

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT
[2012] EWHC 3119 (TCC)

Claim No. 8BS90620

Before: HIS HONOUR JUDGE HAVELOCK-ALLAN QC

Between:

MELHUIISH & SAUNDERS LIMITED

Claimant

- and -

(1) EDWARD CHARLES HURDEN
(2) ELIZABETH ANN HURDEN

Defendants

Paul Newman (instructed by **Harris & Harris**) appeared for the claimant

Andrew Kearney (instructed by **Wards**) appeared for the defendants

Approved Judgment

I direct that 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 HAVELOCK-ALLAN Q.C.

Introduction

1. The claimant is a building contractor based in Shepton Mallet. In November 2007, it commenced this action in Bath County Court. The claim was for a sum of £28,046.92, which was the amount of an unpaid invoice, dated 21 September 2007, for the balance said to be due in respect of building works which the claimant had carried out for the defendants, Mr and Mrs Hurden, in Radstock. The works involved the building of a new home for Mr and Mrs Hurden on land adjacent to where they used to live.

2. The claim was met with a defence that the house which the claimant had constructed was defective in so many respects that it had not received a final certificate of compliance with Building Regulations. The defendants advanced a substantial counterclaim in which they contended, at one point, that the house would have to be completely demolished and re-built. That radical solution has now been replaced by a proposal that the stone outer-leaf of the external walls of the property should be taken down and reconstructed. At trial, the value of the counterclaim, including the rebuilding of the outer-leaf, exceeded £300,000. The counterclaim without re-building of the outer-leaf but replacing of wall-ties and re-pointing instead (the “budget cost” option), was in the region of £83,000.

3. Subject to the counterclaim and one other point as to liability which is addressed in paragraph 125 of this judgment, the claim is not disputed. This judgment focuses on the counterclaim. By agreement of counsel (Mr Newman for the claimant and Mr Kearney for the defendants) the defendants opened the trial and called their evidence first. Each side called expert evidence from a building surveyor. The defendants’ expert was Mr Christopher Easton of Easton Bevins. The claimant’s expert was Mr Stefan Gray. Before considering their evidence and that of the witnesses of fact on the few factual matters which were controversial, I shall sketch in the background history.

The history

4. Until 2006 the defendants lived in a property known as Ailsa Craig. The address was 21 Meadow View, Foxhills Road, Radstock. Their daughter lived at number 22. The new house was to be built on land between 21 and 22 Meadow View. The defendants instructed a firm of architects, called Martin Parish Associates, to prepare plans and a

planning application. When planning permission was obtained, the defendants invited tenders from local builders for the construction of the new property. The claimant was one of the companies invited to tender. The invitation to tender was accompanied by a copy of the plans which had been prepared by Martin Parish Associates. They were incorporated into a scale drawing, which was numbered 1072/3 and dated August 2006. The drawing was not a complete construction drawing; but it did contain "Construction Notes". A revision of the drawing (numbered 1072/3A) was later produced. There is disagreement as to whether the contract eventually entered into between the defendants and the claimant was based on the revised drawing or the original: but the difference between the two drawings is immaterial to the present dispute.

5. The claimant submitted a quotation of £163,425.00 dated 2 November 2006 together with some "Contractor's Proposals" which supplemented the Construction Notes on the drawing. The defendants had by this time sold 21 Meadow View and were living in rented accommodation in Midsomer Norton. They met with two of the claimant's employees, Robin Corbet and Darryl Mitchard, shortly after the quotation was received. Mr Corbet was the claimant's estimator and quantity surveyor. Mr Mitchard was the claimant's contracts director and the son of the claimant's managing director, Mr John Mitchard. The defendants accepted the claimant's quotation after discussing the timescale of the works and how they would be supervised.

6. The claimant said that it proposed to start the works on or about 27 November and that they would take about 20 weeks. That meant that they would be finished around 28 April 2007, although no precise date was fixed. Darryl Mitchard said that he would oversee the works and that the claimant would appoint a site foreman with day-to-day responsibility. Mr Corbett and Mr Mitchard both say that they recommended to the defendants that they instruct their architects to act as contract administrator. Mrs Hurden denies this but I think her recollection must be at fault. It is much easier for a builder to deal with a professional rather than the lay client and it is inherently likely that the claimant would have made the suggestion. But it made no impression on the defendants. They had no experience of how a building contract is run and did not appreciate the value of having someone on their side to administer it. The claimant's quotation was the most expensive. The claimant had a good reputation, and Darryl Mitchard had said that he would be supervising the works. That was enough for the defendants. But I think they were also reassured by the fact that the works were to be the subject of independent

inspection for compliance with Building Regulations and that the claimant had undertaken to provide a 10 year NHBC warranty.

7. By the time of the pre-contract meeting, the defendants had engaged a company called Total Building Control Ltd (“Total”) to act as the approved inspector under the Building Regulations. This had been arranged for them by Martin Parish Associates. They told the claimant that Total had been appointed.

8. The Building Act 1984 requires that a new property be inspected to establish that the construction complies with the Building Regulations. It provides that the inspection must be carried out by an approved inspector. The inspector is often an employee of the local planning authority. But approved inspectors from independent organisations can be used. The duties of independent inspectors are prescribed by Part II of the Building Act 1984 (“Supervision of Building Work Etc Otherwise Than By Local Authorities”), in particular by sections 47-53 (“Supervision of Plans and Work by Approved Inspectors”). The inspector serves an initial notice (s.47) at the outset of the project. This is followed by a certificate approving the plans (s.50). During the works there are prescribed inspections at particular stages (“statutory inspections”): but the inspector can attend site, or be asked to attend site, at any other time in order to carry out additional inspections (“risk inspections”).

9. By Regulation 11(1) of the Building (Approved Inspectors etc.) Regulations 2000 (as amended), the inspector must satisfy himself at the conclusion of the works that the building meets Regulation 7. If it does, the inspector issues a final certificate in the prescribed form attached to the Regulations at Schedule 2 (Form 5). The statutory basis for the final certification process is section 51 of the Act. It provides:

51(1) Where an approved Inspector is satisfied that any work to which an initial notice given by him relates has been completed, he shall give to the local authority by whom the initial notice was accepted such certificate with respect to the completion of the work and the discharge of his functions as may be prescribed (called a “final certificate”).

10. The inspectors from Total who visited the defendants’ site were Mr Burgess and Mr Green. The initial notice from Total was dated 7 September 2006. The plans certificate was issued by Total on 3 October 2006.

11. Work on what is now known as Meadow Cottage, 21A Meadow View, Foxhills Road, Radstock began, as planned, towards the end of November 2006. The drawings showed a two storey dwelling, with 4 bedrooms and two bathrooms upstairs, and a living room, dining room, kitchen and cloakroom downstairs. During the course of the project various additional works were agreed, principal among them the construction of a new conservatory for a quoted sum of £12,731.52, and a new boundary wall, rear patio and paved area towards the front of the property.

12. The external walls were to be of an insulated cavity construction. The Construction Notes prescribed an external leaf of 125 Farrington dressed rubblestone, with a cavity of 80 mm, lined with 30 mm CELOTEX GAA 3000Z cavity batts as insulation. These were to be clipped back to an inner leaf of 100 DUROX SUPABLOCK blockwork, or its equivalent. In fact CELCON blockwork was used and Rockwool batts: but no one suggests this was a departure from the specification. Farrington rubblestone is a local quarried product. The claimant produced a sample panel of stonework for approval by the planning authority. The planners rejected it as being too random in appearance because the stone was of many different sizes. They approved the use of Purbeck (blue lias) stone blocks instead. These were of a more regular dimension, which meant that they could more easily be laid in courses.

13. There is a conflict of evidence as to whether Total inspected the construction of the cavity walls and had an opportunity to look into the cavities before they were closed. Mr John Mitchard initially believed that there had been such an inspection; but I am satisfied that he is wrong about that. Total carried out six inspections in all. The initial statutory inspection was carried out by Mr Burgess on 12 November 2006. At that point the site was being laid out and the works had hardly begun. The second inspection was a risk inspection. It took place on 12 February 2007. By that stage the blockwork had reached plate level and the wall plates were ready to receive the roof members. It would only have been possible to look down into the cavities from plate height, and they had already been filled with the CELOTEX insulation. Wall structure does not fall within the regime of statutory inspection for Building Regulations. Unless expressly asked to do so, Total would not have looked at the cavities at any stage of their construction. There is no evidence that Total was asked to look at them.

14. Mr Burgess conducted a second risk inspection on 19 March 2007. By that stage the roof had been constructed and the timber trusses were in

place. There was one more inspection before the last inspection for the final certificate. This occurred on 6 June and was another risk inspection. By this time the defendants were sufficiently dissatisfied with the works that they had instructed a firm of surveyors to examine them.

15. Their dissatisfaction had been brewing for some months. The defendants thought progress was slow and they were not happy about the finish of some of the work. They took particular exception to the appearance of the stonework. The stonework had been allocated to a subcontractor called Kevin (K.C.) White. His first team of bricklayers left the site early in 2007. They had laid the stone of the outer leaf in approximately even courses up to first-floor level. Mr White himself then took over, and started laying the stone at the gable ends in a random pattern which did not match what had already been built. When the defendants complained, the claimant instructed Mr White to take it down and relay it. Another problem was that the colour of the mortar had changed as the outer leaf was being constructed. This was due to the fact that later supplies of sand had come from a different batch to earlier supplies and the colour was different. The claimant told the defendants that the different colours of mortar would blend into one with the passage of time. The claimant thought that it had dealt satisfactorily with most of the defendants' complaints, until it received a communication on 1 June 2007 from a firm of surveyors which said that it had been appointed to act on the defendants' behalf.

16. The appointment of Brooks Chartered Surveyors ("Brooks") was prompted by friends of the defendants, who had connections with the building trade, and one friend in particular, Mr Chivers, who was a retired builder and had known Mr Hurden since his schooldays. They suggested that the defendants should get experts to look at the site. Mr Goodman of Brooks Surveyors visited 21A Meadow View on or about 1 June 2007. He compiled a Snagging List and sent it to the claimant. On his advice the defendants told the claimant that until further notice the claimant should deal with Mr Goodman rather than with themselves.

17. The Snagging List was extensive. Although described as a Snagging List, a number of items in it were examples of significant defects rather than minor repairs. The List indicated that, in the opinion of Mr Goodman, the quality of the work that had been done left a good deal to be desired. Darryl Mitchard and Robin Corbet met Mr Goodman and another representative from Brooks, Mr Shawn Donnecky, at the site on 18 June. They went through Snagging List. The claimant then wrote to Brooks on 21 June with a list of the work it would carry out to cure the

defects. The claimant had already asked Kevin White to return to site to re-point the whole of the stonework. He had refused to do so. The claimant now promised Brooks that it would carry out a complete re-pointing itself.

18. By this stage the claimant had presented five valuations to the defendants. The defendants had paid the first four of them without argument, but had balked at paying the fifth. Now the claimant had agreed to carry out further work to rectify the items in the Snagging List, the defendants paid £10,000 in respect of valuation 5. They did so on Brooks' advice. The money was paid on or about 20 July, by which time work on the items in the List had already begun.

19. An item not mentioned in the Snagging List, but which was discussed between Brooks and the claimant on 18 June, concerned the head stones and lintels above the windows and doors. The Construction Notes on drawing 1072/3 specified that the lintels above all external openings were to be insulated Catnic CG70/100 lintels with 150 mm end bearings. These were metal lintels intended to sit above the head stones in order to take the weight of the outer leaf above. The head stones themselves were not intended to be load bearing: but they were intended to form a bridge below the lintels and prevent any weight being transferred to the window or door opening below. However, there were problems with both the head stones and the lintels which the claimant fitted.

20. The claimant ordered head stones of pre-cast stone from a supplier called Mendip Masons. For the wider openings, which were those over the dining room and living room windows on the front elevation and over the kitchen and main bedroom windows on the rear elevation, the claimant realised that single head stones would exceed 20 kilos each, which was the maximum weight limit in the Manual Handling Regulations. So the claimant ordered head stones for these openings in two sections. In fact the claimant ordered divided head stones for all the window openings except those on the South East elevation and the opening above the patio door: 9 divided head stones in total. The head stones had a joint in the centre which fitted together with stainless steel dowls.

21. There is an issue as to whether divided head stones of this type complied with drawing 1072/3, because the drawing depicted the head stones over each opening as a single piece. The drawing was not a detailed construction drawing, so there is room for argument as to

whether it was being prescriptive in this respect. I will come back to that argument later. However a divided head stone affords less support than a single head stone with continuous reinforcing bars running through it. The recommended width of the mortar joint in a divided head stone of cast stone is 5-10mm. In most instances the joint created by the claimant exceeded 10mm. This weakened the head stone further: so it was imposing pressure on the frame of the opening below. The pressure was exacerbated by the fact that the lintels which had been specified in drawing 1072/3 were intended for use with an outer-leaf of 125 Farrington dressed rubblestone. The Purbeck stone blocks actually used were larger and heavier, and resulted in a much greater overhang above the lintels than 125 mm. Brooks were of the view that the lintels over the four wider openings did not have sufficient load-bearing capacity. They needed additional support.

22. Brooks consulted Catnic and came up with two possible solutions. One was replacing the divided head stones with single reinforced head stones which would be load bearing. The other was to fit another L shaped Catnic metal lintel (type CN99 4074C) on top of the existing lintel. I shall call this latter solution the “Brooks retrofit lintel plan”. It involved removing one or two courses of stonework above each of the head stones. The claimant adopted the Brooks retrofit lintel plan and implemented the work in the week beginning 17 September 2007, using a subcontractor who was supervised by John Mitchard. However, no sooner had the stonework above the lintel over the kitchen window been removed, than the defendants complained that they had found sizeable lumps of mortar in the exposed cavity and that the mortar in the joints of the inner-leaf of blockwork was not well bonded.

23. John Mitchard met Mr Goodman on site on 18 September 2007 and Mr Goodman inspected the new lintel which had been added above the kitchen window. Mr Mitchard's evidence of this meeting is that Mr Goodman approved the work that had been done and said that the claimant had done a good job. Mr Goodman also inspected the mortar and pronounced that it was sound. There is no evidence about the meeting from Brooks and so no reason to doubt this evidence. Mr Mitchard also says that there was no sign of mortar snots in the cavity. There may not have been when he looked on 18 September, but Mr Hurden is adamant that there were mortar snots present when the cavity was first opened up. He brought a lump of it to court, which he said came from the cavity above the lintel over the kitchen window. The defendants were also unhappy that the retrofitting of the additional lintels meant that the new pointing above the windows had to be disturbed. When the stonework

was put back the replacement pointing did not match. The defendants objected but Mr Mitchard said that the new pointing would blend in with time.

24. Shortly afterwards, around the third week of September 2007, the claimant told the defendants that their new home was ready for them. The claimant gave the defendants the keys and a pack of documentation about the property. The defendants were living in rented accommodation and were reluctant to extend their tenancy. They say they felt that they had no option but to move into 21A Meadow View, even though the property had not yet been given a final certificate by Total.

25. The claimant did warn them that the work was complete subject to one aspect, which was the step in front of the front door. Drawing 1072/3 had specified that there was to be a ramp to the front door with a minimum width of 900 mm and a maximum rise of one in 15. The ramp was to lead to a level platform of a minimum depth of 1200 mm immediately in front of the door threshold, which was to be level. This arrangement was no doubt to facilitate wheelchair and disabled access. The claimant had built a ramp made out of paving stones (PHOTO 6/257). The defendants did not like it and asked for it to be replaced with a step. The claimant had created a step but said at the time that it probably did not comply with Part M of the Building Regulations governing front door access. During his inspection on 6 June 2007, the approved inspector from Total (on this occasion Mr Green) noted that the step was indeed non-compliant. On the suggestion of Brooks, the claimant had then replaced it with a temporary ramp made out of timber. This arrangement did not satisfy the inspector either. When he carried out his statutory inspection on 21 September 2007, he declined to grant a final certificate because of the following items which he noted in his report:

“Request that entrance door to comply with Part M Building Regulations.

Following re-pointing of the building it is noted that weep holes are missing. These will need to be replaced.

Cavity tray vents at 450 centres and stop ends are required.

It is required that mastic is applied to a joint between conservatory and main building.”

26. Mr Green wrote to the claimant on 24 September confirming that these points needed to be addressed. In his letter he also expressed concern about the standard of finish of the works. However, poor finish is not a matter for the inspector unless it breaches Building Regulations or

compromises Health and Safety. Mr Green had no reason to suspect that the poor quality of the work he had seen did either of those things.

27. The items which had been noted by Mr Green were not difficult to correct. The claimant took the view that they could easily be rectified within the usual defects liability period and that, since the defendants still had the benefit of a 5% retention, it was time to send them the final account. So the claimant sent the defendants the invoice which is the subject matter of the claim in this action. It included a discount of £1,000, which John Mitchard described as a “goodwill gesture”. But the defendants were still not happy. They said that they would only pay the invoice when everything had been completed to a satisfactory standard.

28. At around this time the defendants terminated their retainer of Brooks. When the claimant pressed the defendants’ solicitors for payment of the invoice, the solicitors said that the defendants were intending to instruct new surveyors. Despite this indication, when the Defence and Counterclaim was served it turned out to be based almost entirely on the Brooks Snagging List. The subsequent conduct of the defendants’ case is one of the less satisfactory aspects of this litigation. It is addressed at some length in Mr John Mitchard’s second witness statement. Mr Kearney, the defendants’ counsel at the trial, is almost certainly correct when he said that this section of the witness statement must have been drafted by the claimant’s solicitor. This judgment is not the place to apportion blame for the tortuous history of these proceedings but a brief summary will not go amiss.

29. The claim was issued in Bath County Court in November 2007. It was not transferred to the Technology and Construction list in Bristol until the autumn of 2008. By then directions had been given for the appointment of a single joint expert, Mr David Simmonds. He produced a report in March 2008 but was then dis-instructed as single joint expert because it was discovered that he had earlier been appointed by the defendants to advise them on the state of the property. Permission was given for each side to appoint its own expert. Mr Easton was instructed by the defendants in the summer of 2008. His first visit to the property was on 13 June 2008 and his first report was issued on 9 July of that year. Mr Gray was first instructed by the claimant around the same time, and produced his first report on 7 July 2008.

30. The Defence and Counterclaim was amended three times between May 2008 and August 2009, on each occasion by consent, but on the usual terms as to costs. The amendments were necessary to accommodate

the defendants' developing list of complaints. Mr Easton's first report raised a number of issues, some of which were later dropped. His main concerns in 2008 were with the state of the lintels in the window heads and the cavity trays above them, the joints in the stonework around the door and window openings, the lack of uniformity of the pointing and the need for the front door access to comply with Part M of the Building Regulations. Wall ties were not thought to be a problem at this stage.

31. The wall tie problem surfaced in October 2009, as I shall describe presently. A trial date had been fixed for May 2010: but a visit to the property by Total, in March of that year, caused the defendants to want to change their case again, and the trial date was adjourned. A fourth amendment was made to the Defence and Counterclaim in September 2010. It was only upon service of that amendment that the defendants dropped their case that the property needed to be demolished and rebuilt. However, the amendment introduced new allegations of defects. A fifth amendment of the Defence and Counterclaim was made in December 2010 to take account of tenders which the defendants had by then obtained through Mr Easton for the cost of repairs. Then the defendants were not ready for trial in 2011 because of funding difficulties. These were only resolved when they obtained a public funding certificate to cover the cost of bringing the case to trial (albeit not the cost of counsel).

32. The trial has been concerned with complaints about two major defects, and a number of smaller items. The first major defect is the condition of the cavity walls, and in particular the remedy for inward sloping wall ties. The second is the state of the head stones and lintels, and in particular the fact that the lintels do not have sufficient load-bearing capacity and the lintel above the kitchen window is not watertight. The first of these major defects was not the subject of complaint before the autumn of 2009. How did it come to light?

33. Mr Chivers was largely responsible. He persisted in telling the defendants that the construction was so bad that the house needed rebuilding. At his instigation, a section of the cavity wall either side of the front door, about 2 metres vertically and 1 metre horizontally, was opened up. When this was done, the defendants say that they spotted a lot of mortar in the cavity. They asked Mr Burgess to come and inspect. He visited the property on 31 October 2009. Mr Chivers was present: but the claimant's representatives were not invited. Mr Burgess wrote to the defendants on 3 November recording the upshot of his inspection:

“... I can confirm that, in our opinion, the amount of mortar within the cavity is not acceptable and it would also appear that the cavity wall ties are sloping back towards the interior of the property, which contravenes good building practice.

During the inspection you sprayed water over the external wall and it became apparent, on the underside of the lintel in the kitchen, the water was entering the property. We were unable to ascertain the presence or condition of a cavity tray. However, cavity trays were present in other areas of the property where walls were exposed.

It was further noted that during the construction of the roof the gable blockwork has become dislodged and will require reconstruction.”

34. A final certificate had still not been issued. Mr Burgess now decided that a final certificate would not be issued unless a one metre square area of the outer-leaf was removed for further inspection of the cavity. He told Mr Easton. Mr Easton told Mr Gray, and Mr Gray told the claimant. It was agreed that Mr Easton would arrange for the opening up of four areas of the outer-leaf, so that the cavity could be further inspected with the claimant present. This was done. On 4 February 2010 John Mitchard attended the site with Mr Easton to inspect the areas that had been opened up. The defendants were there also. There is a dispute as to what happened next. Mr Mitchard says there was no evidence of any mortar in the cavities. Some wall ties were found to be sloping down from the outer-leaf to the inner-leaf but there was no sign of damp where the ties were fixed to the blockwork. According to Mr Mitchard, Mr Easton agreed that there was no breach of the cavity by moisture, and he had no concern about the sloping wall ties. Mr Mitchard recalls Mr Easton saying words to the following effect: “Everything’s all right John. I am going back in to advise the clients to settle”. Mr Mitchard says he responded by saying: “This could be your last time on site. Brooks have recommended settlement and now you!”. Mr Easton agrees that, unlike in the cavity above the kitchen window lintel, no significant snots of mortar were found in the cavity in the areas newly opened up: but he says that he did not say that there was no breach of the cavity, nor did he indicate that he had no concern about the downward sloping wall ties. In his view the inward sloping wall ties were a potential breach of the cavity. For that reason alone he is sure that he would not have said that everything was all right or that he was going to advise the clients to settle.

35. Although Mr Mitchard's recollection of the conversation has the ring of truth about it, I am not persuaded that it is accurate. From the moment the sloping wall ties were discovered, Mr Easton's professional opinion in this case has been highly critical of the fact that the wall ties had been bent and were not horizontal. He recommended almost immediately that new wall ties should be installed. It is not credible in those circumstances to suppose that he dismissed the significance of the wall tie discovery on 4 February or that he said he was going to advise the defendants to settle.

36. The defendants were angered by the new discovery and by the continued withholding of a final certificate. They were concerned that no action was being taken to put their property right. They took the matter into their own hands by ringing Total to complain that nothing was being done. The complaint was referred to a director, Mr Ian Bain, who was the immediate superior of Mr Burgess and Mr Green.

37. Mr Bain carried out his own inspection of the property on or about 16 March 2010. The defendants were present, and so again was Mr Chivers. The defendants were quite cross by now and, supported by Mr Chivers, told Mr Bain that in their opinion the whole property had to be demolished and rebuilt from the damp proof course upwards. They showed Mr Bain a DVD of the hose test which had been conducted for the benefit of Mr Burgess the previous October. Mr Bain also looked at the new areas which had been opened up and the exposed cavity either side of the front door. He concluded that there were two main problems to be addressed. The first was the ingress of water above the kitchen window, which, in his view, was due to lack of a cavity tray, insufficient bedding of the wall ties in the mortar joints of the outer-leaf adjacent to the lintel, and the need for the lintel to have more support. The second was the fact that some of the wall ties in the exposed cavities were sloping inwards from the outer leaf to the inner leaf and were poorly bedded in the outer-leaf. He also thought there was insufficient mortar in many of the perpendicular joints of the outer-leaf, and too much mortar in the cavities. He was not persuaded that a total rebuild of the property was required, but he regarded the wall-tie issue as an inherent structural defect, which would require major works if it was to be rectified. He noted that there was as yet no evidence of water ingress into the property caused by the inward sloping wall ties: but regarded water ingress from the inward sloping wall ties as being a very real possibility in the future.

38. On 24 March 2010, Mr Bain wrote to Mr Easton expressing his view in these terms:

“I can confirm that there are defects in the cavity wall, where inspected around the front door area, and where the full fill cavity insulation was removed. There is evidence of wall ties sloping towards the inner leaf of the building, poor mortar filling to the vertical joints, wall ties not properly bedded, and an excess of mortar within the cavity. The condition of the cavity wall (where inspected) is not in accordance with good building practice and contravenes the requirements of the Building Regulations. If the defects had been seen on site then advice would have been given to rectify the defective work. ... In my opinion the most practical way of ensuring that the external cavity wall performs its function throughout the life of the building is to demolish and rebuild the whole external leaf. This will allow the wall ties to be installed correctly, excess mortar in the cavity to be removed, defective lintels to be replaced over openings with adequate cavity trays, and for the external stonework to be properly bedded.”

39. Mr Bain followed this up with a letter to the defendants on 28 April 2010 in which he justified his decision not to issue a final certificate in respect of 21A Meadow View on the following grounds:

“I am unable to provide the final certificate as I am aware of inherent defects within the cavity wall which are very likely to allow water penetration into the building, which will be prejudicial to the health and safety of the occupants of the building.”

The terms of the contract

40. Only one issue arises as to the terms on which the claimant contracted. It is not in dispute that the house was to be built to the design and specification set out in drawing 1072/3. It follows that the “Construction Notes” in the drawing were express terms of the contract, save as varied by the planning authority’s insistence on Purbeck stone in place of the Farrington rubblestone. I find that the “Contractor’s Proposals” attached to the claimant’s quotation were also incorporated into the contract.

41. There is no dispute either that the contract contained implied terms that the claimant would use materials of merchantable quality and would carry out the construction with reasonable skill and care. Provided so constructed, it would be expected that a final certificate would follow

from the approved inspector. However, the defendants say that it was an express term, alternatively an implied term, of the contract that the claimant (1) would carry out the works to a standard sufficient to procure a final certificate from Total and (2) would take reasonable steps to obtain such a certificate.

42. The case for an express term rests on the unconverted fact that Mrs Hurden gave the claimant a copy of Total's letter accepting appointment as approved inspector before the pre-contract meeting and that, at the meeting itself, Darryl Mitchard says that the defendants declined to appoint an architect or contract administrator to supervise the works on their behalf not only because the claimant was to have a site foreman but because the works were to be inspected by Total. Mrs Hurden did not corroborate Mr Mitchard's evidence in this respect, but I have accepted the claimant's evidence (and rejected Mrs Hurden's evidence to the contrary) that the claimant suggested at the pre-contract meeting that it would be a good idea if the defendants appointed a contract administrator, and I think Mr Mitchard was right when he gained the impression that the role of Total played a part in the defendants' decision not to appoint their own contract administrator, even if the defendants did not say so.

43. There is no magic about construing express terms. As Lord Clarke said in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (at paras 14 and 21), "... the ultimate aim of interpreting a provision of a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. ... The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business commonsense and to reject the other".

44. Mr Kearney submits that a reasonable person would have understood from what took place before and at the pre-contract meeting that the parties were expressly agreeing that the house should be built to a standard which would qualify for a final certificate. I do not think that the evidence of what was said goes quite this far: but I accept his alternative submission that by implication this is precisely what was agreed. Although the approach to the implication of contractual terms has been

expressed in the past in the form of a number of overlapping tests (see e.g. Lord Simon of Glaisdale's speech in *BP Refinery Westernport Pty Ltd v Shire of Hastings* [1978] 52 AJLR 20 at 26), the task of the court remains the same as when construing express terms, namely, to ascertain what the meaning of the contract would be to the “reasonable addressee” having all the background knowledge which would reasonably be available to the two parties (see Aikens LJ in *Thomas Crema v Cenkos Securities plc* [2010] EWCA Civ 444 at paras. 36-41). A term will only be implied if it is necessary: but it is necessary and will be implied if that is what the contract must mean. In my judgment, it is obvious that the parties intended that the house should be built to a standard which would qualify for a final certificate from Total. The obligation which that term imposed on the claimant was absolute just as the obligation to exercise reasonable skill and care was an absolute obligation. For the reasons set out in the rest of this judgment, those obligations were broken in a number of respects.

45. The more difficult question is whether it was also an implied term that a final certificate would be provided. I think it follows from the implied obligation that the house should be built to a standard which would qualify for such a certificate, that the parties agreed that the claimant would obtain the certificate. However this was not an absolute obligation. The claimant could not guarantee that the inspector would not act capriciously. It was an obligation of reasonable endeavours, which would be satisfied if the house was built to the right standard, the claimant invited the inspector to carry out the necessary inspections and asked for the certificate when the work was completed. The parties disagree as to whether this second limb of the implied term was also broken. Unless it can be said that Mr Bain is being capricious or perverse (and that is not the view of the experts – see paragraph 71 below, or the view I take in the light of their evidence), it seems to me that the second limb was broken, because a final certificate is still being withheld.

Were the wall ties defective?

46. Wall ties perform an important structural role by holding the outer-leaf of stone or brick to the inner leaf of blockwork. To perform this task they need to bridge the cavity roughly horizontally between the two leaves, and be properly embedded in a mortar joint at each end. There is no dispute that in order to be fully effective, a wall tie should be embedded at least 50mm in the mortar. Wall ties are made of stainless steel. There is a horizontal D shape at each end, to give purchase in the

mortar. Cavity wall ties also have a perpendicular kink in the middle (called a “drip”) which is designed to ensure that any moisture travelling along the tie drops off at the mid-point of the cavity and does not reach the outer face of the inner leaf.

47. About 516 wall ties were used in constructing the external walls of 21A Meadow View. A significant number of them were bent so that they sloped inwards from the outer leaf to the inner leaf. Some that were bent were not properly embedded in the mortar joint of the outer leaf. Mr Bain’s evidence is that he saw a “high incidence” of bent wall ties in the exposed cavities either side of front door. He regarded one bent wall tie in every 2 sq metres of wall as representing a high incidence. The experts, Mr Easton and Mr Gray, were agreed at the trial that probably between one quarter and one third of the wall ties were either sloping inward or not properly embedded in the mortar joint of the outer-leaf, or both.

48. The wall ties were bent because the claimant’s subcontractors had failed to build the outer leaf so that the horizontal mortar joints were parallel with those of the inner leaf. The courses of the inner leaf were 225 mm apart. The courses of stone on the outer leaf were 165 mm apart. How the joints got out of kilter is immaterial: but should not have been allowed to happen. The weekly site reports indicate that the inner leaf of blockwork was built up to joist level by Christmas 2006, which was before any of the Purbeck stone had arrived. It is easier to level the horizontal mortar joints if the two leaves of the cavity wall are built roughly in parallel, or in a way that ensures that the inner leaf of blockwork is no more than about 1 metre higher than the outer leaf of stone or brick at any one time. When the outer leaf came to be constructed, the subcontractors bent upwards many of the wall ties already fixed in the inner leaf, so that they linked with the mortar joints in the outer leaf where they were higher.

49. The claimant’s primary case is that inward sloping wall ties are not a construction defect. In the alternative Mr Newman’s submission is that even if technically they are a defect, there is no evidence in the present case that moisture has penetrated across the cavity to the inner leaf. No damage has been caused and the risk of any damage in future is minimal. At most, therefore, the defendants are entitled to compensation for loss of amenity on the basis of the approach taken by the House of Lords in *Ruxley Electronics v Forsyth* [1996] AC 344. Alternatively, the claimant adopts the defendants’ fall-back case that any damages should be awarded by reference to the diminution in market value of the property if,

by reason of the state of the wall ties, no final certificate is issued by Total.

50. I am in no doubt that the inward sloping wall ties were a defect. However the experts were divided on this issue. Mr Easton was of the opinion that they were a defect, while Mr Gray supported the claimant's case. So it is appropriate that I should say something at this juncture about the experts and the quality of their evidence.

51. Mr Easton is an experienced expert witness. To deflect any criticism of his independence in the present dispute, Mr Kearney disclosed, before Mr Easton went into the witness box, that the defendants might be personally liable to Mr Easton for the payment of his fees and that there was a significant unpaid fee account. Since the defendants had now qualified for public funding, Mr Kearney was concerned that it might appear that the defendants would be unable to pay Mr Easton's outstanding and future fees unless the counterclaim was to succeed and/or they were to obtain an order for the recovery of their costs. Mr Kearney was right to bring this to the court's attention. Mr Newman, to his credit, did not seek to make mileage out of it. I was quite satisfied, and remain satisfied, that financial considerations did not influence Mr Easton's opinion in any way and that his evidence was not coloured by any indirect interest he might have in the outcome of the case.

52. In this context it is ironic that Mr and Mrs Hurden both expressed a loss of confidence in Mr Easton when they gave their evidence. They felt that he had made too many admissions against their interest, in the course of discussions with Mr Gray and the production of the four joint statements. That Mr Easton felt able to make admissions against his clients' interest, where he thought it appropriate to do so, merely reinforces my impression of his impartiality.

53. Mr Gray, by contrast, was less accustomed to the role of a court expert. This was the first case in which he had given evidence. His comparative inexperience showed in two ways. First, he did not appreciate the importance of ensuring that any approach made to independent witnesses was notified to his opposite number, Mr Easton. Three months before the trial Mr Gray had a meeting with Mr Bain at which it is fairly clear that he sought to persuade Mr Bain to retreat from his view that the only remedy for the bent wall ties was the rebuilding of the outer leaf. Mr Easton was not informed of this meeting beforehand and only learned it had taken place some weeks after the event. He should

have been invited to attend, not least because he had already produced three joint statements with Mr Gray and the meeting between Mr Gray and Mr Bain took place only a few weeks before the fourth and final joint statement. Second, Mr Gray adhered to the view that the bent wall ties were not a defect, and required no remedial works, past the point when it should have been plain to him that this view was not tenable. Eventually Mr Newman was constrained in his closing submissions to disavow Mr Gray's primary stance that the inward sloping wall ties were not defective. Inward sloping wall ties are not good practice. Wall ties that are not properly embedded at either end are not good practice either. There is a wealth of information in published standards in the industry to support these propositions. I quote here only a few extracts from British Standards:

BS.5628 Part 3

"in cavity walls, some water will inevitably penetrate the outermost relief and prolonged periods of wind driven rain..."

BS.5628 Part 3 1985 section 32.11.4 wall ties

"... And have a slight fall to the outer leaf."

BRE Good Building Guide 41

"If ties slope the wrong way, if drips are off centre, or inverted, or if ties are fouled by mortar, rain can cross the cavity".

BS.5628 Part 3 2005 Section A5421

"... bed wall ties at least 62.5 mm or the desired embedment length into masonry walls and level or slope slightly downwards towards the outer leaf. Ensure the drips point downwards. It is important that proprietary wall ties are laid the correct way up".

54. Mr Gray questioned whether these British Standards applied to the defendants' property because, in his view, it was not a conventional construction. He regarded a conventional construction as one involving an outer leaf of no more than about 100 mm thickness, equivalent to the dimensions of a standard brick. Here, the outer leaf of Purbeck stone was 160-165 mm thick. Mr Easton did not think this was an adequate basis for discounting the British Standards for cavity wall ties. I agree with him. In any case, it is common ground that NHBC standards applied to the construction of 21A Meadow View because the claimant had undertaken to provide an NHBC warranty. The NHBC standards for cavity wall ties are very similar to British Standards. The following appears in NHBC 61-S5(b):

“If ties slope down to the inner leaf, if drips are off centre, or if ties have mortar droppings on them, water can cross the cavity... The two leaves should be coursed so the wall tie is level or slopes outwards.”

55. This guidance in these extracts from British Standards and NHBC standards highlights the risk of moisture reaching the inner leaf if the wall ties slope inwards. In his third and final expert report, Mr Gray focused on this risk, and the extent to which it was present in the defendants’ property. He cited the following statements in Approved Document C of the Building Regulations 2000 (as amended):

“Resistance to Moisture

C2. The floors, walls and roof of the building should adequately protect the building and people who use the building from harmful effects caused by:

...

(b) precipitation and wind driven spray.”

Cavity External Walls

5.12 Any external cavity wall will meet the requirement if the outer leaf is separate from the inner leaf by drained airspace, or in any other way which will prevent precipitation from being carried to the inner leaf.

Technical Solution

5.13 the construction of a cavity external wall could include:

- a. outer leaf masonry (Bricks, blocks, stone or manufactured stone); and
- b. cavity at least 50 mm wide. The cavity is to be bridged only by wall ties, cavity trays provided to prevent moisture being carried to the inner leaf, ... and cavity barriers, fast stops and cavity closures, where appropriate; and
- c. inner leaf masonry or frame with lining.”

56. Mr Gray’s evidence was that the construction of 21A Meadow View satisfied these parameters. However, in cross-examination, he had to concede that the BS and NHBC guidance assumed that the wall ties

were properly installed, and that wall ties which were inward sloping did not comply with British Standards. Nevertheless, he stuck to his view that there was no appreciable risk of moisture reaching the inner leaf of the defendants' property because the cavity was filled with Rockwool insulation. He attached to his report a copy of the BBA (British Board of Agrément) Certificate for Rockwool cavity wall insulation batts of the kind which had been used by the claimant. The Certificate states that such products "do not absorb water by capillary action and may therefore be used in situations where they bridge the DPC's of the inner and outer leaf". It goes on to say in paragraph 6.1: "The orientation of the water repellent treated fibres of the products will prevent water crossing the wall construction by the installation. Correctly installed (in accordance with this Certificate) the slabs [of Rockwool insulation] provide an uninterrupted barrier to water which penetrates the outer leaf of the wall and drains down the cavity face of the outer leaf".

57. These statements, and the absence of any sign that moisture had in fact penetrated to the inner leaf when the property was inspected, led Mr Gray to the view that the Rockwool batts provided a barrier which it was almost impossible for water to penetrate. However, the BBA Certificate goes on to say in paragraph 6.2: "It is important to ensure during installation that: (a) wall ties are installed correctly and thoroughly clean...".

58. The significance of this qualification should have become apparent to Mr Gray when he questioned the manufacturers of the Rockwool batts about their water repelling properties. In May 2010 he put to them the following (somewhat tendentious) question:

"... some of the wall ties ... have a negative slope towards the inner leaf. My query is - if the wall ties are completely surrounded with Rockwool material containing a water repellent, then how can wind driven rain that might be forced through the 165 mm outer leaf track across the wall tie if it is prevented from doing so by the Rockwool?"

The answer he received was not entirely helpful. Rockwool said:

"The Rockwool Cavity consists of water repellent fibres which are randomly orientated which prevents water crossing the wall construction through the insulation batt. The product is designed so that any water penetrating the outer leaf will drain down the

surface of the batt. The product is suitable for use in standard masonry constructions i.e. brick, block or dressed stone.

The construction should be designed to the appropriate local wind driven rain index, paying due regard to the design detailing, workmanship and materials to be used and relevant recommendations of BS 5390: section 3 (BBA certificate 94/3079)

The wall ties penetrate through the insulation and effectively act as a bridge which water could traverse.

Our installation recommendations are based on good building practice guidance set out in the British Standards and NHBC. As per the product datasheet, we recommend that wall ties should be installed sloping to the outside leaf to prevent or minimise the risk of water ingress into the inner leaf.

BS 8000: part 3:1989 paragraph 3.4.3.1 states: “Wall ties – bed ties at least 50 mm into masonry leaves, and sloping slightly downwards towards the outer leaf. Ensure that, with wire ties, the drip points downwards.”

NHBC Good Craftsmanship Guide for brickwork and blockwork states – “wall ties should be level or slope into the outside” and “ensure drips wall ties face downwards in the centre of the cavity”.

We would recommend that you seek the advice of the wall tie manufacturer so as to obtain their opinion as to the correct installation or recommendation for the wall ties used.”

59. The response demonstrates to my mind that the manufacturers of Rockwool regard inward sloping wall ties as a potential threat to the waterproof integrity of cavity walls in which Rockwool insulation batts fill the cavity.

60. Mr Easton accepts that there is no evidence that moisture has penetrated through to the inner leaf of the defendants’ property as a result of the inward sloping wall ties. He points out, however, that Radstock is located in an area rated as being in the “Severe” category for exposure to weather, and that water was seen running down the inner face of the outer leaf where the cavity had been opened up either side of the front door. The water may have come from the hose test conducted for the benefit of Mr Burgess, but it illustrates that the outer leaf was permeable. Mr Easton

says that, where an inward sloping wall tie penetrates the insulation, it is likely over time that the Rockwool will degrade and lose its molecular strength if moisture travels down the tie and comes into contact with it. He points out that the blockwork of the inner leaf was not dry lined on the interior of the building. It was covered in a conventional cement render with a topcoat of plaster. Conventional render can absorb moisture, which will eventually be exhibited in the form of discoloured patches on the plasterwork of the walls. The process might take a considerable time; but the guidance in British Standards (e.g. as to the correct installation of wall ties) is drafted with a building lifespan of 60 to 80 years in mind. In the opinion of Mr Easton, there is a real risk of moisture penetrating the Rockwool batts and reaching the inner leaf of the defendants' property well within that timescale.

61. In my judgment, Mr Easton's assessment of the risk of ingress of moisture is closer to the truth than that of Mr Gray. Whilst there is no probability of damage in the short term, there is an enhanced risk, which I would describe as a significant risk, of moisture penetration in the medium to long-term i.e. in 20-30 years. I reject Mr Gray's evidence that there is no appreciable risk at all.

62. Moreover, the focus at the trial on risk of moisture penetration tended to obscure the structural implications of the fact that so many of the wall ties are bent. Since inward sloping wall ties cross the cavity at an angle, their efficiency as a brace which connects the outer leaf to the inner leaf is reduced. The evidence that at least some of the bent ties are not properly embedded in the mortar joint at one or other end reduces their efficiency still further. Whilst there was, and is, no question of the building collapsing (as the defendants at one time feared), bent wall ties create a structural weakness. In buildings where most of the wall ties have failed, the outer leaf can become detached from the inner leaf in violent weather. The risk of that happening to the defendants' property is impossible to assess without knowing whether there is a concentration of poorly embedded wall ties in any particular area. There is no evidence of this, or that any part of the outer leaf has become unstable. Nevertheless, the structural implications of the bent wall ties cannot be ignored. They are an additional factor which confirms my view that the bent wall ties are a defect, and that, in allowing the property to be built with so many of them in this condition, the claimant failed to exercise reasonable skill and care.

The remedy for the wall ties

63. The defendants' remedy is damages reflecting the cost of cure. I see no parallel between the present case and the case of the swimming pool in *Ruxley Electronics v Forsyth*. Although the swimming pool was shallower than Mr Forsyth had specified, there was no suggestion that it was defective. It will still be capable of being used in precisely the same way and was safe for diving. Damages for loss of amenity were awarded as the best means of compensating Mr Forsyth for not having received a pool to his exact dimensions but one which was nonetheless fully functional. Loss of amenity compensation might be appropriate in the case of a building, perfectly constructed, but wrongly set out so that its dimensions departed from the plans to a modest extent. But that is not this case. There is a defect in the cavity walls which the defendants are entitled to have remedied even if physical damage has not yet occurred. The risk of damage in future is in my judgement sufficiently high to warrant a remedial scheme which replaces the bent wall ties with wall ties properly installed. The cost of that scheme is the appropriate measure of the defendants' loss.

64. Diminution in the market value of the property is a potential alternative: but is very difficult to assess. There was no valuation evidence at the trial; but I have no hesitation in rejecting the claimant's case that the state of the wall ties and the absence of a final certificate from Total made very little difference to what the property was worth. I accept that it is likely to be hard to sell a newly built house from which a final certificate has been withheld by the approved inspector, even if the property is covered by an NHBC guarantee. Mrs Hurden said that she had found it impossible even to obtain buildings insurance and gave examples of approaches she had made to 3 well-known insurers who had refused cover (although whether the wall tie problem was correctly described to them is open to question). The bottom line is that the defendants commissioned 21A Meadow View as their new home. They intend to live in it rather than sell it. The best measure of their loss is the cost of remedying the defect. This will enable them to continue to live there, without fear of damage occurring in the future.

65. The choice of cure is between the budget cost option and rebuilding the outer leaf. The budget cost option is advocated by Mr Gray. It involves using ground penetrating radar to identify the position of wall ties in the outer leaf. Their position is then marked on the outside wall and measured against the level of the mortar courses in the inner leaf of blockwork, which it is agreed are likely to be 225 mm apart. Wall ties located on the outer leaf above the level of the mortar courses in the

blockwork will be removed by taking out the adjacent stonework and cropping off the bent wall tie inside the cavity. A new wall tie is then be anchored chemically to the inner blockwork and the stonework of the outer leaf rearranged so that there is a mortar course level with the new tie.

66. Mr Easton agrees that this is a feasible solution, albeit not the one he recommends. It has the advantage of being cheap. The agreed cost of the exercise is £4,895 excluding VAT. Mr Newman submits that it is the proportionate solution, having regard to the relatively low risk of damage resulting from the bent wall ties, at least in the short-term. He also submits that it is the appropriate solution because the defendants cannot be relied upon to implement Mr Easton's more expensive scheme of rebuilding the outer leaf in its entirety.

67. On these last two points, Mr Newman referred to the judgment of His Honour Judge Toulmin in London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd [2007] EWHC] 2546 where a claim for reinstatement costs following a fire at the Fire House in Southwark was rejected because there was no evidence that the claimant intended to carry out any of the remedial schemes which were the basis for the claim. Judge Toulmin referred to the following passage in the speech of Lord Lloyd of Berwick in the Ruxley Electronics case (at pages 369H – 370A):

“If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement as where for example the expenses of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value.”

Judge Toulmin also referred to the judgement of Clarke LJ (as he then was) in the Southampton Container Terminals Ltd v Schiffartsgesellschaft “Hansa Australia” [2001] 2 Lloyd’s Rep. 275 at para. 56, where he said:

“Ruxley also supports the proposition that, although what the claimant does with any damages he receives is irrelevant, his intention to reinstate or not to reinstate, while not conclusive, is relevant to the question whether it would be reasonable to reinstate the property – see Lord Jauncey at page 359C-D and Lord Lloyd at pages 372-373...”

68. Disadvantages of the budget cost option are: (1) that it would leave the outer leaf looking rather piebald and possibly requiring complete re-pointing (although this is controversial), and (2) that it might not be sufficient to persuade Mr Bain to issue a final certificate.

69. The alternative of rebuilding the outer leaf was first proposed by Mr Bain but has since been endorsed by Mr Easton. It would be considerably more expensive. The cost claimed by the defendants is in the region of £150,000, excluding VAT. However, it would almost certainly result in a final certificate being issued by Total. It would facilitate the undertaking of certain other remedial works which it is agreed are necessary e.g. to the lintels and cavity trays, and it would obviate the need for complete re-pointing if complete re-pointing would be necessary following implementation of the budget cost option.

70. I will deal with the final certificate point first. Mr Bain was called to give evidence. Mr Newman objected to his evidence on the ground that it was not confined to the factual history of his involvement in the project, but included his opinion of what was wrong and what should be done to put it right. It seems to me that this was inevitable. Both parties wanted to know from Mr Bain about the circumstances in which he would be prepared to issue a final certificate. In addition Mr Newman wanted to put to him (and did put to him) that, if he was only prepared to issue a final certificate if the outer leaf was rebuilt, his view was unreasonable.

71. Mr Bain accepted that he recommended in March 2010 that the outer-leaf should be rebuilt because it was the only satisfactory solution that occurred to him at that time. It remained, in his view, the best solution; but he was prepared to entertain others. By that statement I understood him to mean that if the court was to determine in this judgment that the budget cost option was sufficient, he would be willing to reappraise the situation and might agree to issue a final certificate if the budget cost option was properly implemented. Mr Newman tried to depict Mr Bain as obdurate and more concerned to protect Total from allegations of negligence than to concentrate on what in truth will be sufficient for the property to satisfy Building Regulations. I do not think this is right. Mr Bain was being understandably cautious in only committing himself to issuing a final certificate if the outer leaf was rebuilt. Mr Gray accepted that this was a reasonable view in the sense that it lay within the range of views which an approved inspector in Mr Bain's position could be expected to adopt. Mr Gray was not prepared to say that Mr Bain was being perverse.

72. The impression I have is that Mr Bain does not consider that only one solution would be acceptable to Total. He is prepared to look at the budget cost option on its merits, if the court awards damages on that basis. Whilst the court would have no power to direct that he should issue a final certificate if the budget cost option was employed, I think it more likely than not that he would issue a final certificate if he was satisfied that the budget cost option had been properly and carefully carried out under adequate supervision. It follows, in my judgment, that the final certificate point is not so critical to the choice between rebuilding the outer leaf (Part A of the defendant's counterclaim) and the budget cost option (Part B) as both counsel suggested it to be at the trial.

73. It follows also that the single most important factor in determining between the two reinstatement schemes is not whether one would secure a final certificate where the other would not, but whether one is more appropriate than the other having regard to the cost, the level of risk posed by the defective wall ties and all other relevant factors. Other relevant factors legitimately include the defendants' peace of mind and confidence that their home meets proper standards of construction. Taking this last factor, and all the other circumstances into account, I have come to the conclusion that reinstatement by the replacement of the defective wall ties without rebuilding the outer leaf is the correct basis of compensation in this case.

74. I start with the premise that both solutions will provide a cure for the wall-tie problem and that, if properly carried out under close supervision, the Part B solution will probably result in a final certificate being granted by Total, even if this is not quite as certain as it is with the Part A solution. I recognise that the complete removal of the outer-leaf may assist the carrying out of other remedial works: but the Part B solution covers all other necessary remedial works to the cavity walls other than the removal of any mortar snots in areas of the cavities which would not have to be opened up to replace wall-ties or install new lintels. I am not persuaded by the evidence that the incidence of mortar snots in the cavities is so widespread that the Part A solution should be adopted on that account.

75. I place no reliance on Mr Newman's suggestion that the defendants might not carry out the Part A solution if damages were awarded on that footing. There is no evidence at all that that is so: on the contrary I find that the defendants would be likely to carry out whichever remedial scheme is favoured by this judgment.

76. I accept the defendants' submission that if the Part B or budget cost option is pursued, the property will need complete re-pointing. I am quite certain that, without complete re-pointing, the building will have a patchwork appearance with different colours of mortar showing in the areas of the outer leaf newly opened up. The defendants are entitled to a better quality of finish than that.

77. There remains, however, a substantial difference in cost between the two schemes which cannot be ignored. I will come back to the precise figures in a later section of this judgment. It is sufficient here to point out that, by the conclusion of the trial, the defendants' Part A figure, inclusive of preliminaries and OHP, but net of professional fees and VAT, was £187,959.15, whereas the defendants' corresponding Part B figure was £41,461.50, plus preliminaries of around £16,500. Given that the Part A figure exceeds the contract price, I consider, overall, that the budget cost option is the proportionate solution for reinstating the property.

The head stones and the lintels

78. I have given a brief description already of the head stone problem. Drawing 1072/3 showed single continuous head stones. However, it was smaller scale than a full construction drawing, and there is no stipulation as to the type of head stone in the Construction Notes. In the circumstances, I do not think the defendants are right in saying that single continuous head stones were a matter of contractual specification. Nevertheless, divided head stones were not appropriate for two reasons: (1) they were susceptible to sagging in the middle, unless supported adequately by lintels from behind, and any sagging would have the effect of bearing down on the frame of the opening below, and (2) the tendency to sag was aggravated by the fact that most of the head stones were installed with a central mortar joint wider than the maximum recommended width. Since the original lintels did not provide adequate support, divided head stones were a poor choice. As it turns out, any deficiency in the load bearing quality of the head stones is cured by the solution proposed by the experts for the lintels. That still leaves the issue of the central mortar joint in the divided head stones: but this will be of cosmetic rather than structural significance once the new lintels are installed. The defendants want the divided head stones replaced with single head stones (Item 7 in Part B of the Scott Schedule). Since I am not persuaded that installing divided headstones was a breach of contract per se, I do not find the claimant liable for this head of the counterclaim.

79. The lintel problem is twofold. The first is that the wrong lintels were installed at the outset. The experts are in agreement about this. Nothing turns on whether the claimant ought to have checked the specification with Martin Parish and Associates after the switch from Farrington rubblestone to Purbeck stone, or whether the fault lies with the architects. It is immaterial, because the claimant took it upon itself to reinforce the lintels by implementing the Brooks retrofit lintel plan. The Brooks retrofit lintel plan, as implemented, was inadequate. The experts are in agreement about this also. The new L-shaped lintels were installed with their vertical length central in the cavity rather than flush with the rear of the outer-leaf. In consequence, the leading edge was recessed from the inner face of the outer-leaf, so that it had insufficient bearing width to support the stonework. Neither Mr Easton nor Mr Gray believe that the fitting of L-shaped lintels above the head stones was the right solution. They have agreed a solution proposed by Mr Easton for the fitting of an L-shaped lintel and a new cavity tray behind and under the head stone.

80. The claimant's case is that it faithfully implemented the Brooks retrofit lintel plan and if that plan was inappropriate, the defendants should pursue Brooks not the claimant. This is wrong on two counts. First, Mr Donnecky of Brooks gave the claimant a choice of remedial works. The claimant chose to retrofit additional lintels rather than install single reinforced head stones. Second, it is plain from Mr Donnecky's email to Darryl Mitchard of 9 August 2007, in which the choices were put forward, that Brooks left the choice of Catnic lintel and the way in which it should be fitted to the claimant. The essential requirement, as Mr Donnecky made clear, was that it should have adequate load bearing capacity. It had to be of sufficient width, and to penetrate the bed joint of the outer leaf to a sufficient depth, to achieve that purpose. The remedial works carried out by the claimant were deficient in this respect.

81. I find the claimant liable for the cost of the experts' remedial scheme to fit new lintels (Items 1 to 6 and 8 in Part B of the Scott Schedule). Mr Easton's figure for the work was £9,369.76. The defendants' final figure at the conclusion of the trial was £8,097. The claimant's figure is £4,868 (if done by a new contractor) or £4,349.36 (if permitted to do the work itself). I will come back to the figures presently.

82. It was agreed at the trial that the experts' remedial scheme for the lintels obviated the need to carry out separately certain items of internal work included in Mr Easton's Specification for Part A of the counterclaim, namely, items 27.05, 27.06, 28.33 to 28.35, 28.51 to 28.56

and 28.101 to 104. In addition it was agreed that the sum awarded for interior redecoration (item 38 of Part A) should be reduced by 41%. My understanding is that these adjustments do not arise on Part B of the counterclaim.

Liability for other defects and repairs

83. By the conclusion of the trial counsel had achieved a large measure of agreement as to the claimant's liability to make good defects other than in respect of the wall ties and the lintels. The few items in Part B remaining in dispute were item 7 (divided head stones), item 9 (joints of window and door surrounds), item 13 (re-pointing), items 28, 36, 37, 38 and 40 (various minor snagging items). I have resolved item 7 in favour of the claimant and item 13 in favour of the defendants. I can deal with the other 6 items quite shortly.

84. In paragraph 6.6.4 of his report, Mr Easton recorded his measurements of the joint widths of the cast stone surrounds to the doors and windows. They stand uncontradicted. They show that at least one joint in nine of the window and door openings exceeded the recommended maximum width of 10 mm, and that there was no uniformity in the joint widths around each opening. This is not construction in accordance with best practice or carried out with reasonable skill and care. The cast stone surrounds should be re-fitted with roughly uniform joints of no more than 10mm width. I find the claimant liable in respect of item 9.

85. Item 28 is a complaint that the door of the freezer fouls the 13 amp socket on the wall so that the freezer door cannot be fully opened and the freezer baskets have to be squeezed when taken in and out. The claimant's case is that it agreed the position of electrical sockets in the kitchen with the defendants before they engaged a kitchen designer. So if the socket now needs to be moved, the cost should not be for the claimant's account. I accept this explanation. The claimant is not liable for item 28.

86. Item 36 concerns a loose pedestal under a wash hand basin. The claimant says this has resulted from the fact that the defendants removed the pedestal after it was installed. However this was not put to the defendants. There is no evidence about it. A loose pedestal is a defect and the claimant must correct it. I find the claimant liable for item 36.

87. Item 37 is a complaint about broken slates on the roof. There is no evidence to explain how this is the fault of others, as the claimant's contend. Broken slates are a defect and the claimant is liable to replace them.

88. Mrs Hurden says in her first witness statement that the defendants paid £375 to a Mr Gunter to trace and fix water leaks in the utility room (item 38). The quantum of this item has now been agreed in a sum of £200: but not liability. The clear purport of Mrs Hurden's evidence is that the leaks were leaks in the original plumbing: not in alterations to the plumbing which might have been carried out later. The claimant blames others. They are not identified and there is no evidence to suggest others are to blame. I hold the claimant liable for item 38.

89. Item 40 is the cost of replacing a missing verge fillet. Whilst it is agreed that the verge fillet is now missing, there is no evidence as to whether it was missing in the first place or how it came to get lost. However, the verge fillet should have been provided originally and, if properly installed, ought not to have become detached or gone missing in the time which has elapsed since the property was built. I find the claimant liable to replace it.

90. I mention here a number of other items as to which there was a dispute as to liability, or the extent of liability, when the trial began. I do so because negotiations continued between counsel throughout the course of the trial, and I may not have recorded correctly whether agreement was reached in respect of them.

91. First, there was a dispute as to the extent of the cleaning that would be necessary on the Part A and Part B basis of claim (see item 26.04 in Mr Easton's Part A specification). The experts gave concurrent evidence about this. Mr Easton said that a builders' clean would be required even if the budget cost option was followed. I agree with him. The claimant is liable for the cost of a builders' clean if and insofar as this is not included within the items in Part B of the Scott Schedule.

92. There was also an initial difference of opinion as to the extent to which a photographic record of the works and protection for fixtures and fittings was required (items 27.01 and 27.07 to 27.11 in Mr Easton's Part A specification). I accept that these will be necessary, even in the case of the Part B solution. I recorded the cost as having been agreed towards the end of the trial in a sum of £850. I stand to be corrected, following the delivery of judgment, if I have got this wrong.

93. There was evidence about two other matters in the course of the trial. The first was an incomplete section of the radon barrier in one location (item 44 in Part B of the Scott Schedule). This was all that remained of a larger complaint about the radon barrier, which was abandoned at an earlier point in the action. The final quantum schedule which accompanied Mr Kearney's closing skeleton, shows the amount of this head of claim as having been agreed in a sum of £150 and that liability was admitted. If I am wrong about the agreement on liability, counsel can raise the matter after judgment has been delivered and I will deal with it in an addendum.

94. The second matter is the replacement of the fire surround in the sitting-room, for which the defendants say they paid a sum of £927. They have produced an invoice, dated 29 November 2007, for £600 in respect of a new fire surround and £327 for fitting it. Their evidence was that the stone fire surround originally installed by the claimant was easily dislodged from its bed of mortar very soon after they moved in. Once loose, it was hazardous and had to be taken down. The claimant says that it was impossible for the fire surround to become dislodged simply by being knocked, because it had been bolted by brackets to the blockwork behind. The claimant's case is that the defendants must have decided to have it removed and replaced. There is a direct conflict of evidence on this issue. I prefer the defendants' account, in particular because, in the photograph taken of the fire surround after it had been taken down, there is no sign of brackets or the remains of bracket fixings. On the other hand, I see no reason why the claimant should be liable for a new fire surround when the original one does not appear to be damaged. If the claim in respect of the fire surround remains live and has not been the subject of agreement, I would award £327 for the cost of refitting: but not for the replacement article. If this head of claim is no longer live, this paragraph of the judgment should be ignored.

Who is to carry out the remedial works?

95. The claimant takes two separate points about the carrying out of any remedial works. The first is that the defendants should have made a claim under the NHBC guarantee. The second is that the claimant should itself be allowed to carry out any works required.

96. Ultimately, both points amount to an allegation of failure to mitigate. Mr Newman appeared to suggest at one stage that it was a

condition precedent to the defendants' right to bring the claim that they should have first exhausted the cover provided by the NHBC "Buildmark" policy. Mr Kearney prepared an Amended Reply and Further Amended Defence to Counterclaim to address this argument: but he had no need to introduce it because the argument was not expressly advanced. I know of no general principle that a claimant must resort to available insurance cover before instituting proceedings against the party liable. As for permitting the claimant to do the works, it is common ground that this was not a case in which the contract gave the claimant any entitlement to do so. The defendants have a choice in the matter. They can only be criticised for not choosing the claimant if choosing the claimant to do the work would reduce their loss and it is reasonable to expect them to choose the claimant on that account.

97. Whether a claim could have been made under the Buildmark policy at an earlier stage of this dispute was a matter raised more than once, by the claimant and by the court, during case management before trial. Curiously, neither side produced a definitive answer to the question. There are two potentially relevant sections of the Buildmark policy. Section 2 covers defects arising in the first two years from completion. Section 3 covers defects arising in years 3-10 i.e. which were not patent in the first two years. Cover under the policy provided by the claimant to the defendants started on 31 August 2007. The wall-tie problem would appear to fall under Section 3 since it was not discovered until after 31 August 2009. The Section 3 cover is in a total sum of £250,000, which reduces as claims are paid.

98. Despite pleading a failure to mitigate by not claiming under the policy, the claimant has never advanced a positive case either as to which of the alleged defects would fall within the Section 2 and/or Section 3 of the policy, or as to what the outcome of any claim would have been. However, an inkling of the likely outcome of a claim may be derived from correspondence between the defendants' solicitors and the NHBC in 2010. Although the claimant received the Buildmark insurance certificate shortly after it was issued on 31 August 2007, it failed to pass it on to the defendants when they moved in. The defendants were first sent it under cover of a letter dated 22 July 2008, which was some 8 months after the claimant had started this action. On 29 November 2010, the defendants' solicitors wrote to the NHBC, enclosing a copy of the Schedule of Defects and Estimated Remedial Costs attached to the then current version of the Defence and Counterclaim, and purported to initiate a claim. The reply they received on 8 December was as follows:

“Kindly note that this matter cannot be given any further consideration under the cover afforded in accordance with Section 2 or Section 3 of the Buildmark policy as court proceedings are currently in progress. Once a final adjudication has been made, please forward any further correspondence for consideration if applicable.”

99. From this exchange it appears that NHBC policy is not to get involved where proceedings have been commenced, but only to investigate claims under Section 2 or Section 3 of the Buildmark policy once a final adjudication in the proceedings has been made. In view of this, Mr Newman disclaimed any positive argument in his closing submissions that the defendants had failed to mitigate their loss by not making a claim on the Buildmark policy before service of the Defence and Counterclaim in this action. Any remedy which might have been, or which might yet be, available under the policy remains a matter of conjecture.

100. The claimant says that there would be a significant saving if it was chosen to carry out the remedial works. The rates for the work would be lower because no profit would be charged. The job would be done more efficiently because the claimant is familiar with the layout of the property, having built it in the first place. And, according to John Mitchard, there would be no VAT chargeable.

101. The first two points are good ones: I am not so sure about the third. Mr Mitchard’s explanation of why VAT would not be chargeable is that the remedial works because would be treated as part of snagging works on a new building for which the supply is zero rated for VAT purposes. I rather doubt whether replacement of the inward sloping wall ties or the lintels can properly be regarded as snagging, especially when carried out so long after any usual defects liability period. Another reason why VAT might not be chargeable is that the claimant, unlike a third party contractor, would not need to raise an invoice for the works. Whether it is legitimate to contend that no supply has been made because no invoice was raised is not a point which was investigated at the trial.

102. Whatever the amount of the saving, I accept that it would be cheaper if the claimant did the work rather than another contractor. I accept also that the claimant is competent to do the work, which would anyway be supervised by Mr Easton and Mr Gray. In the third joint statement, the following appears:

“The Experts are of the opinion that the Claimants are perfectly placed and competent to undertake all the remedial works, subject to the following: a) Appropriate and adequate supervision, b) NHBC and Building Regulation Certificates, c) Relevant access being granted.”

103. It was suggested that this was a concession by Mr Easton that the claimant ought to be allowed to do the works. I do not read it as such. I read it as a recognition by him that the claimant cannot be ruled out of contention on grounds of competence.

104. The rule against recovery of avoidable loss is well settled. A loss is avoidable if it would be reasonable to expect the claimant to have taken the steps necessary to avoid it. It was held in *Woodlands Oak Ltd v Conwell* [2011] EWCA Civ 254 (see Sir Anthony May P at paras. 18-20) that refusal of an offer from the builder to return to site to carry out remedial works may amount to a failure to mitigate. But it all depends on the circumstances, and the burden is on the defendant to establish that the refusal was not reasonable.

105. In my judgment the claimant has not discharged that burden in the present case. Mr Newman recognised that the “duty” to mitigate is not an onerous one. Both of the defendants, as they said in the witness box, have lost trust and confidence in the claimant. Although Mr Hurden’s antagonism towards the claimant may be greater than is warranted, I find there is a good deal of justification for their disillusion. First, the property was not constructed to a proper standard in a large number of respects. It is unusual for an approved inspector to pass comment, as Mr Green did in his letter of 24 September 2007, on the poor quality of finish of aspects of the works which did not fall within his remit. His opinion was shared by Brooks, by Mr Simmonds, by Mr Bain and by Mr Easton. Although the claimant may be a company with a good reputation, much of the work done on this project did not live up to that reputation. Second, the claimant has already made one attempt at remedial works in carrying out the Brooks Snagging List and, in the case of the retrofit lintels, the works were not adequate. Third, the claimant initiated this litigation and has pursued it for several years without offering to return to do the works but instead relying on the expert evidence of Mr Gray that the inward sloping wall ties were not a defect and did not need to be replaced.

106. I think Mr Kearney is right that there is a world of difference between a builder who offers to return to do the necessary works as soon as a complaint is made and a builder who fights the complaint to trial and

only then raises an argument that it would be a failure to mitigate on the part of the employer if he was not allowed to remedy the defects because it would cost him less to do so. Given the history of this dispute, I do not consider it at all unreasonable that the defendants should not want the claimant back on their property. I reject this limb of the claimant's mitigation argument. I find that the defendants are entitled to be compensated in damages for the cost of engaging a new contractor to carry out the remedial works.

The figures

107. By the conclusion of the trial, the battle over the cost of the Part B counterclaim lay between three sets of figures. The first was the claimant's figures. These were based upon the counterclaim for the Part A solution (rebuilding of the outer leaf), adopting and adapting the figures in support of that claim as appropriate. The figures in Part A of the counterclaim were derived from an open market tender process conducted on the defendants' behalf in the autumn of 2010 under the supervision of Mr Easton. The first quotation, dated 31 October 2010, was from Bath Style Limited. The second quotation was from Downend Builders Limited. It was about 10% less than the Bath Style quotation and the defendants incorporated the Downend figures in the fifth amendment of the Defence and Counterclaim.

108. The second set of figures was the claimant's own internal costing of the Part B solution. Since I have rejected the argument that the claimant ought to be allowed to do the remedial works, these figures are not an appropriate basis for assessing damages, but they are of residual relevance because they establish the bottom end of the cost spectrum. The claimant's "in-house" figures are the lowest across the board and, not surprisingly, their fall-back set of figures lie somewhere in-between. The claimant's fall-back figures (referred to in closing submissions as the "Uplifted M&S" figures) were put forward in Mr Corbet's second witness statement. The source of his prices is not entirely clear. Insofar as they are based on figures supplied by third party contractors: the contractors are in most cases not identified. In some instances the prices appear to be derived from the claimant's in-house figures, with an uplift for OHP.

109. The choice lies between the Downend figures and the M&S uplifted figures unless there is good reason for adopting a figure different from these two sets of figures. Fortunately, by the time the trial ended, the cost of only a few items was in dispute. The cost of the remainder had

been agreed and entered on a schedule which was appended to Mr Kearney's written closing argument. The disputed items in Part B of the counterclaim are: items 1-6 and 8 (the lintels and cavity trays), item 14 (the fall on the path adjacent to the rear patio), item 17 (failure of the screed on the two patio door thresholds), item 22 (fall of the slot drain in the driveway), item 23 (extractor fan to bathroom discharging within roof void), item 24 (loose and displaced blockwork to the gable within the roof void), item 26 (kitchen worktops not meeting adequately at the mitre), item 27 (fridge door has to be forced shut because oven not correctly finished), item 29 (gaps around kitchen unit because walls out of alignment), item 30 (hob unit not fitted square), item 31 (back of kitchen unit cut off), item 32 (dishwasher forced out of line), item 33 (no fitting to top of boiler) and item 40B (horizontal movement in floor above kitchen). There is also a dispute about preliminaries.

110. All of the disputed items, save items 1-6 and 8 (lintels and cavity trays), are agreed to be minor. The difference in the rival figures is in the hundreds, and in some cases the tens, of pounds. I can deal with these briefly by saying that I prefer in each case the defendants' Downend figure to the uplifted M&S figure for two reasons. The first is that the defendants' figure is based on an open market quotation from an identified source, whereas the claimant's figure is not. The second is that the claimant was unable to advance any cogent reason why the Downend figure should not be accepted e.g. as being extravagant or unreasonable, other than the fact that the claimant had put forward a lower figure.

111. The rival figures for the lintel and cavity tray repairs are £8,097 (defendants) and £4,868 (claimant). The defendants' figure is based on the Downend quotation. The claimant's figure is based on a quotation obtained by Mr Gray from TRAC Structural Limited and a quotation from a company called Jones of Oswestry for the supply of the lintels. It is not obvious to me why the two figures should be so far apart. Whilst in this instance the origin of the claimant's figure is clear from the Schedule attached to the Defence to Counterclaim, there is no detailed description of the work it covers. There is a detailed description of the work covered by the defendants' figure in section 30 of the Downend quotation (excluding item 30.15). The burden lies on the defendants to justify their figure. The Downend quotation is the support for it. The claimant has not convinced me that a sum of £8,097 (which is a reduction on the total in section 30) is an unreasonable or extravagant sum. So I find in favour of that figure.

112. The argument about preliminaries largely relates to the duration of the works. Mr Easton put forward a period of 16 weeks: Mr Gray argued for half that time. There was otherwise a good deal of common ground. It is agreed that a site cabin will need to be rented. I have recorded that it was eventually agreed that the cost of delivery and collection of the cabin would be £650 and the weekly hire rate would be a sum of £370. It was also agreed that Heris fencing will be needed to protect the site at a cost of £200 per week. Contractor management was agreed at £320 per week to cover two half days (8 hours in total) at £40 per hour. The final agreed element was the cost of a part time labourer at £360 per week, although Mr Easton and Mr Gray were not in agreement about whether a part-time labourer would be needed.

113. I am confident that Mr Gray's estimate of the length of the works is an underestimate. He allows one week for setting up and one week for dismantling and clearing the site, with only 6 weeks in between for replacing the wall ties, carrying out the lintel and cavity tray repairs and all other items included in Part B, and re-pointing the entire exterior. Mr Easton believes that 10 weeks will be needed for the re-pointing alone. I find that Mr Easton's estimate is nearer the mark. The figure which the parties have agreed for the re-pointing is based on one gang (a bricklayer and a labourer) working for 10 weeks. The replacement of wall ties and the lintel repairs can be carried on simultaneously. They are likely to take a minimum of 2 weeks. Allowing for a week at either end, the minimum period is 14 weeks. This allows for no slippage. In the circumstances, I accept Mr Easton's figure of 16 weeks. I am not, however, persuaded of the need to employ an additional part-time labourer.

Other counterclaims for damages

114. There are three additional counterclaims: (1) for the cost of temporary accommodation during the remedial works, (2) for damages for distress and inconvenience, and (3) for the recovery of a sum of £470 in respect of Building Control costs which the defendants paid but which they say were to be included in the price agreed with the claimant. I will deal with these in reverse order.

115. The claim for Building Control fees is agreed in the experts' third joint statement to be a matter of evidence. The evidence from Mrs Hurden is that the defendants paid the fees of £470. In paragraph 13 of his first witness statement Mr Corbet concedes that the fees were included in the claimant's quotation and that the defendants should be

credited with £470 or reimbursed. So this sum must be added to the judgment on the counterclaim.

116. It is well settled that general damages can be awarded for distress and inconvenience caused by a breach of contract, if the contract was one for the provision of some thing or some service having an amenity value or which was designed to provide personal enjoyment or peace of mind. In construction cases, damages may be awarded for distress and inconvenience arising from defects in the claimant's own home, but will not usually be awarded for defects in commercial premises (see *Keating on Construction Contracts*, 8th ed. at para. 8-041). The sums awarded are modest. Akenhead J. concluded, from his review of the authorities in *Axa Insurance plc v Cunningham Lindsay United Kingdom* [2007] EWHC 3023 (TCC) at para. 275, that: "In the absence of particular physical symptoms or illnesses caused by the breaches, it is unlikely that general damages as at 2001 would exceed the rate of £2,000 per person per year. In many cases, it may be less. ... Allowing for inflation up to the end of 2007, the maximum for this type of general damages would not generally exceed £2,500 per person per year".

117. Uplifted by the CPI to December 2011, Mr Kearney has calculated that the annual figure becomes £2,820. Mr Kearney's submission is that, in respect of Mrs Hurden, damages should be awarded at this annual figure for the period from June 2007 (when Brooks was called in) until at least 6 months after judgment (to allow a period for the remedial works to be planned and completed). This would produce a claim of £16,215 (£2,820 x 5.75). For Mr Hurden, who has given unchallenged evidence that the dispute over defects with the claimant has caused him anxiety and depression requiring medication, Mr Kearney suggests a higher annual figure of £4,000, which produces a claim of £23,000.

118. I bear in mind that these sums are probably less than Mr Kearney would urge the court to award at the date of this judgment because the CPI will now have taken the annual figure to nearer £2,900. Nevertheless, both sums are in my judgment too high. I accept that the defendants should receive an award of damages for distress and inconvenience: but not for the length of time or at the annual rates for which Mr Kearney contends.

119. I take, first, the period. It is right to start in June 2007. I also have no quarrel with allowing 6 months from the date of judgment for the works involved in the Part B solution to be planned and implemented. However, the defendants are in large measure responsible for the length

of time the counterclaim took to reach trial. The history referred to in paragraphs 29 to 31 of this judgment has prolonged, and therefore aggravated, the inconvenience to the defendants and their distress: but this has not all been the fault of the claimant. The defendants have been far too slow in formulating the case ultimately presented at trial and in progressing it to a hearing. I consider that a period of 4.25 years more fairly reflects the period of distress and inconvenience for which the claimant should be held liable.

120. As to the annual rate, this case is by no means at the worst end of the spectrum. The house has been habitable. The plumbing, heating and electrics have worked. There has been no, or no significant, incidence of damp. It is true that Mr and Mrs Hurden have not been able to complete the decoration of the property by laying carpets and flooring, and that the poor quality of the finish must have been a constant reminder of the more serious defects within the cavity walls. However their fears as to the structural safety of the property were unwarranted. The claimant cannot be held responsible for the fact that well-meaning friends of the defendants, such as Mr Chivers, may have given warnings which exaggerated the risks involved and the remedy required. In the case of Mrs Hurden I consider that compensation at an annual rate of £1,500 is appropriate. This results in an award of £6,375.

121. I agree that the annual sum of compensation for Mr Hurden should be greater since the strain has told more heavily on him and has caused him to be diagnosed with depression. The annual rate in his case should be £1,800. This gives rise to an award of damages of £7,650.

122. In arriving at a combined total of damages for distress and inconvenience in a sum of £14,025, I have taken into account the discount of £1,000 which the claimant subtracted from the amount of its final invoice.

123. I turn to the relocation counterclaim. In my judgment, the works involved even in the Part B solution are sufficiently extensive to justify the defendants moving out of the property to temporary accommodation while the works are carried out. In determining the issue of preliminaries I have allowed 16 weeks for implementing the Plan B solution. Assuming a maximum of 6 weeks of planning, the entire process should take between 5 and 6 months. Whilst it would not be essential that the defendants move out of the property immediately planning begins, it is not unreasonable to conclude that they should start to move, and place their furniture and belongings in store or take them with them, no later

than 2 weeks before work starts. They will need to rent alternative accommodation in the area. A single assured shorthold tenancy of 6 months would be sufficient. The evidence of rental costs around Radstock and Midsomer Norton suggests that suitable accommodation could be obtained for around £675 per calendar month. I therefore award damages under this head in a sum of £4,050.

Conclusion

124. The counterclaim succeeds to the extent I have indicated. I will leave counsel to work out the correct figure and will deal with any residual differences about that figure at a hearing to be fixed following the handing down of judgment. There may also be argument about discretionary interest on the damages and the period over which it should run. There will be no interest on the sums awarded for distress and inconvenience and relocation. The extent to which there should be interest on the damages reflecting the cost of remedying defects may depend on the extent to which the defendants have already incurred expense.

125. An issue remains as to whether the claim succeeds also, or whether the amount of the claimant's final invoice is simply to be credited against the damages. Mr Kearney submits that the amount of the final invoice never fell due because the works were not completed. The question is one of substantial completion (see *Keating* at paras. 4-008 to 4-009). The view I take is that, in spite of the defects, the works were substantially completed by September 2007. This is not a case where the employer can say that the contractor left site leaving significant aspects of the work still to be done. Mr Kearney's fall-back point is that the counterclaim operates as a defence of set-off. Here, he is on stronger ground. The counterclaim for defects and the cost of remedial works plainly does operate as a set-off defence and since it overtops the amount of the claim, the technical result is that the claim fails.

126. A final point concerns the retention under the contract. My understanding is that the defendants are still retaining a sum of £4,592.25 out of the contract price. If that is correct, the claimant is entitled in my judgment to credit for that amount against the counterclaim, even though it was not separately claimed in the action.