flat in respect of any other part of the development" (paragraph 5).

(d) The definitions of the structural parts and the service installations were in fairly standard terms. The former was widely defined to mean "the foundations of the building[5], the main structural frame and exterior of the building, including (without limitation) their load-

[5] Defined as "the building on the development … on plan 1", the development being defined as "the landlord's development at New Lawrence House".

bearing columns and walls, any party walls, the structural parts of the floors and ceilings, and the timbers stanchions and girders and roofs of the building, and the exterior glazing and exterior doors, door frames and window frames". The latter was also widely defined to include all pipes, drains and the like "on and serving the development".

(e) The "common parts" were also defined in fairly standard and wide terms so as to include such parts as the "entrances hallways reception areas staircases lift (if any) lobbies and landings in the building serving more than one flat" together with the car parking spaces (as defined), the fire alarms, the service installations serving more than one part and the exterior doors and window frames and their glazing. It would appear to follow from this definition that the structural parts were not in themselves common parts, although the exterior doors and windows were both structural parts and common parts.

(f) There was a separate and wide definition of the "retained parts" as meaning "those parts of the development including the common parts, the structural parts, the car parking spaces … and the service installations … not included nor intended to be included in this demise or a demise of any other [flat]".

(g) There were exceptions and reservations to the landlord contained in part 3 of schedule 1 to the lease. These included rights for the landlord and other tenants to enter the flat to undertake repairs etc to other parts of the building "causing as little disturbance as possible and making good all damage caused".

(h) The tenant was obliged to pay to the landlord a ground rent of £250 per annum together with a "service charge", which was defined as "the contribution payable by the tenant in respect of the services described in the second schedule and properly certified in accordance with clause 8.3 as being payable by the tenant such contribution to be [a specified percentage] of the total expenditure incurred by LHM in relation to the services". The obligation to pay the respective proportion of the service charge by equal monthly instalments to the management company was, by clause 7, a covenant given by the tenant to the landlord, the management company and "each of the tenants for the time being of the other flats on the development".

(i) The tenant was also obliged to keep the flat in good and substantial repair (clause 7.5.1) and to permit JCS and/or LHM to enter the flat to execute works to the building and making good all damage caused (clause 7.8).

(j) The tenant was also obliged "to inspect the development including the building for defects and wants of repair decoration reinstatement replacement or renewal for which the landlord or the management company is responsible and forthwith to notify the landlord or the management company of any defects or wants of repair decoration reinstatement replacement or renewal" (clause 7.10).

(k) If the management company failed to perform any of its obligations within three months of being requested to do so by the landlord and if the landlord at the request of any tenant performed those obligations, then the tenant was obliged to pay the landlord in advance

and on demand an amount equal to the service charge which would have been payable to the management company on account of the performance of those obligations, and whether or not the tenant had previously paid the management company - except where the landlord had recovered the payment from the management company (clause 7.26). (This obligation on the part of the tenant tied in with the provisions of clauses 8.12 and 9.9, as to which see below.)

(l) The "management company" was defined as LHM or "any other company to which the rights and duties of the management company are assigned or transferred or which is under the control of the tenants of the majority of the flats on the development and responsible for the time being for the administration of the development". It was recited that LHM had "agreed to join in this lease with responsibility for the services and the general management of the development". The tenant was obliged by clause 7.13 to take one share in and become a member of the management company. Provision was made for the transfer of such share and the entering into of appropriate obligations by the incoming tenant upon any assignment or other devolution of the lease.

(m) The obligations of the management company were set out in some detail in clause 8, by which the management company covenanted with the landlord and the tenant (although subject to the tenant paying the service charge and complying with all of the tenant's covenants and obligations in the lease) to perform the obligations specified in that clause. These included an obligation to "provide the services when due at all times throughout the term" (clause 8.1). The services were defined as being the services set out in the second schedule.

(n) Paragraph 1 of the second schedule was in wide terms, and provided as follows:

"1. Provision replacement renewal repair maintenance decoration improvement and cleaning (as the case may be) of:-

1.1 the common parts the structural parts the car parking spaces and the service installations;

1.2 lighting and heating (where appropriate) to the common parts;

1.3 firefighting equipment in the common parts (as required by law or as the insurers or the management company and/or the landlord deem reasonable)

1.4 any other amenities that the management company deems reasonable or necessary for the benefit of the flats within the building or the development whether or not the management company has covenanted to make such provision."

6.2 It can immediately be seen that paragraph 1 includes services the provision of which might either be regarded as obligatory or discretionary. How the management company could be obliged to provide services which are discretionary is something which requires consideration. Moreover, the remaining paragraphs of the second schedule include matters which may easily be viewed as obligatory services and others which may easily be viewed as discretionary services.

6.3 Paragraph 2 of the second schedule was also in wide terms, and provided as follows:

"2. The costs incurred by the management company in:-

2.1 the performance and observance of the covenants obligations and powers on the part of the management company and contained in clause 8 of this lease insofar as they relate to the common parts the structural parts the car parking spaces and the service installations or to obligations relating thereto or to their occupation and imposed by operation of law and in particular the management company's insurance obligations set out in clause 8.9 and 8.10 hereof.

2.2 the obtaining and renewal of maintenance contracts and the provision of services facilities amenities improvements and other works where the management company in its reasonable discretion from time to time considers the provision to be for the general benefit of the flats in the building or the development and whether or not the management company has covenanted to make such provision including the cost of employing managing agents caretakers or other staff.

2.3 the payment of bank charges and of interest on and the cost of procuring any loan or loans raised to meet expenditure on the common parts the structural parts the car parking spaces and the service installations.

2.4 making representations and other matters pursuant to clause 7.19 insofar as they relate to the development. (Clause 7.19 is a covenant by the tenant in relation to statutory notices.)"

6.4 Whilst the introductory reference to "costs incurred" is unhelpful, and whilst there appears to be some duplication as between paragraphs 1 and 2 if paragraph 2 is read as an independent category of services, again it appears that paragraph 2 does allow for the provision by the management company both of obligatory and discretionary services.

6.5 Paragraphs 3, 4 and 5 identified specific services relating to waste collection and disposal, signs notices and lighting systems and lifts, whilst paragraph 6 was in the widest possible terms and simply stated: "managing the development in general".

6.6 Returning to clause 8, clause 8.2 required the management company to keep proper books of account and clause 8.3 specified the management company's obligation to keep proper accounts and to obtain its accountant's certificate as to the amount to be paid as service charge in advance each year, with further provisions for subsequent adjustments.

6.7 Clause 8.6 required the management company to: "to keep in good and substantial repair and to maintain reinstate replace renew and (if appropriate) improve the retained parts", subject to a proviso that the management company should not be liable for failure to do so without first having been notified and given sufficient opportunity to remedy any defect.

6.8 Clause 8.9 required the management company to keep the building insured against the defined insured risks.

6.9 Clause 8.11 imposed an obligation "at the written request of the tenant or the landlord or any mortgagee of the tenant to enforce by all means available to the management company at the entire cost of the person requesting it the covenants entered into by the tenants of the other flats on the development". However this obligation was subject to certain provisos in particular as to the provision of security for costs by the person requesting action.

6.10 Clause 8.12 imposed an obligation to remedy any breach of its obligations forthwith upon service of written notice by the landlord. In default of compliance within three months and without reasonable cause the landlord was entitled to perform the obligations at its cost and obtain payment in advance from the tenant of an amount equal to the service charge which would have been paid to the management company for performing those obligations.

6.11 Finally, clause 8 required the management company to indemnify the landlord against its acts, neglects or defaults (clause 8.14) and also contained a general proviso excepting the management company from liability to any tenant where breach was due to circumstances beyond its control.

6.12 The obligations of the landlord were set out in clause 9. They included an obligation "at the written request of the tenant or the management company or any mortgagee of the tenant to enforce by all means available to it at the entire cost of the person requesting it the covenants entered into by the management company and the tenants of the other flats on the development", but subject to the same provisos as found in clause 8.11 (clause 9.3). They also included an obligation "that if the management company fails to perform any of its obligations at the request in writing of the tenant to the landlord the landlord will perform those obligations subject to payment being made by the tenant in advance and on demand to the landlord of an amount equal to the service charge which would have been paid to the management company on account of the performance of those obligations" (clause 9.9).

6.13 In contrast to a traditional lease, therefore, the lease imposed no direct repairing obligation upon the landlord in favour of the tenant in relation to the retained parts (including the common parts, the structural parts and the services installations). The landlord's only obligation was a secondary one, namely upon request being made to enforce the obligations imposed on the management company or on the other tenants or to perform the management company's obligations, but only subject to conditions which effectively required the tenants to pay the landlord in advance if required their proportionate share of the cost of so doing.

6.14 Moreover, the lease contained no warranty by the landlord as to the quality or fitness of the flat or the retained parts. Whilst the sale contract did contain such a warranty that warranty was deemed satisfied where the approved buildings inspector issued a Bldg Regs final certificate.

6.15 There are a number of issues which arise from the terms of the leases, which are as follows:

(i) Whether or not the management company is obliged to remedy any or all of the defects which are the subject of this claim and which are upheld as against ZIP and, if so, whether it is: (a) entitled to claim the cost of so doing from the tenants under the service charge provisions of the leases; (b) obliged to claim the cost of so doing from defaulting tenants under clause 8.11. If so, how – if at all – is that obligation affected by the fact that CJS is in administration and how - if at all - can any such claim be made as against CJS?

(ii) Whether or not the management company is entitled to remedy any or all of such defects and, if so, is: (a) entitled to claim the cost of so doing from the tenants under the service

charge provisions of the leases; (b) obliged to claim the cost of so doing from defaulting tenants under clause 8.11. The same questions as to enforcement against CJS arise.

(iii) Whether or not the tenants are entitled to require the other tenants under clause 7.1 to contribute towards the cost of remedying any or all of such defects. The same question as to enforcement against CJS arises.

(iv) Whether or not the tenants and/or the management company are entitled to require the landlord to take action under clause 9.3 to require the management company to remedy any or all of such defects and, if so, whether or not the landlord is obliged to do so and on what basis.

(v) Whether or not the tenants and/or the management company are entitled to require the landlord to take action under clause 9.3 to require the other tenants to comply with their obligations in relation to the cost of remedying any or all of such defects and, if so, whether or not the landlord is obliged to do so and on what basis. How – if at all – is that obligation affected by the fact that CJS is in administration and how - if at all - can any such claim be made as against CJS? In particular, is the landlord entitled under clause 11.1 to forfeit the leases of any tenant which does not comply and does that extend to CJS?

(vi) Whether or not the tenants are entitled to require the landlord to take action under clause 9.9 to perform the obligations of the management company under clauses 8.1 and/or 8.6 and, if so, whether or not the landlord is obliged to do so and on what basis. The same questions arise as above as regards CJS.

(vii) Further questions arise as to the extent of the tenant's demise, specifically in relation to the balconies and the walls which separate the flats from each other and the common parts.

6.16 Whilst not all of these questions are pure issues of construction of the leases, and whilst it may well be that the answers to many of these questions follow on without difficulty once the initial questions are answered, it is convenient to address the questions in principle at this stage before grappling with their potential application to the claims made against ZIP.

6.17 There is no longer any need to refer to copious authority on the interpretation of contracts, since the relevant principles are summarised by the Supreme Court in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 at paragraphs 8 – 15, which are already well-known and do not require citation in this judgment. The court looks primarily at the natural and ordinary meaning of the words used. It will have regard, to the extent which is necessary and appropriate insofar as there is any room for argument, to the context and purpose of the particular clause and the contract as a whole and to the relevant factual circumstances as known to the parties at the time (but disregarding their private intentions and their previous negotiations). Where there remains genuine uncertainty the court will test the competing interpretations by considering their consistency with and consequences for the contract as a whole. In conducting this exercise the court will have regard, to the extent appropriate, to its assessment of commercial common sense but should not allow its own assessment of what it thinks the parties would have intended, had they foreseen the dispute which is

currently before the court, to dictate the result in cases where the meaning of the words used is clear.

6.18 In this case the process of interpretation must take into account the fact that the leases were obviously drafted by lawyers and were intended to be used for every separate lease and to regulate the position not only as between landlord and tenant but also (at least to some extent) as between each of the tenants and also (and most importantly) as between the landlord, the tenants and the management company. In such circumstances it may be assumed as a starting point that the words used will have been carefully chosen, although it should also be accepted that the courts have wide experience of errors or contradictions in even the most sophisticated of contracts. The process of interpretation should also take into account the fact that the freehold and the leasehold interests were also intended to be freely transferable by the landlord and the individual tenants respectively. In such cases the need for certainty of meaning is obviously heightened.

6.19 It is however worth making particular reference to the principles of construction insofar as they apply to service charge provisions. Service charge provisions in commercial leases are regulated only by the common law: *Woodfall: Landlord & Tenant* 7.162. The general principles of contract construction apply to such provisions: *Woodfall* 7.163.1. The question of what work is included within particular service charge provisions is also a question of construction although, as is well known, there is established authority as to the general approach in relation to the construction of such terms as "repair" "renewal" and "improvement" – to some of which I was referred by the claimants in their written opening submissions at [222]-[229] - and as to the limits upon the discretion of a landlord or management company to choose as between different options: *Woodfall* 7.164. The approach to the construction of clauses conferring general or sweeping-up powers will depend upon the particular terms of the lease and circumstances: *Woodfall* 7.174. There is not necessarily a correlation between an obligation to provide a service and a right to recover service charge, or vice versa, although in appropriate cases one may be implied: *Woodfall* 7.184.

6.20 Although there are statutory restrictions on forfeiture for non-payment of service charge, discussed in *Woodfall* in chapter 7 section D, none are relevant to the situations under consideration here. As regards CJS there is a statutory restriction under the Insolvency Act 1986 on forfeiture proceedings without the permission of the court or the consent of the administrator (see *Woodfall* 17.151.1).

6.21 In my view the most important question is whether or not LHM is obliged to undertake the works claimed for by the claimants. For present purposes, and since these construction issues only arise if and insofar as the claimants otherwise succeed as against ZIP, the assumption must be that these are works which ought to have been undertaken by JCS to the standard necessary prior to completion of the leases in order to comply with their obligations under the Bldg Regs and/or the ZBG technical requirements, but which were not in fact undertaken to that standard. I am not concerned with works which are required to remedy subsequently occurring disrepair, other than disrepair caused by a failure to construct to that standard from the outset – for example corrosion of unprotected steelwork or present or imminent failure of the roof due to water penetration or condensation.

6.22 In my view LHM plainly is obliged to undertake both categories of work. As ZIP submit, the answer is clear from clauses 8.1 and paragraph 1 of Schedule 2 to the lease as well as from clause

8.6 of the lease. Even if there was room for doubt as to whether or not the obligation is one of repair, maintenance, reinstatement, replacement or renewal it is clearly one of improvement. Whilst that is qualified by the words "if appropriate" in clause 8.6 it is not so qualified in paragraph 1. Even if one has to consider that qualification it cannot be disputed that if there is a defect which is so serious as to amount to a breach of Bldg Regs and/or the ZBG technical requirements it would be appropriate to undertake the work.

6.23 Insofar as it is relevant to take into account wider considerations, there is nothing at all surprising about this conclusion. Under the lease the tenants are only responsible for internal parts and the landlord has no obligation at all for any of the parts. If the management company had no responsibility for the common or structural or services installations or retained parts then no-one could be compelled to ensure that they were and remained in a fit standard. That is a result which could scarcely have been intended in the context of a 125 year lease where in the absence of such an obligation no-one could be compelled to undertake what might be the most serious and urgent of works. The cost to the management company in such a scenario is divided equitably as between all of the tenants. The only objection to this consequence is that on this hypothesis the landlord does not have any obligation to contribute. However, there is nothing objectionable about this as such, since the landlord only collects a modest ground rent each year from the tenant which could scarcely be supposed to furnish it with enough to fund substantial works.

6.24 In closing submissions Mr Selby argued that a conclusion which required the management company to undertake, and thus the tenants to pay for the cost of undertaking, works to remedy the developer's own failure to build to a proper standard could not have been intended. However, as noted above, the landlord may or may not at any time during the 125 year duration of the lease be the original developer, so that it would be wrong to construe the lease as if the landlord was necessarily also the developer. Moreover, even if the developer is still the landlord then it would be possible for tenants who have had to pay service charge to remedy defects for which it is legally responsible to make a claim against it for breach of the obligations assumed by the developer under the sale contract. Whilst it is true that this would only provide a remedy within the limitation period that is unlikely to be a problem in the majority of cases in relation to initial construction defects and there is of course always the limitation extension afforded in cases of fraudulent concealment. If, as may be the case given the particular terms of the sale contract used in this case, any such claim is barred because of the issue of the Bldg Regs final certificates, then whilst that would obviously be unfortunate it is nonetheless merely the consequence of the commercial bargain the parties have made. In any event, in such a hypothesis if the sale contract is relevant then so is the fact that under the sale contract the developer ensures that the tenant has the benefit of building warranty insurance against structural and other serious defects. The tenant is therefore able to make a claim under the insurance policy for his or her share of the cost. The tenants are not left to bear the whole cost themselves.

6.25 In its written opening submissions the claimants noted that the covenants undertaken by the management company as set out in clause 8 are expressly made "subject to the service charge being paid by the tenant and to compliance by the tenant with all covenants and obligations on the tenant's part in this lease". Whilst I can see that this might prevent an individual tenant who was in default of his or her obligations seeking to enforce the clause 8 obligations upon the management

company, that does not seem to me to be relevant to its obligations as owed to those tenants who are not in default, let alone to its obligations as owed to the landlord.

6.26 Furthermore, it appears from a careful reading of clauses 8.2 and 8.3 that if one or more tenants do not pay their proper share of the service charge and if the management company is unable to obtain payment from the defaulting tenant(s) that the amount certified by the accountant under clause 8.3 will have to take into account any expected shortfall in recovery from other tenants with the result that the paying tenants' obligation will be proportionately increased. It may be assumed that the potential unfairness of this will be ameliorated by the ability either of the management company to obtain a judgment against any defaulting tenant which may be enforced by sale of the flat or of the landlord, if so required, to take enforcement action including forfeiture under clause 9.3. Insofar as the defaulting tenant is, like CJS, in some form of insolvency procedure, that would of course normally be subject to the agreement of the insolvency officeholder or the permission of the court being obtained.

6.27 If I am wrong in my primary conclusion as to the obligation on the management company then it is nonetheless clear in my view that the management company would be entitled to undertake these works under the provisions of paragraph 2.2 of the second schedule to the lease. On any view such works would be "improvements" or "other works" which the management company could reasonably exercise its discretion to consider to be for the general benefit of the flats in the building. In such circumstances the management company would plainly be entitled to recover the cost from the tenants under the service charge provisions of the lease. In my view neither the other tenants or the landlord could compel the management company to exercise its discretion to undertake the works in such circumstances. However, the position would be that the management company, controlled as it is by a majority of the tenants, would be entitled to decide to do so. Again this makes perfect sense in the context of a development with potentially up to 104 separate 125 year leases.

6.28 It follows in my view that the management company could be compelled to perform its obligations under the leases, either by the tenant or by the landlord, and that the tenant is entitled to require the landlord to do so in default, subject always to the rights of the management company and/or the landlord to be covered against such costs. There is also a series of perfectly workable interlocking arrangements whereby the costs can be recovered against defaulting tenants. Of course there is always the commercial risk of one or more of the tenants being unable or unwilling to pay but: (a) the assumption must always be that tenants who have the benefit of a valuable asset are unlikely to persist in such refusal if the consequence is that the lease will either be subject to execution or to forfeiture; (b) the enforcing party can always ask the court to permit execution or forfeiture where otherwise the other tenants would be out of pocket due to the insolvent tenant's failure to pay his or her or its own fair share of the service charge; (c) in the worst case scenario any shortfall is borne by the remaining tenants in equal shares.

6.29 So far as the extent of the demise is concerned, I propose to deal with those issues at the point where they naturally fall for consideration, which is in the next section.

7 The terms and proper construction of the policies

7.1	The policy terms
7.2	Claims relating to CJS and other non-claimant new homes
7.3	Common parts
7.4	Major physical damage – what is a load bearing element?
7.5	Physical damage or major physical damage – what is the intended physical condition?
7.6	Present or imminent danger to the physical health and safety to the occupants
7.7	Indemnity only if rectification or repair works will be undertaken?
7.8	The meaning of "reinstatement of any areas not directly affected by physical damage / major physical damage"
7.9	Is compliance with the claims notification conditions a condition precedent to cover?
7.10	Does the proportionate share limitation apply to present or imminent danger claims as well as major physical damage claims?
7.11	The maximum liability provision
7.12	Claims or contributions to claims where some other form of compensation or damage is available
7.13	Basement and other specific exclusions
7.14	The balconies
7.15	The condensation exception
7.16	Excess
7.17	Cover for the reasonable cost of alternative accommodation
7.18	Betterment

7.1 The policy terms

7.1.1 I have already summarised in section 3 at [3.27] the general nature and effect of the building warranty policies issued by ZIP.

7.1.2 As I also said in section 3 at [3.4] above, once JCS successfully achieved membership status with ZBG as an approved builder in June 2007 ZBG was willing to issue building warranty policies to individual purchasers of homes within JCS' developments. The detail of the contractual arrangements as between JCS and ZBG have not been referred to during the course of trial. For present purposes it suffices to say that ZBG agreed to issue policy documentation to individual purchasers as notified to it by JCS once its building warranty surveyor had inspected and confirmed that the home was completed in accordance with the requirements to be found in the ZBG technical manual.

7.1.3 There was no pre-existing contractual relationship between ZBG and the individual purchasers thus the first document which the latter would be likely to receive was the cover note, in those cases where one was necessary, transmitted by ZBG to JCS and then sent on by Ramsdens as JCS'

solicitor to the individual leaseholder's conveyancing solicitors. The cover notes were in standard form and identified the developer as JCS, identified the ZBG site surveyor by name, identified the development by its ZBC reference number, identified the address by reference to the individual flat number and stated the date of its issue. There was also a space for the inspector to issue an inspection comment.

7.1.4 Below these details the cover note stated: "This is confirmation that our surveyor has carried out a final inspection on the above plot and that Zurich agrees to issue the insurance certificate, provided the developer is on the Zurich directory as at the date of exchange of contracts with the first owner and full payment has been received. This will be sent direct to the developer and to the purchaser's solicitor / conveyancer where notified. The cover commences from the date shown on the insurance certificate."

7.1.5 The cover note did not, therefore, purport to be the insurance policy, nor did it identify the insured by name. This of course is not surprising since completion of the individual flat would not have occurred until after the cover note had been issued. Payment was made by JCS rather than the individual leaseholder. Presumably it was paid by JCS from the proceeds of sale on completion, which is why the sale contracts provided and the case was that the formal insurance certificates were only sent on by Ramsdens to the individual leaseholder's conveyancing solicitors after completion.

7.1.6 On this development two insurance certificates were issued in respect of each flat. The first in time for the majority of flats was headed "for new home excluding common parts" and the second was headed "for common parts only". The initial certificate had a note at the foot stating: "If your new home is a flat and this certificate excludes common parts, a separate certificate will be issued for the common parts. The certificate will not necessarily be issued at the same time". Other than these differences the two certificates were in identical terms.

7.1.7 All of the certificates identified JCS as the developer and identified what was referred to as the "new home" by flat number and stated the name of the "buyer" of that new home. They each had a separate unique certificate number and specified their effective date. They also each stated: "see schedule and endorsements overleaf". The sample versions produced are headed "buyer copy" so that, presumably, further copies were issued to JCS as the developer.

7.1.8 The evidence is that a certificate was issued to each of the individual leaseholders and also in relation to each of the flats where JCS subsequently granted a lease to CJS (although the latter have not been placed in evidence). There is no suggestion or evidence that separate certificates were issued addressed to JCS in its capacity as original freeholder or to Freehold Managers when they took over the freehold or subsequently to Zagora.

7.1.9 The note at the foot of each certificate stated:
"This is to verify that the new home described above has been found acceptable for insurance. We therefore agree that the protection offered in the policy, as shown in the schedule overleaf, comes into force from the effective date shown above. Note: the policy is automatically transferable and therefore new certificates are not required for the successors in title."

7.1.10 The schedules identified that cover was provided under what was identified as Parts 1, 2 and 4 of what was described as "your Standard 10 policy". Part 1 was entitled "building period insurance" and is not relied upon or relevant to this case. Part 2 was entitled "developer's warranty" and referred to section 2 of the policy, stating the applicable excess as being "£100 indexed for each and every item of claim or £500 indexed in total". Part 4 was entitled "insurance cover and our responsibilities" and referred to section 3 of the policy, stating the applicable excess as being "£1,000 indexed for each and every item of claim". It also included a specified endorsement which stated: "New home excludes basements /semi basements unless shown for residing / sleeping purposes in plans deposited with the local planning authority before the building period certificate date".

7.1.11 The schedule also stated that no cover applied in respect of Parts 4 ("manufacturer's warranty"), 5 ("environmental impairment insurance") or 6 ("additional insurance cover") and I need make no further reference to those sections. Part 7 was entitled "conditions" and referred to the conditions section of the standard 10 policy. Finally, Part 8 was entitled "exclusions" and referred to the sections of the standard 10 policy identifying "what we will not pay" and to the endorsements below, of which only one is relevant which was a specific exclusion for "balcony decking".

7.1.12 It is common ground that the "Standard 10 policy" was a reference to the document produced by ZBG and entitled "ZBG standard 10 new home structural defects insurance policy". This would have been sent to the individual leaseholders along with the insurance certificate in the pack sent to their conveyancing solicitors after completion. It extended over 15 pages, beginning with an introductory page (also headed "ZBG standard 10 new home structural defects insurance policy") and continuing with a definitions section before proceeding to set out the cover provided under sections 1 to 4, of which as I have already noted above only sections 2 and 3 are relied on and relevant to this case, before finally concluding with the conditions section.

7.1.13 The introductory page stated that the full details of cover were to be found in the policy wording, the definitions and conditions, the certificates and any endorsements printed upon them. It stated that the policy was an insurance contract between the buyer and ZBG, entered into by the developer on behalf of the buyer, and that the policy was not valid unless accompanied by an insurance certificate. The introductory page also stated that the insured could only claim under the policy whilst it was the current buyer and could not make or continue a claim once it had sold or otherwise disposed of its interest in the new home. The buyer was defined as "the person having a freehold, commonhold, leasehold or tenancy interest in the new home for the time being or any mortgagee in possession excluding the developer, builder, directors, partners, and their relatives and associated companies, and all those involved with or having an interest in the construction or sale of the new home". The developer was defined as "the person or company named in the certificates from whom the first buyer acquires the new home or who undertakes the work of building the new home for the buyer". The insurance certificate was defined as "the certificate issued by ZBG to signify acceptance of the new home for insurance under the policy [which] may be endorsed to include or exclude specified items from cover".

7.1.14 It is clear in my view from the terms of this introductory section when read with the certificates that: (a) ZIP was issuing cover to individual buyers of individual flats pursuant to a prior agreement with and at the direction of JCS as the developer; (b) the insured was the original buyer; (c) the

benefit of the policy would be automatically transferred to any successor in title; (d) the original buyer or any subsequent transferee would lose the benefit of the insurance or the right to make or continue a claim upon sale of the flat. In short, only the owner of the flat for the time being was entitled to be the insured and to make or continue a claim, but there was no need for a successor in title to have a new insurance certificate.

7.1.15 It is also clear, as I have already said, that the original developer and those associated with the original developer were excluded from cover. This would apply, as is common ground, to CJS. There is no evidence that JCS was entitled to call for an insurance certificate to be issued to it in its capacity as freeholder. Nor is there any evidence that ZIP would have been required to have issued an insurance certificate to a third party unconnected purchaser of the freehold interest from JCS in respect of that freehold interest.

7.1.16 The cover applied only to a "new home", defined in the definition sections as "the new property … described in the insurance certificate". It was expressly provided that it included 7 identified elements, of which the first and by far the most important so far as this case is concerned is the "common parts", which was itself a defined term to which I shall refer shortly. There was a long list of identified elements which were not included in the definition of a new home, including as relevant to this case: (i) lifts; (ii) basements or semi basements unless shown for residing or sleeping purposes in the plans deposited with the local authority.

7.1.17 Common parts were defined as "those parts of a multi-ownership building (of which the new home is part), for a common or general use, for which the buyer has joint responsibility together with other buyers or lessors".

7.1.18 Under section 2 of the policy ZBG agreed to pay during the first two years after the effective date:

> "2.1 The reasonable cost of rectifying or repairing physical damage caused by the developers failure to comply with the requirements in the construction of the new home."

7.1.19 "Physical damage" was defined as "a material difference in the physical condition of the new home from its intended physical condition. For the avoidance of doubt, physical damage includes major physical damage" (I shall refer further to major physical damage under section 3 below).

7.1.20 The "requirements" were defined as "the requirements contained within the technical manual issued by [ZBG] and in force at the time when the appropriate notice to build in respect of the new home was deposited with the local authority for the purposes of the Bldg Regs".

7.1.21 ZBG also agreed to pay[6]:

> "2.3 The reasonable cost of rectifying a present or imminent danger to the physical health and safety of the occupants caused by the failure of the developer to comply with the Bldg Regs in respect of the following: structure, fire safety, site preparation and resistance to

[6] Clause 2.2 referred to the reasonable cost of rectifying excessive sound transmission and is not relevant to this case.

moisture, hygiene, drainage and waste disposal, heat-producing appliances, glazing – safety in relation to impact, opening and cleaning."

7.1.22 Bldg Regs were defined as those governing the construction of the new home in force at the time the notice to build was deposited with the local authority. The 7 items beginning with "structure" were, as is well known, the 7 parts of the applicable requirements contained in Schedule 1 to the Bldg Regs with which, by regulation 4, building work was required to be carried out so that it complied.

7.1.23 ZBG also agreed to pay:

"2.5 The reasonable cost of alternative accommodation where the new home is not fit for habitation as a result of the carrying out of remedial works by us covered under the terms of this policy provided that you have first obtained our written consent to such costs being incurred" (clause 2.4).

"2.6 Professional fees incurred in connection with your claim, provided that you have first obtained our written consent to such costs being incurred."

7.1.24 On the other side of the same page there then appeared a number of bullet point items under the heading "What we will not pay under section 2". These included the following which are of potential relevance to this case:

(i) "Any claim reported for the first time to the developer or to us more than two years after the effective date".
(ii) "Claims for anything that is not part of the new home".
(iii) "Claims for any loss that is caused by anything other than the failure by the developer to build to the requirements".
(iv) "Any repair that exceeds the original specification for the new home", the original specification being defined as "the specification the developer used to construct the new home up until the date shown on the insurance certificate".
(v) "Any sum that exceeds our maximum liability".
(vi) "Any sum in connection with … loss of income, business opportunity … or any other consequential or financial loss of any description".
(vii) "Any sum above your proportional share of the reasonable cost of repairing physical damage to common parts".
(viii) "Any claim or contribution to a claim where cover is available under another insurance policy, or where some other form of compensation or damages is available to you".
(ix) "Any reduction in value of the new home".
(x) "Sums in connection with or caused to or by the presence of a lift or lift shaft".
(xi) "Claims for the prevention of, or any loss caused by surface or any other form of condensation".
(xii) "Any sums in respect of the excess (as specified in the insurance certificate)".
(xiii) "Claims by any persons other than the buyer".
(xiv) "Any claim where we have not issued a valid insurance certificate".
(xv) "Claims for wear, tear, neglect, lack of maintenance (etc)".

(xvi) "Reinstatement of any areas not directly affected by physical damage or major physical damage".

(xvii) "Anything that you knew about when you purchased the new home including any items mentioned in a home condition report".

7.1.25 Under section 3 ZIP agreed to pay during the subsequent eight years:

"3.1 The reasonable cost of rectifying or repairing major physical damage which is caused by a failure by the developer to comply with the requirements in the construction of the new home."

7.1.26 "Major physical damage" was defined as "a material difference in the physical condition of a load bearing element of the new home from its intended physical condition which adversely affects its structural stability or resistance to damp and water penetration" and "requirements" had the same definition as under section 2.

7.1.27 ZIP also agreed to pay:

"3.2 The reasonable cost of rectifying a present or imminent danger to the physical health and safety of the occupants caused by the failure of the developer to comply with the Bldg Regs in respect of the following: structure, fire safety, site preparation and resistance to moisture, hygiene, drainage and waste disposal, heat-producing appliances, glazing – safety in relation to impact, opening and cleaning."

7.1.28 This, therefore, was identical to the cover provided by clause 2.3 of the policy. ZIP also agreed to pay the reasonable cost of alternative accommodation and professional fees, in precisely the same terms as under sections 2.4 and 2.5 above.

7.1.29 Again, on the other side of the page appeared a list of items which ZIP would not pay, in substantially the same terms as those applying to section 2. The only relevant difference was that instead of "any claim reported for the first time to the developer or to us more than two years after the effective date" the relevant item was "any claim that could reasonably have been reported in writing to the developer or to us within two years of the effective date but was not reported to the developer or to us".

7.1.30 Finally, there were a number of conditions applying to all claims under the policy, including the following:

"1. Claims notification. On discovery of any item of claim you shall as soon as reasonably possible: (a) take all reasonable steps to prevent further loss; (b) where section 2 applies, ensure written notice has been given to the developer; (c) give written notice to us; (d) if requested by us and at your expense, submit in writing full details of the claimant supply all reports, plans, certificates, specifications, quantities, statutory notices or other information and assistance as we may reasonably require to verify the claim. Where we subsequently accept the claim, we will reimburse the reasonable expenses incurred in obtaining such reports."

"2. Our rights. Where we accept a claim under this policy, we and the developer and our agents shall be entitled to have reasonable access to the new home and shall also be entitled to remain in occupation for as long as is necessary in order to carry out proper repairs to our satisfaction."

"3. Recoveries from Third Parties. We are entitled to take proceedings at our own expense, but in your name, to secure compensation from any third party in respect of any claim accepted by us under this policy."

7.1.31 There are a number of significant issues as to the proper construction of certain elements of the policy, which I shall now address.

7.1.32 In the same way as with the leases the construction of the policy is governed by the principles applicable to the interpretation of contracts generally as summarised by the Supreme Court in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 at paragraphs 8 – 15. The established rules are considered in a number of the established textbooks and I have reminded myself by reference to the summary in chapter 3 of *Colinvaux's Law of Insurance* 11th edition.

7.1.33 In submissions the claimants contended that the proper construction of the policies ought to proceed from the premise that the policies were, putting it in broad terms, intended to provide effective building warranty insurance to individual flat owners both for their individual flats and for their common parts and that any particular terms of the policy which might have the effect of abrogating or limiting or restricting that cover in a material degree ought to be given a restrictive interpretation. In contrast, ZIP contended that this was a straightforward insurance policy entered into between an insurance company and individual property owners which contained a number of detailed terms and conditions which ought to be construed in accordance with their natural and ordinary meaning and without any presumption about what the policy "ought" to cover.

7.1.34 This point is addressed in *Colinvaux* at 3-011, where it says:

"English law does not recognise the concept that the policy must be construed in accordance with the reasonable expectations of the assured, although it has been said that a policy should be construed other than in a way which would "unwarrantably diminish the indemnity which it was the purpose of the policy to afford. In some cases, however, the wording may be so clear that the court is constrained to construe them as they stand even though the result might not be commercially sensible ..."

7.1.35 It appears to me that the approach in this passage strikes the right balance. The starting point is the natural and ordinary meaning of the words used, which cannot be overridden by an argument that they should be construed in accordance with what the assured may reasonably have believed was being provided. However, where the words used leave reasonable room for doubt as to what was intended, a construction which would unreasonably limit the scope of the cover which it was the clear purpose of the policy to provide is to be avoided. That applies particularly where the insurer has put forward a policy which contains exclusions from cover which is otherwise afforded which are genuinely ambiguous, since the "contra proferentum" rule "consists of two quite distinct limbs:

that words are to be construed against the person who put them forward; and that words of exclusion are to be construed narrowly": see *Colinvaux* at 3-012.

7.1.36 It is however important to note that this is not a case in which the majority of the claimants, being buy-to-let investors, can seek to place reliance on the *Unfair Terms in Consumer Contracts Regulations 1999* (now replaced by the *Consumer Rights Act 2015*). Moreover, although in their written closing submissions the claimants suggested that reliance could be placed on those Regulations by the two claimants who bought flats for occupation, in oral closing submissions they acknowledged that the Regulations could not be used to seek to construe core provisions of the policies so as to secure cover greater than that which was afforded on a proper construction of the policy.

7.1.37 There is a further general point as to the proper construction of the policies which is or may be relevant to a number of the debates in this case which I should address, which is the difference between cases where loss is caused concurrently by an insured and an uninsured peril and cases where a loss is caused concurrently by an insured and an excluded peril. The difference, as is made clear in the discussion in *Colinvaux* at paragraphs 5-057 to 5-061, is that in the former case the claimant can recover whereas in the latter case the claimant cannot: see *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp* [1974] QB 57. (This point, it should be observed, is a separate and logically subsequent question to the question as to whether or not there was only one or more than one proximate cause, since if there is only one proximate cause the simple question is whether that is an insured cause or an uninsured or excluded cause: see the discussion in *Colinvaux's Law of Insurance 11th edition* at 5-039 to 5-056.)

7.1.38 In this case it is not as easy as it might be to identify whether the items listed under the side of the page entitled "what we will not pay" are items which are uninsured or which are excluded or otherwise. The language "what we will not pay" is more obviously consistent with a description of items which are uninsured rather than exclusions. However, some of the items might be said only to make sense on the basis of being exclusions from or limitations upon cover otherwise provided. It appears to me that it will be necessary to consider the proper interpretation of particular items by focussing closely on their wording and on their inter-relationship with the items listed on the other side of the page in order to reach a clear conclusion where there may be scope for argument.

7.2 Claims relating to CJS and other non-claimant new homes

7.2.1 It is common ground that the claimants cannot recover under the policy for claims which relate solely to new homes owned by CJS or others and which do not relate to the common parts. In its written closing at [20] ZIP identifies one example, being service installations solely serving the flat in question.

7.2.2 However, it also identifies the doors to the flats as another example. That seems to me to be wrong because although the external doors to the flats are not expressly identified as being within or without the demise, in contrast to the internal doors which are expressly identified as being within the demise, the walls which enclose the flat are specifically excluded and the repairing covenant in clause 7.5.1 prohibits the tenant from decorating any part of the exterior of the flat "including the exterior of the external doors of the flat".

7.2.3 Furthermore, ZIP contends that the claim for work to the compartment walls dividing the common parts from the individual flats cannot include any work to the internal sections of those walls. Again, however, that seems to me to be wrong. As I have said the walls which enclose the flat are specifically excluded from the demise and the only items expressly included within the demise are the "linings and surface finishes including lath plaster and board of the interior of all walls". It appears from the information available in the Edwards reports, helpfully summarised for me by the parties after closing submissions, that between the flats and the common corridors the mode of construction (running from inside the flat outside) is a single stud wall comprising: (a) 2 layers of plasterboard; (b) wall cavity with mineral fibre quilt; (c) single timber stud with OSB, whereas between adjacent flats the mode of construction is a double stud wall comprising: (a) 2 layers of plasterboard; (b) timber studs with mineral quilt fibre between studs; (c) OSB; (d) wall cavity; (e) wall cavity. Whilst I agree that it would appear to follow that the inner layer of plasterboard would fall within the demise, there is nothing to prevent the necessary remedial work being undertaken to the external layer of plasterboard and/or to the OSB on the common corridor. If, as ZIP contend, the remedial works have been built up and costed on the basis that the works will be undertaken to the inner linings, there is no basis for thinking: (a) that the works cannot be done leaving the inner layer unaffected and, if so: (b) that the cost will be any less. Given that these works are undoubtedly necessary in order to ensure that the present or imminent danger to occupants of all flats (not just CJS flats) is maintained so that occupants can safely exit via the common corridors forming the means of escape, there is no reason to proceed on the assumption that CJS could effectively frustrate these remedial works or that ZIP could avoid liability to pay for them.

7.2.4 ZIP also appears to contend that in any event it would not be required to make good the internal sections of those walls, insofar as they relate to CJS flats. I am satisfied that this argument is unsustainable. It seems to me to be necessarily implicit in the cover provided by the policy that making good is included unless specifically excluded. That is particularly so where the lease requires making good where access is required to other flats to undertake remedial works. The only specific exclusion which ZIP might otherwise rely upon is that excluding "reinstatement of any areas not directly affected by physical damage or major physical damage". However, I am satisfied that this cannot apply to making good works to areas which are directly affected in that they have to be removed to allow remedial works to be undertaken.

7.2.5 It follows, I am satisfied, that the premise to the contention at [22] of ZIP's written closing that the claimants can recover nothing in respect of work to the compartment walls, because the work claimed for includes work which they are not entitled to recover, is not made out.

7.2.6 In its opening submissions ZIP also appeared to argue that the works relating to the ceilings and floors, such as the provision of missing insulation above the fourth floor flats and the provision of effective fire stopping of the services installations passing through from CJS flats down to the basements was not covered. However it is plain that the floors and ceilings other than the surface finishes do not form part of the demise and, for the same reasons as given above in relation to the compartment walls, I reject these arguments.

7.3 Common parts

7.3.1 It is clear that there are two separate elements to the definition, so that to fall within the definition of a common part a part must be "for a common and general use" and also "for which the buyer has joint responsibility together with other buyers or lessors". The first element seems to me to be a straightforward question of fact in each case and does not present any difficulty of interpretation. The second is more contentious. For forensic reasons both the claimants and ZIP have advanced arguments which may at first blush appear adverse to their respective cases. However both agree, rightly in my judgment, that joint responsibility includes indirect financial responsibility under the service charge provisions of the lease. Whilst it is true that the policy does not refer expressly to such provisions, it is inconceivable in my view that a policy such as this, specifically intended to include blocks of flats (see for example the definition of "continuous structures"), would not have been drafted bearing in mind that individual flat-owners are more likely to have indirect financial responsibility for common parts under such service charge provisions than direct responsibility. That is obviously consistent with the exclusion of any sum above the proportionate share of the reasonable cost of repairing major physical damage to common parts.

7.3.2 Thus the debate has turned more upon the application of this provision to the particular terms of the lease, to which I have already referred above. Given my conclusions above as to the width of the management company's obligations and given also (and separately) my conclusions as to the width of the management company's discretion in relation to undertaking works to address the defects complained of in this case, even if they do not fall within the scope of its obligations, in my view it is plain that all of the relevant parts of the development which are not within the individual flats in respect of which claims are made in this action fall within the definition of common parts under the insurance policy. For the avoidance of doubt, this applies not only to the common parts as defined under the leases but also to the structural parts and the retained parts insofar as on a proper construction of the leases some or all of them are outside the lease definition of common parts – that being because there is no reason to treat the definition of common parts under the policy as necessarily equating to what may be a more restrictive definition of common parts under a particular lease of a particular block of flats.

7.4 Major physical damage – what is a load bearing element?

7.4.1 There is a debate between the parties as to the meaning of the phrase "load bearing element". A number of possibilities have been advanced. The most restrictive definition is that it only applies where the element bears the load of another element of the new home. The intermediate position is that it is sufficient if it bears any load, including loads imposed by the elements or by the occupants. The most expansive definition is that it is sufficient if it merely bears its own load. I am satisfied that the intermediate position is the correct one, so that in principle a load bearing element is an element which bears the load of another element of the new home or a load imposed by the elements or by the occupants but not one which bears solely its own load. As a matter of language, an element bears a load if it bears a load imposed from another element but also if it bears a load which may be transient, caused by the elements such as wind, water or snow, or by occupants of the building, so long as it is designed to bear such loads. In contrast, the most expansive definition would deprive the words in question of any real significance, in circumstances where it is plain from a comparison of the definition of major physical damage and the definition of physical damage that they were intended to have effect. It is a matter of fact and degree whether or not the

load imposed, whether by another element of the new home or from the elements such as wind, is sufficiently material to make it load bearing.

7.4.2 In its written closing submissions ZIP also contends at [65] that an element which simply transfers load from one element to another element is not a load bearing element. I disagree. It is important to construe the words in their context. As I have said, the definition of major physical damage: is "a material difference in the physical condition of *a load bearing element* of the new home from its intended physical condition *which adversely affects its structural stability or resistance to damp and water penetration*" (emphasis added). In contrast, the definition of physical damage is "a material difference in the physical condition of the new home from its intended physical condition". It follows in my view that if the effect of structural instability or lack of resistance to damp and water penetration of the element in question has no impact on anything other than the element itself it is unlikely that the element could be regarded as load-bearing. By contrast, if the effect of structural instability or lack of resistance to damp and water penetration of the element in question does impact on the structure of the new home, then the element is likely to be regarded as load-bearing. Analysed in this way, structural instability of or damp or water penetration to an element which transfers load is just as serious as structural instability of or damp or water penetration to an element which bears load, since if it cannot safely transfer the load then the element imposing the load which it is intended to transfer is at risk.

7.4.3 I derive some support for this construction from the Zurich technical requirements, which is clearly a relevant constructional tool because it is referred to in clause 3.1 which provides the cover for major physical damage, and which states, in the context of steel frames at p.204, that: "load bearing walls should be designed to support and transfer loads to foundations safely and without undue movement" and that "suspended floors should be designed to support and transmit loads safely to the supporting structure without undue deflection". The transfer and transmission of loads are clearly regarded as important functions for load bearing walls and suspended floors.

7.4.4 Moreover, as the claimants submit, it is also important not to seek to subdivide individual parts of one composite element in an artificial and strained manner in order to seek to deny cover on the basis that the particular part is not, viewed in isolation, a load bearing element. This issue arises in particular in relation to the roof and I shall discuss the application of the definition to the particular parts of the structure at the appropriate part of the judgment, since it is a fact specific question which can only be determined on the particular facts of the particular question where it arises.

7.5 Physical damage or major physical damage – what is the intended physical condition?

7.5.1 There is a debate between the parties as to whether the definition applies to what may colloquially be described as design defects. This debate is of particular significance to the cold roof construction of the blocks, where ZIP contends that the roof was designed to have a cold roof construction even though its own experts agree that it was wholly inappropriate to do so in the way in which it has been designed and/or constructed in this case, namely as an unventilated cold deck. The question is whether there is cover where the element is in its intended physical condition, even though that intended condition arises from defective design or a defective construction process which is contrary to the ZBG requirements and which adversely affects its structural ability or

resistance to damp or water penetration. ZIP argues that there is no cover in such circumstances whereas the claimants argue that there is cover.

7.5.2 In my judgment the claimants are right on this point. If the scope of the cover under section 3 is read as a whole it applies where there is a material difference in the physical condition of a load bearing element of the new home from its intended physical condition, which adversely affects its structural stability or resistance to damp and water penetration and which is caused by the developer's failure to comply with ZBG's requirements in the construction of the new home. A failure to comply with ZBG's requirements due to design errors is not excluded. It can be seen from a cursory reading of the ZBG technical manual that it includes design obligations as much as it does construction obligations. One sees, for example, page 268 dealing with flat roofs which makes it clear that flat roofs should be designed as either warm deck roofs or ventilated cold deck roofs. ZIP cannot sensibly argue in my judgment that on an objective interpretation of the policy there would be no cover if that specific design obligation was not complied with. It seems to me that the intended physical condition is the condition which, considered objectively, complies with the ZBG requirements. It is the material difference between that intended physical condition and the actual condition which has been caused by the failure to comply with the requirements which triggers the cover. I do not accept that there is no cover where there is the intentional adoption of a defective design mode or a defective construction mode which, judged objectively, would produce a physical condition which was contrary to the ZBG requirements. In my view the intended physical condition must be the physical condition which was intended to result from compliance with the ZBG requirements.

7.5.3 ZIP contends that the intended physical condition is to be determined by reference to the original specification, which is a defined term, being "the specification the developer used to construct the new home up until the date shown on the insurance certificate". However, I see no reason to construe the phrase "intended physical condition" in that restricted manner. The term original specification is relevant: (a) to the cover provided by section 1 under which ZIP agreed, where the developer failed to complete the new home due to its insolvency or fraud and the buyer lost the deposit, either to pay the reasonable cost of completing the home to the original specification or to pay the deposit; and (b) the exclusion for any repair that exceeds the original specification for the new home. There is no reason in my judgment to extend its application to the definition of physical damage or major physical damage.

7.5.3 I have to confess that I am happy to be able to reach this conclusion. It seems to me to be inconceivable that any other sensible construction could have been intended. On ZIP's construction there would be no cover if a developer built, deliberately, to a design which he knew would breach the ZBG technical requirements and would make the building structurally unsafe. I am surprised, frankly, that ZIP felt it appropriate to argue for such a construction. I very much doubt that it would have done so had it still been offering these policies to the market.

7.6 Present or imminent danger to the physical health and safety to the occupants

7.6.1 There is a debate between the parties as to what is meant by a present danger to the physical health and safety of the occupants of the new home and what is meant by an imminent danger to the physical health and safety of those occupants.

7.6.2 In my view this is a classic case where the ordinary and natural meaning of the language used directs the result. A present danger is one which is actually occurring at the time in question, even if it is not known about. An example would be if the supports of a tread in a fire escape staircase had so decayed that the tread was liable to collapse if used by occupants evacuating the building. An imminent danger is one which is not present but which requires something else to happen which can properly be said to be imminently about to happen. An example would be if the supports of the tread in the above example had almost but not quite decayed so that at some stage in the near future the tread was liable to collapse. In contrast, if the supports of the tread were liable to decay due to, for example, damp conditions within the staircase, but had not actually decayed to the point where it could be said that there was any imminent danger of collapse, that would not fall within the scope of the cover.

7.6.3 It follows, in my view, that the claimants cannot succeed simply by pointing to the fact that due to a failure to comply with Bldg Regs a part of the structure will inevitably fail at some stage during the lifetime of the building. The claimants can only succeed if they can show that during the lifetime of the cover provided by section 3, i.e. within years 3 to 10 inclusive of the effective date, there is a present or imminent danger which entitles them to make a claim.

7.6.4 However ZIP takes a number of further points.

7.6.5 The first is that it is only the reasonable cost of rectifying the present or imminent danger which is covered, so that temporary measures which rectify the present or imminent danger, even if they do not remove the danger completely, are sufficient.

7.6.6 I do not accept this argument, which seems to me to seek to ascribe too much weight to the words "present or imminent". In my judgment those words are present in the clause to make it clear, as I have said, that dangers which may be present or imminent at some time in the future but which are neither present nor imminent as at the current time are not covered. Once, however, a danger is present or imminent then it is the reasonable cost of rectifying that danger which is covered, rather than the reasonable cost of temporary measures so that the danger is, whilst those temporary measures continue, neither present nor imminent. Whilst of course it will be a question of fact in any individual case whether or not the measures proposed satisfy the requirements of the section, in my view the starting point is that the measures proposed ought to be measures which ensure that the relevant part or parts of the building comply with the applicable Bldg Regs.

7.6.7 The second is that it is only the reasonable cost of rectifying present or imminent danger to "occupants". It follows, it is said, that any attempt by the claimants to rely on dangers to the occupants of flats other than their own flats is not permissible nor, for example, is any attempt to rely on a danger, for example, to workmen walking on the roof.

7.6.8 It seems to me that this is a bad point because it sets up a false distinction. Since the new home includes the common parts it seems to me that any occupant of a flat is of course entitled to use the common parts. There is no reason why that should not extend to the common parts in respect of which there is a right or an obligation to repair. Thus, dangers to those on the roof for lawful

purposes, which would include occupants and would also include contractors engaged by occupants, whether directly or indirectly through the management company, are covered.

7.6.9 Again I am pleased to be able to dispose of what I regard as an unattractive point to take.

7.7 Indemnity only if rectification or repair works will be undertaken?

7.7.1 This is a fundamental issue as between the parties. The claimants' case is that they are entitled to recover the reasonable cost of rectification or repair, as the case may be, under the applicable sections of the policy without either first having to undertake the works or second having to prove that they intend and/or are actually in a position, financially or otherwise, to undertake the works. In contrast, ZIP contends that the policies do not respond to claims for the cost of works that will never be carried out, for whatever reason.

7.7.2 This is also an important point, because it forms a major plank of ZIP's case that the claimants cannot recover in this case because they will never, due to their financial position and the financial arrangements they have entered into for the funding of this case, be in a position to undertake any repairs covered by the policies.

7.7.3 It is clear that the decision to this issue depends upon the proper construction of the policy. In that respect I have found very useful the discussion in *Colinvaux's Law of Insurance* 11th edition chapter 11 - Loss and the Measure of Indemnity. In section 2 - the measure of indemnity, a distinction is drawn between valued and unvalued policies. This is of course an unvalued policy. In relation to such policies, the overriding principle of indemnity is stated at [11-025] to be that the insured is entitled to be indemnified for his loss and no more. However, at [11-026] it is said that "unless an option to reinstate has been exercised, the insurers are required to make a money payment to the assured and the assured is entitled to use the monies as he thinks fit even though he has been indemnified on a reinstatement basis". It is noted at [11-027] that there are frequently clear words in an insurance policy which identify the measure of indemnity, such as by reference to reinstatement or repair costs. In an Australian case there cited, an argument by the insurers that there was an overarching rule that the assured was to be held to the difference between the market value of the property before the casualty and its market value after the casualty was rejected. It is said at [11-028] that in the absence of any policy terms which fix the measure of indemnity, the guiding indemnity principle is to be satisfied by reference to the nature of the loss in the value of the damaged property to the assured immediately before the loss.

7.7.4 At [11-031], to which my attention was drawn by the claimants in their closing submissions at [391], it is said, importantly, that:

"… the assured may be entitled to recover an indemnity based on the cost of reinstatement even though reinstatement is never actually effected. That will be the case where the policy provides that the assured or the insurer, as the case may be, opts for indemnity on a reinstatement measure or where reinstatement is not possible. If the policy merely provides for reinstatement without any alternative, it is difficult to see why impossibility should affect the insurers' obligation to indemnify the assured on a reinstatement basis: the loss is assessed by reference to the position immediately before the occurrence of the insured peril, the obligation to pay is divorced from what actually

happens to the insurance monies and the obligation on the insurers to pay the insurance proceeds cannot be regarded as frustrated in any way. The point arose in *Anderson v Commercial Union Assurance Co* (1885) 55 LJQB 146, the problem in that case being planning restrictions on reinstatement. The Court of Appeal held that, given the impossibility of reinstatement, the proper approach was to construe the contract between the parties to determine whether the insurer was discharged from all liability or whether its liability reverted to payment. The court had little hesitation in holding that the latter was the proper construction. Thus, subject to the terms of the policy, the insurer will be liable on a cost of reinstatement basis even where actual reinstatement is no longer possible, as for instance where the damaged premises have been sold, or where town planning restrictions prevent rebuilding, in which case the cost is assessed on a notional reinstatement basis."

7.7.5 In their closing submissions at [391.2] the claimants referred me to the decision of Jefford J in *Hodgson v NHBC* [2018] EWHC 2226 (TCC). In that case, which concerned a claim made by an insured against the NHBC under a previous settlement agreement (under which, according to the claimant, the NHBC had agreed to deal with a claim brought against it under the NHBC insurance policy on its merits), she had to address a submission by the NHBC that the claim should be struck out on its Part 24 summary judgment application because, after the settlement agreement had been entered into, the claimant had sold the property and, hence, could not now undertake any remedial works. It was submitted to her that the analysis in *Colinvaux* at [11-031] was inconsistent with the observations of Christopher Clarke LJ in *Great Lakes Reinsurance v Western Trading Limited* [2016] EWCA Civ 1003 and should be rejected.

7.7.6 She summarised the facts of the *Great Lakes* case and cited Christopher Clarke LJ's observations (as relevant to the issue before her) in the following terms:

"25. … In that case, a property was unused and awaiting redevelopment: it was insured for over £2 million which was its estimated rebuilding cost but its market value was only £75,000. The policy included a memorandum including a reinstatement clause that defined reinstatement as rebuilding to the same condition as when new and a special condition that no payment beyond the amount payable under the policy would be payable for reinstatement until the cost had actually been incurred. The property burnt down. Since no reinstatement had been carried out, the court had to consider what would have been payable under the policy if the memorandum had not been incorporated. Obiter, Christopher Clarke LJ expressed this view:

"72. I doubt whether a claimant who has no intention of using the insurance money to reinstate, and whose property has increased in value on account of the fire, is entitled to claim the cost of reinstatement as the measure of indemnity unless the policy so provides. …. The true measure of indemnity is "a matter of fact and degree to be decided on the circumstances of each case" per Forbes J in *Reynolds v Phoenix*; and is materially affected by the insured's intentions in relation to the property.

73. The significance of intention begs the question as to (a) what exactly is the requisite degree of intention; and (b) what safeguard, if any, is available to an

insurer who pays out the cost of reinstatement to an insured who then finds that he cannot reinstate or, even if he can, in fact, sells the property. Neither of these issues were the subject of submission; so what I say on them must be regarded as tentative.

74. … The problem arises in a case such as the present where there is a real possibility… that reinstatement may not take place either because it cannot do so… or because a markedly more attractive alternative presents itself.

75. As to (a) it seems to me that the insured's intention needs to be not only genuine, but also fixed and settled, and that what he intends must be at least something which there is a reasonable prospect of bringing about (at any rate if the insurance money is paid).

76. As to (b) an insurer who pays out has, in general, no redress if none of the money is used in reinstatement. Once he has got it, it is for the insured to decide what to do with it… But I incline to the view that, in a case where, at the time of the hearing, there is a real possibility that reinstatement may not in fact occur it is open to the court to decline to make an immediate award of damages and either to make some form of declaratory relief, alternatively to postpone assessment of the extent of indemnity (and the payment of it) until such time as it is apparent that reinstatement (i) can and (ii) will go ahead or, at least that there is a reasonable prospect that it will."

7.7.7 At [36] of her judgment, having already rejected the NHBC's application on the basis that it was at least arguable that the claim under the settlement agreement was unaffected by the subsequent sale of the property, she proceeded to state her view if she was wrong on the conclusion she had just reached as follows:

"36. If that is wrong, then the issue between the parties is what the NHBC is now liable to pay under the Policy. There seem to me to be numerous issues that potentially arise, the end result of which is that the "no loss" defence is not one suitable for determination on a summary basis:

(i) firstly, an insurance policy may indemnify the insured against loss. Under such a policy it is a question of law and fact what loss has been suffered. The policy may by express inclusion or exclusion identify how loss is to be assessed.

(ii) There is no decided authority that where the claim is in respect of defects in or damage to property, such loss cannot include the cost of remedial works if the remedial works will not be carried out. The views expressed in the *Great Lakes* case are obiter and at odds with the views expressed in a leading textbook.

(iii) That conflict of view is perhaps understandable if one sees the cost of remedial works as one measure of loss. In such cases, if the remedial works are never to be carried out or are wholly disproportionate, the court may regard the cost of

remedial works as an inappropriate measure. That is likely to be a question of fact and degree not suitable for determination on a summary basis.

(iv) In any case, the distinguishing feature here is that the Policy does not provide for the NHBC to indemnify against loss – rather it requires the NHBC to pay the Cost as defined. In that sense, it may be distinguished from the policy in the Great Lakes case in which the operative insuring provision insured against loss and the reinstatement clause provided the basis on which the amount payable was to be calculated. For the reasons I have already given, it is certainly arguable that the issue in this case is not the appropriate measure of loss but what the NHBC has undertaken to pay in accordance with the definition of Cost."

7.7.8 Since this observation is strictly obiter, and since Jefford J was saying no more than that it was at least arguable, for the purposes of a summary judgment application, that the obiter observations of Christopher Clarke LJ on the facts of that particular case might not dictate the outcome on the facts of the case before her at trial, what she said is plainly not in any way determinative of the issue before me. However her analysis is, if I may respectfully say so, illuminating in drawing attention to the need to focus on the particular terms of the policy in question, in a case where the relevant terms of the NHBC policy bear close similarities to those of the instant policies.

7.7.9 In this case, the policy clearly provides that ZIP "will pay … the reasonable cost of rectifying or repairing the physical damage [or] the reasonable cost of rectifying a present or imminent danger". Accordingly, this is not, unlike the *Great Lakes* case, an unvalued policy which contains no express provision as to how the indemnity is to be ascertained. On the contrary, it is a policy which contains an express reinstatement clause under which ZIP binds itself to pay the reasonable cost of rectification or repair.

7.7.10 There is no express provision in the policy stating that this obligation only applies either if and when rectification or repair has already taken place or if the insured can prove that he has a genuine, settled and achievable intention to reinstate, either before payment or once payment is received. The obligation is to pay the "reasonable cost" which, in my view, is neutral as to whether it is a cost already incurred or a cost to be incurred or indeed a cost which may never in fact be incurred. Unlike the professional fees cover the word "incurred" is not used. Unlike the alternative accommodation and professional fees cover there is no express proviso that the insured has first obtained ZIP's written consent to the costs being incurred.

7.7.11 Furthermore, there is no obvious reason why the provision should be construed so that any such limitation should be implied. Indeed it is far from obvious, even on ZIP's case, what should be implied. Is it that: (a) the cost has already been incurred or; (b) that the cost will on the balance of probabilities be incurred and, if the latter, whether it will be incurred regardless of whether or not the insurance monies are paid out or; (c) both.

7.7.12 Moreover, in my view condition 2 is wholly inconsistent with ZIP's construction. It entitles the insurer, on accepting a claim, to undertake proper repairs itself and to refuse to accept a claim if reasonable access cannot be gained within a reasonable time period. This condition, which is

effectively a reinstatement option given to the insurer, would make no sense if the insurer was only liable where the works had already been undertaken.

7.7.13 Whilst the wording used in some of the exceptions or limitations could be argued as only applying where repairs have actually been undertaken (for example "any repair that exceeds the original specification"), in my view the words used are just as consistent with the "repair" identified in the insuring clause and, hence, are not on proper analysis indicative of a clear contractual intention that only incurred costs are covered.

7.7.14 In the circumstances, I reject ZIPs submission that the reference to "costs" means that the policy only responds to a claim where those costs have already been incurred or will be incurred, where the question as to whether or not those costs will be incurred must be determined by the court on the balance of probabilities. In short, I consider that the approach discussed by Christopher Clarke LJ in *Great Lakes* has no application to the facts of this case.

7.7.15 On the same basis I also reject ZIP's submission that because, it is said, the sums claimed are unreasonable and wholly disproportionate to the diminution in value of their interests in the development the claimants should be limited to the diminution in value. However, as it transpires in my view ZIP can achieve the same result by the application of what I agree, for the reasons stated below, is the correct construction of the maximum liability provision.

7.8 The meaning of "reinstatement of any areas not directly affected by physical damage / major physical damage"

7.8.1 ZIP contends in its closing submissions at [41-43] that where, as in the case of the unprotected structural steelwork, cover is provided for the cost of protecting the structural steelwork, whilst that cover will include the cost of accessing the structural steelwork by removing the external sections of the walls and roof necessary to access the structural steelwork, it will not include the cost of replacing those external sections since they have not been directly affected by physical damage or major physical damage.

7.8.2 The first issue which arises is whether or not this exclusion applies in the case of present or imminent danger claims. I am quite satisfied that it does not. The cover provided is for the reasonable cost of rectifying a present or imminent danger. It cannot credibly be contended that the cost of rectifying the danger does not include the cost of making good to areas disturbed in order to gain access to the areas which need to be worked upon. If that was so, it would apply to any insurance policy and I am unable to accept that any equivalent clause in any insurance policy could be construed in such a manner. ZIP has referred me to no authority in support of such a contention. This conclusion alone disposes of the argument in relation to the unprotected structural steelwork.

7.8.3 The second issue which arises is how this exclusion applies in the case of physical damage or major physical damage claims. The definitions of physical damage and of major physical damage necessarily involve that either some element of the new home in the former case or some load-bearing element of the new home in the latter case are materially different from their intended physical condition and that the insured is entitled to the reasonable cost of rectifying or repairing that element. In the absence of this exclusion it is clear, for the same reason as given above, that the

reasonable cost would include the cost of making good to areas disturbed in order to gain access to the element which needs to be worked upon. The question is whether this exclusion is properly to be construed as meaning that the insurer is not liable for such making good. In my view it cannot credibly be contended that it should be construed as having such effect. In my view an area is directly affected if it has to be removed to allow access to the element in order to rectify or repair that element and, therefore, the exclusion does not operate to permit the insurer to require the insured to pay for the cost of making good.

7.9 Is compliance with the claim notification conditions a condition precedent to cover?

7.9.1 Insofar as this point is argued and maintained I address it as follows.

7.9.2 *Colinvaux* at 8-026 says as follows:

"A condition precedent may be created in a number of ways: the consequences of a breach of condition may be spelt out; the condition may be described as a "condition precedent"; the policy may contain a general clause which describes all conditions as conditions precedent; or the wording or the significance of the condition is such as to lead to the conclusion that it was intended to be a condition precedent."

7.9.3 Here it is said by ZIP that the consequences of the provisions in sections 2 and 3 are spelt out ("we will not pay"). It is clear that ZIP cannot make the same argument in relation to condition 1 and further that condition 1 is neither described as a condition precedent nor is there a general clause to that effect. In relation to condition 1 ZIP would have to show that the significance of the condition is such as to lead to the conclusion that it was intended to be a condition precedent. The obvious difficulty for ZIP is that clause 1 contains at least 5 separate obligations, of varying significance. In the circumstances I am satisfied that it is not a condition precedent to liability.

7.9.4 No issue arises in relation to section 2.

7.9.5 In relation to section 3 the claimants do not contend that it should not be regarded as a condition precedent. They do however submit that it can only apply strictly in accordance with its terms, read with condition 1, so that the question is whether any claim falling within section 3 "could reasonably have been reported in writing to JCS or to us within two years of the effective date". They submit that this can only apply "on discovery of any item of claim" (as per condition 1) and, hence, that actual as opposed to constructive notice is required. I agree.

7.9.6 I add only that there is a good reason for giving this exclusion a narrow construction, which is that there is another express exclusion for "additional costs arising from unreasonable delays in reporting a claim either to us or the developer". In such cases claims will be paid save to the extent that they include such additional costs. That provides ZIP with a defence which is calibrated to the prejudice suffered due to delay in notification and which also means that delay in notification is not an all or nothing matter so far as ZIP is concerned.

7.10 Does the proportionate share limitation apply to present or imminent danger claims as well as major physical damage claims?

7.10.1 In my judgment it plainly does not. The policy is quite clear that this limitation only applies to major physical damage claims. It cannot be suggested by ZIP that this is a mistake. It makes obvious sense that an individual flat-owner should be entitled to have a present or imminent danger to the physical health and safety of the occupants of the flat rectified where it relates to the common parts without running the risk that s/he will be unable to fund those works because not all of the affected flat-owners are also insured or ready, able or willing to make a claim.

7.10.2 Moreover, if the claimants are entitled to bring their claim within this section of the policy then it is irrelevant that the claim could also be made or even has been made under the major physical damage section of the policy as well. The claimants are entitled in my judgment to elect under which section of the policy they wish to make such claim and seek judgment upon and, if doing so under the present or imminent danger section is more beneficial, to choose to do so. ZIP cannot insist on treating such a claim as having been made under that section of the policy which is financially more beneficial to itself.

7.10.3 *Colinvaux* addresses this point at 5-039 as follows:

"… If there is only one cause of loss the assured is free to classify that cause as he thinks fit so as to bring it within the terms of the policy: *Capel Cure Myers Capital Management Co Ltd v McCarthy* [1995] L.R.L.R. 498."

7.11 The maximum liability provision

7.11.1 The maximum liability provision was stated to apply specifically to sections 2 and 3 of the policy. Whilst the claimants contend that on its true construction it provided an overall limit of £25 million and, hence, is of no importance on the facts of this case, on ZIP's case it limits each of the claimants to the value of the purchase price of their flat and, therefore, excluding the value of the CJS and other non-claimant flats. On that basis, taking the figure provided in ZIP's closing submissions, the total limit on the claim would be £3,634,074.65, which is very significantly less than the full value of the claim.

7.11.2 "Maximum liability" was a defined term which, in view of the importance of the argument raised, I must set out in full.

"Our maximum liability in respect of all claims under Sections 2 and 3 of this policy is as follows:

(a) for a New Home which is entirely detached, the purchase price declared to Us, subject to a maximum of £25 million;

(b) for a New Home which is part of a Continuous Structure, the maximum amount payable in respect of the New Home shall be the purchase price declared to Us subject to a maximum of £25million.

Where the combined value of all New Homes within a Continuous Structure exceeds £25million, the total amount payable by Us in respect of all claims in relation to the New Homes and the Continuous Structure shall not exceed £25million."

7.11.3 A Continuous Structure was defined as:

"A single building containing more than one New Home, including blocks of flats and terraces, or a New Home(s) and other parts of the same building used for some other purpose(s)"

7.11.4 The claimants' case is that this imposes a maximum liability of the lower of the total purchase price of all flats within the development or £25 million in relation to any claim concerning any one continuous structure i.e. any one single building and thus including, in this case, the connected blocks of flats forming part of this development. I was provided with a schedule showing that the total purchase price paid for all of the flats was only £10,846,076.65 so that, if the claimants are right, this would be the maximum liability on any one of their claims. On that basis, the effective cap is £25 million.

7.11.5 ZIP's case, in contrast, is that the definition at (b) means that there is a maximum liability in relation to any claim made by an individual leaseholder of the declared purchase price of the flat in question, with the result that the total maximum liability in this case is the total of the declared value of the 30 flats in respect of which claims are made by the individual leaseholders. On that basis, the effective cap is £3.634 million.

7.11.6 The claimants contend that ZIP's argument ignores the proviso to (b), which they say is intended to make clear that in the case of a continuous structure where there are common parts, the purchase price limit applies only to the new home itself and does not apply to claims in relation to the common parts.

7.11.7 The difficulty with the claimants' reliance on the proviso, in my view, is that the opening words to the proviso make it clear that it only applies where the combined value of all new homes within the continuous structure exceeds £25 million. The purpose of the proviso, therefore, must be to limit the total value of all claims made in relation to any one continuous structure to £25 million, even if the combined value of all of the new homes within that continuous structure exceeded £25 million and therefore, on a straightforward application of (b), the total claim could exceed £25 million.

7.11.8 Although the claimants contend that if the proviso was to be interpreted in this way it would be meaningless, in that it is difficult to imagine a continuous structure with a combined value of £25 million, that is by no means obvious. For example a similar size development with an average price per flat of £250,000 would qualify, and it would make perfect sense that this was, as its wording indicates, the intended purpose of the proviso.

7.11.9 However, the claimants also argue that on a proper interpretation of (b) the maximum amount payable only applies to the new home itself, and not to any claim in relation to the common parts. Their argument is that where a new home is part of a continuous structure there is a clear separation in the policy as between the new home itself and the common parts. Their argument is that the proviso, by referring separately to claims in relation to the new homes and claims in relation to the continuous structure, expressly acknowledges that claims in relation to the continuous structure, which they say can only be claims in relation to the common parts, are separate and distinct from claims in relation to the new homes themselves. Their argument is that since (b) only refers to the maximum amount payable in respect of the new home, it cannot have been intended - in direct

contrast with the proviso - to cover common parts claims in relation to the continuous structure as well.

7.11.10 This is an ingenious argument, but in response, ZIP reminds me that the definition of the new home specifically includes the common parts. In other words, the common parts are not treated separately in the policy from the new home. They say that in the face of this clear definition it cannot credibly be argued that a separate approach should be adopted in relation to the construction of sub-clause (b) simply through a side-wind in the proviso. This is a powerful argument which, in my judgment, must prevail unless it can be said to be plain and obvious that clause (b) when construed with the proviso can only have the effect for which the claimant contends.

7.11.11 It cannot be said, in my view, that clause (b) when construed with the proviso does have that clear and unambiguous meaning. Indeed if one considers the definition of a continuous structure it is obviously not the same as the common parts. It is either a single building containing more than one new home (where the definition of each new home includes the common parts) or a single building containing a new home and other parts of the building used for other purposes. On either analysis the reference to continuous structures in the provision cannot be read as if it meant common parts. It seems to me that the more likely reason why the proviso makes express reference to continuous structure is to make it clear that it covers any other parts of a building not falling within the definition of new home.

7.11.12 I am aware that it may be said that – depending on my findings in relation to the insurance claim below –this limitation will operate harshly upon the claimants. If the actual cost of remedial works is say £10 million but they can only recover say one third of that then that is a real problem for them. That of course is a matter of concern. However, it must be borne in mind that the principal reason for the problem in this case, namely the fact that some two thirds of the flats were sold to and have been retained by an entity and by individuals connected with the developer who are, therefore, unable to make their own claim under a policy, is not one which would have been foreseen as particularly likely nor of course is it the fault of ZIP in any way. To the contrary, it does not seem to me to be obviously unreasonable for ZIP to wish to limit its cover for what was a 10 year policy for a one-off premium to the original purchase price, even if it did include cover for the common parts. That is so even though, as Mr Selby reminded me in closing submissions, condition 10(c) provides that the policy terminates automatically once the maximum liability has been paid.

7.11.13 However, in my view it follows from the definition of maximum liability and condition 10(c) that the maximum liability limitation is the last limitation to operate. It is not open to ZIP to contend for example that the excess provision should apply to reduce the amount payable below the declared purchase price.

7.12 Claims or contributions to claims where some other form of compensation or damages is available

7.12.1 The context is that ZIP contends that this exclusion applies in a number of ways. In relation to the leases it contends that the claimants (both the individual leaseholders and Zagora) have the right under the leases to require LHM to undertake the necessary works, that the individual leaseholders have the right under the leases to require Zagora to do so, and that all have the right to seek a

contribution from CJS and the other non-claimant leaseholders. ZIP also contends that some of the claimants have claims, and of course have pursued those claims, against ZBC.

7.12.2 The claimants contend that even though the words "some other form of compensation or damages" are wide words, they cannot possibly extend to a right under a lease to require a tenant or a management company or a landlord to perform its obligations under that lease in relation to repair and the like or in relation to the payment of service charge. I agree. In my view the words must be construed by reference to the whole of the clause, which provides that ZIP does not have to pay "any claim or contribution to a claim where cover is available under another insurance policy or where some other form of compensation or damages is available to you". This must mean a claim to compensation or damages which is substantially the same as the cover available under the policy. It cannot extend to a claim to enforce a right to contribution under the provisions of the lease, which is neither "compensation" nor "damages" nor is it some other form of compensation or damage of the same character as cover under another insurance policy.

7.12.3 Moreover, if it did have this effect, it would deprive what I am satisfied must have been an intended difference between major physical damage claims and present or imminent danger claims, in terms of the proportionate share limitation, of any practical effect. In my view it is proper to interpret this provision narrowly, since it operates not simply to reduce the claim against ZIP by reference to what the insured has in fact already recovered from the other source or, for example, to require the insured to take reasonable steps to obtain monies from that other source and to give credit for any recoveries secured, but to prevent the insured from bringing any claim at all where that other source is available.

7.12.4 Of course in relation to a major physical damage claim the proportionate share limitation would mean that such a claim would be circular anyway, since the tenant's claim is only for the proportionate share and he or she would still have to pay the proportionate share of the service charge in any event even if the lease provisions were enforced.

7.12.5 In relation to a present or imminent danger claim, whilst on my analysis a tenant can recover the full cost from ZIP, that does not mean that a tenant has some other form of compensation or damages available to him as against CJS or the other tenants in relation to the amount which CJS or the other tenants ought to pay in order to meet their share of the service charge obligation. Leaving aside the prior point that in my view the proper interpretation of the clause would not cover such a claim, in my view it could in any event only apply in circumstances where it can be said that it would be reasonable for someone in the position of the claimants to make such a claim instead of claiming under the insurance policy. That is because if I am wrong in my prior analysis the word "available" must connote that a reasonable assured ought, on an objective analysis, to make such a claim on the basis that it would succeed and that he or she would recover compensation or damages. That is particularly so since of course not only is there no provision for ZIP to fund any such claim but nor would the costs be covered under the policy if the claim was made but proved unsuccessful for any reason. In contrast, condition 3 of the policy entitles ZIP to "take proceedings at our own expense but in your name to secure compensation from any third party in respect of any claim accepted by us under this policy".

7.12.6 Here, CJS is a limited liability partnership which is in administration. It follows that it would be necessary for an individual tenant or for LHM or for Zagora to seek and obtain the agreement of the administrators to make a claim, failing which the permission of the court to bring proceedings against CJS would have to be obtained. ZIP contends that there is no good reason why an administrator should not agree or why any court should not give permission, in circumstances where the administrators have the benefit of these flats and ought to pay their fair share of the liabilities to which all flat-owners are subject. ZIP also contends that there is every reason to believe that the administrators would meet CJS' liability, in circumstances where if they did not do so it would be open to the claimants to enforce the liability by obtaining charging orders on the flats and selling them. As against this the claimants contend that given the hurdles which they would have to surmount and the risks they would have to take, all at their expense, any claim to compensation against CJS is not, in all of the circumstances, something which is reasonably available to them.

7.12.7 These points made by the claimants are compelling and I accept and prefer them. What ZIP would effectively be requiring the claimants to do is either to fund two thirds of the cost of undertaking works to remedy a present or imminent danger and then to seek by litigation to compel the administrators to pay their share or to defer undertaking such works until it has obtained the funds from the administrators up front. Unless the Bank was prepared to put the administrators in funds, which can by no means be guaranteed, the only way in which the funds could be provided would be by voluntary sale of the flats or the claimants also being permitted to enforce by forfeiture or possession and sale. There can be no guarantee that the court would sanction this.

7.12.8 In my view where, as I accept, there is reasonable doubt as to the availability of a realistic remedy against CJS, the tenants ought to be entitled to recover under the insurance policy in full on the basis that ZIP has its own express subrogation rights against CJS in any event. Mr Baatz invited me to clarify whether or not these findings also apply to the rights which the individual leaseholders have under the lease as against LHM (as management company) and/or Zagora (as landlord). I can confirm that they do on the basis that on my analysis of the leases the fundamental problem from a commercial perspective is that there is no basis for enforcing these liabilities unless or until either it could be said that LHM or Zagora could or should have obtained a recovery from CJS of its proportionate share or that the individual leaseholders should have advance funded that proportionate share in the hope or expectation that LHM or Zagora could then have recovered from CJS and refunded them. For the same reasons I reject any argument that the individual leaseholders have failed to act reasonably to mitigate their loss. I am not satisfied that ZIP has identified or put a case to each of the individual leaseholders and to Zagora which I am able to accept that, on a true analysis of the terms of the leases and by reference to the financial and other positions of those parties as well as LHM and CJS at the relevant times, either that it would realistically have been possible for CJS' share of the costs of the works to have been recovered from CJS or from LHM or Zagora in default or that the individual leaseholders acted unreasonably in not following these routes to recovery instead of pursuing their claims against ZIP.

7.12.9 ZIP also contends that the claims which the claimants have against ZBC also fall within the scope of this provision. I reject this argument for the following reasons. Firstly, I do not accept that this provision, on a proper analysis, can extend so far as to require a tenant to take on expensive and risky litigation against a third party in the position of ZBC. I have no doubt that it would not be

proper to conclude that any claim under the present or imminent danger section ought to be reduced on the basis of this clause. Furthermore, and even if I was wrong about that, there is an exclusion under the policy for any reduction in value of the new home and it is difficult to see, therefore, how a claim against ZBC for precisely that relief could be "some other form of compensation or damage" in respect of a claim against ZIP under the insurance policy for the reasonable cost of rectifying a present or imminent danger to the physical health and safety to the occupants. Finally, the outcome of the claim against ZBC in this case provides a good reminder of the dangers of construing this clause as ZIP contend. On ZIP's analysis the claim against it should fail by reference to this exclusion or limitation, even though in fact the claim against ZBC has failed. That would appear to be an extremely harsh and unreasonable outcome.

7.13 Basement and other specific exclusions

7.13.1 The definition of the new home makes it clear that it does not include basements and semi-basements. Whilst the car park is not a fully enclosed basement, and is open sided on one side at least, described by one of the valuers as an undercroft, it is plainly a semi-basement. Although the claimants say that it also falls within the definition of an attached or integral garage, it does not seem to me that the car parking spaces in the basement could possibly fall within that definition.

7.13.2 It follows that the real question is what happens where, as here, the basement, which is expressly included, forms part of the common parts, which are expressly included: does the inclusion or the exclusion apply? The general rule is that where an event is within the general cover but also within the exclusion from cover it is not covered. However, that general rule is inapplicable here where, as a matter of construction, the common parts fall within a list of positive inclusions rather than a statement of general cover.

7.13.3 In my view the inclusion prevails over the exclusion. That is because if it had been intended that, in a common parts case, basements should nonetheless be excluded it should have been expressly so provided. The two are not mutually exclusive and it cannot be said from the wording that it is plain and obvious that the basement exclusion prevails over the common parts exclusion. Apart from anything else it would be wholly unsatisfactory if there was no cover for major physical damage or present or imminent danger where a defect in a basement was a real danger not just to those using the basement for common purposes but also to the safety of occupants of the flats above.

7.13.4 There is also an exclusion for retaining walls. There can be no dispute that retaining walls are indeed excluded save where they form part of or provide support to the structure. It does follow that any claim relating to any element of the development which can properly be characterised as a non-structural retaining wall cannot succeed. The same is true in relation to the exclusion for wear and tear, neglect, lack of maintenance scratching, chipping, staining, fading, efflorescence, changes in colour, opacity or texture.

7.14 The balconies

7.14.1 It is common ground that the balconies themselves are not excluded from cover whereas, as provided in the endorsements to the insurance certificates, the balcony decking is specifically

excluded. However, there is a dispute as to whether, as ZIP contends, the balconies form part of the demise of the flats and do not fall within the common parts or whether, as the claimants contend, they do not form part of the demise and fall within the common parts. The dispute is material in that if ZIP is right then it is clear that the individual leaseholders can only recover in relation to the cost of rectifying the balconies which form part of their flats and, accordingly, cannot recover in relation to the cost of rectifying the balconies which form part of the CJS or other non-claimant flats.

7.14.2 The starting point is the terms of the leases. The flats are defined "as described in part 1 of the first schedule and shown edged red on plan 2". As the claimants submit, plan 2 clearly does not include the balconies as being within the property edged red. Nor does the balcony feature in the list of items specifically included in part 1 of schedule 1. Moreover, as the claimants submit, the definition of the structural parts includes the exterior of the building and the exterior glazing and exterior doors, door frames and window frames, so that it would be anomalous if the balconies fell outside of that definition. This is also consistent with the repairing obligations imposed upon the tenant under clause 7.5.1, which specifically prevents the tenant from decorating "any part of the exterior of the flat including the exterior of the external doors of the flat".

7.14.3 However the question arises that if the balcony is not included in the demise of the lease then how does the tenant have the right to use the balcony. The answer it seems to me appears from part two of the first schedule to the lease, in which the tenant is granted the right, subject to and conditional upon paying the service charge, of "(5) all other rights easements quasi rights and quasi easements as are now enjoyed by the flat in respect of any other part of the development". Given that the individual balconies can only be accessed through the individual flats to which they relate it appears to me that they fall within this wide clause.

7.14.4 It also follows, in my view, that the balconies are included within the repairing obligation imposed upon the management company in respect of the retained parts under clause 8.6 of the lease, as well as the repairing obligation in respect of the services under clause 8.1 of and the second schedule to the lease.

7.14.5 However ZIP submits that even though on this analysis the balconies fall within the definition of the common parts under the leases they do not fall within the definition of the common parts under the insurance policy. Mr Baatz submits that to fall within the definition they must fall within the first part of the definition, namely "those parts of a multi-ownership building for a common or general use", as well as the second part, namely "for which the buyer has joint responsibility together with other buyers or lessors". Mr Selby submits that it is sufficient if they are for a common use or for a general use. He submits that where, as here, the balconies are not within the demise of the flats and where: (a) the other tenants have rights under part 2 of schedule 1 of way and entry in relation to the balconies of the other flats for the specific purposes stated therein; (b) the landlord also has a right of way for all reasonable purposes in relation to the balconies of the other flats; (c) the management company has an obligation to undertake repairs etc in relation to the balconies and the right under clause 7.8 to access the balconies through the flat to do so, those rights are sufficient to bring the balconies within the common or general use requirement.

7.14.6 I agree with Mr Selby. It is clear from the express exclusion in relation to balcony decking that it was envisaged that balconies were intended to be covered. It is also clear that the policy does not

expressly provide the answer to the question – what if there are parts of a multi-ownership building which are intended to be used for the enjoyment of the individual flat-owner but which are outside the demise and within the common parts under the lease and in respect of which the other tenants and through them the management company have repairing obligations and rights? In my view it cannot, objectively, have been intended that these parts would fall outside the policy as being neither part of the new flat as a demise or part of the common parts. The words "common or general use" are wide words which do not require that the use must be for the purposes of sole occupation or enjoyment and in my view use as being part of the structure and common parts in respect of which there are common or general repairing and ancillary access obligations is sufficient.

7.14.7 On that basis, it seems to me that insofar as the claimants are able to make a claim in relation to the balconies under the present or imminent danger cover provided by the policy, they are able to recover the full cost of rectifying that danger without the proportional share limitation applying. It also follows, however, that insofar as the claimants are only able to make a claim in relation to the balconies under the physical damage or major physical damage cover provided by the policy, the proportional share limitation will apply to that claim, which effectively produces the same result in relation to such claims as ZIP contended for, albeit for different reasons.

7.15 The condensation exception

7.15.1 In relation to some items of claim, in particular the roof and walls, the claimants' complaint is that the primary consequence of the unventilated cold roof design and construction is that condensation has formed within the structure which has led to deterioration of and damage to the structure. ZIP contends that such claims are excluded by the condensation exception. In their opening submissions at paragraphs [158] – [165] the claimants advanced a number of reasons why this exclusion would not apply in a case where otherwise the claim would fall within the major physical damage or the present or imminent danger cover afforded by the policy. In summary, the argument is that if the presence of condensation is itself the cause of physical damage, major physical damage or present or imminent danger, and is itself the consequence of the developer's failure to comply with the ZBG requirements or the Bldg Regs, then the presence of condensation in itself is not the proximate cause of the damage and, hence, the condensation exclusion does not apply. It is said that the condensation exception only applies to condensation which occurs other than due to the developer's failure to comply with the ZBG requirements or the Bldg Regs and, thus, either to naturally occurring condensation or to condensation due to the occupant's lifestyle.

7.15.2 Reliance is placed on the decision of Robert Goff J in *Prudent Tankers Ltd S.A. v Dominion Insurance Co Ltd (The Caribbean Sea)* [1980] 1 Lloyd's Rep. 338, where a ship had been insured under a policy which provided cover in respect of: "Any latent defect in the machinery or hull", where the ship sank apparently due to a defect in a nozzle that had deteriorated over time and caused damage to adjacent parts thereby permitting water ingress, and where the insurers' case was that the loss was caused by ordinary wear and tear, which was excluded. Goff J held that the enquiry that he had to undertake was to look for the proximate cause of the loss:

> "In the present case, however, the casualty is not simply to be attributed to ordinary wear and tear. The defect upon which the owners rely consisted of the fatigue cracks in the

wedge-shaped nozzle; and the presence of these cracks is to be attributed to two factors - the manner in which the ship was designed (viz., the welding of the gussets to the nozzle with fillet welds in proximity to the circumferential weld between the nozzle and the spool piece) and the effect upon the nozzle, in these circumstances, of the ordinary working of the ship. The result of this combination of circumstances was that the fracture opened up a significant period of time before the end of the natural life of this ship. I do not consider that recovery in respect of loss of the ship, consequent upon such a fracture, is excluded by s. 55(2)(c) of the Act. Let me take the example of a ship incorporating such a design, which results in a far swifter development of fatigue cracking, and the sinking of the ship within, say, two years of her entering service. The loss could not, in such a case, have been proximately caused by ordinary wear and tear. It is not like a case where a ship's plating simply wastes away through rust, or a ship sinks through general debility."

7.15.3 In this case, therefore, the claimants say that by parity of reasoning the proximate cause of the loss is not the mere presence of condensation, rather the effect that the condensation has upon the physical condition of the roof, itself caused by a breach of the requirements or regulations.

7.15.4 In contrast, ZIP contends that even if the claim would otherwise fall within the scope of the cover, any such claim is clearly excluded where it falls within the scope of the condensation exception. In support of its argument ZIP referred at [70] of its written closing submissions to its internal claims handling document, but it seems to me that this is plainly irrelevant to the proper construction of the insurance policy. In contrast, the ZBG technical requirements, being referred to specifically in the policy, clearly fall within the factual matrix and thus at least of potential relevance to the proper construction of the policy. They make a number of references to the need to design and construct the building in order to address the risks of condensation. It would, therefore, be surprising if a failure to comply with the ZBG requirements in such a way as to lead to condensation and to the major physical damage or present or imminent danger cover being triggered should then be excepted, but of course if the policy on its proper construction leads inexorably to that result then that result must follow, however surprising.

7.15.5 I prefer and accept the claimants' case in this respect and am satisfied that in such cases the condensation exclusion does not apply. In my view this is because whether one considers this case as being one of proximate cause or concurrent causes the position is that the failure by the developer to construct the building in accordance with the ZBG requirements or the Bldg Regs is either the proximate cause or at the very least a concurrent cause of the loss. It is the proximate cause because without the failure by the developer it would not have happened. It is the concurrent cause because even if one takes the view that the condensation itself is also a proximate cause, again without the failure by the developer the loss would not have happened. Furthermore, upon a proper construction of the policy the condensation exception is not an exclusion, but simply an uninsured cause, whereas the major physical damage and present or imminent danger items are insured causes. Therefore, the loss is covered.

7.16 Excess

7.16.1 Excess is defined as "the first amount (indexed) of each claim which is payable by you for which no insurance is provided under this policy and which is specified in the insurance certificate". The

schedule refers, as I have said, not to an excess in relation to each "claim" but an excess in relation to "each and every item of claim" and also to different excesses in relation to sections 2 and 3 - £100 in relation to section 2 and £1,000 in relation to section 3. Moreover, an overall excess limit of £500 is specified in relation to section 2 whereas no overall excess limit is specified in relation to section 3.

7.16.2 It follows, contends ZIP, that in relation to every separate "item of claim" under section 3 the £1,000 indexed excess applies. There is no separate definition in the policy either of "claim" or "item of claim". ZIP's primary position is that each separate item of each of the Scott schedules is a separate item of claim to which a separate excess applies. ZIP also contends that the excess must be applied to each of the separate claimants in respect of each separate item of the Scott schedules. It follows, as can readily be seen, that if these arguments succeed the effect is very substantially to reduce the amount which it is liable to pay.

7.16.3 In contrast, the claimants submit in their written closing submissions at [384] that since each claimant is entitled to claim the entire cost of rectifying each defect, each claimant is jointly and severally entitled to judgment for the full remedial works cost claimed, with the result that each defect should be the subject of a single excess and not to multiple excesses by reference to the number of claimants. They make clear that this applies only to the common parts claims and accept - see [384.7] - that individual claims relating to individual flats are subject to a single excess per flat. They also submit that a more global view should be taken as to what are individual items of claim, so that the claim in Scott Schedule A, relating to the defective roof, is one item of claim, rather than a series of separate items of claim. On this analysis, they contend that there are only 13 separate items of claim relating to the common parts. They go on to submit that even in relation to these 13 items, if one claim is subsumed by another claim, or falls away as a result of the findings made in relation to another claim, then no excess applies in relation to those claims. Their case, if successful in relation to the key defects for which they contend, is that only 9 excesses would be applicable.

7.16.4 In my view there is a difficulty with the claimants' analysis in relation to the application of excess to the common parts claims insofar as they are major physical damage claims, where there is a proportionate share reduction. Since each claimant is entitled to recover no more than his or her proportionate share of such claims it must follow that each claimant has a separate claim from the others. Since each policy is a separate contract between ZIP and the individual claimant it does not seem to me to be possible to say that there is a joint and several liability in relation to the proportionate share claims. It follows that the excess must apply to each claimant separately.

17.16.5 So far as the present or imminent danger claims are concerned I have already decided that the proportionate share reduction does not apply. On the face of it, therefore, each individual claimant is entitled to recover the reasonable cost of rectifying those dangers in full against ZIP. Strictly speaking, it seems to me that ZIP has a several, as opposed to a joint and several, liability to each claimant for the full cost of each claim item but, of course, ZIP cannot be liable for more than the full cost. It follows, it seems to me, that if ZIP is able to limit its overall liability to the amount of any one individual claimant's claim, it cannot be entitled to claim to have the benefit of more than one excess. In relation to present or imminent danger claims, therefore, I accept the claimants' argument.

7.16.6 However that leaves open the question of what is meant by each item of claim. In its written closing ZIP referred me to the decision of the Court of Appeal in *Trollope & Colls Ltd v Haydon* [1977] 1 Lloyd's Rep 244, where the policy contained an excess clause requiring the insured to bear 'the first £25 of each and every claim'. The insured building contractor agreed with the employer to build 481 houses with garages, and the buildings were defective in a wide range of respects, including resistance to water ingress. It was decided that an excess applied to each building.

7.16.7 Cairns LJ stated at p.249 column 1:

"… the matter does not depend on how the claims are formulated either by the [employer] or by the [insured]. It depends on whether the facts give rise to one claim or to more."

7.16.8 He observed at p.249 column 2:

"If there were several defects at the same time in the same dwelling at the same time each contributing to rendering that dwelling unweathertight, I think it would be absurd to treat them as giving rise to several claims rather than one. At the other extreme, I think it would be absurd to treat all the failures and defects in all the buildings as giving rise to only one claim. Nor can I see that there is any justification for grouping together all the defects of a particular kind (such as leaking sills) in all the buildings and regarding them as giving rise to one claim."

7.16.9 Shaw LJ said:

'Where there are a series of failures of weathertightness in the same individual unit it is a question of fact whether they give rise to a single comprehensive claim or to a number of separate claims. If they are sufficiently closely related in causation and in time, they may properly be regarded as a single episode of failure of weathertightness. If they are divided by substantial intervals of time and are due to building defects of different kinds, they may well constitute separate claims to each of which the £25 franchise would apply. This is a matter to be decided on all the surrounding circumstances of the case'

7.16.10 It is clear, therefore, that the question is fact sensitive. In my view it must be answered, as was the question in the *Trollope & Colls* case, by adopting a sensible rather than an absurd interpretation, having regard to all of the relevant circumstances and, in particular, the cover afforded by the policy, bearing in mind the distinction between cover for an individual flat and cover for common parts.

7.16.11 In my view, the sensible approach is one which focusses on the cover given. Thus, in relation to major physical damage to common parts, there is a separate item of claim for the cost of rectification or repair for each "element" of the building caused by a failure to comply with the ZBG requirements. Where for example the element is the continuous roof or the continuous external walls then that is one item of claim even where it could be said that separate areas of the roof or the walls are affected by the same failure. The same is true where there are a number of physically separate elements which are all affected by the same failure; it is one item of claim. In

relation to present or imminent danger, there is a separate item of claim for each danger caused by a failure to comply with the Bldg Regs. Thus a danger caused by the spread of fire, whether due to untreated structural steelwork or a lack of compartmentation, is one item of claim.

7.16.12 Once I have addressed the individual claims, I will apply this conclusion to the claims which have succeeded.

7.17 Cover for the reasonable cost of alternative accommodation

7.17.1 The issue is whether or not a buy-to-let landlord who lets out the flat should be entitled to recover what is, effectively, a loss of rental income whilst the development has to be vacated. ZIP submits that they should not, because such claims are not, on proper analysis, the reasonable cost of alternative accommodation and additionally because of the exclusion of claims for loss of income, business opportunity or any other consequential or financial loss of any description.

7.17.2 In my view ZIP is right in this respect. It is difficult to see how any claim for loss of rental income does not fall within the exclusion.

7.17.3 Furthermore, there is a more fundamental objection to all of the claims, even those made by Mr Dickie and Mr Bartlett, who are not buy-to-let investors, which is that in my view section 3.3 only applies where ZIP has exercised its right to reinstate itself under condition two of the policy and ZIP's written consent has first been obtained. Since ZIP has not made any election to reinstate itself, nor has it purported to reserve the right to do so, there are no circumstances under which this claim could arise. This is the case which was pleaded by ZIP in its response to Appendix 1 to the Particulars of Claim at paragraphs 7(a) and (c) and, in my view, is an insuperable objection to the section 3.3 claims.

7.18 Betterment

7.18.1 In a number of places within its written submissions ZIP has contended that where, for example, the claimants are held entitled to recover the cost of new cladding a discount for betterment ought to apply. There is no express clause in the policies providing for a discount for betterment and ZIP has referred to no authority in support of the proposition that an insurer under a policy such as this is entitled to a discount for betterment even where there is no express provision. Given that this is a contractual claim under an insurance policy where, as I have held, the insured is contractually entitled to the cost of reasonable reinstatement there is no basis for bringing in by analogy the principles developed in claims in tort or insurance claims where the insured was not contractually entitled to indemnity based on rectification.

8. Zagora's claim under the alleged agreement to rectify

8.1 The chronology of events between Zagora's acquisition of the development and the alleged agreement to rectify has been the subject of considerable detailed investigation and analysis, both in the pre-trial stages and at trial itself. Fortunately, there is a wealth of contemporaneous correspondence between those involved on both sides and little in the way of serious factual

dispute. Moreover, I do not consider that it would be safe to make any critical finding of fact based on the evidence either of Mr Broadhurst or Mr Parvin, since I do not consider that either were convincingly reliable as to the detail of what was said or agreed at the various meetings, specifically that of 27 June 2013. Neither Mr Troth of Arup nor Mr Brown of Thomasons were able to give relevant evidence, since it is common ground that nothing of importance was said at the second part of the meeting of 27 June 2013 at which they were present, as is revealed by Mr Troth's contemporary note. The key contemporaneous document is the letter from David Robinson written on 2 July 2013 after the 27 June meeting. In the circumstances I can make the relevant factual findings of fact relatively shortly and without needing to refer to and record each and every exchange which took place.

8.2 As I have already recorded at [3.49] above, the correspondence begins with the letter from Mr Broadhurst written on behalf of Cobe to Zurich dated 18 April 2013.

8.3 In that letter Cobe introduced itself as writing on behalf of the "freeholder and individual tenants" of the building. In cross-examination Mr Broadhurst explained that he believed that Zagora had authority to make claims on behalf of all of the individual leaseholders given his belief that it was acting as the management company. He rightly accepted that he did not have express authorisation from all of the individual leaseholders to advance claims on their behalf under their policies with ZIP. The most that he could say was that he subsequently updated all of the individual leaseholders as to what he was doing and none expressly objected. He also said that as the claim developed it altered from one being made on behalf of the freeholder and the individual leaseholders to one being made solely by Zagora. This point is well made. It is clear that by the time David Robinson came to write the letter dated 2 July 2013 neither he nor Mr Parvin believed that any agreement which might have been reached involved a settlement of any claims which the individual leaseholders might have against ZIP or ZBC and that they were dealing and seeking to reach agreement with Zagora alone. In the circumstances it is unnecessary for me to consider whether any agreement which was reached was invalidated by any lack of authority from all of the individual leaseholders.

8.4 Although the letter began by referring to Zurich as having provided both a building warranty and as having provided building control services, the claim which was asserted related exclusively to alleged failings in relation to the provision of its building control function and there was no express mention at this stage of a claim against ZIP under the insurance policies.

8.5 ZIP responded on 1 May 2013. It was written by Mr Scott on behalf of ZIP's property claims unit and treated Cobe's letter as if it was a claim under an insurance policy. It asked Cobe to provide the insurance certificate number to enable ZBG to respond further.

8.6 Mr Broadhurst responded on 8 May 2013. He was unable to provide an insurance certificate number since Zagora did not, of course, have an insurance certificate. He did, however, provide a "sample Zurich guarantee for the common parts" as well as the Bldg Regs final certificates. He also attached a review of a building regulation compliance report obtained by Cobe from a practice known as Dunwoody dated 5 May 2013, from which ZIP would have been able to see that there were a significant number of areas of concern. He also referred to the structural steelwork having been tested and the white paint having been found not to be intumescent and therefore offering no

fire protection. He explained that he was writing to Manchester Building Control for advice as to whether or not a prohibition notice should be issued. In the circumstances, he asked for an early response.

8.7 Mr Scott's response dated 9 May 2013 said that ZIP had instructed Cunningham Lindsey to investigate. He also stated that since he understood that a claim was being made under the structural insurance section of the policy by all of the individual flat owners, each would be responsible for their individual excess of £1,211 under that section of the policy. Cunningham Lindsey wrote to introduce itself on 10 May 2013 and to arrange a visit and wrote a further introductory letter in standard terms on 15 May 2013.

8.8 By this stage Mr Parvin as the team leader for major loss claims had been made aware of the claim, given its potential value and complexity, but was not directly involved. David Robinson visited site on 17 May 2013 and conducted an inspection. Mr Broadhurst states that David Robinson was shocked at the state of the development. He followed up the meeting with an email to David Robinson of 20 May 2013, in which he made it clear that the claim was being advanced on the basis that the development was incomplete and a risk to health and safety. A further site meeting took place involving Mr Broadhurst, David Robinson and Mr David Reid, a member of ZIP's major loss team working under Mr Parvin's control, on the following day, 21 May 2013. Mr Parvin would undoubtedly have been briefed on developments and would, as he said, have been aware that the state of the development as regards the safety of its occupants was a matter of concern.

8.9 On 22 May 2013 Mr Broadhurst met with representatives from Manchester City Council housing department and the Fire Service at the site and was made aware, and duly informed David Robinson, that although the Fire Service was not intending to serve a prohibition notice the Housing Department was intending to serve an improvement notice under the powers conferred by s.7 Housing Act 2004. That notice was duly prepared and issued on 30 May 2013. It required Zagora, as the freeholder, to undertake remedial works as specified in the notice to remedy the hazards also specified. Zagora was required to begin remedial works on 1 July 2013, which included undertaking works to ensure that the structure to the common areas obtained a minimum of one hour's fire separation, and to complete them within a further 90 days. The principal hazard specified was that of fire, the deficiency being an "indication of the common area structure not compliant to one hour fire separation (exposed steelwork not protected …)", although further hazards were specified in relation to defects in the staircases and roof leaks. The principal action specified was to "undertake works to ensure that the structure to the common areas attains a minimum of one [hour] fire separation". Failure to comply was a criminal offence and there was also the power for Manchester City Council to undertake the work and recover the cost from Zagora.

8.10 Mr Broadhurst copied the notice to David Robinson on the same day. Mr Parvin accepted that this notice provided independent verification of Mr Broadhurst's complaints.

8.11 By this stage Mr Parvin had also become aware from obtaining the ZBG records from archive that, although ZBC had retained the plans which had been submitted to it by JCS, there were little if any other documents and, in particular, there was no written fire strategy plan, which was clearly a matter of concern to him.

8.12 Internally, Zurich had divided the claim into the warranty claim - which was being dealt with by Mr Parvin and his team with the assistance of Cunningham Lindsey but without reference to lawyers - and the Bldg Regs claim - which had been passed to its "financial lines claims" team based in London, where it was being dealt with by a Mr Alcock, the team leader for "global corporate and non legal professions", apparently with the benefit of in-house legal advice. On 29 May 2013 Mr Alcock wrote to Mr Broadhurst, making the point that legal proceedings would be precipitate without Zagora first submitting a pre-action protocol letter of claim. Mr Broadhurst responded on 31 May 2013, making it explicit that Zagora was advancing the claim on a twin basis, namely: (1) a claim under the building warranty; (2) a claim in negligence against ZBC.

8.13 On 5 June 2013 David Robinson sent a letter of response to Zagora's claim. It is significant in that:

(1) It was clearly written following lengthy discussions with Zurich.

(2) It was made clear that no decision had been made in relation to liability, so that all further enquiries were being made on a without prejudice and rights reserved basis. This was repeated in subsequent correspondence, including David Robinson's subsequent email of 17 June 2013 ("at this point in time liability has not been accepted"), but was not repeated in David Robinson's subsequent letter of 2 July 2013, which is a point to which I shall return.

(3) It was asserted that any recovery in relation to the common parts would be limited to 38/104ths of the total amount payable, due to CJS' ownership of 66 of the 104 flats, and it was further asserted that the excess of £1,211 would be applied to each of the 38 leaseholders, producing a total excess of £46,018. This was also repeated in subsequent correspondence including the email of 17 June 2013, but not in the letter of 2 July 2013.

(4) It made no reference to the Bldg Regs claim, according to Mr Parvin because that was not a matter for him or David Robinson to deal with. In a subsequent email of 12 June 2013 David Robinson explained that even though he was only looking at the warranty claim Zurich was still considering the Bldg Regs claim.

8.14 Mr Broadhurst responded in his email of 10 June 2013 by observing that whatever the arguments in relation to policy coverage might be, the "main element of claim is going to be a claim in negligence against ZBC". It appears from this email and David Robinson's responsive email of 11 June 2013 that both Mr Broadhurst and David Robinson were proceeding on the basis that Cunningham Lindsey was not instructed to deal with that claim, which David Robinson referred to as "the PI claim". It is clear from Mr Broadhurst's emails of 12 and 13 June 2013 that his strategy was to talk up the Bldg Regs claim so as to seek to outflank ZIP in its attempts to rely on its policy coverage arguments, although it was also made clear that the warranty claim was still being pursued. In that respect he explained that Zagora had instructed and was meeting with Arup (the fire consultancy who, it will be recalled, JCS had previously instructed in 2010) in order to obtain a report.

8.15 On 18 June 2013 Mr Broadhurst wrote to David Robinson, enclosing a letter from Mr Troth, the fire safety expert at Arup instructed by Mr Broadhurst. Mr Troth regarded the fire protection to the stairs and corridors to be inadequate to meet reasonable standards to safeguard persons in and around the building in the event of a fire and considered that in its current form the development should not be occupied until sufficient remedial works were undertaken or sufficient temporary emergency procedures were initiated. He also suggested that the Fire Service should be contacted immediately to draw his views to their attention. Mr Parvin accepted that this opinion from a reputable fire consultancy such as Arup demanded to be taken seriously and indicated that there was a present or imminent danger to the physical health and safety of the occupants of the buildings.

8.16 On 19 June 2013 Mr Parvin and David Robinson visited New Lawrence House and met Mr Broadhurst and Mr Robinson. This was Mr Parvin's first visit to the development. He brought the drawings retrieved from archive with him and the four men walked around the development, comparing the layout with the drawings and the deficiencies in the buildings about which Mr Broadhurst, now supported by two consultants and Manchester City Council housing department, was so concerned. It is quite clear, in my view, that it was a detailed inspection and that Mr Parvin as an engineer by qualification with extensive experience in dealing with building warranty claims, was quite clearly aware by the end of the visit that the failings in the buildings were both evident and serious. I accept Mr Broadhurst's evidence that in the course of this meeting there was a suggestion for the first time from David Robinson and Mr Parvin that ZIP might be willing to accept a single policy claim in relation to the common parts if made by Zagora in its capacity as the freeholder undertaking the management company's role. Mr Broadhurst addressed that requirement in his email to Cunningham Lindsey of 19 June 2013, enclosing a copy of one of the leases, and stating that the "management company was dissolved in 2011 and therefore the duties of the management company have been assumed by the freeholder". I shall return to the potential significance of this statement later. I also accept Mr Broadhurst's evidence that at the meeting Mr Parvin would have said something along the lines that a claim under the policy ought to include addressing all of the immediate fire safety risks.

8.17 The first direct communication from Mr Parvin to Mr Broadhurst followed on the following day, when on 20 June 2013 Mr Parvin emailed Mr Broadhurst to arrange a telephone call on the basis that: "Having visited the site I am now in a position to outline a way forward but I would like to discuss initially rather than just write to you".

8.18 I am satisfied that during the course of the telephone conversation which took place it was suggested to Mr Broadhurst by Mr Parvin that it would assist if he could provide a schedule setting out the claims, both those said to fall within the building warranty and those which would have to be made against ZBC. I accept that there was a discussion along the lines that some claims which might not technically fall within the policy might nonetheless be able to be included as part of the overall remedial scheme, a result which would be beneficial to Zagora and the individual leaseholders and which would also have the advantage for both of mitigating the need for any expensive and – for Zurich – embarrassing litigation against ZBC. It was obviously in Mr Parvin's interests to put this proposal over the phone, rather than commit himself to writing and I am satisfied that the impetus to do so was that, having visited the site for the first time, he had become fully aware of the problems which ZBC would face in defending any Bldg Regs claim.

8.19 Mr Broadhurst's email to Mr Parvin of 20 June 2013, sent following the telephone conversation, is significant in that:

(1) As requested, he divided the claims into the relevant sections of the Approved Document and further subdivided the claims into those which he believed would fall within the policy and those which he believed would fall within the Bldg Regs claim.

(2) He began with Part B (Fire). He identified 13 separate items of which 12 were said to fall within the policy. They included incomplete compartmentation in the common parts and a lack of fire protection to structural steelwork. They also included safety issues in relation to the staircases and an apparent absence of cavity barriers to the cladding. Two were said to require investigation, namely the "internal party wall construction" (which, in context, plainly refers to the party walls between flats) and the external wall structure.

(3) He then continued to deal with Part C (Resistance to Moisture), where he identified that the main roof was defective and problems with the entrance lobby roofs and external render, and Parts E, H, K, L, M and N. He emphasised that this was not an exhaustive list.

(4) His proposed way forward involved, subject to agreeing funding, establishing the full extent of the defects through invasive investigations and then "establishing and agreeing a schedule of remedial works and liability". He was suggesting undertaking works on a phased block by block basis, decanting tenants as the works proceeded. At this stage, therefore, he was envisaging that the issue of liability would not be resolved until further investigations had taken place and the remedial works schedule had been produced and agreed.

(5) Mr Broadhurst was proposing a further meeting next week to discuss "logistics", following which they could involve the necessary specialists to discuss the likely extent of the works and practical solutions. It is clear, in my view, that the reference to logistics was a reference to the mechanics of the process, rather than to anything more substantive.

8.20 There were further email exchanges to arrange the further meeting which took place on 27 June 2013. It is clear from those email exchanges that it was agreed that the meeting should take this in two stages. The first stage was to be without the specialists and was to "discuss strategy and practicalities" (Mr Broadhurst's email of 21 June 2013) and "work through the various heads of claim … and agree a general way forward" (Mr Parvin's email of 25 June 2013). The second stage, at which the fire specialist experts but not the building control specialists would be present, was to "put a little more detail on how that will be achieved" (Mr Parvin's email again). It is clear from the evidence that the parties agreed that it was not necessary for the building control specialists to be present at the second stage, because the strategy was to see what could be resolved under the policy claim and thereby leave over at least for the time being consideration of any Bldg Regs claim. This is consistent with Mr Parvin's evidence, which I accept, which is that he was not authorised to discuss or reach any agreement in relation to the Bldg Regs claim, which was being dealt with separately by a separate department but also consistent with Mr Broadhurst's evidence, which I also accept, that Mr Parvin was willing to discuss an overall solution which might involve remedial

works going above and beyond what ZIP might strictly be responsible for under the policy in order to minimise the likelihood of a separate claim against ZBC.

8.21 In the meantime, the Fire Service had been stung into action by the receipt of the Arup report and on 24 June 2013 issued enforcement notices under the provisions of the 2005 Fire Safety Order 2005. This notice required Zagora to: (i) undertake a fire safety risk assessment; (ii) provide a minimum 60 minutes fire resistance in relation to all walls partitions and glazing to the means of escape, a minimum 30 minutes integrity to door assemblies, and sufficient ventilation to the means of escape. Zagora was required to comply by 8 January 2014 and failure to do so would amount to a criminal offence.

8.22 I am satisfied that this, together with the consequential decision by the buildings insurers to withdraw cover by 1 July 2013, increased the desire on the part of both Mr Broadhurst and Mr Parvin to reach some form of agreement as to a way forward.

The meeting of 27 June 2013

8.23 It is common ground that the first part of the meeting was attended by Mr Broadhurst, Mr Parvin and David Robinson. No notes are available of this part of the meeting, because Mr Broadhurst did not take any and because if and insofar as Mr Parvin or David Robinson did take notes ZIP has asserted privilege in that respect. Fortunately, however, David Robinson produced a letter to confirm what had been discussed and agreed within a week of the meeting, which Mr Parvin accepted he had seen and approved before it was sent, which provides a good contemporaneous record and which also indicates ZIP's intentions going forwards. The content of that letter insofar as it recorded what had been discussed and agreed at the meeting was not contradicted by Mr Broadhurst at the time and, indeed, it is positively relied upon by Zagora in support of its case in relation to the agreement to rectify.

8.24 Whilst I will refer to the detail of what was agreed by reference to the subsequent letter, it is important to emphasise that Zagora does not suggest that full agreement on all matters was agreed at that meeting. Zagora's pleaded case is that:

> "34. At the 27 June Meeting, Mr Parvin agreed with Mr Broadhurst (for Zagora) that ZIP would pay Zagora the cost of rectifying various defects in the Development on the terms set out below in order to resolve those of Zagora's claims against ZIP and ZBC that had been set out in Mr Broadhurst's email dated 20 June 2013 ("the Agreement to Rectify"). The Agreement to Rectify is evidenced by Cunningham Lindsey's letter to Mr Broadhurst dated 2 July 2013 ...
>
> 35. The express terms of the Agreement to Rectify were as follows:
>
> 35.1 ZIP would pay the cost of the following remedial works, subject to a single excess of £1,211:
>
> 35.1.1 All necessary remedial works to the common corridors, including: fire stopping to all party walls to deal with all compartmentation issues to

walls and floors to common parts and the party walls to apartments; proper separation to the apartment lobbies; replacement of the stairs in all Blocks; replacement of all doors and frames; and the protection of all exposed steelwork with intumescent paint.

35.1.2 The replacement of the roof and the completion of the entrance lobby roofs to Blocks C and D;

35.1.3 Repairs to the pressure relief pipes for the hot water cylinders;

35.1.3 Repairs to the balustrades so as to reduce the maximum distance to 100mm;

35.1.4 Replacement of laminated glazing in areas where it had been installed the wrong way round.

35.2 Further investigations were required in order to determine:

35.2.1 Whether remedial works were required to the compartmentation between the individual apartments; and

35.2.2 Whether the external walls required replacing to deal with the various fire stopping issues, the failure to install proper cavity barriers, the failure of the render and the water penetration.

35.3 Experts would be appointed to carry out the said further investigations and to determine the full extent of all necessary remedial works, it being an express, alternatively an implied, term of the Agreement to Rectify that ZIP would pay the cost of carrying out such remedial works as were identified as necessary following the said further investigations.

35.4 Further opening up was required before a detailed specification of remedial works could be agreed between the experts.

35.5 In relation to the common corridors, Arup would draw up a brief scope of temporary works so as to avoid the risk of the occupiers being required to decant: i.e. a temporary alarm system and the employment of fire wardens. ZIP would pay the cost of such temporary works.

35.6 No discount would be made to reflect the fact that the leasehold interests in 66 flats were owned by CJS.

35.7 Individual leaseholders' claims for loss of rental or associated repairs to their individual flats would be dealt with separately."

8.25 In contrast, Mr Parvin suggests that no agreement was reached other than an agreement that ZIP would fund further investigative works which would include further temporary works to ensure that the building could continue to be occupied by tenants and on the basis that if the fire specialists could agree what remedial works were required it might then be possible to reach agreement as to what liability if any ZIP might accept for the cost of those works, with all rights being reserved in the meantime.

8.26 In his witness statement at [102] Mr Broadhurst had said that Mr Parvin made it clear that ZIP wanted to reach an agreement with Zagora in relation to the works to the common parts, on the understanding that no claim was made against ZBC. Mr Parvin's evidence was that he held no brief for ZBC, whether at the meeting or otherwise, and there was never any discussion or agreement in relation to any claim there might be in relation to Bldg Regs certification. Under cross-examination Mr Broadhurst accepted that no agreement had been reached in relation to that claim and the discussion had been along the lines that any claims there might be outside the policy might well be resolved simply because the scope of remedial works agreed pursuant to the agreement reached at the meeting would include any works the subject of those claims anyway. An example of this, by reference to what David Robinson stated in the subsequent letter, was that the overall scheme to deal with fire compartmentation might well address any issues in relation to sound transmission due to penetration of the party walls.

8.27 I accept that there was no express agreement in relation to any claim against ZBC and that Mr Broadhurst was wrong to suggest it in his witness statement. However, notwithstanding Mr Parvin's denials I do accept that he was keen to resolve matters in a way which would obviate the need for any claim to be made against ZBG for negligent certification. I have no doubt that Zurich would not have wanted the reputational damage associated with such a claim and that Mr Parvin was genuinely appalled at the absence of documentation to support the Bldg Regs final certificates issued by ZBC and the clear evidence of serious non-compliance with the Bldg Regs which the inspections had revealed. It is known that the department based in London which was dealing with the ZBC claim was involved and, notwithstanding Mr Parvin's inability to recollect the details of its involvement, I have no doubt that there would have been pressure on Mr Parvin to avoid any claim and adverse publicity against ZBC if that was possible.

8.28 In his witness statement at [103] Mr Broadhurst had said that neither the policy terms nor the exclusion clauses were discussed at the meeting. He said that this was because Mr Parvin wanted to try and resolve everything through ZIP so that he did not believe there was any reason to refer any more to the policy terms. He was cross-examined on the basis that the absence of reference to the policy terms was just as consistent with ZIP's rights under the policy being reserved. That seems to me to depend on the context of what was agreed, and I address this point below when considering the terms of the subsequent letter. It was suggested by ZIP that Mr Parvin's authority was limited to £5M and that he would never have been prepared to agree an open-ended liability. The force of the former point was rather undermined by Mr Parvin's ready acceptance that he had never referred to any limit on his authority. The force of the latter point was diminished – although perhaps not completely negated – by the absence of any suggestion by Mr Parvin that he considered that the potential cost of the works discussed at the meeting could have exceeded that limit.

8.29 Mr Broadhurst's evidence was that Mr Parvin did not maintain ZIP's argument that the cost of any remedial works should be discounted to reflect CJS' ownership of the 66 flats. His evidence was that this issue had been resolved on the basis of ZIP accepting that Zagora was entitled to make a claim under the policy as freeholder in relation to the common parts subject only to one excess. He accepted that ZIP still refused to meet any cost of any internal works to CJS' flats or for any loss of rent incurred by CJS. Mr Parvin's evidence was that ZIP's position that any claim would have to be discounted to reflect CJS' flat ownership was very much maintained. However, he also accepted that Zagora was entitled to be treated as a policyholder despite having no insurance certificate in its capacity as buyer of the freehold.

8.30 Mr Broadhurst accepted that there was no agreement in relation to the individual leaseholders' claims in relation to any works to their apartments save insofar as part and parcel of the works which were agreed (for example in relation to fire compartmentation between flats and common parts) and also that there was no agreement in relation to any alternative accommodation costs or claims which the individual leaseholders might have.

8.31 The second stage of the meeting brought in Mr Troth of Arup and Mr Brown of Thomasons. Mr Troth took a contemporaneous handwritten note which, happily, is still available and which he was able to decipher in his oral evidence. It is common ground that the second stage of the meeting was, as envisaged, a practical discussion as to the extent of the problems and how they were to be addressed. There was no discussion at this stage of the meeting in relation to legal or policy issues or the like. It is apparent from the note that this part of the meeting focussed on the way forward in terms of investigations and remedial works. In particular, the two stage strategy of an immediate solution in terms of fire safety, in particular the provision of a suitable fire alarm system (temporary or permanent) and bringing in fire wardens, followed by a permanent solution, was discussed, as was the inspection strategy which involved beginning by opening up the common areas for inspection.

David Robinson's letter of 2 July 2013

8.32 The day after the meeting Mr Parvin sent a brief email to Mr Broadhurst and David Robinson as well as Mr Troth, Mr Brown and Mr Reed and Mr Johnson at ZIP, confirming their contact details and stating: "I think it was a very constructive meeting yesterday". Mr Broadhurst responded, agreeing that it was a very constructive meeting, and attaching a schedule of owner details for each unit and stating that he was in the process of obtaining a budget cost for the fire alarm works. It seems clear to me, therefore, that neither man was suggesting that everything had been agreed and, as I have said, that is not Zagora's case.

8.33 It is also clear from the opening words of David Robinson's letter of 2 July 2013 that it had been agreed at the meeting that a letter would be sent by him which would set out ZIP's position following the meeting. The email sent to Mr Broadhurst on 4 July 2013 which attached the letter read: "As promised a letter is attached setting out Zurich's position on matters at this point in time". The letter was copied to Mr Parvin who, as I have said, had read and approved it before it was sent. He does not suggest that in any way it inaccurately recorded what was said at the meeting. Indeed, it plainly reflected the position taken by ZIP after the discussions at the meeting had been the subject of further reflection and discussion both internally and with David Robinson. Mr Parvin

was clear that it was not the subject of prior discussion with or approval from those representing ZBC and I accept this.

8.34 Mr Broadhurst does not suggest that he expressed any disagreement at the time with the content of the letter, either as an accurate record of what had been discussed at the meeting or as to the way forward. In its reply to ZIP's request for further information Zagora stated that Mr Broadhurst believed that the letter was a true and accurate record of his discussion with Mr Parvin and David Robinson and accurately recorded the agreement that was reached.

8.35 Nonetheless it would be wrong to read it as if it was a carefully drafted legal document. That is not how it was intended or how it reads. There are clearly some linguistic infelicities. For example, in the opening sentence David Robinson began by stating the purpose of the letter, which was said to be to "confirm in principle what was agreed during the meeting". ZIP argues that the words "in principle" should be read as appearing after "agreed" because they make no sense in the position where they actually appear and, therefore, it follows that David Robinson was clearly intending to convey that what was agreed was agreed only in principle and that it was not intended to be a final or legally binding agreement. The claimants on the other hand emphasise the word "agreed" and also submit that it is extremely significant that in this letter David Robinson did not, as he had in previous correspondence, refer to ZIP's position as being "without prejudice" to liability or subject to a reservation of rights.

8.36 A similar point may be made in relation to the following sentence, which read: "In broad terms I would confirm that Zurich will accept the following items under the terms of the warranty subject to a single excess of £1,211". ZIP emphasises the words "in broad terms" which, it submits, reinforces its case that this was not intended to be a final or legally binding agreement. The claimants on the other hand observe that this is an unqualified acceptance by ZIP of a claim made by Zagora under the terms of the insurance policy, subject only to the application of a single excess, in circumstances where in previous correspondence Mr Robinson had always qualified ZIP's position as above and also by reference to the policy terms, importantly including the arguments that any liability would be subject to a proportionate reduction for the CJS flats and also to the application of an excess for each individual leaseholder claimant.

8.37 I shall pick up those competing arguments when I come to deal with the proper meaning of the letter once I have referred further to its contents.

8.38 The letter continued by setting out ZIP's position in relation to each Part of the Approved Document, beginning with Part B, Fire Safety. That section read as follows:

"This is subject to further investigation and agreement as to scope of works, however at this point in time I can confirm that the works to the common corridors and stairs are accepted. I note that following our meeting Arup were to draw up a brief scope for the stage one works (to manage the risk and satisfy the council / Fire Brigade) and I look forward to receiving this information in due course.

With regards to works to the compartmentation between the individual apartments, fire stopping in the external walls and with regards to Approved Document B 4 (external fire spread) the cedar

wood panelling to the rear of block D, until the opening up has been carried out we cannot confirm what costs will be accepted. We look forward to receiving your proposals for the further opening up works."

8.39 Again, both parties emphasise different aspects of this section. Thus, the claimants draw attention to the fact that works to the common corridors and stairs were accepted by ZIP, subject only to further investigation and agreement as to the scope of works, whereas ZIP emphasise that any agreement was expressly made subject to further investigation and agreement and, moreover, that no commitment was given in relation to compartmentation between flats or fire stopping in the external walls.

8.40 Similar arguments are made in relation to the next section, headed Part C, Resistance to Moisture, where the letter stated:

"We agree that there are issues with the roof and that in all probability this will need replacement. The entrance lobby roofs to blocks C and D need to be completed and this cost is accepted. With regards the external render to the front elevation of block E, we do not accept that this is an item which will form a stand-alone claim under the warranty, however it may well be that remedial works are needed as a result of gaining access to deal with other issues.

With regards to the elevations, as per my comments regarding the fire stopping, further investigation is needed here to actually confirm what the issues are so that we may agree then what costs may be covered and what action would need to be taken. In terms of our priority order, clearly the issues with approved document B are the ones which need to be addressed first.

With regards to water penetration to the basement walls, at this point in time we do not accept that there has been a breach of the approved documents and regardless this is an item that would be considered under the warranty."

8.41 Again, it can be seen that within this section David Robinson was stating that whilst the lobby roof claims were accepted and that the roof will "probably" need replacement, other items were not accepted, either at all or pending further investigation. The final sentence does not immediately make sense unless it is read on the basis that the word "not" has been omitted, which would be consistent with ZIP relying on the exclusion of the basement from the policy.

8.42 The next section addresses Part E, Resistance to Passage of Sound, where David Robinson stated that no claim would be accepted under the warranty, whilst suggesting - as noted above - that it might be addressed as part of the overall scheme in relation to fire compartmentation issues.

8.43 The remaining sections, addressing parts H, K, L, M and N contain a similar mix of statements to those relating to Part B.

8.44 The letter then continued as follows:

"Turning to the strategy going forward, firstly a couple of comments regarding policy cover.

With regards to the various heads of claim under the warranty as was discussed at the meeting it is our opinion that only one excess will apply to the overall claim of £1,211.

Whilst a claim for those apartments belonging to the developers would not be covered if it was submitted as a standalone claim, again as discussed we will deal with the claim for the making good works to the structure, as your interest as freeholder allows you to claim instead of the developer. However any loss of rent and/or alternative accommodation claims made by them will not be covered."

8.45 It is plain in my view that David Robinson was making it clear that ZIP was no longer advancing its arguments based on multiple excesses and a proportionate reduction for the CJS flats. I reject Mr Parvin's evidence to the contrary. The approach in the letter is consistent in my judgment with Mr Broadhurst's evidence that Mr Parvin was keen to find a way in which what appeared to be justified claims under the warranty could be accepted as a claim made by Zagora so as to achieve the objective of making the developments safe for occupation in terms of fire safety and structurally and without the impediment which would be caused by a strict application of the policy terms in relation to multiple excesses and the CJS flats, which would leave ZIP vulnerable to separate litigation and the risk of reputational damage to ZBC. In cross-examination Mr Parvin suggested that the acceptance that only one excess would be deducted did not represent a concession so much as an alternative approach based on an alternative interpretation of the policy. Whilst I accept that this is the correct interpretation of the present or imminent danger section of the policy, nonetheless it clearly did reflect ZIP taking a commercial approach to seek to resolve the claim on a pragmatic basis. The question, of course, is whether this apparent unqualified acceptance of liability on this basis formed part of a legally enforceable agreement or, as ZIP would contend, part of what was at best only an agreement in principle where all rights were reserved pending a final agreement.

8.46 The letter then turned to the next steps to be undertaken, which he identified as: (a) Zagora obtaining a price for a temporary fire alarm system and investigations; (b) opening up and agreeing a detailed specification for the fire stopping works to the common areas; (c) investigating the integrity of the individual apartments and Zagora's proposals for the costs, methods and dates for this work. Mr Robinson confirmed that ZIP would be using Thomasons as its expert advisers and that agreement needed to be reached as to who should prepare the final specification.

8.47 David Robinson concluded by setting out in tabular format a "summary of immediate activities" which provided more details as to the next steps identified above. It is apparent in my view from this section that two separate activities were being proposed, the first being to undertake the steps necessary to install a fire alarm system in the development which would enable it to continue to be occupied in the short-term, and the second being to undertake further investigations before agreeing further remedial works and producing a schedule of those works. Against each activity David Robinson had identified who was responsible for taking action to implement the activity. After the temporary works had been undertaken and further investigations had been undertaken and assessed the next activity was to "agree extent of remedial works", to be actioned by "Arup, Zurich Risks and Thomasons".

8.48 Mr Selby made the point that, as Mr Parvin agreed, he was not part of the Zurich Risks team. It was put to Mr Parvin that he was not included because there was no question of ZIP being entitled

at that stage to make a decision as to what works it was prepared to fund, since any issues of liability or cover had already been agreed. Mr Parvin disagreed. However I agree that the wording used is not apt to encompass a further stage at which Mr Broadhurst as the decision maker on behalf of Zagora and Mr Parvin as the decision maker on behalf of ZIP would then be required to confirm their respective agreement to the proposals which had been discussed and agreed between the experts including Mr Johnson as the Zurich Risks engineer. That point is not however, in my view, determinative as to the question as to what had been agreed and what, overall, the letter recorded as having been agreed.

8.49 In cross-examination Mr Parvin accepted that ZIP had agreed to fund the cost of the temporary works to allow the immediate fire safety concerns to be assuaged and thus to ensure that the development could continue to be occupied and insured. It is right to say, as Mr Selby submitted, that this does not expressly appear in David Robinson's letter of 2 July 2013. Mr Selby submits that this shows that not everything which was agreed at the meeting was included within David Robinson's letter. He also submits that since ZIP was willing to agree to fund these works there was no reason why it should not also have been willing to fund the works which were accepted in relation to the common corridors and stairs and the other works which Zagora says were agreed at the meeting. I accept the force of this point. Indeed, one can see from the wording used in David Robinson's letter that the opening section ("we will accept the following items under the terms of the warranty") when read with the closing summary of activities amounts to an implicit acknowledgement that ZIP would fund the costs of those activities. However, that does not in my judgment answer the crucial question, which is whether or not there was a contractually binding commitment and, if so, what were its terms.

8.50 Finally, and before I leave the correspondence, Zagora also relies upon a subsequent email of 5 July 2013 from David Robinson to an estate agent acting for some of the individual leaseholders, in which he says that Zurich would be "financially assisting" Zagora to act on the improvement notice issued by the City Council. Whilst this is a clear indication that Mr Robinson believed that Zurich had agreed to fund the fire alarm system and other steps to allow the development to continue to be occupied it does not in my view take matters any further than that. On 9 July 2013 David Robinson wrote to Mr Tarasov, stating that "Zurich are engaged, with the freeholder, in rectifying the issues". On 11 July 2013 he wrote a memorable email to Mr Broadhurst in which he stated: "it's bad enough they [JCS] build it badly, rob the residents and then leave you to fix it and for us [ZIP] to pay for it!". Whilst it reflects an understanding that at the time ZIP would end up paying for some or all of the necessary remedial works, it does not seem to me to go further and reflect an understanding that ZIP had entered into a binding contractual commitment to do so.

8.51 The same is true of the subsequent email sent by Mr Broadhurst to the individual leaseholders of 9 July 2013, where he said that "Zurich have confirmed that they will pay for the majority of the rectification works and where they won't directly some of the works will indirectly resolve other matters". That email simply reflected his belief as to what had already happened and what would happen going forwards. It was not copied to Zurich or to Cunningham Lindsey and has no particular relevance to the issue which I have to decide.

8.52 ZIP in turn rely on a letter written by Mr Broadhurst on 25 March 2014 to the individual leaseholders, in the context of the ongoing dispute regarding the control of LHM, in which he said:

"we … were near to agreement for [Zurich]". I agree that insofar as relevant that does tend to indicate that not only had no final agreement been reached (which Mr Broadhurst does not contend for anyway) but also that Mr Broadhurst did not believe that he had reached a binding agreement in relation to a part only of the matters being discussed with ZIP. However I would not decide the point on this rather slender evidential thread.

Submissions and decision

8.53 It is important to emphasise that this is not a case where Zagora is contending that a full, final and complete agreement was reached at the meeting of 27 June 2013. Zagora does not suggest that this was a final concluded agreement in relation to each and every claim it and/or the individual leaseholders had against ZIP under the policy and against ZBC under the Bldg Regs claim. It does however submit that it represented a final concluded agreement in relation to some of the matters referred to at the meeting of 27 June 2013 and in the letter dated 2 July 2013. In contrast, ZIP submits that it simply represented a step along the road to a potential agreement which was not, objectively, intended to amount to a legally enforceable agreement in the event that no final agreement was concluded.

8.54 It is also important to emphasise that this is not a case where Zagora is contending that an agreement was reached at the meeting of 27 June 2013 which went beyond or was not qualified by what was contained in David Robinson's letter of 2 July 2013. In other words, Zagora is not contending that even if, on a proper construction of the letter of 2 July 2013, no legally binding agreement was reached nonetheless a legally binding agreement had already been reached at the meeting of 27 June 2013 from which David Robinson wrongfully and ineffectively sought to row back in his letter of 2 July 2013. Zagora's case is that what was agreed at the meeting of 27 June 2013 is accurately stated and recorded in the letter of 2 July 2013.

8.55 In my judgment this is a proper and a realistic approach to take. If Mr Broadhurst had suggested in his oral evidence that a full and binding agreement was reached at the meeting which did not require any written confirmation of its precise terms from ZIP following the meeting to become legally binding, and from which ZIP attempted to resile in some key respects in the letter of 2 July 2013, then I would have had no hesitation in rejecting that evidence. That is because that has not been his position or Zagora's case or his evidence in the proceedings at any time. Furthermore, in my view it is inherently implausible that any reasonable person in his position could have believed that a full and binding agreement in relation to matters of such obvious significance had been reached in the course of this two stage meeting, without the detailed terms of the agreement as proposed by ZIP subsequently being set out in a subsequent formal written communication for his consideration. It was not Zagora's case or his evidence that after the meeting involving the experts there had been a further separate meeting involving only Mr Broadhurst, Mr Parvin and David Robinson at which a written record of the agreement had been drawn up and agreed to by all three men. If that had happened then I can see that there would have been no need for a further written communication. However, that was not what happened in this case.

8.56 In determining this question it is, rightly, common ground that what matters is how the parties expressed themselves to each other, whether in words, writing or conduct. What they may have intended is irrelevant if that intention was not communicated to the other party.

8.57 In a case where the parties have no pre-existing relationship the court applies well-established principles in deciding whether or not they have concluded a legally binding contract. It is necessary to show that they have agreed on all matters essential to the formation of a contract or, insofar as they have not, that it can be demonstrated that the law will imply an agreement in relation to a particular matter. So, for example, in some cases where no price is agreed the circumstances may be such as to justify the court implying a term that a reasonable price will be paid, whereas in other cases the circumstances are such that the court will conclude that in the absence of agreement on a price no legally binding contract can come into effect. In such cases it is necessary to show agreement on all matters because save in the limited circumstances where the court can imply a term the court cannot retrospectively fix the essential terms of a contract which the parties have not agreed at the time and without agreement on such essential terms the contract is too uncertain in its terms to be enforced.

8.58 However, in cases where there is a pre-existing relationship between the parties the need for agreement on all matters is not so acute. That is because if there is a pre-existing contractual relationship it is possible for the parties to agree on some, but not all, issues which have arisen as to the respective entitlements under that contract, and to leave the remaining issues to be resolved either by subsequent agreement or, failing agreement, by the court. It is possible for the court to determine the remaining issues because there is an existing contractual relationship which provides the legal structure by which those issues can be resolved. The question in such cases will be whether the circumstances are such that it can be concluded that the parties intended to and did reach a partial settlement and to leave other matters unresolved or whether they only intended to reach agreement if everything which was in issue could be agreed.

8.59 The present case does not fall neatly into either category. That is because the pre-existing relationship between the parties was not entirely clear or free from dispute. Thus Zagora was asserting a warranty claim against ZIP which could be advanced on any one or more of three separate grounds, none of which were entirely clear nor free from doubt, namely: (a) a claim as a policyholder as subsequent purchaser of the freehold, in circumstances where the original freeholder was the developer who would not have been entitled to make a warranty claim; (b) a claim on the basis that it was, effectively, the management company, in circumstances where there was some uncertainty as to its right to do so and where it was not immediately obvious in any event that the original management company would have been entitled to make a warranty claim save, perhaps, as agent for the individual leaseholders; (c) a claim on behalf of the individual leaseholders, in circumstances where there was also some uncertainty as to its authority to do so and where on any view it had no express authority to claim on behalf of CJS, the owner of the majority of the flats. Moreover, the terms of the warranty were neither entirely clear nor free from doubt as to who could make claims or make full recoveries and on what basis. Finally, Zagora was asserting a separate claim against ZBC where, to succeed, it would have to establish that there was a legal duty (the claim then being advanced as a duty of care in tort, as the parties had not applied their minds as to whether or not it would be necessary to go further and establish deceit) either between itself and ZBC or between someone else on whose behalf it was entitled to act and ZBC.

8.60 Nonetheless, these complications should not be over-stated. In relation to the warranty claim, it is perfectly possible for it to be agreed between a claimant and an insurer that the insurer will

recognise the claimant as an insured and will accept liability to that claimant for one or more specified claims, either on the basis of a full agreement as to what remedial works were required or the amount to which the claimant was entitled or on the basis that if full and final agreement on remedial works or cost cannot be reached any outstanding disputes can be determined by the court in accordance with the terms of the contract of insurance. However, it must be recognised that in many, probably the vast majority, of cases it will be in the interests of both parties – and certainly the insurer – to reach a full and final settlement on all matters, so that it is unlikely that a partial agreement of the nature postulated would be attractive compared with a full and final agreement on all matters. What is crucial to the validity of such an agreement is clarity as to what issues have been agreed and on what basis and what issues are left outstanding because, in the absence of such clarity, any agreement is too uncertain to be legally enforceable.

8.61 In this case, the evidence shows that some of these potential complications were indeed resolved. I am satisfied that it was accepted that Zagora would be treated as an insured freeholder which was entitled to make claims under the policy in relation to the common parts on its own behalf and on the twin basis that: (a) no CJS discount would be applied to these common parts claims; (b) only one excess would be applied to these common parts claims. This was a perfectly sensible pragmatic solution to a serious and pressing problem.

8.62 I am also satisfied that it was agreed that the claim against ZBC would be left on the back burner, as were all claims which the individual leaseholders might have, including claims in relation to the individual flats and for alternative accommodation costs. Whilst it might be objected that this would not achieve an insurer's usual objective of securing full and final settlement, again it was a sensible pragmatic solution to a serious and pressing problem, in circumstances where it was clearly appreciated that agreement on the common parts would address the most substantial, most complex and most pressing of the issues with the development.

8.63 However, in my judgment the real difficulties arise when one considers the detail of what was agreed. Thus, in relation to what was perhaps the most important and pressing issue of fire safety the position seems to me to be at best complex and at worst hopelessly uncertain. Everything was said to be subject to further investigation and agreement, even the works to the common corridors and stairs which were accepted although, importantly, not further specified at that stage. Nothing was specifically agreed in relation to compartmentation between the flats and the common parts or between flats or in relation to fire stopping to the external walls pending further investigation. Nor was the position in relation to any untreated structural steelwork specifically addressed. Assuming that it was agreed that any such steelwork in the corridors and stairs would be treated it is not clear whether or not that would also apply to steelwork in individual flats. Nothing was said about structural steelwork or other fire safety issues in relation to the roof.

8.64 Furthermore, even in relation to the corridors and stair fire safety works nothing specific was agreed. Zagora's case is that the agreement was sufficiently certain, because there was no reason to believe that the works could not be agreed between the experts. However, that could not of course be guaranteed. The parties had clearly not considered what would happen if the experts were unable to agree or, indeed, even if the experts agreed but either Zagora or ZIP or both were not happy to abide by their agreement. It would follow that in such a case there could be no final agreement so that this part of the agreement could only work if a term was to be implied that the

court would determine the scope of works. However it is not clear whether that would be on the basis that all that the court was required to do was to determine the reasonable scope of the works or whether it would be open to ZIP to contend that it should be treated as a claim under the insurance policy so that all policy arguments other than those specifically conceded might be raised. One can see a real prospect of a disagreement between experts as to whether or not what was required was: (a) to resolve the matters identified by the Manchester City Council housing department improvement notice or; (b) the Fire Service enforcement notice or; (c) the matters specifically identified in Mr Broadhurst's email of 20 June 2013 and, in either case, what was reasonably necessary. One can also see for example a real prospect of a disagreement as to whether or not what was required was: (a) to ensure that the corridors and stairs complied in all respects with Part B of the Approved Document or; (b) merely to ensure that the reasonable cost of rectifying or remedying major physical damage or a present or imminent danger to physical health and safety of occupants (i.e. the policy claims) and again, in either case, what was reasonably necessary.

8.65 In seeking to answer this objection Mr Selby referred me to the decision of the Court of Appeal in *Mamidoil v Okta* [2001] 2 Lloyd's Law Reports 76 in support of his argument that it was not fatal to the certainty of an agreement that matters were left to be agreed between experts. I am not at all convinced that the case referred to is authority for that proposition. In that case, which concerned the question as to whether or not a provision for a 10 year contract duration was insufficiently certain where the price to be paid after year 3 had not been agreed, Rix LJ referred at [53] onwards to what he described as well-known authorities for the principles which could be extracted from them. Having done so, he set out at [69] what he described as a list of the principles relevant to that case which, he stressed, was not intended to be exhaustive. Nothing specific was said in relation to the role of experts, although reference was made to the possibility of the court being prepared to imply obligations in terms of what is reasonable or, in the context of there being an arbitration clause, to find that there is a "commercial and contractual mechanism which can be operated with the assistance of experts in the field".

8.66 The difficulty here, in my view, is that there was insufficient certainty as to the basis on which the experts were to proceed. It follows in my view that if the experts were unable to agree the court could not proceed to determine what works were reasonably required under the agreement to rectify. It follows in my judgment that there is no mechanism by which the implication of the term contended for by the claimants could render the contract sufficiently certain. Mr Selby protested that there was no reason to think that the experts would not have been able to agree on the scope of works. I accept that the court should not be too negative about the prospect of agreement. However, it must not be forgotten that further investigation was undoubtedly required. The experts might reasonably disagree both as to the seriousness of any non-compliance and as to what remedial works were required. They might ask for input from their respective principals, who might – given the uncertainty – reasonably disagree about the correct approach. At the time, I fully accept, the principals and the experts might have confidently expected that as reasonable men they would be able to agree. However, in the end the fact remained that the interests of Zagora and the interests of ZIP did not necessarily coincide. In short it remained in an important respect an agreement to agree which, as is common ground, is not enforceable as a legally binding contract.

8.67 Similar objections in my view apply in relation to resistance to moisture (and indeed all of the remaining sections). With the modest exception of completing two entrance lobby roofs nothing at all was agreed. In relation to the roof, which of course was a particularly significant item, all that was said was that "we agree that there are issues with the roof and that in all probability this will need replacement". That is very far from a clear and unqualified acceptance of responsibility for the complete replacement of the roof. The same is true in relation to the external walls. The proposal in relation to external render was completely unenforceable. Here, the parties were even further away from any consensus on how any subsequent disagreement about what was required could be determined.

8.68 These practical difficulties entirely justify in my view the opening words of the letter. Referring to an agreement in principle and in broad terms clearly move the claim further forwards than under previous letters, where ZIP's rights were expressly reserved. However, the question is whether they go sufficiently far to demonstrate an immediate and unqualified acceptance of a liability to undertake whatever repairs the experts might agree or, alternatively, whatever repairs might be reasonable to undertake on the basis that no points of defence under the policy would be taken subject to the specific points expressly raised in the letter.

8.69 The reality, in my view, is that what was agreed at the meeting and set out in the letter represented a step along the road to what the parties at the time would have hoped and expected would have been a pragmatic resolution of a serious and urgent problem, even if not resolving all of the claims which all of the parties might have had either as against ZIP or as against ZBC. Had it not been for the unfortunate intervention of CJS and the subsequent litigation it may well have been that matters could have been resolved. However, that did not happen and the question which the court must resolve is whether the consequence is that the parties are brought back to their strict legal positions prior to 27 June 2013 or whether that step along the way can now be given effect as a binding legal contract. In my judgment it was not, on any objective analysis, ever intended that what was agreed at the meeting and set out in the letter could represent a binding immediately enforceable contract between Zagora and ZIP and, it follows, the parties are thrown back to their strict legal positions.

8.70 I have considered whether or not it could be said that leaving aside anything else the effect of what was said and written was that ZIP had agreed to accept Zagora as if it was an insured under a Standard 10 policy of the common parts on the same terms as issued to the individual leaseholders and on the basis that ZIP would accept a claim made by Zagora under that policy without any deduction for the CJS and associated owner flats and subject only to one excess. I am unable to accept that this was the case. I am satisfied that there was no contractual intention to do so. To do so would again in my view have the effect of seeking to carve out some immediately binding partial agreement from what was, on an objective analysis, always intended only to be a step along the road to a complete agreement. What was said by Mr Parvin and written by David Robinson amounted to no more, in my view, than that as and when (and, importantly, if) full agreement could be reached in relation to the remedial works which ZIP was prepared to fund then ZIP would accept a claim by Zagora on the basis stated above. In the absence of subsequent agreement in relation to the remedial works that cannot retrospectively be hived off as amounting to a separate independently enforceable agreement. This is not a case such as those sometimes encountered where there is a claim under an insurance policy where there are disputes about liability but where following a meeting the insurer agrees to accept liability on an agreed basis but leaves all matters in

relation to quantification to be resolved subsequently. In such a case it might be said that if all of the necessary requirements for a contract are present the insurer cannot subsequently seek to resile from that contractually binding admission of liability.

8.71 I cannot pretend that I reach this conclusion with any particular enthusiasm. However, it is a conclusion which I must reach on the evidence and by reference to the law. It is a great shame that the discussions, which might otherwise have proceeded to a successful outcome, were brought to an abrupt halt by the intervention of CJS and the subsequent litigation and were not resurrected thereafter. Whether the parties would have reached a final agreement I simply do not know; Mr Broadhurst was after all seeking to drive a hard bargain and achieve an advantageous result for Zagora and its associated business interests rather than just securing a satisfactory result for the individual leaseholders and there can be no guarantee that Mr Parvin would have been prepared to accept his demands.

Other defences

8.72 In the circumstances it is unnecessary for me to consider other than briefly and for completeness the other defences advanced by ZIP.

8.73 In closing submissions ZIP contended that there was no consideration for any such agreement, arguing that there could be no consideration provided by a forbearance to sue in circumstances where it was accepted that neither the claim under the policy nor the Bldg Regs claim was being compromised. However if I had found that there was an agreement I would have been satisfied that there was consideration, in that the agreement as contended for by Zagora would have afforded ZIP the legal and practical benefit of avoiding facing imminent litigation by Zagora and in avoiding any potential additional liability resulting from the development having to be decanted if the works required by the improvement notice and enforcement notice could not be undertaken and/or if the buildings insurers went off cover as a result.

8.74 I do not accept ZIP's case based on a mistake as to the identity of the contracting parties. ZIP had contended that the agreement to rectify, if made, had involved Mr Broadhurst or the companies who he represented purporting to act on behalf of all of the individual leaseholders, in circumstances where he did not have their authority to bind them. However, on a proper analysis of the evidence it is clear that by 27 June 2013 neither Mr Broadhurst nor Mr Parvin believed that any agreement involved the individual leaseholders. Instead they proceeded on the basis that any agreement would simply have involved ZIP accepting that Zagora was entitled to make a claim under an insurance policy in relation to the common parts in its capacity as freeholder, with any claims by the individual leaseholders being left on the backburner. It follows, in my view, that no question of authority or mistake arose. Nor did Mr Parvin suggest in his evidence that it did.

8.75 However, I must also consider ZIP's further contention that Mr Broadhurst had represented on 19 June 2013 that due to the dissolution of the management company its duties had been assumed by the freeholder. ZIP's case is that before the meeting on 27 June 2013 Mr Broadhurst had become aware that LHM had been restored to the register of companies and that it was contending through solicitors that it was entitled to manage the development and that Zagora was not and should not be doing so. ZIP contends that Mr Broadhurst was therefore obliged to inform ZIP of these facts but

that he failed to do so. ZIP argues that this is important because the underlying basis of any agreement was a pragmatic acceptance by ZIP to treat Zagora as an insured so that ZIP could fund the necessary remedial works on the basis that Zagora was in a position to do so as the freeholder undertaking the management function. ZIP argues that if this underlying basis, which had been represented to be the position by Zagora, was known by Zagora not to be the case prior to the 27 June 2013 meeting then Zagora was obliged to notify ZIP. Having failed to do so, it is said that ZIP was induced to enter into the agreement to rectify by reason of a material misrepresentation and is and was entitled to avoid the agreement to rectify as a result.

8.76 It is clear that as a matter of law a statement which was true when made may become a misrepresentation if the maker of the statement comes to know before the contract is concluded that it is no longer true: see *Chitty on Contracts* 33rd edition at 7-022 and 7-033.

8.77 However, I am not satisfied that as at 27 June 2013 or at any time prior to 4 July 2013 it can be said that Zagora knew that it was no longer true. The position is that LHM had indeed been dissolved and Freehold Managers as the then freeholder had indeed taken over the management role. Although there had been non-cooperation and indeed objection from those associated with CJS there had been no active challenge. Mr Broadhurst and Mr Robinson had decided to proceed with the acquisition by Zagora of the freehold on the basis of a statement in the sales particulars that this was the position and the absence of any suggestion that it was not the case. It is true that after the acquisition there had again been non-cooperation and indeed objection from those associated with CJS, which had led to Mr Broadhurst becoming aware that CJS had taken steps to restore LHM to the Register of Companies, but there is no evidence that as a result of this Mr Broadhurst no longer believed that Zagora was not still entitled to manage New Lawrence House as at the end of June or early July 2013. He was obviously aware that there was a dispute about the matter but that is different from his knowing that Zagora did not have the entitlement. I do not accept that in such circumstances he had a duty to disclose the existence of that dispute. In the circumstances, I would not have accepted this defence either.

8.78 ZIP advanced a connected defence based on illegality. The argument is that by reason of the interim injunction granted by the court on 10 July 2013 and continued thereafter it was illegal for the agreement to rectify to be performed. I reject this argument. Performance of the agreement to rectify was never rendered illegal. It was simply the case that the investigations and remedial works could not be implemented whilst the interim injunction remained in force unless varied. However, it is a statement of the obvious that an interim injunction is very different from the final permanent injunction. It was always known to ZIP that Zagora was contesting the claim advanced by CJS through LHM and that at some stage the court would rule on the dispute. Eventually on appeal the court ruled that CJS had no right to bring litigation against Zagora through LHM and that LHM was controlled by the individual leaseholders who supported Zagora. From that time there was no legal impediment to the agreement to rectify being performed. ZIP contend that in fact the injunction was never formally lifted. This was not investigated at trial but, even if that is so, that is a pure technicality because it is clear that the individual leaseholders who have controlled LHM since 2014 would agree to the injunction being lifted if that would enable the agreement to rectify to be performed.

8.79 It might have been argued by ZIP that if the agreement to rectify was made there was some implied term that it should be performed within a reasonable time and, that being impossible due to the injunction, it was entitled to treat itself as discharged from further performance. However even if there was such a term the difficulty is that ZIP never sought at any time before the litigation was finally won by Zagora and the individual leaseholders to bring the agreement to rectify to an end on that basis.

8.80 I am unimpressed by ZIP's argument based on waiver and/or estoppel by convention. ZIP pleaded an argument that it was not open to Zagora to assert the agreement to rectify since they had failed to advance the existence of any such agreement at any time from 2013 down to 2017, when it was first pleaded in the particulars of claim. It was said that the effect was that Zagora was estopped from relying upon the agreement to rectify or had waived any reliance upon it. The factual basis for the argument is that after the successful outcome of the appeal to the Court of Appeal on 19 September 2014 Mr Broadhurst wrote to David Robinson saying: "this puts us back in a position whereby either the management company or the Landlord will be making a claim against Zurich for the necessary repairs at the above under the terms of the original claim…". ZIP relied upon subsequent correspondence to similar effect.

8.81 It appears that for reasons which were not explored in evidence and which are unexplained neither side suggested that they should revert to the position the discussions had reached in July 2013. However, at no stage did ZIP or David Robinson on its behalf protest that this was contrary to the agreement or approach which had been reached in June / July 2013 and nor did Mr Broadhurst or anyone else from Zagora assert in terms that they considered themselves no longer bound by any agreement reached in 2013. Indeed since it is not Zagora's case that the agreement to rectify compromised all claims under the insurance policies or against ZBG I do not accept that there is an obvious and irreconcilable inconsistency between the correspondence relied upon and the agreement to rectify as advanced by Zagora.

8.82 Moreover, Mr Broadhurst contended in his witness statement that the existence of the agreement to rectify had been asserted in the course of a without prejudice meeting on 1 July 2015. ZIP objected to Mr Broadhurst giving that evidence but, after hearing legal argument, I ruled that Zagora was entitled to adduce such evidence on the basis that it fell within an established exception to the procedural rule excluding evidence relating to without prejudice discussions. Mr Broadhurst was not cross-examined on that evidence nor did ZIP call or adduce any evidence to contradict him.

8.83 In the circumstances I am satisfied that this defence would not have succeeded.

Quantum of the claim under the agreement to rectify

8.84 Had I accepted Zagora's case in relation to the agreement to rectify I would have needed to grapple with the question of quantification. In particular there is a substantial difference between Zagora's primary case as predicated on the basis that the scope of the agreement extends to all matters which it says that the experts, acting reasonably, would have been able to agree and ZIP's case that any agreement to rectify could not have extended any further than in relation to those items where David Robinson had said in terms that ZIP would accept responsibility. The differences can be seen from comparing paragraphs 125 and 126 of the claimants' opening submissions where the

claim is put on the former basis as amounting to £7.647 million net of add-ons, whereas ZIP's Defence at [39A] contends that the claim is limited to the following much more modest items:
"Fire safety works to the common corridors and stairs; Completion of entry lobby roofs to Blocks C and D; Pressure relief valves for hot water cylinders; Balustrades –reduce maximum distance to 100mm; Glazing – installation of laminated glazing the right way round."

8.85 If I had accepted Zagora's case I would have needed to make clear findings as to how the agreement to rectify would have worked and, specifically, whether: (a) it was limited to specifically agreed works as ZIP contends (and, if so, which); (b) it was limited to such works together with those expressly referred to as to be agreed between the experts following further inspection and, if so, which; (c) it extended to everything the subject of discussion in the letter other than those items expressly rejected. I would also have needed to make clear findings as to whether my decision should be made solely on the basis of what is required under the Approved Documents or also by reference to policy terms and, if so, which. I should also have needed to make clear findings as to the outcome in relation to individual items where there might reasonably have been disagreement between experts – as indeed there has been – about the nature and extent of the necessary remedial works, including the necessary access and reinstatement works. Unless my conclusion in relation to the agreement to rectify is overturned on appeal and clear directions given as to the correct approach it seems to me to be pointless to speculate further, let alone make findings on every possible permutation.

6.86 However I can say with confidence that I would have rejected the argument advanced by ZIP that since only Zagora can make a claim under the agreement to rectify it can only recover its loss which is the diminution in value of its interest. The clear commercial purpose of the agreement to rectify, had it been made, was that Zagora should be entitled to be put in funds to undertake the necessary remedial works for the benefit of the individual leaseholders as well as its own benefit. In the circumstances it would not be open to ZIP to contend that Zagora's claim should be valued on the basis only of the diminution in value of its own interest.

6.87 I can see that other difficult issues might arise as to whether or not it could be argued that the loss should be measured by reference to the diminution in value of the whole development or indeed whether or not the argument in relation to Zagora's ability to undertake the works given the impact of the costs and the funding agreements would have traction had Zagora succeeded under the agreement to rectify. However and again other than in the eventuality of a successful appeal with clear direction being given as to the correct approach it would be pointless to speculate further let alone make findings based on the possible permutations.

6.88 Finally, however, I can say with confidence that I would not have accepted the argument that Zagora has failed to mitigate its loss by pursuing CJS under the covenants in the leases. That is on the basis that the clear commercial purpose of the agreement to rectify, if concluded, was to allow Zagora to undertake the necessary works without deduction for the CJS flats. It could not therefore be argued by ZIP that Zagora was obliged to mitigate its loss by seeking to proceed against CJS rather than pursuing ZIP to enforce the obligation which on this hypothesis it accepted but then failed to honour.

9. Zagora's claim under the Policy

9.1 Zagora's pleaded case at [52] is that it is entitled to sue under the policy because it has a freehold interest in the development as a whole and does not fall within the exclusion to the definition of "Buyer/You/Your" contained within the definitions section of the policy.

9.2 ZIP's position is that Zagora is not and never has been an insured person under a building warranty insurance policy.

9.3 The starting point is that it is common ground that there is no insurance certificate identifying Zagora as a buyer, whether for an individual flat excluding parts or for the common parts only, in the same way as there is for the individual leaseholder claimants.

9.4 However, Zagora submits that this does not matter. It submits that although each certificate expressly refers to a particular flat and to a particular buyer, the certificate does not limit the cover to the buyer shown on the certificate. It submits that since the definition of the buyer in the policy is "the person having a freehold, commonhold, leasehold or tenancy interest in the new home for the time being" the cover extended not only to the named buyer of, in this case, the long leasehold interest in each flat but also to the freeholder for the time being of each flat. Thus, it submits, Zagora became a co-insured in relation to each flat when it acquired the freehold of New Lawrence House.

9.5 This is an ingenious argument, but I have no doubt that it is wrong. It is true that the insurance policy does not specifically provide that only the Buyer named as such in the insurance certificate falls within the definition of the buyer within the policy. It is also true that the definition of the buyer extends to someone with a freehold interest. However:

(1) The policy and the certificates are clearly intended to and do constitute separate parts of the one contract of insurance. In the insurance certificates the Buyer is expressly identified by name. The only circumstances provided for in the policy in which the identity of the Buyer could change is in the event of a transfer to a successor in title.

(2) The policy does not make provision for there to be more than one insured with separate interests in the same flat. Specifically, there is no provision for insurance cover for a freehold owner as well as a leasehold owner. The definition of "Buyer" does not help Zagora in that respect, since it is apparent that the buyer of a house or flat falling within the definition of a New Home in the policy might acquire a freehold or leasehold interest; the standard terms of the policy are not limited in their application only to those acquiring leasehold interests in separate flats within multi-ownership buildings.

9.6 Standing back, there is no reason why the policy should need to provide that only the Buyer identified as such by name on the insurance certificate (or their successor in title) may be the insured. It is axiomatic that a contract of insurance is a contract between the insurer and a named insured (or insureds). If the policy was intended to extend to another insured not named or otherwise identified in the certificate it would be expected that express provision should be made for that in the policy. Thus, the absence of express provision that only the named Buyer is the

insured is nothing to the point. It is the absence of express provision that anyone else should have the rights of an insured that is more telling.

9.7 It is also true, as ZIP observe, that there is an exception in the policy for "claims by any person other than the Buyer". However, this exception only applies to section 2 and section 4 and not to section 3. It is not immediately clear why not and I have not had submissions on the point. Regardless, I am quite clear that the absence of this exception from section 3 does not in itself support, let alone command, a conclusion that it follows that Zagora as a successor freeholder of each of the flats can advance a claim as a co-insured under the policy in that capacity.

9.8 It follows, in my view, that Zagora could only have become an insured under the automatic transfer provisions of the insurance policy, as referred to in section 7 above, if a previous certificate had been issued in favour either of JCS as holder of the freehold or in favour of Freehold Managers as incoming freeholder. The difficulty for Zagora, however, is that there is simply no evidence that ZIP ever issued any preceding freeholder of the development with an insurance certificate nor did it otherwise recognise any preceding freeholder of the development as an insured.

9.9 ZIP accepts, and I agree, that had JCS transferred the freehold to a third party on completion of the development it would in principle have been possible for ZIP to have been asked to and to have agreed to issue an insurance certificate in favour of that incoming freehold owner. It might I suppose also have been asked to and issued an insurance certificate in favour of LHM as the intended management company. However since JCS retained the freehold it makes complete sense that it did not ask ZIP to issue it with an insurance certificate and there was of course no reason for it to do so anyway, since JCS as developer fell outside the definition of a buyer in the insurance policy anyway and accordingly could never have derived any benefit from the policy. It follows that whilst a policy issued to the freeholder would have been capable of automatic transfer to a successor, this never happened here because neither JCS (nor, for that matter, Freehold Managers as the successor freeholder from JCS) was ever issued with an insurance certificate by ZIP. In those circumstances ZIP contends, and I agree, that it is simply not possible for Zagora to contend that it has the benefit of any insurance policy with ZIP.

9.10 In that respect it is irrelevant that Mr Parvin and Mr Robinson appear to have believed or accepted over the period from April to July 2013 that Zagora was either an insured or was entitled to make a claim as if it was an insured. There is no evidence or suggestion that this was based on any particular investigation on their behalf. It appears, from the evidence I have referred to above, simply to have been a tacit acceptance by them that it was convenient to treat Zagora as an insured in order to resolve the pressing issue as to what to do about the dangerous state of the development.

9.11 I therefore must address Zagora's alternative case that ZIP is estopped from contending that Zagora is not entitled to sue under the Policy or has waived its right to contend to the contrary. Zagora's pleaded case at [53] and [54] is to the following effect:

> "53. If and insofar as Zagora's entitlement to sue is denied, Zagora will say that ZIP is estopped by representation or convention from denying Zagora's entitlement and/or has waived any issues arising in connection with Zagora's entitlement. In the letter to Zagora's Mr

Broadhurst dated 2 July 2013 (which evidences the Agreement to Rectify), ZIP's loss adjuster (Cunningham Lindsey) specifically stated on behalf of ZIP:

"I refer to our meeting of Thursday last week and the discussions at that time and write to confirm in principle what was agreed during the meeting.

In broad terms I would confirm that Zurich will accept the following items under the terms of the warranty subject to a single excess of £1211.00"

" Whilst a claim for those apartments belonging to the developers would not be covered if it was submitted as a standalone claim, again as discussed we will deal with the claim for making good works to the structure, as, your interest as freeholder allows you to claim instead of the developer."

54. It would be unjust and/or unconscionable for ZIP to resile from these concessions in circumstances where, after the 27 June Meeting and in reliance upon the concessions made at the 27 June Meeting,

54.1 Zagora made arrangements for the necessary opening up work to be carried out (which included the gaining of access to empty flats) and paid for such works;

54.2 Zagora appointed experts to communicate with experts appointed by or on behalf of ZIP and/or ZBC to reach agreement in connection with a temporary fire alarm system;

54.3 Zagora engaged and paid Arup to provide (a) a risk assessment as to the risk of spread of fire between Blocks D and E and (b) a risk assessment relating to fire detection and alarm measures;

54.4 Zagora paid for temporary fire marshals, fire plans and fire alarm proposals; and

54.5 In order to secure cooperation, Zagora assured individual leaseholders that ZIP and/or ZBC would be meeting the costs of necessary remedial works: see, for example, Mr Broadhurst's email to Mr Sugarman dated 1 July 2013, Mr Broadhurst's email to Mr Tarasov dated 7 July 2013, and Mr Broadhurst's email to a number of leaseholders dated 8 July 2013."

9.12 In opening submissions the claimant referred me to *Wilken and Ghaly, The Law of Waiver, Variation, and Estoppel* (3rd ed.) for a summary of the elements of estoppel by representation at 9.01 (cited with approval in *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC)):

"First, A makes a false representation of fact to B…Second, in making the representation, A intended or knew that it was likely to be acted upon, B, believing the representation, acts to its detriment in reliance on the representation. Fourth, A subsequently seeks to deny the truth of the representation. Fifth, no defence to the estoppel can be raised by A".

9.13 The first difficulty with this argument is the content of the letter of 2 July 2013. As I have already held, on an objective interpretation it stated ZIP's position in principle and its proposals at that

point in time but subject to further investigation and agreement, so that it was simply one step along the way to what was hoped would conclude in a final agreement. In that context the statements relied upon by Zagora do not amount to a clear and unqualified statement that come what may, and even if the discussions did not result in a final agreement, Zagora would be entitled to make a claim as a policyholder. Apart from anything else, there was a lack of clarity in the statements relied upon as to whether that related solely to the common parts or extended to claims in relation to the flats owned by the non-CJS leaseholders, whether or not the concession in relation to the one excess was a "for all time" concession, and whether or not all other policy points remained open to ZIP to take.

9.14 Whilst I have not heard from David Robinson, there is no evidence whether in relation to the meeting or objectively ascertained from the letter from which it could properly be inferred that ZIP intended or knew that Zagora would act on the basis that it was an insured even if there was no final agreement in relation to the proposed remedial works.

9.15 The point can be tested in this way. Assume that everything was agreed save for the external render to the front of block E. If Zagora then sued ZIP under the policy for the cost of completing the external render it is difficult to see how Zagora could say that it was not open to ZIP to contend that Zagora was not entitled to make such a claim because it had made a clear and unqualified statement to the contrary even in relation to matters which had not been agreed.

9.16 The second difficulty with that submission is that even if there was a clear and unqualified representation to the effect contended for there is little if any evidence that Zagora conducted itself after the meeting and letter in reliance upon any such representation and in such a way as would make it unjust or unconscionable now to contend that Zagora was not an insured. That is because:

(1) All of the conduct relied upon is equally consistent with Zagora proceeding in accordance with the way forward which had been agreed at the meeting and confirmed in the letter and in the expectation that agreement would be reached in relation to a remedial works package which would address the matters under discussion particularly in relation to fire safety.

(2) There is no hard evidence of Zagora in fact doing anything very much to its detriment in the period between 27 June 2013 and the injunction on 10 July 2013 which prevented it from taking any further steps. The only evidence is that it had taken steps to obtain costings from an alarm company and had instructed Arup to attend at New Lawrence House with a view to conducting a joint investigation. There is no evidence of any fire marshal fees being incurred or of payments for fire plans or fire alarm proposals. Communicating with the leaseholders is not detriment.

9.17 In the circumstances I am unable to accept this fall-back argument by Zagora.

10. The leaseholder claims under the Policies

10.1	Introduction and overview

10.2	Scott Schedule E items 1 – 3: fire protection to the structural steelwork
10.3	Scott Schedule A: the roof
10.4	Scott Schedule B: the cladding
10.5	Scott Schedule C: structure, basement and car park
10.6	Scott Schedule D: the balconies
10.7	Scott Schedule E: fire protection
10.8	Scott Schedule F: mechanical and electrical issues
10.9	Scott Schedule G: lifts and other items
10.10	The add-on items
10.11	Quantification
10.12	Intention / ability to reinstate
10.13	Maintenance and champerty / abuse of process
10.14	Drawing together the threads

10.1 Introduction and overview

10.1.1 The claim is pleaded and advanced under 7 separate Scott Schedules A to G inclusive, as described above and as addressed in detail below.

10.1.2 The claimants' approach in their closing submissions was to address those defects which between them ought to account for the entirety of their claim, not in strict Scott Schedule order but by generally prioritising their financial value and by seeking to group together those defects which have an inter-relationship with each other.

10.1.3 In contrast ZIP has adopted the more traditional approach of working through the Scott Schedules from A through to G and addressing the individual items or groups of items one by one.

10.1.4 Both approaches have their advantages. Save as appears below I have decided to adopt ZIP's approach to ensure that I do not, through inadvertence, omit any relevant items. I have, however, adopted the claimants' approach to this extent: I have concentrated more time and attention on the big ticket items than the smaller value items and, for that reason, I begin by taking out of turn the claim for fire protection to the structural steelwork which appears at Scott Schedule E items 1 – 3 because that is the biggest of the big ticket items and, if answered in the claimants' favour, dispenses with the need for applying quite the same amount of attention to a number of the other items which would be addressed anyway by the works relating to this item.

10.2 Scott Schedule E items 1 – 3: fire protection to the structural steelwork

10.2.1 ZIP admitted in its Counter-Schedule that these defects exist, are breaches of Bldg Regs and the Zurich requirements and fall within clauses 3.1 and 3.2 of the policies. The only issue is whether the lack of fire protection to the structural steelwork is universal, as to which the claimants contend that it is, whereas ZIP contends that there has been no systematic investigation of the extent of the

fire protection by fire lining or by intumescent paint and no testing of the paint said not to be intumescent.

10.2.2 The claimants invited me in their closing submissions at [59] to find that the lack of fire protection is universal for the following reasons:

> "(1) The parties' fire safety experts agree that it is universal: see item 2, column 3 of their joint statement and column C of their agreed remedial statement. Paragraph 6 of their joint statement records that ZIP's expert, Mr Pagan, was asked to consider whether any further or different investigations should be carried out and that none were identified or proposed."

10.2.3 The claimants correctly record the position. Paragraph 6 records Mr Pagan as seeking to reserve ZIP's legal position about the "burden of proof with respect to those flats and areas which were not inspected". He does not, however, suggest that any further investigations should be carried out to confirm or otherwise the universality of the lack of fire protection.

10.2.4 The claimants contend that: "Mr Pagan, checked the steelwork in 10 external locations and 33 internal locations and never found any adequate fire protection: see paragraphs 10.7 to 10.17 of Mr Pagan's report. It will not be lost on the Court that Mr Pagan was not ultimately called to give evidence." Again the claimants correctly record the position. Moreover at 10.10 Mr Pagan states in terms that neither the red oxide paint with which the steel is generally coated, or the white emulsion found in some areas, were intumescent or would provide any level of fire protection. No explanation was given by ZIP for not calling Mr Pagan and the claimants are, of course, perfectly entitled to rely upon the contents of his report: see CPR 35.11.

10.2.5 The claimants contend that: "The Claimants' expert, Mr Lavender, concludes that the defect is universal: see section 6.3 of his first report, section 1.4 of his supplemental report and his annotated plans which collate all the evidence of unprotected steelwork. This evidence was not undermined in cross-examination. Although Mr Lavender was shown photographs of steelwork painted in other colours (in addition to the red oxide), none of that steelwork was fire protected." In their closing submissions ZIP vigorously criticised Mr Lavender's approach to the selection of flats and other areas for testing and his evidence. I disagree with that criticism. Mr Lavender made clear that the initial investigations were undertaken in flats where access was available. There can be no possible criticism of that. Further investigations were subsequently undertaken with a view to providing as varied a sample as possible and in my view both the approach to sampling and the overall percentage of flats inspected was entirely sufficient.

10.2.6 It is true that Mr Lavender did not test to obtain a definitive answer to whether or not the paint was intumescent. Neither, however, did Mr Pagan nor anyone else for that matter. ZIP has adduced no evidence to show that testing is required or positively recommended before a conclusion can properly be drawn. ZIP has adduced no evidence showing that any one of the many independent consultants who have inspected this development over the years has ever stated that they positively believed that the paint was intumescent. In contrast, as the claimants submitted:

"ZIP's structural expert, Mr Hambly, never in any of his inspections [of the roof] saw any steelwork with fire protection on it. ZIP's cladding expert, Mr Huband, saw no evidence of fire protection to the steelwork: see paragraph 3.23 of Mr Huband's first report."

10.2.7 ZIP suggested to Mr Lavender in cross examination that photographs of steel delivered to site showed it to be unpainted, the inference being that the paint applied subsequently could, putting it at its lowest, just as likely be intumescent than not. However, I note that in his first report Mr Huband referred at [3.22] to the steelwork as seeming to be protected "by a red primer coat" which he clearly did not consider evidence of fire protection.

10.2.8 As the claimants submitted, the photographic evidence of the walls during construction does not suggest that the steel had protection applied to it. Under cross-examination Mr Huband was referred to photographs which he agreed showed that it was unlikely that fire retardant board could have been applied at that stage. He said that he "did not know" whether the red painted steelwork which could be seen on the photographs was intumescent, however based on his evidence in his report as above it is unlikely that he believed that it was.

10.2.9 As the claimants submit, there is no positive evidence of any location in the development where the steelwork is properly protected. I agree that the photographs in the report produced by Byrom Clarke Roberts provide no positive evidence one way or another.

10.2.10 In the circumstances I am satisfied on the evidence that the absence of fire protection is universal. At this stage I should record that during the course of the trial ZIP had submitted that the evidence failed to take into account the possibility that there was a difference between the flats which had been completed early and sold to the individual leaseholders and the CJS flats which had been completed late and not sold. The suggestion was that it was possible that the standard of workmanship deteriorated as the development staggered on and JCS' financial and other difficulties worsened. However: (a) there was no good positive evidence to this effect, it was solely surmise; (b) there was no obvious correlation established on the evidence either between the stages of construction and the allocation of flats or the nature and extent of the defects found in the claimants' flats and the other flats[7]; (c) it was not immediately obvious what it was being said that the claimants' experts should have done to take this possibility into account, other than to investigate the possibility to see if there was a correlation, an exercise which ZIP's experts were as well placed to undertake but who did not appear to consider it necessary to do so. Although I was referred to my own decision in *Amey v Cumbria County Council* [2016] EWHC 2856 (TCC) where I made certain observations about the proper approach to cases based on sampling, that was a case very far removed from the instant case and cannot be thought to lay down principles of application to cases such as the present.

10.2.11 A further issue is whether or not the structural steelwork in the roof requires fire protection. Approved Document B includes provisions at section B3 in relation to internal fire spread (structure). Section 8.4 excludes from the scope of the section structures which only support a roof,

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[7] It appears that all bar 4 of the top floor flats are CJS flats, which may be explained by an understandable disinclination on the part of prospective purchasers to purchase a 4th floor flat in a development without lifts, but does not of itself suggest a different standard of workmanship to lower floor flats.

unless they are essential for the stability of an external wall which needs to have fire resistance. Mr Lavender agreed that it followed that only the structural steelwork in the roof which was essential for the stability of the external walls required fire protection. He also agreed that this was a question for the structural engineers. However Mr Hambly, ZIP's structural engineer, had not addressed this question in his report. He said that he had left the extent of the roof steelwork that should be fire protected to be addressed by Mr Pagan. Mr Pagan was of course Mr Lavender's fire expert equivalent. He had not raised the issue as to whether or not the steel columns were cantilevered in his report and would not have had the expertise to do so anyway.

10.2.12 In cross examination it was suggested to Mr Allen, the claimants' structural engineer, that the steel columns which comprise the structure of the external walls were cantilevered and, hence, provided the necessary lateral restraint for the wall. He agreed that if the columns were cantilevered they would have that effect, but denied that they were cantilevered. He agreed that he had not specifically examined the construction of the steel columns but said that "any structural engineer looking at the building would tell you that they would not be able to do so, because they do not have enough bending strength".

10.2.13 This question was, however, raised in examination in chief of Mr Hambly. Mr Baatz asked Mr Hambly to comment on one of the contemporaneous photographs taken by Watts during the course of the construction works. Mr Hambly suggested that it showed that the steel column was spliced just above the 3rd floor. He said that this splicing would mean that no support from the roof bracing was required. He accepted that this was not the design intent but "it would, as a matter of fact, I think, do it - provide it". In cross-examination he accepted that this was something he had not considered in his report. He agreed that he should not be taken to be expressing an opinion about whether or not any particular item of roof steelwork needs fire protection. It was clear from his evidence that this was something he had only recently been asked to consider and was unable to do any more than offer a comment on the basis of the photograph he had been shown.

10.2.14 The circumstances in which Mr Hambly had come to be shown that photograph and asked to consider it are not known. However, what is clear is that it was not considered by the structural engineering experts either in their joint discussions or statement or in their individual reports. Without intending to be pejorative, Mr Allen was plainly ambushed in cross examination on this point and it was introduced in examination in chief of Mr Hambly on the basis that it was a matter upon which Mr Allen had been cross-examined. Mr Allen had been given no opportunity to consider the issue in advance or to formulate a measured response. In the absence of a measured and convincing analysis by Mr Hambly or a clear acceptance by Mr Allen I prefer the initial emphatic response of Mr Allen to the rather more cautiously expressed view, based on a single photograph, of Mr Hambly.

10.2.15 A major issue between the parties is as to whether or not the substantial remedial works contended for by the claimants are recoverable under the policy. A number of issues arise, the first being ZIPs contention that those works are unnecessary because other less disruptive and expensive measures would suffice. Specifically, ZIP contend that the provision of sprinklers throughout the development would suffice and would obviate the need for fireproofing the steelwork.

10.2.16 I have already addressed the policy interpretation issue at paragraphs 7.6.5 and 7.6.6 above and concluded that in principle the claimants are entitled to be indemnified against the cost of a permanent repair even if temporary measures would suffice to make the danger neither present or imminent. I observed however that the question as to whether the rectification of the present or imminent danger could be achieved by temporary measures was a question of fact in the individual case but that in my view the starting point should be that the claimants are entitled to be indemnified against the cost of measures which ensure that the relevant part or parts of the building comply with the applicable Bldg Regs.

10.2.17 The claimants submit that both fire experts stated their opinion in their reports that sprinklers could only ever be a temporary measure. In particular Mr Pagan considered that even if a fire alarm and sprinkler system was adopted it would still be necessary to have at least one member of staff on duty 24/7 to manage and assist any evacuation due to fire and that this would not be a long term solution; his opinion was that it would be a short term solution to allow the building to be occupied whilst the longer term remedial measures are carried out. Although in their closing submissions ZIP referred extensively to the cross-examination of Mr Lavender on this topic it did not seem to me that he altered his view as contained in his report or that he said anything different to Mr Pagan.

10.2.18 In the circumstances I am satisfied that the claimants are entitled to recover the reasonable cost of the remedial scheme to fire proof the structural steelwork under section 3.2 of the policy. Moreover, and contrary to ZIP's submission in closing, I am satisfied that they are also entitled to recover this cost under section 3.1, since what is required is to rectify the situation where the structural stability of the structural steelwork is adversely affected in the event of fire due to it not being fire protected in accordance with the technical requirements, although I accept that if that was the only route to recovery it would be affected by the proportionate share limitation.

10.2.19 As to the remedial works required there is no dispute as to the essential nature of the scheme. The fire safety experts have agreed that, in short, the relevant walls and ceilings need to be stripped back to allow appropriate fire protection (fire-boarding preferably, and application of intumescent paint where not practicable) to be applied to the structural steelwork. Where the structural steelwork is located within the floor voids and the roof, the ceilings to the flats and common parts need to be removed to allow access to the structural steelwork. Given the amount of structural steelwork located in the external walls, the experts are agreed that the external walls need to be removed as well.

10.2.20 The principal dispute is as to whether or not the external walls need to be stripped all the way back to the internal plasterboard linings (as the claimants contend) or whether they can be stripped back just to the oriented strand board (OSB, for short) which is external to the plasterboard, following which a remedial solution propounded by Mr Huband involving the application of a proprietary remedial solution known as Stotherm can be applied (as ZIP contends). As the claimants explain in their closing submissions, the cost difference between the two solutions is around £98,000 if Stotherm is applied only to the rendered elevation and around £274,000 more if applied to the timber clad elevations, and there is also a further saving of around £215,000 because it would in such circumstances not be necessary to cut back the plasterboard by 1 metre to access the structural steelwork. However it is also the case, I am satisfied, that since the Stotherm solution will require some assessment of the condition of the OSB, with a possibility of localised repair or replacement,

and some local removal of the OSB to access the structural steelwork, with a consequential need to replace the sections locally removed, a great contingency to cater for these additional costs would be required.

10.2.21 The debate in relation to the Stotherm solution was one which raged throughout the latter part of the trial. As well as cross-examination of Mr Troughton and Mr Huband it involved both experts agreeing to commission Stotherm to produce further calculations and then producing a further joint statement in which they disagreed about the significance of those further calculations as well as the impact of calculations produced by another firm instructed by Mr Troughton alone.

10.2.22 In summary, however, it is common ground that the external wall as installed was defective in that it did not have a vapour control layer (VCL) affixed to the external face of the internal plasterboard which would prevent moisture in the warm air from inside the flat from passing through the loosely insulated void and then condensing on and, over time, damaging the OSB to which the existing render system was attached. Whether or not that caused a problem in practice was a matter of debate but, for present purposes, the question is which of the following two options to choose once the render and cladding is removed to allow access to fire proof the structural steelwork. The first, as propounded by Mr Troughton, is to start from scratch and install the textbook approach solution, involving replacing the internal plasterboard (and thus disturbing the internal finishes of the flat) and then applying a VCL to the external face of that inner plasterboard, before installing the necessary insulation and OSB and then the new render and cladding. The second, as propounded by Mr Huband, is to leave the existing plasterboard, insulation and OSB in place and then, having applied a VCL to the external face of the OSB, install the proprietary Stotherm system involving mineral fibre insulation backed by a render finish. This is not the textbook solution but has the advantage of avoiding having to interfere with the existing OSB and plasterboard and, thus, avoiding needing to disturb the internal finishes of the flat and saving considerable cost.

10.2.23 I did not find Mr Troughton's evidence to be of any great assistance in resolving this dispute. It seemed to me that his approach was unduly dogmatic and inflexible and I found his opinions unconvincing. The real question, in my judgment, was whether or not Mr Huband's optimism that the Stotherm solution would work and thus avoid the risk of condensation, was justified by reference to the enquiries he had made of Stotherm and the information they had provided and by reference to his confidence as an engineer that the solution would work in the real world.

10.2.24 Whilst I do not criticise Mr Huband for suggesting this as an alternative, since I accept that he was looking at the question from a genuine and practical point of view, rather than seeking to propound and support a remedial solution as a "hired gun" purely and simply with the intention of seeking to save ZIP money, nonetheless on balance I am not persuaded by his evidence that there is the necessary degree of confidence that his proposed system would work. In particular:

(i) It is clear that Mr Huband had not fully considered the detail of the Stotherm specification nor specifically addressed the significance of the differences between his proposal and the specification. He admitted that it required some "design development".

(ii) I was particularly troubled by the fact that the Stotherm specification was clear and that Stotherm specifically advised that 18mm OSB was required, whereas the OSB in place is

only 10mm. Stotherm said in terms: "Stotherm recommend a minimum 18mm OSB, I doubt 10mm OSB will be strong enough in terms of pull out". Given that there is already an issue in terms of the condition of the OSB (as noted by Mr Huband himself, albeit locally) and given that Mr Huband agreed that it would require local removal in order to insert the fire protection to the structural steelwork there is clearly a real risk in my view that the OSB would have to be removed in its entirety, thus rendering the cost saving nugatory.

(iii) In addition, it is clear that the Stotherm specification recommends a breather membrane which Mr Huband has not included and that Stotherm recommended that the polythene air barrier created a condensation risk and should be placed behind the two layers of plasterboard.

(iv) Moreover, the calculations produced by Stotherm and Build Desk show that there is clearly a risk of condensation in very cold temperatures. Whilst it may be said with some truth that the climate of Manchester is normally mild, I agree that since one is considering the position in all climactic conditions a risk of condensation occurring in a cold snap which lingers long enough to attack the OSB before it dries off cannot simply be discounted.

(v) There may be difficulties with ventilation both to the internal cavity, where the design requires that it be closed, and with a lack of ventilation to the external cavity, where the design requires that it be open. Mr Huband had not really thought through the position in terms of ventilation. His suggestion in evidence that a parapet detail could be incorporated to allow ventilation notwithstanding the remedial works required to the parapets was an example of his having to think on the hoof. Whilst there may be solutions, as part of the "design development", equally it is at least possible that these may not work or may involve additional cost.

10.2.25 Moreover, in order to achieve a significant cost saving the render would have to replace the existing timber cladding which would likely require planning permission. There has been no investigation as to whether or not this would be accepted by the planning authority. Moreover, it is apparent from the photographs and was apparent on the site visit that the contrast between the render and the timber clad sections of the development is a significant aspect of the aesthetic appearance of the building. It does not seem to me to be right for the claimants who are entitled to be indemnified for the reasonable cost of rectification or repair, to be required to accept a less pleasing external appearance with, at least potentially, some knock on effect in terms of the value of the flat and its rental value.

10.2.26 I am, therefore, satisfied that the claimants are entitled to the cost of the remedial solution as proposed by their experts and as costed by the quantity surveyors. For the avoidance of doubt, I am satisfied that this includes the necessity to strip out and reinstate the flats affected by the removal of the plasterboard and the top floor flats. I do not consider that the cross-examination of Mr Lavender in relation to the plasterboard invalidates these items of claim in the absence of any positive evidence to the contrary – indeed Mr Huband in his first report at paragraph 8.7 identifies the need for this as one of the drivers behind his recommendation of the alternative solution, nor did

I consider the evidence of Mr Hambly convincing in relation to the possibility – or indeed the economics - of protecting the existing fittings within the top floor flats.

10.2.27 Finally, and for the reasons given in my consideration of the policy issues, I am satisfied that the claimants are entitled to recover the cost of reinstatement of the cladding and also the cost of reinstating the balconies, even those from which access is gained from the CJS and other non-claimant flats.

10.2.28 I should also say that I am satisfied that no notification defence can apply here. As ZIP submit, the 2 year period begins on 10 September 2010, being the date of the issue of the common parts final certificates. Taking Mr Tarasov as the best contender, so far as ZIP is concerned, I have already held that it was not until August 2012 that he had any knowledge of problems with fire safety. Even though he had sight of the fire risk assessment, it made no specific reference to a lack of fire protection of the structural steelwork. Moreover, he was instructed not to, and did not, share the report with anyone else. Throughout the period up to and beyond 10 September 2010 he was, perfectly reasonably, communicating with Mainstay and Freehold Managers to see whether or not they were intending to deal with Zurich on behalf of all of the individual leaseholders before making direct contact. In the circumstances, I am satisfied that it cannot be said that he ought reasonably to have reported this claim in writing either to JCS or to Zurich by 10 September 2012. As I have already said, I am satisfied that he did not begin to know the full extent of the fire safety or structural issues, which did not fully emerge until after Zagora became involved in April 2013.

10.2.29 In relation to Ms Bedi, it is clear that the report which she obtained in May 2012 made no reference to problems with fire safety, other than some reference to some of the fire detection and escape fittings being out of full working order, and she notified a claim under section 2 of the policy to ZIP in any event. Contrary to ZIP's suggestion, there is no evidence that throughout 2012 there was some well organised communications network involving a significant number of the claimant individual leaseholders in which their knowledge concerning defects in the development was shared.

10.2.30 Insofar as it is contended that any of the claimants were in breach of the claims notification requirements, I reject that contention and note in any event that ZIP has not identified any additional costs due to any unreasonable delay in reporting the claim.

10.2.31 In their closing submissions the claimants summarised at [69] the financial value of the claim for the base costs in relation to fire proofing the structural steelwork as amounting to £4.734 million. On top of this are to be added consequential works and add-on costs. What will be immediately apparent is that if I am right in my interpretation of the maximum liability limitation and if the total purchase price of all of the claimants' flats is £3.634 million, then the claimants will not even recover the full amount of the cost of fire-proofing the structural steelwork. On that basis it follows that it will make no financial difference to the claimants if I award them the remainder of their claim in full, award some proportion of their total claim or award them nothing. Nonetheless it is clearly important that I should set out my views as to what their claims in relation to the remaining items are, so that if I should subsequently be provided to be wrong in my interpretation of the maximum liability provision the effect can be ascertained. However, I do not propose to do so in

quite the same detailed way that I would do if, on my findings as to the effect of the policy terms, it mattered.

10.3 Scott Schedule A: the roof

Items 1(a)-(h) & 2 (the roof is poorly insulated and does not adequately protect the building from the ingress of water and/or the risks of damp and condensation)

10.3.1 The generic allegation in respect of the roof is as stated above and the Scott Schedule then contains a number of particular issues identified, numbered 1a to 1j. The claimants' case is that the key particulars are items 1f and 1h (the lack of a VCL to the warm side of the insulation) and items 1g and 1h (the lack of ventilation to the roof). Item 1c (moisture and corrosion to the steel) and items 1a, 1b and 1d (spongy/collapsing roof deck) are the consequences of items 1f and 1g.

10.3.2 The roofing experts agreed in their joint statement that there is no VCL in the flat roof and that the omission of the VCL combined with the poor ventilation in the roof void has resulted in deterioration of the ply deck (it being common ground that there are soft spots in the ply deck in a number of locations throughout the roof) and that this (or, more specifically, the effect of the condensation which results upon the ply deck) is the primary reason why the roof finishes and construction across the entire building needs to be replaced. The claimants' structural and roofing experts also identify some consequential corrosion of the steelwork in the roof.

10.3.3 Although there is an issue between Mr Troughton for the claimant and Mr Hambly for ZIP as to whether or not the deterioration of the roof deck is also due to leaks from the parapet (there is agreement that there are some isolated breaches in the membrane above the ply deck, but I am satisfied that it cannot be said that these are responsible for anything other than modest localised problems or would, by themselves, require extensive remedial works to the roof), I shall begin by considering the claim on the basis that the primary mechanism is through condensation as stated above.

10.3.4 There are effectively three issues (with issue 2 having two sub-issues) in relation to liability, namely:

(1) Whether this complaint falls within the present or imminent danger cover afforded by clause 3.2 of the policies. (I take this first because if it is covered under clause 3.2 the proportionate share limitation does not apply.)

(2) Whether this complaint falls with the major physical damage cover afforded by clause 3.1 of the policies. This raises two sub-issues: (i) whether the ply deck is a "load bearing element" for the purposes of a claim under clause 3.1; (ii) whether the intended physical condition was always a roof with no VCL and no adequate ventilation, so that there is no difference between its intended and its actual physical condition for the purposes of a claim under clause 3.1.

(3) Whether these claims are excluded by the condensation exclusion to section 3 of the policies.

10.3.5 As to issue (1), Mr Troughton's evidence is that the roof gives rise to a present or imminent danger because the damp in the roof void will cause water ingress, mould, fungus and damp within the flats and the ceilings of the flats to collapse. I do not accept that this is anything other than an isolated and historic leak related problem and I have no doubt that this is not due to condensation. Mr Troughton's opinion is that there is a present or imminent danger due to the risk of a workman falling through a deteriorated section of the ply deck when working on the roof, potentially onto the occupants of the flats or common parts beneath. Mr Hambly's opinion is that the ply decking has not collapsed and there is no evidence that its collapse is evident and that in any event the roof membrane above the ply deck will act as a catenary and will prevent the person on the roof from falling through.

10.3.6 Mr Hambly points out that there have been a number of site visits to the development and that various people (including me, as it happens) have walked on top of the flat roof without mishap or suggestion that it was too dangerous to do so. However in cross-examination he accepted that: "It [the deck] is giving way. I do not know if it is in danger of collapse yet. It will do so at some point. It is on its way, but that does not lead to it being a present or imminent danger, in my view". In my view the evidence of the presence and extent and degree of deterioration is sufficient for me to conclude that there is an imminent danger, subject to Mr Hambly's point about the catenary effect of the membrane. However as to that I am satisfied that this was simply speculation on Mr Hambly's part. The membrane was not designed to act as a catenary and Mr Hambly has not either conducted an assessment of its ability to withstand load from people walking on the roof, possibly in conditions of other load (snow, for example) or carrying equipment, nor has he inspected the membrane to assess the strength and condition of its seams. I am therefore satisfied that the present or imminent danger condition is met.

10.3.7 As to (2), I am satisfied that the ply deck is a load bearing element. It is common ground that loads will be applied to the ply deck, for example from ponding water, snow and workmen on the roof, and it is also common ground that those loads will be transferred by the ply deck to the firrings and joists upon which it is laid. If it was not structurally stable, which I am satisfied it is not, then it would be unable to transfer those loads. In the circumstances, and adopting the interpretation of this clause as stated above, it falls within the definition of a load bearing element in my view. Moreover, and regardless of the fact that it appears at least at the point of construction to have been designed not to have a VCL or adequate ventilation, I am satisfied that such was not its intended physical condition, in circumstances where -a s I have said - it is clear that a proper design and construction in accordance with the Bldg Regs and the Zurich technical requirements would have required a VCL and adequate ventilation.

10.3.8 Finally, for the reasons stated above when considering the proper interpretation of the condensation exclusion, I am satisfied that it cannot apply here in circumstances where I am satisfied that the admitted failure by JCS to design and construct the building in accordance with the Zurich technical requirements or the Bldg Regs is either the proximate cause or at the very least a concurrent cause of the loss.

10.3.9 In the circumstances I am satisfied that the claimants have proved their case on liability and that they are entitled to recover the reasonable costs of rectification under clause 3.2 without any proportionate share limitation.

10.3.10 I am also satisfied that no notification defence can apply here, in circumstances where there is simply no evidence that this claim could reasonably have been reported within 2 years of the effective date. Knowledge by some of the individual leaseholder claimants of isolated leaks into their flats is completely different from knowledge of this serious problem of design and construction giving rise to widespread deterioration of the ply deck due to condensation. ZIP has not identified any additional costs due to any unreasonable delay in reporting the claim.

10.3.11 In opening submissions ZIP also suggested that since the original specification did not include for a VCL the cost of its provision is caught by the policy limitation that ZIP is not liable to pay under the policy for any repair that exceeds the original specification for the new home. However I have no doubt that this limitation cannot apply where it is established – as it is here – that if that was the original specification (as opposed to a late unauthorised deviation from the original approved specification) it was not in accordance with the Bldg Regs or the technical specification.

10.3.12 The claimants addressed the remedial works and costs in their closing submissions. In particular, they addressed the need for a temporary roof, which Mr Hambly now agreed, but also - and more significantly - whether or not it would be necessary to take down and reinstate the ceilings of the top floor flats in order to provide a crash deck and, if so, whether it would be necessary to strip out and reinstate the top floor flats for that purpose. It is common ground that if, as I have found, it is necessary to fire protect the roof steelwork it would be necessary to take down and reinstate the top floor flat ceilings anyway, so that this point is moot unless I am found wrong in relation to the roof steelwork. In that scenario, I am not convinced that it would be necessary to remove the top floor flat ceilings and prefer Mr Hambly's opinion that it would be unnecessary to do so. The crash deck is only a failsafe safety precaution and I do not accept that the ceilings or installation immediately above need to be removed for any reasons for which ZIP could be held responsible. However I do accept that if it is necessary to strip out and reinstate the top floor flats it makes economic sense to remove the kitchen units on the basis that it would be quicker and cheaper to do so rather than to protect in situ. For similar reasons of economy and practicality I agree with the claimants that the remedial scheme ought to involve replacing the roof structure with steel purlins; the alternative of having to programme to inspect and remedy as necessary the existing joists, with the risk that all might have to be replaced anyway if they are discovered not to be sufficiently strong to take the new roof load, does not make as much sense as replacing with steel purlins. Finally, I agree that it will be necessary to budget for a Mansafe and that this is a cost for which ZIP would be liable under the policies.

10.3.13 The claimants address the additional works cost of rectifying the roof, over and above the cost of fire protection to the structural steelwork, in their written closing submissions. If it is necessary, which it will not be unless I am wrong about the maximum liability provision, the quantity surveyors ought to be able to provide a revised calculation adjusted as necessary in the light of my findings above.

10.3.14 Moreover, on the basis of the conclusions I have reached in relation to fire protecting the roof steelwork and the remedial works to the roof, I agree that it follows that the claimants have established the necessity of providing the scaffolding cost claimed.

10.3.15 For completeness, I note that item 2 is not pursued as a standalone item.

Items 1(j) and 3 (Roof leaks)

10.3.16 The remedial works relative to this complaint are subsumed by my conclusions in relation to items 1(a)-(h) and 2 above. It is not pursued as a standalone item. If it had been it would fail for the reasons stated by ZIP in their closing submissions at [126-127].

Items 4 and 5 (roof parapets)

10.3.17 Again the remedial works relative to this complaint are subsumed by my conclusions in relation to items 1(a)-(h) and 2 above.

10.3.18 It is common ground between the roofing experts that the roof parapets and capping have been inadequately installed and do not comply with the Zurich Requirements. ZIP contend however that these defects are neither major physical damage nor present or imminent dangers and there are also issues as to the scope of remedial works. Based on previous reports ZIP also suggested that any debonding was due to poor or no maintenance but I am satisfied that there is no good evidence that this is the sole or substantial cause of the problem when compared with the admitted problem of inadequate installation.

10.3.19 As to major physical damage, the question is whether a "holistic" view (as Mr Hambly characterised it) is taken of the parapets or whether one considers the capping and the membrane as separate elements. Mr Hambly realistically agreed that if a holistic view was taken, i.e. that the parapet is one composite element, then it should properly be characterised as a load bearing element. I agree, and am satisfied that it should be viewed as a composite element and, hence, load-bearing with the result that clause 3.1 does apply.

10.3.20 As to present or imminent danger, Mr Troughton's opinion is that the defects in the parapets allow water to ingress causing damage to the ceilings and mould, fungus and damp within the flats and even, he says and refers to a photograph he took to prove it, a risk due to water running down the walls and into electrical sockets. He also refers to a risk through cappings becoming detached and flying off the roof with a consequential risk to passers-by.

10.3.21 There was extensive cross examination about the mode of construction of the parapets and whether or not water, which both experts agree is getting into the parapet construction due to deficiencies in the installation of the membrane and capping, is able to run down the internal face of the parapet and saturating the ply decking and then the ceilings below, or is running down the external cavity of the parapet and, thus, not impacting on the flats themselves. Whilst Mr Hambly's analysis appeared impressive in examination in chief, based on his diagram attached to his supplementary report, on closer analysis it seemed to me to suffer from the following weaknesses: (1) it assumed that water was entering the ply deck through membrane tears or other unintentional openings where water was

ponding adjacent to the internal parapet, however that was effectively supposition on his part; (2) it assumed that the membrane had been turned back over the steel inner leaf all the way to the cavity whereas, as was apparent in at least some areas, that was not the case so that the membrane was not in fact turned back at all or very much over the parapet top under the capping, then water could be running down the inner face of the parapet, behind the membrane, and entering the ply deck at that location; (3) it assumed that water running down the inner cavity could not get into the inner section due to the steel inner leaf, whereas Mr Hambly had to accept that he did not know whether that steel inner leaf or any other water impermeable structure was continuous along the length of the external walls, where there were no vertical steel columns. On balance, therefore, I preferred Mr Troughton's analysis on this point and am satisfied that there is a present or imminent danger. If, however, the only risk had been that of capping blowing off, whilst I accept that this is also a present or imminent danger I would not have been satisfied that the nature and extent of remedial works solely to address that problem could have justified the full scope claimed by the claimants.

10.3.22 In relation to the remedial works, I accept for the reasons I have already given that this would involve the replacement of the ply deck in the areas around the parapets. I do not accept, however, that a complete scaffold around the entire building and a crash deck would be necessary and prefer Mr Hambly's analysis that the only requirement would be for scaffolding where the parapets are 1m high or less, with the figures being £90,000 for the remedial works and £133,613.74 for the scaffolding, as explained in paragraph 273 of the claimants' closing submissions. As regards the scaffolding, although ZIP submitted that this cost was irrecoverable because, as Mr Troughton accepted, in the real world no one would remedy the parapets without also remedying the flat roof, that is not a point open to them to take in my view, since in this counterfactual hypothesis where ZIP are not obliged to indemnify against the cost of remedying the flat roof, the claimants are in my view entitled to the reasonable costs of rectifying the parapets in isolation and ZIP cannot, having successfully refused indemnity in relation to the flat roofs, then be heard to say that the reasonable cost of rectifying the parapets must be ascertained on the assumption that the claimants will repair the flat roof anyway.

Items 6 (rainwater outlets) and 7 (roof access)

10.3.23 Again these are subsumed within my existing finding. Item 6 is not pursued as a standalone item. Insofar as either item is separately pursued, I am not persuaded that these are recoverable, essentially agreeing with the submissions made in paragraphs 133 and 134 of ZIP's closing submissions.

Item 8 (Further structural issues with the roof)

10.3.24 There are, essentially, 3 separate defects which are under consideration. The first is agreed, but applies only to a limited area. The second does not, in my analysis of Mr Allen's evidence, justify the need for any remedial works. The third is agreed and is more widespread than Mr Hambly initially assumed.

10.3.25 The lion's share of the remedial works are subsumed within my existing finding. If not, then in accordance with Mr Allen's concession that the work could be done from below, the remedial costs

are as specified in paragraph 287 of the claimants' closing submissions. Since I am satisfied that these fall within clause 3.2 of the policy, the full amount would be recoverable.

10.4 Scott Schedule B: the cladding

Items 1 (external walls poorly insulated and do not adequately protect the building from water, damp and condensation, defective render, inappropriate cladding installation) and 2 (curtain walling poorly installed, poor or non-existence closures between cedar cladding and other elements, risk of detachment of timber and render)

10.4.1 I have already considered and decided that the external walls need to be removed and reinstated in order to fire protect the structural steelwork. This section considers whether or not, assuming that to be wrong, the external walls need to be removed and reinstated for the reasons relied upon in Scott Schedule B.

10.4.2 Although the claimants suggest that this is a single complaint that the external walls are simply unfit for purpose which should be addressed on that basis I agree with ZIP that it is necessary to break down the complaint into its significant separate components.

10.4.3 However I agree with the claimants that the external walls have to be considered as a whole when addressing the question as to whether or not clause 3.1 of the policies is engaged by reference to the load bearing element definition. In my view one has to consider the whole structure, from the external render all the way through to the internal plasterboard, as one composite structure which performs a load-bearing function. It would not be appropriate in my view to consider the render separately from the insulation and both separately from the OSB and so on. I agree with the claimants that support for this conclusion can be derived from the technical requirements referring to curtain walling, which requires that: "dead and live loads should be transferred safely to the building structure without undue permanent deformation or deflection of any component".

10.4.4 It is appropriate to begin with the admitted lack of an effective VCL around the building. It is accepted by ZIP and in any event I am satisfied that the absence of an effective VCL creates a risk of condensation within the external walls which will have the effect of corroding the steelwork and deterioration and rotting of the timber elements within the external walls. However, as Mr Huband said and Mr Troughton, somewhat reluctantly, agreed the fact that the cavity is ventilated – albeit admittedly accidentally and inappropriately as contrary to Part L - means that the adverse effects of condensation is prevented or minimised. Therefore, ZIP argues, the definition of major physical damage is not satisfied since there is no adverse effect on the structural stability or resistance to damp and water penetration of the external walls. Insofar as Mr Troughton protested that the heat loss through the ventilated cavity leads to a cold environment within the flats, he also had to accept in cross examination that he was unable to quantify this and Part L is not the subject of a separate Scott Schedule pleaded case albeit that this non-compliance with Part L is referred to in Scott Schedule B.

10.4.5 With some reluctance, because it is not an attractive argument that ZIP can rely upon a failure to comply with another technical requirement to excuse a breach of this technical requirement, I must accept that ZIP is correct on this point. In the absence of an adverse effect on structural stability or resistance to damp and water penetration the cover under clause 3.1 is not triggered. In the absence

of a pleaded or proven case that the accidentally ventilated cavity has already been closed up (which it plainly has not) or must be closed up for good technical reasons (as to which there is no positive case or evidence) and that this would inevitably lead to condensation (which, as I have already held, would not be excluded) which either adversely affects its structural stability or resistance to damp and water penetration it seems to me that the right to indemnity does not arise. Nor, on a similar basis, can it be said that the present or imminent danger cover is engaged.

10.4.6 There are then a series of other generalised defects, summarised in paragraph 295 of the Claimants' closing submissions, together with a number of various localised defects summarised in paragraph 297 of that document. The claimants submit that these in themselves represent a risk due to a number of open water paths from the outside into the external walls and, moreover, lead to a risk of render becoming detached and injuring occupants or passers by.

10.4.7 Whilst I accept the claimant's case as to the presence of these defects, I am unable to accept that individually or cumulatively they would justify the complete replacement of the external wall. I agree with ZIP that in order to make good this case it would have been necessary for the claimants to: (a) produce a detailed survey report, showing on an individual external wall section by section basis where all of the relevant defects are situated, identifying how they lead to water ingress and consequential damage to the wall structure which is not prevented or mitigated by the accidental cavity; (b) identify the necessary remedial works on the basis of an itemised repair basis and, separately, a globalised repair basis, so as to satisfy the court that it would be more economic to undertake a globalised repair solution compared to an individual repair solution. That is not something which Mr Troughton or Mr Bramall have done. That is not a criticism; I can understand why in the real world the experts would conclude that the totality of the problems in the external walls justify a complete replacement. However, in the context of this policy claim, if one is forced to strip out the VCL and the unintended ventilation as causative items, one is left with a series of individual defects, albeit some more or less widespread, with an absence of detailed analysis of how they represent either major physical damage or a present or imminent danger, either individually or globally, and a lack of analysis as to why a globalised repair scheme is justified and makes more economical sense than undertaking patch repairs. There was clearly a conflict of opinion between Mr Troughton and Mr Huband as to the patch repairs option. Whilst Mr Troughton obviously believed that patch repairs would be inappropriate and unsightly, it seemed to me that he was giving this evidence on the hop, in circumstances where he had not previously considered this point in any detail previously and, ultimately, I was not persuaded by his evidence on this topic.
This conclusion applies as much to the risk from falling render as to the risk from water penetration more generally.

10.4.8 The only respect in which I was satisfied that a separate claim was made out was in relation to the need to replace the unfinished render in block E, this being the subject of a section 2 as well as a section 3 claim. Whilst ZIP advanced a notification defence to this, since I accept that at least Mr Tarasov notified this claim to JCS within 2 years of the effective date I am satisfied that this defence must fail. I also note the concession in relation to the cedar cladding on the parapet on the south side of the development referred to at paragraph 177 of ZIP's opening submissions but assume that it will be covered by the necessary remedial work to the parapets more generally.

10.5 Scott Schedule C: structure, basement and car park

10.5.1 Generally, in the light of the conclusion I have reached in relation to policy cover, it is not open to ZIP to reject a claim on the basis that the item in question is located within the basement car park.

Item 1 (ungrouted column base plates)

10.5.2 It is conceded by ZIP that this defect is present and that it amounts to major physical damage. ZIP does not accept that it is also a present or imminent danger and, having considered Mr Hambly's answers in cross-examination, I agree that it is not. The only real issue relates to the extent of the problem. It is common ground that there are 28 relevant base plates; the structural experts agree that 8 of the 9 which they inspected were found not to be grouted, whereas one was grouted. Given the modest remedial costs of £3,539 for doing the work, I am satisfied that the claimants have made out their case in relation to the whole; if only one out of 9 is satisfactory then it seems to me that on the balance of probabilities the likelihood is that the remainder will be unsatisfactory. However, the proportionate share limitation will apply to this claim.

Item 2 (car park lightwell)

10.5.3 This is not pursued as a standalone claim.

Item 3 (balustrade walls surrounding podium staircase to basement)

10.5.4 Liability for this item is admitted. In relation to quantum, as ZIP observe in their closing submissions Mr Allen agreed Mr Hambly's remedial scheme in cross examination, which should therefore be the scheme which should be costed and allowed for. Insofar as it has not been costed for by the quantity surveyors, then in my view it ought to have been and, if it mattered, I would have wanted it to be done upon receipt of this draft judgment or, if not, I would have wanted submissions as to why it should not be done. Again, the proportionate share limitation will apply to this claim.

Item 4 (Staircase timber infill inadequate)

10.5.5 This is not pursued as a standalone claim.

Item 5 (Unsafe glazing to communal areas)

10.5.6 The defect is admitted and the only issue is as to whether or not the glazing needs to be replaced or whether it would be sufficient to provide a guardrail. Both Mr Allen and Mr Hambly were cross-examined about this and, to summarise their evidence, the position in my view is as follows: (1) Mr Allen agreed that a guardrail would suffice, subject to the risk that it might subsequently be removed, which I regard as an inadequate objection, and to the need to provide an infill panel below to prevent children from getting under the guardrail; (2) Mr Hambly accepted that the guardrail option had not been raised in ZIP's original counter schedule and had been raised by him following a further analysis of the reason for the problem; (3) Mr Hambly was disposed to accept that an infill panel would be a good idea - although he believed that the kite marking on the glass indicated that it should be sufficient anyway, he had not investigated this and could not be definite;

(4) Mr Hambly also suggested that further works were necessary in order to ensure that the curtain wall was properly secured.

10.5.7 Although in closing submissions the claimants contended that the glazing should be replaced as a safer option and that a guardrail and infill would be a rather ugly feature, on balance it seems to me that it is a reasonable solution and that a full replacement is not justified. It was not entirely clear to me what the agreed costing of this solution was (compare paragraph 333 of the claimants' closing submissions and paragraph 176 of the defendants' closing submissions). Moreover, I am not sure whether or not the infill panel has been priced and there is no indication that the further securing work suggested by Mr Hambly has been priced. Accordingly, in the same way as above, if it had mattered I would have wanted the quantum experts to address all this upon receipt of the draft judgment. Finally, since this is a present or imminent danger case, there would be no proportionate reduction applicable.

Item 6 (Excessive staining to basement retaining wall)

10.5.8 It is clear that the drawings specified that there should be a damp proof membrane affixed to the basement retaining wall in order to prevent or limit moisture ingress and that the damp proof membrane was not properly fixed during the course of construction. I am also satisfied that as a result the wall is affected by moisture ingress, as is evident from a site inspection and from the photographic evidence.

10.5.9 Since this is a retaining wall, I agree with the claimants that the technical requirements require that: "Retaining walls should be provided with a damp-proof course at low level and tanking system so as to prevent ingress of moisture from the retained ground."

10.5.10 I also agree with the claimants that the basement blockwork walls are load bearing elements and that there is a material difference in the intended physical condition of these walls because they do not comply with the technical requirements and that this adversely affects the wall's resistance to damp and water penetration. In the circumstances I agree that the claim is made out under clause 3.1 of the Policies.

10.5.11 It does not seem to me that it is open to ZIP to contend either that the nature and extent of the moisture ingress is minimal or that it is not outside of the minimum technical requirement tolerance of "some seepage and damp patches" for garages. Furthermore, even though I accept that Mr Hambly is right to observe that the greatest area of moisture ingress and water staining, coinciding as it does with the approximate position of a downpipe discharging above ground at that location, I do not accept the proposition that it is sufficient simply to re-site that downpipe to remedy the defect. Nor do I accept that it is not necessary to remedy the breach by providing a damp proof membrane along the whole length of the retaining wall.

10.5.12 In the circumstances I am satisfied that the claimants have made out their claim and that the remedial works cost is £46,023.14 as referred to in paragraph 229 of the claimants' closing submissions and paragraph 184 of the defendants' closing submissions, although the proportionate share reduction will apply.

10.6 Scott Schedule D: the balconies

10.6.1 I have already concluded that the claimants can recover in respect of the CJS balconies on the basis that they form part of the common parts but that nonetheless the proportionate share reduction applies to any clause 3.1 claim (but not to a clause 3.2 claim). I have also noted the exclusion in relation to the "balcony decking".

10.6.2 If, as I have concluded, the balconies have to be taken down and replaced in order to fit fire protection to the structural steelwork, the relevance of this item as a standalone item is that it increases the recoverable cost by £294,150, being the difference between the total for removal and replacement with compliant balconies of £556,400 and the allowance already made for the cost of removal and simple reinstatement of £262,250.

Item 1(a) (Balconies not capable of carrying vertical loading from occupants)

10.6.3 Mr Hambly accepted that the balcony decking had been laid directly on top of the balcony steel beams, without joists being interposed to provide greater support. He also accepted that the balcony was not compliant with the technical requirements or the Bldg Regs Approved Document. He also accepted that there was a present or imminent danger and also major physical damage, assuming that the balconies should be considered as a whole when determining whether or not a load bearing element. Although he also said that he was "perfectly happy" walking on the balconies, he accepts that he could not "back analyse it to prove" that they are in fact safe to use. Fortunately, the balconies have not to date failed whilst in use but, as the claimants submit, if there is a material non-compliance and a not fanciful risk that - for example - a number of occupants or their guests standing or, perhaps for example, dancing on the balconies might result in their failure, it is obviously necessary to undertake remedial works.

10.6.4 I address the question of remedial works below.

Item 1(b) & (c) (the balcony balustrades)

10.6.5 The expert structural engineers agreed that as regards the timber balustrades they have inadequate strength and stiffness, do not comply with the Bldg Regs and represent a present or imminent danger within clause 3.2. In relation to the steel balustrades they agree that: these balustrades have inadequate stiffness, the horizontal frames that support the balustrades do not have sufficient torsional rigidity and that the balustrades do not comply with the technical requirements or the Bldg Regs.

10.6.6 However there is a dispute as to whether or not the steel balustrades give rise to a present or imminent danger, in circumstances where Mr Allen's opinion is that they will be liable to deflection, whereas Mr Hambly considered that the only real risk was if the balustrade fell off, which he considered was unlikely due to the presence of a welded lug between the post and the frame.

10.6.7 In my view Mr Allen's more cautious approach is to be preferred. I agree that there is a risk in relation to unanticipated deflection of the balconies and I also agree that Mr Hambly's assessment

of the lug cannot safely be relied upon in circumstances where it was not designed to perform this strengthening function and where his opinion was not supported by detailed analysis. In the circumstances it seems to me that the proper and reasonable course is to replace the balconies with ones which are undoubtedly compliant and do not represent a risk to occupants or their guests.

10.6.8 Given my conclusions the full cost of replacing the balconies with compliant balconies is recoverable. Since the replacement is justified under clause 3.2 no proportionate share reduction applies. No deduction for the cost of replacing the balcony decking applies since so far as I am aware (and unless it has been agreed by the quantum experts and included in their valuation) there is no suggestion that it would be economically practicable to re-use the decking as a standalone item.

Item 2 (lack of balcony cold bridge details)

10.6.9 It is agreed between the experts that the lack of cold bridge details to the balconies is likely to imply a failure to comply with the Bldg Regs and the only issue is whether or not this item gives rise to a major physical damage claim under clause 3.1 of the policies, in circumstances where no clause 3.2 present or imminent danger claim is made.

10.6.10 This claim only requires separate consideration if I am wrong in relation to the previous claim and, hence, I shall deal with it shortly. In short, I agree with the claimants that the balcony as a whole is a load bearing element and that the effect on the condensation of the non-galvanised steel is such as adversely affects its structural stability, even if there is no positive evidence that it has led to damage due to corrosion as yet. However I also prefer Mr Huband's evidence that this could be the subject of patch repairs and would not in itself justify the removal and refitting of the balconies.

Item 4A (missing balconies to flats 126 and 127)

10.6.11 This is recoverable in the amount claimed even if no other balcony claim was allowed.

Other balcony claims

10.6.12 No other balcony claims are pursued as standalone items so far as I am aware.

10.7 Scott Schedule E: fire protection

10.7.1 I have of course already addressed items 1 – 3, fire protection to the structural steelwork, and now address the remainder insofar as necessary.

Items 4 to 8 (compartmentation defects)

10.7.2 I have no doubt that these defects exist and are present throughout the development, for the reasons summarised in the claimants' closing submissions. ZIP's case is focussed on the absence of a comprehensive survey but I do not consider that given the expert evidence as to the investigations already undertaken and the evidence they gave as to the likelihood of the same defects not being

present elsewhere that the absence of a comprehensive survey materially undermines the claimants' case on extent.

10.7.3 A separate issue arises in relation to the fire doors. Mr Lavender had been very clear in his evidence that he had been unable to satisfy himself or been provided with evidence that the doors to the flats were fire doors. In his supplemental report he identified the documentary evidence which he expected to see to satisfy himself that the doors were fire doors. In cross-examination it was put to him that he could have conducted further physical inspections to satisfy himself whether or not the doors were fire doors. As a result, it was agreed that he and Mr Pagan should undertake a joint survey which, having removed the doors from their frames, revealed that there was evidence on the doors of two of five to indicate they were fire doors, whereas none had correct letterplates and three did not have suitable firestopping or the correct intumescent strips.

10.7.4 In the circumstances and on the basis of this evidence I am clearly not in a position to conclude that all of the fire doors are not compliant. I am entitled to and do make an informed assessment from the available evidence as to what proportion of the fire doors are not compliant. I reject, if pursued, any argument by ZIP that the lack of a full inspection of a greater proportion of doors means that I cannot be satisfied in relation to any specified number and therefore have no material before me to make any informed assessment. Given that neither ZIP nor Mr Pagan suggested that this joint inspection be undertaken before trial or that the claimants or Mr Lavender unreasonably refused to agree until trial I am satisfied that insofar as there is a lack of detailed evidence in relation to a greater number of fire doors that should not prevent the claimants from recovering anything. Taking an approximate approach and erring on the side of caution I am satisfied that 50% of the total require replacement and that the appropriate course is to reduce the total claim relating to the fire doors by one third.

10.7.5 I am also satisfied that all doors and walls, including those relating to the CJS flats, are covered for the reasons given above in relation to the proper interpretation of the lease

10.7.6 I therefore accept the claimant's quantification of this claim, so that the claimants will recover 50% of the cost at paragraph 167 and the balance at paragraph 166 in full. The costs referred to in paragraph 168 are recovered elsewhere already.

Item 9 (cavity barriers)

10.7.7 This is addressed in the claimants' closing submissions at paragraphs 71 - 76. In short, ZIP concedes that the absence of any or any effective cavity barriers is a present or imminent danger (whilst there is an issue as to whether or not it also constitutes major physical damage that is not necessary to determine) but the issue is whether or not the cavity barriers are universally absent.

10.7.8 The claimants set out in paragraph 73 their case as to why the cavity barriers are universally absent or ineffective. Most significant in my view is that:

(1) The fire safety experts agreed that the cavity barriers behind the timber clad elevations were, as a minimum, extensively missing and potentially entirely missing and that this

defect was likely to be present throughout the Development and that there had been sufficient investigation to confirm this.

(2) Mr Lavender investigated the presence of cavity barriers behind the rendered elevations in survey locations agreed between the parties' experts and found a 100% failure rate: in eight out of the twelve locations inspected, there were no cavity barriers at all; and in the remaining four locations inspected, there were no effective cavity barriers. Mr Pagan does not contest these findings in any material respect. There is no positive evidence to the contrary and Mr Pagan records – and Mr Lavender agreed in cross-examination - that design drawings for the Development show an intent to provide cavity barriers in line with floor slabs, but not in line with party walls or around windows, service penetrations or at the top or bottom of cavities.

10.7.9 In the circumstances I am satisfied that the cavity barriers are if not universal as near as makes no material difference universally missing or ineffective.

10.7.10 It is common ground that the direct cost of the provision of cavity barriers totals £136,751.16. It is also common ground as between the experts that the installation of cavity barriers in the external walls would also require the removal and reinstatement of the external cladding. Of course, this work is the same work as is required to provide fire protection to the structural steelwork but, as the claimants submit, is another and separate reason why that work is necessary.

Item 10 (inadequate subdivision of common corridors to blocks A/B)

10.7.11 I am satisfied that this claim is made out as claimed and costed. An issue was raised in cross-examination of Mr Lavender as to whether or not the doors needed to be glazed. Mr Lavender perfectly reasonably said that it was necessary to be able to see through to the other side of the door and I am satisfied that this is a reasonable allowance even if gazing is not strictly required under the Bldg Regs.

Item 11 (means of escape from the basement)

10.7.12 I am satisfied that this claim is made out as claimed and costed.

Item 12 (external escape routes)

10.7.13 The claimants only pursue items 12(b) and (c). It was suggested in cross-examination that item 12(c) is unnecessary because there is evidence that the lift shaft is bricked up. However that is based on an email from Mainstay to Ms Bedi which, although it refers to bricking up, could just as well be a lazy or mistaken reference to the incombustible boards which are recorded as having been installed. I am satisfied on the basis of that evidence that the claim is made out as claimed and costed and the lift exception is plainly not engaged.

Item 13 (further means of escape from basement)

10.7.14 Only items 13 (b) and (d) are claimed. Although ZIP suggest that this is just a matter of rerouting the marked escape route I am satisfied that it is a perfectly justified fire safety related claim and succeeds in the modest amounts claimed.

Items 14-15 (basement wall fire resistance and doors to the plant and store rooms)

10.7.15 Item 14(b) is not pursued but the claim for the remainder succeeds as claimed and costed.

Item 16 (lack of access for the fire service)

10.7.16 This relates to the need for dry fire mains to enable the hose laying criteria to be satisfied. As the claimants submit in closing submissions it was agreed between experts that there was a breach of the Bldg Regs and of the technical requirements, that it falls within clause 3.2 since its absence increases the risk to the health and safety of occupants and as to the necessary remedial works.

10.7.17 Despite this Mr Baatz sought to cross-examine Mr Lavender on the basis that it was not a breach of the Approved Document which was not mandatory anyway. Mr Lavender did not agree. Mr Pagan was not called and thus his opinion contradicts the submission which is now made and which I have no doubt about rejecting.

10.7.18 In the circumstances this claim succeeds as claimed and costed.

Items 17-21 (staircases and means of escape)

10.7.19 As the claimants say in their closing submissions these items were all admitted by ZIP as falling within clause 3.2 and the remedial works have been agreed.

10.7.20 Again, however, in closing submissions ZIP seeks to resile from this by reference to cross-examination of Mr Lavender on the basis of unsubstantiated speculation that the timber stairs have in fact been treated with a fire-resistant material, which not surprisingly – given the history of JCS' performance on this development – he was not willing to accept. I am satisfied that this claim is made out and succeeds as claimed and costed, not including costs relating to the ceilings in the common areas which are recovered elsewhere.

Items 22-24 (emergency lighting, electrical panels and emergency exit signs)

10.7.21 Items 22 and 23 are admitted subject to extent whereas the claimants are put to strict proof as regards items 24.

10.7.22 The real issue is whether the desktop assessments of Mr Lyons for the claimants in relation to items 22 and 24 can be relied upon, in circumstances where Mr Lewis for ZIP said that he was unable to provide an assessment since it was a job for an architect upon which he did not feel competent to opine. In contrast Mr Lyons had provided his best estimates on the basis that he believed that he had sufficient experience to give a realistic assessment as to what an architect would stipulate. ZIP submitted that Mr Lyons was in truth in no better a position than Mr Lewis and that his estimate could not be relied upon. I accept that his estimate must be approached with some caution but do

not consider that it can be rejected out of hand as ZIP contends. I do not accept ZIP's argument that Mr Lyons cannot give exert evidence; it would be unrealistic and disproportionate to have required yet another expert to give evidence on a matter on which Mr Lyons was sufficiently well qualified by practice to opine.

10.7.23 I accept the claimants' case in relation to item 23. Moreover, as regards item 24 I reject ZIP's argument that the policy does not respond to fire safety related defects in the basement.

10.7.24 In the circumstances I accept the claimants' submission that it is reasonable to award the middle ground figure adopted by the quantum experts of £50,784.50.

10.8 Scott Schedule F: mechanical and electrical issues

Item 1 (incorrectly fitted bathroom hot water installations)

10.8.1 The claimants do not pursue this claim since they concede in their closing submissions that due to the impact of the excess no recovery can be made. This is clearly correct given that these are flat specific claims.

10.8.2 They suggest that it is still relevant to the agreement to rectify. If so, and assuming that my conclusions in relation to whether or not the agreement to rectify was concluded and if so whether or not it applied to this defect are both wrong, then in short in my judgment the claim would fail save for flat 28 for the following reasons: (a) these are flat specific claims, so that there is no basis for not inspecting at least a reasonable sample of the claimants' flats so as to be able to contend that all flats are affected; (b) given that the sample actually inspected showed 3 out of 28 flats to be compliant, in the absence of checking all of the claimant flats it cannot be said which specific ones are effected and since this is not a common parts claim it cannot be said that it does not matter.

Item 2 (discharge pipework is plastic rather than metal and does not have a continuous fall)

10.8.3 It is accepted by ZIP that the defect exists and that it is a breach of the Bldg Regs and the technical requirements. The real issue is as to the potential for it to represent a present or imminent danger. The evidence shows that for it to be a present or imminent danger it would be necessary for a flat occupant or invitee (such as an electrician) to be inside the cylinder cupboard at a time when a discharge of high temperature water or steam might occur and for the overflow to be incapable of being accommodated by the discharge system, notwithstanding its non-compliance.

10.8.4 It is true, as ZIP contends, that the likelihood of all 3 events occurring at a time and in such a way as to cause injury is, given the relative probabilities of each both in itself and operating at the same time, extremely remote. However it is a truism that events such as this can and will occur even though they are statistically unlikely to happen at any given moment in time. It cannot be said that the discharge of high temperature water or steam cannot occur (indeed ZIP's expert accepted that it could) and it also cannot be said that the discharge system will undoubtedly safely carry any such discharge away (in circumstances where the Bldg Regs and technical requirements have been contravened in a material way). In such circumstances, it seems to me that the risk must be present or imminent even if it is a remote risk. In the circumstances I am satisfied that the claim succeeds.

10.8.5 Whilst ZIP contends that the claim should only be allowed in relation to the claimants' flats, since the discharge pipework affected is common pipework, albeit that it subsequently branches off to serve individual flats, it is a common part defect which falls within clause 3.2 and, hence, in my judgment does not fall for any reduction. In the circumstances the claim succeeds in the sum agreed between the quantum experts.

Item 3 (discharge pipes not surrounded by a wire cage in the car park) and Item 4 (main cold water tank is difficult to maintain)

10.8.6 The claimants do not pursue these by reference to the impact of the excess.

Item 5 (mains cold water pipe work not insulated or adequately supported)

10.8.7 The claimants contend that this item has been conceded by ZIP or its expert as a present or imminent danger and there is no issue as to the remedial works or cost. I agree. ZIP rightly observe that under cross-examination Mr Purcell accepted that on further inspection the support was found to be present and adequate so that he withdrew that aspect. Whether or not that makes a difference to the quantification of the agreed works or cost I do not know. If it mattered it ought to be possible to ask the experts to liaise and clarify.

Items 6-8

10.8.8 These claims are not pursued for the reasons explained by the claimants in their closing submissions at [344].

10.9 Scott Schedule G: lifts and other items

Item 1 (lifts installations not completed)

10.9.1 The claimants accept that the claim in relation to the lifts cannot be pursued due to the specific exclusion of the lifts from the policy.

Item 2 (entrance canopy roofs not watertight)

10.9. An issue is raised as to whether or not this falls within clause 3.1 on the basis that the canopy roofs are not loadbearing elements. I am satisfied that the canopy roofs are loadbearing when a holistic view is taken – apart from anything else they must surely have to bear or transfer imposed loads from rain or snow. I am also satisfied that the lack of watertightness will adversely affect its resistance to damp and water penetration. Thus this succeeds in the agreed amount of £3,600.

10.10 The add-on items

10.10.1 There are a number of items which must be considered under this heading, although some have been the subject of agreement between the quantity surveying experts.

Scaffolding

10.10.2 I have already dealt with the scaffolding costs whilst addressing the relevant substantive Scott Schedule claims and, hence, need say no more about them here.

Inflation

10.10.3 This is now agreed between the quantity surveyors at 5.241%. Insofar as it is still suggested by ZIP that an allowance for inflation ought not to be made because it is said that the claimants have delayed in undertaking the necessary remedial works, I have no doubt in rejecting any such argument. Given the financial circumstances of the claimants and given ZIP's refusal to indemnify, there is no way in my view that the claimants could, realistically, have undertaken remedial works prior to trial.

Preliminaries

10.10.4 These are now agreed at 13%. Although there remained an open issue as to whether or not the preliminaries should be higher if the total works cost awarded after scaffolding and inflation was less than £7 million, that is not an issue which arises having regard to my valuation of the total works cost prior to the application of the maximum liability limitation.

Price adjustment

10.10.5 Ms Nash for ZIP suggested that there should be a 1% downwards price adjustment to reflect the discount which she suggested a contractor would allow for the saving to be achieved in terms of time and efficiencies on undertaking what she suggested was relatively straightforward work involving a lot of repeat work in different locations.

10.10.6 However, as Mr Bramall for the claimants said, this is dependent both on an analysis of the relative attraction of the works relative to other comparative jobs which a contractor might be interested in tendering for and, in his experience, this work is not particularly attractive nor obviously straightforward or of a repeat nature. Furthermore, as he also said, the current market in the Manchester area is buoyant such that contractors would not be inclined to offer or accept discounts from their usual rates on this basis. I accept and prefer Mr Bramall's opinion on this issue, in circumstances where it does not seem to me that this work is obviously attractive compared to other jobs and where Mr Bramall seems to me to have rather better knowledge of the local market than Ms Nash. Accordingly, I do not discount on this basis as suggested by Ms Nash.

Design and other fees

10.10.7 These are now agreed at 7.75%.

Contingencies

10.10.8 This was the most vigorously contested issue at trial, not surprisingly since Mr Bramall believed that a 15% addition for contingencies should be applied (5% design and price risk and 10% for

unknowns), whereas Ms Nash believed that only a 5% contingency should be applied (2.5% design and price risk and 2.5% unknowns). Given the total base cost, a swing of 10% is clearly significant.

10.10.9 There was some cross examination and discussion as to the appropriate principles on which contingency should be added in a case such as the present. It is important to bear in mind that my task is to ascertain the reasonable cost of the remedial works for which the claimants are entitled to be indemnified. That is different from the task which a quantity surveyor is asked to perform in a usual construction project, which is simply to assess the likely total out-turn cost of a project by reference both to the vicissitudes inherent in any project and also to the risks referable to the particular project given such matters as the extent to which the works have already been designed, the extent to which – for example – ground conditions have already been investigated and the extent to which fit-out choices are liable to fluctuate.

10.10.10 Whilst I do not accept all of Ms Nash's arguments nor do I accept her 5% valuation, I am satisfied that in this case a relatively modest contingency of only 7.5% is appropriate, broken down as to 2.5% design and price risk and 5% unknowns, for the following reasons:

(i) Although the project has not been fully designed or tendered, it is relatively unusual to have a building which has been the subject of intensive inspection and attention by a contingent of highly experienced construction professionals looking at what remedial works are necessary across the whole field of specialisms from structural engineers and cladding and roofing experts through fire safety experts to M&E and electrical experts as well as quantity surveyors. Thus it is very far from being the preliminary business plan stage which was referred to in the article on which Mr Bramall placed reliance.

(ii) Moreover, as Ms Nash said, the impact of the remedial works will be substantial in that the roof and external walls will (on my findings) have to be completely stripped down to the steel structure and rebuilt, leaving only the structure and internal parts. To that extent the scope for known unknowns or unknown unknowns is correspondingly reduced. Whilst it is true that it is possible that the structure, once fully exposed, will transpire to be defective in some as yet unknown way, given the age and complexity of the structure it is not immediately obvious that this is a high risk area and of course the main issue in relation to the structure, the adequacy of the fire protection, has already been fully investigated and catered for.

(iii) Insofar as other problems might become apparent in the internal areas it is important to note that, unlike a traditional project, there will be a question mark as to whether they are matters which are at the claimants' own risk or whether they fall within the scope of the insurance cover. If for example it transpires that there is a serious problem with a non-loadbearing element which does not represent a present or imminent danger then the work may have to be done and funded by the claimants but ZIP will not be liable to pay for that work. That would of course be the subject of adjustment by a loss adjuster in a conventional insurance funded remedial works project.

(iv) Whilst I accept that the possibility of associated electrical works which was formerly included in the specific Scott Schedule pricings has now been removed into the

contingency, I have to say that I was not particularly impressed by the claimants' initial case as to the probability of this work needing to be done to anything like the extent contended for.

(v) It did not seem to me that Ms Nash's relative lack of recent knowledge of dealing with projects from start to finish significantly impacted on the reasonableness of the reasons she gave in this case.

VAT

10.10.11 It was agreed in closing submissions that the question of VAT might well depend on the findings I make and, therefore, should be parked until my draft judgment was produced.

10.10.12 Since it is clear in my view that the maximum liability provision must include any liability for VAT, so that there is no basis for adding VAT on top of the maximum liability recovery, there is nothing more to say about VAT.

Other incidental costs

10.10.13 These are referred to in the claimants' opening and closing submissions but have not, so far as I can see, been addressed by ZIP. I am not sure what the position is and if needs be this can be clarified on receipt of this judgment in draft.

10.11 Quantification

10.11.1 As I have already said on a number of occasions, it is apparent that on the basis of my findings the maximum recovery will be the total declared purchase price of the claimants' flats. That renders the procedure which it was envisaged would be necessary, namely the translation of my findings into figures, otiose.

10.11.2 The only circumstances in which it might make sense to translate my findings into figures would be if the claimants intended to seek to appeal my finding of the maximum liability provisions, since I can see that it may be better to finish the exercise now, whilst everything is fresh in minds and the same personnel are still available, than - potentially – having to start the process over a year down the line. In my draft judgment I said that I would leave it to the claimants and ZIP's legal advisers to consider and discuss with a view, if possible, to reaching agreement as to whether it is a worthwhile exercise. That process did not produce any agreement. In the circumstances I will limit myself to recording that: (a) the claimants contend that but for the impact of the maximum liability provisions they would have been entitled to judgment for a sum in excess of £9.7 million exclusive of any claim for VAT; (b) ZIP does not accept this; and (c) I will determine whether or not any and if so which further determinations should be made at the hearing of all consequential matters.

10.11.3 I ought however to address the competing arguments in relation to the application of the excess. In short, I accept the claimants' analysis in their closing submissions. In my view the position is as follows:

(1) The fire safety claims in Schedule E comprise three items of claim, namely those relating to the ability of the building structure to contain the spread of fire, those non-structural respects in which the means of escape is unsafe, and the lack of dry risers for fire service access. Since the Schedule E claims are present or imminent danger claims there are three excesses of £1,221.10 (£1,000 adjusted for inflation) each. Moreover, these claims subsume the Schedule B cladding claims which the claimants need not pursue and hence in respect of which there is no excess.

(2) The roof claims in Schedule B are, save insofar as already subsumed within Schedule E and each other, two distinct claims, one relating to the roof deck and one relating to the roof parapets. Again they are both present or imminent danger claims and thus there are two excesses of £1,221.10 each.

(3) The Schedule C claims. I accept the claimants' argument that there are 4 separate items of claim, items 1, 3, 5 and 6. Save for item 5 none are present or imminent danger claims with the result that there will be a separate excess of £1,221.10 for each of the claimant's flats applying to items 1, 3 and 6, thus a total excess of £3,633 per flat and a total excess under Schedule C of £111,120.10.

(4) The Schedule D claims. I agree that the essential complaint is that the construction of the balconies represents a present or imminent danger and that this is one item of claim and thus that there is only one excess of £1,221.10. The cold bridging claim is subsumed within this.

(5) The Schedule F claims. I agree that there are two present or imminent danger claims and hence a total excess of £1,221.10 each.

(6) The Schedule G claim item 2 is one item and a section 2 claim and, hence, an excess of £100.

10.11.4 That results in a total excess of £120,889.

10.12 Intention / ability to reinstate

10.12.1 Given the view that I have already reached as to the proper interpretation of the insurance policies, this point does not arise. However, given that it has been the subject of very significant interlocutory disagreement and substantial argument I should address the point in case the matter should go further.

10.12.2 There are really three separate points to be addressed. The first is ZIP's argument that any monies payable to Walker Morris and the Bank under the funding agreements are not monies which are payable under the contractual indemnity provided by the policy and, hence, since Walker Morris and the Bank have "first call" on any recoveries, any claim must be reduced to the extent of those claims. The second is ZIP's argument that, given the amount of the recovery and the amounts which will be deducted from the recovery before monies are available for reinstatement, there is no real likelihood of sufficient monies being available to undertake reinstatement and, in such

circumstances, if there is no reinstatement there is no indemnity. The third is ZIP's argument that the claimants have given control of the decision whether or not to reinstate to the Bank and now 123 Pay in circumstances where, ZIP submits, there is no realistic likelihood that the Bank and now 123 Pay will do anything other than elect to receive its share of the recoveries rather than to agree to reinstatement.

10.12.3 This section of my judgment is, of course, predicated on the assumption that – contrary to my actual decision in section 7.7 above – the policy on its true interpretation only provides an indemnity for monies actually expended on reinstatement or where the court can be satisfied on the balance of probabilities that any monies awarded will be spent on reinstatement.

10.12.4 On that assumption I agree that insofar as the funding agreements entitle Walker Morris to have first call on any recoveries to recoup what are defined as the "solicitor liabilities" (i.e. all sums due to Walker Morris under its retainer) and the Bank / 123 Pay, to have second call to recoup what are defined as the "lender liabilities" it must follow that these sums will not be spent on reinstatement. It is important to note, as the claimants submit, that the definition of lender liabilities limits this obligation to sums loaned to the claimants to cover their legal fees including disbursements. In other words it is not, as ZIP has asserted, a means for the Bank / 123 Pay to recoup all monies advanced by the Bank to CJS or otherwise owed by CJS to the Bank.

10.12.5 However it also seems to me that, insofar as the claimants are able to recover their legal costs from ZIP, that recovery must be offset against the amounts which would otherwise be payable to Walker Morris and/or the Bank / 123 Pay.

10.12.6 Even so, I am far from convinced that this would represent a just outcome. In many cases where an insurer under an unvalued policy wrongly declines indemnity it will be necessary for the insured to incur a liability for legal costs, which may well in today's legal climate include the costs of obtaining third party funding, which may well include costs and associated liabilities which will not be fully recouped from the insurer even in the event of a successful outcome. If it was open to insurers to argue that they should not have to indemnify to the extent that the insured has incurred irrecoverable costs simply to obtain indemnity from the insurer that appears to me to be an abuse. The answer may be that the question should not be considered by reference to the position as at trial but as it would have been as at the point the insurer should have indemnified and not refused indemnity, unless it can be said that it would not be unjust to have regard to supervening events. Since this point has not been argued before me and since it is not strictly necessary for me to deal with the issue I say no more about it.

10.12.7 As to the second point, in Appendix 4 to their closing submissions ZIP provided an analysis of the sums which will have to be deducted from any damages awarded to the claimant in order to illustrate the financial outcome. It is obviously provisional, but it is helpful in providing a broad idea of potential outcomes. It included the outcome which I have decided applies, namely that the claimants are limited to the maximum value of £3.63M. It suggests that if one deducts from that recovery the irrecoverable costs which the claimants will have incurred including any adverse costs ordered in favour of ZBC on the assumption – as had transpired – that the claim fails against ZBC and that the ATE policy does not pick up that adverse cost exposure then the end result is that the claimants will have a deficit of around £500,000.

10.12.8 The claimants have not specifically responded to that Appendix and it may well be that the assumptions made in relation to the irrecoverable costs, the incidence of VAT and the true interpretation of the ATE policy are open to challenge. In that respect it was agreed in closing submissions that this section of the judgment would be provisional and the parties might, if necessary, seek to make further submissions on the details post promulgation if necessary. Whilst it is not necessary for further submissions to be made given that these conclusions are all hypothetical, ZIP's Appendix 4 does indicate that on any view there is a real risk that the claimants will end up with insufficient to undertake anything like the programme of works necessary to resolve even the most serious of the matters considered in this judgment, particularly the fire safety related matters which as matters currently stand have left the building empty.

10.12.9 Again I consider that this may produce an unjust result and question whether or not the analysis suggested at paragraph 10.12.6 above might operate to avoid this unfairness but, again, need express no view one way or another on this hypothetical argument.

10.12.10 As to the third point, it is common ground that once the solicitor liabilities and the lender liabilities are discharged the net recoveries are to be applied in accordance with clause 5.1 of the Priority Deed. This provides that it is for the "project manager" (to be appointed by the "lender" – now 123 Pay, but required to act as a trustee on behalf of all of the "proprietors" – defined as the individual leaseholder claimants, Zagora and CJS) to determine "in his/her absolute discretion", and the lender to agree, whether it is in the best interests of the proprietors as a whole to undertake the remedial works (as defined) and, if so, to use the net recoveries for that purpose. If the project manager determines, and the lender agrees, that it is not in the best interests of the proprietors as a whole to undertake the remedial works then under clause 5.2 the net recoveries are used to pay the "leaseholder liabilities" (in summary, the leaseholders, which includes CJS, are paid out proportionate to the square footage of their flats).

10.12.11 It was a major plank of ZIP's case that the Bank, which effectively controlled CJS through the administrators, would have no incentive to fund remedial works when it could "take the money and run" by refusing agreement to remedial works. Although in closing submissions the claimants submitted that its right so to act was restricted by its right only to refuse consent where it was not in the best interests of the proprietors as a whole to undertake the remedial works, I am very doubtful that this is a limitation which could be policed by the court; if the project manager has an absolute discretion then surely so must the Bank and it would be difficult in my view successfully to challenge a refusal to agree save in the most manifestly unreasonable of cases. On any view, if the analysis by ZIP in Appendix 4 is anything like realistic it is very difficult to see how any refusal of consent could be categorised as manifestly unreasonable.

10.12.12 However the claimants contend that on a proper analysis of the new arrangements involving 123 Pay the position is very different. In short, they submit that - unlike the Bank - 123 Pay will not be entitled to receive anything which CJS might be entitled to under clause 5.2 in the event that the remedial works are not undertaken. Instead, 123 Pay are positively incentivised to support the remedial works being undertaken if they exercise their option to acquire the CJS flats from the administrators on the terms provided in the option agreement.

10.12.13 I agree with the claimants' analysis of the position as regards 123 Pay and therefore also agree that this takes the legs from under ZIP's argument based on its analysis of the Bank's commercial position and interests under the funding agreement. Since the question has to be decided as at the date of the judgment, it does not avail ZIP to protest that before the transactions between the Bank and 123 Pay were entered into in July 2018 their analysis was correct.

10.12.14 In the result, therefore, whilst it is unnecessary and indeed not appropriate on the information currently before me to be able to express a firm opinion, I accept that if I had found for ZIP on the policy interpretation question it would have had good grounds by reference to the first and second points considered above for contending that the claimants would be unable to recover anything and that it would have been necessary for me to invite further submissions in order to make a final determination on the point.

10.13 Maintenance and champerty / abuse of process

10.13.1 ZIP's pleaded case is as follows:

"…The Bank has no genuine commercial interest in these proceedings in whole or in part. The Bank is the mortgagee of the 66 CJS flats but CJS's claim was abandoned on 28 June 2017. This was because CJS could not claim against ZIP under the policies because it fell within the exclusion within the definition of Buyer and if not the reason that was in any event the case and CJS had no legitimate claim. Therefore neither CJS nor its mortgagee, the Bank, had a legitimate claim against ZIP. On the other hand both CJS and the Bank have the power pursuant to clause 9.3 of the Lease to enforce clause 8.6 and therefore clause 9.9. For the Bank to fund claims in the hope of achieving indirectly what it cannot achieve by a direct legitimate claim, (because its mortgagor was not entitled to claim or because it will not claim against Zagora) does not give the Bank a legitimate pre-existing interest in the proceedings and accordingly the funding is maintenance."

10.13.2 As the claimants said in their written opening, the relevant principles are as follows:

"[286] First, a person is guilty of maintenance if (a) he supports litigation, (b) in which he has no legitimate concern (c) without just cause or excuse. A person is guilty of champerty if, conditions (a) to (c) being met, he also stipulates for a share of the proceeds of the action or suit (*Trendtex Trading Corp v Credit Suisse* [1980] 1 QB 629, at 663).

[287] Second, where a person is guilty of maintenance or champerty, the effect is that the contract of maintenance or champerty is unenforceable as between the parties to the contract (see *Cole v Booker* (1913) 29 TLR 295, at 297 and *Hutley v Hutley* (1873) LR 8 QB 112). The illegal maintenance of an action is not a defence to the action (*Martell v Consett* [1955] Ch 363).

[288] Third, the court will not stay proceedings which are being maintained unless it constitutes an abuse of process or the action is commenced in bad faith: see *Abraham v Thompson* [1997] CLC 1370, 1385. The fact that any arrangement is champertous does not of itself mean that the underlying proceedings are an abuse of process: see *Re Latreefers Inc* [2001] BCC 174, 205-206."

10.13.3 In my judgment there are a number of insuperable difficulties faced by ZIP in succeeding in this argument, which are as follows:

(1) ZIP's fundamental complaint is that this is an impermissible attempt by the Bank to recover through the back door what CJS could not recover against ZIP through the front door. However, that argument was only ever a good argument if it proved to be the case that either Zagora or the individual leaseholder claimants could somehow recover losses suffered by CJS which it could not recover directly against ZIP. As my decision has revealed: (a) if Zagora had succeeded against ZIP under the agreement to rectify it would have been on the basis that at the time ZIP (through David Robinson and Mr Parvin) was perfectly willing to allow Zagora to recover the cost of remedial works without deduction for the CJS flat percentage either on a commercial basis or – according to Mr Parvin – on the basis of a tenable interpretation of the policies; (b) the individual leaseholders have succeeded against ZIP on the basis that on the proper interpretation of the policy any individual flat-owner can recover the full cost of repairs to the common parts in a present or imminent danger case even if the other flat-owners could not also have recovered on that basis. In the circumstances there was nothing wrong in the Bank seeking to fund the claimants in litigating to recover on either basis.

(2) ZIP also argued that the Bank was never interested in using any recovery to undertake repairs and simply wanted to secure a recovery and to take the money and run. I am not persuaded from the evidence before me that this was always the Bank's fixed intention come what may. If that had been the case there would have been no point in setting up the detailed provisions of clause 5 of the Priority Deed which clearly envisaged that remedial works would be undertaken under the decision and direction of an independent person if there was sufficient money to do so. Indeed one may query why the individual leaseholders were willing to continue the action if their understanding or advice was that this was all an elaborate charade for the Bank to be paid out and for them to be left with a payout but an ongoing liability under the lease.

(3) In the circumstances, and looking at the matter widely, the Bank had a genuine commercial interest in funding the litigation. In a recent case, *Recovery Partners v Rukhadze & others* [2018] EWHC 2918 (Comm), Cockerill J suggested, when considering an argument that an assignment was champertous and having considered the decision in *Massai Aviation Services v Attorney General* [2007] UKPC 12 and other relevant authorities, that the tide of recent authorities indicated a considerable relaxation of the approach to questions of assignment and champerty in favour of looking at the transaction as a whole rather than encouraging a narrowly focussed view of the commercial aspects.

(4) The introduction of 123 Pay and the alteration in the commercial transaction addressed any offensive element which – if I am wrong in the above – previously existed. It would plainly be wrong to dismiss an action that has proceeded to trial and succeeded on the merits on the basis of what would, on this analysis, be a historic abuse which could, if necessary, be penalised in interest and/or costs.

10.14 Drawing together the threads

10.14.1 The claim against ZIP by the individual leaseholders succeeds but is capped to the total of their declared purchase prices.

10.14.2 I have not addressed the section 2 claims separately. There is no need to do so, since the maximum liability provision applies "in respect of all claims under sections 2 and 3 of this policy" and thus the individual leaseholder claimants cannot secure a greater recovery by seeking to add on any individual section 2 claims to the total of the section 3 claims. Apart from the reference in Scott Schedule G item 2 no mention is made of a section 2 claim in the claimants' opening and closings, so that it does not appear that the claimants are seeking a separate award in relation to the section 2 claims on any other basis.

10.14.3 I have not addressed interest. Mr Baatz reminded me that in paragraph 572 of its closing submissions the claimants said: "Given that their claim is for future costs, the claimants accept that they cannot claim interest from ZIP on their damages up to the date of judgment. Of course, if there is any delay in satisfying the Court's judgment, interest on judgment monies will accrue in the usual way under section 17 of the Judgments Act 1838". Mr Selby submits that despite this concession the claimants should be entitled to advance a claim for interest on the claims as now held subject to the cap. In the circumstances I defer any issues arising in relation to interest to the hand-down hearing.

11. The claim against ZBC

11.1 As I have said the claim is brought in deceit (otherwise known as fraudulent misrepresentation). To succeed the ZBC claimants must prove the following elements of the tort:

a. That Mr Mather (because it is not alleged that anyone else was dishonest) made misrepresentations to them.
b. That Mr Mather intended them to rely on those misrepresentations.
c. That Mr Mather knew the representations were false or was reckless as to whether they were true.
d. That they relied on those misrepresentations.
e. That they have suffered loss as a result.

11.2 The burden of proof of course rests on the claimants. The standard of proof is also of course the balance of probabilities, although it is well established by the authorities to which Mr Asquith referred me (and I must bear firmly in mind that) this test is applied in a fraud case in a more exacting way, recognising that it is inherently less likely that a person acted dishonestly rather than negligently, such that the stronger the misconduct alleged, the less likely it will be that it occurred. Accordingly, to the extent that it is inherently improbable that a particular person was dishonest, the evidence needed to rebut that inherent improbability on the balance of probabilities will have to be more cogent than would be needed to prove that he was negligent (see paragraph 85 of ZBC's opening).

11.3 The claimants remind me that the classic test for dishonesty in deceit is to be found in the speech of Lord Herschell in *Derry v Peek* (1889) 14 App. Cas. 337 at 376:

> "First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth."

11.4 It is accepted that as a matter of law it is not necessary to prove that Mr Mather had an intention to deceive the claimants: as Lord Herschell said "…if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." (p. 376).

11.5 However, as I said in the course of submissions whilst it is not necessary to show a motive, as a matter of common sense the court is likely, when considering the issue of dishonesty, to ask itself why Mr Mather should knowingly or recklessly have made a false representation. If it is difficult to answer the question: what motivated someone such as Mr Mather, a man with an unblemished reputation, to write something which was untrue, either knowing that it was untrue or not caring a toss[8] whether or not it was true, then it is difficult to conclude in a case where there is genuine scope for doubt that it is not simply an innocent or careless mistake.

The misrepresentations made by Mr Mather

11.6 Each of the Bldg Regs final certificates stated that it related to the work of the construction of the new build flats specified in the certificates and further stated that: "the work described above has been completed and Zurich Building Control Services Ltd have performed the functions assigned by regulation 11 of the 2000 Regulations (as amended)".

11.7 Regulation 11 of the Building (Approved Inspectors etc.) Regulations 2000 (as amended) is headed "Functions of approved inspectors" and provides so far as relevant that: "an approved inspector by whom an initial notice has been given shall, so long as the notice continues in force, take such steps as are reasonable to enable him to be satisfied within the limits of professional skill that…(a) regulations 4 and 6 of the Principal Regulations are complied with…". Regulation 4(1) of the principal regulations referred to, being the Bldg Regs 2000, provided so far as relevant that: "Building work shall be carried out so that it complies with the applicable requirements contained in Schedule 1". It is Schedule 1 which contains the detail of the requirements in Parts A through to N.

[8] According to the Oxford English dictionary, a phrase first used in this sense by G. Eliot in Daniel Deronda.

11.8 It is common ground and I am satisfied that by issuing the Bldg Regs final certificates in the terms which he did and in the context of the regulatory regime referred to Mr Mather represented that ZBC had taken such steps as were reasonable to enable it to be satisfied within the limits of professional skill and care that the works referred to had been completed in accordance with the Bldg Regs.

11.9 ZBC accepts that on an objective reading of the Bldg Regs final certificates they related to the relevant access and egress routes for the relevant flats, as well as the flats themselves. This was common ground between the experts.

11.10 ZBC also accepts that, as was common ground between the experts, it had not taken reasonable steps to satisfy itself that Bldg Regs had been complied with. Thus it admits that Mr Mather made misrepresentations in issuing the Bldg Regs final certificates.

Did Mr Mather intend the claimants to rely on those misrepresentations

11.11 In closing submissions ZBC accepted that Mr Mather did intend the individual leaseholder claimants to rely on the representation made in the Bldg Regs final certificates, which was entirely sensible and realistic given his evidence as referred to below. ZBC did not, however, accept that Mr Mather intended Zagora to rely on the representation made in the Bldg Regs final certificates.

11.12 Mr Mather's evidence in his witness statement at [44] was as follows:

"We provided copies of the building control final certificate to the local authority and the developer, and also kept a copy for our records. The local authority building control documents cannot be viewed by the public. What the developer did with their copy was up to them, for example, if they used it as part of their marketing or sales documents. A developer does not have to use the final certificate as part of marketing a property, but I would be surprised if he did not do so. I expect that a subsequent purchaser of a flat (years down the line) might rely on the final certificate as proof that the flat had building regulations approval when it was completed."

11.13 In cross-examination Mr Mather accepted that generally "a purchaser of the property, which is the subject of [the final] certificate" would ask for a copy of the Bldg Regs final certificate in order to assist them in deciding whether or not to purchase the property. As regards subsequent prospective purchasers he made the obvious point that such a purchaser could not reasonably assume that the building was in the same state as it was when the certificate was actually issued. He accepted that it would be a question of the time between the date of the Bldg Regs final certificate and the date of purchase.

11.14 In written closing submissions Mr Asquith made a discrete submission about flat 126, contending that since the evidence showed that flat 126 had been accidentally included in the 15 December 2009 Bldg Regs final certificate Mr Mather could not have intended its purchaser to rely upon it. In my judgment that is a non sequitur. It is irrelevant that flat 126 was included by mistake. It was included in the certificate and Mr Mather, who was unaware of the mistake at the time, knew that its prospective purchaser was likely to rely upon it in precisely the same way as would the

prospective purchasers of the other flats. It follows that there was the necessary intention in relation to flat 126 as well.

11.15 Returning to Zagora, in his second witness statement Mr Mather had said that: "I am sceptical about a freeholder's reliance on the Final Certificate given the passage of time. In particular, certain alleged defects, for example a leaking roof, would have become obvious over the years, especially given the weather conditions in Manchester. At the time of signing off the Final Certificates I did not consider the possibility of a future freehold purchaser to relying on them". He was not asked in terms about this or more generally as to his belief as to whether or not a business such as Zagora, i.e. a subsequent purchaser of the freehold, would want to see or would rely upon a Bldg Regs final certificate.

11.16 So far as the law is concerned, it is well summarised in *Clerk & Lindsell on Torts* 22nd edition at 18-30 to 18-33. Thus at 18-30 it is said that:

> "In order to give a cause of action in deceit, not only must the statement complained of be untrue to the defendant's knowledge, but it must in addition be made with intent to deceive the claimant: with intent, that is to say, that it shall be acted upon by him. It seems that intent, for these purposes, includes not only the case where the defendant actually desires the claimant to rely on what he says, but also where he appreciates that in the absence of some unforeseen intervention he will actually do so."

11.17 The footnote refers to the decision of Longmore J in *Shinhan Bank Ltd v Sea Containers Ltd* [2000] 2 Lloyd's Rep. 406 (where a buyer who signed receipts for undelivered goods knowing that the seller would use them to obtain bank finance was held liable to the bank in deceit when the seller collapsed). At [26] Longmore J stated that this formulation of "intent" was used in the criminal law (see *R. v Woollin* [1999] 1 A.C.82) and, in his judgment, was "equally applicable when one has to assess intention for the purposes of the law of deceit".

11.18 The editors consider the position of a representation not made to the claimant directly at 18-31 and, referring to authority, say that: "All that is required for these purposes is that the representation be intended, in one way or another, to reach the claimant in order to induce him to act on it. Nor is it even necessary that the defendant know precisely who the statement is intended for, provided he intends it to be relied on by someone in the claimant's position: thus in another banker's reference case a bank was held liable when it sent a fraudulent reference to another bank for the benefit of a customer of whose identity it was entirely unaware. Indeed, in one case it was even held that an action for deceit could be based on a newspaper advertisement, provided the claimant showed that he was one of the class of persons at whom it was directed."

11.19 Applying those principles, it seems impossible to me to conclude that Mr Mather intended, in the legal sense, a subsequent purchaser of the freehold such as Zagora to rely upon the Bldg Regs final certificates over 2 to 3 years later. There is no evidence that Mr Mather ever expressly contemplated the position of a purchaser of the freehold, as opposed to the purchaser of the individual flats, at the time he issued the Bldg Regs final certificates. This is not surprising, since there is no suggestion that JCS intended to dispose of the freehold at the time Mr Mather was having dealings with its representatives. There is no evidence that Mr Mather was aware from

previous experience that developers commonly transferred the freehold to companies such as Zagora whose commercial interest was to collect the ground rent or that there was a market in the purchase of such freehold interests. Nor is there any evidence that Mr Mather was aware from previous experience that any such purchasers would have any interest in whether or not the development had been passed for Bldg Regs purposes.

11.20 In the circumstances, whilst I would not necessarily simply have accepted Mr Mather's assertion in his second witness statement as determinative, it seems to me to accord with the reality. It follows, in my judgment, that Zagora's claim must fail on this basis alone.

Dishonesty

11.21 I have already considered ZBC's involvement with the development and Mr Mather's actions in some detail in section 4 above and do not intend to repeat the findings made in that section here.

11.22 In short, the claimants' case, insofar as it survives my factual findings in section 4 above, is as follows.

(1) There were a significant number of defects, particularly in relation to fire safety in the common parts, which the experts agree ought to have been obvious to a reasonably competent building control inspector. The claimants point to Mr Easton's agreement in the joint statement that: "the release of the Final Certificates, having regard to the number of defects that exist on the property, in his opinion shows actions that fell below that of a reasonably competent Building Control Officer. In his opinion, no reasonably competent Building Control Officer should have issued the 3 Final Certificates referred to".

(2) By 11 November 2009 Mr Mather knew that Manchester Building Control were seriously concerned about the state of the development and compliance with Bldg Regs. Mr Mather was keen to seek to complete the building control function in relation to New Lawrence House as soon as possible so as to avoid the difficulty of having to deal with the serious concerns expressed by Manchester Building Control with the associated risk of its taking back the building control function in relation to the development. He was also keen to seek to complete the building control function so as to, in popular parlance, get JCS off his back and reduce the overall amount of work on his plate. Knowing that Mr Eadsforth was about to leave ZBG at the end of December 2009 and knowing that Mr Nicholls was effectively no longer involved in undertaking the building warranty surveying function in relation to the development gave him another strong incentive to complete the building warranty function as soon as possible for similar reasons.

(3) As at 15 and 21 December 2009, when Mr Mather issued the first 2 Bldg Regs final certificates, he knew from his own inspections in November and December 2009 that there were a number of serious fire safety defects in the development which had not been rectified and, specifically, he knew that the steelwork had not been fire protected.

(4) As at 15 and 21 December 2009 Mr Mather had not been informed expressly, whether by Mr Nicholls or Mr Eadsforth, that they had inspected and issued building warranty final

certificates in relation to all of the individual flats included in the first 2 Bldg Regs final certificates.

(5) As at 15 and 21 December 2009 Mr Mather knew that neither he, Mr Nicholls or Mr Eadsforth had carried out the detailed inspection of all of the individual flats included in the first 2 Bldg Regs final certificates together with the common parts insofar as they formed part of the means of escape from those individual flats necessary before the 2 Bldg Regs final certificates could conscientiously be signed off.

(6) By November 2009 and beyond, Mr Mather knew that he could not place any real reliance on information provided or assurances given by JCS, but nonetheless continued to do so because it was easier and simpler for him to do so.

(7) Nothing that happened after December 2009 justified Mr Mather in believing that the serious fire safety issues at the development had been remedied. His continued involvement with the development from January 2010 was cursory in the extreme. The circumstances in which he signed off the remaining defects and issued the building warranty common parts certificates in September 2010 demonstrated the most perfunctory of investigations and a continued reliance on what he was told by JCS without independent verification. He had no proper basis for signing off the remaining flats in November 2010.

(8) In the circumstances it can properly be concluded that Mr Mather knew that ZBC had not taken reasonable steps to satisfy itself that the Bldg Regs had been complied with.

11.23 Without doing Mr Asquith's detailed and excellent submissions a discourtesy, the essential case advanced by ZBC in response is that:

(1) Mr Mather was reasonably unaware of the nature and extent of the defects, because - as he was entitled to – he placed reliance both upon what he reasonably believed was the skill and expertise of the ZBG building warranty surveyors and upon the truth of what he was being told by JCS.

(2) Mr Mather had no particular reason to be worried about the concerns being expressed by Mr Timperley or the possibility that Manchester Building Control might take back the building control function in relation to New Lawrence House. Insofar as there was a concern, it could not sensibly have operated on his mind so as to induce him to sign off Bldg Regs final certificates if, as the claimants contend, he knew that there were serious unremedied fire safety defects within the development which represented a real danger to the safety of occupants.

(3) As at 15 and 21 December 2009 Mr Mather was still honestly and reasonably placing reliance on information provided by the ZBG building warranty surveyors and by JCS. He was unaware of the serious fire safety defects. He would not have consciously risked his employment and his reputation by signing off a seriously defective building, particularly given the risk that Mr Timperley might refer his concerns to other authorities and an investigation might reveal the true position.

11.24 I am properly conscious of the need to be satisfied that there is clear and compelling evidence before finding Mr Mather guilty of deceit. However, having carefully considered the evidence and rival submissions I am satisfied that the claimants have made out their case. In particular, I am satisfied that in December 2009 Mr Mather knew that the position was very different from how it would have been expected to be had the normal system been operating properly. He knew that there were real concerns about fire safety provision in the development which had to be addressed before Bldg Regs final certificates could properly be issued insofar as they impacted on the safety of the means of escape through the common areas. He knew, I am satisfied, that he and Mr Eadsforth were working together at this stage, without Mr Eadsforth being accompanied or supervised by Mr Nicholls, to satisfy themselves that the flats could be passed on the final stage 08 inspections and final building warranty insurance certificates issued as well as Bldg Regs final certificates issued before the Christmas shutdown. He undertook a number of joint inspections with Mr Eadsforth in November and December 2009. I am quite satisfied that he was as aware as Mr Eadsforth undoubtedly was as to the ongoing serious non-compliances with fire safety provision, particularly in relation to the absence of protection for structural steelwork and lack of fire compartmentation. I am quite satisfied that he was not informed by Mr Eadsforth at any time prior to 15 or 21 December 2009 that these non-compliances had been attended to and, from his own inspections he must have known that to be the case. I am quite satisfied that he could not have relied and did not rely upon the final stage 08 inspections or final building warranty insurance certificates issued by Mr Eadsforth in November and December 2009 as demonstrating that Mr Eadsforth was reasonably satisfied that these non-compliances had been attended to, when he was aware from his own inspections that they had not been attended to. In circumstances where he must have known, both from what he was told by Manchester Building Control and by JCS and from his own attendances, that at least some of the flats were already occupied, I am satisfied that he persuaded himself that it was safe to sign off the Bldg Regs final certificates on the basis that the individual flats could reasonably be signed off even though the means of escape were not safe, relying on JCS' assurances that the fire safety non-compliances would be attended to in the New Year.

11.25 It is absolutely clear, I am quite satisfied, that in those circumstances Mr Mather positively knew that ZBC had not, whether directly through himself or indirectly through Mr Eadsforth as ZBG building warranty surveyor, taken reasonable steps to satisfy itself that the Bldg Regs had been complied with at the time he issued the Bldg Regs final certificates so far as fire safety in the common areas as relevant to the means of escape was concerned. At the very least I am satisfied Mr Mather could not positively have believed and did not positively believe, in the light of his involvement in November and December 2009, that ZBC had taken reasonable steps so far as compliance with fire safety was concerned.

11.26 I am conscious that these findings may raise the question as to what Mr Eadsforth's state of mind was in December 2009 when he was signing off individual flats - and therefore generating the building warranty final insurance certificates - and at least one cover note. In the absence of his having been asked questions on the point it does not seem to me that I am in a position to make positive findings. Nor in my view is it necessary for me to do so for the purposes of this case. The case is pleaded and put solely against Mr Mather. It does not depend, either from a pleaded or a necessary basis, upon my having to find that there must have been some conspiracy as between Mr Mather and Mr Eadsforth. He was after all inexperienced and just about to leave ZBG and, since there were no open defects recorded in Live 27 against the individual flats, perfectly able to enter

them as complete. His state of mind as regards the common parts defects is not known and not relevant to the state of mind of Mr Mather given, as I have said, that Mr Mather was attending the development himself at the time and relying on his own inspections.

11.27 That position remained unchanged through 2010 into November 2010, when the third Bldg Regs final certificate was issued. At no stage in that intervening period, when Mr Mather was the only person dealing with matters on behalf of ZBG, did anything happen which would have caused Mr Mather to believe that ZBC had taken reasonable steps. Specifically, I am quite satisfied that he did not and could not have believed that whatever he might have seen or might have been told in September 2010 could have changed the position.

11.28 It is, as I have already recorded, not necessary for me to make any positive finding as to Mr Mather's motive in acting in this manner. Indeed Mr Asquith went further and submitted that I should not make a finding as to motive when the claimants had consciously declined to plead or assert a specific motive. Nonetheless I am satisfied that the explanation for Mr Mather acting in this way was, as I have already said in section 4 above, that whilst he knew that by November 2009 this was not a normal job where he could safely rely on the skill and experience of Mr Nicholls in surveying and certifying, he knew that he could not blindly rely on Mr Eadsforth as an inexperienced junior employee who he was effectively supervising, and he knew that he could not blithely rely on JCS' assurance on matters as critical as fire safety in relation to means of escape, he was under such pressure of work that he did not conduct the careful and detailed inspections which he knew he needed to do before he could conscientiously issue Bldg Regs final certificates and, feeling himself between the rock of pressure from JCS and the hard place of the concerns being expressed by Manchester Building Control, decided that he just wanted to get this job off his desk regardless. All this explains why he did something which, I accept, he would not have done under normal circumstances.

Reliance

11.29 The pleaded case, as it stood at the start of the trial, was that the ZBC claimants completed the purchases of their respective flats "in reliance upon (a) the existence of the [relevant Bldg Regs final certificate] and consequently (b) the misrepresentations contained therein".

11.30 In their written opening the ZBC claimants referred to and relied upon the principles relevant to reliance and inducement as set out by Arden LJ in *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169, at [99]:

> "(1) it is a question of fact whether a representee has been induced to enter into a transaction by a material misrepresentation intended by the representor to be relied upon by the representee; (2) if the misrepresentation is of such a nature that it would be likely to play a part in the decision of a reasonable person to enter into a transaction it will be presumed that it did so unless the representor satisfies the court to the contrary (see Morritt LJ in *Barton v County NatWest Limited* [1999] Lloyd's Rep Banking 408 at 421, paragraph 58); (3) the misrepresentation does not have to be the sole inducement for the representee to be able to rely on it: it is enough if the misrepresentation plays a real and substantial part, albeit not a decisive part, in inducing the representee to act; (4) the presumption of

inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee's decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all; and (5) the issue is to be decided by the court on a balance of probabilities on the whole of the evidence before it."

11.31 Relying upon that statement, the ZBC claimants submitted that: "representations in a certificate certifying that works were complete and had been properly inspected by an Approved Inspector, are the sort of representations that a party would be presumed to rely on in the purchase of a flat or the freehold of a block of flats. Accordingly, ZBC will have to overcome the presumption that the ZBC Claimants did in fact so rely".

11.32 Mr Asquith objected that this was not a pleaded case. I agreed, with the result that the ZBC claimants applied to amend their statement of case to plead the presumption. I refused permission to amend on the basis that it was a very late application and that I was satisfied that ZBC had been deprived of the opportunity to consider obtaining evidence, possibly from the relevant conveyancing solicitors, to overcome the presumption.

11.33 The ZBC claimants also submitted in their written opening that: "A common theme in the ZBC Leaseholders' evidence is that many of them were relying on their conveyancers to make sure that the appropriate documentation was in place before they were willing to purchase their flats. Such documentation likely included the Final Certificates because (a) that is what a prudent conveyancer would seek to obtain (see section I1.4 of The Law Society's Conveyancing Handbook (24th ed 2017)) … and (b) clause 11 of the sale agreements in which JCS specifically provided that the Development (not just the individual flat) was deemed to comply with Bldg Regs provided it had been inspected and approved by the Building Inspector. There is no suggestion that ZBC contends that reliance can not be through an agent (such as a conveyancer) …. In any event, reliance by an agent will suffice: see *Gross v Hillman* [1970] Ch 445, 461 and the final sentence of *Chitty on Contracts* (32nd ed 2015) paragraph 7-031."

11.34 Again, Mr Asquith objected that reliance by the ZBC claimants upon their conveyancing solicitors was not a pleaded case. Again I agreed and again the ZBC claimants applied for permission to amend. I granted permission to amend to plead the allegation, on the basis that it would be addressed and determined solely on the basis of the documentary and witness statement evidence already adduced by the ZBC claimants, which I was satisfied that ZBC had come to trial prepared to meet. I also permitted the ZBC claimants to amend to include an allegation that their conveyancing solicitors had relied upon the Bldg Regs final certificates but refused them permission to include an allegation that it should be presumed that they had done so, either in accordance with the *Dadourian* case or on the basis of an argument that it would have been negligent for them not to have ensured that Bldg Regs final certificates were in place before exchange or completion. Thus the pleaded case in its amended form said that: "In reliance upon: (a) the existence of the [relevant Bldg Regs final certificate] and consequently (b) the misrepresentations contained therein and/or (c) their conveyancing solicitors, the [relevant ZBC claimant] and/or their conveyancing solicitors as their agents completed the purchases on their respective ZBC Flats".

11.35 In closing submissions it was made clear on behalf of the ZBC claimants that, having reflected on the evidence which had been adduced, whilst all of them pursued the claim on the basis of reliance on their conveyancing solicitors who themselves relied upon the Bldg Regs final certificates, only four, namely Zagora, Mr Manchikalapati, Mr Gledhill and Mr Hussain were also pursuing claims based on their own reliance. Given my conclusions in section 5 I have no doubt that neither Mr Manchikalapati nor Mr Gledhill can succeed in establishing personal reliance. I shall return to Mr Hussain below.

11.36 I shall also consider the case of Zagora separately from and subsequent to the cases of the individual leaseholder ZBC claimants. There are two reasons for that. The first is that my consideration of its claim as regards reliance is strictly not necessary for the determination of its claim, which has already failed on the first hurdle of intention. The second is that it raises different factual issues from those raised by the individual leaseholders.

11.37 One overarching point made by the ZBC claimants is that it was not necessary for them or their conveyancing solicitors actually to have read the Bldg Regs final certificates to have relied upon them. This was not contested in terms by ZBC, in my view rightly so. That is because if it is possible to conclude on the evidence that either the individual claimant or his conveyancing solicitor had become aware of the existence of the relevant Bldg Regs final certificate prior to purchase or completion and was aware that it confirmed that the property had been inspected and signed off by the approved building inspector and, even if unconsciously, viewed this as confirmation that the job had been done properly by the approved building inspector, then that in my view would amount to sufficient reliance.

11.38 A further overarching point made by the ZBC claimants is that it was sufficient for them or their conveyancing solicitors to have become aware of the existence of the relevant Bldg Regs final certificate prior to completion, even if they were not aware of its existence prior to exchange. ZBC disputed this on the basis that once the ZBC claimants had exchanged contracts they were committed to the purchase of the flat and, therefore, becoming aware of and relying on the existence of the Bldg Regs final certificate between exchange and completion would be irrelevant. In my view that is true as a statement of the general position. However, given the terms and effect of the relevant sale contracts, as discussed in section 3 above at paragraphs [insert], it seems to me that in principle it might be possible for an individual ZBC claimant to prove that he or his conveyancing solicitors had relied upon the existence of the relevant Bldg Regs final certificate in the context of a decision whether or not to agree to proceed to completion or to contest being compelled to complete on the basis that the individual flat or the whole development had not been properly completed.

11.39 Another overarching point made by ZBC is that the only difference between the 11 leaseholder claimants who bring a claim against it and the remaining 15 who do not is that each of the ZBC claimants completed the purchase of their flats after the relevant Bldg Regs final certificate was issued, whereas each of the non-ZBC claimants did not. Indeed, in some cases the same claimants bring a claim against ZBC in respect of flats completed after the relevant Bldg Regs final certificate was issued but do not bring a claim in respect of flats purchased before that date. This is notwithstanding that in several cases the same firms of solicitors acted for the ZBC claimants and the non-ZBC claimants.

11.40 The ZBC claimants submit that this is a non-point, because it is obvious that those claimants who completed on their flats before the relevant Bldg Regs final certificate was issued cannot, as a matter of chronological logic, have relied on non-existent certificates and, hence, cannot have a claim against ZBC. ZBC, however, submits that this misunderstands the point which it is making, which is that if it was so important for a prospective purchaser and/or their conveyancing solicitors to know that there was a Bldg Regs final certificate in place, because of the additional security which that gave, then why did the non-ZBC claimants complete and, more pertinently, why did their – often the same - conveyancing solicitors not advise them that they should not complete unless and until a Bldg Regs final certificate had been issued?

11.41 The ZBC claimants are, it seems to me, unable to answer this point. They are unable to adduce any evidence from their conveyancing solicitors which might explain the apparent difference in view between those who completed before and those who completed after Bldg Regs final certificates were issued. The only obvious explanation, which would be fatal to the ZBC claimants' case, is that the conveyancing solicitors who acted for the ZBC claimants did not in fact consider the Bldg Regs final certificates to be important. In my view this is the only sensible conclusion to be drawn from the evidence which has been placed before me.

11.42 There is a complete absence of evidence that any of the ZBC claimants or their conveyancing solicitors were provided with the relevant Bldg Regs final certificate either before exchange or before completion. There is no suggestion that they asked for it or sought to obtain some comfort, legal or otherwise, that it would be provided. Nor is that particularly surprising, given that any sensible purchaser and his conveyancing solicitor would be far more interested in the fact that JCS was able to offer a ZBG building warranty as part of the sale package, since that was a policy which was directly enforceable by the purchaser against a blue-chip insurer in accordance with its terms in the event of any breach of Bldg Regs whereas – as any lawyer would know, either through existing familiarity with *Anns v Merton LBC* or a modicum of research – no claim could be made against the building control inspector even on proof of negligence, since only proof of fraud would suffice.

11.43 If the contracts had provided for completion to take place once JCS had provided the purchasers with a copy of the Bldg Regs final certificate then I accept that the position would be very different. However they did not, making the trigger the provision of the cover note. There is no basis for inferring that the conveyancing solicitors would have believed there to have been a necessary correlation between the issue of the cover note and the issue of the Bldg Regs final certificate such that the issue of the cover note must have meant that the Bldg Regs final certificate had already been issued. Contractually, there is no relationship between the two. In practice, as this case has revealed, the cover note should be followed by the building warranty final certificate and then by the Bldg Regs final certificate, but the process of issuing a cover note is a separate process from the issue of the Bldg Regs final certificate.

11.44 Thus, in the absence of specific evidence in a particular case that the conveyancing solicitors did in fact come to know of the existence of the Bldg Regs final certificate and considered it relevant to whether or not their client was obliged to complete if their client was not willing to complete, then in my view the ZBC claimants' case based on their relying upon the reliance placed by the conveyancing solicitors upon the Bldg Regs final certificate must fail.

11.45 I have already, in that context, considered Dr Ikpeme's case and concluded that he cannot succeed on that basis given my assessment of the facts.

11.46 Mr Hussain's case raises more difficult issues. I am satisfied that the real question is the reliance of Mr Syed who, I am satisfied, was undoubtedly acting as agent of Mr Hussain for all relevant purposes. The evidence shows clearly that before completion he had been made aware of and received a copy of the Bldg Regs final certificate. It is also clear that he was not prepared to accept that certificate as conclusive, because he was challenging both JCS and Mr Mather as regards what he regarded as the remaining unresolved defective state of the opening windows. Moreover, there is no clear documentary evidence which shows that he believed or he was being advised by the conveyancing solicitors that the issue of the certificate would prevent Mr Hussain from contesting his obligation to complete on the basis of the ongoing problem with the french windows and balcony.

11.47 In my view and on balance Mr Hussain has not succeeded in proving reliance. It must be borne in mind that at no time prior to exchange was the Bldg Regs final certificate even in existence, let alone referred to. It follows, in my view, that it could only have been relied upon prior to completion on the basis that it influenced the decision whether or not to complete. There is simply no documentary evidence which shows that it did influence that decision. It was only produced because Manchester Building Control suggested that Mr Syed should check that it related to the right flat. It was not deployed by JCS to force Mr Hussain to complete. There is no credible evidence that Mr Hussain's solicitor or Mr Hussain or Mr Syed believed that it did. The email written to Mr Mather the day after completion is in my judgment not credible as an accurate record of fact; if Mr Syed had genuinely believed that Mr Hussain was compelled to purchase because of the certificate then I have no doubt that he would have continued to correspond with Mr Mather from March 2010 onwards to seek to persuade him to accept that the certificate should be withdrawn or suspended until the ongoing problem with the opening windows as he perceived it had been resolved. It seems to me that he is just writing to preserve Mr Hussain's position in relation to any potential future claim. There is no credible evidence that Mr Syed had any positive belief in the accuracy of the certificate other than in relation to the opening doors. Indeed, there is no credible evidence that he had any positive belief in its accuracy at all.

11.48 In summary, I am satisfied that all of the individual leaseholder claimant cases fail in relation to reliance on and by their conveyancing solicitors and I am also satisfied that those who also allege personal reliance fail on the facts as well.

11.49 I should also add, for completeness, that even had I allowed the individual leaseholders to amend to plead the presumption of reliance and/or to plead that it should be presumed that the conveyancing solicitors relied because it would have been negligent not to obtain a copy of the Bldg Regs final certificate before exchange or completion I would not have found in favour of the claimants on the issue of reliance. In short, that is because:

(a) All issues of reliance are fact-sensitive.

(b) In a typical deceit case, where a representor has made a fraudulent misrepresentation, intending the representee to rely on it, and the representee has in fact entered into the transaction which the representor intended him to enter into, then it is relatively easy to make a presumption in favour of the representee.

(c) Here, in the particular context of this case it cannot so easily be presumed that the representee has relied on the misrepresentation, given that the provisions of the sale contracts entered into by the individual leaseholders make it clear that: (i) the Bldg Regs final certificate has no particular contractual significance to the purchasers when compared to the cover note; (ii) the Bldg Regs final certificate has no particular commercial significance to the purchasers given that they are obtaining the benefit of the ZIP building warranty in any event.

(d) When considering all of the evidence referred to above, I am satisfied that any presumption that might otherwise operate would have been discharged by ZBC in the particular circumstances of the case.

(e) On the facts of this case it cannot be presumed that the conveyancing solicitors must have obtained and relied on the Bldg Regs final certificate when: (i) the evidence before the court is that very few in fact did obtain the Bldg Regs final certificate and there is no reason to believe that others did; (ii) the evidence before the court is that none actually relied on the Bld Regs final certificate and none advised their clients along the lines that this provided an assurance that the flat and common parts had been properly constructed in accordance with the Bldg Regs and that they could place legal reliance upon this assurance in certain circumstances; (iii) the authorities and standard forms placed before me by the claimants do not establish that it would have been either common practise to obtain, or negligent not to obtain, the Bldg Regs final certificate before exchange or completion on the particular facts of this case.

11.50 That leaves just Zagora, whose claim I have already held fails at the hurdle of intention. In short, and by reference to the evidence I summarise and findings I make at section 5 above, I would have found that Zagora itself did rely on the Bldg Regs final certificates when proceeding to exchange and complete. Reliance on and by its conveyancing solicitors does not arise because it is so plain that Mr Broadhurst and Mr Robinson were personally relying on the Bldg Regs final certificates being in place.

Limitation

11.51 Given the conclusions I have already reached, there is no need to consider limitation in relation to any of the ZBC claimants, however for completeness I shall do so shortly.

11.52 First, it is common ground that there is no limitation issue in respect of Zagora's claim against ZBC, whereas limitation issues are raised against the individual leaseholder ZBC claimants.

11.53 The individual leaseholder ZBC claimants rely on section 32(1) of the Limitation Act 1980, which provides that time for claims in fraud does not begin to run until "the plaintiff has discovered the

fraud… or could with reasonable diligence have discovered it". Given that the ZBC leaseholders' claims were issued on 11 August 2017 the onus is on them to establish that time did not start to run until sometime after 11 August 2011.

11.54 As the claimants said in their written opening section 32(1) was considered in *Allison v Horner* [2014] EWCA Civ 117, where the following points were made at paragraphs 14 to 16:

(1) Discovery of the fraud refers to knowledge of the precise deceit which the claimant alleges had been perpetrated on him. It follows that knowledge of a fraud in a more general sense is not enough to start the limitation period running.

(2) Knowledge of the deceit alleged on the part of a claimant's agent will be insufficient to start the limitation period running under section 32(1). Similarly, the fact that the claimant's agent could with reasonable diligence have discovered the alleged deceit does not start the limitation period running.

(3) Section 32(1) is concerned with whether the claimant could (rather than should) with reasonable diligence have discovered the relevant deceit at any particular time. Accordingly, a claimant has to establish that he could not have discovered the fraud without taking exceptional measures which he could not reasonably have been expected to take.

11.55 In its written opening ZBC referred me to the judgment of Millett LJ in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 418, where he held that:

> "The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree." (Italics in original)

11.56 Applying these principles to the facts of this case, in my view the starting point must be to enquire at what point each of the individual leaseholders, acting with reasonable diligence, did in fact discover or ought to have discovered that: (a) his or her flat, including the common parts used as a means of escape in case of fire, were not compliant with the Bldg Regs; (b) given the nature and extent of the non-compliances, the building control inspector could not have taken reasonable care in inspecting and certifying the flat and associated common parts; (c) given the circumstances, the building control inspector must have known that reasonable care had not been taken (or at least have been reckless as to whether or not reasonable care had been taken). However, the acts or omissions of their agents or the knowledge which their agents in fact acquired or ought to have acquired will not be attributed to the individual leaseholder.

11.57 In my view it would follow that the starting point would have to be actual knowledge on the part of an individual leaseholder that the flat or associated common parts were Bldg Regs non-compliant in a serious way and that this must have been blindingly obvious to any building control inspector.

11.58 Taking Mr Tarasov as a good example, I am satisfied that he did not acquire nor could he with reasonable diligence have acquired this level of knowledge before August 2011, based only upon knowledge that the development was incomplete and that there were a number of serious defects such as an absence of lifts. Even his knowledge in August 2012, once he had been in contact with Freehold Managers and Mainstay and had received the risk assessments produced by BDW which clearly indicated problems with fire safety, would not have been sufficient. Nor would his knowledge by January 2013, when he obtained the surveyor's report which identified fire safety and structural defects to the common parts, but did not make any reference to the possibility that the Bldg Regs final certificate ought never to have been issued, have been sufficient. In my view the starting point could only have been in April 2013, when he was informed by Mr Broadhurst that there was a claim against ZBC.

11.59 I reach the same conclusion in relation to Ms Bedi. Although she brought proceedings before August 2011 they did not involve claims against ZBC nor ZIP for that matter nor did they raise allegations of serious non-compliance with the Bldg Regs. Whilst it might be said that those advising her at the time might have considered investigating the possibility of a claim against ZIP and/or ZBC which might have brought the relevant facts home to Ms Bedi, that never happened and she is not to be fixed with knowledge which she could only have gained had her advisers acted differently.

11.60 Mr Dickie is more marginal. As I have recorded in section 5, by February 2011 he positively asserted that in some respects the Bldg Regs had not been complied with and, in my view, had he given the matter any thought at that time he would have appreciated that the effect of what he was asserting was that the development had been signed off by the building control inspector when it ought not to have been. Nonetheless on balance I do not consider that this was enough for him with reasonable diligence to commence an investigation with legal and expert assistance which would have provided him with sufficient knowledge by August 2011. In context, he was making a modest claim against ZIP and was not aware of serious structural or fire safety related defects making his flat unsafe to occupy – especially since it was being lived in by his daughter - or unsaleable.

11.61 The only individual leaseholder where I would have reached a different conclusion is Mr Hussain. Assuming I am wrong as regards reliance, by 5 July 2010 Mr Syed clearly believed at that point that the certificate was wrongly issued and that had reasonable steps been taken by Mr Mather it would not have been issued. By that stage Mr Syed had already previously been advised by Manchester Building Control to commission a survey and instruct a solicitor. Mr Hussain cannot seek to argue that this knowledge of his agent should not be attributed to him since the email was sent to him for him to send on to Mr Mather and he cannot say: "I did not bother reading it". Whilst knowledge of the problem with the balcony is not knowledge of the other defects, had Mr Hussain acted reasonably and made further enquiries with Mr Syed it would not have been unreasonable for him to have acted as recommended by Manchester Building Control. In such circumstances there is no reason to believe that the other serious problems with the development,

specifically the fire safety issues, would not have been revealed in the same way as they were seen by the surveyor instructed by Mr Tarasov later on. There is no reason to believe that Manchester Building Control would not have been prepared to provide copies of its correspondence with ZBC. On any view well before August 2011 Mr Hussain would have had the requisite knowledge. Insofar as the only reason given by Mr Syed for not following the advice from Manchester Building Control was a lack of funds that cannot be a sufficient answer, at least in the context of a buy-to-let investor who ought to have been extremely concerned about the risk of harm to his tenants and who has not adduced evidence that he would not have been able to afford relatively modest expenditure.

Loss

11.62 Finally, but for my previous conclusions I would have had to consider the question of loss, where a number of different and potentially complex issues have arisen.

11.63 The starting point is that the parties agree that the primary basis of claim is diminution in value, to which should be added any justified claims for associated losses and from which should be deducted any justified credits for associated gains.

11.64 I should record that there was a large measure of agreement as between the valuers instructed by the claimants and by ZBC, which has made my task easier. I should also express my gratitude to the legal representatives for the ZBC claimants and for ZBC who, during the course of the proceedings and continuing after the close of the trial proper, endeavoured to agree figures as figures, resulting in the production of an updated schedule of loss which was sent to me on 30 November 2018 and which contained agreement on everything save for 5 individual issues. Taking those shortly:

(1) An issue arises as to whether or not the actual interest costs incurred by Zagora should be claimed throughout or should be reduced on the basis that Zagora would, as planned, have been able to refinance at lower interest rates but for an unrelated issue relating to a separate lease which was not picked up or dealt with by Zagora's conveyancing solicitors at the time. In cross-examination Mr Broadhurst accepted that it was Zagora's conveyancing solicitors who were responsible for these costs being incurred. In closing submissions Zagora argued that this was irrelevant, since: "ZBC is responsible for all the loss that flows from a transaction induced by its fraud. Accordingly, it does not lie in the mouth of ZBC to say that the losses claimed could not reasonably have been foreseen (*Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, at 167). The rule of law is that any damage directly flowing from the fraudulent inducement may be recovered unless it is caused by the claimant behaving completely without prudence or common sense (*Doyle v Olby*)". I agree with that submission. Therefore, these losses can be recovered. Mr Asquith invited me to clarify whether the same reasoning leads me to reject his further argument, raised in closing submissions, that Zagora had, but did not take, the opportunity to proceed with a loan from RBS at a lower rate in May 2013 and I can confirm that it does. Moreover, I agree with Mr Selby that this submission is not made out on the facts, since it is based solely upon a passing answer from Mr Robinson in cross-examination by Mr Baatz on a point which had not previously been raised in terms by ZBC nor taken up or further investigated with Zagora at trial.

(2) Mr Spadaro. I agree with ZBC on the correct figure for rental income for Flat 77.

(3) Mr Hussain. I agree with the claimant that it is irrelevant that Mr Syed was depositing monies into his account in order to enable him to discharge the mortgage on the property. In my view Mr Hussain, as the legal owner and the party legally liable under the mortgage can recover the mortgage payments even though he was being indemnified against them by Mr Syed or, it appears, in part by his father.

(4) Mr Dickie. I agree with ZBC that the claimant cannot recover mortgage costs plus additional rental costs for his daughter's alternative accommodation, so that the latter are irrecoverable.

(5) Ms Anjali Bedi. I accept the claimant's figure of £1,094.38.

11.65 Turning to the other issues between the parties, it is convenient to address them by reference to ZBC's written closing submissions. Since there will be no judgment in favour of any of the claimants against ZBC, there is no need for me to determine anything other than the principle between the parties. I do not need to decide figures.

11.66 In paragraph 205 it is submitted that the starting point for diminution in value is the no defect valuation of the flat in question, as opposed to the actual price paid if greater. Adopting the approach in *Doyle v Olby* referred to above, I do not agree.

11.67 In paragraph 206 it is submitted by ZBC that Zagora's claim for diminution in value should not have as its starting point the defect free valuation, £410,000, since Zagora was aware of some defects in the development prior to purchase. It is common ground as I understand it that the starting point should be the actual price paid, which seems to me to be correct in principle. Mr Asquith invited me to clarify whether or not I had rejected his argument in closing submissions that ZBC did not cause Zagora any loss because Zagora decided to hold on to the freehold in May 2013 after becoming aware of the fire safety issues and despite receiving some expressions of interest. I clarify that I do reject this argument on the basis that: (a) this evidence does not detract from the evidence, agreed between the experts, that objectively there was a diminution in value; (b) there is no evidence that it could in fact have re-sold the freehold in May 2013 or subsequently at the same price as it paid for it.

11.68 In paragraph 210 and onwards ZBC submit that the valuation should take into account the value attributed to the ZBG building warranty. The point, as I understand it, is that if a valuer was aware of the presence of defects, but also aware that they would be covered by the warranty insurance, then there would be no basis for discounting for the cost of remedial works if they were going to be paid by the insurer anyway. Subject to points about the excess and any discount to reflect any uncertainty and aggravation, that argument seems to me to be correct in principle. However, Mr Selby made what seems to me to be an unanswerable point in response, which was that under the structural defects policy here there was an exclusion for anything known about by the insured when purchasing the flat. On that basis, if a valuer was valuing a flat for a prospective purchaser which had the benefit of this policy but was known to have defects, the valuer would have to proceed on the basis that the policy would not pay out in respect of those defects anyway. Although Mr

Asquith suggested that this consequence could be avoided by the vendor agreeing to make the warranty claim and then either to assign the claim to the purchaser or to agree to pass any recovery to the purchaser, that argument falls foul of the further provision in the policy that a homeowner is not entitled to make or continue a claim under the policy once he has sold or otherwise disposed of his interest in the flat. As Mr Selby submitted, in the real world no prospective purchaser is going to take on this level of risk in relation to what otherwise ought to be a straightforward purchase of a simple buy to let investment flat in a new build development in Manchester. In the circumstances, I also agree that the appropriate deduction for the aggravation factor should be 10% and not 5% as suggested by Mr Massie, ZBC's valuer, on the basis of the warranty cover being in place.

11.69 However, given my conclusions in relation to the proper construction of the leases, I reject the argument advanced by the claimants that the valuation both of the individual flats and of the freehold should take into account that the leaseholders would not in fact be obliged to contribute towards the cost of repairing the pre-existing defects in the development the subject matter of this case, since I am satisfied that in fact this is not the case. The position, as I am satisfied it is, is that the works ought in principle to be done by a properly constituted management company and then recovered pro rata from the individual flat owners. On that basis, there is no appreciable risk factor. As invited by Mr Asquith, for clarity I confirm that I reject the claimants' submission based on its analysis of the proper construction of the leases and the evidence of its expert Mr Taylor that the freehold and leasehold interests in the development are valueless.

11.70 I also reject the argument advanced by the claimants that it is appropriate to value on the basis of the flats being sold off at the same time, rather than on an individual basis.

11.71 It is common ground that the diminution in value should be assessed by reference to the remedial costs, which, as regards the individual leaseholders, would have to be ascertained by reference to my conclusions in relation to the proper cost of those works, adopting the methodology referred to in the Claimants' written closing at paragraphs 547 and following. Given my conclusions on liability, I do not propose to undertake that analysis in this judgment. In relation to Zagora I clarify, as invited by Mr Asquith and agreed by Mr Selby, that it is common ground that the diminution in value would be £25,000.

11.72 Otherwise, where there are specific differences as between the claimants' expert witness Mr Taylor and Mr Massie, I agree with ZBC that Mr Massie was by far the more convincing and reliable witness, so that I would prefer his opinions in preference to those of Mr Taylor.

11.73 There was also an issue as to whether or not any recovery against ZBC ought to take into account and the claimants ought to give credit for any recovery against ZIP. In my judgment it should not, on the basis that in accordance with established principles any recovery obtained through insurance cover taken out by a claimant should not be taken into account when valuing a claim against a defendant tortfeasor.

11.74 The claimants referred me, at [252.2] of their closing submissions, to the summary of the relevant principle, that of *res inter alios acta*, given by Lord Sumption JSC in *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32 at [11] as follows:

> "The general rule is that loss which has or could have been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as a cost of mitigation. To this there is an exception for collateral payments (*res inter alios acta*), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying each case. In spite of what the Latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss…The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose."

11.75 Applying that approach the proper analysis in this case, notwithstanding the close factual connection between ZIP and ZBC, is that the claimants were – on the assumption that they established liability against ZBC - induced into purchasing flats which they would not otherwise have purchased as a result of the deceit of ZBC as to their proper performance of its duty as building control inspector. They are entitled to damages for the losses flowing as a result. Separately, as part of the commercial transaction with the vendor, they obtained the benefit of buildings warranty insurance cover. There is no basis in principle, in my judgment, for requiring them to give credit for their recovery under that insurance policy.

11.76 Finally, it follows from the conclusions which I have reached that the question as to whether or not the ZBC claimants are entitled to declaratory relief does not arise.