Neutral Citation Number: [2020] EWHC 2308 (TCC)

Case No: E22YK487

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN BRISTOL
TECHNOLOGY & CONSTRUCTION COURT

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Date: 04/09/2020

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

DR JONES YEOVIL LIMITED	**Claimant**
- and -	
THE STEPPING STONE GROUP LIMITED	**Defendant**

- -
- -

James Frampton (instructed by **Reeves James Solicitors Limited**) for the **Claimant**
James Pearce-Smith (instructed by **Stephens Scown LLP**) for the **Defendant**

Hearing dates: 9th to 12th and 17th June and 7th and 20th July 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and its release to Bailii at 10:00am on 4 September 2020.

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.

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HH JUDGE RUSSEN QC

HH Judge Russen QC:

Introduction

1. The Claimant ("**DRJ**") is a company which carries on business as a building contractor. The Defendant ("**SS**") is a property developer which specialises in building 'assisted living' homes for elderly residents.

2. Between 2009 and 2012, SS employed DRJ under three building contracts to build ten assisted living units and also to refurbish a building known as The Engine House into an eleventh unit ("**the Works**"). These were all on the same site at the property known as Nynehead Court, Nynehead, Wellington, Somerset ("**the Site**"). The 11 residential units constructed there are together known as Nynehead Mews.

3. Those contracts were as follows:

   i) "**the Phase 1 Contract**", relating to Units 1 to 6, entered into on 20 August 2009;

   ii) "**the Phase 2 Contract**", relating to Units 7 to 10, entered into in March 2011; and

   iii) "**the Engine House Contract**", relating to Unit 11, entered into in November 2011.

4. The Phase 1 and 2 Contracts were in the form of the JCT Design and Build Contract 2005 (Revision 2 2009) as amended by the parties. The Engine House Contract was in the form of the JCT Minor Works Contract 2011, meaning DRJ had no design responsibility.

5. The Employer's Agent under the Phase 1 and 2 Contracts was the firm of Baker Ruff Hannon ("**BRH**") represented by Mr John Hannon.

6. Although SS entered into the three contracts for the development of the Site, it did not own the Site. The Site was owned by Nynehead Care Limited ("**NCL**"). NCL is a wholly-owned subsidiary of SS. Having disposed of the units on long leases, NCL still owns the freehold of the common parts.

7. Taken together, all three contracts had a total Contract Sum of £2,319,339.16 excluding VAT.

8. The Works under the Phase 1 and 2 Contracts achieved practical completion in 2011: 28 January 2011 for Phase 1 and 1 December 2011 for Phase 2. DRJ subsequently attended the Site to carry out certain remedial works. Practical completion under the Engine House Contract was achieved in July 2012.

9. DRJ was paid the sums due under the Phase 1 and 2 Contracts save for the half of *'the Retention Percentage*' (of 5%) which Clause 4.18.3 of their Conditions provided

might be deducted where practical completion had been achieved but a 'Notice of Completion of Making Good' (in respect of a schedule of defects served by SS) had not been issued. Thus:

i) under the Phase 1 Contract, SS withheld £32,085 being 2.5% of the adjusted Contract Sum of £1,283,400; and

ii) under the Phase 2 Contract, withheld £16,676.57 being 2.5% of the adjusted Contract Sum of £667,082.67.

10. The total withheld by SS was therefore £48,761.57.

11. The issue of sums outstanding under the Engine House Contract was generally resolved by an Adjudication between the parties in 2016/2017. As I mention below, the Adjudication involved consideration (in the context of the Engine House Contract) of the meeting between the parties on 14 December 2014. In essence, SS argued that the payment of £40,000 as a result of discussions at that meeting discharged its liability to pay any greater sum under that contract. By his Decision of 25 January 2017, the Adjudicator, Mr Robert Sliwinski, rejected that contention in deciding that SS should pay the balance of the sum of £58,304.56 (plus VAT and interest) for which DRJ had applied for payment in July 2012 under that contract. The Adjudicator did decide that the £40,000 had been paid (by two payments of £20,000 on 18 September and 7 October 2015) against the Contract Sum under the Engine House Contract.

12. However, on 14 February 2013, DRJ had issued an invoice to SS in respect of the VAT element of the cost of carpets and certain electrical items supplied under that contract. DRJ claims it was entitled to do so because the items in question fell within the exception to zero-rated building supplies (under Group 5 of Schedule 8 to the Value Added Tax Act 1994). The invoice was for £1,181.63. It fell due for payment on 28 February 2013 but was not paid. It forms part of DRJ's claim in these proceedings. Subject to its counterclaim, SS admits the sum is due.

13. On 6 February 2018 DRJ issued its claim against SS in respect of sums retained under the Phase 1 and 2 Contracts and the VAT invoice under the Engine House Contract. The claim in respect of the first two contracts was not for the full amount of the retention (£48,761.57) as DRJ gave credit for the sum of £9,280.40. That credit sum reflects the amount which DRJ accepts was agreed to be deducted from any final payment at a meeting on 9 December 2014 ("**the December 2014 meeting**"). I return below to the significance of the December 2014 meeting which SS point to in saying that DRJ has "*admitted liability*" (at least in relation to the heat pump issue) for the purposes of these proceedings.

14. It is evident from the impasse which prevailed over the release of the retention that SS showed no appetite in the 3 years or so following the December 2014 meeting for pursuing the heads of loss now forming the basis of its counterclaim.

Procedural History

15. As DRJ's claim was for the relatively modest amount of £40,622.80 plus contractual interest, it was issued in the County Court Money Claims Centre and then transferred to Weymouth County Court.

16. On 6 July 2018, SS served its Defence and Counterclaim. SS sought to set-off and counterclaim for alleged losses, totalling £240,151.90 (as later amended) before credit for sums otherwise due to DRJ. These losses were said to arising from various alleged breaches of all three contracts by DRJ. The largest claim is in respect of alleged additional electricity costs incurred by the residents (and leaseholders) of the units because SS says the heat pumps installed by DRJ were incapable of meeting the Employer's Requirements ("**ERs**") incorporated in the contracts. The topic of "*excessive electricity*" had arisen at the December 2014 meeting.

17. At the CCMC in Weymouth County Court on 30 April 2019 the proceedings were transferred to the TCC in Bristol. District Judge Bridger also made pre-trial directions, including for the exchange of expert evidence in the fields of building surveying and mechanical electrical engineering (and quantum for both) and the calling of experts.

18. DRJ made Part 18 requests of SS for further information about its case both before and after that transfer. The first request (to which SS had already given an original and amended response) was the subject of an Order, on the occasion of transfer, to provide details of the agreements which SS alleged it had made with leaseholders in respect of electricity costs. That led to a third response on 28 May 2019.

19. Disclosure and inspection took place in September 2019 and on 22 October 2019, the parties exchanged witness evidence.

20. On 6 November 2019, before exchange of expert reports, DRJ applied for summary judgment and/or strike out against SS. On 13 December 2019, SS cross-applied to amend its Defence and Counterclaim.

21. At a hearing on 30 January 2020, I refused DRJ's application for judgment and/or strike out and granted SS's application to amend. By the time of the hearing SS had served the experts reports upon which it wished to rely. A significant part of the argument on the day related to SS's ability to recover damages by relying, if necessary, upon the principle of transferred loss in respect of increased electricity charges paid by residents to whom NCL had granted long leases. For the reasons given in my judgment on the day, I concluded that in all the circumstances it would not be right to grant summary judgment against SS. However, my Order was conditional upon SS paying the sum of £35,000 into Court.

22. SS served its Amended Defence and Counterclaim on 14 February 2020. DRJ then made a further Part 18 request in respect of it on 19 February 2020. Again, the focus of the requests was generally upon the claim in respect of electricity charges, including the relationship between SS and NCL and any arrangements made with residents to compensate them and DRJ's alleged breaches in relation to the replacement heat pumps and carpets fitted in the units. SS responded to the RFI on 10 March 2020.

23. On 19 March 2020, SS served its Amended Reply and Defence to Counterclaim.

24. DRJ served its expert reports on 14 April (SS having served its own before the January hearing). Both sets of experts thereafter made joint statements.

25. The trial took place before me, by video-link, over 7 days in June and July 2020 (the original trial time estimate of 4 days plus a reading day having proved to be inadequate). Mr James Frampton appeared for DRJ and Mr James Pearce-Smith appeared for SS. I am grateful to them for the clarity of their submissions and to their instructing solicitors for their efforts in making the necessary arrangements to enable the hearing to take place remotely. They have included compiling a substantial electronic trial bundle and making appropriate additions to it as the hearing continued.

Outline of the Dispute

26. The discussion at the December 2014 meeting, which I address further below, provides a neat reference point for the purposes of identifying the nub of the dispute between DRJ and SS as it has crystallised in the proceedings brought just over 3 years later.

27. DRJ says there is no good reason for SS continuing to withhold the net sum of £39,481.16 (after the accepted deduction of £9,280.40 in respect of a list of agreed defects) which is due to it as retention under the Phase 1 and Phase 2 Contracts. Any alternative arrangement for quantifying the net amount payable to SS, of the kind contemplated by the discussion at the December 2014 meeting, never came to fruition.

28. SS, on the other hand, says that the discussion at the meeting operated to displace the provisions of the contracts so far as the release of the monies previously categorised as retention was concerned. In any event, SS says it has a counterclaim arising out of the existence of defective work, and the financial consequences of the relevant defects, which significantly outweighs the balance of the contract sums sought by DRJ. SS therefore claims to be entitled to set off against DRJ's claim and to recover the excess losses.

29. I have already mentioned that most significant head of loss is said to arise out of the additional electricity costs which SS says have been incurred as a result of defective heat pumps installed in the units. SS relies upon the fact that DRJ recognised that the Exhaust Air Heat Pumps ("**EAHPs**") which it had installed in the units were defective (in not meeting the ERs) and, for that reason, were agreed to be replaced in 2015 by Air Source Heat Pumps ("**ASHPs**"). SS's claim in respect of additional electricity costs does not stop at the points in time when the ASHPs were installed in place of the EAHPs. The relative inefficiency and lack of economy of both the EAHPs and the ASHPs is held out against greater economy of a Ground Source Heat Pump ("**GSHP**") of the kind which had been specified in the ERs for the Phase 1 Contract.

30. SS relied heavily upon the fact that DRJ had obtained its own redress in relation to the EAHPs against Heat Radiation Limited ("**Heat Radiation**", the sub-contractor which installed them) by bringing legal proceedings after the December 2014 meeting. On 1 February 2016, and therefore after DRJ had replaced the EAHPs with ASHPs, DRJ issued a claim against Heat Radiation claiming £153,434 for breach of contract and

negligence in recommending the use of EAHPs manufactured by NIBE Energy Systems Limited ("**NIBE**"). They were said not to have complied with the ERs and to have resulted in SS withholding the retention and seeking compensation for the additional energy costs incurred. The sums claimed in the Particulars of Claim as damages included £64,083 in respect of the costs and compensation claimed by SS and a later Part 18 response from DRJ increased this to £72,567 by reference to the amount sought by SS. In light of SS's counterclaim in the present proceedings DRJ made a claimant's Part 36 offer to HRL in the sum of £120,000 and Heat Radiation accepted that offer on 1 November 2018. SS rely upon the fact that the value the other claims (referable to DRJ's replacement of the EAHPs) was £89,351 so there was, within the global settlement figure, substantial recovery by DRJ in respect of the compensation now pursued by SS.

31. SS's counterclaim is not confined to the recovery of damages in respect of the energy costs. It also makes claims in respect of other items (two of which – carpets and insulation – feed into the excess electricity claim) which are said to reflect defective workmanship by DRJ. They include the alleged failure to deal effectively with the Japanese Knotweed ("**JKW**") on Site and for the recovery of other losses connected to the ASHPs (including the lack of a manufacturer's warranty to cover repairs) and other unrectified snagging issues.

32. Although DRJ recognised at the December 2014 meeting that SS was mounting a claim for excess electricity costs (in relation to the heat pumps at least) its position is that there was no agreement over the amount of them and that SS has since failed to establish a genuine claim for such. In relation to the other items, DRJ says that SS is guilty of adopting a position which is both vague and unsubstantiated by evidence. DRJ says that, in circumstances where it attended to true snagging items well before the commencement of proceedings, SS has simply raised a series of after-the-event, ever-changing and meritless points in an endeavour to resist paying the balance of the retention properly due. It says that even the claim (for £8,208.50) which SS presents by reference to actual invoices paid by it is wholly unsupported by evidence showing that they relate to defective workmanship under the contracts.

33. So far as the recovery from Heat Radiation is concerned, DRJ's Amended Reply and Defence to Counterclaim admitted that it had entered into a settlement with Heat Radiation "*under which it was paid a sum to settle the entirety of its claim against HRL which included the cost of replacing the EAHPs with the ASHPs*." But it points to the fact that the recovery was less than the amount claimed in the proceedings against Heat Radiation and disputes that any of it is referable to residents' heating bills.

34. The fact that the Site is owned by NCL, and that it was that company which granted the long leases of the units to their residents, are points which have emerged from SS's amendment of its counterclaim quite close to trial. They raise issues over SS's ability to recover damages for certain heads of alleged loss (e.g. the additional electricity costs suffered by the residents or what NCL says is its burden of removing JKW from the Site) even if liability on the part of DRJ is otherwise established. The parties disagree upon SS's ability to do so through reliance upon the principle of transferred loss.

The Witnesses

35. DRJ's witnesses of fact were Mr Mark Porter, the Managing Director of DRJ who was present at the December 2014 meeting and who dealt with SS's withholding of the retention, and Mr Dave Jones, a director of the DRJ whose limited evidence addressed SS's complaint about the carpets.

36. I found both Mr Porter and Mr Jones to be honest and reliable witnesses. Of course, the general nature of the dispute between the parties is such that there was no onus (certainly not any initial burden) upon them to justify a position on any of the items of allegedly defective work.

37. Mr Porter made the telling point that SS had still not spent any part of the monies retained in making good the alleged defects of which it complained. He was challenged by Mr Pearce-Smith about the recovery SS had obtained from Heat Radiation in respect of the EAHPs, and the components of the settlement sum of £120,000, and he did later correct (from 12.5% to 15%) the percentage figure he had previously identified as having been included in the claim to cover DRJ's overheads. However, the correction only operated to reduce the scope for SS arguing that some part of the £120,000 must have been referable to a recovery of excessive electricity bills.

38. As for Mr Jones' evidence, what Mr Lewin later said in his testimony about the carpets revealed that there was no real basis for challenging what he had said about offering to replace them.

39. Mr Pearce-Smith made a pointed observation about the lack of evidence from Mr Chris Neil when he had been primarily responsibility on behalf of DRJ for the development of the Site prior to late 2014. Mr Porter accepted that there was no reason why Mr Neil could not have made a witness statement and given evidence at trial. I consider the same point made in relation to the absence of Mr Mike Evans and Mr Jim Howard (each of whom had involvement on behalf of DRJ in relation to the installation of the replacement ASHPs) had less resonance. However, even though Mr Neil was certainly involved in earlier discussions which led to the parties contemplating a deduction for electricity charges at the December 2014 meeting, I do not regard DRJ's case as significantly weakened when the issues which fall to be decided really arise on SS's counterclaim and that is fundamentally based upon the discussion at that meeting. By the time of the meeting, Mr Porter had recently taken over from Mr Neil in having overall responsibility for the development.

40. SS called four witnesses of fact. They were Mr John Lewin who is the former managing director of (and NCL and other subsidiaries of SS); Mr John Hannon (the partner and representative of BRH, until his retirement in 2015, who I have already mentioned); Mr John Bailey who is a director and the company secretary of SS (and a director of NCL); and Mr Justin Cole who is the head gardener at the Site and addressed the issue of JKW.

41. SS had also proposed to call evidence from Mr Dennis Thompson, the owner of Unit 3, in relation to the electricity charges incurred in relation to that property and what he said was DRJ's delay in acting upon the replacement of the EAHPs with ASHPs. However, shortly before the trial SS indicated that Mr Thompson would not be giving

evidence for health-related reasons and a hearsay notice was served in respect of his statement on 5 June 2020.

42. The court's Order dated 30 April 2019 gave the parties permission to adduce expert evidence in the fields of building surveying and mechanical and electrical engineering (including in each case on issues of quantum) and to call the experts at trial.

43. DRJ's expert on the building surveying issues (which covered all the alleged defects aside from the heat pump running costs) was Mr Philip Sealey FRICS, a chartered surveyor and also a Fellow of the Chartered Association of Building Engineers and a Member of the Chartered Institute of Building. Mr Sealey is the principal of the (incorporated) business of chartered surveyors trading as Philip Sealey Chartered Surveyors. DRJ's expert on M&E matters, who addressed the heat pump issues, was Mr Brian Doherty BEng CEng, a chartered engineer and a member of the Institution of Mechanical Engineers and other professional bodies. Mr Doherty has around 36 years' experience in the mechanical and electrical engineering sector and is a sub-consultant to Hoare Lea, a substantial building services engineering consultancy.

44. SS's expert on building surveying issues was Mr Ian Squair ACIOB who, in addition to his associate membership of the Chartered Institute of Building, holds a Higher National Certificate in Building Studies. Mr Squair is a consultant building surveyor with the firm Drew Pearce. On M&E engineering matters, SS's expert was Mr Ian Scott CEng a chartered engineer and project manager and, like Mr Doherty, a member of the Institution of Mechanical Engineers and other professional bodies. Mr Scott has over 40 years' experience in his professional field and is a Low Carbon Consultant with EDP Environmental who provide building and low carbon energy consultancy services.

45. Mr Frampton challenged Mr Squair in cross-examination on his competence to give expert evidence upon the matters he had addressed in his report, pointing to the fact that Mr Squair's professional qualifications were not as advanced as they might be. I do not accept that Mr Squair lacked the necessary expertise to address the issue raised for his consideration. His report explained his practical experience in building survey and construction matters over the last 30 years and, although his reference to past experience in preparing expert reports for both litigation and mediation was expressed in general terms, he was not challenged on either. Such experience can produce professional expertise. As I explain below, the most obvious shortcomings in Mr Squair's evidence appeared in his treatment of those aspects of SS's claim against DRJ in respect of snagging costs which he sought to justify and his assumption that defects in insulation had been established. However, each of those can be said ultimately to relate back to deficiencies in SS's underlying factual case on those issues.

46. Having heard and since reflected upon the testimony at trial I have formed the clear conclusion that, on points of material conflict between any of the witnesses (whether they were giving factual evidence or expressing a professional opinion) the evidence given on behalf of DRJ is to be preferred. On issues of fact, its evidence was generally more closely allied to the position revealed by the contemporaneous documents and in particular what those showed to be the extent of the agreement between the parties both in terms of the original specification of the works (as varied in the case of heat pumps) and any steps required to remedy any defects arising in the

execution of them. On matters of expert opinion, and to the extent a degree of consensus did not emerge from the respective experts' joint reports, the evidence of Mr Doherty and Mr Sealey demonstrated a more thorough and analytical approach to the questions raised for their consideration than their counterparts Mr Scott and Mr Squair.

47. By way of general comment at this stage, I was troubled by concerns about the reliability of the evidence of Mr Lewin and Mr Hannon. It did not get off to the most auspicious start in their witness statements being in materially identical terms to the point of them sharing common typographical errors. Mr Lewin said he suspected the draft of his statement was produced by SS's solicitors. Mr Hannon denied he had largely cut and pasted his witness statement from the text of Lewin's statement. He said he had prepared some parts of his witness statement and there had then been some to'ing and fro'ing with Mr Lewin and Mr Bailey, by which he invited comments to check for completeness, before he sent the signed version to SS's solicitors. He said he had not read either Mr Lewin's witness statement or Mr Bailey's and that he had no idea whether or not Mr Lewin had simply copied his statement. This evidence about the materially identical nature of their respective witness statements obviously causes some concern about how much of each reflected the witness' own recollection.

48. The testimony of Mr Lewin revealed significant flaws in his recollection of the detail of matters which were said to justify SS's counterclaim. His evidence generally inclined towards vagueness on key points. I deal separately below with the reasons why no confidence could be placed in the electricity meter readings which he had produced.

49. It also emerged from Mr Lewin's evidence that (having since left SS and NCL) he had not carried out a search for relevant documents within his own files. He said that he had some in storage but had not been asked to carry out any search. Mr Lewin also said that he had not been able to access some of his older emails. Most of the copies of emails in the trial bundle for the years 2009 to 2017, which had been disclosed by SS, were shown to have been obtained from Mr Hannon. Mr Hannon confirmed as much when he said he had retrieved as much as he could from papers kept by BRH in storage. The trial bundle documents emanating from Mr Hannon included a photograph of an email dated 27 November 2009 added late to the trial bundle (and addressed in paragraphs 153 and 154 below) to which SS sought to attach great importance. When viewed in the light of the almost identical terms of Mr Lewin's statement and the general vagueness of Mr Lewin's testimony, this enabled Mr Frampton to make the telling point that SS's case appeared largely to be Mr Hannon's case.

50. I should also note that during a 10 minute mid-morning break in the course of the second day of Mr Lewin's testimony (via video link on his tablet) Mr Lewin was overheard by Mr Frampton and a representative of SS's solicitors having a private telephone conversation with Mr Bailey while the microphone on Mr Lewin's tablet remained switched on. I did not immediately before that break remind Mr Lewin not to speak to anyone else about his evidence, while he was giving it, but I had given him the usual admonition against doing so at the end of the previous day's testimony. No doubt having also heard me give a similar warning to previous witnesses, he therefore knew not to do it. As I had paused the recording of the hearing during the break there is a degree of uncertainty over what was said between Mr Lewin and Mr

Bailey. However, Mr Lewin accepted that he had telephoned Mr Bailey to "*ask him how I was doing*." Initially, Mr Lewin said Mr Bailey had told him to hang up but then admitted that they did exchange further words and that he (Mr Lewin) had said "*am I getting my knickers in a twist?…Sorry, just stick to meter readings do I?*." Mr Lewin then said that all Mr Bailey told him was "*No, carry on*", before accepting that this did not make sense. When Mr Frampton later asked Mr Bailey about the conversation, he said he had only told Mr Lewin he was doing "*Okay*".

51. This was an unfortunate episode and guarding against the obvious risk of contamination of a witness' independent recollection of events is the reason why there should be no consultation with others while it is being tested in the witness box. It was apparent to me that both men regretted it. Although the picture is not entirely clear, I am satisfied that the shortness of the break and the even shorter duration of the call within it means that there was no question of Mr Lewin being fed his lines by Mr Bailey. Regrettable though it was, I therefore do not point to it as a reason to draw a conclusion from Mr Lewin's testimony (or Mr Bailey's for that matter) which I would not otherwise have reached.

52. Mr Hannon explained in his evidence that he was still personally retained as a quantity surveyor by SS/NCL on a new project at Nynehead Court (referred to as "Court Farm") and that they were paying for the premiums on his professional indemnity cover. I accept Mr Hannon's evidence that the email he sent the day after the December 2014 meeting (referred to below) would have been prepared by reference to notes made in a notebook, which he then discarded, and was an accurate aide memoire of what had been discussed at the meeting. I found his evidence to be less clear when he explained the reasons for not naming either residents of the units or NCL, within the contracts, as beneficiaries of purchaser and tenant rights or collateral warranties. So far as the omission of NCL was concerned, it really came down to him saying that Mr Lewin represented both companies (and had not sought to distinguish between the two when giving instructions) and that, by the time of the ERs were drawn up, SS was the named developer. In addition, Mr Hannon's evidence to the effect that he had misgivings at the time about how DRJ had dealt with the JKW also struck me as resting upon after-the-event analysis.

53. Mr Bailey was frank and straightforward when giving his evidence. However, some of the proper concessions he accordingly made in the witness box only served to reveal his significant dependence upon what Mr Lewin had told him and that certain aspects of his witness statement (most notably on the question of whether a development agreement existed between NCL and SS) had been overstated.

54. Mr Cole was also generally a straightforward witness whose evidence about the presence of JKW (past and present) at the Site was helpful. However, I did not find his evidence as to how DRJ had disposed of the JKW in early 2011 to be reliable. It was at odds with what DRJ were reporting at the time would be done and I think Mr Cole's evidence on that point was coloured by what his witness statement confirmed was his assumption that any form of on-site burial (even in accordance with published guidelines) would not comply with DRJ's contractual obligations.

55. I felt unable to place any meaningful reliance upon the hearsay evidence of Mr Thompson. DRJ was unable to test the detail of his general complaint about the electricity costs incurred in running the EAHP in Unit 3 and the basis and

circumstances of his statement that the running costs of the ASHP is "*still higher than we had been promised prior to us purchasing the property*." In this regard, it emerged from Mr Lewin's evidence that Mr Thompson had not, for a period of 2 ½ years, acted on Mr Lewin's recommendation to change the electricity meter from an Economy 10 meter which was ill-suited to the pattern of Mr Thompson's electricity consumption and an EAHP (as opposed to GSHP). In relation to the issue over the carpets (both as a component of increased electricity costs and in their own right) Mr Lewin expressed some doubt as to whether Mr Thompson had ever had a carpet in the sitting room of Unit 3 where a photograph showed a wooden floor partly covered by a rug.

56. As I have indicated, I also found DRJ's expert evidence to be the more persuasive on points of disagreement between the experts. I return to particular aspects of the expert evidence when addressing below the detail of the issues between the parties.

Analysis of the December 2014 Meeting and its Context and Effect

57. The December 2014 meeting took place between Mr Porter of DRJ, Mr Lewin of SS and Mr Hannon of BRH.

58. The context of the meeting was that DRJ was about the start replacing the EAHPs with the ASHPs.

59. No minutes appears to have been made at the meeting of the matters discussed. That said, there was a late addition to the trial bundle of some notes ("**the Porter Notes**") which contained Mr Porter's manuscript annotations upon a list of *'Defects at Nynehead Mews as at 6 Aug 14*'. The items highlighted in yellow on that list (of 63 items) explain the components of the agreed sum of £9,280.40 for defects mentioned next. The ticks on the list appear to indicate other defects to be addressed (which might well have meant to be considered for remedial action) as the heat pumps were replaced.

60. Also, the following day, 10 December 2014, Mr Hannon sent Mr Porter and Mr Lewin an email in the following terms:

> *"I have listed below a few bullet points as an aide Many thanks for the meeting yesterday – I thought real progress was made at last. memoire.*
>
> *ENGINE HOUSE*
>
> *AGREED ACCOUNT £308,500*
>
> *PREVIOUS PAYMENTS £252,133*
>
> *MEWS PHASE 1*
>
> *AMOUNT OUTSTANDING £ 32085*

MEWS PHASE 2

AMOUNT OUTSTANDING £16677

TOTAL OUTSTANDING £105129

DEDUCTIONS

As Defects List items £ 9280.40 (agreed).

Excessive electricity (JL to provide updated meter readings)

LAD's (tba)

Carpet tog rating issues (tba)

All defects to be addressed as the Heat Pumps are replaced.

MP to respond with financial proposal for settlement figure and programme by 5pm on Tuesday 16/12/14 for agreement.

JL undertook to pay £40k upon agreement of above being reached, 50% of remainder on completion and remaining sum after 6 months of satisfactory performance.

I trust this accurately reflects our meeting and thank you once again for your involvement."

61. The list forming the basis of the Porter Notes confirmed that, for each unit, that "*Heat pump to be replaced with ASHP; details to be provided as agreed at meeting of 29 Jul 14*."

62. The pleaded position of SS in relation to the December 2014 meeting (in the Amended Defence and Counterclaim) was that it resulted in an agreement by which the balance of the withheld sum of £39,481.16 (£48,481.16 less £9,280.40) became either:

> *"sums to be taken into account in the calculation of the sums due once the deductions had been calculated and agreed."*
>
> Or

> *"sums only became payable to the Claimant, if and to the extent that, any sums were due to be paid to the Claimant once the deductions had been calculated and agreed."*

63. As Mr Frampton pointed out, SS therefore appeared to accept that DRJ is entitled to the withheld sum, either in the form of a payment or as a set-off against sums due to SS.

64. In relation to SS's position, an obvious point arises as to what was to happen in the absence of further agreement upon further deductions to be made against DRJ (beyond the £9,280.40). Simply by refusing to engage with the process of agreeing upon them or by withholding its agreement SS could ensure that DRJ never received the £39,481, or any part of it, even if there was no deduction properly to be made against it. The 10 December email clearly contemplated a net payment to DRJ. To put it another way, SS would obtain satisfaction, to that value, on its claims against DRJ even though it is only at DRJ's prompting that they came to be advanced in the shape of the counterclaim made some 3½ years after the date of the meeting.

65. DRJ says that the December 2014 meeting cannot be treated as having given rise to a binding agreement, save in relation to the "*agreed*" sum of £9,280.40 in respect of the defects highlighted on Mr Porter's list. Mr Frampton submitted that, at its highest, it was otherwise a classic agreement to agree which therefore lacked the necessary certainty of a binding contract.

66. Mr Pearce-Smith's initial argument on behalf of SS was to say that the December 2014 meeting resulted in an agreement which replaced the payment provisions in the Phase 1 and Phase 2 Contracts. He submitted in his skeleton argument that "*it matters not whether the parties have actually used the mechanism to establish the sums due*." At the very least, he said, the agreement operated to suspend the Final Statement mechanism under those contracts and under which no payment is due to DRJ if there is no Final Statement or there is one but it is not conclusive because no Notice of Completion of Making Good ("**Making Good Certificate**") has been issued. Neither DRJ nor SS had sought to bring the replacement agreement (of December 2014) to an end – indeed SS was said to have complied with it by providing updated electricity meter readings and paying the £40,000 mentioned in the email of 10 December 2014 – and DRJ's right to claim under the Final Statement mechanism remains suspended.

67. Mr Pearce-Smith's alternative argument was that, if the agreement reached was not effective, then payment provisions of the formal contracts must still apply but *"[t]hese have not been carried out, and therefore no sums are due to [DRJ] under the Contracts. Not only have the outstanding defects not been rectified but the Final Statement procedure has not been operated*." He said that issues of heating (i.e. the alleged increase in electricity charges) and JKW had been raised in snagging lists during the course of the Rectification Period but not been satisfactorily resolved, so that SS was entitled to refuse to issue Making Good Certificate.

68. As a final fall-back, Mr Pearce-Smith submitted that, if the court were to find that a Making Good Certificate should have been issued at an earlier point in time, the appropriate relief would be to direct SS to issue such a notice and to award DRJ damages for any loss suffered as a result of it being issued late. As to the period of lateness, he said that, leaving aside any other unresolved defects, the Notice should

not have been issued before the end of 2015 and the installation of the ASHPs. As to any loss suffered through it only being issued now, in 2020, he said that there would be none because (to quote from his skeleton argument) SS would be "*entitled to deduct from the Final Statement figure sums due in respect of losses caused by [DRJ's] breaches of contract*." I return to this argument below.

69. Although SS's primary position in opening had been that the upshot of the December 2014 meeting was that the payment provisions in the Phase 1 and Phase 2 Contracts had been replaced by the agreement reached at that meeting, by the stage of closing submissions it had come to recognise the conditional nature of the later agreement. In his written closing submissions, Mr Pearce-Smith said:

> *"It is submitted that the true nature of this agreement was that it was conditional on the agreement to these particular items. If these items could be agreed, then the balance outstanding after deduction of these items would be the sum payable to the Claimant or the Defendant as appropriate. But if they could not be agreed, the whole of the agreement would be ineffective, and the parties would be thrown back onto the payment mechanisms of the Contracts."*

70. In my view, this was a sensible shift of position having regard to the precatory language of the 10 December email (*"(tba)"*, *"for agreement"* and *"upon agreement of above being reached"*) and the whip hand that would otherwise be given to SS under the contrary conclusion (even if SS then chose not to engage with DRJ, in a timely manner, in reaching the contemplated agreement on outstanding points) when compared with how the terms of the Phase 1 and Phase 2 Contracts regulated sums withheld as a retention. Paragraph 34.6 of the Amended Defence and Counterclaim had alleged it was an implied term of the agreement that the parties would carry out the steps needed to calculate and agree the deductions within a reasonable time but did not spell out the consequences (and in particular how any damages would be quantified) in the event of a breach by either. Similarly, if SS had chosen to engage with DRJ but did so in a manner which made the prospect of agreement upon further deductions (beyond the £9,280.40) against the outstanding contract sums unlikely. I make that observation because DRJ contends that the meter readings submitted to it in the manner anticipated by the 10 December email were presented on a fraudulent basis.

71. As Mr Porter was able to say in evidence with the unqualified backing of subsequent events leading to this litigation: "*We failed to reach agreement on the agreement…These items are all subject to the agreement which was never reached*". When cross-examined about the email, Mr Lewin said "*I cannot work out what agreement to the above is on this email*." At one point in his evidence Mr Lewin indicated his understanding that the reference in the email to "*LADs*" (i.e. liquidated and ascertained damages) referred to "*all defects*" though he later accepted he was confused on the point. Even recognising the email as an accurate record of what was discussed the previous day, it is obvious that the parties had merely agreed to agree.

72. This accords with the Decision of the Adjudicator in respect of the Engine House Contract. Addressing Mr Hannon's email of 10 December 2014, he said:

> *"9. What has become clear during this adjudication is that the 'compromise agreement' has not been finalised as the parties are still, after two years, trying*

to resolve issues such as what was the level of excessive electricity use. Stepping Stone at paragraph 11 of the Response say that the final amount payable will be determined at the end of this winter season once the heat pumps have been monitored for the agreed period. Clearly any compromise agreement would need this information before it can be finalised. I accept that Stepping Stone has provided some electric meter readings, as note in Mr Lewin's witness statement and Mr Hannon's email of 15 December 2014, but it also appears that these were not sufficient to reach a final agreement as to a compromise.

10. Stepping Stone say that the email of 10 December 2014 shows that an agreement was reached, in the words of Mr Lewin at paragraph 5 of his witness statement, "The agreement constitutes a binding settlement of the outstanding disputes in relation to the three contracts. It does not determine the sums that were due or would become due pursuant to the three contracts, because these could not be determined until after all the heat pumps had been replaced and performance monitored for a period of time. It set out the mechanism for how the final sums would be determined and provided for an interim payment to be made in the meantime".

11. I am not convinced by this view. At best the email of 10 December 2014 shows an agreement to agree as suggested by Jones in their reply. Despite this Stepping Stone continue to submit that there was a binding agreement and this is the part of the email that refers to the interim payment of £40,000.00. In fact, the email says 'JL undertook to pay £40k upon agreement of above being reached, 50% of remainder on completion and remaining sum after 6 months of satisfactory performance.' I do not accept that this is a binding agreement for an interim payment. I find that this wording shows an intention to make a payment should certain matters be agreed. At the very least the excessive electricity has not been agreed and, as submitted by Stepping Stone, cannot yet be agreed until such time as the monitoring period has expired.

12. I do not find that the email of 10 December 2014 evidences a compromise agreement between the parties."

73. That conclusion is not binding upon me but its correctness for the purposes of this litigation has been confirmed by the evidence adduced at the trial and the fact, the obviousness of which Mr Frampton said should not be overlooked, that 5 years later the parties are still in dispute.

74. As I have sought to explain, one of the questions for me to decide is whether or not the force of that common sense observation is met by SS's argument that the potential for the discussion at the December 2014 meeting to have produced a binding agreement means that the parties' pre-existing contractual rights were put in a state of limbo so that, even now, it cannot be said that the sum has been improperly retained.

75. The revised position adopted by SS therefore brings into sharp relief the parties' competing arguments as to how the Phase 1 and Phase 2 Contracts operate in relation to the sum of £39,481.16.

Retention under the Phase 1 and Phase 2 Contracts

SS's Position

76. As I have already mentioned, SS's first alternative argument is that the balance of the retention only becomes payable as part of the sums due under the Final Statement under the contracts. Mr Pearce-Smith submitted that DRJ has no entitlement to payment if there is no Final Statement or if there is one but no Making Good Certificate has been issued (so that the Final Statement has not become conclusive).

77. His further alternative argument was to say that even if there is a Final Statement and it has become conclusive (after the issue of a Making Good Certificate) then SS is entitled to deduct from the Final Statement figure sums due in respect of losses caused by the alleged breaches of contract by DRJ. In his oral closing submissions, Mr Pearce-Smith referred to the retention as providing both security and leverage. He said SS's retention of the monies was the way by which it could force DRJ to put things right or pay compensation (including for the benefit of the residents or NCL) for not doing so.

78. Mr Pearce-Smith said (with particular reference to the authorities relied upon by Mr Frampton in his analysis of the terms governing the release of the £39,481) that the entitlement to the monies turned on the particular provisions of the contract under consideration. So much is obvious, provided that it is borne well in mind that the balance in question certainly acquires its initial identity as part of the Retention provided for by clause 4.18 of the Phase 1 and Phase 2 Contracts (which specified a Retention Percentage of 5%). Clause 4.8 stipulates that the Retention was to be deducted from any interim payments due to DRJ. Under clause 4.18.3 half of the Retention Percentage (i.e. 2.5%) could be deducted by SS where the Works had reached practical completion but no Making Good Certificate had been issued.

79. However, Mr Pearce-Smith said in his closing submissions that the remaining 2.5% was "*not an actual sum of money*" and "*not truly a retention*." He said that, whereas the first half of the retention became payable upon practical completion, the "*second half ceases to be a retention because it does not become payable (qua release of a retention) upon a further event*."

80. Mr Pearce-Smith also correctly pointed out that the ERs had amended the standard form of contract (clause 4.16) to provide that SS was not the trustee or fiduciary of DRJ in respect of the Retention but that instead the relationship between them was that of "*debtor and unsecured creditor, subject to the terms hereof*". Looking at clause 4.18.3, however, his submission was that the contract was silent as to what governs the retained 2.5%. He said it could only be payable as part of the balance stated to be due by the Final Statement in accordance with clause 4.12. Clause 4.12.7 provides that the final date for payment of that balance is 28 days from the Final Statement (or Employer's Final Statement) having become conclusive. No Final Statement had been issued by DRJ (none was identified in DRJ's Particulars of Claim) and, even if one had been, it cannot have become conclusive in accordance with clause 4.12.5 as no Making Good Certificate had been issued and DRJ's pleaded claim proceeded on the basis of SS's failure to issue one.

81. I have already mentioned SS's position in relation to DRJ's alternative plea that, if not entitled to the retention, then damages are recoverable for the amount of the retention on the basis that SS ought to have issued a Making Good Certificate. SS says there is no loss because the sums counterclaimed in respect of DRJ's alleged breaches of contract may be deducted from the Final Statement figure. Mr Pearce-Smith referred to the contractual entitlement of the employer to serve a Pay Less Notice under clause 4.12.7 of the Phase 1 and 2 Contracts by reference, for example, to sums which SS claimed to be due from DRJ in respect of the excess electricity costs it had notified to DRJ.

82. On SS's analysis, therefore, the sum sought by DRJ is very much locked into the balance, if any, payable under the Final Statement to the extent that it should not properly be analysed as a retention.

DRJ's Position

83. Mr Frampton said that SS's contention that the retention only become due upon the Final Statement was wrong as a matter of contract. He said that the trigger for the release of the retention was not the issue of the Final Statement but the issue (or what should have been the issue) of the Making Good Certificate. Clause 4.18.3 provides as follows:

> "*half the Retention Percentage may be deducted from so much of the total amount as relates to work where the Work or relevant Section(s) have reached practical completion but in respect of which a Notice of Completion of Making Good under clause 2.36 or a notice under clause 2.32 has not been issued*."

84. Mr Frampton made the point that the purpose of retention is to act as security for the employer against which it may indemnify itself for any loss or damage it suffers as a result of breach by the contractor. He cited the following authorities for the following propositions:

i) *Birse Construction Ltd v Eastern Telegraph Company Ltd* [2004] EWHC 2512 (TCC), at [34] where HHJ Humphrey Lloyd QC said it was clear and well established that "*payment of retention held after practical completion under a building contract incorporating JCT conditions is conditional on the contract obtaining a certificate of making good defects*". The contract in that case was the JCT Standard Form of Building Contract (1980 ed) with Quantities, as varied by a subsequent letter agreement between the parties. The judge had noted the employer's concession that that contractor might instead persuade the court that the making good certificate ought to have been issued: compare the decision in *Henry Boot* mentioned next. He also highlighted the common misconception that the employer's right of recourse was limited to claims in respect of defects when "*subject to the terms of the contract, retention is security for default in any respect (damages for delay, claims by third parties met by the employer for the which the contractor is to indemnity the employer etc.)*";

ii) *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] 1 WLR 3850, per Dyson LJ at [23], for the proposition that the contractor's right to an interim payment arises when a certificate either was issued or ought to have been issued (the case concerned a contract incorporating the ICE Standard Conditions (6th ed) where the engineer was the certifying officer). Although the issue of a certificate was a condition precedent to payment the absence of one did not bar the *right* to payment. If that right is established, it enables the court to decide that a certificate for payment ought to have been issued when one has not been issued. Mr Frampton said that DRJ is entitled to the retention because SS ought to have issued the Making Good Certificates under the Phase 1 and Phase 2 Contracts;

iii) *PC Harrington Contractors Limited v Tyroddy Construction Limited* [2011] EWHC 813 (TCC), at [22]-[24], where (in noting that the contract under consideration by him contained no express provision for the release of the retention) Akenhead J observed that it was the common, if not invariable, practice of the construction business that the first half of retention is released on practical completion and the second is then released on the completion of the defects liability period. Mr Frampton said that the judge's observation that *"[s]ometimes the second half of the retention is payable only on the issue of the Certificate of Making Good Defects*" described the well-established position under JCT Contacts. Akenhead J described the retention as a credit that was already due to the sub-contractor (in that case); and

iv) *Relicpride Building Company Ltd v Cordara* [2013] EWCA Civ 158, 147 Con LR 92, [39]-[41], for the proposition that an employer cannot hold on to a retention indefinitely. The Court of Appeal held that the purpose of the retention in that case was to act as security out of which the paying parties might indemnify themselves against loss or damage arising from non-fulfilment of the payee's obligations against which the retention had been made.

85. As Mr Frampton highlighted, practical completion of the Phase 1 Contract was certified as having been achieved on 28 January 2011. The Rectification Period under that contract expired on 30 November 2011. Practical completion of the Phase 2 Contract was certified as having been achieved on 1 December 2011. The Rectification Period under that contract expired on 30 November 2012 (the Certificate erroneously referred to 31 November). Under clauses 2.35 and 2.36 of the Phase 1 and 2 Contracts, the Making Good Certificate was to be issued by SS once any defects, shrinkages or other faults in the Works which appear during the Rectification Period and have been specified by SS (in a schedule of defects delivered to DRJ no later than 14 days after the expiry of the Rectification Period as an instruction requiring it to be made good) had been made good. Under clause 4.18.3, the issue of the Making Good Certificate would have brought an end to SS's right to withhold the 2.5% retention.

86. In his factual analysis, Mr Frampton pointed to the vagueness of SS's pleaded case so far as fitting it to the regime of clauses 2.35 and 2.36 is concerned. I return to this below.

<u>My conclusions on retention and their application to the facts</u>

87. In my judgment, it is clear from the language of clause 4.18.3 that the sum representing the 2.5% (or any part of it) cannot be withheld ("*deducted*") where the Certificate of Making Good *has* been issued. The entitlement to do so ends with the issue of one. It is equally clear that the subject matter of that clause is the balance of the Retention, in respect of which the parties have expressly recognised that SS is DRJ's debtor, and that it does not lose its identity as such. The "*terms hereof*" which the amended clause 4.16 identified as regulating the debt owed by SS included clause 4.18.3 in relation to the 2.5%.

88. SS's argument that clause 4.18.3 somehow fails to address the fate of the 2.5% is one that loses sight of these basic points. For the same reason, there is a fundamental misconception in the argument that this "*half [of] the Retention Percentage*" somehow loses the characteristics of a retention (presumably from the moment of its deduction in accordance with that clause) because the clause, so it is suggested, does not spell out in positive terms that it is to be payable upon the happening of a certain event. The flaw in that argument, which if correct would result in the Phase 1 and Phase 2 Contracts themselves placing the re-categorized sum in limbo, is equally obvious from a plain reading of clause 4.18.3. Not only does the clause *not* say that the remaining half of the retention becomes something else, unregulated by the debtor-creditor relationship established by clause 4.16, but it expressly states for how long (and only for so long) it may be retained by the debtor, SS.

89. As to the period for which the second half of the retention may be deducted and treated as not yet payable, it is equally clear from the decision in *Henry Boot* that, if the facts warrant it, DRJ should be able to say that which ought to have been done in relation to the issue of the Making Good Certificate should be treated as having been done. I would also make the general observation that the relevant observations in *Birse Construction* and *Henry Boot* (and *Grove Developments* mentioned below) are essentially to the effect that the court should not be too hidebound by the existence or absence of notices which required as part of the contractual machinery regulating the cash-flow between the parties when it comes to the determination of their substantive rights. The point serves to expose further the weakness in SS's position in relation to the retention in the light of the significance it attaches the absence of a Final Statement (or Making Good Certificate).

90. SS's argument that it might have served a Pay Less Notice under clause 4.12.7 cannot be a good response to DRJ's claim to the £39,481 as a debt which has fallen due (with interest at the rate of 5% above the Bank of England's official rate as specified in clause 1.1 of the Phase 1 and Phase 2 Contracts). As Mr Frampton pointed out, the service of a Pay Less Notice is all about cashflow and (if challenged by the contractor) has the potential to lead to adjudication. Even if an adjudicator had duly upheld the Pay Less Notice, that decision upon the amount of payment immediately is not determinative of the parties' primary contractual rights and obligations: compare the observations of Sir Rupert Jackson in *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448, [87]-[88]. The Phase 1 and Phase 2 Contracts (entered into before the 2009 amendments to the Housing Grants, Construction and Regeneration Act 1996 took effect on 1 November 2011) obviously provide for the requisite payment and adjudication regime.

91. That the spectral presence of Mr Pearce-Smith's hypothetical Pay Less Notice under clause 4.12.7 has no real bearing upon DRJ's entitlement to the balance of the

retention is illustrated by the elementary point that the absence of such a timely notice would not relieve DRJ of the burden of establishing that the payment claimed was one contractually due to it. The same goes for the Retention Percentage (and the relevant half of it) which is fixed by reference to the Gross Valuation, for interim and final payment purposes, and the items within it that are subject to retention.

92. Any Pay Less Notice served by SS in response to DRJ's Final Statement would have to state the grounds for it. On the assumption that the Final Statement otherwise became "*conclusive as to the balance between the parties*" because a Making Good Certificate is assumed to have been issued (see clause 4.12.5) the point would have to rest upon SS having given DRJ notice that it disputed something in the Final Statement. For the purposes of this case, the only basis for SS disputing the hypothetically served Final Statement would be that one or more the defects identified in its schedule of defects had not been rectified and that SS intended to make an appropriate deduction from the Contract Sum in respect of them: see clause 2.35. Yet the premise behind the issue of a Making Good Certificate by SS is that it recognises that the defects have been made good: see clause 2.36.

93. As Mr Frampton also pointed out, when contrasting the actual position between the parties compared with what might have come from a Pay Less Notice served under clause 4.12.7, they have now engaged in a High Court trial for the purposes of finally determining their respective rights and obligations when the decision of an adjudicator would not have done so. Mr Frampton submitted that his client is therefore entitled to the sums retained even if the court finds that defects were notified to DRJ in accordance with clause 2.35 and not subsequently made good. Even in that eventuality, DRJ is entitled to the retention subject to any loss and damage found to be recoverable on SS's counterclaim.

94. I agree with that observation. It highlights the need for SS to make good its counterclaim independently of any right to retain monies under the Phase 1 and Phase 2 Contracts. The point made in *Relicpride* shows that, now that the parties are some 8 and 9 years respectively on from the expiry of the Rectification Period, SS should not otherwise be able to treat its counterclaim as secured by the £39,481 and the contractual interest accruing on that sum.

95. In *Relicpride* the retention had been made out of the purchase price due under an agreement for the sale of property. It was to be released on the last of the occurrence of three events and to be held by the purchasers' solicitors as stakeholders in the meantime. The local council's change of position (in subsequently not requiring the vendor to enter into a section 106 agreement) meant that one of the stated three events never would occur. The purchasers contended that the retention was not payable to the vendor because certain snagging items (to be addressed under that agreement for sale and a related agreement) had not been remedied. The judge had found that some of them had not been addressed so that the second stated pre-conditions for payment of the retention had not occurred and, as Kitchen LJ noted at [24], "[*I]t mattered not, he continued, that the cost of carrying out these works would be far less than the retention*." Although the judge's conclusion in relation to the outstanding snagging items was not appealed, the Court of Appeal held that, subject to the purchasers being indemnified against the loss and damage caused by those items, "*the balance, if any, of the retention would then be payable to [the vendor] as the outstanding part of the purchase price.*"

96. The Court of Appeal in *Relicpride* noted that the agreement had not addressed what was to happen in the event of it becoming apparent that any one of the three events, identified as pre-conditions for the release of the retention, would not occur within a reasonable time or possibly not at all. Kitchen LJ (with whom Moore-Bick LJ and Lord Dyson MR agreed) said, at [38], that it would have made no sense to attribute to the parties an intention that the retention should be condemned to "*the sterile fate*" of being held by the solicitors indefinitely.

97. The decision of the Court of Appeal in *Relicpride* shows that the retention in the present case cannot be used as to provide SS with unjustified leverage simply because it is the party in possession (and in possession of it as a "mere" debtor rather than as a fiduciary whose duty of loyalty would in my view be tested beyond breaking point by seeking to get out the retention more than was justified). Mr Pearce-Smith submitted that the decision in *Relicpride* turned on the construction of the particular agreements under consideration in that case. That is true but the observation does not assist his client's case.

98. In *Relicpride*, the fact that retention was described as part of the purchase price (rather than as a reduction in the purchase price) was said to provide an indication that the withholding of it could not be justified otherwise than by reference to the purchaser's actual loss. It is in the very nature of a "retention" out of the contractual price that the parties anticipate it being *released* to the payee at some point during the performance of the contract (even if that be at its very end and subject to whatever deductions may properly be made by the payor under the terms of the contract). Whereas the agreements in *Relicpride* did not expressly address the release of the retention in the circumstances which had arisen, clause 4.18.3 of the Phase 1 and Phase 2 Contracts does fix DRJ's entitlement to be paid by reference to the timing of the Making Good Certificate (or, applying the reasoning in *Henry Boot*, what should have been that certificate).

99. The decision in *Harrington v Tyroddy* also concerned a contract (a building sub-subcontract in the form of a letter agreement) which provided that valuations would be subject to a percentage retention but contained no express provision for the release of it. It was the absence of a provision akin to clause 4.18.3 in the Phase 1 and Phase 2 Contracts which prompted Akenhead J to make the observation noted in paragraph 84(iii) above. Like SS in the present case, the employer had sought to argue that the amount of money to which the contractor was entitled, including the amount of retention that might become due, could not be established until the final account between them was agreed. However, the court rejected the argument that the contract was to be construed or a term implied that the retention was only payable once the final accounting process has been finalised as "*it will be payable by implication by Harrington within a reasonable time of completion by Tyroddy*".

100. Again, Mr Pearce-Smith submitted that the decision in *Harrington v Tyroddy* turned on the language of the particular contract before the court. This time, that observation actually undermines SS's case. If the employer under a building contract cannot succeed in tying accountability for and payment of the retention to the final accounting process (clause 4.12 for present purposes) when the contract is *silent* upon the release of the retention, the argument becomes hopeless in the face of a provision like clause 4.18.3 in the present case. That clause wholly undermines SS's argument that the 2.5% should not be analysed as retention monies. SS is forced to make it

because the authorities relied upon my Mr Frampton are so clear in supporting DRJ's entitlement to it.

101. Although the decision *Birse Construction* confirms that the retention may be resorted to as security for contractual default going beyond any defects subsequently certified to have been made good, SS therefore cannot ignore the point that the retention represents monies earned and otherwise payable to DRJ. In *Birse Construction*, after the issue of the certificate of practical completion, the parties had entered into a letter agreement which included provision for the contractor to be paid a specific sum after snagging defects had been made good to the satisfaction of the architect. The agreement also addressed the release of the retention which was to be paid in phases upon the architect issuing making good certificates in accordance with the JCT Contract (which, the letter agreement confirmed, remained in full force and effect save as varied by it). The contractor's claim was for the unpaid balance of the final account agreed under the contract, as varied by the letter agreement, having "*resurrected a claim for outstanding retention which had been dormant*". The employer claimed a larger sum in respect of defects, either still outstanding or since remedied at its own expense. The court recognised (at [35] and [217]) that the purpose of its decision was to assess the damages payable if the contractor was found not to have performed its primary obligation of making good the defects, for the purposes of valuing the employer's "*rights of abatement, set off or counterclaim*" and "*if they are less than the amount of retention claimed, release the balance.*"

102. As Mr Frampton correctly submitted by reference to these authorities, there would be no proper basis for SS to assert that a claim for loss and damage with a value of, say, £10,000 in respect DRJ's breaches of contract justified retaining the whole £39,481. That would involve SS repudiating the debtor-creditor relationship recognised by clause 4.16 in respect of the balance. It is one thing for the retention to be used properly as leverage to ensure that outstanding breaches are rectified, or as *pro tanto* security for the loss incurred if they are not. It is quite another for leverage to be exerted by the *de facto* withholding of the whole of the retention, regardless of the true extent of SS's set-off against the debt it owes to DRJ, when the initial contractual expectation is that it will be released. Although DRJ's claim to recover that sum has now prompted SS to advance its counterclaim for loss and damage, there had been a risk that the indefinite withholding of the retention by SS would have seen DRJ's interest in it as a creditor meeting a worse than sterile fate (from DRJ's perspective) without any judicial or quasi-judicial decision that it should. Now that the counterclaim has been advanced, my decision will necessarily involve an assessment of SS's claims of loss where some of the alleged defects have, many years later, still not been remedied at its own expense.

103. However, before turning to the heads of counterclaim in their own right, I need to address DRJ's argument, based upon the proposition in *Henry Boot*, that its right to be paid the retention has already crystallised.

104. I have already noted DRJ's position that SS's analysis of the case from the perspective of the operation of clauses 2.35 and 2.36 is concerned was hopelessly vague. DRJ's focus was upon the expiry of the Rectification Periods under the Phase 1 and Phase 2 Contracts on 30 November 2011 and 30 November 2012 respectively and the need for SS to have specified the defects relied upon in relation to each

contract in a schedule of defects delivered no later than 14 days after each the relevant date.

105. By an amended response to a Part 18 RFI served in February 2019, SS set out the defects, and instructions requiring them to be made good, upon which it relied. These were as follows:

- Incorrect heat pumps –snagging list dated 10 June 2011 (item 25)
- Thermal insulation - snagging list dated 26 January 2012 (item 19)
- JKW – snagging list dated 26 January 2012 (item 55)
- Carpets and underlay - snagging list dated 9 July 2012 (item 65)

106. However, Mr Pearce-Smith's submissions at trial, about the timing of notification of defects, were expressed in more general terms. He argued that all of the alleged defects raised by his client's counterclaim were specified within the relevant Rectification Periods and had not been made good. He added that any single outstanding defect would have entitled SS not to issue a Making Good Certificate. The following is a summary of the argument advanced on behalf of SS:

i) The issue of excessive heating costs was identified at the outset, the earliest reference to these costs being in correspondence with DRJ in January 2011 and therefore in the early part of the Rectification Period for the Phase 1 Contract. Problems with the heating of some of the Units were identified in the first snagging list, dated 30 November 2010 and later, in relation to all five units then completed, in the snagging list dated 15 December 2010. Item 25 on the snagging list of 10 June 2011 was simply one in a sequence of snagging lists in which issues over the EAHPs and excessive running costs had been raised. 33. In March 2012, the snagging lists for both the Phase 1 and Phase 2 Contracts referred again to the problem with the excess costs, the issue by then also affecting the recently completed Phase 2.

ii) The problem with the thermal insulation was first identified in April 2013, which was after the expiry of the Rectification Period for the Second Contract. However, DRJ tacitly acknowledged its liability for this defect by attempting what SS says was an unsuccessful repair in September 2013. It was only after this that a Building Thermographic Survey was obtained (in October 2013) which highlighted certain anomalies which, SS says, indicates defective workmanship by DRJ.

iii) The problem of JKW had been notified in relation to the Phase 1 Contract by May 2011, causing SS to ask for an indemnity and to notify DRJ that the retention would not be released before a guarantee had been provided. The JKW was noted as having re-appeared as at 9 June 2011. So far as the Phase 2 Contract is concerned, JKW was referred to in all the defects lists issued during the Second Contract Rectification Period. This included references to JKW having reappeared.

iv) The problem over the excess TOG rating of the carpets was first identified in May 2012. This was outside the Rectification Period for the First Contract, but within the Rectification Period for the Second Contract. However, this alleged defect is said to have been an aspect of wider "defect" in respect of excessive electricity costs and inadequate heating, which had been identified by SS within the Rectification Period for the First Contract. The excess TOG-ratings contributed to the problem by exacerbating the inadequacies of the EAHPs; and if the EAHPs had performed as warranted then (despite their excess TOG-rating) there would have been no defect in the carpets requiring remedy.

107. It will be immediately apparent that, in relation to the heat pumps (and, as recognised by SS, the carpets also) the alleged "defect" is presented in terms of "*excessive heating costs*". Relying upon SS's reference to those costs between January 2011 and late 2013, and recognising that the EAHPs later came to be replaced by ASHPs in 2015, Mr Pearce-Smith's closing submissions said "[*t]he fact that the cause of the defects was not identified at that point does not alter the fact that the defects were notified in time*" and that "*the defect was never rectified*". This obviously raises the question as to whether SS is right to analyse an excessive level of heating costs as a defect, as opposed to the potential *consequence* of one or more instances of defective installation or workmanship, particularly in circumstances where (as was recognised at the December 2014 meeting would be done) the parties had agreed that the defective EAHPs should be replaced by ASHPs.

108. Although the email of 10 December 2014 shows that they did not regard their replacement as obviating the need to address "*excessive electricity*" (as proposed to be substantive by updated meter readings) the fact that they were replaced raises clear doubts over SS's ability to call for what might be described as "re-rectifying" work. And I have just noted SS's position, in relation to the carpets, that a combination of replacement heat pumps and appropriate recompense for any additional electricity charges would have meant there was no defect to remedy in the first place. As I explain below, that is not only how Mr Pearce-Smith put it in his closing submissions but also how Mr Lewin appears to have approached matters when DRJ offered to replace the carpets.

109. In addition to expanding upon what had been said in his client's amended Part 18 response, Mr Pearce-Smith reminded me that the Amended Defence and Counterclaim took the point that DRJ was estopped from denying the validity of any schedules of defects served after the expiry of the Rectification Periods. He said the parties had agreed by their conduct to extend the Rectification Periods. SS continued to notify DRJ of defects which had been identified after the expiry of the "initial" Rectification Periods by way of snagging lists, which the SS acknowledged and (in some instances) attended to without objecting that they had been notified too late, or asking for Making Good Certificates (eg. DRJ's attempted repair of the thermal insulation in September 2013). He said DRJ benefited from this arrangement as it spared it from the cost of having to compensate SS for the cost of employing other contractors to rectify the defects.

110. Mr Frampton adopted a more analytical approach to what (at the second time of asking, in the amended response to the RFI) had become SS's pleaded case in relation to the relevant defects and instructions to make good. This was clearly the right

approach given the strict requirements of clauses 2.35 and 2.36, the significance of those contractual provisions to the release of the retention, and the need for certainty in the parties' pleaded positions.

111. Mr Frampton also observed that SS's estoppel argument had not been covered in evidence. I accept that submission. SS did not lead any evidence to suggest that it had relied upon any representation by DRJ, by words or conduct, that it would not rely upon those contractual provisions. The only evidence bearing upon a potential departure from the strict terms of the Phase 1 and Phase 2 Contracts was that relating to the December 2014 meeting which failed to result in a contractually enforceable agreement which overrode the Phase 1 and Phase 2 Contracts. Mr Frampton also said that DRJ's attempt to remedy a defect could not be relevant conduct for the purpose of an estoppel. That must also be right in circumstances where any rectification of defects in part performance of the "agreement" reached in December 2014 cannot be material to the extension of Rectification Periods which had expired some 2 and 3 years previously if the agreement itself cannot stand. As I have already noted, SS's position by the end of the trial was that if the agreement was ineffective then the parties would then be thrown back on the payment mechanisms in the contracts.

112. In relation to the Phase 1 Contract, DRJ's position was that the only defect which SS averred, by the amended response to the RFI, it had required to be made good within 14 days of the expiry of the Rectification Period of the Phase 1 Contract (namely by 14 December 2011) was the heat pumps.

113. However, item 25 of the minutes of the meeting of 10 June 2011 simply stated *"£1907.45 to be recovered for use of electricity on improperly fitted heat pumps*". DRJ said that this was therefore not an instruction requiring it to make good a defect and, further, that it related to an alleged installation issue, rather than the design issue with the EAHPs. Mr Frampton also pointed out that the particular sum was deducted by SS in its calculation of sums due to DRJ. The installation issue was therefore resolved.

114. The design issue with the EAHPs did not appear during the Rectification Period for the Phase 1 Contract and was only notified to the Claimant on 13 August 2013 ("*Independent report has been received stating that pumps are undersized and inadequate for design*"), which DRJ said was too late for clause 2.35 purposes. In any event, even if SS was considered to have instructed DRJ to make good the design issue with the EAHPs by 14 December 2011, DRJ completed the making good when it replaced the EAHPs with the ASHPs in 2015.

115. So far as the Phase 2 Contract was concerned, SS's pleaded position was that the heat pump issue was notified on 10 June 2011 (it being assumed that it had appeared by that date). DRJ said that was therefore too early as that was before the Phase 2 Rectification Period started on 1 December 2011. DRJ's position was the same as for the Phase 1 Contract in that the design issue only appeared on 13 August 2013, which was too late. Under clause 2.35, the last date for the defect to appear was 30 November 2012 and the last date for SS to instruct the Claimant to make it good was 14 December 2012. Again, DRJ's case is that it made good the design issue with the EAHPs when it replaced them with the ASHPs.

116. Mr Frampton highlighted that the issue over thermal insulation (item 19 of the snagging list dated 26 January 2012) related only to Unit 6 under the Phase 1 Contract. The item did not in fact refer to insulation but stated "*Further balancing needed to heat pump to enable more heat to be transmitted to sitting room floor*". He made the point that SS's subsequent allegations of breach in respect of the insulation are based solely on a Building Thermographic Survey dated October 2013 and it is therefore clear that this alleged issue did not appear, and was not notified, by either 14 December 2011 or 14 December 2012.

117. As for the JKW, this issue was notified at item 55 of the snagging list dated 26 January 2012, which stated "*JKW treatment on going>. Evidence needed of continued treatment and warranty*". DRJ's position was, therefore, that item 55 did not relate to the subsequently pleaded allegation of breach in respect of the JKW based upon it having been buried on the Site when it should have been disposed of at a landfill site.

118. As for SS's reliance upon item 65 of the snagging list dated 9 July 2012, to say that an issue with carpets and underlay was notified to DRJ, it was accepted that this issue did appear during the Rectification Period for the Phase 2 Contract but DRJ said that SS did not instruct DRJ to make it good and that in fact Mr Lewin declined an offer by DRJ to replace the carpets.

119. Mr Frampton also noted that, for both the Phase 1 and Phase 2 Contracts, none of the defects identified in the amended Part 18 response were listed on the final snagging list dated 24 May 2016. That list did mention the ASHPs and JKW. However, the first was only a reference to a specific issue in Unit 3 and to documentation. The terms of the Defence and Counterclaim showed that the specific issue had been resolved (at a cost sought to be recovered by SS as part of its counterclaim for snagging items) and that the point about documentation was not pursued. DRJ's position is that the documentation was provided in February 2016 with some further documentation provided in September 2016 and Mr Hannon accepted it was no longer an issue. The reference in the final snagging list to JKW was to a "*Warranty to guarantee non return of JKW still to be provided*". Mr Frampton said that DRJ did not have a contractual obligation to provide such a warranty and noted that the pleaded allegation is only that JKW was illegally buried on the Site. He also referred to DRJ's previous offer of a 5 year JKW treatment plan which DRJ made at the first progress meeting on 17 March 2011. According to the minutes of that meeting (and confirmation of their accuracy in the minutes of the next meeting) and the evidence of Mr Lewin at trial, which contradicted his own and Mr Hannon's witness statement that this was not accepted, that proposed treatment was in fact agreed upon.

120. In his evidence, Mr Hannon accepted that none of the items on the 24 May 2016 snagging list justified the withholding of the Certificates of Making Good and the retention.

121. Therefore, in support of DRJ's argument that it should be in the position as if Making Good Certificates had been issued, Mr Frampton pointed to his client's case that, regardless of notification issues from the perspective of the Rectification Periods, DRJ had made good the design issue over the EAHPs by replacing them with the ASHPs; that there was no defect in insulation; that it had complied with its obligations with respect to JKW; and there was no breach in respect of the carpets.

122. I return to the detail of the parties' rival contentions on these matters when addressing SS's counterclaim for damages below. Partly for the reasons given there but, for immediate purposes, also because SS has not established on the evidence a competing case which conforms with the provisions of clauses 2.35 and 2.36 of the Phase 1 and 2 Contracts, I accept DRJ's case in relation to the retention.

123. In relation to the most significant of the defects said by SS still not to have been rectified (the "defect" presented in the form of the running costs of the heat pumps) it is clear that the parties did agree in July 2014 the replacement of the EAHPs with the ASHPs as the solution to rectify the defects of the former. As a matter of specification and design the ASHPs complied with the Employers Requirements (as varied in the case of the Phase 1 Contract). Accordingly, there is no basis for the defence which proceeds as if the agreement to install ASHPs can be ignored so that SS may revert to some other higher specification of heat pump against which they can be considered defective and say (per the Defence) "*hence the defects with the heating system have not been satisfactorily rectified*". I return to the heat pump issue below when addressing the claim advanced by SS for damages in respect of electricity charges in the period prior to the installation of the ASHPs and following.

124. Applying the principle in *Henry Boot*, and in circumstances where those contractual provisions were not displaced by any binding agreement flowing from the December 2014 meeting, Mr Hannon's evidence confirms that the Making Good Certificates should have been issued no later than 24 May 2016. As Mr Frampton highlighted, the point is reinforced by Mr Hannon's confirmation in evidence that BRH's appointment as the Employer's Agent under the Contracts had terminated and that he had last visited the Units "*years ago*". It is therefore obvious that the Phase 1 and Phase 2 Contracts came to an end some time ago and, rather than the retention being held in an uncertain state of limbo, SS's obligation as debtor should be recognised.

125. Accordingly, I find that SS has no defence to the payment of the £39,481 as retention which has fallen due for payment with interest (at the rate of 5% above the Bank of England's official rate) as specified in clause 1.1 of the Phase 1 and Phase 2 Contracts. In the absence of prior agreement between them upon the commencement date for the accrual of interest, I indicated in the draft of this judgment circulated before its handing down that I would invite further brief written submissions from the parties upon the date from which interest should run. I have just observed that it should be no later than 24 May 2016 and I have already noted SS's fall-back position which contemplates the notional issue of a Making Good Certificate no earlier than the end of 2015. The fact that, two years on from the expiry of the second of the Rectification Periods, the parties had at the 9 December 2014 meeting agreed upon the replacement of the EAHPs and held out the prospect of coming to a different arrangement, which would have dispensed with the issue of Making Good Certificates, might have had a bearing on whether, applying *Henry Boot* reasoning, the date should be any earlier than the end of 2015 and completion of the installation of the ASHPs. By the time of the handing down the parties had reached agreement on this aspect, which I record in my conclusion below.

126. I now turn to SS's counterclaim in order to establish whether SS have a damages claim against DRJ in respect of one or more alleged breaches of contract which may be set off against the debt.

127. Although it is arguably taken out of sequence, I begin with an issue of law between the parties which relates to SS's ability to recover damages in respect of any established breaches. That is the true scope and impact of the principle of transferred loss. I do so at this stage because SS rely upon the principle in relation to most of the heads of its counterclaim and it is the only remaining issue of law between them.

Transferred Loss

128. SS relies upon the principle of 'transferred loss' in saying that it is entitled to recover damages in respect of DRJ's alleged breaches of contract despite the fact that it lacks a proprietary interest in the Site. Whether the proprietary interest is that of NCL (which owns the parts of the Site said be affected by the JKW and to have incurred costs in relation to snagging items) or the owners of Units 1 to 11 (who are said to have suffered increased electricity bills) SS says that its interest as employer under the three contracts enables it to recoup the losses suffered by those others. Otherwise, Mr Pearce-Smith submits, the result would be the entirely unjust one of DRJ escaping the proper consequences of its breaches of contract.

129. On behalf of SS he therefore submits that SS is entitled to recover under either the "broader ground" or, alternatively, the "narrow ground" for recouping what is now known as transferred loss as those grounds have emerged from subsequent analysis of the decision of the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposal* Ltd and *St Martins Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85. In relation to the electricity charges, the transferred loss analysis is itself an alternative to the contention that SS has a direct ground for recovering from DRJ because it has a direct contractual liability either to the residents or to NCL.

130. It is clear from the *St Martins* case and the later authorities mentioned below that the reasoning underpinning the principle of transferred loss (especially the broader ground for it) is the need to avoid an unacceptable 'legal black hole' where a contract-breaker escapes financial accountability because his contractual counterparty cannot be shown to have suffered the relevant loss. As the key to avoiding such a consequence lies in establishing that the parties to the contract knew that one or more third parties were to benefit from its proper performance (and would likely suffer the resulting loss if there was a breach) it is also clear that the principle touches upon some elementary principles relating to privity of contract and the recognition of separate legal personalities. Although not a factor at the time of the decision in *St Martins*, the former includes the potential significance of the Contracts (Rights of Third Parties) Act 1999. The court will not recognise the existence of a black hole (as between the contract-breaker and his counterparty) if the third party who benefits from contractual performance has his own, separate right of redress or where a company contracts for the benefit of an associated company but does not tell the other party (the contract-breaker) that it is doing so.

131. On behalf of DRJ, Mr Frampton takes the following points against SS's reliance upon the principle of transferred loss even if such loss could be established:

    i) Any loss incurred in the form of increased electricity charges have been incurred by the leaseholders of the units who have their own rights of redress

against NCL. In what was really as much of an objection to the notion that the occupiers could have any genuine claim, Mr Frampton noted that 6 of the units had in fact been sold by the original leaseholders (who took their leases from NCL) to subsequent leaseholders;

ii) SS deliberately arranged its affairs, with the assistance of a professional in BRH's Mr Hannon, by expressly stating that the Contracts (Rights of Third Parties) Act 1999 would not apply to the contracts and by choosing not to use the collateral warranties or the purchaser and tenant rights available in their standard JCT form. Indeed, Mr Frampton submitted that by expressly including the statement (at clause 1.6 of the Phase 1 and 2 Contracts and clause 1.5 of the Engine House Contract) that "*nothing in this Contract confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it"*, DRJ and SS effectively disowned the suggestion that they should be taken to know that the contracts were for the benefit of NCL or future leaseholders for the purpose of applying the principle. This, he said, should preclude recovery in respect of the JKW or any defective insulation, if NCL's property is affected by either, and DRJ would otherwise be accountable for a breach of contract. If this was not a conscious decision by SS and NCL then the redress lay against BRH for failing to advise them properly; and

iii) the electricity costs, as a secondary and consequential type loss, are akin to loss of profits which are not recoverable under the principle of transferred loss.

132. The authorities on the principle of transferred loss, beginning with *Albacruz (Cargo Owners) v Albazero (Owners) ('The Albazero')* [1977] AC 774, have recently been the subject of detailed analysis by Coulson LJ in *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596; [2019] 3 WLR 1113. In the course of it, his lordship touched upon what had been said about the narrow ground (originating in the decision in *The Albazero*) but, as the case before him concerned a third party suffering loss from a position akin to that of a sub-contractor to the claimant in its provision of product to the defendant, rather than the transferee of property in respect of which the defendant had contracted to provide services, his focus was upon the true scope and application of the broader ground.

133. Coulson LJ noted, however, what had been said by Lord Browne-Wilkinson about the narrow ground in the *St Martins* case. In that case, the first plaintiff ("Corporation") had the benefit of the building contract with the defendant but had transferred all its interest in the subject matter property to the second plaintiff ("Investments") after entering into the contract but before any relevant breaches of it had occurred. In circumstances where an assignment of contractual rights by Corporation to Investments was found to be ineffective (because the contract prohibited it without the contractor's consent), Lord Browne-Wilkinson in the majority said that both contracting parties knew that the property was "*going to be occupied, and possibly purchased, by third parties and not by corporation itself*." Their knowledge of a possible purchase was sufficient to enable Corporation to sue for loss in fact suffered by the later owner, Investments, as a result of the breaches of contract. The nature of the property - a large development to be occupied by others - therefore brought the case within the principle recognised in *The Albazero* (for carriage of goods cases where the point is not addressed by the endorsement of a bill of lading in favour of the consignee) which enables the consignor of goods to recover damages for breach of a

contract of carriage even though the ownership and risk in the goods has by then passed to the consignee. In such cases, the court may impute to the contracting parties an intention that the consignor is entering into the contract for the benefit of others who will acquire property in the goods but have no right to sue for breach of contract.

134. Lord Browne-Wilkinson applied that reasoning to the transfer of the development property to Investments so as to ensure there was a remedy for the breaches of contract through Corporation being entitled to recover damages for the cost of the remedial work required to put them right.

135. In addressing the broader ground in *Nederlandse*, Coulson LJ noted what had been said by Lord Griffiths in the minority in *St Martins* which had in later cases then gained expressions of support at the highest judicial level. The most recent of those was *Swynson Ltd v Lowick Rose llp* (*formerly Hurst Morrison Thompson llp*) [2018] AC 313 where, although he did not need to decide the point as there was no scope for its application to the facts of that case, Lord Sumption JSC said, at [17]: "*Like others before me, I consider there is much to be said for the broader principle*".

136. Applied to a building contract where, at the time of the contractor's alleged breach, the employer under the contract has no proprietary interest in the property which unites him directly with the loss caused by it, the broader ground is that "*in the ordinary case where the third party (C) has no direct cause of action against the building contractor (B) A can recover damages from B*": per Lord Browne-Wilkinson in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 577G. The damages are more than nominal because A is treated as having suffered the loss of the value to him of the performance of the contract.

137. It can therefore be seen that the analysis of the broader ground is perhaps not so much about a loss transferred (with real or personal property) but an interest retained. The analysis is that the claimant ('A') who contracted with the defendant ('B') "*... although not himself suffering the physical or pecuniary damage sustained by the third party C, has suffered his own damage being the loss of his performance interest, i.e. the failure to provide C with the benefit that B had contracted for C to receive*." (per Lord Browne-Wilkinson in *Panatown* at p. 577H).

138. In *St Martins*, Lord Griffith's reasoning in support of the broader ground was that the husband who had contracted for a roof replacement (on a house in which he either had no interest at the time of the contract or was one he had since relinquished) could recover damages for the cost of having the job done properly by a second builder. In *St Martins* the remedial works to the property in Investments' ownership had cost £800,000 plus VAT. As Coulson LJ pointed out in *Nederlandse*, at [79], in *St Martins* "*it was Corporation who paid for the remedial works, and "for financial reasons beneficial to Corporation and Investments" (p. 96F), Investments then reimbursed Corporation. So, the position is far from clear-cut*."

139. In the light of the decision in *Nederlandse*, the following points about the broader ground are now clear so far as this judgment is concerned:

    i) the broader ground is good law;

ii) it is underpinned by the need to avoid the 'legal black hole' and the necessity of providing a remedy for a breach of contract in the interests of giving effect to the object of that contract. As the principle of transferred loss is an exception to a fundamental principle of the law of obligations, it is driven by legal necessity. The dicta of Coulson LJ at [77] (and the observation of Lord Sumption in *Swynson*, at [1], about the fundamental implications of recognising the distinct legal personality of a company) indicates that those who decide to contract through a chosen corporate entity may face difficulties in making out such necessity if the black hole can be said to be of their own making;

iii) as for the narrower ground, there is no such necessity where the third party has a direct right of action for the same loss, on whatever basis, because there will then be no black hole;

iv) it is an essential component of the broader ground that, at the time the contract was made, the contracting parties had a common intention and/or a known objective that its terms should benefit the third party or a class of persons to which that third party belonged (what Coulson LJ described by way of shorthand as "*the known third party benefit*"); and

v) there is doubt about whether or not the broader ground extends to claims for the third party's loss of profit or is confined to recovering damages to reflect the cost of remedial work to the property in its ownership.

140. I will return to these propositions when addressing SS's specific heads of counterclaim. I now turn to those.

Heat Pumps

141. SS's case in relation to the heat pumps is based upon a representation allegedly made and a contractual warranty allegedly given by DRJ that the EAHPs installed in the units would be as reliable, energy-efficient and economic as the GSHP which had initially been specified in the Phase 1 Contract.

142. However, SS's counterclaim does not (in relation to that contract) involve a claim that a GSHP should be installed or for the cost of installing one, but instead a claim for what are said to be the additional electricity costs incurred in operating the two types of air heat pump (EAHPs and then ASHPs) which were installed by DRJ. SS sought to resist DRJ's claim to the retention by alleging that the ASHPs had not rectified "*the defects with the heating systems*", expressed in terms of running costs, and the counterclaim is based upon the inadequate performance of the EAHPs and ASHPs so far as those running costs (relative to a GSHP) are concerned. It seeks "*compensation payable to the owners of the 11 units*" in respect of the past and ongoing electricity charges (with the allegations relating to the installation of overly thick carpets and defective insulation also advanced in support of such compensation).

143. The Phase 1 Contract incorporated ERs which specified "*a ground source heat pump with a wet underfloor heating system and an insurance backed 10 year minimum*

guarantee is a requirement." The ERs also specified that, "*with an outside still air temperature of -2ºC and assuming continuous operation of the system, the space heating insulation must be designed to give the following room temperatures given the air change rate as shown [Table showing temperatures for each room of 21ºC or 22ºC.]*".

144. However, after their entry into the Phase 1 Contract, SS and DRJ agreed to change the Phase 1 Contract ERs. Accordingly, on 27 January 2010 BRH instructed DRJ to install EAHPs instead of the specified GSHP. The ERs for the Phase 2 Contract then specified that the heating would be by EAHPs, not a GSHP. The Engine House Contract did not impose any design responsibility on the part of DRJ and its specification stated that an EAHP was to be installed.

145. SS says the change from the GSHP (in the Phase 1 Contract) was made because of the alleged representation and warranty by DRJ.

146. DRJ accepts that the EAHPs did not comply with the ERs of the Phase 1 and 2 Contracts. In particular, they were of insufficient size to meet the heat loads to achieve the design temperatures in the ERs without relying too much on the direct immersion heaters. It was on this basis that they agreed to replace them with the ASHPs. The proposed replacement of the EAHPs with ASHPs was noted in Mr Hannon's email of 10 December 2014 written after the December 2014 meeting. Their replacement had been decided upon at a meeting on 29 July 2014 where all present – including Mr Lewin, Mr Hannon, Chris Neil and Mike Evans of DRJ and representatives of the sub-contractor Heat Radiation – had favoured this "*Option 2*" ("*Option 1*" having been to supplement the EAHPs with an additional, external ASHP").

147. In 2015, the EAHPs were replaced by ASHPs. Their installation was completed around December 2015. Mr Scott stated in his report and in his testimony that, as a matter of design and specification, the substitute ASHPs complied with the ERs. DRJ say this is wholly unsurprising when their installation reflected specialist advice received by SS from Econergy (a British Gas company) and Xpert Energy Ltd and also by DRJ, who commissioned a report from specialists Houghton Greenleese Associates in December 2013.

148. On one view (which is the one taken by DRJ) that perhaps should have been an end to any complaint about the EAHPs. The meeting on 29 July 2014 had been recorded in minutes titled "*Notes of Meeting Held on 29 July 2014 To Discuss <u>Solutions</u> To Heating Problems*" (with my emphasis through underlining). It is true that the 10 December 2014 email contemplated that DRJ would respond (within the week) with a proposed settlement figure which would take account of the updated meter readings by SS. However, it does not appear clear to me that it was in anyone's contemplation that a claim for excessive electricity costs would run for a period beyond the replacement of the last of the EAHPs, or that DRJ would be anything other than the net creditor (beyond the payment of £40,000) under the compromise envisaged at the December 2014 meeting. Paragraph 34.6 of the Amended Defence and Counterclaim said that the final balance would be paid 6 months after "*satisfactory performance*" of the ASHPs.

149. Paragraph 32 of that statement of case recited that DRJ had acknowledged that the ASHPs might still not achieve the level of performance said to have been warranted so that it was "*agreed that any shortfall in performance would be compensated by way of an appropriate deduction from the final account*" Although paragraph 35.1 referred to Mr Hannon sending to DRJ on 15 December 2014 (as anticipated at the December 2014 meeting) a spreadsheet of meter readings for the EAHPs only and suggesting compensation in the sum of £21,156, SS came to contend in these proceedings that there should be compensation to reflect the inefficient and costly running of both the EAHPs and the replacement ASHPs (when compared to a GSHP) over that period. This was on the basis (per para. 42(f)) that the ASHPs have not achieved the specified and warranted performance, consume excessive energy and "*hence the defects within the heating systems have not been satisfactorily rectified*." The counterclaim sought £72,567 for increased electricity costs (attributable to both the heat pumps, the carpets and the allegedly defective insulation) in respect of the period when EAHPs were installed in the units and £49,500 as estimated additional associated with the ASHPs which is "*based on a projected liability of 10 years [and] assuming that [DRJ] fails to replace the ASHPs with heat pumps which are capable of achieving the warranted levels of performance and/or to replace the overly thick carpets and underlay and/or to remedy the defective insulation*."

150. The Amended Defence and Counterclaim (paragraphs 17 and 18) alleged that DRJ had made a representation and given a warranty in the form of "*case studies presented to [SS] by [DRJ] giving predicted energy usage of the proposed EAHPs*". It alleged that the energy usage of the EAHPs exceeded "*the warranted figures*" by an average amount of £948 per unit per year. It is important to note that the subject matter of the alleged representation and warranty was the EAHPs only. No separate representation or warranty about energy usage by the ASHPs is alleged by SS (in fact, quite the contrary given what I have just said about paragraph 32) though SS do allege the existence of an agreement for "*an appropriate deduction*" in respect of any underperformance by those.

151. DRJ denied that any warranted figures about energy usage were given, or that any such figures became terms of any of the three contracts. The fundamental premise of SS's case (both on liability and quantum) that DRJ was required to supply EAHPs, and later ASHPs, that were as reliable, energy efficient and/or economic as a GSHP – as if that had become a contractual level of performance for the heating - was also denied. DRJ admitted giving SS case studies from NIBE, which contained predicted energy usage for the proposed EAHPs, before the change under the Phase 1 Contract from the GSHP, but said that these did not amount to such a promise and were instead examples of costs which had been achieved on specific sites. The case studies were not intended to form part of the basis of the contractual relations between the parties. DRJ said that the EAHPs and ASHPs were installed in accordance with the manufacturer's recommendations and noted that SS had failed to particularise any alleged installation breaches in respect of either set of pumps.

152. Putting to one side, for the moment, the issues of quantum and transferred loss, the starting point for consideration of SS's claim in respect of the EAHPs and ASHPs (i.e. for the recovery of excessive electricity costs allegedly attributable to both) involves testing the case that DRJ made a representation and gave a warranty which would expose DRJ to liability in the event of the heat pumps proving not to be as efficient or

economic as a GSHP. Moreover, that if DRJ did so then the potential liability extends not just to the pumps installed in Units 1 to 6 (in circumstances where the Phase 1 Contract had initially specified GSHP) but also to those installed under the Phase 2 Contract and the Engine House Contract, neither of which mentioned a GSHP as opposed to EAHPs. There is also the discrete question (to be considered against my finding that the December 2014 meeting did not produce a binding agreement upon the compensation payable for the underperforming heat pumps) as to the significance of the alleged representation and warranty about *the performance of the EAHPs* to the actual performance of the replacement ASHPs.

153. In his closing submissions, Mr Pearce-Smith referred to a document which had been added late to the trial bundle and which was an email dated 27 November 2009 from Mr Lewin to Mr Hannon and Mike Evans of DRJ on the subject of "*Boilers*" (the addition to the trial bundle was actually a photograph of that email in what appeared to be a binder of documents, presumably in the possession of Mr Hannon). Mr Pearce-Smith said this was possibly the most important document in the case and he noted that DRJ had referred to it in their claim against Heat Radiation.

154. In that email Mr Lewin said that he had revisited "*the considerable amount of research documentation that we undertook prior to going out to tender*" (the "*we*" was presumably a reference to himself and Mr Hannon) and, by reference to previous notes, referred to the descending order of efficiency and costs savings from GSHPs, to ASHPs to EAHPs. His email concluded by saying "*you can now see why we specified GSHP's in the first place*" and that he would need to be convinced that any other proposal did not reduce the usable space within the units and would be "*as efficient/economical as the GSHP to run*."

155. Mr Pearce-Smith said it was only by making the representation and providing the warranty that DRJ persuaded SS to make the switch from GSHP to EAHPs. He also referred to an email between representatives of Heat Radiation and NIBE (the supplier of the EAHPs) on 25 January 2010 in which the sub-contractor said "*we are starting to get [the client] to accept the air exhaust unit idea*." That email also revealed that Mr Lewin had some figures of his own for GSHPs. It was in response to that email that NIBE provided the case study of running costs (pointing out that "*these are site specific and costs will vary depending on load and usage*") so that they could passed to Mr Lewin to make a comparison.

156. In my judgment, SS has signally failed to make good its case based upon a representation and warranty. I say this for the following reasons:

i) The ERs in the Phase 1 Contract had mentioned the need for the heat pumps to have an insurer-backed 10 year guarantee. DRJ's Amended Reply and Mr Porter's evidence was to the effect that the switch from GSHP to EAHP was on the advice of Heat Radiation that the latter would be more appropriate having regard to a number of factors including ground conditions and DRJ's inability to obtain such a guarantee for GSHPs. I accept Mr Porter's explanation on this point. Although Mr Neil, who was responsible for the contract at the time of the switch, did not give evidence, Mr Porter's evidence is corroborated by the contemporaneous evidence and the other points made in the following sub-paragraphs. By their Particulars of Claim in the proceedings brought against Heat Radiation, DRJ said that SS had been induced to make

the change from GSHP by the information and case studies originating from Heat Radiation and NIBE, Heat Radiation's skill and judgment as specialist engineers and NIBE's skill and judgment as specialist manufacturers of heating plant.

ii) Mr Lewin's evidence did not support the pleaded representation and warranty. His witness statement referred to him having "*reluctantly agreed to the replacement of ground source heat pumps with air source heat pumps [sic] with the firm proviso that they were as economical as we were led to believe by the running costs in the case studies provided*." Those NIBE case studies did not contain the representation actually pleaded against DRJ and this evidence falls short of establishing SS's case on either the alleged representation or the alleged warranty. I would add that, in order for there to be sufficient certainty to the terms of either, the parties would have needed to have a clear, shared understanding in 2010 of the running costs of the contemplated GSHPs. Without one, formed at that time, it could not be known whether or not DRJ had later fallen foul of the representation and warranty so as to become potentially liable. The Amended Defence and Counterclaim did not identify in figures what SS says would have been the efficient and economic performance of GSHPs by reference to which an allegation of breach could be tested. DRJ's Amended Reply and Defence to Counterclaim put SS to strict proof of their projected running costs. In December 2019, SS for the first time attempted a comparison of the energy efficiency and cost of GSHPs on the one hand and EAHPs and ASHPs on the other. This appeared in Appendices VI and VII to the expert report of Mr Scott dated 2 December 2019. The factual question as to what the terms of an alleged representation or warranty actually were, when made or given in 2010, cannot in my judgment rest upon the court being persuaded by an expert opinion 10 years later as to what they *might* have been. On the contrary, unless the efficiency and economy of the contemplated GSHPs was known and agreed by the parties at the time of the alleged representation and warranty, so as to produce a sufficiently certain benchmark against which the comparable performance of the EAHPs and ASHPs could then be tested, they would not know whether grounds for alleging a breach of the same had arisen (or whether proceedings involving such expert evidence would be justified).

iii) As the quoted passage from Mr Lewin's witness statement indicates, the case studies provided by NIBE and forwarded by DSJ to SS were just that – particular illustrations of the running costs of that company's EAHPs - and did not contain a representation that EAHPs were as energy-efficient and economic as GSHPs, let alone "*at least as economic to operate as a GSHP*" as Mr Pearce-Smith suggested in his written closing submissions. As those same submissions accept, it was SS (through Mr Lewin) who interpreted those case studies as showing that the cost of supplying not only heating and but also hot water for each of the units would be in the region of £800 per annum (in the evidence alternative figures of £817 and £840 also emerged). Mr Lewin appears to have persuaded himself to overcome his misgivings about switching from GSHP where the contemporaneous emails reveal a significant amount of research into what he had identified to be the most energy-efficient and economical of the three types of heating.

iv) It is true that the £800 figure (for NIBE running costs) was noted in the minutes of a progress meeting on 23 February 2010 but that appears to have been a figure identified by Mr Lewin rather than anyone else. An email from Mr Lewin to Mr Hannon dated 26 January 2010 shows that he did not think NIBE's figures for flats could be used as a comparison for the units at Nynehead but that others "*appear to be for refurbished properties occupied all day at cost of less than £1 per day averaged over a period in excess of one year in Scotland. That looks good to me!!!*" As DRJ was able to say in closing submissions, no-one (not even Mr Scott) had been able to understand where this figure came from and none of the witnesses were able to explain it. They included Mr Lewin. Mr Scott said in his Report that "*the NIBE Case Study information is very poor. There is insufficient information to make any sound assessments since there is no information to make reliable comparisons between the projects mentioned and the Nynehead Mews project*." The NIBE case studies did not provide any figures similar to the £800 (or £817 or £840) figure. It appears to have been calculated by Mr Lewin based of his own research. In the claim against Heat Radiation, DRJ said that it was SS who had interpreted the case studies to mean that the running cost of the EAHP was £800 alternatively £817 p.a..

v) I therefore reject Mr Pearce-Smith's argument that it does not matter how Mr Lewin arrived at the £800 figure because the claim is not based (in the light of Mr Scott's evidence) on Mr Lewin's calculations; and that what matters is the case studies were interpreted by Mr Lewin as supporting the representation that EAHPs would be at least as economical to run as a GSHP. The terms of a representation or warranty cannot be unilaterally defined by the representee or warrantee according to his own interpretation of a document provided by the other party when there is no objectively explicable basis in the document for that interpretation.

vi) Aside from the provision of the NIBE case studies, there is nothing in the contemporaneous documents which supports SS's case on the making and giving of a representation and warranty, or one upon which SS relied. On the contrary, by the email dated 26 January 2010 which prompted BRH to then instruct DRJ to install the EAHPs under the Phase 1 Contract, Mr Lewin began by saying "*I have read the bullshit on running costs and heat pumps at today's meeting and, if they can be believed, they appear impressive*". It is obvious that Mr Lewin treated the NIBE case studies with a high degree of scepticism. As for a representation or warranty which operated in relation to the Phase 2 Contract and Engine House Contract, they stipulated EAHPs with no reference back to the GSHP formerly contemplated for Phase 1 as some kind of contractual benchmark. Nor was there any such reference back to the greater economy of GSHPs when the decision was taken in July 2014 to replace the EAHPs with ASHPs.

157. Mr Frampton was right to say that SS's case was, in essence, that ASHPs are less efficient than GSHPs and that is not a ground for finding there to have been a breach. The evidence shows that SS (through Mr Lewin) always knew that to be the case.

158. I therefore conclude that there is no basis for holding DRJ liable under the representation and warranty alleged by SS.

159. There remains, however, the point that at the December 2014 meeting (and as evidenced by Mr Hannon's 10 December email) DRJ contemplated that it would at least compensate SS for the excess electricity costs arising from the inefficient performance of the EAHPs that were duly replaced. Mr Lewin was to provide updated meter readings for the units and Mr Porter was to propose a settlement figure. In this context, SS also relies heavily upon the fact that DRJ made some recovery from Heat Radiation in respect of their installation.

160. Mr Pearce-Smith correctly observed that there had never been any dispute in principle that compensation was payable. He made the following points:

    i) the size of the compensation was uncertain until the EAHPs had been replaced. It was for this reason that the communications about settlement were not concluded whilst the EAHPs remained in place;

    ii) DRJ was contractually responsible for the delay in replacing the EAHPs. It was during that period of delay, after SS had raised concerns in 2010-2011 that SS undertook the exercise of taking electricity meter readings. It took until the end of 2015 for all the EAHPs to be replaced with ASHPs;

    iii) it was accepted by DRJ that the excess costs should be deducted from the retentions; and

    iv) DRJ used the claim for excess costs in its claim against Heat Radiation (relying at the time, the evidence revealed, upon the expert assistance of Mr Doherty even though it did not reach the stage of him preparing an expert report). Mr Pearce-Smith pointed out DRJ had pleaded the terms of Mr Lewin's email dated 27 November 2009 (which DRJ had simply forwarded to Heat Radiation at the time) in which he talked about needing to be convinced that any alternative to the GSHP should be just as efficient to run.

161. The first difficulty with SS's position, however, is that most of those points are based upon what was discussed at the December 2014 meeting which I have found produced nothing more than an agreement to agree. In the event, those discussions did not operate to produce a binding agreement under which an element of excessive electricity costs could be withheld from the retention. The parties' discussions in December 2014 did not produce an enforceable agreement; not even one with whose incomplete terms might be overcome by the court supplying some subsidiary and inessential machinery, in order to make it effective, in accordance with the principle in *Sudbrook Trading Estate Ltd v Eggleton* [1982] 1 A.C. 444. In these circumstances, the December 2014 meeting is no more effective in providing a springboard for a counterclaim for damages than it is for the purposes of displacing the operation of clauses 2.35, 2.36 and 4.18.3 of the Phase 1 and Phase 2 Contracts.

162. As to the point about DRJ recovering from Heat Radiation, and as I observed at the trial, there is no claim in restitution in these proceedings by which SS might argue that an element of the settlement sum agreed between DRJ and Heat Radiation might be said to represent money had and received to the use of SS (or, through SS, the residents of the units).

163. In any event, regardless of any legal issues that might have arisen on such a claim, the evidence at the trial indicated that it is not possible to earmark a particular element of that recovery from Heat Radiation to the element of running costs. The evidence of Mr Porter, which I accept and is what one would have expected, was that DRJ had to justify the particular elements of its recovery from Heat Radiation to the satisfaction of their solicitors (DAC Beachcroft). He said the claim for electricity costs "*failed*" and that the recovery was in respect of the cost of replacing the EAHPs and ancillary works together with the 15% (in respect of overheads and profit) and interest. His evidence was reinforced by the evidence of Mr Hannon who confirmed that, despite being asked by DRJ's solicitors for assistance on that front in the first half of 2016, he had declined to provide information to assist with the claim against Heat Radiation. One of the questions raised by the solicitors was how Mr Lewin had calculated the figure of £817 from the NIBE case studies. In testimony, Mr Hannon had said "*I did not want to bother John Lewin with it*" and that, in relation to the limited information he did provide to DRJ "*I deeply regret giving [the Claimant's solicitor] that information now*". That position struck me as a somewhat bizarre one to adopt in the light of the common cause which DRJ and SS appeared to share in seeking to recover from the party responsible for fitting the energy-consuming EAHPs but, nevertheless, it is the one that SS and BRH decided upon. It may be that they considered the *de facto* withholding of the retention by SS reduced the incentive to support a claim for the fullest recovery from Heat Radiation.

164. The question therefore arises as to whether there is some other legal basis for recovering the compensation that was recognised to be payable in principle at the December 2014 meeting.

165. The Contract Conditions of the Phase 1 and Phase 2 Contracts (clauses 3.13 and 3.14) did not address the financial consequences of the EAHPs not conforming with the ERs other than by providing that no addition would be made to the Contract Sum and (for the purposes of LADs) no extension of time would be given. However, SS's counterclaim did allege that DRJ's installation of the EAHPs was negligent and involved a breach of an implied term to exercise reasonable skill and care (implied by section 13 of the Supply of Goods and Services Act 1982) and sought damages on those alternative bases. DRJ's Amended Reply and Defence and Counterclaim disputed the implied term, saying that its obligations were as contained in the express terms of the three contracts, and admitted that DRJ owed a duty of care coterminous with its contractual obligations but said that the duty did not extend to the recovery of pure economic loss.

166. Although that last point was not explored in legal argument, I assume that DRJ's position was moulded by the reluctance of the courts to see the "*assumption of responsibility*" principle operate to permit recovery for pure economic loss where the negligence has been in the performance of services under a building contract and the contract itself identifies the extent of the service-provider's responsibility for defects by its applicable terms and warranties: compare *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2012] Q.B. 44, at [67]-[82] per Jackson LJ and [92] per Stanley Burnton LJ. The loss suffered by employer through the defect is the cost of rectifying it which is ordinarily irrecoverable in tort as pure economic loss to which the contractor's duty of care does not extend.

167. In any event, Mr Pearce-Smith did not press his client's pleaded case based upon the alleged implied term or duty of care but instead focused upon the concession that EAHPs were installed in breach of contract. So far as any consequential losses are concerned, however, this simply brings one back to the legally unenforceable agreement of December 2014. Although that agreement in principle did not operate to produce a result which obviated the need for any proceedings over that issue of consequential loss, it did result in the defective EAHPs being rectified by the end of 2015.

168. Even if SS otherwise had available to it a viable cause of action in respect of the heat pumps I would have been unpersuaded by the suggested quantification of damages under it. This observation applies to loss claimed up to the point of replacement of the last EAHP and ongoing losses suggested to be made good by a comparison between the ASHPs and a GSHP.

169. As to the suggested losses up to the end of 2015, I note that when Mr Lewin sent Mr Hannon two tables of figures to support the claim to increased electricity costs, by an email dated 15 December 2014, he said "*I would settle at £20k*". The attachments to his email were described as spreadsheets based upon electricity usage at as 16 May 2013 and another as at 22 October 2014. Mr Lewin had previously sent the figures to Mr Hannon in May 2013, saying they showed the running costs for a complete year and that he would not take further monthly readings. The email of 15 December 2014 described the spreadsheets as "*revised charts attached with the extra cost of overuse added.*" An earlier email dated 12 December 2014 from Mr Lewin to Mr Hannon explained that he had updated those earlier figures "*using figures from the monthly readings taken during the first 2.5 years of occupation*." With figures calculated down to 31 January 2015, they respectively suggested compensation due as at that date of £18,096 or £21,156.

170. Mr Hannon forwarded the revised charts to Mr Porter by his own email dated 15 December 2014, in accordance with the discussion at the December 2014 meeting and said "*I will leave this for your consideration and await your response by 5pm tomorrow*". SS had previously provided DRJ with another spreadsheet, prepared by Mr Lewin, which was based upon figures for the Ecodan ASHPs (manufactured by Mitsubishi Electric) that DRJ had provided to SS and from which he had calculated an annual overspend of £17,387 and total compensation due as at 31 January 2015 of £62,176. Mr Lewin sent this again to Mr Hannon on 12 December 2014. However, it is to be noted that save for the larger Unit 11 and Unit 34 (£866) that spreadsheet was based upon the annual running cost of the Ecodan ASHPs at significantly less than the £800 p.a. (or £817 or £840 p.a.) figure relied upon by SS as a benchmark. It appears that Mr Porter then duly forwarded on all three spreadsheets to his colleague Mike Evans (who was DRJ's Senior Quantity Surveyor).

171. By an email of 24 December 2014 (after some chasing by Mr Hannon) Mr Porter said "*I will not be able to let you have a figure for the electricity usage until the New Year*." He explained that any offer DRJ might make "*will be added to a future claim against other parties and as such our solicitor has to ensure it is fully justified and fair*." DRJ never did provide a figure. I have already explained how later requests from DRJ's solicitors as to how SS had gone about their calculations did not produce the desired clarification. In the claim against Heat Radiation, DRJ pleaded the three

heat pump cost analyses which SS had submitted to DRJ and claimed to have suffered loss in the sum of £62,176.

172. The evidence at trial has revealed that the figures which Mr Hannon passed to DRJ with a view to eliciting a settlement offer were inaccurate and unreliable.

173. Indeed, DRJ went so far as to say that the figures on the two December spreadsheets provided by Mr Lewin to Mr Hannon, and then by Mr Hannon to DRJ, had been fraudulently manipulated. Mr Frampton made this submission on behalf of his client by reference to certain differences between the figures recorded in the spreadsheet provided by Mr Lewin to Mr Hannon in May 2013 and those contained in the revised spreadsheet of December 2014. Mr Frampton pointed to the following:

i) Mr Porter was relatively new to the matter in taking over from his colleague Chris Neil in seeking to agree a settlement figure with SS. As mentioned below, Mr Neil had been asking for sample electricity bills (for one unit) to test SS's position;

ii) the annual use and overall annual electricity consumption figures for Units 1, 2, 7 and 10 on the revised December 2014 spreadsheet differed from and overall were significantly higher than the equivalent entries in the May 2013 spreadsheet;

iii) the "*Cumulative reading on meter changeover in 2013/2014*" for Unit 1 in the December 2014 version (based on meter readings taken on 22 October 2014) had to be incorrect. If the cumulative figure in May 2013 had been recorded at only 5,068 kWh, it could not be 41,080 kWh only a year or so later. The later spreadsheet also noted that "*No. 1 vacant for part period and heat pump turned off*." An unoccupied unit would not involve an annual use of 10,795 kWh as suggested in the spreadsheet; and

iv) Mr Lewin's evidence was that he had prepared the revised figures for the December 2014 spreadsheet by manually transposing the figures rather than cutting, copying and pasting from the May 2013 version. The layout of a keyboard is such that the apparent errors in the later version could not be explained away by some slips of the finger.

174. In circumstances where the December 2014 meeting did not result in the parties agreeing upon a settlement figure for excess electricity charges, by reference to what DRJ says are false figures, I do not consider it necessary to go further than to say that I accept DRJ's submission that the figures presented by SS appear to be wholly unreliable. Mr Lewin himself accepted in cross-examination that there was "*something very odd*" in the figures and "*I have clearly done something wrong*." If it had been necessary for me to quantify a sustainable claim by SS for the recovery of damages in respect of such charges while the EAHPs were in operation, I would not have been persuaded that any of the three spreadsheets produced by SS in late 2014 was a reliable reference point. The discrepancies identified in the cross-examination of Mr Lewin throw all of the figures into doubt.

175. Mr Pearce-Smith said that the 2014 spreadsheets were irrelevant as the claim was based upon the figures from May 2013. In fact, the pleaded figures for loss in respect

of the EAHPs and the ASHPs (see paragraph 149 above) were derived from Mr Lewin's calculations based upon the Ecodan ASHP figures as paragraph 165 of his witness statement (and the materially identical paragraph 164 of Mr Hannon's statement) confirmed. What Mr Pearce-Smith meant was that Mr Scott's expert evidence about excess electricity costs was based upon the accuracy of the readings shown in the May 2013 spreadsheet, the accuracy of which DRJ were implicitly accepting in attacking the accuracy of the later spreadsheets. I return below to this aspect of Mr Scott's evidence.

176. Mr Frampton further submitted that only copies of electricity bills would have shown the true costs incurred and DRJ's Amended Reply and Defence to Counterclaim took that point. They would have shown actual usage and actual cost per kWh of electricity used in each unit. Only two bills in respect of one unit were disclosed by SS in these proceedings. These were for Unit 3 for the period between November 2011 and May 2013. An email from Mr Porter of 6 November 2014 (which included Mr Lewin as an addressee) shows that he understood that Mr Lewin had agreed to supply copies of electricity bills at the December 2014 meeting. In commenting upon points in an earlier email from Mr Lewin of 31 October 2014, in which Mr Lewin said he would be happy to accept the difference between the current and projected costs shown on the Ecodan chart, Mr Neil of DRJ had asked for "*physical copies of electricity bills of a unit of the site to ascertain the excess usage you have quoted is correct. Can we pick unit 4 as a typical example of usage of electricity over the 12 month period."*

177. DRJ said the evidence showed that SS had failed to make serious attempts to obtain any further electricity bills beyond the two for Unit 3. Mr Lewin said he asked for them "*right at the beginning*" at a coffee morning but, when told that 8 or 9 of the residents did not manage their own bills, he appears not to have asked those who did on their behalf (the occupier's relatives or representatives) for copies. Also, despite SS producing a schedule of leases indicating that Unit 1 was first occupied in mid-January 2015 and an email from Mr Lewin to Mr Porter of 19 December 2014 asking for the EAHP in that unit to be replaced first as "*the lady moving in to no. 1 Nynehead Mews is booked to do so on 14 January*", Mr Bailey said in his evidence that the unit had been let on a short-term basis to somebody earlier than 2015. I have already noted that the December 2014 spreadsheet noted the unit's partial vacancy during the relevant period. Mr Frampton observed that SS should itself have had its own electricity bills for Unit 1 if it had been used on a less formal basis prior to the grant of a long lease and at a time when an EAHP was in use.

178. I agree that, in support of a claim to recover increased electricity costs incurred by residents, the most obvious documentary evidence would have been the bills actually paid by them. Their absence means that there was no reliable documentary evidence in support of quantum aspect of the claim.

179. That leaves the expert evidence to be considered and SS's reliance upon the evidence of Mr Scott.

180. Mr Pearce-Smith was not entirely correct when saying that Mr Scott had based his calculations upon the May 2013 spreadsheet rather than any other one. Mr Scott said in his report (and of his Appendices VI and VII) that he had calculated his figures for additional electricity charges "*using actual meter readings*" and had reached a total

figure similar to SS's. In comparison with the excess electricity cost pleaded in the counterclaim, Mr Scott had calculated the excess cost attributable to the EAHPs at £72,693 and that attributable to the ASHPs at £31,704 (the latter down to the date of 31 October 2019 rather than extrapolated over a 10 year period). That last figure was an amended one and a significant increase from the earlier one of £8,640 identified in the original version of the report, before Mr Doherty pointed out an error in its calculation, and the comment about the similarity with SS's pleaded figure was probably more apposite in relation to that much lower one.

181. Mr Scott's report referred to "*the original Excel spreadsheets from which various calculations have been derived to do my own calculations*," noting that within the spreadsheets there were some actual electricity meter readings but "*[u]nfortunately, there are not many recent ones*". He noted that *"[a]ctual Energy Costs for each dwelling would need to be determined by inspection of all of Utility Bills throughout the entire period from first occupancy. It seems unlikely that all of this information would still be available.*" He also noted that, over the years, most residents had switched from the Economy 10 meters which, he said, were beneficial when more energy is consumed at a lower rate during the night but less suitable for the units where energy was being consumed by residents throughout most of the day.

182. It is clear from Mr Scott's Appendix VI that he did use the inflated figure of 12,202 kWh annual use for Unit 1 which appeared in Mr Lewin's December 2014 spreadsheet (though he did not replicate its higher annual use figures for Units 2, 7 and 10). Mr Scott's Appendix V1 otherwise replicated the figures for the other units shown in Mr Lewin's May 2013 spreadsheet as "*overall annual consumption*." However, during his cross-examination Mr Scott also referred to having had access to an Excel file which contained some numbers which supported those he had used. I assume this was the same Excel spreadsheet(s) mentioned in his report.

183. That report not identify any further spreadsheet and DRJ said none had been disclosed or included in the trial bundle. This was obviously an unsatisfactory state of affairs. Nevertheless, he was clear that he had not compiled his figures by selecting from the two different spreadsheets as he said he had access to one which contained all the figures for actual use set out in his Appendix VI. Mr Scott said that he had only become aware of the discrepancies between the May 2013 spreadsheet and the December 2014 spreadsheet (in relation to Units 1, 2, 7 and 10) when Mr Lewin was cross-examined upon them. But he said he had subsequently checked his Appendix VI figures against the other spreadsheet to which he had made reference.

184. I accept Mr Scott's evidence that the relevant figures in his Appendix VI did reflect the content of some further excel spreadsheet information of the kind mentioned in his report. However, doing so does not really assist SS's position in circumstances where Mr Lewin's evidence had already cast doubt over the particular figure for Unit 1 and where the further source of information was not available to DRJ or the court.

185. Allowing for Mr Scott's comment of "*estimated*" alongside in relation to the figure of 12,202 kWhr per year for Unit 1 (itself appearing in a column indicating actual kWhr consumption over the year when the EAHPs were installed), DRJ criticised Mr Scott's adoption of Mr Lewin's suspect figure. The figure had appeared in Mr Lewin's December 2014 spreadsheet in conjunction with a figure of 3,908 for "*annual heat pump consumption*" for Unit 1. Mr Scott's Appendix VII had noted

"*low occupancy*" of Unit 1 after May 2013. Mr Scott accepted in testimony that he should have picked up on the discrepancy.

186. Mr Scott's calculations of predicted heating and hot water energy consumption (expressed in terms of kWhr/year) for a GSHP were based upon the GSHP having an average co-efficient ("**COP**") of performance of 3.6. His calculations for the running costs of such a GSHP were by made reference to the Microgeneration Certificate Scheme ("**MCS**"). Mr Scott explained that an MCS calculation is required in order for an energy user to apply for a Renewable Heat Incentive ("**RHI**") payment in respect of a property and, he said, "*gives a reasonably reliable estimate of heating and hot water energy consumption*." For the purposes of drawing a comparison between what were said to be the actual kWhr/year running costs of the EAHPs and ASHPs, respectively, he said he would expect the MCS running costs of the GSHP to be around 75% of the total energy usage within a residential unit. Mr Scott's "*rule of thumb*" was that electricity for heating would be 75% of total electricity usage. The actual running costs were compared with the grossed up MCS figure with the calculations for the EAHPs being at the average rate of £0.16 per kWhr and the ASHPs at an average £0.18 per kWhr.

187. Mr Doherty criticised Mr Scott's use of the MCS figures. He said it was not a reasonable way of providing a benchmark against which actual energy use could be compared or criticised. Mr Doherty's evidence was that the only approach which comes reasonably close to providing a reliable benchmark was Dynamic Thermal Simulation or Dynamic Thermal Modelling ("**DTM**") but even the result may have a margin of error of plus or minus 15%. DTM incorporates the fine detail of building fabric properties and dimensions which are then applied to data in relation to occupancy, use of appliances, control systems and prevailing weather conditions. Mr Doherty said that a DTM-based analysis would, in the present case, have require temperature readings from a sample of, say, three units to be taken over a period of several months. He recognised that this was a relatively costly and time-consuming exercise, involving specific software and a detailed knowledge of how the building is actually being used (or is to be used).

188. Mr Doherty explained that, by contrast, the MCS uses a traditional approach based upon the number of 'Heating Degree Days' ("**HDD**") within a relevant period of time. The number is in fact an average one based upon the variance over time of an outside base temperature (of 15.5°C) relative to the temperature required inside a room or building. The MCS calculator involves a tabulated value of HDD which assumes a particular inside-outside temperature difference. When multiplied by a heat loss co-efficient for that room or building the approximate energy usage for the relevant space can be calculated. The MCS relies upon pre-set temperatures and occupancy and involves estimates based upon average weather conditions rather than actual ones, it is aimed at rating the building and not the energy consumption by its occupants. It is more of a building design tool than an analysis tool, producing rough calculations for energy usage based on the standard inputs.

189. Mr Doherty said that even if the fixed parameters within the MCS calculation could be changed, its accuracy for predicting energy use within the building over a period of time would still be poor compared with DTM. He said that he had no doubt that Mr Scott would appreciate the shortcomings of estimating energy usage using the MCS as opposed to DTM. In fact, by overriding the standard inputs in the MCS, Mr Doherty

produced a second MCS calculation in Appendix 2 to his report based upon the design temperature and ventilation rate specified in the ERs. This showed that the heating load and heating energy used would be greater with the design temperature requirements of the ERs than with the lower pre-set temperatures reflected in his Appendix 1 (based on the standard inputs). Mr Doherty had calculated that applying the design temperatures in the ERs would increase Mr Scott's figures by 41% (or by 58% if elderly residents were heating rooms to 24°C degrees or 68% if they were doing so by leaving the heating on all day).

190. Mr Scott admitted that he had used DTM when advising clients on predicted electricity costs but had never used the MCS to give accurate predicted figures.

191. Having considered and assessed the written and oral expert evidence at trial I have formed the clear conclusion that Mr Doherty's evidence is to be preferred. Even though it would have involved greater expense and effort on the part of SS in seeking to prove their case on electricity costs, DTM should have been used in any attempt to compare what might have been achieved using GSHPs. Mr Pearce-Smith noted that DRJ had not offered an alternative analysis based upon DTM and instead had, through Mr Doherty, focussed only upon a criticism of reliance upon the MCS. But the claim to recover excess electricity costs was not DRJ's to prove.

192. In the light of my conclusion that the evidence of Mr Doherty is to be preferred in relation to the unreliability in using the MCS as a starting point for measuring those costs, it is unnecessary to dwell too long upon other points relied upon by DRJ in challenging SS's case. However, each of the following points provide further reasons for doubting the soundness of its approach to quantum:

    i) Mr Scott assumed that the floor area Unit 3 was larger than it actually appears to be (129m² rather than 111m²).

    ii) He also assumed that the heat pumps were to produce hot water as well as room heating. I have already mentioned that Mr Lewin's estimated annual running cost of £800 for an EAHP assumed that the cost of providing hot water was also covered by it. However, Mr Doherty was in my view clearly correct to interpret the Phase 1 ERs (and an attached "*suggested quotation*" for a GSHP which expressly stated that the GSHP would provide heating only and would not be connected the hot water system) as involving the use of an immersion heater for hot water. In their general description of the design brief, the ERs referred to individual GSHPs "*supplemented by electric immersion heaters*". Mr Doherty accepted that a GSHP can be used to provide hot water but said that it would need to be supplemented by an immersion heater to provide hot water to the higher temperature required (and more quickly). He pointed out that, without needing also to heat hot water, a heat pump could operate at lower temperatures and more efficiently. However, the simple point is that Mr Pearce-Smith was wrong to interpret the ERs as if they nowhere suggested that the GSHP would not also be used to provide hot water, either all of it or most of it. The flaw in Mr Scott's approach (and in Mr Lewin's interpretation of the NIBE case studies) is that no allowance at all has been made for the running costs of an immersion heater, connected to the Economy 10 meter, which was specified in the Phase 1 ERs.

iii) Mr Scott's rule of thumb in taking the heating costs at 75% of overall electricity costs was just that and (as appeared from the figures for Unit 1 in his Appendix VI when compared with what Mr Lewin's May 2013 spreadsheet recorded as having been used when the unit was not even occupied) appeared to have significantly underestimated the amount of electricity consumed by other appliances. Mr Scott accepted in cross-examination that there was no direct link between heating costs and electricity usage for non-heating appliances; and that the proportion of total energy bills referable to the latter would depend not only upon the type of heating system in place but also the particular lifestyle of the household. The crudeness and fallibility of the 75% estimate undermined the reliability of his exercise (in that appendix) of grossing up the MCS figure for heating costs to produce a predicted kWh/year figure for each unit against which (presumed) actual usage could be measured.

iv) Mr Scott's Appendix V involved predicted running costs of the EAHPs (and ASHPs) based on a charge of £0.14 per kWhr. Doing so produced a set of figures which (save in relation to Unit 11) were less than the £800 p.a. figure which Mr Lewin had assumed by reference to the NIBE case studies. I have already observed that Mr Scott could not see where that figure had come from and said that the cost of £0.09 per kWhr which lay behind it was unrealistic. Although he therefore said there was no basis for seeking to draw any proper link between his Appendix V and the £800 figure, the fact remains that the alternative predicted costs in that appendix indicate that Mr Lewin must have been assuming higher rates of energy consumption (at £0.09 per kWhr) than Mr Scott had (at £0.14 per kWhr). Mr Scott offered no real explanation of the difference between his predicted figures for EAHPs and ASHPs and his actual figures. As Mr Frampton observed, one explanation is simply that his predictions were too low.

v) Mr Scott's Appendix VII (in relation to the ASHPs) involved calculations of annual average kWh consumption for the period since May 2013, at least for those units where there was no changeover in the meter. That approach takes no account of the fact that EAHPs remained installed for more than two years after that date. In the same appendix Mr Scott also did not use what the May 2013 spreadsheet indicated was an actual reading for Unit 1 (instead of taking that figure of 2,386 kWh reflecting low occupancy he took the higher figure of 5,136 kWh for Unit 2 on the basis that they were comparable) and that for either or both of Units 9 and 10 he assumed that the consumption was similar to Unit 6 as no actual readings were available.

193. SS's problems in relation to quantum do not end there. The claim for damages in respect of excessive electricity costs was advanced by reference to agreements which SS, either alone or with NCL, said it had reached oral agreements to compensate residents of the units for having incurred them. The Amended Counterclaim referred to Mr Lewin, acting on behalf of SS and NCL, having entered into oral and informal agreements with residents, from time to time, to obtain such compensation. This was said to have been agreed so as to deter them from bringing claims against NCL or SS and against the background of the agreement in principle reached with DRJ at the December 2014 meeting. SS said that, pending resolution of the issue of

compensation, residents were provided with free local transport and refreshments in the orangery at the Nynehead complex. A letter dated 25 January 2016 from Mr Lewin addressed to "*All Mews Owners*" made reference to this arrangement.

194. Mr Porter's evidence was that Mr Lewin had said at the December 2014 meeting that SS had already made compensation to residents through a waiver of some service charges and/or management fees, causing Mr Porter then to ask for proof of the relevant amounts, and mention of this had been made in a letter from Stephens Scown LLP dated 9 March 2017 responding to the letter of claim. However, Mr Pearce-Smith confirmed during his cross-examination of Mr Porter that the claim was not being pursued on that basis.

195. By a series of Part 18 Requests, made before the amendment of the counterclaim, DRJ sought clarification of the oral agreements relied upon by SS. An initial response on 15 August 2018, was that it was a premature request for evidence and that details of the agreement (singular) with the owners would be provided in evidence in due course. An amended response of 14 February 2019 (after DRJ had pressed for a compliant response) then appeared to state that there were no oral agreements with the leaseholders and the Defendant's liability was only under the original sales contracts for the long leases of units. After an order that SS should disclose any relevant documents relied upon, on 28 May 2019 SS gave its re-amended response which attached the contracts for the sale of Units 1 and 11 and said it understood that all other sales contracts had been destroyed. The next day DRJ pointed out that the sales contracts were between NCL and the leaseholders and put SS notice that it had to amend its pleaded case.

196. In the event, the witness statements served by SS in October 2019 did not make any reference to the agreement with the owners. It was only Mr Lewin's second witness statement dated 13 December 2019, made in support of an application to amend the Defence and Counterclaim with an explanation of the position of NCL and in response to DRJ's application for summary judgment indicating that any claims by leaseholders under their sales contracts would be time barred, which reverted to the pleaded oral agreement which "*consisted of a series of individual discussions, meetings and correspondence with residents*." Significantly, aside from the interim provision of free local transport and tea, coffee and biscuits, Mr Lewin said that on behalf of SS and NCL he had confirmed to residents that "*in principle, [SS/NCL] would compensate the residents for the excessive energy costs, once compensation had been received from [DRJ]*".

197. In cross-examination, Mr Lewin confirmed that "*there was not a binding agreement for me to compensate them, no*". Instead, the agreements were "*all personal assurance and understanding*" which was based on a "*duty of care*" or "*moral duty*" which he felt as an individual, including due to the fact that his wife had acted on behalf of NCL in promoting sales of the units.

198. This evidence confirms that there was no binding agreement reached by SS or NCL, or both, with residents to compensate them in respect of electricity charges. The conditional nature of the arrangement was clearly a reflection of the discussions between SS and DRJ which had given it support but the end product was no more contractually binding than the agreement in principle reached at the December 2014 meeting.

199. Indeed, unlike the December 2014 meeting, any informal discussions with leaseholders appear to have taken place without reference to any extant contractual rights or obligations and the legal concepts of an intention to create legal relations and consideration appear to have been some distance away from what Mr Lewin said were discussions at coffee mornings with residents, some of whom had dementia and whose electricity bills were dealt with by family members or representatives. There is no evidence of any resident presenting a formal claim, or anything approaching one, against SS.

200. Even if SS's claim against DRJ could be supported by its own quantified or quantifiable liability to residents (or to NCL on behalf of residents) then, as Mr Frampton observed, it would not only suffer from the lack of supporting electricity bills – leaving only what I have found to be the unpersuasive factual and expert evidence addressed above – but also the need to address certain key points in reasonable mitigation of its own loss. DRJ would not be liable to unreasonable settlements reached with residents.

201. Therefore, SS would have been obliged to test the claims in respect of Units 2, 4, 5, 7, 8 and 9 where there has been a transfer of ownership by the original leaseholder (in 4 cases, if not all of them, after the December 2014 meeting). It is not immediately obvious why a second or subsequent leaseholder coming to his property, with an ASHP (with its attendant running costs) installed, should have a claim against SS fixed by reference to a more efficient GSHP. Also, I have already mentioned that Mr Lewin was anxious that Unit 1 should have an ASHP installed before the lease of that unit was granted in January 2015. The leaseholder of Unit 1 cannot have any claim in respect of a defective EAHP.

202. The evidence also showed that the date of the installation of the ASHPs was such that leaseholders benefited from payments under the Renewable Heat Incentive Scheme. Mr Lewin confirmed as much in cross-examination. They would not have done so if a GSHP had been installed at the outset. In a Part 18 Response dated 10 March 2020 SS had said that it was "*not known*" whether any of them had. At the meeting on 29 July 2014, held to discuss solutions to the heating problems, NIBE's representative had said that the RHI payment to each leaseholder might be between £4,000 and £5,000 over a 7 year period. SS would have been obliged to raise any RHI payments to leaseholders as an offset against any compensation for excess electricity charges.

203. These particular aspects of quantum would have fallen to be addressed by SS under whichever viable route to compensation was open to it, if liability on the part of DRJ could have been established.

204. No doubt because DRJ's successive Part 18 requests had served to highlight both that it was NCL (not SS) who had granted leases of the units and that the agreement to compensate leaseholders was an informal one, and in the face of DRJ's application for summary judgment, SS amended its Defence and Counterclaim in February 2020 to plead two further, alternative routes to the recovery of losses. The first was an alleged development agreement between SS and NCL ("**the Development Agreement**") and the second was reliance upon the principle of transferred loss explained above. These were not confined to recovery of loss in respect of excessive electricity charges but I now address them in that context.

205. The Development Agreement was said to have been orally agreed between Mr Bailey and Mr Lewin acting on behalf of both SS and NCL in September 2008. The recently pleaded terms of the agreement included the express one that SS would carry out the Nynehead Development on behalf of NCL on the basis that NCL would pay SS the cost of developing the Site plus a fee based on actual construction costs. One of the alleged implied terms of the Development Agreement was that SS would indemnify NCL against losses suffered by NCL against losses suffered by NCL by reason of any defect in the development works.

206. For reasons already explained above, it has not been established that NCL has suffered any such loss in the form of a legal liability to leaseholders in respect of electricity costs. Mr Lewin said he had been acting on behalf of both SS and NCL when reaching what I have found only to be a conditional, non-binding agreement. In a witness statement dated 20 January 2020, and served in opposition to DRJ's summary judgment and strike-out application and in support of the amendment of the Defence and Counterclaim, Ms Barrett of SS's solicitors had confirmed that "*if the Defence and Counterclaim is struck out, the people most affected by the Claimant's breaches of contract will not be compensated.*" Even though SS had by that stage indicated its reliance upon the Development Agreement, this indicates that NCL does not recognise a free-standing liability to leaseholders. The corollary of NCL not having already compensated shareholders would appear to be that any claim by NCL against SS would now be time barred.

207. However, I regard the prospect of such a claim by NCL against SS as entirely fanciful. That is because I have not been persuaded that the two companies, by their common directors, entered into the Development Agreement in September 2008. There are a number of reasons for this.

208. First, there was no mention of it until late 2019. Secondly, the witness evidence in support of the Development Agreement was extremely vague. Although Mr Bailey's witness statement dated 22 October 2019 (though not Mr Lewin's of the same date) had referred to SS carrying out the development for NCL for a fee of 10%, it was only his second witness statement dated 13 December 2019 which said "*I now realise that the above arrangement amounted to a 'development agreement'*". This indicates that the directors did not intend to commit the respective companies to a contractual relationship. Mr Bailey's oral evidence on the nature of the discussion was vague and he could not recall what words had been used by them. A Part 18 response had indicated that the gist of the words relied upon was that the two companies would undertake the development in the same way as two earlier ones they had carried out (the terms of which were not explored). Thirdly, and linked to that last point, there was no documentary support for the Development Agreement. Mr Bailey's second statement said that he and Mr Lewin had not considered there to be any need to formally document it. But the entry into such an agreement, with inter-company obligations, ought to have been recorded in board minutes for both companies. As Mr Frampton pointed out that is a requirement under section 248 of the Companies Act 2006. Nor were any company accounts, or inter-company ledgers, produced to support the existence of the fee arrangement. Lastly, no evidence was adduced to show NCL pressing SS to bring the claims advanced in these proceedings, even though one of the reasons relied upon in the Amended Defence and Counterclaim for

the implied term as to indemnification is that "*if there were no such term, the contractors would have no liability to pay damages for [their] breaches of duty*."

209. I therefore turn to SS's reliance upon the principle of transferred loss.

210. The first point to note about the case on transferred loss is that I have real doubt as to whether SS can assert the existence of a legal black hole when it has advanced a case based upon the exposure of SS and/or NCL to the claims of leaseholders. I have addressed above SS's case based upon an oral agreement to indemnify them against electricity charges. One of the reasons pleaded in support of the implied term of the alleged Development Agreement was that, in respect of the units sold by it, "*NCL would be exposed to the risk of breaching its contractual or other duties to the purchasers of the leases of the units*." The assertion that the leaseholders had rights capable of being enforced against the companies is at odds with any expectation of compensation disappearing into a black hole. That is so even if there would now be a good limitation defence to any assertion of their legal rights in proceedings. SS should not be permitted to approbate and reprobate, or blow hot and cold, on the question of whether or not the leaseholders have or had an available route to redress. However, I have concluded that any agreement reached with the leaseholders by SS was conditional and unenforceable by them and, the nature of the suggested claim against NCL under the leases not having been explored at trial, I would have been reluctant to have rejected an otherwise viable transferred loss claim by reference to this point alone.

211. However, in my judgment, SS's case on transferred loss does fall foul of the requirement identified by Coulson LJ in *Nederlandse* as "the known third party benefit". As Mr Frampton highlighted, the parties expressly agreed in all three Contracts (at clause 1.6 of the Phase 1 and 2 Contracts and clause 1.5 of the Engine House Contract) that: "*nothing in this Contract confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it.*"

212. Mr Hannon said that he completed the relevant section of the contracts which provided for any purchaser, tenant or funder to be identified by way of an exception to that provision. That section stated that purchaser and tenant rights ("**P&T rights**") were only confirmed on those sufficiently identified within it. Mr Hannon's evidence was that he made a deliberate decision not to confer on the leaseholders third party rights or the benefit of collateral warranties so as to avoid them being left to bring their own claims against DRJ. He said he was following housing association practice in this regard. So far as NCL was concerned, he initially said in cross-examination that he was not sure of the relationship between SS and NCL, though he did then say that he assumed NCL owned the freehold. His witness statement was clear in saying that he was appointed by NCL in 2005 ("*a subsidiary of [SS]*") to give advice on a possible development at Nynehead Court. He then explained how, in 2009 and after the grant of planning permission "*I was also instructed by John Lewin that the employer for the works would be [SS] who would carry out of the project for NCL the developer and landowner*." NCL and Mr Hannon were therefore aware of an ownership interest that could have justified NCL being named as a beneficiary of P&T rights.

213. Reverting to the owners of the units, and looking at the position at the time of the Contracts, in my judgment it cannot be said that the parties had a common intention to

benefit future leaseholders of the units. Clauses 1.6 and 1.5 respectively were express contractual provisions amounting to a positive disclaimer of the suggested third party benefit. To put it another way, they constituted a contractual agreement as to the factual position which is sufficient to support a contractual estoppel against the existence of knowledge of any such benefit. In *Swynson*, Lord Sumption observed that the principle of transferred loss is an exception to the law of obligations. When the parties to the contract have specifically addressed the lack of third party entitlement, and curtailed obligations accordingly, I can see no proper basis for overriding their agreement.

214. I would also have rejected the case on transferred loss on the basis that, as Mr Frampton submitted, the claim in respect of electricity costs represents a secondary, consequential loss akin to a claim for loss of profits. I say immediately that, in the light of the tentative observation by Coulson LJ in *Nederlandse*, at [78], about the potential difficulty in excising that type of claim from the principle of transferred loss, my decision to do so would probably have been worthy of consideration on appeal had it been determinative of the outcome of the claim and not just the last in a series of insurmountable obstacles faced by SS.

215. However, although Lord Browne-Wilkinson in *Panatown* addressed the broader ground by reference to "*the physical or pecuniary damage sustained by the third party*", that case and the *St Martins* case involved the third party acquiring ownership of a defective property requiring remedial work. In the present case, there is no outstanding physical defect requiring remedy and I have highlighted that the "defect" has been presented in the pecuniary form of excessive electricity costs. The claim in respect of excessive electricity charges is one for recovery of pure economic loss.

216. To permit those to be recovered by SS under the principle of transferred loss - when as the contracting party (or representee and/or warrantee) SS has not itself suffered the loss because it has not paid the electricity bills – would in my judgment involve an unjustified extension of the principle of transferred loss. Again, the principle of a transferred loss is (per Coulson LJ in *Nederlandse* at [75]) a narrow exception to the rule that a party can only recover for a loss it has suffered. In the context of a building contract, I read that observation in the light of the general rule (see paragraph 166 above) that it is the contractual terms, and not any wider non-contractual duty of care to avoid economic loss, which will regulate the remedying of defects and identify the recoverable heads of associated loss.

217. On SS's case, and in the light of my finding that the installation of the ASHPs cured the defect in the ASHPs, it (or rather NCL) has transferred to the leaseholder a non-defective property whose ownership carries with it an appendant claim to economic loss (or, less "profitable" ownership). A decision which permits SS to recover such economic loss for their benefit seems to me to be tantamount to saying that DRJ not only had contractual obligations to SS in relation to the remedying of defects but did owe a wider and independent duty of care to avoid such loss. I do not see any good reason why DRJ should be treated as having come under such a duty, because ownership of the units has subsequently been transferred to them, when it would have owed no such duty to SS.

218. Any suggestion that it is the alleged representation by DRJ about the performance of the EAHPs, which survived any contractually compliant remedial work through their

replacement by the ASHPs, which sustains the claim for the benefit of third parties would take SS well outside the principle of transferred loss. The principle is concerned with filling a legal black hole when the conferment of a remedy for the defendant's *breach of contract* requires it. It is not to be used to plug any deficiencies in a claimant's case in relation to inducement and loss in a misrepresentation claim.

219. For all the reasons given above, I conclude that SS's claim in respect of the heating pumps fails on all issues of liability and quantum.

Carpets

220. I now address the counterclaim in relation to carpets because along with next topic of allegedly defective insulation they have been linked with the heating pumps in support of the claim for recovery of excess electricity costs, both past and anticipated. In addition, SS says it has agreed with the owners of the units to replace the carpets and underlay "*with the correct TOG ratings*" at an estimated cost of £46,237. That is the previously pleaded figure of £38,530 (advanced in the factual and expert evidence relied upon by SS) with VAT added. The VAT registered status of SS (and NCL) means that there is no basis for recovery from DRJ of damages to reflect the VAT element when it can be offset against VAT due on outputs.

221. By its Part 18 response dated 10 March 2020, SS confirmed that the agreements it had entered into with leaseholders in respect of the JKW, carpets and alleged defects in the insulation were "*conditional on recovering compensation from [DRJ] in respect of such costs*."

222. The ERs did not specify any particular TOG rating for the carpets.

223. However, it was part of the design of the development that the units would have underfloor heating. DRJ contracted with Mec-Serv Ltd ("**Mec-Serv**") to supply the underfloor heating systems. By their specification for the underfloor heating, Mec-Serv stipulated that "*where carpet and/or underlay is to be used the thermal resistance of both should be no greater than 0.15 W/m²K (1.5 TOG). Confirmation from the manufacturer should be sought*."

224. SS complains that the carpets and underlay fitted by DRJ in Units 1 to 10 had a combined TOG rating of 3.4 and those in Unit 11 had a rating in excess of 1.5 TOG.

225. DRJ accept that they fitted a thick, high quality 42oz carpet in Units 1 to 10 and the combined TOG was 3.4. In relation to Unit 11, the carpet and underlay had a combined TOG rating of 1.9 TOG.

226. The allegation is that, in respect of the carpets and underlay, DRJ failed to carry out and complete the contract works in a proper and workmanlike manner. Mr Pearce-Smith submitted that DRJ cannot have been operating in a good workmanlike manner when supplying carpets which significantly exceeded the design of its subcontractor (for which it assumed design responsibility under the Phase 1 and Phase 2 Contracts); and the supply of overly thick carpets was contrary to the requirement in the ERs to provide economical, low-energy accommodation.

227. It was common ground between the parties that Mr Lewin had chosen the carpets for Units 1 to 10 (I address the separate choice of carpet for Unit 11 below) from a range of samples. However, the combined TOG rating of carpet and underlay does not appear to have been addressed at the time.

228. The short answer to SS's case on the carpets is that I accept DRJ's case that it offered to replace the carpets in Units 1 to 10 in a telephone conversation between Mr Jones and Mr Lewin on 11 July 2012. In his witness statement Mr Jones said he offered to replace the carpets free of charge:

> "*I personally made the offer to Mr Lewin – on the phone on 11 July 2012. I phoned him as Jones had not received a payment due of £32,587.16. Mr Lewin complained about the TOG rating of the carpet and I reminded him that he had selected what I would describe as good quality heavy carpet. I told Mr Lewin that I would take up the heavy carpet and replace it with a thinner one (which would have a reduced TOG rating) but he said he did not want to do that. I suspected that the residents would not want their carpets taken up in any event*."

229. Mr Jones then exhibited an email which he then received that same day from Mr Lewin. In relation to their discussion about carpets, and referring to a snagging list of 9 July 2012, this said: "*We accepted that the TOG rating concern (para 65) is the only item that may not be possible to resolve within the stated time frame and we can discuss options further in due course*."

230. SS did not address this offer or any suggested inadequacy in it (which was not raised at the time) in its Amended Defence and Counterclaim and Mr Lewin's witness statement did not address it. The cross-examination of Mr Jones proceeded on the basis that there had been no such offer ("*The truth is you didn't make an offer*"). However, Mr Jones was firm in his recollection:

> *"I offered to replace them carpets… I said I will replace them carpets, if you want me to come and take them lovely carpets up and put a cheaper, thinner carpet down, I haven't got a problem with that, I will do that because there is still value in the existing carpets. That conversation happened and in that conversation I offered to replace them carpets at that time. John never took that offer up at all*."

231. Crucially, the later testimony of Mr Lewin confirmed an offer had been made by Mr Jones, albeit in robust terms:

> "*Alright then I'll take the effing carpets out and put a cheaper one in*."

232. I do not accept Mr Lewin's suggestion that this was not a sensible offer or, if taken up, would not have led to underlay in Units 1 to 10 also being addressed. Mr Lewin's email of 16 June 2012 (mentioned below) had just set out at some length, in relation to carpets and underlay, the basis for his expectation of an early proposal from DRJ to remedy the position.

233. Mr Lewin never followed up his email of 11 July 2012 with a decision to go ahead with the replacement of the carpets. In his letter to all mews owners dated 25 January 2016 Mr Lewin told them that SS were chasing DRJ to act upon the incorrect TOG

rating of the carpets and noted that additional electricity costs will be incurred until the necessary remedial works were completed. There is no contemporaneous evidence to support that statement. In an email dated 2 February 2013 to Mr Hannon (copied to Mr Evans) which focused principally upon the defective EAHPs, Mr Lewin said "*[w]hilst it was acknowledged that the TOG rating of the floor coverings was too high for the installed system to operate cost effectively, this was to be left unattended for the time being ….".* Mr Lewin accepted in cross-examination that he had not requested DRJ to replace the carpets after the ASHPs were installed.

234. As to the carpet in Unit 11 (covered by the Engine House Contract under which DRJ had no design responsibility), email exchanges between Mr Lewin, Mr Hannon and Mr Evans of DRJ in June 2012 show that Mr Lewin knew and approved of the proposal to fit carpet and underlay with a combined rating of 1.9 TOG. He did so in circumstances where his email of 16 June 2012 was raising issues about the combined TOG rating of 3.4 in Units 1-10, a month before DRJ's offer to replace them (in forwarding the email to Mr Evans, Mr Hannon's email of 18 June 2012 said "*DRJ need to propose a solution to this ASAP if further high energy bills are to be avoided*.").

235. Mr Lewin's email of 16 June 2012 concluded by saying that before he accepted any further valuations he needed to "*know and approve: 1. What underlay and carpeting is to be used in the Engine House, 2. What is to be done to remedy the faulty installations in Plots 1-10, I expect an early response*."

236. Mr Evans' email of 21 June 2012 in response said he had spoken to Mec-Serv's representative who had confirmed that:

> *"…. as long as the tog rating is below 2.0 and the water temperature is set at 50C at which it is designed to be on this system the unit within their design specification for this property. In order to achieve this we propose to use Roma underlay which is specifically designed for underfloor heating with a tog rating of 0.7 and then the 32oz Comar Oaklands with a tog rating of 1.20 tog which gives an overall tog rating of 1.9 which Mec Serv will not in any [sic] effect [sic] the efficiency and operate within their design criteria which I trust you [sic] is acceptable* to you."

237. Mr Lewin's email of 16 June 2012 said he had been "*informed by three independent sources that underfloor heating is normally designed for use with carpet and/or underlay with a minimum thermal resistance of 2.5 TOG*."

238. Again, in relation to Unit 11, SS's pleaded case ignores the fact of discussions in the summer 2012 and that the carpet and underlay for that property 11 was specifically approved by it.

239. SS case on liability in respect of the allegedly defective carpets, requiring to be remedied, therefore fails at the first hurdle.

240. Despite the passing of 8 or 9 years from practical completion, SS has not replaced the carpets and sought to recover the cost from DRJ. I have already noted its position that its agreement with leaseholders for the replacement of carpets is conditional upon recovery of the cost from DRJ. The Amended Defence and Counterclaim refers to

NCL's exposure to claims by residents for "*breach of contract*". But SS has not explained the basis of suggested liability. Nor has it explained how, in circumstances where only the sale of Unit 1 took place within the last 6 years, such claims would not be time-barred. The sales contract for that unit excluded liability for any misrepresentation save for written statements made by NCL's solicitors which were not susceptible of independent verification by search and enquiry of the competent authority. SS's Part 18 response of 10 March 2020 stated that it did not know what representations were made by the solicitors. There is no evidence of any leaseholder pressing his "claim" with a request for the replacement of the carpet.

241. As for a second or third leaseholder of a unit agreeing to purchase with an ASHP installed, it is difficult to see how he would have a claim for loss reflecting the need to change the carpets as fitted. In fact, one photograph in the trial bundle (of Unit 3) illustrates that it is quite possible that the carpet fitted by DRJ may subsequently have been removed by a leaseholder in favour of other floor covering, at least in certain rooms. DRJ raised this as an issue in the Reply and Defence to Counterclaim in the context of putting SS to proof of the area of carpeting required to be replaced. SS has failed to address such points. In relation to the removal of the carpet since the NCL sold the units, the response was simply that neither SS nor NCL had replaced any carpet.

242. Mr Pearce-Smith submitted that, if the carpets have been shown to have been installed in breach of contract, then the cost of their replacement may be awarded. He said that it was not unreasonable to award that cost even if the resident chooses not to replace the carpet and that the court looks to the position as if the contract had been properly performed. That general rule in respect of damages for breach of contract chimes with the loss of the "*performance interest*" which underpins the broader ground within the principle of transferred loss. I understood that to be the basis for SS's suggestion that, by contrast the ongoing electricity costs associated with a unit, it ought to be the original residents who should be compensated in respect of the cost of replacement carpet. However, that suggestion simply highlights the danger in the court proceeding upon an *assumption* of loss, which is at risk of falling into a legal black hole, when there may be none at all. A leaseholder who has already taken out the allegedly defective carpet in favour of some type of floor covering (eg. wooden floor and/or rugs) has no interest in the cost of replacing the carpet. And, unless his onward sale price was reduced by a specific amount to reflect the presence of a defective carpet, an original leaseholder who has since sold his unit would only profit by receiving the cost of a replacement which is never going to be made.

243. As Mr Frampton pointed out, relying upon *Ruxley Electronics v Forsyth* [1996] A.C. 344, at 357-359 and 372-3, and *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates* [2007] EWHC 2546 (TCC), at [95(c)], the absence of any intention to replace the carpets is relevant to any decision to award damages on the basis of a need to replace them, just as an assessment of the reasonableness of their proposed replacement many years after they were originally laid would also be relevant. Of course, a denial of damages fixed by reference to the cost of replacement does not preclude an award of damages for the diminution in value of the property burdened by an unrectified defect but here there is no evidence of that in relation to the units.

244. The same goes for NCL. Even if SS had established the existence of the alleged development agreement with NCL, it has not been shown that NCL has suffered any loss in its own right. There is no evidence that NCL sold the units in the first place on the basis of a discounted price which reflected the installation of the "defective" carpets; and any suggestion that it did so would be at odds with SS's case that it (SS) has reached an agreement with the owners of the units (albeit a conditional one) which reflected exposure to a claim by them for loss and damage. They could only have suffered such loss (in respect of the cost of carpet replacement) if they paid NCL an undiscounted price.

245. In the circumstances, it is not necessary for me to reach any decision upon the appropriate allowance to be made for the cost of replacing the carpet. Mr Lewin said that SS had estimated the cost of replacing the carpet (in all areas where it had originally been fitted) at £38,500. Mr Squair said this (or rather the actual pleaded figure of £38,530) appeared to be reasonable and, in addition to allowing for labour costs of removal of the old carpet and fitting of a new one (over an assumed area of 985m², the area for which DRJ had originally quoted) said a price of £35 per m² for the replacement carpet and underlay was reasonable. However, Mr Sealey said £25 per m², including fitting, was more reasonable. As that was the rate allowed in the ERs and was supported by the RICS Building Cost Information Service abstract (£24.89 per m²) I would have favoured Mr Sealey's figure of £25 per m², plus the £3 per m² allowed by Mr Squair for removal of the old carpet. The actual area for any replacement of carpet would have remained to be determined. As SS and NCS are both VAT registered for the purposes of reclaiming that tax, the revised claim for VAT would not have been justified.

246. So far as the recovery of additional electricity charges is concerned and what SS acknowledges to be the conditional nature of the agreement with leaseholders results in the same difficulties as arise out of what I have found to be the similarly conditional nature of the agreement to compensate them for the running costs of the heating pumps.

247. And, for the same reasons as given above in relation to the running costs of the heat pumps, I would also have rejected any claim to recovery of electricity costs referable to the TOG rating on the same grounds.

248. In any event, the expert evidence in relation to the extra energy required to overcome the thermal resistance of the carpets fitted by DRJ in Units 1 to 10 indicated that the additional costs would be relatively small. Mr Scott's report made the self-evident point that the TOG rating of 3.4 had the effect of increasing the thermal resistance and preventing the heat getting into the room.

249. Mr Squair made the same point. He referred to BS EN 1264 advising a maximum thermal resistance of 1.5 TOG for any covering laid on a heated floor but he also referred to a study undertaken by the Underfloor Heating Manufacturers Association (in conjunction with the Building Services and Research and Information Association) which found that carpet and underlay value of 2.5 TOG had little effect on the functioning of underfloor heating. It also made the obvious point that the thermal resistance of a carpet will reduce with its wear and tear over time. That is relevant to this case given the passage of time. Mr Sealey referred to the same study's conclusion

that published TOG values for woven carpet with underlay over-estimated thermal resistance by approximately 1.0 TOG.

250. Mr Squair said that the additional 0.9 TOG value of the carpets fitted by DRJ (over the 2.5 TOG referred to in the study) would have increased the response time of the heating system and led to significantly increased energy use. Mr Sealey did not agree and said that the increase would be nominal.

251. Mr Doherty agreed with the observation about thermal resistance (pointing out that TOG is actually a unit of measurement of thermal resistance) but said that the likely order of magnitude of their effect in terms of increased electricity consumption was a couple of percent. Mr Doherty said a more precise calculation would require detailed knowledge of the flooring and pipework, and would still rely upon a number of assumptions, which he had not undertaken in the light of Mr Scott's adoption of the MCS calculation rather than reliance upon DTM.

252. Had it been necessary to do so I would have accepted the evidence of Mr Doherty that, at least when fitted with their TOG rating as new, the carpets and underlay would have increased the electricity bills by up to 2%. No evidence was in fact adduced by SS of electricity bills or meter readings (prior to June 2012) for those residents in occupation before DRJ offered to replace the carpets in July 2012. Although I consider it reasonable to assume that was still their TOG rating at the time of that offer (three of the units had only recently been sold and two more had yet to be sold) SS cannot maintain a claim which ignores the fact that it did not subsequently take it up.

253. For that and the other reasons set out above, SS has not made good its counterclaim in respect of the carpets.

Insulation

254. Like the claim in respect of the carpets, SS's claim in respect of allegedly defective insulation at Nynehead Court feeds into the claim in respect of owners' excess electricity charges and carries with it a claim for remedying the alleged defects in the VAT inclusive sum of £14,160 (though, as for the carpets, the VAT element appears to be unjustified as an element of alleged loss).

255. That cost of remedial work, in that estimated sum, is alleged to be one that NCL has agreed with the owners of the units to incur. However, I have already noted that SS has clarified the conditional nature of that agreement.

256. As with the claim in respect of the carpets, SS's case against DRJ on liability is that DRJ breached its duty to carry out and complete the works in a good and workmanlike manner. More specifically, Mr Pearce-Smith said, SS was entitled to require DRJ to install insulation in accordance with its own drawings, which required the insulation to be fitted tightly between the rafters of the units.

257. The actual pleaded case against DRJ appears from paragraph 55.5 of the Amended Defence and Counterclaim and is as follows:

> *"the Claimant failed to install insulation in a good and workmanlike or effective manner, or otherwise failed to design the installation of the insulation so that it was sufficiently effective. The Defendant will rely upon the Building Thermographic Survey Report commissioned by the Claimant in October 2013 in support of these contentions."*

258. DRJ sought to draw SS on the specifics of the alleged failure resulting in sufficiently effective insulation. By its amended Part 18 response of February 2019, SS said *"[t]he insulation is ineffective for the reasons set out in the Building Thermographic Survey Report dated October 2013*."

259. That was a reference to a Building Thermography Survey Report dated 30 October 2013 ("**the Thermographic Survey**") prepared by Red Current Ltd by reference to a thermographic survey conducted at Nynehead Court on that date. Shortly before the Thermographic Survey, DRJ had installed some additional insulation at the property.

260. The Thermographic Survey was based upon an external survey of the buildings involving thermal images of each elevation upon which Red Current made observations upon the infrared energy emissions captured by those images. It identified particular isolated "anomalies" where the images showed extra heat loss.

261. In his written closing submissions, Mr Peace-Smith said:

> "*There ought not to be the unexplained anomalies identified by Red Current. The existence of unexplained anomalies effectively throws the onus onto the Claimant to investigate and explain the anomalies, but it has failed to do so. In the absence of such an explanation, the court should treat the anomalies as uncontradicted evidence of defects*."

262. I disagree. It is not for DRJ to disprove a case of *suspected* defective workmanship. Not only does that submission appear to involve an impermissible reversal of the burden of proof but it also reads far too much into the Thermographic Survey so far as any shift in the evidential burden is concerned.

263. The submission does not become any more attractive simply because SS accepted the force of Mr Sealey's observation that Red Current suggested that some of the anomalies might be explained by things other than suspected defective insulation, such as the presence of heat pumps in the roof voids of some units and the presence of bats in one location, so that SS did not pursue its case in relation to those. In relation to the remainder, it still left SS simply saying that, where Red Current had said areas of heat loss were "*possibly due to missing/defective insulation*", the suggestion was "credible" in the absence of any other explanation.

264. As to that, the Thermographic Survey said *"[t]he recommendations and findings within this report should be taken as a guide only. Where there are areas identified as possible defects, confirmation should be sought using this report in conjunction with construction drawings and other detection methods under the advice of a suitably qualified Construction Engineer*." In the 'Anomaly Analysis Section' of the survey Red Current said in relation to each identified anomaly: "*Inspect the site of this*

anomaly to verify the possible cause. If found to be as result of a defect, rectify the cause as appropriate." (my emphasis).

265. Mr Squair and Mr Sealey said in their Joint Statement: "*We both agree that the Red Current report does not state that defects are present. We also both agree that the report shows areas of increased loss.*"

266. Mr Squair accepted in cross examination that he could not say or not defects in the insulation do exist. He accepted that it remained a point of conjecture as to whether or not any was missing or defective or, instead, present and correct. Mr Sealey's analysis of the Thermographic Survey was more thorough and he explained in his oral evidence he had gone further than Red Current by considering each anomaly identified by them against the construction drawings. He said that in most instances there was a possible explanation for the additional heat such as an internal walls, soil-and-vent pipes, extractor fans and the presence of bats. I have already noted that SS accepted the force of at least some of his observations.

267. Both experts were therefore agreed that the absence of effective insulation or presence of defective insulation, in certain places, had not been established. Their Joint Statement also said that neither of them could say how the reduction of resistance in the roof insulation affects the building as a whole.

268. In his testimony, Mr Sealey made the observation that SS had evidently not wanted to incur the cost and disruption of acting on Red Current's recommendation to establish the cause of the anomalies. Mr Scott noted that the Thermographic Survey had recommended "*further intrusive inspection of insulation*." Only by undertaking such work would SS have established whether or not DRJ had been at fault. Instead, more than 6 years have passed without any further investigatory work and Mr Frampton correctly pointed out that insulation was removed as an item from the SS's snagging list with effect from November 2015.

269. The evidence therefore confirms that SS has failed to establish that DRJ are liable for having installed defective or insufficiently effective insulation.

270. In any event, and for the same reasons as I have given in relation to the carpets, any claim for recovery from DRJ (either for increased electricity costs or in respect of the cost of remedy) cannot be sustained by reference only to a suggested liability to unit holders. SS's agreement with them, to replace the insulation, has been confirmed to be conditional upon recovery from DRJ. Whether or not the holding out by SS/NCL of the prospect of remedial work has served to stay their hand, none of the unit owners appears to have pressed a claim against NCL in relation to the insulation. Were any owner to have done so, the same fundamental uncertainties as bedevil the contemplated claim against NCL in respect of the carpets - the basis for the claim, establishing and quantifying any loss and and limitation (for all bar Unit 1) - apply here. SS's Part 18 response of 10 March 2020 stated that leaseholders were shown the Thermographic Survey of October 2013 soon after it was received.

271. NCL has not established the Development Agreement and, for the same reasons as apply to the carpets, has not established it has suffered any loss.

272. The evidence in relation to quantum was in any event unpersuasive. This was the inevitable consequence of SS being unable to point to the extent of any defective work (if any at all). Mr Squair's report said: "*Where the defects exist the plasterboard ceilings should be removed to allow the insulation to be renewed and adjusted. The ceilings will then need to be made good. I estimate the costs of these works to be £11,800*". In fact that was the figure which Mr Bailey in his witness statement had said SS had estimated to be the cost of making good the insulation. Mr Hannon said in his witness statement that he had estimated the cost at £11,800 (in Mr Lewin's materially identical statement this became "*we have estimated …*"). In his testimony, Mr Squair said he had seen a breakdown of that sum prepared by Mr Hannon but no such breakdown appeared in the trial bundle. The £11,800 is therefore an unsubstantiated figure.

273. So far as any part played by the anomalous heat spots in additional energy consumption was concerned, Mr Scott made the uncontroversial observation (at least in relation to the identified spots, and the dwellings affected by them, if not the buildings as a whole) that excessive heat leakage would affect the thermal efficiency of the dwellings and the energy consumption. However, he did not attempt any calculation of the excess electrical costs attributable to such leakage.

274. For the reasons set out above, SS has not made good its counterclaim in respect of the insulation.

Japanese Knotweed

275. SS make a claim against DRJ based upon the presence of JKW at Nynehead Court. It seeks to recover from DRJ the sum of £28,200 which it estimates to be the cost to remove and dispose of the JKW and which is said to be loss suffered by NCL Again, that figure includes VAT when its inclusion in their damages claim is not justified.

276. In addition the counterclaim refers to NCL having suffered loss in the form of the costs of herbicidal treatment of the JKW. SS's Part 18 response dated 10 March 2020 said the relevant costs were (i) approximately £350 per annum for annual treatment carried out by an external contractor; (ii) £40 (i.e 2 hours work) per month for NCL's gardeners since 2010; and (iii) £1,050 for professional advice on the removal and disposal of the JKW. In response to DRJ's request, SS confirmed that the costs of treating the JKW had not been included within the service charge payable by residents.

277. In addressing DRJ's claim to the retention, I have already referred to the snagging list dated 26 January 2012 ("*JKW treatment on going>. Evidence needed of continued treatment and warranty*") and to the final snagging list dated 24 May 2016 ("*Warranty to guarantee non return of JKW still to be provided*") and to DRJ's position that it was under no contractual obligation to provide such a warranty.

278. I have also mentioned above DRJ's provision of JKW treatment plan which DRJ made at the Progress Meeting No. 1 on 17 March 2011. The minutes of that meeting record: "*DRJ will underwrite the possibility of re-growth of Japanese Knotweed for 5 years after the Date of Completion*." In their witness statements, Mr Lewin and Mr

Hannon had said that this was a proposal which SS had not accepted, as DRJ was to expand further on it and explain how the "*underwriting would work*". However, Mr Lewin accepted in cross-examination (when shown the minutes of the next meeting in April 2011) that the proposal must have been agreed. Mr Porter's evidence, which I accept, was that Mr Lewin then approached Carle Adey of specialist contractors Complete Weed Control ("**CWC**") in about June 2011 and referred him to DRJ.

279. The evidence at trial indicated that the idea of a warranty being provided in respect of the JKW treatment was raised in 2016 as a result of pre-contract enquiries raised by solicitors acting on the purchase of one or more of the units. Indeed, during the re-examination of Mr Lewin reference was made to legal advice that SS had received in relation to JKW otherwise that in contemplation of these proceedings (Mr Hannon had also said Mr Lewin had taken legal advice in the email mentioned next). I therefore directed that the advice should be disclosed. By a letter dated 16 June 2020, SS's solicitors responded by saying that it appeared that SS never received any formal written advice on the point and that the solicitor (from another firm) who acted on the sales of the properties had no recollection of providing such advice. There was no response to a follow-up request on behalf of DRJ as to whether an oral or informal advice had been given.

280. By an email dated 9 November 2016, Mr Hannon said *"[o]ne sticking point is the JKW guarantee. JL knows that the weed was buried on site and therefore insists on a RICS and PCA backed 10 year guarantee (see s34 EPA)."*

281. Mr Hannon was referring to the Environmental Protection Act 1990 ("**the EPA**") and an RICS Information Paper (effective from 1 September 2015 and "*updated in the light of industry developments since its publication in 2012*") in the trial bundle which contained a reference to it being likely that lenders on property purchases "*will begin to specify that the management plan provider*" – i.e. under a JKW management plan – "*is an 'appropriately qualified person or company' such as an accredited member of an industry recognised trade association such as the Property Care Association (www.property-care.org/invasive-species) and the Invasive Non-Native Specialists Association (www.innsa.org).*" SS did not produce any evidence to suggest that a plan underwritten by both the RICS and the PCA were available.

282. As Mr Sealey explained in evidence, and must be obvious from the fact that the Environment Agency's code of practice (mentioned below) highlights the inherent danger of JKW spreading or reappearing, the kind of "guarantee" which Mr Hannon had in mind was not some kind of promise that JKW would either never return, or not return within the stated period, but instead a long term treatment plan. The guarantee element relates to the JKW management plan provider, should it go out of business, not the JKW itself.

283. In March 2011 the parties had agreed that DRJ (alone) would "*underwrite*" against the possibility of the "re-growth" of JKW for a period of 5 years from practical completion. DRJ acted on that agreement by appointing CWC to provide treatment of JKW from June 2011 to October 2015.

284. When, in 2016, SS raised the proposal of a 10 year plan from an accredited provider, DRJ offered to pay for "*a PCA approved JKW insurance backed guarantee that will be provided through Complete Weed Control who is a member of the Property Care*

Association" at a cost of £2,685 plus VAT. This was offered, by emails in December 2016, on the basis that, after deduction of that amount by SS, the balance of the retention would then be released. DRJ explained that the JKW management plan and guarantee had to be paid for and taken in the name of the legal owner of the property. However, by an email dated 11 December 2016, Mr Lewin said:

> "*I'm afraid that is not acceptable. See my email below of 8 December. If you cannot fulfil the requirement yourself, I will accept the completed application form and/or paperwork with payment in order that I may submit the paperwork with your payment for the undertaking to be completed*."

285. His reference was to an earlier email in which he said the onus was with DRJ to complete all snagging satisfactorily, and that included "*the provision of a RICS and PCA backed 10 year JKW guarantee applicable to 1-10 Nynehead Mews, before agreeing or undertaking any further action*." Leaving aside the point that, on the face of it, Mr Lewin was insisting that DRJ provide something that I am not persuaded was available for purchase (a plan backed by both the RICS and PCA), SS's position was therefore that that DRJ had to pay for the 10 year plan otherwise than out of the retention.

286. My decision in relation to the retention shows, in hindsight, that SS would have been well advised to have accepted DRJ's proposal in December 2016.

287. In fact, it appears that having not agreed to release the retention or any part of it, SS did take out the plan with CWC which DRJ had identified for purchase. Email exchanges between Mr Evans of DRJ and Mr Adey of CWC in July 2017 involved CWC confirming that SS took out a 5 year JKW management plan with CWC in August 2015 and began paying for treatment of JKW in 2016. The trial bundle included an invoice dated 8 November 2017 from that company (addressed to Mr Cole at Nynehead Court) which was for £160 plus VAT for "*Year 2*" of a JKW management plan. That invoice forms part of SS's counterclaim in respect of snagging items. SS had not told DRJ it had taken out this plan in a way that would have been likely to have prompted DRJ to press further for the balance of the retention in accordance the proposal it had recently made. On the face of things, it seems that Mr Lewin's email of 11 December 2016 was looking to get DRJ to pay for a plan with CWC to which SS had already signed up.

288. One might have thought, in these circumstances, that the issue between the parties would therefore have been confined to the question of which of them should ultimately bear the cost of the extra 5 years of guarantee-backed treatment by CWC. However, SS's shifting complaints in relation to the JKW, up to and at trial, have shown the claim to have a recrudescence worthy of its subject matter.

289. SS's only pleaded allegation is that JKW was illegally buried on the Site. The Counterclaim said that JKW is classified as "*controlled waste*", that under section 33 of the EPA it was an offence to treat or dispose of it without a licence, that it is a requirement of the EPA and regulations made under it that it must be disposed of at an appropriately licenced landfill site and that "*unlawfully, the Claimant arranged to bury JKW found on site at the Site, behind units 7 - 9, rather than arranging for it to be transferred to and disposed of at an appropriately licensed landfill site."*

290. At the trial, SS did not press its pleaded claim which involved an assumption that the burial of JKW at Nynehead Court, as opposed to at an appropriately licensed landfill away from the Site, was unlawful. Mr Squair and Mr Sealey agreed that there was no requirement requiring the removal of JKW away from site and they both referred to Government guidance which recognises that burying JKW is an appropriate way to dispose of it. Mr Sealey referred to RICS guidance to the same effect.

291. The RICS Information Paper '*Japanese Knotweed and residential property'* (IP/2012) says that JKW can be excavated and buried on site using encapsulation by membranes where it cannot be covered with 5m or more of overburden. The Government Guidance on '*Prevent Japanese knotweed from spreading*' (effective 30 March 2016) is to the same effect in identifying burial of JKW as an alternative to spraying with chemicals or burning it.

292. Indeed, as Mr Frampton correctly pointed out, the Environment Agency's '*the knotweed code of practice'* (published in September 2006) says "*If Japanese knotweed cannot be killed by burying or bunding infested excavated soil on site, you must dispose of it at a suitably licensed or permitted disposal facility*." A flowchart within that paper shows that the Environment Agency's first choice for a disposal method, if possible, is long term herbicidal treatment. Mr Sealey said he would always recommend chemical treatment of JKW.

293. I have already referred to Mr Hannon's email of 9 November 2016 and his and Mr Lewin's awareness that the JKW had been buried on site. By emails exchanged between Mr Hannon and Mr Lewin on 15 April 2011 (when the Phase 2 Contract had just been concluded and the need for a site waste management plan for that contract had been discussed at a meeting three days earlier) they recognised it was being buried. Mr Hannon assessed that "*the knotweed is about 60% buried*". Mr Lewin was sceptical about that figure and said "*there is a recognised problem in burying/removing the stuff*". By an email of 9 May 2011, Mr Lewin expressed concern that "*they have run out of space to bury it illegally* (sic)"

294. In relation to the Phase 2 Contract works, on 18 May 2011, Mr Evans of DRJ wrote to the Approved Inspector informing him that the JKW "*within the area of Phase 2 Nynehead Court construction*" had been managed in accordance with Environment Agency Guidelines in that a decision had been made, in accordance with a JKW management plan, not to remove the material on site but to bury "*the small quantity of Japanese Knotweed found*" at the correct depth and to apply herbicidal treatment to the buried material. Mr Evans said that the burial was outside the footprint of any building and that a root barrier membrane had been used. Mr Neil of DRJ wrote an email to Mr Hannon the same day informing him of the same. Mr Porter explained that this work was undertaken by the sub-contractors M&M Groundworks.

295. Mr Hannon responded to Mr Neil's email of 18 May 2011 by saying: "*That's useful – thank you. Would you please confirm the DRJ Indemnity for the phase 1 knotweed as previously discussed and agreed*." That was a reference to the treatment plan agreed a Progress Meeting No. 1 and upon which DRJ was soon to act upon by instructing CWC.

296. At the Progress Meeting No. 6 on 16 August 2011 it was noted that "*Knotweed control for phases 1 and 2 being undertaken*".

297. When SS later pressed for a 10 treatment plan, in late 2016, there was no complaint to SS about the fact of burial nor any suggestion that the JKW had not been properly buried in the manner recorded more than 5 years previously. The focus was instead upon ongoing chemical treatment of the JKW. To quote from Mr Hannon's email of 9 November 2016: *"[Mr Lewin] has taken legal advice and this is the sole recommended remedy*".

298. However, Mr Lewin's view expressed to Mr Hannon in an email two days earlier was "*We know that JKW was illegally buried on site and this concern cannot be satisfied without a RICS and PCA backed 10 year JKW warranty*." As I have noted above, whether that view was in fact based on legal advice (as Mr Hannon represented) and, if so, from whom and with what effect, is a matter of doubt. I found Mr Hannon's evidence at trial that he knew Mr Neil "*was lying*" when he reported in his email of 18 May 2011 upon what had been done by way of burial of JKW, to be completely unconvincing. Mr Hannon said that he had seen that DRJ (or M&M Groundworks) had not done the work but he did not want to say anything if it was later approved by the Environment Agency. A responsible Employer's Agent would not have stayed silent at the time if such doubts had been genuinely held. The silence permeates through to the absence of any pleaded complaint otherwise than the one based upon the fact of burial of the JKW rather than the manner of burial. There was no application to amend the Counterclaim.

299. Likewise, I did not find Mr Cole's evidence to be credible when he said that he saw JKW being pushed into one of the foundations of one of Units 9 and 10 and covered with contaminated soil. This was at odds with Mr Bailey saying in re-examination that the JKW was buried about 3 metres from the access road running through the Site. In cross-examination, Mr Cole also said it was common knowledge that the JKW was being pushed around the Site. He accepted that he did not mention this to anyone at the time and his witness statement confirmed that he was aware of the strict Government guidelines in relation to JKW and, indeed, he said he had compiled a booklet of relevant guidance. Again, this particular allegation of improper burial did not feature in SS's pleaded case.

300. The absence of any evidence to support the pleaded complaint means that SS's counterclaim in relation to JKW knotweed must fail.

301. In expressing that conclusion I should make it clear that, even if SS's evidence on such points had carried more credibility, I would not have been prepared to act upon it when DRJ had not been given proper notice of the suggested grounds of any wider complaint beyond the fact of burial.

302. Mr Pearce-Smith submitted that the use of the phrase "*in particular*" in the relevant paragraph of the Amended Defence and Counterclaim (paragraph 55.3) entitled SS to advance not just the complaint about the allegedly poor handling of JKW but also that DRJ had failed to comply with the Site Waste Management Plan prepared by DRJ in August 2009 ("**SWMP**").

303. The SWMP was prepared in anticipation of the Phase 1 works. Clause 4.16.4 of that contract required DRJ to observe the Site Waste Management Plan Regulations (those were later repealed in 2013) and to agree and sign a plan with SS prior to starting work on the Site. In the section of the SWMP dealing with disposal of waste, the

entries in relation to JKW suggested that it would be burnt on site and that 0.25 tonnes would be dealt with my disposal at a specialist site. A "*method statement*" was contemplated to exist.

304. The copy of the SWMP in the trial bundle was signed on behalf of SS (Mr Lewin said it was signed in early October 2009) and DRJ in relation to the "declaration" of the proposed works but the section recording any "*Post Contract Review/Comments for Future Improvements* " remained blank and unsigned. It is clear from what I have said above that the parties had opted for burial of JKW. Clause 4.16.4 relied upon by SS expressly contemplated that, after signature, DRJ would work with SS "*to review, refine and revise the Plan as required*."

305. The only other reference to JKW in the context of the Phase 1 Contract was in a topographical survey drawing previously prepared for BRH in November 2005. This showed two locations on the site where "*dense brambles and knotweed*" had been identified. It seems that this particular drawing was included within a number appended to the ERs though the ERs themselves made no other reference to JKW. Section 9.5 of the ERs did address disposal of materials and said that any material identified as hazardous was to be removed to an accredited disposal site. Mr Sealey's evidence, which was not challenged on this point, is that JKW is not classified as hazardous.

306. Mr Pearce-Smith submitted that DRJ's obligations in relation to the JKW under the Phase 1 Contract were to dispose of it in accordance with the SWMP. Thus even if it was not a breach of the EPA to have buried it on site, there was a contractual obligation to dispose of it at a specialist site. It would not be quite right for me to say that that SS glossed over the reference to burning in the SWMP because Mr Pearce-Smith submitted that, by simply cutting and burning the stems, DRJ would not have addressed the more dangerous rhizomes (or roots) of the JKW. In relation to the relatively modest tonnage of 0.25t, Mr Pearce-Smith said in his written closing "*the simple explanation for the quantities in the SWMP is that [DRJ] badly underestimated the work required and the quantities involved.*" That observation was made in the light of what Mr Sealey had said in his testimony. In contrasting the reference to 20 tonnes of trees and shrubs to be taken to a recycling facility, Mr Sealey said the 0.25t figure appeared to be far too small a quantity to include the excavation of JKW rhizomes and was therefore probably a reference to the ash of stems above ground which were burned.

307. The very exercise undertaken by SS in picking and choosing which part of the SWMP suits its case for now saying that the JKW should have been taken away, and also ignoring both the reference in the SWMP to it being burned and the evidence in contemporaneous emails establishing knowledge of its burial, shows how speculative SS's case in relation to JKW had become.

308. Mr Frampton was right to say that the court would not have been in a position to resolve the unpleaded allegations fairly against DRJ. DRJ's witnesses (which might well have included a representative of M&M Groundworks in relation to the work actually undertaken) had not addressed the allegation of improper handling of JKW. Likewise, the absence of pleadings, witness evidence and proper disclosure in relation to the SWMP means that the court could not have reached a properly informed decision about the contractual significance of the SWMP (for either the Phase 1

Contract or the Phase 2 Contract) and what it meant in the light of what subsequently occurred. That DRJ would inevitably have made such points in response to any late application by SS to amend its case in relation to the JKW is almost too obvious to mention.

309. I was also struck by the different formulations used by Mr Pearce-Smith in his written closing submissions to describe what he said should have been the product of proper performance by DRJ of their suggested contractual obligations. In the section addressing the JKW, he talked about obligations to "*eradicate*", to "*dispose of*", to "*deal with*" and to "*remove*" the JKW.

310. Mr Frampton was therefore again correct to say that SS's case is really based upon the fact that there is JKW is growing on site. Mr Pearce-Smith said in his written closing that "*the simple point is that JKW has repeatedly re-appeared throughout the history of this site*." The leap which SS made in saying that that must be because of a failure on the part of DRJ (i.e. to "eradicate" it) not only presumed a contractual obligation which has not been established but also ignored what clearly emerges from the published guidance about this highly invasive plant.

311. The Environment Agency's code of practice states that the rhizome may remain dormant for 20 years and the steps identified in its flowchart mentioned above are about its containment, so as to avoid it spreading, and its management in the long-term. The code specifically states in relation to herbicide treatment that "*you must not see the lack of regrowth as evidence that Japanese knotweed is no longer alive*." In referring to the need for a knotweed management plan, it says that the existence of such a plan may provide evidence that the site has been appropriately managed if subsequent Japanese knotweed regrowth results in litigation.

312. Pointing to the presence of JKW and seeking to attribute responsibility to DRJ involves SS ignoring the plant's fundamental characteristics and the obvious purpose behind taking out successive treatment plans with CWC. SS's recognition of this point appears from the snagging list of 6 August 2014 which formed the basis of the Porter Notes: "*Lots of JKW is reappearing in areas where it was buried behind plots 8 and 9 and new growth appearing in patio of No. 9*". What SS required in relation to that item (admittedly with a view to ensuring "*full eradication of JKW*") was evidence that payment would be made for ongoing treatment of the JKW. Mr Porter made the note "*Letter of Comfort*" in relation to that item.

313. Mr Cole gave evidence about the location of the JKW presently visible at the Site. Mr Cole produced photographs of showing JKW growing in two places. By annotations on the 2005 topographical survey drawing he had marked in red the locations of "*JKW infestations since re-development*" in contrast to what he said were the three (not just two) existing locations before DRJ started work there. The third location identified by Mr Cole and also by Mr Lewin in his evidence (but not marked as one on the original 2005 drawing) was said to be between what is now Unit 3 and the nearby access road through the Site. His evidence was that JKW had been on the Site from around 2001 to 2002 and possibly earlier. He said that in the years before DRJ commenced works the relevant parts had been completely overgrown and "*in complete dereliction*".

314. I prefer the evidence of Mr Cole as to the present location of the JKW over that of Mr Lewin who, when shown another drawing indicating an areas which potentially contained JKW rhizome, said "*the JKW is re-growing everywhere in this area*." That drawing had been prepared by Mr Adey of CWC (it appears in 2015) and he was careful to distinguish the "*potential areas of growth given the history of the site*" (per his later email dated 6 July 2017) from those where JKW had appeared in the 4 years prior to 2015 but which were not visible when SS took out their 5 year JKW management plan with CWC at that time.

315. Mr Cole's photographs and annotations on the topographical survey drawing showed that some of the JKW is now growing in the hedgerow on the western boundary of the Site. SS's case is that the JKW was buried behind Units 7 and 9 which are situated at the northern end of the Site and on the other side of the access road from Units 1 to 6. This is supported in part by what was said in the snagging list of defects of 6 August 2014.

316. Although some of Mr Cole's other annotations indicate JKW between Units 7 to 9 and the northern boundary, the fact that it has broken out elsewhere would not support the conclusion that DRJ's burial methods were inadequate even if that had been pleaded. There was also a suggestion by SS that the JKW might have been spread through the tyres of construction vehicles but the presence of JKW within the hedgerow which then formed an established boundary to the Site is at odds with that. It is significant that in his drawing indicating past, existing and potential areas of JKW (at the time of the August 2015 JKW management plan) Mr Adey identified the hedgerow as an area where JKW had been in the past but was not visible in August 2015. This (and the plan generally) only highlights the point about JKW's propensity to lie dormant before breaking out again.

317. In summary, there is insufficient evidence to link the presence of now growing JKW on the Site with that which DRJ buried in the course of its works.

318. Although it is not strictly necessary for me to address the quantum of SS's claim, for completeness I should say that I was not persuaded by SS's evidence in support of the quantum of the JKW claim.

319. Mr Hannon had prepared an estimate in the sum of £25,565.60 for the removal of the JKW and associated works. This was the estimated sum as at 11 March 2020 and involved a 12% uplift on a quote provided by specialist contractors Environet in February 2017. They had provided alternative quotes for either digging and disposing off site or processing on site 64m³ of JKW infested soil. I note that the quote therefore assumes that JKW affects a fairly modest surface area of 16m², or what Mr Sealey described as a "*fairly localised patch*".

320. As I have explained above in relation to the carpets (at paragraph 243) SS should not expect to recover the cost of carrying out work if there is no intention to undertake it.

321. NCL did not act on the Environet quote in 2017 but instead carried on with the herbicidal treatment by CWC which the evidence indicates is the preferred method of managing JKW. The joint expert evidence in these proceedings has since established the basic misconception in earlier statements which Mr Lewin made to residents (for example in his letter 'to All Mews Owners' dated 15 February 2015) about the JKW

having been "*buried illegally*" which would have encouraged them to expect "*to have the buried material unearthed and legally deposited in a registered site in accordance with EA guidelines*".

322. Mr Bailey said that undertaking the contemplated work of digging up and disposal off-site was not dependent upon first recovering from DRJ. He referred to a proposal for the widening of the access road in support of a further contemplated development at Nynehead Court, saying the likely disturbance of the buried JKW (in the place he described it as being) caused him some concerns. If the digging up and removal of the JKW, or some parts of it, was prompted by the further redevelopment then that would raise its own questions as to whether or not DRJ should be held responsible for the cost of doing so. In any event, Mr Bailey confirmed that planning permission for the further development had yet to be obtained and he accepted that there were no precise plans in relation to the road widening.

323. I am not satisfied that NCL intends to dig up and remove the JKW.

324. There is also the sum of £1,050 claimed in respect of professional advice on the removal and disposal of the JKW. No invoice has been produced by SS to support that claim.

325. There is no suggestion that NCL sold any of the units for less than market value because of a knotweed problem and no evidence to support any alternative claim based upon a diminution in value of NCL's property.

326. As for the past and ongoing herbicidal treatment, SS had the opportunity to recoup the sum of £2,685 when DRJ offered in late 2016 to pay for a further period of treatment by CWC. Although SS said that NCL has not recouped these and the specified gardening costs from the service charges payable by residents, the terms of their leases provide for a service charge which covers the maintenance of the common parts, including the gardens. However, the evidence did not satisfactorily address how the costs referable to JKW had not been recouped in the form of service charges. Although Mr Bailey said they had not been, I would have expected to have seen some specific evidence as to how the service charge had been calculated and charged without those particular items of cost included.

327. In any event, I would also not have been persuaded that a claim lay in respect of NCL's alleged loss. I have rejected the case based upon the Development Agreement. For the reason given in paragraph 213 above, in my judgment SS is also contractually estopped from asserting the knowledge of that third party's benefit which is required to sustain a claim of transferred loss.

Snagging Items

328. At paragraph 57.5 of the Amended Defence and Counterclaim, SS identified a number of items of cost (including VAT where applicable) which it is said NCL has incurred "*in remedying or responding to defects for which [DRJ[is liable under the Contracts*." The total sum claimed is £8,208.50. Prior to amendment, the sum had

been £16,190.84 (which it was said SS had incurred). At trial, Mr Pearce-Smith further clarified that the total sum sought was £8,151.34.

329. DRJ's position is that this head of claim has always been inadequately particularised. By a Part 18 request dated 18 July 2018 it sought, in relation to each item, an explanation of the nature of the remedial work which was said to have been requited, how it was carried out, how the cost was calculated and how DRJ was said to be liable for it. SS responded by saying it was a premature request for factual or expert evidence which would be provided in due course.

330. Mr Porter said in his witness statement that he did not therefore have sufficient information for him to respond. He tentatively suggested that many of the items appeared to relate to maintenance of heating units.

331. SS did not put forward any explanation in its factual evidence to support the recovery of these snagging items and instead relied upon the expert report of Mr Squair. In his report he made the assumption that DRJ had been notified of the defects and failed to attend to them. Mr Squair addressed a number of invoices in respect of which he was unable to say the cost was attributable to a defect for which DRJ was responsible. For example, he referred to the cost of a repair to a table in respect of which there was no witness statement to support the claim and to others where there was either no description of the work in the relevant invoice or the invoice did not mention the cause of the repair work covered by it. However, in respect of the remainder he said "*all the remaining invoices appear to relate to repairs associated with defect works. The cost for each is modest in size and appears to be reasonable.*" They totalled £6,044.46.

332. Mr Sealey's report stated that he had noted that most of the invoices and receipts were dated 2016, 2017 or 2019. Like Mr Squair, he noted that some items appeared to be totally unrelated to work carried out by DRJ. In relation to others, he noted that they appeared to be too remote by time from DRJ's work or installation to be in respect of anything other than maintenance work. As an example, he referred to the replacement of a bypass valve in 2019. Mr Sealey disagreed with Mr Squair's conclusion that the remaining invoices appeared to be reasonable.

333. The inclusion by SS of claims on which the experts were agreed there was no factual basis for seeking to hold responsible was clearly not an auspicious start for SS's snagging claim. However, in his testimony at trial Mr Squair was forced to accept that he had not been able to carry out a proper analysis to form a clear view that any of the invoices totalling his £6,044 figure were attributable to defective workmanship by DRJ. His report had stated that the relevant invoices "*appear to be DR Jones' responsibility*" and in his evidence he sought to justify that somewhat tentative conclusion by pointing to the requirement in the ERs for a 10 year guarantee.

334. As Mr Frampton correctly observed, the reference to a guarantee in the ERs was limited to the heat pump units (and I address it next as the last item of the counterclaim) and the claim in respect of the snagging items had not been pleaded as arising from the failure to provide that guarantee. He also pointed out that there was no evidence that these invoices are for issues which should have been covered by the guarantee which would not typically cover ordinary wear and tear.

335. In my judgment, the evidence adduced by SS was inadequate to shift the evidential burden on to DRJ and signally failed to make good its case that the costs reflected DRJ's liability to make good defects. Mr Pearce-Smith submitted that, whilst in some cases expert evidence from a building surveyor might be needed to establish whether an item of claim was in respect of a defect, it was not necessarily the case for all claims. He gave the example of it not being necessary for a building surveyor to opine on whether or not a table had been damaged by a DRJ's workmen. Indeed, Mr Pearce-Smith interjected during the course of Mr Squair's cross-examination to suggest that the experts were not opining on liability for snagging items. However, that was not a sound suggestion. The direction for expert evidence from building surveyors was not limited to quantum and, on that basis, Mr Squair had been expressly asked and had responded in his report on the question as to whether the items being claimed are defects for which DRJ were liable. In any event, without Mr Squair's evidence, SS had no case on liability beyond what had been said in verified counterclaim which he had felt unable to support in its entirety. The point is illustrated by him not feeling able to vouch for the claim in these proceedings in respect of a table repair.

336. In these circumstances I reject SS's suggestion that the court should adopt the sensible and proportionate approach which it said Mr Squair had adopted in evaluating the snagging claim. That course was urged upon me by Mr Pearce-Smith in order to compensate SS for costs that would not have been incurred but for DRJ's breaches of contract. However, the relevant breach has to be proved, not assumed.

337. In the circumstances, it is not necessary to go into the detail of Mr Frampton's analysis in his closing submissions of each of those invoices which Mr Squair had relied in support of his figure of £6,044. Having regard to the more general points made above, I accept the points he made in relation to each of them.

338. However, I will highlight one particular item as it highlights SS's cursory approach to this head of claim. One of the items pleaded in paragraph 57.5 of the Amended Counterclaim is "*cost of resolving heating problem at Unit 3 - £662.40*" (a figure revised downwards from the initial pleaded figure of £3,200). As Mr Scott noted, the invoice in that VAT-inclusive sum was from Sedgemore Heating which was overlaid with a cheque in the sum of £1324.80. The invoice was in respect of works described as "*Flush complete system and balance UFH Commission whole of system after flush out test all rooms customer unhappy about Study Temperature still waiting for result Two men 12 hours*." However, the greater sum of £1,324.80 was included in the calculation of the figure of £9,280.40 agreed for defects at the December 2014 meeting (as shown by the Porter Notes) and confirmed by Mr Hannon's email of the next day. Even in relation to an item of cost which had been shown to relate to a defect, there was an obvious flaw in Mr Squair's assumption that DRJ had not addressed it satisfactorily. It had featured as item 63 on the snagging list dated 6 August 2014 but did not feature on later ones.

339. I refer below to some other invoices from Heatwave Mechanical Services Ltd ("**Heatwave**") which were also relied upon in support of the snagging claim.

340. In any event, I would not have permitted SS to recover in respect of loss suffered by NCL for the same reasons as those given in relation to the JKW.

ASHP Warranties

341. The amendment of the Counterclaim in February 2020 introduced a new head of claim in the form of loss that SS says NCL has suffered in the form of the estimated cost to be incurred in obtaining a 10 year manufacturer's warranty for the ASHPs. The estimated cost of such a guarantee has been put at £12,000 (including VAT which, as I have said, NCL ought to be able to recover otherwise than from DRJ).

342. SS's case is not that DRJ was under a contractual obligation under any of the three contracts to procure that such a guarantee was provided. That would be difficult to establish in circumstances where the Engine House Contract made no mention of any guarantee of heat pumps and where the reference to "*an insurance backed 10 year minimum guarantee is a requirement*" in the ERs for the Phase 1 and Phase 2 Contracts was, in each case, in conjunction with a stipulation for a different type of heat pump than the ASHPs subsequently fitted. I have explained above how SS and DRJ later agreed that the ASHPs would be fitted in place of the GSHP specified in the ERs for Phase 1 and the EAHPs specified for Phase 2. Not only is there no suggestion by SS that DRJ agreed to procure a 10 year guarantee in relation to the ASHPs but in June 2015 Mr Howard (DRJ's Regional Gas Technical Supervisor) responded to Mr Lewin's queries identified in a '*Heat Pump Installation Check List V2 as at 27 Mar 15*' (and which had said the ASHP need to be "*accompanied by manufacturers product guarantee*") that there would be a "*JH Mitsubishi 3 year warranty*".

343. Instead, the claim that DRJ "*failed to install the ASHPs correctly and/or to remedy defects in the installation of the ASHPs, which resulted in Mitsubishi refusing to provide manufacturer's warranties in relation to the ASHPs*." The estimated figure of £12,000 is said to be the expenditure NCL will have to incur "*in order to obtain a ten year warranty for the ASHPs that it would have obtained had [DRJ] fulfilled its contractual obligations in relation to the ASHPs*."

344. The way the case is put therefore raises two basic questions about what SS could have expected to have received in relation to a Mitsubishi manufacturer's warranty and as to the cause(s) of that expectation not being fulfilled.

345. When pressed on the first question, SS said in its Part 18 response of 10 March 2020 that it did not know what the details and terms of the Mitsubishi warranty would have been and that a "*warranty was required in accordance with the ERs and was not provided*." As with the claim in respect of electricity costs, SS therefore harked back to an expectation in relation to the GSHP. As I have just noted, SS had no expectation that the manufacturer's warranty for the ASHPs would have been any longer than 3 years. Mr Lewin accepted as much in cross-examination while still referring back to the ERs. As shown by the terms of the 'Mitsubishi Electric Homeowner Guarantee' in the trial bundle, the ASHPs came with a 3 year warranty if installed and commissioned by an 'Accredited Installer' or a standard account holder installer and a 5 year one if installed and commissioned by Mitsubishi Electric 'Business Solutions Partner'. Each was conditional upon registration within 3 months of commissioning, failing which the guarantee was limited to 12 months. Therefore,

SS has no basis for saying NCL ought to have benefited from a 10 year warranty in respect of the ASHPs.

346. In my judgment, it is significant that on 10 September 2012 (and therefore at the time when the EAHPs were to provide the heating) Mr Lewin wrote to all residents explaining that the EAHPs came with a 2 year warranty and that, after an initial free-of-charge servicing period, he would make arrangements for ongoing servicing. In his testimony, Mr Lewin recognised the distinction between an initial manufacturer's warranty and a maintenance agreement which it was the responsibility of NCL to arrange.

347. Mr Lewin also said in his evidence that the 3 year warranty had never been provided. Although Mr Pearce-Smith said the simple point was that DRJ had not provided a warranty in respect of the ASHPs, even though it had supplied them, it is necessary to establish the reason why NCL does not have one. On that second question, SS's Part 18 response to a question about DRJ's allegedly incorrect insulation of the ASHPs involved SS referring to "*the snagging reports and reports supplied by the Ecodan Mitsubishi engineer*" and attached a "*sample report for No. 3*".

348. In fact, that report by JTR Ltd ("**JTR**", a Mitsubishi Electric service network company) was the only engineer's report produced by SS. It was based on a visit to Unit 3 on 1st February 2017 in relation to a reported fault that "*system not achieving set temp during colder ambient conditions*". It noted that the work recommended in the report was to be carried out by Heatwave, who had requested a copy of the report for the purposes of identifying the parts needed.

349. SS sought, as part of its snagging claim, to recover the costs charged by Heatwave in respect of their visit to Unit 3 alongside the JTR engineer (by an invoice dated 8 February 2017 which included the £300 they had paid to JTR for visiting Units 3 and 6) and then undertaking the necessary work on the ASHP in Unit 3 (by an invoice dated 17 March 2017 in the sum of £622.44). Heatwave were responsible for servicing the ASHPs and both the content of JTR's report and the work described in those invoices reinforces the point made by Mr Sealey about the clear distinction to be drawn between costs incurred in rectifying the consequences of the defective installation of an item and costs incurred in making good the effect of wear and tear through its use. As I read the JTR report, the only aspect of it which might support a case of defective installation by DRJ was the engineer's comment that the expansion vessel had been mounted without a bracket and positioned so that the air valve was inaccessible and unserviceable. He recommended that it be re-positioned and secured. Email exchanges between Mr Evans and Mr Lewin on 21 February 2017 show that DRJ then addressed this issue in Unit 3 and the other units.

350. The report by JTR in respect of Unit 3 did not say anything about the ASHP in that property not being worthy of a guarantee by reason of defective installation in 2015 and was otherwise in respect of maintenance issues. Mr Pearce-Smith was wrong to rely upon it as evidence of "*installation problems*" affecting all the ASHPs which meant that when SS or NCL sought to obtain warranties from Mitsubishi "*they were refused*".

351. What the JTR report did say was that, in 2017, the system did not meet the required standard for a service and maintenance agreement (with Mitsubishi). If JTR's visit

had been covered by a 3 year warranty the engineer would not have completed the service and maintenance section of the report in which that statement appeared ("*please skip to last page if Warranty/Commissioning site visit*").

352. As a matter of common sense one would not expect things said about the condition and operation of an ASHP in 2017 to be relevant to its eligibility for cover under a 3 year warranty which should have been registered within 3 months of its installation in 2015. An email from Mr Howard to Mr Lewin dated 17 August 2015 stated that Mitsubishi had sent the warranty documentation direct to Nynehead Court. The warranty documentation was not listed in the final snagging list of 24 May 2016 which did identify some other missing documentation in relation to the ASHPs.

353. SS's Part 18 response said that Mitsubishi refused to provide a manufacturer's warranty on 1 February 2017 due to the incorrect installation. As I have just explained, this (and what Mr Lewin had to say about the engineer's visit) appears to be based upon a misconception of what JTR in fact reported. If, however, that was the first occasion when SS asked for warranty cover (beyond the default cover of 12 months from commissioning) then it simply highlights that the fault lies with SS in not promptly registering the commissioning of the ASHPs with Mitsubishi. For the reason touched on below, incorrect installation of the ASHPs (as discerned upon any later call out under the guarantee) would be a reason for the manufacturer to say that the relevant repair was not covered by the warranty but not a reason for not accepting registration of the guarantee in the first place. That is illustrated by the point that no evidence has been adduced to show that the ASHPs did not benefit from the 12 months warranty offered by Mitsubishi even in the absence of such registration.

354. SS has not specified any defective installation issue which came to light (and was relied upon by Mitsubishi to avoid cover) within the 3 month registration period and I have rejected the snagging claims under invoices which were said to be indicative of defects emerging at a later stage. Of course, had I reached a different conclusion on the recovery from DRJ of snagging claims referable to the cost to make good defects in the ASHPs (whether incurred within 3 years or 10 years from installation) it would have been necessary to consider the potential overlap with the present head of claim. At first sight, there would be a risk of double recovery. SS should not be able both to claim that NCL has lost the value of guarantee cover in respect of the ASHPs, which would have included the benefit of avoiding having to pay out of its own pocket for repair work, and also recover in respect of NCL's out-of-pocket expenditure.

355. Guarding against such double recovery would have required other points to be considered when they were not adequately addressed by SS. It is clear from the terms of the Mitsubishi Electric Homeowner Guarantee (and unsurprising) that it would not have covered costs of repair resulting from incorrect installation or inadequate commissioning. It was also a term of the guarantee that the ASHPs should be maintained by a Mitsubishi Electric Business Solutions Partner, an Accredited Installer or (at least on one reading of the term) by a suitably qualified maintenance services provider, or directly by Mitsubishi Electric. Servicing had to commence within 12 months of commissioning of the ASHPs and take place at yearly intervals thereafter. The evidence indicates that Heatwave were not an Accredited Installer though there seems to be no reason to doubt that they were qualified to provide maintenance services which they appear to have done from 2016. Mr Pearce-Smith said that Heatwave's standing was a distraction, in circumstances where no guarantee

had been provided, but SS obviously could not complain about the loss of a manufacturer's extended guarantee (of whatever duration) if NCL there was any doubt about its compliance with that pre-condition to work being covered by the warranty. Mitsubishi would have been entitled to require evidence of compliance with it before agreeing to carry out work under warranty.

356. In relation to the servicing undertaken by Heatwave, it is significant that that SS's pleaded figure of £12,000 is based upon a relatively recent quote from them, by a letter dated 2 December 2019, which said they could offer a 10 year warranty on all 11 ASHPs (therefore including the one installed under the Engine House Contract which made no mention of a guarantee) at a cost of £10,000 plus VAT "*which we will build into an annual contract*". Heatwave said any "*additional remedial works required*" would be costed separately. Again, therefore, the distinction between product failure covered by a manufacturer's warranty and routine maintenance and replacement of parts through wear and tear (or what Mitsubishi's terms described as "*repair or replacement of any Product consumables*") is apparent. As Mr Frampton pointed out, if DRJ was held liable in damages for the cost of NCL accepting Heatwave's offer (made over 9 and 8 years after the dates of practical completion under the Phase 1 and Phase 2 Contracts) it would in effect be paying for a warranty and servicing going well beyond the 10 year period suggested. Although ASHPs were installed after practical completion, in 2015, Mr Pearce-Smith submitted that the 10 year period should run from the date of commissioning of the original EAHPs which were installed before practical completion.

357. For all the reasons set out above, SS has fallen way short of establishing its case that NCL has "lost" 9 years of warranty, beyond the 12 months cover offered by Mitsubishi in event, by reason of some fault on the part of DRJ's. I agree with Mr Frampton's observation that it appears that this last head of claim was very much an afterthought.

358. In any event, in my judgment no recoverable loss can be sustained by reference to the position of NCL for the same reasons as I have given in relation to the JKW and snagging claims.

Conclusion

359. It follows that SS has not made good any part of its counterclaim.

360. In his witness statement, Mr Porter had attributed to Mr Lewin the statement that he "*doesn't pay retentions*". At the final point of his cross-examination by Mr Pearce-Smith, when he was challenged the truthfulness of that evidence, Mr Porter elaborated upon it. Mr Porter said that he knew that SS had not paid the retention of another contractor engaged on other work at the Site (CS Williams, who later went into administration) and that Mr Lewin had made the statement at the December 2014 meeting. Mr Porter added that, on his drive back from the meeting at Nynehead to his offices in Yeovil, he telephoned Mr Jones to express his concerns that DRJ were going to get the same treatment and to say "*I think we are going to have a problem here*."

361. At the time, Mr Porter's evidence on this point struck me as truthful. It has been fully borne out by the very unsatisfactory way in which SS has firstly struggled to articulate and then signally failed to establish its case on the various shortcomings on the part of DRJ which were said to justify the non-payment of the balance of the retention.

362. DRJ is therefore entitled to the sum of £39,481.16 together with contractual interest as indicated in paragraph 125 above. Since the circulation of the draft of this judgment the parties have helpfully reached agreement that interest should run from 7 October 2015 (the last ASHP installed in Units 1 to 10 was that for Unit 5 on that date) to the date of this judgment. They are agreed that the figure is £10,668.86.

363. In addition, DRJ is entitled to the sum of £1,181.63 in respect of the claim to VAT (mentioned in paragraph 12 above) on which interest at the contract rate should run from 28 February 2013 when payment under DRJ's invoice fell due. The parties are again agreed upon an interest figure of £488.64.

364. SS's counterclaim falls to be dismissed.

365. In the absence of agreement between the parties upon the cost order to be made as a result of my decision, I will invite their sequential written submissions on that question with a view to me either determining it on paper or convening a further short, remote hearing for further argument. I direct that DRJ shall file and serve its costs submissions by 4pm on Friday 11 September, that SS's submissions in response shall be filed and served by 4pm on Friday 18 September and that any submissions in reply are filed and served by 4pm on Tuesday 22 September 2020.

366. By an email received within just over half an hour before the time fixed for the remote handing down this judgment, Mr Pearce-Smith has indicated by email that, in addition to costs, the issue of permission to appeal was (or, perhaps, might be) a further outstanding matter. There has been insufficient time for me to establish whether or not SS does intend to appeal and I appreciate the point made by Mr Pearce-Smith in his email that the draft was only circulated on Sunday 23 August 2020 (during what is conventionally the holiday period). That said, it is not at all clear to me why SS left it so late to express their tentative position. It is fortunate that I have had the free time to address it (at the expense of a slight delay in the handing down). By an email in response submitted some 10 minutes before the hand-down Mr Frampton said it was far too late in the day for SS, without explanation, to raise the matter of permission to appeal at the last minute when it could have made an application in writing for permission to appeal beforehand or at least informed the court and DRJ earlier so that the question might have been properly addressed. Mr Frampton expressed concern that it appeared to be an attempt to delay payment. He said SS should be left to seek any such permission direct from the Court of Appeal.

367. Having considered these rival contentions, the procedure identified in *McDonald v Rose* [2019] EWCA Civ 4, [21], shall apply in relation to any proposed appeal. In the event of SS deciding that it wishes to appeal any finding in it, I direct that an application shall be made to me in writing within 14 days of this handing down (by 4pm on 18 September 2020). Any submissions by DRJ in response shall be filed by 4pm on 2 October 2020. If made, the application for permission will be determined by me on the papers and the hand-down shall be adjourned for that limited purpose.

The time for filing an Appellant's Notice with the Court of Appeal under CPR 52.12(2)(a) will be 21 days from my determination of the application for permission.

368. Nothing in this contemplated appeal procedure involves stay upon the enforceability of the money judgment I have given against SS and to which the ordinary 14 day rule for compliance under CPR 40.11 applies.

369. I would please ask the parties to lodge a minute of order reflecting this outcome.