

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

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

Before:

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

-----  
Between:

	<b>BLUE MANCHESTER LIMITED</b>	<b><u>Claimant</u></b>
	<b>- and -</b>	
	<b>NORTH WEST GROUND RENTS LIMITED</b>	<b><u>Defendant</u></b>

-----  
**MR. PAUL DARLING QC (instructed by Freeths LLP, Birmingham) appeared for the Claimant.**

**MR. DAVID SEARS QC (instructed by JMW Solicitors LLP, Manchester) appeared for the Defendant.**

-----  
Hearing dates: 15, 16, 28 September 2020  
Draft judgment circulated: 2 October 2020  
Approved judgment handed down: 20 October 2020  
-----

**APPROVED JUDGMENT:**  
**DEFENDANT’S APPLICATION TO VARY ORDER FOR SPECIFIC PERFORMANCE**

This judgment was handed down remotely to the parties and by publication at 2pm on 20 October 2020

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

.....

**His Honour Judge Stephen Davies**

1. This is my judgment on the defendant's application made on 15 May 2020 to vary the order for specific performance made on 11 February 2019 ("the order") made pursuant to my judgment following a trial which took place between 7 and 11 January 2019.
2. The most significant issue at trial was whether or not the defendant ought to be ordered specifically to perform its landlord's repairing covenant by undertaking works to a number of shadow box units ('SBUs') forming part of the glass curtain walling system comprising the external façade of the 47 floor Beetham Tower in Manchester ("the tower"). The tower comprises a Hilton Hotel from ground level to level 23, owned and operated by the claimant, and a number of flats owned by various leaseholders at higher levels.
3. As I said in paragraph 1 of my original judgment, the tower has been described as an iconic feature of the Manchester skyline, partly because of its slim rectangular shape with a distinctive cantilevered overhanging section from mid-height level upwards and also because its external elevations are fully glazed, the façades being made up of glass panels which form a sleek uninterrupted wall of glass because there are no visually intrusive connections between the panels.
4. The SBUs are so named because they have a glass outer panel and an opaque panel inside. The purpose is to achieve a fully glazed external appearance but to prevent anyone being able to see into through the SBUs into areas such as the hotel bathrooms where privacy is required. Where privacy is not required the units are fully glazed.
5. It is worth repeating what I said at [103] of my previous judgment as to the impact of the original designed effect as compared with the temporary stitch plate repair existing as at the date of the trial:

“... As the authorities referred to above demonstrate, the starting point is the position as it existed at the time of the lease and aesthetic considerations are in principle relevant matters to be taken into consideration. Whilst various witnesses have expressed differing views as to the aesthetics of the tower, there can be no doubt that the unitised appearance of the glass facades, which depends upon there being no obvious externally visible fixings between the separate panels, is an important aspect of the overall design and original appearance of the building. Moreover, whilst various witnesses have expressed differing views as to the impact of the stitch plates, again there can be no doubt that they have a significant adverse impact on the unitised appearance of the glass facades and that they are more intrusive and more ugly than would be the case even if the glass facades had been designed and constructed to have externally visible connectors between the separate units from the outset ...

As well as seeing photographs in the trial bundle I have, as I notified the parties at the beginning of the trial, walked past the hotel and looked up at the facades. The stitch plates are so called because they give the appearance of the panels being stitched together by some giant hand, around 16 stitch plates in total to each panel. Whilst the glass panels do not completely abut each other, because there is a thin strip of weather-seal separating them, without the stitch plates the facades have a clean, modern and unitised appearance which is significantly and adversely affected by the presence of the stitch plates. In my view there would have to be some compelling reason why a tenant such as the claimant should have to accept this as a repair for a building such as this other than as a temporary time-limited repair pending a permanent repair to restore the tower to its original appearance.”

6. The problem which has led to this litigation is that in 2014, some 8 years after completion of the tower, it was discovered that in some of the SBUs in the lower half of the tower there was a failure of the structural sealant bond between the glass and the carrier frame of the SBUs, leading to a risk that the glass might blow off which would, of course, pose a very grave risk to the safety of pedestrian and other traffic below. Carillion, the well-known former construction company, had built the tower and was asked to investigate. It provided a temporary fix, which involved using screw stitched pressure plates to secure the glass to the carrier frames, and provided protective hoardings at ground level for further protection, but had neither designed nor implemented a permanent remedial scheme before going into liquidation. The claimant was dissatisfied with what it perceived to be the failure of the defendant as its landlord to resolve the problem and the continued impact of the temporary fix and protective hoardings. Accordingly, it brought these proceedings seeking, amongst other things, an order for specific performance of the defendant's landlord's repairing covenant.
7. It was ordered that there should be a trial of the preliminary issues of liability, including the issue as to what, if any works, the defendant was liable to undertake pursuant to its obligations under the lease, but not the issue of the quantification of the cost of such works.
8. For the reasons stated in my judgment, neutral citation number [2019] EWHC 142 (TCC), which is readily accessible through the Bailii website, I determined that the claimant was entitled to specific performance to compel the defendant to undertake a permanent remedial scheme which would restore the external façade to its condition immediately before the discovery of the defects in the SBUs and the undertaking of the temporary remedial works subsequently carried out.
9. The order was intended to and did reflect the judgment as handed down. It included the following material provisions:
  - “4. The Defendant shall:
    - (a) Remove the existing stitch plates from the SBU's to the external Façade of the Building;
    - (b) Remove the existing SBUs (and frames as appropriate) from the Façade;
    - (c) Reinstate or replace SBUs (and frames as appropriate) so that the new SBUs, their frames, and component parts are securely affixed to the structure of the Building in such a way as provide substantially the same external appearance as was present at the date of the Lease and prior to June 2014, and preserves the design intent for the function of the curtain wall system; and
    - (d) Make good any damage caused to the Façade (“the Repair Works”).
  5. The Defendant shall complete the Repair Works by no later than 31st July 2020.  
...
  8. The parties shall have a liberty to apply in relation to compliance with paragraph 4 and 5 above.
  9. In particular, the Defendant shall have a liberty to apply:
    - (i) to be permitted to undertake some different remedial scheme if the Repair Works required by this order are revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost; and

(ii) to extend compliance with paragraph 5 above.”

10. The application as presented at the hearing on 15 and 16 September 2020 seeks to vary those provisions to the following effect:

“1. Paragraph 4 of the Order dated 11 February 2019 be and is hereby varied so that, instead of removing and reinstating the SBUs, the Defendant should:

- (a) Provide aluminium pressure plates to the vertical edges of all the SBUs forming part of the external envelope of the Building, using mechanical fixings at circa 300 mm to which aluminium plates are to be fitted;
- (b) Provide cosmetic cover caps for the aluminium plates; and
- (c) Make good any damage caused to the façade.

2. Paragraph 5 of the Order dated 11 February 2019 be and is hereby varied so that the Defendant should complete the Repair Works (as hereby varied) by 31 July 2021.”

11. The defendant’s case is that its application falls fairly and squarely within the specific permission to apply provision contained in paragraph 9 of the 11 February 2019 order. In short, the defendant’s position is that during the period from February 2019 onwards its investigations have revealed that the remedial scheme as ordered has been shown to be not reasonably practicable other than at disproportionate cost, whereas the alternative remedial scheme which it propounds is reasonably practicable and can be undertaken at proportionate cost and more speedily than the ordered scheme. The defendant also submits that whichever scheme it is now required to implement the time for compliance should be extended to reflect the time reasonably required to undertake it.

12. The claimant’s case is that that the court cannot and should not vary the order for the following reasons, as articulated by Mr Darling QC in his skeleton argument (I shall explain the references to the various remedial works options below):

“(a) The judgment has been delivered and the Order made. The judgment has not been appealed. This court does not have the jurisdiction to interfere with that, unless the court’s specific power (from the judgment) or general power (from the CPR) is engaged. Neither are. All parties agree that option B1 is achievable by competent contractors and that the cost of option B1 is approximately the same as last trial. There is therefore no question of any of the liberty to apply provisions being engaged.

(b) The defendant has not shown why the court should exercise its discretion in its favour, in circumstances where the defendant has substantially delayed in making this application.

(c) The reasons for making the judgment and the order have not changed. The judgment explains why appearance must remain the same and the order requires the external appearance to be substantially the same after the repair. The method the defendant now wants to adopt (called option C) breaches that requirement and offends that reasoning, providing a different appearance;

(d) The defendant has not explored alternative methods of achieving the court-ordered repair (e.g. B2 and B3);

(e) Option C, which is in reality a variant of option A, has not been shown to be a viable technical solution;

- (f) The costings of option C are still in question;
  - (g) The finances of the defendant are irrelevant and should be ignored not least since, by its own admission, it cannot afford either option B or option C.
  - (h) The court should not impose upon the claimant an alternative, inferior repair where the claimant still has an extant claim against third parties for the costs of carrying out the court-ordered repair.”
13. The claimant’s initial response was to seek an order dismissing the application as an abuse of process. Following argument at a hearing on 9 June 2020 I refused to do so and instead gave directions for an expedited determination of the application, including provisions for the exchange of expert and witness evidence and a two day trial in September 2020.
14. The defendant served and relied upon the following evidence:
- (a) An initial witness statement from Mr Jones, the defendant’s solicitor, in support of the application. It was not necessary for Mr Jones to give oral evidence.
  - (b) A witness statement from Mr Naish, a director of the defendant’s parent company, who gave oral evidence.
  - (c) A witness statement from Mr Robinson, a director of the company which is itself the sole director of the defendant, who also gave oral evidence.
  - (d) Expert evidence from Mr Andrew Webster, its expert building surveyor, who had provided a report in support of the application and subsequently contributed to a joint statement and then produced his own separate report. He also gave oral evidence. He had not been involved in any way in the previous stage of the litigation, when the defendant had relied upon the expert evidence of Dr Newby of Sandberg, consulting engineers.
15. The claimant relied upon the following evidence:
- (a) Witness statements from Mr Marsden the claimant’s solicitor, who also did not need to give oral evidence.
  - (b) A witness statement from Ms Brown of the claimant company, who gave oral evidence.
  - (c) Expert evidence from Mr Clarke, its expert facade engineering specialist, who also contributed to the joint statement, produced his own separate report and also gave oral evidence. Mr Clarke had provided technical input as a façade specialist in the previous stage to Mr Kavanagh, the claimant’s primary expert, and had participated in the experts’ joint discussions and joint statement produced pre-trial, but had not given oral evidence at trial.
16. No issues of significance arise as to the credibility of the factual witnesses. I was not convinced by the evidence given by Mr Naish and Mr Robinson as to the circumstances in which the defendant’s parent company, Ground Rents Income Fund plc (“GRIF”), would or would not continue to provide financial support to the defendant such as would allow it to undertake the remedial works under whichever of the options it is required to undertake. However that is not, as Mr Sears QC for the defendant realistically accepted, a material consideration on this application, notwithstanding that it may be a very material consideration in the real world.

17. As to the expert witnesses, notwithstanding the criticisms made by Mr Darling as to Mr Webster's compliance with his obligations as an expert witness, some of which were well-founded, I am satisfied that he as well as Mr Clarke approached their duties in accordance with their obligations as independent experts and provided me with helpful evidence, written and oral. Much was common ground between them, as revealed by their joint statement and in their oral evidence, and I am grateful to both of them.
18. I also had the benefit of eloquent and persuasive submissions from leading counsel for both parties, in their opening and short closing skeleton arguments and in their supplemental oral submissions.
19. Having considered the evidence and the submissions I am satisfied that the application fails and should be dismissed.
20. My reasons appear below.

### **Relevant legal principles**

21. It is common ground, as Mr Darling submitted, that in circumstances where a trial has taken place, a judgment has been delivered and an order been made, sealed and not appealed, a court does not have jurisdiction to revisit the order – whether of its own volition or on the application of either party - unless and to the extent that the order properly authorises it to do so or its general power to do so, whether under its inherent jurisdiction or under the Civil Procedure Rules, is engaged.
22. It is also common ground that the question as to whether the court has jurisdiction to revisit the order under a permission to apply provision depends on a proper construction of the provision in question. Here, as will be seen from paragraph 4 above, there is both a general permission to apply in relation to paragraphs 4 and 5 and a particular permission to apply to undertake some different remedial scheme if the repair works required by paragraph 4 are revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost.
23. Mr Sears was content to proceed on the basis that the instant application fell squarely within the particular permission and did not seek to argue as a fallback that it was sufficient if it fell within the general permission.
24. He submitted that on a proper construction of the order the question of whether the ordered remedial scheme was or was not reasonably practicable other than at disproportionate cost could only sensibly be addressed by reference to a comparison between the practicability and cost of the ordered remedial scheme and of the alternative remedial scheme, rather than solely by reference to the ordered remedial scheme.
25. Mr Darling disagreed, submitting that the question as to whether or not the ordered remedial scheme was not reasonably practicable other than at disproportionate cost was something which should only be addressed by reference to that scheme, bearing in mind the evidence as to practicability and costs which was before the court at trial, rather than by comparison with the proposed alternative scheme.
26. Mr Darling also submitted that it would be wrong for the permission to apply provision to be used to revisit the merits of the previous judgment by adducing new evidence and new arguments which, if they were to be raised, could and should have been raised at the original

trial or, potentially, by appealing and persuading the appellate court to exercise its power to admit fresh evidence and allow fresh arguments to be raised

27. I agree with that last submission as a matter of general principle. Although said in the context of an appeal, the memorable observation of Lewison LJ in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 at 114(ii) is apt:  
“The trial is not a dress rehearsal. It is the first and last night of the show.”
28. However, on the question of construction of the particular permission provision I agree with Mr Sears that my decision has to be made in the context not only of a consideration of the practicability and cost of the ordered remedial scheme as now appears, compared with the position as it appeared at trial, but also in the context of a comparison with the proposed alternative scheme. There is no compelling reason in my view to construe the particular permission provision as excluding any consideration of the practicability and cost of the proposed alternative scheme. The claimant’s construction would require the court to engage in a two stage process where, at the first stage, the court only had to determine whether or not the ordered remedial scheme was or was not reasonably practicable other than at disproportionate cost, without reference to the practicability and cost of any alternative remedial scheme being proposed. Only if it answered that question in favour of the defendant could it go on to consider the alternative remedial scheme. In my view that would be artificial and strained. It would make little sense for the court to have to determine the practicability and cost of the ordered scheme in a vacuum. The comparative ease and cost of the alternative proposal is clearly relevant to an assessment of the practicability and cost of the ordered scheme. In my view the court is required to and should undertake a broad analysis, looking at the plusses and negatives of each scheme and then reaching a holistic conclusion.
29. However I do accept and proceed on the basis that the terms of the particular permission provision provide a clear signpost that if the evidence shows that nothing has changed significantly since the original trial as to the practicability and cost of the ordered remedial scheme and that what the defendant is seeking to do is to advance an alternative scheme which was, or could have been, put before the court at the original trial and is only being advanced because it would be less costly for the defendant, the application is very unlikely to succeed.
30. I should also address some further disputes as to the proper construction of the particular permission provision. In my view the starting point is that I should not approach the construction as strictly as I would if it was the equivalent of a statute or a contract, given that it is really no more than an attempt to identify in advance the particular circumstances in which the court would be willing to entertain an application to vary the order for specific performance.
31. I accept, as Mr Sears submits, that the question as to whether or not something is reasonably practicable is different from whether it is technically practicable and invites a more wide-ranging enquiry.
32. As to what is a disproportionate cost, in my view that requires an attempt to make some comparison between the benefit to be obtained from the remedial scheme and the cost of achieving that benefit.
33. Mr Darling submitted that the authorities cited in *Dowding on Dilapidations: The Modern Law and Practice (6th Ed.)* at paragraphs 11-42 to 11-44 show that where it is said that the cost of the works is such that they fall outside the scope of the repairing covenant, the relevant comparator is the cost of a new building. Whether or not that is the case, and it does not seem to me that the cases intend to lay down some principle of universal application in this respect,

I do not consider that this prevents this court in determining this application from looking at wider considerations.

34. It is common ground that, as was the case at the original trial and judgment, I will have to have regard to the contribution made by the particular design of the SBUs to the visual appearance of the tower, i.e. to aesthetic considerations. The experts rightly accepted that they could not give expert evidence as to aesthetic considerations. Nor should I follow my own personal view as to aesthetic considerations. I should however give, as I did in my previous judgment, considerable weight to the design intent of the building as realised in the construction. I should also give appropriate weight to the opinion of Ms Brown as to the value to the Hilton Hotel of this important element of the design from a commercial perspective. However I should also have regard to the fact that the defendant has, earlier this year, applied for and obtained planning permission for its proposed alternative scheme, in circumstances where the planning authority was of course entitled to and – I have no doubt – did have regard to its own assessment of the aesthetic merits of that scheme when compared with the original scheme. I should also bear in mind that the planning application was supported by the Beetham Tower residents association, comprising the owners or occupiers of the residential flats in the building, and who of course also have an interest in the appearance of the tower.
35. That last point brings me onto the position of the leaseholders of the flats. As I recorded in my original judgment, I am not concerned with the position as between the defendant and the flat leaseholders, who have not sought to intervene in these proceedings. However, it has always been the case that the defendant intends to seek to recover a proportion of any costs incurred in undertaking remedial works against the flat leaseholders pursuant to the service charge provisions of those leases. I have been shown a copy of a recent notice served by the defendant's agents upon the flat leaseholders under section 20 of the 1985 Landlord and Tenant Act 1985 as amended, giving notice of its intention to undertake the works the subject of the proposed alternative scheme, if permitted to do so, and inviting observations upon the works. It was said by Mr Robinson in evidence that the defendant intended to seek to recover 51% of the net costs of the works, whatever they might be, from the flat leaseholders. If the costs are, as the defendant says they are, very considerably higher under the existing ordered scheme than under the proposed alternative scheme, that may well end up causing the amount claimed against the flat leaseholders to be substantially increased.
36. However, I do not consider that this is a matter for me to take into account. I am in no position to investigate whether or not the flat leaseholders would be obliged to pay the difference in cost between the two schemes if I hold the defendant to the ordered scheme. It may be that the flat leaseholders would be entitled to contend that they should not have to do so, in circumstances where it might be said that the defendant ought to have put this alternative scheme forward at the original trial if it really was as good as the court ordered scheme.

### **Is the ordered remedial scheme reasonably practicable?**

37. The answer to this first question can be shortly stated. I have no doubt that it is reasonably practicable. In their joint statement Mr Webster and Mr Clarke, referring to the concerns identified in relation to undertaking the court ordered repairs, agreed at [8.4] that “while challenging, these concerns are not without solution if a competent contractor were engaged”. They explained why this was so in more detail in succeeding paragraphs, agreeing that there might be instances where instead of retaining the glass as envisaged it would be necessary to break out the glass and replace the unit with a completely new unit and that in such a case the difficulties and the risks associated with this would need to be addressed. Whilst in his



subsequent separate report Mr Webster said that he remained of the opinion that this option would be “extremely challenging to prosecute” he did not seek to resile from his agreed position in the joint statement. The same is true of his oral evidence. Whilst he emphasised his concerns as to the practicalities and risks, particularly his concern as to the danger to workers and third parties from falling glass, he did not seek to resile from his agreement in the joint statement.

38. In my view there is a real difference between works not being reasonably practicable on the one hand and works being extremely challenging, but those challenges being capable of being solved by a competent contractor. It is not said by Mr Webster that any of the solutions to these challenges are not reasonably practicable, whether individually or collectively.
39. Mr Sears sought to place particular reliance on the comments made by Dr Newby in his first letter dated 23 April 2020 which was attached by Mr Webster to his first report. Mr Darling submitted that this was impermissible, since the defendant had chosen not to rely on Dr Newby as an expert witness on this application so that he had not participated in joint discussions nor signed a joint statement nor provided a CPR Part 35 compliant expert report nor been cross-examined on his opinions. To the extent that Mr Webster and/or Mr Clarke specifically adopted the views of Dr Newby in their evidence I consider that it is permissible for me to have regard to the content of the letter, but only on that specific and limited basis, and not otherwise. In any event I do not consider that the content of this letter adds materially to the expert evidence already before me.
40. It is however necessary in the light of the further issues and arguments raised to provide a little more detail in relation to the issue of reasonable practicability by reference to the evidence at the original trial and on this application.
41. There were four alternative remedial options which had been identified and considered by the experts prior to the original trial. In their joint statement they identified at [6.1] the two options as identified by Carillion, together with the two variants on those options as suggested by Fill UK, the remedial contractors who had been engaged by the defendant to undertake inspections of the affected SBUs and who had already been considered as potential contractors to undertake any remedial works.

Option A1	Carillion	continuous external pressure plates
Option A2	Fill UK	individual pressure plates
Option B1	Carillion	replace glass on existing carrier frames
Option B2	Fill UK	replace glass on new carrier frames

42. In broad terms, as I said at [70] of my previous judgment, option A involved the application of pressure plates to the vertical edges of the glazing and, thus, represented an extension of the existing short term remedial stitch plate system, whereas option B involved the installation of replacement frames for the affected SBUs and, thus, represented substantially a like-for-like replacement of the existing affected SBUs, of which there are some 1,440. As helpfully clarified by Mr Clarke at this trial, the only difference between options A1 and A2 is that in option A1 there is just one pressure plate which is fixed across the SBU and the adjacent unit, whereas with option A2 there are two vertically separated pressure plates which are fixed together at the junction between the SBU and the adjacent unit. What is important for present purposes is that both involve fixing two long pressure plates which run down each vertical side of the SBUs, in contrast to the stitch plates which involve separate pressure plates inserted at spaces around all four sides of each SBU.

43. The experts were agreed in their joint statement produced for the original trial at [6.3] that the advantage of options A1 and A2 was that installation was likely to be relatively straightforward and would not involve the removal of any glazing units. However, they noted at [6.4] no less than seven disadvantages, including a number of significant technical disadvantages. They noted at [6.5] that there were four significant advantages of options B1 and B2, reflecting the fact that these would retain the existing design intent from a visual and technical perspective. They also noted at [6.6] a number of disadvantages, relating to the difficulty of removal and thus the likely cost and duration of the works. However, they qualified this conclusion by saying that this was “by no means certain, given the number of variables and unknown circumstances”.
44. Significantly, as I recorded at [81] of my previous judgment, the experts had agreed at [6.9] that options B1 and B2 were “the most satisfactory technically and practically and would maintain the long-term integrity and performance of the system”, whereas options A1 and A2 were not satisfactory “because they alter both the structural support and the inherent flexibility of the system and may compromise the long-term integrity and performance of the cladding system”. It is important to note therefore that not even Dr Newby as the defendant’s expert was suggesting at the original trial that either variant of option A was satisfactory from a technical perspective and that no further variant of option A was put forward as able to overcome these technical difficulties.
45. As regards option B their opinion was caveated at [6.10], where they said that whether options B1 or B2 could actually be implemented would depend on the practical circumstances relating to the current installation and that a site tolerance survey would be required before a final decision was made. At [6.11] they also agreed that before choosing between options B1 or B2 further development was required, including detailed design, structural calculations, installation methodology, site tests and evaluation of costs.
46. It is not surprising that in those circumstances the defendant was realistically unable to, and did not, advance a positive case at the original trial that if, contrary to its primary case, it was in breach of its repairing covenant under the lease and if, again contrary to its primary case, the court was persuaded that it should exercise its discretion to order specific performance of its repairing covenant, then either option A1 or A2 should be preferred to either option B1 or B2.
47. It was also in those circumstances that I said at [98] of my previous judgment that the defendant was required to repair the SBUs by adopting option B in either iteration, unless that was revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost, and at [105] that I was satisfied that “it is necessary to reinstate the original fixing of the SBUs or to replace them so as to produce substantially the same result substantially along the lines of option B in either iteration. I am satisfied that a remedial solution along the lines of option A in either iteration would not represent a reasonable choice unless option B is revealed by investigation and analysis by a suitably qualified consultant to be not reasonably practicable other than at disproportionate cost”.
48. Following the previous judgment and the making of the order the defendant instructed the consultants Savills to procure the undertaking of the required remedial works in accordance with option B. I had allowed the defendant what I recognised at [111] and [112] of my previous judgment was a generous, but in my view a realistic, timescale for compliance of 18 months with permission to apply, so that if the defendant was able to demonstrate by credible

evidence the discovery of factors causing delay which could not reasonably have been anticipated or guarded against or mitigated it should be able to seek an extension of time.

49. In circumstances which I do not need to rehearse the defendant's expert Mr Webster became involved in the procurement of the required remedial works from around May 2019 at the instigation of the defendant's newly appointed investment advisers, Schroder Real Estate. On 18 June 2019 he and other members of the team, including Dr Newby of Sandberg, attended a demonstration by Fill UK to assess the ease of removal of the SBUs. He also attended a follow-up design team meeting a month later on 11 July 2019. He has produced a file note of the demonstration and the meeting which I accept as an accurate account, consistent as it is with the views also expressed by Dr Newby in his April 2020 letters. It is a lengthy and detailed note which records the difficulties encountered by Fill UK in removing the sample SBUs. Amongst other things they noted that: (1) the operation was very weather dependent, being unable to proceed in wet<sup>1</sup> or windy conditions; (2) the carrier frame release mechanisms were very difficult to operate for various reasons so that this was a job which was difficult and labour intensive, especially at height; (3) since both options B1 and B2 involved removing and then later replacing the SBUs two operations were required for each SBU and protective measures were required for the exposed backing panel in the meantime; (4) assuming no bad weather and no need to break out the SBUs if they could not be removed intact the work would take around 49 weeks, whereas allowing for bad weather and other risks a period of at least 2 years from start on site to finish was realistic.
50. In the same note Mr Webster said that having reviewed matters he had concluded that there was an alternative option, which was a hybrid of options A and which involved fixing decorative steel plates to each SBU. He said that this would avoid having to remove the SBUs and would allow working in a much wider range of conditions and thus, in his view, reducing the scheme duration down to 9 to 12 months. He noted that there would be two challenges with this proposal, namely firstly securing an aesthetically acceptable design using plates which would be maintenance free for 10 years, and second to secure court approval for any change. He considered that this option would address the technical objections as they had appeared to the experts at the original trial.
51. It is common ground that over the summer of 2019 Mr Webster met with Mr Clarke on a without prejudice basis to discuss the alternative proposal but that no consensus was reached as between the parties for that to take the place of the court ordered scheme.
52. I accept Mr Webster's evidence that from autumn 2019 work proceeded in tandem in preparing to tender the court ordered scheme and in developing the proposed alternative scheme.
53. For the purposes of addressing the practicability of the court ordered scheme it is sufficient to say that in December 2019 the tender documentation was released to the three (out of 19) contractors who were willing to provide tenders. Tenders were received in March 2020 and the results analysed by a QS working with Mr Webster in April 2020.
54. The resultant tender analysis records a vast disparity in the adjusted tenders, with Fill UK tendering the lowest at £6,040.446.06<sup>2</sup>. A company known as GIG tendered £9,500,000 and

---

<sup>1</sup> Either during rainfall or whilst the façade is wet.

<sup>2</sup> Throughout this judgment all sums are net of VAT and any professional fees unless the contrary is specifically stated.

a company known as CLM tendered £16,322,298. GIG's tender was not investigated further due to various identified discrepancies in the tender. All three tender totals included a 50% allowance as set by Mr Webster for adverse weather-related costs which, notwithstanding Mr Darling's criticisms, I am satisfied is a reasonable estimate. CLM had allowed for completely new SBUs to be fitted, with new glazing, instead of the specified requirement to re-use the existing glazing, whereas Fill's tender included an allowance of some £150,000 for some glass breaking out and cutting out.

55. There was also a very significant disparity in anticipated duration, with Fill offering 57 weeks and CLM 96 weeks. Both Fill and CLM both excluded the cost of inclement weather delays. It is not entirely clear to me from its tender whether Fill was also seeking to exclude the cost of any delay due to difficulties in removal of the existing SBUs including glass breaking and cutting out.
56. On the basis of a 50% allowance for weather related delays it is apparent that a reasonable time allowance from start on site to completion is anything from 18 months plus to well in excess of 2 years.
57. Significantly, it was recorded in the tender analysis that both Fill and CLM had demonstrated a good understanding and suitable method statement for the removal and procedure process. The recommendation was that Fill be appointed. This is important, because it was no part of Mr Webster's evidence in the joint statement or in his expert reports that Fill's tender ought not to be accepted by the defendant if it was required to undertake these works. There was no suggestion that the tender was technically or otherwise defective, or that Fill did not have the technical or organisational abilities to undertake this work, or that it appeared to have priced the tender on an unrealistic basis. There was no suggestion that Mr Webster had investigated the reasons for the significant difference between the two conforming tenders and concluded that Fill's tender was unrealistic or otherwise ought to be disregarded. Whilst it is fair to say that Mr Webster did state in his oral evidence his real concerns as to the difficulties which would be experienced in performing the works and the associated health and safety risks nonetheless he had proceeded, in his capacity as project adviser / manager to recommend Fill's tender as acceptable subject to the 50% allowance and in his capacity as independent expert to agree that the difficulties could be addressed by a competent contractor into which category – as he accepted – Fill fell. Whilst in oral evidence he referred to his concern that Fill did not fully appreciate the risks associated with the job I agree with Mr Darling that this did indicate a little rowing back from his written evidence which was not convincing. As to his further expressed concern in oral evidence that Fill did not have a substantial asset position, he did not suggest that the other tenderer was in any better position and I also note that the adjusted tender included for a performance bond.
58. It is for all of these reasons that I am satisfied that the court ordered remedial scheme cannot be shown to be not reasonably practicable in itself.

**Is the cost of the court ordered scheme disproportionate in itself?**

59. I am not satisfied that the defendant has demonstrated that the cost of the court ordered scheme is disproportionate in itself, in the context of a remedial scheme to put the tower back into its condition as at the date of the grant of the long (999 year) lease to the claimant's predecessor in title.
60. I am satisfied that I can and should proceed on the basis, as stated above, that Fill as a competent contractor has been willing to produce a tender for around £6 million in round

terms, which has not been shown to suffer from any major flaws and has been recommended as being acceptable. That amount does not seem to me to be obviously disproportionate, even if VAT is to be added (and cannot be reclaimed, as to which there is no clarity) and even allowing for professional fees. Whilst I have no information as to the cost of rebuilding the tower or indeed the cost of completely recladding the affected external facades to recreate the original design intent, there is no basis for concluding that the remedial costs of the court ordered scheme are disproportionate to such costs, particularly in the context of the premium paid by the claimant's predecessor in title for its long leasehold interest of £60 million. Nor do I consider that the cost is obviously disproportionate to the benefit to be obtained, both to secure a proper structural repair and to return to the original design intent. Whilst it is unnecessary to decide this point, it is fairly obvious that the defendant's case would have been far stronger had both tenders been in the region of the CLM tender of around £16 million.

61. Anyone with any experience of the construction industry would recognise that there is clearly a risk that Fill UK may have under-priced its tender, whether by accident or by design. There is however no evidential basis for concluding that it is any more than a risk. Furthermore, whilst I am also satisfied that there must, for all of the reasons relating to the nature of and risks associated with option B and the significant difference in tenders, be a significant risk that the eventual out-turn cost may transpire to be significantly in excess of £6 million, there is no evidence upon which I could properly conclude that this is a probable outcome as opposed to merely a risk.
62. Moreover, as Mr Darling submits, the cost is not self-evidently disproportionate by reference to the figures available at the previous trial. It is fair to record that the experts had not attempted to assess the cost of the various options at or before the previous trial – which I emphasise is not intended as a criticism of them because they were not asked to do so. Nor had either party set out to provide any other estimated cost figure to the court. The only available evidence came during the course of the trial when the defendant did disclose, when pressed for various documentation, an email from Fill UK, responding to a request from the defendant for indicative costings, which suggested that option A2 would cost around £1,975,000, option B2 around £3,680,000 and a full SBU replacement around £5,145,000. Option B2 appears to be the closest to the option which Fill has been asked by the defendant to tender.
63. On that basis I am prepared to accept that the Fill UK tender represents an increase of over 50% on the cost estimate it gave for the closest equivalent in its email. That is a not insignificant increase. However, it is also no more than 20% higher than the cost of the full SBU replacement cost estimate which is in itself a further variant of option B and, thus, would comply with the court ordered remedial scheme.
64. As it happens, that is also an option which Mr Clarke has suggested is worthy of further consideration in his separate report. I do not need to address the arguments for and against this option in any great detail because Mr Clarke only put it forward on that limited basis. He suggested it on that basis because whilst, as he agreed, the cost of making entirely new units with new glass would be greater than re-using the existing glass there would, he believed, be a considerable cost saving because it would mean that the existing SBUs could be removed destructively if removal in one piece proved troublesome and the replacement, being prefabricated, could be installed in the same operation as the removal. In short, his view was that any immediate increase in cost and procurement time would be more than justified by the reduced cost and time (and unforeseeable extra risk) of removal and replacement. Whether or not he is right I need not decide, although I do see force in his opinion. The point of relevance for present purposes is that the cost of the Option B variant as tendered by Fill is

not significantly more than the cost estimate available at trial for this further variant of the court ordered scheme. It cannot be known on the evidence before me to what extent the CLM tender is higher than Fill's because of their decision to tender for full replacement SBUs.

65. Mr Darling also complained that the defendant was to be criticised for not itself investigating this option or any other variants to options B1 and B2 before proceeding to make the application to be allowed to return to a variant of option A. There is some force in this criticism. However, in the absence of any evidence that it would substantially affect the practicability and/or the cost of adopting option B I do not consider that this point is fatal to the defendant's application. The suggestion could, after all, have been put forward by the claimant in open correspondence in August 2019 once the claimant had been presented with the defendant's option C proposal and had, it would appear, declined to accept it.

### **Comparison with the option as proposed by the defendant**

66. I have already explained above, when referring to Mr Webster's investigations, the essential nature of the defendant's proposed alternative scheme, which has been referred to as option C, although as Mr Darling said it ought more strictly perhaps to be referred to as option A3 as being essentially a further variant on the existing A options. Three issues require consideration; practicability, cost and aesthetics. I shall deal with each in turn below.

#### *Practicability*

67. This has been the subject of some debate and some disagreement between the experts but in my view Mr Clarke's oral evidence, admirably given in full compliance with his duty to the court as an independent expert, removed most if not all of the bones of contention.
68. He accepted that, when compared with option B, option C was much faster and more economical and would carry fewer health and safety risks. This was not a surprise, since a solution which involves keeping existing units in place and providing additional protection against failure is always likely to be much easier, much quicker and therefore much cheaper than a solution which involves their complete removal and replacement.
69. However, in the joint statement Mr Clarke registered his concern that he had not seen the documentation he would expect to have been produced to demonstrate the technical performance of the alternative cladding proposal, as noted in section 9.6 of the statement. In section 9.6 the experts agreed in terms that further technical documentation would need to be provided before the proposal could be demonstrated to be technically sound. As many as 7 particular items were identified, although they were said not to be an exclusive list, namely: (i) detailed drawings of each SBU interface; (ii) structural calculations of the glass, pressure plate and fixings; (iii) thermal stress assessment of the glass; (iv) thermal assessment of the mullion; (v) review of movement and tolerance report; (vi) cleaning and maintenance strategy; and (vii) material data sheets.
70. These and the other issues raised in the succeeding paragraphs of the joint statement were also discussed further in the separate reports and in evidence. There were some continuing issues between the experts as to whether or not all of these items were reasonably required at this stage and also as to whether some were items which one would expect the contractor to provide. It is regrettable that by the time that some of these items were provided in the second half of the week before the trial it was, I accept, not reasonably practicable to have expected Mr Clarke to have read, assimilated, responded and provided instructions to the defendant's

legal team to enable them to be addressed, which is why I ruled the documentation and Mr Webster's additional observations upon them inadmissible.

71. In his oral evidence Mr Clarke maintained his position that he had not been provided with sufficient information to come to a conclusion as to whether or not option C was technically sound. However, he agreed that he was not saying that it was not a viable solution and he also agreed that if the documentation he required was provided it could be demonstrated to be viable. He also agreed that he would be very surprised, given his experience in such matters, if option C or some close variation upon it could not be made to work and if his queries could not be addressed and answered. In short, his clear opinion was to the effect that, whilst the information he had requested was important and was not simply a box-ticking exercise, he had no reason for considering that option C could not work and would not achieve the advantages of speed, cost and reduced health and safety concerns from a technical perspective.
72. Nonetheless I consider that Mr Darling was entitled to maintain a submission that the defendant's failure, over a prolonged period, to undertake the full design work required to demonstrate practicability, was surprising in the context of its having to make this application. I also accept that as a consequence there is a residual risk that some real problem with practicability would emerge which could not easily be addressed, whether at all or only at significant additional time and cost or – possibly – aesthetic impact.

#### *Cost*

73. As I have already said option C was tendered by the defendant's professional team as a separate exercise to the tender of option B. Tenders were sought in June 2020 from the same three contractors and tenders were received the following month. A report on the tenders received was produced in August 2020 by the QS working with Mr Webster in the same way and in the same format as that produced in relation to option B as referred to above. It records that: (a) as with option B, GIG's tender was discounted; (b) unlike option B, there was a very close similarity between CLM's tender and Fill's tender, both in terms of adjusted tender value (£2,388,314.75 and £2,779,246.96 respectively) and contract period (30 weeks for both); (c) both included a 20% allowance for additional programme duration.
74. Whilst making clear that the claimant did not necessarily accept that these tenders were an accurate guide to the cost of option C, Mr Darling did not cross-examine any of the defendant's witnesses in relation to this tender exercise to contrary effect. In my view the results of the exercise demonstrate that the tender cost is likely to be a reliable guide to the eventual out-turn cost, given the similarity in tender amounts and the much lesser risk of the works being delayed or disrupted by adverse weather, by difficulties experienced in removing the SBUs and by a reduced risk of accidents or other health and safety related matters causing the works to have to be stopped.
75. I am satisfied therefore that I can and should conclude that the cost of option C is likely to be in the region of £2.4 million to £2.8 million, with a modest risk of a modest increase in out-turn cost (based largely on the risks contingent on the design not having been fully developed), compared to the cost of option B being around £6 million with a significant risk that the eventual out-turn cost may exceed that amount, possibly by a substantial amount. Moreover, even allowing for a 20% additional programme duration, one is looking at a 9 month contract duration from start on site to finish. There is no indication that the period of time from contract award would be any longer under option C than option B and, indeed, good reason for thinking that it would be less given the reduced need for making arrangements for new frames and, potentially, for new glass to match the existing where there is a clear risk that the existing glass may have to be broken during removal.

### *Aesthetic considerations*

76. As I said in my previous judgment at [103], set out at paragraph 5 above, although under the initial design and construction and under option B the glass units are not completely adjoining, because there is a thin strip of weather-seal separating them, the total strip width is only around 18mm and thus has little effect on the overall unitised effect which is clearly regarded as a very important aspect of the design philosophy and overall impact of the tower as constructed.
77. The stitch plates, which I regarded as unacceptable in their visual impact, are some 60mm wide, thus overlap each adjacent unit by some 20mm. Each is 150mm long and there are 16 per unit, 4 along each vertical and horizontal edge.
78. As I have said, option C involves fixing continuous pressure plates to the complete length of each vertical edge of each of the SBUs. Pressure plates are not to be fitted to the horizontal edges because that would present a significant risk of water ingress. Grey coloured cosmetic cover caps will cover the pressure plates. The experts note that whilst the mullion section drawing which accompanies the planning application is not dimensioned the annotations indicate that it would be some 80mm wide and that the cover cap would be some 25mm – and no more than 30mm – proud of the glass surface. It is possible that the cover cap would not completely cover the pressure plates or the low friction tape which is an essential part of the technical design.
79. It will be apparent that the proposed pressure plates are over 4 times wider than the existing weather seal strips and some 25% wider than the existing stitch plates. They will also protrude from the surface of the glass to an appreciable extent. On any view they will significantly detract from the unitised effect of the cladding as designed and constructed, although I accept that they will be concealed, unlike the stitch plates, and will be less obtrusive because they are continuous along the vertical elevations.
80. As I have already said, the Beetham Tower residents committee has supported the application and Manchester City Council as the relevant planning authority has approved the application, whereas Ms Brown of the claimant company expressed very strong adverse views in her witness statement as to their appearance, suggesting that they would ruin the uninterrupted glass façade design and affect footfall, business and the long term value of the building. She went so far as to compare the proposal to “putting tape on a top-end luxury car” which would “ruin the entire look of the car”.
81. The defendant has placed mock-ups of the pressure plate cover caps on one of the elevations in order to be able to show what they would look like, which is what Ms Brown is commenting upon and which I have also been able to see, and which are also shown on the photographs which accompany the planning application.
82. There is obviously room for genuine disagreement as to the aesthetic impact of option C, were it to be adopted, when compared with the existing design and construction (and thus option B) and, insofar as relevant, with the existing stitch plates.
83. What however can be said I think without contradiction is that whilst the pressure plate cover cap proposal is an obvious and significant improvement on the stitch plates, it is an obvious and significant worsening compared with the original unitised appearance. Moreover, as Ms Brown says, they will not be applied uniformly, since they will only be applied where there are affected SBUs at lower levels, and will not be applied to the horizontal edges, so that there will be something of a patchwork effect. I would not be prepared however to accept Ms Brown’s analogy of applying tape to an expensive motor car; it is reasonably clear that if it was really that bad it would not have been supported by the residents association nor passed



by the planning authority. Having spent some time looking at the differing glass facades of the new towers which are such an increasing feature of the Mancunian cityscape, I would suggest that the initial unitised appearance gives the Beetham Tower an undoubted visual impact which is more impressive than the more typical glass facades which have more visually obvious connecting structures.

84. It follows, in my view, that to require the claimant to accept option C would involve requiring it to accept a visual appearance which is materially different from and significantly less visually impressive than the original appearance.

### **Other relevant factors**

85. Mr Darling has submitted that it would have been perfectly possible for the defendant to have advanced option C to the court at the previous trial. He submits that it would be wholly wrong to allow the defendant a second bite at the cherry. He submits that it is entirely irrelevant that it did not do so because its then expert had either not conceived of option C or – if he had – had felt unable to support it. He also submits that the test exercise in June 2019 did no more than reveal difficulties which had already been contemplated at the original trial.
86. In my judgment these are powerful submissions. There is no good reason advanced by the defendant why option C could not have been presented to the court at the original trial. It would appear that the defendant and its advisers had not appreciated that – as it now says – there were ways and means of overcoming the technical difficulties with option A nor that it was necessary to investigate and present a solution which at least mitigated the unacceptable visual appearance of the temporary stitch plate solution. Whilst it is true that the testing exercise in June 2019 did reveal that the difficulties which had been feared might exist did exist, as I said in my judgment at [110] the defendant could and should have undertaken this exercise before the original trial in any event. In short, I accept that the defendant could have made this case at the original trial and that its failure to do so is a powerful point against acceding to its present application.
87. Mr Darling has also submitted that it is irrelevant that it is likely to take less time to undertake option C than option B. He submits, on instructions, that the claimant is willing to accept the increased time and disruption intrinsically involved in undertaking option B as a price worth paying to achieve a return to the original design. In that respect he submits that it is relevant that the defendant, having been guilty of considerable delay in dealing with this problem since it first arose in 2014, cannot now pray in aid the more modest time differential between the two schemes on this application. I note the concession and agree with the submission.
88. Whilst Mr Darling also made much – at least in his written opening - of what he submitted was the defendant’s culpable delay in proceeding with the court ordered remedial scheme and in making the instant application, I myself am less critical of the defendant in this respect and attach less weight to it as a relevant factor.
89. It is true that it would appear that the defendant did not, through its external consultants, proceed with great despatch from the outset. Mr Webster candidly accepted that he did not consider that the team tasked at the outset with procuring the court ordered scheme had a sufficient grasp of what needed to be done or sufficient expertise to do what needed to be done. However, in my view once he became formally involved in May 2019 that changed. He brought on board his own experience as a building surveyor with the ability to direct and drive forward the remedial project and to involve QS and other relevant experience. In my view it is difficult to criticise the process from May 2019 which led to the removal testing

exercise in June 2019, the planning meeting in July 2019, the approach to the claimant in August 2019 and the decision to move forwards to tender the court-ordered scheme in September 2019 alongside the further investigation of what became option C.

90. It is also true that the time it took to go out to tender in December 2019 appears to have taken longer than was objectively justified, even though it is clear that the tendering exercise was not without its complications, particularly the need to identify contractors who were willing even to be involved and to comply with the legislation in relation to the flat leaseholders' right to participate. It is also true that because Mr Webster was more involved in option C than option B the process of getting in tenders and analysing them, from January to April 2020, also appears to have taken longer than was objectively justified. It is also true that this application was only made in May 2020.
91. However I would not accept that the evidence shows that the delay was either gross or wholly inexcusable or that the defendant was deliberately dragging its feet because it had already decided to pursue option C alone and to seek to present the claimant and the court with some form of *fait accompli*.
92. Nor would I accept that the defendant ought to be criticised for not making the application significantly earlier. It is obvious in my view that the defendant could not sensibly have made the application until it had satisfied itself both as to the practicability and cost of the court-ordered scheme and as to the practicability and likely cost of the alternative scheme.
93. Nor do I consider that the defendant ought to be criticised for not making an application to extend time earlier, in circumstances where it would be necessary to know what the likely time for completion would be, which itself involves knowing whether option B or option C is required, and where it appears that the defendant has kept the claimant informed of its actions as required by the order made after the previous trial.
94. I have already referred to the evidence as to the defendant's financial position and recorded that the defendant accepted that its financial position was irrelevant to the question as to whether or not the ordered remedial works should be varied, in just the same way as it was irrelevant to the question which was determined at the original trial as to whether or not an order for specific performance should be made. It is worth noting however that the defendant itself is unable to finance any remedial works and can only do so if its parent company GRIF is willing to advance it sufficient funds to finance the works. On the evidence put before me it appears that GRIF is only willing to do so if the court approves the application and if the defendant makes a sufficient recovery against the third parties which it is suing for GRIF to sanction further expenditure. Whilst as I have already said I was not particularly impressed with the defendant's evidence on this point, agreeing with Mr Darling that the witnesses had not fully investigated or thought through the various costs, recovery options and permutations, the one point which does emerge is that it would not be safe for me to assume that if I acceded to the application the defendant undoubtedly would be placed in funds to undertake the works. It follows that the defendant is unable to make the application on that basis, which would at least have afforded the claimant and the court some comfort that the works would be undertaken if the application was allowed.
95. In that regard Mr Darling went further and submitted that the court should not impose upon the claimant an alternative, inferior repair where it still has an extant claim for damages against the defendant and the third parties which it is also suing for the cost of carrying out the court-ordered repair, on the basis that allowing the application would prejudice the claimant's prospects of recovering damages against third parties.

96. In my view this is not a relevant consideration. The claim for specific performance against the defendant under the terms of the lease is of course a discretionary remedy, which involves taking into account a range of factors which would not be relevant to a conventional claim for damages for breach of contract. It follows that there is no necessary equivalence between the two remedies, whether against the defendant or the third parties. Whilst I agree that in the real world it may be difficult to persuade the court to award damages against third parties based on a remedial scheme which is more extensive and expensive than the scheme which has been ordered and has actually been undertaken under the specific performance jurisdiction, it is possible to envisage circumstances where that is possible. But even if not, that is a risk which the claimant takes when pursuing a claim for specific performance in a case such as the present. If as a result of my acceding to the application the claimant had no wish further to pursue the specific performance route then it would have been entitled to invite the court to discharge the order for specific performance and to seek to persuade the court to award it damages against the defendant and/or third parties for its preferred option.

## Conclusions

97. I am satisfied that the defendant has not shown that the ordered remedial scheme is not reasonably practicable save at disproportionate cost. I am satisfied that this is so whether considered without reference to the alternative option or with reference to the alternative option.
98. I do accept that there are real advantages to option C as compared with option B in terms of the relative practicability of and challenges in undertaking the works, the relative timescale, the relative cost and the relative risk of unforeseen difficulties which may increase the timescale and cost. I am also conscious of the increased health and safety risk involved in option B, given the challenges of removing and replacing the SBUs whilst working at height. However, as against that it is clear that both the experts and Fill as the preferred contractor consider that option B is practicable and that the challenges can be overcome and the differences in timescale and cost are not inordinate.
99. I held at trial that the claimant was entitled to insist on option B as the means of restoring the tower to its appearance as designed and constructed unless that was shown to be not reasonably practicable at disproportionate cost, which has not been shown. There is clearly a significant difference in terms of visual appearance as between option B and option C and the claimant's genuine wish to have the tower brought back to its original appearance instead of being forced to accept option C cannot be dismissed as idiosyncratic or perverse.
100. It would be inappropriate for me to speculate as to whether I would have found in favour of the defendant had it advanced the case in favour of option C at the original trial. It would be even more inappropriate for me to reinvestigate the merits of the decision I made at the original trial under the cloak of the permission to apply provision which was inserted for a very specific and limited purpose.
101. Whether the claimant is making the right decision in terms of its own commercial interests in seeking to enforce option B is not a matter for me. It is possible that its preference to have two birds in the bush as opposed to one in the hand (or, given the evidence as to GRIF's position, one bird not quite in the hand) will be shown to be a poor one. However, ultimately I accept that I should not revisit the merits of my original decision and force the claimant to accept what it, not unreasonably, regards as the lesser option.
102. For these reasons I refuse the defendant's application to be permitted to undertake option C.

103. So far as the application to extend time is concerned, I am satisfied that I should extend time to allow the defendant a reasonable period from the present time to undertake option B. Whilst it could be argued that the defendant should not obtain a benefit from the delay due to its having made this ultimately unsuccessful application, since I am satisfied that the defendant has not acted unreasonably in making the application and since I am satisfied that the defendant has not been guilty of significant culpable delay in seeking to implement the order I am satisfied that it is not unreasonable to allow the defendant a fair and reasonable extension.
104. As I have said, the Fill tender allowed for 57 weeks. Mr Webster had allowed for a 50% extension for weather related delays which he believed and I accept is realistic. He confirmed that Fill had agreed to extend the time for acceptance of both tenders so that it was still open for acceptance. On that basis a realistic allowance would be 85 – 86 weeks, which from the end of September 2020 runs to the end of May 2022. I will allow a further month for mobilisation and a further month for contingencies and will thus extend time to 31 July 2022. I appreciate that this has the effect of allowing the defendant a further 2 years but, as against that apparently lenient outcome, it is apparent from the tender process that the defendant would always have been entitled to a substantial extension once it became apparent that the works would be more challenging and take longer following the June 2019 test exercise. I also bear in mind that in my view it would be wrong in principle to decline to grant a reasonable extension based on current evidence since I am satisfied that the defendant has not acted unreasonably to any significant extent since the order was made and that otherwise I would effectively be condemning the defendant to being in contempt of court.