Neutral Citation Number: [2020] EWHC 19 (TCC)

Case No: HT-2019-000245

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2020

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

(1) JOHN INNES FOUNDATION
(2) EARLHAM INSTITUTE (FORMERLY THE GENOME ANALYSIS CENTRE LIMITED)
(3) JOHN INNES CENTRE
(4) ANGLIA DNA SERVICES LIMITED (In Liquidation)

Claimants

- and –

VERTIV INFRASTRUCTURE LIMITED (FORMERLY EMERSON NETWORK POWER LIMITED)

Defendant

- -
- -

Rachel Ansell Q.C. and Athena Markides (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
Gary Blaker Q.C. (instructed by **W Legal Limited**) for the **Defendant**

Hearing date: 4th December 2019

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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.

Mr Roger ter Haar QC :

1. This is the judgment on the Defendant's application under CPR 3.4(2)(a) to strike out the claim on the basis that the Particulars of Claim discloses no reasonable grounds for bringing the claim and/or for summary judgment pursuant to CPR 24.2 on the basis that the Claimants have no real prospect of succeeding in their claim.

The Facts

2. The claim is a claim for loss and damage arising out of a fire which occurred on the 7th March 2015 ("the Fire") at the Genome Centre at Norwich Research Park, Colney, Norwich, NR4 7UH ("the Property").

3. Because it is central to the strike out application, it is necessary to set out at some length a number of contractual provisions.

4. At the time of the Fire, the First Claimant ("JIF") owned the freehold in the Property and the Second, Third and Fourth Claimants (collectively referred to as the "Claimant Tenants") occupied and had leasehold interests in different parts of the Property.

5. There is in evidence before me the lease from JIF to the Second Claimant, then known as The Genome Analysis Centre.[1] These were some of the provisions of that lease:

(1) Clause 1.1:

> "**Insured Risks** means fire, tempest, storm, flood, lightning, explosion, impact, aircraft (other than hostile aircraft) and other aerial devices and articles dropped from them, riot, civil commotion and malicious damage, bursting or overflowing of water tanks, apparatus or pipes and such other risks as the Tenant may from time to time insure against subject to such exclusions, excesses, conditions and limitations as may be imposed by the insurers and insurance being available on reasonable terms in the London insurance market."

(2) Clause 3.5:

> "**Repairs and Maintenance**
>
> "3.5.1 The Tenant shall put and keep the Premises at all times in good and substantial repair and condition (but the Tenant shall not be liable to repair or make good damage by the Insured Risks, except to the extent that payment of insurance monies is withheld because of any act, neglect or default of the Tenant or any undertenant or any person under its or their control)….
>
> ….
>
> "3.5.3 The Tenant shall put and keep in good and substantial repair and condition and in good working order all plant machinery apparatus and equipment in the Premises in the nature of landlord's fixtures and fittings and shall keep in a safe condition all apparatus and equipment installed in the Premises by the Tenant or installed in the Premises on the Tenant's behalf and belonging to the Tenant for the Permitted Use and for that purpose:

[1] 1/tab 3/263

"(a) shall enter into and thereafter maintain in force contracts with reputable contractors for the periodic and regular inspection servicing and maintenance of the said plant machinery apparatus and equipment; and

"(b) shall produce to the Landlord on demand from time to time sufficient details of such contracts as are then current to satisfy the Landlord that Clause 3.5.3(a) is being complied with; and

"(c) shall renew or replace from time to time such of the plant machinery apparatus and equipment in the Premises which in the reasonable opinion of the Landlord's Surveyor becomes during or at the expiry of the Term in need of such renewal or replacement with plant machinery apparatus and equipment (as the case may be) of a substantially similar kind and quality and reasonably fit for purpose having regard to the age of the items to be replaced; and

"(d) at all times shall ensure that such plant machinery apparatus and equipment is properly operated maintained and serviced.

…"

(3) Clause 3.16.6:

"***Fire precautions and equipment***

"(a) The Tenant shall comply with the requirements and recommendations of the fire authority, the insurers of the Building and the Landlord in relation to fire precautions affecting the Premises or the Building.

"(b) The Tenant shall keep the Premises equipped with such fire fighting and extinguishing appliances as are provided by the Landlord and required by any statute, the fire authority or the insurers of the Building or reasonably required by the Landlord and shall keep such appliances open to inspections and maintained to the reasonable satisfaction of the Landlord…"

6. There is in evidence before me the lease from JIF to the Third Claimant ("JIC")[2]. These were some of the provisions of the Lease:

(1) Clause 1.1:

"Insured Risks means such risks as the Superior Landlord may from time to time insure against pursuant to the Superior Lease subject to such exclusions, excesses and limitations as may be imposed by the insurers."

(2) Clause 3.5 and 3.16.6 were in substantially the same terms so far as relevant as those clauses in the lease between JIF and the Second Claimant.

(3) The principal difference between the lease to the Second Claimant and that to the Third Claimant is that under the former lease the tenant had the obligation to effect insurance whilst in the latter it was the responsibility of JIF.

7. There is also before me a copy of a lease from JIF to The Sainsbury Laboratory.[3] As this is dated after the Fire and is not to any of the parties to these proceedings, I am

[2] 1/tab 3/129

unsure of the relevance of that lease. However, for the purpose of his submissions Mr. Blaker Q.C. relied mainly upon the lease from JIF to JIC, which appeared to me sufficient for the points he wished to make based upon the lease arrangements, to which I refer below.

8. The Property had an emergency lighting system which was powered by an uninterruptible power supply ("the UPS"). The UPS incorporated an Emergency Lighting Unit (the "ELU") and comprised a central control cabinet which was flanked on either side by a large battery cabinet containing four batteries ("the Batteries"). The Batteries were arranged in 4 strings of 30 12v blocs (or monoblocs) with 2 strings in each cabinet. It is the Claimants' case that the Fire was caused by a thermal runaway in one or more of the monoblocs in the Batteries which were well beyond their service life at the time of the Fire.

9. The Defendant, Vertiv, is a specialist in the maintenance and repair of standby power equipment, including uninterruptible power supplies. Vertiv is the current incarnation of the company formerly known as Harath Engineering Services Ltd, Chloride Electronics Ltd T/A Chloride Harath and Emerson Network Power Ltd.

10. In 2006, the Defendant was asked by the Third Claimant ("JIC") to design a proposal for the maintenance of the Property's standby and emergency power equipment, including the UPS.

11. By letter dated the 1st March 2006, the Defendant provided JIC with "our proposal for the maintenance of your standby and emergency power equipment". This proposal was stated to include "2 service visits per year" and to provide "for the maintenance and emergency cover aspects of the services we offer".[4]

12. The maintenance proposal was accepted by JIC in 2006, and the Defendant's contract was renewed on an annual basis up to 2012.

13. In 2012, NBI Partnership Ltd ("NBI") was engaged pursuant to a Members Agreement dated the 27th February 2012 to act, in effect, as the managing agent of the Property ("the NBI Agreement").[5] The parties to that Agreement were two of the Claimants (JIC and the Second Claimant) and two non-parties to these proceedings (The Institute of Food Research and The Sainsbury Laboratory).

14. The following were terms of the NBI Agreement:

(1) The Recital:

> "(A) NBI Partnership was incorporated under the Companies Act 2006 on 9 January 2012 and is a private company limited by guarantee.
>
> "(B) NBI has been established for the purpose of rendering its members those services directly necessary for the exercise of their activities and upon the basis that NBI Partnership shall merely claim from its members exact reimbursement of their respective shares of the joint expenses.

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[3] 1/tab 3/210
[4] 2/4/573
[5] 2/tab 4/684-711

"(C) JIC, IFR, TGAC and TSL wish to participate as members in NBI Partnership for the purposes and on the terms set out in this Agreement".

(2) Clause 6:

"**Provision of the Services**

"6.1 With effect from the date of this Agreement, the NBI Partnership shall supply and make available to the Members and their Relevant Group Entities:

"6.1.1 the Administration and Support Services; and

"6.1.2 the Property Related Services.

"6.2 The NBI Partnership shall supply the Administration and Support Services and Property-related Services with reasonable skill and care and in doing so the NBI Partnership shall comply at all times with:

"6.2.1 all applicable laws;

"6.2.2 all applicable policies and regulations of the Members which are notified to it in writing; and

"6.2.3 all service level agreements, specifications, policies and procedures as may from time to time be agreed between the Members (or any of them) and the NBI Partnership.

"6.3 If the Administration and Support Services and/or Property-related Services do not conform with the warranty in clause 6.2, the NBI Partnership will use all reasonable endeavours to correct any such nonconformity. Such correction shall constitute the Members' sole and exclusive remedy for any breach of the warranty in clause 6.2 save that the Members may also, by notice to the NBI Partnership, require a corrective action plan to be prepared by the NBI Partnership….."

(3) The phrase "property-related services" is defined by clause 1.1 as meaning:

"the property-related services which from time to time are provided by NBI Partnership to any one or more of the Members …. including, without limitation, those services described in schedule 2".

(4) Schedule 2 is entitled "Property-related Services". It states that "the Property-related Services include but are not limited to the elements listed in the table below with accompanying illustrative descriptions". There follows a table. In the first column of that table (headed "Property-related Services") the fourth entry is "Repairs and Maintenance". In the second column (headed "Illustrative Description") against that fourth entry in the first column is the following description:

"Planned and reactive electrical, mechanical and building services engineering service costs, including staff costs, external contract services and consumables."

(5) Clause 15:

"**Insurance**

"15.1 The NBI Partnership shall effect and maintain with a reputable insurance company a policy or policies of insurance providing an adequate level of cover in respect of the following categories and risks:

"15.1.1 public liability insurance;

"15.1.2 employers liability insurance;

"15.1.3 professional indemnity insurance (and shall ensure that all professional consultants or subcontractors involved in the provision of the Administration and Support Services and Property-related Services hold and maintain appropriate cover)."

(6) Clause 16:

"Liability

"16.1 This clause 16 sets out the entire financial liability of the NBI Partnership (including any liability for the acts or omissions of its agents and subcontractors) to the Members and their Relevant Group Entities in respect of:

"16.1.1 any breach of this Agreement ….

…

"16.4 Subject to clause 16.3:

"16.4.1 the NBI Partnership shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation (whether innocent or negligent) or otherwise for any loss of profits, loss of income, depletion of goodwill or similar losses, or pure economic loss, or for any special, indirect or consequential losses, costs, damages, charges or expenses howsoever arising; and

"16.4.2 the NBI Partnership's total aggregate liability in contract, tort (including negligence or breach of statutory duty), misrepresentation (whether innocent or negligent), restitution or otherwise, arising in connection with the performance or contemplated performance of this Agreement shall be limited to the aggregate Administration and Support Services Costs and Property-related Costs during the 12 months immediately preceding the date on which the claim arose."

15. From 2012 NBI rather than JIC engaged the Defendant.

16. The Particulars of Claim append as Appendix A Maintenance Proposals for 2013 and 2014. The Maintenance Proposal for 2014 is the more important being closer to the date of the Fire, although there do not appear to me to be any material differences in the proposals for each year.

17. The Scope of Works was stated to be as follows:[6]

[6] 1/tab 1/27

- "Covering a term of 1 year – 1st April 2014 – 31st March 2015

- "Two essential Emergency Lighting Unit control module and associated battery planned maintenance visits, to be completed by Emerson Network Power service engineers during Normal Working Hours. The planned maintenance visit scope of work includes:

    - "Cleaning of ELU, including fans.

    - "Mechanical condition check.

      ….

    - "Test of ELU system by battery discharge test simulating mains failure (if possible)

  ….

- Basic Cover (Bronze) – All parts and labour outside of normal PPM visits are chargeable."

18. On a page headed "Supplementary Upgrades" the proposal provided[7]:

    "**Battery Impedance Testing**

    "Whilst basic voltage checks are carried out as part of your ELU maintenance, impedance testing provides a more rigorous check of each individual battery block. Using battery manufacturers pass/fail data enables the engineer to detect individual faulty blocks within the overall battery set. Impedance testing provides the means to effect controlled replacement of individual failing blocks thus averting the risk of catastrophic failure of the battery set and potential loss of critical support under mains failure conditions."

19. The Proposal sets out "Terms of Offer". Clause 1 of the Terms of Offer provided[8]:

    "This offer is made by Emerson Network Power, The Seller and is subject to the enclosed quotation, Emerson Network Power Terms of Offer and Emerson Network Power Terms and Conditions Rev 1 May 2012 (available upon request), and to the exclusion of any terms and Conditions stated on the buyer's purchase order and or Contract, unless agreed in writing by an Authorised Signatory of Emerson Network Power. In the event of any contradiction these documents will take precedence in the order stated above."

20. The Emerson Network Power Terms and Conditions referred to in that clause contained the type of limitation and exclusion of liability clauses which might be expected.

21. There is a battle of forms: it is the Claimants' case that NBI's acceptance of the offer incorporated NBI's terms and conditions which did not contain any limitation or exclusion clauses in the Defendant's favour.

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[7] 1/tab 1/28
[8] 1/tab 1/29

22. Clause 12 of the Terms of Offer provided[9]:

> "**Contract term** – The Service Contract will commence with immediate effect or at an agreed date following receipt and the Sellers acknowledgment of the Buyers written order. The contract shall be for the stated duration. All contracts are subject to a 90 day cancellation period. The Seller reserves the right to charge during this cancellation period on a pro-rata basis. The Seller shall use their best endeavours to fulfil the contract requirements to carry out all service visits as detailed in the service contract. Should the Seller be impeded from undertaking service visits as a result of circumstances beyond their control, such as repeated refusal to provide access the site and or equipment, it shall be deemed that the contractual obligation has been fulfilled, and the contract will expire on the appropriate end date, without prejudice to any other conditions of contract, financial or otherwise."

23. Although the Defendant had contracted to provide two maintenance visits per year, it is common ground that in the two years before the Fire no visits had taken place. It is also common ground that NBI had not specifically requested any such visits.

24. There is evidence before me that when visits took place between 2009 and 2012 they did not take place on exactly 6 monthly intervals.[10]

The Pleaded Claim

25. As the recital of the facts above shows, after 2012 the relevant contracts with the Defendant were with NBI, not JIC.

26. After 2012 JIC had no continuing contractual relationship with the Defendant. None of the other three Claimants ever had any contractual relationship with the Defendant.

27. Accordingly, any claim by any of the Claimants for loss or damage arising out of the Fire has to be brought in tort, and has been brought in tort.

28. At paragraphs 16 to 18 of the Particulars of Claim it is alleged[11]:

> "16. Therefore, there were express terms of the contract between NBI and the Defendant that:
>
> > "a. The Defendant would service the UPS twice during the 12 month lifespan of the contract; and
> >
> > "b. The Maintenance Regime in 2013 and 2014 would include the inspection(s), tests and service set out above at paragraph 14.
>
> "17. There were implied terms of the agreement between NBI and the Defendant that:
>
> > "a. The Defendant would contact NBI in order to arrange the said bi-annual inspection, testing and servicing. Such term was implied pursuant to the

[9] 1/tab 1/31
[10] 1/tab 3/56: paragraph 26 of Mr. Wood's First Witness Statement.
[11] 1/tab 1/6-7

other parties' previous course of dealings and/or as a matter of necessity and/or to give business efficacy to the agreement.

"b. The Maintenance Regime would include the inspections, tests and service (set out in the Preventative Maintenance Visit Report, or that it would include reasonable equivalents. Such term was implied pursuant to the parties' previous course of dealings and/or as a matter of necessity and/or to give business efficacy to the agreement.

"18. Despite contracting to undertake the Maintenance Regime in 2013 and in 2014 and despite invoicing and receiving payment for those works, the Defendant entirely failed to undertake the Maintenance Regime in 2013 or 2014."

29. Paragraphs 22 to 25 set out the case as to the Duty of Care owed by the Defendant[12]:

"22. The Defendant owed a duty of care in tort to the Claimants, as owners and occupiers of the Property, to prevent damage to their property by carrying out the Maintenance Regime with reasonable care and skill. In particular:

"a. The Defendant was responsible for, and was paid, to carry out the Maintenance Regime, including bi-annual inspection, testing and servicing of the UPS.

"b. The Defendant knew or ought reasonably to have known that the batteries in the UPS required regular and careful servicing to ensure the functionality and safety of the UPS.

"c. The Defendant knew or ought reasonably to have known that the batteries in the UPS had a service life of approximately 7 years.

"d. The Defendant therefore knew or ought reasonably to have known that the batteries in the UPS would be reaching end-of-life by early 2015.

"e. The Defendant knew, or ought reasonably to have known that, if the Maintenance Regime were not carried out and if the batteries were not replaced at end-of-life, there was a risk of defects leading to thermal runaway, and consequently a risk of fire and damage to the Claimants' property.

"23. Further, it is averred that the Defendant assumed responsibility for the Maintenance Regime, including, but not limited to, the bi-annual inspection, testing and servicing of the UPS.

"24. Had the Defendant properly undertaken the Maintenance Regime in – at the very least – 2014, the poor condition of the battery installation would have been detected and a recommendation made to replace the whole battery installation.

"25. Had such a recommendation been made, it would have been promptly implemented by NBI and the Fire would not have occurred."

30. Paragraph 26 sets out the Claimants' case as to breach by the Defendant:

[12] 1/tab 1/8-9

"In breach of duty and/or negligently, the Defendant, its servants or agents:

"a. Failed to notify NBI and/or the Claimants that the UPS required servicing in 2013 and/or 2014 and/or to arrange to undertake the Maintenance Regime.

"b. Failed to notify NBI and/or the Claimants that the Maintenance Regime had not been undertaken in 2013 and/or in 2014.

"c. Failed to undertake the Maintenance Regime in 2013 and/or in 2014 adequately or at all.

"d. Failed to establish the poor condition of the batteries in the UPS and/or to recommend their replacement prior to the Fire.

"e. Failed to notify NBI and/or the Claimants of the risks posed by the Defendant's failure to undertake the Maintenance Regime.

"f. Failed to identify and/or notify NBI and/or the Claimants of the risks posed by the batteries within the UPS prior to the Fire.

"g. Failed in all the circumstances to undertake their work with reasonable care and skill and to protect the Claimants and their property from foreseeable damage."

31. Paragraphs 27 to 31 set out the case as to causation:

"27. The UPS was last serviced by the Defendant on or around 13 December 2012. If the Defendant had carried out the Maintenance Regime as contracted, it would have undertaken two service visits at six monthly intervals in 2014. Therefore, at the latest, a service visit would have been undertaken in December 2014 prior to the Fire.

"28. Had the Defendant undertaken the Maintenance Regime as required, it would have identified that the UPS batteries were reaching end-of-life at or before December 2014. In particular, had the batteries been subjected to the discharge test then they would have failed almost immediately, revealing their poor condition and the need for their replacement.

"29. This should have been notified to NBI and/or the Claimants. Had they been so notified, then the batteries would have been promptly replaced, and the Fire would not have occurred.

"30. The Fire caused direct damage to the UPS and surrounding area, and smoke also spread throughout the building interior. As a result, extensive damage was sustained to the building and its contents, including plant, machinery, computer equipment and stock.

"31. By reason of the Defendant's negligence, the Claimants have therefore suffered loss and damage".

32. The First Claimant claims for damage to the building; the Second to Fourth Claimants claim for damage to machinery and equipment, computer equipment and scientific equipment. In addition the Second to Fourth Claimants claim damages in respect of business interruption and increased costs of working.

Principles applicable to this application

33. As set out above, the Defendant seeks to strike out the claim pursuant to CPR 3.4(2)(a) on the basis that the Particulars of Claim discloses no reasonable grounds for bringing the claim and/or for summary judgment pursuant to CPR 24.2 on the basis that the Claimants have no real prospect of succeeding in their claim.

34. In their skeleton argument, Ms. Ansell Q.C. and Ms. Markides, who appear for the Claimants, set out the applicable tests by reference to the relevant parts of the White Book:

> "2. The tests applicable to applications made pursuant to CPR 3.4(2)(a) and CPR 24.2 will be well known to the Court. In summary:
>
> > "2.1 Insofar as the application made pursuant to CPR 3.4(2)(a) is concerned:
> >
> > "2.1.1 The threshold for striking out a case is a high one. A Statement of Case should only be struck out if it is *"unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded"* and or sets out a case *"which do[es] not amount to a legally recognisable claim or defence";*
> >
> > "2.1.2 A Statement of Case is not suitable for strike out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence;
> >
> > "2.1.3 An application to strike out should not be granted unless the court is certain that the claim is bound to fail; and
> >
> > "2.1.4 Where a Statement of Case is found to be defective, the Court should consider whether that defect might be cured by amendment, and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend.
>
> "2.2 Insofar as the application pursuant to CPR 24.2 is concerned:
>
> > "2.2.1 The threshold for summary judgment is similarly high. A party can defeat an application by showing its case has some "prospect", by which it is meant that *"it must be more than merely arguable".* A party is *"not required to show that their claim will probably succeed at trial."*
> >
> > "2.2.2 The Court should not conduct a mini-trial and decide which party's position is more probable: *"the criterion which the judge had to apply under CPR Pt 24 is not one of probability; it is absence of reality"*; and
> >
> > "2.2.3 An application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue having regard to all of the evidence."

35. I have also found assistance, and relied upon, Stuart-Smith J.'s summary of the applicable principles in paragraphs [13] to [16] of his judgment in *Sainsbury's Supermarkets Ltd v Condek Holdings Ltd* [2014] EWHC 2016 (TCC), a particularly helpful case as in that case, like this, the Defendants sought to strike out claims on the basis that no duty of care was owed.

Some Preliminary Matters

36. After that very lengthy recital of the background to the present application, I turn now to the application itself. There are some preliminary points to be made.

37. For the Defendant, the thrust of the case put forward by Mr. Blaker Q.C. was firstly, that the Defendant owed no duty of care to any of the Four Claimants; and, secondly, that there was no breach of any duty if there was one. Whilst the evidence served by the Defendant's solicitor also raised issues as to causation, those issues were not pressed before me, and I need say no more about causation.

38. Criticism is made in paragraph 51 of Mr. Blaker's skeleton argument of the absence of evidence from the Claimants themselves either in the form of a signature on the Particulars of Claim or a supporting witness statement. As to the first, the Particulars of Claim was signed by a claims manager at Aviva, the Claimants' insurer. As to the second, the supporting witness statements for the Claimants were signed by Ms. Hawkins, the Claimants' solicitor.

39. I do not think there is any strength in this criticism. The points which are put forward by the Defendant are points of law upon which I am prepared to take the Claimants' pleaded case on its face.

40. In any event, the factual disputes in this case appear to me to be relatively limited. Whilst there will doubtless be a dispute as to expert evidence, that primarily goes to causation. Otherwise the only factual disputes appear to me to be likely to relate to quantum, which is irrelevant for the purposes of this application.

41. Finally, by way of preliminary matters, I did not understand the Claimants to submit that if the application were to be otherwise successful, the claim could be rescued by any amendment.

Duty of Care

42. Counsel for the parties summarised their arguments in skeleton arguments served in the usual way before the oral hearing before me and then developed their arguments orally. At my request, those submissions were supplemented after the conclusion of the oral hearing by submissions from both parties principally, but not exclusively, upon the decision of H.H. Judge Coulson Q.C. (as he then was) in *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2008] BLR 114 and upon the cases referred to by him in that decision.

43. For the Defendant, Mr. Blaker's submissions in summary were as follows:

(1) The starting point is Lord Bridge's triple test in *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605. He submitted that there was no foreseeability or proximity between the Claimants and the Defendant and that it would not be fair just and reasonable to impose a duty of care upon the Defendant;

(2) There was no special relationship between the Claimants and the Defendant and thus no *Hedley Byrne & Co. v Heller & Partners Ltd* [1964] A.C. 464 type of claim can be maintained. Not only was there no special relationship between the Claimants and the Defendant but the Defendant cannot be said to have assumed any responsibility towards the Claimants. There is nothing in the factual matrix in

this case that suggests that it would be appropriate for the Defendant to have assumed responsibility to the Claimants when it contracted with a separate party, NBI;

(3) In the present case it cannot be said that the arrangement amounted to one which was akin to a contract between the Claimants and the Defendant. In fact it would seem that not only has the Defendant only ever contracted with one of the Claimants but when NBI was formed it was not a "partnership" of all the Claimants;

(4) Furthermore, there is no contemporaneous correspondence that suggests that any of the Claimants explained to the Defendant that in effect it would still be contracting with them. It was quite the opposite. NBI was formed to manage the property and the Defendant was told that it would be contracting with NBI;

(5) Mere foreseeability of reliance is insufficient for a duty of care to be imposed towards a non-contracting party;

(6) Strike out/summary judgment is a perfectly appropriate and common course of action for the court to adopt in a situation such as this;

(7) In the present case, not only does the factual and contractual framework underpin any consideration of whether a duty of care exists, but the regulatory and statutory framework also provides useful guidance in this regard. Failure to comply with regulations in the Fire Order 2005 is a criminal offence: the responsible person is criminally liable and, as the Claimants could be criminally liable for a failure to maintain, it suggests that no civil duty should be imposed on a third party for a failure to inform the Claimants that the batteries needed to be tested annually. The Claimants should have been well aware of this and put measures in place to ensure that there was not going to be a failure to miss an annual test;

(8) In his supplemental submissions, Mr. Blaker submitted that dicta in the *John F. Hunt* case were wrong, but in any event the there was an important distinction between that case and the present in that the present case arises out of an omission to act rather than a negligent act (this point had also been developed by Mr. Blaker in his oral submissions).

44. For the Claimants, Ms. Ansell's submissions in summary were as follows:

(1) It is common ground that the Defendant was a specialist provider of professional maintenance services in relation to emergency power systems. It was also common ground that the Defendant was contracted to provide its services in respect of the ELU by NBI (who were not specialists in emergency power systems) and that it failed to do so;

(2) The Defendant's application requires the Court to accept that the professional services which it designed and provided were both irrelevant and inadequate: that they were of no assistance to NBI in fulfilling its regulatory requirements, and that NBI and the Claimants as the freeholder and leaseholders of the Property were not entitled to rely upon the Defendant to provide those services and thereby ensure the safe functioning of the ELU;

(3) This contention is unsustainable: applying the threefold test in *Caparo*:

a) The loss was foreseeable;

b) There was a relationship of sufficient proximity between the parties; and

c) It is fair, just and reasonable in all the circumstances for a duty to be imposed;

(4) The existence and scope of that duty was not qualified by the terms of the NBI Membership Agreement or the terms of the 2014 Maintenance Agreement. The Defendant's standard terms and conditions and the exclusions contained therein which are relied upon by the Defendant were not incorporated into the 2014 Maintenance Agreement and/or do not apply and/or are unenforceable as they are unreasonable;

(5) The Defendant was responsible for providing bi-annual discharge tests in relation to the ELU, and the Claimants and NBI were entitled to rely upon the Defendant's services as discharging their obligations to undertake annual testing of the ELU required by the Fire Regulations;

(6) The Defendant breached that duty by failing to provide its Maintenance Services between 1 April 2014 and 31 March 2015;

(7) Had the Defendant provided the Maintenance Services as required, it would have carried out at least one Maintenance Visit prior to the Fire, during which it would have identified that the Batteries were reaching end of life and were therefore dangerous, and it would have notified NBI and/or the Claimants that the Batteries required replacement;

(8) Had the Defendant notified NBI and/or the Claimants of this danger, then the Batteries would have been promptly replaced and the fire would not have occurred;

(9) As such, the Claimants maintain that the Defendant owed them a duty of care which was breached, causing the relevant losses, which were foreseeable in all the circumstances;

(10) Both in oral submissions and in supplemental submissions: that there is a qualitative difference between cases of direct physical damage and indirect economic loss. This is clear from the authorities cited by H.H. Judge Coulson Q.C. in the *John F. Hunt* case and provided the basis for the first limb of his two stage approach which he set out in paragraph 33 of that case in which he said "where, as here, the damage consists of physical damage to property, then the starting point is that, subject to questions of foreseeability, a duty of care will usually be owed".

The Starting Point: A Two Stage Test or a Three Stage Test? Is this a case of physical damage or economic loss?

45. As set out above, the Defendant's starting point is the oft cited dictum of Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at pages 617-618:

> "in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing

> the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the court should impose a duty of a given scope upon the one party for the benefit of the other."

46. For the Claimants, emphasis is placed upon paragraph 33 of the judgment in the *John F Hunt* case:

> "On the basis of the cases noted above, and adopting the two-stage approach referred to in *Riyad*, I derive the following principles:
>
> "(a) Where, as here, the damage consists of physical damage to property, then the starting point is that, subject to questions of foreseeability, a duty of care will usually be owed (see, for example, *Marc Rich* and *Customs & Excise v Barclays*).
>
> "(b) If, however, the contractual provisions negative the existence of a duty of care, then no such duty will be found: see, generally, *Pacific Associates* and *Henderson v Merrett* and, more specifically, *Norwich City Council* and *Thompson*. It is important to note that, even though a duty was found to exist in *Thompson*, the decision turned on the precise terms of the contract. If, in that case, the subcontractors in question had been nominated and not domestic then, under the terms of the contract, they would have been covered by the insurance provisions, and no duty of care would have been found.
>
> "(c) Accordingly I conclude that whether or not, in this case, the subcontractor, Hunt, owed the employer, Whitehall, a duty of care at common law must turn on the precise terms of both the main contract and the subcontract."

47. Mr. Blaker draws attention to the first sentence of paragraph 28 of the judgment in the *John F Hunt* case. That paragraph in full reads as follows:

> "Mr. Althaus also referred me to *Marc Rich & Co & Ors v Bishop Rock Marine Co Ltd* [1996] 1 AC 211, a decision in which the House of Lords emphasised that, in cases of physical damage to property in which the claimant had a proprietary or possessory interest, the only requirement was proof of reasonable foreseeability; and the similar comment by Lord Hoffmann in *Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at page 198, where he said that in the case of personal or physical injury, reasonable foreseeability of harm was usually enough to generate a duty of care whilst, in the case of economic loss, "something more is needed". Finally, for completeness, I should also note that I was also taken to *Riyad Bank v Ahli United Bank plc* [2006] 2 Lloyd's Rep 292, a decision of the Court of Appeal in which they upheld the approach, in a case like this, of considering, first, whether there was a duty, and, second, whether such a duty was excluded or negative by the operation of the contract(s), although they stressed that, in that case, had the judge asked himself one composite question rather than two, he would still have answered it in the same way."

48. He submits that that first sentence does not appear accurately to record what the House of Lords said in *Marc Rich* and that the test as applied in the *John F Hunt* case was not the correct test.

49. In my view, if attention is directed simply at that first sentence, there is some strength in what Mr. Blaker submits, since at page 235 D-E of *Marc Rich* Lord Steyn sets out an argument of counsel precisely to that effect and then says in terms that "since the decision in *Dorset Yacht Co. Ltd v Home Office* [1970] A.C. 1004 it has been settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff".

50. However, that first sentence must be read in the context of the whole paragraph, particularly the cited dictum of Lord Hoffmann that "in the case of personal or physical injury, reasonable foreseeability of harm was usually enough to generate a duty of care whilst, in the case of economic loss, 'something more is needed'". In my view both *Marc Rich* and *Customs & Excise v Barclays* support the learned judge's conclusion in paragraph 33(a) of his judgment (emphasis added):

> "Where, as here, the damage consists of physical damage to property, then the starting point is that, subject to questions of foreseeability, a duty of care will **usually** be owed (see, for example, *Marc Rich* and *Customs & Excise v Barclays*)."

51. That rule of thumb, if I may so describe it, does not make the three limbs of *Caparo* irrelevant. It merely reflects that the law recognises a spectrum of cases: at one end of the spectrum are cases where the claimant suffers physical injury as a result of a negligent act, in which case the law readily recognises a duty of care to avoid such injury. However, even in cases of physical injury the threefold test may be relevant: see *Sutradhar v Natural Environment Research Council* [2006] UKHL 33; [2006] 4 All E.R. 490. At the other end of the spectrum are cases of pure economic loss, where often but not always it is necessary for the claimant to establish an assumption of responsibility on the part of the alleged tortfeasor.

52. Between these two extremes lie cases of physical damage. Mr. Blaker drew my attention to a passage of the judgment of Cooke P. in a New Zealand case – *South Pacific Manufacturing Co. Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at page 296:

> "The first concern of the law is naturally personal safety. Injury to the person is a kind of damage in a class of its own. Or at least most people would, I think, say so. On the other hand a plaintiff awarded damages for harm to property is being compensated essentially for economic loss. It would be a crude system of law that drew a vital distinction for this purpose between tangible and intangible property interests…."

53. In my judgment, the authorities establish that where a negligent act of a person causes physical damage, that type of act will normally be actionable. However, as the dictum of Cooke P recognises, physical damage causes loss of an economic type and in some cases the loss may be an indirect loss to property interests. Where a novel situation arises, then the authorities make it clear that the court should approach the development of the law incrementally by reference to analogous decided cases, applying the threefold *Caparo* test.

54. In this case, the pleaded claims are for loss caused by physical damage to the building (in the case of the First Claimant) and to computers and other machinery and equipment (in the case of the Second to Fourth Claimants), but also for loss in respect of business interruption and increased costs of working (in the case of the Second to Fourth Claimants) which may be loss consequent on the damage to the relevant Claimant's property or may be pure economic loss.

55. In my view, the appropriate approach in this case is to consider the application of the threefold *Caparo* approach to these claims, whilst bearing in mind the willingness of the courts to find that a duty of care exists in respect of acts causing physical damage.

Liability for omissions

56. In two places above I have underlined the word act or acts. This is important: in the *John F Hunt* case the negligence of which complaint was made was a very familiar fire hazard in building projects – careless use of welding equipment. In the important passage in *Marc Rich* where Lord Steyn said that "the law more readily attaches the consequence of actionable negligence to directly inflicted physical loss rather than to indirectly inflicted physical loss" (at [1996] 1 A.C. 237 D-E) he went on to give the example of a surveyor carelessly dropping a lighted cigarette into a cargo hold known to contain a combustible cargo, thus having in mind a negligent act.

57. In *Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 A.C. 181 at paragraph [39] Lord Hoffmann said:

> "There is, in my opinion, a compelling analogy with the general principle that, for the reasons which I discussed in *Stovin v Wise* [1996] A.C. 923, 943-944, the law of negligence does not impose liability for mere omissions."

58. In the same case Lord Walker of Gestingthorpe said at paragraph [70]:

> "The other complicating factors are not limited to the distinction between pure economic loss and personal injury or physical damage to property. Other factors are ….. the distinction (elusive though it sometimes is) between acts and omissions …."

59. Lord Hoffmann in the passage cited above referred to his own speech in *Stovin v Wise*, in which he (along with the other members of the House of Lords) emphasised the difference in the approach of the law to cases of omissions and to cases of positive acts of negligence. The distinction is not determinative, but in the case of omissions the law is astute to ask whether there was a duty to act.

60. Such a duty to act is more easily found in a case where the alleged tortfeasor is found to have assumed a responsibility to act. Such an assumption of responsibility will normally involve some form of relationship between the claimant and the tortfeasor.

61. In this case the claim against the defendant rests upon an allegation of failure on its part to make the contracted visits. Whilst this is not necessarily determinative of the issue as to the existence of a duty of care, I agree with Mr. Blaker's submission that the fact that the claim is based upon a failure to act rather than a negligent act is a relevant factor and a relevant distinction between this case and the *John F. Hunt* case.

The contractual chain

62. It is clear on the authorities that a relevant factor in deciding whether or not a duty of care exists is the existence or not of a contractual chain. In *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C.145 at 195G to 196D Lord Goff of Chieveley said (emphasis added):

> "I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort. Let me take the analogy of the common case of an ordinary building contract, under which the main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with the sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the *Hedley Byrne* principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. *For there is generally no assumption of responsibility direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility."*

63. This reasoning seems to me particularly important in the present case, where the issue is whether or not the Defendant had a duty to act, and in which accordingly the question of whether the Defendant assumed a responsibility is an important if not essential enquiry.

64. It is significant in that context that the claim cannot succeed unless the Claimants establish that the Defendant had a contractual duty to visit the premises: the allegations of breach of express and implied terms of the agreement between NBI and the Defendant at paragraphs 16 to 18 of the Particulars of Claim are essential to the Claimants' case.

65. Whilst not a typical chain of contracts such as that referred to by Lord Goff in the passage referred to above, here there is nevertheless a very carefully constructed chain of contracts.

66. First there were the leases between JIF and the various tenants under which the allocation of insured risks was carefully considered and dealt with. In one lease, the "insured risks" expressly referred to the risk of fire, in the other the risk of fire was not expressly referred to as an "insured risk", but it appears to me highly probable that it was, as being a risk against which insurance is commonly taken out by the landlord. Accordingly, as between JIF and he tenants, JIF may well have been unable to sue for any fire damage caused by a tenant's failure to carry out maintenance of the batteries: see *Mark Rowlands Ltd v Berni Inns Ltd.* [1986] 1 Q.B. 211.

67. Each of the tenants took on maintenance responsibilities, which at least some of them discharged through the Members Agreement with NBI. As set out above, the Members Agreement contained carefully drafted provisions excluding or limiting liability on the part of NBI.

68. NBI in turn contracted with the Defendant. Whilst there is a dispute as to the terms of the contract between NBI and the Defendant, it is clear that it was an arm's length commercial contract.

69. Whilst JIC had previously had a contractual relationship with the Defendant, none of the other Claimants ever had had one.

70. JIC, by becoming a party to the creation of NBI and entering into the Members Agreement, deliberately acted so as to distance itself from contractual arrangements with suppliers of maintenance services such as the Defendant. The same can be said for the Second Claimant.

71. It would be somewhat curious if JIC, who previously would only have been able to have recourse against the Defendant subject to its terms of contract with the Defendant, could find itself in a position where by making a claim in tort it could potentially be in a better position because the Defendant's contract was now with NBI.

72. As for the other Claimants, there is no allegation in the pleading that any of them ever had any relevant or significant direct contact with NBI.

73. In my view, this is precisely the situation referred to by Lord Goff in the passage I have emphasised above, where the parties have so structured their relationship that it is inconsistent with an assumption of responsibility.

The relevance of insurance

74. The Defendant relies upon the fact that the present claim has been brought by insurers, presumably exercising rights of subrogation.

75. I do not think this assists the Defendant. Indeed, the relevance of insurance (other than in the context to which I have referred above where it is a relevant part of the contract chain allocating risk down the chain) is that the law is less likely to find a duty of care where it would be impossible or economically prohibitive to procure insurance to protect against such liability (see for example paragraph [102] of the speech of Lord Mance in *Customs & Excise v Barclays Bank*). This is not such a case.

The relevance of Fire Regulations

76. The Defendant places considerable reliance upon the obligations of the Claimants under the Regulatory Reform (Fire Safety) Order 2005 (S.I. 2005/1541), and contends that as the Claimants had responsibilities to take precautions against fire, this operates to negate any duty of care. Reference was also made in this regard to various British Standards.

77. I do not find this argument persuasive. On the contrary, it appears to me that the purpose of the maintenance arrangements with the Defendant was to attempt to ensure

that the statutory obligations and good practice were complied with. If anything, this factor points towards a duty of care, rather than against it.

Duty of Care: Conclusion

78. Having set out what seem to me to be the most important relevant factors, I now seek to draw the threads together and consider whether there is a case in which the claim should be struck out applying the principles I have set out above.

79. I have no difficulty in concluding that the Claimants can show that the risk of damage if tests were not carried out was foreseeable: the purpose of the visits which should have taken place but did not was in part to ensure that the risk of fire from the ELU was minimised.

80. So far as proximity it concerned, it is necessary to consider the position of each Claimant separately.

81. JIF as the head landlord placed the responsibility for maintenance upon each of the tenants (see clause 3.5 set out at paragraphs 5(2) and 6(2) above). Thus JIF was relying upon the tenants to carry out necessary precautions to avoid or minimise the risk of fire.

82. There is no pleaded case of reliance by any of the Claimants upon the Defendant. Whilst two of the Claimants (the Second and Third Claimants) entered into the NBI Membership Agreement, the other two did not. Thus insofar as those two who did not enter into the Membership Agreement are concerned, there was not even an indirect contractual link through NBI with the Defendant. Doubtless in a general way the Claimants may have expected arrangements to be made to test the equipment, but there is no suggestion that any of the Claimants relied upon the Defendant in particular to carry out such tests.

83. As to JIC, as pointed out above, the purpose, or at the least the effect, of the creation and interposition of NBI was to distance it from the Defendant.

84. In the circumstances, it is in my judgment difficult to say that there was sufficient proximity between any of the Claimants and the Defendant to satisfy the requirement of proximity.

85. In this case, as in many others, there is a considerable overlap between the requirement of proximity and the question as to whether it is fair just and reasonable to impose a duty of care upon the Defendant.

86. As I have said above, it is an important feature of this case that what is alleged is a failure to act. Stripped bare, the allegation is of a negligent failure by the Defendant to honour its contractual obligation to NBI to attend site or to remind NBI that such visits were due. That is, on my understanding of the authorities, a novel case which I should approach as an incremental extension of the scope of the law.

87. On the pleaded case, I find it impossible to discern any factual basis upon which it can be said that the Defendant assumed any responsibility to any of the Claimants to make the visits or to issue reminders, nor that any of the Claimants relied upon them to do so.

88. Further, this appears to me to be a case falling clearly within the passage from the speech of Lord Goff set out at paragraph 62 above, particularly the last sentence which I have set out in italics – namely that the parties here have so structured their relationship that it is inconsistent with an assumption of responsibility.

89. For these reasons I conclude that the Claimants' case that the Defendant owed each of them a duty of care is bound to fail. As I say below, my conclusion is strengthened by some of the arguments advanced by the Defendant as to breach of duty.

90. I have considered whether there are any facts which might come out on a full trial which might alter that conclusion. However, taking the pleaded case on its face, as I must, I cannot discern any factual evidence which would alter the conclusion which I have reached. The only area of factual investigation which the Claimants' skeleton argument suggests might be relevant is investigation as to whether the Defendant knew or ought to have known that the Claimants were relying upon it to carry out the annual testing of the equipment. However, that reliance appears to go no further than establishing foreseeability, which I have accepted can be shown in this case. As I have pointed out above, there is no suggestion that any of the Claimants relied upon the Defendant in particular to carry out such tests.

91. Thus, as it seems to me, I am in as good a position as a trial judge is likely to be in answering the central question, which is a question of law, as to whether a duty of care was owed to any or all of the Claimants.

92. Even if some duty of care was owed to one or other of the Claimants, there remains the question whether the Defendant owed a duty of care to take care to avoid pure economic losses. On the authorities, even if a duty to take care to avoid physical damage existed, it is difficult to see how a duty to take care to avoid pure economic loss could be established on the facts of this case.

Breach of Duty

93. At paragraphs 52 to 59 of his skeleton argument, Mr. Blaker argues as follows:

> "52. There is some considerable overlap between the lack of a duty of care and the lack of a breach.
>
> "53. First, it is submitted that D was not under a duty to send out reminders to either NBI or the Cs. The responsibility for fire safety, testing and maintaining records fell with the Cs or possibly NBI. It did not fall on D's shoulders.
>
> "54. Secondly, the court should be guided by the terms of the contract. There is nothing in the contract that even suggests D was obliged to send out reminders to NBI, let alone send them out to a third party. Presumably one of the points of having the contract with NBI was that it dealt with the maintenance of the property and external contractors would not have to deal with individual occupiers of the premises at the property.
>
> "55. Thirdly, as dealt with above, it was the Cs (and or NBI) that had the responsibility to keep records of monthly and annual testing. That in itself suggests that the failure to get in touch with a contractor who could carry out the annual testing would be a failure on the part of the responsible person. Unless a third party had specifically contracted or promised to send out reminders to a

> third party, it is difficult to see how such a duty could exist or indeed how there could be a breach of duty.
>
> "56. Fourthly, even upon a cursory examination of the pattern of historic visits it is clear that D was not visiting the property precisely every six months or indeed twice in each contractual period. In the 2010/11 year, four visits were made and in the 2011/12 year only one visit. There was a gap of over 1 year between the visit on 15 June 2011 and the visit on 22 June 2011.
>
> "57. No explanation has been provided by Ms Hawkins as to when a breach is said to occur if a visit has not taken place after six months. It would be nonsensical if a breach occurred one day after the six month period elapsed. A court would find it exceptionally difficult to assess when a breach actually occurred. By 1 April of the following year a new contractual term begins with a fresh obligation to provide two maintenance visits. If regular visits had not taken place then the Cs/NBI should have been aware of this and contacted D in order to arrange a visit.
>
> "58. Fifthly, it is no answer to the issue to allege that because the purchase orders … said "Please contact Mike Steward/Jerry Walsh or Richie Bruce to arrange convenient time/access" and "Please arrange visits via Mike Steward" this means D owed an obligation in tort to a third party. The fact that a contact name is mentioned does not impose a contractual or tortious obligation to contact them. It was simply a way of indicating to whom contact should be made.
>
> "59. Sixthly, there was correspondence between D and NBI in February 2014 when the proposal for the 2014/15 year was sent to NBI. That should have acted as a wake-up call to NBI to examine its records and contact D to ensure that a six-monthly visit took place. During the period that D is said to be in breach of a duty of care NBI still paid the invoices for the annual contract."

94. If I had come to the conclusion that the Defendant owed a duty of care to the Claimants or to one or more of the Claimants, or that it was arguable that such a duty was owed, I would find it difficult to say that the case was unarguable on the grounds set out above.

95. However, some of the suggested difficulties in establishing breach of duty, particularly the points raised in paragraphs 53 to 57, seem to me to underline the difficulties in establishing a tortious duty to act. What those points underline is that in order to succeed, the Claimants may well have to establish not merely a failure to visit, but a failure to visit within a particular time frame which was not necessarily the pattern of visits which had been established in previous years.

Conclusion

96. For the above reasons, and applying the principles set out at paragraphs 34 and 35 above, I hold that there is no arguable case available to the Claimants that the Defendant owed a duty to them or any of them.

97. Accordingly this application succeeds, and there will be summary judgment for the Defendant.