Neutral Citation Number: [2024] EWHC 1257 (TCC)

Claim No. HT-2019-000437

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

Date: 23 May 2024

BEFORE:

MR SIMON LOFTHOUSE K.C.

SITTING AS A JUDGE OF THE HIGH COURT

- -

JENNI GLOVER	**First Claimant**
LITTLETON GLOVER	**Second Claimant**
- and -	
~~FLUID STRUCTURAL ENGINEERS & TECHNICAL DESIGNERS LIMITED~~	**~~First Defendant~~**
~~CHASE CONSTRUCTION (CONTRACTS) LIMITED~~	**~~Second Defendant~~**
~~STARSTONE INSURANCE SE~~	**~~Third Defendant~~**
~~CHUBB LONDON AVIATION LIMITED~~	**~~Fourth Defendant~~**
~~CHUBB EUROPEAN GROUP~~	**~~Fifth Defendant~~**
AXA XL INSURANCE COMPANY LIMITED (FORMERLY KNOWN AS XL CATLIN INSURANCE COMPANY UK LIMITED)	**Sixth Defendant**

- -
- -

David Turner KC (instructed by Penningtons Manches Cooper) for the Claimants
Luke Wygas (instructed by Penningtons Manches Cooper) for the Claimants
Mr Rona Hanna (instructed by Reynolds Porter Chamberlain) for the 6th Defendant

Hearing date: 3 May 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 23rd May 2024.

Introduction

1. The main application before the court is the claimants' application, issued on 25 April 2024, seeking permission for a new structural engineering expert in place of Mr Andrew Hardy together with consequential directions.

2. The sixth defendant ("AXA XL") by its application issued on 23 February 2024 seeks the revocation of the claimants' permission to rely on the evidence of Mr Hardy. This application is, effectively, conceded.

3. Against a background of the Claimants' admitted interference in the expert process, AXA XL resists the appointment of a replacement expert alternatively submits that any permission should be conditional on extensive disclosure of without prejudice communications with Mr Hardy. By the time of the hearing the claimants had identified Richard Tant of Richard Tant Associates as the replacement expert they wished to retain.

4. The third matter before the court concerns an earlier application by the claimants issued 16 February 2024 seeking an extension of time for service of a Schedule of Loss. The costs of that application remained to be determined however it was apparent from the parties' skeleton arguments before me that the parties are now in agreement as to the appropriate costs order.

5. The applications occupied a full day on Friday 3 May 2024. Given the timetabling issues that arose, I told the parties that I would provide my decision after the

Bank Holiday Monday with full reasons to follow. On Wednesday 8 May I made the order set out at the end of this judgment. This judgment contains the reasons for that order.

Background

6. The claimants are the owners of 124 Westbourne Grove, London, W11 2RR. It is not in issue that in around 2016 they commenced renovation works including the creation of a new basement. Whilst carrying out these works damage was suffered to surrounding properties including 122 Westbourne Grove ("the adjoining owners").

7. By its Particulars of Claim dated 4 July 2022 the claimants brought claims against a number of parties including Chase Construction (Contracts) Limited, the original building contractor for the works and Fluid Structural Engineers & Technical Designers Limited the appointed structural engineers for the works. I am advised that the other claims have been compromised and the claimants now only proceed against AXA XL.

8. The claimants updated schedule of loss dated 1 March 2024 identifies a VAT inclusive sum of £1,881,005.61 in respect of damage to 122 Westbourne Grove.

9. The claimants seek a declaration that they are entitled to an indemnity from AXA XL under an insurance policy issued in their favour. By its defence dated 26 August 2022, AXA XL seeks to rely on what it contends are an extensive range of exclusions in the XL policy excluding liability for damage that (i) was the fault of the builder or designer, (ii) was inevitable damage, (iii) was recorded in a survey attached to the policy or (iv) was due to works undertaken prior to the

start of the policy. It can therefore be seen that issues as to the cause, nature and extent of damage and when it occurred are central issues between the parties.

10. The trial is listed to commence on 16 September 2024 with a reading day, 5 days of evidence with oral closing submissions to follow on 26 September 2024.

11. On 22 March 2024 a party wall award was issued in relation to a dispute between the claimants and adjoining owners. This found the sum of £1,832,638.76 as payable by the claimants to the adjoining owners. That award is the subject of an appeal dated 3 April 2024.

Expert procedural history

12. At the costs and case management conference on 4 April 2023 HHJ Stephen Davies gave permission to the parties to call expert witnesses in respect of structural engineering and quantum. That evidence was timetabled in the usual way to rule 35.12(3) statements followed by experts' reports.

13. The claimants engaged Mr Hardy as their structural engineering expert. AXA XL engaged Mr Howard Tucker.

14. The Rule 35.12(3) statement evolved through various drafts reflecting discussions between the experts. When the draft was at an advanced stage Mr Tucker expressed his concern to RPC, solicitors for AXA XL, as to what he believed to be significant changes to Mr Hardy's views recorded in the latest version. Put shortly, Mr Tucker was concerned that on the face of it there appeared to have been involvement from the claimants' lawyers.

15. A joint statement was nevertheless agreed and signed on 3 November 2023.

16. By letter dated 12 December 2023 RPC wrote to Pennington Manches Cooper ("PMC"), solicitors for the claimants addressing complaints made by PMC as to delays in finalising the experts' joint statement:

> "….
>
> With respect to your comments on the delay regarding the preparation of the Experts' Joint Statement (EJS) we have discussed the matter with our Expert, Mr Tucker, and understand that the delay arose due to substantive changes having been made to the EJS between V3 and V4 by Mr Hardy. For the avoidance of doubt, we are not suggesting that there is any loss of privilege over the drafts of the EJS, but between V3 and V4 we are advised that there were significant changes to the matters that had been agreed to the draft.
>
> Mr Tucker has advised us that he was unable to account for the changes made between V3 and V4, but that he considered the nature of the amendments made and the language employed suggested that there may have been involvement from lawyers.
>
> We trust that the Claimants' legal team complied at all times with the guidance in paragraph 13.6.3 of the TCC Guide. However, in light of the concerns raised by an independent expert and as a matter of professional courtesy, we feel obliged to raise the matter with you and provide you an opportunity to respond. We trust that Mr Tucker's concerns are unfounded, but to put the matter to rest we invite you to confirm that Mr Hardy was not provided with instructions as to the substance or wording of the draft EJS; that he was not provided with wording for the draft and that he was not asked to include certain opinions or to alter opinions already expressed in draft. We would ask you to confirm that you have provided by Mr Hardy with a copy of this letter.
>
> …
>
> "

17. In its letter of 14 December 2023 PMC addressed a number of matters. On the issue of interference in the Joint Statement process it stated :

> " …
>
> 3. An adverse inference will be drawn that there was no reasonable basis for Mr Tucker not to have prepared his Expert Report on time.

4. Instead, your letter relays an unsubstantiated attack by Mr Tucker on the independence of Mr Hardy with respect to the EJS which is denied. This attack is surprising considering that Mr Tucker's approach to the EJS appears contrary to CPR 35.12(1)(a) requiring that the discussions between experts is to identify and discuss the expert issues **in the proceedings** (bold added for emphasis). Without waiver of privilege and whilst this should not be necessary to detail but for the unsubstantiated attack on Mr Hardy's independence, it is noted that Mr Tucker's drafting of the EJS:

   a. initially failed to deal with the pleaded issues as to the inevitability of damage;

   b. avoided referring to the Scott Schedule prepared by the parties in dealing with timing of damage;

   c. initially failed to deal with AXA XL's own pleaded issues as to theories of negligent causes of movement, which were then generally rebutted by Mr Tucker in contradiction with AXA XL's pleaded case;

   d. an excessive detailing of issues relating to front garden underpinning, largely unsupported by AXA XL's pleaded case, to support AXA XL's current main argument on the cause of movement;

   e. raised an unparticularised cause of movement with respect to item 4.16;

   f. failed to deal with the pleaded issue of remedial works despite this being an issue that is relevant to the experts.

5. The above suggests either influence by AXA XL's legal representative with Mr Tucker's approach or Mr Tucker's failure to adopt an independent approach with the EJS with respect to the issues in the proceedings.

6. We do not believe there was a delay between V3 and V4 of the EJS but there was a delay between Mr Hardy issuing V4 of the EJS on 12 October 2023 and Mr Tucker issuing V5 of the EJS on 1 November 2023 (a mere 2 days prior to the Court deadline of 3 November 2023). Without waiver of privilege, it is denied that this delay was as a result of alleged significant changes by Mr Hardy but was due to Mr Tucker having other work commitments (as you yourselves suggest in your letter of 29 November 2023)

…"

18. In a brief response on 21 December 2023, RPC stated :

> "…
> We will respond to the balance of your letter in due course but are troubled by your failure to address the questions we posed with our letter of 12 December 2023 regarding whether you complied with your duties in respect of the preparation of the Joint Statement.
>
> Whilst we indicated in our letter that we trusted that everything would be in order, it should be appreciated that the failure to answer our questions now means that our client has an active concern regarding this issue. We repeat our request for answers and invite you to confirm a date for a response.
>
> We invite you to confirm that you have placed a copy of our letter of 12 December 2023 before Mr Hardy.
>
> …"

19. That letter of 21 December 2023 did not receive a response until PMC's letter 16 January 2024, the material parts of which are set out below:

> "…
> 3. You seek to complain that we did not answer questions posed in your letter of 12 December 2023. However your letter of 12 December 2023 did not pose any questions and our letter of 14 December 2023 provided a very prompt and sufficient answer to the points made in your letter, having regard to the privileged nature of the discussions to which it related.
>
> 4. Indeed, it is evident that not only do your letters seek to discuss the without prejudice communications between the parties' experts in open correspondence, they also enquire as to our privileged communications with our client's experts. As you will know when enquiring as to these communications, we are unable to divulge details of them to you. There is something contrived about you making enquiries that you know we cannot answer and then quickly seeking to draw an adverse inference from our appropriately discreet response.
>
> 5. What we can say, with respect, is that it appears to us from Mr Tucker's conduct (no privilege waived) and from your correspondence that he and your firm appear to be taking an erroneously restricted view of the role of solicitors in relation to the preparation of an Experts Joint Statement.

6. We respectfully request that you consider carefully paragraph 13.6.3 of the TCC Guide to which you have referred. This expressly acknowledges and permits legal advisers to identify the issues that the Joint Statement should address and where necessary, to invite the experts to consider amending the draft Joint Statement where there are serious concerns that the Court may misunderstand or be misled by the terms of that Joint Statement.

7. We also refer you to section 75 of the Civil Justice Council's Guidance for the instruction of experts in civil claims that : "*In multi-track cases the parties, their lawyers and experts should co-operate to produce an agenda for any discussion between experts,* ***although primarily responsibility for preparation of the agenda should normally lie with the parties' solicitors"*** (bold added for emphasis). This also serves to confirm the important role played by solicitors in identifying the issues that the joint statement should address.

8. Without waiver of privilege, we confirm that our approach to giving directions to experts in any litigated case (and we specifically confirm that this one is no exception) is entirely in line with the above. In short, we offer guidance to experts in an attempt to ensure they address the pleaded issues and do so clearly. The substance of their views are a matter for them and we do not (and have not here) sought to supplant our views for theirs.

…"

20. Perhaps understandably, that response did not satisfy RPC who responded on 24 January 2024. This was a lengthy letter, extracts of which I set out below :

"The assertion that the 12 December 2024 letter did not contain any questions is not understood. It stated :

"We invite you to confirm that Mr Hardy was not provided with instructions as to the substance or wording of the draft EJS; that he was not provided with wording for the draft and that he was not asked to include certain opinions or to alter opinions already expressed in draft. We would also ask you to confirm that you have provided Mr Hardy with a copy of this letter."

No such confirmations have been received, nor any answers to those questions."

RPC then proceeded to repeat the questions.

21. The letter of 24 January 2024 also addressed paragraph 13.6.3 of the TCC Guide. It observed that the Civil Justice Council's guidance was directed to settling the agenda for experts meetings whereas the particular concern of AXA XL concerned the changes between revisions 3 and 4 of the EJS. In that regard, reference was also made to *BDW Trading Ltd v. Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC) highlighting the following in paragraph 18 of the Judgment of HHJ Stephen Davies :

> "What happened here was, I agree, a serious transgression and it is important that all experts and all legal advisers should understand what is and what is not permissible as regards the preparation of joint statements. To be clear, it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the experts should not ask the solicitors for their general comments or suggestions on the contents of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide. This is consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12(5)). **There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact.** If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the Trial Judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re--open the discussion by this means." (emphasis added)

RPC then observed:

> "Importantly, and as that judgment makes clear, the very limited exception envisaged by paragraph 16.3.6 of the TCC Guide enables the lawyers to bring to the experts' attention that there is some material misunderstanding "of law or fact" (where there is a serious risk that the court might be misled). It does not permit the lawyers to comment on the substance of the draft joint statement or the opinions expressed therein, save only to correct a

material error of law or fact. If you disagree with that statement of the position in law, please explain why.

..."

22. RPC continued later in the letter of 24 January 2024:

> "We and our client have grave concerns regarding the proprietary of the expert joint statement process. We believed that these concerns could readily be put to rest in correspondence with you. It is a matter of real regret that this has not yet occurred and that, instead, your continuing evasiveness of this issue heightens our concern that there has been a serious transgression of the rules governing expert evidence.
>
> …"

In its final paragraph RPC stated :

> "In the event that this matter is not resolved shortly, we put you on notice that our client intends to make an application to Court. Without prejudice to our client's rights in full, the relief sought would include withdrawing the Court's permission for the Claimants to rely on Mr Hardy's evidence and/or permission to cross-examine Mr Hardy on this issue at trial and/or making the right to rely on Mr Hardy's evidence at trial conditional upon disclosure of versions 3 and 4 of the EJS and/or of the comments thereon made by the Claimants' legal team. We would invite you to take note of the BDW case referred to above, as well as Dana UK Axle Ltd v. Freudenberg FST GmbH [2021] EWHC 1413 (TCC) and Andrews v. Kronospan Ltd [2022] EWHC 479 (QB)."

23. As set out above, on 23 February 2024 AXA XL issued an application seeking the revocation of the claimants' permission to rely on the evidence of Mr Hardy.

24. In its letter of 14 March 2024 referring to the application PMC stated :

> "….
> Without waiver of privilege and any further admissions, we have determined that our conduct of the joint statement process was not fully in compliance with the applicable rules and/or guidance. Any non-compliance is not an admission of any compromising of Mr Hardy's independence nor his expert views. This non-compliance was by our firm and not by our clients who are lay clients who were not involved in this process. Our clients should not be

prejudiced in being able to present its case on equal footing as a result of any non-compliance by us and the sanctions requested by your client's application. Your client is requested to bear this in mind in terms of its response to the proposal set out in this letter than may unfairly penalise our clients

We have set out in this letter our proposals to remedy this non-compliance which will be the most time and cost effective course of action.

We propose that the parties agree an order setting out the following :

1. Our clients' permission to rely on expert evidence from Mr Andrew Hardy is revoked. Our clients retain their permission to rely on expert evidence and structural engineering (as granted at paragraph 9.a of the order of HHJ Stephen Davies of 11 April 2023) from an alternative structural engineer.

2. The parties' engineering experts carry out the joint statement process, with the parties' solicitors to endeavour to agree an agenda for discussion in advance.

3. The parties' engineering experts issue their Part 35 reports.

4. Our clients shall bear their own costs and cover your client's reasonably incurred costs for re-doing the engineering experts' joint statement and report stages.

5. Our clients shall cover your client's cost of their application up to date.

…"

25. The final letter relevant in this exchange to which I need to refer is from RPC dated 21 March 2024. That letter noted that the statement made in PMC's letter of 16 January 2024 that its approach to giving directions to experts in any litigated case was entirely in line with paragraph 13.6.3 of the TCC Guide and section 75 of the Civil Justice Council's guidance on experts was not true. RPC observed it was disappointing that it required an application to the court for the true position to be acknowledged. In addressing the proposals made:

"….

5. You appear to assume that, because no expert was named in the CCMC Order it granted permission to rely on expert evidence, your clients are at liberty to change their report. That is misconceived: see ***Edwards-Tubb v. JD Wetherspoon Plc*** [2011] 1 WLR 1373 in particular per Hughes L.J. at [27]

…

8.1 This is, on the Claimants' own case, an instance of expert shopping. It is a particularly egregious example. Having committed serious transgressions of the rules of Court – and, in so doing, having fatally undermined the credibility of their expert – the Claimants now wish to change experts so as to avoid the inevitable consequence of those actions. That amounts to the Claimants taking advantage of their own wrong. It would be contrary to the interests of justice.

…

10. It seems to us that the way forward is for the Claimants to prepare a draft application for permission to change their expert (which would also amount, in part, to a response to AXA's extant application) and that this should be provided to us in draft before being issued. It may be that the draft application and draft supporting evidence might need AXA to review the position set out above. To be clear, however, that would require the draft to deal squarely with the matters set out above. In particular, it is our view that the application must provide full and proper disclosure of the comments / instructions given to Mr Hardy in respect of the changes to the draft joint statement (and any communications / drafts in which those are set out or recorded). We note that this was the approach taken by the applicant in ***Andrews v. Hardy*** [2022] EWHC 479 (QB) in similar circumstances to the present case.

…"

The evidence served in support of the applications

26. In her statement of 23 February 2024 Ms O'Callaghan of RPC exhibited and commented on the correspondence set out above.

27. Peter Stockill, the partner at PMC with overall supervision of the claimants' claim, provided a statement dated 25 April 2024 in support of the claimants' application. Privilege was waived in relation to communications between PMC and Mr Hardy

as exhibited to his statement. This included the drafts of the experts' joint statement.

28. In addressing the expert process, Mr Stockill states :

> "12. I accept that my firm did not comply with the applicable rules and guidance. In particular, I accept that we made comments on and proposed amendments to draft 3 of the Joint Statement that we were not permitted to make. In addition, I confirm that (albeit to a lesser extent) my firm also provided comments on and proposed amendments to drafts 2, 6 and 7 of the Joint Statement that we were not permitted to make. This non-compliance arose through a failure to understand the applicable rules and guidance and I apologise unreservedly to the Court and AXA XL for this.
>
> 13. In acting as we did, my firm did not intend to have any impact on the substance of the views of the Claimants' structural engineering expert, Mr Hardy, or on his independence. However, I do accept that the Court could not now be satisfied as to his independence.
>
> 14. I also wish to make clear that neither the Claimants nor counsel had any involvement in the joint statement process"

29. Give that admission it is unnecessary to go through the totality of the communications with Mr Hardy on drafts 2, 6 and 7 in respect of which privilege was waived. The stated intention underlying the revisions to the third draft statement is apparent from an email dated 12 October 2023 and sent to Mr Hardy by an associate at PMC, copied to Mr Stockill:

> "Please see attached our amends to the Joint Statement. I accepted Howard Tucker's previous changes and made our amends in track (but I have removed the metadata so it doesn't show PMC made the amends).
>
> You will see the amends are with the intention of staying faithful to the pleaded issues rather than the plethora of objections raised by Howard Tucker which are more appropriate for the comment boxes. We have also covered off other pleaded issues which the engineering experts are expected to cover including all pleaded theories of negligence and the remedial works scope (linked to the party wall submission that Howard Tucker should have a copy of but if not, we can send you a copy).

> We would be grateful if you could review and confirm if you agree with the changes and where you wish to make further changes to the statements and your comments, to make these. Please then send us a further copy for review before this is sent back to Howard Tucker to comment on."

30. There were extensive revisions and deletions made to the third draft. To fully understand their nature it is necessary to compare the third draft enclosed to the e-mail of 11 October 2023 with that provided to PMC by Mr Hardy on 9 October 2023. The revisions were generally undertaken by way of track changes with explanations provided by way of "Commented" boxes adjacent to the revised text.

31. At paragraph 50 of his witness statement Mr Stockill addresses the revisions made. Given Mr Stockill does not seek to justify the revisions made it is unnecessary to address them in great detail however I indicate their nature below by way of examples below.

32. Issue 1.2 "Expectation of damage" was revised to read "Inevitability of damage". The previous wording against that issue:

    > "It is not possible to construct a new basement extension to a Victorian terrace without cracking in the neighbouring properties. Pre existing cracking and distortion in the neighbouring properties is to be expected. Cracking arising from the basement construction should be limited to within tolerable limits"

    was revised to read:

    > "The policy does not provide for damage "which can reasonably be foreseen to be inevitable having regard to the nature of the work to be

executed or the manner of its execution" which is an exclusion under the XL Policy

And Mr Hardy's Comment "Agreed" against the original issue was deleted with "noted for reference" added against the revised issue.

The explanation provided in the "Commented" box was:

"Not an expert issue relevant to the pleading"

33. In his witness statement Mr Stockill explained that the revised wording was to refer explicitly to the policy exclusion wording in circumstances where the earlier draft used terms which were "*unhelpful*" because the policy wording was "*inevitable"* and that addressing issues such as "*Expectation of damage"* and "*Accepted limits on damage to neighbouring properties*" (the wording in issues 1.2 (second) and 1.3 which was similarly revised) may "*lead the experts to answering the wrong question*".

34. Against Issue 3.2, "*Grout gap between party wall underpinning and the executed work face*" the previous wording under "Statement" was recorded as "*Agree*d" by Mr Hardy and Mr Tucker:

" To the centre/rear of the party wall the ground was in contact with the earth face at the front the results from the coring were inconclusive but show trench sheeting behind the underpinning. If there were voids behind trench sheeting at the rear of the underpin towards the front of the building this could have allowed the ground beneath the foundations of the front wall of No 122 to settle"

As revised, that previous wording in the "Statement" column was deleted and replaced with :

> "There was a grout gap between party wall underpinning and the excavated earth face"

Mr Hardy's agreement to the previous wording in the column "Mr Hardy's Comments" was deleted and replaced with:

> "Not agreed. To the centre/rear of the party wall the ground was in contact with the earth face, so there was no gap. At the front one core found concrete cast up to a metal trench sheeting. It would not be possible to explore behind this sheeting without trespassing into 122 WBG's land. There is no evidence that there are voids behind the trench sheeting that required grouting and this is only a theory. Even if there is evidence to support this theory, any lack of grouting in this area does not explain the significant movement and damage to the front façade"

35. Mr Stockill seeks to explain this revision as follows:

> "Item 3.2 was not faithful to paragraph 55.2(a) of AXA XL's Defence regarding the grouting gap between the underpinning and excavated face, so we sought to make it so. We added comments for Mr Hardy based on what had been in the statement column and with no intention to cause Mr Hardy to express views he did not actually hold. We moved some of the text from the "statement" column into Mr Tucker's comments box in deference to the fact that these were his views."

36. Issue 4.1 "*Cause of damage*" was revised to add the underlined words:

> New cracks and the widening of existing cracks in the front elevations of the properties during the Policy Period was caused by <u>(partial) collapse and/or subsidence and/or weaking (sic) or removal of support arising out of or in the course of or by reason of the carrying out of</u> the Works to construct the basement to No 124.

37. Mr Stockill explains that addition to the Statement column on the basis that Issue 4.1 "*did not address the specific insured perils in the insuring clause (collapse subsidence etc) so we added these for the experts to consider*".

38. The revisions ultimately made were then passed by Mr Hardy to Mr Tucker in a draft 4 dated 12 October 2023. I make clear that not all of these revisions found their way into the later draft or the final version of the joint statement agreed on 3 November 2023 although some did (such as the revision to Issue 1.2 and 4.1 (including the typographical error).

Joint Statements: The Applicable Principles

39. Paragraph 13.6.3 of the TCC Guide, to which reference has already been made, states:

> "Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that Joint

Statement. Any such concerns should be raised with all experts involved in the joint statement."

40. In *Imperial Chemical Industries Ltd v. Merrit Merrall Technology Ltd* [2018] EWHC 1577 (TCC) at [237] Fraser J (as he then was) stated:

> **"**The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR Part 35, Practice Direction 35. Every expert should read it. In order to emphasise this point to experts in future cases, the following points ought to be borne in mind. These do not dilute, or change, the approach in ***The Ikarian Reefer.*** They are examples of the application of those principles in practice.
>
> 1. Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number.
>
> 2. Where there is an issue, or are issues, of fact which are relevant to the opinion of an independent expert on any particular matter upon which they will be giving their opinion, it is not the place of an independent expert to identify which version of the facts they prefer. That is a matter for the court.
>
> 3. Experts should not take a partisan stance on interlocutory applications to the court by a particular party (almost invariably the party who has instructed them). This is not to say that a party cannot apply for disclosure of documents which its expert has said he or she requires. However, the CPR provides a comprehensive code and it may be that disclosure is not ordered for reasons of disproportionality. However, if documents are considered to be necessary, and they are not available (for whatever reason), then an opinion in a report can be qualified to that extent.
>
> 4. The process of experts meeting under CPR Part 35.12, discussing the case and producing an agreement (where possible) is an important one. It is meant to be a constructive and co-operative process. It is governed by the CPR, which means that the Overriding Objective should be considered to apply. This requires the parties (and their experts) to save expense and deal with the case in a proportionate way.
>
> 5. Where late material emerges close to a trial, and if any expert considers that is going to lead to further analysis, consideration or

testing, notice of this should be given to that expert's opposite number as soon as possible. Save in exceptional circumstances where it is unavoidable, no expert should produce a further report actually during a trial that takes the opposing party completely by surprise.

6. No expert should allow the necessary adherence to the principles in ***The Ikarian Reefer*** to be loosened. It is to be hoped that expert evidence such as that called by ICI in this case, and also in ***Bank of Ireland v Watts Group plc***, does not become part of a worrying trend in this respect. There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of them. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence."

41. Before me there is no disagreement between the parties as to these principles or their application. The wording of paragraph 13.6.3 is clear. Nevertheless, Mr Stockill's evidence is that there had been a failure to understand the applicable rules and guidance for which he apologised unreservedly to both the court and AXA XL.

42. What is clear from the correspondence is that PMC believed it was permissible to amend the draft statement where it was thought the content did not reflect the pleaded issues and said the same to RPC (see for example, paragraph 8 of the letter of 16 January 2004). Such a belief, however misguided, is not the same as a deliberate and knowing disregard of the applicable principles.

43. Mr Stockill further states that whilst in acting as it did PMC did not intend to have any impact on the substance of the views of Mr Hardy or his independence, he accepts the Court could not now be satisfied as to Mr Hardy's independence. On the evidence before the court it is clear that it cannot be satisfied as to the

independence of Mr Hardy in the joint statement process, however I should make clear that I have no evidence before me from Mr Hardy himself.

44. The deletion of metadata is explained as occurring under time pressure in circumstances where the wish was not to share comments with others. In particular the identification that text had been added at the suggestion of PMC was sought to be avoided. In so doing, Mr Stockhill makes clear this is neither his common practice nor that of the associate who wrote the e-mail of 12 October 2023 and neither can recall ever having done so before. Nevertheless such conduct was thought at the time to be justified as the comments were regarded as privileged in any event. As Mr Stockill states in his witness statement "*We also did not wish to be conspicuous about our involvement because we did not want to turn the joint statement process in a lawyer led process.*"

45. It must be observed that the actions taken had precisely (and predictably) the very consequence Mr Stockill was striving to avoid. The revisions made caused Mr Tucker to be understandably concerned as to the joint statement process. The consequence of this was the involvement of the parties' legal representatives addressing the joint statement process leading to the current applications before the court.

Changing experts: The applicable principles

46. What divides the parties are the circumstances in which permission should be given for a replacement expert and the conditions to be attached to any such permission. In addressing these issues a number of authorities were cited, most

were directed to the conditions to be attached to any permission to change experts. I address them chronologically.

47. In *Edwards-Tubb v. JD Wetherspoon plc* [2011] EWCA Civ. 136 the Court of Appeal imposed conditions on a claimant who wished to change expert from the expert originally retained for the purposes of the pre-action protocol for personal injury claims. Having first concluded that there was no difference between a change in expert pre-issue (as part of the pre-action protocol procedure of co-operation) and post-issue, Hughes LJ stated, at paragraph 31 :

> "For these reasons I would hold that the power to impose a condition of disclosure of an earlier expert report is available where the change of expert occurs pre-issue as it is when it occurs post-issue. It is of course a matter of discretion but I would hold that it is a power which should usually be exercised where the change comes after the parties have embarked upon the protocol and thus engage with each other in the process of the claim."

48. In that case the reason for the change of expert was not clear and as the Court of Appeal noted it was not permissible to infer at trial that the earlier report was unfavourable to the claimant if the claim for privilege in the earlier report was successful.

49. As I have observed the claimants have already waived privilege in respect of such of the joint statement process as the claimants' consider necessary to deal with the applications.

50. In Adams v. Allen & Overy and Others [2013] EWHC 4735 (Ch) the claimants' allocation questionnaire identified an expert different from the chartered surveyor originally retained. As part of the pre-action process, that earlier expert, Mr Smith, had also prepared a "second and rebuttal commentary." In the defence

of the second and third defendants Mr Smith was expressly referred to and his evidence described as "fatally flawed". Mr Smith subsequently declined to act with the necessity for the claimants to retain a new expert.

51. In that case there was no evidence that the expert's unwillingness to continue was anything other than genuine and in particular, it was not a mask for some ulterior reason on the part of the claimants' legal team to be rid of him as an expert. Against that background, Foskett J considered whether there was anything else that Mr Smith or the claimants' legal team should convey to the defendants' legal teams as a condition of granting permission. As the Court observed, the reports had already "*been revealed*". At paragraph 49 the court concluded:

> "I do not think it would be right to make it a condition of permission that all communications between him and the claimants' legal team should be revealed. I cannot see how, even if revealed, they could properly deployed in the trial process. Given the critical scrutiny to which Mr Smith's views have been subjected it is unlikely in the extreme that either defendant would wish to call him in support their cases. This is not a case where a party has deliberately not sought to rely on an expert view that is favourable to that of the opposing party, who then wishes and is entitled to put the report before the court under CPR Part 35.11."

52. In *Murray v. Devenish* [2017] EWCA Civ. 1016 the Court of Appeal was considering a case where the claimant appellant, or more particularly its counsel, had lost confidence in the retained expert. At first instance the Judge refused permission to change experts having regard to the proximity of the trial date and the claimant's previous conduct of the proceedings. In the event, once permission to appeal was granted, the claim was stayed and the trial date vacated until determination of the appeal.

53. Having concluded that he would not have interfered with the case management decision made by the Judge at first instance as it was a decision he was entitled to reach, Gross L.J. noted that the position before the Court of Appeal was different in that there was no new trial date. In those circumstances, whilst dismissing the appeal, the Court of Appeal gave permission for the replacement expert subject to disclosure of previous reports.

54. In reaching the same conclusion Underhill L.J. did not regard this as a case of expert shopping in the pejorative sense and whilst stating that he would not necessarily have reached the same conclusion as the court at first instance, it could not be said that the decision was not open to him.

55. The decision of HHJ Stephen Davies in *B.D.W. Trading Ltd* has been referred to above. In that case it became apparent during the evidence given at trial that the defendant's expert had made changes to the first draft of the Joint Statement as a result of comments and feedback received from the defendant's solicitors.

56. Against that background HHJ Stephen Davies concludes:

> "19. However, it was plain to me having heard him give evidence that Dr Tonks was genuinely unaware that his conduct in this respect was inappropriate. Furthermore, I am quite satisfied that there is no basis for considering that he had modified in any significant way the substance of his opinion as discussed with Mr Waite [the claimant's expert] as a result of his contact with and feedback from IGL's solicitors. My only qualification to that is that I am satisfied that he added to his opinion in section 14 of the Joint Statement, in relation to the specific issue as to whether or not the investigation undertaken by IGL was a "main investigation" as defined by the relevant Code of Practice (as to which see below), as a result of feedback from IGL's solicitors.
>
> 20. Nonetheless overall Dr Tonks' evidence seemed to me to be balanced and realistic and I tend to accept his views."

57. In the *Dana UK Axle Ltd v. Freudenberg FST GmbH* [2021] EWHC 1413 (TCC) an application was made on Day 7 of the hearing to exclude the defendant's technical expert evidence. The basis of the application was the discovery of numerous breaches by the defendant's three experts of CPR Part 35 and the 2014 Guidance for the Instruction of Experts in Civil Claims. These breaches were particularly concerning given that in granting relief from sanction for the late service of the defendant's three technical expert reports, O'Farrell J imposed conditions. These conditions comprised the provision of full details of all materials provided to those experts by the defendant's solicitors and the defendant itself, disclosing all documents produced by or provided to each experts during any site visit (including notes taken) and identifying the source and details of the data and other information relied on in support of each proposition/opinion. Those conditions were, in the event, not complied with.

58. Having established the extent of the non-compliance Joanna Smith J refused permission to rely on the technical expert reports in circumstances where the defendant's failures to meet the conditions imposed by the PTR Order meant it did not have permission. It is clear from the judgement that the court considered there was a lack of candour in the responses to earlier enquiries directed to the conditions and the extent to which they had been complied with. In her concluding paragraph Joanna Smith J states :

> "94. The provision of expert evidence is a matter of permission from the Court not an absolute right (see CPR 35.4(1)) and such permission pre-supposes compliance in all material respects with the rules. I agree with Mr Webb's submission that the use of experts only works when everyone plays by the same rules. If those rules are flouted, the level playing field abandoned and the need for transparency ignored,

as has occurred in this case, then the fair administration of justice is put directly at risk."

59. In *Rogerson v. ECO Top Heat Power Ltd* [2021] EWHC 1807 (TCC) Mr Alexander Nissen QC, sitting as a Judge of the High Court provided a helpful review of the authorities on changing experts and the imposition of conditions. In that case he concluded that the defendant was seeking to call a different expert "*for a reason which I infer to be or at least has the appearance of expert shopping".* As a result, when giving permission to change experts he imposed wide-ranging conditions of disclosure extending to reports, letters and attendance notes from the previous expert to the defendant, its solicitors and others and attendance notes by the defendant's solicitors setting out or referring to the expert's views on causation.

60. *Patricia Andrews v. Kronospan Ltd* [2022] EWHC 479 was a case where the claimant's solicitors had commented on drafts of an expert joint statement provided to them by the claimant's retained expert for the purpose of soliciting their assistance. Senior Master Fontaine concluded that the expert's approach and acted in a way which "*strongly suggests he regarded himself as an advocate for the Claimants, rather than as an independent expert whose primary obligation is to the court*" (paragraph 31 of judgment refers).

61. As in the present case, the Court had no evidence from the expert as to the reasons for his conduct (whether he was unaware of his obligations as an expert and if so, why, or whether he was aware, in which his case his reasons why he thought it was appropriate to transgress those obligations).

62. Having found that she had no confidence in the expert's ability to act in accordance with his obligations as an expert witness the claimants' permission to rely on his evidence was revoked. In granting permission for a replacement expert and applying the overriding objective Senior Master Fontaine noted that the trial date was not in jeopardy because no trial date had been set. Account was also taken of the fact that the claim was one in nuisance where the claimants would, if successful, seek an injunction or declaration as well as damages so they would not be fully compensated by a claim against their solicitors (paragraph 35 refers).

63. In *The University of Manchester v. John McAslan & Partners Ltd and Others* [2022] EWHC 2750 (TCC) Mr Roger ter Haar KC sitting as a Deputy High Court Judge provides an extensive and helpful review of the authorities on conditions to be attached when granting permission to change experts. In noting the judgment of Stuart-Smith J in *Vilca v. Xstrata Ltd* [2017] EWHC 1582 (QB) he sets out at paragraphs 26 and 27 addressing those situations where there is a power to impose conditions (the emphasis is added by Mr ter Haar KC):

> "26. The second question, which arises if the court has determined that it has case management powers, is how they should be exercised on the facts of the particular case. I have already said that they should always be exercised in accordance with the overriding objective. The cases to which I have referred above do not establish some different principle. What they establish is that the court will always have regard to the possibility of undesirable expert shopping and the instinctive desire for the court to have full information (with the associated desire of the other party to be assured that the court's process is not being abused). **The Court of Appeal has consistently said (albeit in slightly different terms) that the object of imposing a condition that reports of previous experts should be disclosed is to prevent expert shopping and to ensure that full information is available.**
>
> 27. I do not exclude the possibility that there might be cases where the two limbs of the rationale identified by the Court of Appeal might be

absent and yet there might be some other reason, specific to the facts of that case, which require or justify the imposition of the condition of disclosure. But I do not accept that it is established either on principle or by authority that there is a rule of practice or procedure requiring that the condition be imposed if the two limbs of the rationale are absent and there is no other good reason to impose it. Furthermore while the usual course where the two limbs of the rationale are present will be that the conditions will be imposed, it is not inevitable. In my judgment the Court should in all cases apply its mind to what course will best meet any concerns that may exist and best advance the overriding objective. This requires the Court to consider in any given case what weight, if any, is to be given to those factors that might support the imposition of conditions as well as to those which tend in the opposite direction."

64. In that case the court concluded that the interests of the defendants were sufficiently protected by the disclosure already given. In *The University of Manchester* there had been a change of position and the claimant did not wish to call evidence from the experts sought to be replaced**.** The court concluded that the courts discretion to impose conditions was engaged**:**

> "75. That said, the case is a long way from the sort of abuse or possible abuse of the expert witness process in respect of which the authorities cited above show that the Court is astute to guard its procedure. What Clyde & Co's letter shows is an openness which runs contrary to the hidden abuse which "expert shopping" will typically involve.
>
> 76. On the other hand, it is right that their evidence should be available to the Court, the Defendants and the Third Party, not because of suspicions of expert shopping, but because it is or may be relevant evidence of primary facts.
>
> 77. That legitimate interest is, in my judgment, satisfied on the facts of this case by the disclosure already given."

65. The final authority to which I was referred is the decision of O'Farrell J in *Avantage (Cheshire) Ltd and Others v. GB Building Solutions Ltd (in administration) and Others* [2023] EWHC 802 (TCC). That case concerned an application to call a new expert, Dr Neil Ketchell, in place of a forensic scientist

and a fire engineer. The necessity to replace the forensic scientist was due to her serious illness which prevented her participation in the proceedings. Whilst concerns were raised as to the reasons for replacing the fire engineer with suggestions of expert shopping, permission was given when it became clear that the claimants were not happy with their original expert and wanted to have permission to rely on an expert in whom they had confidence. The detail of that lack in confidence was not before the court however it was accepted that this would be apparent should disclosure of the experts' reports be made a condition of granting permission to change experts. Such a condition was imposed however the court refused the application to disclose attendance notes of discussions with that expert:

> "39. However, I do not consider that this is a case in which the claimants' solicitors should be required to disclose attendance notes of their discussions with Mr Wise. Such an order will cause practical difficulties in producing redacted versions of the documents that were of any probative value. Further, such an order would constitute an unnecessary invasion of the claimants' privilege in circumstances where there is no suggestion of any culpable behaviour on the part of the claimants or their experts; they are simply unhappy with Mr Wise as an expert."

The Parties Submissions

66. In the claimants' written note, Mr David Turner KC and Mr Luke Wygas identify seven factors which they submit are relevant to the determination of whether permission should be granted to replace an expert and if so, subject to what conditions:

(a) There has been full and frank admission by PMC of the position and an unreserved apology has been given by Mr Stockill for what has happened;

(b) The claimants themselves were not involved in discussing matters with Mr Hardy;

(c) The claim is one which rests heavily on engineering evidence;

(d) Given the extent of the issues turning on expert evidence the claimants would be highly prejudiced if they were not allowed to rely on any structural expert evidence;

(e) Replacement expert evidence can be accommodated without imperilling the September trial date or the utility of the PTR listed for 19 July 2024;

(f) The claimants accept they must pay the costs thrown away by having to repeat the expert evidence (although they will be indemnified by PMC);

(g) Given the above, it would be wrong to punish the claimants for the actions of their solicitors.

These written submissions were expanded upon orally and by reference to the authorities set out above.

67. Mr Rónán Hanna appears for AXA XL. Given there is now no longer an issue as to the revocation of permission for Mr Hardy to give structural engineering evidence, his submissions focussed on the consequences of that revocation. Permission for a replacement expert was resisted on the basis of the application as presently formulated. In essence, AXA XL submits that any permission should be conditional on further extensive disclosure. In support of this Mr Hanna submits that there was covert interference by PMC with Mr Hardy's evidence and the effect of this was to alter the views expressed which included deleting

wording in which Mr Hardy was recorded as agreeing with key parts of the case advanced by AXA XL.

68. Mr Hanna does not suggest that new structural engineering evidence cannot be accommodated in time for the September hearing. However he notes, with some force, that it would have been helpful to have at least a draft of the proposed report before the court. On that point, I am told by Mr Turner that there was no contact with Mr Tant prior to PMC's letter of 14 March 2024 in which it sought agreement to revoke the claimants' permission to rely on expert evidence from Mr Hardy. Whatever the reason, there is no draft report before the court.

69. AXA XL believes it has a complete defence under the terms of the policy and it is understandably keen that the liability hearing proceeds in September this year. Greater concerns are expressed in relation to quantum. Given it is accepted there needs to be an updating of the Schedule of Loss to which AXA XL in turn needs to respond, Mr Hanna submits it is unrealistic to consider quantum can be dealt with in the original trial window. He also identifies the impact of the appeal as a good reason why, in his submission, quantum should be deferred until after determination of the appeal.

Analysis

70. I deal first with the question of permission for a replacement expert. I do so on the basis that the facts set out above disclose substantial and impermissible interference in the expert statement process by those acting for the claimants. Such interference is clearly contrary to both authority and the applicable guidance issued by the TCC.

71. When considering the question of a replacement expert I have regard to the overriding objective of enabling the court to deal with cases justly and at a proportionate cost. This includes dealing with cases in ways which are proportionate to the amount of money involved, ensuring a case is dealt with expeditiously and fairly allocating an appropriate share of the court's resources and enforcing compliance with rules, practice directions and orders.

72. I accept Mr Hanna's submission that there is no reported decision on all fours with this case. Every decision is fact sensitive and whilst there can be no excuse for the conduct of the claimant's solicitors, justice is best served by maintaining the trial date if at all possible and ensuring that AXA XL has sufficient disclosure to understand Mr Hardy's views, however unlikely it is that AXA XL would wish to deploy his report as evidence at trial pursuant to the provisions of CPR part 35.11.

73. In that regard, if the consequence of a replacement structural engineering expert had been to lose the trial date this September then, for that reason alone, I would not grant permission. However as I discuss below, that is not the case here and perhaps understandably the claimants have provided revised directions for the structural engineering evidence which keep the trial date.

74. I consider permission should be given for Mr Tant to be an expert witness in the field of structural engineering. My reasons for doing so are:

    a. It is not disputed that structural engineering evidence is central to the issues in these proceedings. Without it, the claimants would likely be at

a very significant and possibly insurmountable disadvantage in establishing its case as to liability under the policy.

b. As already observed, the expert evidence can be timetabled in a way which preserves the trial date and does not cause unfairness to AXA XL. It is likely that given the steep learning curve Mr Tant will not be able to deal with issues in as greater detail as he otherwise may have wished. However, that is a risk that the claimants are prepared to run. In this regard I have considered the decision of Coulson J (as he then was) in *Fitzroy Robinson Ltd v. Mentmore Towers Ltd* [2009) EWHC 3070 (TCC). In that case the instruction of a new expert had caused delay to the preparation of the joint statement and an adjournment was sought. In concluding a fair trial was not impossible because of limited time for preparation of expert evidence, Coulson J concluded that the experts were on an equal footing and if one was in a better position than the other it was only because of the defendant's deliberate dis-instruction of its expert.

c. Whilst I do not consider PMC have been open from the outset as to the extent of the interference in the joint statement process, the limited evidence before me does not support a conclusion that there was an attempt to change the opinion of Mr Hardy on the central issues in dispute. Mr Turner highlighted the fact that there was uncontradicted evidence from Mr Stockill supported by a statement of truth that he believed the purpose of the revisions was to more accurately reflect the

views of Mr Hardy and ensure the issues addressed were within the parameters of the pleaded case. Mr Hanna does not submit to the contrary observing that he cannot know the intention of Mr Stockill beyond what is stated in his witness statement. He does however submit that the revisions do change the views expressed by Mr Hardy in a manner that is more helpful to the claimants. I do not reach that conclusion on the documents before me. As Mr Turner demonstrated, the changes can be seen as seeking to reflect, however misguidedly, what were believed to be the views of Mr Hardy. I further note Mr Stockill's evidence that the claimants remain of the view that Mr Hardy supports their case.

d. The conduct complained of was not that of the claimants but their solicitors. I accept Mr Turner's submission that if permission for a replacement expert is refused, the claimants may consider its interests are not best served by continuing to retain PMC. Further, should they change representation any change of solicitors may have an effect on the timetable, depending on the view the Court took on the evidence supporting such a decision to change representation.

e. There has been a full and frank admission by PMC and an apology to the court and AXA XL.

75. Mr Turner also observes that any claim against PMC would not be straightforward in that it would be in essence a claim for a "*loss of a chance*". I accept this and that such a claim would take up further Court resources however

on its own I do not consider this a sufficient reason to grant permission. It is not unusual for the conduct of legal representatives to result in serious sanction against their client, yet no authority has been cited which suggests that this is a material consideration militating against the imposition of a sanction that would otherwise be justified. It can be a relevant factor for consideration, as in *Patricia Andrews and ors* where the relief sought included an injunction or declaration as well as damages so that the claimant would not be fully compensated by a claim against their solicitors.

The conditions to be attached to permission for a replacement expert

76. As noted above, in addressing the applications there has been a significant waiver of privilege by the claimants. This extends to the draft joint statements and the comments of PMC on the same. AXA XL seeks further disclosure beyond this. In his oral submissions Mr Hanna confirmed this was limited to attendance notes and e-mail correspondence with Mr Hardy (suitably redacted to remove reference to other matters outside the scope of his evidence).

77. To the extent necessary to decide, I do not consider this is case of “expert shopping” in any pejorative sense. As I have observed, it is Mr Stockill’s evidence that he considers Mr Hardy supports the claimants’ pleaded case and that the proposal to replace him was not made lightly given his extensive knowledge having been involved for almost 5 years. Rather it was made to provide a fair and swift resolution of any concerns of non-compliance and the independence of Mr Hardy’s evidence. I accept that is Mr Stockill’s view. In any event, I consider that the extent of disclosure given, in addition to Mr Hardy’s report, meets the

concern to ensure that full information is available to the claimants consistent with the authorities to which I have already referred. I am not persuaded that the further disclosure sought is necessary. In particular, even assuming there has been a material change in Mr Hardy's support of the claimants' case (which has not been demonstrated), I do not accept that the views expressed by Mr Hardy in the draft joint statements prior to revision cannot be taken to be his true objective views. Further, such additional disclosure has the potential for difficulty identified by O'Farrell J in *Avantage.*

Timetabling generally

78. Whilst AXA XL did not wish to lose the trial date for a hearing on liability, Mr Hanna submitted that it was now too late to hear quantum in September 2024. The current position is that by order made on 10 April 2024, HHJ Stephen Davies extended the date for the quantum joint statement (from 10 May 2024) to a date to be fixed at the current hearing which was listed as expedited.

79. As to the state of quantum, Mr Wygas helpfully took me through the pleadings and the Schedule of Loss. On analysis, the position is not complicated and the necessary changes are not significant. By reference to AXA XL's response to the Scott Schedule of Damage and Repairs dated 12 May 2023 it can be seen that the detail of the works to the adjoining owner is set out at item 3 onwards. That detail can be found reflected in the Updated Schedule of Loss dated 1 March 2024. That Updated Schedule of Loss pleads a figure of £1,881,005.51 inclusive of VAT. This can be compared with the sum of £1,832,638.76 detailed in the award of 22 March 2024

80. It is perfectly possible to timetable the necessary changes to quantum and provide directions for joint statements and reports in advance of the hearing in September 2024. Whilst the order of 10 April 2024 did not formally stay the remaining steps in quantum, even if matters are timetabled starting from the date of receipt of my Order the extended dates I have directed for the quantum joint statement and reports slightly extend the periods originally granted, preserve the trial date and ensure all evidence is served prior to the pre-trial review listed for 19 July 2024.

81. This brings me to the issue of the party wall appeal. The parties are proceeding on the basis that the result of the appeal is going to be relevant to the claimants' loss in respect of no 122 Westbourne Grove although they do not agree as to the extent of the overlap between the appeal and the issues in the present proceedings. This has not been explored in any detail before me although I note that the similarity between the award and the sum claimed against AXA XL may suggest that the overlap is somewhat greater than contended for by Mr Hanna.

82. The present position is that the appeal before the county court is subject to a two month stay for ADR. The stay was agreed at the claimants' request and was ordered on 15 April 2024. The directions given by the county court consequential on the stay included a case management conference on the first open date after 13 August 2024 but no later than 3 September 2024. I have no evidence as to the state of any settlement discussions but if the appeal proceeds I am told by counsel that any hearing is likely to be almost a year away.

83. As already observed, in support of his submission to adjourn quantum, Mr Hanna relies on the uncertainty of quantum prior to the resolution of the appeal.

84. Mr Turner makes a similar point noting that under section 10(16) of the Party Wall etc. 1996 Act ("the Act"):

> "The award shall be conclusive and shall not except as provided by this section be questioned by any court".

As such, he submits that these proceedings may be determined on a basis which turns out to be inconsistent with the result of the appeal against the award.

85. Mr Turner relies on this uncertainty to submit that the best way forward is for the appeal and these proceedings to be heard together. To facilitate this he suggests that a case management conference be listed in both cases assuming that the county court can be persuaded to make an order that the appeal be managed and heard by a judge of the TCC and if so, that the TCC judge can sit as a County Court Judge (as provided for under Section 5(2) of the County Courts Act 1984). I understand that this would likely extend the time estimate due to the involvement of the adjoining owners and the need to address the appeal.

86. I reject that approach. It would have the effect of adjourning the hearing in these proceedings for over a year to July 2025 if HHJ Davies remained as the trial Judge. As paragraph 7.4 of PD29 makes clear, *the court will not allow a failure to comply with directions to lead to the postponement of the trial unless the circumstances are exceptional…and that if it is practical, to do so, the court will*

exercise its powers in a manner that enables the case to come on for trial on the date or within the period previously set. The adjournment of the trial is not a conclusion to which I am driven. AXA XL wishes to keep the hearing date, at least for liability.

87. I have no evidence before me as to the wishes of the adjoining owners. I understand they have not been asked whether they agree to the appeal being heard at the same time as these proceedings. Further, whilst no argument has been directed to the proper construction of the Act and its conclusiveness provisions, I do not consider that the course of these proceedings should be dictated by the course of other proceedings:

    a. Which are not before me
    b. In which I have no evidence as to the wishes of one of the parties to those proceedings and
    c. Which are presently the subject of a stay to ADR and may not even progress to the hearing of an appeal.

88. It follows that I do not consider either liability or quantum should be adjourned to a later date. If the position in respect of the party wall appeal becomes clearer then the parties can always revisit the position however this observation is not to be taken as encouraging the same. In the meantime the parties should prepare for the hearing in September in accordance with the terms of the order previously communicated to the parties and set out at the end of this judgment.

Costs

89. The costs consequences of the grant of permission for a replacement expert are largely agreed. When considering the appropriate costs order to reflect the additional costs caused by the engagement of a new structural engineering expert at this late stage I have been guided by the approach of Foskett J in *Adams.* I recognise that there may well be material in Mr Tant's report which it would have been necessary to consider in any event and so, as in *Adams*, "*I do not think it is as simple as simply paying the sums said…to have been expended in considering and answering [the new report]* " (paragraph 48 of the judgment refers). On the limited information before me, in addition to paying the costs thrown away as a consequence of the permission for Mr Tant, I consider that the appropriate order is that claimants shall also pay 30% of the costs of the AXA XL considering the structural engineering joint statement and expert report of Mr Tant.

Order

90. It follows that for the reasons set out above I order:

    1. Permission for the Claimants to rely on Mr Andrew Hardy as an expert witness in the field of structural engineering is revoked. The request for disclosure of attendance notes and e-mail communications between Mr Hardy and his instructing solicitors is refused.

    2. The Claimants have permission to rely on Richard Tant of Richard Tant Associates as an expert witness in the field of structural engineering. Mr Tant should have access to the same material as Mr Tucker, this includes the Report of Mr Tucker and the signed joint statement and

the exchanges between Mr Hardy and Mr Tucker in respect of the same.

3. The Claimants are permitted to file and serve, by 17 May 2024, an updated Schedule of Loss limited to reflecting the effect of the third surveyor’s award to the schedule of loss filed on 1 March 2024.

4. The Sixth Defendant, if so advised, is permitted to file and serve a revised Counter Schedule of Loss by 31 May 2024 responsive to any change to the Claimants’ Schedule of Loss pursuant to the preceding paragraph.

5. The Claimants are granted an extension of time, pursuant to the Court’s case management powers under CPR 3.1(2)(a), until 1 March 2024 to comply with paragraph 7 of the Order of 11 April 2023.

6. In respect of the structural engineering expert evidence:

    a. By 4pm on 10 May 2024 the Claimants shall serve on the Sixth Defendant a proposed list of expert structural engineering issues identifying (for ease of reference only) where such matters are to be found in the parties’ statements of case. The parties shall agree a final list of expert structural engineering issues by 17 May 2024. Any disputed issues shall be determined on paper pursuant to brief written submissions to be served by 4pm on 21 May 2024.

b. An experts' statement on the structural engineering issues, in accordance with rule 35.12(3) shall be prepared and filed by 31 May 2024.

c. Experts' reports, limited to matters not agreed in the statement pursuant to rule 35.12(3), are to be filed and served by 28 June 2024.

7. A quantum experts' joint statement addressing the case as set out in the revisions to the Schedule of Loss and Counter Schedule and any response thereto is to be filed and served by 14 June 2024.

8. Quantum expert reports limited to matters not agreed in the statement pursuant to rule 35.12(3), are to be filed and served by 10 July 2024.

9. Costs of and occasioned by the Claimants' application of 16 February 2024 (extension of time) shall be costs in the case.

10. The Sixth Defendant's costs of and occasioned by its application of 23 February 2024 and the Claimants' application of 25 April 2024 to be paid by the Claimants in any event to be assessed if not agreed.

11. The costs thrown away as a consequence of paragraphs 1, 2 and 6 of this Order shall be paid by the Claimants in any event, and shall

be assessed on the indemnity basis if not agreed. The Claimants shall also pay 30% of the costs of the Sixth Defendant considering the Structural Engineering Joint Statement and Expert Report of Mr Tant, such costs to be paid on an indemnity basis if not agreed.

Handed down 23 May 2024