Neutral Citation Number: [2014] EWHC 2125 (TCC)

Case No: HT-14-39

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2014

Before:

THE HONOURABLE MR JUSTICE STUART-SMITH

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Between:

(1) The Honourable Edward Iliffe and (2) Mrs Teleri Illiffe	**Claimant**
- and -	
Feltham Construction Limited	**Defendant**
- and-	
Affleck Mechanical Services Limited	**Third Party**

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Richard Wilmot-Smith QC and Julian Field (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Stuart Catchpole QC and Karim Ghaly (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 20 June 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith:

Introduction

1. On 20 April 2012 fire destroyed a large house which was in the course of construction on Green Island, which is in Poole Harbour. The fire started in the roof. The Claimants have brought this action against the Defendant building contractor ["Feltham"] claiming damages in excess of £3,500,000. They now apply for summary judgment pursuant to the provisions of CPR 24 for damages to be assessed, and for a substantial interim payment.

The Applicable Principles

2. The principles are very well known and do not require to be set out in detail here. For the Claimants to succeed they must establish that the Defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why the case should be disposed of at a trial. The word "real" has been much analysed: the Defendant must have some prospect or chance of success, which must not be so slim as to be false, fanciful or imaginary. Put another way, the Defendant's case must be more than merely arguable and must carry some degree of conviction. Evidence is admissible on the application; and the Court should have regard to the possibility that further evidence would be available if the case went to trial.

3. The Court's powers are not limited to merely granting or refusing permission to defend. Where the Defendant's case may be described as real but seems improbable, the Court may make an order permitting it to defend the action conditional upon it bringing a sum of money into court or taking some other specified step in relation to his defence. The Court hearing the application also has the power to give further directions about the management of the case, pursuant to CPR 24.6(b).

The Factual Background

4. The factual background is, or should be, largely uncontentious as it emerges clearly from contemporaneous documentation. I will indicate where any material dispute exists.

5. From the outset it was envisaged that the house would be constructed in three phases. Phase 1 was to be excavations, foundations and concrete work, and drainage. Phase 2 was to be the erection of the main house, which was to be made of wood by Pioneer Log Homes of British Columbia ["Pioneer"]. Phase 3 was to include the application of copper to the roof and a mechanical and engineering package and other fitting out works to bring the house to completion. The mechanical and engineering package included the supply and installation of a two-way log burning stove with heat exchanger and all necessary insulated stainless steel flues. Phase 3 was being carried out when the fire happened and the house was almost completed.

The Phase 1 works

6. The architect originally invited Feltham to tender for Phase 1 of the works in September 2010 on the basis of a document called "Specification for Phase 1". Feltham's tender was accepted and it started work at the end of November 2010.

Although there was talk of a letter of intent being issued (as recorded in the Minutes of the pre-contract meeting held on 10 November 2010) none was forthcoming and no written contract was executed until well after practical completion of the phase 1 works, which was certified by the architect as being achieved on 16 March 2011. However, the Specification for Phase 1 stated that the JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009 would apply and, even before the contract for the Phase 1 works was executed, the parties conducted themselves as if the terms of the standard form of contract applied. Thus, for example, Feltham submitted valuations of work done to the architect who then certified payments due from the Claimants to Feltham on documents headed "Certificate of Progress Payment issued under the JCT Intermediate Building Contract with Contractor's Design 2005"; and the architect issued architect's instructions and took other administrative steps as he would as Architect acting in relation to the Standard Form Contract.

7. The architect eventually sent Feltham the Phase 1 contract documents for checking and signing on 16 June 2011. As anticipated, the main contract terms were the standard JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009. By the letter sending the Phase 1 contract documents, the architect wrote:

> "The [Phase 1] contract documents will then be used as a basis for Phase 3 with that works being a variation to the contract based on the agreed sum for Phase 3."

In the course of submissions, Feltham submitted that this approach was conceptually impossible because the Phase 1 contract as executed described the Works in the First Recital as "the construction of a new house (Phase 1) at Green Island, Poole Harbour". As will become clear, this is not the only technical objection that Feltham raises about the administration and formalities of the contract, to which I will return later.

8. The Second Recital to the Phase 1 Contract stated (as had the Specification for Phase 1) that the Contractors Design Portion would be "steelwork joints where not specified". Otherwise, as the specification made clear, the contractor was generally provided with design details provided by others[1].

9. The only clause of the Standard Form which requires to be set out in detail is Clause 2.1, which provided:

> "**Contractor's Obligations**
>
> **General Obligations**
>
> 2.1 The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan (where applicable) and other Statutory Requirements, and shall give all

[1] See Specification for Phase 1, page 1, Items A11/110 and 120.

> notices required by the Statutory Requirements. In relation to the Contractor's Designed Portion, the Contractor shall:
>
> > 1. complete the design for the Contractor's Designed Portion, including the selection of any specifications for the kinds and standards of the materials, goods and workmanship to be used in the CDP Works, so far as not described or stated in the Employer's Requirements or the Contractor's Proposals;
> >
> > 2. comply with the Architect/Contract Administrator's directions for the integration of the design of the Contractor's Designed Portion with the design of the Works as a whole, subject to the provisions of clause 3·8·2; and
> >
> > 3. …"

The Phase 3 works main contract tender and submission

10. On 12 May 2011 the architect sent Feltham the tender package for Phase 3. The tender package comprised "the drawings numbered on page 1 of the Specification, … the Specification including the Schedule of Works and the mechanical subcontract design description". The architect stated in the course of its letter that:

> > "The quotations and final detail design for the mechanical and electrical subcontracts are still being finalised and I expect to have them shortly. In the meantime, you can progress all other packages. …"

11. The Specification for Phase 3 was 85 pages long and contained the following relevant entries:

    i) The tender drawings listed on page 1 were drawings prepared by the architect, the structural engineer and Pioneer. The list did not include drawings for the mechanical and engineering package. The contract drawings were "as tender drawings": items 110 and 120;

    ii) Section A13 provided a general description of the Phase 3 works which did not refer to the mechanical and engineering package as a whole or the provision of the log-burning stove in particular. It also provided a description of the Phase 2 works, although it is clear that they were not part of the works currently being specified or tendered for: item A12/120;

    iii) The JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009 was identified as the form of contract as for Phase 3 with the following relevant points:

        a) The Contractors Designed Portion was stated for the purposes of the Second Recital to be "the works include the design and construction of electrical and heating systems (sub-contractors already appointed)";

b) Insurance Option A was specified for the purposes of Clause 6.7 and Schedule 1 (i.e. the contractor was to arrange joint names insurance);

iv) At section T90 the Contractor was to complete the design and detailing of the heating system (item T90/210); the solid fuel room heater was specified by manufacturer and product reference (item T90/355)[2]; and the metal flue pipes were to comply with identified British Standards and materials but with the manufacturer being "contractor's choice".

12. The Schedule of Works carried the footer "Phase 3 Schedule of Works for Feltham Construction" and stated in its Introduction:

> "The scope of Phase 3 has adjusted slightly since the writing of the Schedule of Works to Phase 1 and reference should be made to the split between work carried out by Pioneer and work carried out by Feltham, appended to this Schedule. Phase 3 generally will comprise the following:
>
> - …
> - The mechanical subcontract installation, comprising the supplying and installation of … a two way logburning stove with heat exchanged [sic], all with insulated stainless steel flues …
> - The design and installation for the mechanical systems will be carried out by Affleck Mechanical Services Limited.
> - …"

13. Section 10 of the Schedule was "First-fix Plumbing and Heating". It did not expressly refer to the logburning stove save for saying (at item 10.06) "Attend at the same time as Pioneer as required to permit installation of the flues, serving the Rayburns and wood burner, through the roof for flashing with copper."

14. The reference in the Introduction to the "split between work carried out by Pioneer and work carried out by Feltham, appended to this Schedule" was to a document entitled "House on Green Island – Phase 2/Phase 3 split" which listed areas or items of work and allocated them to "Pioneer (or Mastercraft) to supply and fix" or to "Feltham to supply and fix". For present purposes the relevant item was "Heating (radiators & underfloor heating and screed)", which was allocated to Feltham.

15. Feltham submitted its proposals for the Phase 3 Construction works on 28 June 2011. The Phase 3 tender document stated in its Introduction:

> "Having successfully carried out the 1st phase of this exciting project, we trust that the professionalism of all staff involved and the quality of works, provides you with the comfort that we

[2] In the event, a different make of logburner was supplied, but nothing turns on this.

> are the contractor to deliver the next phase of the project for you."

16. The Phase 3 tender document incorporated a priced version of the Schedule of Works that had been included in the tender documentation in the overall sum of £1,155,967.00. The summary build up of that figure and the priced version of the Schedule gave a figure of £216,637.66 for section 10 of the Schedule (First-fix Plumbing and Heating). The priced Schedule allocated £209,877 of that sum to the first item of Section 10, namely "Complete the design and supply and fix all above ground drainage." This apparently improbable entry calls for some explanation, which is to be found in Feltham's process of subcontracting to Affleck Mechanical Services Limited ["Affleck"]: see [18] below.

17. Feltham annexed Affleck's quotation to its tender dated 28 June 2011. By then the Architect had written the letter of 16 June 2011 saying that the Phase 1 contract documents would be used as a basis for Phase 3 with the Phase 3 works being a variation to the Phase 1 contract. The evidence suggests that Feltham had in fact started the Phase 3 works on site on or before 19 June 2011, before receiving Affleck's tender or submitting its own. But on 5 July 2011, after a meeting in the morning, the architect sent an email to Feltham which suggested that the Phase 3 works might be split into 2 parts and continued:

> "You are instructed to carry out the works relating to Phase 3a, this to include an immediate instruction to place an order with Affleck Mechanical to carry out the work in accordance with the specification as included in your tender submitted by email on 28th June 2011.
>
> It is intended that Phase 3b will either continue without interruption or may be deferred until the spring of 2012. [The First Claimant] would want to reserve the right to review any future instruction regarding Phase 3b, which therefore cannot at this stage be fully guaranteed.
>
> …
>
> The work comprising Phase 3 will continue as a variation to the Phase 1 contract, subject to the further possible adjustments as listed above."

About half and hour after sending that email, the architect sent Feltham another which said:

> "Apropos my earlier email (below), would you please consider this as "draft". [The First Claimant] wanted to ensure all points were included in our "email of intent" but he was not going to be able to do so until tomorrow. You wanted the email today in order that you could place your order with Affleck and this you are able to do. …"

Ten days later, on 15 July 2011, the architect removed the word "draft".

The Affleck subcontract

18. Affleck had previously been identified as the Claimants' mechanical sub-contractor of choice. It had been approached and sent drawings in January 2011, after which it developed the detail of the mechanical design. Representatives of Affleck had attended a design team meeting with the architect, Feltham and others on 22 March 2011 at which the capacity of the Rayburns and the logburner had been discussed.

19. Having been sent the Phase 3 tender package on 12 May 2011, Feltham wrote to Affleck on 6 June 2011 inviting it to submit a quotation "to carry out all works in accordance with the enclosed documents … ." The enclosed documents included Tender Drawings from the main contract tender package, the Phase 3 Specification and Schedule of Works, a Brief Description of the Works and a Bill of Quantities that reflected the content of the Schedule of Works.

20. Affleck replied to Feltham on 22 June 2011 providing an itemised quotation in the aggregate sum of £209,877.00 i.e. the sum that Feltham included in its main contract tender allocated to the first item of Section 10. However, as is common ground, that figure was not intended simply to cover drainage, either for a subcontract between Affleck and Feltham or for the main contract between Feltham and the Claimants. Specifically, the Affleck itemised quotation included:

    i) £16,570 for "Installation of New Flue Systems", which was further described as "to supply and install three flue systems comprising 1 … Twin wall insulated stainless steel insulated flue system ... connecting to the proposed Log burner and terminating through the roof with an un-lacquered section of flue pipe. …" and to supply two other flue systems to the Rayburns; and

    ii) £6,865 for "Supply and Installation of Wood Fire in Lounge", which was further described as "to supply and install a Stoves Wood fire … complete with, load unit valve, flue thermostat, air duct and louvre and two ventilation louvres to ventilate the enclosure. …"

21. On 5 July 2011, as a result of the emails received from the architect referred to at [17] above, Feltham sent a Subcontract Order to Affleck which stated:

> "Please carry out and complete the Mechanical Services on the above project in accordance with this order, the Main Contract Conditions, the Sub-Contract Pre-Order minutes, the Standard Form of Subcontract and the subcontract order documents. All for the sum of £209,877.00. Retention 5%. Fixed price: until main contract completion. No particular, general or printed conditions appearing on your offer which are additional or supplementary to any of the Sub-Contract Conditions shall apply."

22. The reference to the "Sub-Contract Pre-Order minutes" was a reference to the minutes of a Sub-contractor Pre-Order Meeting between Affleck and Feltham held on the same day. The minutes recorded, amongst other things, agreement that the Standard Form of Subcontract DOM/1 would be incorporated as part of the Sub-Contract Conditions and that Affleck had notice of the Main Contract provisions which were

identified as being the JCT Intermediate Building Contract with Contractors Design 2005, Revision 2, 2009.

The execution of the Phase 3 works

23. On 12 August 2011 there was a formal site meeting for Phase 3 attended by Feltham and the architect. The architect's minutes recorded that "the work, known as Phase 3 … was proceeding under a letter of intent as a continuation of Phase 1 carried out by Feltham Construction Limited." Those minutes were accepted as a true record of the August meeting at the following one, held on 21 September 2011. As a matter of fact the Phase 3 work proceeded without any letter of intent being issued, the nearest thing to it being the pair of emails on 5 July 2011. This absence of a letter of intent mirrored the parties' experience with the Phase 1 works, as did the fact that no written main contract had been executed by the time of the fire. However, the parties acted as they had done for the Phase 1 works, with Feltham submitting monthly valuations and the architect issuing certificates which referred expressly to the JCT Intermediate Form of Contract.

24. Nine such certificates were issued between 21 September 2011 and 3 April 2012. The last of these certificates stated that the value of the work executed and of materials and goods on site was £1,546,594.92, an increase of £773,594.92 over the equivalent value stated in the first of them.

25. Feltham's valuation in support of its application for the issue of the last of these certificates was in conventional form and may safely be assumed to be typical. It valued measured works by taking items from the Phase 3 Schedule of Works, stating the sum that it had tendered for the item, giving a percentage completion achieved and applying that to the tendered sum in order to arrive at the value for which it currently contended. Virtually all of the originally priced works were listed by Feltham as being 100% complete. The exception was Item 10.0 (First-fix Plumbing and Heating) where the figure of £225,617.78 appeared as the contract figure, 99% was Feltham's assessed percentage completion and £223,361.60 was accordingly claimed. Although these figures appeared against "Complete the design and supply and fix all above ground drainage", that was not the true significance of the contract sum for the reasons set out above: the figures substantially referred to (and would have been known by all to refer to) the mechanical package which Feltham had subcontracted to Affleck.

Other Parties

26. Affleck says that it sub-sub-contracted the design and installation of the flues to Docherty Chimney Group Limited ["Docherty"]. It appears that a Mr Calloway carried out the installation in or about late 2011. There is no doubt that the logburner and its flues were installed and operational by the time of the fire, and that the logburner had been used on a number of occasions before the fire happened.

The Fire

27. The main source of information about the happening of the fire is a detailed report dated 24 October 2013 prepared by Dr Goudsmit of Burgoynes, who investigated the fire on behalf of the Claimants. Feltham, Affleck, Docherty and Mr Calloway also

instructed forensic experts. Feltham's expert was Mr Boyle from Hawkins and Associates who are, like Burgoynes, leaders in the field of forensic fire investigation. Dr Goudsmit met Mr Boyle on site on 25 April 2012 and 9 May 2012. He met the experts instructed for Affleck and Docherty on site on 18 July 2012. There were meetings of the experts on 4 December 2012 and 20 March 2013, the later meeting being principally to examine the recovered remains of the chimney from the logburner. On 22 April 2013 Dr Goudsmit met Mr Boyle and the expert instructed on behalf of Docherty to re-examine briefly the recovered remains of the chimney.

28. Dr Goudsmit's report was annexed to the Particulars of Claim, which were served on 7 February 2014. It had previously been served on Feltham in October 2013. In its skeleton argument for the hearing Feltham contended that the Court should not look at the report because permission had not been given to rely upon it pursuant to CPR 35.4(1). This contention had no merit in the context of an application for summary judgment where all parties have had the opportunity to instruct experts and Dr Goudsmit's report has been disclosed for months, giving Feltham every opportunity to consider it and to advance contrary evidence if it wished to do so. Mr Catchpole QC, acting on behalf of Feltham, did not press the argument and effectively abandoned it by referring extensively to Dr Goudsmit's report in the course of his submissions. Feltham did not submit any contrary evidence about the fire, for reasons which appear later.

29. The chimney from the logburner passed through the roof, which was a timber construction. Near to where the chimney emerged through the roof there was a soil pipe and an open upstand. There was a passage through the upstand so that someone standing inside the house could see the sky. The insulated chimney from the logburner came in sections. Each section had a male and a female end which were meant to be locked together by locking bands. The manufacturer's installation instructions were that 50mm separation was required between the exterior of the chimney and any combustible materials. In late 2012 an issue arose because the distance between the roof joists was 286mm which would only leave a separation of about 11mm instead of the specified 50mm. It is not clear whether any steps were taken to meet this problem, and the destruction by the fire meant that no meaningful measurement or reconstruction of the timbers in the roofspace where the chimney passed through it was possible. An independent inspector, Mr Sinden, was contacted by the architect after the fire and said that he had been happy that the flue outlet location was compliant to the Building Regulations, though he appears to have concentrated primarily on the height of the chimney. He had not signed off the installation by the time of the fire but any check of the separation between the chimney and combustible materials would by then have had to be destructive, in order to gain access to the interior of the roofspace.

30. According to information provided to Dr Goudsmit by Mr Calloway's forensic expert, Mr Calloway jointed all of the joints using the proprietary locking bands; but he also secured the locking bands on to the sections using self-tapping screws. Physical evidence of the use of the screws was identified after the fire, and suggested that they had been used to join two sections where the joint was in the roofspace. The use of self-tapping screws in this way is unconventional and should be unnecessary. In normal use the external surface of the insulation chimney may reach about 70 degrees.

31. The logburner had been used for the equivalent of 2-3 weeks before the fire. This included use by the First Claimant who had stayed in the house over Easter 2012. It had been lit on the morning of 19 April 2012. The last logs were said to have been put on by about 9 pm and possibly before then. The evidence suggested that it would have gone out about 2-3 hours later. The electrical contractor who was working in the house at the time reported hearing "funny cracking noises" from the area of the logburner and the chimney on (probably) 18 and (certainly) 19 April 2011.

32. The fire was discovered between 6.30 and 7 am on 20 April 2011. The first thing that was noticed was a crackling sound. The fire was in the roof space through which the chimney from the logburner passed to the outside, close to the open upstand. The fire brigade attended but fought the fire from the outside only, with the result that the copper lining on the roof prevented effective dousing. The house was largely destroyed.

33. For present purposes it is sufficient to record that Dr Goudsmit described his forensic examination of the debris, including the evidence of the use of screws to fix the joints. He then addressed the possible causes of the fire in a detailed discussion covering twenty pages of his report. He gave as his opinion that the fire started "within the roof construction and specifically in that part of the roof close to the chimney", for reasons that are cogent and compelling and have not been contradicted by any evidence adduced for this hearing. He discounted the possibility of a brand from the logburner being emitted from the top of the chimney or coming from elsewhere outside the house falling into the hole of the open upstand, again for reasons that are cogent and compelling and have not been contradicted by evidence adduced for this hearing[3]. Similarly, he discounted the possibility of the fire being started in the roofspace by an electrical fault: the only circuitry in the roofspace near where the fire was first seen was associated with fire alarm detectors and, even if faulty, would have caused an audible alarm to sound while causing only slight and transient damage to the wiring. No alarm was heard.

34. As Dr Goudsmit said: "the remaining causes all relate to the chimney." While recognising that Mr Calloway and possibly Feltham would be able to provide more details, his opinion was that it was reasonable to conclude that there were combustible materials closer to the chimney than the required 50mm and that therefore it had not been installed in accordance with the manufacturer's instructions or in accordance with the Building Regulations.

35. In a section of his report headed "A Separation of the Chimney Sections" Dr Goudsmit turned to the jointing of sections of the chimney. He reported that "the examination of the retained sections showed that screws had been used widely and variously. Mr Calloway had sometimes used only screws; had put screws through locking bands; and had used screws with the locking band placed around them." He identified one joint (described as being "between Sections Q and R" of the chimney) as being noteworthy because the evidence indicated that it was at about roof decking level.

> "There was a ring of 8 screws joining the female end of Section R to the tip of Section Q and there was a ring of four additional

[3] Though see [58(vi)] below.

> screws at the edges of the tip and the outer wall of the male end, from where the tip had separated. In my opinion, the only feasible explanation for the ring of four screws was that they were fitted to secure, or possibly to re-secure, the tip on the end of the male section. In terms of the ring of 8 screws I can only suggest that these were used to hold Sections Q and R together."

36. Dr Goudsmit expressly recognised that "in the absence of more witness evidence, particularly from Mr Calloway, the precise nature of the problem(s) is a matter of speculation." In particular, in the light of evidence that the flashing fitted tightly around the roof chimney, it was not clear when or precisely how the chimney would have been put into position where it passed through the roofspace. However he concluded this discrete section of his report by saying[4]:

> "In summary, the method of installation used by Mr Calloway could not be determined from the physical evidence and no detailed witness evidence has yet been provided. However, the use of screws and possibly a crimping tool ought not to have been necessary and represented a non-standard installation. …
>
> In view of the uncertainties in relation to the installation, it was possible that an aspect of the non-standard installation led to the fire. For instance and whilst it is difficult to envisage why the lower sections of the chimney might have moved, it is possible that the screws securing the tip of the male end of Section Q proved inadequate and a gap of unknown size was formed at about roof level between Sections Q and R. …
>
> It was also possible that the uppermost sections of the chimney could have moved as a result of strong winds at some time to create a gap at roof level between sections Q and R. …"

37. Dr Goudsmit then considered the occurrence of a lagging fire, which he considered possible. The most likely mechanism that he identified was that fire spread either from an imperfect joint or by condensates that had seeped past that joint beyond the outer wall. He then considered the possibility that combustible materials outside the chimney were heated to combustion, either by convection or by conduction. He identified technical difficulties in the way of such a possibility but concluded that "if ventilation had been sufficiently restricted in the confined and insulated roof construction at the house, the build-up of heat could potentially have raised the temperature of the combustible materials in the "oven" to the point of ignition."

38. In expressing his conclusions to the report, Dr Goudsmit followed the general outline of his earlier discussion and statements of opinion. Reiterating that the initial fire was in the roof construction close to where the chimney serving the wood-burner passed through that construction, he firmly discounted an electrical fault. That meant that "all the remaining causes relate to the chimney and there is nothing inherently unlikely in a roof fire being caused by a chimney." He then separately considered the

[4] At [6.4.20] and [6.4.21]

possibility of falling brands and chimney fires and again explained why they were improbable causes. He also expressed the conclusion that a small gap between sections of a chimney "would not represent a likely cause for the fire during normal operation". However, the physical and witness evidence indicated that the installation had been carried out in a non-standard manner. The reasons for the manner of installation could not be determined from the physical evidence alone. He then identified what he considered to be the three possible mechanisms by which non-standard installation could have caused the fire before concluding that "a mechanism involving high temperatures in the area of the chimney as the result of the reduced heat losses [was] the probable cause." In other words, he considered the probable cause to be that "the normal heat losses from the outside of the chimney had been restricted by insulation and/or a lack of ventilation."

39. On a fair reading of Dr Goudsmit's report, his references to the three identified mechanisms as being "possible" should be seen in the context of his conclusion that the fire started in the roofspace and was caused by heat from the chimney. That conclusion is supported by compelling evidence and cogent argument, including the evidence of non-standard installation and a previously identified problem with lack of clearance around the chimney. In the absence of material that shows a real prospect that Dr Goudsmit is wrong, his report is sufficient for the purposes of a summary judgment application to support a finding that the fire was caused by the installation of the chimney and that, if properly installed, the fire would not have happened.

Procedural steps before Issue of these proceedings

40. On 24 August 2012 the Claimants' solicitors (who were acting on the instructions of Aspen Insurance UK Limited) sent a letter of claim to Cunningham Lindsey, who were then acting as appointed agent for Feltham's insurers, AXA Insurance UK plc. In the course of the letter, the solicitors wrote:

> "Phase 3 – This involved the fit-out of the [House] and installation of a copper roof on the [House]. As part of the fit-out, a wood burning stove was installed, which was connected to a stainless steel flue that passed through the roof space. Feltham was appointed as the main contractor to carry out the Phase 3 works, pursuant to the terms of the [Phase 1] Contract (as varied by reference to the Phase 3 works and the agreed sum for those works). We understand that Feltham engaged subcontractors to carry out various aspects of the Phase 3 works.
>
> …
>
> **Causation**
>
> … It is the strong view of our client's forensic expert that, on the balance of probability, the cause of the fire was the failure to comply with Building Regulations when installing the steel flue, which resulted in the steel flue being installed in close proximity to combustible material, which was ignited when the steel flue became heated following the operation of the wood

> burning stove. We are not aware that this view is opposed by any other forensic expert engaged by any party to date."

41. The solicitors continued by asserting that Feltham was in breach of Clause 2.1 of the JCT Intermediate Standard Form (as set out above) and invited Cunningham Lindsey to confirm that Feltham admitted liability for the incident. They added the request "In the event that Feltham disputes liability, then please let us have the basis of such denial and copies of any supporting documentation." They requested a response within 21 days.

42. No response was forthcoming until 12 December 2012, and when it came it was a letter from Feltham's solicitors. It followed the same format as the letter of claim and said:

> "Phase 3
>
> There was no separate contract put in place in respect of the Phase 3 works. It appears that it was agreed that the Phase 3 works would continue as a variation to the Phase 1 contract, which according to the Phase 3 Specification for Works would also be governed by the 2005 JCT Intermediate Building Contract conditions.
>
> …
>
> **Causation**
>
> We confirm that our expert, Mr Jon Boyle, of Hawkins agrees that the witness evidence would place the seat of the fire as being within the roof space of the Property.
>
> Notwithstanding that, however, we would submit that it is a significant leap from noting that the fire was first seen in the roof structure in the vicinity of the flue to concluding that the fire was caused by the twin wall insulated flue, which under normal circumstances would be expected to have a relatively low surface temperature.
>
> It is denied that the fire was caused by the negligence of either our client or their subcontractors. It is further denied that our client and/or their subcontractors failed to install the wood burning stove and its flue in accordance with the appropriate building regulations and instructions.
>
> …
>
> We note that it is Mr Goudsmidt's "*strong view*" that "*on the balance of probability, the cause of the fire was the failure to comply with Building Regulations when installing the flue, which resulted in the steel flue being instead in close proximity to combustible material, which was ignited when the steel flue*

became heated following the operation of the wood burning stove".

We would submit that your allegations rest on suppositions and speculation on the part of your client (and your expert) regarding both the cause of the fire and what our client and/or their subcontractors may or may not have done.

As far as our client (and expert) is aware, there is no physical evidence which has been produced to date which positively demonstrates either the precise cause of the fire or that our client and/or their subcontractors failed to install the flue correctly. Indeed, our expert has confirmed from discussions with the other experts in the claim, including your Mr Goudsmidt, that all of the experts have acknowledged the difficulty in this case in establishing the mechanism which caused the fire, given the lack of 'hard' physical evidence in relation to this.

…

It is agreed that the flue and the wood burning stove were to be installed in accordance with the manufacturer's installation instructions and the ADJ. It is our case that the flue was installed properly and that the requisite 50mm distance between the flue and surrounding combustibles was achieved. Our client's witness evidence, to be disclosed at the appropriate time, will outline the process involved with the installation of the flue, including the steps taken to measure the holes for the routing of the flue through the Property to make sure the separation distances set out in the instructions and/or ADJ were complied with.

…

Our expert's investigation into the fire is still ongoing…

We confirm that the installation of the steel flue formed part of the Phase 3 works that were being undertaken by our client. We accept that, in principle, our client remains liable under the Contract for the acts and/or omissions of its subcontractors. We also acknowledge that under Clause 2.1 of the Contract our client was under a duty to carry out the works in compliance with the provisions of ADJ.

However, your allegations of breach of contract pursuant to Clause 2.1 and/or your client's claim for and indemnity under Clause 6.2 of the Contract are firmly rejected. For the reasons outlined above, we deny both that our client/or their

> subcontractor's failed to install the flue in accordance with the ADJ and that it was their negligence that caused the fire."

43. At the hearing Feltham confirmed that no further indication of Mr Boyle's views was given to the Claimants until disclosure of various adjudication documents to which I refer below. In a witness statement for the hearing, Feltham's solicitor emphasised the use of the words "it appears" in the first paragraph set out above, suggesting that they indicated caution and uncertainty about what was agreed. This ignores the penultimate paragraph that I have set out above. Reading the letter as a whole, there was no uncertainty: Feltham accepted that the installation of the steel flue formed part of the Phase 3 works that it was undertaking. It also accepted that there was a contract in existence and that, in principle, it remained liable under that contract for the acts and/or omissions of its subcontractors, with no suggestion that the sub-contract with Affleck was to be treated differently. Feltham also accepted that the JCT Intermediate Building Contract applied, that being a necessary implication of its acceptance that "under Clause 2.1 of the Contract [it] was under a duty to carry out the works in compliance with the provisions of ADJ".

44. On 29 April 2013 the Claimants' solicitors wrote again to the Defendant's solicitors referring to the experts meeting on 20 March 2013, to their understanding that it had now been discovered that the installation of the chimney flue was unorthodox and not in accordance with the manufacturer's instructions, and stating:

> "We are advised that none of the experts demur from the proposition that the cause of the fire is associated with the chimney flue of the woodburner. As we previously stated in our letter of claim of 24 August 2012, clause 6.2 of the contract makes your client liable for all damage and/or loss arising from the performance of the works, including all damage and/or loss arising from the acts and negligence of its subcontractors. It is clear to us that the fire in this case arose from the poor and negligent installation of the chimney flue by your client's subcontractor."

45. Feltham was invited to admit liability within 14 days. Its solicitors replied on 30 April saying that they were awaiting their expert's report and would not be in a position to respond until they had it. In response to a separate point, they said:

> "... we are instructed to confirm out agreement to the dis-application of the arbitration provisions of the contract."

46. When Feltham's solicitors had not responded after three months, the Claimants' solicitors wrote on 8 August 2013 requesting a response within a further 14 days, failing which they would take formal steps to protect their clients' position and recover their outlay. Feltham's solicitors replied on 16 August 2013 saying that their expert's investigations into the cause of the fire "remain ongoing" and that he was still "in the process of considering the various possible causes and whether the testing regime … proposed and previously agreed between the experts is required to investigate the causes of the fire further. Our expert has advised that a number of the other experts, at the inspection, expressed interest in still proceeding with the testing." On the information available to the Court, the inspection to which they referred must

have been the one on 22 April 2013, nearly four months before. By 29 October 2013 Feltham had still not provided a substantive response. The Claimants' solicitors therefore gave Feltham one last opportunity to respond within 7 days; and they sent draft Adjudication and Referral notices that they intended to serve if liability was not admitted by then.[5] They included Dr Gouldsmit's report. Feltham's solicitors replied on 30 October 2013 asking for an extension to 13 November 2013 so that they could show the report to their expert for his comments and take their client's instructions. It was now 14 months since the Claimants' original letter of claim and more than 10 months since Feltham's response on 12 December 2012. Not surprisingly and (to my mind) entirely justifiably, the Claimants refused the requested extension and formally served the Notice of Adjudication and Referral Notice, thereby initiating what became known as Adjudication 1 on 6 November 2013.

47. By its Response Notice, which was served on 26 November 2013, Feltham took two main points. First, it contended that there was no contract in writing within the meaning of sections 107(1) and 108(1) of the 1996 Act. Second, it contended that the proceedings were defective because they had been brought by Mr Iliffe alone. Neither of these points had been taken by Feltham in the short period between provision of the draft Notices on 29/30 October and formal service on 6 November 2013. Feltham did not suggest that there was no contract at all between it and the Claimants – the most it said was[6] "to the extent that it has contracted with an Employer, that Employer is "Mr and Mrs Iliffe"" – its contention on the first point was merely that there was no contract *in writing* within the terms of the 1996 Act.

48. The reason for the limited scope of the first issue in the Response Notice in Adjudication 1 is not far to find. On 7 November 2013, the day after receiving Mr Iliffe's Adjudication Notice, Feltham's solicitors wrote to the Claimants' solicitors attaching a copy of an Adjudication Notice initiating an adjudication by Feltham against Affleck which it had served that day. That Notice included the following:

> "4. It was agreed between the Referring Party and Mr and Mrs Iliffe that the Phase 3 Works would continue as a variation to Phase 1 of the Main Contract. The specification for these works noted that the Phase 3 works would also be governed by the 2005 JCT Intermediate Building Contract conditions. Phase 3 of the Works involved the installation of the internal finishings, mechanical services and copper roof covering. The Phase 3 Works commenced on 6 June 2011 and were due to be completed by 27 April 2012.
>
> 5. By way of the Subcontract, the Referring Party subcontracted the provision of the mechanical and electrical services under Phase 3 of the Main Contract to the Responding Party. The Subcontract included the supply and installation of the flue for the wood burning stove and the chimney flue in the living area of the House."

[5] Exhibit NMY1 contains letters dated 16 September and 29 October 2013 (at pages 41 and 42)which are otherwise identical. It is not clear if the letter was sent on 16 September, but it is clear that the one dated 29 October 2013 was sent to and received by Feltham's solicitors.
[6] At [19]

49. On any reasonable construction, this amounted to an acceptance that the Phase 3 works were carried out pursuant to an agreement that they would be treated as a variation to Phase 1 of the Main Contract and that the 2005 JCT Intermediate Building Contract conditions applied to the carrying out of the work. That is made clear by [4] and confirmed by the reference in [5] to Feltham subcontracting the mechanical and electrical services "under Phase 3 of the Main Contract". There can be no suggestion that Feltham and its solicitors either could not or did not understand what they wrote. So far as I am aware, if Feltham served a Referral Notice in this particular adjudication, it is not in evidence for the present hearing.

50. On 10 December 2013 the Claimants issued a fresh Adjudication Notice against Feltham in their joint names, thereby initiating Adjudication 2. It is plain from the content of the Notice that this was done in order to meet the point raised by Feltham in Adjudication 1 that Mr Illiffe on his own was not a proper Referring Party. Once again, Feltham responded taking the point that there was no contract in writing and therefore the adjudicator did not have jurisdiction. On the merits of the claim, it merely put the Claimants to proof.

51. On 10 December 2013, the day that the Adjudication Notice in Adjudication 2 was served on it, Feltham itself issued a new Adjudication Notice against Affleck, this time reflecting the fact that it was now subject to a claim in Adjudication 2 brought by both Claimants. The new Adjudication Notice said:

> "6. Phase 3 of the works included installation of the internal finishings, mechanical services and a copper roof covering ("the Phase 3 works"). Pursuant to an agreement with Mr and Mrs Iliffe, Feltham undertook certain Phase 3 works including the installation of the mechanical services. These same mechanical service works were subcontracted in their entirety by Feltham to Affleck pursuant to the Subcontract. In particular, the Subcontract works included the design, supply and installation of a wood burning stove in the living area of the Property and the flue serving it."

52. Although marginally less clear, the essentials of this passage were that (a) Feltham undertook the Phase 3 mechanical services works (b) pursuant to an agreement with Mr and Mrs Iliffe and then (c) subcontracted those mechanical services works in their entirety to Affleck, including (d) the design, supply and installation of the stove and lining. This time Feltham did not send the Adjudication Notice to the Claimants.

53. On 17 December 2013 Feltham served its Referral Notice in the adjudication against Affleck, in which it set out its case in more detail. It did not provide a copy to the Claimants. On the contrary, when the Claimants had been sent Feltham's Adjudication and Referral Notices by Affleck's solicitors and had annexed them to its skeleton for the hearing, Feltham's skeleton argument objected to the Court reading them. Once again (correctly in my view) this objection was not maintained by Mr Catchpole QC at the hearing and in due course he referred extensively to the documents which had been provided to the Claimants by Affleck's solicitors, as outlined below.

54. The Referral Notice included the following:

> "3. Feltham was employed by the Honourable Mr and Mrs Iliffe ("the Employer") as Main Contractor for fit-out works to Property ("the Fit-Out Works" or "the Phase 3 Works". These Fit-Out works included the installation of two Rayburn Heat Ranger 345W free standing cookers in the kitchen of the Property ("the Rayburns") and one Woodfire RS19D wood burning stove in the living room ("the Wood Burner"), together with the associated flues for all three appliances.
>
> 4. Feltham subcontracted the mechanical installation work for Phase 3 in its entirety to Affleck pursuant to a contract entered into on or around 5 July 2011 ("the Subcontract").
>
> …
>
> **C The Employer's Claim**
>
> 12. The adjudication notice and Referral in the Employer's claim against Feltham are appended to this Referral … . As is the Employer's Expert Evidence, obtained from Dr Goudsmit of Burgoynes …. Dr Goudsmit's view is that the Fire was caused by the defective installation of the flue to the Wood Burner. His opinion is summarised at paragraphs 15 and 16 of the Employer's Referral ….
>
> 13. Feltham obtained its own expert evidence from Mr Boyle of Hawkins in an attempt to defend the claim brought by the Employer. However, Mr Boyle's view is also that the fire was caused by the defective installation of the flue to the Wood Burner by Affleck. Consequently, Feltham does nor intend to serve its evidence in the Employer's Adjudication - as this would amount to an admission of the Employer's claim – but appends the reports to this Referral ….
>
> …"

55. There is no suggestion in either of Feltham's Adjudication Notices or its Referral Notice that it did anything other than undertake the mechanical services works pursuant to an agreement with the Claimants to which the JCT Intermediate Building Contract conditions applied. Elsewhere in the documents, it is clear that the person preparing the documents is familiar with and ready to use the common expedient of making allegations contingent upon their being proved against his or her client by another person[7]; but Affleck's case on the existence of a contract between the Claimants and Feltham which incorporates the provisions of the JCT Intermediate Building Contract is not expressed contingently in any way.

[7] See, for example, the first Feltham Adjudication Notice at [7] and the Referral Notice at [6]

56. On 11 January 2014 the adjudicator for the Claimants' Adjudication 2 ruled that she had jurisdiction but that she had "reasonable doubt as to whether contractual liability can in this case be inextricably and exclusively linked to the report's findings on workmanship and probable cause of ignition."

57. Meanwhile, on 9 January 2014 Affleck had served its Response in the adjudication brought against it by Feltham. It had 8 appendices which have not been produced for the present hearing. Those appendices were described as including:

    i) A note from Professor Warwicker (Chartered Building Services Engineer) concerning other possible causes of the fire: Appendix 1(i);

    ii) A short supplemental witness statement from Affleck's Kevin Gillman ("Gillman 3rd"): Appendix 2;

    iii) Docherty's Response and Appendices in the Affleck/Docherty Adjudication, including Statements from Mr Dearie, Mr Calloway and Mr Spreadbury: Appendix 4.

58. Affleck's response is central to Feltham's defence of the present application for summary judgment. In particular, Mr Catchpole QC relied upon the following passages:

    i) At [13] Affleck attacks Dr Goudsmit's evidence, contending that "Nowhere does Dr Goudsmit state the cause of the Fire was the defective installation of the flue … . … In fact, Dr Goudsmit, largely states possible causes only to disregard them because there is an absence of supportive physical evidence, or because they are improbable. Further and in any event, Dr Goudsmit's views are premised on the assumption that there was a joint between sections Q and R within the roof space. This assumption may not stand in the face of Mr Calloway and Mr Spreadbury's evidence, and Dr Goudsmith may entirely revise his views, when he is provided with that witness evidence."

    ii) At [14] Affleck turns to Mr Boyle's evidence. It quotes from his report (which the Court has not seen) his conclusion that "it was highly probable that the fire was caused by heat transfer from the flue gases to combustible materials in the roof structure."

    iii) At [15] it records that Affleck's expert, Mr Mamoon Alyah, concludes that the most probable cause of the Fire was ignition of wood shavings and timber in the roof structure where the flue passed through the roof.

    iv) At [16] it records that Docherty's expert, Mr Leng, accepts that the seat of the Fire was in the roof, close to the flue, but that he has reached different conclusions, although he expressed reluctance to offer a final opinion on the potential causes of the Fire, due to the lack of information obtained from the other parties.

    v) At [17] it asserts that the only matter agreed between these experts is that the seat of the Fire was in the roof near the chimney. "What is clear is that whilst each expert has considered a number of possible causes, with the exception of

Mr Boyle, they are cautious or reluctant to state what was the most probable cause of the Fire. Mr Boyle's conclusion may well not stand in the face of Mr Calloway's evidence that there was no joint between Q&R Sections in the roof space."

vi) At [18] it relies on "a short note" from Professor Warwicker concerning possible causes of the Fire. He apparently considers the ignition of nearby combustible materials such as roof timbers or membranes is highly unlikely because the temperature on the outside of a twin-skin flue would have been no more than 70 degrees. He also considers that the additional hole in the roof, which was constructed as a conduit for cables and electrics to be installed in due course, was also a source of additional combustion air to the wood burner. In his view, movement of air through the additional hole would have created a suction effect, and a negative pressure gradient, which would increase the likelihood of fly-ash or embers from the chimney being sucked into the roof via this hole. One further possibility is said to be that the Fire was caused by some unspecified action by the Electrical subcontractors.

vii) At [20] Affleck refers to the contents of Docherty's response. The points mentioned are:

a) There is no actual evidence of a failure to maintain a 50mm gap in the roof space. Mr Calloway is said to have reported this to Feltham "several times", but it was not attended to;

b) It appears that "scalloping" of the timbers as detailed in design drawings from Pioneer was not carried out. This would have involved shaving or cutting material off the joists so as to increase the separation around the flue. Docherty asserts that Feltham was well aware of the requirement;

c) Mr Calloway says that he did not locate a joint within the roof space and it is disputed that the Q/R joint failed in any case;

d) An allegation that the chimney projected too high above the roof may be based on a misunderstanding of the manufacturer's literature.

e) Docherty apparently asserts that of the four allegations about causation, three (the proximity of the flue to combustible materials, the use of non-combustible material and insulation material, and inadequate ventilation and/or heat dissipation) are the responsibility of Feltham while there is no evidence to support the fourth (locating a joint in the roof space).

59. I need only record that Feltham served a robust Reply to Affleck's Response, pointing to the fact that Affleck's expert agrees with the conclusions of Dr Goudsmit and Mr Boyle and asserting that "were this a Court case, Affleck would simply not then be permitted even to attempt to argue that it did not cause the fire." They assert that Mr Leng (Docherty's expert) does not state any opinion as to what caused the fire and set out at length why they say that Affleck's position is unsustainable. None of this is said to be contingent upon proof of their case by the Claimants.

These Proceedings

60. By the beginning of February 2014, this is how things stood. Over £1 million of Phase 3 works had been carried out for which Feltham had submitted valuations by reference to the priced Schedule and for which the architect had certified payment and Feltham had been paid. The Claimants had formulated a claim in contract in August 2012 alleging breach of Clause 2.1 of the JCT Intermediate Building Contract on the basis that the flue had been installed too close to combustible material. In December 2012 Feltham's solicitors had accepted that the works were being carried out pursuant to a contract which incorporated the JCT terms and that Feltham would be responsible for acts or omissions of its subcontractors. Despite accepting in December 2012 that the fire broke out in the roofspace of the property, Feltham had subsequently equivocated for a year saying that Mr Boyle's investigations were not complete. When the Claimants issued Adjudications 1 and 2 late in 2013, Feltham took the point that there was no contract in writing but did not assert that there was no contract or that it had no responsibility under the contract. In its adjudications against Affleck, it asserted positively that the Phase 3 works were agreed to be a variation to Phase 1 of the Main Contract and that the JCT Terms applied; and on the issue of causation it asserted that Mr Boyle agreed with Dr Gouldsmit and that the reason why it had not disclosed his report would be that it would involve admitting the Claimants' claim. What is more, the documentation disclosed to the Claimants by Affleck's solicitors showed that Affleck's expert concluded that the most probable cause of the fire was the ignition of wood shavings and timber in the roof space (which would strongly support the Claimants' case that the flue was placed in close proximity to combustible materials) and Docherty's expert expressed no opinion on the cause of the fire.

61. In these circumstances it is hardly surprising that the Claimants issued these proceedings. Nor is it surprising that the Particulars of Claim which were issued with the Claim Form on 7 February 2014 were leanly pleaded. The essentials of the Particulars of Claim were:

    i) They pleaded the Claimants and Feltham "[entered] into a JCT Intermediate Building Contract with Contractor's Design 2005 (Revision 2 2009) in relation to Phase 1 in or about June 2011 … with Phase 3 being carried out by way of a variation to the Contract" and pleaded Clause 2.1 of the JCT Form as setting out Feltham's obligations under that Contract[8]. In the light of Feltham's previous conduct the Claimants may reasonably have thought this to be common ground. In particular, given the terms of Feltham's solicitors' letter of 12 December 2012 and [4] of Feltham's Adjudication Notice dated 7 November 2013, the Claimants had every reason to suppose that Feltham would understand the nature of the case being brought against it about the nature of the contract because it was pleaded in terms that were very similar to the terms that Feltham and its solicitors had used on those occasions;

    ii) They pleaded that the Phase 3 works included the installation of the wood-burning stove and its chimney and that Feltham subcontracted the installation of the chimney to Affleck who in turn sub-contracted it to Docherty who in

[8] See Particulars of Claim at [4] and [5].

turn subcontracted it to Mr Calloway[9]. Again, this may reasonably have been considered to be common ground in the light of what had gone on before;

iii) They alleged that "the Chimney was assembled and installed in a non-standard and defective manner."[10] This was pleaded in the knowledge that it represented the opinion not merely of Dr Goudsmit but also of Mr Boyle and that the reason why Mr Boyle's opinion had not been brought forward by Feltham was that to do so would be tantamount to admitting the Claimants' claim;

iv) They pleaded the fact of the fire on 20 April 2012 during the course of the Phase 3 works, with the fire originating in the roof space in the area where the chimney passed through the roof[11]. This was known to be the view of Dr Goudsmit, Mr Boyle, Mr Alyah (Affleck's expert), and Mr Leng (Docherty's expert). On the materials that I have seen, this proposition was not contradicted by Professor Warwicker or any other expert;

v) They alleged that the cause of the fire was a combination of one or more of the defects in the manner in which the Chimney had been installed and identified at 10 "Particulars of Breach", largely founded on the report of Dr Goudsmit[12]. None of these alleged defects would have come as a surprise to Feltham, since Dr Goudsmit's report had been served in October 2013; nor was there any difficulty in understanding or addressing them, since Feltham had the advice of Mr Boyle and knew the views of the other experts down the line[13];

vi) They pleaded the alternative mechanisms proposed by Dr Goudsmit in his report, one or more of which were alleged to have caused the fire and claimed damages estimated to exceed £3,500,000, promising a schedule of loss when reinstatement is complete[14].

62. With the benefit of its prior knowledge of the case and the communications that had previously passed between the parties, Feltham should have had no difficulty in understanding the case that it had to meet, despite (or partly because of) the relative leanness of the pleading. That being so, the approach adopted by the Defence and Counterclaim is surprising.

63. The Defence takes the following technical points:

i) The Particulars of Claim does not comply with CPR 16.4(e) and PD 16 paragraphs 7.3 and/or 7.4 and/or 7.5 which provide that:

a) Where a claim is based on a written agreement a copy of the contract or documents constituting the agreement should be attached or served with the particulars of claim;

[9] See Particulars of Claim at [6] and [7].
[10] See Particulars of Claim at [8].
[11] See Particulars of Claim at [9].
[12] See Particulars of Claim at [9] and [10].
[13] The Court was told that Mr Boyle had not been disinstructed but that neither he nor any other expert had yet been instructed to advise in the context of these proceedings.
[14] See Particulars of Claim at [11] and [12].

b) Where a claim is based on an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken; and

c) Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done.[15]

ii) The pleading of the Particulars of Claim is "opaque"[16] and "is inadequate in that it does not set out, or enable Feltham to ascertain, the Iliffe's case as to the scope of Feltham's obligations"[17]

iii) "Feltham notes the reference to the report of Dr Goudsmit at sub-paragraph 10(2). Feltham also notes CPR 35.4, which provides that no party may put in evidence an expert's report without the court's permission. The relevance of the report is therefore not understood and Feltham does not plead to it."[18]

64. It is convenient to deal with these technical points now, to get them out of the way:

i) The first point is technically accurate. However it lacks any substantive merit in a case where the Claimant was entitled to understand that the material fact of the existence of a contract for Phase 3 was common ground;

ii) I reject the second point. Paragraph 5 of the Particulars of Claim "set out [Feltham's] obligations" by setting out Clause 2.1 of the JCT Form. If the point were intended to go wider as a general criticism of the pleading, I would still reject it. The nature of the Claimants' case emerges clearly from the Particulars of Claim. Feltham may now wish to depart from the position it has previously taken; but that does not mean that it cannot understand the pleading;

iii) The reference to CPR 35.4 is misconceived. Although the Claimants do not have permission and Dr Goudsmit's report is not at present compliant with the requirements for an expert's evidence to be adduced at trial, that was not the purpose of annexing it to the Particulars of Claim. The stated purpose of the reference to Dr Goudsmit's report at [10(2)] of the Particulars of Claim was to assist in the identification of the joint between sections Q and R of the chimney, which was reasonable. The relevance of the report for that purpose is plain. Whether for this narrow purpose or if a broader view is taken of Dr Goudsmit's report, its relevance is obvious and is (or should be) fully understood by Feltham and its legal team, who have had the benefit of Mr Boyle's investigations, advice and explanation if it was required to enable them to understand it.

65. Turning to the more substantive aspects of Feltham's pleaded Defence, at [5] it sets out steps relating to the Phase 1 works, concluding with the execution of the Phase 1 Contract. It then sets out steps relating to Feltham's tendering for the Phase 3 works

[15] Defence at [4.1] and [9.2]-[9.4]
[16] Defence at [8]
[17] Defence at [4.2]
[18] Defence at [14.2]

and its subcontracting the design and installation to Affleck. In doing so it highlights the following features:

i) The statement in the Schedule of Works, which was incorporated in Feltham's tender, that "The design and installation for the mechanical systems will be carried out by Affleck Mechanical Services Limited."[19]

ii) The statement in the architect's letter dated 16 June 2011 that "The [Phase 1] contract documents will then be used as a basis for Phase 3 with that [sic] works being a variation to the contract based on the agreed sum for Phase 3."[20]

iii) Feltham commenced work on site on 19 June 2011 without the benefit of a contract or letter of intent relating to that work.[21]

iv) The architect's two emails on 5 July 2011 with their references to the Phase 3 works continuing as a variation to the Phase 1 contract and the instruction to place an order with Affleck.[22]

v) The minutes of Site Meeting No 1 on 12 August with its reference to the Phase 3 works proceeding under a letter of intent as a continuation of Phase 1 carried out by Feltham.[23]

66. At [5.17] Feltham pleads that "No contract in writing in respect of the Phase 3 Works was ever incepted and Feltham has no record of receiving any document which was, or purported to be, a variation order relating to the Phase 3 works." After rehearsing that the Claimants' claim arises from the carrying out of the wood-burner and flue, Feltham pleads that it "did not enter into any contract with the [Claimants] in relation to the Wood-burner or Flue. Feltham acted on the request of Mr Iliffe, and/or his agent the Architect, in placing an order with Affleck for the installation of the Wood-burner and Flue. It is not alleged that the placing of the order was done defectively; or that it has, of itself, resulted in any loss to the Iliffes; or that it can, of itself, give rise to any relevant liability on the part of Feltham." Feltham restates this aspect of its case at [10] ("There was no contract") and [14.1] ("Feltham denies that it entered into any relevant contract with the Iliffes.") This last contention taken on its own is open to the interpretation that there may have been a contract but not one that relates to the logburner and flue; but the previous two are unambiguous.

67. On the factual background to the happening of the fire, Feltham pleads that it cannot admit or deny:

i) That the chimney was assembled and installed in a non-standard and defective manner; or

ii) That the fire originated in the roof space in the area where the Chimney passed through the roof; or

[19] See [12] above
[20] See [7] above. The word "that" is evidently a mistake, but the meaning is clear.
[21] See [17] and [23] above.
[22] See [17] above.
[23] See [23] above.

iii) That the cause of the fire was one or more of the defects in the manner in which the Chimney had been assembled.[24]

68. Feltham admits that the fire caused extensive damage but neither admits or denies that the reinstatement costs will exceed £3,500,000. It requires that the Iliffes should disclose the basis for the assertion that the reinstatement costs will exceed £3,500,000, including any relevant documents.

69. By a Reply to Feltham's Defence, the Claimants set out matters that they rely on in opposition to Feltham's assertion that there was no contract between them in relation to the wood-burner or chimney. These include:

i) The steps alleged by Feltham at [5] of its Defence relating to its tendering for the Phase 3 works;

ii) The fact that Feltham's order to Affleck was expressed to be a sub-contract order;

iii) The terms of the sub-contract order, which identify that the main contract was on the terms of the JCT Intermediate Building Contract;

iv) The authorisation of payments for Phase 3 works by the architect on certificates stating the applicability of the JCT Intermediate form of contract;

v) The fact that AXA has responded to fund most of the reinstatement works, which (it is alleged) would not have happened unless Feltham had been carrying out the works subject to the terms of the JCT Intermediate form and had therefore taken out Option A joint names insurance;

vi) The fact that Feltham had not asserted in the adjudication proceedings that there was no contract at all;

vii) The terms of Feltham's Adjudication Notice and Referral Notice against Affleck.

70. In the alternative, if there was in fact no contract between the Claimants and Feltham, the Claimants allege that they conducted themselves on the common understanding that they had so contracted and the Claimants rely upon the doctrine of estoppel by convention.

71. Feltham has issued Part 20 Proceedings against Affleck that are expressed to be contingent upon the Claimants succeeding against it in the main action. By its Defence to Feltham's Part 20 claim, Affleck admits that its works included the installation of the wood-burner and flue and that its works included sub-contractor's design; it denies that wood-burner and flue were dangerously defective; and in the alternative it alleges that Feltham took no steps to ensure that there was the requisite 50mm separation between the chimney and combustible materials despite Mr

[24] At the hearing it was explained that the justification for these non-admissions was uncertainty about what would be said by the parties further down the line and concern that admissions made by Feltham might prove to be inconsistent with findings made subsequently in its contribution proceedings against Affleck.

Calloway warning that the existing separation was inadequate. Affleck has in turn brought a claim against Docherty, to which no Defence has yet been filed.

72. The Claimants drew up draft amended Particulars of Claim which were served on Feltham. They set out a case that there was a contract for the Phase 3 works which was concluded by conduct in a number of alternative ways. The first is that an offer was made by the provision of the tender documents to Feltham and the first of the architect's emails on 5 July and that offer was accepted by the Defendant's tender, the carrying out of the Phase 3 works by itself and through Affleck, making applications to the architect for payment under the Contract as if the Phase 3 works had been carried out under it, and receiving payment for the work done. The second is that the parties agreed by conduct that the Phase 3 works would be carried out by Feltham on the basis that the work would be done as if it had been instructed as a variation to Clause 5 of the Contract conditions in one of two ways: either by the architect certifying payment as if the Phase 3 works were a variation under clause 5 of the JCT terms, which was accepted by Feltham accepting the payment; or by Feltham making application for certification for work done as if the work had been done pursuant to a variation order under clause 5 of the JCT terms and the Claimants accepting the offer by the architect certifying sums and the Claimants paying them pursuant to the certificates. Finally, the Claimants rely upon the emails on 5 July 2011 as being a variation under Clause 5 of the Contract conditions.

73. Although the draft had been sent to Feltham and was before the Court, no application to amend has been made. Its main significance for the hearing was that it enabled Feltham to submit that the Claimants no longer have confidence in their case as originally pleaded.

The Issues on this Application

74. The issues to be decided emerge clearly from the factual background that I have set out above. They are:

    i) Did the Claimants and Feltham enter into a contract in relation to the carrying out of the Phase 3 works?

    ii) If the Claimants and Feltham did enter into a contract in relation to the carrying out of the Phase 3 works, did Feltham owe any relevant obligation to the Claimants in respect of the supply and installation of the woodburner and stove. Specifically:

        a) Were the terms of the JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009 part of that contract?

        b) Did Feltham's obligations extend beyond the fact of placing an order for Affleck to carry out the supply and installation of the woodburner and flue?

        c) Did Feltham owe any design obligation to the Claimants in respect of the woodburner and flue and, if so, does it matter?

d) Is Feltham contractually responsible for the acts or omissions of Affleck or its sub-contractors further down the line?

iii) Have the Claimants proved to the requisite degree of certainty that the fire was caused in the roofspace as a result of defective installation of the woodburner or flue?

iv) If the answer to issue (iii) is yes, is Feltham liable in contract to the Claimants in respect of the fire?

v) If the answer to issue (iv) is yes, is there some other compelling reason why there should be a trial of the action or why summary judgment should not be given to the Claimants.

75. In addressing these issues I bear in mind at all times that an application for summary judgment is not the occasion for a mini-trial and is not an appropriate occasion to resolve significant disputes of fact. This does not mean that the Court has to accept every assertion that a party makes as true – far from it; but it means that if there is any real doubt on a matter of fact, it is to be resolved in favour of Feltham at this stage. In addition, the Court should be astute not to resolve issues in circumstances that might deprive Feltham of a legitimate defence or subject it to significant prejudice in its dealings with those further down the line.

76. It is convenient to take the contractual issues first.

The Contractual Issues:

i) **Did the Claimants and Feltham enter into a contract in relation to the carrying out of the Phase 3 works?**

ii) **If the Claimants and Feltham did enter into a contract in relation to the carrying out of the Phase 3 works, did Feltham owe any relevant obligation to the Claimants in respect of the supply and installation of the woodburner and stove. Specifically:**

a) Were the terms of the JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009 part of that contract?

b) Did Feltham's obligations extend beyond the fact of placing an order for Affleck to carry out the supply and installation of the woodburner and flue?

c) Did Feltham owe any design obligation to the Claimants in respect of the woodburner and flue and, if so, does it matter?

d) Is Feltham contractually responsible for the acts or omissions of Affleck or its sub-contractors further down the line?

77. Feltham submits that the Court "is not in a position to identify, let alone determine, the factual issues that will need to be resolved in order to determine the scope of Feltham's obligations. This is because the Iliffes have repeatedly refused to set out the factual basis for their case as to Feltham's contractual obligations, as required by

[the rules and the practice direction]." However, the facts that are alleged on either side to be relevant are before the court, and neither side has submitted that any further facts are or might be material to the to the existence or otherwise of a contract. In particular, it is common ground that after 5 July 2011 no further document purporting to be a letter of intent was issued (apart from the removal of the word "draft" on 15 July 2011) and no formal contract in writing was executed. That being so, the court is in as good a position now as it would be at a trial to determine the contractual issues: the answers are to be found in the documentary tender process, the emails on 5 July 2011, the removal of "draft", the minutes of the August site meeting and the fact that, whether or not the Affleck works are excluded for this purpose, Feltham carried out all the Phase 3 works and was paid for them in accordance with its tender.

78. Feltham also submitted that the Court should not embark on the contractual analysis because the case being advanced by the Claimants was not consistent with their case as pleaded in the Particulars of Claim. Mr Catchpole QC submitted that Feltham was in real difficulty in knowing what case it had to meet; and that it would be unfair to require Feltham to respond at all at a time when, on his submission, the Claimants' case was inadequately pleaded in the Particulars of Claim and the draft Amended Particulars showed that the claim to which Feltham had pleaded in its Defence was not really the Claimants' case any more. However, he also accepted (rightly in my view) that if the contractual analysis could be properly conducted without unfairness to Feltham and the conclusion of the analysis was clear, the Court was entitled to state its conclusion at this stage. In my judgment there is no possible unfairness to Feltham in resolving the contractual issue now when all relevant materials are before the Court, Feltham has pleaded virtually all of them itself (while contending for a different outcome than that alleged by the Claimants), and Feltham has had nearly two years since receipt of the letter of claim to make up its mind about the terms (if any) on which it carried out the Phase 3 works. My conclusion that it is not unfair is reinforced by the fact that in December 2012, Feltham's solicitors made clear statements about the contractual arrangements between the Claimants and Feltham, which were in substance repeated in late 2013 in Feltham's adjudication documents, and that the first suggestion that there was either no contract or no relevant contract emerged in Feltham's Defence in these proceedings. For the reasons set out at [48]-[49], [61(i) and [64(i)] above, if there is any merit in Feltham's assertion that the Claimants have "repeatedly refused" to set out the factual basis for their case as to Feltham's obligations in the manner set out in PD16, it is technical only.

79. The question whether a contract was concluded is to be determined objectively. If a contract was concluded, then:

> "If the question is whether a term was incorporated into a contract, the subsequent conduct of the parties may be very relevant to the inquiry whether such a term was or was not agreed. Mr Flaux's submissions to the contrary were, with respect, a misapplication of the principle that the subsequent conduct of the parties cannot be relied on as an aid to the construction of the contract, see *Miller v. Whitworth Estates* [1970] A.C. 583, 603D−E per Lord Reid, 615A per Lord

> Wilberforce. No such principle exists in relation to the question whether an alleged term of a contract was, in fact, agreed."[25]

80. Since it is common ground that no contract in writing was executed, any contractual consensus must have involved either an oral statement of offer or acceptance or conduct which, viewed objectively, demonstrates that consensus has been reached. The applicable principles are well summarised by *Chitty on Contracts, 31st Edition* at [2-030]-[2-031]:

> **Acceptance By Conduct**
>
> 2-030 An offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them; an offer to sell goods, made by sending them to the offeree, can be accepted by using them, and an offer contained in a request for services can be accepted by beginning to render them, where a customer of a bank draws a cheque which will, if honoured, cause his account to be overdrawn, the bank, by deciding to honour the cheque, impliedly accepts the customer's implied request for an overdraft on the bank's usual terms. But conduct will amount to acceptance only if it is clear that the offeree did the act of alleged acceptance with the intention (ascertained in accordance with the objective principle) of accepting the offer. … That conduct is then referable to the oral contract rather than to the attempted later variation. … A fortiori, there is no acceptance where the offeree's conduct clearly indicates an intention to reject the offer. …
>
> **Establishing the Terms of Contracts Made By Conduct**
>
> 2-031 Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement are obviously more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all. But sometimes the court can resolve the uncertainty by applying the standard of reasonableness or by reference to another contract (whether between the same parties or between one of them and a third party), or even to a draft agreement between them which had never matured into a contract. For example, in *Brogden v Metropolitan Ry* a railway company submitted to a merchant a draft agreement for the supply of coal. He returned it marked "approved" but also made a number of alterations to it, to which the railway company did not expressly assent; but the company accepted deliveries of coal under the draft agreement for two years. It was held that once the company began to accept these deliveries there was a contract on the terms of the draft agreement."

[25] *GNER v Avon* [2001] Lloyds Rep IR 793 at [29] per Longmore LJ

81. Where parties have carried out work and been paid for them, the Court will scrutinise a suggestion that they did so without there being a contract in existence with care, for the reasons given by Steyn LJ in *G Percy Trentham v Archital Luxfer Ltd* [1993] 1 Lloyds Rep 25, 27:

> "The fact that the transaction was performed on both sides will also make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential."

82. To similar effect, the Court of Appeal in *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Refinery AD No 1* [2001] EWCA Civ 406 said:

> "Particularly in a case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the Courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest.
>
> This is especially the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.
>
> For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the Courts are prepared to imply an obligation in terms of what is reasonable."

83. Applying these principles, I have reached the clear conclusion that the parties entered into a contract which incorporated the terms of the JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009, for the reasons that follow.

84. The tender package which was sent to Feltham invited it to tender on the terms there set out, with the intention that the parties would enter into a contract. The Specification stated that the work would be on the terms of the JCT Form and that the Contractors Designed Portion would include the design of and construction of the heating system. The statement that sub-contractors had been appointed meant (and would have been understood by Feltham in the light of the meeting on 22 March 2011) that it was anticipated that the work of producing the design and carrying out the installation would be carried out by sub-contractors; but that did not detract from the fact that responsibility for the design would rest with Feltham because it was to be included in the Contractors Designed Portion. The architect's statement in his letter of 12 May 2011 which accompanied the tender documents that "the …. Final detail design for the mechanical and electrical subcontracts are still being finalised and I

expect to have them shortly. In the meantime you can progress all other packages" should be read in the context of the contractual terms that the Employer was proposing. When that is done, the statement does not mean or imply that the design of the works would be outside the scope of the tender or of Feltham's contractual responsibility. It merely means that Feltham is unable to quote for it yet since it does not know what design or subcontractor's quotation will be within the Contractor's Designed Portion. This conclusion is reinforced by Item T90/210, which required the Contractor to complete the design and detailing of the heating system. It is not undermined by the statement in the Introduction to the Schedule of Works that the design and installation for the mechanical systems would be carried out by Affleck, since that neither says nor implies anything about contractual responsibility for the design under the proposed JCT terms.

85. Feltham's tender did not contradict the proposal that the JCT terms should apply. By necessary implication, therefore, Feltham tendered on the basis that the terms would apply as set out in the employers' tender package. Although the manner of inclusion was unconventional as outlined at [16] and [18-20] above, the effect of the tender was that the installation of the logburner and flue was included in section 10 of Feltham's priced tender. There is nothing in the tender documents which either says or implies that Feltham's obligation would be no more than to place an order with Affleck.

86. The events of 5 July 2011 have to be viewed against this factual background, which was known to both parties. By that date, Feltham had put out its own sub-contract tender documents to Affleck, and Affleck had tendered. On that date there was the Pre-Order meeting between Feltham and Affleck, where various contractual terms were agreed including the applicability of DOM/1 Standard Form of Contract. There was also a meeting between Feltham and the architect. The Claimants did not commit themselves contractually to the whole of Feltham's tender. Instead, by the first email the architect instructed them to carry out the Phase 3a works including the Affleck package. Since it must have been known that the work was to be done by Affleck, it made sense to refer to Feltham placing an order with them. Once again, the fact of placing an order with Affleck does not mean or imply that the works are taken out of the scope of the works for which Feltham would be assuming contractual responsibility. Shortly afterwards, the architect asked that the first email be treated as "draft". Whether or not Feltham treated is as such, Feltham placed the order with Affleck as had been envisaged and on the terms that had been agreed.

87. Feltham now submits that the architects statements on 16 June and 5 July and the agreed position recorded in the minutes of the meeting on 12 August 2011 show two things: first, the references to there being a letter of intent shows that there was at that point no contract in existence; and, second, that the Phase 3 works cannot have been conducted as a variation to or continuation of the Phase 1 contract. There is force in each of these submissions, but I do not think that they are determinative of the contractual issues in the case. Both arise because the parties in 2011 were not applying the same remorseless logic as is now deployed by leading counsel and solicitors.

Acting under a letter of intent

88. It is a curious feature of the history as a whole that, despite clear references to letters of intent for both Phase 1 and Phase 3, none was issued for either. There is a

suggestion in the second email on 5 July 2011 that the first was to be regarded as an email of intent, though the terms of the first appear to commit the Claimants, at least to the extent of the phase 3a works. Whatever the explanation, for the purposes of this summary judgment application I will proceed on the basis that the parties considered up until at least 12 August 2011 that Feltham was carrying out the Phase 3 works pursuant to a letter of intent.

89. Letters of intent are typically sent where the parties are not in a position to enter into a projected contract towards which they may have been working, but the employer instructs the contractor to take certain steps that would be included in their projected contract if it had been concluded (whether by executing formal contract documents or otherwise). It is well established that the issuing of an instruction by a letter of intent is itself capable of giving rise to a contract, which is separate from the projected contract. The relevant authorities were reviewed by Akenhead J in *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC) and more recently by Edwards-Stuart J in *Twintec Ltd v Volkerfitzpatrich Ltd* [2014] BLR 150. I respectfully agree with the approach adopted by the Court in each of those cases.

90. Both Akenhead J and Edwards-Stuart J held clearly in mind the need for sufficient certainty if there was to be a contract as a result of the letter of intent. In *Diamond Build* Akenhead J found certainty to be present because there was "a commencement date, a requirement to proceed regularly and diligently, the completion date, and overall contract sum and an undertaking to pay reasonable costs in the interim." In *Twintec* there was no requirement to proceed with the works regularly and diligently but Edwards-Stuart J held that a requirement to proceed "... with all works necessary to enable you to achieve the Design Programme and Construction Programme" gave sufficient certainty in relation to time. He also held that the statement in the letter that, if no formal subcontract was concluded, the contractor would be reimbursed for proven reasonable costs (up to the maximum that the contractor had submitted as its contract price) gave sufficient certainty on remuneration for the work that was instructed to be done.

91. I note also that Edwards-Stuart J attached significance to the fact that the proposed sub-contract, if and when it was entered into, would be retrospective in effect: see *Twintec* at [21], [30] and [45].

92. *Twintec* and the authorities to which it refers establish that a letter of intent may give rise to a free-standing contract. The Court is to assess whether or not a contract has been formed applying the same objective approach to the primary facts and to the factual matrix as applies in any other case. For there to be a contract there needs to be sufficient certainty about necessary terms, but lack of precision or certainty about peripheral matters need not prevent the formation of a contract. I also consider that, where the nature and established terms justify it, the Court may hold that the contract includes implied as well as express terms: see the citation from *Mamidoil-Jetoil* above. Thus although the fact of a letter of intent will generally show that a projected contract has not yet been concluded, it does not follow that the relations between the parties when services are performed pursuant to the letter are subject to no contractually binding obligations at all.

Variation of the Phase 1 main contract

93. Feltham submits that for the Phase 3 works to have been carried out as a variation of the Phase 1 main contract would have wreaked contractual havoc. The procedures for effecting Variations under the JCT Form are precise and have defined contractual consequences[26]. If implemented, they would have required an extension of the contract period and undoing the practical completion that had been achieved in March 2011, which would have had the effect of returning the Phase 1 works to the risk of the contractor; and other steps would have followed, none of which happened. These are substantial legal arguments and it is plain that neither the Claimants, nor the architect, nor Feltham thought of them at the time.

94. There are three references to varying or continuing the Phase 1 contract: see [7], [17] and [23] above. What they have in common was that the provisions of the Phase 1 contract would form the basis of the contract for the Phase 3 works subject to necessary amendments. This is consistent with the terms of the Phase 3 tender package Specification which followed the same format as that for Phase 1: both specified the JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009 as being the applicable terms. The material difference between the two tender packages and Feltham's two tenders was in the description of the work content (including the Contractors Designed Portion) and Feltham's prices. To my mind, the significance of the references to varying the contract or the works being a continuation of Phase 1 is that they indicate that the parties intended that the JCT Terms would apply, at least so far as they could be directly translated to the Phase 3 works, since that was the basis of the Phase 1 contract and the basis upon which Feltham had tendered for the Phase 3 works. What appears clear is that, despite the references to carrying out the works as a Variation to the Phase 1 contract, no such Variation was effected.

The Period from 5 July to 12 August 2011

95. There was no contractually relevant oral or written communication during this period apart from the emails on 5 July, the removal of the word "draft" on 15 July and the recorded agreement on 12 August 2011. The first email on 5 July 2011 instructed Feltham to carry out the works relating to Phase 3a, to include the immediate instruction to place an order with Affleck to carry out the work "in accordance with the specification as included in Feltham's tender." In contrast to the Phase 3a works, the First Claimant wanted to reserve the right to review any future instruction regarding Phase 3b "which therefore cannot at this stage be fully guaranteed." The obvious implication of this contrast is that the Phase 3a works (including the installation of the logburner and flue) were "fully guaranteed". On a strict interpretation of the architect's email, his statement that the work should be carried out "in accordance with the specification as included in Feltham's tender" only applied to Affleck's work. Even if this narrow interpretation were to be adopted, however, it means that the installation of the logburner and flue was to be carried out in accordance with the specification. The specification applied the terms of the JCT standard form. While there may be arguments (as in *Twintec*) about the applicability of some of the JCT standard form terms when proceeding pursuant to the architect's 5 July 2011 instruction, the obligations set out in Clause 2.1 were readily applicable and

[26] See clauses 2.13, 2.14, 2.19, 2.20.1, 3.8, 3.11, 4.13, 5.1, 5.2

were imposed on Feltham because, for the reasons I have given at [84]-[86], Feltham's obligation was not merely to place an order on Affleck without having any further responsibility. This was clearly understood by Feltham, as is shown by the form of the sub-contract order which it issued that day.

96. To my mind it seems clear beyond argument to the contrary that the intention of the architect's first email on 5 July 2011 was to give a binding instruction to Feltham to carry out the works relating to Phase 3a[27]. It was therefore an acceptance of Feltham's tender to the extent of the Phase 3a works and, as such, incorporated the JCT Terms, which the Specification stated and Feltham's tender accepted would apply to all of the Phase 3 works. It was also an acceptance of Feltham's tender so far as it related to the Contractor's Design Portion, on which the Specification and Tender were ad idem and which covered the works that were being sub-contracted to Affleck.

97. It is also clear beyond argument that Feltham understood the architect's email in the way it was intended, because it immediately entered into its sub-contract with Affleck on terms which included the DOM/1 standard form of sub-contract and provided that Affleck had notice of the JCT Intermediate form of contract as the main contract provisions.

98. In my judgment, the instruction given in the first email gave sufficient certainty for the conclusion of a contract. The instruction to carry out the Phase 3 works was clear and, in context, can only have been by reference to the process of tendering that had gone before and the fact that the projected contract, if concluded on the terms of the tender process, would have retrospective effect: see *Twintec* on the need to dovetail the contractor's obligations so that it is not placed in breach of contract if and when the projected contract is concluded.

99. Having given the instruction in the first email, the architect then declared it to be "draft" in the second. Whether it was open to the architect to do so is a moot point which it is not necessary to decide, because the "draft" was removed on 15 July 2011 at which point, if not before, the contract was concluded.

100. Even if my conclusion that there was a contract which incorporated the JCT Intermediate standard form terms were wrong, I would reject any suggestion that Feltham carried out the Phase 3 works (including Affleck's subcontracted portion) without there being any contract in existence at all. At its lowest, the architect's instruction required Feltham to provide the specified services, for which it would be entitled to be paid a reasonable sum if it should be held that its tender prices had not been accepted. There was certainty about the services to be provided, the time for commencement and the right to be paid. If nothing more were said, it would be implied that the work should be carried out within a reasonable time. There would therefore be consensus on the core aspects of the agreement so as to constitute a contract for the provision of services. In that event, if the JCT Intermediate terms did not apply, Feltham would have been subject to a term implied by s. 13 of the Supply

[27] There is a suggestion in Feltham's submissions for this hearing that the division between Phase 3a and 3b was not clearly defined. This was not developed at the hearing and had not been raised previously. What is clear is that Feltham had no such difficulty in understanding the instruction at the time and clearly understood the intended contractual implications, as set out in its solicitors' letter of 12 December 2012 and its adjudication with Affleck.

of Goods and Services Act 1982 to carry out the service (namely the Phase 3 works) with reasonable care and skill.

The Period from 12 August 2011

101. It is clear that progress had been made on the Phase 3 works by 12 August 2011. However, even leaving that aside, during the period from 12 August 2011, Feltham carried out the work that it had tendered to carry out; and it submitted monthly valuations by reference to its tender prices which led to certification by the architect as described above and payment by the Claimants. In the language of Steyn LJ in *Percy Trentham*, the transaction was performed on both sides. Adopting *Mamidoil-Jetoil* language, performance was given on both sides over a period: Feltham had invested resources in the carrying out of the works and had the advantage of payment which reflected the parties' agreement; and the Claimants had the advantage of almost complete performance of the Phase 3 works and had invested over £1.5 million in payments certified by the architect by reference to Feltham's tendered prices. It is unrealistic to argue that there was no intention to enter into legal relations.

102. Feltham submits that it is essential to identify when a contract arose. I disagree. It is sufficient, particularly in a case where the contract has been concluded by conduct, to identify a date by which the contract was in place. For the reasons set out above, I consider that a contract was concluded on either 5 or 15 July 2011. However, if I were wrong about that, the contract was concluded relatively soon after 12 August 2011 when it became apparent that the works were continuing and were going to continue without the parties formalising their relations any more than they had done in the course of Phase 1.

103. Having concluded that the parties intended to and did enter into legal relations, it is permissible to look at their post-contractual conduct to see what terms were incorporated. On that, the evidence is all one way: Feltham carried out the works that it had included in its tender, subject to variations that were treated in a manner consistent with the requirements of the JCT Intermediate standard form; and it submitted applications for payment by reference to its tender prices. The architect's certificates stated that they were issued pursuant to the JCT Intermediate standard form and the Claimants paid without demurring from that approach. Feltham's subcontract order to Affleck asserted that the JCT Intermediate standard form applied, required Affleck to take notice of it, and incorporated the standard DOM/1 form, which was designed to be used with the JCT main contract forms, and it continued on that contractual basis throughout. Then, after the fire, its distinguished solicitors accepted on 12 December 2012 that the JCT Intermediate standard form applied and agreed on 30 April 2012 to the disapplication of the arbitration provisions: they only applied in the first place if Feltham had contracted on terms including an arbitration provision, such as was included in the JCT Intermediate standard form. At the very end of 2013, Feltham asserted against Affleck that the main contract was on the JCT Intermediate standard form terms: I assume that those documents were drafted by the solicitors, since the names of counsel do not appear on them.

104. I therefore conclude that relatively soon after 12 August 2011, whether or not there had been a concluded contract before, the parties concluded a contract by conduct, the basis of the contract being that the parties understood and agreed that Feltham's tender for the Phase 3a works had been accepted. It is apparent that, in the event, the

Claimants also accepted the tender in relation to what would have been the Phase 3b works, since virtually all the tendered Phase 3 works had been completed by the time of the fire.

105. Mr Wilmot-Smith QC, counsel for the Claimants, submitted that, since this was a contractors' design contract, it did not matter how the fire started as it was obviously attributable to a design or construction fault. As I have said, the tender documents provided that the design and construction of the logburner and flue were included in the Contractors Design Portion. However, Mr Catchpole QC was right to submit that the failures alleged by the Claimants are all failures of workmanship (including a failure to comply with the manufacturers' design instructions to maintain 50 mm separation around the flue); and he objected to any attempt to widen the scope of the enquiry to cover allegations of defective design. This objection was well founded: although Feltham has had ample opportunity to address the case as it has been advanced by the Claimants to date, it would be unjust to speculate on possible allegations of design fault that have not yet been formulated. I therefore conclude that, although the design of the logburner and flue installation was within the Contractors Design Portion, it does not matter for present purposes.

106. For these reasons I answer the contractual issues as follows:

i) The Claimants and Feltham entered into a contract in relation to the carrying out of the Phase 3 works. Initially it may only have been for the "Phase 3a works", but, if so, those works included the installation of the logburner and flue and the contract was subsequently extended to cover all of the Phase 3 works. The contract for the Phase 3a works was concluded on 15 July 2011 at the latest, which is on the assumption (but without deciding) that the introduction of the "draft" provision in the second email on 5 July 2011 was effective. Alternatively, if no contract was concluded on 15 July 2011, it was concluded relatively soon after 12 August 2011.

ii) The terms of the JCT Intermediate Building Contract with Contractor's Design 2005, Revision 2, 2009 were part of the contract. Even if not all terms of the JCT standard form were incorporated, the provisions of Clause 2.1 of the JCT standard form were incorporated from 15 July 2011 (or 5 July if the introduction of "draft" was ineffective).

iii) If I am wrong about the incorporation of the JCT standard form terms, the contract was a contract for services to which s. 13 of the Supply of Goods and Services 1982 applied. In that event, there was an implied term that Feltham would carry out the works with reasonable care and skill.

iv) Feltham's obligations in respect of the logburner and flue were not limited to placing an order with Affleck. Feltham had contractual responsibility for the acts and omissions of Affleck, as correctly acknowledged by its solicitors on 12 December 2012.

v) The design of the logburner and flue was included in the Contractors Design Portion but this does not matter since the case brought by the Claimants alleges defective workmanship and not defective design.

The Causation Issues

Have the Claimants proved to the requisite degree of certainty that the fire was caused in the roofspace as a result of defective installation of the woodburner or flue?

107. Feltham has chosen merely to put the Claimants to proof of how the fire started. At the hearing it submitted that others down the line may not agree with Dr Goudsmit and that therefore it would be unsafe to conclude that he is right and unfair to expose Feltham to inconsistent findings if it were to be required to pursue a recovery action after judgment had been entered against it. It has referred to the views of others but has not provided the Court with the Appendices to Affleck's response, although it has them.

108. There can be no doubt that the fire started in the roofspace close to the stainless steel flue from the logburner. I would be prepared to make that finding without the assistance of experts on the basis of the photographs annexed to Dr Goudsmit's report. As it is, there is unanimity between the experts whose views are known to the court, namely Dr Goudsmit (Claimants), Mr Boyle (Feltham), Mr Alyah (Affleck) and Mr Leng (Docherty). There is no expert or other evidence to the contrary and no realistic prospect that evidence to the contrary would emerge or be accepted at a full trial.

109. The evidence in support of the outbreak of fire being associated with the installation of the flue in the roofspace is overwhelming, for the following reasons:

i) It is the opinion of Dr Goudsmit, Mr Boyle and Mr Alyah. Mr Leng is said to have reached different conclusions but what they may be is not specified; and it is said that he expressed reluctance to offer and did not offer a final opinion on the potential causes of the Fire, due to the lack of information obtained from the other parties;

ii) The only causes of ignition that have been suggested that would not be attributable to the installation of the flue are (a) an electrical fault and (b) a burning brand entering the roofspace by the open upstand adjacent to the flue. They can be discounted as real possibilities because:

a) The only wiring in that part of the roofspace was associated with the fire alarm detectors. If faulty, such wiring would only have suffered slight and transient damage and it would have resulted in an audible alarm which should have been heard but was not. No party has advanced a positive case alleging that the fire was started by a wiring fault. Docherty does not: see [58(vii)] above. Although Professor Warwicker in his "short note" apparently suggests it to be possible that the fire was caused by some unspecified action by the Electrical subcontractors, Affleck does not advance that as a positive case and, in the absence of any other wiring in the relevant area, such a possibility can be safely discounted even for the purposes of a summary judgment application;

b) The suggestion of a burning brand falling from the logburner chimney is highly speculative and Dr Goudsmit's reasons for dismissing it are

compelling. His opinion is evidently supported by Mr Boyle and Mr Alyah. Mr Leng's view is not known, but is not said to support this theory[28]. The suggestion of a burning brand from a bonfire outside the house starting the fire can be discounted because the Claimants' housekeeper/guardian kept a record of all fires started on the island and there had been none for days[29].

iii) It follows that the only evidence against the flue being the cause of the fire in the roofspace is Professor Warwicker's reported view that the ignition of nearby combustible materials is highly unlikely and Mr Calloway's assertions that he did not locate a joint within the roof and that the Q/R joint failed in any case. As to those points:

a) The ignition of combustible materials in close proximity to chimneys is a well-recognised risk, which is why 50 mm separation is a standard requirement (and was a manufacturer's requirement with this flue);

b) Objective evidence of non-standard installation has been found at the Q/R joint, as described by Dr Goudsmit and shown in his photographs. That evidence is not contradicted by any other expert evidence;

c) There is contemporary documentary evidence of Mr Calloway raising the question of inadequate separation between the flue and the joists;

d) Docherty asserts that the "scalloping" of the timbers as detailed in design drawings from Pioneer was not carried out. Feltham has not put any evidence before the court to the effect that steps were taken to ensure adequate separation, despite being faced by cogent evidence that the proximity of the flue to combustible materials was the cause of the fire. Nor has it put any evidence before the Court to suggest that such evidence might be forthcoming if the case was allowed to go to trial. It has, in its pleadings and this application, merely put the Claimants to proof.

110. Neither Feltham nor any other party has advanced a case that the chimney or its installation were inadequately designed. Once it is accepted, as it must be in the absence of any suggestion that the flue was inherently unsuitable, that the flue would not have caused the fire if it had been installed properly and with adequate separation, the Claimants' workmanship case against Feltham is overwhelming.

111. I therefore conclude with the certainty necessary to justify summary judgment that the fire was caused in the roofspace as a result of defective installation of the logburner or flue and that there is no realistic prospect of any other explanation or cause being established if the case went to trial.

[28] See Affleck's response at [16] and [18].

[29] Given the unlikelihood of a brand entering the upstand and starting the fire, it is not necessary to consider whether, if proved, this would cause liability to attach to Feltham. It is, however, obvious that the Claimants would have a powerful argument that to leave an upstand open which enabled a burning brand to set fire to the roofspace would be a serious failure of workmanship.

Liability

Is Feltham liable in Contract to the Claimants in respect of the fire?

112. For the reasons set out above, Feltham was responsible in contract for the acts and omissions of its subcontractors. It follows that it is in breach of Clause 2.1 of the JCT Intermediate standard form terms and is liable to the Claimants in respect of the fire. If my primary conclusion was wrong and Feltham was not subject to the relevant JCT standard form terms, s. 13 of the Supply of Goods and Services Act 1982 applied and Feltham was in breach of the term implied by that section. It does not matter whether the cause was entirely attributable to the acts or omissions of Affleck and its sub-contractors or, as Mr Calloway will apparently suggest, Feltham was directly responsible for "scalloping" or otherwise ensuring that there was adequate separation around the flue: its responsibility in contract would be the same.

Is there any other compelling reason why there should be a trial of the action or why summary judgment should not be given?

113. Feltham's submissions on this point were inextricably linked to its submission that there was a danger of inconsistent findings down the line. Having examined the case being advanced by those down the line and the evidential basis for in support of those contentions, I have concluded that the danger of inconsistent findings is remote. There is accordingly no unfairness in giving summary judgment now.

Conclusion

114. There will be summary judgment in favour of the Claimants for damages to be assessed. I will hear counsel on the handing down of this judgment on the size of the interim payment to be awarded and on costs.