Neutral Citation Number: [2020] EWHC 985 (TCC)

Case No: HT-2018-000281

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

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Friday 22nd May 2020

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

(1) MR CHRIS HART
(2) MRS KERRY HART

Claimants

- and –

(1) MR RICHARD LARGE
(2) MICHELMORES LLP
(3) HARRISON SUTTON PARTNERSHIP

Defendant

- -
- -

Helena White (instructed by **Wright Hassell LLP**) for the **Claimants**
Simon Wilton (instructed by **Kennedys LLP**) for the **Defendants**

Hearing dates: 18-20 24-26 February 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Friday 22nd May 2020.

Mr Roger ter Haar QC :

1. In this action the Claimants ("the Harts") now claim damages from the First Defendant ("Mr. Large") arising out of alleged negligence in surveying and valuing a residential property situated in a hill-top location in Devon ("the Property").

2. Until shortly before trial, there were two other Defendants in addition to Mr Large: Michelmores LLP, who were the firm of solicitors engaged by the Harts to act as conveyancing solicitors in the purchase of the Property, and the Harrison Sutton Partnership, who were a firm of architects engaged by Mr and Mrs Fitzsimons (who sold the Property to the Harts) to carry out architectural services in respect of the renovation and extension of the Property, as further explained below.

3. The trial before me lasted 6 days. Thanks to the efficiency of both legal teams, who evidenced high levels of co-operation between both counsel and solicitors, the evidence was completed within that time. It was originally anticipated that there would be one round of written closing submissions followed by oral submissions. However, because of the Covid-19 measures, I directed that there should be a further round of written closing submissions, followed, if the parties wished, by oral submissions over the telephone. In the event, neither party wished to avail themselves of the opportunity to make oral submissions.

4. I am grateful to both parties for the co-operative approach which they adopted in this as well as other aspects of the case.

The Claimants

5. As set out below, Mr and Mrs Hart bought the Property in November 2011.

6. They both gave oral evidence before me.

7. For a significant period during the interlocutory phases of this action Mr and Mrs Hart represented themselves, including at the time for exchange of witness statements. A consequence of this was that they each prepared their own witness statements. In the case of Mr Hart, his witness statement concentrated to a significant extent upon deficiencies which he perceived in the then three Defendants' compliance with the orders of this court. In the case of Mrs Hart, she did set out her recollection of events, in some places in somewhat argumentative terms.

8. From this court's point of view witness statements taken by experienced litigation solicitors would have been of somewhat greater assistance. However, that said, I have found the statement of Mrs Hart in particular to be of great assistance.

9. Having heard both Mr and Mrs Hart give evidence under cross-examination, I accept that they were careful and truthful witnesses. Generally, with the notable exception of evidence given by Mrs Hart as to a conversation with a representative of the architects, all crucial elements of the history were supported by contemporaneous emails.

10. Neither Mr nor Mrs Hart were construction professionals. As set out in more detail below, both of them relied upon the advice given to them by their professional advisers.

Mr. Large

11. Mr. Large also gave oral evidence. He is now retired but had a long career as a surveyor with considerable experience in the area where the Property stands.

12. Like the Harts, he was a conspicuously honest witness who, as I explain below, made genuine attempts to assist the Harts both before and after they bought the Property.

13. I have to assess whether he fell below what I am satisfied were his usual high standards when advising the Harts in respect of the Property.

Other witness statements

14. In addition to the witness statements from the Harts and Mr Large, the trial bundles contained witness statements from the Harts' solicitor, Mr. Close, and from two members of the architectural team. These were prepared at a time when the solicitors and architects were still parties to the proceedings. I have not been asked to pay any attention to these witness statements, and have not done so.

The Property and the Works carried out to the Property

15. The Property was originally a bungalow built in the 1920s or 1930s. In March 1999, the local planning authority approved plans for relatively modest changes including the construction of a new porch and conservatory.[1]

16. In September 2004, Harrison Sutton prepared drawings for an extensive reconstruction and extension of the Property, which were submitted to the

[1] E1/5-7

local planning authority in February 2005.[2] The application stated that there would be mains foul water disposal.[3] Planning permission was granted on the 24th February 2005.[4]

17. Mr and Mrs Fitzsimons appear to have bought the Property in 2008. A Harrison Sutton letter of the 8th August 2008 records a meeting between the Fitzsimons and Mr Sutton of Harrison Sutton with a view to that firm being engaged to act as architects in respect of works to the house.[5] An email of the 11th February 2009 from Mr. Sutton records the firm's instructions to proceed.[6] Thereafter Harrison Sutton produced detailed drawings for the project.[7]

18. In about July 2009, Harrison Sutton submitted a full plans submission to the Devon Building Control Partnership, which was acting on behalf of the local authority in respect of Building Regulations approvals. Now the means of foul drainage was stated to be a treatment plant.[8]

19. In July 2009, Harrison Sutton prepared the Specification for the works.[9]

20. On the 7th August 2009, Mr. Fitzsimons entered into a building contract with Simon Proctor Ltd.[10] The contract sum was £402,375.

21. On the 19th November 2010 Harrison Sutton issued the Practical Completion Certificate.[11] There were two pages of "outstanding items as of Practical

[2] E1/9-27
[3] E1/25
[4] E1/29
[5] E1/41
[6] E1/44
[7] E1/47-50
[8] E1/51
[9] E1/52-70
[10] E1/74

Completion".[12] An inspection sheet in respect of an inspection on the 2nd December 2010 showed that a number of these items had not yet been dealt with.[13]

22. On the 6th January 2011, Mrs Fitzsimons sent an email listing out a large number of items which she felt needed to be dealt with by the builder.[14]

23. On the 28th January 2011, Mrs Fitzsimons sent an email with a shorter list of problems. Significantly, it included the following:

> "Front door
>
> "Work done but wait and see if effective"

24. It appears likely that in about April 2011 Mr and Mrs Fitzsimons found a buyer for the Property, because there is in the bundles a Property Information Form dated the 27th April 2011.[15] There is also an indication that this was so in an email from Mr. Sutton, dated the 4th May 2011, which says:[16]

> "Emily also met yesterday a surveyor who was acting on behalf of your purchaser. He was being incredibly pedantic about some minor variations to the original planning approval. In our view these were de minimis, however, we are suspicious that your purchaser is trying to find as many excuses as he can, perhaps to force a compromise from you."

The reference to "Emily" was a reference to Emily Hawker, who later became Emily Sullivan. She was a member of the architect's team. I refer to her hereafter as "Ms Sullivan".

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[11] E1/117
[12] E1/118-119
[13] E1/119-121
[14] E1/213-216
[15] E1/228-241
[16] E1/245

25. On the 19th May 2011, Harrison Sutton produced a snagging list.[17] This did not reveal any major problems, but there were several areas where making good was necessary.

26. On the 7th June 2011, the Devon Building Control Partnership certified completion of the work and compliance with the Building Regulations.[18]

27. Between June and September 2011, there was a series of important emails:

(1) 16th June 2011 Membland Property to Mr. Fitzsimons[19]:

> "Following on from our previous email – decided it was best to send you some photos showing a few issues.
>
> "1) There was a pool of water under the stairs. Which appears to have spread from a window leak next to the front door? The blue cloth left at the foot of the stairs was also drenched.
>
> "2) The bedroom above the kitchen has obviously had the carpet lifted again. The furniture has also been moved around. Unfortunately the floor is still creaking.
>
> "3) The Master bedroom has dried water stains on the LHS inside window frame & sill.
>
> "So sorry to deliver bad news but sure you'd rather be in the know. Guess if we hadn't had some rain we wouldn't have discovered the leaks!!"

(2) 17th June 2011 Mr. Fitzsimons to Mr. Sutton, Ms Sullivan and others at Harrison Sutton[20]:

> "Please find a copy of email. The door has now been leaking for 10 months and I am concerned that the floor is now being damaged …."

(3) 17th June 2011 Mr Sutton to the builder[21]:

[17] E1/257
[18] E1/294A
[19] E1/301
[20] E1/301

> "….
>
> "You can see from the email from Eddie that there is still water leaking through a door. I am not aware of this apparent long term problem, but hope that you can resolve it immediately."

(4) 17th June 2011 Mr Sutton to Mr Fitzsimons[22]:

> "Thank you for your emails and you can see that I visited [the Property] on Wednesday…..
>
> "I didn't know about the leak but hope that Simon can rectify."

(5) 20th June 2011 Mr Fitzsimons to Mr Sutton[23]:

> "Thanks for your email. I really do need some sort of firm time plan. The outstanding issues of floor and leaky door have been going on for some considerable time and do not seem to be getting any sort of priority. As you are aware I am trying to sell [the Property] and have wasted thousands of pounds advertising in Devon Life and Country Life and have had to put off viewings as frankly I do not know what sort of state the house is in or if builders are there.
>
> "Can I please have a timetable of when these major snags and the other not so major will get done. Currently I cannot let or sell the house. This is unreasonable after nearly two years and in excess of £500k spend …."

(6) 24th June 2011 Mr Sutton to the builder[24]:

> "I have spoken with Chris Benney at F1 Joinery who has advised that they were not aware that this door was still letting in water. To be honest, we understand that F1 joinery had gone back to fix the problem and we thought it was resolved. Eddie's photograph shows that it was not.
>
> "F1 Joiner wondered whether the problem was to do with the fitting of the door, which apparently was by yourselves, but this is a factual answer as to responsibilities and as F1 built the whole screen I would have thought it was their responsibility to have the water bar in the right place. …."

(7) 24th June 2011 Mr Sutton to Mr Fitzsimon[25]:

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[21] E1/308
[22] E1/309
[23] E1/310
[24] E1/314

> "… Regarding the water at the reveal of the windows, this is probably coming through one of the trickle vents but Simon is checking this and it should be easily resolved.
>
> "Although the squeaking floor might be a problem when showing potential purchasers around, the leak to the front door only occurs in heavy rain with a specific wind direction and although obviously it must be cured, it should not prove a reason why purchasers should not be shown around."

(8) 28th June 2011 Mr Sutton to F1 Joinery[26]:

> "We spoke on the phone last week with reference to [the Property] regarding the above project. We have been sent irate emails (deservedly so) from the client because the front door is still letting in water and for the past few days of rain and wind this has been so serious that he has had to have someone coming in to wipe it up on a daily basis.
>
> "We understand that the problem is a weather bar which is either the incorrect type or is in the wrong position. You thought you had rectified this before but it obviously has not worked. It is essential that you rectify this latent defect without further delay, something we appreciate on our telephone call you would action immediately. Please advise us
>
> "1. What you intend to do
>
> "2. When you intend to do it.
>
> "We can then advise our clients and hopefully complete this project where these doors have been a problem for many months….."

(9) An email from Ms Sullivan to Mr Fitzsimons dated the 15th July 2011 records that the works to the front door were going to be carried out on the following Tuesday (19th July).[27]

(10) 25th July 2011 Ms Sullivan to the builder[28]:

[25] E1/315
[26] E1/316
[27] E1/321
[28] E1/323

> "I have informed Eddie that all snagging items are completed and have asked him when he is able to come down and inspect…"

(11) On the 29th July 2011 Harrison Sutton issued a Certificate of Making Good Defects[29]:

> "I/we hereby certify that the Contractor's obligations to make good any defects, excessive shrinkages or other faults which have appeared within the defects liability period have in my/our opinion been discharged on 29th July 2011."

(12) 1st August 2011 Mr Fitzsimons to Ms. Sullivan[30]:

> "How can you say snagging is complete when I have pointed out three snags. Who has been through the house and checked? Simon's men refitted the doorlock only a few weeks ago. Nobody has properly checked the house and this is why I insist on doing so before I recognise completion."

(13) 1st August 2011 Ms Sullivan to Mr Fitzsimons[31]:

> "I have checked the house, however we have not checked any of the locks other than the front door as we did not have keys. Simon will deal with the garage door.
>
> "The making good Defects certificate is our opinion of the completion, however certain snags are only made clear by using the house…."

(14) On the 4th August 2011 Ms Sullivan emailed the builder indicating that Ms Fitzsimon was happy that all the snagging was complete subject to five minor points.[32]

(15) This satisfaction was shortlived. On the 19th September 2011 Mr. Fitzsimon sent an email to Ms Sullivan and the builder saying[33]:

[29] E1/324
[30] E1/326
[31] E1/327
[32] E1/329
[33] E1/332

> "I am afraid that the front door continues to leak when you get wind blown rain from the East across the field opposite and facing the door. Again it is clear that the door was not tested after the last attempt at repair. Can I please ask you as a matter of urgency to arrange a effective repair and for it to be tested after completion.
>
> "As you are aware the property is on the market and after a quiet August I now have some interest again and do not want people to find puddles of water at the entrance which I found on my visit. I am also worried that the floor is being damaged as it is now changing colour.
>
> "Please let me know what is happening and do not let it drag on for weeks."

(16) The documentation before me does not show how either architect or builder responded to this email. However on the 1st November Mr. Fitzsimon sent an email to Ms. Sullivan[34]:

> "Any update on door? A lot of water has come in recently and has been cleaned up. I do need this done urgently….."

The Harts appoint Mr. Large

28. The evidence before me does not disclose when the Harts first saw the Property. However, by the 26th October 2011 Mr and Mrs Fitzsimons had accepted an offer from them of £1,240,000.[35]

29. Mr and Mrs Fitzsimons had engaged Savills as estate agents. The Savills brochure provided to them stated that "[the Property] has been completely re-built over the last 18 months under the design and supervision of well known local architects, Harrison Sutton from Totnes."[36]

[34] E1/352
[35] E1/341
[36] E3/299

30. In his witness statement, Mr Hart said[37]:

> "12. I wanted to buy this house. My wife did not. She chose a highly experienced surveyor and a highly experienced conveyancer (expensive and head of department) in the expectation that they would find something wrong. If either had done their job remotely well the sale would not have gone ahead. As it was, D1 produced an effusive report which I remember did influence us to proceed, and I (incorrectly as it turned out) trusted D2 was dealing properly with the legal side. I incorrectly assumed that D2 was dealing with our requests to secure the drawings and an architect's certificate.
>
> "13. I promised my wife that if we did not like the house we could easily sell it….."

31. Mrs Hart's evidence in her witness statement was[38]:

> "2. Prior to purchasing [the Property] in 2011 we had viewed quite a large number of other properties in different locations, some of which I was keen on us considering for purchase as our family home. Some of these properties were equestrian properties which I favoured over [the Property]. I was not immediately drawn to [the Property] as a home, in particular because of the location. While the house is sited in an undeniably breathtakingly dramatic location, with beautiful open sea views, I was well aware that living there would cause me significantly increased travelling time and inconvenience. Specifically, living at [the Property] would mean me having to drive over an hour to family commitments in one direction, and over an hour to work in the opposite direction.
>
> "3. However, in addition to the sea views, the house that we thought we were buying, was an impressive modern building with light and airy open plan living spaces. With five bedrooms it would allow room for our family and also for visitors to stay and enjoy the remarkable location with us. As such it was an attractive option. We therefore decided to make an offer. Initially the offer that we made on the property was not accepted by the vendor. I was actually relieved by this as I also had mixed feelings about the quality of the house itself. I am cautious by nature and this was a massive financial commitment by us. That was combined with me feeling that there was something not quite right about the workmanship on the house, despite the impressive first impressions."

[37] C1/11
[38] C1/28-29

32. I accept the evidence of both Mr and Mrs Hart which I have set out in the preceding paragraphs.

33. On 26th October 2011, the day, when their offer was accepted, the Harts instructed Mr. Close of Michelmores to act as conveyancing solicitor. In an email that day Mrs Hart wrote to Mr. Close[39]:

> "Dear Chris
>
> "[The Property], agreed price £1.240 m. To include furniture, fittings and equipment at the property (excluding the white sofa in the downstairs sitting room).
>
> "Geo Technical Survey will probably be next Wednesday 2 Nov.
>
> "I think we will go ahead and try to arrange the Home Buyers report for the day after so as not to slow things down. If you do have a recommendation for a Surveyor that would be helpful."

34. On the 1st November Mrs Hart spoke to Mr. Large and arranged for him to carry out a survey on the following day. Mr. Large had a template email[40] which was adapted by him to send an email to Mrs Hart confirming his appointment[41]:

> "Many thanks for your instruction to provide a Homebuyer Report in respect of the above property.
>
> "I confirm that my fee for undertaking this will be the sum of £600.
>
> "The description of the Homebuyer Service, including the standard terms of engagement which apply, can be read by clicking the following link:
>
> "Homebuyer Report Description and Terms
>
> "You may wish to download a copy of this pdf document to your computer, for your records.

[39] E1/343
[40] E1/357; transcript day 2/68
[41] E1/358

> "Please note that the report is provided for your use and no responsibility can be accepted if it is used or relied upon by anyone else.
>
> "Please reply by email to confirm you wish me to proceed.
>
> "I will contact Savills immediately to hopefully arrange available tomorrow (Wednesday). I'll let you know.
>
> "I will forward the report very soon thereafter, usually within about 24 hours, by email and also a printed copy in the post.
>
> "I will issue my invoice with the report and settlement is requested within seven days.
>
> "You may also wish to read a leaflet about surveys produced by my professional governing body, the Royal Institution of Chartered Surveyors, which you can view here.
>
> "If you should have any reason to wish to reconsider the service you require, please advise me immediately. However I am confident that the Homebuyer Report is satisfactory for this property & will provide you with the necessary information & advice.
>
> "Thank you once again for your instruction and I look forward to receiving your confirmation by email that I should proceed."

35. Mrs Hart responded the same day[42]:

> "Thank you for your email. I confirm that I would like you to proceed with the Homebuyer Report survey at [the Property].
>
> "As discussed some points that we are concerned about are the cliff location and how that may affect the property, the construction of the property, ie is it timber framed, the septic tank (see below for location of the tank). Television reception (we forgot to check that when we were at the property, there is a television in the downstairs lounge) would you mind turning it on to check there is reception."

Different types of surveyor's report

36. As can be seen from the above exchanges, Mr. Large suggested that he produce a "Home Buyer's Report", and Mrs. Hart accepted that suggestion – indeed she had already referred to such a report in her email to Mr Close. (In

[42] E1/362

cross-examination it was suggested to Mrs Hart that she wanted a HomeBuyer's Report even before she contacted Mr. Large. I accept her evidence that another surveyor had told the Harts that they would need a property survey[43] and that she was not making an informed choice between a HomeBuyer's Report and a fuller building survey of the type discussed below).

37. In December 2010, the RICS produced the 4th edition of its Home Buyer Report practice note.[44] This included advice to clients about three different types of report[45]:

(1) First was the RICS Condition Report:

> "Choose this report if you're buying or selling a conventional house, flat or bungalow built from common buildings materials and in reasonable condition. It focuses purely on the condition of the property by setting out the following:
>
> - clear 'traffic light' ratings of the condition of different parts of the building, services, garage and outbuildings, showing problems that require varying degrees of attention;
> - a summary of the risks to the condition of the building; and
> - advice on replacement parts guarantees, planning and control matters for your legal advisers.
>
> "An RICS Condition Report does not include a valuation, but your surveyor may be able to provide this as a separate extra service.
>
> "Ask your surveyor for a detailed 'Description of the RICS Condition Report Service' leaflet. "

[43] Transcript day 1/page 97
[44] There are several copies in the trial bundles. I take my references from the copy starting at D3/51
[45] D3/72-74. See also E3/1323-1325

> Neither party suggested that an RICS Condition Report would have been appropriate in respect of [the Property].

(2) Next was the RICS HomeBuyer Report:

> "Choose this report if you need more extensive information whilst buying or selling a conventional house, flat or bungalow, built from common buildings materials and in reasonable condition. It costs more than the Condition Report but includes:
>
> - all of the features in the Condition Report;
> - the surveyor's professional opinion on the 'Market Value' of the property;
> - an insurance reinstatement figure for the property;
> - a list of problems that the surveyor considers may affect the value of the property;
> - advice on repairs and ongoing maintenance;
> - issues that need to be investigated to prevent serious damage or dangerous conditions;
> - legal issues that need to be addressed before completing your conveyancing; and
> - information on location, local environment and the recorded energy efficiency (where available).
>
> "Ask your surveyor for a detailed 'Description of the RICS Homebuyer Service' leaflet."

As I have said, it was a HomeBuyer Report that Mr. Large advised he should produce. It is the Harts' case that this was inappropriate advice. Mr. Large's case is that such a report was suitable for the Harts' purposes.

(3) The third type of report was a "building survey":

> "Formerly called a structural survey, you could choose the building survey if you're dealing with a large, older or run-down property, a building that is unusual or altered, or if you're planning major works. It costs more than the other RICS reports because it gives detailed information about the structure and fabric of the property. It includes:
>
> - a thorough inspection and detailed report on a wider range of issues;
> - a description of visible defects and potential problems caused by hidden flaws;
> - an outline of repair options and the likely consequences of inactivity; and
> - advice for your legal advisers and details of serious risks and dangerous conditions.
>
> "A building survey does not include a valuation, but your surveyor may be able to provide this as a separate extra service."

It is the Harts' case that they should have been advised that a building survey was appropriate rather than a HomeBuyer's Report.

38. Mr and Mrs Hart also received advice from their solicitors, Michelmores, in "A Guide to Buying Your House"[46]:

> "Survey
>
> "It is the responsibility as the Buyer to ensure that the physical state of the property being purchased does not hold any surprises. The seller is not under any duty to disclose any problems that may exist. It is for this reason that a survey is recommended. There are three types of survey that may be arranged:
>
> "1. Valuation:
>
> "This is the cheapest option and, as might be expected, gives the least information and protection. The brief inspection is designed to indicate whether the price being paid for the property is reasonable on the assumption that there are no defects other than those which may be obvious.

[46] E4/95 - 96

> "2. Home Buyer's Report:
>
> "A considerably more detailed report which is based on a thorough visual inspection of the property. Tests for damp are also likely to be carried out. If the visual inspection reveals matters that require further specialist investigation then this will be drawn to your attention.
>
> "3. Structural Survey:
>
> "Expensive! This will involve very detailed inspections and may include exposing foundations, lifting carpets and floor boards, or exposing wall structures. It is unusual for such a survey to be carried out unless there are known to be structural problems.
>
> "….
>
> "Spending money on a survey can be a little bit like spending money on insurance. There may be nothing to show for it at the end of the day but it might save you spending considerable sums of money which can be ill afforded. The tighter the budget the more carefully you should consider a proper survey …."

39. The practice note gives detailed advice to the practising surveyor. At the heart of the HomeBuyer Report concept is the traffic light/condition rating system. The practice note includes a template for the report. This includes the following guidance for the client under the heading "about the inspection"[47]:

> "We inspect the inside and outside of the main building and all permanent outbuildings, but we do not force or open up the fabric. We also inspect the parts of the electricity, gas/oil, water, heating and drainage services that can be seen, but we do not test them.
>
> "To help describe the condition of the home, we give condition ratings to the main parts (the 'elements') of the building, garage and some parts outside. Some elements can be made up of several different parts.
>
> "In the element boxes in parts E, F, G and H, we describe the part that has the worst condition rating first and then briefly outline the condition of the other parts. The condition rating are described as follows."

[47] D3/92. A different form of advice to the client, which is in somewhat shorter form, is in the bundles at E4/254 to 259

40. What then follow are four categories:

(1) Condition rating 3, with a red light: "Defects that are serious and/or need to be repaired, replaced or investigated urgently". (Condition rating 3/red light is also to be applied to situations falling within subsection 2.7 of the Practice Note – see paragraph 44 below).

(2) Condition rating 2, with an amber light: "Defects that need repairing or replacing but are not considered to be either serious or urgent. The property must be maintained in the normal way."

(3) Condition rating 1, with a green light: "No repair is currently needed. The property must be maintained in the normal way."

(4) "NI": "Not inspected (see 'important note' below)."

These categories are further explained for the benefit of the surveyor, rather than the client, in section 4 of the Practice Note to which reference is made below.

41. The "important note" referred to in the NI category reads as follows[48]:

> "Important note: We carry out only a visual inspection. That means that we do not take up carpets, floor coverings or floorboards, move furniture or remove the contents of cupboards. Also, we do not remove secured panels or undo electrical fittings.
>
> "We inspect roofs, chimneys and other surfaces on the outside of the building from ground level and, if necessary, from neighbouring public property and with the help of binoculars.
>
> "We inspect the roof structure from inside the roof space if there is access (although we do not move or lift insulation

[48] D3/92

> material, stored goods or other contents). We examine floor surfaces and under-floor spaces so far as there is safe access to these (although we do not move or lift furniture, floor coverings or other contents). We are not able to assess the condition of the inside of any chimney, boiler or other flues.
>
> "We note in our report if we are not able to check any parts of the property that the inspection would normally cover. If we are concerned about these parts, the report will tell you about any further investigations that are needed.
>
> "We do not report on the cost of any work to put right defects or make recommendations on how these repairs should be carried out. Some maintenance and repairs we suggest may be expensive."

42. Paragraph 2.2 of the Practice Note emphasises to the Surveyor that "it is mandatory to use the specified format, without variation. No departure from the specified elements of the service is permitted."[49]

43. In respect of the issue as to whether a HomeBuyer's Report was the appropriate type of report, Mr. Wilton on behalf of Mr. Large points to paragraph 2.3 of the Practice Note[50]:

> "The service applies to houses, bungalows and flats that are conventional in type and construction and are apparently in reasonable condition. This would generally include property conversions and properties that:
>
> - are of Victorian to present-day construction;
> - have load bearing structures or simple frames;
> - use conventional building materials and construction methods; and
> - have service systems commonly used in domestic residential properties…."

44. Paragraph 2.4 of the Practice Note gives the surveyor the following advice as to the focus and limitations of the service[51]:

[49] D3/59
[50] D3/59

> "The service is specifically designed for lay clients who are seeking a professional opinion at an economic price. It is, therefore, necessarily less comprehensive than a building survey.
>
> "The focus of the service is on assessing the general condition of the main elements of a property, and identifying and evaluating the particular features that affect its present value and may affect its future resale.
>
> "The inspection is not exhaustive, and no tests are undertaken. There is, therefore, a risk that certain defects may not be found that would have been uncovered if testing and/or a more substantial inspection had been undertaken. This is a risk that the client must accept. However, where there is a 'trail of suspicion' the surveyor 'must take reasonable steps to follow the trail'. These 'reasonable steps' may include recommending further investigation. (See also subsection 2.7)."

To the third of these paragraphs there is a footnote in respect of the "trail of suspicion" which draws the surveyor's attention to the judgment of Kennedy J. in *Roberts v J. Hampson & Co.*. Subsection 2.7, referred to at the end of the above cited passage, says[52]:

> "Recommendations and caveats for further investigations, such as the testing of services or structural movement, should be included in HBR only when the surveyor feels unable to reach necessary conclusions with reasonable confidence. The element under consideration should, in such a case be given a condition rating 3 ….
>
> "In such cases it may be appropriate either to:
>
> > "(a) defer providing the valuation until the result of such further investigations are available; or
> >
> > "(b) provide the valuation on a 'special assumption' dependent on the outcome of specified further recommended investigation …."

[51] D3/60
[52] D3/61

45. Section 4 of the Practice Note is headed "Compiling the report – commentary and guidance". Subsection 4.1 advises[53]:

> "All information and comments in the report should be kept short and to the point. This will result in the whole report being concise in fact as well as in theory. It will also avoid confusing the client with distinctions, such as irrelevant and unhelpful details and surveyor jargon, which can be incomprehensible and off-putting to laypersons …."

46. Subsection 4.2 deals with "Condition ratings and rules governing them". The first paragraph says[54]:

> "All reports will include condition ratings on elements within section E Outside the property; section F Inside the property; section G Services; and section H Grounds (including shared areas for flats). These are identified by the inclusion of a condition rating box. The rules governing condition ratings are strict and must be followed in order to achieve a degree of consistency in their application."

47. Subsection 4.2 then sets out the four condition categories to which I have already referred at paragraph 40 above. Whilst the Practice Note gives further guidance for the benefit of the surveyor, I need only refer to the following passages:

> "**NI Not inspected**
>
> "This rating must be used when it is not possible to inspect any parts of the dwelling usually covered. If the surveyor is concerned about these parts, advice must be given about any further investigations that are needed."[55]
>
> ….
>
> "A present or suspected defect that requires further investigation must be reported with a condition rating 3. In such cases, enough evidence to justify suspicion must be present and explained in the report. Giving careful and

[53] D3/62
[54] D3/62
[55] D3/63

> consistent condition ratings will enable clients to judge the importance (seriousness or urgency) of defects."[56]
>
> ….
>
> "Very few older buildings remain as they were originally constructed. The surveyor should be vigilant over any works or alterations that may have been undertaken which may now impact the performance and function of the original parts of the structure and other components. The surveyor should also fully consider any impact those works or alterations may have on condition and future building performance."[57]

48. Subsection 4.3 concerns applying the condition ratings. It advises that[58]:

> "The overriding principle is that only one condition rating is allocated to each element described in sections E, F, G and H and carried forward to the front of the report in the summary of the conditions ratings boxes in section C."

The text then describes three steps: first, identifying the elements and sub-elements; second, condition rating the elements and sub-elements; and, finally, establishing the element rating.

Mr. Large's Inspection and Report

49. On the 2nd November 2011, Mr. Large attended at the property. Mr. Large describes in his witness statement both his usual practice and what he did when he inspected and reported on the Property[59]:

> "28. Before attending I checked the relevant (South Hams) council website for planning documents. I can recall there was very limited information available at the time although I got what I could off the South Hams website. There was nothing in relation to the Building Regulation position. My normal practice would also be to check Google Maps and to see if a Google Street View was available but I cannot recall if it was on this occasion.

[56] D3/63
[57] D3/64
[58] D3/64
[59] C1/67 to 71

"29. I recall it was quite a windy day, but dry, on 2 November 2011 when I inspected the Property. I met a lady at the Property who let me in. I do not recall who she was, it may have been a lady called Lesley as this is on my instruction form (document 1 of my Disclosure List). I do not think she was from Savills. She just sat there whilst I was in the Property.

"30. The inspection as a whole took approximately 2.5-3 hours.

"31. Having arrived at the Property I saw nothing to indicate that it was not appropriate to provide a HomeBuyer survey. It was apparent that there was a more substantial part of the original construction still in place than I had expected. However, there had plainly been extensive rebuilding to form what was largely a new building, apparently using conventional modern building techniques. The Property also appeared to be in good condition.

"32. When I inspect a property I take in a ladder, a damp meter, a torch and an electronic measuring device. I leave my other equipment in the car until I need it. As I go around a property I carry a clipboard where I have got the printed floor plan and the estate agency (in this case Savills) paperwork. I also take with me my camera and a bag containing the damp meter, torch and electronic measuring device. Around my neck I have a recording device, an Olympus handheld dictaphone. As I walk around the property I make verbal notes into the recording device. I will also test for damp as I go.

"33. Initially I look round the outside and inside of the property to orientate myself; it takes about 15 minutes or so and I do this before I make any notes.

"34. Then, as I begin my detailed inspection I always go around the outside first, before moving inside.

"35. I inspected the exterior of the Property before looking at the grounds. I also looked at the path to the beach and its surroundings. I went a fair way down as I wanted to look at the cliff/coastal slope because Mrs Hart had specifically asked me about it.

"36. When inspecting the exterior of a property I look at the building construction and I am typically looking for cracks, distortions, loose areas of wall render, broken slates on the roof, damaged materials, ponding of rain water and evidence of leaking gutters. I closely check seals around the doors and windows; I check the woodwork for rot, splits, deterioration and looseness. I am of course additionally looking for anything else that I consider to be of significance. I take photographs as I go.

"37. I tend to look at specific components such as the roof and comment into the recording device and then move onto the next component, whilst relating each component to others and the overall condition. The benefit of using the recording system is that I can spend more time looking at the building and can comment as I spot things and then pick them up in the report preparation.

"38. When I move inside I normally take internal measurements before I inspect the interior. The Property was a little more difficult than most to measure in that it had several different levels. It is normal practice to look in the roof space, but there were no accessible voids here so there was nothing to inspect.

"39. When undertaking my internal inspection I work through the house commenting into the audio device and again taking photographs. As I am walking around the inside of the property I am looking for cracks, damp patches, visible evidence of damp, along with anything else I consider to be of significance.

"40. I carry out damp checks using a machine called a Protimeter Surveymaster. I place the machine on the wall to scan the surface; it does not cause damage in this form of use (such as the pin probes can), but when dampness is identified it makes a noise and shows a red light that can be intermittent or solid. The machine does not indicate the actual percentage moisture content unless you use it in the pin probe mode in wood. However, the non-invasive scan mode indicates whether damp is present on the surface or a short distance (1-3 cm) beneath. The machine will also pick up metal within the wall so care has to be taken to move the machine all around the wall in different areas to check that you are not just finding a piece of metal concealed within the wall (such as cables or metal lathing).

"41. The Property is in a very exposed location, so I was particularly anxious to make sure there were no damp issues. I carried red and green felt-tip pens to mark where the readings were taken on a plan of the Property (see item 11 of my disclosure list). If there was damp, it is marked with red. Green is for where the readings were taken. There were no red or adverse results and I did move the meter around the walls quite extensively, particularly in locations which my experience suggested could be vulnerable.

"42. These readings are carried out in conjunction with me looking at and feeling the relevant surface. I check to see if there is any "give" in the material and whether it feels damp. I am also looking for staining, blemishes, salt contamination, blown plaster, distortions in doorways, timber defects, and

signs of rot in locations such as skirting boards and windowsills.

"43. As there was very little planning documentation available to me it would have been difficult, had it been within my remit, to consider which areas may have required compliance with Building Regulations. However, I believe it is outside the remit of a HomeBuyer report to ascertain such compliance. A HomeBuyer report does not deal with Building Regulation compliance in detail, as indicated in the RICS information sheet to which I provided the link for Mrs Hart.

"44. Where a property has clearly been recently built or altered in a manner and under such supervision that would appear to require Building Regulation compliance the initial and I believe reasonable assumption has to be that the work has been signed off by Building Control though I always state in my report that this assumption should be checked by legal advisers as I did in this case at I1 on page 20.

"45. The other difficulty with Building Regulations compliance in the context of the HomeBuyer service is the fact that the regulations frequently change and the date of works is rarely known to me, although I accept that in this particular case the Savills particulars provided an overall time-frame indicating when works had been undertaken. It is still the case, however, that a property, when work was completed, may well have been compliant with Building Regulations at the time, but not comply with them at the time I am undertaking an inspection.

"46. I, therefore, do not spend my time on the survey focusing on the question of whether or not a property complies with the Building Regulations. I focus instead on the visible issues and in particular any observable defects that should be reported. I believe that reflects the core requirement of the HomeBuyer report: in other words I am not checking technical compliance with the detailed requirements of the Building Regulations (which of course change, meaning that most properties do not comply with all the current Building Regulations), but am instead looking for any significant defects and focusing on matters that, in my opinion, may affect the value of the property being surveyed if they are not addressed.

"47. For example, there was no ventilation for the stove at the Property, but I had no information about the type of stove that had been fitted or what its technical requirements were; some stoves require ventilation and some do not. That is an issue that one would expect would be addressed when the stove was put in and the assumption, subject to the recommended checks by the legal adviser, would be that a recently installed stove forming part of extensive building works was compliant with

> the Building Regulations. It would not in my view be a matter for inclusion in the HomeBuyer report unless there was something patently defective about the stove.
>
> "48. I have described above my general approach to inspection of a property, which I confirm I followed in this case.
>
> "49. After the inspection my working practice was always, including on this occasion, to return home and copy the photographs and the audio file across onto my computer. I start the report pretty much immediately, whilst it is all very fresh in my mind. I have two screens, with the photographs that I have taken on one screen, and my draft report on another screen. While I am typing I am playing back (by use of a foot pedal) the audio recorded during the inspection. I do not normally transcribe the audio; I just listen to it but I do keep the audio file."

50. I accept that this is an accurate record both of Mr. Large's usual practice and what he did on the 2nd November 2011 at the Property.

51. As Mr. Large followed his usual practice, he took a large number of photographs, the vast majority of which have been placed before me[60]. Whilst some photographs have not survived, there is in my view no criticism to be levelled at Mr. Large in this respect.

52. Also in accordance with his usual practice, as Mr. Large went around the property he dictated notes. These notes have survived and have been transcribed.[61]

53. Some criticism was directed at Mr. Large because in February 2014 he produced a transcript of his notes which was not a verbatim transcript.[62] With the benefit of hindsight, this was an unfortunate thing to do, as he recognised readily in cross-examination[63], but whilst unsurprisingly this caused Mr and

[60] Bundle F3A
[61] E1/380.1 to 380.2
[62] E1/378
[63] See for example transcript day 3/pages 12, 14 and 45

Mrs Hart to be suspicious when they discovered that this had been done, I accept Mr. Large's explanation that this was done to be helpful.[64]

54. Mr. Large produced his written HomeBuyer's Report on the Property on the same day as his inspection and forwarded it to Mrs Hart by email on the following day.[65] He loyally followed the RICS Practice Note's guidance as to the structure of the report.[66]

55. There was only one condition rating 3/red light item, which was in respect of drainage. There was only one condition rating 2/amber light item, which was in respect of the rainwater pipes and gutters.

56. I set out relevant portions of the report below when considering the alleged defects in the property. However, at this point it is material to refer to the part of the report relating to the only condition rating 3/red light item, which (as I have said) related to drainage[67]:

> "G6 Drainage from the various fittings is fully concealed within the building but is assumed to have been installed during the recent works. Externally the underground drains run to the south-east and there are inspection chambers in the sloping ground adjoining the building which are modern moulded plastic type. There is also an inspection chamber in the area outside the utility room on the north-east side; this contains glazed clayware drain channels.
>
> "**Condition rating 3 (further investigation)**
>
> "It is understood that the drains discharge to a private tank located to the east of the house, beneath vegetation close to the north-east boundary but no signs of this could be seen. The type and age of tank cannot be advised. The estate agent refers to a "cesspit" (a sealed tank which does not provide a treatment process and requires frequent emptying). However most

[64] Transcript day 2/pages 64-65
[65] E2/474
[66] E1/381 and following.
[67] E1/398-399

> installations are septic tanks which provide natural bacteriological treatment and discharge treated effluent to the ground through a soakaway system. Unfortunately no information has been forthcoming and there are no visual indicators as to the provision here. The Environment Agency advises they have no record of registration of an installation. Increased occupancy and provision of sanitary fittings may have necessitated upgrading an original system and investigations should be made regarding compliance with Building Regulations in this respect ….
>
> "It is recommended that further investigations are undertaken to ascertain the nature, efficiency and condition of the sewage treatment and disposal arrangements and a suitably competent drainage contractor should be requested to undertake the necessary investigation and report to you prior to a commitment to purchase. In addition, your legal adviser should request and report to you regarding any available documentation. I shall be pleased to comment further as appropriate once the results of these further investigations are available."

57. The report contains a section entitled "Issues for your legal advisers". This advised as follows[68]:

> "We do not act as 'the legal adviser' and will not comment on any legal documents. However, if during the inspection we identify issues that your legal advisers may need to investigate further, we may refer to these in the report (for example, check whether there is a warranty covering replacement windows).
>
> "I1 Regulation: Very limited information on the planning consent for the recent works have been seen on the Council website and no information regarding Building Regulations has been seen. Full investigation should be made and a Completion Certificate for the works, together with appropriate certification for the controlled services should be requested.
>
> "I2 No guarantee documents have been provided but enquiries regarding any available guarantees should be made by your legal adviser and all such documents should be transferred to you on completion of the purchase. It is assumed that there will be guarantees at least for windows and doors, the heating installation, electrical appliances, sanitary ware etc.
>
> …."

[68] E1/401

58. Mr. Large valued the property in the sum of £1,200,000 and advised that the reinstatement cost of the property was £440,000.[69]

From the Harts receiving Mr. Large's report to exchange of contracts

59. Having received Mr. Large's report on the 3rd November, Mrs Hart forwarded it to Mr Close at Michelmores.[70] Later that day Mrs Hart sent an email to Mr. Close saying[71]:

> "the provision of appropriate drainage for the property is a cause for concern. We have not been able to locate the tank, the surveyor contacted Savills who were unable to help. Hopefully there will be some information regarding the building regs etc. in the documents that you have."

60. Enquiries were carried out in respect of the drainage, which established that there was no mains drainage.[72] The Harts established that the only drainage was to a cesspit. On the 8th November 2011, Mrs Hart sent an email to Mr Close[73]:

> "Please would you look in the documents from the sellers solicitor for the land plan that apparently shows the exact location of the cesspit. If it is possible to send a copy to me that would be very useful.
>
> "It does not seem sensible for you to spend time undertaking any further work on [the Property] at present as a number of issues affecting our ability to proceed are yet to be resolved."

61. In her witness statement, Mrs Hart had said[74]:

> "5. After our offer was accepted we visited the property again and I noticed further things that left me uneasy. For example, things such as how the manhole covers had been scattered in

[69] E1/403
[70] E2/476
[71] E2/484
[72] E2/493 to 519
[73] E2/521
[74] C1/29

> the front garden in a highly visible and unattractive way which detracted from the lovely view, or the untrimmed flapping roof felt in places, or the metal flashing that was hanging loose, the odd lumpy grey material painted several inches up the stainless steel struts on the patio, the strange position of electric sockets and lights, the lack of care with groundworks at the front of the property, a surprising mixture of new modern and clearly older mismatching sanitaryware. All of these apparently relatively minor things left a feeling of a lack of care having been taken, which worried me. It was hard for me to give a justification for my feelings of unease about the build of the property as I am not a professional in this area."

62. In oral evidence, Mrs Hart explained that when she referred in her email of the 8th November to "a number of issues affecting our ability to proceed"[75], she thought had she had been referring to concerns about Radon and about the cesspit.[76]

63. Mrs. Hart now took steps to find out who to speak to at Harrison Sutton. She was given Ms. Sullivan's contact details.[77] She contacted Ms Sullivan. Her evidence in her witness statement was as follows[78]:

> "8. On or around 7 or 8 November 2011 I called Harrison Sutton and spoke with Emily Sullivan (nee Hawker). She did indeed seem to be expecting my call. I explained who I was and explained that I was calling because I had some concerns about the property. During this conversation Ms Sullivan gave me reassurances about the property. One of the things that I was concerned about with the property was Radon, as it is situated within a high risk Radon area. I said to Mrs Sullivan that I was also concerned about Radon and
>
> "9. Ms Sullivan reassured me and advised that I didn't need to worry about Radon as all new floors have Radon protection. It is claimed by the third defendant that we did not rely on the reassurances given to us by Ms Sullivan. That is not correct. See email from the vendor Mr Fitzimmons [2] advising Ms Sulivan: *"I have been asked a couple of questions by my buyers."* This shows the vendor was getting the architect to

[75] E2/521
[76] Transcript day 1/pages 181 to 182
[77] E2/522
[78] C1/31-34

> answer the questions. It was Ms Sullivan who advised me, see below, and I relied on her assurances when making my decisions about purchasing the property.
>
> …..
>
> "12. There were issues with the plumbing at [the Property] and concerns regarding the waste system. We asked Mr Large to check this for us when he was surveying the property but he could not locate the drainage system on his visit. During these investigations I contacted Ms Sullivan again for advice and she emailed me details of a professional drainage surveyor that she recommended …
>
> "13. I took reassurance about the overall quality of the property from the fact that the property had been designed by, and the building of it had been supervised by, Harrison Sutton Architects. Not only was this stated in the particulars of sale (so therefore confirmed to be the case by the vendor and by Savills estate agents) but it was confirmed to me by Emily Sullivan, when I spoke with her on the telephone. She said that she had supervised the build. I am aware that now, retrospectively, Ms Sullivan, or her advisors, are denying this along with denials regarding other assurances that Ms Sullivan personally gave to me. I however recall the reassurances that I was being given as they were so important to me. I was not merely calling Harrison Sutton for reassurances. I was calling to find out if these alleged assurances could be relied upon. I was looking for reasons not to buy [the Property] as much as I was looking for reassurances, as I was still very much of the opinion that it would be a difficult location from which to manage work and family life. At no point did Ms Sullivan say that Harrison Sutton had not supervised the build of [the Property]. During my call to Ms Sullivan on or around 7 or 8 November 2011, she assured me that she had supervised the works at [the Property] and that there would be no problems with the property and no problems with Radon."

64. In the course of cross-examination, Mr Wilton tested Mrs Hart as to whether her recollection as to her conversation with Ms Sullivan was accurate.[79] I have no contrary evidence which would lead me to reject this evidence from Mrs Hart, but, in any event, I found Mrs Hart to be a generally truthful and accurate witness, and I accept her evidence as to the assurances she was given by Ms Sullivan.

[79] Transcript day 1/pages 128 to 131

65. On the 8th November 2011 Mrs Hart wrote to Mr Large[80]:

> "I thought that you may be interested to know that it has been confirmed that it is the original cesspit at [the Property] not a septic tank or other system. Also that it hasn't been upgraded in any way. Harrison & Sutton confirm that their advice had been to upgrade/replace. Still some questions about building regs etc."

Mr Large responded[81]

> "Thanks for the update. So the concerns were entirely valid! Sounds like a good reason to renegotiate on price. Worth looking at a package treatment plant as well as septic tank."

66. Faced with problems with the drainage, Mrs Hart wrote to the estate agent for the vendors, Mr. Lamb, concerning a revised offer.[82] This led to activity on the part of Mr. Lamb to try to dissuade the Harts. In the event, the agreed price was reduced to £1,200,000 rather than the £1,240,000 originally agreed. Exchange of contract was anticipated on or before Friday the 18th November 2011.[83]

67. On the 15th November 2011, Mr Close sent to the vendors' solicitors a letter enclosing pre-contract enquiries. These enquiries included the following[84]:

> "5. You have supplied a copy of the completion certificate for the works recently carried out. Please supply a copy of the building regulation application and any plans submitted with it.
>
> "6. Our search discloses an application for windows dated the 7th June 2005. Please supply any documentation relating to those windows, in particular any guarantees and FENSA certificate.
>
> "7. Please supply details of the electrical works carried out in 2009/2010 together with any certificates issued by the electrician.

[80] E2/523
[81] E2/524
[82] E2/527
[83] E2/561
[84] E2/569

> "….
>
> "9. Section 5.1 of the Property Information Form has not been completed. Are there any guarantees for any of those items listed?
>
> "10. We assume, please confirm, that Radon protection measures were taken during the construction of the extension."

The reference in enquiry 9 to section 5.1 of the Property Information Form is to a standard set of questions relating to warranties and guarantees.

68. Having seen this list of enquiries, Mrs Hart raised a further issue in an email to Mr. Close[85]:

> "A question that we would like to add to the pre-contract enquiries letter relates to section 5.1 of the property information form (that you have mentioned already). It is regarding insulation and damp proofing. It would be useful to know what was used. We already know from the Surveyor's report that the heating is going to be expensive and inefficient, so it would be useful to know what insulation was used if we need to look at upgrading. Property brochure says '…over-specified double glazing and insulation'."

69. On the 16th November 2011 the vendors' solicitors replied to the enquiries which I have set out above.[86] The most significant documents now produced were:

(1) Building Control full plans submission[87];

(2) Completed section 5.1 of the Property Information Form which showed: (a) that no new home warranty would be provided; (b) that no damp proofing guarantee would be issued; but that (c) guarantees were forthcoming in respect of certain windows installed at the Property.

[85] E2/575
[86] E2/582
[87] E2/589

70. Having received copies of this documentation from Michelmores, Mrs Hart wrote to Mr. Large on the 17th November saying[88]:

> "Last night we received some info from the Seller of [the Property] that gives slight concern. It is section 5.1 of the Property Information Form that refers to Damp proof, Underpinning, Wood treatment. The seller has ticked no warranties or guarantees available on these sections. Given the corners previously cut e.g. drainage we would value your opinion on whether this is appropriate.
>
> "In theory the aim is to exchange contracts tomorrow. I can email you the relevant forms supplied but did not want to inundate you with attachments or assume that you are available to advise."

71. After Mr. Large received that email, he spoke to Mr. Hart. Mr Large's recollection of that conversation was as follows[89]:

> "I had a telephone call on my mobile with Mr Hart on the afternoon of 17 November 2011. I was in Plymouth at the time and I can distinctly recollect having the phone conversation although I cannot recall the full contents of the conversation and I made no notes of that conversation. I believe the Claimants were under pressure to exchange contracts and that it was in that context that we talked about the drainage and I talked about an architect's supervisory certificate being transferable to them (which would have been a reasonable expectation). I also said it would be reasonable for the Claimants to insist on appropriate guarantees and warranties and a Building Regulations Completion Certificate. I offered to check the documentation they had and Mr Hart said he would send me the documents they had received from the vendor by email, which Mrs Hart did later that day."

72. Also on the 17th November, Mrs Hart wrote to Mr Close[90]:

> "We have now had a chance to look at the attachments that you forwarded to us yesterday and we do have some concerns. I have emailed our Surveyor and asked if he can assist with a few points. I know that you are not in the office today so will probably [not have received] the signed contract from us that

[88] E2/623
[89] C1/75/paragraph 74
[90] E2/624

> will arrive at your offices today but in my paranoia I just wanted to check that nothing will be forwarded to the sellers' solicitors without our approval.
>
> "I assume that the guarantees and warranties that have not been supplied as attachments so far eg for heating system and windows etc will be in the big pile that you refer to. They have not supplied warranties in their attachments just instructions.
>
> "Can you confirm that they will be letter us have all details of the house eg plans, receipts, guarantees, contracts etc and that no documents will be destroyed or not transferred. Not sure what will be in the pack that you will be sending."

73. Later on the 17th November, Mr. Close sent his "Legal Report for Mr & Mrs C Hart for the purchase of the Property"[91]. This listed out a number of documents attached to the report, including:

(1) The Property Information Form;

(2) The Full Plans Approval Notice; and

(3) The Building Regulations Completion Certificate.

74. The Michelmores Legal Report was based on a pro forma. In the documents before me is a copy of the pro forma marked up in manuscript by someone at Michelmores. In the pro forma, one of the documents listed as attached to the Report is a "Professional Consultants Certificate".[92] That item has been crossed through and does not appear in the issued report.

75. A sample blank Professional Consultant's Certificate was placed in evidence before me.[93] This provides:

> "I certify that"

[91] E2/628
[92] E2/609
[93] E1/8

"1. I have visited the site at appropriate periods from the commencement of construction to the current stage to check generally

"(a) progress, and

"(b) conformity with drawings, approved under the building regulations, and

"(c) conformity with drawings/instructions properly issued under the building contract.

"2. At the stage of my last inspection on _____ , the property had reached the stage of _____

"3. So far as could be determined by each periodic visual inspection, the property has been generally constructed:

"(a) to a satisfactory standard, and

"(b) in general compliance with the drawings approved under the building regulations.

"4. I was originally retained by _____ who is the applicant/builder/developer in this case (delete as appropriate).

"5. I am aware that this certificate is being relied upon by the first purchaser _____ of the property and also by _____ (name of lender) when making a mortgage advance to that purchaser secured on this property.

"6. I confirm that I will remain liable for a period of six years from the date of this certificate. Such liability shall be the first purchasers and their lenders and upon each sale of the property the remaining period shall be transferred to the subsequent purchasers and their lenders.

"7. I confirm that I have appropriate experience in the design and/or monitoring of the construction or conversion of residential buildings……

"8. The box below shows the minimum amount of professional indemnity insurance the consultant will keep in force to cover his liability under this certificate _____ for any one claim or series of claims arising out of one event."

76. Paragraphs 5 and 6 of the Michelmores' Pro Forma Legal Report read as follows[94]:

> "5. **PROFESSIONAL CONSULTANT'S SCHEME**
>
> "The Property is not being constructed with the benefit of NHBC Scheme, but is built under the supervision of an architect and the Seller will provide a Professional Consultant's Certificate which will be sufficient for most mortgagee's requirements. This provides that the architect will remain liable for a period of 6 years from the date of the Certificate in relation to the Certificate he gives which is that the Property has been generally constructed to the satisfactory standard and in general compliance with the drawings approved under the Building Regulations. This Certificate is backed by an insurance policy a copy of which is enclosed. The Insurer is [Royal & Sun Alliance] and the limit of indemnity is [£1,000,000.00] for each claim. This should be sufficient to deal with any problems in relation to the construction of the Property within the requisite period.
>
> "OR
>
> "6. **NHBC SCHEME**
>
> "6.1 The Property will be built under the National House Building Council's Scheme and will have the benefit of the NHBC Warranty and Insurance Cover. The documentation, together with explanatory notes, will be sent to you once exchange of Contracts is complete. The notice of insurance cover will be issued by the N.H.B.C. after the house has been completed to the Council's satisfaction.
>
> "6.2 Basically, the scheme covers the owners of the Property against those defects which appear within two years of the house being built. The cover is available whether or not the original builder is still in existence. However, the Scheme is subject to restrictions on claims imposed by the Council, as well as financial limitations on the compensation payable and, consequently, the protection given will not necessarily meet the full cost of repair. It is a condition of the scheme that any defect must be reported to the council as soon as it become apparent to the owner and no compensation will be payable in respect of any defects which are revealed by the buyer's surveyors report …."

[94] E2/615-616

77. This pro forma shows a consciousness of the need for a buyer of a newly built property to have, if possible, protections in place in respect of defects in that property. I return below to the implication of this.

78. In the Legal Report as issued not only were paragraphs 5 and 6 of the pro forma omitted (inevitably as neither a PCC nor a NHBC Certificate was available) but there was no discussion of the significance of the absence of such certificates.

79. The Legal Report refers to the Property Information Form in paragraph 7.1[95]:

> "I enclose a copy of the Property Information Form and any enclosures mentioned in it.. Please check the Seller's comments carefully and let me know whether there are any discrepancies between the answers given and your inspection of the Property.
>
> "7.1.1 The Property does not have the benefit of any specialist guarantees for matters such as timber and damp treatment. If you require any specialist reports to be carried out, you should arrange for this prior to exchange of Contracts.
>
> "7.1.2 It would be prudent to have the boiler and heating system tested, or at least seen in working order, prior to exchange of Contracts. Please note that you will not have any recourse against the seller if the system ceases to function on completion."

80. As set out above in paragraph 71 above, Mr Hart spoke to Mr Large on the 17th November. The results of that conversation were recorded in an email from Mr Hart to Mr Close[96]:

> "I spoke to our surveyor about our concerns and the outcome was that we should have sight of:
>
> "1) The South Hams completion certificate (that the house meets building regs)

[95] E2/635
[96] E2/638

> "2) The architect completion certificate (we believe they supervised the works)
>
> "before exchange.
>
> "He has kindly offered to check they are ok if need be.
>
> "He also confirmed that he thinks it perfectly reasonable under the circumstances that we get all documentation (eg orders, receipts, plans) with respect to the house passed over to us."

81. There was a lot of activity on the 17th November. As a result of contact made by Mrs. Hart, Ms Sullivan sent Mrs Hart an email attaching the Building Regulations Completion Certificate and other associated documentation[97] and then a second email attaching Harrison Sutton's Certificate of Completion of Making Good Defects[98], to which I have referred at paragraph 27(11) above.

82. At 17.45 that day, Mrs Hart, having sent on the documents she had received from Ms. Sullivan, asked Mr. Large if what Harrison Sutton had sent included the "two things that you suggested to Chris that we should have?"[99]

83. Mr. Large responded with commendable speed at 21.43 that evening[100]:

> "Sorry for delay in replying, family issues intervened.
>
> "A building control Completion Certificate is an essential document. 2 points:
>
> "1. I am surprised it wasn't provided as a matter of course at the outset – it's a standard requirement when building works have been done.
>
> "2. I have never before seen a Completion Certificate produced as an rtf document editable in Word. It would normally be a pdf. I just wonder why a pdf has been converted to an rtf document.

[97] E2/639 to 652
[98] E2/654
[99] E2/658
[100] E2/659

> "The Harrison Sutton "Making good defects" certificate is not the type of certificate I was expecting, which would be more like the Professional Consultant's Certificate provided on the Council of Mortgage Lenders website ….. The certificate provided seems to only relate to "snagging" type issues. It is not necessarily essential that a certificate is provided, but with a project of this size, stated as having been managed by an architectural firm, it would not be unreasonable to ask for this. If such a certificate is not available, there may be little practical recourse if it were found that unseen deficiencies exist. You should seek advice on this from your legal adviser."

84. On the following morning, Mrs Hart emailed Mr Close[101]:

> "We are concerned re relevant paperwork being supplied. I contacted the Architects yesterday and asked if they could send:
>
> "The South Hams completion certificate
>
> "The architect completion certificate
>
> "They did send several documents (have forwarded the emails to you), some of which you have already seen, but not the paperwork suggested by the surveyor, see email from Richard Large below.
>
> "Not sure what to do now, nervous about proceeding without the usual guarantees. What do you advise?"

85. On the 21st November 2011, Mrs Hart wrote to Mr Lamb of Savills[102]:

> "There are a number of new issues with [the Property] that have caused us concern. These include an extraordinary and unusual planning restriction preventing the removal of overgrown trees and bushes on [the Property] land (they do affect the sea view significantly) without the prior approval of the neighbouring property and written permission of South Hams District council Planning Department. There is no Architects Completion Certificate, which we are advised by our surveyor we should have. Recent confirmation from BT that there will almost certainly be no Broadband available at this property and satellite internet will be our only option, which is expensive and is also very limited. In the spirit of moving forward we took the decision to accept these things, and to deal with them after the purchase, in order to allow exchange to go

[101] E2/660
[102] E2/663

> ahead on Friday. Unfortunately that did not happen, as you know.
>
> "We have had the funds waiting in our solicitors account in order to proceed. We have also transferred the purchase amount to a current non interest paying account to allow for a speedy transfer of funds for completion as requested by you and your client. Clearly there is no benefit to us in rushing to exchange contracts and then waiting 10 days for furniture to be removed.
>
> "As discussed previously we do not wish to pay a further sum for the furniture. Our main reasons for the furniture was to speed completion and eliminate the risk of damage to the property.
>
> "In order to proceed we need your client to provide all receipts and documentation previously requested before Tuesday 22 November. We can then exchange contracts on Thursday 24 November. Your client to arrange removal of all of his furniture from the property on Wednesday 23 November (or Tuesday 22 if preferred) ….
>
> "Alternatively if the furniture is not an issue and we can reach agreements on receipts and documentation we are in a positon to exchange Tuesday and complete Wednesday …."

86. Mr Hart forwarded this email to Mr Close with a covering email saying "just to confirm please do [not] exchange until we give the go ahead."[103]

87. Later on the 21st November Mr Hart wrote to Mr Lamb saying[104]:

> "If we can have written agreement for all the docs and receipts – unredacted to be supplied and agreement that we will send on personal effects (list to be supplied) on Wednesday we will exchange today (Monday) and complete tomorrow (Tuesday).
>
> "If you want to [persist] with the redaction and later completion then that will have to wait until tomorrow when Kerry is here as we can see:
>
> "No reason for redaction, we will have exchanged/completed/paid after all
>
> "No reason for Eddie to delay things for a visit as he has got £3,000 for the furniture and to speed things up."

[103] E2/663
[104] E2/669.1

"Eddie" is a reference to Mr Fitzsimons. Mr Lamb replied[105]:

> "OK on redacted documents. Can give VP[106] and completion on Wednesday if you exchange contracts today. Hope that's ok."

88. At 18.08 that day Mr. Lamb emailed Mr Close[107]:

> "To complete on Wednesday, we need to exchange before 11.00 tomorrow. My client will not exchange, complete & give VP simultaneously, and does not need to complete so quickly. He fully understands if the Harts want to make an inspection between exchange and completion to reassure themselves that he has not ripped the house to bits. In normal circumstances, he would have wanted to get his housekeepers in before completion to ensure that the house is spick & span for them – but it does take a day or 2 to organise…."

89. On the morning of the 22nd November, Mrs Hart wrote to Mr Close (the phrase in larger font in the third paragraph is in larger font in the original)[108]:

> "Thanks for forwarding us Martin [Mr Lamb's] email.
>
> "Firstly, apologies that this is becoming so drawn out. Should I ask Martin to only deal with us until these unagreed matters have been dealt with? It does not seem sensible to take up your time unnecessarily by involving you in these frustrating negotiations.
>
> "We have spoken about the exchange/complete/Eddie visiting the property. Given that Eddie wishes to visit the property we are not happy to exchange until he has done so and finished whatever his outstanding business is there. I do not understand why there is an objection to exchanging and completing in one day.
>
> "We are still happy to go ahead and exchange today and complete tomorrow if Eddie is not going to visit the property in between and we are sending on his effects. He can supply a list of the things he wants sent and it could be in the contract that we do so within 24 hours. We would need written in the contract that all of the receipts and documentation previously

[105] E2/669.1
[106] VP = Vacant Possession
[107] E2/674
[108] E2/673

> discussed would be supplied on exchange and that the house is as seen/photographed inc furniture.
>
> "We are also happy to exchange and complete on Wednesday if Eddie is insisting on visiting the property today. We would visit the property on Wednesday morning and exchange and complete right away. After Wednesday it gets difficult due to hospital appointments so time is running out on this if not decided today.
>
> "Not sure who I am supposed to be discussing this with now, you or Martin so please advise."

90. After that Mr Close had a conversation first with Mrs Hart and then with his opposite number at the vendors' solicitors. The manuscript attendance note is difficult to read, but appears to me to say[109]:

> "Kerry Hart – OK to exchange
>
> "Sol'rs – you confirm you will send all papers, receipts, guarantees etc that you have – you think client has given/is giving same to Savills so will arrange for those to be passed on as well."

91. What followed was a letter from Mr Close to his counterpart as follows[110]:

> "We write to confirm the telephone conversation between your S Tomlinson and our Chris Close at 12.50pm today when Contracts in relation to the above were exchanged under Law Society Formula B with completion to take place on 23 November 2011.
>
> "By way of exchange, we now enclose our client's signed part of the Contract and look forward to receiving your client's part in due course….."

92. The contract as exchanged that day contained no requirements for the delivery of documents.[111]

[109] E2/672
[110] E2/672
[111] E2/678 to 682

Ongoing remedial works at the Property up to the 23rd November 2011

93. Whilst the above intense exchanges were taking place in the run up to exchange of contracts, unknown to the Harts or Mr Large, Mr Fitzsimon, Ms Sullivan and the builder had been busy.

94. On the 9th November 2011 there was the following exchange[112]: Ms Sullivan emailed Mr Fitzsimons:

> "As you will see I have been in contact with F1 Joinery again. Last time I met Trevor on site he told me he was undergoing treatment for cancer. I have spoken with the manager and she has assured me that Chris (Trevor's boss) will be dealing with this."
>
> Mr Fitzsimons responded:
>
> "Sorry to be a pain but we plan on exchange next Wednesday!"

95. On the 15th November Ms Sullivan wrote to Mr Fitzsimons[113]:

> "We have found a seal which we think will solve the problem. This is due in in the next day or so and will be fitted by F1 Joinery as soon as it arrives in."

96. As already recorded above, on the 17th November Ms Sullivan sent Mrs Hart the Certificate of Making Good Defects.[114] She did not mention the ongoing problem with the front door.

97. On the 21st November there was the following exchange[115]: Mr. Fitzsimons wrote to Ms Sullivan:

[112] E2/551
[113] E2/566
[114] E2/653
[115] E2/670

> "The door must be done before Wednesday as I am under pressure to complete on Thursday! I plan on being down on Wednesday …."
>
> Ms. Sullivan replied:
>
> "I have spoken with Trevor this morning.
>
> "The new seal is due in this morning and he will either fit this afternoon or tomorrow am (as well as ease the door!!)…."

98. On the 22nd November there was the following exchange: first Mr Fitzsimons wrote to Ms Sullivan[116]:

> "I cannot now come down tomorrow as I need to be here to sign stuff as we complete at midday. I really do need the door guys to do the door tomorrow otherwise I am in big trouble! …."
>
> Ms Sullivan responded[117]:
>
> "No problem. I have been assured from F1 will be on site at 830 am. I will speak to them mid morning to make sure it is complete."

Defects become apparent

99. At paragraphs 40 to 42 of her witness statement, Mrs Hart describes what happened when she and her husband arrived to take possession of the Property[118]:

> "**23 November 2011 - Completion Day**
>
> "40. Following a call to us from Michelmores Solicitors, advising us that we were now the legal owners of [the Property], Chris and I arrived at the property in the afternoon. We were supposed to be meeting the estate agent at [the Property] to receive the keys from them. We were very excited as we drove there, chatting excitedly about moving into our beautiful new home. As we pulled into the driveway we were

[116] E2/676
[117] E2/677
[118] C1/43 to 45

> met by a shocking site. There was a builders van in the driveway and the front door to the property was removed. We introduced ourselves to the builders and asked what they were doing. They said they were *"trying to fix the leaking door"*. They advised that Emily Sullivan of Harrison Sutton had arranged for them to do the work. They advised that we would need to call Emily Sullivan before they would let us into the property.
>
> "41. We did not get to experience even the first hour of enjoyment of our new home without the crushing realisation that things were clearly not as had been described to us by a number of 'professionals'. Since that moment of arriving at our new home, when our excitement was replaced by shock at being greeted by the front door removed and remedial works being attempted, under the instructions of Harrison Sutton, our family's life has been irreversibly changed. When we called Emily Sullivan, at the instruction of the builders on site of our new home, she said "shit!" loudly down the telephone. She of course denies that now, but taken in the context of what we now know to have been Emily Sullivan's behaviour in relation to [the Property], it was hardly a surprising response.
>
> "42. This was a bad start to our ownership of [the Property]. We were not to know it was just the start, and the impact of the myriad of problems with this property, and the ensuing litigation, have been unrelenting for our family since that day."

100. Mrs Hart took up the problems with Mr Close of Michelmores as she describes in paragraphs 43 to 46 of her witness statement[119]:

> "**Mr Chris Close Michelmores Solicitors After Purchase**
>
> "43. By 6 December 2011 we still had not received the paperwork that had been promised and I wrote to Mr Close chasing it: "*We have a significant number of things to repair asap eg leaking doors and windows and the receipts are essential.*[120]
>
> "44. *Before I chase the matter with Savills I was wondering if they had come via you as the supply of them was part of the condition of exchange of contracts".*[121] He replied: "*No, I have not received any receipts. As you say, they were going to be*

[119] C1/45 to 46
[120] E2/690
[121] E2/690

> *delivered via Savills. I will check with the solicitors to see if they have anything".*[122]
>
> "45. It is astonishing in hindsight that a Solicitor with Mr Close's experience would oversee such a shambolic property transaction, which entailed essential documents that we were asking to have before final exchange of contracts, not being provided in advance of the sale being completed. In fact they were mostly not provided at all. It is clear to us now, as lay people caught out very badly by a one sided and exploitative property transaction, what could and should have been done to protect us. However, Mr Close is an experienced professional working in this area and he should have known the risks that we faced by proceeding with this property purchase with no protections. Furthermore, he should have been aware of the potential pitfalls and fully explained them to us. Sadly he did not. He was careless and reckless when he was in a position of trust and we are living with the consequences of his negligent behaviour.
>
> "46. Over a period of 18 months following the purchase of [the Property] I attempted to obtain assistance with locating the missing 'guarantees'. Mr Close was aware of how bad the problems were at the property and he also admitted in letters that documentation should have been provided as part of the sale. [44] Months would pass with Mr Close not responding to emails or calls. Eventually contact ceased when Mr Close did not respond to requested dates for a meeting."

101. Whilst I am not going to recite her evidence, which is lengthy, at paragraphs 48 to 77 of her witness statement Mrs Hart describes how the problems of water ingress continued and got worse and worse as the Harts tried to get the architect and builder to resolve the problems.[123]

102. That the problems were rapidly recognised as serious is reflected in the following email from Ms. Sullivan to the builder[124]:

> "The new owners have now taken possession of [the Property] and are in the process of moving in. They have had a number of issues with various parts of the house which could use your attention. Whilst I appreciate we are now outside the snagging

[122] E2/690
[123] C1/48 to 55
[124] E2/708

> period it would be really useful if you could spare a chippy to attend to a few door easings and adjustments etc.
>
> "A more serious issue is the front glazed screen. Where we thought water was coming through the door seal it turns out that it is coming through where the windows sit in the frame. Water is currently pouring through!! The sealant on the inside is showing signs [of] degrading so I can only assume the internal sealant where the frames have been fitted is the same. Another point where water is coming in is the joints where the timber verticals meet the horizontals. Trevor has had another look and agrees that this is the case. These joints also need properly sealing up. Can I suggest that you liaise with Trevor and Kerry Hart (see email contact above) to arrange a meeting on site to agree a way forward. It may be that the Windows and joints are temporarily sealed up and then come spring the windows are removed and properly sealed within the frame ….."

103. By June 2012 the builders and Ms Sullivan had been back to the Property on numerous occasions and there had been extensive opening up. Water was coming through some doors and windows and through the ceiling into the ground floor sun room. In a revealing report dated the 1st June 2012, Mr Sutton of Harrison Sutton reported after inspecting two particular areas, the South West facing screen W5 and the entrance frame screen. In respect of both areas his report was damning, but perhaps particularly so in respect of screen W5[125]:

> "There's a multitude of issues here. Some could be failing now, some will likely cause more issues in the future. Sorry to say, but a real bag of worms and to remedy some aspects and leave others may well result in not actually fixing the leaks, and could leave other problems to arise in the near future. There's already render scarring from previous investigative works. Stripping it back to the ply and start over would be no bad thing, plus there is also dealing with the VCL, if one doesn't exist. A tough call. As an absolute minimum, the render around the window needs to be cut back, and the flashing redressed with a weathered top and membranes lapped OVER, but as before, the scarring in doing this would be impossible to lose."

[125] E3/849-850

104. In a letter dated the 4th July 2012, Mrs Hart expressed her dissatisfaction in a letter to the architects[126]:

> "It is now over seven weeks since you and your colleagues came to inspect the faults at [the Property].
>
> "Whilst we would not wish to rush you in your deliberations I hope you will appreciate how difficult it is in present conditions to live in a house which leaks this badly. We are unable to be away from home as when it rains we need to be here to mop up the water from the wooden floors and stairs. In addition to the buckets and soggy towels for collecting water we also have large areas of removed plasterboard, exposed metal beams, lifted slabs and other half executed 'temporary solutions'. Emily gave us her word that she was "committed to resolving the problems, so we have been patient and trusted that you would do so….."

The Harts contact Mr. Large

105. Mrs Hart also describes in her witness statement how contact was finally made with Mr. Large[127]:

> "72. We emailed Mr Large on 12 May 2012 to advise of problems with the property and to enquire about his use of a damp meter.[128] Mr Large replied on 15 May 2012 "...*I recall a conversation expressing my concerns in this respect & hopefully your solicitor did get some documents…"* We assume that Mr Large is referring to the conversation that he had pre purchase with Mr Close around the 20 November 2011"...*As I recall it the seller was presenting the property as a virtually new house…" "it would be worth investigating the question of any guarantee that may be attached to the roof terrace construction. Hopefully your solicitor would have passed any documents on to you."*[129] Mr Large visited us at [the Property] on 6 July 2012. We asked him during that visit if a different survey would have been more appropriate. He said that a Homebuyers Report was the most suitable survey. He has continued to assert throughout these proceedings that his report *"was appropriate, correct and reasonable".* He told us he had not noticed the obvious repairs to the SW large window or the

[126] £3?873
[127] C1/55-56
[128] The email was actually dated the 15th May 2012: E2/835
[129] E2/835

> bodged Triflex and Duct tape next to the French door, which is confirmed in his audio tape."

106. Mr. Large set out in his witness statement what happened when he returned to the Property in the summer of 2012[130]:

> "78. I then heard nothing further until May 2012. On 15 May 2012 Mrs Hart again made contact and advised me by email that they had some bad leaks, one in the front door frame and the other in the flat roof over the lower ground floor. She asked about my use of a damp meter. My response, by email the same day, was to confirm, having also been sent some photographs, that there did appear to be a detailing defect with the roof and also to ask if this was in relation to the recent storms as the Property is in a very exposed location. I confirmed that I had used a damp meter and had not found evidence of water ingress or damp at the time of my inspection. I also confirmed that other than the door being rather stiff and swollen, as commented on in my report, there had been no evident defect with the front door. I offered to come out and inspect if need be. I also queried whether a guarantee for the flat roof had been provided.
>
> "79. Mrs Hart responded confirming that water had been coming in through the ceiling since February 2012 and the front door had been leaking since they moved in. There was no evidence of either of those issues when I inspected the Property and used a damp meter. I did report that the front door was binding slightly and had swollen a little (E6 of my report) and that it might require some remedial attention if the problem persisted but there was no sign of water ingress. I believe this is also evidenced by the photographs that I took at the time which show the appearance of the Property to be in good condition in that respect.
>
> "80. I had offered to attend the Property and the Claimants eventually took me up on this in late June 2012, when we arranged for me to visit on 6 July 2012. The Claimants were very pleasant when we met, but they were clearly fed up and I was very concerned when I saw the state of the Property. The issues, in particular with water ingress and evidence of poor workmanship, which I saw in June 2012 were just not there to be seen when I inspected the Property in November 2011.
>
> "81. Mr Hart showed me the terrace where it had been opened up and this was the only area where Mr Hart was slightly critical when he was speaking to me. He asked me if I thought

[130] C1/76 to 77

> that the lead covering the windows sills was slightly flat and asked if the water could pond there because of that. I accept that they were slightly flat and as a consequence water might pond there, but the wind would normally blow it off. I did not mention that issue in my report as I could not see how the water from there would go into the house; it was no more likely to than rainwater running down a window pane would be likely to run through to the inside of a window. Whilst this may be considered rather poor detailing it is not uncommon and without evidence of any ingress of water was certainly not a detail I would include in a HomeBuyer report. It was not a significant defect and I did not believe that it had caused the problems of which the Claimants were, in June 2012, now complaining: it was not where the issue was. I advised Mr Hart of this.
>
> "82. I never contemplated that the Claimants would bring a claim against me at this time. They seemed pleased to see me and appreciative of the help I had given them and the questions they asked about the damp meter and the lead covering for the window sills were not of an accusatory nature."

Investigations and remedial work

107. As set out above, during 2012 the original builders and the architects made numerous visits to site without curing the problems of damp ingress.

108. Thereafter, the Harts sought independent advice. This included obtaining advice from a chartered surveyor, Mr. Venn of Vickery Holman in May 2014[131], who concluded that there were numerous problems with the building; in July 2014 from Civil and Structural Engineers, CASE Consultants as to steel work defects; and from a firm of architects, Stubbs Rich, who in August 2014 identified further defects[132].

109. The Harts also had remedial works carried out in 2014, 2016 and 2018.

[131] E3/984 to 1080
[132] E3/1104 to 1117

110. The understandable steps taken by the Harts to understand and solve the problems in their home made the task of the experts whose evidence I heard more difficult.

The Effects upon the Harts

111. Mrs Hart's evidence as to the effect of the problems with the Property upon her family in her witness statement was as follows[133]:

> "73. It is not possible to describe in a few short paragraphs the devastating impact that the disastrous purchase of this house has had on our family. We have not just been living in a leaking, defective and dangerous house since we moved in eight years ago. We have also endured attempted remedial works to the property which have left large sections of our home unusable. During such periods our home has had, staircases boarded up, windows boarded up, scaffolding preventing doors and windows from being opened, for months at a time, in hot weather. Rooms out of use, for example the garden room had the ceiling taken down, and it stayed down for about 1½ years When the ceiling was finally replaced we had the ceiling redecorated. The decorators were sympathetic to our situation and they worked overtime in their attempts to give us a usable room in time for Christmas. They had almost completed the job when, just a few days before Christmas, the leaks started to seep through the freshly decorated ceiling again. There was a Christmas when sections of our home had windows boarded up, scaffolding inside the sitting room, metal beams exposed and buckets collecting water ingress. We did our best to make our home more festive than a building site for our family and young children by decorating the scaffolding etc. It was of course not very effective.
>
> "74. There have been periods when the outside areas have been dangerous, for example due to glass panel balcony screening having come loose and fallen eight feet to the ground below. Children have fallen and hurt themselves on the many areas of lifted patio when our home has been surrounded by rubble and trenches. Both woodburners have been condemned as unusable and the property is consequently not warm enough in winter. When we discovered recently, seven years after our family had moved into the property, that an essential fire door had been removed by the instructions of Harrison Sutton we were

[133] C1/56 to 59

horrified. Given the two dangerous log burners, and the dangerous electrics in the property, we were particularly disturbed by this. The response from the defendants on this point has been offensive. They have even stooped so low as to say that a fire door, required for building regulations, would be wasted on our family because we are *"in the habit of propping doors open"*. This is totally false and misleading and shows how the Defendants' experts are not giving a fair and balanced view. We do not prop fire doors open eg with wedges. There is one door that effectively props itself open due to bad workmanship as the bottom of the door, visibly, binds on the wooden floor beneath. We manually close this door, especially at night, but on the day in question there were six experts separately inspecting our house and therefore it is likely that this door was not closed for most of that time. The defect was easily visible but presumably "missed" by the expert who made this comment.

"75. The wasted time and money that the purchase of this property has cost us is enormous. Our work has suffered, holidays have not been taken because of it, health has deteriorated.

"76. List of parts of house unuseable:

> "The whole house has elevated Radon levels. We are reducing this with careful ventilation. Not using the fires has helped (Fires with no ventilation suck in Radon).
>
> "Garden room approx 4 years (and still leaks) Playroom over Garage cannot be used as a bedroom, despite being sold as a bedroom.
>
> "Garage is very damp with water coming through the floor which would not have happened if membranes had been installed properly.
>
> "Areas of terrace and patio unuseable for about 2 years of works
>
> "Both wood burning fires unusable
>
> "Back stairs/hall section of the house, ie the area adjacent to the damp garage, is very damp and mouldy. We can not leave items there eg coats etc as they go mouldy and smelly.

> "77. We have also had to endure a very difficult litigation situation. During these proceedings it has suited the defendants to mischaracterise us as being a nuisance to the court process. That we are attempting to claim for faults that do not exist or that we have caused the problems. The true situation is that we should be considered victims. We were tricked by Harrison Sutton and we should have been protected by Mr Large and by Mr Close. We were of course naive, but that is why people employ professionals to assist with a property purchase.
>
> "78. The sums of money involved are life changing for us. In addition to coping with nightmares of the property we are a family being abused by three well funded insurance companies, who are very happy to crush us financially and personally to avoid honestly addressing the matters raised.
>
> "79. We would never have considered purchasing this property at all had we known it had any significant faults.
>
> "80. We will never get back the past years lost on attempting to deal with the problems with the property and the associated litigation."

The Expert Evidence before me

112. I heard oral evidence from two building surveyors, Mr. Easton for the Harts, and Mr. Avery for Mr. Large.

113. Mr. Easton had a slight advantage over Mr. Avery in that he had been involved for longer than Mr. Avery. In respect of the existence of defects in the building and the appropriate approach to be taken by a surveyor carrying out a HomeBuyer's Report inspection or a building surveyor, I found the evidence of both of great use. In some respects during the course of the trial the differences between them narrowed somewhat, but big differences remained which I must resolve.

114. I heard evidence from Mr Easton also as to the preparation of a scheme for remedial works, upon which I comment below.

115. In his closing submissions, Mr Wilton was critical of Mr Easton in a number of respects and described his as an unsatisfactory witness. I accept that there is some strength in some of his criticisms, not least as to the structure of his report, which was somewhat lengthy and to an extent rambling. The report could have done with a certain amount of editing and sorting: however, those criticisms do not affect my judgment of Mr Easton as an honest and extremely experienced surveyor.

116. A particular criticism put forward in paragraph 28 of Mr. Wilton's Closing Submissions does call for comment from me. The submission was as follows:

> "It is not at all clear that Mr Easton even understood the proper test for negligence. He referred at paragraph 16.1 in his report to 'errors of judgment' when that formulation does not tell one anything about whether the error in question was negligent, and when he ought to have been concerned with whether D1 had met the standard of a reasonably competent surveyor instructed as D1 had been, asking himself also whether *no* reasonably competent surveyor could have acted as D1 did if and to the extent that there was scope for reasonable differences of view. This confusion appeared to persist when he was cross-examined on the point [T3/p163-4]."

117. The part of the transcript to which reference was there made read as follows:

> "Q. You say, this is the second sentence:
>
> " 'He made not one but many errors of judgement.'
>
> "A. Yes.
>
> "Q. An error of judgment is not the same thing as negligence, is it?
>
> "A. Are you asking me as a surveyor?
>
> "Q. I am asking you as an expert witness?
>
> "A. Yes. I think it – in most circumstances it would be. An error of judgement would normally be based against the RICS guidance note.

> "Q. That is your understanding, is it?
>
> "A. Mm-hm.
>
> "Q. An error of judgment is negligence in most cases?
>
> "A. Where is a breach of a guidance note, yes.
>
> "Q. You understand that it is not –
>
> "A. I'm sorry, I am just thinking. He is asked to make a judgement. The guidance requires a – to look at the element, look at the sub-element, consider it and make a judgement on its condition. So yes, what I meant there was the judgement he made on not identifying the breaches of Building Regulations, or an error of judgement because he didn't identify that they – that they breached the Building Regulations and the guidance note. That is what I mean by an error of judgement in that regard.
>
> "It is not meant in what a lawyer might mean. I am not a lawyer. I am saying that he was required to make a judgement, that is what the RICS guidance note says, and he got that judgement wrong on not one or two, and I think that is also an important point --"

118. I accept that that passage indicates that Mr Easton may not have focussed appropriately on the legal definition of "negligence". However, as he said, he is not a lawyer. It is for me to apply the appropriate test to the evidence, assisted, but not constrained restrictively, by all the expert evidence before me.

119. Mr Wilton continued in paragraph 29 of those submissions:

> "It is submitted that these matters fatally undermine the weight of Mr Easton's evidence on liability issues. He was the wrong expert, his perspective was not the appropriate one for the difficulties facing D1 when it was essential he should do so. It is submitted that the Court should place no weight on his evidence as a result."

120. I accept that I should scrutinise Mr Easton's evidence (and that of all the experts) with care. I fully accept that the difficulties facing Mr Large when he

surveyed and advised are important considerations. However, I firmly reject the suggestion that I can place no weight on Mr Easton's evidence.

121. Mr Easton, unlike Mr Avery, did not hold himself out as able to advance opinions as to valuation. Accordingly, on valuation issues I heard evidence from Mr. Avery for Mr Large and Mr Raine for the Harts. There were significant differences between them, which again I must resolve.

122. I also heard evidence from two quantity surveyors, Mr Evans for the Harts and Dr Champion for Mr Large. What appeared at first sight to be significant differences narrowed as it became apparent that the differences mainly related to the basis upon which each was asked to opine.

123. I record that all the experts whose oral evidence I heard were fully professional and of assistance, even where their evidence was divergent.

124. In addition, there were in the bundles reports from two architects, Mr Orme and Mr Satow. This evidence was of less significance following the settlement between the Harts and the architects, but retained some significance to the evidence given by the quantity surveyors.

The Proper Approach to a claim for Surveyor's Negligence

125. At paragraphs 35 and 36 of Mr Wilton's Closing Submissions he submitted:

> "35. It remains important to keep in mind here that the benchmark as to whether reasonable skill and care has been exercised is not what the exceptionally conscientious or diligent or insightful practitioner might have done. As Oliver J. put it, in the solicitors' negligence case of *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 at 402-3, it is wrong to judge according to the standard of a "…*particularly meticulous and conscientious practitioner…the test is what the reasonably*

> *competent practitioner would do having regard to the standards normally adopted in his profession*.
>
> "36. Furthermore, where there is scope for individual variation in the way a task is competently performed or in the judgment which might competently be arrived at, then a breach of a professional's duty to exercise reasonable skill and care will only be established if he or she acts in such a way that no reasonably competent professional person could have done. That is 'the *Bolam* test', endorsed by the House of Lords in *Hall v Simons* [2002] 1 AC 615, when Lord Hobhouse said at 737 that in order to establish negligence a claimant is required to show that "…*the error was one which* ***no*** *reasonably competent member of the relevant profession would have made*." (emphasis added). See also *Jackson & Powell* at 10-071 and the useful citation there from Judge Everett QC in *Leigh v Unsworth* (1972) 230 EG 501 where the judge said:
>
> > *'The carrying out of a survey and the reporting to a client involves observation, deduction and the exercise of professional skill and judgment. The mere fact that one professional man might suffer from an excessive caution does not mean that another man, exercising his judgment to the best of his skill and ability and taking perhaps a somewhat more optimistic view, is guilty of a departure from the appropriate standard of professional care and skill.'"*

126. I accept these submissions and have endeavoured to follow these principles in this judgment.

Was Mr. Large negligent in failing to recommend a "building survey"?

127. It is the Claimants' case that Mr Large was negligent at the outset in failing to advise that the Harts should commission a "building survey" rather than a HomeBuyer Report".

128. The differences between the two reports can be summarised as follows:

(1) A surveyor will spend longer on site carrying out an inspection of the property being surveyed if preparing a Building Survey rather than a

HomeBuyer's Report. This increases the likelihood of any defects being identified;

(2) A report following a Building Survey will be longer than a HomeBuyer's Report not only because the longer inspection may reveal more matters calling for comment, but also because the concept of the HomeBuyer's Report is to keep the content as simple as possible in order to aid understanding by a non-expert reader;

(3) Naturally, a Homebuyer's Report is more expensive than a Building Survey.

129. Ms White's submission on this point, in paragraph 6 of her Closing Submissions, was that:

> "It is acknowledged that, when pushed in cross-examination, Mr Easton conceded that it was a choice for Mr Large as to whether to carry out a Homebuyers Report or a Building Survey. It seems that his settled evidence was that it was not necessarily wrong for Mr Large to have opted for the former, but Mr Easton himself would certainly not have done so. The Harts would say that was clearly the wrong choice, especially given the very particular concerns they had flagged up to him, before he carried out the survey, in their email dated 1 November 2017 [E1/362], regarding the impact of the cliff location and how that might affect the Property, as well as the construction of the Property, in particular any timber frame. The Harts believe that they flagged up further issues for Mr Large to investigate – including the presence of plastic strips at the threshold to patio doors **[Photo D3A/8 and 9]** but unfortunately this cannot be confirmed because, it appears, relevant emails have been deleted by Mr Large."

130. The perfectly proper concession in the first two sentences of that paragraph is fatal to the case that Mr. Large should have advised that a Building Survey should be carried out. That seems to me to be an issue on which surveyors

could legitimately differ, and, accordingly, applying the *Bolam* test, this allegation of negligence fails on the evidence before me.

131. However, I need to consider how far this conclusion matters. In his submissions at paragraph 37, Mr Wilton submits:

> "It is not clear that this part of the claimants' case is meaningful anymore because the claimants have abandoned any case based upon the failure to report the 'Drainage/2', 'Other/2', 'Other/13B', and 'Other/13C' defects which comprise *all* the defects which the claimants previously said were identifiable only if a building survey had been undertaken. All the remaining defects still in issue are defects which, on the claimants' case, should have been identified via a HomeBuyer report."

132. For her part, Ms White submits at paragraphs 9 and 10 of her Closing Submissions:

> "9. What this all comes down to is that, insofar as Mr Large decided to carry out a Homebuyers Report, he needed to do it properly. Reasonable skill and care required him to ensure that the report was as thorough and complete as possible. In other words, he did not have licence to "miss out" important issues, because he decided – without consulting the Harts' further – to stick to his initial advice that *"I am confident that the Homebuyer Report is satisfactory for this property & will provide you with the necessary information"* [E1/363].
>
> "10. As set out below, in order to achieve this end, Mr Large was required to follow the guidance set out in the Practice Note. Furthermore, it was established in evidence that the core difference between the Homebuyers Report and the Building Survey was (i) the amount of time taken to carry out the inspection and (ii) the amount of descriptive detail that would go into the report."

133. Thus, for differing reasons, there is agreement that the answer to this issue is by no means conclusive of the issues of liability.

134. Mr Wilton submits at paragraphs 39 and 40 of his Closing Submissions:

> "39. That leaves the question whether D1 should have said that a building survey was required when he visited the Property and/or in the light of the later concerns in respect of the cesspit and the absence of suitable certification and warranties.
>
> "40. One first has to look at how the relevant allegation of breach of duty is pleaded – see paragraphs 26(a) and (b) **[A1/222]**: the criticism targets the decision to undertake a Homebuyer Report at all, rather than any failure at a later stage to raise the issue of a building survey. However, it is accepted that it is open to the claimants on the pleadings to say that D1 should have reconsidered the correct form of survey when visiting the Property. It is not accepted that it is open to the claimants to say that D1 should have advised them to have a building survey at a later stage when the problems with the cesspit and the absence of suitable certification and warranties came to light. Nothing in the pleading suggests that D1 should have returned to the issue at that stage."

135. In the event for reasons I set out below, I do not regard it as necessary to consider whether Mr Large should have revisited his view as to the proper type of report at a later stage.

136. Before leaving this subject, however, I would say that I have to be careful to guard against the following supposedly logical steps in a surveyor's thinking:

(1) It was reasonable to decide that a Homebuyer's Report was sufficient;

(2) I carried out a HomeBuyer's Report;

(3) I missed some problems;

(4) I would have noticed those problems if I had carried out a Building Survey;

(5) But, reasonably, on a HomeBuyer's Report exercise, I did not notice/report on those defects;

(6) Therefore, I, the surveyor, having advised on the appropriate level of survey and having had that advice accepted, am not liable for the fact that defects were not identified.

137. The fallacy, or safeguard, in respect of that logic, in my judgment is in Mr Wilton's concession above, which I interpret to be that a surveyor has a continuing obligation, having advised that a HomeBuyer's Report is appropriate, to keep that advice under review (a) in the time between being asked to carry out a survey and reporting following that survey; and (b) as appropriate (a very important qualification) when advising after reporting on the initial survey.

Surveying a building which has been recently rebuilt

138. Mr Large was asked, and agreed, to survey a property which had been the subject of extensive reconstruction.

139. It would be hoped that a building which had been the subject of very extensive reconstruction only months before the survey, and where the reconstruction works had been designed, specified, inspected and certified by a highly experienced and respected firm of architects with the benefit of extensive local experience and esteem, would be generally free from defects apart from the sort of niggling problems which often follow building contracts, even where the contractor is a company in the top tier of contractors and the architect is in the top tier of architects.

140. However, such hopes are sometimes dashed.

141. They were certainly dashed in respect of the Property: I make findings below as to the extent of the problems at the Property. On any view, what has been revealed by later opening up of the property has revealed an appalling state of affairs.

142. The court has to be particularly careful to guard against the application of hindsight.

143. However, that danger, rightly emphasised by Mr Wilton on behalf of Mr Large, has to be balanced against a careful consideration of the role of a surveyor surveying a newly rebuilt or restored property.

144. If I understand the evidence in this case correctly, it is rarely necessary for a purchaser of a newly built house or flat to commission a report of any sort from a surveyor, since in the vast majority of cases there will be an NHBC guarantee or similar protection available to the purchaser.

145. Those refurbishing or reconstructing properties are likely to be owners hoping to occupy the newly refurbished or reconstructed property: those owners will have the benefit of direct contractual relationships with the contractors and professional advisers.

146. Here the problem is different: the Harts were buying the newly reconstructed property and had no contractual rights against the rebuild contractors or professional advisers engaged by Mr and Mrs Fitzsimons, unless such rights were conferred during the course of the negotiations for the Harts to buy the Property, for example by having an assignment of the vendors' right against the contractors and professional advisers.

147. In that context, what is the role of a surveyor? In my view, the role of a surveyor dovetails into the role of the conveyancing solicitor to ensure that the purchaser has the total package of advice and protection that that purchaser needs. There is a very real risk that the solicitor will regard a matter as being the exclusive or predominant preserve of the surveyor and vice versa: there is a real risk of a purchaser falling between the two and not receiving the advice he or she really needs.

148. There is also a risk that a purchaser might suffer because the surveyor might be lulled into failing to exercise the necessary level of diligence because the surveyor may be comforted by the thought that the recent reconstruction works were inspected by competent or presumably competent architects and signed off by competent or presumably competent building control officers.

149. There is also a further problem, which is that in many cases the building will not have been exposed to the elements for very long after the works were completed. A feature of this case is that it is agreed between the surveyor experts that when Mr Large attended there was no, or no substantial, "damage", most particularly no significant evidence of water ingress leading to actual dampness.

150. Thus the surveyor is left looking for signs of "defects", that is to say inappropriate design details or workmanship which will or may cause problems in the future.

151. There is therefore a tension: in a situation where the surveyor is particularly at risk of being lulled into a false sense of security because of the recent involvement of professionals engaged by the vendors or employed by the local

building control authority, the surveyor does not necessarily have the benefit of the sort of indicia which will often alert the surveyor to problems, such as readings from a damp meter.

152. During the course of the trial there were what are sometimes called "hot tubbing" exercises, or "witness conferencing sessions" involving the building surveyors. From my point of view, one of the most important parts of the process was whilst I was asking questions about the problems faced by surveyors in this situation. This was on day 5 between pages 9 and 18 of the transcript. The passage is too lengthy to repeat in this judgment, but I set out part of it in the next paragraph.

153. I gained the firm impression that a purchaser in the position of the Harts could be left in the position where the report they had contracted the surveyor to provide could be wholly or partly worthless because all it would in truth be saying would be "I see no reason not to suppose that everything was done properly when the building was redeveloped/refurbished". Indeed, Mr Avery, the surveyor called on behalf of Mr Large in effect accepted that in the following passage, albeit in the context of a building survey rather than a HomeBuyer's report[134]:

> "MR ROGER TER HAAR Q.C.: I have the impression from part of the evidence you gave yesterday, Mr Avery, when you talked about the content, not so much the inspection but the content of a full building survey, that in this case the building surveyor might say something along the lines of – it is obviously very important to have damp-proofing, stands to reason, as they say, and traditionally doors going on to terraces you would expect there to be an upstand and a visible DPC.
>
> "Mr AVERY: That's correct.

[134] Transcript Day 5 pages 17-18

> "MR ROGER TER HAAR QC: Modern techniques increasingly don't have that, which gives a problem for surveyors because you cannot necessarily see whether there is a DPC or not.
>
> "MR AVERY: Yes, my Lord. And you are then very dependent on looking at any damage which may have occurred as a result of that detail being incorrect.
>
> "MR ROGER TER HAAR QC: Can I just continue, because this is what I was thinking, in terms of a lengthier exposition, you then go on to say the one indicator, important indicator, is whether or not there is any sign of dampness, either visible damp staining or damp records when I use a damp meter. But even that may not be sufficient because the weather conditions may have not yet thrown up a problem. At the end is that, "If you buy this house, I cannot assure you that there is adequate damp-proofing in place". Would that be what you would expect in a competent building surveyor's report?
>
> "MR AVERY: I would agree, my Lord, yes, that is what you would expect in a more detailed building survey."

154. Whilst Mr Avery was there talking about a building survey, it seems to me that logically the same inconclusive type of statement should find its way into a HomeBuyer's Report.

155. That problem is particularly acute here where the evidence I have, as set out above, is that both before and after Mr Large surveyed, there were problems with the front door in particular, which the vendors, the contractor and the architect were working furiously to resolve, whilst, unsurprisingly, not revealing these endeavours to the Harts or the Harts' advisers.

156. Where does this leave me? My answer to that question is that the surveyor has a choice: either the surveyor can say that in truth he or she cannot say whether the property is (for example) actually weatherproof; or the surveyor has to dig very deep and analyse the built structure with a considerable level of scrutiny

to advise whether there are areas in respect of which the advising surveyor has doubts.

157. This raises, as Mr Wilton submits although not perhaps in these terms, real commercial issues. It is not the role of building surveyors and valuers to stifle important aspects of the property market. Nor is it their role to say to purchasers "I am sure it is all right" when in truth there is no basis for saying so.

158. These problems are particularly acute where, as here, there is a building riddled to a remarkable extent with defects, many if not most of which would not be observable by a surveyor spending the time contemplated by the surveyors' profession in carrying out a HomeBuyer's Report.

159. In my view, the only ways that the surveyor can protect the prospective purchaser are (1) to spell out the limitation on the advice given; (2) to be particularly alert to any signs of inadequate design or faulty workmanship; and (3) to draw attention in appropriate terms to protections available to the purchaser, including (on the facts of this case) a Professional Consultant's Certificate.

The problems of dampness at the Property

160. I turn now to consider what seems to me to be by far the most significant problems at the Property, namely the multiple problems of dampness.

161. the Property stands in a dramatic position on the coast with magnificent coastal views. Withstanding the weather would always have been a problem, and any surveyor would have to be alert to see if there were any signs that the

property either already had damp problems or might have such problems in the future. In paragraph 41 of his witness statement, Mr Large made it clear that he was well aware of this.

162. I am satisfied on the evidence before me that he took extensive damp readings and that none of those revealed any problems.

163. In section E4 of his report (which related to "main walls) he reported as follows[135]:

> "There are no signs of structural movement in the main walls which are generally vertical and free from any serious cracking, bulging or other signs of inadequate construction or support. The render coatings are firmly attached and no damage or weathering has occurred. An exposed coastal location of this type could lead to relatively rapid weathering and possible corrosion of metal fixings or other materials (such as wall ties between skins of cavity blockwork or angle beading at corners and edges of render); it would be normal good practice to use non-ferrous components but they are entirely concealed and no specification has been provided as to materials used. The structure has not yet been in place for sufficient time for any defects of this nature to develop, but if suitable materials were used and properly installed there should be no major problems. The timber framed wall areas are likely to be designed with suitable weatherproofing membrane, insulation and vapour control within the structure, but these are concealed; however there are no apparent reasons to suspect any defects or deficiencies. The windows to these areas have lead apron flashings which are satisfactory….
>
> "Damp-proofing of the walls would be provided by means of damp proof courses near ground level and wall cavities to protect from lateral damp penetration, particularly along the north-east side where the ground is well above the internal floor levels. The lower ground floor room would also have damp-proofing provision of the internal main walls which are built against the higher ground beneath the house. None of the damp-proofing detail can be seen. See also Section F4 regarding internal wall finishes and dampness"

164. In Section F4 of the report (which related to "walls and partitions") he said[136]:

[135] E1/391-392

> "There are no signs of dampness internally and it appears that the damp proofing protection is satisfactorily designed and preventing rising or laterally penetrating dampness from affecting the interior. Condensation can form on cool or inherently damp walls and cause mould growth to develop. There are no signs that this is a problem at present but this can be dependent upon factors such as heating, ventilation and occupancy."

165. Section E5 dealt with "windows"[137]:

> "The windows are Rationel manufactured units, which are wood based with aluminium external coatings. They have double glazed lights and opening windows are a mix of side and top hung, with friction stays. Security locks and trickle vents are provided. There are also double glazed fixed window panels with hardwood framing to the hall and stairwell area by the front door and to the gable apex of the sitting room over the garage.
>
> "**Condition rating 1**
>
> "The windows are of reasonably good quality and are in good condition and satisfactorily installed. Several opening lights were operated and are satisfactory. (It was noted that many had fly swarms present which should disperse once the property is regularly occupied). Maintenance requirements should be relatively low although the coastal location may result in a need for fairly frequent lubrication of metal components. There were no signs of rain seepage around windows but extreme weather conditions may result in some deterioration over a prolonged period. The hardwood framing to the fixed gable windows is in good order; this has a varnish or similar coating which is satisfactory but will need periodic decorative attention."

166. Section E6 related to "outside doors (including patio doors)". Here he advised[138]:

> "The outside doors other than the main front door are Rationel units similar to the windows, with double hung door units to the sitting room, dining area and three to the lower living room. The front door is a boarded hardwood set in a hardwood frame and sill.

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[136] E1/395
[137] E1/393
[138] E1/393

"**Condition rating 1**

"The Rationel door units are in good order and the same factors apply as for the windows; some lubrication of locks etc. will be needed but no major problems are foreseen. The front door is sound but binds slightly, evidently having swollen a little; if this persists through the seasons it will need some remedial attention. The door and sill varnish coating is wearing slightly and will need attention before long."

167. Thus, apart from a reference to the front door binding slightly, the report gave the Property a clean bill of health so far as dampness and damp proofing were concerned.

168. I have already recorded that both before and after Mr. Large's survey, there were serious problems of damp penetration around the front door. It seems highly probable that sufficient works had been done in anticipation of his survey to disguise the extent of those problems.

169. How serious are the damp proofing problems at the Property?

170. In his report, Mr Avery says at paragraphs 6.13 and 6.14[139]:

"6.13 I do not propose to itemise and comment upon the individual issues in this section of the report but will comment upon the alleged issues under my next section by way of observations on the Claimants' expert's opinion. I can say immediately though that at the time of my inspection, other than as revealed by the opening up carried out by the Claimants' experts and their contractors, I saw no evidence of significant water ingress, or indeed any evidence of, for instance, defects to flooring within the main residential areas alleged to have been caused by water ingress issues.

"6.14 From my initial walk around the Property it was also clear that despite the Claimants having been in residence for a little under 8 years, the Property still retained an appearance of a premises that had been extended/redeveloped to a generally high standard of finish, with good quality floor coverings, good quality kitchen fitments and sanitary ware which at the time of

[139] D3/12-13

> redevelopment would have been of high quality. I also understand, however, that the Claimants have undertaken certain remedial works which have resolved a number of the problems that were experienced from their early occupation of the Property."

171. It may well be that by the time that Mr Avery attended there was no longer evidence of extensive water ingress, but I am satisfied both from the evidence of Mr and Mrs Hart (Mrs Hart in particular) and of Mr Easton that there was extensive water ingress. As I have pointed out above, Mr Avery was at a disadvantage compared to Mr Easton in that whilst Mr Easton had made a number of visits to the property, Mr Avery only made one, on the 24th September 2019.

172. I have before me a Scott Schedule which itemises the defects which the Harts allege. In his Closing Submissions, Mr Wilton very helpfully sets out in a table Mr Large's position as to those defects. The following defects relevant to damp proofing are admitted:

(1) LGF/1: damp penetration at the patio door/window threshold;

(2) LGF/4: damp proof membrane not linked to door thresholds of garden room;

(3) GF/2C: defective design and construction of timber frame extension at ground and first floor, allowing damp penetration;

(4) GF/5: damp penetration to front entrance screen;

(5) GF/7: damp ingress because of penetration through the paved terrace;

(6) GF/11: damp penetration to staircase to garage;

(7) FF/1: damp penetration through external cedar cladding;

(8) DP/Other/1: damp penetration because of defective Rationel window and external door/screen openings;

(9) DP/Other/2: in at least one case the lead flashing to a window did not have an appropriate fall.

173. Mr Easton's list of damp proofing related defects is longer, but this list of admitted defects reveals a very extensive list of problems in many locations in the house.

174. In addition, I am satisfied on Mr Easton's evidence that the following other damp related defects have been established:

(1) LGF/3: dpc to external walls on patio less than 150mm above ground without tanking;

(2) LGF/5: no vapour barrier to the ground floor room;

(3) GF/3: damp penetration at threshold to living and dining room doors.

However, whilst this is a more extensive list of defects than admitted on behalf of Mr Large, for reasons explained below relating to the point that an incoming purchaser would value on the basis that the property needed to be demolished and rebuilt, this does not make a difference to the outcome in this case.

Fire Safety Issues

175. Item Fire Sep/1 alleges an insufficient step from the garage. This is admitted, but is a minor issue.

176. Item Fire Sep/3 alleges lack of adequate fire protection to steel columns and beams. This is disputed by Mr Large, but I accept Mr Easton's evidence that this defect existed.

Defective flues to stoves

177. This is item SFA/1. It is partially accepted as a defect.

Ventilation issues

178. There are two of these items in the Scott Schedule – items Vent/1 and Vent 2. I am satisfied they existed, but they are minor.

Approach Steps

179. This is item Other/1 in the Scott Schedule. I am not persuaded that this is made out as a defect – the allegation is that the approach steps were non-compliant with Regulation M1 Schedule 1 of the Building Regulations. The requirements of the Regulations are complicated. In this case, the Building Control officials approved what was proposed and built.

Surface Rust

180. Item Other/5 alleges that there was surface rust on the steelwork to the lounge and dining room. This is not admitted.

181. It is not clear to me that this was the case when Mr Large inspected the property (he would not have been able to see the concealed steelwork) nor the extent to which it is now the case.

Plasterboard to garage

182. This is item Other/8. The allegation is that the plasterboard in the garage should have been, but was not, moisture resistant. This is contested, but I accept Mr. Easton's evidence that it should have been and was not.

Roof Defects

183. Items Other/13A and Other/14 relate to roof defects – in the first case an allegation that certain roof slates had an excessive overhang, and in the second place that there were defective lead overlaps to the bay roof outside the dining area. These are both admitted as defects.

Structural Steelwork

184. Item Other/16 alleges that Mr Large should have recommended that a warranty be obtained in respect of the structural steelwork.

185. In the absence of evidence from a structural engineer, I decline to make any adverse finding against Mr Large as to the existence of any problems with the structural steelwork.

Lack of Party Wall Agreement

186. This is item Other/18. It does not seem to me to be an appropriate allegation against Mr. Large.

Was Mr Large negligent in failing to draw attention to the defects in the Property in his report?

187. Of the defects which I have found existed in the building, many are relatively trivial: the items relating to flues and ventilation seem to me to be in that category as also in the overall scale of the defects are the allegations in respect of the plasterboard in the garage and the insufficient step from the garage.

188. One defect of greater significance was not capable of being seen by Mr Large on his survey – the surface rust on the steelwork to the lounge and dining room.

189. Some of the items were accepted by Mr Large in cross-examination not only to be defective, but visibly so: item FF1, in respect of the external cedar cladding, in the case of at least one window, item DP/Other/2 relating to the fall on a window cill, and the defective lead overlaps to the bay roof outside the dining area.

190. However, as I have already said, the most significant problems were with aspects of the damp proofing.

191. I have found that there was no evidence of actual damp at the time of his survey.

192. However, it is clear that generally there was no evidence of damp proof membranes. Generally, this was because the walls were rendered in such a way as to make it impossible to see whether there were or were not such membranes, although there were some locations where a damp proof

membrane should have been visible but was not. However, these were isolated instances.

193. The consequence was that Mr Large simply could not say whether there was or was not adequate damp proofing of the building. In section E4 of his report he did say that "the lower ground floor room would also have damp-proofing provision of the internal main walls which are built against the higher ground beneath the house. None of the damp-proofing detail can be seen". Higher up in the same section he said "the timber framed wall areas are likely to be designed with suitable weatherproofing membrane, insulation and vapour control within the structure, but these are concealed; however, there are no apparent reasons to suspect any defects or deficiencies." Thus, in both these instances, Mr Large was simply assuming that because these features should have been present they were.

194. I have noted at paragraph 47 above that the RICS Practice Note refers to the category "Not Inspected" – it seems to me that this would have been the appropriate categorisation in respect of the damp proofing where Mr Large was unable to inspect.

195. In paragraphs 37 to 39 of her Closing Submissions, Ms White submits:

> "37. However, regardless of whether there was significant damage evident (i.e. damp or water ingress), the point is that Mr Large should have reported that he could not see visible d.p.c. at any relevant location and that further investigations were required, which in essence would require confirming the position with Harrison Sutton and Building Control, with the potential to undertake opening up, if those enquiries proved unsatisfactory.
>
> "As set out above, it is a clear requirement of the Practice Note to report on *"Damp proof course – type, position and*

> *condition"*. The very requirement itself demonstrates that the d.p.c should be visible and there to be inspected and that its total absence would be unusual.
>
> "39. The crux is whether the d.p.c. could have been seen at all at the Property. Both Mr Large, and Mr Avery in support of him, say that the d.p.c. was rendered-over. However, that it not correct from an inspection of photos **[F3A/8 & 9 & 10]**. Even if there is one door with level access, the other door was of a traditional construction with an upstand, where the d.p.c. should have been visible, in line with the relevant British Standard:"
>
> > "a. BS.5628;3;2005, 5.5.5.1 states "… a d.p.c. should extend through the full thickness of the wall or leaf and preferably project beyond the external face".
> >
> > "b. That this is accepted practice is confirmed by the Brick Development Association Guidance Note on Building, which states "… on external faces, it is preferable to project d.p.c's slightly. Never point over the face of a d.p.c. i.e.. d.p.c.'s should project in order to be visible and to ensure water does not bypass the d.p.c. through the pointing" [D1/5/36]."

196. I accept those submissions, particularly paragraph 37.

197. Further in my view, given the difficulties which faced Mr Large in reporting upon a newly redeveloped house, he should have been alert to some of the signs of sloppy workmanship which were there to be seen and to which he should have drawn attention, or given greater emphasis:

(1) In the latter category, giving greater emphasis, it seems to me that he dealt somewhat lightly with the fact that the front door of this newly redeveloped property was binding.

(2) In the first category were the defects relating to the falls on the window cills, the two roofing defects and in addition obviously poor workmanship in the laying of a terrace.

198. All of these should have merited some mention or more emphatic mention in his report.

199. It is against that background that I turn to consider the case relating to the absence of a Professional Consultant's Certificate.

Was Mr Large negligent in respect of advice as to the need for a Professional Consultant's Certificate?

200. Towards the end of the HomeBuyer's Report is a section headed "Issues for your legal advisers". I have set out the contents of that section at paragraph 57 above, but because of its significance, I repeat the contents here. It starts with this rubric[140]:

> "We do not act as "the legal adviser" and will not comment on any legal documents. However, if during the inspection we identify issues that your legal advisers may need to investigate further, we may refer to these in the report (for example, check whether there is a warranty covering replacement windows)."

201. There then follow three boxes. The first I1, relates to "Regulation". That box was completed by Mr Large in the following terms:

> "Very limited information on the planning consent for the recent works have been seen on the Council website and no information regarding Building Regulations has been seen. Full investigation should be made and a Completion Certificate for the works, together with appropriate certification for the controlled services should be requested."

202. The next box, I2, related to "Guarantees". In this box Mr Large wrote:

> "No guarantee documents have been provided but enquiries regarding any available guarantees should be made by your legal adviser and all such documents should be transferred to you on completion of the purchase. It is assumed that there

[140] E1/401

> will be guarantees at least for windows and doors, the heating installation, electrical appliances, sanitary ware etc."

203. The third box, I3, related to "other matters". In this he wrote:

> "The property is understood to be of freehold tenure but no further information has been provided. Your legal adviser should investigate and report to you on all aspects of tenure, including any rights, reservations and covenants. The location of the boundary to the north-east of the house should be verified. Any rights and obligations regarding the coastal slope area should be fully investigated."

204. Thus there was no advice in the Report that a Professional Consultant's Certificate should be sought.

205. In the course of witness conferencing I asked both Mr Avery and Mr Easton about the advice which a surveyor should give as to seeking such a Certificate[141]:

> "MR ROGER TER HAAR QC: It seems the consequence of what you have just said, Mr Avery, is the advice from an experienced surveyor to Mr and Mrs Hart should have been, "You have jolly well got to get a PCC for two reasons. Firstly to be sure that the property has been properly designed and constructed, but also because if you want to resell you will be in real trouble in a couple of years time if someone is trying to get a mortgage, without one of those in existence –
>
> "MR AVERY: Certainly the PCC, my Lord, is of great assistance when it comes to selling on. As time passes of course, it becomes, as the NHBC does, less and less important.
>
> "MR ROGER TER HAAR QC: And you become more and more reliant upon whether there has been any leakage or whether the heating actually works, or whatever it might be.
>
> "MR AVERY: Yes.
>
> "MR ROGER TER HAAR QC: Mr Easton?
>
> "MR EASTON: I would agree with Mr Avery. I can't comment on the resale and valuation one bit. But it will give the purchaser the comfort that the architect is saying, "Yes, I

[141] Transcript Day 4 pages 174 -175

> designed it, yes, I monitored it, and here is a certificate to prove it". You may then ask more questions behind it, "How often did you? Can I have a copy of the drawings? And all the usual questions that we would probably ask for, but you would have comfort that the man or the lady – and I think it was a lady in this case – designed the project and saw it through, would be able to say, "Yes, I'm happy it complies" – sorry, I am just thinking.
>
> "It isn't that you can – nobody wants to – nobody wants to – litigants don't want to be here. Nobody wants to sue anybody. They just want comfort that their house complies. And the PCC, the Professional Consultant's Certificate, will give much more comfort, as Mr Avery has said, that somebody has seen it through from beginning to end and the hypothetical bits go out of the window."

206. Thus there was agreement between the surveyors that Mr Large should have advised in his report that the Harts should seek a Professional Consultant's Certificate.

207. Mr Wilton's submission on behalf of Mr Large at paragraph 65 of his Closing Submissions was:

> "The claimants criticise D1 for the fact that he did not advise sufficiently *in his report* as to the need for a certificate from D3 or as to the importance of getting a suitable range of guarantees. However, at that stage the concerns that subsequently arose had not come to pass and D1 had not been provided with any information as to the certification and warranties, if any, the claimants had or would obtain, because the claimants got D1 to inspect and report at short-notice, at a time when the usual conveyancing inquiries had not yet been completed. It is submitted that there was in those circumstances no reason to give any more advice about warranties than the general advice D1 gave, and that there was no call specifically to call for a certificate from D3. In any event, D1 gave clear and specific advice about a certificate from D3 and about warranties etc at a later stage, in advance of exchange of contracts."

208. In my judgment this submission (insofar as it relates to the original report) is difficult to sustain in the light of the evidence from the surveyors which I have set out above.

209. A fortnight after providing his report, Mr Large did advise that such a Certificate should be sought – see paragraph **[83]** above. In his email Mr Large advised that a building control Completion Certificate was an "essential document". By contrast in respect of the Professional Consultant's Certificate he said:

> "It is not necessarily essential that a certificate is provided, but with a project of this size, stated as having been managed by an architectural firm, it would not be unreasonable to ask for this. If such a certificate is not available, there may be little practical recourse if it were found that unseen deficiencies exist. You should seek advice on this from your legal adviser."

210. In giving evidence orally, Mr Large accepted that the fact that the property had been completely rebuilt under the supervision of well-known local architects was something he was bringing to bear in reporting.[142] This made it particularly important to obtain a Professional Consultant's Certificate.

211. Further, when asked questions about the email containing this advice, Mr Large spoke of the concerns he was feeling by this time[143]:

> "The ones that gave me concern were perhaps more to do with perhaps the quality of finish in some elements, rather than anything I suspected might be hidden away. It wasn't that. As I have – if I haven't said it before, there was nothing in what I could see visually during the whole of my inspection that led me to think that there was a trail to suspect hidden defects.
>
> "It was the – yes, the feeling one gets, I suppose, with experience, one gets a feel for a property and I was beginning to feel a little bit uncomfortable with some elements of the quality of the finish and things like that that might me wonder to what extent and whether they had in fact supervised the work, which is why I wanted to be sure about that.

[142] Transcript day 2 pages 77 - 78
[143] Transcript day 3 pages 67 - 68

> "MR ROGER TER HAAR QC: Sorry to press you, can you say what were the elements of the finish that you were concerned about? I know it is a long time ago.
>
> "A. Yes, things like the rather scruffy finish to the paving slabs, that type of thing.
>
> "MR ROGER TER HAAR QC: I have to say I noticed that looking at the photographs, it didn't look like a brand new terrace.
>
> "A. Yes, it wasn't well done, it wasn't well pointed. Some of the things that I would have registered but would have assumed were picked up, such as, which hasn't been discussed, but you are aware of it, the question of the step in the garage perhaps not quite meeting the 100 millimetre requirement for a step, which was silly because there is another staircase leading up to the accommodation, so there is no conceivable way that the requirement of the Building Regulations would have been relevant in those circumstances, because the garage had a floor area of about 41 square metres, I believe, and it wouldn't have been possible for any discharge of fluid to enter the new accommodation. But nevertheless, it was the fact that that was there, it was a relatively small, insignificant thing, they were that type of thing.
>
> "But I was just beginning – but mainly I have to say that primarily my suspicion in terms of making sure that we had – they had what they needed in protection was the fact that the cesspit hadn't been upgraded, as I was told after my report, because of course I think Mr Lamb from Savills went and found it on the other side of the fence, which is why I couldn't find it. It wasn't within what I perceived to the boundary of the property."

212. Against that background Ms White submits in paragraph 86 of her Closing Submissions:

> "Given the settled evidence of the experts, insofar as Mr Large took it upon himself to provide further evidence about the PCC – outside the strict confines of the report – he should reasonably have emphasised that obtaining the PCC was essential and something that had to be done prior to committing to a purchase, in the particular circumstances of this case, especially given Mr Large's reliance on the involvement of Harrison Sutton, when coming to the conclusions about the state of the Property. "

213. In his Closing Submissions for Mr Large, Mr Wilton submits at paragraphs 66:

> "The claimants also criticise D1 for failing to give more *emphatic* advice about the need for a suitable architect's certificate from D3. That is not a fair criticism given that the claimants *knew* they needed such a certificate and had resolved not to exchange without the assurance they would get it and were by now relying on D2: see Mr Hart's statement at paragraphs 15 and 49 **[C1/1/35, 47]**, Mrs Hart's statement at paragraph 23 **[C1/2/37-8]** and her oral evidence at **[T1/p156 lines 1-25, p157 lines 1-6, p158 lines 18-25, p159 lines 7-25 and p164 line 18 – p165 line12]**, and the documents at **[E2/663, 669.1 and 673]** which make it clear the Harts were insistent they should have such a certificate if they were to proceed. That resolution was the product of the conversation Mr Hart had with D1, and of D1's email of 17 November 2011 **[E2/638 and 659]**. It therefore makes no sense to say the latter communication was not sufficiently emphatic. It was because the Harts were alive to the significance of the point. Notwithstanding the nuances in D1's language he made absolutely clear that there could be serious consequences in respect of a lack of recourse for latent defects if the claimants went ahead without a suitable certificate. When one also bears in mind that this communication had to be passed on late at night by way of 'extra duties', pursuant to his volunteering to assist the Harts further, without any additional payment, it is submitted that there is nothing in this criticism. D1 was going above and beyond the call of duty and it is hopeless to say that his advice was not sufficiently emphatic when the claimants themselves were quite capable of taking on board the importance of what was being said, as indeed they did. Even if he *might* have said more, it was not negligent to say what he said."

214. In my judgment, given Mr Large's understandable reliance upon the previous role of the architects, and given the concerns which he was feeling by the time he advised in his email, and given that in my judgment he should have drawn attention to the need to obtain a Professional Consultant's Certificate in his report, I accept Ms White's submission on this point.

215. For the above reasons, I conclude that Mr Large was negligent in failing to recommend in his Report that a Professional Consultant's Certificate should be sought and in failing to advise in terms in his 17th November email that like the Completion Certificate from building control, it was essential that a Professional Consultant's Certificate should be sought.

How would the Harts have reacted to different advice from Mr Large?

216. Thus I have concluded:

(1) that Mr Large should have reported that he could not see visible damp proofing at any relevant location and that further investigations were required, which in essence would require confirming the position with Harrison Sutton and Building Control, with the potential to undertake opening up, if those enquiries proved unsatisfactory (see paragraph 195 and 196 above);

(2) that Mr Large was negligent in failing to recommend in his Report that a Professional Consultant's Certificate should be sought and in failing to advise in terms in his 17 November email that like the Completion Certificate from building control, it was essential that a Professional Consultant's Certificate should be sought (see paragraph 215 above).

217. If such advice had been given, how would the Harts have reacted and what would have happened?

218. For Mr Large, Mr Wilton argues that if advice of the type suggested at paragraph 216 (1) had been given, the Harts would have continued to purchase subject perhaps to some reduction in price.

219. For the Harts, Ms White submits at paragraphs 45 and 46 of her Closing Submissions:

> "45. If Mr Large had reported with reasonable skill and care on the d.p.c., then all of the issues with the waterproofing would have come tumbling down like a house of cards because the Harts would clearly have made particular and focussed enquiries of Harrison Sutton, who would either have had to reveal, in the face of such specific questioning, that there may be an issue or, otherwise, simply obfuscate in the face of such questions. It is submitted that they would not have been able to be as flippant as when they asserted casually that *"there would have been no problems"* with the Property. They would have been pushed by the Harts to provide comment on this (and other) particular issue.
>
> "46. In the absence of a proper answer from Harrison Sutton, the Harts would either have withdrawn from the purchase immediately, or having undertaken further investigations at the Property, would have withdrawn from the purchase at that point."

220. Having heard evidence from both of the Harts, and having considered the contemporary email traffic, I have no doubt that Ms. White's submissions are right. In reaching that conclusion, I bear in mind the concerns which the Harts had already expressed about the property (see paragraphs 61 and 85 above).

221. As to the advice which I have referred to at paragraph 216(2) above, Ms White's submission in paragraph 87 of her Closing Submissions is as follows:

> "The inevitable consequence is that, had Mr Large provided proper advice, the Harts would have pushed harder to ensure that they had the PCC <u>in their hands</u> prior to instructing Michelmores to exchange contracts. They would have pushed to resolve the issue as they had done in respect of the drainage. Indeed, had they been made aware of the significance of the PCC by Mr Large, they would certainly have withdrawn from the purchase had no PCC been forthcoming."

222. For Mr Large, Mr Wilton makes a powerful submission that it was upon Michelmores, the solicitors, that the Harts relied to get adequate protection

through obtaining a Professional Consultant's Certificate, not Mr.Large. Mr Wilton submits:

> "70. It is denied that the claimants ultimately relied on D1 in respect of advice concerning the need for guarantees and warranties and due certification. On the contrary, the claimants ultimately relied on D2 in that respect, because D1 had advised insofar as he could about such matters, because the claimants were left to take things up with D2, because D2 had conduct of the conveyancing process in which suitable guarantees and warranties etc were being called for (via the Property Information Form and otherwise), because the question of what more could be obtained and what more could be done to protect the claimants and whether any remaining risks should be run was pre-eminently a legal issue, and because the claimants would naturally look to D2 to advise them about what to do in all such respects, as they did.
>
> "71. What in fact happened was that the claimants, as intimated above, sought D2's advice by email at 9.53 on 18 November 2011 **[E2/660]**. There was an initial plan to exchange contracts that day (a Friday) but that did not happen, and then on 21 November 2011 at 8.36 **[E2/663]** the claimants emailed Savills (the selling agents) to say that they had a number of concerns including the absence of a completion certificate from D3 which D1 said they should have, although "*In the spirit of moving forward we took the decision to accept these things and to deal with them after the purchase, in order to allow exchange to go ahead on Friday. Unfortunately, that did not happen as you know*". That indicates that the claimants had been prepared to deal with such matters *after* exchange (albeit in the belief that there was an obligation to provide them) although the claimants now said to Savills that the Fitzsimmons would have to provide all the receipts and documentation previously requested *before* exchange could occur. That email was copied to D2 at 8.53 **[E2/663]** and D2 was told not to exchange until the claimants gave the go-ahead. Then, at 10.21 on 22 November 2012, the claimants emailed D2 to say **[E2/673]** "…*We would need written in the contract that all of the receipts and documentation previously discussed would be supplied on exchange*…", apparently referring in that respect to a suitable architect's completion certificate, amongst other things (see the Reply to D2's Defence paragraph 10b **[1A/4/34]**).
>
> "72. What then happened is a little obscure but it looks as if D2 merely reached an informal understanding with the vendors' solicitors on 22 November 2011 that all the documentation the

> vendors had would be handed over after exchange **[E2/671]**, exchange then took place at 12.50 pm without any contractual provision for the passing on of certification or guarantees **[E2/678]**, with completion the following day.
>
> "73. The claimants both acknowledged in their evidence that at the end of this process they were looking to D2 to protect them: Mrs Hart (see above); Mr Hart **[T2/pp49-55]**.
>
> "74. It is submitted that ultimately the claimants did not rely on D1 in respect of the question of guarantees and warranties and the availability of any form of certification from D3. D1 had earlier made it clear that such documentation should be provided and identified the critical risk that the claimants might have no recourse if there were latent defects at the Property if such material, and in particular a suitable certificate from D3, was not forthcoming. The claimants took that up with D2 as from their point of view this was an essential requirement, they made that clear to D2, and yet D2 dealt with the problem in the ineffective way detailed above. For his part D1 had no further involvement and no opportunity to advise when it became clear (insofar as it did) what was available.
>
> "75. As there was ultimately no reliance in this respect this means the claimants can have no claim in respect of D1's advice so far as these matters are concerned even if (which is denied) any earlier advice was negligent. In short, D1's advice (or the lack thereof) in respect of the need for certification from D3 did not ultimately pay a real and substantial part in inducing the claimants to purchase without such a certificate: see *Capital Alternative Fund Services v Drivers Jonas* [2011] EWHC 2336 (Comm) at [268] for the 'real and substantial part' test. On the contrary, the claimants were by the time of exchange of contracts relying solely on D2 and the losses, if any, referable to the absence of due certification from D3 were solely caused by D2's failure to take appropriate steps to try and procure a suitable certificate and an appropriate range of warranties and guarantees prior to exchange and/or in not advising the claimants sufficiently of the risks they were running if that material was not to hand prior to exchange and/or in assuming the material would be provided after exchange when D2 did not know what was available or whether it would meet the claimants' expectations."

223. There is real strength in these submissions, but in my view, having concluded that Mr Large was in breach of his duty of care in the respects set out above, the question I must answer is whether there was negligence on the part of Michelmores, and, if so, whether that negligence broke the chain of causation

between the negligence on the part of Mr Large and the loss suffered by the Harts.

224. I must be cautious in finding that a professional party not represented before me fell below the standards to be expected of it, but on the evidence before me I find the conduct of Michelmores difficult to understand. Firstly, it is difficult to understand why their standard pro forma report was edited to exclude any reference to the absence of a Professional Consultant's Certificate.

225. Secondly, it is difficult to understand why, once Mr Large's email of the 17th November had been forwarded to them, Michelmores then failed to press for such a Certificate, or to advise the Harts against exchange of contracts without having the benefit of such a Certificate.

226. Thus, on the evidence before me, and conscious that I have not had the benefit of evidence or submissions explaining what appears to me to be inexplicable, I approach the issue of causation upon the basis that Michelmores were guilty of causatively relevant negligence.

227. The question which I then have to answer is whether that negligence on the part of Michelmores broke the chain of causation so as to prevent the Harts recovering damages from Mr Large.

228. In my view the answer to that question is "no". In my judgment, had Mr Large not failed in the respects set out at paragraphs 216(1) and (2) above, the position would have been markedly different. Firstly, the Harts would have been very determined to obtain the relevant Certificate and, in the absence of

such a Certificate, would in my view have withdrawn from the transaction, particularly given that Mrs Hart was never as enthusiastic about the purchase as Mr Hart was. Secondly, if Mr Large had raised the issue in his Report and/or had been more emphatic in his email, I find it difficult to believe that Michelmores would have acted as they did.

229. If the architects had been asked in clear terms to provide a Professional Consultant's Certificate, would they have done so? Again I have to be careful having not received evidence or submissions from the architects, but my conclusion is that no such Certificate would have been forthcoming: as I have set out above, at the time of exchange of contracts, Ms Sullivan was working hard to try to find a solution to the water ingress problem around the front door. In those circumstances, it seems to me unlikely that the architects would have wanted to expose themselves and their professional indemnity insurers by issuing a Certificate.

230. It is also relevant that the architects' pleaded case in paragraph 15.4 of their Amended Defence is that if requested they would not have provided a Certificate.[144]

231. For these reasons, I accept Ms White's submission set out at paragraph 221 above: the Harts would not have proceeded with the purchase without the benefit of a Professional Consultant's Certificate. Such a Certificate would not have been forthcoming.

232. The consequence is that, had Mr Large given the advice which I have held that he should have given, the Harts would not have purchased the Property.

[144] A/tab 12/328

Who is to bear the risk of unidentified defects?

233. In circumstances where I have concluded that this is a "no transaction" case, the parties agree that I should assess damages (apart from damages for inconvenience and distress) upon the basis of diminution in value.

234. Mr Large valued the Property in the sum of £1,200,000.

235. It is common ground that without significant defects, this was the true value of the property.

236. After that agreement, there is a substantial divergence between the parties.

237. Ms White submits that the approach should be as follows:

> "91. …there is a dispute between the parties as to whether Mr Large should be liable for (putting aside the issue of any site cap), based on the principles set out, *inter alia*, in *South Australia Asset Management Corporation v. York Montague Ltd* [1997] A.C. 191:
>
> > "a. the diminution in value arising from any defects that Mr Large negligently failed to report on in the Homebuyer Report. On this basis, Mr Large is only liable for defects he should have reported on but did not;
> >
> > or
> >
> > "b. the difference in value between the Property with the defects as reported to them in the Report, and its value with all the defects which in fact existed. The Harts say that this is the appropriate measure insofar as Mr Large should have advised the Harts – as part of his advice in respect of the need to obtain a PCC - that, given the defects which were apparent, there were likely to be other substantial defects which were not obvious on a survey, and that this was very likely to be the case if Harrison Sutton were not willing to provide a PCC, and that as a result the Claimants should not purchase the Property, if Harrison Sutton were not willing to provide a PCC. Crucially, at the time of Mr Large's 17 November 2011 email, he knew that Harrison Sutton had provided a Certificate of Making Good of Defects, when

> they had been asked for an Architect's Completion (i.e. a PCC). This should have caused him to give clear and unambiguous advice that the purchase should not proceed without the PCC. This is especially the case where he knew – or should have known – having undertaken his inspection, that the Property was riddled with defects and other issues, notwithstanding Harrison Sutton's role.
>
> "92. The latter measure of damages arises because of the advice given – or rather not given – in the email sent by Mr Large on 17 November 2011 (which is discussed above). He should have explained that the PCC was essential, in the circumstances, and that an adverse inference would inevitably have to be drawn if Harrison Sutton were not willing to stand behind the quality of the build by providing a PCC.
>
> "93. The Harts' case is therefore, that Mr Large should be liable for the diminution in value arising from the need to repair all of the defects. As is set out below, the basis upon which the Claimants will need to give credit will depend on whether the Judge takes the former or latter approach to valuing the claim."

238. Mr Wilton, on the other hand, submits:

> "96. The use of the 'diminution in value' measure in a 'no-transaction' case, established by the Court of Appeal in *Watts v Morrow* [1991] 1 WLR 1421 and reaffirmed in *Smith v Peter North* [2001] PNLR 274, appear to be agreed by the claimants – see the measures at paragraphs 28a and 28b of the particulars of claim **[A1/9/226-8]**. However, they go on to put forward two further measures of loss. It is submitted they are misconceived.
>
> "97. The first proceeds from the allegation that D1 should have advised that given the defects that were apparent there might be other substantial defects not obvious on a survey and/or that as a result the claimants should not purchase the Property. It is said that that entails a more expansive measure of loss, as set out in paragraph 28c, that is, the difference in value between the Property with the defects as reported and its value with all the defects which in fact existed. That, it is submitted, is wrong in principle as the claimants are entitled to damages for the difference between what they paid for the Property in its assumed condition and its value if a competent report had been given. If D1 should have reported as is suggested then one has to ask what the value of the Property would then have been in the light of *that* information ie to the effect that there could be unknown defects, not what its value would have been if all latent defects had somehow been made known, as they subsequently were. To seek damages by reference to matters

which D1 could never have identified is to treat D1 as having warranted the apparent good condition of the Property or as a guarantor or insurer for the condition of the Property, or, in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 ("SAAMCo") / *Hughes-Holland v BPE Solicitors* [2017] UKSC 21; [2018] AC 599 terms, to hold him liable for losses which were not referable to the information he provided. Instead they represent inherent risks of buying a property, that is, the risk of latent defects which a competent survey does not unearth, and which will only come to light at a later date, sometimes, as in this case in some respects, only following opening-up and other intrusive investigations. D1 was not assuming responsibility for all such risks, only for those a reasonably competent surveyor should have been expected to identify at the time, and the measure of loss should be tailored accordingly, reflecting the value of the Property as it could and should have been described at the time in question, not later: compare *Cottingham v Attey Bower* [2000] PNLR 557 at [46]-[48]; *Thomson v Christie Manson & Woods* [2005] EWCA Civ 555, [2005] PNLR 713 at headnote and [99], [111], [126-139, particularly [131], and *Capita v Drivers Jonas* [2011] EWHC 2336 (Comm) at first instance at [298-309].

"98. The further alternative measure in 28d is misconceived for similar reasons. D1's duty was to advise about the condition of the Property and in respect of ancillary matters such as identifying the need to take precautionary steps such as seeking appropriate guarantees or warranties or certification. However, it was not D1's job to procure such documentary protection: that was for the claimants assisted by their solicitor, D2. D1 had not therefore assumed any duty to *ensure* that the claimants could exercise rights of recourse against D3 and it owed no duty in respect of any losses which the claimants may have sustained as a result of not having such rights of recourse. Like surveyors and valuers generally, D1's duty was directed to the condition of the Property and its value, and it is there that the claimants must try and find compensable losses.

"99. It is unsurprising therefore that the 'diminution in value' measure is the invariable measure of loss used against surveyors and valuers even where they are instructed to provide or volunteer information which goes beyond their core brief: see the *Capita* case where a surveyor was obliged to assess a number of factors pertaining to the prospects of a potential investment in a factory outlet centre but that was all directed at the central obligation to provide a valuation: that in turn limited the losses within the scope of the duty to a 'diminution in value' measure."

239. As was emphasised by Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at page 211A the starting point is to consider the cause of action against the defendant (in that case a valuer advising a lender):

> "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action."

240. In a well known passage at page 213 C-F Lord Hoffmann gave this "parable", as it as described in a later case:

> "Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.
>
> "I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.
>
> "On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice

> because it would have occurred even if the advice had been correct.""

241. A little later, at page 214 B-F, he continued (italics are in the original):

> "Your Lordships might, I would suggest, think that there was something wrong with a principle which, in the example which in have given, produced the result that the doctor was liable…..There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.
>
> "I think that one can to some extent generalise the principle upon which this response depends. It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.
>
> "The principle thus stated distinguishes between a duty to *provide information* for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course he should take. If the duty to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong."

242. In *Hughes-Holland v BPE Solicitors* [2017] UKSC 21; [2018] AC 599 at paragraph [1] Lord Sumption JSC cited Lord Hoffmann's mountaineer example and said:

> "Like all parables, this one over-simplifies the issue and will not bear too much analysis. But it serves the purpose which its

> author intended, of introducing one of the main dilemmas of the law of damages."

243. Lord Sumption discussed in some detail Lord Hoffmann's distinction between "advice" and "information":

> "39. Turning to the distinction between advice and information, this has given rise to confusion largely because of the descriptive inadequacy of these labels. On the face of it they are neither distinct nor mutually exclusive categories. Information given by a professional man to his client is usually a specific form of advice, and most advice will involve conveying information. Neither label really corresponds to the contents of the bottle. The nature of the distinction is, however, clear from its place in Lord Hoffmann's analysis as well as from his language.
>
> "40. In cases falling within Lord Hoffmann's "advice" category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction he should have protected his client against. The House of Lords might have said of the "advice" cases that the client was entitled to the losses flowing from the transaction if they were not just attributable to risks within the scope of the adviser's duty but to risks which had been negligently assessed by the adviser. In the great majority of cases, this would have assimilated the two categories. An "adviser" would simply have been legally responsible for a wider range of informational errors. But in a case where the adviser is responsible for guiding the whole decision-making process, there is a certain pragmatic justice in the test that the Appellate Committee preferred. If the adviser has a duty to protect his client (so far as due care can do it) against the full range of risks associated with a potential transaction, the client will not have retained responsibility for any of them. The adviser's responsibility extends to the decision. If the adviser has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client would not have entered into the transaction on a careful assessment of its overall merits, the fact that the loss may have resulted from risks B, C or D should not matter.

> "41. By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in *Nykredit*, the defendant's legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision."

244. In respect of surveyor's negligence claims, it is important to keep in mind that in many, if not most, of the cases the complaint focuses upon the role of a surveyor in valuing a property. This is most obviously the case in the claims considered in *SAAMCO* of lenders suing valuers. It is also at the heart of other cases – thus, for example, in *Watts v Morrow* [1991] 1 W.L.R. 1421 at page 1434H - 1435B, Ralph Gibson LJ said:

> "The task of the court is to award to a plaintiff that sum of money which will, so far as possible, put the plaintiff in as good a position as if the contract for the survey had been properly fulfilled: see *per* Denning L.J. in *Philips v ward* [1956] 1 W.L.R. 471, 473. It is important to note that the contract in the present case, as in *Philips v Ward*, was the usual contract for the survey of a house for occupation with no special terms beyond the undertaking of the surveyor to use proper care and skill in reporting on the condition of the house.
>
> The decision in *Philips v Ward* was based upon that principle: in particular, if the contract had been properly performed the plaintiff either would not have bought, in which case he would have avoided any loss, or, after negotiation, he would have paid the reduced price. In the absence of evidence to show that any other or additional recoverable benefit would have been obtained as a result of proper performance, the price will be taken to have been reduced to the market price of the house in

> its true condition because it cannot be assumed that the vendor would have taken less."

245. *Smith v Peter North & Partners* [2001] EWCA Civ; [2002] P.N.L.R. 12 is another case in which damages against a negligent surveyor were assessed on the basis of the difference between the price paid for the property concerned and its actual value at the time of purchase.

246. In the present case, the argument put forward in behalf of Mr Large is that I should assess damages by identifying any defects in the property which a competent surveyor should have noted and reported upon and assess the extent to which any such defects would have reduced the value of the property below the sum advised of £1,200,000.

247. On the facts of this case, that approach would be likely to produce a gross injustice and far from putting the Harts into the position the Harts should have been in if there had been no breach of duty, adopting that approach would have the opposite effect: the problem here is that the competent surveyor producing a HomeBuyer's Report could not say one way or the other whether the property was defective in respect of the most important elements so far as this property was concerned, namely damp proofing. Thus the logic of the approach urged upon me on behalf of Mr Large would lead to a very low award of damages.

248. As Lord Hoffmann made clear in *SAAMCO*, the starting point is to ask what is the nature of the Claimants' cause of action against the defendant surveyor? Whilst there were relatively minor defects to which I have held Mr Large should have drawn attention in his Report, the major findings of breach of his duty of care which I have made relate to a failure initially to recommend, and

a later failure to recommend with sufficient emphasis, that obtaining a Professional Consultant's Certificate was an essential precaution.

249. The purpose of obtaining such a Certificate was precisely to obtain some form of protection against the presence of defects which a competent surveyor could not identify in a newly rebuilt house.

250. The approach advocated by Mr Wilton seems to me to transfer the risk of such unidentifiable defects entirely onto the Harts. In a situation where, on the facts of this case, Mr Large was already feeling some concerns about the quality of the redevelopment, this would be particularly inappropriate. Had the advice been given that it was essential that such a Certificate should be obtained before exchange, either such a Certificate would not have been forthcoming with the consequence that the transaction would not have gone ahead (as I have held was probable) or such a Certificate would have been provided and the transaction would have gone ahead, but in this situation at least a significant part of the risk of there being defects which could not be identified by a competent surveyor would rest with the architects.

251. Furthermore, the willingness of a firm of architects to issue such a Certificate would be an acid test of the architects' faith in the quality of the redeveloped building.

252. The analysis in Lord Sumption's judgment in *Hughes-Holland* of the advice/information dichotomy suggested by Lord Hoffmann in *SAAMCO* must be considered with particular care. Here what was needed by the Harts was clear and unequivocal advice that there were risks which simply could not be assessed and against which the Harts needed protection if they wished to

proceed. Whilst this is not going so far as to say that Mr Large had "a duty to protect his client (so far as due care could do it) against the full range of risks associated" with the purchase of the Property, what they needed was advice which was so fundamental to whether the transaction should go ahead that Mr Large should be held to bear the consequences of such advice not having been given.

253. For these reasons, in my judgment this is not a case where the usual *Watts v Morrow* approach is appropriate. On the contrary, I accept that the proper approach is that set out in paragraph 91(b) of Ms White's submissions which I have set out at paragraph 237.

254. To be clear, that means that damages are to be assessed by assessment of the difference in value between the Property with the defects as reported to the Harts in the Report, and its value with all the defects which in fact existed.

Remedial works or rebuilding?

255. On behalf of the Harts, I had the benefit of a remedial works scheme prepared by Mr Easton, the costs of which had been assessed by a Quantity Surveyor, Mr Evans. Because Mr Easton's scheme emerged late, the Quantity Surveyor engaged on behalf of Mr Large, Dr. Champion, did not have the opportunity to assess the costs of that scheme.

256. For the Defendant, I had the benefit of a report (but no oral evidence) from an architect, Mr. Orme, who identified the works necessary to remedy the defects identified in the Scott Schedule.

257. As the Orme basis had the benefits of (a) being based upon the case pleaded in the Scott Schedule and (b) being assessed by both Mr Evans and Dr Champion, it is useful to compare their figures. Both produced a figure for costs at 2011 prices, and costs at late 2019 prices. On these bases, Mr Evans costed the Orme works at £699,199.22 (2011) and £928,863.19 (current); whilst Dr Champion came to £148,983 (2011) and £199,273 (current).

258. I also had the benefit from both Quantity Surveyors of the estimate of the cost of demolishing and rebuilding the property. At 2011 prices, Mr Evans's figure was £899,045.26 and Dr Champion's £467,543.

259. Coming to a conclusion as to the level of damages in this case involves consideration not only of the evidence of quantity surveyors, but also of valuers. I had the benefit of evidence from two valuers: Mr Avery and Mr Raine. They took radically different approaches.

260. Mr Avery drew attention to a number of properties on the Devon coast which had been bought largely by people seeking second homes which had been the subject of demolition and reconstruction so as to produce very high value properties. These properties shared with the Property the feature of having the benefit of dramatic coastal locations.

261. Based on these comparables, Mr Avery expressed the following opinion[145]:

> "7.17 As can be seen from the above there is a continuing market for properties in unique locations for which purchasers will pay at or approaching full value even if they intend to demolish and redevelop the property, and the Property sits in exactly that position.

[145] D4/tab 10/51 - 52

> "7.18 In addition to the evidence provided above, I have noted other properties in the immediate vicinity selling over the last two years for figures considerably in excess of the purchase price of [the Property] at the date of survey.
>
> "7.19 I am therefore of the opinion that, contrary to the residual method of valuation, the likely market value of the Property, (in the light of the alleged defects and on the basis it could easily be demolished and redeveloped into a much more significant premises), can be fairly stated in the sum of £1,000,000 (One Million Pounds). This figure in my opinion allows for all costs of demolition, and the need for planning applications etc, and reflects the likely end result of a redevelopment which would be, even at the relevant date in 2011, a property that would be worth in excess of £2,000,000 (Two Million Pounds).
>
> "7.20 I am of the opinion that while the obtaining of planning consent for demolition or redevelopment in such a sensitive coastal area would not be straightforward there is sufficient precedents of such redevelopments being consented by the Local Planning Authority along the South Hams coast at this time.
>
> "7.21 I am also of the opinion that there would be an additional group of more speculative purchasers in the market that would purchase possibly at a discount, with a view to undertaking short term repairs, on the assumption that even if planning consent for demolition proved more difficult to obtain, so they could then sell on the patched up property at a premium due to the uniqueness of the site."

262. He continued at paragraph 8.2 of his report[146]:

> "It is my conclusion however that the value of the Property would have altered very little given the condition of the market at the time and the rarity of the site on which it stands, even if its condition had been as defective as the Claimants allege."

263. Thus Mr Avery's range of reduction in value is from zero to £200,000 (the difference between the agreed value in good condition of £1,200,000 and his valuation at paragraph 7.19 of £1,000,000).

264. His valuation assumes that the property would be demolished and rebuilt.

[146] D4/tab 10/53

265. For the Harts, Mr Raine's approach was somewhat more analytical. He opined as follows[147]:

> "7.4 In my opinion, the Market Value of the Property in the condition as should have been reported in the Survey will depend on the scope and cost of remedying the unreported defects ("the Works"). That is outside the scope of my evidence and within the scope of the evidence of the surveying and cost experts.
>
> "7.4.1 In my opinion, the diminished Market Value, if any, would be based on the reasonable cost of the Works, together with an additional allowance for "contingency and inconvenience" of a buyer having to arrange and conduct the necessary repairs. This allowance would also include an allowance for the stigma associated with the requirement to disclose on resale the need to have conducted repairs which reasonably be a concern to future buyers. In my opinion, a reasonable additional allowance is 15% of the cost Works. If a contingency is explicitly included in the figures discussed and agreed by the cost experts, there is no requirement for an additional contingency and the allowance of 15% should be reduced to 7.5%, an allowance to reflect the substantial inconvenience over and above the cost of Works. Therefore, the diminished Market Value at November 2011 would be the price paid of £1,200,000, less the reasonable cost of conducting the Works, plus an additional allowance of 15% for contingency and inconvenience, or 7.5% if a contingency is included in the cost of Works.
>
> "…
>
> "7.4.5 I have assumed that the purchaser would be a private buyer and not a property developer. Therefore, I have not included any additional allowance for finance or profit, which are normally relevant considerations in this type of residual calculation, depending on the scope and cost of the Works. The reason I have not made any additional allowances for these costs is in recognition of the fact that the Property occupies an exceptional location and notwithstanding the weak market, it is more likely than not that a private buyer would be found who would overlook these costs in order to acquire this Property. In my opinion, this is a full recognition and allowance for the exceptional of the Plot. Furthermore, the valuation of £1.2M obviously includes the plot location in its valuation.

[147] D4/tab 9/13-14

> "7.4.6 In my opinion, the formula of calculation at paragraph 7.4.1 is subject to a cap which is referred to as 'site value' in the Joint Statement, In my opinion, there is [a] minimum amount that a willing buyer would pay for the Property in the worst case scenario for demolition and rebuilding and in my opinion the valuation of the site value is informed by the Cost Report dated 22nd November 2019 prepared by Mr Brian Evans. It is my understanding that the figures in the Cost Report are adjusted to Q4 2011 prices in order to make them relevant to the valuation date which is 23 November 2011. The conclusion of the Cost Report is that the total cost of demolition and rebuilding the Property at Q4 2011 prices would be £785,076.69 plus a 10% contingency (£78,507.67) = a total of £863,584.36
>
> "7.4.7 In my opinion, due [to] the quality of the plot location, notwithstanding the weak market, a willing seller in November 2011 would not have had to acquiesce to a price reduction for any contingency allowance within the cost, therefore the valuation of the cap would be £1,200,000 minus £785,076.69 [say] £785,000 = £415,000."

266. Mr Raine's approach allows for the possibility that I might hold that it would not be appropriate to carry out a valuation on the basis of demolition and rebuilding.

267. The difference in approach between the experts for the parties is remarkable – at one end of the range Mr Avery is looking at a figure of £1 million, £200,000 less than the true value. At the other end of the range, taking Mr. Evans's costing for demolition and rebuild at 2011 prices, the value of the property at a rebuilding cost of £899,045 deducted from the figure of £1,200,000 produces a value of £300,955. Thus there is a difference in value on a rebuild basis of approximately £700,000.

268. Before tackling this difference, I must first consider whether it should be assumed that a hypothetical purchaser of the property, knowing of the defects, would have made an offer on the basis that the property would be demolished and rebuilt.

269. As I have said, this was the hypothesis underlying Mr. Avery's valuation.

270. When he gave evidence before me, Mr Raine thought that at about a level of £250,000 to £300,000 the cost of repairs would get to a point where the costs of remedial works would be such that a valuer would value upon the basis of demolition and rebuilding. (He did at one stage agree to a figure proposed by me of £200,000, but it is safer to take the figure first given by him of £250,000 to £300,000).[148]

271. On the basis that I have decided that the valuation should be carried out on the basis of the defects which actually existed at the property (see paragraph 254 above) and having heard the evidence of both quantity surveyors, I have no doubt that the cost of remedial works would pass the threshold of £250,000 to £300,000. It is true that Dr Champion's figures came out below that level, but because of the basis of his instructions his figures do not allow for the works which the Harts had carried out after 2011, and also I am satisfied that Mr Evans had a longer opportunity to consider the figures, and the figures in his assessment more closely approximate to the costs which would be incurred (although, as set out below, his figures were not without problems).

272. Accordingly, I assess damages upon the basis that a prospective purchase would be based upon the incoming purchaser intending to demolish and rebuild.

[148] Transcript Day 6 pages 100 to 101

The difference in value

273. It appears to be common ground that the difference in value should be assessed at 2011 prices. Even if that were not agreed, I would regard that as appropriate as representing the date when the Harts purchased the Property.

274. As I have pointed out, Mr Avery takes a radical view as to the value of the Property.

275. I regret that I cannot accept his view. Firstly, it seems to me that almost any prospective purchaser would carry out some form of residual site valuation, assessing the likely final value of the newly rebuilt property and the cost of achieving that value.

276. Secondly, the comparables taken by Mr Avery were largely in prime locations in well known places, more fashionable or sought after than the location of the Property.

277. Thirdly, the high value comparables taken by Mr Avery generally had been the subject of considerable expansion and were more substantial houses than the Property - there was no evidence that the local planning authority would have allowed an increase in footprint or volume of the property so as to allow the sort of value to be achieved which Mr Avery suggested as an end product of the Property being rebuilt. However, I do accept that the Property was and is in some respects a slightly awkward house – it retains part of the original bungalow. It seems to me that upon redevelopment a rather more elegant solution might be found, even if not substantially increasing the footprint or volume of the house.

278. As between the two valuers, I found Mr Raine to be more careful and more reliable.

279. I have already set out the differences in rebuild costs between Mr Evans and Dr Champion. A major cause of the difference between them related to the square footage of the property. Having heard the evidence and having had the opportunity of discussing this with both experts, I am satisfied that Dr Champion has understated the square footage of the property.

280. Dr. Champion also placed reliance upon the contract price for the original rebuild works carried out on behalf of Mr and Mrs Fitzsimons. Given that that information would not necessarily have been available to the hypothetical purchaser, and given that the standard of that work suggests a contractor not operating to the highest standards, I am cautious in relying upon the original contract price as a fair comparator. It is also the case that in part the redevelopment of the Property by Mr and Mrs Fitzsimons retained parts of the existing structure, as I have noted. It seems to me that an incoming purchaser would be likely to completely demolish and rebuild the structure.

281. Generally, I found Mr Evans to be a reliable witness. I also recognise that Dr Champion is a quantity surveyor of enormous experience.

282. Whilst I generally prefer Mr Evans's evidence, in large part because it seems to me that the assumptions upon which it is based are more securely founded, there were aspects of Mr Evans which in my view need to be tempered. In particular, there was an element of double counting in that his method of valuing each item in Mr Easton's schedule tended to take each as a separate work package, as Mr Wilton demonstrated in cross-examination.

283. There is a danger of being too scientific: the hypothetical purchaser of the Property entering into a hypothetical negotiation would have been unlikely to be over precise. Accordingly, in the assessment made below I have resorted to making broad assessments consonant with the tenor of the evidence I have heard, rather than precise calculations.

284. In my view the right cost to take would be a figure in the range between the two experts, but tending towards the upper end of that range to allow for my finding that Dr Champion has taken too low a figure for the area of the building, but also allowing for the matters referred to in paragraph 282 above. On that basis, I take the cost of demolition and rebuilding as being £800,000.

285. Given that the parties are agreed that the value of the Property as described by Mr Large was the price paid of £1,200,000, and given the approach advocated by Mr Raine in paragraph 7.4.7 of his report (see paragraph 265 above) the diminution in value of the property would be equal to the assumed cost of demolition and rebuilding. On that basis, the amount of damages which I would award in respect of difference in value, which is assessed at 2011 prices, would be £800,000. However, in my view I should make allowance for the fact that I have held that on a complete rebuild a somewhat more attractive building might be created. I have no evidence upon which to value this, but doing the best I can, to reflect this I reduce the award for difference in value to £750,000. However, this is a subject to another factor, to which I now turn.

Credit for sums received from the solicitors and architects

286. By a settlement which I have not seen, the Second and Third Defendants have agreed to pay and, I understand, have paid the Harts £376,000.

287. In her Closing Submissions at paragraph 94 Ms White concedes that, unless I were to hold that Mr Large should only be liable effectively for a handful of defects, full credit for this sum of £376,000 should be given.

288. On the authorities, this concession is appropriately made.

289. Accordingly, the sum of £750,000 above will be reduced to £374,000.

Inconvenience and Distress

290. The Harts claim general damages for the inconvenience and mental distress which they have suffered. The effects upon the Harts of the problems with the Property were described by Mrs Hart in the passages from her witness statement, which I have set out at paragraph 111 above.

291. I accept that this is an appropriate case for such an award. This case merits an award towards the upper end but not at the top end of the range.

292. I assess the appropriate award as being in the sum of £7,500 per claimant.

Conclusion

293. For the above reasons I award £374,000 by way of damages for difference in value and £15,000 for inconvenience and distress.