



Neutral Citation Number: [2022] EWHC 1266 (TCC)

Case No: HT-2019-000475

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 25/05/2022

Before:

MRS. JUSTICE O'FARRELL

Between:

(1) NORTHUMBRIA HEALTHCARE NHS FOUNDATION TRUST
(2) NORTHUMBRIA HEALTHCARE FACILITIES
MANAGEMENT LIMITED

Claimants

- and -

(1) LENDLEASE CONSTRUCTION (EUROPE) LIMITED
(2) LENDLEASE CONSTRUCTION HOLDINGS (EUROPE)
LIMITED

Defendants

- and -

BALFOUR BEATTY KILPATRICK LIMITED

Third Party

BALFOUR BEATTY GROUP LIMITED

Fourth Party

MPB STRUCTURES LIMITED

Fifth Party

KEPPIE DESIGN LIMITED

Sixth Party

BRIGGS AMASCO LIMITED

Seventh Party

IKO UK LIMITED

Eighth Party

HORBURY BUILDING SYSTEMS LIMITED

Ninth Party

HORBURY JOINERY LIMITED

Tenth Party

HORBURY GROUP LIMITED

Eleventh Party

Sean Brannigan QC, Jennie Gillies & Patrick Hennessey (instructed by Addleshaw Goddard
LLP) appeared for the Claimants

Vincent Moran QC & William Webb (instructed by CMS Cameron McKenna Nabarro Olswang
LLP) appeared for the Defendants

Dominique Rawley QC & Jennifer Jones (instructed by Shepherd and Wedderburn LLP)
appeared for the Third and Fourth Parties

Simon Lofthouse QC (instructed by Simmons & Simmons LLP) appeared for the Fifth Party

Ben Quiney QC & Michele de Gregorio (instructed by DAC Beachcroft LLP) appeared for the
Sixth Party

Hearing dates: 18th and 19th May 2022

Approved Judgment

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

**“This judgment was handed down by the judge remotely by circulation to the
parties’ representatives by email and release to The National Archives. The date
and time for hand-down is deemed to be Wednesday 25th May 2022 at 10:30am”**

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MRS JUSTICE O’FARRELL DBE

MRS JUSTICE O'FARRELL:

1. These proceedings arise out of the design and construction of a specialist emergency care hospital on a 20 hectare site at Cramlington, Northumberland.
2. The hospital comprises a central, three-storey 'hub', housing the main clinical support facilities, surrounded by 'cogs' housing the wards, offices and a conference centre. The external wall insulation system comprises a metal structural frame, supporting a cementitious panel board, which is covered with expanded polystyrene, to which is applied a render system that is painted. A feature of the buildings is that most of the external wall elevations are curved.
3. The parties to the proceedings are as follows:
 - i) The First Claimant NHS Trust entered into a PFI Project Agreement dated 9 October 2012 with the Second Claimant for the design, construction and facilities management of the hospital.
 - ii) The Second Claimant engaged the First Defendant to design and construct the hospital by a contract dated 9 October 2012. The Second Defendant provided a parent company guarantee in respect of the First Defendant's obligations under the contract.
 - iii) The Third Party ("BBK") was engaged by the First Defendant to carry out mechanical and electrical works in respect of the project. The Fourth Party provided a parent company guarantee in respect of BBK's obligations under its sub-contract.
 - iv) The Fifth Party ("MPB") was engaged by the First Defendant to carry out civil engineering and drainage works in respect of the project.
 - v) The Sixth Party ("Keppie") was the architect and lead designer for the project, whose appointment was novated to the First Defendant.
 - vi) The Seventh Party ("Briggs Amasco") was engaged by the First Defendant to carry out roofing works in respect of the project. The Eighth Party provided a parent company guarantee in respect of Briggs Amasco's obligations under its sub-contract.
 - vii) The Ninth Party ("Horbury") was engaged by the First Defendant to carry out dry-linings and internal partition works, and the external wall render system in respect of the project. The Tenth Party ("HGL") carried out remedial works to the fire doors at the hospital. The Eleventh Party is the parent company of Horbury and HGL.
4. The works were certified as practically complete on 31 March 2015.
5. On 20 December 2019 the Claimants issued proceedings against the Defendants. The Claimants' case is that there are substantial design and construction defects throughout the hospital as set out in annexes to its pleaded case, for which the Defendants are responsible. The case is complex, raising allegations that cover a number of expert disciplines, and the Claimants' pleadings are voluminous, containing over 120 separate

annexes in addition to the main statements of case and responses to request for further information.

6. During 2020 the Defendants issued the Part 20 claims, in which they seek to pass on any liability for the defects to the Third to Eleventh Parties, summarised as follows:
 - i) Annex B1 – Passive fire protection defects, including fire-stopping, fire dampers, fire doors, smoke clearance, smoke curtains and use of lifts for evacuation – BBK, Keppie, Horbury and MPB;
 - ii) Annex B2 – Flooring and ground floor slab defects – MPB and Keppie;
 - iii) Annex B3 – External wall defects in respect of fire resistance and structural stability – Keppie, Horbury and BBK;
 - iv) Annex B4 – Roof defects – Briggs Amasco, Keppie and BBK;
 - v) Annex B5 – Pipework defects – BBK;
 - vi) Annex B6 – General building defects – BBK, MPB and Keppie;
 - vii) Annex B7 – Defects in the design and construction of the foul drainage and external drainage systems – MPB;
 - viii) Annex B8 – M&E defects – BBK;
 - ix) Annex B9 – Defects in the fire-rating and structural stability of the internal partitions and door frames – Keppie, Horbury and BBK;
 - x) Annex B10 – Landscaping defects;
 - xi) Annex B11 – Helipad defects – BBK and Keppie.
7. The Claimants' total claim is for damages in the sum of £140 million approximately. A large part of the claim, some £73 million, is claimed as the cost of 'the decant scheme', comprising the decanting of the hospital into a specially constructed four-storey building during the proposed remedial works, so that the hospital can continue to function and maintain the level of care necessary for patients subject to critical or emergency medical conditions.
8. At the first CMC on 15 July 2020, the trial was listed for 12 January 2022 with an estimate of 10 weeks. By order dated 10 May 2021, on the application of the Claimants with the consent of the other parties, the trial date was vacated and re-fixed for 3 October 2022 with the same estimate. The estimate takes into account evidence to be given by expert witnesses in respect of the following disciplines:
 - i) Building Surveying;
 - ii) Structural Engineering;
 - iii) Civil Engineering;

- iv) Architecture;
 - v) Fire Engineering and Fire Safety;
 - vi) Mechanical and Electrical Engineering;
 - vii) Metallurgy and Material Engineering;
 - viii) Drainage Engineering;
 - ix) Floor Finishing Engineering;
 - x) Roofing Engineering;
 - xi) Helipad Engineering;
 - xii) Quantity Surveying;
 - xiii) Clinical Planning and Decant; and
 - xiv) Valuation.
9. There have been recent settlements of parts of the case between the Claimants and the Defendants. The claims in Annexes B2, B4, B5, B6, B8, B10 and B11 have now been settled or are agreed in principle. Although it is not clear whether any of those claims will continue to be made against the Part 20 Defendants, as *Biggin v Permanite* claims, some of those claims have already, or are likely to be, settled with all parties so as to reduce the scope of issues and evidence at trial. The main outstanding claims in issue are those set out in Annex B1 (fire protection defects – direct remedial costs of £1.5 million), Annex B3 (external walls – direct remedial costs of £11 million) and Annex B9 (internal partitions and door frames – direct remedial costs of £11 million).
10. This is the fifth CMC in these proceedings. The matters before the court are as follows:
- i) the Claimants' application for permission to amend their pleadings dated 10 May 2022;
 - ii) the Defendants' application for permission to amend their pleadings dated 14 April 2022;
 - iii) BBK's application for permission to amend its pleadings dated 26 April 2022;
 - iv) revisions required to the timetable and consideration of adjustments to the trial date, split trial or adjournment of the trial;
 - v) Keppie's application for permission to rely on expert valuation evidence;
 - vi) the Claimants' application for specific disclosure dated 4 May 2022.

Test on applications to amend

11. Once a statement of case has been served, a party may amend it only with the consent of the other party or with permission of the court: CPR 17.1.

12. CPR 17.3 provides that the court has a general discretion to allow an amendment to a statement of case, subject to CPR 17.4 (which does not arise in this case).
13. The leading authorities on applications to amend where lateness is an issue are *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) per Coulson J (as he then was) at [19] and *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 per Carr J (as she then was) at [36]-[38].
14. The relevant principles enunciated in both authorities can be summarised as follows:
 - i) In exercising the court's discretion whether to allow an amendment, the overriding objective is of the greatest importance. Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.
 - ii) Therefore, such applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.
 - iii) The starting point is that the proposed amendment must be arguable, coherent and properly particularised. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success.
 - iv) An amendment is late if it could have been advanced earlier, or involves duplication of steps in the litigation, costs and effort. Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.
 - v) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay.
 - vi) A very late amendment is one made when the trial date has been fixed and where permitting the amendment would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.
 - vii) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

Claimants' application to amend

15. By application dated 10 May 2022 the Claimants seek permission to amend their statements of case. The application is supported by the witness statement of John Emerton of Addleshaw Goddard LLP, dated 10 May 2022. The proposed amendments are to Annex B1, Annexes B1-36 and B1-36A, responses to the Defendants' Third RFI, Annex B9 and Annex B9-23. They identify the results of tests carried out or obtained by the Defendants and fire stopping defects identified during joint inspections by the technical experts on which the Claimants seek to rely in support of their inferential case of widespread defects.
16. Mr Brannigan QC, leading counsel for the Claimants, submits that the amendments are relatively minor, they will not require any further factual evidence and can be accommodated within the technical experts' discussions. The amended pleadings can be served by 23 May 2022.
17. The Defendants consent to the proposed amendments, subject to the usual order as to costs and permission to pass down the new allegations raised to the Part 20 Defendants.
18. In correspondence and in submissions BBK raised a concern that Annex B1-36A did not contain adequate cross-references to other defects already pleaded in Annexes B1-18 to B1-23A and B9-9A to B9-9D.
19. However, at the hearing Mr Brannigan clarified that:
 - i) Annex B1-36 contains allegations of additional, specific defects, identified during the joint inspections carried out by the experts in August, September and December 2021 (now reduced from 163 items to 71 items following removal of duplications); and
 - ii) Annex B1-36A contains further particulars of those defects, cross-referred to Annex B1-36.
 - iii) The defects are relied on by the Claimants as part of their inferential case that such defects exist throughout the hospital. There is no duplication, or overlap, between the defects in Annex B1-36 and the defects set out in the other Annexes. Therefore no cross-referencing could be provided or would serve any useful purpose.
20. Following that clarification, there are no outstanding objections to the application. Therefore, permission is granted, subject to an order that the Claimants pay the costs of and occasioned by the amendments.

The Defendants' application to amend against the Claimants

21. By application dated 14 April 2022 the Defendants seek permission to amend their statements of case. The application is supported by the third witness statement of Steven Williams of CMS Cameron McKenna Nabarro Olswang, dated 14 April 2022 and the fourth witness statement of Mr Williams dated 13 May 2022.
22. The Defendants seek to amend a number of pleadings in the main claim, namely, Annexes B1, B1-5, B1-9, B2, B3, B3-12, B5 (now settled), B7, B7-3A, B7-3B, B9, B9-11, B9-23, B9-25, F2, F2.1 and F2.2. The key proposed amendments comprise: (a) the

incorporation of various test results; (b) passing on to the Claimants defences pleaded by the Part 20 Defendants; and (c) pleading revised remedial schemes, including alternative decant schemes. The amended pleadings can be served by 23 May 2022.

23. A large measure of agreement has been reached between the parties but:
- i) the Claimants object to certain amendments whereby the Defendants seek to pass on new allegations made by Horbury; and
 - ii) the Claimants submit that the court should not grant permission for a number of the proposed amendments pending the provision of further information by the Defendants and this part of the application should be adjourned for that purpose.

Horbury amendments

24. Following abandonment by the Defendants of some of the disputed amendments, and acceptance of others by the Claimants, the only outstanding proposed Horbury amendment to which objection is made is at paragraph 7V.4 of the Annex B9 Defence.
25. Paragraph 7V.4 concerns an allegation that the Defendants (Horbury) failed to install glass mineral wool insulation within the internal partitions as required by the Siniat specification. The proposed amendment is:

At paragraph 147.27G of the Horbury Defence, Horbury avers that (a) as to item K3 of Annex B9-20 (and photo 1055230), no insulation was ever required; and (b) as to the items generally, insofar as insulation is absent, it has been removed by others during investigation works (in particular as regards photographs 095830, 095837, and 095849 (which show insulation fibres on the board) and 121336 and 122055 (which show that insulation has been removed), but not photographs 114317, 114349, 114622, or 124235). Insofar as the said averments are established, the Defendants will rely on the same in defence of the claim.

26. Mr Brannigan submits that the proposed amendment is directly contrary to the Defendants' expert view that the failure to install the insulation amounts to a defect and therefore it has no real prospect of success. Further, even if Horbury could establish that the insulation was removed by (unidentified) others, that would not necessarily provide a defence for the Defendants.
27. Mr Moran explains that the proposed amendment is put forward as a contingent pleading on the assumption that Horbury is able to prove its defence, which was not raised against the Defendants until December 2021.
28. This amendment is permitted. It is clear and coherent. It raises two short points that can be addressed by the technical experts. It is likely to turn upon any evidence as to the requirements of the specification by Horbury's architectural expert and the photographic evidence of the alleged defects. Although Mr Brannigan rightly notes that the 'others' have not been identified, the pleading is clear that the insulation is said to have been removed during investigation works. If, as submitted by Mr Brannigan, either

or both of those arguments are bad points, that can be addressed by the technical experts.

29. The parties have resolved most of the issues arising out of the Claimants' requests for further information as a pre-condition to agreeing the proposed amendments. The outstanding issues are set out in the helpful schedules produced by the parties.

Annex B3 amendments

30. Items 6 to 13 concern the Defendants' proposed amendments to the Annex B3 Defence, LL Annex B3-12 and Annex F2.1, raising an alternative remedial scheme in respect of the alleged B3 defects that would avoid the need for the Claimants' decant scheme. A brief description of the alternative remedial scheme is set out at paragraph 136B of the Annex B3 Defence, a more detailed methodology and breakdown of cost is set out in LL Annex B3-12, and the Defendants' case that such remedial works would not require decant measures is set out at paragraph 36 of the Defence to Annex F2.1.
31. Part of the Defendants' case is that noise and vibration generated by the remedial works could be controlled and monitored using tested protocols and work methods, together with scaffold wrapping. The Defendants rely on the witness statement of Katherine Slaney, a project manager for the John Radcliffe Hospital in Oxford, dated 25 March 2022. Ms Slaney explains that remedial works are being carried out to the external façade of the John Radcliffe Hospital, including the removal and replacement of existing cladding panels, without a decant scheme. Working protocols have been used to address clinical concerns regarding noise, temperature, patient dignity/privacy issues, and dust, fumes and infection risks during the works. The Defendants have served on the Claimants a B3 remedial pack, containing draft protocols addressing these issues, which they confirm are relied on as part of their case.
32. The Claimants seek copies of the John Radcliffe protocols, details of the extent to which those protocols were complied with or breached, information as to the allegedly comparable nature of the remedial scheme at the John Radcliffe, and further particulars of the Defendants' remedial scheme and quantum of the same. Mr Brannigan submits that these details are necessary so that the decant experts are in a position to consider the new remedial scheme before they produce their joint statement and expert reports.
33. Mr Moran submits that the alternative remedial scheme has been pleaded in much more detail than the Claimants' case, it is in sufficient detail for the Claimants to understand the nature of the claim and any further details can be dealt with by the technical and quantum experts.
34. The case set out in the proposed amendments is arguable, coherent and detailed. The issue is whether the court should adjourn the application until further information has been provided. There is no dispute that further information can, and should be provided by the Defendants by 25 May 2022. The Defendants are not in a position to produce the John Radcliffe protocols, which are not in the possession or control of the Defendants and not relied on as being directly comparable. Reliance on the John Radcliffe remedial scheme is limited to a case that it is possible to carry out external cladding remedial works without a decant operation. On that basis, the court will not order the Defendants to provide those documents. It is not suggested by the Claimants that these amendments would jeopardise the trial date. The parties need certainty moving forwards and

adjourning the application would simply build in further delay and costs. For those reasons, permission is granted for the amendments.

Annex B7 amendments

35. Item 16 concerns the Defendants' proposed amendments to the Defence to Annex B7, Annex B7-3A and Annex B7-3B, raising additional points on the requirements and application of BS EN 752:2008, and seeking to pass on part of MPB's defence to the claim for additional future maintenance costs, including MPB's case that proactive, preventative maintenance should be adopted at the hospital.
36. The Claimants seek further information as to the basis on which it is asserted that BS EN 752:2008 does not apply to some of the drainage runs, frequency of the additional inspections and jetting identified, and details of the basis of the amended case on maintenance costs. The Defendants' position is that these matters will be addressed in the expert evidence; they have agreed to provide further information but are awaiting a response from MPB and will endeavour to provide it by 25 May 2022.
37. The new allegations are arguable, coherent and sufficiently detailed for the Claimants to understand the case and for the experts to consider it. The Defendants have agreed to pass on further information when received from MPB. Permission is granted for this amendment.

Annex B9 amendments

38. Items 17 - 21 concern the Defendants' proposed amendments to the Defence to Annex B9, LL Annex B9-23 and Annex B9-11. The outstanding issues are as follows:
 - i) In the Annex B9 Defence at paragraph 7AH.5, the Defendants seek to pass on Horbury's case that the internal partitions were Universal Board, a Siniat warranted system. The Claimants seek further details of the assertion that the installed partition system is a warranted system, including test data. Horbury have indicated that they are unable to provide further particulars of the testing. The court is satisfied that the assertion is pleaded clearly so that the Claimants know what case they have to meet. This matter can be raised in the experts meetings; if it is supported by Horbury's architectural expert, the experts can agree what, if any, further information is required.
 - ii) In LL Annex B9-23, the Defendants set out an alternative remedial scheme for alleged defects in the internal partitions. The Claimants seek further information in respect of the costs breakdown for the remedial works. Details of the alternative remedial scheme have been set out in the proposed pleading together with a breakdown of the costs of the scheme. This is adequate so as to allow the experts to discuss it and address it in their joint statements.
 - iii) In Annex B9-11, in response to schedule item 40 (cable penetration unsealed in plasterboard wall), the Defendants seek to pass on Horbury's case that a hole in the Hilti remedial works was cut retrospectively. The Claimants seek further particulars of this assertion. The Defendants have passed on the request to Horbury and are awaiting a response. The request for further information should

be answered but the allegation is limited in scope and sufficiently clear for the Claimants to understand the case made.

Annex F2.1 amendments

39. Items 22 to 25 concern the Defendants' proposed amendments to the Annex F2.1 Defence, in response to the Claimants' decant scheme. The outstanding issues are as follows:
- i) Paragraphs 61A to 61D form part of the Defendants' case that an alternative, more modest, decant scheme could be implemented in phases. The Claimants seek a programme / phasing details for the alternative scheme. They are entitled to this information. The Defendants have now provided a programme for this scheme. Any further matters can be discussed by the experts.
 - ii) In paragraph 57F of the Annex F2.1 Defence, the Defendants plead that the Claimants must give credit for the value of the decant scheme against their claim for damages, setting out a breakdown of their calculation of the credit at Section D to Annex F2.2. The Claimants' position is that there will be no beneficial value to them in the temporary decant facilities. They seek details as to the beneficial use which it is asserted they will have and the associated revenue impact to the Claimants in retaining the decant facility. This amendment is arguable, coherent and sufficiently particularised so that the Claimants can properly understand the case. It is a matter for the experts to discuss the alternative decant scheme and address it in their joint statements and reports.
40. For the above reasons, permission is granted for the amendments subject to an order that the Defendants pay the costs of and occasioned by the amendments. The Claimants have permission to serve any consequential amendments to the Reply by 30 May 2022.

The Defendants' application to amend against the Part 20 Defendants

41. The Defendants also seek to amend their pleaded case against BBK, Keppie, MPB and Horbury. The amended pleadings can be served by 25 May 2022.
42. Horbury have agreed to the proposed amendments against the Horbury Defendants.
43. BBK does not object to the Defendants' proposed amendments against BBK, subject to costs, a suitable timetable to address the new case and confirmation that no further increases in the scope of the case will be made. Although there remain outstanding issues for clarification in respect to the new decant case, BBK are content for those matters to be dealt with through the experts' meetings.
44. MPB have agreed to the proposed amendments against MPB, save for those relating to the damp proof membrane. The Defendants and MPB have agreed to adjourn that part of the application for one week as it is anticipated that the relevant claim in Annex B2 has been, or will be, settled.

The Keppie amendments

45. The Defendants seek to amend the case against Keppie by amending the Re-Amended Particulars of Additional Claim, LL-Keppie Annex 1, LL-Keppie Annex 2, LL-Keppie

Annex B9 and Amended Annex Keppie B3. In paragraph 177 of the existing Particulars of Additional Claim against Keppie, the Defendants seek to pass on to Keppie any liability which they incur to the Claimants as a result of the breaches of contract for which Keppie is responsible. In the proposed amendments, the Defendants identify the specific defects alleged against Keppie which, if established, would give rise to the need for the decant scheme or alternative decant scheme pleaded against the Claimants. Further, the Defendants seek to introduce new mini decant schemes that would be caused by various combinations of defects alleged against Keppie.

46. Keppie has agreed to some of the proposed amendments but objects to others as set out in the witness statement of Laura Clayburn of DAC Beachcroft LLP dated 11 May 2022.
47. Mr Quiney QC, leading counsel for Keppie, submits that the disputed amendments are very late and should be refused. The amendments are not merely a refinement of the Defendants' existing case; they articulate, for the first time and very late in the day, a specific case on causation and decant against Keppie and introduce two entirely new alternative decant schemes. There is simply insufficient time left in an already extremely tight timetable for Keppie properly and fairly to consider and respond to the new claims in time for the trial.
48. Keppie's alternative proposal, if the amendments are permitted, is that the court should order a split trial, dealing with issues of liability first, with quantification of the remediation and decant issues to be resolved in a second trial, if necessary. That would allow the Defendants to advance its new claims on causation and decant without causing serious prejudice to Keppie and the Autumn trial date could be retained.
49. Mr Moran submits that the disputed amendments should be allowed. They provide further particulars in respect of already pleaded alternative decant schemes. They introduce new mini decant schemes in respect of the alleged defects against Keppie but the effect of such amendments is to reduce the scope of the claim against Keppie. Keppie was already facing a claim in respect of any liability for the costs of any decant scheme for which the Defendants might be liable to the Claimants caused by Keppie's breaches or contract. Keppie's decant expert has fully participated in the experts' discussions and joint statement process to date. The amendments do not expand the existing case; rather, they narrow and refine it in a manner that can be addressed by the experts. They do not, on proper analysis, prejudice the trial date or cause significant disruption, as any additional litigation steps would be minimal.
50. Mr Brannigan submits that any 'domestic issues' between the Defendants and the Part 20 Defendants should not be allowed to interfere with the timetable for trial in the main claim. If necessary, any new part of the case against the Part 20 Defendants, on causation and/or liability for damages (apportioned or in full), could be heard after the trial of liability and quantum in the main claim.
51. Ms Rawley QC, leading counsel for BBK, submits that the current timetable for the trial is not achievable for a number of factors, including the proposed amendments to the new decant scheme and separate delays by other parties to service of the technical experts reports. However, BBK's position is that a revised start date to the trial and a two-phase hearing would enable the parties to maintain the sequence and spacing for the expert tasks and prepare properly for the trial.

52. Mr Lofthouse QC, leading counsel for MPB, submits that this case is listed to start in October 2022 and the proposed amendments should not be permitted if the consequence would be another adjournment. Any suggestion of a split trial should be similarly rejected as the worst of both worlds, causing further delay and expense. Mr Lofthouse submits that such proposals would be particularly prejudicial to MPB, which now faces a very modest claim, given that the decanting claim is no longer pursued against it. The costs already far exceed any potential liability for the claims now advanced against MPB.
53. The court permits the proposed amendments for the following reasons. Firstly, the proposed amendments are arguable, cogent and sufficiently detailed to allow Keppie to understand the case against it. The underlying premise is that the need for, and extent of, any temporary decant facilities will be dictated by the extent of the remedial works required. There are a number of different possible permutations as to the extent of any remedial works for which Keppie might be liable; in particular, having regard to the scope of its professional duty, any breaches for which it is responsible, and the resulting remedial works for which it is responsible. The primary case advanced by the Claimants and, if established, sought to be passed on by the Defendants, is that Keppie is liable for all the defects alleged against it and, therefore, liable for the full remedial and decant schemes claimed. However, if some but not all of the defects are established and/or the combination of defects established do not justify a full remedial and decant scheme, the Defendants seek to pass on to Keppie alternative permutations of smaller remedial schemes and/or decant schemes. Those alternatives are now pleaded so that Keppie can understand and respond to the same.
54. Secondly, the Defendants have provided adequate explanation for the delay in making the amendments to the causation and decant claims against Keppie. Mr Williams sets out in his third witness statement the history of these proceedings, including the numerous amendments that have been made by all parties over the last two years. No criticism is made of the parties in this respect. This is a complicated piece of litigation and the number of parties involved has resulted in serial amendments up and down the line, as claims and defences are considered, denied or adopted against other parties. Hence, at the last CMC in January 2022, the court provided for a timetable for the parties to produce further draft amendments to their pleadings in March 2022. However, the consequence is that it has taken a substantial period of time before the parties have reached a final position on the alleged defects. This in turn has delayed the finalisation of appropriate remedial schemes, which dictates the nature and extent of any decant schemes.
55. Thirdly, the court does not accept that the proposed amendments are very late amendments. Although the timetable needs to be revised and some adjustment is required to the start date in any event, it is still possible for the trial to go ahead. Indeed, none of the parties indicated that it would seek an adjournment of the trial from the Autumn term of 2022, at least on liability.
56. Fourthly, if the amendments are not permitted, the Defendants will suffer prejudice by losing the opportunity to present their alternative causation and damages arguments against Keppie, that they maintain flow from the combination of findings on liability and remedial costs that are open to the court.

57. Fifthly, it is said by Keppie that if the amendments are permitted, it would suffer very significant prejudice, in particular, because Keppie's expert on decant issues requires about three months to consider the multiple alternatives now advanced by the Defendants. No breakdown has been provided for that estimate but the court recognises that the amendments necessitate Keppie and its experts undertaking significant additional work. However, Keppie's technical experts will already have considered the alleged defects; the technical experts have agreed joint statements and will be in a position to exchange and file their reports by 27 May 2022. Keppie's decant expert will already have considered the full decant scheme and the Defendants' alternative schemes as set out in the existing pleadings. The further particulars and the new mini decant schemes will now have to be considered but the decant expert will be able to draw on the extensive work that has no doubt already been undertaken on the decant schemes as a whole.
58. For those reasons, the court permits the Defendants' amendments against the Part 20 Defendants, subject to the Defendants paying the costs of and occasioned by the amendments, including any wasted costs.
59. The Defendants have indicated that they can serve the amended pleadings by 25 May 2022. The court will consider further submissions from the parties on the timetable for any further consequential pleadings.

BBK's application to amend

60. By application dated 26 April 2022 the Third and Fourth Parties seek permission to amend their statements of case. The application is supported by the witness statement of Iain Drummond of Shepherd and Wedderburn, dated 26 April 2022.
61. The key amendments reflect the results of fire testing conducted by Warringtonfire, as set out in their report dated 20 December 2021, disclosed to the other parties' experts on 23 December 2021 on a without prejudice basis, and disclosed on an open basis on 29 January 2022. The report was updated on 31 March 2022 and the revised report served on the Defendants on 6 April 2022.
62. The draft pleadings were served on 16 March 2022. Following exchanges between the parties, Further Information was provided on 12 May 2022. At the hearing it was confirmed that there are no outstanding objections to the application. On that basis, permission is granted, subject to an order that BBK pay the costs of and occasioned by the amendments.

Timetable for trial

63. The Claimants and the Defendants submit that it would be sensible for the start of the trial to be postponed for three weeks. Although that would necessitate an extension to the conclusion of the hearing, time is likely to be saved by the settlement of a number of the smaller claims, which are the subject of Tomlin orders that have been approved by the court.
64. BBK submits that the timetable has become far too compressed for the trial to proceed as currently listed, without serious prejudice and injustice to BBK and others. Ms Rawley submits that the primary reason that the current trial date is unachievable is the

delay that has already occurred to the service of the technical expert reports (caused by illness on the part of the experts), compounded by the need for additional work by BBK to address the new Annex B9 case introduced by the Defendants.

65. BBK's proposal is that pressure on the timetable should be relieved by deferring the start of the trial by one month to 7 November 2022 and dividing it into two phases:
 - i) the first phase of the trial would start on 7 November 2022 with an estimate of six weeks and would address all liability issues; and
 - ii) a second phase of the trial would be fixed in early 2023 with an estimate of four weeks to deal with the decant case and quantum.
66. MPB's position is that some revisions are required to the timetable, to accommodate slippage in the preparation of the experts' reports, but the trial date in October 2022 should be maintained to avoid the costs incurred by all parties escalating yet further.
67. As set out above, Keppie's alternative proposal, if the amendments are permitted, is that the court should order a split trial.
68. The court has considered carefully the proposal for a split trial but rejects it. A split trial on liability and quantum would have a serious prejudicial effect on the Claimants, who could be forced to wait for up to a further year for the quantum trial, having regard to the time required for a liability judgment in what everyone agrees is a very substantial and complex case, and to find a further window for the quantum hearing before the same judge. Similarly, other parties would incur increased costs if the trial is split. The court does not consider that it is in the interests of any of the parties to delay the resolution of this dispute.
69. The court rejects BBK's proposal for a two-phased trial. Although it would not require a judgment to be handed down before the second phase, unlike the split trial option, the difficulty of finding a suitable window for the second phase that could accommodate the availability of the judge, counsel, solicitors, factual and expert witnesses is likely to result in significant delay to the conclusion of the hearing.
70. However, the court agrees that it would be sensible to postpone the start of the trial by three weeks to 24 October 2022 and extend the trial to the end of term if necessary. That will give the parties additional time to prepare for the trial, whilst ensuring that the hearing is concluded within the Autumn term.
71. Subject to any further submissions from the parties, the timetable for the experts can be adjusted as follows, to allow additional time for the experts to consider the amended case:
 - i) Technical expert reports (save for amendments) by 27 May 2022;
 - ii) Technical expert supplemental reports (including the amendments) by 24 June 2022;
 - iii) Decant experts joint statements (including the decant amendments where possible) by 15 July 2022;

- iv) Decant expert reports (including the decant amendments where possible) by 29 July 2022;
 - v) Decant expert supplemental reports (including any further points raised by the decant amendments) by 26 August 2022;
 - vi) Valuation expert joint statements by 15 July 2022;
 - vii) Valuation expert reports by 29 July 2022;
 - viii) Valuation expert supplemental reports by 26 August 2022;
 - ix) Quantum expert joint statements (excluding decant) by 8 July 2022;
 - x) Quantum expert reports (excluding decant) by 22 July 2022;
 - xi) Quantum expert supplemental reports (excluding decant) by 12 August 2022 ;
 - xii) Quantum expert joint statements (decant schemes) by 5 August 2022;
 - xiii) Quantum expert reports (decant schemes) by 26 August 2022;
 - xiv) Quantum expert supplemental reports (decant schemes) by 16 September 2022.
72. The experts of like disciplines should be encouraged to continue to discuss the outstanding issues in dispute and produce updated or new joint statements where further agreement can be reached.

Keppie's application to rely on expert valuation evidence

73. The Claimants and the Defendants have permission to rely on expert valuation evidence. Further, BBK has been granted permission (by consent). Keppie also seeks permission to rely on expert valuation evidence. The application is not opposed and is granted.

Claimants' application for specific disclosure

74. By application dated 4 May 2022, the Claimants seek an order for:
- i) specific disclosure pursuant to CPR 31.12 of the following documents or categories of document:
 - a) the documents referred to in an email from Mr Smailes to Mr Coull on 24 October 2019, namely: (i) the "matrix that indicates the suitability" of each of Lendlease's proposed decant options; (ii) the "final programme" and (iii) a document described as "Alan's spreadsheet";
 - b) the "attached DRAFT Remedial Programme as discussed today" referred to in an email from Ms Ghiban to Mr Smailes dated 23 October 2019; and

- c) the "Inspection/QA" produced by Horbury referred to in an email from Mr Smailes to Mr Syddall, Mr Hampshire and Mr Milne dated 8 November 2019;
 - ii) the addition of Ms Alexandra Ghiban of the First Defendant to the list of custodians;
 - iii) a witness statement from the Defendants addressing:
 - a) the steps that were taken by the Defendants between October 2020 and March 2022 to preserve the hard copy documents and files created and/or compiled by Mr Smailes;
 - b) the steps which have been undertaken by the Defendants since 30 March 2022 to search for the hard copy documents created and/or compiled by Mr Smailes;
 - c) the steps which have been undertaken by the Defendants since 30 March 2022 to search for any electronic copies of the hard copy documents created and/or compiled by Mr Smailes;
 - d) the search techniques that were adopted by the Defendants in trying to locate the hard copy documents or electronic copies; and
 - e) whether any of the hard copy documents or electronic copies have been located by the Defendants.
75. The application is supported by the second witness statement of Mr Emerton dated 4 May 2022.
76. The application is opposed in part by the Defendants, as set out in the sixteenth witness statement of Fraser Askham, of CMS Cameron McKenna Nabarro Olswang LLP, dated 13 May 2022, on the following grounds:
- i) the documents referred to in Mr Smailes' emails in i)(a) have been disclosed but are withheld from inspection because they are covered by litigation privilege or legal advice privilege; the document in i)(b) is irrelevant and covered by litigation privilege; and the document in i)(c) has not been found;
 - ii) the Defendants agree to add Ms Ghiban as a custodian and carry out a fresh disclosure exercise in respect of her documents;
 - iii) the Smailes' documents referred to in iii) have been located, digitised and included in the documents which were reviewed and, where relevant disclosed.

Smailes' emails and documents

77. Mr Emerton explains in his witness statement that Mr Smailes is a former employee of the First Defendant, who was engaged to plan and manage defect remedial work at the hospital between May 2019 and October 2020. Mr Smailes has given a witness statement on behalf of the Claimants dated 23 March 2022, in which he sets out his

involvement in the project, including the options and plans prepared by the First Defendant for remedial works, including plans for decanting patients and staff.

78. At paragraphs 23 to 27 of his statement, Mr Smailes states:

“I understood at the time that Lendlease as a whole recognised that the only way to deal with the defects we knew existed would involve decanting patients and staff away from those areas that were being fixed... After I circulated this plan, Lendlease brought in a planner from their London office, Alexandra (Alex) Ghiban, to map out this scheme into a proper programme i.e. a detailed construction programme. When this was completed, she presented the programming options for the remedial works, showing different permutations for closing down different parts of the hospital...

Unfortunately, it became clear to me that the commercial view of those higher up the chain of what Lendlease was prepared to do did not reflect my understanding of what in fact was required to address the defects. ... I was told by Ged Coull, and in turn I told Alex Ghiban to prepare a programme that reflected the views of Lendlease's commercial team and what had been reported by them to the board ...

Alex and I therefore drew up two programmes, one that reflected the board's commercial instruction. The other programme that reflected the remedial works which were actually required ...

My contemporaneous notes regarding all of these discussions were recorded in my hard copy notebooks which I used at the time. I do not have access to those papers, as my notebooks et cetera were left on my desk when I left Lendlease's employment. I recall that there was a A3 hard copy paper file of these programmes, and a yellow file of sketches and notes of meetings with others at Lendlease, about them.”

79. Mr Webb, counsel for the Defendants, relies on Mr Askham's statement, setting out the basis on which it is claimed that the documents referred to in the emails from Mr Smailes are subject to litigation privilege or legal advice privilege. On 26 July 2019 the Claimants served their pre-action protocol letter of claim in respect of the claims for damages for the alleged defects in the hospital. From 7 August 2019, the Defendants and their solicitors held weekly strategy meetings. On 16 August 2019 the Defendants produced a list of individuals who constituted the instructing client and were responsible for seeking and /or receiving legal advice from the solicitors in relation to this dispute. The list included Mr Smailes, Mr Avey and Mr Coull. The documents produced as part of the workstreams agreed at the strategy meetings included a costs forecast (Alan's spreadsheet), remedial options and programmes for various scenarios based on the scope of work set out in the pre-action protocol letter of claim. Mr Askham also explains the basis on which it is contended that the draft remedial programme is irrelevant and/or subject to litigation privilege, and the steps taken to identify and produce the Inspection/QA document requested.

80. Paragraph 14.1 of the disclosure pilot at Practice Direction 51U provides that a party who wishes to claim a right or duty to withhold disclosure or production of a document, part of a document, or class of documents, which would otherwise fall within its disclosure obligations, may exercise that right by describing the document or class of document and explaining the grounds on which it claims that right or duty. Paragraph 14.2 provides that a party who wishes to challenge the exercise of such a right or duty must apply to the court by application notice supported where necessary by a witness statement.
81. The scope of legal privilege was described in *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2004] UKHL 48 per Lord Scott at [10]:
- “Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients where legal advice is sought or given.”
82. The requirements for litigation privilege were set out in *Three Rivers* per Lord Carswell at [102]:
- “... communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
- (a) litigation must be in progress or in contemplation;
 - (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
 - (c) the litigation must be adversarial, not investigative or inquisitorial.”
83. In *Starbev GP Ltd v Interbrew Holding BV* [2013] EWHC 4038 (Comm.) Hamblen J (as he then was) stated that the legal requirements of a claim to litigation privilege could be summarised as follows:
- “(1) The burden of proof is on the party claiming privilege to establish it – see, for example, *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258 at [50].
- (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible – see, for example, *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* (14 February 2001) at [30] and [39] (Andrew Smith J); *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC

1729 (Comm) at [52], [53], [86] (Beatson J); *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB) at [52] (Eder J).

(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation – see, for example, *United States of America v Philip Morris Inc* [2004] EWCA Civ 330 at [68]; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at paras [19] – [20]. As Eder J stated in *Tchenguiz* at [48(iii)]: "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility".

(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 589-590 (cited in *Tchenguiz* at [54]-[55]); *West London Pipeline and Storage Ltd v Total UK Ltd* at [52]."

84. Paragraph 31.3.6 of the White Book states that the test for legal advice privilege is whether the communication or other document is made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Communications passing between a party and its solicitors are privileged from production, provided they are confidential and written to, or by, the solicitor in their professional capacity, and for the purpose of getting legal advice or assistance for the client.
85. In *R (Jet2.com Ltd) v The Civil Aviation Authority* [2020] EWCA Civ 35, the Court of Appeal confirmed at [95] that for communications or documents to fall within the scope of legal advice privilege, they had to be created or sent for the dominant purpose of seeking legal advice, i.e. that the test is the same as the test for litigation privilege in that particular respect, and communications covered by legal advice privilege include documents which evidence the substance of such confidential communications.
86. Such privilege extends to internal communications where an employee has been tasked with seeking and receiving such legal advice: *Jet2.com Ltd* per Hickinbottom LJ at [47]:
- “... where the relevant client is a corporation, documents or other materials between an employee of that corporation and a co-employee or the corporation's lawyers, even if required or

designed to equip those lawyers to give legal advice to the corporation, do not attract LAP unless the employee was tasked with seeking and receiving such advice on behalf of the company.”

87. In *West London Pipeline and Storage Ltd v Total (UK) Ltd* [2008] EWHC 1729, Beatson J set out the approach that the court should take in cases where a claim to privilege was challenged at [86]:

“(1) The burden of proof is on the party claiming privilege to establish it: see *Matthews & Malek on Disclosure* (2007) 11-46, and paragraph [50] above. A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: *Bank Austria Akt v Price Waterhouse; Sumitomo Corp v Credit Lyonnais Rouse Ltd* (per Andrew Smith J).”

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved: *Re Highgrade Traders Ltd; National Westminster Bank plc v Rabobank Nederland*.

(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority*.

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharane* (the Chief Constable's letter), *Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per A L Smith LJ.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: *Jones v Montivedeo Gas Co; Birmingham and Midland Motor Omnibus Co v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland*.”

88. In the subsequent case of *WH Holding Ltd v E20 Stadium LLP Ltd* [2018] EWCH Civ 2652), the Court of Appeal emphasised that the court has a general discretion in such cases – that is, it does not have to accept an affidavit as conclusive. However, the examples given by Beatson J of situations where the court would not be satisfied in relation to legal advice privilege, are indicative namely, where: (i) from the statements of the party making it, it is reasonably certain that he has erroneously represented or has misconceived the character of the documents in respect of privilege claimed; (ii) it is reasonably certain from the evidence of the person who directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect; or (iii) other evidence before the court shows that the affidavit is incorrect or incomplete on the material points.
89. Where the court is not satisfied that the right to withhold inspection is established, the court may order inspection; it may order a further witness statement to deal with those matters; it may inspect the documents, although this should be a last resort, in part, because of the danger of looking at documents out of context at the interlocutory stage; and the court may, in certain circumstances, order cross-examination of the person who has made the witness statement.
90. In this case, the court is satisfied that the claim to litigation privilege is established in respect of the documents referred to in, or attached to, the Smailes' emails. Firstly, Mr Askham has set out in detail in his witness statement the circumstances in which the documents referred to in the emails to or from Mr Smailes were produced. Secondly, the documents were produced after the pre-action protocol letter of claim had been received, when litigation was in contemplation. Thirdly, Mr Smailes was identified as one of the individuals who constituted the instructing client and was responsible for seeking and/or receiving legal advice from the solicitors in relation to the contemplated litigation. Fourthly, the documents were produced as part of the workstreams identified in the strategy meetings formed for the purpose of conducting the litigation.

Alan's spreadsheet

91. Mr Brannigan accepts that this document, which was marked as privileged, attracted litigation privilege when created. However, he submits that once it was shared with Mr Smailes and Mr Coull for the purpose of devising their remedial scheme and then referred to by Mr Smailes in his email of 24 October 2019, such privilege was extinguished or waived. The court rejects that argument for the reasons set out above. Mr Smailes and Mr Coull were part of the strategy team who were asked to consider various options for remedial schemes as part of the consideration of the pre-action protocol letter of claim and conduct of the contemplated litigation.

Inspection / QA

92. Mr Askham has explained in his witness statement the steps taken by the Defendants but that they have been unable to locate this document. In the absence of any evidence to suggest that the document can be identified and found, no order for disclosure will be made.

Additional custodian

93. The parties have agreed that Ms Ghiban should be added as a custodian and that the Defendants should carry out a fresh disclosure exercise in respect of her documents.

Mr Smailes notebooks and files

94. Mr Brannigan submits that the Smailes' notebooks and files should be included in the Defendants' disclosure. Mr Webb submits that the documents have been located, digitised and included in the documents which were reviewed and, where relevant disclosed. Mr Askham explains that 158 separate files originating from the notes and hard copy documents have already been disclosed and he has appended a list of those documents to his witness statement.
95. It is noted that the parties agree that the notebooks and files are relevant documents that fall to be disclosed. Having regard to the contents of Mr Smailes' witness statement, the court is satisfied that the Claimants should have an opportunity to read the documents in their original format. Therefore, the court will order the Defendants to disclose and make available for inspection the notebooks and files in hard copy, subject to a review to cover up any pages for which privilege is claimed.

Order and consequential matters

96. The parties are invited to draw up the order in respect of the above matters, seeking to agree any outstanding dates for pleadings and other procedural steps. The court will resolve any urgent outstanding matters on paper. All other matters, including any outstanding issues about costs, will be dealt with at the next procedural hearing.