Neutral Citation Number: [2024] EWHC 2903 (TCC)

Case No: HT-2023-MAN-000432

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

Rolls Building,
London, EC4A 1NL
Date: 18 November 2024

Before: His Honour Judge Stephen Davies sitting as a High Court Judge

- -

Between :

(1) BNP PARIBAS DEPOSITARY SERVICES LIMITED
(2) BNP PARIBAS DEPOSITARY SERVICES (JERSEY) LIMITED
(TOGETHER THE "TRUSTEES",
AS TRUSTEES OF THE CITY TOWER UNIT TRUST) **Claimants**

- and -

BRIGGS & FORRESTER ENGINEERING SERVICES LIMITED **Defendant**

- -
- -

CARLO TACZALSKI (instructed by **Stephenson Harwood LLP, London EC2M 7SH**) for the **Claimants**
JAMES FRAMPTON (instructed by **Hawkswell Kilvington Limited, Leeds LS15 8ZB**) for the **Defendant**

Hearing dates: 22-23 October 2024
Draft judgment circulated: 7 November 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on 18 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ Stephen Davies:

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A. Introduction and summary of decision

1. City Tower is a 30 storey 1960s office skyscraper in central Manchester which is owned by the claimants trustees ("**BNP**"). In February 2021 BNP, acting through its manager ("**Schroder**"), entered into a design and build contract with the defendant specialist building services company ("**B&F**") for the design and construction of stair pressurisation works in risers A and B of the building.

2. The stair pressurisation system allows for the supply of pressurised air into the stair cores, which operate as fire-escape and fire-fighting routes in case of fire. Pressurised air is carried through the building through ducting located in the risers within the stair cores. The purpose of the pressurised air is to keep the stair cores free of smoke in the event of a fire. The works involved the removal of the existing system, carried through existing ducts in the risers, and its replacement with an upgraded system.

3. It was always known that there was at least some asbestos containing material ("**ACM**") in the existing risers. It is common ground the contract included for at least some works to remove ACM within the risers ("**ARWs**"). However, the fundamental issue which divides the parties, and which is the primary subject of this claim, is the extent of those works and, in particular, whether B&F owed any obligation to undertake further refurbishment asbestos surveys ("**RASs**") to identify the presence of further ACM in all areas where it was required to undertake works and, if found, to undertake all such ARWs as were necessary for all such works to be undertaken.

4. BNP contends that on a proper interpretation of the contract B&F did owe such an obligation.

5. B&F contends that, absent variations, its obligations were limited to the ARWs identified in a quotation dated 17 April 2020 from its specialist licensed asbestos removal and disposal subcontractor ("**Woods**") which, it says, was based on the results of a RAS undertaken by a company known as Eton (the "**Eton RAS**").

6. Problems arose when further asbestos was encountered in areas outside the scope of the Woods quotation and in which B&F was scheduled to work. BNP, acting through its advisers and Employer's Agent MHBC Cumming ("**Cumming**"), a professional services firm, specialising in surveying and project management, contended that B&F

was obliged - at its cost - to undertake further RASs to identify all such asbestos which might be encountered during the course of the works. B&F contended that this was not part of its scope of work and that it would not undertake such surveys or such works without an instruction. Such an instruction would, of course, allow it to recover the additional cost of complying and, as necessary, an extension of time and recovery of its associated delay costs.

7. Problems also arose when it was discovered that some of the floors in riser B were not sufficiently structurally sound to allow further works to be conducted there without floor reinforcement works. BNP contended that this was B&F's responsibility, whereas B&F disputed this and, again, required an instruction to undertake floor reinforcement works.

8. In December 2021 works effectively ground to a halt for these and, says BNP, other reasons.

9. There was then a lengthy impasse, during which the parties engaged in attempts to resolve these disputes, undertaken under the protection of privileged communications. Eventually, in January 2023, B&F issued a suspension notice under the contract, followed by a termination notice in February 2023, on the basis (in summary) that BNP was preventing it from completing the works, by not providing further RASs or an instruction for the same and by not providing an instruction for floor reinforcement works.

10. BNP's response was to treat the termination as a repudiatory breach of the contract, which it accepted in February 2023 as discharging the contract.

11. BNP issued the current proceedings in November 2023, claiming declarations as to how the contract was terminated. Specifically BNP claimed the following declarations:

    1. Briggs had no entitlement to serve the Purported Suspension Notice nor the Purported Termination Notice.
    2. Briggs' service of those notices, separately or together with its failure and refusal to proceed with the Works in accordance with the Contract in 2023 (from either 26 January 2023 or alternately 14 February 2023), amounted to a repudiatory breach of the Contract.
    3. The Trustees accepted Briggs' repudiatory breach and thereby terminated the Contract by letter dated 27 February 2023.

12. The claim was intentionally limited in this way because, by excluding the other matters in dispute, including financial claims and cross-claims, the claim could properly be issued and tried under the Shorter Trials Scheme. The parties are hopeful that a decision on this point will allow the remaining issues in dispute to be compromised or, failing which, will allow the remaining disputes to be resolved on the basis that legal responsibility for the contract being terminated has been determined.

13. As well as denying that BNP is entitled to these declarations, B&F is also contending that it is entitled to a declaration that it validly terminated the contract on 14 February 2023 in accordance with clause 8.9.3.

14. Pursuant to an agreed timetable, I had one day of pre-reading, followed by a half day of oral evidence and one and a half days of oral submissions. Counsel had each, at my request, prepared very full opening submissions, and the parties had arranged for a live transcription service, both of which steps enabled the trial phase to proceed

speedily and efficiently. I am grateful to everyone for their co-operation in achieving this objective, which has enabled me to produce this judgment with reasonable speed.

15. There was only one witness statement served and one witness called. This evidence was from Mr Greg Williams, formerly a senior building surveyor with Cumming. Mr Williams was the main point of contact at pre-contract stage and remained involved in the contract stage. He was plainly an honest and reliable witness.

16. The defendant chose not to adduce any witness evidence. I was invited to draw adverse inferences from its failure to do so. I address this where relevant below but, in short, I do not consider it appropriate (or necessary) to draw specific adverse inferences.

17. In short, my decision is that BNP is entitled to the two declarations sought.

B. The principles of contract interpretation

18. There is no need to refer to the general principles, which are by now well-established. They are helpfully set out in some detail in: (a) Chitty on Contracts 25th edition ("Chitty"); (b) in The Interpretation of Contracts by Sir Kim Lewison (8th edition) ("Lewison"); and (c) particularly as regards construction contracts, in Keating on Construction Contracts (11th edition) ("Keating").

19. There are only two particular matters which I need to address in any detail.

20. The first is the limits on the extent of the relevant admissible factual matrix. The principles are well summarised in Chitty at chapter 16, section 3(c) – the Matrix of Fact, paragraphs 16-056 to 16-062, and in Lewison in section 9 – Pre-contractual Negotiations, paragraphs 3.43 to 3.65. Two points are worth emphasising.

21. First, as noted in Chitty at 16-056, referring to the Commercial Court Guide, "a party who wishes to contend that there is a relevant factual matrix should set out in its statement of case each feature of the matrix which is alleged to be of relevance".

22. This is a valuable discipline for the parties. It is also particularly helpful for the court. That is especially when it is compared to the more common approach of cherry-picking, in statements of case, witness statements, cross-examination or submissions, things which were said and done (or not said and done) in the course of the pre-contractual negotiations, with a view to persuading the judge that the party's interpretation should be preferred on the basis of some broad appeal to the perceived merits. Lewison refers (at 3.63) to observations made by Arden LJ in Anglo Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd [2009] EWCA Civ 218, in which she emphasised the need to avoid distracting the court from its main task, of deciding what a contract means, through arguments about the reception of evidence of pre-contractual material which, on proper analysis, is neither admissible nor relevant.

23. Second, the helpful summary at the beginning of section 9 of Lewison reads (as material) as follows:

> "Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties; … to determine which party put forward a particular term[1]; and to elucidate the general object of

[1] This is only admissible where the contra proferentum principle is in play: Lewison at 3.55.

the contract. Evidence that parties negotiated on the basis of an agreed meaning is only admissible in support of a claim of estoppel or rectification."

24. It is important, therefore, that any evidence is directed either to a particular known fact or to the general object of the contract.

25. As to the particular known facts, there is a difference between evidence of particular known objective facts, which will usually be uncontroversial, and evidence of the parties' intentions or understanding as to what the contract meant. It is important to keep this difference well in mind, even though it may not always be a straightforward task to distinguish between the two.

26. As to the general object of the contract, in Merthyr (South Wales) Limited v Merthyr Tydfil County BC [2019] EWCA Civ 256 Leggatt LJ confirmed that evidence as to the genesis and aim of a particular provision is admissible if it is sufficiently important to qualify as part of the genesis and aim of the whole transaction: paragraph 50. As Lewison observes at 3.58, how far this extension goes is still open to doubt. The author draws attention to the further observation of Arden LJ that: "Judges should exercise considerable caution before treating as admissible communications in the course of pre-contractual negotiations relied on as evidencing the parties' objective aim in completing the transaction".

27. It appears that a fact which was known to both parties, but was not communicated between them, so that it cannot be said that each knew that the other also knew of it, may nonetheless in principle be admissible. However, in my view judges should exercise caution in placing too much reliance on such evidence, otherwise the risk is that party A seeks to adduce evidence from its own witness X and to cross-examine witness Y for party B, with the aim of seeking to demonstrate that X and Y both knew a particular fact, which was not communicated between the parties, with a view to contending that nonetheless it was known to both and, thus admissible. If the fact in question was not self-evident and, thus, uncontroversial, it is unlikely that it was regarded as significant at the time if it was not even communicated. It also seems to me that this approach will often involve seeking, impermissibly, to categorise what is in truth evidence of the intentions of the parties as evidence of fact.

28. The second point to which I should refer concerns two connected principles appearing and summarised in sections 7.4 and 7.5 of Lewison, namely that:

> "Where the contract is a standard form of contract to which the parties have added special conditions, then unless the contract otherwise provides greater weight must be given to the special conditions, and in case of conflict between the general conditions and the special conditions, the latter will prevail. However, in interpreting a standard form there is less room for the influence of the special background applicable to any particular transaction."
>
> "Where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions."

29. The second principle is particularly relevant to construction contracts such as the present, where one has a standard form contract as varied by amended conditions, bespoke Employer's Requirements incorporating a number of different documents and Contractor's Proposals, as well as other assorted documentation. This is well illustrated by the recent decision of the Court of Appeal in A&V Building Solutions v

J&B Hopkins [2023] EWCA Civ 54, where this principle was referred to by Coulson LJ at paragraph 46 and applied at paragraphs 58 - 59.

30. These principles are both potentially relevant in this case, although it is important to emphasise the reservation in Lewison at 7.4 that the first principle applies "unless the contract otherwise provides".

C. The design and build contract

31. Given that the controversy as to the proper interpretation of the design and build contract is at the heart of this case it is necessary to refer to the relevant provisions at some length.

32. The contract documents themselves were contained in one volume. The contents page identified the following documents:

1.0 JCT – Design & Build Contract 2016 with Schedule of Amendments.

2.0 Contract Sum Analysis.

3.0 Employer's Requirements.

4.0 Instructions for Pricing.

5.0 Contractor's Proposals.

6.0 Preliminaries.

7.0 Document Register, Drawings and Specifications.

8.0 Supplementary Information.

9.0 Programme.

33. The JCT standard design and build contract was completed in accordance with the standard form, subject to the schedule of amendments, and executed as a deed.

The Recitals, Articles and conditions

34. The First and Second Recitals identified the works as being stair pressurisation works at City Tower, with BNP's requirements for the works being contained in the Employer's Requirements and B&F's response being contained in its Contractor's Proposals and Contract Sum Analysis.

35. The Third Recital as amended stated that:

> "The Contractor has examined the Employer's Requirements and is satisfied:
>
> (a) that they have been prepared in compliance with the Statutory Requirements;
>
> (b) that the Contractor's Proposals meet the Employer's Requirements and that there is no discrepancy within and/or between these two documents; and
>
> (c) where the Employer's Requirements contain elements of design, such design has been carried out with proper skill, care and diligence."

36. This was different from, and significantly more extensive than, the unamended version, in that it included contractual statements - in summary – that: (a) the Employer's Requirements were compliant with the Statutory Requirements (which were defined as including any regulation which affects the works or performance of any obligations under this contract and, thus, included the Control of Asbestos Regulations 2012 – "**the CARs**"); (b) the Employer's Requirements and Contractor's Proposals were not in conflict; and (c) the design in the Employer's Requirements had been properly carried out.

37. This latter point was confirmed by amended clause 2.11 of the conditions, under which B&F accepted entire responsibility for the adequacy of any design contained within the Employer's Requirements and the Contractor's Proposals. To the same effect was amended clause 2.17, under which B&F accepted the "entire responsibility for the design of the Works and whether carried out by or on behalf of the Employer or the Contractor or on his behalf by the Contractor's Design Team or any of his sub-contractors, all designs contained in the Employer's Requirements and Contractor's Proposals". Under the same amended clause B&F warranted its exercise of reasonable skill and care and diligence in the design of the Works and, on that basis, that the works should, when completed, comply with any performance specification or requirement included or referred to in the Employer's Requirements and/or the Contractor's Proposals".

38. Under Article 1 the Contractor accepted an obligation to complete the design for the Works and to carry out and complete the construction of the Works in accordance with the Contract Documents.

39. Article 4 identified the Employer's Requirements and the Contractor's Proposals as those referred to in the Contract Particulars. It also provided (as added to by the Schedule of Amendments) that: "The Contractor confirms that:

    1. it will accept responsibility for any design contained in the Employer's Requirements.
    2. the Employer shall have no liability arising out of or in relation to the Employer's Requirements or for any representation or statement contained in them.
    3. where the Employer's Requirements contain or make reference to any particular specification, such specification shall where and to the extent adopted be deemed for all purposes of the Contract to form part of the Contractor's Proposals; and
    4. the Employer makes no representation or warranty as to the accuracy or completeness of any such specification and the Contractor shall not be entitled to rely upon the same".

40. This was a significant extension of B&F's obligations, because B&F was agreeing to take full contractual responsibility for the Employer's Requirements, including their design and any specification contained in or referred to in them.

41. Clause 2.1 confirmed what Article 1 had said, stating that the contractor's general obligation was to "carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan and other Statutory Requirements and for that purpose shall carry out and complete the design for the Works".

42. It is apparent from the above that B&F was accepting full design responsibility for the whole of the design, including that contained in the Employer's Requirements, and including that required to comply with the Statutory Requirements.

43. This acceptance of full design responsibility was also further significantly extended by new clause 2.40, which is worth setting out in full and provided that:

    "1. The Contractor has had an opportunity to inspect the physical conditions (including the sub-surface conditions) and all other conditions of or affecting the site and shall be deemed to have fully acquainted himself with the same and to

> have obtained all necessary information as to risks, contingencies and all other circumstances which may influence or affect the execution of the Works.
>
> 2. Any information prepared by or on behalf of the Employer (including any survey, report or document) relating in whole or in part to the physical conditions (including sub-surface conditions) and other conditions of or affecting the site is provided for information only. The Employer and the Employer's Persons make no representation or warranty as to accuracy or completeness of any such information or for any representation or statement contained therein whether made by the Employer or the Employer's Persons for misrepresentation or misstatement whether made negligently or otherwise in respect of such information.
>
> 3. No failure on the part of the Contractor to discover or foresee any physical conditions and/or other conditions affecting the site and/or any risks, contingencies or other circumstances whatsoever referred to in Clause 2.40.1 (whether the same ought reasonably to have been discovered or foreseen or not) shall entitle the Contractor to an adjustment of the Contract Sum or an adjustment of the Date for Completion of the Works or any Section thereof."

44. Moreover, the order of precedence as between the different parts of the contract was governed by amended clause 1.3.

> "Where there is a discrepancy or conflict between the Contract Documents the priority shall be as follows:
>
> First: The Agreement;
>
> Second: The Conditions;
>
> Third: The Employer's Requirements;
>
> Fourth: The Contractor's Proposals;
>
> Fifth: The Contract Sum Analysis; and
>
> Sixth: (where applicable) the BIM Protocol."

45. It follows that the common contractual intention, objectively expressed, was that the amended conditions should override the Employer's Requirements and the Contractor's Proposals in case of any discrepancy or conflict. Also, under amended clause 2.14, the contractor was obliged to resolve any discrepancies between the Employer's Requirements and the Contractor's Proposals as required by the employer at its own expense.

<u>The Employer's Requirements</u>

46. These are defined in the contract particulars as comprising the document titled "Employer's Requirements". As noted above, it is the document at 3.0 which is headed Employer's Requirements.

47. In its Particulars of Claim BNP pleaded that the Employer's Requirements included the Instructions for Pricing, the Preliminaries and the FHP drawings and specifications (including the MEP Performance Specification prepared by FHP). This allegation was admitted in the Defence. However, in oral closing submissions Mr Frampton advanced for the first time a submission that only the document at 3.0 in fact comprised the Employer's Requirements. This was of course contrary to the earlier admission and, when objection was taken by Mr Taczalski, Mr Frampton submitted that I should allow him to resile from the admission. This was opposed. Given that in his grounds for objecting Mr Taczalski referred to the alleged lack of

merit in the new proposed case, the most sensible course is to work through the relevant documents and to deal with this point at the end.

48. The document at 3.0 entitled Employer's Requirements has the header "City Tower, Manchester – Stair Pressurisation Works" with the Cumming logo. It comprises only just over one page and reads as follows:

> "Employer's Requirements. Pursuant to the Conditions of Contract, the Employer requires the following to be designed, constructed, and installed by the Contractor. All works are to comply with the relevant British Standards and Codes of Practice.
>
> Stair Pressurisation. The work to be executed shall comprise the design, supply, erection, adjusting, connection, testing and setting to work and commissioning of the Stair Pressurisation Installation all as described in the respective sections of this document to form a complete installation. The 'complete installation' shall mean not only the major items of plant, equipment and/or apparatus detailed but shall include all the incidental sundry components necessary for the complete execution of the work and for the proper operation of the stair pressurisation system installation all as per FHPP drawings and specifications.
>
> Builder's Work in Connection with Services. The scope of builder's work includes, but is not limited to the following and is subject to approval by Building Control.
>
> Any necessary work associated with the stair pressurisation installation and the asbestos removal works.
>
> Holes for new cabling, containment systems and ductwork to allow pass through at riser floors and walls.
>
> Fire stopping for sealing of new cabling, containment systems and ductwork to allow pass through at riser floors and walls.
>
> Protection to the risers, services, floors and walls.
>
> Alteration to the existing risers and plantroom.
>
> Asbestos Removal Works. The scope of asbestos removal works includes, but is not limited to, the phased removal and disposal of all asbestos containing material identified in a safe and compliant way. These works shall include an environmental clean within the existing service risers following successful completion of the above. All works are subject to provision of 'clean air' certification on completion. All tickets, documents demonstrating safe disposal of all material to be provided. All works to be executed by a registered specialist contractor."

49. I shall refer to the relevant parts of this document in due course, but it is worth noting at this stage the following points.

50. First, the contractor was to design the entirety of the works.

51. Second, the Stair Pressurisation Installation works were to be "all as described in the respective sections of this document to form a complete installation". However, the remaining sections of the document do not describe the Stair Pressurisation Installation works, they describe the ancillary works. The following words of this section make clear that the description of these works is to be found in the FHP drawings and specifications.

52. Third, each item, i.e. the Stair Pressurisation Installation works, the Builder's Work in Connection with Services and the Asbestos Removal Works were all identified in deliberately wide and non-exhaustive terms.

Instructions for Pricing

53. There immediately followed document 4.0, entitled "Instructions for Pricing", which has the same header and runs to 9 pages. This included the following:

> "1 – The Works.
>
> 1.1. An outline description of the works is included in the preliminaries document and shall be deemed to form part of the Schedule of Employer's Requirements.
>
> 1.2. The contractor shall note that the Employer's Requirements shall not be relied upon as fully indicative of the extent works. The contractor is to use their experience to identify any additional elements of work that would be required in undertake the project works. This shall include all temporary works, phasing and additional detailing required.
>
> 2 – Drawings & Specifications
>
> 2.1. The successful contractor will be required to take on the Design and develop it through to completion."

54. This makes clear that the preliminaries document is to be deemed to form part of the Schedule of Employer's Requirements. Whilst there is no further reference to any "Schedule", it is nonetheless reasonably clear that the intention is to include the preliminaries as part of the Employer's Requirements. This is, of course, unsurprising given the sparse detail in the actual document titled Employer's Requirements.

55. It also makes clear (in addition to what is already stated in the Employer's Requirements document) that the Employer's Requirements do not fully indicate the extent of the works and that B&F must identify any required additional work elements, as part of its design development obligation.

56. Clause 2.5 required the Contractor's Proposals to comply with all the standards as set out in this document.

57. Clause 5.6 stated that: "The Buildings shall comply in all respects with the following … HSE Approved Code of Practice 'Managing and working with asbestos.' L143 (2nd ed.) 2013; The Control of Asbestos Regulations 2012 (CAR)".

58. Clause 5.7 stated that: "It is the Contractor's responsibility to ensure that his proposal fully reflects and deliver a scheme which complies with all Statutory Regulations. Should changes be required in order to comply with any Regulations following the award of the contract or acceptance of each work package, then the Employer will not be liable for any increase in cost".

59. These clauses are important, because they make clear that B&F takes full responsibility for complying with the statutory regulations and approved code of practice in relation to asbestos.

60. To similar effect is clause 10, which required B&F to "provide Asbestos Register and Clean Air Test certification upon completion of the works, along with plans clearly detailing the extent of any asbestos removal works undertaken".

61. Clause 9.3 stated that "the Contractor is advised that the client has provided limited information regarding the existing building (for which he accepts no liability) and that the contractor should allow for undertaking necessary further works, tests and analysis

to satisfy the basis of their design proposals, method of working and compliance with statutory requirements".

62. This is also important as confirming that B&F cannot rely on information provided by BNP as regards the existing building.

63. Although this document is not specifically identified as a part of the Employer's Requirements, it contains a specific link between the Employer's Requirements and the Preliminaries documents, all three of which are identified as contract documents, and it is the type of document that one would expect to find as part of the Employer's Requirements under a design and build contract.

Preliminaries

64. This is document 6.0. It runs to 60 pages and is headed "City Tower, Manchester – JCT 2016 Design and Build Contract" with the contents page itemising the preliminaries in conventional format from A10 through to A56. I will only refer to sections of direct relevance.

65. A12, 170, under "Site Investigation":

> "1. Report: Included in the tender documents. Any such report is for information only.
>
> 2. New Item: It is the Contractor's responsibility to undertake his own investigations or verify existing information as necessary."

66. A13, 120, under "The works":

> "1. Description: The works shall include but not be limited to:
>
> Strip out and removal of the existing redundant stair pressurisation equipment and redundant plant room ductwork for staircases A and B thorough testing and analysis has been carried out by the contractor. Strip out will include but may not be limited to the pressurisation fans and associated ductwork.
>
> …
>
> Removal under controlled conditions of all works related to asbestos containing materials and all asbestos containing materials.
>
> Builders Work in Connection with Services including all temporary and permanent works
>
> …"

67. The above clauses are all consistent with the terms of the Employer's Requirements and the pricing document.

68. A34, 370 required that suspected ACMs be reported, and that safe methods of removal or encapsulation be agreed. B&F could not, therefore, simply assume that its obligations only extended to the removal of ACM specifically identified in any existing asbestos surveys or similar. This, as will be seen, is entirely consistent with the obligations placed on an employer under the asbestos regulations and code of practice.

69. A34, 630, Existing Structures, required the following, which is relevant to the structural works issue:

> "1. Duty: Check proposed methods of work for effects on adjacent structures inside and outside the site boundary.
>
> 2. Supports: During execution of the Works: 2.1. Provide and maintain all incidental shoring, strutting, needling and other supports as may be necessary to

> preserve stability of existing structures on the site or adjoining that may be endangered or affected by the Works; 2.2 Do not remove until new work is strong enough to support existing structure; 2.3 Prevent overstressing of completed work when removing supports."

Document Register, Drawings and Specifications

70. This section was headed "City Tower, Stair Core Pressurisation - Contract Document Register" and was divided into the following sections: "FHP; Supply Information; JGA; CHPK; Butler & Young".

71. The section headed FHP was subtitled "City Tower Stair Pressurisation MEP Performance Specification inclusive of the appendices containing the following [specified] documents / drawings". MEP is a an abbreviation for a mechanical, electrical and plumbing.

72. The MEP Performance Specification makes clear that it was that produced by FHP, a MEP consultancy retained by BNP, in October 2020. I shall refer to it as the FHP specification.

73. It runs to 119 pages and was sub-divided into the following sub-sections: (1) project general specification; (2) general project requirements; (3) project particulars; (4) mechanical services tender summary; (5) electrical services tender summary; (6) Appendix A – Fire Report; (7) Appendix B – Schedule of Electrical Manufacturers; (8) Appendix C – Schedule of Drawings; (9) Appendix D - City Tower Stair Core Pressurisation - MEP Strip Out and Demolition.

74. Whilst I shall have to refer to the detail of the FHP specification in due course, it is worth making the following points at the outset.

75. First, it was specifically referred to in the Employer's Requirements, as I have already mentioned.

76. Second, it contained the "nuts and bolts" of what was required, in comparison with the rather skeletal document which is specifically headed Employer's Requirements.

77. Third, although it was described as an "MEP" performance specification, it was not simply a narrow specification dealing only with the minutiae of the new electrical and mechanical installations.

78. Thus, section 1.1 stated: "This contract is for the alterations and installations to form a fully complete stair pressurisation system for both staircases A and B. This specification covers the work associated with the modifications and renewal of the existing Electrical and Mechanical installations".

79. Section 1.2, headed scope of works, stated: "The scope of works shall generally include the complete supply and installation, connection, testing and commissioning and setting to works of the new mechanical systems as detailed in this specification and on the tender layout drawings". It continued: "The works shall include but not be limited to:-

> Strip out, and removal of the existing stair pressurisation equipment and redundant plant room ductwork for both staircases A and B that cannot be re-used after thorough testing and analysis has been carried out by the contractor. Strip out will include but may not be limited to the pressurisation fans associated ductwork. The contractor shall allow for the diversion or removal of any other unrelated services that interfere with the stripping out of required systems.

> The installation of new fans within the plant room in which the existing fans have been removed. The fans shall connect to the existing ductwork only if the contractor can prove the ductwork is in a suitable state to re-use. If the ductwork is not in a suitable condition, replacement of the ductwork shall be within the contractors works…
>
> CFD analysis shall be carried out by the contractor to prove the design will operate as intended. (CFD is short for Computational Fluid Dynamics.)"

80. Mr Frampton submitted that there was no basis for treating this document as part of the Employer's Requirements. In my view it is clear from the express reference to the document in Employer's Requirements itself that it was incorporated as part of the Employer's Requirements. It would, indeed, be wholly unrealistic to consider that this was not intended, given the scale and complexity of the work. Further, it must be borne in mind that the whole design and build contract was included within one volume, with the contents indexed as described above. If the instructions for pricing, preliminaries, drawings and specifications were not otherwise identified as separate contract documents, which they were not, it is difficult to see what else they could be other than part of the Employer's Requirements.

81. This is a convenient point to determine the question whether or not B&F should even be allowed to argue this point. In his oral closing submissions Mr Frampton's explained that this admission was an oversight which had not been intended. I accept that. However, since Mr Taczalski had drawn attention to and relied on the admission in his written opening served in the run up to trial, it would have been better for this point to have raised before the start of the trial. Mr Taczalski submitted that by reference to the factors in CPR 14.5 (application for permission to withdraw admission) I should not allow the admission to be withdrawn. He submitted that it was a very late application and: (a) his client was prejudiced, because it had been unable to investigate whether there was evidence which was, or might be, material to the issue; and (b) it had no prospects of success.

82. In my judgment it would not be in the interests of justice to allow the admission to be withdrawn. I cannot exclude the possibility that BNP would have been able to adduce relevant evidence and, if the point had been taken in the Defence, it may be that it would have led to a claim for rectification. BNP has lost the opportunity to investigate these points. Moreover, as I have just explained, in my view the argument has no merit anyway, for the reasons I have given.

83. Returning to the FHP specification, other relevant paragraphs are as follows.

84. 2.17 – Inspection of the site: " … it is absolutely vital the contractor is aware no claim for extra costs will be considered in respect of any items in which the existence of said items could have been established by inspection of the site" (in bold in original). This was reinforced by section 3 – project particulars, under which it was stated that "the successful tenderer shall be deemed to have visited site and included for any works necessary to complete the contract".

85. This again reinforced the message conveyed by the other contract documents referred to above.

86. 2.34 – Definition of approval. This set out a system for the submission of drawings for approval, under which status A and B allowed the contractor to proceed with the works in question whereas status C did not.

87. This is relevant to a point relied upon by Mr Taczalski in relation to the contractual requirements for B&F being able to rely upon the suspension and termination where there are said to be other causes in play, one of which – says BNP – was outstanding design.

88. There was then an important section 3.1 - Current state and further analysis, which included the following:

> "…The ductwork is located within the risers adjacent to the cores which are accessed via the tenant's demise The contractor should refer to the smoke control & stair pressurisation system survey document for full details. It is also believed the ductwork is contaminated with asbestos in areas. It is the contractor's responsibility to assess the ductwork and its routes to determine whether it can be re-used or amended. FHP would recommend installing new ductwork throughout the building…
>
> Further Analysis should include but not be limited to: … On-site inspection; Asbestos Surveys".

89. I shall refer to this later when I come to analyse the asbestos responsibility issue.

90. In section 3.2 – Strip Out – Existing Services, it was stated that: "The contractor shall allow for the strip out works as per the strip out drawings, however these drawings are indicative only and cannot be considered a complete scope of works". Appendix 9 comprised a schedule and drawings, both produced by B&F as part of a previous instruction, which identified the MEP alterations to the responsive stair cores A and B, and which included reference to various works, including works to be undertaken by ACM removal contractors, where the drawings were referred to as "preliminary". As Mr Taczalski submitted, it is apparent that these strip out works were still at a provisional stage.

91. Under 3.3 – System Description – Stair Pressurisation, appeared the following: "After the Design process has been completed by the contractor and due to the fact there are no air release paths within the modified class C design the proposals will need to be assessed though a CFD study to establish whether the system will achieve a satisfactory standard of safety for means of escape and firefighting operations. CFD analysis shall be in line with the fire report in Appendix A". This was a reference to the stair pressurisation performance criteria provided by JGA Associates (also referred to as Jensen Hughes).

92. From this it was clear that further works were required and that a CFD study analysis was required to see if the system was satisfactory. Again, this is relevant to the issue as to whether outstanding design works were another cause of the suspension of the works.

<u>Supplementary information</u>

93. There was then section 8.0, entitled supplementary information. This included various materials, such as a pro forma letter to be sent to tenants by B&F and, more relevantly, Pre-Construction Information provided under the Construction Design & Management Regulations 2015 ("**CDM**") by a company known as CHPK. The latter referred, at section 3.2.1, to a refurbishment asbestos survey having been undertaken in targeted areas local to the service risers, which had identified ACM which would need to be removed by a licensed asbestos removal contractor (a "**LARC**"). It referred to the "Asbestos Refurbishment Survey report which is included in Appendix

6.1". The Eton RAS is the survey report which was referred to and attached at Appendix 6.1.

94. It is important, given the emphasis which B&F places on the Eton RAS, to observe that its inclusion within the design and build contract is as an appendix to the Pre-Construction Information provided under the CDM.

The Eton RAS

95. As is clear from the survey, Eton Environmental is an asbestos consultancy which was engaged by Cumming to undertake a RAS for ACM. The report was issued in February 2020. The executive summary at section 1 recommended that asbestos residue or sprayed coatings was to be removed within identified floors in risers A and B.

96. The introduction at section 2 explained that the purpose of the survey was to "assist duty holders in managing asbestos within premises. The survey is to provide sufficient information for an asbestos register and allow for the planning of removal of all ACMs as far as reasonably practicable from the premises prior to refurbishment". It explained that the survey only covered the risers which had been surveyed.

97. In section 3 it explained that floor 13 had been excluded from the survey due to access restrictions. The table in section 4 provided further details of where asbestos had been identified in each area, the type of asbestos found and the recommended action. The principal categories and locations where it was found were "residue to real [sic – rear] wall", "sprayed coating debris within riser", "sprayed coating to ducting", "Sprayed coating behind metal ducting". Further details of each location were given in the lengthy Appendix B, which contained an assessment of each area where asbestos had been found and of those areas where it had not been found. This was summarised in section 5 – conclusions and actions, which stated that asbestos had been found in 65 of the 75 samples taken.

98. Section 5 continued that "in the areas where the survey was undertaken with regard to refurbishment of the survey site area, the recommendation is that all asbestos containing materials are removed from site prior to refurbishment in compliance with the Control of Asbestos Regulations 2012" and that "due to the contamination identified in risers A and B it is recommended that the entire risers are decontaminated as part of the remediation works". This is important, because in my judgment the survey cannot be read as making a clear and unambiguous recommendation that only the categories of asbestos found in the specified locations surveyed should be removed.

99. B&F has pleaded that the Eton RAS "purported to be, and would be understood by a reasonable recipient as, a comprehensive survey of the ACMs present in the areas accessed, i.e. all floors to the risers save the 13th floor". That, in my judgment, is not a realistic analysis of the Eton RAS. It was not, and in no way suggested that it was, a comprehensive survey of all floors to both risers or that the risers were free of asbestos outside of the specified locations surveyed. Indeed, section 6 stated in terms: "It should be noted that whilst the surveyor makes every effort to locate all suspect ACMs as far as is reasonably practicable, it cannot be guaranteed that all ACMs have been located. Some materials may be hidden within the fabric of the building may only come to light during refurbishment".

100. I note that when Mr Williams sent the Eton RAS to B&F he did say “they have tested a lot of encapsulated wall residue which wasn’t within the scope though there are also samples regarding the duct and behind the duct” and added “you are welcome to being [sic – begin] inviting your supply chain to review”.

101. The first point is consistent with Mr Williams’ evidence that he was not expecting the whole of the risers to be cleared of ACMs because: (a) it was not envisaged that B&F would be working in the whole of the risers; and (b) there would no obvious reason to remove asbestos residue which was safely encapsulated and would not be disturbed, especially if that process adversely affected the tenants’ ability to occupy and use the building, in particular to access the stair cores and the risers. But, again, there is no evidence that a specific limitation on the area where ACMs would be removed was agreed, merely that both parties were proceeding on the commonsense basis that ACMs would only need to be removed where that was necessary for the contract works to be safely undertaken.

102. The second point confirms that Mr Williams expected and was content that B&F would be using the Eton RAS to obtain quotations from a LARC for the removal of ACMs. But that does not prove that there was any agreement or common understanding that B&F or Woods could safely assume that the only ACMs which would need to be removed were those specifically identified by the Eton RAS.

<u>The Contractor’s Proposals</u>

103. These form document 5.0 in the Contract. The Contractor’s Proposals themselves are unusual in that they do not contain any narrative. They are in the form of a quantified schedule of rates. It is helpful to refer to some elements of this schedule of rates.

104. The first section of the schedule of rates is titled: “Section 0001: Stair Core A”. The first sub-section is location 0001A: smoke ventilation. The first item, smoke ventilation – design” is item 1.000 within It has a price of £16,509.45 and, under the column headed “comments”, it states: “Quote from specialist Supplier (Copy of Quote attached)”. This is a reference to one of two documents attached to the Contractor’s Proposals, which is a schedule of rates from a company known as Interactive Special Projects (“**ISP**”), which correlates with the items and prices in B&F’s schedule of rates as regards works identified where the same column entry appears. Thus, the purpose of the reference to the ISP schedule of rates can be understood from the Contractor’s Proposals themselves as providing a backup for this element of the works. It is not necessary to refer to the further detailed items of this first section or the following section which is to the same effect as regards Stair Core B or to section 3, which includes for site preliminaries and for commissioning and engineering staff. Sections 1-3 together are then added together to produce a sub-total to which an 9.5% for OHP (i.e. overhead and profit) was added.

105. Section 4 is headed “additional items”. This includes as one item a “strip out & demo survey” under a “LOI”. This is a reference to a May 2020 report undertaken by B&F under a separate letter of intent, to which I shall refer briefly below as part of the factual matrix.

106. Section 5 contains 5 separate items, of which item 5.1 is asbestos removal. The price is £266,615. There is no comment against this item. The same is true of the other items, which are all asbestos removal related, being items for an analyst for air monitoring and stage 4 clearance and a sample ACM strip. OHP is then added to the sub-total for these items.

107. Finally, there are two provisional sums. The first is for £70,000, for what is described as "Additional Asbestos Removal - determined by undiscovered ACM's during MEP alterations within the Tenant Riser surrounding areas". Again, there is no comment against this item. The second is not relevant for present purposes.

108. That concludes the schedule of rates, totalling £1,626,963.67, which is slightly different to the contract sum as specified in the contract particulars of £1,627,157.14, but the difference is not said to be material.

109. There then follows the ISP schedule of rates, to which I referred above and, finally, the Woods quotation, which thus, as will be seen, appears without express explanation as part of the Contractor's Proposals.

The Woods quotation

110. The quotation is dated 17 April 2020 and is titled: "City Tower Smoke Vent Removal".

111. The scope of work is identified as being: "To carry out asbestos abatement works at the City Tower, Manchester, based on information provided, as follows …".

112. It then provided essentially the same description in relation to riser A and riser B, being: "To remove 1 x vertical air conditioning duct that is close to the back wall along with all the expanding foam, fully decontaminate this section of wall, where horizontal duct connections have been made these will also be removed to allow for the new ducts to be installed".

113. It then added these words: "The remaining area within the riser will not be fully decontaminated as this is not possible due to the walls being encapsulated with ET150 sealant, however in order to allow other trades safe access in to this area upon completion, all surfaces will be cleaned to remove all loose surface dusts. Any minor spot encapsulation recommended by the independent analyst will be carried out[2]".

114. And further: "NB: Based on the information provided within the asbestos survey report, we would anticipate that there would be a caveat issued on the Certificate of Re-Occupation (4SC) issued by the independent analyst, advising there could be asbestos fibre beneath the old encapsulated walls, Providing these walls are not damaged during the follow on works, new installations could be carried out safely".

115. Under the subheading "Air Monitoring": "This quotation includes for the appointment of an independent UKAS accredited company to undertake all necessary air monitoring".

116. Although there were some minor discrepancies in the figures, and a more significant discrepancy of around £20,000 in relation to the analyst cost, it would have been reasonably apparent that the amount included for ARWs in B&F's schedule of rates was taken from the Woods quotation. It would also have been reasonably apparent that the reference in the Woods report to the asbestos survey report was a reference to the Eton RAS.

117. However, what would also have been reasonably apparent in my judgment is that the scope of works included in the Woods quotation was significantly different to that ultimately recommended in the Eton RAS.

[2] This was subject to a stated assumption that "only minor repair spot encapsulation would be required to the main walls within the riser".

118. As stated, the Eton RAS concluding recommendation was that the entire risers were decontaminated as part of the remediation works. That was plainly not what the Woods scope of works was including.

119. Nonetheless, in my judgment it would have been reasonably clear to any informed reader of the Eton RAS and the Woods quotation, placing themselves in the position of the parties, that the Woods quotation was essentially based on the previous recommendation in the Eton RAS that "in the areas where the survey was undertaken with regard to refurbishment of the survey site area, the recommendation is that all asbestos containing materials are removed from site prior to refurbishment". In short, this would involve the removal of the ductwork located adjacent to the rear wall and the decontamination of that section of wall, with the remaining areas within the riser only being subject to cleaning and minor spot encapsulation where recommended.

120. B&F pleads that "on a proper interpretation of the Contract, Briggs' obligation in respect of the removal of asbestos, a secondary or ancillary element of the Works, was limited to the scope of the asbestos abatement Works set out in the AA Woods Quote. Objectively, the AA Woods Quote was specifically, and unusually, included as a Contract Document for this purpose".

121. B&F further pleads that "the Eton Survey set out the known ACMs in the risers and the AA Woods Quote set out the agreed scope of Works to address those known ACMs. The further surveys or testing for asbestos which Briggs was obliged to carry out were limited to discrete, specific items, such as taking samples from a plasterboard wall through which a hole had to be drilled if the asbestos register at City Tower did not state whether or not the wall contained asbestos".

122. I shall need to consider these arguments below because they are at the heart of this particular aspect of the case.

<u>The contract sum analysis</u>

123. This was based upon the schedule of rates contained within the Contractor's Proposals and I need say no more about it.

D. The relevant and admissible factual matrix

124. It is rightly common grounds that the CARs and the Approved Code of Practice and Guidance ("**COPAG**") are part of the factual matrix, given that the former are referred to as part of the Statutory Requirements and the latter are referred to in the Instructions for Pricing.

125. Although B&F sought to place considerable reliance upon the CARS and the COPAG they are in my judgment of limited relevance to the question of contract interpretation which I have to decide. That is because whilst they impose duties, including non-delegable duties, on persons falling with the definition of a "dutyholder" and an "employer", they do not prohibit either person from contracting with others to undertake tasks which they are required to perform to satisfy their duties. Indeed, it would be bizarre if they did prohibit such action, given that very few individuals or companies have sufficient specialism to perform the obligations directly and given that only LARCs may work with asbestos.

126. There was what is in my view a sterile debate as to whether B&F, as well as BNF, was a dutyholder under the CARs. If it was necessary to decide the issue, I would agree with Mr Frampton that B&F was not a dutyholder, because it never had any obligation as regards the maintenance or repair of the property and, even though it

may have had a degree of control of the risers, being a part of the property, under the design and build contract, it cannot seriously be doubted that BNP must also have had an obligation in relation to the risers as well under its leases with its tenants. Thus, the essential pre-requisites for B&F being a dutyholder are not satisfied.

127. Regulation 4(3) says that: "In order to manage the risk from asbestos in non-domestic premises, the dutyholder must ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises". There is no basis for a suggestion that BNP had not historically complied with this obligation. I was referred to the asbestos inspection survey report carried out by a specialist consultancy, Bellamy, in March 2019 in relation to the common and landlord parts of the property. Further, the Eton RAS also amounted to such an assessment.

128. Although Mr Frampton also relied on section 4(6), imposing a review obligation if there is reason to suspect that the assessment is no longer valid or there has been a significant change in the premises to which the assessment relates, there is no sensible factual basis for any contention that such obligation was ever triggered on the facts of this case. In particular, Mr Frampton made much of an argument that the review obligation was triggered because the Eton RAS was shown to be deficient, in that ACM was found outside the areas it had found. However, there is no detailed evidence or explanation as to where ACM was found which ought to have been identified in the Eton RAS. More fundamentally, since the Eton RAS recommended the need for wholesale removal within both risers it is difficult to see how the discovery of ACM within the risers invalided the Eton RAS.

129. But in any event, if as between BNP and B&F the contractual responsibility for dealing with all ACM, wherever found, including the responsibility to obtain such further RASs as were required, lay with B&F, then even if BNP also had a statutory responsibility to obtain such RASs that cannot assist B&F in relation to the question as to which of the two parties, contractually as between themselves, was responsible for obtaining them.

130. Mr Frampton also referred me to the COPAG with a view to bolstering his case, but in my view paragraph 85 of that guide shows that it is sufficient for the dutyholder to delegate the relevant obligations to a "competent person".

131. Paragraph 114 of COPAG draws a distinction between a management survey (which should be carried out to identify the asbestos for normal day-to-day occupation and maintenance of the building) and a refurbishment and demolition survey (should refurbishment or demolition work be planned). The Eton RAS described itself as a refurbishment survey which, plainly, was indeed its purpose.

132. It is accordingly plain in my judgment that there could be no objection, so far as CARs and COPAG is concerned, to BNP contracting with B&F for it to be responsible for undertaking any further RAS which might be required prior to or during the course of the works.

133. Moreover, as Mr Taczalski submitted, since regulations 5 to 8 impose similar obligations upon an employer proposing to undertaking work exposing his employee to asbestos, and since regulation 9 imposes a notification obligation upon the employer as well, there is no obvious reason why the contract should not require B&F to undertake any further refurbishment survey which might be required prior to or during the course of the works.

134. It is also common ground that B&F was instructed to and did produce a smoke control and stair pressurisation system survey report in October 2019, using ISP to carry out the initial survey. They identified suspected asbestos contamination throughout the risers and had arranged for testing and confirmation to be undertaken. They set out their proposals for a new improved system. This was the genesis of the lengthy discussions which resulted in the eventual entry into the design and build contract.

135. There was also a further pre-contract instruction for B&F to undertake further surveys to enable it to produce strip out and demolition drawings, resulting in a report produced in May 2020. The stated purpose of this was to "identify all MEP installation services that will need alterations/removal/replacement on a temporary or permanent basis". BNP relies on the report as indicating that, due to problems with access to the ductwork, the final design was far from complete and that in certain areas panels would need to be removed by the asbestos specialist contractor in order to undertake further surveys. Asbestos was identified as a risk item, to be controlled by employing a "reputable and experienced ACM removal contractor and carry[ing]out due diligence prior to appointment". The "structural design of existing structure in particular riser floors in both stair cores", was also identified as a risk factor, to be controlled by "test holes included in provisional sums".

136. In short, these were identified pre-contract as issues which needed to be addressed and, since B&F was proposing to accept the role of design and build contractor, it could not simply say – as a traditional main contractor might say – that it was tendering on the basis that it was relying on the accuracy of the information provided by the employer.

137. I should note at this point that B&F pleaded, as part of its case as to the relevant factual matrix: (a) at paragraph 28.5 of its Defence, that "there were a series of meetings between Cumming (on behalf of the Trustees), Briggs and AA Woods to discuss the scope of the asbestos works prior to the Contract being agreed"; and (b) at paragraph 28.7 of its Defence, that "it was agreed between Briggs and Cumming that the AA Woods Quote would be included as a Contract Document and set the scope of the asbestos removal works". However, B&F has provided no particulars as to: (i) these meetings or agreements; or (ii) the relevance of these meetings or agreements in relation to the factual matrix. Nor has it led evidence from any witnesses as to these meetings or agreements. Not surprisingly in the circumstances, Mr Frampton was unable to suggest, either at all or credibly, to Mr Williams that he was party to any such tri-partite meetings.

138. As to the alleged agreement, the starting point is that the Woods quotation was included as part of the Contractor's Proposals without explanation in that document (or in any other contract document) as to why it was included. Evidence of the negotiations leading up to the formation of the contract, to seek to explain why the Woods quotation was included as a contract document or what its purpose was, is inadmissible in my view for the purposes of construing the design and build contract.

139. In any event, and even if I was wrong about that, in his witness statement Mr Williams had explained that he thought it was included as a back up to B&F's schedule of rates. He was cross-examined about this. He accepted that he wanted to see what Woods was going to do, although he said that his principal interest was in understanding how the works would impact on the tenants. He also said that the Woods quotation was not a method statement, which is what he had expected to see in

the contract. That evidence is consistent with his contemporaneous email to B&F of 1 September 2020.

140. In his written submissions at paragraphs 112 to 119, under the heading "chronology – pre-contract", Mr Frampton submitted that BNP had asked for Woods' method statement to be provided "as a contractor proposal to be appended within the contract" and that it had been provided. It is not entirely clear whether Mr Frampton was suggesting that this was the genesis of the inclusion of the Woods quotation into the contract as part of the Contractor's Proposals. The difficulty for B&F is that it was the Woods quotation and not the Woods method statement which was appended to the Contractor's Proposals. Indeed, if the submission is that the Woods quotation was included in error and that the Woods method statement was the intended appendix to the Contractor's Proposals, that would appear to undermine B&F's case as to the reason for its inclusion as a contract document.

141. In fact, the contemporaneous documents show that the Woods quotation was provided by B&F to Cumming in response to a request to demonstrate that the subcontractor element of the price submitted by B&F had been subject to market testing, i.e. it was to do with financial validation rather than with scope of works. There is no contemporaneous evidence to which I have been referred which support B&F's pleaded case or the case advanced in Mr Frampton's written submissions as summarised above.

142. Moving on to what is not disputed, it is common ground that work started in 2020, before the design and build contract was executed. It is also common ground that even before the contract was signed on 5 February 2021 it had been discovered that there was further residual asbestos in the first levels to be worked on. That discovery did not trigger on either side a need for any renegotiation of the contract to clarify the allocation of responsibility for asbestos above and beyond the scope of the Woods quotation.

E. Discussion and conclusions on contract interpretation

The first contract interpretation issue – responsibility for any further refurbishment surveys

143. By reference to the terms of the contract and the relevant factual matrix I now turn to the first fundamental issue of contract interpretation which divides the parties, namely responsibility for any further RASs necessary to identify any further ACM and the need for any further ARWs.

144. Although B&F has other arguments, it places great weight on the Eton RAS and the Woods quotation as contract documents. That is understandable, since in my judgment the remainder of the design and build contract makes it plain beyond serious argument that the design and build obligation and the risk in relation to the scope of the works necessary to provide the complete stair pressurisation installation, including the need to survey for ACM to the extent necessary and to undertake any ARWs to the extent necessary, lies firmly on B&F. As I have identified above, under the design and build contract B&F took full responsibility for the Employer's Requirements and the Contractor's Proposals as regards the design of the works, the execution of the works, compliance with the FHP performance specification and with the Statutory Requirements.

145. In particular, there is clause 2.40 (set out above) which is, I have said, a bespoke clause introduced by the schedule of amendments. Mr Frampton advanced a number

of submissions with a view to nullifying its impact, none of which in my judgment can succeed.

146. He argued that clause 2.40.1 only applies to the stair pressurisation works and not the ARWs. However, the words refer to risks, contingencies and all other circumstances which "may influence or effect the execution of the works" which, plainly, the presence of ACM does.

147. He had to accept that clause 2.40.1 (the no warranty clause) meant that BNP could not be taken to have warranted the Eton RAS, unless he could show that the contract documents as a whole compelled a different conclusion, which in my judgment they plainly do not.

148. He argued as regards clause 2.40.3 that it did not apply as the presence of ACM was not unforeseen. That argument, however, involves giving this clause a far more limited meaning that it in fact has, by treating it as applicable only to unforeseen conditions, when it is expressly made applicable in far wider circumstances.

149. The Employer's Requirements made it clear that the scope of the ARWs included, but was not limited to, the removal of all ACM identified. Mr Frampton submitted that "identified" means identified in the Eton RAS and/or the Woods quotation. However, there is no obvious reason for reading the words used in such a limited way.

150. As already indicated, the Eton RAS had identified ACMs in the majority of places surveyed but: (a) did not suggest that this was an exhaustive list of every place where ACM might be found; and (b) to the contrary, qualified the report and advised much more extensive ARWs than just those to remove the ACM found in the survey.

151. Nor did the Woods quotation expressly limit the scope of the works by reference to the specific areas of asbestos found in the Eton RAS. Instead, it quoted for the removal of the existing vertical ductwork and horizontal connections and for limited ARWs to other areas, which is different from removing "all ACM identified". In other words, the Woods quotation showed that a conscious decision had been taken to undertake limited ARWs. Nothing in the Employer's Requirements indicated that this was an agreed reduced scope of works for which the employer had undertaken the contractual risk of it not covering all ACM which was identified during the course of the works as necessary to be removed in order to undertake the stair pressurisation works.

152. Further, the Woods quotation also noted that the independent analyst might issue a caveat on the re-occupation certificate in relation to sealed cleaned areas, and that this would not prevent new installation being undertaken safely <u>provided that</u> the walls were not damaged. Since the Employer's Requirements required all works to be subject to the provision of clean air certificates on completion, and since B&F would be undertaking the new installation, it was obvious that B&F's scope of works was not limited only to those works specifically included in the Woods quotation, because the Woods quotation envisaged that further ARWs might be necessary in at least one instance.

153. Finally, the Employer's Requirements stated that the scope of the ARWs included, but was not limited to, the removal of the identified ACM. Those qualifying words again made it clear in my judgment that this obligation was not to be read restrictively by reference to the Eton RAS or the Woods quotation.

154. In section F(ii) of his written submissions Mr Frampton advances the following arguments.

155. First, he relies upon the absence of an express obligation to undertake a RAS. However, this argument is substantially based on his submissions in relation to CARS and COPAG, which – as I have already said - do not assist in relation to the contractual responsibility issue, especially given that this case is concerned with the contractual responsibility for further RASs in the context of the Eton RAS having already been undertaken.

156. Second, he advances a submission that section 3.1 of the FHP performance specification is a "slender and insufficient thread" for BNP's case, on the basis that the specification is concerned with the MEP services works and the reference to asbestos surveys is, read in context, referring to the decision whether or not to re-use or replace the existing ductwork which, it was believed, were asbestos contaminated. I accept that this is probably the immediate focus of this section. However, given that there was no separate specification for ARWs, which is not surprising since they were only required as an incident of the MEP services works, there is no compelling reason to read this section as limited to the ductwork only or to read the asbestos surveys referred to as limited to the ductwork only. The MEP performance specification must be read as a whole, so that section 3.1 should be read with the wide scope of works contained within section 1.2 (see above) as well as with sections 2.1 (design standards – also see above) and 2.17 (inspection of the site – also see above). It follows, in my view, that the asbestos surveys were required wherever necessary to undertake the stair pressurisation works as a whole.

157. Third, he advances a submission that B&F did not take the risk of the Eton RAS being wrong, especially since it was obtained by BNP and provided to B&F pursuant to BNP's statutory obligations under CAR and the CDM Regulations.

158. In his opening submissions Mr Taczalski had addressed the genesis of the commissioning of the Eton RAS. He established in my judgment, by reference to the documentary evidence and the evidence of Mr Williams, that it was commissioned by BNP at a time when B&F was expressing an unwillingness to accept contractual responsibility for any ARWs, so that BNP might have needed to enter into a separate contract for these works, even though it would have preferred – for obvious reasons – to let them as part of the overall design and build contract. It follows that there is no evidence to support Mr Frampton's submission that the Eton RAS was commissioned by BNP for the specific purpose of complying with its statutory obligations, still less than it was commissioned with a view to providing it to B&F as information on which it could place reliance as limiting its scope of works in relation to ARWs.

159. Furthermore, this submission fails to engage with the repeated references in the design and build contract making it clear that B&F could not place contractual reliance on any information provided by BNP, whether as part of the Employer's Requirements or otherwise, and if it chose to do so it did so at its own risk.

160. Yet further, it is apparent from a comparison of the Eton RAS and the Woods quotation that a decision had been made by B&F to submit Contractor's Proposals based on a rejection of Eton's final recommendation in favour of contracting to undertake more limited ARWs to remove any ACM found in, and in the region of, the existing ductwork.

161. That may well have been a perfectly sensible decision to take in the circumstances. Indeed, Mr Williams accepted in cross-examination that he would not have expected or even wanted B&F to tender on the basis that all of the ACM within both risers would need to be removed, even if there was no risk on current information to believe

that this would be necessary to allow the existing ductwork to be removed and replaced.

162. However, B&F goes further and invites the court to find that, because the Eton RAS and the Woods quotation were both included as part of the contract documentation, this demonstrated an express or implied acceptance on BNP's part that it was accepting the contractual risk of that assumption being proved wrong.

163. In my judgment, B&F would need to be able to point to some clear indication from the terms of the contract or from the relevant admissible factual matrix that the inclusion of the Eton RAS and the Woods quotation within the contract documents demonstrated a clear and unqualified agreement between the parties, by way of derogation from the clear terms of the other contract documents as to B&F's complete responsibility for the design and the construction of the whole pressurisation system, including all necessary ARWs, that there was a specific contractual carve-out for the ARWs, so that any works above and beyond those expressly contained within the Woods quotation were exempted from the otherwise wide-ranging design and build obligation.

164. It is plain in my judgment that there is simply nothing in the Eton RAS or the Woods quotation or otherwise in the contract which could justify such a conclusion.

165. Finally, I consider that this conclusion is fortified by the inclusion in the contract documents of the provisional sum.

166. I accept Mr Taczalski's submission that this showed that the parties had addressed their minds to the potential need for ARWs to areas within the tenants' demise and, in that respect, had agreed that this should be covered by a provisional sum and, thus, that this contingency was at BNP's financial risk.

167. On B&F's case, there would have been the same need for a similar contingency to cover any ARWs found anywhere outside the existing ductwork and directly surrounding area the subject of the Woods quotation. There was no such additional contingency. It would be very surprising – to put it mildly – if the parties had foreseen a risk of undiscovered ACMs in the tenants' demise but had either not foreseen a risk of undiscovered ACMs in the risers or within the stair core areas more generally or – which appears to be B&F's case - had foreseen the risk (especially since it was referred to both in the Eton RAS and the Woods quotation), agreed that it was BNP's risk, but decided that nonetheless there was no need to include any provision for these works as a contingency.

168. The obviously more likely conclusion, in my judgment, is that this was because it was understood, at least by BNP that this was within B&F's risk under the design and build contract. I am prepared to accept that it is possible that B&F was operating under a misapprehension at the time as to the effect of the design and build contract in this respect, but that cannot assist B&F on this point of contract interpretation.

169. Mr Taczalski also sought to buttress his argument by referring to the previous iteration of the contingency, which would have covered the risk of undiscovered ACM in a wider area, but which was then reworded so as to be limited as stated above. However, it seems to me that this is an inadmissible attempt to interpret the contract by reference to previous negotiations. In any event, it is unnecessary given my conclusions as above.

170. In the circumstances, I am satisfied that BNP's case is to be preferred on this first contract interpretation issue.

The second contract interpretation issue – liability for structural strengthening works

171. This is more straightforward, because neither the Eton RAS nor the Woods quotation are relevant to this issue, which is simply a question of interpretation of the general provisions of the design and build contract.

172. To frame the issue, it is sufficient to explain that the existing ductwork passed through floors within the risers which were made up of concrete with reinforcing bars underneath to provide structural support. During the course of the works it became known for the first time that in certain floors on riser B the reinforcing bars were not present throughout, leading to an obvious and acknowledged risk to the safety of anyone working in this area and, thus, requiring remedial works to provide sufficient structural support to allow the works to continue. The simple issue is whether that was BNP's or B&F's contractual responsibility.

173. B&F's case is that repairs to the structural defects with the riser floors were not expressly identified in the contract documents and there was no term expressly requiring it to carry out such works.

174. Whilst it is true that repairs to the structural defects within the riser floors were not expressly identified in the contract documents, that is not surprising since the defects were not known about as at the time the contract was entered into. The same also explains the absence of any term expressly requiring it to carry out those particular works. However, this argument misses the point that the real question is what the contract provided in terms of allocation of risk for such a problem. In my judgment the answer is that the contract provided for the risk to be firmly laid at B&F's door.

175. Clause 2.40 (set out above) is of major importance. The impact of clause 2.40.1 was that it was not open to B&F to argue that it was reasonably unaware of existing site conditions and the associated risks associated with them. The impact of clause 2.40.2 was that B&F was not contractually entitled to rely on the accuracy of information, including that contained in surveys and reports, provided by BNP. The impact of clause 2.40.3 is that all these matters were at B&F's risk in terms of the impact of subsequently discovered matters on the time and cost of the works.

176. It is clearly not open to B&F to somehow dismiss these clauses as standard clauses which should give way to special conditions or specific provisions. These were special conditions, not included in the JCT standard form, and thus representing the parties' specific agreed intentions.

177. The Employer's Requirements also included, in the Stair Pressurisation section, for "all the incidental sundry components necessary for the complete execution of the work". This would plainly include the need for any additional reinforced steel to the riser floors to allow the existing ductwork to be removed and the new ductwork to be installed. This would also include all works, whether temporary or permanent, and whether new installations or work to remedy defects in the existing building if they needed to be remedied to allow the Stair Pressurisation works to be completely executed.

178. The Employer's Requirements also included, under paragraph 110 (Builder's Work in Connection with Services), for: (a) "any necessary work associated with the stair pressurisation installation and the asbestos removal works"; (b) "holes for new … ductwork to allow pass through at riser floors …"; (c) "protection to the risers, services, floors and walls"; and (d) "alteration to the existing risers and plantroom".

Precisely the same points apply as made above in relation to the Stair Pressurisation work.

179. B&F argues that the general reference to builder's work in connection with services in the Employer's Requirements (referred to above) is not sufficient to make it responsible for these works.

180. It contends that remedial works to a pre-existing defect in the riser floor do not fall under the natural and ordinary meaning (or customary meaning) of builder's works in connection with services. It says that rectifying a structural defect with the floor, which prevents or limits access, is not builder's works "in connection with services".

181. However, it is plain from the Employer's Requirements that services are widely defined and include the stair pressurisation installation, the asbestos removal works and the ductwork, as well as protection and alterations to the risers and floors.

182. There is also clause 9.3 of the Instructions for Pricing, which requires the contractor to allow for necessary further works and the provisions from the Preliminaries referred to above. Most relevant for present purposes is A34, 630 (supports), where there was an express obligation to provide all supports as may be necessary to preserve the stability of existing structures on the site.

183. In contrast to this formidable body of material, Mr Frampton points to the FHP performance specification at section 3.2.1 which, he observes, only requires the contractor to provide "detailed proposals in order to rectify this issue and provide access to the riser" if it "deems the risers inaccessible for current or future use". However, this must be read against the overall performance specification, including section 2.17 (inspection of the site) and section 3 as a whole. In my judgment the obligation to provide detailed proposals cannot be read as if it was limited to such an obligation, so that it was incumbent on the employer to decide whether or not to accept such proposals and, if so, to give an instruction for the work to be carried out at its expense.

184. Finally, Mr Frampton sought to place reliance on the contra proferentem principle of contract interpretation. However, as the authors of Keating on Construction Contracts 11th edition observe in their discussion of this principle at 3-048: (a) the contra proferentem rule is only to be invoked as a last resort if the meaning of the words is equally or finely balanced; and (b) it is unlikely to apply to commercial contracts negotiated between parties of equal bargaining power. This is not a case where (a) applies in my judgment and, moreover, there is no basis for suggesting that this contract was unequally negotiated, where it is an amalgam of a standard form contract and bespoke clauses, including provisions under which B&F accepted full responsibility for the Employer's Requirements including the performance specification forming part of it or referred to within it.

185. Finally, insofar as there was a conflict between the Employer's Requirements and the amended conditions, the latter would take precedence anyway.

186. In the circumstances I am also satisfied that BNP's case is also to be preferred on this second contract interpretation issue.

F. Was B&F entitled to terminate the contract for the reasons given?

Clause 8.9.2 and the relevant legal principles

187. The starting point is clause 8.9.2 and its proper interpretation about which there is, happily, little or no dispute.

188. Clause 8.9.2 provides that:

> "If after the Date of Possession… but before practical completion of the Works the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for a continuous period of [2 months] by reason of any impediment, prevention or default, whether by act or omission, by the Employer or any Employer's Person, then, unless it is caused by the negligence or default of the Contractor or any Contractor's Person, the Contractor may give to the Employer a notice specifying the event or events (a 'specified' suspension event or events)."

189. Clause 8.9.3 provides that:

> "If a specified default or a specified suspension event continues for 14 days from the receipt of notice under clause … 8·9·2, the Contractor may on, or within 21 days from, the expiry of that 14 day period by a further notice to the Employer terminate the Contractor's employment under this Contract."

190. It is common ground that impediment, prevention and default are different things. An impediment or a prevention does not require a breach of contract: Jackson J in <u>Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No.2)</u> [2007] BLR 195 at [56(i)], followed in <u>North Midland Building Limited v Cyden Homes Limited</u> [2018] EWCA Civ 1744 at [31]. A default is simply a failure to fulfil a legal requirement or obligation: <u>ABC Electrification v Network Rail Infrastructure Limited</u> [2020] EWCA Civ 1645 at [31].

191. B&F's pleaded case is that the specified suspension events constituted acts of prevention.

192. As to this, Mr Taczalski referred to the judgment of Constable J in <u>Tata Consultancy Services Ltd v Disclosure and Barring Service</u> [2024] EWHC 1185 (TCC) at [48(5)] where he stated that:

> "An act of prevention may be (a) a breach of an express or implied contractual obligation; and also (b) the exercise of an entitlement (such as the giving of an instruction). It will not be the happening of an event for which the parties have otherwise agreed the allocation of risk within the contract. The concept of 'prevention' is, therefore, itself rooted in consideration of the parties' express or implied obligations…"

193. Mr Taczalski emphasises that it is necessary for B&F to prove that as a matter of fact the impediment, prevention or default caused the carrying out of the whole or substantially the whole of the uncompleted works to be suspended for a continuous period of 2 months. He relies upon the judgment of Hamblen J in <u>Adyard Abu Dhabi v SD Marine Services</u> [2011] EWHC 848 (Comm) where he stated that the conduct which engaged the prevention principle "has to render it 'impossible or impracticable for the other party to do the work within the stipulated time' The act relied on must actually prevent the contractor from carrying out the works within the contract period or, in other words, must cause some actual delay".

194. Mr Taczalski also emphasises that the "impediment, prevention or default" must itself not have been caused by the "negligence or default of the Contractor".

195. Finally, it is common ground that if a contractor wrongly purports to terminate pursuant to an alleged contractual right, and leaves site undertaking no further work, then that purported termination will normally be a repudiatory breach of contract. See <u>Keating on Construction Contracts</u> 11th edition at 21-492.

196. I now deal separately and shortly (given that the precise facts are largely irrelevant to the key questions which arise) with the facts.

The further RASs

197. It is clear that further ACMs were also discovered from a relatively early stage post-contract. For example, in a progress report in April 2021 B&F requested that BNP either provide a RAS for the plantroom, where the presence of ACMs was suspected, or instruct B&F to provide one under the contract. Cumming's response was to say that this was within B&F's scope of works and that BNP would not be providing any RAS or any instruction. This was the subject of ongoing dispute, although it did not appear to cause a problem in practice until November 2021, seemingly because in the meantime B&F was prepared to commission such RASs as were necessary in order to allow the works to progress from Environmental Essentials Limited ("**EE**"), the asbestos consultant engaged by B&F with responsibility for providing 4 stage clearance certificates as required under the CARs.

198. On 19 November 2021 Cummings sent a lengthy response to B&F's variations order claims 14 – 23 (excluding 17 and 22). As relevant to this case, it formally rejected the claims insofar as they related to ARWs. That resulted in B&F saying that it would not carry out any works it deemed outside its scope without a formal instruction.

199. On 1 December 2021 Cummings replied, saying that it would issue an instruction to proceed with these items, with any dispute as to whether they were variations being resolved by formal dispute resolution. This did not break the impasse.

200. In the meantime, tensions were developing between B&F and Woods and between B&F and EE about non-payment by B&F, leading to some work suspensions. On 8 December 2021 Woods left site for non-payment and did not return. The immediate effect of this was that all works on site were suspended, because until Woods had completed the ARWs B&F could not make a meaningful start on site on the subsequent work phases. However, discussions continued about the need for B&F to complete its design work, in circumstances where BNP's advisers Jensen Hughes were not satisfied with the CFD produced by B&F's consultants and refusing to lift the design status from C to B (which would allow works to progress).

201. As already stated, nothing of relevance occurred in 2022 (or at least to which I could be referred) because the parties were seeking to resolve their disputes on a without prejudice basis, but failed to do so.

The structural issue

202. On 28 October 2021 a Woods operative was just about to begin the process of breaking out the floor of level 18 in riser B when he observed that the reinforcing bars were not fully present, raising a real risk of danger to anyone working on the riser floors.

203. It is not in dispute that this led to works being paused whilst investigations were made as to whether this was an isolated occurrence or other floors were involved. It was discovered that the same problem was present to floors 15 – 17 (and, it was believed at this stage, other floors) as well. B&F asked Woods to provide a quotation to undertake remedial strengthening works.

204. On 15 November 2021 B&F said that it considered these remedial works to be outside its contact scope and would not undertake them without an employer's instruction acknowledging the works as a variation, without which works to these levels would

remain suspended. On 19 November 2021 B&F provided its variation order no 25, giving costings for the remedial works, involving the installation of steelwork to the underside of the affected floors. The cost was £2,461.21 per riser.

205. There was no response from Cumming prior to 8 December 2021 when works were suspended as stated above. Cummings' letter of 1 December 2021 did not include any proposal in relation to VO 25.

206. Although B&F now also alleges that even if BNP had approved the works as an instruction it had also not approved the proposed detail, that was not stated as a ground for complaint either in December 2021 or in January / February 2023 and B&F has been unable to identify a contractual requirement for a separate design detail approval in a situation such as this, when in fact all that BNP needed to do was to issue an instruction to proceed with the works as a variation in accordance with VO 25.

<u>The suspension and the termination notices</u>

207. B&F's suspension notice dated 26 January 2023 stated that: "We confirm that [B&F] has been unable to continue to carry out and complete the Contract works since 8 December 2021 in view of the following issues:

> 1. Schroder has failed to procure a refurbishment and demolition survey (RDS) and in view of the extent of asbestos discovered, particularly by reference to the asbestos register for the site, our team is unable to safely access the site. We note that Schroder have refused our requests for a RDS to be carried out or for instructions to arrange for the same (see for example, progress report no.10).
>
> 2. We are also unable to access floors 11, 15, 16, 17 and 18 within Riser B because structural reinforcement bars have been cut away in these areas and no structural supports have been installed. We have advised you that reinforcement works are required and requested an instruction (see for example, our correspondence to the Employer's Agent dated 3 December 2022). However, no such instruction has been provided.
>
> We confirm that the above issues constitute impediments, acts of prevention and/or default by the Employer which have resulted in the whole (or substantially the whole) of the uncompleted Works having been suspended for a continuous period since 8 December 2021. These issues are therefore "specified" suspension events as defined by clause 8.9.2 of the Contract. Accordingly, this letter constitutes a notice pursuant to clause 8.9.2. Should a "specified" suspension event continue for 14 days from receipt of this notice, we reserve the right to terminate our employment under the Contract in accordance with clause 8.9.3."

208. I have not been referred to any response from BNP and, on 14 February 2023, B&F issued a termination notice, confirming that the specified suspension events had continued for 14 days or more since the suspension notice, with the result that B&F was now terminating its employment under the contract.

<u>Discussion and conclusions</u>

209. Given the conclusions I have already reached in relation to the contractual responsibility for further RASs and for the structural works to the affected riser floors in riser B, it is an inevitable conclusion that the cause of the suspension of the works from 8 December 2021 was <u>not</u> any impediment, prevention or default on the part of BNP. To the contrary, the cause of the suspension was B&F's default, in that it had:

(a) failed to undertake such further RASs as it was required to perform in order to continue with the works whilst complying with its contractual obligations, including its obligation to comply with the statutory requirements as regards working in areas of suspected ACMs; (b) failed to undertake the required structural remedial works to the affected riser floors, again contrary to its contractual obligation to do so.

210. In the circumstances, B&F was not entitled to issue the suspension notice or the termination notice by reference to the stated grounds for doing so.

211. B&F has not advanced any fallback argument that, even if it was not entitled to serve the suspension notice or the termination notice, its conduct in doing so was not repudiatory. That is not surprising, in circumstances where its steadfast refusal to comply with its contractual obligations (as I have found them to be) had continued since December 2021 and where there was no indication on its part of any willingness to consider any alternative resolution.

212. The above conclusions are, thus, determinative of the issue. I should, however, rather more briefly address some of the remaining arguments.

213. First, if I had not found for BNP on its contractual responsibility case, I would have needed to address its further argument that B&F was not entitled to suspend or terminate because it could and should have accepted the proposal in Cumming's letter of 1 December 2021, instructing B&F to undertake the necessary works identified with the question of contractual responsibility for such works to be determined pending determination of the contractual position. In my judgment it cannot realistically be said that this proposal meant that BNP had not prevented B&F from carrying out the works or that its refusal to accept the proposal meant that it was acting negligently or was itself in default. Both sides had adopted and maintained their positions. The fact that B&F was not prepared to accept a compromise which, on this hypothesis, it was not contractually obliged to accept cannot fairly be held against it. In any event, BNP could just as easily have offered to instruct the works and pay for them pending the final determination of contractual responsibility.

214. There is also no need for me to resolve BNP's fallback arguments on causation. However, I should say that – had I needed to – on the evidence which has been placed before me I would have accepted BNP's argument, as pleaded in paragraph 35 of its Reply, that at the time that B&F ceased work a significant portion of its work under the contract remained to be done, namely (as I find) the remaining design work required to achieve status B design.

215. Mr Taczalski's starting point was B&F's internal email of 4 May 2022, which confirmed that the three outstanding problems were: (i) the two issues the subject of the suspension and; (ii) the fact that "the new installation works cannot commence as the design is still not signed off due to the fire engineer perceived issues with the CFD. Some elements of the design have achieved B status but with the caveat the issues with the CFD need to be addressed before this can be submitted to building control and fire services for approval".

216. Mr Taczalski submitted that this internal assessment was consistent with correspondence between the parties pre-suspension, including a detailed email from Cumming to B&F of 11 November 2021 and the minutes of a design team meeting held the same day, both identifying the outstanding problems with the design. He also referred to the provision of further design works from B&F's consultant on 10 December 2021, Cumming's email of 10 January 2022 explaining why the design was

not accepted, Cumming's email of 17 January 2022 chasing the updated design document, B&F's email dated 19 January 2022 promising a response and to involve an independent specialist if its response was deemed unacceptable and, finally, the lack of any evidence of action on this point thereafter at any time before the suspension or termination notice.

217. In his witness statement Mr Williams had also referred to an earlier email of 15 October 2021 from Cumming to B&F, raising the same issue as a serious issue which was likely to cause significant delay.

218. This chain of correspondence provides a powerful basis for Mr Taczalski's submission that it cannot be said that substantially the whole of the uncompleted works was suspended by reason of any impediment, prevention or default by BNP.

219. In response Mr Frampton referred me to valuations produced by Cumming in April 2022, which appeared at first blush to show the design work as complete. However, on closer examination, the CFD analysis was shown as only 85% complete and the design for the BMS controls was not even begun. The internal B&F email of 5 May 2022 to which he referred me also confirmed that the new system design was still not signed off.

220. Mr Frampton submitted that the real issue was whether BNP's consultant, Jensen Hughes, was right to refuse to sign off the design.

221. The difficulty which B&F faces in my judgment is that the evidence which has been placed before me shows that, both externally and internally, it was not asserting at the time that its existing consultants had done everything that was needed or that Jensen Hughes was being unreasonable, let alone that it had obtained or shared a report from an independent consultant to confirm that the design was complete and satisfactory.

222. Further, as Mr Taczalski submits, if B&F had intended to contend at the time that the design had been complete and had achieved B status but that BNP's design engineer had wrongfully refused to accept that it was, then this should also have been included as a specified event of impediment, prevention or default in the suspension and termination notice.

223. I should refer at this stage to the question whether I should draw adverse inferences against B&F from its failure to adduce witness evidence from the various key personnel involved in this case. Mr Taczalski pointed out that in advance of the first case management hearing B&F had indicated an intention to call Mr Owens and Mr Sarjeant as witnesses, but that on the day set for exchange of witness evidence B&F's solicitors had notified BNP's solicitors that "having reflected upon its position, it is not our client's intention to serve witness evidence". No other explanation was offered.

224. Mr Taczalski referred me to the speech of Lord Leggatt in Efobi v Royal Mail Group Ltd [2021] 1 WLR 3863 at [41] in which he summarised the applicable principles as to when an adverse inference may be drawn from the absence of a witness.

225. Responding to this point, Mr Frampton explained that Mr Sarjeant had left B&F's employment in November 2023, had had some ill-health and was semi-retired. He said nothing about Mr Owens. He submitted that there was no need to serve witness statements, not least because they would add nothing to the contemporaneous documents, especially given the prohibition in PD 57 AC on witness statements containing comment on documents or argument.

226. In my judgment it would be wrong to draw an adverse inference against B&F as regards its failure to adduce witness evidence on this particular point, in circumstances where I do not consider that it was obvious that a particular witness could and should have been called to give evidence to do so. Although Mr Owens was the author of the May 2022 email it was not obvious that he had direct responsibility for this area of the works.

227. However, where the failure to adduce evidence does leave B&F is that I have to determine this issue on the only available evidence, namely the documentary evidence before me. In the absence of any documentary evidence to support a case by B&F that it had, in fact, substantially completed the outstanding design work, and that it was the unreasonable refusal by BNP's design consultant which was causing the problem, I am unable to find in its favour on the point.

228. Given that the right to terminate the contract is a serious step, in my judgment the absence of a design for the stair pressurisation works completed to approval status to allow the stair pressurisation works to commence must mean that "substantially the whole of the uncompleted works" have not been suspended by reason of any impediment, prevention or default by the employer.

229. Finally, Mr Taczalski raised a number of other arguments as to why the right to suspend and to terminate had not occurred. It is unnecessary for me to determine these remaining issues, given the conclusions I have already reached, and there are good reasons for declining to do so.

230. First, to do so would unduly lengthen this judgment and its production. That is particularly so, given the basis set out in the Particulars of Claim for issuing this claim in the Shorter Trials Scheme, i.e. that it was effectively a short question of contract interpretation. It would be wrong in my judgment to undertake a factual investigation on detailed matters which go significantly beyond this issue and which cannot easily be determined by reference solely to incontestable contemporaneous documents (in the same way as I was able to determine the design delay issue above).

231. In particular, Mr Taczalski submitted that since the real reason for the initial termination was Woods walking off site because it had not been paid and, since they never returned, this was the continuing cause of the suspension. However, if I was to assume – as I would need to in a scenario where this ever became relevant – that Woods' action was to be construed in the context of BNP being wrong on its primary case as to the contractual responsibility for further RASs and for the structural works (and, indeed, for the number of contested variations in relation to further ARWs), then it would appear on current information that the reason Woods never returned to sit was because, given the contractual stand-off between BNP and B&F, there was no further work of any substance which it could do until that was resolved. In such circumstances, it would be unsafe to conclude that this was a separate and independent cause of the suspension of the works.

232. The same is true of his argument that the real reason why B&F refused to return to site or to instruct Woods to continue was because of its tactical decision to put pressure on BNP to resolve the commercial disputes.

233. Finally, in relation to Mr Taczalski's identification of further work items which remained to be done, given that they were not particularised in the Particulars of Claim or in the Reply it would in my view be unjust to make binding determinations on such points, which are intensely fact-specific.

234. The only exception concerns his submission that it would be necessary for B&F to have succeeded on both of the reasons given in the suspension and termination notices. That is because if, for example, Mr Frampton had succeeded in showing that BNP was contractually responsible for the further RASs, but not that it was contractually responsible for the structural works, then it would have followed that B&F could safely have continued with the remaining strip out or other works in the floors affected by the structural issue without the need for any further RASs in that area, so that it could not have shown that substantially the whole of the uncompleted works was suspended due to prevention on BNP's part. That seems to me to be an unanswerable point in the absence of any case or evidence to support a conclusion that this area could not be worked on due to both reasons acting concurrently, which is not a case advanced by B&F.

G. Conclusion

235. It follows, in my judgment, that BNP is entitled to the declarations which it seeks.

236. In the absence of agreement I will determine any outstanding matters once this judgment has been handed down.