

Neutral Citation Number: [2021] EWHC 1600 (TCC)

Case No: HT-2019-MAN-000060

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

Manchester Civil Justice Centre  
Bridge Street, Manchester M60 9DJ

Date: 11 June 2021

**Before :**

**His Honour Judge Stephen Davies sitting as a High Court Judge**

**Between :**

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**CARTWRIGHT POND LIMITED**

**Claimant**

**- and -**

**MS. LOUISE WILD**  
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**Defendant**

**Sarah Lawrenson** (instructed by **DTM Legal, Chester**) for the **claimant**  
**The defendant** in person

Hearing dates: 12, 13, 14, 17 May 2021, 11 June 2021  
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**JUDGMENT APPROVED**

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 1 p.m. on Friday 11 June 2021.

**His Honour Judge Stephen Davies**

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(1) [Introduction](#)

1. This is a dispute about a contract for building works at a residential property in Goostrey, Cheshire, where the parties are unable to agree as to such fundamental matters as: (a) the terms of the contract; (b) who was responsible for the delay occurring before termination of the contract; (c) who wrongfully repudiated the contract; (d) the contractor's claim for variations and loss of profit; and (e) the employer's claim for defects, costs of completion and damages for delay.
2. The claimant building company contends that the defendant houseowner wrongfully repudiated the contract and that it is entitled to the balance of the contract price including variations for the works undertaken and its loss of profit on the remaining works. The defendant contends that the claimant was guilty of delay and defective workmanship, that its conduct was repudiatory, that the claimant's claim for the balance including variations is overstated, that it is not entitled to claim for loss of profit and that instead she is entitled to her delay related losses flowing from the repudiation and the costs of completing outstanding work and rectifying defects.
3. Given its low value and the absence of any particularly complex features, the case really ought to have been issued in or transferred to the County Court as Business and Property Court work allocated to the TCC, but it was issued in the High Court and not transferred and I did not consider it appropriate to transfer down on the first day of trial. I heard evidence over three days from two witnesses of fact called by the claimant, Mr Steven Davies, its managing director, and Mr Robert Cornwall, its project manager, and from the defendant herself. I also received in evidence a number of witness statements adduced by the defendant. There was also written evidence from Mr Tony Mancini of Scanlans, Manchester, a jointly instructed building surveyor expert witness instructed to address the defects and outstanding work claim.
4. I then received written and heard oral closing submissions on day four after which I adjourned to produce this judgment. It had been hoped that there would have been sufficient time to give an extempore judgment on day 4 but, given the tenacity with which each side has fought their respective cases and the amount of detail involved, that did not prove possible. However, allocating a fair share of the court's resources to this case and avoiding undue delay does require me to refrain from undertaking a minute analysis of each and every contested issue pleaded or addressed in the witness statements or written submissions. I am grateful to Ms Lawrenson for her capable conduct of the case and her clear and persuasive arguments and to Ms Wild for conducting her case with skill and determination.
5. I do not need to say very much about the witnesses. Mr Davies seemed to me to be reasonably reliable and genuine and was willing to admit that he had not, for example, always responded to the defendant's communications when he ought. He seemed to me to be an old-fashioned builder who found the defendant - as a professional, assertive woman - rather difficult to deal with when things were not going well and, as a consequence, tended to avoid doing so. I do not think that his building company particularly covered itself with glory on this contract, but

equally I do not accept that its performance was anything like as bad as the defendant contended. Mr Cornwall came across as not particularly experienced in project management and extremely nervous when giving evidence, reflecting - it seemed to me - the fact that he had signed up to sections of his witness statement which rather overstated his true evidence and underplayed his awareness that the project was not a particularly successful one.

6. The defendant was and, I assume, still is a self-employed IT professional. She had experience of project management in the IT sector. She was very keen to ensure that the project should begin and end on time (particularly because she wanted it completed as soon as possible into the 2018 autumn term, when her son was starting A level studies) and on budget. She made what with hindsight was the error of deciding not to appoint her architect as contract administrator and to deal with the claimant herself. She and Mr Davies are very different personalities and the problems with the works, which could have been resolved without undue difficulty had the relationship been better or an experienced contract administrator been involved, were left unresolved and the project drifted for far longer than it ought to have done until it was brought to an acrimonious and unsatisfactory end in March 2019. She instructed two firms of solicitors before representing herself and, whilst perfectly pleasant and genuine, had clearly convinced herself that she was the wronged party throughout, so that I was unable to place very much weight on her uncorroborated oral evidence.
7. At the pre-trial review HHJ Eyre QC had ruled that large sections of the evidence contained in the eleven other witness statements she had adduced comprised irrelevant and inadmissible opinion evidence and comment which the court would not admit and expressed the view that it was unnecessary for each to be paraded to be separately cross-examined on those (extremely limited) parts of their witness statements which were relevant and admissible and advanced the claimant's case in any material way. As he observed, this was particularly so where: (a) as regards defects, their general expressions of opinion weighed very little compared to the independent expert evidence of Mr Mancini; (b) as regards delay, the issue was not whether the works were delayed (which they plainly were) but why that was, as to which again their general expressions of opinion weighed very little. In the circumstances, the claimant took the sensible decision not to require those witnesses to attend to be cross-examined on their witness statements. I have had nonetheless of course had regard to that witness evidence so far as relevant and admissible.
8. The following principal issues arise for determination:
  - (1) The terms of the contract, including:
    - (a) Was there a fixed date for completion?;
    - (b) Were the terms of the RIBA Domestic Building Contract 2014 terms ("the RIBA form") incorporated into the contract between the parties?;
    - (c) Was any period in which the defendant could be entitled to liquidated and ascertained damages ("LADs")?
    - (d) Was the claimant contractually obliged to provide storage facilities and can the defendant recover the cost of this and/or removal of the conifer hedge and/or movement of hot tub?
  - (2) Was the defendant entitled to and did she terminate the contract on the basis of alleged breaches by the claimant, or was the claimant entitled to and did it terminate the contract on the basis of alleged breach by the defendant?
  - (3) Assuming the claimant lawfully terminated, what is the value of the claimant's final account claim, including the cost of any variations to the original contract and its claim

for damages, and taking into account the defendant's claim for defects and delay related damages?

(4) Assuming the defendant lawfully terminated, what is the value of the respective claims and counterclaims?

9. My determination on those issues appears below and the end result is contained in the conclusions section.

(2) Terms of the contract

10. The defendant purchased the property, a 1970's property requiring modernisation, in December 2014. She decided to undertake alterations to the property and in 2017 instructed an architect, a Mr Hough, to produce a specification and various plans and a structural engineer to produce calculations.
11. The specification envisaged that any contract would be entered into in the RIBA form. The introductory section identified the RIBA form as being the contract and identified some of the particulars which would need to be inserted into the RIBA form, such as the site location and the contract administrator (Mr Hough). It did not however specify all of the particulars, so that it did not identify the contract documents or the start or completion date, although it did state that LADs would be £50 / day. The RIBA form contains an option for the employer to be allowed to act as contract administrator, but this option was not selected in the particulars.
12. The remainder of the specification was in standard form, containing general provisions in relation to matters such as general requirements, site preparation and specific work packages.
13. The scope of the work can be discerned from the various plans. It does appear that the architect also produced various other plans and specifications but there is, rather unusually, some question as to whether or not all of them were sent to the claimant as part of the invitation to tender process. The form of tender which the claimant received and completed referred to a "schedule, specification and drawings as per [Hough's] email of 31 January 2018" and stated, above Mr Davies' signature, that the tenderer was "prepared to enter into a Contract for the whole of this work as set out in section A of the specification". For some unknown reason neither party disclosed a copy of the email of 31 January 2018 and, whilst the claimant has disclosed the specification and those plans which it admits it received, the defendant has not disclosed any schedules or other plans or other version of the specification. There is no good reason why not, especially since she remained on sufficiently good terms with Mr Hough to obtain a witness statement from him, and who could - presumably - have supplied the necessary documents from his records. Although she sent some tender documents which differed to those disclosed by the claimant to the expert Mr Mancini, he said that he did not find any fundamental differences to the drawings or the specification. Mr Davies said in his witness statement that the tender documents which the claimant received were those disclosed. He was not cross-examined on this and the defendant did not address this issue in her witness evidence.
14. In those circumstances I must conclude that the only tender documents upon which I can rely as being contractual documents are the claimant's tender, the specification and the plans as disclosed by the claimant. It is unfortunate that this issue was not the subject of proper disclosure or witness evidence from the defendant in particular or properly investigated prior to trial, so that by the time of closing submissions, when the potential significance of this lacuna in the evidence was first raised by me, it was too late to undertake the necessary investigation.

15. Importantly, there was no express design obligation upon the claimant and in some respects the basis of the tender was that the claimant would install a number of the fittings which the defendant would supply at her cost, so that in these respects the tender was effectively on a labour and materials basis.
16. The claimant's tender was in the sum of £84,805.85, broken down within the attached tender pricing form, specifying a commencement date "TBC" and a completion date of "12 weeks". Mr Davies said that when arriving at this time estimate he had assumed that the defendant would vacate the property. Although this is inconsistent with the specification, which said that the site would be occupied, I accept that this is what he assumed - albeit wrongly. He was invited by the architect to a site meeting to discuss his tender with the defendant and did so, accompanied with his father, who had priced the job, on 15 March 2018. The subsequent exchange of emails confirms that he was advised that the defendant would be remaining in the property and that he would produce a revised programme to cater for this. He confirmed that the tender figure would cover all aspects of the work save for "tree removal to the front elevation [which] we can cover within our costs".
17. The most significant dispute from the meeting is that whilst the defendant insists that Mr Davies senior offered to transport and store her furniture at claimant's premises for the duration of the works free of charge, Mr Davies insists that whilst he said that the claimant could arrange for the defendant's furniture to be stored in a container at its premises for the work duration he did not offer to cover the cost and that the defendant never took him up on this offer. There is no contemporaneous correspondence either way, however in my judgment: (a) it is intrinsically unlikely that Mr Davies would offer to transport the furniture free of charge, even if his father might have said that some containers could be stored free of charge at the premises; (b) the absence of any complaint by the defendant that the claimant had not kept its promise (especially when the issue of furniture getting in the way was a bone of contention through the contract and when, on her case, she had incurred costs for storage elsewhere which she never sought to contra-charge until her Defence) supports the claimant's case. I conclude that the defendant is wrong about this and it was never agreed.
18. As regards the programme, on 21 March 2018 the email from Mr Davies enclosing it stated that the claimant assumed that the defendant could manage with three upstairs bedrooms and the upstairs bathroom during the majority of the works and the sitting room, hall and staircase, and access to the kitchen for as long as possible. The attached programme was in bar chart form, showing start on Mon. 9 July 2018 and completion 14 weeks later on Fri. 12 October 2018.
19. The defendant responded a day later: (a) querying some of the costs which she thought seemed high<sup>1</sup>; (b) asking if the start date could be brought forward and the contract duration shortened. The claimant replied, offering a full breakdown if she wanted it (there is no evidence that she said that she did or chased its non-supply) and saying that whilst the start date could be brought forward the contract duration could not be shortened. It took the defendant until 11 April 2018 to inform the claimant that she had chosen the claimant. On 17 April 2018 the claimant replied to say that it could no longer start any earlier than 9 July 2018 and on 18 April 2018 the defendant instructed him to schedule the work in.
20. It is common ground that there were no further contractual exchanges before the work started on 9 July 2018. Even though the above communications were copied in by the defendant to

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<sup>1</sup> It is common ground that she was mistakenly referring to figures in another contractor's tender.

Mr Hough she did not appoint him as contract administrator and no contract was ever produced or signed on the RIBA form. The defendant evidently decided that she could do without a contract administrator and did not suggest that she ever put herself forward as undertaking that task.

21. In those circumstances the question arises whether or not the contract incorporated the terms contained in the RIBA form. Although the defendant pleaded and continued to maintain that it did, I have no doubt that it did not. The simple fact is that, whilst the specification envisaged that a contract on the RIBA form would be entered into and the claimant said in its tender that it was willing to do so, no such contract was ever drawn up with all of the details included or signed. None of the exchanges referred to indicate that the parties had agreed to proceed on the basis that the contract which had been formed by 18 April 2018 would incorporate the RIBA form pending, or instead of, the drawing up of a formal contract. The defendant never stated that Mr Hough would be the contract administrator and he did not act as such. It is evident from reading the RIBA form that the contract can only operate in accordance with its terms if there is a contract administrator, either an independent professional or (if the client proposed and the contractor agreed, as to which there is no suggestion in this case) the client itself.
22. The contract works perfectly well as a simple contract incorporating the tender documents and the correspondence and other relevant documents referred to above, including the contract programme and this, in my judgment, is what happened.
23. Although the defendant argued that the contract duration had been reduced back down from 14 weeks to 12 weeks because, in her email preceding the production of the programme, she had said “I’d rather get on with making good progress than be too concerned over accommodation” it is plain that by sending over the programme the claimant did not accept any lesser period than 14 weeks and there is no evidence that the defendant repeated - or the claimant accepted - any further revision.
24. I do not accept Ms Lawrenson’s submission that the claimant’s only obligation was to complete within a reasonable time. The contract as formed contained an express term for completion within 14 weeks, which was not dependent upon the RIBA form being incorporated. However, I would accept that in circumstances in which there were a number of variations to the works as the works progressed, which in my judgment were clearly such as to involve some delay to the works, in the absence of incorporation of the RIBA form there was no contractual mechanism for extending time, so that the fixed date was no longer applicable and was replaced with an obligation to complete within a reasonable time. What is a reasonable time must be assessed objectively by reference to all the circumstances of the case. It is necessary for the defendant to establish what a reasonable time would be, disregarding delays caused by her own failures: see Baht v Masshouse Developments Ltd Ch D (2012) referred to within, and see more generally for the applicable legal principles, Keating on Construction Contracts (11<sup>th</sup> edition) at 8-010 to 8-014.
25. However, there is no basis for any contention that the time for completion was of the essence of the contract, so that a failure to complete by the specified date enabled the defendant without more to treat the contract as discharged. That would not have been the case even if the RIBA form had been incorporated and there is no basis for construing the contract as actually made as having that effect. I refer to the discussion in Keating in chapter 8(2)(b).
26. As regards LADs, I am satisfied that the resultant contract did indeed include the provision in the specification for £50 / day LADs. It is not necessary for the LADS provision to work that the RIBA form is incorporated. However, it is necessary for the LADS to be invoked once a

dispute has arisen that either there is no cause of delay which cannot be attributed to the contractor or there is a contractual provision, such as in the RIBA form, which allows an extension of time to be granted for such delays. Otherwise, as is well established, time becomes “at large” and the employer cannot levy LADs. See Keating at 10-033. It follows that here, because of the impact of variations and because of the absence of any provision for extension of time, time did indeed become at large and the defendant is relegated to a claim for general damages for such delay as she may prove: see Keating at 10-036.

27. Finally, so far as the contractual issues are concerned, it follows from my findings above that there is no basis for holding the claimant in breach of contract in failing to provide storage, whether free of charge or otherwise. Instead, it was the defendant’s obligation to ensure that the areas in which the claimant needed to work were not obstructed by furniture storage. Nor is there any basis for the defendant seeking to deduct any amount from the claim for the cost of the defendant and/or her partner, Mr Simms, removing the conifer trees or the hot tub. They did so, I am satisfied, without prior reference to the claimant and without any agreement that the cost should be credited, in circumstances where: (a) the claimant had simply offered to cover the tree removal within its costs; and (b) it was no part of the tender for the claimant to have to move the hot tub.
28. It is worth also saying at this point that nor in my judgment is the defendant entitled to any reduction for the work which she says she did in relation to the demolition / clearance process in the kitchen or other areas of the house prior to the claimant starting work. Again, that was something which she chose to do without reference to the claimant and without any prior agreement that she should be entitled to some price reduction to reflect the saving to the claimant. Having volunteered this assistance, no doubt with the best of motives to try to speed up progress, but without agreement, she cannot after the relationship soured now force the claimant to give her a credit for that unsolicited assistance, even if - which there is not - there is a proper evidential basis for quantifying the cost saving to the claimant. I do not need to lengthen this judgment by refereeing to the law of restitution; it suffices to say that no claim for credit by way of restitution is pleaded or made out on the evidence.

(3) Termination:

29. This was the issue on which most time was spent at trial and is addressed in three separate sub-sections: (i) relevant legal principles; (ii) who was in repudiatory breach; and (iii) who accepted whose repudiatory breach?
  - (i) Relevant legal principles
30. This is one of those cases where both parties allege that the other was guilty of repudiatory breach, which each party contends that it accepted as discharging the contract. In summary, the claimant contends that in March 2019, at a time when it was - subject to the defendant providing the necessary information to allow it to do so - ready, willing and able to complete the works, the defendant refused to confirm that it was allowed access to do so, that such refusal was repudiatory, and was accepted by the claimant. The defendant contends that by February 2019 the claimant was in repudiatory breach of its obligation to complete the works within a reasonable time, having effectively given up on the works, and that she accepted such repudiation by email dated 27 February 2019, alternatively later in May 2019 by instructing replacement contractors.



31. In my judgment there are two key issues to decide: (1) whether or not by February 2019 the claimant was in repudiatory breach of its obligation to complete the works within a reasonable time; and if so (2) whether the defendant accepted such repudiation by her email dated 27 February 2019. If the defendant cannot make good her case as regards (1) and (2), then in my judgment it is plain that in March 2019 she did refuse to confirm that the claimant was permitted to return to site to complete the works, that without the justification of her earlier acceptance of the claimant's alleged repudiation such conduct was repudiatory, and that the claimant accepted it as such.
32. The relevant legal principles are well-established and are explained in Keating in chapter 6 section 10. Repudiation is explained at 6-094 as being where "... one party so acts or so expresses himself as to show that he does not mean to accept the obligations of a contract any further" (Lord Simon in Heyman v Darwins [1942] A.C. 356 at 361). At 6-112 the authors refer to the analysis by the same judge in the same case that: "Repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other." Reference is also made to the judgment of Lord Steyn in Vitol SA v Norelf Ltd [1996] A.C. 800 HL at 810–811 that: "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end ..."
33. At 6-126 the authors observe that "delay on the part of the contractor where time is not of the essence of the contract does not amount to a repudiation unless it is such as to show that it will not, or cannot, carry out the contract or that the delay is such as to deprive the innocent party of substantially the whole benefit of the contract". At 6-127 they note that: "In most cases it is desirable to give notice that continuance of the delay will be treated as repudiation before purporting to accept the repudiation by dismissing the contractor". As regards the employer, they state that: "It is, in general, a repudiation if the employer wrongfully by its own acts, and without lawful excuse, renders completion impossible".

(ii) Who was in repudiatory breach?

34. As well as considering who was in repudiatory breach, I must also consider who was guilty of any material breach, even if non-repudiatory, since the defendant is entitled to maintain a counterclaim for delay related damages even if any breach by the claimant was not repudiatory.
35. The starting point is of course the contractual obligation upon the claimant to start on 9 July 2018 and finish within 14 weeks by 12 October 2018.
36. The claimant admits, as of course it has to, that it did not complete by that date or anywhere near it. In summary, its case is that: (a) its works were delayed from the outset by the very substantial number of omissions and additions instructed during the course of the works; (b) a significant cause of delay was the defendant's decision to increase the area of tiling and also to supply not the standard size and thickness ceramic tiles, which the claimant says it was reasonably entitled to assume it would be required to fit, but larger, thicker, heavier marble, granite and porcelain tiles from a specialist supplier which took much longer to fit; (c) from December 2018 onwards the claimant was unable to make progress because of the defendant's failure to provide clear instructions as to what she required as regards the major outstanding items, specifically the external doors, porch, staircase and external driveway.
37. Whilst not disputing that these events may have been the cause of some limited delay, the defendant vigorously denies responsibility for many of these events and also vigorously denies



that they caused anything like the delay contended for, blaming instead what she regards as the claimant's lackadaisical and disorganised approach to the works.

38. The editors of Keating observe at 8-001 that: "Claims for "delay and disruption" represent a common feature of construction disputes. Claims based on either delay or disruption are often difficult for a party to present and for contract administrators and tribunals to assess given the factual complexity of major construction projects". Whilst this is very far from a major construction project, it is not an easy task for a court to make clear findings as to the causes of delay in circumstances where: (a) there is not very much in the way of contemporaneous documentary evidence; (b) no independent contract administrator was appointed who undertook a contemporaneous analysis of the causes of delay; (c) neither party has undertaken a detailed retrospective analysis of the causes of delay and their impact upon the critical path of works necessary to achieve completion; and (d) there is no expert evidence in relation to delay. I shall have to do the best I can in such circumstances.
39. In the Particulars of Claim the claimant identified 11 particular variations to the contract, which the defendant admitted in her Defence, drafted by counsel, at a time when she was legally represented. Attached to her Defence was a schedule prepared by a quantity surveyor previously instructed by her which addressed each and every one of the additions and omissions the subject of the final account and which, again, took no issue with the fact of the variations.
40. The defendant's case as to delay was pleaded, in summary, as follows. In October 2018, by which time the works ought to have been completed, a "crisis meeting" was held at which the claimant acknowledged responsibility for the delay but asked, and the defendant agreed, to be given the opportunity to complete by providing a new work schedule and increasing labour resourcing. The claimant never produced a new work schedule and, although the claimant initially increased labour, that ceased by early December 2018 and after that there was only the most intermittent of attendance. By February 2019 it was clear that the claimant had wholly failed to fulfil its promises and by its conduct had made it clear that, contrary to its protestations, it had no interest in completing the works. Such conduct was repudiatory and was accepted as such by the defendant in her email of 27 February 2019.
41. Apart from the correspondence, the only other contemporaneous documentary evidence consists of the claimant's labour records. The claimant's directly employed labour did not complete timesheets as such, but Mr Davies did provide details each week of the labour allocated to this job (by name and role) and these were entered into a schedule which has been produced in this case. Whilst it is rather difficult to gain a picture from this schedule in its format as produced, which might profitably have been converted into a resource allocation graph, it is possible when considering the schedule with the benefit of the evidence at trial to gain some overall impression of labour resource allocation over the relevant period. In summary, from 9 July 2018 through to the end of August 2018 the resource allocation appears reasonable. Through September 2018 the principal resource was for tiling, where both the principal tiler Piotr Pawlowski and his assistant Jacob Jezierski were regularly present, along with other trades on a more ad hoc basis. However, through October 2018 only Mr Pawlowski was regularly present, and attendance by other trades was irregular and limited. From late October 2018 some more general labour was provided. After what appears to be a period of lesser overall resource around mid-November 2018, resource was increased again through to the Christmas break, after which there is nothing until two men attended on 28 February 2019 (to fit the doors). The schedule does not include attendance by subcontractors, and there is non-disputed evidence that in addition subcontract painters and decorators and electricians were present over periods of time, but there are no documentary details as to their attendance.

42. This overall analysis seems to me to be broadly consistent with the contemporaneous documentary evidence and the impression I have gained from the evidence of the witnesses which, in summary, is as follows.
43. Apart from a text message complaining of a lack of progress at the end of July 2018 the first documentary complaints from the defendant about progress begin towards the end of September 2018, with an email dated 21 September 2018 and subsequent text messages.
44. By this time it is apparent that there had already been a significant number of variation orders, a total of 27 by the date of the claimant's second valuation dated 6 September 2018. Although it is true that the overall increase in the value of the contract works was relatively modest, because a lot of the variations involved a change to existing work items by way of omissions and additions rather than solely additions, nonetheless I accept, as Mr Davies said in evidence, that these changes had a cumulative impact in terms of programming. He gives as a good example the defendant's decision to replace the Velux rooflight as fitted with a wider version, which did not just involve the delay in ordering and fitting the new Velux but also had a more general disruptive effect in terms of labour planning and allocation, albeit that the effect is difficult to quantify. The most substantial additional work item at that point was the addition of a balcony, which obviously also had a time impact on the programme. Mr Davies also complains about the disruption due to the defendant's decision to store furniture in some of the rooms where the claimant was working. The defendant had chosen to store her possessions in a number of places, some of which were in the house in locations where the claimant needed to work. An example is where plumbers or electricians needed underfloor access to services which were most accessible from those rooms. Another relates to the rooms to which access was not envisaged as needed under the original plan, where the external doors and windows were to be re-painted and re-glazed, whereas because it was subsequently agreed to supply and fit new doors and windows all round access to those areas was needed.
45. However, as I have indicated the most significant impact, according to the claimant, was the defendant's decision to increase the area of tiling and to supply tiling which took much longer to fit. Mr Davies addressed this in some detail in his witness statement, stating that: (a) the original programme envisaged 11 days to tile 93.4m<sup>2</sup>, whereas the changes to the overall area and the inclusion of tiled alcoves and skirting tiles added 13 days; (b) the additional difficulties in laying the tiles supplied added 40 days to the programme; (c) producing an overall delay of around 10 weeks. He was cross-examined on this evidence and the defendant was also cross-examined on her case and her evidence to the effect that: (a) the contract did not specify ceramic tiling; (b) a competent contractor ought to have been able to cut and fit the tiles supplied without great difficulty, so long as it had sufficient skilled labour and the right tools; (c) the real reasons for the delay were the claimant's persistent failure to provide the right tools and equipment and to provide a back-up man to assist Mr Pawlowski the tiler.
46. In my judgment the position is as follows.
47. First, whilst it appears that there may have been a tiling schedule, there is no evidence that it was supplied to the claimant as a tender document, and the only provision within the tender documentation relating to the tiling is the general specification at M4 (sheet and tile finishes), which does refer only to ceramic tiles. There is no evidence to show that the claimant was otherwise made aware at the outset of the defendant's particular choice of tiling. It follows that the claimant could not have been expected to estimate on the basis of the non-ceramic tiling actually supplied, and there is no basis for criticising the original programme allowance which can be seen in the programme.

48. Second, the defendant has failed to adduce any evidence on which I can place weight to support her case that the difficulties were due to the claimant's failure to provide the appropriate equipment. In her witness statement the defendant refers to what she was told by a representative of the tile supplier as to his criticism of the claimant's working methods, but she acknowledges that there is no witness statement from the person involved. Nor is there any other corroborative evidence of any weight to support her case in this respect. Whilst Mr Mancini noted poorly cut and defective tiles he did not suggest that they were indicative of an absence of appropriate equipment. Indeed, when asked specifically by the defendant in Part 35 questions to comment on this issue he said that he could not. Mr Davies stated that he provided an angle grinder and a work bench or board to cut the tiles outside and there is no cogent evidence that this was not sufficient. The defendant's evidence that Mr Pawlowski complained about the lack of suitable equipment is not a sufficient basis for such a finding.
49. Third, the defendant has failed to adduce any cogent evidence to contest Mr Davies' evidence as to the impact of the additional tiling areas and the actual tiling supplied. In cross-examination she suggested that Mr Davies was exaggerating the impact of the decision to include tiled alcoves, but Mr Davies gave what I considered to be a reasonable explanation as to why this was not a straightforward minor additional item.
50. Fourth, however, the claimant's own labour records do indicate that there is a period from late September to late October 2018 when it appears that Mr Pawlowski was working largely by himself. This is consistent with the defendant's evidence, although her evidence is plainly exaggerated as to the period over which this happened. Although Mr Davies suggested that an assistant was not always necessary, and was provided when required, I am not satisfied that this can explain the significant period of time when no assistant appears to have been available. Nor do I accept Mr Cornwall's off-the-cuff explanation that this must have related to the wall tiles, which was only a one man job. I am satisfied that whilst the tiling did undoubtedly reasonably take much longer than was envisaged at programme stage, the overall delay of some 10 weeks was unreasonable, given the lack of sufficient resource from late September onwards. Furthermore, I accept that Mr Davies was unable to explain convincingly in cross-examination how the delay to the tiling led inevitably to a delay of the same magnitude in relation to the other works.
51. A meeting was arranged and took place on 16 October 2018. Although there is no direct contemporaneous record the defendant's subsequent email of 22 October 2018 contains a summary of her complaints about the lack of progress and the claimant's promise to provide more resource. It is clear that the relationship was beginning to become seriously strained. Mr Davies admitted in cross-examination that he found the defendant difficult to deal with and he also admitted that there came a point at which he actively avoided engaging with her, which cannot have assisted matters. A further email a week later identified the outstanding work, with the defendant complaining again about the failure to provide more resource to finish the internal works.
52. A further meeting was held on 23 November 2018, after which Mr Davies texted to say he would provide a team, including joiners, electrician, plumber and bricklayers. The timesheets show that this resource was indeed provided, albeit one can see for example that no bricklayers attended until mid-December 2018.
53. The defendant contends that the meeting on or around 13 October 2018 was a "crisis" meeting, at which she says that she offered Mr Davies the option of either leaving site or agreeing to get the job right and get it done. She says that he said he would provide a revised schedule and a team of tradesmen to complete the works, but that neither materialised. Mr Davies contends

that the meeting in question took place on the 23 November 2018, that there was a disagreement about why the works were overrunning, and that without accepting blame he agreed to arrange for the various tradesmen to complete the project, so far as he was able.

54. I accept and prefer the claimant's version of events, in that: (a) the defendant's chronology in her own witness statement is more consistent with the meeting taking place in late November 2018 than in October; (b) there was no subsequent communication from the claimant complaining about the failure to provide a revised schedule; (c) the evidence indicates that labour resource was increased after 23 November 2018; (d) the correspondence from mid-October 2018 is overall inconsistent with the defendant's version of events. It is more likely in my judgment that by mid to late November 2018 the parties were both sufficiently concerned about the delays that they both wanted to ensure that the works were completed before the Christmas break, at least internally.
55. Indeed, it does appear that the works were substantially completed, at least internally, leaving aside the staircase and issues with various defects, by the Christmas break. Although the defendant complained for example about water leakages pre-Christmas, she has not suggested that the works internally were not substantially complete at that stage, either in contemporaneous correspondence or in her witness statement in what is a detailed or convincing way.
56. It is the claimant's case that after the Christmas break it undertook such further works as it was able, but was unable to make progress on the outstanding external works due to the defendant's failure to provide clear instructions on what she wanted in relation to the remaining external doors, the porch, the staircase and the driveway.
57. It became clear in cross-examination that the defendant's case was that she blamed the claimant for being insufficiently pro-active to put forward proposals for revised designs in relation to these works. In contrast, the claimant's position is that once the defendant had stated that she wanted to make changes to these work areas then, whilst it was ready and willing to help her to make her choice, it was under no contractual obligation to do so, such that if there was delay due to the defendant not giving clear instructions it was not legally responsible for that delay. When this was put to her the defendant suggested that in such circumstances it was the claimant's obligation to avoid delay by reverting to the initial contract specification if necessary.
58. In my judgment, and subject to one caveat, the claimant's analysis is correct on this point. If an employer notifies the contractor that it wishes to vary the works then it is its obligation to provide the necessary details as to what it wishes to be done. Unless the contract provides otherwise, the contractor is under no obligation to provide alternative details for consideration, whether at all or within any specific timeframe, and is under no risk of being found to be in breach should the consequence of this delay lead to overall delay to the works. The caveat is that I am prepared to accept that if the contractor voluntarily agrees to provide alternative details it is under an obligation to do so within a reasonable time.
59. In this case, for example, the defendant needed to make a choice as to the external doors to the front door and the rear garage door. The former was a particular issue, since the claimant was unable to complete the tiling in the front door area until it knew what dimension door was to be installed. On 5 December 2018 the claimant provided a link to a door supplier. On 9 December 2018 the defendant indicated her preference for the front door. On 8 January 2019 the claimant provides 3 quotations for consideration. After some delay (due to a family bereavement and not picking up the email) the defendant responded, asking more questions, on 24 January 2019. The claimant responded on 28 January 2019 and subsequently and, once it

had confirmation from the defendant, proceeded to place the orders. In my judgment it is impossible to find that the claimant was in breach of any duty to the defendant on that chronology of events. Although the defendant complains that the claimant should have provided links to door suppliers earlier, there is no evidence of prior complaint other than what is a cut-off text message from September 2018 which, as legible, simply reads “Can you send me information on doors and?”. In my judgment the contractor cannot be held legally responsible for not chasing around for prospective suppliers when it was fundamentally the defendant’s responsibility to specify what she wanted.

60. In the same correspondence there was a similar discussion in relation to the staircase, where the claimant had provided a link to suppliers of metal spindles and stairparts and where the process of the defendant making a final choice provided protracted and was never concluded pre-termination. The defendant was of course entitled to be sure she was making the right choice before proceeding, but she cannot seek to blame the claimant for this delay. Mr Davies was chasing the defendant for a discussion and a decision in relation to the staircase, external porch detail and external paths in January and February 2019 and never received any clear instructions. Indeed, by February 2019 the tenor of the defendant’s correspondence and her evidence made clear her belief that the claimant had no intention of undertaking these works and was simply positioning himself more favourably in relation to forthcoming litigation. In my judgment these assertions, rejected by Mr Davies in cross-examination on the basis that he was not sufficiently legally sophisticated as to come up with such a strategy, have no substance. I am satisfied that the claimant wanted to finish and be paid and that it could and would have done so had it been provided with the necessary information as to what was to be done. I am satisfied that it was the defendant who by these later stages was stringing matters out. Indeed, in January 2021 she obtained an alternative quotation from another builder for these outstanding works to be undertaken and, I have little doubt, would have accepted it had it been acceptable in price.
61. For all these reasons I substantially reject the defendant’s case on delay. I am satisfied that overall the claimant acted with reasonable diligence, given the delaying impact of the facts and matters referred to above. I do however accept that there was some unacceptable delay in relation to the tiling, primarily due to the lack of labour resource over the whole period, and also some unacceptable delay, again due to the lack of resourcing, over the period September to November 2018 inclusive. In summary, doing the best I can, and bearing in mind the general principle that it is for the defendant to prove that the works lasted longer than was reasonable, I am satisfied that there was an overall delay of 6 working weeks to the overall programme due to these causes. That, however, is a relatively modest proportion of the overall delay from the original contract completion date of 12 October 2018 down to 27 February 2019 when the defendant claims to have accepted the claimant’s repudiatory breach.
62. Moreover, and having regard to the history of events and my conclusions as referred to above, and to the detail of the events in February 2019 as referred to below, and to my assessment of the nature and extent of the defects in the works, I am satisfied that there is no basis for contending that as at 27 February 2019 the claimant was in repudiatory breach of the contract. Whilst there had been culpable delay up to the Christmas break, and whilst there were defective works as at 27 February 2019, it cannot be said in my judgment that these matters were so serious as to show that the claimant would not or could not finish off the contract at that point or that the delay or defects or their combined effect was such as to deprive the defendant of substantially the whole benefit of the contract.

(iii) [Who accepted whose repudiatory breach?](#)

63. In my view it is plain that: (a) even if (contrary to my above finding) the claimant was in repudiatory breach as at 27 February 2019, the defendant did not clearly and unequivocally convey to the claimant that she was treating the contract as at an end, whereas: (b) as a result of the defendant's conduct after 27 February 2019 she became in repudiatory breach and the claimant was entitled to and did elect to accept her repudiatory breach.
64. Whilst I was referred to the full email exchanges leading up to the email of 27 February 2019, it is sufficient to summarise the position as follows.
65. In January 2019 the claimant submitted its third interim valuation and invoice. Although the defendant had not paid the invoice in full, in January and February she had identified certain outstanding work items and had also produced a detailed analysis in relation to the valuation, to which the claimant had responded, also in some detail, and suggested a meeting to discuss.
66. In January 2019 the claimant also asked the defendant to discuss the outstanding items of works where the defendant needed to make decisions to allow the claimant to proceed to complete the works and there had been a process of discussion about such matters as the choice of external doors and staircase.
67. In the course of these exchanges the defendant had suggested in her email of 17 February 2019 that the claimant was "not interested in completion", making some strong criticisms of the claimant's failure to complete the works as promised. However, in its email of 20 February 2019 Mr Davies had said that the claimant was ready to fit the external doors, which would enable it to complete the tiling. In emails exchanged on 25 and 26 February 2019 Mr Davies was asking for access for these works and further works to the balcony and for updates on the outstanding choices required, whereas the defendant was indicating that she was only willing to allow the doors to be fitted because she did not believe that the claimant was committed to finishing the project in a proper manner.
68. Not surprisingly Mr Davies asked the defendant to confirm whether or not she wanted the claimant to carry out any further work or whether she was ending the contract. The defendant did not give a clear answer and he pressed her for an answer about the status of the contract. On 27 February 2019 Mr Davies re-stated his position that he wanted to be allowed to finish the work and he proposed a meeting to discuss, asking the defendant to clarify its position. Again the defendant did not provide a clear answer, suggesting in her emails that she did not believe that the claimant's expressed desire to finish the works was genuine.
69. Mr Davies in his final email of 27 February 2019 said that the claimant wanted to finish the work and that it was proposing to fit the doors, the glass balcony and the tiling over the next two days, saying that "I presume this is ok". The defendant in her final email of that day in response said that his answer that the claimant wanted to finish the work was "insufficient". She agreed that the doors could be fitted but that anything else was "not for you to assume and no trades should attend my property". She repeated her earlier request for the claimant to remove the portaloos, but she did not make a more general demand that the claimant should remove all outstanding items from site and not return other than for the limited purpose of fitting the doors.
70. In my judgment, whilst the defendant was clear in her email about what work she would be prepared to allow the claimant to attend that week to do, she was completely unclear about whether or not she had made and was communicating a final unequivocal decision that the claimant would not be permitted to undertake any further works on the site. The impression conveyed by the words of her final email, read in the context of the previous exchanges, was that whilst she strongly believed that the claimant's expressed desire to finish the works was a

sham, and that as at that time she was not prepared to allow the claimant access to undertake any further work than to fit the doors, she had not completely closed the door on further dialogue or was finally and unequivocally unwilling to allow the claimant to attend to undertake any further works other than to the doors.

71. As I said in the course of closing submissions, in my view what comes across very clearly is that the defendant was not prepared to state in correspondence at this time, clearly and unequivocally, that she was terminating the contract. What the email exchanges conveyed is that she did not want to be the one to make the decision to end the contract. She may have feared the consequences of being the one to do so. She may have wanted to engineer the claimant into ending the contract. Whilst her motives are irrelevant, the clear meaning of the words used was that she was not communicating a final and unequivocal decision to treat the contract as at an end.
72. Although the claimant's reaction to the email is also not strictly speaking relevant, I am confirmed in my view by how the claimant actually responded at the time. On 1 March 2019 Mr Davies emailed the defendant, enclosing a spreadsheet of outstanding work and information, and asked when the claimant's two operatives could attend to "get on with finishing the work". There was no response until, after some chasing, the defendant replied on 4 March 2019 in very similar - albeit more detailed - terms to those in which she had previously expressed herself and, importantly, failing to give a clear answer to a very clear question. On 6 March 2019 Mr Davies wrote repeating the claimant's desire to be allowed to finish. There was no response. Finally on 14 March 2019 Mr Davies wrote asking the defendant to confirm her position by 18 March 2019. Again there was no response and on 20 March 2019 Mr Davies emailed saying that the claimant was treating her continuing silence as a breach of its entitlement to carry on to complete the work and that it was accepting the claimant's breach. As Ms Lawrenson suggested in cross-examination, if the defendant had believed that her email of 27 February 2019 had made the position clear she would doubtless have said so. Her continuing silence and equivocation was telling.
73. In the circumstances I am satisfied that the defendant's failure, from 25 February 2019, either to permit the claimant to return to site to continue with the works or to confirm that she was willing to do so, was undoubtedly a repudiatory breach of her obligation as employer which the claimant was entitled to and did accept on 20 March 2019. It follows that the monetary claims and counterclaims which I must address later are to be assessed on this basis.

(4) [Valuation of contract works and varied works](#)

74. Although this had not been fully appreciated in the run-up to the trial, on investigation it emerged that the defendant had served a schedule to her Defence which set out her positive case in relation to the valuation of the claim for the contract works and variations and which had not been superseded in her Amended Defence. It had been prepared by quantity surveyors previously instructed by the defendant, a firm known as QCL. However, since the defendant had not sought or been granted permission to rely on QCL's opinions as expert evidence, the contents of the schedule do not amount to evidence in its own right but simply as a statement of the defendant's case. The same applies to the claimant's response to that schedule as attached to its Reply and Defence to Counterclaim. I can only have regard to the schedules as submissions and must rely on the evidence as contained in the documents and the witness evidence. Moreover, since the defendant had not sought to amend her schedule to withdraw any admissions made within it, I am not able to consider the defendant's objections to some of the items as contained in her witness statement or as ventilated at trial, in circumstances where they contradict unqualified admissions made in the schedule as a part of her formal defence.



75. Further, I must disregard - or at least be careful not to double count in respect of - those parts of the defendant's schedule which: (a) under the heading "additional comments" raise matters which are unrelated to the works valuation and are dealt with elsewhere; (b) seek to bring in claims relating to defective works, which are more properly the subject of the separate defects counterclaim addressed by Mr Mancini.
76. Unfortunately, there is no alternative to working through the schedule item by item, but I do so in a summary manner relative to their value, given that to deal with each in detail would be disproportionate and result in unnecessary delay to the production of this judgment. I confirm that I have read and considered the submissions made and evidence adduced in relation to each, insofar as drawn to my attention. Sums in brackets are of course negative sums for which omissions are required.
77. **Works item 1: Preliminaries.** The claimant claims the tender sum of £6,250. The defendant allows only £5,342.90 on the basis not all works were completed and seeks an abatement for cleaning labourer not provided and on site management not provided. However, on any view the preliminaries were incurred over the full period of the original contract works. Indeed, it would have been possible for the claimant to have claimed additional preliminaries for the period of delay, save for the 6 weeks attributable to its own breach. In any event, there is no proper basis for the abatement claimed, since on any view a project manager was provided and cleaning was undertaken, and there is no evidential basis for a deduction based on an apportionment. Decision: allow £6,250.
78. Works item 3: Site Preparation. The claimant claims the tender sum of £5,100 The defendant allows only £2,925.25 on the basis of a valuation of the work done by the defendant. However, as the claimant contends this is a lump sum and the defendant cannot seek a revaluation on the basis of her evidence that she decided without agreement to undertake some of the work herself. Decision: allow £5,100.
79. Works item 6. No dispute on schedule Decision: allow £1,040. The same applies in relation to work items 7, 8, 9, 10, 11, 12, 15, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 27 and I allow respectively £955, £882.50, £2,007, £750, £3,600, £5,075, £1,077, £4,915, £1,800, £2,750, £3,800, £18,156, £2,265, £3,250, £6,100, £450, £4,708. (I appreciate that some of these items are also the subject of omissions, which are addressed below.)
80. Works item 13: Doors and frames - new doors. The claimant claims the tender sum of £4,476.25 The defendant contends that the doors are included in the variation account. However I agree that these are not included in the variation account. Decision: allow £4,476.25.
81. Works item 16: Plastering etc. The claimant claims the tender sum of £4,550 The defendant contends that drawing 01E requires all walls to be skimmed and seeks an abatement for the hall not being skimmed. However the claimant disputes that drawing 01E was provided with the tender and relies on drawing 01G which makes no reference to skim to the hall wall and, in the absence of evidence that drawing 01E was supplied and became a contractual document, I agree. Decision: allow £4,550.
82. Works item 24: Heating system - radiators. The claimant claims the tender sum of £850. The defendant allows nothing for defects. However this is dealt with under defects. Decision: allow £850.
83. Thus the total for the works items amounts to £84,806.25.

84. VO1: add £155 for increased steel. Admitted in schedule as a design error. Although in her witness statement and again at trial the defendant suggested this was the claimant's responsibility, it is plain from Mr Davies' evidence that this was not the case, given that the claimant did not have any design obligation, so that there is no basis for requiring the claimant to bear this cost. It is noteworthy that the defendant accepted the variation at the time. Thus allow £155.
85. VO2: add £8,251 for new door sets and windows. Admitted in schedule and allow £8,251. The same applies in relation to the added or omitted work in relation to the following items where I allow respectively: VO4 (£500); VO5 £730; VO6 (£2,750); VO7 (£6,100); VO8 £255.85; VO9 £57; VO10 £25.36; VO11 £121.33; VO12 £121.33; VO13 £53.83; VO14 £47.44; VO15 £25.19; VO16 £86.04; VO17 £59.47; VO18 £148.20; VO19 £197.25; VO20 £180; VO21 £80; VO22 £40; VO23 £5,223; VO24 £90; VO25 £520; VO26 £180; VO27 (£350); VO28 (£2,490), VO29 £4,500; VO30 (£4,150), VO31 (£2,295), VO32 £3,008; VO33 (£350); VO34 (£226); VO35 (£794); VO36 £746; VO37 £327; VO38 £200; VO40 (£1,100); VO41 £2,298; VO42 £1,196; VO44 £516.32; VO45 £495; VO46 £220; VO47 £574; VO49 £300; VO50 £909; VO51 £2,258; VO52 (£1,800); £1,120; VO54 £619; VO55 £2,400; VO56 (£1,058); VO57 (£65); VO58 (£1,140); VO59 (£400); VO60 £587.34; VO61 £249.51; VO62 £235.76; VO63 £212.84; VO64 £183.51; VO65 £115; VO66 (£250); VO67 £200; VO68 £321; VO69 £107; VO70 £262; VO72 £238; VO73 £162; VO74 £105; VO75-76 nil; VO77 £1,373; VO78 £180; VO79 £501; VO80 £180; VO83 £35; VO84 £175; VO83 £330; VO86 £276; VO87 £210; VO93 (£750); VO94 (£630); VO95 (£7,656); VO96 (£2,007); VO97 (£1,077); VO99 (£480); VO101 (£135); VO102 (£18); VO103 (£200).
86. VO3: omit £6,500 for window painting system, new glazing and new windows and door sets. The defendant suggested the omission should be £3,600 which is the tender price for item 11, however the claimant responded, and I agree, that in fact there is no basis for omitting £6,500 instead of £5,075 for item 12 so I allow (£5,075). I am also satisfied that the cost of the replacement Velux window is an additional item, since I prefer and accept Mr Davies' explanation that the length of the initial Velux as installed was as long as was practicable, given the position of the purlins, so that the defendant's instruction to fit a wider one to compensate is an extra cost item. It follows that there is no basis for seeking adding back the original cost of £621.57.
87. VO39. I agree that the omission elsewhere means that the sum allowed is £581.
88. VO43. I agree with the claimant's valuation. Allow £1,128.
89. VO48. There is no suggestion that the claim includes for moving CCTV. Allow £410.
90. VO71. I accept the defendant's evidence in her witness statement at [100]. Allow £243.20.
91. VO81. I accept Mr Davies' evidence in relation to the provision of the bullnose step. Allow £85.
92. VO82. I accept that the claimant's allowance is reasonable. Allow £140.
93. VO88. I accept the claimant's case that there is no reference in the tender documentation (see section M6 of the specification in particular) to the effect that internal decoration is included. I allow £3,216 as a variation as claimed.
94. VO98. I accept the claimant's evidence that the glass balustrade and fittings was supplied so the credit is only for fitting cost. Omit (£60).

95. VO100. In the absence of clear evidence from the defendant to contradict the claimant's account and allowance I allow (£200).
96. Thus the total for the variations account amounts to £6,260.77.
97. Thus the total for measured works and variations amounts to £91,067.02, with VAT at 20% at £18,213.40 total £109,280.42.

(5) Defects

98. As I have already said, the court has the benefit of a written report from Mr Mancini, attaching a number of photographs on which he placed reliance as well as a schedule containing a very helpful summary of his views. Written questions were also submitted to and answered by him. Because Mr Mancini's report was produced after the parties had exchanged their witness statements, both parties have also provided comments on his schedule so that I now have one composite schedule which sets out Mr Mancini's views and both party's respective cases in one document. More recently Mr Mancini has added to his views with the benefit of seeing some further documents provided to him by the defendant.
99. Although no order was made for Mr Mancini to attend court for cross-examination, nonetheless because both parties are unwilling to accept many of Mr Mancini's views (albeit in different respects and for different reasons) and because the court is not bound - nor even entitled - to accept the views of an expert without testing them against the totality of the evidence and considering the respective submissions, it is necessary for me to consider each individual claim. However, since Mr Mancini's total valuation of all defects is only £22,486 net it would be disproportionate for me to devote the same time and attention to each as might be justified in a multi-million pound defects claim.
100. There are a number of recurring issues which I should address before turning to the individual claims.
101. The first is that some of the items relate to incomplete as opposed to defective work. Where this is the subject of an omission credit from the claimant, then of course the defendant cannot also recover the cost of completing, since that would amount to double recovery. Further, given my conclusion that it was the defendant who repudiated, the defendant is not entitled to claim any shortfall between the credit given by the claimant and either the cost as valued by Mr Mancini or the actual cost to complete.
102. The second is that some of the items relate to work, whether incomplete or defective, which was not done by the defendant prior to selling the house shortly after Mr Mancini's inspection undertaken prior to his report in March 2021. Although not the subject of any pleaded case from either side, nor even an application to amend, Ms Lawrenson took the point that in the absence of any pleaded case or evidence to the effect that the sale price was reduced by the presence of these unremedied items it was not possible for the defendant to recover for them. She referred me to the commentary in Keating, where the position is well summarised at [9-071] and [9-075]] as follows:

[9-071] "Where there has been substantial completion the measure of damages is the amount that the work is worth less by reason of the defects and omissions, and is normally calculated by the cost of making them good, i.e. the cost of reinstatement ..."

[9-075] "... Sometimes the proper measure of damages is not the cost of reinstatement but the difference in value between the work as it is and as it ought to have been. This will be so in particular where the claimant has no prospect or intention of rebuilding, or where it would

otherwise be unreasonable as between the claimant and the defendant to award the cost of reinstatement.”

103. In my judgment these extracts demonstrate that there is no hard and fast rule, and each case must be decided by reference to the individual circumstances. Having heard Ms Lawrenson’s submission, the defendant said that the position was that the property had sold for £5,000 less than its asking price - albeit that the overall price was the same, with the difference being made up by a £5,000 agreed additional payment for contents. She contended that it might have been possible to have achieved a greater sale price had the defects complained of not been present. She had no positive evidence that this was the case but she contended that equally there was no positive evidence that there was no impact. Ms Lawrenson countered that in the absence of evidence of any price reduction post the purchaser’s building survey there could be no assumption that the defects had resulted in a price reduction.
104. It appears that the claimant’s approach has been to assert that each item where Mr Mancini had observed a defect, as opposed to relying on historic photographic evidence, had been unremedied before the property was sold, shortly after Mr Mancini’s inspection. By reference to the schedule, the majority of these items are relatively modest claims. Some relate to defects which would probably not have been apparent on inspection by the purchaser before making a purchase offer, for example the most substantial claim (item 61) for addressing leakage from the en-suite shower. It seems to me that it is unlikely that such items, unless discovered or disclosed during the sale process, for example through the property questionnaire or survey (in which case they would have been specifically referred to) would have been factored into any general price reduction, whereas I am prepared to accept that where the defects would have been visually apparent they may well have contributed to a general reduction by reference to an overall assessment of the quality of the property. A good example is the poor quality tiling, which appears so dramatically from the photographs.
105. In my judgment the correct approach is to determine whether this is a good defence on an item by item basis applying the above test, since it would not be fair to allow the defendant to recover for remedial works which she will not in fact undertake, unless there is reasonable evidence that they may have contributed to the overall assessment of the price to be paid for the house as a whole. In such case I am satisfied that the modest cost of remedy, net of VAT on the basis that there is no basis for including VAT where the cost will never be incurred by the defendant, is a reasonable approach to valuation, even though it is not possible to make a direct linkage between the cost of remedy and any specific diminution in value.
106. The third is that, where the defendant has identified that these works have been undertaken, she ought to be limited to the actual remedial cost rather than be permitted to recover Mr Mancini’s valuation, if greater. However the corollary of this is that the court should not be so restrictive as Ms Lawrenson invited me to be in ascertaining which remedial invoices related to which costs, otherwise there would be a risk of the defendant being double penalised, which would not be just in my view.
107. The fourth is that where the works are incomplete or snagging type works, as opposed to discrete defects, the court ought only to award the defendant Mr Mancini’s net valuation, i.e. the cost net of his assessment of 16% addition for contractor’s preliminaries, overhead and profit (“OHP”) and net of VAT. This is because, but for the defendant having repudiated and excluded the claimant from site, the claimant would have been able and entitled to have completed at net cost so that the defendant cannot now recover the add-on costs of OHP and VAT.
108. I now turn to the individual items.

109. Item 1 - decoration in snug. I am satisfied that the defendant is entitled to recover £2,798 being the total of the two invoices from her remedial contractor (Mr Burgess) which I am satisfied include for these works and the other works identified below. I am not satisfied that the defendant has established that any of the other invoices or costs referred to or pleaded relate to these items.
110. Item 2 - allow as claimed (£66.12) on basis not completely resolved by Mr Burgess and visual defect may have impacted on sale price.
111. Item 3, 4, 6, 7, 8, 9, 10, 11, 16, 17, 21, 22, 23, 24, 25, 27, 33, 40 - all included in 1. No basis for further omission in items 7 and 22.
112. Item 5 - allow as claimed (£11.60) on basis not resolved by Mr Burgess and visual defect may have impacted on sale price.
113. Item 12 - allow £29 on basis I prefer the defendant's evidence on this point.
114. Item 13 - allow nil as not a defect.
115. Item 14, 15 - allow as claimed £164.72 as satisfied a defect for which claimant responsible, and visual defect may have impacted on sale price, but do not allow greater amount as defendant refers to invoice not referred to in evidence at trial or in trial bundle.
116. Item 18 - allow as claimed £174 as satisfied a defect for which claimant responsible and visual defect may have impacted on sale price.
117. Item 19 - allow as claimed £179.80 as satisfied a defect for which claimant responsible and visual defect may have impacted on sale price.
118. Item 20 - allow as claimed £266.80 as satisfied a defect for which claimant responsible, where the defendant addressed this issue in her witness statement [111] and Mr Davies did not, and there is evidence that the installation was poor quality.
119. Item 26 - accept that since the defendant repudiated the omission already given is sufficient remedy.
120. Item 28 - allow as claimed £121 as satisfied a defect for which claimant responsible and visual defect may have impacted on sale price.
121. Item 29 - no allowance as there is no documentary evidence or witness evidence that the Floorcare estimate was accepted or the work undertaken and paid for. I also note that the estimate included for urine, tea and coffee stains for which the claimant cannot be held responsible.
122. Item 30 - I am satisfied that the defendant should recover the difference between the omitted amount of £1,140 plus VAT (£1,368) and Mr Mancini's estimated amount of £1,503.36 gross in the sum of £135.36, since the defendant was entitled to remedy the defect, but I am not satisfied that the greater actual cost said to have been incurred can be recovered.
123. Items 31, 32 - I accept Mr Mancini's view that these are not defects.
124. Item 34 - I accept not within the scope of work or impliedly necessary.
125. Item 35 - allow as claimed £29 as satisfied a defect for which claimant responsible and apparent defect may have impacted on sale price.

126. Item 36 - I accept that the claimant had supplied the items which it was not permitted to install and that the installation omission of £60 already allowed is sufficient. Thus no further award justified here.
127. Item 37 - allow as claimed £146.16 as satisfied that even if work not expressly shown in specification it was impliedly necessary.
128. Item 38 - allow as claimed £174 as satisfied a defect for which claimant responsible and apparent defect may have impacted on sale price.
129. Item 39 - I accept Mr Mancini's view that this is not a defect requiring remedial works.
130. Item 41 - I do not accept that the claimant was under an obligation to bleed all radiators, even those it did not fit, or that the radiator being lukewarm on inspection years after the event evidences a defect. Nor is it an apparent defect which may have impacted on the sale price.
131. Item 42, 43 - I am satisfied that the omission provides sufficient remedy, given the defendant's failure to choose and her repudiation.
132. Item 44 - I accept the defendant's evidence and Mr Mancini's opinion and award £271.44.
133. Item 45 - whilst I accept Mr Davies' evidence as to the bolster cut brickwork I do not accept that the claimant's works were appropriate and prefer Mr Mancini's opinion and that the apparent defect may have impacted on sale price and award £440.80 as claimed.
134. Item 46 - I do not accept that the defendant's repudiation is an excuse for not providing the guarantee, however there is no evidence of visual defect or specific price reduction and hence no basis for award.
135. Item 47, 48 - I agree with the claimant that Mr Mancini has confused storage of the claimant's materials and storage of the defendant's goods and that under the contract the claimant was not obliged to provide storage for the latter and hence no basis for award.
136. Item 49 - I accept Mr Mancini's opinion that there is no damage.
137. Item 50 - I accept Mr Mancini's evidence of what he saw and award £34.80 as a reasonable remedial cost.
138. Item 51 - no claim.
139. Item 52 - this is not a defects claim. The defendant complains in general terms of the claimant's failure to keep the premises clean. It is well known that this is often a bone of contention in domestic building projects, where standards may reasonably differ. I am not satisfied that the defendant has established a breach of duty or that there is any sufficient basis for awarding the defendant £50 / month as claimed.
140. Item 53 - this is not a defects claim. The complaint is about the loss of multiple hoovers, however there is no evidence of these claims and I am unable to understand how, if these items were lost, the defendant can state in her schedule that she still has 2 such hoovers for evidence, unless she is actually saying the hoovers were broken as opposed to lost, as to which there is no evidence.
141. Items 54, 55 - I accept the claimant's submission that it was under no obligation to undertake decoration.
142. Item 56 - I accept Mr Mancini's evidence and the claimant's submission that this was not part of the contract works.

143. Items 57, 58 - I accept the claimant's submission that this work was omitted and there is no basis for any further claim.
144. Item 59 - the complaint is about problems with the combi cooker and lighting. The claimant's defence was that it only wired the cooker into a fused spur. Initially, Mr Manini rejected this item on the basis of there being no visual evidence and no electrical report of fault. He was then provided with some documentation from Thomas Halliwell and noted that he was "not able to differentiate which items may have been in connection work done by the Claimant or which may be related to pre-existing electrics which were not included in the Claimants scope of works". Nonetheless, he suggested that it was reasonable to award the defendant the cost of the report and 50% of the value of the identified work. I am unable to accept this as a proper basis for concluding that there was a breach in any specified respect or that the defendant is entitled to claim the cost of the report or 50% of the estimated costs.
145. Item 60 - the complaint is of a badly fitted thermostat and there is evidence that the defendant has expended £696.25 on its repair. The claimant suggests, but provides no evidence, that the cause may be a faulty module supplied by the defendant. However, the defendant's case is supported by Mr Mancini and I accept this evidence and award £696.25.
146. Item 61 - the complaint is that the ensuite shower is badly fitted and leaking. Mr Mancini identified visual evidence of water staining underneath and evidence of ongoing potential failure of tanking of wet room floor construction. His estimated remedial cost of £2,726 net of VAT was to take up all floor tiling and perimeter edge tiling to walls, to supply and install new wet room tanking system in accordance with manufacturer's instructions and to reinstate wall and floor tiling and make good all associated damage. This work was not done by the defendant before sale. I have allowed an amount for the damage beneath under items 14 and 15 above. The cost of substantial remedial works would undoubtedly, had they been identified by the purchaser, have been the subject of specific agreement. In the absence of evidence of such it is not reasonable to allow the defendant to recover the cost of works which will never be undertaken by her and could have had no impact on the purchase price.
147. Item 62 - There is no evidence that this was part of the claimant's scope of work.
148. Item 63 - There is no sufficient evidence that this was part of the claimant's scope of work or that the claimant wrongfully took the timer from site (if this is what is alleged).
149. Item 64 - I accept Mr Mancini's opinion of the defect and I also accept his valuation of and allow the sum of £417, rejecting the defendant's claim for a far higher amount which is so far in excess of Mr Mancini's valuation as to be irrecoverable. I note that Mr Mancini maintained his position in his answer to the defendant's questioning of his opinion.
150. Item 65 - this generalised allegation of "concerns on electrical system" raises the same issue as item 59 and I do not accept this claim for the same reasons.
151. Item 66 - the complaint is that the circuit breaker to the garage supply is undersized and Mr Mancini confirms that in his opinion there is physical evidence of this in the dimmer switch not working. The claimant contends that this must be a faulty module, I assume on the basis that it was supplied by the defendant. In his answers 32 and 33 to the claimant's quotations Mr Mancini appears to confuse the dimmer switch and the circuit breaker and to accept that there may be an inherent fault with the product, having undertaken a visual inspection only. In the circumstances I consider there is sufficient doubt not to allow this claim.



152. Item 67 - I accept Mr Mancini's opinion, maintained and explained in his answers, and award £81.20 net of VAT on the basis that this work has not and will not be undertaken by the defendant.
153. Item 68 - I accept Mr Mancini's opinion, maintained and explained in his answers, and do not accept this item.
154. The total counterclaim for defects as allowed by me thus amounts to £6,237.05.
- (6) [The claimant's claim for damages for loss of profit and the defendant's counterclaim for damages for delay](#)
155. This claim was included in the claimant's final account claim as being a claim for £1,326, being 10% of the work not completed, comprising the porch, stairs and balustrade and hard landscaping. No particulars were given in the Particulars of Claim and in the Defence the claim was not admitted.
156. As a matter of principle, a contractor who has been wrongfully deprived of the right to complete the rest of the contracted works is entitled to recover the loss of the opportunity to earn those profits. It may be that in appropriate cases those profits would include a claim for what are referred to as head office overheads, i.e. those overheads which are not site specific but fixed.
157. However, in all cases the claim must be proved. Here, although this issue received no attention at trial, this claim was not addressed in the witness evidence for the claimant. Mr Davies did not give any evidence as to the profit element which was included in the original contract tender or, if different, the profit element which was included in the items of work in respect of which the claim was made. Nor was reference made to the filed or management accounts for the period in question which would have showed the general profit element, gross or net, obtained by the claimant from its contracting work. Nor did Mr Davies give any evidence as to the profit actually earned on the contract works which were undertaken, once all variations and costs were taken into account. Nor did he give any evidence to the effect that the claimant was unable to make up the opportunity to earn profits on these outstanding items by taking up other profitable work.
158. In the circumstances it seems to me that the claimant has not satisfied the burden of proving its case in respect of this item. The defendant, having not admitted the claim in the Defence, was entitled to put the claimant to proof and was not obliged to cross-examine on points which were not covered in Mr Davies' evidence. In the circumstances there is no evidence which enables the claimant to say that it has established this claim on the balance of probabilities.
159. As to the defendant's claim for damages for delay, I have already found that the claimant is guilty of culpable delay of 6 weeks. In the absence of an operative liquidated damages clause the defendant is only entitled to general damages, as to which, as is said by Keating at [9-083], only modest damages are recoverable in the context of delay in completing a domestic home. Reference is made to the decision in Axa Insurance v Cunningham Lindsey [2007] EWHC 3023 TCC, approved in subsequent cases, where it was said that "[i]n the absence of particular physical symptoms or illnesses caused by the breaches, it is unlikely that general damages as at 2001 would exceed the rate £2,000 per person per year. In many cases, it may be less. Allowing for inflation up to the end of 2007, the maximum for this type of general damages would not generally exceed £2,500 per person per year".
160. Here, the defendant, her son and her partner were undoubtedly seriously inconvenienced by the delayed completion, so that until the end of October 2018 the defendant and her partner were

living in a tent and both before and afterwards all of them had limited access to the usual house facilities of kitchen, bathrooms and leisure space. However, they did not suffer from particular physical symptoms or illnesses, and nor is this case similar to those where homeowners have to live in seriously unsanitary or unpleasant conditions for a prolonged period. Although in her opening submissions the defendant referred to a claim for loss of earnings on the basis that she was unable to take on remunerative contract work during some or all of the period of delay, that was not a claim which had been pleaded or addressed in her witness statement so that, as I said in argument, I am unable to allow her to advance it. Nor would there have been any basis for permitting any amendment of her claim in such circumstances, since she had only made passing reference to this as a head of loss in correspondence in early 2019. Furthermore, although the claimant also referred to the impact of the delay on her son's A-level studies, whilst I am sure that as a concerned mother she feels this keenly, there is no sound legal basis for increasing any award on this basis, since: (a) the evidence indicates that, understandably, she prioritised the available occupation so that her son had a bedroom where he could study; (b) there is no sufficient evidence for concluding that a delay of 6 weeks (which is the delay for which the claimant is legally responsible) could have had such a dramatic impact as might have been suggested.

161. The defendant made the claimant aware at the time of contracting of the importance of finishing on time in relation to the impact of delay on her son in particular, but there is no evidence that her partner was specifically identified or mentioned. In all the circumstances I am satisfied that a global award of £10 / per day, representing £5 each for the defendant and her son, producing a total of £420 over the period of 6 weeks, is as much as I can reasonably award.

(7) Conclusions

162. The end result is as follows: (a) measured works plus net variations plus VAT total £109,280.42; (c) less net defects £6,237.05 (inclusive of VAT, as applicable); (d) less general damages £420 (no VAT), total £102,623.37.
163. It appears to be common ground that the defendant has paid the sum of £42,983.23 net of VAT, or £51,579.87 gross.
164. It appears to follow that the net liability of the defendant amounts to £51,043.50.
165. To that will be added interest from the date of the final account (27 March 2019) down to judgment. Although the rate contended for by Ms Lawrenson in her submissions was 6%, there is no evidence or basis for awarding anything more than 2% above base - being the appropriate rate in the case of a small building firm such as the claimant: see the approach of Jackson J in Claymore Services Ltd v Nautilus Properties Ltd [2007] EWHC 805 (TCC) cited in the current edition of Civil Procedure (the White Book) at 16A1.2).
166. At a blended rate of 2.4% pa to reflect the change in base rate from 0.75% to 0.1% on 17 March 2020, over 807 days from 27 March 2019 to 11 June 2021 that results in a total interest award of 5.3% and thus a total award inclusive of interest of £53,748.81.