

**TRANSCRIPT OF PROCEEDINGS**

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Ref. HT-2017-000150

**IN THE HIGH COURT OF JUSTICE  
QUEENS BENCH DIVISION  
TECHNOLOGY AND CONSTRUCTION COURT  
Mr Justice Waksman**

**[2018] EWHC 3858 (TCC)**

**IN THE MATTER OF**

**WHARFSIDE REGENERATION (IPSWICH)**

**- v -**

**LAING O'ROURKE CONSTRUCTION SOUTH LIMITED (1)  
LAING O'ROURKE (2)  
GEORGE HOWE LIMITED (3)  
CARILLION PLC (4)**

**MR R CHOAT appeared for the Claimant**

**MR W WEBB appeared for the Defendants**

**APPROVED JUDGMENT**

**10<sup>th</sup> OCTOBER 2018**

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*This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.*

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MR JUSTICE WAKSMAN:

1. In 2007 the first defendants were engaged to demolish a number of buildings and construct in their place seven high blocks of flats in Ipswich.
2. The second defendant is the parent company of the first and provided a guarantee.
3. The third party, George Howe, was instructed to design and install the external render and which includes the cladding which is now at issue in this case and that company was acquired by Carillion, the fourth party. Carillion of course is now in liquidation and so is the third party, so the single solvent target here is the first and the second defendants.
4. The works were completed in 2009. The claimant employer entered administration in 2010.
5. On the 28<sup>th</sup> of October 2013, during what's become known as the St Jude's Day Storm, sections of the cladding were blown off one of the blocks and it was subsequently alleged that the design and installation of the cladding on all of the blocks or at least five of them was defective.
6. Although the initial incident was concerned with the stability and fixing of the cladding which was called into question by bits of it falling off, subsequent investigations also focussed on whether the cladding, which was used which is a product called Sto Classic, had adequate fire retardant qualities; that is an issue which perhaps unsurprisingly after the Grenfell tragedy has tended to assume more prominence and it has assumed greater prominence in this case.
7. When there was initial correspondence between the parties about it, Carillion was taking the lead and it suggested that insofar as there was liability, the way to sort out the problem was in fact to repair the existing Sto Classic cladding but in a way in which would remedy other defects, for example inadequate fire breaks. That was certainly the position by 2016.
8. It is suggested that in correspondence in 2015 it was already accepted that where there were defects proved, replacement of the cladding would be the only option.
9. I am not satisfied that this is the necessary inference to draw from the correspondence because the particular letter I was shown seems to deal in particular with the cladding which had incontestably fallen off block A1; and the suggestion was that where the cladding fallen off or was likely to fall off, there would be replacement. That does not necessarily mean that when looking at the problem as a whole, including for example whether there was an issue with fire retardant qualities, that the only appropriate approach was to replace as opposed to repair the cladding essentially in situ but with some important modifications.
10. At any rate, in 2016 it is common ground that the fire safety experts (who are still the experts for both sides now) in particular, were considering whether a repair option would be adequate or not. The claimant's fire expert was already in place then, namely a

Mr Bullock. There was an earlier fire expert instructed by Carillion called Mr Martin but the defendants have now got their own fire expert, Mr Lay.

11. When proceedings were issued, again there was still an option being proffered by the defendants which was that in the event that they were found liable, the appropriate course was not replacement but repair. Paragraph 27 of the particulars of claim, among other paragraphs, recites in detail what the historic position of the defendants was. Paragraph 27 says that LOR suggests that all of the defects alleged are capable of remedy by repair to the existing Sto Classic installed at the development as opposed to removal and replacement. One side rejects that suggestion and notes that LOR has been unable to provide any or inadequate repair scheme. That point is therefore, that the legal teams and their experts were engaged in this issue of repair or replacement.

12. A supplementary point was made in paragraph 28 which was that even if Sto Classic complied with building regulations, it would still be necessary to remove the system and replace it in order to rectify the balance of the defects which were not concerned with fire retardant qualities (should the claimants be successful there) and a point was made that it would be more economical to use something called Sto Vario rather than to attempt a piecemeal repair using products additional to the Sto Classic which would remain.

13. By December 2017 the position as to costs was this: there had been a quotation in 2015 from a contractor called Hodgson for the repair works which had been suggested by Carillion and the defendants which put them at something around £3 million. But by that time, the claimant's estimated cost for replacing the Sto Classic installation with Sto Vario was around the same figure, or perhaps only slightly more.

14. In the light of that, it is perhaps unsurprising that the defendant took this position in paragraph 21 of the defence, among other places, and I quote: "LOR no longer maintains that it is practicable to repair the StoTherm Classic cladding. The extent of the repairs required to rectify the design, which could be repaired without replacement, means that replacement is more suitable than repair." It is admitted that the proper remedial solution required is the replacement. They do not advance a positive case that the remedial scheme involved replacement of Classic with a new and properly designed and installed system but if GHJ and Carillion put forward such a case that is still to use Sto Classic then they would adopt it. It was expressly denied it was necessary to replace StoTherm Classic with StoTherm Mineral cladding. That introduces the three different types of cladding, all made by the same manufacturer, in one sense in ascending order, Sto Classic, Sto Vario and Sto Mineral.

15. The evidence from the defendants which I have no reason not to accept is that that was a sensible and wise admission to make given that there was not much difference in the cost.

16. What was still in issue in the proceedings and remains in issue as a result of amendments which the claimant made was this: the claimant's case, which is denied by the defendants in this respect, is that one reason why the whole installation was defective was because, regardless of the method of fixing and design and the ability of the cladding to stay on the building, the constitution of the main part of the cladding, which is a form of

polystyrene called EPS, itself did not meet current building regulations as to fire retardant qualities and, that being so, it would have to be replaced.

17. The claimants originally had proposed a replacement scheme with Sto Vario but they later said that the replacement cladding should be Sto Mineral. The claimant's case is that the difference between replacing with Sto Vario and Sto Mineral was not very much and although therefore the defendant resisted the notion that Sto Mineral replacement was necessary (in fact it said it was betterment) and said that Sto Vario would be sufficient, while it is the claimant's principal case that it was not, the claimant says that is not much of an issue because at the end of the day the claimant would not mind if it receives compensation based on a Sto Vario replacement since there is not much of a costs difference with Sto Mineral.

18. That may well be true from a commercial point of view but it does not deal with the fact that there is at the moment a dispute as to whether the form of cladding involving Sto Classic material is itself not compliant with building regulations.

19. There the matter, broadly speaking, rested until May 2018 when the claimant produced a new schedule of loss. The replacement costs have risen from £3 million to some £9 million. I have been taken in detail to the various documents which explain why that increase has occurred. It is not necessary for me to go to the details but the following features are important.

- a. First, the actual contractor costs for fixing - supplying and fixing the relevant cladding has gone up by about £1.7 million.
- b. Secondly, the access costs have risen by over a million pounds. There is a different contractor and therefore there can be different work rates but what also seems to be clear from the quotations is that a much longer period of attending at the works is now said to be necessary compared to what would have been necessary before.
- c. All of that then has a knock-on effect as to prelims and other features of the costs which are themselves percentages of the basic costs and that in brief explains how it has come to be that the figures have risen so dramatically.

20. That being the case - and it really does not matter whether the costs relating to cladding could be said to have increased to £7 million as opposed to £3m, or £8 million or £6 million - the key point is that the costs have risen enormously and the first time that the defendant was aware of the claimant's case in this regard was in May of this year. That was partly or perhaps wholly driven by the fact that the claimants (who had previously also been relying on a quotation from Hodgson) now sought a different contractor and that is what the figures ended up at.

21. It therefore occurred to the defendants and is obvious, that the commercial usefulness of making an admission in the way that it had done had now disappeared. It was now facing the prospect of a claim which was millions of pounds more than they thought it would be and they decided to revisit the question of the admission.

22. In that context, it also reinvestigated the whole question of fire retardant features and appointed a new fire expert, Mr Lay. One of Mr Lay's tasks was to see whether the case that the Sto Classic cladding failed the building regulations was as strong as the claimants had asserted it to be which was an issue in the case in any event. It had received much more favourable advice from Mr Lay on that point. As a result, it decided to take the course of making the application now before me to withdraw the admission and to allow it once more to present a case that in the event of liability (much of which is now admitted), the appropriate course is still repair rather than replacement and therefore there is a concomitant application to amend its defence so to plead.

23. The trial of this matter will start on the 14<sup>th</sup> of January, some three months away. It will last for eight days. I accept as a result of recent concessions made by the defendant on liability, as matters stand and without the amendment, it is quite possible that it would take less.

24. On the facts, before turning to the law and then my analysis, I should add the following points: hard on the heels of the claimant's amendment in May, the defendants instructed its expert to consider possibly the repair option again. They also instructed its experts to have discussions about that option as well as other matters when they met the claimant's experts on the 1<sup>st</sup> of August. I understand that the matter was raised and discussed to some extent at that meeting but the product of that meeting in the form of a joint statement has not yet been produced, partly because Mr Bullock is not unfortunately well at the moment. Accordingly, I cannot take further precisely what was discussed there but I am told that this matter may also have been discussed in a significant amount of email correspondence between the parties since then.

25. Furthermore, and it is absolutely plain from Mr Webb's comprehensive submissions and the evidence of Miss Sunway, that the claimant's evidence had had a pretty good look at this repair case based on the quotation now relied upon and also on the expert evidence submitted in short form by Mr Lay. Mr Webb would not have been able to make such comprehensive submissions about why he says the repair case is hopeless had that not been the case.

26. So the claimant's expert, in particular Mr Bullock, has looked at this option in 2015, 2016, when it was still on the table in 2017 and more recently since May of 2018. I do not accept that there is any real problem with the claimant's experts dealing with the expert case now advanced on the question of repairs in time for this trial and, to be fair to Mr Webb, that was not at the forefront of his submissions.

27. It is now appropriate for me just to remind myself about the relevant legal principles and there is no dispute between the parties about that. The principles, drawn from existing case law, are really set out in paragraph 7 of practice direction 14 to CPR 14.1. "In deciding whether to give permission to withdraw an admission, the court will have regard to all the circumstances, including the grounds on which the applicant seeks to withdraw, in other words, why; the conduct of the parties; the prejudice that may be caused to any person if it is granted or refused; the stage at which the applicant to withdraw is made; the prospect of success if the admission is withdrawn; the interest of the administration of justice."

28. I was also referred helpfully to a paragraph in the judgment of Popplewell J in the *Constantine* case from 2017 where he cited useful dicta of Ward LJ to say that the paragraph confers a wide discretion on the court. Paragraph 7.2 lists the specific factors but they are not in any hierarchical sense, nor must it be implied that any one factor has greater weight than another. A judge dealing with a case like this must have regard to each and every one of them, give each and every one of them due weight, take account of all the circumstance and balancing the weight strike a balance with a view to achieving the overriding objective. Cases will vary infinitely and the weight to be given to relevant factors will inevitably vary from case to case.

29. In this particular context, I also remind myself that when considering any submission based on the merits or otherwise of the repair case which the defendants wish to resuscitate, this is going to be a matter of expert evidence at trial and I must be careful not to usurp the function of the trial judge who will arrive at a judgment after considering what may be quite technical and difficult opposing expert evidence.

30. Having set out that checklist, let me just make one other point. This is now an admission of a particular fact, it is an admission of what would be a reasonable course to take in the context of this case and, in particular, in the context of the relevant costings as they appeared at the time. It was not, for example, an admission that the retention of Sto Classic cladding would inevitably be a breach of building regulations, quite the reverse because it still denies liability that that was the case when the cladding was first installed.

31. The nature of the repair needs to be rehearsed at this stage. The cladding itself consists of various features once it is installed and an example of the existing installation using a cross-section as it were can be seen in one of the photographs that I have been supplied with. One can see that against what I will term the basic exterior of the flat there are then rails which attached and from those rails or within those rails are then hung and installed the EPS itself, which can be seen very visibly, but then on the exterior side of the EPS there is a separate piece of material. And then in the bottom, which looks like a yellow or orange coloured brick, is what was said to be the fire break.

32. The repair scheme involves more than simply replacing any bits of cladding that has fallen off. It is a repair scheme which, according to the defendants' evidence, in short would make the installation similar to a Sto Vario installation and what that would mean is that for large parts of the cladding they would be removed and they would be replaced where there would otherwise be a void with a mineral substance. That would not replace all of the cladding but the effect, say the defendant, would be the same as if this was a Sto Vario installation because both Sto Vario and Sto Classic have the EPS material in them to some extent. The position is different with Sto Mineral which, as I understand it, does not, and that is why it has been given as it were a higher rating, although one which the defendant contends in any event is more than is necessary here, that is why the defendants allege betterment.

33. Although some criticism is made of the costs alleged by the defendant from the repair scheme, which is £4.3 million, that is not simply on the basis of the Hodgson quote; it is also on the basis of what I am satisfied is a full quotation based on a detailed bill of quantities submitted as recently as the 2<sup>nd</sup> of October this year from another cladding contractor called SERS which I understand has given a figure slightly less than that proffered by Hodgson. So there is no basis for me at the moment to conclude that the

works as - the cost of the works proffered by the defendants are suspiciously or unrealistically low.

34. Against that background, let me deal with the various factors which I must take into account. I start with what I think at the end of the day was really Mr Webb's biggest point, which is that actually this whole repair argument is hopeless and is destined to fail at trial, in which case there is no point in giving the defendants permission to run it.

35. That is, in some respects, a bold argument to make since it turns on expert evidence which would normally be the province of the trial judge but Mr Webb points to some simple feature which he says are really fatal to that claim.

36. The first is by reference to the literature of Sto, the manufacturer in this case and this is on the basis simply of looking at the material itself. For StoTherm Classic a number of its features are put in and then it stays that for areas over 18 metres (that means over 18 metres high), the StoTherm Vario and StoTherm Mineral system should be used. The figure of 18 metres is not simply a construct of the manufacturer; it is known in the industry and in the building regulation context because it has relevance to the ability of fire fighters to reach areas above 18 metres and things of that kind.

37. For StoTherm Vario it says that it is a high performance EPS again with a mineralic reinforcing coat deigned to meet stringent fire safety standards. And it say that it has been fully tested and classified according to the requirements detailed in BR135. BR135 is an approved guidance document for the underlying building regulation to which I will return in a moment. The testing there involves effectively setting fire to a portion of the material and seeing what the result is, it being accepted that the EPS itself is a not material of limited combustibility, i.e. the potential for it to combust is higher than would be acceptable and therefore other methods of proving compliance with the building regulation need to be found. One such method contained in BR135 itself is the fire testing.

38. And then finally we come to StoTherm Mineral which is not made with EPS at all but mineral fibre boards.

39. So Mr Webb says that since the manufacturer says that for areas over 18 metres StoTherm Vario and StoTherm Mineral systems (and by inference, not StoTherm Classic) should be used, is the beginning and the end of this argument.

40. Moreover, he points to the fact that it would appear that StoTherm Vario, while made of EPS, has a mineralic coat which is not to be found on StoTherm Classic. How can it be, therefore, he says, that any self-respecting expert can proffer an opinion that a repair job using StoTherm Classic can possibly work?

41. The position, in my judgment, is rather more nuanced than that. As Mr Choat has pointed out, what we are concerned with here is not simply the qualities of StoTherm Classic itself but StoTherm Classic as repaired. I have before me quite a lengthy report consisting of some six pages from Mr Lay who is the defendants' fire expert and he produced this in support of this application on the 10<sup>th</sup> of September. His overall thesis and conclusion was that the particular repair scheme which was going to be used would be equivalent to having installed Sto Vario in the first place, ergo it should be regarded as

having the same qualities as Sto Vario and he has stated in terms his belief that this will meet the building regulation.

42. I should perhaps at this point just cite that regulation. It is this, in B4(1): "The external wall to the building should adequately resist the spread of fire over the walls, having regard to the height, use and position of the building".

43. BR135 guidance provides two possible routes which have presumptive effect, in other words, in the absence of anything else they would show compliance with the regulations, in the absence of anything else failure to use those routes would show non-compliance but that is where we get into the 'anything' else.

44. What Mr Lay refers to is the fact that the material which would be now put in behind the external face would now be the mineral material rather than the cladding, or rather than the cladding simply by itself and that deals with the question of fire barriers and then he has given diagrams about how all this would work with express reference to BR135 at pages 236 and 237 of the report and including how he says the scheme which is designed by Mr Fleming would confirm with the regulation.

45. A point has been taken by Mr Webb that that is not the end of the story because it could not be the same as Sto Vario because of the additional mineralic coating which Sto Vario has on the outside. However, the defendants' evidence shows that there is also to be some additional coating on the Sto Classic repair job and so that point may not be as strong as it first appears.

46. It is also the case that contrary to what Mr Webb first thought, it is not as if Mr Lay has ignored the 18 metre point because in his supplementary notes at page 239 he says that: "Sto continue to market a rendered EPS product, Sto Vario, for use on building over 18 metres. The repair scheme prepared by Alex Fleming, if properly carried out, would achieve the same level of adequate fire safety performance as the current Sto Vario product. I am not aware of any existing rendered EPS [that is on other buildings] where it has been suggested that the system should be removed and replaced with a different insulation medium on the grounds of the EPS being present and it was noted that rendered EPS is a common type of façade system for medium and high rise residential buildings." And that is given advisedly in September 2018, in other words in the post-Grenfell context.

47. It is quite impossible for me at this interlocutory stage simply to reject that expert evidence which would be the effect of the submission made by the claimant that there is no case here at all and I do not do so. It will be a matter for the trial judge in due course. There may be problems for the defendants in this argument, there may be significant problems and the claimants may feel confident of success but I am not prepared to rule it out, nor am I prepared to say that it is of such a degree of weakness that it should, as it were, infect the defendant's case otherwise on the withdrawal of its admissions.

48. Let me then turn to some other points. First of all, the question of prejudice. Mr Webb accepts that this is not a case where the withdrawal of the admission or the amendment is made very late in the sense of causing an adjournment of the trial. Quite properly and fairly he says it would be a disrupting factor. Well, it will involve some more work but I question how much more work since the experts have in the past



considered the repair option with particular reference to this area of fire retardant qualities in years gone by. It is far from being a new argument, though obviously I accept that the claimant has not felt it necessary to look at it anymore between December 2017 and the 1<sup>st</sup> of August 2018 when it was intimated again. But, as I have already said, I do not consider there is any real difficulty about expert evidence in that regard.

49. The next point made concerns the level of specificity of repair job. It is said that it is not possible for the claimants adequately to engage with it because while there was a highly detailed and extensive bill of quantities, there is not any invitation to tender. I do not accept that argument. It seems to me that the repair scheme has been set out in great detail, quite sufficient detail for the claimants to say whether getting over any fire retardant problems the scheme is likely to work, whether it is likely to cost what the defendants say or whether it is going to be something different. So there is no real difficulty there.

50. So far as cost is concerned, the defendants have, as I say, produced a quotation valid for 90 days from the 2<sup>nd</sup> of October to do the repairs which have been quoted. I am not persuaded that items like parapet detail show that there is a problem with the specification of the repair works or that it has left out vital elements which means that its overall cost is called into question.

51. However, what Mr Webb also says is this: that in the normal course of events it would be useful for the claimant to investigate whether there really were any contractors out there willing to do this work and, if so, at what cost.

52. The defendants' evidence of course is that there is at least one contractor willing to do it on the basis of the SERS recent quote.

53. The claimants have in the light of this application already made some enquiries. The enquiries that they have had have been to the effect that the contractors they have spoken to in general terms said they would not be interested in doing such a job. If that is the case then that evidence can be adduced.

54. Mr Webb suggested that one of the reasons why the claimants might be facing this problem when a contractor like SERS has quoted for the job, is that it simply does not have the same buying power as a main contractor like the defendant would. It is, after all, a client employer and it is in administration. But, as I pointed out to Mr Webb, if that is the case that is unfortunately an inherent problem with the position of the claimant and it does not make any difference whether they have three months or nine months to see if they can find a contractor willing to do the job.

55. In any event, that is not the whole story because I accept that it is often the case that the question of costs and the viability of the scheme and its pricing will be the subject of evidence from quantity surveyors. In one sense that is second hand because they are not a contractor but that is part of their expertise, to predict what contractors might do. In this case, if there is actually evidence from any contractors themselves, that is, as it were, icing on the forensic cake - so I do not think that there is any point of prejudice which can arise as far as that is concerned.

56. The question of prejudice also raises the issue of the extent to which the issue has already been canvassed, because the more it has been canvassed then the easier it is for the other party to get to grips with it again.

57. I have mentioned the state of the experts but I should also emphasise here that whether the claimants think it is a realistic opposition or not, especially in the light of other concessions, it remains the case that the defendants' position is that the original cladding does comply - did comply with building - the relevant building regulation which I have quoted and whether the claimants think that is an argument worth engaging or not, it is an issue in the case and I have not the slightest doubt that they would in any event have to be expert evidence on that very point.

58. There is then another point because it is said that whatever the experts may predict about building regulations, the proof of the pudding is in the eating and the eating can only come about by having already got a scheme which already has building regulation approval, or one which has at least attracted from the building control department of the local council a strong indication that approval will be given. That is in a context where at an earlier meeting in September 2015 the council officials who were presented by the claimant with their preference for replacement, indicated that they would much prefer that because there might be difficulties with consent over a repair scheme, that's the extent to which they went into it.

59. It is perfectly true as I understand it that at the moment the defendant does not have evidence of a strong indication of approval from the council let alone approval itself but these are problems which this court has to engage with on a regular basis and the court has to make an assessment based on the expert evidence about whether the scheme is viable and that means not only in terms of cost and buildability but also as to whether it will get building regulation approval.

60. If the position at trial is that there is still more doubt about that going forward and the defendant is unable, for example, to adduce evidence from the council directly on the point, that may well be a powerful argument in favour of the claimant's position that the court simply cannot take the risk of awarding damages which are much less than the claimant now claims because the scheme to which they relate might never be allowed. All of that is a matter for submission and evidence at trial.

61. It certainly cannot be said that in a case where there is an issue over building regulation control the case should be rejected entirely because there is not at present clear approval or approval in principle or a strong indication to that effect.

62. I simply do not accept that there is a risk to the claimants that they may be forced to accept compensation of a much lower order than they would wish when it fact it may turn out to be far less than is necessary. The question of that kind of risk will be precisely the sort of thing that the judge will have to engage in at trial.

63. Therefore, on the question of actual compliance, evidence about whether it will get compliance, whether it is really as cheap as the defendants say, all of those factors are factors which must properly be left to trial and I do not accept that dealing with them is a

matter which will cause the claimants any real prejudice. The same goes for the issue as to whether there will be a contractor prepared to carry it out.

64. Dealing with the checklist that Mr Webb put forward at the end of his submissions, he makes the point that effectively the defendants should not have made the admission and should have made more investigations then. Well, obviously in one sense that is true but since one can understand why the admission was made and why they seek to withdraw it, because of the radical increase in price of the claimant, I do not think that helps the claimant very much.

65. Equally, the fact that the claimant had proceeded for about six months or in fact, five months, on the basis of the admission, in the overall scheme of things I do not think this makes any difference in terms of trial preparation. I do not accept that there is inadequate supporting evidence for the withdrawal of the admission or in support of the claimed amendment at this stage such that it should be ruled out.

66. One point which I perhaps should have emphasised more is that as is plain from the report of Mr Lay, the question is not that you either you show limited combustibility and a compliant fire test or “bust”. On his evidence, BS135 can provide routes to compliance but it is not the only way of doing it and, in fact, he also makes a prediction about what the effect of a test would be. It may very well help the defendants if they are able to do a test before the trial, although there is no present indication that they are going to. If they do not do an actual test of this bespoke system, that is a matter of evidence and submission for the judge at the end of the day.

67. It was also suggested that the enabling of the defendant to withdraw its admission and make this amended case will make settlement more unlikely. I have to say I take that with a pinch of salt. Before the costs went up radically I am told that there was a mediation in March of last year at which point the claimant was claiming a bit more than £3 million, the repair scheme was £3 million and therefore the parties were not really very far apart on quantum. Even so, no settlement was reached. I do not consider this is going to be an obstacle to settlement.

68. Mr Webb is right to say that the approach in trial may concentrate minds. If that is the case, they will be concentrated whether this amendment is allowed or not. I do not consider that this is a severe disruption or even a substantial disruption as far as trial preparations are concerned.

69. He also makes the point from the aspect of administration of justice things should not proceed in this way. Well, ideally perhaps not but, as I have indicated, it is not surprising how all of this has happened given the closeness of the figures to begin with and then their expansion of May of this year.

70. In the light of that analysis, I have covered all the factors from A to G set out in 7.2. However, there is of course one further factor and that is the prejudice to the defendant if it is not allowed to withdraw the admission. The prejudice is very substantial indeed. It is that unless the admission can be withdrawn, it now has to meet a case where if it fails on liability the likely compensation award which it will have to pay is in the region of £9

million, where it believes and it has got expert advice that in truth the proper measure is £3 million. That is a huge prejudice to it.

71. Mr Webb may be right when he says that the defendants could have helped themselves by at least taking issue with the £9 million on the basis that even if Sto Mineral was required then the correct course would have been to challenge the quotes which have just been obtained by the claimant and, for example, to put in other evidence or expert evidence that actually the replacement job should not have gone up to £9 million and is still about £3 million or £6 million. Well, that is a matter for the defendants and the fact that they have not chosen to do that yet does not mean that they will not suffer massive prejudice if they cannot raise an argument which I consider is worthy of consideration at trial and which can be dealt with by the parties before trial.

72. For those reasons I am going to allow the withdrawal of the admission and subject to any drafting points I am going to allow the defendants to amend.

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*We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*

This transcript has been approved by the Judge