



Neutral Citation Number: [2023] EWHC 508 (TCC)

Case No: HT-2020-000491

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 16/03/2023

Before :

MR ALEXANDER NISSEN KC
(sitting as a Deputy Judge of the High Court)

Between :

PILGRIMS MANAGEMENT COMPANY LTD

Claimant

- and -

BIRLEM LIMITED

Defendant

Douglas James (instructed by RPC LLP) for the **Claimant**
David Cunnington (instructed by Clyde & Co) for the **Defendant**

Hearing dates: 18, 19 and 20 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 16th February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Alexander Nissen KC:

Background

1. This is a claim for damages resulting from the alleged overfilling of an oil tank in the basement of a block of flats during the course of a delivery.
2. Apart from being a very stale claim – the events with which the Court is concerned occurred in 2014 – the procedural history of the case was unremarkable. Proceedings were issued in April 2021, the Costs and Case Management Hearing took place in December 2021 and the trial took place between 18 and 20 October 2022. At the trial, the Claimant was represented by Mr James of counsel instructed by RPC LLP and the Defendant was represented by Mr Cunningham of counsel instructed by Clyde & Co LLP. I am grateful to them and to their instructing solicitors for their assistance.

The Parties

3. The Claimant is a freehold management company. Its directors are a number of leasehold owners of flats within a property at Pilgrims Cloisters, 116, Sedgmoor Place, Camberwell, London, SE5 7RQ (“the Property”). The Claimant employed Kinleigh Folkard and Hayward (“KFH”) to act as its managing agents. The Defendant was a company engaged in the supply and delivery of petroleum fuels, lubricants and related products. Among the services in which it was experienced was the delivery of oil to tanks in residential properties.

The Property

4. The Property is a two-storey, Grade II listed building which has been converted into forty-one flats. The hot water and heating system for the building is provided by two oil-fired boilers located in the plant room in the lower ground floor of the Property. There are also two flats on the lower ground floor. The plant room is accessed by doors which have key locks. The boilers were supplied by a steel oil storage tank which was also located in the plant room.
5. It is common ground that the routine method of filling the oil tank was via a remote fill point which is external to the Property¹. In order to access the remote fill point, it is necessary to park the vehicle some distance away, unravel the long hose down an alley way and connect it to the external fill point. The fill point is housed in a box at ground level fixed on an outside wall at a point which is immediately above the plant room. From there the oil is piped to the tank inside the building. The area in which the external fill point is sited is not easy to find. There is foliage around and the fill point is almost hidden by ivy.
6. No-one would ever contemplate dragging the fuel hose inside the Property to make the delivery internally and such a course was not suggested in the course of these proceedings. Most deliveries to properties involve the remote filling of tanks. Obviously, there is no way of seeing the gauge on the tank within the Property whilst filling it externally. There is no separate gauge at the remote fill point. However, it

¹ Surprisingly, there was no available photograph of the fill point.

has an alarm to warn the supplier when the tank is nearly full. As such, the sounding of an alarm is a routine, rather than an unusual, event.

The claim in outline

7. In summary, the claim arises in the following way. On behalf of the Claimant, the managing agents procured the delivery of oil from the Defendant. It is common ground that oil was delivered by the Defendant to the remote fill point on 22 August 2014. At some point during the following day, 23 August 2014, the owners of the flats on the lower ground floor noticed a strong smell of oil. They went into the plant room and found oil on the floor. A clean-up operation was undertaken on 24 August 2014. The boilers were then recommissioned. The Claimant blames the Defendant for having caused the oil spill as a result of overfilling the tank from the remote fill point. The claim is pleaded in contract and in tort. As pleaded in the Schedule of Loss, the claim comprises the cost of investigative and remedial works in the sum of £147,662.68; alternative accommodation costs for some leaseholders during remedial works in the sum of £51,066.63; and professional fees of £18,655.40. The total claim is pleaded in the sum of £217,295.71 together with interest of £126,989.44. The claim is an adjusted one being pursued by the Claimant's insurer as a subrogated claim.
8. In legal terms, nothing turns on the difference between the contractual and tortious claims. It is common ground that the contract for delivery contained a term to execute the delivery with reasonable skill and care. The duty imposed at common law, to avoid physical damage, is in the same terms.
9. As pleaded, the primary basis of complaint is that the Defendant should have, but failed to, inspect the tank in the plant room of the Property before filling it remotely. It is said that such an inspection would have informed the Defendant that the capacity of the tank was not 6,000 litres (which was the quantity of oil ordered) but circa 4,500 litres. An inspection would also have identified the extent to which the tank had any residual oil within it. Both pieces of information would have reduced the prospect of the tank being overfilled. In opening, the nub of the dispute was described as whether, in the circumstances prevailing on 22 August 2014, the Defendant acted reasonably in making any delivery at all.
10. In relation to the exercise of skill and care, the Court was provided with expert evidence concerning the precautions which are necessary when undertaking a fuel delivery.
11. The Defendant denies breach. In overview, it is critical of the evidence available in these proceedings. The "evidential deficit" relates both to disclosure and witnesses. The Defendant contends that the delivery was undertaken with reasonable skill and care. It also denies causation. Relevant features of the case on causation include the possibility that there was another delivery of oil, on 23 August 2014, and the admitted fact that there was a large oil spill in 2015, before any remedial works for which the claim is now made were undertaken. Should it arise, quantum is also in issue. Lastly, there is a claim in contributory negligence on the basis that the Claimant (through KFH) made an error in respect of the tank capacity.

The Facts

Introductory remarks

12. Some of the material facts relating to the delivery of oil were in issue. Three witnesses of fact were called, each of whom had provided witness statements in the conventional way. For the Claimant, Alice Duggan of KFH gave evidence. She was the person who placed the order for the supply. For the Defendant, Kirk Buckley and Tom Buckley gave evidence. Kirk Buckley was the manager who took the order. Tom Buckley was the driver who carried out the delivery. This being a family business, they are related.
13. The management agreement between the Claimant and KFH dated 1 July 1994 appointed the latter to provide the services at the Property set out in the Schedule thereto. Amongst the duties to be performed, KFH was to manage the property with monthly inspections on site; to provide arrangements for and supervision of day-to-day repairs and maintenance, cleaners, gardeners and other service contractors. Responsibility for renewal of contracts for maintenance of service contracts was also included within the duties. So too was maintenance of all appropriate records and files for the Property.
14. Unsurprisingly, there were not many documents to assist the recollection of the witnesses in respect of the delivery. The witnesses prepared their statements earlier in 2022 and then gave evidence to the Court at a time which was around 8 years after the incident. Recollections obviously fade and cannot be prompted when there are limited documents available. There can be a tendency to honestly reconstruct events on the basis of supposition as to what the witness now thinks he or she would have done. I am satisfied that all three witnesses did their best to assist the Court. However, it is right to note that Ms Duggan freely accepted that her own recollection was poor and I bear that acceptance in mind in those areas where her evidence conflicted with that given by Messrs. Buckley.
15. A surprising omission, to which I shall return, is that none of the leaseholders gave evidence. Nor were any photographs taken of the oil spill discovered on 23 August 2014.
16. A further omission of some potential significance is that, despite having been given express permission to file a witness statement from the loss adjuster, Mr Townsend, the Claimant elected not to do so.

The Defendant

17. In 2014, the Defendant was a family business which has been in operation for more than forty years. It was sold in 2018. It made deliveries of fuel throughout the UK but mainly in the London and Essex areas. It had seven lorries running, driven by a combination of four permanent drivers and some additional seasonal drivers hired for the winter months when demand is at its highest. As a rough guide, the Defendant would be expected to make 25 deliveries a day, 5 days a week. Aside from the need to acquire certificates of competence, practical training of drivers involved driving around with experienced drivers for a period of time.
18. The delivery driver involved on the relevant occasion was Mr Thomas Buckley. He started working for the Defendant in 2011, initially in the yard, and from 2012 acted as a fuel delivery driver. That appointment would only have taken place once the

Defendant was satisfied that he was ready to do so. He had acquired a Class 2 Certificate of Professional Competence for driving lorries and an ADR certificate for carrying dangerous goods by road. By the time of the events to which this case gives rise he had 18 months practical experience of delivering fuel. I am satisfied that Mr Thomas Buckley was competent to have performed the tasks ascribed to him in this case.

The Delivery

19. At 8.15am on Friday 22 August 2014, Ms Duggan of KFH received an email from a leaseholder at Pilgrims Cloisters informing her that the water at the Property was barely warm. She suggested that the oil in the tank may be low. Shortly after, Ms Duggan received an email to similar effect from another leaseholder. He had checked the boiler room and said that the dial showed the tank was out of fuel. He asked for a delivery to be made that day.
20. Ms Duggan replied at 10am to say that she had arranged a “guaranteed delivery” for the following morning, namely Saturday 23 August 2014. This was to be provided by Lintons. Lintons was the regular supplier of oil at Pilgrims Cloisters. She added that she was also working on getting a delivery that same day until the full delivery could be made the following day by Lintons.
21. Between 10am and 10.20am Ms Duggan got in contact with the Defendant by telephone. It is likely that she found their contact details because they supplied oil to another property that KFH managed.
22. Ms Duggan spoke with Mr Kirk Buckley. She asked for an urgent delivery of fuel. She told Mr Buckley that the capacity of the tank was 6,000 litres and that the tank was empty. In evidence she was unable to explain why she used that figure. It may not matter but one possibility is that it was the capacity of the tank at the other premises to which the Defendant supplied oil. Ms Duggan accepts she was mistaken as the capacity of the tank at Pilgrims Cloisters was approximately 4,546 litres.
23. Mr Kirk Buckley said he could get a tanker to make the delivery. For putting himself out, he asked if the Defendant could be given the regular delivery job. Ms Duggan did not agree but probably made encouraging signs that that would happen.
24. After the phone call, Mr Kirk Buckley spoke with Mr Thomas Buckley. He was in the process of driving to Colchester to make a delivery but was told to return to London. This was an unusual request and, as a result, the whole delivery stuck in his mind.
25. Shortly after the phone call, Ms Duggan sent an email to Mr Kirk Buckley timed at 10:20am as follows:

“Hi Kirk

Further to our conversation please could you deliver some furnace oil to Pilgrims Cloisters, 116 Sedgmoor Road, London, SE5 7RQ today? The capacity of the tank is 6000 litres and there is currently nothing in there so anything you can deliver would be fantastic.

The fill point is on the adjacent road round the back of the block, Havil Street, and is level with a turn off called Brunswick Villas. It is necessary to go down the alley way to reach the fill point so the truck will need a long hose.

If you let me know when the delivery will be made I will speak to the residents and see if someone can be around to meet the driver.

The client for invoicing is:

Pilgrims Management Company Limited

c/o Kinleigh Folkard & Hayward

Nelson House

58 Wimbledon Hill Road

Wimbledon

SW19 7PA

Please let me know if you require any additional information at this stage.

Thanks so much for getting me out of this hole and I will do my best to send the contract your way if I can.

Kind regards

Alice.”

26. At 10.26am Mr Kirk Buckley replied:

“Thanks Alice,

Do you have a contact tel no for the site?

The driver will be able to contact them when he’s on his way.

Regards

Kirk Buckley”

27. At 10.34am Ms Duggan replied:

“Hi Kirk

If the driver can call me when on the way and I’ll locate someone on site at that time.”

28. After returning from Colchester, Mr Tom Buckley went to the depot in Tottenham to off load the kerosene he had been carrying and to take on the fuel oil which had been ordered by Ms Duggan. He also picked up the delivery note which had been partially completed by Mr Kirk Buckley. The driver’s instructions to him said:

“Tank empty. Emergency run out”

29. The quantity that had been handwritten in by Mr Kirk Buckley was 6,000 litres. Mr Tom Buckley then left for the Property.

30. There is a contested issue as to whether Mr Tom Buckley did call Ms Duggan as requested in the email. It is relevant because a successful outcome of the call would have been that Mr Buckley would not only have been helped in locating the fill point but also could have been provided with access inside the Property by the residents so as to enable him to inspect the tank within the plant room before commencing the filling procedure. By contrast, if Mr Buckley did not call at all, it may be said that he had not made all reasonable attempts to inspect the tank before filling it.

31. In her witness statement, Ms Duggan said that, to the best of her recollection, the driver did not contact her and she did not give the Defendant any instruction beyond that set out in the email. She said that if the driver had contacted her upon arrival at

site she could have arranged access to the boiler room. Keys were available on site for any contractor. In his witness statement Mr Tom Buckley said he rang Ms Duggan about ten minutes before arrival. He says she thanked him for being able to make the delivery and said she would contact someone on site to meet him. Mr Duggan said that there was no-one to meet him when he got there so he rang again. In the second call, Ms Duggan told Mr Tom Buckley where he would find the remote fill point. She explained that she had not been able to find any of the leaseholders. There was no discussion about access to the plant room. None was offered.

32. I am satisfied that Mr Buckley did call Ms Duggan on those two occasions and that, as a result, it was not the Defendant's fault that no access to the plant room was made available. I so find for the following reasons:

- (a) I accept the evidence of Mr Tom Buckley who was a truthful and straightforward witness. The delivery to Pilgrims Cloisters stuck in his mind because it was most unusual for him to be called back to the depot before completing the delivery in Colchester. He said that rarely happened, if ever.
- (b) Ms Duggan's recollection was poor. As a result, her evidence that, to the best of her recollection, there were no such calls carries much less weight.
- (c) Although there are no records of the calls, such as phone records or notebooks, I do not find their absence to mean that no such calls took place. There may be many reasons why there are no such records before the Court, to the extent such ever existed.
- (d) The Claimant submits that the timing of the call from Mr Kirk Buckley to Mr Tom Buckley militates against a call having been made by Mr Tom Buckley to Ms Duggan. I do not accept that submission and see no basis for it. The fact that Ms Duggan had given Mr Kirk Buckley some directions for finding the fill point did not mean that there was no purpose in Mr Tom Buckley also speaking with Ms Duggan.
- (e) Throughout, the Defendant has been consistent in its version of events, as explained by the Buckley witnesses. Thus, in an email dated 21 May 2018, the claims handler wrote:

"I confirm that the driver did contact Ms Duggan shortly before he arrived on site, was informed of how to access the remote fill point and was assured that someone would be present to meet him. Upon arrival on site no-one was present and the driver again rang Ms Duggan and was told to proceed to the fill point in a road at the rear of the property and to proceed with the delivery which he did."

33. The Claimant submitted that it was implausible that Ms Duggan would not have arranged for one of the 41-odd residents to meet Mr Buckley if he had in fact called. I disagree. Ms Duggan's email of 10:20 had said she would speak to the residents to see "if" someone can be around, which suggests it was not inevitable that this would happen. In the short time between Mr Buckley's call and his arrival, it was perfectly understandable that Ms Duggan had not been able to locate any of the members of the

Claimant company to assist, especially if she had not already made such arrangements in advance. (This was not really explored.) Mr James suggested that the emails from residents in the morning tend to suggest that someone would have been available if access had been sought. No such witnesses were called to test that proposition.

34. After making the second call to Ms Duggan, Mr Thomas Buckley located the fill point. He unscrewed the threaded end cap and tested the overflow alarm system which had a switch, buzzer and alarm. Having completed the testing of the overflow system he unrolled the hose (which is already pre-filled with oil), screwed it onto the fill point connection and returned to the lorry. He set the pump to 6,000 litres and put the delivery note in the clocking meter to record the delivery. Delivery commenced. He then went back to the fill point and stayed there during the delivery. He rejected any suggestion that he waited in the lorry during the delivery process. I conclude he was right to do so. After a while, the alarm sounded. On hearing this, Mr Buckley stopped the delivery. No suggestion was made that he had not acted with sufficient despatch in reacting to the alarm. Mr Buckley had no reason to think there had been an overfill as he stopped the delivery as soon as the alarm sounded. There is normally a buffer between the sounding of an alarm and actual capacity being reached. That was Mr Buckley's experience but was also that of Mr Emm, the Claimant's expert.
35. After making the delivery, Mr Thomas Buckley scribbled out the quantity of 6,000 litres and, in its place, wrote 4,523 litres. The delivery note has a stamped meter record which shows that 4,523 litres was provided. This stamped record is obtained from the delivery lorry itself, rather like a clocking in card. The note shows 000 000 when the delivery started and 004,523 when it ended. I am therefore satisfied that the Defendant supplied 4,523 litres to the Claimant. Mr Buckley left a copy of the delivery note in the box at the fill point. He took the other copy back to the depot. He got back there at between 5pm and 6pm.

A second delivery?

36. There is an issue as to whether there was or, at least may have been, a further delivery of oil by Lintons on 23 August 2014. As noted above, it is clear from the email of 10.02 am on 22 August 2014 that Ms Duggan had already arranged for a "guaranteed delivery" to take place on 23 August 2014 before she managed to source a delivery from the Defendant. There is an open question as to whether Ms Duggan cancelled that order. Ms Duggan said she could not recall a delivery having been made the following day. But she also frankly acknowledged that she had very little recollection of these events. The following features have led me to conclude that there may well have been a delivery on that day:
- (i) Ms Duggan candidly accepted and did not bridle at the suggestion that it was possible that she completely forgot to cancel the Lintons delivery once the Defendant's delivery had been booked or once it had actually been made. She also accepted it was possible that she did call Lintons to cancel but only did so by leaving a voicemail that went unnoticed because it was late on a Friday afternoon, prior to the delivery arranged for the Saturday.
 - (ii) Equally Ms Duggan may not have intended to cancel the Linton's delivery at all until she could be sure that the Defendant had delivered sufficient oil to fill

the tank, as opposed to merely providing sufficient to tide the residents over. Her original plan was to secure oil of whatever quantity was available, with Lintons filling the tank to the top the next day.

- (iii) As a result of the insurance claim, GAB Robins carried out a survey in December 2014. That survey revealed evidence of a significant spill around the external fill point and recorded reports of kerosene in garden soil. If Lintons had attempted to fill the tank on 23 August 2014, when it had only just been filled the day before, it is to be expected that it would have overflowed both internally and externally at the fill point. Mr Emm, the Claimant's expert, accepted this. Dr Graham, the Defendant's expert, agreed. There was no suggestion that the Defendant was responsible for causing a spill externally. In short, the agreed expert evidence was that the pattern of spillage was consistent with an attempt to fill a tank that was already full.
- (iv) There is a written note from Loss Adjusters dated 18 August 2015 recording a call between Ms Duggan and Mr Townsend, the loss adjuster. This was immediately after the 2015 spill caused by Lintons. The note records that:
"Alice frankly was speechless she just couldn't believe that they had managed to do this 2 years running..."

On account of her poor recollection generally Ms Duggan was not asked about this note in evidence but it does at least suggest that, at that time, Ms Duggan thought that it was Lintons who bore some responsibility for the spill in August 2014.

37. As none of the leaseholders gave evidence, it was not possible to identify at what time of the day they detected the smell of oil and discovered the spillage on 23 August 2014. This may have assisted in determining whether the spillage occurred before Lintons could ever have been expected to make a delivery.
38. In submissions, Mr James contended that it was mere speculation to suppose that a further delivery had been made on 23 August 2014. He said there was no evidence of it. He said it would be astonishing that, in combination, Ms Duggan forgot to cancel the order; that Lintons turned up and started pumping; and that they left no paper trail in respect of the delivery. I have already noted that Ms Duggan was prepared to accept she may have forgotten to cancel the delivery. If Lintons considered they had been booked to make a delivery, there is every reason to suppose they would have attempted to do so. I accept there is no specific paper record of their delivery. There are many possible reasons for this. One possibility is that Lintons never created any because, essentially, the delivery failed. Another is that it has simply been lost. Other documentation which ought to have been created by Lintons in the relevant period, such as records of subsequent deliveries in the following six months, which were properly requested by the Defendant's solicitors, was also unavailable on disclosure. A yet further possibility is that the documents were simply not searched for.
39. Mr James also pointed out that when Lintons did spill oil in August 2015, they accepted responsibility. I do not regard that as significant. I do not know if Lintons were ever blamed for having caused an overspill on 23 August 2014.

40. I remind myself that the burden lies on the Claimant to persuade me that the oil found on the plant room floor on 23 August 2014 was caused by the actions (or inactions) of the Defendant. I do not find that burden to have been discharged having regard to the realistic possibility that there was an attempted delivery on 23 August 2014 which was not made by the Defendant and which was made to a tank that was already full. That attempted delivery could have caused the spillage both internally and externally.

Discovery of the spill

41. If a tank is overfilled, the overflow would be expected to be discharged through apertures or access points within the tank. Mr Emm, the Claimant's expert, had not inspected the tank at Pilgrim's Cloisters but had seen a photograph of it, including a pipe into which a chain could be dropped to measure capacity. It was possible that overfilled oil may have exited through there or some other access point.

42. The evidence relating to the actual discovery of the spill is sparse. There are no photographs of it. As I have noted, no leaseholder gave evidence of the scale or extent of the spillage. There is a written record that Oakleaf Heating Ltd were called out on Sunday 24 August 2014. Their invoice merely records:

"Sunday Call Out

Found the boiler house to have a large amount of oil on the floor due to oil tank being overfilled. Isolated power to boiler for safety reasons. Return to site once spillage is cleared."

43. Other than that, there is a report prepared by Ecologia, an environmental company, who were engaged to undertake a survey on 8 October 2014. The author met residents of Flats 12 and 17. The report describes the spill in the following terms:

"Ecologia were informed by Kinleigh Folkard & Hayward about the incident as follows:

- *A delivery of kerosene heating oil has been made on 22nd August 2014;*
- *Kerosene in excess of capacity of the tank was delivered;*
- *Residents detected strong oil odours on 23rd August 2014 and checked the boiler room,*
- *A pool of kerosene heating oil was observed in (sic) the boiler room floor and the boilers were switch (sic) off for safety.*
- *...*
- *It is not known how much kerosene heating oil have (sic) been spilled"*

44. Having regard to the record of damage referred to in the documents and doing his best to assist the Court, the Claimant's expert, Mr Emm, suggested the spill would have been measured in tens of litres rather than hundreds of litres. That evidence is, of course, consistent with the Claimant's pleaded case that the delivery was at least 23 litres more than the capacity of the tank. This suggested scale of overspill is a useful indicator, given that it is known that the subsequent spill in 2015 was in the order of 1,000 litres. I return to this point below.

The invoice

45. The Defendant submitted its invoice for the delivery of 4,523 litres in the sum of £2,573.59 plus VAT. It was received by KFH on 3 September 2014, after the spill had been discovered, and it was paid in full by the Claimant a couple of weeks later. It is

of note that, despite the spill having been discovered on 23 August 2014, there was no letter of complaint to the Defendant at the time. Nor was there any attempt to negotiate a reduction on the invoice. The first time that any complaint about the delivery was raised with the Defendant was in February 2015. If Ms Duggan had been satisfied that the Defendant was causally responsible for an overspill on 22 August 2014, I consider that she would probably have made that complaint at the time and either not paid the invoice or paid it under protest.

Expert Evidence on Breach

46. Both of the parties called their own expert evidence. In each case, the written expert evidence was limited to questions of breach rather than causation. This was surprising because it was, in principle, open to the Claimant to adduce expert evidence on causation had it wanted to do so. At trial, some assistance was provided by the experts in relation to causation and I have taken that into account in my factual findings already made. Neither expert had visited site.
47. The Claimant's expert was Mr Emm of Hawkins & Associates Ltd. He held qualifications which included a BEng in materials engineering. He is also a Chartered Engineer. The Defendant's expert was Dr Graham of Geoffrey Hunt & Partners LLP. His qualifications included BSc (Eng) ACGI, an honours degree in Aeronautical Engineering, a MSc DIC in composite materials and a PhD in Mechanical Engineering.
48. Despite their academic qualifications, I must say that neither expert was particularly well qualified to express professional opinions on the activity of oil delivery or the specific standards which should be adopted in respect of the delivery of oil. Neither had much, if any, practical experience of this. That is not to say I found their evidence overall to have been unhelpful or irrelevant. They provided assistance to the Court in a broader, generalised, context.
49. Both experts were agreed that the exact capacity of the oil tank had not been measured. Doing the best they could with the available photographs, the scale on the gauge showed a range of 0 to 1000 gallons and, assuming that these are imperial gallons, this meant the capacity was 4,546 litres. Given that 4,523 litres had been delivered by the Defendant, the experts were agreed that the complaint that the Defendant negligently made a delivery comprising 23 litres more than the capacity of the tank of 4,500 litres was not sustainable. The experts were also agreed that it was acceptable for a delivery driver to deliver oil via an external fill point provided they had confidence in three matters, namely that: (a) the oil tank and associated equipment was in a suitable condition to receive it; (b) the tank has sufficient ullage (i.e., unfilled capacity) to receive the oil without overflowing; and (c) suitable safety devices are installed at the external fill point including an overfill alarm system.
50. The experts differed over the steps which a reasonably competent delivery driver should take when fulfilling an order for the delivery of oil. This was said to initially depend on whether the delivery of the supply should be regarded as one made to domestic or commercial premises. They had agreed within the Joint Statement that the delivery in this case was to commercial premises even though it related to residential

accommodation². I accept the agreed evidence and, in any event, find that this should have been regarded as a delivery to commercial premises given that it was commissioned by a communal management company, namely the Claimant, and procured through commercial agents for that purpose.

51. However, the real issue which determined the appropriate approach which a driver should take was whether the delivery had been procured by a competent person. A delivery driver who is commissioned to deliver fuel by an ostensibly informed person capable of considering possible risks is entitled to act differently from one who is commissioned by someone lacking in professional experience. Whereas Mr Emm considered responsibility for ensuring the tank was in safe and good condition and had sufficient ullage lay with the driver, Dr Graham considered that the driver was reasonably entitled to rely on an ostensibly competent company of professional managing agents. If that organisation did not seek to prevent the driver from making a delivery in circumstances where it knew the tank had not been accessed and inspected, such conduct may be acceptable. In circumstances where the delivery had been procured by lay person in a domestic setting, the driver should refuse to make the supply where the tank and other equipment had not been seen. I accept Dr Graham's evidence that if a delivery has been ordered for a specific quantity of oil by a professional firm, the driver was entitled to carry out the filling process having made appropriate checks at the fill point, notwithstanding that he had not been able to inspect the tank. The acceptable checks would comprise checking the functionality of the alarm and that an acceptable connection to the thread of the fill point could be made.
52. The experts were agreed that, in a commercial setting, a delivery driver may rely on assurances provided by a suitably qualified competent person nominated by the recipient property owner/occupier. The experts differed as to whether Ms Duggan should be regarded as a competent person for these purposes.
53. Whilst I am doubtful whether it is truly a matter for an expert to opine on the question of whether a person is to be regarded as suitably competent for these purposes, I am quite clear that Ms Duggan was such a person. KFH were employed to provide independent professional management services for the Claimant. They are a well-known company in that field. Ms Duggan herself had experience of oil deliveries and was held out by KFH as competent to conduct that role. In summary I have no hesitation in concluding that KFH should have been regarded as ostensibly competent.
54. Although the delivery was made in an urgent situation, in the sense that the oil in the tank at the Property was understood to have run out, the experts were agreed that the requirements of the client could never outweigh the need to maintain safety and other environmental concerns.

² Both in his report and in evidence Mr Emm sought to suggest he had not intended to agree this and merely meant to say that a reasonably competent driver could have taken the view that this was a commercial property because it was under the communal commercial management of KFH. I am not sure this subsequent qualification made any difference in the end because he also accepted that it was for the driver to make the domestic/commercial distinction. For his own part, whilst he considered it should probably be regarded as a domestic property, he agreed it was the driver's view that mattered.

55. Mr Emm's expert evidence contained a review of industry guidance. He recognised that legal interpretation of the documents to which he referred was a matter for the Court but offered comments on the documents from an engineering perspective. From the literature he identified, he discounted some which contained no or no material guidance of relevance to the present case. Ultimately his report focussed on two sources:
- (a) a document titled "Delivery Standards" published by Certas Energy UK Ltd, dated January 2016; and
 - (b) a document jointly produced in 2007 by the Federation of Petroleum Suppliers ("FPS") and the Environment Agency entitled "Guidelines for Safer Deliveries". There is an updated version of this document from 2019 but that post-dated the delivery. The document contains a series of flowcharts which, if followed, can result in the conclusion that no delivery should be made.
56. I can deal with the first of these two documents quite shortly. Certas Energy UK is a large reputable company engaged in the distribution of oil. It may, therefore, illustrate the approach which one particular reputable company takes when making deliveries but that could never be a standard by which a delivery driver outside that organisation should inevitably be judged. Standards can differ between different organisations. Certas is just one of them. That said, it is the document from Certas Energy UK which makes the distinction between domestic and commercial deliveries and uses the expression "competent person". Both experts took those matters into account.
57. As to the second of these documents, namely the "Guidelines for Safer Deliveries" produced by the FPS, Mr Emm was unable to say whether the Defendant was a member of the FPS. Mr Emm's evidence was that membership of the FPS was not a necessary pre-requisite of its application. Mr Emm accepted that it may be regarded as impractical and unrealistic to expect a delivery driver slavishly to follow the document in detail at each delivery made. In the Joint Statement he agreed that the flowcharts within the guideline could be considered as over-cautious if followed explicitly. What mattered was the gist of their content. In summary, Mr Emm merely expected drivers to be familiar with the key guideline points within the Guideline and to act with caution whenever there was uncertainty.
58. The flowcharts within the Guidelines were central to the Claimant's case that, in the circumstances which prevailed, no delivery should have taken place.
59. Dr Graham did not accept that the FPS document was applicable to the Defendant in the circumstances in which the delivery was made. He said it should not be accepted as a counsel of perfection or nearly so. Dr Graham's evidence was that the flowcharts were over-cautious if followed explicitly. He expressed the view that the FPS Guidelines could be of application (at least to an FPS member) in private installations where there was nothing to suggest a formal process of inspection and maintenance of tanks etc. In the context of a delivery in a commercial setting commissioned by a professional agent, the application of the flowcharts in the Guidelines was unrealistic. As he graphically expressed it, the Guidelines were written on the basis that the driver could have no confidence in anything he has not put his own eyes on. His point was

that, in real life, that was unrealistic if applied universally. He accepted that the substantive content of some of the Guidelines was relevant to the general and obvious principle that spillages should be prevented but the document itself did not apply.

60. There was probably not as much between the experts as might first appear. Not even Mr Emm was contending for a strict application of the flowcharts. However, to the extent material, I accept the approach of Dr Graham. In the circumstances of this delivery, I do not consider it right to treat the FPS Guidelines as applicable at all. In my judgment, it would be wrong to test the position by following through the flowcharts to see whether, in the end, a delivery should have been made. I agree they illustrate some useful and relevant considerations which can bear on the need to avoid spillages but, in this context, they are no more than that.
61. Although, as Mr James pointed out, neither expert has pointed to any other guidance than the two documents identified by Mr Emm, it does not follow that either of those Guidelines necessarily provide the best evidence of what to do in all circumstances across the industry. Overall I accept Mr Cunnington's submission that the FPS Guidelines should not be regarded as either a substitute for, or particulars of, the common law requirement for the driver to exercise reasonable skill and care. For that reason, I do not take the FPS Guidelines into account beyond their illustration of some common-sense considerations which impact upon the need to make safe deliveries and avoid spillages.
62. Having heard the evidence, I have come to the firm view that Dr Graham's evidence was generally to be preferred where the approaches of the experts differed. I accept Dr Graham's evidence that if a delivery of oil has been ordered by a professional firm, as occurred in this case, the driver was entitled to carry out the filling process at the external fill point once he had checked the functioning of the alarm.
63. I reject Mr Emm's evidence that the driver in this case should have declined to fill the tank in the face of the order placed and the circumstances in which he found himself.
64. Finally, I note that Mr Emm had undertaken no investigation which sought to show that the alarm was set to sound too close to the maximum remaining capacity thereby leaving insufficient time to disconnect the supply. Nor did he provide any evidence, beyond speculation, that the flow was set too fast or that the Defendant took too long to react to the alarm. Although, in closing, Mr James sought to make a case based on the point that the Defendant was too slow to stop the filling, this is based on nothing but speculation. In any event, I reject it.

Risk Assessments

65. Mr Kirk Buckley gave some evidence that, in the past, pre-delivery risk assessments were undertaken by the Defendant using a particular pro forma. None were disclosed in this litigation and, accordingly, the experts have not considered the question of breach in this case by reference to any such risk assessment. Nor is there any plea in respect of a failure to undertake or to follow a risk assessment. In any event, I find that the deployment of such risk assessments was historic and that the Defendant was properly entitled to rely on the judgments of its experienced drivers as to whether formal written down assessments were required. None were in this case. I reject Mr

James' closing submission that the absence of a risk assessment is a pointer towards a failure to have exercised reasonable skill and care.

Particulars of Breach

66. In light of my conclusions and the expert evidence which I have heard, I now turn to the allegations of breach which have been pleaded at paragraph 18 of the Particulars of Claim. It is not necessary for me to recite these allegations in full, especially as they contain an element of repetition. To some extent, it is also convenient to consider causation as it arises.

(1) Birlem failed to request access to the plant room to inspect the tank

This complaint fails. Access to the plant room was not made available by the Claimant despite the calls from Mr Buckley. Through KFH, the Claimant was content to allow the delivery to continue to be made knowing that such access had not been procured. It is wholly unrealistic to suggest that, in such circumstances, the Defendant should not have made a delivery at all.

(2) Birlem failed to gain access to the plant room and inspect the tank

See (1).

(3) Birlem failed to inspect the tank or otherwise examine its condition or any labels, notices or warnings affixed to it

See (1).

(4) Birlem failed to check or confirm the capacity of the tank

See (1). The Defendant had no means of checking or confirming the capacity without access. In any event, it was entitled to rely on what it had been told by an ostensibly competent professional.

(5) Birlem failed to check or confirm how much oil was in the tank before starting to fill it

See (1). There was no means of checking without access. In any event, it was entitled to rely on what it had been told by an ostensibly competent professional, namely that the tank was empty.

(6) Birlem failed to check or confirm the ullage of the tank

See (5).

(7) Birlem failed to check that there was an overspill alarm on the tank

This complaint fails. I accept Mr Buckley's evidence that he did check there was a functioning alarm, which he tested.

(8) Birlem failed to test the overspill alarm

See (7).

(9) Birlem filled the tank without knowing the capacity of the tank, the amount of oil already in it and its ullage

This complaint fails. The Defendant was entitled to rely on what it had been told by an ostensibly competent professional, namely that 6,000 litres were required

and that the tank was empty. Provided that a check had been made to ensure there was a functioning overspill alarm, which was done in this case, it was acceptable to make a delivery in such circumstances.

(10) Birlem continued to fill the tank not knowing if and when the tank's capacity would be reached or exceeded

See (9). The Defendant was entitled to rely on the functioning alarm to inform it when the capacity would shortly be reached. There is no evidence from the Claimant that the Defendant failed to act sufficiently promptly in reaction to the alarm. I accept the Defendant's evidence that it did react appropriately by turning off the supply when the alarm sounded.

(11) Birlem relied on the customer's description of the tank's capacity and did not obtain the customer's informed written consent to proceed without it not being able to tell for itself the capacity and ullage

This complaint fails. The Defendant was entitled to rely on the quantity ordered by an ostensibly competent and informed professional. No written consent was necessary.

(12) Birlem failed to deliver a quantity of oil that matched the ullage of the tank

This complaint fails. The Claimant has not proven that the Defendant delivered a quantity of oil that exceeded the ullage of the tank. Even if it had done so, it had no means of knowing the ullage. See (9).

(13) Birlem delivered too much oil to the tank

See (12).

(14) Birlem failed to heed adequately or at all any warning given by the sounding of the overfill alarm

This complaint fails. The Defendant did heed the warning alarm and disconnected the supply. Mr James conceded that there was no evidence that the alarm sounded and was ignored. In any event, the Claimant has not proven that the tank was overfilled during the course of the Defendant's supply on 22 August 2014.

(15) Birlem failed to stop the delivery of oil before the tank exceeded its capacity

See (14).

(16) Birlem allowed oil to spill from the tank where, by the exercise of reasonable skill and care, no oil would have spilled

The Claimant has not proven that oil was spilled from the tank during the course of the Defendant's supply on 22 August 2014. In any event, there is no evidence of any failure by the Defendant to have exercised reasonable skill and care during the course of its delivery.

(17) Birlem failed to inform KFH or Pilgrims that it had delivered 1,500 litres less than it thought was capable of delivering for no apparent reason

This complaint fails. KFH and the Claimant were informed of the quantity delivered by means of the delivery note left at the Property. In any event, this complaint has no causative consequence. The Claimant has not proven that the tank was overfilled during the course of the Defendant's supply on 22 August

2014. Even if it had been overfilled, such would already have occurred prior to it providing (or not providing) notification.

67. Returning to the three criteria upon which the experts were agreed as being necessary before the making of any oil delivery, I find as follows:
- (a) The Defendant was entitled to rely on the Claimant's professional agent, KFH, in determining that the oil tank and associated equipment within the plant room was in suitable condition to receive the delivery;
 - (b) The Defendant was entitled to rely on the Claimant's professional agent, KFH, in determining that the tank had sufficient ullage to receive the oil without overflowing;
 - (c) The Defendant was entitled to rely on an overfill alarm at the external fill point as the appropriate safety device, provided it was working, which it was. It is true that the experts agreed that suitable safety devices (plural) were required and that, in this case, there was only one. It was not established on the evidence what other safety device would have been necessary which would have prevented the (supposed) spillage. If the overfill alarm was insufficient, it begs the question why Lintons had been supplying to the Property before and after these events.

Causation

68. The Claimant's case on causation is pleaded at paragraphs 19 to 21 of the Particulars of Claim. It is expressed in two ways. Firstly, it is said that if the Defendant had carried out the appropriate checks of the tank and the alarm, it would have realised that it could only deliver a maximum of 4,500 litres of oil and the overspill would not have occurred. This case on causation fails for at least two reasons. Firstly, the Claimant has failed to prove there was any overspill at all during the course of the Defendant's supply. Secondly, even if there had been an overspill, there would have been no fault on the Defendant's part in having caused it.
69. The alternative causation case is that, if the Defendant had acted with reasonable skill and care it would not have delivered any oil at all because it would have explained to KFH that such a delivery would be unsafe and could not properly be made. This alternative case also fails for at least two reasons. Firstly, the Claimant has failed to prove there was any overspill during the course of the Defendant's supply. Secondly, it was consistent with the exercise of reasonable skill and care for a delivery to have been made in the circumstances in which it was in fact made. Therefore, it does not follow that KFH should have been told a delivery was not safely possible. KFH knew the delivery was being undertaken without the Defendant having had the opportunity to inspect the tank and KFH thereby took responsibility for any risk resulting from that decision. It is also highly unlikely that KFH would have agreed to no delivery taking place. The delivery itself was urgently arranged at short notice because the oil had run out.
70. Irrespective of which of those alternative cases on causation is said to be established, the Claimant's pleaded case contends that the Defendant ended up delivering at least 23 litres too much. In this respect the Claimant had pleaded that "the facts speak for

themselves”. That argument must fail, as Mr James was forced to concede. In light of the expert evidence, the capacity of the tank, if empty, was 4,546 litres which was greater than the quantity of oil delivered, namely 4,523 litres. It is not therefore sufficient to prove an overspill must have occurred merely by comparing the delivery with the approximate tank capacity of 4,500 litres.

71. Mr James suggested he nonetheless had a back-up case by reason of the supposed fact that there was some oil still in the tank. That case is inconsistent with the evidence (albeit not given by a live witness) that the heating system had failed and that the gauge was showing the tank as empty. As Mr James himself accepts, it was Ms Duggan’s evidence that there was “nothing” in the tank³. This back-up case therefore has no credibility and there is nothing to support it. It is accepted that there would be a small quantity of oil below the level of the outlet which feeds the boilers because that will always be so. But even in that respect, the difficulty is that there was no adequate calculation of what that residual amount would have been⁴. Mr James accepted that Mr Emm, who had not inspected the tank, was not the ideal person to present that information. I reject the back-up case in the absence of any proper evidence about it. In any event, I do not see how this case makes any difference in light of my factual finding that Mr Buckley disconnected the supply upon the sounding of the alarm. Even though there would have been a limited amount of residual oil in the tank, the consequence was that the alarm merely sounded earlier than it otherwise would have done if it had been completely empty.
72. In closing, I raised with Mr James what the Claimant contends would have happened had an internal inspection taken place. He said it would have revealed that the proposed delivery of 6,000 litres was not required and that an error had been made. He suggested that, in such a case, the Defendant should have called Ms Duggan to discuss how to proceed. Mr Tom Buckley had not been asked whether that is what he would have done. Ms Duggan did not say what she would have done had that call been made. This set of consequences was simply never explored.

Conclusions

73. It follows that the Claimant’s case on breach and causation fails in its entirety. There is no distinction between the claims in contract and in tort. Questions of contributory fault do not arise.
74. In light of these conclusions, it is unnecessary for me to address quantum. Suffice it to say that there would have been a difficult issue in the Claimant’s way even at this point. As noted above, the extent of the overspill in 2014 was said to be in the order of tens of litres. By contrast, the spillage in 2015, for which it is accepted the Defendant was not responsible, was in the order of 1,000 litres. The remedial works simultaneously rectified the consequences of both. No costs have been allocated and the full amount is claimed in these proceedings.
75. The loss adjuster’s report dated 19 June 2017 said:

³ See the email of 22 August 2014 at 10:20.

⁴ It would require the dimensions of the tank to be measured and to have knowledge of the height of the outlet.

“Following completion and further investigations by MEL Environmental Solutions it is unlikely that we will ever be able to determine the difference between the extent of damage occasioned by the first and second spillage.”

76. Accordingly, there was simply insufficient evidence before me as to what remedial works would have been required solely as a result of the 2014 spill and how much those remedial works alone would have cost. I agree with Dr Graham that a further investigation would have been required to see what additional damage would have been caused by the 2015 spillage. Such investigation had not been done.
77. In the event, I dismiss the claim.
78. If the parties are unable to agree the consequential matters, they will need to be dealt with in a hearing. The parties are to notify the Court within fourteen days of handing down what consequential issues remain outstanding and how long is required of the Court in order to determine them.