Neutral Citation Number: [2019] EWHC 186 (QB)

Case No: QB/2018/0040
QB/2018/0204

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On appeal from the County Court at Central London
HHJ Bailey

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2019

Before :

MRS JUSTICE FARBEY

- -

Between :

SAVI RABILIZIROV

Claimant

-and-

(1) A2 DOMINION LONDON LTD
Defendant/Additional Claimant/Respondent

(2) A2 DOMINION HOMES LTD
Defendant/Additional Claimant/Respondent

(3) GROUND CONSTRUCTION LIMITED
Defendant/Appellant

(4) DURKAN LIMITED
Third Party/Respondent

- -
- -

Anneliese Day QC (instructed by **Kennedys Law LLP**) for the **Appellant**
Joseph Sullivan (instructed by Shoosmiths LLP) for the **Third Party/Respondent**
Adam Robb QC and Rebecca Drake (instructed by **Clyde and Co LLP**) for the **First and Second Defendants/Respondents**
The Claimant (who was not a party to the appeal) did not appear and was not represented

Hearing date: 9th November 2018

- -

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.

.....

Mrs Justice Farbey :

1. In this appeal, Ground Construction Limited ("GCL") seeks to overturn the judgment of HHJ Edward Bailey sitting as the designated Technology and Construction judge in the Central London County Court. In an ex tempore judgment delivered on 2 February 2018, the judge held that GCL was liable to indemnify Durkan Limited ("Durkan") in relation to certain losses caused to an under-lessee of a newly-constructed building. The under-lessee (Mr Savi Rabilizirov) was a businessman selling rugs, Russian art and other artefacts. He was the claimant below. The landlord of the property was A2 Dominion London Ltd (the second defendant below) until its reversionary interest in the property was passed to A2 Dominion Homes Ltd (the first defendant below).

2. The building in question in which Mr Rabilizirov had an underlease was located beside the Regent's Canal at 16-16A St Pancras Way, London NW1. The judge held that liability to pay for Mr Rabilizirov's losses should be passed down the chain of defendants to GCL. The effect of the judgment (so far as material to this appeal) was that GCL (which was the third defendant below) was required to pay to Durkan £340,000 in damages together with costs. By the date of the trial, Durkan was a third party below.

3. Permission to appeal was granted by Julian Knowles J on 2 July 2018. Ms Anneliese Day QC appeared for GCL before me (but not below). Mr Joseph Sullivan appeared for Durkan (as below). Mr Adam Robb QC appeared on behalf of the A2 companies (but not below) together with Ms Rebecca Drake who appeared below and who settled the A2 companies' skeleton argument for this appeal which in most material respects took a similar position to Durkan.

The Facts

4. Durkan was employed by A2 Dominion London Ltd as the main contractor for the construction of 16-16A St Pancras Way which took place from 2006 to 2007. The building design included the installation of a waterproof tanking system in relation to the reinforced concrete retaining wall to the rear of the building, adjoining the canal. The purpose of the tanking was to protect the retaining wall from lateral penetration of water. Durkan sub-contracted GCL to carry out this work.

5. GCL completed the construction of the retaining wall by 30 August 2006 and shortly thereafter poured a mass concrete infill up to the design height. GCL also applied the tanking, which had the proprietorial name "Rawmat". It seems that GCL had carried out the tanking by about March 2007.

6. By the end of August 2007, both A2 Dominion London and Durkan were aware of water ingress affecting the ground floor of the building along the rear wall. At the time, A2 Dominion London was in the process of negotiating a lease of the ground floor to Mr Rabilizirov. The proposal was that he would take the premises in an unfinished condition. In particular, the windows had not yet been installed and (as found by the judge) the "convenient assumption" was made that water ingress was rainwater penetrating through the window spaces. The view was taken that the problem would be resolved after weatherproof windows had been installed.

7. In December 2007, Mr Rabilizirov purchased an under-lease of the ground floor for £840,000. The premises had been advertised on the basis that there was the potential to add a mezzanine floor. The advantage of a mezzanine to Mr Rabilizirov was that he would be able to construct and rent out offices without interfering with the storage of his stock which would remain on the ground floor below. Mr Rabilizirov had moved his stock into the premises by early January 2008.

8. On 16 January 2008, a flood severely damaged and in some cases destroyed items of Mr Rabilizirov's stock. By October 2008, he had installed windows after which it became apparent that the problem of water ingress had not been the window apertures. Although by that time A2 Dominion London and Durkan had identified that there was a defect or disrepair, no effective steps were taken to remedy the situation. The problem of water ingress continued over the years. At trial, the leakage of water into the building had not been resolved, albeit that Mr Rabilizirov had by then described 95% of the problem as having been eliminated.

9. The judge records the numerous attempts to analyse and deal with the problem. The A2 companies, Durkan and GCL all tried to deal with the leakage. I shall return to their endeavours below.

10. By March 2010, consideration had been given to the effectiveness of the Rawmat. GCL went on site and carried out works but on 2 June 2010 Mr Rabilizirov complained that GCL workmen had not attended the site for over a month. The judge records that GCL appeared to have run out of ideas. In December 2010, Durkan and GCL corresponded. The correspondence which I have seen includes a letter from GCL to Durkan dated 16 December 2010. In that letter, which Ms Day described as being key to the appeal, GCL denied that it was responsible for the ingress of water and stated:

> "We are as always prepared to meet and amicably discuss the… matter further. Our construction director, John Power who has been actively involved in the… matter from inception, is available to meet on site and discuss a solution. In light of the above, we would advise you not to undertake any remedial works in the interim prior to meeting with GCL".

11. On 20 December 2010, GCL emailed Durkan saying (among other things):

> "We must reiterate that GCL does not accept responsibility for the above problem experienced on site. As per our letter, we are prepared to meet and discuss the matter on site but advised Durkan not to undertake any remedial works in the interim…".

12. Durkan responded by email later on the same day. The email stated that Durkan had started remedial works using other subcontractors as "GCL refused to carry out any further works despite continuing water ingress". GCL had no further engagement with the site after the December correspondence. Water penetration continued.

The County Court proceedings

13. Mr Rabilizirov commenced proceedings in the County Court in December 2013. In response to the claim, the A2 companies denied liability suggesting that responsibility

lay with Durkan. Durkan blamed GCL who in turn blamed a brickwork company (originally the fifth defendant).

14. After the commencement of proceedings, it emerged through expert evidence that the Rawmat did not extend to the top of the retaining wall. The water penetration had been caused by GCL's failure to install the tanking to the necessary height. GCL accepted at trial, but not before, that it was in breach of its obligation to install the Rawmat properly.

15. For the purposes of the litigation, the parties agreed on an appropriate method (as advised by the experts) for attempting to deal with the continuing problem of water ingress. I do not set out the details of the agreed method here. It suffices to note that it involved the application of a cementitious waterproof render to the internal face of the affected wall. The judge observed that, while the agreed method could not be gainsaid, it could not be stated with entire confidence that it would succeed where all other attempts had failed. The judge's observations reflect the written expert evidence where the proposed solution was described as "pragmatic" with the possibility that some water ingress through the remedial waterproofing may occur and therefore some maintenance may be required over the lifetime of the property.

16. Mr Rabilizirov claimed three heads of loss. The first was damage to artworks and rugs. During the trial, GCL agreed to settle that claim for the sum of £150,000. I need say no more about it. The second claim was for remedial works to the property. Shortly before trial, the A2 companies agreed with Mr Rabilizirov that they would carry out the works which were costed at £141,598.20.

17. The third claim was loss of rent arising from Mr Rabilizirov's inability to sub-let the premises. The primary claim for loss of rent was £1,532,350 which was made on the basis that a mezzanine would have been built. An alternative claim for £716,295 was made on the basis that the property would have been let without a mezzanine. In the event, the claim for loss of rent was settled as between the A2 companies and Mr Rabilizirov for £340,000 which (as Mr Sullivan emphasised) was considerably lower than both the primary and the alternative claims.

18. Mr Rabilizirov has therefore been compensated (and has not needed to be involved in this appeal). Moreover, on 23 February 2017, HHJ Saggerson allowed Durkan's application for summary judgment against Mr Rabilizirov on the grounds that Durkan owed no freestanding duty to him. As a result, Durkan ceased to be a defendant. However, in August 2017, Durkan was brought into the litigation again by the A2 companies as an additional party under CPR Part 20. In November 2017, Durkan in turn issued a Part 20 claim against GCL.

19. The trial proceeded for five to six days at the end of January and beginning of February 2018. The judge considered factual and expert evidence. By the end of the trial, it fell to the judge to decide the two Part 20 claims: in broad terms, whether Durkan was liable to indemnify the A2 companies in respect of liability to Mr Rabilizirov; and whether in turn GCL was liable to indemnify Durkan.

The Judgment

20. In a detailed judgment running to 134 paragraphs, the judge found that both indemnities were made out, with the result that GCL was liable for the cost of the remedial works and the loss of rent claim. It is necessary for me to set out the judge's conclusions in some detail.

The indemnity

21. The judge considered the contract made between Durkan and GCL. The contract was contained in a Durkan sub-contract order. Under paragraph 4 of the order, the main contract was expressed to be JCT98 with Contractors Design. Paragraph 5 of the sub-contract order provided:

> "Works to be carried out in accordance with the terms and conditions of DOM2 except where superseded in this subcontractor order".

DOM2 is a reference to the Construction Confederation (CC) Domestic Sub-contract DOM/2 (1981 edition; reprinted 1998).

22. Durkan relied on the indemnity clause in paragraph 5.1.2 of DOM/2 which provides that the sub-contractor shall:

> "indemnify and save harmless the Contractor against and from:
>
> .1 any breach, non-observance or non-performance by the Sub-Contractor or his servants or agents of any of the provisions of the Main Contract insofar as they relate and apply to the Sub-Contract; and
>
> .2 any act or omission of the Sub-Contractor or his servants or agents which involves the Contractor in any liability to the Employer under the provisions of the Main Contract insofar as they relate and apply to the Sub-Contract; and
>
> .3 any claim, damage, loss or expense due to or resulting from any negligence or breach of duty on the part of the Sub-Contractor, his servants or agents…".

23. Ms Day's submissions relied to a significant degree on paragraph 5.2 of DOM/2 which states:

> "Nothing contained in the Sub-Contract Documents shall be construed so as to impose any liability on the Sub-Contractor in respect of any act, omission or default on the part of the Employer, the Contractor, his other sub-contractors or their respective servants or agents nor create any privity of contract between the Sub-Contractor and the Employer or any other sub-contractor".

24. The judge held that the indemnity clause in DOM/2 paragraph 5.1.2 had been incorporated into the contract between Durkan and GCL, and that it was sufficiently wide to indemnify Durkan. He held that, whether or not Durkan had its own responsibility as a result of negligence or breach of contract to Mr Rabilizirov, GCL's breach of contract was an effective cause of the loss such that the indemnity was effective.

Foreseeability and remoteness of damage

25. The judge went on to consider GCL's submission that the loss of rent - or at least its extent - was not foreseeable and was too remote to be recoverable. GCL argued that the effect of building a mezzanine floor was to increase the rental space to such a significant degree that GCL could not reasonably be regarded as having assumed responsibility for the much larger loss of rent claim. The mezzanine would have made the premises an essentially different property which could not have been within GCL's reasonable contemplation.

26. The judge rejected GCL's submission in the following terms:

> "It was plainly foreseeable, and GCL assumed responsibility for damage arising from loss of use of the premises, that if a groundworks contractor so improperly carried out its contract that water penetrates into the premises, he cannot possibly say that he did not foresee that the owner of the premises might, indeed would, sustain a loss of use of the premises. That type of damage being foreseeable, it is not open to GCL to complain that because of Mr Rabilizirov's intention to substantially increase the size of the premises his claim is for a rather greater loss of use than GCL, had they put their minds to it, might have foreseen".

The question of delay as a novus actus interveniens

27. GCL argued before the judge that the delays and failures on the part of the A2 companies and Durkan to find the cause of, and remedy, the defect which caused the ingress of water were unreasonable. As a result, although GCL's breach of contract may have caused losses up until the end of 2010 when it left the site, GCL's workmanship was not an effective cause of any loss which occurred after then. The judge treated this submission as an argument about novus actus interveniens.

28. The judge accepted that there can in principle be a novus actus on the part of a contractor in failing to identify and remedy a defect caused by a subcontractor, though such a case would be rare. However, on the facts of this case, the judge found that it was not open to GCL to complain that Durkan took so long to resolve the problem:

> "Had GCL been dismissed from site and told that its input into the resolution of the problem [was] not required back in 2009/2010, the novus actus argument might have found favour given the extraordinarily long passage of time it has taken Durkan to deal with the water penetration. But the circumstances were otherwise. In effect, GCL dismissed themselves from site".

29. In reaching that conclusion, the judge had regard to the December 2010 correspondence which I have cited above. Contrary to Ms Day's submission, he was plainly aware of GCL's offer in that correspondence to return to the site. However, he was not persuaded that this made a difference:

> "I do not overlook the fact that at the end of their letter of 16 December 2010 there is a suggestion that they might get further involved if requested, but their attitude was plain".

Failure to mitigate

30. GCL made a further but overlapping argument to the judge that Durkan had failed to mitigate its loss by failing to take reasonable steps to identify and resolve the cause of water ingress. That argument too was rejected on the facts. The judge concluded:

> "GCL really do need to do more than they have to demonstrate that Durkan failed to act as a reasonable contractor in connection with the investigation and resolution of the water ingress".

31. A number of other arguments were raised before the judge but I do not propose to deal with them because they have played no significant part in this appeal.

Grounds of appeal

32. The grounds of appeal to this court are concerned only with the loss of rent claim. I was told by Ms Day that the appeal had been brought primarily because the order for costs which the judge had made against GCL as the losing party was of such magnitude that the company would go out of business if the appeal failed and the costs order was not thereby set aside. The grounds of appeal did not pursue any discrete challenge in relation to the assessment or quantification of costs and so Counsel did not address me on the proportionality of the costs below. Plainly this Court cannot, in the absence of proper grounds of appeal, re-visit the assessment of costs.

33. The grounds of appeal were conveniently summarised in Ms Day's skeleton argument. She submitted first that DOM/2 was not incorporated into the subcontract between GCL and Durkan; alternatively that no indemnity on the part of GCL could arise where loss was not caused by GCL. Secondly, the claim for loss of rent was due to the negligence or unreasonable conduct of the A2 companies (in deciding to let the premises without the ingress having been remediated) or Durkan (who had failed to supervise GCL and failed to carry out adequate remedial works). In such circumstances, the judge ought to have concluded that a novus actus broke the chain of causation between the loss of rent claim and the entitlement to an indemnity from GCL; alternatively that the A2 companies and Durkan had failed to take reasonable steps to mitigate the loss of rent claim. Fourthly, the loss of rent claim was not within the scope of GCL's contractual or other duties and was not reasonably foreseeable.

Scope of the appeal

34. By virtue of CPR 52.21(1), this appeal is not a rehearing but is limited to a review of the judge's decision. The appeal stands to be allowed only if the judge's decision was (a) wrong; or (b) unjust because of a serious procedural or other irregularity (CPR 52.21(3)). This court will accord appropriate respect to the lower court's conclusions.

35. The appeal is against the judgment of a judge of the Technology and Construction Court. In *Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd* [2005] EWCA Civ 894, [2005] BLR 395 at para 28, May LJ cited with approval the judgment of Lawrence Collins J in *Skanska Construction UK Ltd v Egger (Barony) Ltd* [2002] EWCA Civ 1914 at para 7:

> "decisions of the Technology and Construction Court have special characteristics which affect the readiness of the Court of Appeal to reconsider them on appeal. First, the findings of fact often fall within an area of specialist expertise, where the evidence is of a technical nature and given by experienced experts, and which is evidence of a kind which judges of the Technology and Construction Court are particularly well placed to assess. Second, the conclusions of fact will frequently involve an assessment or evaluation of a number of different factors which have to be weighed against each other, which is often a matter of degree. Third, the decisions may deal with factual minutiae not easily susceptible of reconsideration on appeal. Fourth, the judgments will frequently be written on the basis of assumed knowledge of the detail by the parties and their advisors, and will not address a wider audience, with the consequence that the underlying reasoning may not always be readily apparent or fully articulated".

36. Ms Day submitted that the approach set out in *Yorkshire Water Services* did not apply with particular force in this case. Modifying the position which she had taken in her skeleton argument, she submitted that the questions to be decided in this appeal were questions of law only, which did not involve specialist or technical expertise. She submitted that the relevant questions of law could be determined by this court on the face of the papers and that I was not disadvantaged as an appellate judge. I disagree. The specialist judge heard evidence over a number of days. He considered detailed technical evidence concerning the failed attempts to stop the water ingress. He considered the whole of the parties' evidence – which I do not have - and formed his judgment on the various issues on the basis of that evidence and his experience as a TCC judge. In my judgment, this trial had the "special characteristics" to which the court referred in *Yorkshire Water Services* and I should be cautious before interfering with matters of fact and evaluation of the evidence.

37. The approach taken by the court in *Yorkshire Water Services* is relevant to what Mr Sullivan (in my view correctly) regarded as the bedrock of GCL's grounds. Ms Day emphasised that the admitted defects in GCL's workmanship were not corrected by the A2 companies or by Durkan for nearly ten years (from the time of the work until the time of the trial). Given this significant delay, she submitted that the loss of rent should be paid by the A2 companies and Durkan, and not by GCL. She framed the argument by reference to various legal principles as well as by an attack on the judge's failure to make adequate findings on whether the A2 companies and Durkan were negligent in failing to solve the problem within a reasonable time. Each of her arguments must in my judgment be considered through the prism of *Yorkshire Water Services*. It is not the function of this court on appeal to provide the appellant simply with another opportunity to ventilate its submissions below.

38. In *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372F-H, Lord Hoffmann observed:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment…but also of a reserved judgment based upon notes…These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account….An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of

> the judge by a narrow textual analysis which enables them to claim that he misdirected himself".

39. Lord Hoffmann's cautionary words are applicable to the present case. This court will resist the temptation to cherry-pick certain aspects of the evidence and will bear in mind the advantages of the trial judge in making multi-factorial decisions based on all the written and oral evidence.

The Indemnity

40. I turn from these general principles to the specific grounds of appeal. Ms Day submitted that Durkan had failed to discharge its burden of proving that the DOM/2 indemnity had been incorporated into the contract between Durkan and GCL. In this case, Durkan and GCL had agreed that "works" were to be "carried out" in accordance with the terms and conditions of DOM/2. The only terms incorporated from DOM/2 were, in Ms Day's submission, those relating to the actual carrying out of the works (which I understood to mean the actions relating to the physical work involved under the sub-contract). The indemnity clause was a collateral clause and did not relate to the carrying out of the works. There was no express incorporation of the indemnity clause. The judge had been wrong to conclude that the words of the contract were sufficiently clear and certain to show that the parties had intended the indemnity to be part of the contract.

41. The judge dealt with this incorporation argument at paragraphs 80-81 of his judgment. He correctly observed that the interpretation of the contract turned on what the parties intended. He found that it was very difficult to conclude that the parties intended that only terms relating directly to carrying out the works were to apply and not collateral terms applying to the consequences of works being carried out.

42. He reached that conclusion for a number of reasons. First, the natural meaning of the words in the contract indicated that all the terms and conditions of DOM/2 should apply. Secondly, an attempt to restrict the terms to those applicable directly to the carrying out of the works would give rise to uncertainty. Thirdly, it is standard for there to be an indemnity clause of this nature in a sub-contract of the size of the contract in the present case: the inclusion of the indemnity clause in the DOM/2 terms testified to that. Fourthly, if the parties intended that a common contractual provision was not to apply, that would need to be expressly stated.

43. The judge's reasoning is unimpeachable. Doubtless with the benefit of hindsight, Durkan and GCL would have paid more attention to drafting the terms of a detailed sub-contract. However, they did not do so at the time. In considering the intentions of the parties, the specialist judge reached the view that an unexpressed divide, between (on the one hand) contractual terms relating to the physical acts of carrying out the works and (on the other hand) any other terms, would have resulted in lack of certainty about the scope of the contract which neither party would have intended or willingly countenanced. I see no reason to depart from the judge's reasoning in this regard.

44. Furthermore, I agree with the judge that the natural meaning of "works to be carried out" is that GCL's job as a sub-contractor was to be governed by DOM/2. In my judgment, the judge was correct to conclude that DOM/2 governed the whole of the contractual relations for the job rather than only those terms relating to the physical actions of carrying out the work.

45. I was referred by Ms Day to Hudson's Building and Engineering Contracts (13th ed) para 3-053 which considers the approach that the courts will adopt where reference is made in a contract to an external document (such as DOM/2). This passage of Hudson makes the uncontroversial point that merely because the document is referred to for one purpose, and may be incorporated to that extent, it does not follow that the whole of the document will be incorporated into the contract. The intention to incorporate must be sufficiently clear and the provisions to be incorporated must be sufficiently certain.

46. By way of illustration, the authors of Hudson refer to the case of *Skips A/S Nordheim v Syrian Petroleum Co Ltd* [1984] 1 QB 599. I was not taken to the report of the case but it seems that the Court of Appeal held that the incorporation of certain conditions in a bill of lading was limited to conditions under which goods were to be carried and delivered, and did not extend to a collateral term such as an arbitration clause.

47. In my judgment, the section of Hudson in which the *Skips* case is cited does not detract from the well-established principle that in all cases the court will ascertain the intentions of the parties. In order to ascertain the proper interpretation, both the context and the language of even an opaque clause must be carefully examined (Chitty on Contracts (32nd ed) para 15-018). That is the task which the judge undertook in this case. I do not think that he can be faulted.

48. Ms Day complains that the judge overlooked the burden on Durkan to show that the indemnity clause was incorporated. In my judgment, that complaint lacks substance: the burden on Durkan to prove the indemnity has, for the reasons given by the judge, been met. I do not accept that the judge misunderstood who carried the burden in establishing the indemnity or that he would not have had the correct legal principles in mind (*Piglowska v Piglowski*, cited above).

49. Ms Day submitted that, even if the indemnity clause was incorporated into the contract, it should have been strictly construed by the judge so that GCL was not bound to indemnify Durkan against any loss caused by Durkan's negligence.

50. It was GCL's case before me and before the judge that either the A2 companies or Durkan or both were negligent in failing to remediate the water ingress effectively. The A2 companies (it was submitted) had let the property to Mr Rabilizirov without proper investigation of the cause of the leakage, relying on the convenient assumption of rainwater coming through the window apertures. GCL subsequently did its best to remedy the situation before it was asked to leave the site permanently in 2010. GCL should not be held liable for loss after it dropped out of the picture. Durkan did nothing which had any effect. It carried out no proper investigation or monitoring. It had failed to supervise GCL's installation of the Rawmat, which (according to one of the expert's reports) fell below the standard to be expected of an experienced main contractor. The remedial works which it did carry out were ineffective. The A2 companies made no effort to deploy anyone else to fix the problem. The need to obtain expert advice should have been plain to the A2 companies and to Durkan but none were consulted prior to the commencement of the claim. The ever-accruing claim for rent was the fault of other parties.

51. Ms Day submitted that, as the loss of rent claim had been caused by Durkan's negligence, the judge was wrong to hold that the indemnity applied. She pointed out that the judgment cited DOM/2 paragraph 5.2 (set out above) which excludes the sub-

contractor's liability for negligence on the part of the main contractor. She criticised the judge for failing to apply paragraph 5.2 and failing to make findings of fact as to whether Durkan was negligent in the present case.

52. Mr Sullivan made the point that Ms Day's reliance on DOM/2 paragraph 5.2 did not accurately reflect GCL's pleaded case or the closing arguments before the judge. Ms Day did not clearly rebut that criticism which is properly made out on the documents that I have seen. The judge cannot have been wrong under CPR 52.21(3) by failing to consider an issue that did not squarely form part of GCL's case. Mr Sullivan's criticism is a complete answer to this ground of appeal.

53. In any event, the exclusion of a sub-contractor's liability under paragraph 5.2 (which is rooted in the acts of the main contractor) has a function in a contract that is distinct from the indemnity in paragraph 5.1.2 (which is rooted in the acts of the sub-contractor for which the main contractor would otherwise be liable to the employer). Those are two conceptually distinct situations. Linking the two clauses would emaciate the indemnity clause in a way which would lack common sense.

54. Having found that GCL's workmanship was an effective cause of loss, the judge held that the indemnity clause was sufficiently wide to allow full recovery from Durkan. Given the width of the indemnity ("indemnify and save harmless from any breach" etc.), he was entitled to reach this conclusion even if there was a second, twin cause of loss (*ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2012] UKSC 17, [2012] 2 AC 164, para 61).

Actions or omissions of other parties as novus actus interveniens

55. Ms Day submitted that the judge had erred in finding that GCL was liable for the loss of rent claim because the failure of the A2 companies and Durkan to resolve the problem amounted to a novus actus interveniens which had broken the chain of causation between the loss of rent claim and any entitlement to an indemnity from GCL. In my judgment, this argument has two elements. First there is a legal element, namely the question whether there can ever be a novus actus on the part of a contractor in failing to identify and remedy a defect caused by a subcontractor.

56. In relation to this question, I was referred to Clerk & Lindsell (22nd ed) para 2-126 which deals with intervening conduct of a claimant. The authors say:

> "when the conduct of the claimant exacerbates or adds to the injuries of which he complains, that conduct will generally result in a reduction of his damages on grounds of contributory negligence, or failure in his duty to mitigate damage. However it may be that the conduct of the claimant is so wholly unreasonable and/or of such overwhelming impact that that conduct equities the defendant's wrongdoing and constitutes a novus actus".

57. In the present case, the judge accepted that there may come a time when a contractor's failure to take any steps to investigate and resolve a known problem will constitute intervening conduct after which a subcontractor's initial responsibility ends and any further responsibility to the party ultimately suffering loss becomes that of the contractor. So the question of law was answered in favour of GCL.

58. However, the remainder of the judge's enquiry into this issue was fact sensitive (*Borealis AB v Geogas Trading SA* [2011] 1 Lloyd's Rep 482, para 47). As to the facts, I shall consider the evidence in two parts: first, the actions of the parties until around 2011; secondly, their actions from 2011 until trial.

Events until 2011

59. The judge concluded (at para 111 of the judgment) that "GCL took a firm stance which has since been accepted as wrong and turned its back on playing any part in the investigation and the resolution of the problem it created". Ms Day submitted that this finding was unreasonable and based on a partial reading of the evidence, stressing GCL's professed willingness to return to the site, as stated in the December 2010 correspondence. However, the judge plainly had regard to the suggestion in the correspondence that GCL might get further involved if requested but did not give the correspondence the decisive weight for which Ms Day contends. I am not persuaded of any error in his approach: the weight to be attributed to any particular item of evidence is not easily overturned on appeal.

60. In short, GCL's disagreement with the judge's factual analysis is not a ground for interfering with his conclusion. I accept Mr Sullivan's submission that I should not be drawn into factual findings on the basis of a snapshot of the evidence (such as the December 2010 correspondence). Not least, I am not in a position to say whether that evidence played a greater or lesser role at the trial, and whether the written correspondence should be read in light of oral evidence on the point at trial.

61. In any event, the judge surveyed the wider circumstances in relation to the novus actus argument. He found that Durkan "tried almost everything that one might think they might try". I was not directed by Ms Day to any other realistic or tangible step that the A2 companies or Durkan could or should have taken to stop the problem that has caused GCL to have to pay damages. This makes it difficult to argue that the failure by A2 Dominion or Durkan to cure the problem amounted to a novus actus.

62. In his skeleton argument, Mr Sullivan helpfully set out the various steps which the parties took to investigate and remedy the problem of water ingress. In late 2008, GCL installed a DPC skirt along the rear wall. In June 2009, GCL installed lead flashing along the rear wall. In October 2009, GCL sealed the surface gullies and downpipes where they passed through the retaining wall. In January and February 2010, GCL installed a bund on the ground floor slab. At a similar time a non-party had carried out opening up works and dyed water tests.

63. In about March 2010, a trial pit was dug. In April 2010, GCL excavated along the outside of the retaining wall to expose the top part of the wall and installed a waterproofing membrane. In April 2010, Durkan contracted with a sealant specialist who carried out a resin injection of the construction joints between the ground floor slab and retaining wall and applied a waterproof concrete render along the inside of the joint. In August 2010, Durkan carried out further dyed water tests. Waterproof paint was applied to the bund.

64. In December 2010 or January 2011, a damp proof membrane was laid under the paving slabs between the building and the canal. A waterproof concrete beam was fitted and hydrophilic water bars were provided.

65. The judge found that "the only thing that Durkan appeared not to have attempted was the installation of what is usually referred to as an internal gutter attached to a sump treating the ground floor of this warehouse". The judge observed however that it would be hard to criticise Durkan for not adopting a precaution that is regularly found in basement construction in the case of a building which was not a basement.

66. The judge also concluded that there was a complete absence of evidence as to what might reasonably be expected of a contractor in the present circumstances. The solution proposed by the experts was not bound to succeed (implying that it was not such an obvious remedy that Durkan could be criticised for having failed to adopt it more expeditiously).

67. Taking all these factors into account, the judge held that there was no novus actus interveniens. The judge's evaluation of the evidence and his findings of fact mean that it is not open to GCL to argue on appeal that the conduct of the A2 companies or Durkan was so wholly unreasonable or of such overwhelming impact that it eclipsed GCL's wrongdoing such as to constitute a novus actus. Given that the judge analysed the evidence in detail, and made findings which were open to him, I see no reason to interfere with his overall conclusion.

Events from 2011 until trial

68. I have set out above the steps which the parties took on site up until around the beginning of 2011. Ms Day made the additional submission that the claim for loss of rent had been allowed by other parties to build up over years. The dispute had been conducted at a slow pace, with the claim for loss of rent increasing as time passed. If the pace of progress had been greater, GCL's liability would have been substantially reduced. GCL had had little control of, or input into, the dilatory way in which the other parties had progressed the litigation. The law should not countenance an outcome whereby GCL had been unable to exert influence in the proceedings but was nevertheless fixed with the financial consequences of the delay of other parties in litigating the claim.

69. I reject that submission for two reasons. First, it does not tally with the facts. There was evidence from a witness on behalf of the A2 companies (Ms Doreen Wright) that it seemed that the problem of water ingress had been resolved by March 2011. A small amount of water ingress was then reported by Mr Rabilizirov on 20 June 2011 but he did not maintain contact with the A2 companies about the problem. Nothing further was heard from him until 18 April 2012 when he reported further water ingress. It is not plausible to suggest that lack of action by the A2 companies or Durkan during this quiet period was a novus actus.

70. The claim was issued in December 2013 and the claim form served in April 2014. In its amended defence dated 9 October 2017, GCL admitted that the Rawmat was not continuous to the top of the rear wall but still did not accept liability. At the time of a site visit by other parties' experts on 28 March 2017, GCL's expert did yet not have confirmed instructions. In its response to the Part 20 claim dated 28 November 2017, GCL did not accept liability but (among other things) repeated its amended defence to the main claim (i.e. non-admission).

71. On 18 January 2018 (nearly four years after the claim form was served and a mere few weeks before trial), GCL applied to amend its defence to the claim and its Part 20 defence to deny that it had failed to install the Rawmat correctly, and applied to adduce evidence to that effect. That application was due to be heard on the first day of trial. It was GCL's skeleton argument, produced for the trial, that admitted for the first time negligence on its behalf.

72. This chronology makes it difficult for GCL to argue that the extent of the loss of rent claim should be attributed to the delay of other parties in confronting the issues either in the original claim or in the subsequent Part 20 claims. GCL has at all material times had access to appropriate experts and advice. I do not accept that it has been prejudiced by the conduct of other parties or that it has had one hand tied behind its back in the litigation.

73. Secondly, Ms Day's submission amounted at times to the assertion that the outcome of the case was unfair: she seemed to say that this court should not countenance GCL's liability for such a large sum (for which it was very regrettably not insured) when the slow pace of proceedings was the other parties' responsibility.

74. The A2 skeleton argument describes this aspect of the appeal as a cynical attempt to gain sympathy. I do not regard the argument about fairness as cynical. I was not however directed to authority to support it. The outcome of the court's legal enquiry will be determined only by the relevant questions of law and not by any ex post facto evaluation of whether or not the proceedings were sufficiently expeditious. If GCL had wanted the litigation to develop in a different way, it should have deployed the Civil Procedure Rules to achieve that outcome.

Failure to mitigate

75. Ms Day submitted in the alternative that there was a failure by the A2 companies and Durkan to mitigate the loss of rent. This submission relied on the proposition that the A2 companies and Durkan failed to take all reasonable steps to identify and remedy the cause of the water ingress from 2007 onwards. I have set out above how this proposition cannot be made good. In my judgment, the judge applied the correct legal principles relating to the duty to mitigate loss but found that GCL's argument failed on the facts.

76. The test is not whether the A2 companies or Durkan were able to cure the problem but rather whether they took all reasonable steps to do so. The standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer (McGregor on Damages (20th ed) para 9-079).

77. Lord Macmillan in *Banco de Portugal v Waterlow* [1932] AC 452, 506 remarked that the measures which a party should be expected to take by way of mitigation "ought not to be weighed in nice scales" at the instance of the party whose actions have occasioned the difficulty. In my judgment, the appellant's submissions in relation to this part of the appeal in effect require this court to weigh the evidence in nice scales. It was the task of the judge to weigh the evidence in relation to mitigation. I see no reason why this court should interfere.

Remoteness of damage

78. The final ground of appeal was that loss of rent from the inability to build a mezzanine floor was too remote to be recoverable. Ms Day submitted that the A2 companies should not have agreed the underlease until the water ingress had been resolved and that loss of rent from the premises was a liability greater than GCL could reasonably have thought it was undertaking (*Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, [2009] 1 AC 61, para 16).

79. This was a commercial warehouse in the St Pancras area which the judge described as "an attractive area for businesses" such that it was anticipated that a beneficial rent could be achieved. The judge held that a distinction needed to be drawn between the type of loss and its extent. It was the former that had to be foreseeable. He cited Pill LJ in *Sanders v Williams* [2002] EWCA Civ 673, para 22: "Foreseeable damage caused to an unforeseeable degree is recoverable in the courts".

80. On this basis, the judge concluded:

> "It was plainly foreseeable that…if a groundworks contractor so improperly carried out its contract that water penetrates into the premises, he cannot possibly say that he did not foresee that the owner of the premises might, indeed would, sustain a loss of use of the premises".

That type of damage being foreseeable, it was not open to GCL to complain about its amount.

81. The judge's approach reveals no legal flaw. He comments in the judgment that he was dealing with this aspect of the claim in comparatively short terms. He was however under no duty to give lengthy reasons. There is nothing to suggest that the judge did not know "how he should perform his functions and which matters he should take into account" (*Piglowska v Piglowski*, above). The judge applied the correct legal principles to the facts of the case. GCL may disagree with his conclusion but demonstrates no sound reason for this court to interfere.

Other secondary submissions by the appellant

82. GCL made a number of secondary criticisms relating to the judgment. Ms Day emphasised, for example, that the judgment says at one point that Durkan had done very little if anything after 2010 and certainly after mid-2011 to identify the problem or resolve it. She submitted that that conclusion was inconsistent with the conclusion later in the judgment that Durkan tried almost everything that one might think they might try. There is nothing in this criticism, which relates simply to the way in which the judge expressed himself rather than to any point of substance. I do not accept that GCL can be left in any doubt about what the judge found Durkan did or did not do. Not least, as I have set out above, the judge deals with each of those steps in his judgment.

83. A number of criticisms were made of the judge for failing to deal with evidence that favoured GCL's view of the case, including GCL's expert evidence. These submissions were marginal to the grounds of appeal and could not in any event realistically be established on the bundles of evidence before me. The submissions seemed to me to fail to acknowledge the high threshold for overturning factual findings on appeal.

Durkan's respondent's notice

84. Durkan filed a respondent's notice on two grounds. First, it was submitted that if the appeal was to succeed on the basis of the indemnity ground, then the judge's decision should nevertheless be upheld on the basis that GCL was liable to pay equivalent damages for breach of contract. Secondly, the respondent's notice stated that, if the appeal was to succeed on the basis that Durkan was not liable to the A2 companies (and there was therefore nothing for GCL to indemnify), then Durkan wished to make clear that this finding should apply as against A2 Dominion in respect of its Part 20 claim against Durkan.

85. The cross-appeal was framed as being necessary only if the appeal were to succeed. In the event, it is not necessary for me to deal with the points which Durkan raised. This means that it is not necessary for me to deal with Mr Robb's submissions in relation to the A2 companies' liability down the chain.

Conclusion

86. In conclusion, the judge directed himself correctly in law and I am not persuaded that his findings of fact were anything other than properly rooted in the evidence before him. The appeal will be dismissed.