Neutral Citation Number: [2019] EWHC 142 (TCC)

Case No: D50MA026

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester, M60 9DJ

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
(Sitting as a Judge of the High Court)

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Between:

	BLUE MANCHESTER LIMITED	**Claimant**
	- and -	
	NORTH WEST GROUND RENTS LIMITED	**Defendant**

- -

MR. PAUL DARLING QC and MR. EDWARD HICKS (instructed by Freeths LLP, Birmingham) appeared for the Claimant.

MR. DERMOT WOOLGAR (instructed by JMW Solicitors LLP, Manchester) appeared for the Defendant.

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Hearing dates: 7, 8, 9, 10, 11 January 2019
Draft judgment circulated: 21 January 2019
Approved judgment handed down: 31 January 2019

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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

A. Introduction and summary

1. The Beetham Tower ("**the tower**") in Manchester is currently the tallest completed building in Manchester and, indeed, in the UK outside London[1]. It was designed by SimpsonHaugh Architects Ltd and completed in or around 2006 and has become what has been said to be an iconic feature of the Manchester skyline. In part this is because of its slim rectangular shape with a distinctive cantilevered overhanging section from mid-height level upwards. It is also because its external elevations are fully glazed, the façades being made up of glass panels which form a sleek uninterrupted wall of glass, reflecting the sunlight in which Manchester is - despite common belief outside Manchester to the contrary - frequently bathed. The glass panels are in fact a mix of double-glazed vision units (i.e. glass both inside and out) and single glazed insulated shadow box units ("**SBUs**") (i.e. glass outside but an opaque panel inside). The panels were designed and constructed to be hung from a unitised frame which itself is hung from the edge of the floor slabs. The need for externally visible fixings is avoided by the panels being attached to the frame by strips of structural sealant around their perimeter which restrain them from becoming loose and at risk of blowing off under wind pressure.

2. A serious problem which emerged in 2014 was the discovery that in the SBUs[2] the bond provided by the structural sealant was failing in some cases. An urgent investigation was conducted by Carillion Construction Limited ("**Carillion**") as the main contractor which built the tower, which also involved BUG-Alu technic GmbH ("**Bug**") as the specialist design and build sub-contractor which designed and installed the façade. The cause of the failure appeared to be the failure of the bond between the structural sealant and the polyester powder coating which had been applied to the frames. A decision was very swiftly taken to ensure the safety of the 1,350 SBUs across the building by screw stitching pressure plates to the frame profiles to hold the panels securely in position. This was completed by the end of November 2014 and was intended to be a short-term expedient pending a full investigation and the design and installation of a permanent remedial solution. However, the investigatory and remedial processes were so protracted that nothing concrete had been achieved by January 2018 when, as is well known, Carillion went into liquidation.

3. The tower has 47 floors. The first 23 floors form a Hilton Hotel ("**the hotel**"), including a bar known as Cloud 23 situated, as its name would suggest, on floor 23 which is where the cantilevered overhanging section begins. The floors above contain residential flats. The defendant is the freehold

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1 It has since been eclipsed by the South Tower at Deansgate Square but that building is not, at the time of writing, fully completed.

2 There is no evidence that the double glazed units are similarly affected but, since there is no material difference in their construction, this may only be - the experts suggest - because lesser temperatures are experienced within these units than within the SBUs.

owner of the tower, having acquired the freehold reversion from the original developer in 2010. The claimant is the owner of the hotel, having acquired the 999 year lease of the hotel part of the tower from the original hotel proprietor in 2011. The claimant brings this claim against the defendant seeking to compel it to undertake works under the repairing covenant in the lease to provide a permanent remedial solution for the SBUs. Although there had been some issue as to the claimant's entitlement to bring this claim that issue is no longer live following the claimant's (belated) production of a written assignment of the management agreement for the operation of the hotel.

4. The claimant has three particular concerns about the existing temporary solution. The first is that being only temporary it says that there are real concerns as to the safety of the SBUs. The second is that it says that the appearance of the stitch plates adversely affects the appearance of the tower and hence the overall impact the hotel makes as a leading 4 star Manchester city centre hotel which the claimant seeks to market as a "destination" venue both for overnight guests and visitors to its bar, restaurant, conference, event and recreational facilities. The third is that since 2014 there have been safety barriers and then hoardings at ground level which, the claimant says, adversely affects vehicular access by guests to the hotel entrance and hence their "arrival experience" as well as impeding the valet parking service which the hotel provides, as well as obstructing the view into and out of the foyer and the ingress of light into the foyer.

5. The defendant's position, in short, is that whilst it accepts that the existing solution is only intended to be temporary it says that nonetheless as matters currently stand it is a sufficient remedial solution which can remain whilst the defendant pursues claims against Carillion's insurers and Bug which it hopes will enable it to fund a permanent solution. It says that as matters stand it has sufficiently complied with its repairing obligations under the lease so that it is not in breach and the claimant is not entitled either to specific performance – which it says would be inappropriate anyway, given the lack of a clear agreed remedial specification - or to damages.

6. Whether the claimant or the defendant have any rights or remedies against Bug, Simpson or Carillion's insurers is not a matter for determination at this trial, which is concerned solely with the position as between the claimant and the defendant. The claimant has issued separate proceedings against Bug and Simpson and the defendant has issued separate proceedings against Bug and Carillion's insurers.

7. Furthermore, any issue as to whether or not the defendant is able to recover from the claimant under the service charge provisions of the lease any future expenditure which may be incurred in remedying the defects is also not a matter for determination at this trial. The claimant's position as articulated in correspondence and as pleaded in voluntary particulars of its case is that such expenditure is clearly excluded by reference to the express terms of the lease whereby costs relating to the initial construction of the building and the remedying of any inherent defect are expressly excluded. The defendant has not chosen to contest that position in correspondence or in its points of defence to those voluntary particulars but neither party raised the issue in their primary pleaded cases or otherwise suggested that it should be resolved in these proceedings. I proceed on the basis that the defendant's liability under the lease must be determined on the basis that there is, at the very least, a real question mark over its ability to recover any costs from the claimant.

8. Likewise, it is possible that the defendant may seek to recover expenditure in remedying the defects against the owners of the leasehold interests in the residential flats above the Hotel. Again, however, that is not a matter for this trial and I should make it clear that the terms of the residential flat leases are not in evidence nor has any argument been addressed to me in that regard. It follows that I should

not and do not speculate as to whether or not the defendant may be able to recover some or all of any costs which it incurs from the residential flat leaseholders.

9. Finally, the scope of this trial is limited to the issue of liability which, as was made clear in the order made in March 2018 by which directions were given and the liability issue was listed for trial, includes the issue as to what, if any works, the defendant is liable to undertake pursuant to its obligations under the lease but not the issue of the quantification of the cost of such works.

10. There are three separate and subsidiary issues which are also for me to determine as part of this trial. The first is the claimant's claim for an injunction and/or damages in relation to the continued presence of the hoardings at ground level. The second is the claimant's claim for damages in relation to interference with the water supply to the hotel in January 2017 in circumstances where the original impetus for this claim was an application for urgent interim injunctive relief to compel the defendant to provide an adequate supply of water to the hotel. As regards both the only issue for this trial is the issue of liability. The third is the issue of to the costs of the claimant's application for interim injunctive relief, in circumstances where there is no continuing claim for injunctive relief in relation to the water supply issue. Although there has also been a running issue as to the defendant's compliance with its disclosure obligations, it is common ground that this is not an issue relevant to my determination of the substantive issues or the costs issue identified above and falls for determination once I have provided my substantive judgment, and so I disregard that matter at this stage.

11. I have heard from two witnesses of fact called by the claimant and from four witnesses of fact called by the defendant. I have also heard from one expert witness called by each party in relation to the disrepair issue. I have received in evidence a report from a single joint expert in relation to the water supply issue. I have also been referred to a number of relevant documents. I have had the benefit of excellent written opening submissions and oral closing submissions from Mr Darling QC and Mr Hicks for the claimant and Mr Woolgar for the defendant (supplemented in both cases by supplementary written submissions in relation to the costs issue), including detailed reference to the authorities, and to all of whom I am greatly indebted.

12. In short, my conclusions are as follows:
    (1) The claimant succeeds on the disrepair issue and is entitled both to specific performance to compel the defendant to undertake a permanent remedial scheme as well as to damages to be assessed.
    (2) The claimant also succeeds on the hoardings issue and the water supply issue and is entitled to damages to be assessed.
    (3) Two thirds of the claimant's costs of the application for an interim injunction should be costs in the water supply issue.

13. I provide my detailed reasons below.

B. The terms of the lease

14. The lease of the part of the building comprising the hotel was entered into on 1 September 2006. Its terms were subject to some modest variation on 13 May 2010. The term was stated to be 999 years from 1 January 2003 with the tenant paying a substantial premium of £60 million and a modest

continuing rent of £20,000 p.a.; those financial terms of course reflecting the commercial reality that a long lease of such a duration is the practical equivalent of an outright purchase.

15. The tower was defined as "the building" and was divided for the purposes of the lease into three parts, comprising: (a) what was defined as "the property" (effectively, the hotel, but more specifically defined by clause 1.24 by reference to the more detailed description in schedule 1 part 1); (b) what was defined as "the retained property" (effectively, the residential flats); and (c) the "common parts" (as defined by clause 1.14). Since it is common ground (albeit only for the purposes of this action) that: (a) the external façade, including the frame and the SBUs; (b) the service installations, including the water supply to the hotel[3] are included within the common parts, it is unnecessary for me to delve further into this definition.

16. The landlord's repairing obligation is found in clause 7.2 under which the landlord covenanted: "at all times to keep in good and substantial repair and when necessary as part of repair to reinstate replace and renew where appropriate the Retained Property and the Common Parts PROVIDED THAT the Landlord shall not be liable for a defect or want of repair reinstatement replacement or renewal relating to the Property unless the Landlord has first had notice thereof and sufficient opportunity to remedy it nor for defects or wants of repair decoration reinstatement replacement or renewal which are the subject of obligation under the Tenant's covenants in this Lease".

17. I shall refer to the effect of the operative words when I consider the law in section C below. There might have been some debate about the proper construction of the proviso, since it is not immediately apparent whether or not the reference to the "Property" was intended or was a mistaken reference to the "Retained Property" but, happily, that is not an issue of any significance to the current case

18. By clause 7.4.1 the landlord also covenanted: "to keep the Retained Property and Common Parts in good and tenantable decorative condition and forthwith to replace all broken glass". By part III of the first schedule certain rights were reserved to the landlord, including in paragraph 1: "The rights for the Landlord and the tenants of other parts of the Building at reasonable times only except in the case of emergency and whenever possible on giving reasonable notice to enter the Property for the purpose of executing works of repair decoration reinstatement replacement renewal alteration addition or improvement to or upon any other part of the Estate or any land or premises adjoining the Estate and such rights as are required in connection with clause 6.5 but not further or otherwise the work being done with reasonable despatch causing as little disturbance damage and inconvenience as possible and making good forthwith all damage caused".

19. Although Mr Darling and Mr Hicks submitted that these clauses were relevant to the proper construction of clause 7.2 as showing the high standard of repair required under that clause I prefer Mr Woolgar's submission that they add nothing of relevance to that matter.

20. I should also mention clause 7.11, which is a form of *Jervis v Harris* clause under which, in the event of default by the landlord in the performance of its repairing obligations, the tenant has the right to enter the common parts and undertake repair works at the landlord's cost.

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[3] In his written opening Mr Woolgar observed that more recent evidence indicated that the water installations the subject of the water supply issue might not in fact form part of the common parts but, since the defendant had always proceeded on the basis that they were and since it was conceded in the defence that they were and since this part of the claim is historic anyway he realistically did not seek to amend the defence so as to take this point.

21. In relation to the hoardings issue, the claimant relies on clause 7.15 (as it was before renumbering) under which the landlord covenanted: "not to affix hoardings advertisements or notices of any description to the external surfaces of any external walls bounding the Property".

22. Mr Woolgar submits that this clause is of no application to this case since the barriers and hoardings erected by Carillion were self-standing structures, installed on the surface of the open area adjoining the building itself. I agree; in my view this clause only applies to hoardings affixed to external surfaces of external walls which bound the hotel.

23. The claimant also relies (by amendment) upon clause 7.16 of the lease under which the landlord covenanted: "not to park on or otherwise obstruct the Common Parts save during reasonable periods for loading and unloading in the loading bays nor litter or make untidy the Common Parts".

24. Although Mr Woolgar submitted that this covenant only applied to parking or other like transient obstructions I do not agree that the words "or otherwise obstruct" can be so qualified. However counsel for both parties accepted, and I agree, that a clause such as this cannot be read in isolation from the terms of the lease as a whole and the general law, so that the specified exception for loading and unloading in the loading bays is not exhaustive as to the circumstances in which what would otherwise be a breach of clause 7.16 may be justified by reference to the reasonable exercise or the reasonable performance of other powers and duties enjoyed by or imposed upon the landlord under the lease or the general law.

25. By clause 8 the landlord gave the usual covenant for quiet enjoyment of the property.

26. By paragraph 1 of part II of the first schedule the tenant was granted: "The right of way with or without vehicles at all times for all purposes over and along such parts of the Common Parts required for the purposes of access to and egress from the Property and to otherwise utilise the Common Parts for all reasonable purposes in connection with the Property…".

27. It is common ground that, as shown by the first plan attached to the lease, there is a diagonal access way which runs from the two roads abounding this part of the site (Great Bridgewater Street and Deansgate) in front of the entrance to the hotel foyer, with some parking areas to either side of that access way. Behind that access way, in a approximate triangular section, there is an area immediately in front of the foyer to the north side of the entrance where the hoardings are currently located.

28. By paragraph 4 of part II of the first schedule the tenant was granted: "the free and uninterrupted right of use…of…water…from and to the Property through the…Service Installations…constructed in or under any part of the Estate". Moreover, among the other building services which the landlord was obliged to perform were obligations, introduced by the variations to the lease, to provide "…hot and cold water to the hot and cold water taps in the Building" and to repair "any…hot and cold water systems…in the Building".

C. The law

29. There has been little if any disagreement on the relevant principles of law to be applied in this case. The disagreement has focussed on the application of those principles to the particular facts of this case. Both Mr Darling and Mr Hicks for the claimant and Mr Woolgar for the defendant have referred

extensively and approvingly to the detailed commentary appearing in *Dilapidations: The Modern Law and Practice*, 6th (2018) edition, by Dowding, Reynolds and Oakes ("***Dowding***").

Disrepair

30. Counsel for both parties have referred to and adopted in their submissions the five-part analysis of liability propounded by the authors of *Dowding*. They suggest that in many, if not most, cases the following questions may conveniently be asked and answered (whilst recognising that there will inevitably be some overlap between the individual questions in many cases):
    (1) What is the physical subject-matter of the covenant?
    (2) Is the subject-matter in a damaged or deteriorated condition?
    (3) Is the nature of the damage or deterioration such as to bring the condition of the subject-matter below the standard contemplated by the covenant?
    (4) What work is required in order to put the subject-matter of the covenant into the contemplated condition?
    (5) Is that work nonetheless of such a nature that the parties did not contemplate that it would be the liability of the covenanting party?

31. As the authors of *Dowding* observe, it will be difficult if not impossible to find in just one of the authorities a summary of all of the legal principles which may applicable to the facts of any particular case since each case will throw up its own individual mix of clauses and facts. In the circumstances, rather than attempt my own summary from the authorities of all of the legal principles applicable to this particular case I have borrowed extensively from the commentary in that textbook and I express my debt of gratitude to the authors accordingly.

32. So far as the interpretation of the repairing covenant is concerned the following points are material.

33. The words "good and substantial" make it clear that the premises do not have to be kept in perfect repair or in a pristine condition. It is well-established that the standard of repair is such repair as, having regard to the age, character and locality of the premises, would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them. See the cases discussed in *Dowding* at 9-04 and 0-05.

34. So far as age is concerned, the general principle is that the standard of repair is to be assessed by reference to the circumstances at the date on which the lease is granted, albeit having regard to the age of the premises at the relevant time (see the cases discussed in *Dowding* at 9-07 and following).

35. So far as character is concerned, in *Gibson Investments Ltd v Chesterton Plc* [2002] 2 P&CR 494 Neuberger J said:

    "Good and substantial repair means more than just that the building must be capable of occupation. It means in this case that the building must be in a state of repair which is appropriate for a high class office building in a prime office location in Birmingham."

36. Clause 7.2 of the lease expressly states that "when necessary" the obligation to repair extends to reinstatement, replacement or renewal. This is plainly a wide repairing covenant, although it is true that the extending words are qualified by reference to necessity. However, this qualification should not be taken too far, since the decision of the Court of Appeal in *Truscott v Diamond Rock Boring Co*

Ltd (1882) 20 Ch. D. 251 (discussed in *Dowding* at 9-03) is authority for the proposition that the inclusion of the word "necessary" does not materially qualify or otherwise affect the proper interpretation of a repairing clause. In that case the covenant required to tenant "to do necessary repairs" and it was held that this qualification added little, since the obligation to repair only arose where it is necessary to do so anyway.

37. There was some debate as to the inter-relationship between disrepair and functionality. Mr Darling and Mr Hicks submitted that there was no necessary correlation between disrepair and functionality, so that a property could be in disrepair even though remaining functional and vice versa, whereas Mr Woolgar submitted that the question of functionality was an intrinsic consideration when considering whether or not a property was in disrepair. In my judgment there is no hard-edged question of principle in issue here since the answer will depend on the particular facts of the case, as illustrated by the cases discussed in *Dowding* at 9-29. Minor disrepairs which do not affect function may not fall below the contemplated standard of repair, whereas a property may not be functional but, if there is no disrepair (e.g. if it is due to an inherent defect), the covenant will not be breached.

38. What is clear is that it is not necessary for the disrepair to be so serious as to make the property currently non-functional for the covenant to be breached: see *Re Mayor and Corp of London* [1910] 2 Ch. 314 referred to in *Dowding*. In that case an underground railway station was constructed with walls, columns, girders and arches which supported Smithfield Meat Market. The station was then let on leases containing a covenant by the tenant:

"Well and sufficiently [to] maintain, uphold, support, and keep in good, substantial, and tenantable repair, order, and condition … the premises hereby demised, including the retaining and other walls, piers, pillars, supports, and roof, forming a part of the same."

Some of the girders supporting the meat market had corroded and become weakened since they were originally constructed. The tenant contended that its liability was confined to keeping the girders in such a condition as would enable them safely to support the meat market. Eve J rejected this, holding the tenant liable to keep the girders in substantially the same condition as they were in at the date of the tenancy. He said:

"I think that in the face of this covenant, plain and explicit in terms, it is not open to the company successfully to contend that the measure of their obligation is the safety and the absolute safety of the superstructure, but that the true measure of their obligation has to be ascertained with reference to that which constituted this part of the demised premises at the time when the tenancy commenced. For reasons which no doubt seemed good and sufficient the parties to the lease agreed upon a certain standard of efficiency, and I do not think it is open to either of them to depart from that standard; the liability of the lessees to support the superstructure is to be ascertained, and at the same time limited by the condition of affairs subsisting at the date of the lease."

39. In *Hunt v Optima (Cambridge)* [2013] EWHC 681 (TCC), the repairing covenant in leases of flats in a block constructed by the landlord obliged the landlord to "maintain repair decorate renew amend clean repoint paint varnish whiten and colour" the main structure of the building and various other items. Akenhead J observed at [112] that:

"There was a real commercial and practical advantage for both Landlord and Tenant for there being a relatively broad 'repairing' covenant. It enabled and indeed obliged the Landlord to make good any

design, workmanship or material deficiency within the Building as a whole, for which it was responsible to, at least, a number of long leasehold tenants to whom the Landlord had promised a certain standard of finished product".

Similar considerations apply here in my view, where the building is divided into a number of long leasehold interests. In the absence of a management company structure it is plainly understandable and indeed desirable for one person, either the original developer and landlord or his successor, being responsible for making good disrepair in the common parts even if due to inherent defect or original defective design or workmanship, and even if that might require extensive and expensive works going beyond mere repair where necessary.

40. Mr Woolgar submitted that such a conclusion ignored the commercial reality in this case, where the defendant's only commercial interest in the building was to collect relatively modest ground rental income and where the premium which it paid for the freehold reversion of some £400,000 was minimal in comparison with the premium paid by the original tenant (£60 million) and indeed that paid by the claimant to acquire the leasehold (some £45 million). He submitted that given the long duration of the lease and the modest rental payable in comparison to the premium paid it could not properly have been intended that the landlord would be required to undertake extensive and expensive remedial works to remedy either inherent or design and construction related defects or defects which might – and given the 999 year duration of the lease when compared with the intended 50 year design life of the façade inevitably would - arise throughout the entire duration of the lease.

41. Persuasively though it was put I do not accept this argument. The plain fact is that the landlord covenanted to keep the common parts (and the retained property) in good and substantial repair throughout the duration of the lease. There was a service charge provision which enabled the landlord to recover a proportionate amount of such common parts expenditure (49%) from the tenant with the remainder (so it would appear) from the residential leaseholders. The landlord agreed that this service charge provision would not apply in relation to inherent or design and construction related defects. It is not known to me whether this was also agreed in relation to the residential leaseholders. One can reasonably infer (although it is not necessary for me to do so) that this was because the landlord as developer was confident that it could recover such costs from the designer or contractor. That is especially since it is common ground that both the original developer as landlord and the original hotel company as tenant both took collateral warranties from the architect, from Carillion as main contractor and from Bug as specialist subcontractor and that these warranties have been assigned to the defendant and the claimant respectively. The plain fact is that the original landlord took the risk that it might be obliged to remedy disrepair to the common parts even though due to inherent defect or design and construction related risks and it also took the risk of having to be responsible for any necessary repairs (subject to the standard provisions in the lease in relation to advance payment of service charge). That was its decision, as it was the defendant's decision to acquire the freehold reversion as a ground rent investment vehicle but taking on that risk as part of the package. Mr Woolgar does not in my view gain any assistance from the cases cited by him, *Post Office v Aquarius Properties* (1987) 54 P&CR 61 (whether at first instance or on appeal) or *Credit Suisse v Beegas Nominees* (1995) 69 P&CR 177 in relation to this argument.

42. Two further particular points have assumed some importance in this case.

43. The first is the question as to what extent solely aesthetic considerations have in the approach to disrepair and remedial works. Although it does not appear that this question has been considered

expressly in any of the reported cases so far as I can tell it is nonetheless clear in my judgment that aesthetic considerations may indeed be relevant in an appropriate case. Some assistance may be derived from the well-known construction case of *Ruxley v Forsyth* [1996] AC 344, where the swimming pool was constructed more shallow than specified although nonetheless perfectly useable and where the disgruntled owner claimed, but failed to obtain, the cost of complete removal and reinstatement. It is clear from the judgment of the House of Lords that there will undoubtedly be cases where it would be unreasonable for a claimant to insist on having contractual obligations reflecting solely aesthetic considerations being performed. A striking example was given of a house constructed with a single lower course of yellow brick instead of a specified single course of blue brick where it was said that it would be unreasonable to insist on having the house pulled down to have the blue brickwork course inserted. However, the judgment also recognised that there would be cases where it would be reasonable for the claimant to insist on remediation to his own aesthetic standards. Lord Jauncey said this:

> "In taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly, if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do.
>
> As Oliver J said in *Radford v De Froberville* [1978] 1 All ER 33 at 42, [1977] 1 WLR 1262 at 1270:
>
> 'If he contracts for the supply of that which he thinks serves his interests, be they commercial, aesthetic or merely eccentric, then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.'
>
> However, where the contractual objective has been achieved to a substantial extent the position may be very different."

44. The second point is whether or not the question of disrepair is to be determined with or without reference to remedial works already undertaken. In this case the defendant argues that the question is to be determined by reference to the position as it is at present, i.e. with the stitch plates in place, whereas the claimant argues that the question is to be determined (at least in the first place) by reference to the position as it would be without the stitch plates in place. In my view the answer depends on the particular question being asked. What I am really concerned with in this case is not whether or not the defendant was in breach prior to the stitch plates being fixed but whether or not the façade is currently in disrepair and if so what remedial works are reasonably required to put the façade into good and substantial repair. In those circumstances I must consider that question in the light of the current position as it stands but also bearing in mind that the stitch plates have been provided as a repair rather than a reinstatement so that the question must be answered in the context of the façade as it was originally designed and constructed and in its current position by reference to the repairs which have been undertaken and their relationship with the existing design and construction.

45. Turning to the 5-part question approach suggested in *Dowding*, it is convenient for me simply to refer to the summaries by the authors in relation to questions 2 – 5 (it being common ground that no issue arises in relation to question 1).

46. Is the subject-matter in a damaged or deteriorated condition?

The position is summarised at 6-05:
"Before any question of repair arises, it must first be asked whether the premises are in disrepair. This involves asking whether there has been a deterioration from some previous physical state. If the answer is no, there will have been no breach of the general covenant to repair, notwithstanding the fact that the premises may be unsafe or unsuitable for occupation or use for some other reason."

47. Is the nature of the damage or deterioration such as to bring the condition of the subject-matter below the standard contemplated by the covenant?
The position is summarised at 6-06:
"Not every occasion of physical damage or deterioration will give rise to a liability under the general covenant. It is necessary to ask whether the consequence of such damage or deterioration is that the premises are not in the state and condition that the covenant contemplates they should be in. This involves first identifying the standard imposed by the covenant, and then comparing it with the actual state of the premises. Again, if the answer to the question is no, there will have been no breach.

48. What work is required in order to put the subject-matter of the covenant into the contemplated condition?
The position is summarised at 6-07:
"Once it has been ascertained that the state and condition of the premises falls below the standard required by the covenant, the next stage is to identify what work is required to put the premises back into the required state."

49. The authors of *Dowding* consider this further in chapter 10 and summarise the position as established by the authorities at 10-07 as follows:

"Any method of repair which does not restore the premises to the condition contemplated by the covenant can be ruled out. Subject to this, the general principle is that where there are several possible methods of repair, each of which would comply with the required standard, the choice between them is one for the covenanting party to make. This applies equally where the choice is between two ways of putting right an immediate problem once and for all, and where it is between a temporary method of alleviating the symptoms of a chronic problem and a more radical cure of the underlying problem."

50. The authors consider at 10-16 the further question as to whether work aimed at preventing further disrepair may fall within the covenant to repair. Whilst recognising that the answer will depend on the particular facts, it is clear that in appropriate circumstances it will. Thus:

"[An] .. example is where damage has occurred to part of the subject-matter and is highly likely to occur to the remainder within the foreseeable future. In such a case it may be better, in practical terms, to carry out all the work at the same time, even to the (as yet) undamaged parts. For example, a building may be constructed with concrete beams contaminated by some corrosive substance. Although damage to the entirety of the beams will inevitably occur sooner or later, the process of deterioration will not occur at a uniform rate in relation to each beam. At a particular point in time, some may already have

failed; others may have begun to crack; and the remainder may still be in perfect condition. Depending on the extent and seriousness of the problem, the sensible and practical course may be to replace all the beams now rather than do it piecemeal.

The relevant authorities make it clear that work does not cease to be repair merely because it includes an element of preventative measures aimed at preventing future disrepair.

…

It does not follow, however, that in every case the covenantor will be obliged or entitled to remedy damage in advance of it occurring. First, there must be some damage or deterioration to the subject-matter before remedial work can amount to repair. Second, it must be reasonable in all the circumstances to carry out preventative as well as remedial work. The question is one of fact and degree in every case."

51. Is that work nonetheless of such a nature that the parties did not contemplate that it would be the liability of the covenanting party?

The position is summarised at 6-08:

"The nature of the work identified as necessary may be such that it goes outside what the covenant obliges the covenantor to carry out."

Specific performance

52. I must also say something about the principles applicable to specific performance, since the question of the availability of specific performance has generated some controversy in this case.

53. It is well-established that specific performance is a discretionary remedy which will only be granted where it appears to the court in all the circumstances to be just and equitable. The court must always proceed with caution since it is a draconian remedy in the sense that failure to comply with an order for specific performance is a contempt of court.

54. The applicable principles were considered and stated by Mr Lawrence Collins (sitting as a deputy HCJ) in a disrepair case, *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch. 64, as follows:

"Subject to the overriding need to avoid injustice or oppression, it will be appropriate for the remedy to be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy."

55. That was a case of a claim by a landlord against a tenant, but similar principles and considerations will of course apply in case of a claim by a tenant against a landlord, where it is now well established that specific performance is available in appropriate circumstances. This is made clear by the decision of Pennycuick VC in *Jeune v Queen's Cross Properties Ltd* [1974] Ch. 97 where, ordering specific performance, he said:

"In common sense and justice, it seems perfectly clear that [specific performance] is the appropriate relief. [The landlord's] repairing covenant requires it to maintain, repair and renew the structure, including the external walls. A mandatory order upon the [landlord] to reinstate the balcony is a much more convenient order than an award of damages leaving it to the individual [tenants] to do the work. There is nothing burdensome or unfair in the order sought."

"I cannot myself see any reason in principle why, in an appropriate case, an order should not be made against a landlord to do some specific work pursuant to his covenant to repair. Obviously, it is a jurisdiction which should be carefully exercised. But in a case such as the present where there has been a plain breach of covenant to repair and there is no doubt at all what is required to be done to remedy the breach, I cannot see why an order for specific performance should not be made."

56. The reference to there being no doubt as to what is required is a matter which has been the subject of debate in this case. The starting point is the speech of Lord Hoffman (with which the other members all agreed) in *Co-operative Insurance Society v Argyll Stores* [1998] AC 1. Although that was a claim for specific performance of a covenant to keep shop premises open for trade Lord Hoffman also considered the availability of specific performance more widely, saying this:

"This is a convenient point at which to distinguish between orders which require a defendant to carry on an activity, such as running a business over or more or less extended period of time, and orders which require him to achieve a result. The possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order. This point was made in the context of relief against forfeiture in *Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691. If it is a condition of relief that the tenant should have complied with a repairing covenant, difficulty of supervision need not be an objection. As Lord Wilberforce said (at p. 724):

"[W]hat the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, or by inquiry, to do precisely this."

This distinction between orders to carry on activities and to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants: see *Wolverhampton Corporation v. Emmons* [1901] 1 Q.B. 515 (building contract) and *Jeune v. Queens Cross Properties Ltd.* [1974] Ch. 97 (repairing covenant). It by no means follows, however, that even obligations to achieve a result will always be enforced by specific performance. There may be other objections, to some of which I now turn.

One such objection, which applies to orders to achieve a result and a fortiori to orders to carry on an activity, is imprecision in the terms of the order. If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signposts to the forensic minefield which he has to traverse. The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically performed. So in *Wolverhampton Corporation v. Emmons* [1901] 1 Q.B. 515, Romer L.J. said that the first condition for specific enforcement of a building contract was that "the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance". Similarly in *Redland Bricks Ltd. v. Morris* [1970] A.C. 652, 666 Lord Upjohn stated the following general principle for the grant of mandatory injunctions to carry out building works:

"[T]he court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions."

Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiff's merits appeared strong; like all the reasons which I have been discussing, it is, taken alone, merely a discretionary matter to be taken into account: see *Spry on Equitable Remedies* (4th ed.) at p. 112. It is, however, a very important one."

57. The point is also considered in *Dowding* at 28-07 (in the context of claims by landlords) as follows:

"The work which the tenant is to be ordered to carry out must be identified sufficiently for the tenant to know what he has to do, and for the court to know whether he has complied with the order. The landlord must therefore have prepared a schedule of the works which must be "sufficiently certain to be capable of enforcement". It is thought that in general terms the schedule should be sufficiently detailed for a reasonably competent and experienced builder reading it to know what has to be done. Thus, a blanket requirement for the tenant to carry out "all works necessary to put the premises into repair in accordance with the covenants to repair in the lease" will not be sufficient. However, the degree of precision required will vary from case to case. The tenant may be well aware of what needs doing, or the disrepair may be so serious that some form of order is required immediately."

58. The same principle is also considered in relation to claims by tenants against landlords, as discussed in *Dowding* at 34-10 as follows:

"For example, in *Flashman v Avenue Properties (St John's Wood) Ltd* (unrep, 12 June 1978) Templeman J refused to order specific performance of a landlord's obligation to keep in good repair the wiring in a residential flat "because I cannot myself, and I do not think anybody can, sit down and write out a list of what exactly the landlord ought to do". Instead he granted a declaration that the landlord was in breach of covenant."

59. In contrast, the authors refer to the case of *Gordon v Selico Co Ltd* [1985] 2 E.G.L.R. 97 (affirmed at [1986] 1 E.G.L.R. 71), where:

"The order made by the judge required the defendant landlord of a block of flats at its own expense and without recovery from the plaintiff tenants within eight months "to put the building of which the premises form part into such reasonable condition as not to cause damage to the plaintiffs or to the premises demised by the lease by the incursion of water, the propagation of dry rot, or otherwise", with liberty to the parties to apply for any necessary directions for that purpose, including the settlement of a schedule of necessary works. The judgment was affirmed by the Court of Appeal in the form of an order "for specific performance of the lessor's covenants", with discretion for the detailed working out of the order being given to the Chief Chancery Master. Likewise, where the landlord can be taken to be aware of what is required, then a relatively general form of order may suffice. For example, the order in *Jeune v Queen's Cross Properties Ltd* (above) was that the landlord:
"[D]o forthwith reinstate the York stone balcony situate at the front of the building known as … in the form in which it existed prior to its partial collapse on May 13, 1972."

60. Finally, however, the authors note that:

"However, wherever possible, a proper attempt to identify what needs doing should be made. It should be noted that in an appropriate case the court has power to order the landlord to permit the tenant's expert to inspect and report on what needs doing."

61. Referring to other matters relevant to the exercise of the jurisdiction, it is well-established that a defence of hardship will not be available save in exceptional circumstances. At 28-12 the authors of *Dowding* say that:

"Specific performance may be refused where to grant it would cause hardship to the defendant. However, the circumstances must be "extraordinary and persuasive". To be relevant, hardship either must exist at the date of the lease, or be due in some way to the claimant. As a general rule, the fact that the defendant cannot afford to perform the obligation is not sufficient. Thus, in *Francis v Cowcliffe* (1977) 33 P. & C.R. 368 an order for specific performance of a covenant to provide and maintain a lift was made, notwithstanding evidence that the defendant landlord was insolvent and could not afford to perform the covenant without finance from an outside source. It follows that financial inability to do the work will not generally be a defence to a claim for specific performance of a tenant's repairing covenant, although in an extreme case it may be that specific performance would be refused under the principle considered in para.28-13 [where the order would be pointless, or where it would be impossible for the tenant to comply]."

D. The witnesses

62. This is not a case which turns of any fiercely contested factual disputes and I can refer to the factual witnesses shortly. For the claimant I heard from Richard Braddock, the chief engineer of the hotel, and from Teresa Brown, head of hotels for the Yianis Group, of which the claimant is part. Mr Braddock's evidence was limited to the water supply issue, about which he had a reasonable but not infallible recollection. Ms Brown's evidence addressed all of the issues. She clearly felt extremely strongly that both the defendant and its managing agents Braemar Estates had failed to provide a good service to the hotel in terms of managing the problems with the façade, hoarding and water supply and both her witness statement and her evidence suffered from being overly argumentative, but in the end nothing much turns on this.

63. The defendant called Thomas Dugdale, senior property manager with the defendant's managing agent, Braemar Estates ("**Braemar**"), who gave evidence in relation to its involvement with all of the issues the subject of this trial. He was at times defensive in the face of forceful cross-examination from Mr Darling, in circumstances where it was clear to me that Braemar was at times placed in a difficult position with the hotel as a demanding tenant, Carillion as a contractor which displayed a marked lack of urgency in resolving the problem with the façade and in taking seriously the hotel's repeated complaints about the hoarding, and the defendant as a landlord who did not want to have to make any difficult decisions or undertake any significant expenditure. Overall, he was however a reasonably reliable witness, as was Robert Dean, the head of operations property funds for Brooks McDonald the investment management firm which advised the defendant in relation to its interests in the Tower. Mr Dean was also placed in a difficult position in that he had been asked to cover matters in his witness statement about which he had little detailed knowledge and in circumstances where, as Mr Darling complained, it might have been better had the defendant chosen to call those with more intimate knowledge of and involvement with those issues.

64. The defendant also called Stephen Pope, a heating engineer, employed by Egan Projects, and Chris Brown, a director of Pressboost Limited ("**Pressboost**"), in relation to the water supply issue. Both were short and reliable witnesses.

65. In relation to expert witnesses, I have already referred to the single joint expert who gave evidence by way of written report and answers to written questions in relation to the water supply issue, Peter White of Public Health Design Consultants.

66. Finally, I heard from the experts on the glazing system issues. Bart Kavanagh was the claimant's expert, an architect with the firm of Probyn Miers, consulting architects, assisted by Mike Clarke of Thornton Tomasetti, consulting engineers. Dr William Newby was the defendant's expert, an engineer with Sandberg LLP ("**Sandberg**") consulting engineers, assisted by Marion Ingle also of that practise. The experts had reached a very substantial measure of agreement in relation to the matters within their expertise, as reflected by the full and helpful joint statement which they produced. Where there is a dispute between the experts I deal with it on the merits rather than by suggesting that one expert's opinion is to be preferred over that of the other in every instance.

E. The disrepair issue

67. There is no direct or documentary evidence as to the discovery of the problem on 22 June 2014. According to Mr Dugdale Carillion's operatives were on site undertaking sealant replacement works when entirely by chance they came across a loose SBU on the 15th floor. Carillion immediately arranged to undertake a full survey of all elevations and, for that purpose, erected a half height metal type barrier exclusion area around the hotel, including the hotel forecourt. Having done so, on 1 July 2014 Carillion notified Braemar, who duly notified the hotel by email, that it had "identified a serious problem with the shadow box glazing units", with 153 of the SBUs being described "as having potential for failure". Carillion said that it had already fitted stitch plates to the 153 units as "a temporary fix" to prevent any glass panels from falling and intended to fit stitch plates to all SBUs "until they can establish the exact causes of the failure and arrange a remedial works programme".

68. It is common ground that Carillion proceeded to fit stitch plates to all of the SBUs and that this was completed by the end of November 2014. Some problems were experienced during the course of those works. The first was that on 2 separate occasions a stitch plate fell off, which resulted in the attendance of representatives of Manchester Building Control and the exclusion area being extended at least for a time. The second was that the initial proposal involved self-drilling screws being used to fix the plates to the frame until subsequent testing by Wintech Limited ("**Wintech**"), which appears to have been the original façade consultancy, revealed that they had insufficient pull out capacity and were replaced by self-tapping screws which Wintech were satisfied had sufficient capacity.

69. Wintech produced a report for Carillion in August 2014 in relation to the stitch plate remedial works. It referred in section 2 to the work being required "after the site team discovered a number of failures in the lateral load support of the glazing to the aluminium frame by structural bonds retaining the glass facade". It stated in section 4 that one of the assumptions made in producing its report was that "the remedial detail is assumed to be applied over a maximum of 3 years before a replacement facade is applied". This was clearly an important assumption, because it was used to justify reducing the worst-case wind loading incorporated into the design load calculations from 50 years down to 3 years. On

that basis Wintech expressed themselves satisfied that the self-tapping screws narrowly met the required load capacity, albeit that they had also applied some reductions to the tested capacity to reflect a partial safety factor for aluminium and a loadings safety factor.

70. Carillion then set about investigating a permanent remedial scheme. This process became inordinately protracted, for no good reason which has ever been explained either by Carillion at the time or by the defendant in the course of this litigation and it was not until April 2017 that it produced a remedial proposal which even then was very far from being finalised. Thus the remedial proposal suggested two alternatives: option A, involving the application of continuous vertical pressure plates and thus representing, in crude summary, an extension of the existing stitch plate system; and option B, involving the installation of an alternative glazed facing representing, again in crude summary, substantially a like-for-like replacement of the existing SBUs albeit with some enhancements to address shortcomings in the existing SBUs which had become apparent during the investigatory phases. Although not stated explicitly it is reasonably clear from the remedial proposal that Carillion favoured option B over option A but some on site trialling was required before a firm decision could be made. However, before anything further was done, Carillion went into liquidation. In the meantime a regime of regular monitoring of the stitch plates had been implemented and undertaken by a company known as Fill UK Metallbau Ltd ("**Fill**"), to which I shall refer shortly.

71. Following Carillion going into liquidation the defendant through Braemar instructed Sandberg to undertake a review and a report was subsequently produced in May 2018 by Dr Newby, who had taken over as lead consultant from his colleague. In the light of the debate at trial, it is worth highlighting certain parts of that report.

72. In paragraph 2.10, referring to the stitch plate solution with the benefit of sight of the Wintech report, Dr Newby stated:
"It is not clear what design calculations underpin the quality, placement and fixing detail of these plates, nor whether they are designed to withstand serviceability or ultimate limit state conditions. In addition, these plates require frequent (approximately biannual) periodic inspection and testing to establish their fitness for continued service. As such, the present situation is not technically viable as a permanent solution to the debonding problem."

73. In paragraph 2.11, Dr Newby added:
"Furthermore, the stitch plates have a detrimental effect upon the architectural appearance of the building, which is a significant and iconic feature of the Manchester skyline".

74. In section 6 he identified and discussed the options for remedial works, identifying the relevant considerations as being technical (function and feasibility), aesthetic (effect on external appearance of the building), nuisance (disruption to building occupants and neighbours) and cost (materials, labour and compensation). He discussed the relative advantages and disadvantages of options A and B, which by this stage had been considered by Fill who had produced alternative versions of both options (options A2 and B2). His conclusion at paragraph 7.6 was that option B in either iteration was the most suitable approach because: "(a) this approach will maintain the design intent of the facade; (b) the external appearance of the facade will be maintained; (c) the alternative (in situ restraint) options may adversely affect the differential movement capacity of the facade".

75. Following the liquidation of Carillion the defendant instructed Fill to continue to undertake twice yearly inspections direct. It is unnecessary to refer to them in detail. It appears from the evidence that

each one has taken or may take anywhere from four to ten weeks to complete, dependent on what is done and the means of access and prevailing weather conditions, and that they require exclusion zones to be provided beneath the works as they are carried out around the elevations. What is apparent is that on Fill's inspections some of the screws were found to have become loose since the previous inspections and had to be re-tightened; indeed Fill has more recently recommended 6 monthly re-tightening (as opposed to 6 monthly inspection and 12 monthly re-tightening). However, the experts do not suggest that the degree of loosening recently observed is so substantial as to cause concern and in reports (although not the most recent one) Fill has said that it considers it to be highly unlikely that any plates or screws would fall to ground between inspections. William Martin, the health and safety consultants instructed by the defendant, has more recently advised that as well as this regular inspection and re-tightening procedure there ought also to be regular visual checks, especially after extreme weather, including checks for suspect debris.

76. Turning to the joint statement of experts, they endorsed much if not all of the content of the May 2018 Sandberg report. I refer briefly to some of the more important sections.

77. In section 4 they considered the nature of the defect. They agreed that there was a failure at the interface of the structural sealant and the powder coating on the aluminium carrier frame and, although he did not expressly agree, Dr Newby did not expressly disagree with the opinion expressed by Mr Kavanagh that "because all the shadow boxes have been constructed to the same details and specification, it is likely that this deterioration of the bond will have affected all the shadow boxes to a greater or lesser degree and may be continuing". Nor did Mr Woolgar cross-examine Mr Kavanagh on this point or on his further statement in his separate report that "because all the shadow boxes have been constructed to the same details and specification, it is more likely than not that this deterioration of the bond will have affected at least a statistically significant number of the shadow boxes to a greater or lesser degree and may be continuing".

78. In section 5 they considered the stitch plates and expressed concerns both as to the independence of Wintech (only, I hasten to add, because of its role as original facade consultant) and the content of the Wintech report, including the approach taken in relation to wind load assessment. They agreed that "without further analysis it cannot be determined whether the stitch plates or their fixings are overloaded". However, they also agreed that on the basis of the pull-out tests conducted by Wintech it was "likely that the presently installed screws are adequate to secure the shadow box glazing against the imposed wind loads". They referred to the inspection and re-tightening maintenance regime conducted by Fill. They explained why this was necessary, referring at paragraph 5.26 to the fact that ultimately the screws would suffer from a loss of fixity although agreeing that "the time to failure could not be established without further information and analysis". As they explained in paragraph 5.30, the eventual loss of fixity is caused by local weakening of the frame each time the screw is re-tightened and, as they said at paragraph 5.31, they did not have the information to ascertain whether or not the rate of loosening was static or increasing. They agreed that a permanent solution designed to produce satisfactory performance for the life of the facade should be pursued in the "near future".

79. However, they also agreed that "at present the affected glazing is secure and will remain secure provided that the stitch plate inspections continue in a timely fashion and provided that the screw fixings continue to be retightened as appropriate". Under re-examination Dr Newby explained why he was able to hold that view, notwithstanding the apparent small difference between the design load criteria and the actual values obtained from the pull-out tests. In particular he drew attention to the reductions applied by Wintech to the test capacity to reflect the partial safety factor for aluminium and

the loadings safety factor, to the fact that Wintech was considering the position at the centre of the SBUs, being the worst of the worst case loading scenarios, where support would be provided anyway by the other stitch plates, and to the fact that it could not be assumed that the bond had completely failed everywhere. Although, as Mr Darling said, one might normally be a little cautious about evidence such as this emerging in re-examination, where the detail was not put to Mr Kavanagh nor was it something upon which he was cross-examined, nonetheless it is clearly both consistent with and explains the view expressed by both experts in the joint statement and there is no reason in my view not to accept it.

80. The experts also agreed that if further investigation and analysis determined that the present arrangement was structurally unsatisfactory, then "it could be made satisfactory by the addition of further stitch plates, more fixings, or different fixings".

81. In section 6 they considered the proposed permanent remedial works options, identifying the comparative advantages and disadvantages in a similar way to the earlier Sandberg report. They agreed that options B1 and B2 were "the most satisfactory technically and practically and would maintain the long-term integrity and performance of the system", whereas options A1 and A2 were not satisfactory "because they alter both the structural support and the inherent flexibility of the system and may compromise the long-term integrity and performance of the cladding system", which they agreed were also problems with the existing stitch plate system. They agreed in paragraph 6.10 that it would be necessary to undertake a site tolerance survey before a final decision could be made as to whether or not either option B1 or B2 could actually be implemented. Dr Newby confirmed in re-examination that the site tolerance survey could be done as a part of the regular façade inspection process – indeed he had suggested that the site installation tolerances should be considered in his May 2018 report.

82. The experts also agreed in paragraph 6.11 that before choosing between options B1 or B2 further development was required, including detailed design, structural calculations, installation methodology, sight tests and evaluation of costs. Dr Newby confirmed in re-examination that this would be a fairly straightforward engineering process, although as he explained it would take some time because it would involve at least an off-site test before deciding which option was preferable.

83. Finally, at paragraph 6.12 they concluded:
"The experts agreed that an indefinite continuation of the present situation was not a viable or effective permanent remedy. The stitch plates require regular inspection, which causes disruption to the operation of the building, and this requirement would continue for the life of the installation. Also, the stitch plates have some of the disadvantages of [options] A1 and A2, including the fact that they may compromise the long-term performance and integrity of the glazing system by increasing the stresses within the components. However, the experts are not aware of any such deterioration at present."

84. In his separate report, Mr Kavanagh included two further observations of relevance.

85. Firstly, he noted that it was not possible to establish the condition of the bond in any individual SBU without removing it from the building and removing the glass which, as he said, would itself be destructive of the bond. This is relevant to the complaint made by Mr Woolgar that the claimant has failed to establish by appropriate inspection and testing the nature and extent of the loss of bonding throughout the totality or at least a reasonable sample of the SBUs.

86. Secondly, he expressed an opinion that "the stitch plates that are currently installed do not provide an adequate remedy even on an ongoing temporary basis, primarily because of the load capacity of the fixings to the stitch plates". His reasoning was that the pull-out tests undertaken by Wintech could not be relied upon beyond the 3 year period for which they had been designed. He was cross-examined by Mr Woolgar about this on the basis that the wording which he had used in paragraph 8.22 was an inaccurate explanation of the impact, if any, of the difference between the design loading for a one in 3 year weather event and for a one in 50 year event, it being common ground that the design life of the facade is around 50 years. Whilst I agree, as I think did Mr Kavanagh under cross-examination, that he had not expressed himself sufficiently clearly in paragraph 8.22, I am quite satisfied that he was making a valid point, which is that an assessment based upon a maximum duration of 3 years, where the wind load being designed for was explicitly reduced from that appropriate for a one in 50 weather event which was the starting point taken by Wintech in accordance, as I understand it, with the required British Standard, could not be relied upon beyond that 3 year period with the same confidence as it could be relied upon within that 3 years.

87. Mr Kavanagh was also cross-examined about his opinion that "the retention of the stitch plates would have a significant adverse effect on the appearance of the building which is an iconic structure on the Manchester skyline as the stitch plates are clearly visible". It was suggested to him that this was an aesthetic evaluation. He agreed but added that it was a view which he was able to reach and express as an architect. It is, of course, also a view which was expressed by Dr Newby in the Sandberg May 2018 report.

88. Dr Newby produced a succinct separate report. He expressed his view that there was no "immediate" cause for concern because the presently installed stitch plates provide an "effective" means of retaining the glass against falling. He agreed that the present situation could not continue "indefinitely" but he also did not consider it likely that the stitch plates would fail in the "near future", although he also said that "further work is required to determine the life expectancy of the present situation". He said that in the "short-term" the stitch plates would, if properly maintained, continue to retain the glass and, "as such, overcome the defect caused by the debonding issue". As Mr Darling observed, this section of his report attempted to describe the relevant time period in a number of different ways but without any precision because, as Dr Newby said, further work was required before its life expectancy could be determined.

Discussion

89. In the light of the terms of the lease, the relevant legal principles and the relevant facts and evidence as summarised above the key questions for me to determine are as follows:
    (1) Whether or not the existing position is such as to place the defendant in breach of its repairing covenant.
    (2) If so, whether or not the claimant is entitled to an order for specific performance and if so in what terms.

Is the existing position such as to place the defendant in breach of its repairing covenant?

90. The starting point is the evidence in relation to the condition of the bond between the structural sealant and the powder coating. Mr Woolgar accepted that there was some evidence, albeit lacking in detail, of a failure of the bond in the one SBU identified by Carillion in June 2014 and of sufficient failure or imminent risk of failure of the bond in the 153 temporarily fixed within weeks of that discovery to

conclude that there was disrepair of those SBUs. He contended that there was no evidence as regards the remainder of the 1,530 SBUs since it appeared that stitch plates had been applied to these on a purely preventive basis. I do not accept that submission for the following reasons:

(a) In fact there is a complete absence of evidence as to whether or not any of the remaining SBUs were tested as part of the work of fixing the stitch plates which continued until the end of November 2014 and, if so, what if anything that testing revealed, so that it cannot be assumed that there was no evidence of debonding in those SBUs;

(b) There is no evidence from Carillion that as a result of its further investigations from November 2014 to April 2017 it was able to conclude that there was no problem with the remaining SBUs – indeed one may query why Carillion was appearing to favour complete replacement in April 2017 if further inspection had revealed no problem;

(c) There was no challenge either by Dr Newby or in cross-examination to Mr Kavanagh's evidence to the effect that on the balance of probabilities the deterioration of the bond would have affected a statistically significant number of the shadow boxes to a greater or lesser degree and might be continuing.

(d) Since, as Mr Kavanagh said, the only way to test the position was to expose the bond in such a way as would destroy the existing bond there can be no criticism of the claimant for failing to insist on being permitted to access one or more of the SBUs to undertake such tests in the absence of any positive evidence to suggest that behind the stitch plates the bonds were perfectly adequate or any suggestion from Dr Newby that this was the case or that testing was needed to confirm the position one way or another.

91. Moreover, since on any view there is evidence that in 2014 a statistically significant number of SBUs were showing evidence of actual or incipient failure such as required immediate remedial work and since there is no evidence which might explain why those SBUs would be affected whereas the others would not similarly be affected in 2019, in my judgment it is clear that – as Carillion recognised – a proper repair scheme, whether temporary or permanent and of whatever nature, required to extend to all of the SBUs.

92. It is plain therefore, in my judgment, that in the absence of the existing stitch plates the SBUs within the façade would be in disrepair and that the defendant would be in breach of its repairing covenant. It is therefore necessary to move on to consider the question as to whether or not the SBUs in their existing condition with the stitch plates in position are in disrepair.

93. It is plain from the authorities that this question must be considered in the light of all of the relevant circumstances. Thus:

(a) It is not sufficient for the claimant simply to say that since the stitch plates were only intended as a temporary repair which do not restore the SBUs to their original condition as at the date of the lease the SBUs are in disrepair and the claimantis entitled to a like for like replacement to restore the SBUs to their original condition regardless of all other considerations.

(b) Equally, it is not sufficient for the defendant simply to say, on the basis of the expert evidence, that since the stitch plates are currently holding the SBUs secure and that they will remain

secure with regular inspection and re-tightening and, if necessary, alteration or addition, for the short term at the very least, the SBUs cannot be in disrepair.

94. In my judgment the starting point must be whether or not the SBUs are structurally safe and will remain so for the foreseeable future. That is clearly the most important, although not the only relevant, consideration. In that regard there are two competing points in my view:

(a) The first is the agreed expert evidence noted at (b) above, that is to say the stitch plates do make the SBUs structurally safe and will, with suitable maintenance and repair, continue to do so for some time period which the experts cannot specify in terms of end point but which they agree cannot be indefinite.

(b) The second is that the stitch plates were only designed and installed as a temporary fix lasting for no more than three years. The Wintech report can only be relied upon as support for the proposition that the stitch plates as currently designed and installed would be structurally safe for three years from installation, i.e. until the end of 2017. The defendant has not commissioned an investigation and analysis from a suitably qualified façade consultant similar to Wintech which demonstrates that the design life of the SBUs with the existing stitch plates or some modified version thereof will be structurally safe for a specified period from the present day. Although the defendant can gain some comfort from the expert evidence in this case both experts make clear that they are not experts in wind loading nor have they conducted an investigation and analysis similar to that undertaken by Wintech. Although the experts believe that the SBUs are secure and will remain so with suitable maintenance and repair, albeit not indefinitely, they are not able to say so with the confidence that could be relied upon by a conscientious landlord to permit the existing arrangement to remain in place either indefinitely or for a specified period. I agree with Mr Kavanagh that the difference between a design based on a one in 50 year peak wind event and one based on some reduction from that to take into account a maximum 3 year lifespan cannot confidently be discounted, not least in the context of a tower of the height of this one.

95. I do not accept Mr Woolgar's ingenious argument that the Wintech calculations provide a sufficient assurance as to structural safety design on a "rolling" 3 year basis so that the court can be satisfied as at the current date that the existing arrangement passes this safety design threshold for at least a further 3 years. No designer of a flood defence would accept that a flood defence designed for a one in 3 year flood event could be relied upon to provide adequate protection for the whole of its design life for a structure which had been designed to have a life of 50 years on the basis that it would be protected against flooding for that whole period.

96. My conclusion is that the SBUs as they stand could only be regarded as structurally safe as at the present time, which includes looking at their structural safety into the short and medium term, if the landlord had already commissioned, or at the very least had a stated and credible intention to commission and obtain in the short term, a full investigation, analysis and report from a suitably qualified facade consultant with a view to following the recommendations of that consultant in terms of maintenance and repair in relation to the existing arrangement and in terms of the appropriate longevity of that arrangement and any necessary additions or alterations to it from the perspective of structural safety, so as to give reasonable confidence as to the structural stability of the current arrangement either indefinitely or for some specified period from the present date. That, however, is

not what the defendant has done[4], nor is it the defendant's stated position at this trial, nor has it acted in a way at any time up to and including this trial such as would afford either the claimant or the court any confidence that it would do so if it had an unconstrained choice. The defendant's position prior to Carillion's liquidation was to rely on Carillion to do what it considered appropriate in circumstances where, as Mr Dean said in cross-examination, his view was that there was nothing to be gained in seeking to force a company such as Carillion to act through threat of or actual litigation. After Carillion's liquidation the defendant did instruct Sandberg but has not done anything to progress matters with Sandberg or any other consultant after receiving the May 2018 report. The defendant issued proceedings against Carillion's insurers and Bug in August 2018 but: (a) the claims made are solely responsive to this existing claim (in circumstances where the defendant had previously applied for but was refused permission to join Carillion's insurers and Bug into this action and to stay this action); (b) the defendant has not pleaded any positive case in those proceedings as to its intention to proceed along the lines outlined above; and (c) those proceedings are currently stayed until April 2019.

97. This is not in any way seeking to reverse the burden of proof which lies upon the claimant to prove disrepair. It simply reflects the reality of the evidence in this case in which the defendant is seeking to persuade the court that a remedial solution which was expressly designed and adopted as a temporary solution lasting no longer than 3 years can nevertheless be relied on in terms of structural safety even after that time has elapsed and continuing for some unspecified period from the present time.

98. On this basis alone I would conclude that the SBUs are currently not in good or substantial repair and that the defendant is in breach of the terms of the lease. However even looking at the matter more broadly, and considering other matters which are also relevant to the question of what repair is required for the defendant to comply with its repairing covenant, I reach the same conclusion and further conclude that the defendant is required to repair the SBUs by adopting option B in either iteration unless that is revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost. My reasons are as follows.

99. The experts are agreed that a further problem with the existing arrangement (and indeed with option A) is that the stitch plates effectively fix the SBUs to their neighbours in a way which is contrary to the original design intent and which "inevitably increases the stress in the façade components" (paragraph 5.4). Mr Kavanagh explained in his report at 8.28 that this could potentially cause breakage of the glass or long term performance issues with the aluminium frame which the experts had not investigated.

100. The experts are also agreed that a further problem with the existing arrangement (and again with option A) is that it has caused or is liable to cause damage to the primary weather-seal. Whilst the experts did not suggest that there was evidence of existing or imminent damage or water ingress to the SBUs or to the façade as a result, again it is plainly contrary to the original design intent and has the potential to cause problems in the long term which the experts have not investigated.

101. The experts are also agreed on the need for ongoing regular inspection and maintenance, including twice yearly inspections and retightening lasting something between 4 and 10 weeks on each occasion and involving the use of a cradle or a cherry picker to gain access to individual SBUs as well as

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[4] After production of this judgment in draft Mr Woolgar properly drew my attention to the instruction given by Braemar to Sandberg by email dated 13 December 2016, to which I had already referred at paragraph 122 below. That instruction however was concerned with an investigation of the need for the retention of the hoardings and was far more limited than and by no means the equivalent of a full investigation, analysis and report such as referred to above.

temporary barriers at ground level for safety purposes. The defendant's safety consultant has also suggested regular visual checking after high winds and other extreme weather as noted at [75] above. It is clear that all this involves disruption to the hotel and its clientele (as well as to the occupants of the residential flats above). Furthermore, insofar as it is possible, as the experts have suggested it is, to address any concern that the existing arrangement is structurally unsatisfactory by the addition of further stitch plates, more fixings or different fixings, those works would of course involve further disruption to the hotel, including noise disruption from drilling.

102. I accept that I should not overstate the impact of this ongoing inspection and maintenance. It is clearly far less intrusive than the closures and obstructions which have subsisted since June 2014 and which are the subject of the hoardings issue as discussed below. Nonetheless the claimant is entitled to say in my judgment that a remedial scheme which does involve disruption and some inconvenience to its clients and to its operations is not, all other things being equal, acceptable in the context of a building of this age, character and locality. For example, for the hotel to have to manage its occupancy so as to seek to ensure that rooms likely to be affected by inspection and tightening operations are not booked unless all other rooms are occupied, in circumstances where due to weather conditions there will always be uncertainty as to precisely when Fill UK will be working in a particular area on a particular day, cannot be regarded as satisfactory. Nor can the risk of disruption to access to the front entrance, whether pedestrian or vehicular, when work is ongoing overhead.

103. Finally, there is the aesthetic consideration. As the authorities referred to above demonstrate, the starting point is the position as it existed at the time of the lease and aesthetic considerations are in principle relevant matters to be taken into consideration. Whilst various witnesses have expressed differing views as to the aesthetics of the tower, there can be no doubt that the unitised appearance of the glass facades, which depends upon there being no obvious externally visible fixings between the separate panels, is an important aspect of the overall design and original appearance of the building. Moreover, whilst various witnesses have expressed differing views as to the impact of the stitch plates, again there can be no doubt that they have a significant adverse impact on the unitised appearance of the glass facades and that they are more intrusive and more ugly than would be the case even if the glass facades had been designed and constructed to have externally visible connectors between the separate units from the outset. Both experts have acknowledged the deleterious impact of the stitch plates in their evidence: Dr Newby most clearly in paragraph 2.11 of his May 2018 report noted above. As well as seeing photographs in the trial bundle I have, as I notified the parties at the beginning of the trial, walked past the hotel and looked up at the facades. The stitch plates are so called because they give the appearance of the panels being stitched together by some giant hand, around 16 stitch plates in total to each panel. Whilst the glass panels do not completely abut each other, because there is a thin strip of weather-seal separating them, without the stitch plates the facades have a clean, modern and unitised appearance which is significantly and adversely affected by the presence of the stitch plates. In my view there would have to be some compelling reason why a tenant such as the claimant should have to accept this as a repair for a building such as this other than as a temporary time-limited repair pending a permanent repair to restore the tower to its original appearance.

104. Furthermore, the defendant has not addressed the position so far as planning is concerned. The experts agree that if a permanent remedial solution along the lines of option A was considered that would involve a change to the appearance of the building which may necessitate a planning application. There is no evidence from the defendant as to whether or not it has even considered let alone investigated whether or not a planning application would also be necessary if the existing stitch plates were retained

for the present time nor, if so, whether or not it would be likely to succeed. At the very least one might have expected some informal consultation with the planning authority on this point.

105. Having regard to all of these wider circumstances I am satisfied that the existing condition does not amount to good or substantial repair as at the present time, having regard to the evidence about the defendant's willingness and ability to devise and implement a satisfactory permanent repair whether in the short term, the mid-term or the long term, and I am also satisfied that it is necessary to reinstate the original fixing of the SBUs or to replace them so as to produce substantially the same result substantially along the lines of option B in either iteration. I am satisfied that a remedial solution along the lines of option A in either iteration would not represent a reasonable choice unless option B is revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost.

106. It does not seem to me that issue 5 in the 5 stage enquiry proposed by *Dowding* really arises here. The repair is simply to put the facades back into the position they were in at the time of the lease. It clearly cannot be outside what is contemplated by the lease to put the facades back into the same condition, both from a design, constructional and functional perspective and from an aesthetic perspective, as they were at the time of the lease. This is not a case where the building has over the intervening period been subject to such deterioration as to render it a reasonable choice to choose not to reinstate it to its condition at the time of the lease. Nor is this a case where the evidence suggests that it will be so significantly more expensive to reinstate to the condition at the time of the lease than to repair as to make it reasonable to choose not to reinstate; the experts have not been able to make any assessment of respective costs since that will all depend on the result of the site tolerance survey as regards option B1 and on the further design workup as regards the choice between options B1 and B2.

Specific performance

107. I have already referred to the relevant principles and considerations above. The argument against ordering specific performance most pressed on me by Mr Woolgar for the defendant was the uncertainty and lack of particularity as to what the defendant would be required to do. It was not suggested by the defendant that damages would be an adequate remedy. I am satisfied that damages would not be an adequate remedy in circumstances where the claimant would either have to accept damages in lieu of an acceptable remedial scheme, which I am satisfied would be unfair and unjust, or undertake the repairs itself under the contractual provisions of the lease and then seek to recover such costs from the defendant in circumstances where the defendant itself might be unable (or might have made itself unable) to meet such costs. There is clearly a concern as to the defendant's ability to meet such costs if the hotel does require extensive remedial works and if its parent company chooses to withdraw its current support. However it was not submitted on behalf of the defendant that its financial or other circumstances were such that it would be impossible for the defendant to comply or that to order specific performance would cause it such serious and exceptional hardship as to make it unjust to do so and, in the light of the incomplete evidence as to the defendant's ability to finance such works either from its own resources or from those of its parent company or wider organisation[5], I am satisfied that no such suggestion could credibly have been made.

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[5] After production of this judgment in draft Mr Woolgar properly reminded me of the report and financial statements produced by the defendant for the year ended 30 September 2018, disclosed during the course of the trial. Whilst these provide some evidence as to the defendant's ability or otherwise to finance such works they do not provide evidence of the ability or otherwise of its parent company or of those associated with the defendant to do so.

108. Turning then to the questions of uncertainty and lack of particularity I am satisfied that what the defendant is required to do is to remove the existing stitch plates from the SBUs to the external facades and to remove and reinstate or replace the SBUs and their frames (as appropriate) so that they are securely affixed to the structure of the building in such a way as provides substantially the same external appearance as was present as at the date of the lease and prior to June 2014. I have also already acknowledged that the defendant should have permission to apply to be permitted to undertake some different remedial scheme if the remedial works identified above are revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost.

109. It does not seem to me that the above formulation suffers from any uncertainty or from any lack of particularity to such a degree as to be unacceptable. As demonstrated by the authorities, the court has a discretion and much will depend on the particular circumstances. It is not necessary for a detailed schedule of works to be drawn up in a case where it is sufficient for the defendant to be ordered to achieve a clearly specified result and so long as the defendant can be protected against the risk of unforeseen circumstances which render it impossible or impracticable to comply. The above formulation addresses both of those concerns.

110. Insofar as the defendant seeks to rely upon the need for a site tolerance survey to be satisfied that either iterations of options B are feasible, that is something which it could and should in my judgment have done on receipt of the Sandberg May 2018 report. In any event it is something which is clearly not particularly difficult, time-consuming or expensive to do. Insofar as the defendant seeks to rely upon the absence of the design or other investigations referred to in paragraph 6.11 of the joint statement, again that is something which it could and should have done on receipt of the Sandberg May 2018 report. In any event this procedure is only relevant as to making the choice as to precisely what works ought to be undertaken to achieve the outcome envisaged by option B, so that the defendant is free to decide upon the detail of the method to be used to achieve that outcome.

111. The defendant is of course entitled to a reasonable time to design and implement these works. Whilst the claimant will of course point to the considerable delay thus far, which is clearly true, and will also point to the defendant's failure to take any sufficiently proactive steps either before or after Carillion's liquidation, which I am satisfied is also true, nonetheless since specific performance is a draconian remedy, breach of which is punishable as a contempt of court, it seems to me that I have to set a realistic time for compliance based on what a landlord in the position of the defendant could expect to achieve given the position as it now is and acting with reasonable diligence thereafter. I will of course hear further argument on this point if there is disagreement but my provisional view (having regard to the evidence which is available as referred in section F below) is that a period of 18 months is reasonable and that there should of course be a general permission to apply as well as the specific permission identified above so that if the defendant was able to demonstrate by credible evidence the discovery of factors causing delay which could not reasonably have been anticipated or guarded against or mitigated it should be able to at least seek an extension.

112. In provisionally allowing what might otherwise seem a generous timescale I bear in mind that apart from times where barriers or hoardings are reasonably necessary either for ongoing inspection and maintenance or for the remedial works the effect of my order in relation to the hoardings issue is that the hotel will not be inconvenienced by the continued presence of hoardings during that period and that the claimant will also be entitled to damages for any continuing loss it may seek to claim and may

be able to prove as a result of the overall delay, which I address in more detail in the subsequent section of this judgment.

113. Thus, even bearing in mind the need for caution and the draconian nature of an order for specific performance I am nonetheless satisfied that I should make such an order in this case.

F. The hoardings issue

114. I have already referred to the relevant terms of the lease: see paras 21 to 28 above. The claimant also relies upon the landlord's obligation not to derogate from grant and upon nuisance. However, as I have already noted at paragraph 23, counsel were agreed that clause 7.16 had to be read on the basis that the claimant could not complain of obstructions to the extent that they were reasonably justified by the landlord's performance of his other rights and obligations under the lease, nor does not seem to me that the claimant can improve his position by reference to other provisions of the lease or rights or obligations arising under or by reference to the lease.

115. The claimant's counsel summarised the position in their written opening as follows:

"In cases where the landlord has a right or duty to carry out works, including works of repair, the process of which would otherwise constitute a temporary breach of other covenants (such as the right to quiet enjoyment or the obligation not to derogate from grant), the landlord is entitled to do the work *provided the landlord has taken all reasonable steps to minimise the disturbance to the tenant caused during the works*. See Goldmile Properties Ltd v Lechouritis [2003] 2 P&CR 1 and Timothy Taylor Ltd v Mayfair House Corp [2016] 4 WLR 100."

116. By way of brief chronology of events relevant to the hoardings issue, when in June 2014 Carillion discovered that the glazing in one of the SBUs was loose it erected half height metal barriers to cover an area at street level at the front of the hotel without any prior warning. The claimant was immediately concerned as to the detrimental impact of the barriers both generally in terms of its effect on the appearance of the hotel and specifically on the impression given to those holding and attending special events at the hotel such as weddings, receptions, dinners and other social occasions, business related or otherwise. Importance is increasingly attached by guests to making an impact when arriving at such red carpet type events in a prestigious private car, frequently recording and posting such arrivals on social media, and the presence of these barriers undoubtedly adversely affected these opportunities. The hotel also operated a valet parking service which for a period was curtailed by the presence of the barriers.

117. The barriers remained in place from June 2014 to November 2014 whilst Carillion investigated and then fitted stitch plates to the shadow box units and the claimant realistically makes no complaint about that. Although the chronology is a little unclear, it is apparent that the cordoned off area was reduced in size so that, in broad terms, it covered the approximately diagonal area between the front of the foyer and the access way (although its extent was subsequently temporarily increased again from time to time when, for example specific concerns about operatives working at high level or falling stitch plates or other items arose). However, the barriers remained in place thereafter, not only whilst inspection and maintenance was being undertaken but on a permanent basis, despite the expressed concerns and complaints. Moreover, matters worsened when in January 2016 Carillion announced that it intended to replace the half height metal barriers with full height metal fencing akin to that used

to surround a building site. This led to a furious protest by the hotel and in the end Carillion agreed to replace the barriers with full height wooden hoardings instead.

118. Mr Dugdale was cross-examined about this. He was informed in an email from Carillion dated 5 January 2016 that "following a review of operational matters … we have been advised that to maintain the optimum level of public protection we must install full height barriers at the front of the Hotel". Mr Dugdale responded asking why this was necessary when "most of the [fallen] pressure plates had been found outside of the exclusion zone". Carillion's response acknowledged that the hotel forecourt was private property but said that the barriers were necessary for public protection and HSE guidance required full height barriers in such circumstances. Mr Dugdale pointed out that this guidance applied only to "sites" and asked Carilion to explain the inconsistency in approach with there being no protection elsewhere around the hotel. Carillion's response acknowledged that the HSE guidance did not "dictate the size an exclusion zone should be and permitted the individuals involved to risk assess and determine the extent of the measures applied" but asserted that the extent of the exclusion zone "covers the area Carillion deems to be the highest risk area and what we have been instructed to install by our directors".

119. Mr Dugdale was cross-examined on the basis that he failed to ask Carillion to provide details and documentary evidence to justify this apparent risk assessment and the continued presence of the exclusion zone when he could and should have done so given: (a) the impact on the hotel; and (b) that the answer provided by Carillion effectively consisted of assertion rather than explanation. It appeared to me both from his evidence and from that of Mr Dean that the true explanation was that he did not have the technical expertise to argue the point with Carillion and that neither he nor his superiors at Braemar nor the defendant were prepared to spend time or money either in seeking to press Carillion for a substantive response or by instructing an independent health and safety consultant to provide an opinion. It appears to me that the reasons for this were a combination of: (a) a failure to appreciate that it was the defendant as landlord which had the right to dictate what should and what should not be permitted in the common parts; and (b) a desire to avoid taking on Carillion if that might result in prejudicing Carillion's seeming willingness to investigate and undertake a permanent remedial solution at its own cost. In short, I am satisfied that the defendant preferred its own interests in keeping Carillion on side to asserting and protecting the interests of the hotel in ensuring that the exclusion zone was only retained if and to the extent it could properly be justified.

120. Despite a stated willingness to investigate and accommodate mitigating measures the evidence shows that Carillion failed to take any meaningful steps to replace the wooden hoardings with perspex or other see-through hoardings or to provide plasma screen advertising or artwork on the hoardings. Even after Carillion's liquidation neither Braemar nor the defendant took any positive steps to investigate the justification for retaining the exclusion zone or hoardings. The hotel has provided covering for the hoarding at its own costs for some particularly prestigious events but otherwise the hoarding has remained.

121. It was only during the course of the trial that the defendant disclosed for the first time a report produced in September 2018 by Mr Cooke of Brooks McDonald (who reported to Mr Dean) for the use of the board of the defendant's parent company to assist it in making a decision as to whether or not the hoardings could be removed. This report enclosed responses from Manchester Building Control, William Martin (the HSE consultants), Fill and the defendant's property insurers which insured the building to requests for input requested in August 2018. In summary, none of the responders expressed the view that the hoarding needed to remain. The insurers were happy for it to be removed so long as

the HSE consultants were happy. The HSE consultants were also happy on the basis of the Fill reports and if Manchester Building Control agreed. Manchester Building Control said that whilst it was not a matter for it to direct that the hoarding remained or was removed it considered that any danger to the public had been removed due to the stitch plates and the inspection and maintenance regime in place. Fill said that it was not a matter for it but added, in a comment which Mr Darling considered particularly telling, that it was its "understanding that the hoarding was erected for the 'placebo' effect it would have with the general public … and not as an actual working zone". It expressed its opinion that it was "doubtful that it serves any purpose at this time and could be removed", whilst adding that a "suitable temporary exclusion zone [should be] erected during any future inspections or works on the façade".

122. The report itself summarised these views but stopped short of making a positive recommendation. The meeting took place on 5 November 2018. Mr Dean was present and draft minutes were produced. The board decided to seek a definitive answer from an expert and that the hoarding should remain in the meantime. The HSE consultants suggested approaching Sandberg and a request to this effect was made in an email dated 13 December 2018 but as yet not actioned.

123. In his opening note Mr Woolgar submitted, and I agree, that it was perfectly reasonable for the metal barriers to remain in place until the end of November 2014 when the installation of the stitch plates had been completed. He also submitted, and again I agree, that it was perfectly reasonable for the metal barriers and subsequently the hoardings to remain in place whilst regular inspection and maintenance to the stitch plates was being undertaken and whilst Carillion and Bug and other contractors were on site investigating the permanent remedial works. He realistically accepted however, and I agree, that there was no justification for the barriers and hoardings remaining in place outside these periods. Although he did not accept this in terms, it is plain, and I find, that it was unreasonable for Braemar and the defendant not to take the position up with Carillion and to insist either on a reasoned justification or their removal. It is also plain, and I find, that had this been done Carillion would have been obliged to accept that there was no such justification and to remove them. On that basis it is clear to me that the defendant was in breach of its obligations to the claimant over a substantial proportion of the period from the end of November 2014 to the present time.

124. Allowing a reasonable time, say 6 months - in recognition of the time that these matters can take given the need for a final inspection and then obtaining feedback from those involved in the consultation process - that would mean that the barriers should have come down by the end of May 2015 and should have remained down save for the twice yearly periods of inspection and maintenance of between 4 and 10 weeks each. Assuming that the hoardings are down by the end of February 2019 in accordance with the order I will make, that represents 3 years 9 months (or 45 months) of delay, less 7 inspections over that period of around 2 months each, and thus a net period over which the barriers and then hoardings were unnecessarily retained of 31 months.

125. Mr Darling and Mr Hicks analyse the issue in a slightly different way. They contend that the question is to be considered in the context that the defendant's obligation was to undertake, directly or through Carillion, a proper permanent remedial scheme along the lines of option B within a reasonable time of the discovery of the initial loose SBU in June 2014. Sensibly, they do not complain about the time taken to the end of November 2014 to investigate and install the stitch plates as a temporary measure. They contend however that there was no reason why the process of investigation, deciding upon and designing a permanent solution should not have been undertaken at the same time as the stitch plates were installed. I agree.

126. There is no evidence offered by the defendant nor apparent from the documents for the appallingly slow delay from November 2014 in undertaking this process. It appears from the evidence that it was not until around November 2015 that a permanent solution had been designed by the subcontractor (as recorded in an email from Carilion dated 25 November 2015) and even then it was still subject to design team review. This solution was along the lines of option A and it was not until April 2017 that Carillion produced a remedial proposal involving Option B which, even then, was still not definite being subject to off-site testing and, no doubt, further consideration after that had been completed. There is no evidence of anything being achieved prior to Carillion's liquidation in January 2018. This snail like progress is to be compared with the time taken from Sandberg's first visit in January 2018 to the production of their report in May 2018 which clearly identified option B as the appropriate permanent remedial solution, subject only to a site survey to confirm its feasibility and further design work to enable a choice to be made between options B1 and B2 which, as I have said, Dr Newby did not regard as a particularly complex task.

127. Regard must however be had to the fact that the defendant did not have any direct control over Carillion. Whilst the claimant submits that this is irrelevant since under the lease the duty was laid upon the defendant as landlord I am satisfied that when one considers what a reasonable landlord in the defendant's position would have done I cannot ignore the fact that a reasonable landlord would undoubtedly have wanted – and indeed probably have been obliged in terms of mitigating loss – to have allowed Carillion the opportunity to devise and implement a permanent remedial scheme at its own cost before having to undertake the process itself and then seeking to recover the costs from Carillion under the warranty which it held.

128. Nonetheless a reasonable landlord would in my view have acted far more proactively in pressing Carillion and insisting on strict deadlines being set and adhered to. I reject Mr Dean's suggestion that it was reasonable to allow Carillion time because the risk of alienating it was far worse. That may have been the case if the defendant was only obliged to consider its own interests but not, as Mr Darling suggested in cross-examination, if it was obliged to consider the hotel's interests as well. In my view Carillion's failure to produce a full and detailed response with its proposals for a permanent solution by May 2015 ought to have led to the defendant instructing Sandberg or a similar consultancy at that stage to obtain its own opinion on the matter. By May 2016 the defendant ought to have been in a position where either Carillion was ready to start work on a permanent solution or, having instructed its own consultants to undertake the necessary further investigations itself, it was ready to proceed to procure and have the works done itself.

129. There is evidence (in the notes of a meeting held on 11 July 2017 and an email dated 19 July 2017) that Carillion's time estimate at that stage was around 12 months for the work itself (plus 4 months before works began to obtain the replacement glass) - as stated at the meeting - or 12 – 18 months in total dependent on weather and other factors - as recorded in the email. Since this is the best evidence available of duration, but since there are also grounds for reasonable scepticism as to Carillion's desire to proceed with all reasonable despatch, I am reasonably satisfied that the works ought to have been completed by the end of June 2017, being 3 years in total from the discovery of the problem.

130. In comparison, assuming that the permanent remedial works are completed in 18 months and thus by the end of July 2020 that will represent an overall delay of 3 years 1 month (or 37 months). That represents the total period over which the claimant will, on my findings, have been disadvantaged by the current temporary stitch plate scheme and the consequences in terms of the twice yearly inspections

and temporary exclusion zones. In addition to that, on my findings, there will have been an additional period of 31 months during which the barriers and hoardings have remained in place when they ought not to have been present.

131. The claimant is therefore in principle entitled in my judgment to damages representing the loss incurred in the 37 months estimated delay in retaining the temporary works and the loss incurred in the 31 months when the barriers and hoardings have remained in place unnecessarily (although I accept that there may be some overlap between these two periods). Following production of this judgment in draft both parties observed that it would be necessary to undertake a more detailed analysis of the periods referred to above so as to ensure that there was clarity as to the periods in question and the basis on which damages would be calculated in relation to each period so that the claimant was properly compensated but not over-compensated. Mr Woolgar also observed that until the works required to be done under the order of specific performance have been done there can be no certainty at this stage as to the periods in question and basis of assessment of damages within those periods, particularly given the permission to apply which the defendant will have both in relation to the scope of the remedial works and the duration of such works. These considerations entirely justify the observations which I make in the following paragraph.

132. It is readily apparent in my view that the process of quantifying the loss will not be easy, since it will be necessary for the claimant to seek to prove what if any financial loss has resulted from these matters. Moreover, the question will have to be considered as to whether damages should be assessed now on the basis of estimated figures or adjourned until the permanent works are completed and thus there is certainty as to actual losses. I would strongly urge the parties to explore the option of alternative dispute resolution to resolve this discrete issue without further resort to litigation. If they are unable or unwilling to do so I make it clear that I will only approve directions for the assessment of these damages (and indeed damages in relation to the water issue below) which are demonstrably proportionate to the likely value of the claims in money terms. Although both parties appeared to invite me to include in this judgment a more detailed analysis as to how damages are to be calculated by reference to the findings made above I do not consider that it is either necessary or appropriate for me to do so and that such matters are better left for further submissions in the light of evidence (for example, as to what degree of interference with the hotel could reasonably be expected or has in fact been experienced whilst the permanent remedial works are undertaken).

133. As regards injunctive relief it is clear in my judgment that the claimant is entitled to an injunction that the defendant remove the hoardings within a specified period (I would suggest 1 month but again will hear submissions on the point if necessary) and do not replace them subsequently save that the defendant should be entitled to erect and maintain such suitable temporary exclusion zone or zones for the duration of such future inspection, maintenance and repair works to the façade or other parts of the building as may reasonably be required.

G. The water supply issue

134. I have already referred to the relevant terms of the lease above. The water supply equipment serving the hotel is located in the 3rd floor plant room of the building. The claimant pleaded and the defendant admitted that this equipment formed part of the common parts. In his opening submissions Mr Woolgar suggested that more recent investigations have suggested that this might not in fact be the case if the equipment in question only supplied the hotel. However, since: (a) the claimant is not

claiming any final injunctive relief and its claim is solely for historic damages relating to the events of January 2017; (b) at the time Braemar had always proceeded on the basis that it was the responsibility of the defendant as landlord to repair this equipment, Mr Woolgar sensibly and realistically accepted that it was not open to him to seek to amend the pleading and run a case in defence of the damages claim on the basis that the defendant was not responsible for the equipment (that acceptance being without prejudice, of course, to any question as to whose responsibility it was to repair the equipment going forwards).

135. In summary, the chronology of events is that from before March 2016 Braemar wanted to arrange to replace the four pressure and temperature and relief valves ("PTR valves") on the four cylinders in the 3rd floor plant room which supplied hot water to the hotel because they had been leaking. As their name suggests, the PTR valves are designed to open and allow water to escape if either the pressure or the temperature of the water within the cylinders exceeds pre-set levels. Leakage from them is not unknown. Whilst the hotel was not averse to this work being done its understanding was that this was not a matter of the utmost urgency because the leakage was still relatively minor and the consequences not thought to be serious. Moreover, its concern was that it had been informed that because the isolation valves which served the cylinders (and which were designed – as their name suggests – to allow each cylinder to be isolated and worked on without having to disconnect the whole hot water supply) were not operating properly it was necessary for the whole water supply to be disconnected whilst this work was done, involving the replacement of the isolation valves as well as the PTR valves. Not surprisingly, it was concerned about the impact of a busy hotel being without hot water for what was envisaged to be a period of around 8 hours. Although the plan was to do the work overnight on a Sunday / Monday, being a time when the hotel was expected to be relatively quiet, the hotel was still unenthusiastic and, despite the promptings of Braemar to agree a date, nothing was fixed and the hotel allowed the matter to drift. Moreover, by late 2016 the hotel was not willing for the work to be done in the last quarter of the year which it expected to be its busiest time.

136. On Christmas Day in December 2016 there was a leak at the hotel which was traced to the leaking PTR valves which made it apparent to everyone that the problem could no longer be ignored. There is no claim pursued in relation to this leak and there is no evidence that it was the fault of the defendant in any event given the chronology to which I have referred above. It would appear however that around this period the hotel was also experiencing intermittent problems with the pressure of the water being supplied to the hotel which, it was believed, was connected with the problem of the leaking PTR valves. Thus the defendant arranged and the hotel provisionally agreed to the works being carried out overnight on Sunday / Monday 22 - 23 January 2017. There was a preliminary meeting earlier that month on 9 January 2017 in which the procedure was discussed. It is common ground or in any event I find that the discussion included the following matters:

(1) The agreed plan was to begin draining down the cylinders with the priority being to start straightaway on replacing the isolating valves at the top of the cylinders since once that was done the individual cylinders could be isolated and any further work could be done at a later stage without having to shut down the water supply. If time permitted the PTR valves and the lower isolation valves could also be replaced but if there was a risk that this would take too long that process could be completed on another occasion. It was also planned to replace isolation valves on a connected part of the hot water system at the same time.

(2) A risk was acknowledged that the draining down process might disturb sediment at the base of the cylinders which would then be drawn into the hot water emerging from taps in sinks or

showers in guest bathrooms which, as a result, would be discoloured. This sediment, whilst harmless, would of course be most undesirable. Mr Braddock was aware of this risk and had arranged a plan, which was to run taps in suitable locations as soon as the water supply was restored to draw off any discoloured water before guests began waking up and using the hot water supply. However, what he did not appreciate and had not been informed about was that this drawing off process would not also draw off any discoloured water which had already been drawn into the pipework serving individual guest rooms before the supply being restored so that there would remain a risk of discoloured water appearing in guest bedrooms on first use of the restored hot water supply. No mention was made at the meeting of the need to warn guests that although this was a possibility it was not something which they needed to worry about and that they should simply alert reception who could arrange to deal with it (by an operative attending and simply running the tap until the water was clear).

(3) The plan as agreed at the meeting was subject to production by the contractor and agreement by Braemar and the hotel of a risk assessment and method statement. This was duly provided by Egan Projects and confirmed that the proposed works involved the cold water supply being shut down from 10pm and that work should start first on the high level isolation valves and then stop by 3am - even if the cylinders had not emptied by then in sufficient time for all of the valve replacement works to be completed – to commence re-filling of the cylinders to allow hot water to be restored by 6am.

137. All went according to plan. Mr Braddock was on site throughout the night to be available as necessary and to draw off any discoloured water on completion. It is common ground that the upper isolation valves were successfully replaced but that by 3am the remaining valves had not been replaced so that the decision was made to leave them for another occasion. Unfortunately however, despite Mr Braddock undertaking the drawing off procedure to his satisfaction, one hotel guest did indeed experience discoloured water (or "sludge", as he later described it) emerging from his tap and, not having been informed of this risk, was appalled and took photographs of the sink full of brown water. He sent these photographs and told his story to various newspapers who published the story in their online editions. Not surprisingly the hotel was extremely upset by this and holds the defendant responsible for any loss or damage it has suffered as a result. It is not entirely clear whether this happened on the morning of 23 January or later on that day or possibly on the following morning, the 24 January, which is the date when the reports appeared in the online newspapers, but even if it was occurred later it can only have been caused by the cylinders being drained on 22 / 23 January.

138. Since all matters of quantum are not for this trial all that I have to do is to determine liability. The difficulty for the defendant is that there is no evidence that it devised or implemented or maintained any system for the regular inspection and maintenance of these isolation valves, notwithstanding their obvious importance to the hot water system and, in particular, the ability for any maintenance or repair works to be undertaken on one or more cylinders without having to disconnect the whole supply. Mr Pope confirmed in re-examination that this would have been very simple and would simply have required a programme of regularly opening and closing the valves every few months to ensure that they could be moved freely when required.

139. Mr Woolgar, whilst understandably accepting that the defendant was in difficulties as regards liability in the light of this evidence, submitted that there could have been no guarantee that the valves would never have seized up anyway. That submission is of course true insofar as it goes but it involves a conclusion that all 4 valves had failed within no more than a few months of each other (i.e. over the

period within which inspections ought reasonably to take place). In my view I can properly conclude that where there are 4 cylinders with 4 isolation valves an absence of evidence of any inspection or maintenance at any time since the hotel was opened is amply sufficient to justify a conclusion that all 4 valves would not have been in a failed state before January 2017 had a simple system such as described by Mr Pope been implemented and maintained.

140. Mr Woolgar also submitted that the causative potency of any breach was nullified by the hotel's failure to give proper warnings or advice to its guests. However I am satisfied that: (a) Mr Braddock was genuinely unaware of the risk of discoloured water being drawn into pipework serving a guest bedroom and being drawn out subsequently even after he had drawn any discoloured water through – as he believed – the system as a whole; (b) neither the defendant nor their agents or contractors advised of this risk, whether at the meeting of 9 January 2017 or otherwise; and hence (c) the claimant cannot be said to have been negligent at all let alone to such a high degree as would extinguish the causative potency of the defendant's earlier breaches. Moreover, although I have not heard argument about this, it is my understanding that any plea of contributory negligence would not be available to the defendant in circumstances where the claimant's claim is based upon breach of a (strict) contractual obligation under the lease.

141. The second problem experienced by the hotel after the works had been completed was a dramatic loss of pressure to the hot water system. This was first experienced on 24 January and caused severe problems in the supply of hot water to the higher floors within the hotel at periods of peak demand and, hence, huge difficulty for and embarrassment to the hotel. Unsurprisingly, but erroneously, both the claimant and Braemar initially assumed that this was connected to the works which had been undertaken by Egan on 22 – 23 January. However, as Mr White has explained, in fact the two problems were unrelated and the true cause of the loss of pressure was the separate and coincidental failure of two pilot operated pressure reducing valves ("PR valves") the function of which is to control the pressure of the water supply serving the hotel and which are installed on the cold water supply as it enters the 3rd floor plant room. As Mr White explained, the loss of pressure experienced by the hotel was due to the failure in operation of the PR valves which was completely unrelated to the previous leakage from the PTR valves or the previous failure of the isolation valves or any of the works undertaken by Egan on 22 - 23 January or subsequently. In short, it was sheer coincidence.

142. However, it is also clear that the PR valves had not been subject to any inspection or maintenance regime prior to their failure in the same way as the isolation valves had not been subject to any such regime. Mr White considers that the previous water pressure problems experienced by the hotel indicate that it is highly probable that one of the PR valves had failed for some time without being detected. The design intent was to have two PR valves so that one would work even if the other failed. The problem in this case was that the first having failed the second one failed as well before the first one could be repaired.

143. The problem was reported by the hotel to Braemar on 24 January when, as I have said, the assumption was that it was connected to what would have been a continuing leakage from the PTR valves, although Mr Braddock also noted the reduction in pressure from 11 bar down to 8 bar through the PR valves and down to 5 bar at peak demand which clearly raised the possibility that it might be unconnected. Mr Braddock asked for urgent repairs to take place within 24 hours. Braemar contacted Egan and instructed it to return to site and complete the works to the cylinders. This work was arranged for 30 January which, although not the defendant's fault as such, unsurprisingly the hotel considered was far

too long to wait on the (incorrect) assumption that this was the cause of the continuing pressure and water problems.

144. The problem was reported again by Mr Braddock on 25 January when given his previous suspicion that the problem might be unrelated he asked for Braemar to arrange for an engineer to attend urgently to look at the pressurisation unit and the PR valves. In the meantime, matters had escalated and the claimant's solicitors were involved in communications with the defendant's solicitors and on the same day the claimant's solicitors threatened an injunction unless the matter was treated seriously. Braemar made contact with Pressboost and persuaded Mr Brown to attend site as a matter of urgency, which he did that evening, spending approximately 3 hours on site with a view to seeking to understand and resolve the problem. His evidence was that he was unable to identify whether or not there was a problem because the pressure gauges were not operational and he was reluctant to undertake an intrusive examination without first obtaining working gauges (which he had, but not with him) and a PR valve repair kit from the manufacturer (which he did not have). He explained that this is what he intended to do and would return as soon as he had done so.

145. Although there is some uncertainty as to whether Mr Braddock was present on this visit and whether the hotel did have replacement working gauges which Mr Brown might have used and some suggestion by the hotel that Mr Brown ought to have considered a temporary fix on this occasion, since Mr Braddock's recollection was poor and since there was no basis from Mr White's evidence or otherwise that Mr Brown could be criticised for his actions on that occasion I accept Mr Brown's account and acquit him of any blame in this respect.

146. Mr Brown ordered a repair kit the following day 26 January but did not obtain any guarantee of a delivery date. Again there is no basis for blaming Mr Brown in terms of his actions since he was undoubtedly reliant upon the supplier. On the same day at 08:30 hrs Mr Dugdale emailed the hotel to update it on what Mr Bown had done, explaining that it now appeared that there was no link between the water pressure issue and the works done on 22 – 23 January, and stating that he "hoped to have a lead time on parts today so that we can schedule the works" and would let the hotel know as soon as a date was scheduled. Mr Braddock suggested in re-examination that he was dismayed at what he believed was the lack of appreciation by Braemar of the urgency of the matter. Nothing more was heard from Braemar because Mr Dugdale had nothing more to report. Not surprisingly the hotel was most unhappy about the prospect of this situation continuing indefinitely and the claimant's solicitors emailed the defendant's solicitors later that day at 15:01 hrs, complaining about the "lackadaisical approach" by the defendant and asking for a full and detailed update and time schedule. The response at 17:15 from the defendant's solicitors was to say that the defendant was informing the claimant directly of all developments as and when they occur. This was disputed by the claimant's solicitors.

147. The position in my judgment is that although Mr Dugdale was clearly acting reasonably and conscientiously in his dealings with Egan and Pressboost he was not actively chasing them with a view to ensuring that they treated this as a grade 1 priority and in particular that Pressboost pressed the suppliers as much as humanly possible to obtain the PR valve repair kit and also considered whether there might be a temporary fix in the meantime. He also clearly did not see it as his function to report to the hotel with the frequency and at the times it obviously expected in the circumstances. It is probable in my view that this is because the relationship between the claimant on the one hand and the defendant and Braemar on the other had deteriorated so that neither the defendant nor Braemar was willing to move heaven and earth for the claimant simply on its say-so and also because Braemar was reluctant to instruct contractors to act regardless of cost in circumstances where they suspected, not

unreasonably, that the hotel might be unwilling to pay the service charge for these works in due course on the basis that it held the defendant responsible for the problems anyway.

148. The end result was that the claimant took the decision on the evening of 26 January 2017 to seek an interim injunction against the defendant and the claimant's solicitors notified the defendant's solicitors of this at 21:16 hrs that night although they did not specify precisely what order they would be seeking or when and where they would be attending. Ms Brown arranged to make a witness statement which, she told me and I accept, she completed and signed in the early hours of 27 January 2017. The claimant's solicitor, Mr Marsden, also made a witness statement.

149. Mr Dugdale contacted Pressboost on the morning of 27 January and asked Mr Brown to re-attend urgently as the hotel was still experiencing problems with the water supply. He emailed the hotel at 8:33 hrs on 27 January to explain that Pressboost would be attending, that they were still awaiting a response from the PR valve supplier but that "they are going to look if anything can be done to further identify the problem and help rectify the loss of pressure". Mr Brown duly attended later that morning midday and was able to use the pressure gauges he had with him to ascertain that both PR valves had failed. He still had no PR valve repair kit but, appreciating that he could undertake a simple fix by effectively opening up a PR valve and using the control in the basement to regulate the water pressure, proceeded to do so. Mr Braddock suggested that he was not given a full explanation as to what Mr Brown had done and with what result and was concerned that there would still be insufficient pressure at peak demand. However neither Mr Braddock nor Mr Brown were cross-examined in detail about this visit and I doubt that either would now have a detailed recollection of events.

150. What is known is that at 15:47 Mr Dugdale emailed the hotel and explained that Pressboost had been working on the two PR valves and made some alterations to the booster set in the basement. This, I accept, did not give the hotel as much assurance as it might have done. Later, at 18:59 he emailed to say that the system had been left stable and running with a constant pressure. Mr Braddock replied at 19:13 to confirm that the pressure had held but that he was experiencing problems with the water temperature. Braemar arranged for Egan to attend that evening and it appears the problem was resolved.

151. As regards the PR valves, whilst Mr Brown's view was that his fix was sufficient not just in the short term but also in the long term, this was the subject of further discussion and in the end Pressboost was instructed to repair one PR valve and replace the other and this work was done in August 2017. In the meantime, however, the fix carried out on 27 January 2017 resolved the problem and the hotel experienced no further relevant problems with water pressure or supply.

152. Whilst I will deal with the costs of the injunction in the next section I must now address the question of liability in relation to the claimant's claim for damages for the loss of water pressure from 24 January to 27 January 2017. In short, in my view the cause of the problem was the defendant's failure to devise, implement or maintain a sufficient system for the inspection, maintenance and repair of the PR valves. If they had done so then, on the balance of probabilities, the first PR valve would not have failed but, on any view, both PR valves would not have been allowed to become in a position and a condition where they both failed within what appears to have been a short time of each other. This follows the clear conclusions of Mr White to the effect that if the valves had been maintained correctly it is highly unlikely that this issue would have occurred and, indeed, Mr Woolgar realistically accepted this in his opening submissions. There is no causation defence realistically open to the defendant.

H. The costs of the injunction

153. On 27 January 2017 the claimant issued proceedings and applied for and obtained an injunction at a without notice hearing before His Honour Judge Simon Barker QC sitting as a High Court Judge in the Chancery Division in Birmingham on that same day. The application as issued was for an injunction to require the defendant to undertake the necessary repairs forthwith and keep the claimant informed of what was being done and to permit the claimant to access the equipment and undertake its own temporary repair. The injunction which was eventually sought and granted was modified so that the defendant was ordered to make a permanent restoration of the water pressure and to provide details of what had been done. The Judge reserved the costs of the application and at the same time transferred the action to Manchester for the matter to be further considered on a return hearing. Fortunately, the parties were able to come to terms so far as the injunction was concerned save for the costs, which are reserved to be dealt with at this trial.

154. In short, the claimant's position is that the costs should be in the case as regards the water supply issue, whereas the defendant's position is that the application was unnecessary and that the claimant failed to comply with its duty of fair presentation to the court at the without notice hearing and that it should have its costs of the application in any event.

155. During the course of the trial the claimant provided a transcript of the hearing before the Judge and I allowed Mr Woolgar to make written submissions on this point after the conclusion of the trial and Mr Darling and Mr Hicks to respond.

156. In short, Mr Woolgar contends at paragraphs 3 -5 that the transcript confirms that the Judge was not given a fair account of the steps that were being taken on the defendant's behalf to address the loss of pressure problem and of the claimant's knowledge of those steps – both the steps that were being taken to effect a temporary fix, and the steps that were being taken to effect a permanent fix.

157. So far as the temporary fix is concerned, Mr Woolgar complained with some justification that it was not immediately clear from the papers or the transcript whether or not Mr Dugdale's email of 8:33 hrs on 27 January was provided in the documents put before the judge but that, even if it was, it was not specifically drawn to his attention. The claimant's solicitors have stated, and I accept, that in fact it was exhibited to Mr Marsden's statement. However it is clear that the exhibits were not in complete order and there is no hard evidence that the Judge in fact read the email. It is clear from the transcript that it was not specifically drawn to his attention. It is also clear in my view that it ought to have been specifically drawn to the attention of the Judge.

158. The force of this complaint however is reduced by the fact that when the claimant went back before the Judge for the third time on the course of that day its counsel disclosed that the defendant's contractors had gone in and told Mr Braddock that they were going to undertake a temporary fix. Although he also said that they had left without confirming what they had done, he did refer to the email sent at 15:57 hrs from Mr Dugdale explaining that Pressboost had made some alterations to the system, although he did not – so it appears – produce a copy of the email to the Judge. Nonetheless counsel stated in terms that this development meant that the claimant was scaling back substantially what it was asking for, so that it was not seeking an order to be allowed to undertake a temporary repair itself but instead just wanted an order for the permanent restoration of the water pressure and for the defendant to provide details of what had been done. It was explained that at this stage Mr Braddock

did not know whether the water was working on the upper floors or how good a temporary fix it was. That was the order which the Judge was prepared to make, whilst also requiring the claimant to undertake to file and serve a witness statement either from Mr Braddock or the claimant's solicitors explaining Mr Braddock's position as to what the problems were and what he found out on 27 January.

159. Mr Woolgar complains that the Judge was not provided with a fair explanation about Pressboost's attendance on 25 January 2017 or about what Mr Dugdale had said in his email sent at 8:30 hrs on 26 January 2017 or, therefore, about what the defendant was seeking to do to procure a permanent solution to the water pressure problem. It does seem to me that Ms Brown was quite wrong to say in paragraph 21 of her witness statement that "There is absolutely no suggestion whatsoever that anything is being done", since in fact it was clear that something was being done, albeit that the hotel's real complaint was that they did not know how urgently it was being done and believed that the defendant was not acting with sufficient urgency. I do not accept the claimant's submission that paragraph 21 was an entirely fair reflection of the position. I also accept that the Judge was not informed about the fact that Mr Dugdale had also stated in his email of 15:47 hrs that he would keep the hotel updated on the permanent fix and timescales.

160. Mr Woolgar contends that in such circumstances the claimant was guilty of seriously failing to discharge its duty of fair presentation and submits that had the duty of fair presentation been discharged the Judge would have seen that there was no need for any interim relief at all.

161. I do not fully accept this submission. I accept that there was a failure to discharge the duty of fair presentation as referred to above, both because the email of that morning was not expressly drawn to the attention of the Judge but also, and in the end perhaps more significantly, because the Judge was not provided with a full and proper explanation of the steps which the defendant was in fact taking to procure a solution albeit in the claimant's opinion inadequate and slow. I am satisfied that had the Judge been given a full and proper explanation it is unlikely that he would have been prepared, as he was, to make a mandatory interim injunction without giving the defendant the opportunity to attend requiring the defendant to "forthwith take all such steps as may be necessary to permanently restore the water pressure" to an adequate level in advance of the return date. However, I am reasonably confident that he would still have made the order requiring the defendant to notify the claimant of the steps which it had taken and which it was to take in relation to the water pressure issue, including whether they were permanent or temporary. That is because it is clear that the Judge accepted the claimant's justified concern that if the works which had been undertaken by Pressboost on 27 January proved not to be successful and if the claimant did not know what had been done and what more the defendant proposed to do and when, it would not have the material which the Judge clearly thought it would need should the claimant consider it necessary to make an urgent application over the weekend seeking, in effect, to restore the second limb of the original application for an order permitting it to enter the plant room and undertake repairs itself to restore the water pressure.

162. Moreover, as the claimant's solicitor said to the Judge at the third appearance, the reason why the application for an injunction was originally decided upon and made was because prior to 8:33 hrs on 27 January the defendant had not in fact said that it was going to instruct Pressboost to go back to see if it could undertake a temporary fix nor had it provided the claimant with any information as to any timescale or even that the defendant appreciated the urgency of securing a temporary or permanent fix as soon as possible to restore the water pressure. It seems to me that whilst the claimant is to be criticised in making an application for an interlocutory mandatory injunction which required the defendant to "carry out the repair works forthwith" without making full and proper disclosure of the

steps which the defendant had already taken and was indicating that it was proposing to take, the claimant was justified on the evening of 26 January 2017 in making an application to require the defendant to keep the claimant fully updated on progress and to allow Mr Braddock to enter and attempt to effect a temporary fix pending a permanent fix by the defendant.

163. In all the circumstances it appears to me that the proper order in relation to the costs of and occasioned by the application for an interim injunction is that two-thirds of the claimant's costs should be costs in the case of the water supply issue.