Judgments

Hall and another v Van der Heiden

[2010] EWHC 586 (TCC)

QBD, TECHNOLOGY AND CONSTRUCTION COURT

Coulson J

23 March 2010

Contract – Building contract – Breach – Claimant employers contracting with defendant contractor to carry out internal refurbishment and remodelling works on property – Defendant failing to complete works and delaying repeatedly – Claimants commencing proceedings against defendant contractor seeking damages for breach of contract – Whether claimants entitled to damages.

Judgment

APPROVED JUDGEMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR JUSTICE COULSON:

I. INTRODUCTION

1. Commonly, building disputes fall into a number of well-defined categories: a claim by the contractor for unpaid sums due on his Final Account; a claim by the employer for defective or incomplete work; and claims by either or both sides in respect of delay. Sometimes there will be claims by either or both sides if the contract came to an end prematurely. This case ticks every box: each one of these categories of dispute is present in these proceedings. Unhappily, despite the multiplicity of issues, the sums in issue are modest by the standards of the TCC. There is a claim by the employer (the claimants) for just over £100,000 and a counter-claim by the defendant contractor for just over £50,000.

2. A further complicating factor has been the absence of the defendant from this trial. Although the defendant

was represented by solicitors and counsel at every stage of the proceedings, up to and beyond the Pre-Trial Review, he apparently dismissed his legal team a week or so before the trial. Moreover, although he endeavoured to postpone or even avoid the trial altogether, by obtaining an interim order under section 252 of the Insolvency Act 1986 from Swindon County Court on the last working day before the trial began, I granted permission for the trial to continue pursuant to section 252(2)(b) of the Act. My judgment on that issue is at [2010] EWHC 537 (TCC).

3. Notwithstanding that order, the defendant still refused to take any part in the trial and it continued in his absence. I heard oral evidence from each of the two claimants, from Mr Wojciech Lenkiewicz, (the contractor who carried out the remedial and the completion works), and Stephen Fletcher, the claimants' architect on the project. As to expert evidence, I was provided with a written report and other written comments by the claimants' expert architect, Mr Frank Cleveland, who had permission from HHJ Toulmin CMG QC to give his evidence in written form, but not to give oral evidence. I heard oral evidence from the claimants' quantity surveyor expert, Mr Andrew Ohl.

4. Of course, the defendant was not present and therefore called no evidence. However, I have had regard to his witness statement of 18.12.09 (the only factual evidence on which the defendant chose to rely); the written evidence of the defendant's expert architect, Mr Daniel Evans; and the written evidence of the defendant's quantity surveying expert, Mr Derek Woods.

5. I propose to deal with the issues in the following way. In Section 2 below, I deal with the contract between the parties. In Section 3, I set out a brief chronology of the principal events. Thereafter, in Section 4, I address the alleged defects, and in Section 5 the allegations of incomplete work. In Section 6, I deal with the issues relating to culpable delay. Then, taking all those strands together, I deal in Section 7 with the determination of the defendant's employment under the contract and whether or not it was justified. In Sections 8-11 below I then go on to consider the claimed heads of loss. There is a short summary of my views in Section 12 below. I ought to express my gratitude to Mr Woods for his considerable assistance in dealing with these issues.

2. THE CONTRACT

6. The contract was dated 8th May 2007. The works were described as “internal refurbishment and remodelling at Flat 1, 25 Stanley Crescent, London, W11 2NA.” The contract sum was £143,054. The architect was named as Steven Fletcher.

7. The contract commencement date was 21st May 2007. The contract completion date was 22nd September 2007. Liquidated damages were expressed to be in the sum of £700 per week.

8. The contract incorporated the JCT Minor Works Building Contract (With Contractor's Design). It is unnecessary to set out all these provisions. For present purposes, the important clauses were as follows:

Section 2 Carrying out the Works.

a) Clause 2.1 set out the defendant's obligations in respect of the carrying out and completion of the works including, at clause 2.1.1, the obligation to complete the design using reasonable skill, care and diligence, and, at clause 2.2, the obligation to use materials and standards of workmanship to the reasonable satisfaction of the architect and/or to a standard appropriate to the contract documents.

b) Clause 2.8, dealing with extensions of time, provided:

“If it becomes apparent that the Works will not be completed by the Date for Completion stated in the Contract Particulars (or any later date fixed in accordance with provisions of this clause 2.8) for reasons beyond the control of the Contractor, including compliance with any instruction of the Architect/Contract Administrator under this Contract whose issue is not due to a default of the Contractor, then the Contractor shall thereupon in writing so notify the Architect/Contractor Administrator who shall make, in writing, such extension of time for completion as may be reasonable. Reasons within the control of the Contractor include any default of the Contractor or others employed or engaged by or under him for or in connection with the Works and of any supplier of goods or materials for the Works.”

c) Clause 2.9 set out the provisions for liquidated damages. Clause 2.9.1 made plain that the relevant period during which such damages would accrue was between the contractual completion date (as extended) and the date of practical completion. Clause 2.9.2 made plain that the claimants were entitled to deduct liquidated damages from sums otherwise due to the defendant or to recover those damages from the defendant “as a debt”.

Section 3 Control of the Works

d) Clause 3.4.1 permitted the architect to issue written instructions with which the defendant was obliged to comply forthwith. All instructions were to be confirmed in writing.

e) Clause 3.6 permitted the architect, without invalidating the contract, to issue instructions to vary the works.

Section 4 Payment

f) Clause 4.3 dealt with progress payments and provided as follows:

“The Architect/Contract Administrator shall, at intervals of four weeks, calculated from the Date for Commencement of the Works, certify progress payments of the percentage stated in the Contract Particulars of the total value of:

.1 The work properly executed, including any amounts either ascertained or agreed under clauses 3.6 and 3.7; and

.2 The materials and goods which have been reasonably and properly brought on site for the purpose of the Works and which are adequately protected against weather and other casualties.

less the total amounts due to the Contractor in certificates in progress payments previously issued. The certificate shall state to what the progress payment relates and the basis on which the amount of the progress payment has been calculated. The final date for payment by the Employer of the amount so certified shall be fourteen days from the date of issue from that certificate. The provision of clause 4.6 shall apply to any certificate issued under this clause 4.3.”

g) Clause 4.7 permitted the contractor to suspend works in certain circumstances of non-payment. It was in these terms:

“ Without affecting any other rights and remedies of the Contractor, if the Employer, subject to any notice issued pursuant to clause 4.6.2, fails to pay the Contractor in full by the final date as required by these Conditions and such failure continues for seven days after the Contractor has given to the Employer, with a copy to the Architect/Contractor Administrator, written notice of his intention to suspend performance of his obligations under this Contract and the ground or grounds on which it is intended to suspend performance, the Contractor may then suspend such performance until payment in full occurs.”

Section 6 Termination

h) Clause 6.4 permitted the claimants to terminate the defendant's employment if the defendant was in default. It was in these terms:

“.1 if, before practical completion of the Works, the Contractor:

.1. without reasonable cause wholly or substantially suspends the carrying out of the Works or the design of the Contractor's Designed Portion; or

.2 fails to proceed regularly or diligently with the Works or the design of the Contractor's Designed Portion; or

.3 fails to comply with clause 3.9,

the Architect/Contract Administrator may give to the Contractor a notice specifying the default or defaults (the 'specified default or defaults')

.2 If the Contractor continues a specified default for 7 days from receipt of the notice under clause 6.4.1, the Employer may on, or within 10 days from, expiry of that 7 day period by a further notice to the Contractor terminate the Contractor's employment under this Contract”

3. BRIEF CHRONOLOGY

9. The works were slow to get underway and by August 2007, the claimants were becoming concerned that the defendant was not going to complete by the contractual completion date. There were very few men on site. These concerns were exacerbated when the defendant took an unplanned holiday for a fortnight between 3rd and 20th August 2008. On his return from holiday, the defendant informed them he was 5 weeks behind. He did not at this stage seek to argue that the delays were anyone's responsibility other than his own.

10. As noted above, the contract envisaged payment by the claimants on the issue of progress payments certificates by the architect. Those certificates would, in turn, normally be triggered by monthly applications or valuations provided to the architect by the defendant.

11. In fact, in the present case, the defendant asked for (and the claimants agreed to make) interim payments in advance of the defendant's applications to the architect, and the architect's certificates. This had the effect that, all the way through the project until December 2007, the claimants' actual payments to the defendant were higher than the sums to which the defendant was actually entitled, and he was also paid in advance of any entitlement. As a result of this arrangement, some of the documents included in the trial bundles, such as the purported invoices from the defendant, were in fact prepared long afterwards and did not form the basis for any of the payments that were actually made.

12. It is not uncommon for contractors to seek to persuade employers to make payments to them in advance of the date stipulated in the contract. Unhappily, to those of us with some experience of the construction industry, this is often a sign that the contractor is in financial difficulties and is robbing Peter to pay Paul. As we shall see, that was the case here: when the advance payments stopped, the defendant's difficulties were suddenly shown up in stark relief.

13. Throughout September 2007, the work slipped further behind. A moving-in date of 1st October had been agreed but became impossible. A new date of 13th October was identified and the claimants gave notice on their alternative accommodation. However, the works were nowhere near ready by 13th October, and the claimants were forced into a series of various short-term lets between 13th October and December 2007. Indeed, so far behind were the works on the 13th October that, although it had been agreed that the claimants would be able to move in some of their possessions into the second bedroom on that day, even this limited objective proved fraught with difficulties when it became apparent that both the bedroom and the hallway leading to it were actually being painted.

14. Towards the end of October, the defendant began to seek, somewhat belatedly, to justify the delays. Although he said there was a lack of written instructions from the architect, it was unclear precisely what he meant. I have been shown a large number of such written instructions in e-mail form. The defendant did not make a formal claim for an extension of time until 1.11.07. At that point, the complaint appeared to be that the instructions were sent by e-mail rather than in some other (unspecified) form.

15. Throughout November 2007, a study of the relevant contemporaneous documents, in particular the e-mails, demonstrates that the defendant was a long way behind, and was not in proper control of the project. Requests for simple things (such as a new programme) were either not dealt with at all or only addressed after significant delay.

16. On 7th December 2007, by agreement with the defendant, the claimants moved back into the property. However, the works had not been carried out even in accordance with the defendant's modified programme. In particular, there was no heating, no completed bathroom, no completed kitchen, and numerous other difficulties. After two nights, the claimants went into a hotel for three nights, returning on 13th December 2007. They immediately noticed a number of important problems. Not only were there still difficulties with the heating and the lighting (which kept switching on and off), and not only was there still no completed bathroom, but the new flooring on the ground floor, which had been laid to a particular finish by the defendant, was defective in a number of ways. It was poorly stained and it was extremely noisy. There was a good deal of squeaking and creaking when it was walked on, and in places it wobbled. Much of the joinery remained undelivered although the defendant suggested that some of the items were at his workshop.

17. On 2nd January 2008, the claimants requested a programme for the completion of the works. No programme was provided and the request was repeated on 7th January. The claimants proposed that the floor issue “be put to one side” until all the other items had been completed. Also on 7th January, the defendant provided a formal (if unparticularised) claim for an extension of time of 10 weeks.

18. Although the defendant accepted that there were items outstanding, in an e-mail of 9th January, he suggested that practical completion had been achieved. In his reply of 10th January 2008, Mr Fletcher refuted that suggestion and set out in detail all the items of work that had to be completed before a certificate of practical completion could be issued. He also indicated how and why an extension of time for 10 weeks would be excessive.

19. By January 2008, the claimants had paid the defendant all the sums certified by the architect. On 7th and again on 9th January 2008, the defendant sent the architect copies of a further valuation. This was referred to both as 'the Final Account' and 'valuation 8'. It was in the total sum of around £170,000. The architect sent e-mails and letters requesting further information as to some of the items in the valuation and also sought confirmation from the defendant that he would attend to the outstanding matters. The architect did not issue a further certificate. Indeed, on 17th January 2008, the architect dealt in detail with the valuation and said this:

> “In the meantime, according to my calculations, the value of work completed to date equals £149,493.25 as opposed to your claim in valuation 8 that £170,043.30 worth of work has been completed. Since we have not yet reached Practical Completion, only 95% of this amount is currently payable. Selby and Phil tell me that they have paid you £156,065 to date. Therefore, if my calculations are correct, Selby and Phil are currently £14,046.41 in credit.
>
> It is my understanding that as the project stands, the final cost of the project could be no more than £162,531, around £10,000 less than the amount you have mentioned. Selby and Phil are obviously very concerned that progress stopped despite the fact that they have, in good faith, paid in advance for certain items/works that are not in place or faulty- for example the stone counters and the hard wood flooring.
>
> Regarding your request for an extension of time of 10 weeks beyond the official completion date Saturday 22nd September 2007, I have carefully reviewed both sides of the story and enclose your e-mail of 7th January stating your case, and a letter from Selby and Phil stating their case. I realise that the reason for this delay includes changes to the structural design at the beginning of the project as well as changes and omissions to the design. However, the delay has largely been caused by poor management and planning on your part, the lack of sufficient and skilled labour and recent declining standards that have required various items to be redone.
>
> With the above in mind, I feel that it is fair to grant you an extension of time of 6 weeks. The amended official completion date is therefore Saturday 3rd November. Please note that I will need to see a breakdown of your costs before agreeing any further preliminaries-these are not currently included in the enclosed spread sheets. I understand that Selby and Phil will be looking for some sort of relief to cover their costs beyond this extension of time.
>
> To summarise, I urge you to return to the site with a decent workforce as soon as possible to complete the remaining work of your usual high standards. I realise that we need to review how to remedy the squeaky floor, and am endeavouring to obtain a specialised report on this as soon as possible. However, there are many other remaining issues that can, and should, be completed by the end of next week. It would be a real pity at this late stage to have to determine your contract and appoint another contractor to complete the works. However we are being forced into having to consider this last resort.”

20. In response to this, and on the very same day, the defendant notified the claimant and the architect by e-mail that he had suspended work on the project due to lack of payment. This was despite the fact that there was no certificate outstanding and, as the architect's letter set out above made plain, whether any further sums were due to the defendant at all was a matter of dispute.

21. On 21st January 2008, the defendant confirmed that he had suspended further work at the property, claiming that this was due to:

> “Lack of agreement on final account
>
> Lack of agreement on your assessment of valuation
>
> Lack of agreement-additional preliminaries
>
> Lack of agreement-level of liquidated damages”

There was a meeting on site on 24th January to try and resolve the issues but it was unsuccessful. Subsequently, the defendant was repeatedly asked back to the property to carry out the incomplete and necessary remedial works but he refused.

22. On 27th February 2008, the architect sent a written notice to the defendant requiring him immediately to return to the site and carry out outstanding works. The notice was expressly given under clause 3.4.1 of the Minor Works Form and warned the defendant that, under clause 3.5, if the defendant did not return, the works would be carried out by others and the defendant would be liable for the costs. In addition, the letter made plain that it was a notice under clauses 6.4.1 and 6.4.2 of the Minor Works Form, specifying the default and requiring the necessary works to be carried out immediately.

23. On the same date, the claimants' solicitors also sent the defendant a letter in similar terms, giving him until 4pm on Friday 7th March 2008 to deal with all outstanding matters.

24. The defendant refused to return to site, saying that, amongst other things, he wanted the final account valuation resolved before he did so. Thus on 12th March 2008 the claimant's solicitors sent a notice pursuant to clause 6.4.2 terminating the defendant's employment with immediate effect.

4. WERE THE DEFENDANT'S WORKS DEFECTIVE?

25. On the evidence before me, there can be no doubt that the defendant's works were defective. There are a number of elements of the evidence which point inexorably to that conclusion.

26. First, there are the contemporaneous documents, and in particular the e-mail exchanges from December 2008 onwards between the claimants and/or Mr Fletcher, the architect, on the one hand, and the defendant, on the other. In those documents, the claimants and the architect were repeatedly drawing various items of defective work to the attention of the defendant. In general terms, his responses did not challenge the defective nature of the items complained of, but instead sought to raise other matters, such as his claims for payment. On any fair reading of that correspondence, it could not be said that the defendant was disputing

the majority of the defects raised with him.

27. Secondly, there is the detailed report from Mr Frank Cleveland, the well-known expert architect. He analyses each of the items in the Scott Schedule and explains in considerable detail how and why those items amounted to a breach of the terms of the contract. His explanations are cogent and clear.

28. Thirdly, there is no architectural expert evidence to gainsay Mr Cleveland's report. The defendant produced an unsigned report from a Mr Daniel Evans, who was put forward as an expert architect, although there was no information in the report as to Mr Evans' qualifications or his experience. Moreover, in relation to the defective work, Mr Evans offers no opinion whatsoever. He certainly does not contradict Mr Cleveland's analysis. On that basis, therefore, the architectural expert evidence is fully supportive of the claimants' claim, whilst there is no architectural expert evidence to support the defendant's pleaded denial of the defective works.

29. Fourthly, in relation to the principal item of defective work, namely the defective flooring on the raised ground floor, I note that the architectural experts are agreed that the flooring was defective. In their agreed statement pursuant to CPR 35.12, the experts asked themselves whether the flooring carried out by the defendant was “to a satisfactory standard”. Their answer is illuminating. They agreed:

> “No. It was unsatisfactory. This does not appear to be seriously contested by the defendant. The flooring was not installed in accordance with published recommendations or with the manufacturer's installation instructions…. In particular the flooring was not a floating floor as intended but was nailed through to the existing construction.”

30. Fourthly, it is clear, again as noted in the experts' joint statement, that the defendant had admitted a number of the items in the Scott Schedule. Interestingly, this did not include the allegations in relation to the flooring which, as we have seen, the experts have agreed was defective in any event.

31. Accordingly, the claimants have established that, taking into account all of this evidence, the work was defective as set out in the Scott Schedule, and I so find.

5. WERE THE DEFENDANT'S WORKS INCOMPLETE?

32. The defendant's works were incontestably incomplete. The same parts of the evidence made that clear, namely the contemporaneous material, the report of Mr Cleveland, the absence of any expert architectural report gainsaying Mr Cleveland's analysis, the architectural experts' joint statement pursuant to CPR 35.12, and the admissions on the part of the defendant. Accordingly, I find that, to the extent that the Scott Schedule identified incomplete as well as defective works, those works were indeed incomplete.

6. WAS THE DEFENDANT IN CULPABLE DELAY?

6.1. The Factual Position

33. The works should have been completed by 22nd September 2007. The architect, Mr Fletcher, granted an extension of time for 6 weeks, which took the completion date up to 3rd November 2007. The defendant sought an additional extension of time of 4 weeks (which the architect refused) which would have extended

time until 1st December 2007. The works were not complete when they were suspended by the defendant on 17th January 2008 (otherwise there would have been nothing to suspend) and, on the claimants' case, were not completed until 17th May 2008. On the claimants' case there was thus a culpable delay from 3rd November 2007 to 17th May 2008, a period of 29 weeks.

6.2 The Appropriate Extension of Time

34. The architect calculated that a 6 week extension of time was due to the defendant. In his witness statement at paragraphs 30 and 31 he explains how he arrived at that figure. He told me that, if anything, this assessment was generous to the defendant.

35. At paragraph 2.2.12 of his report, Mr Cleveland undertook a detailed analysis of the delays. He concluded that a 6 week extension of time was appropriate, and that no further extension of time was due.

36. The report produced by Mr Evans suggested that a 10 week extension was appropriate. However, unlike the 6 week period, the 10 weeks was not the subject of any analysis or detailed calculation. It is a mere assertion.

37. I have concluded that, for the reasons explained by Mr Cleveland, the 6 week extension of time granted was reasonable in all the circumstances. There is no basis on which I could increase that to 10 weeks. In reaching that conclusion I have relied on the evidence of the architect, Mr Fletcher, the analysis undertaken by Mr Cleveland, and the absence of any proper explanation elsewhere in the evidence for any longer period.

38. More generally, I note that the 6 week extension of time was the equivalent of about a third of the original contract period. That seems to me to be generous, given that (as we shall see) the value of the additional work carried out by the defendant was no more than about 15% of the original contract sum. An extension of time of 10 weeks would be in excess of half the original contract period, and there is simply nothing to justify such a large extension of time.

39. Accordingly, I conclude that the 6 week extension of time was reasonable and that there is no basis for any further extension of time. Thus, the defendant should have completed the works by 3rd November 2007 and his failure to do so resulted in culpable delay.

6.3 Reasonableness

40. Mr Woods advanced the alternative submission that, whatever the position on the evidence now, clause 2.8 meant that, in order to increase the 6 weeks already granted, the defendant would have to show that, not only was 6 weeks wrong, but that the architect had acted unreasonably in arriving at that extension of time. He submitted that, provided the architect had not acted unreasonably in reaching his conclusion, his determination could not now be overturned.

41. This was a novel argument and appeared to suggest that a contractor seeking to overturn an existing extension of time in these circumstances would have to show that the architect had reached a conclusion that was Wednesbury unreasonable, importing that concept from public law and the Administrative Court.

42. It is of course unnecessary for me to decide that point in the light of my conclusion that the six weeks was the correct extension of time in any event. But I would express the tentative conclusion that Mr Woods was wrong to set the bar so high. If a contractor can demonstrate, after the event, to an arbitrator or at a trial that a reasonable extension of time was, say, 20 weeks, then he will usually be entitled to an extension of time of 20 weeks, even if, on the material available at the time that the architect reached his decision, an extension of time of only 15 weeks was justified. Of course, if no criticism can be made of the architect's 15 week award on the basis of the material then available to him, then the contractor will not usually be entitled to be compensated for the delay in arriving at the 20 week conclusion, but in my view, he will still be entitled to an award or a judgment in his favour of a 20 week extension of time if that is what is proved by the evidence at the arbitration hearing or trial.

6.4 Practical Completion

43. The next issue is the date of practical completion, and whether or not the defendant ever achieved practical completion of his works before suspending them in the middle of January 2008.

44. I remind myself that practical completion means the completion of all the construction work that has to be done (see *Jarvis and Sons v Westminster Corp* [1970] I WLR 637 at 646) although the architect may have a discretion to certify practical completion where there are very minor items of work left incomplete on 'de minimis' principles: see *HW Nevill (Sunblest) v William Press* (1981) 20 BLR 78 at 87. Moreover, although a practical completion certificate can be issued where there are latent defects, the authorities noted above make plain that such a certificate cannot be issued in circumstances where there are patent defects.

45. Applying those principles to the present case, there can be no doubt that the works here were not practically complete in January 2008 when the defendant left site. First, there were a whole series of patent defects which were the subject of repeated written notices and complaints from the architect and from the claimants to the defendant during December 2007 and January 2008, and which he failed to rectify. Secondly, there were incomplete items which were also drawn to the defendant's attention and which he failed to complete. Thirdly, on the defendant's own case, there were many items of joinery and the like which he had allegedly completed at his workshop but which he did not bring to site, in the end saying that he required to be paid before he did so. In such circumstances it is not remotely arguable that practical completion had been achieved prior to the defendant's suspension of the works.

46. If practical completion was not achieved when the defendant suspended the works in January 2008 then, given that it is common ground that the defendant never returned to site, it must follow that the defendant never achieved practical completion of the works. Practical completion of the works was only achieved once the remedial contractor, Voytex, had completed the outstanding works. That was not until 17th May 2008. It is not suggested that the claimants delayed unreasonably in engaging a replacement contractor. In the absence of any other contender, therefore, 17th May must be the date for practical completion.

6.5 The Period of Culpable Delay

47. Accordingly, on the analysis set out above, it seems to me clear that, after 3rd November 2007, the defendant was in culpable delay. That period of culpable delay extended beyond the defendant's suspension of the works in mid January 2008 and could not be said to come to an end until 17th May 2008, when the works finally achieved practical completion.

7. WAS THE CLAIMANT'S DETERMINATION JUSTIFIED?

7.1 The Relevant Letters

48. The letters relevant to the determination issue are those set out in paragraphs 22 - 24 above.

7.2 The Claimant's Case

49. The claimants' case is that the defendant had, without reasonable cause, suspended the carrying out of the works on 17th January 2008 and/or failed to proceed regularly or diligently with the works. There is no doubt that the defendant had suspended the works and, based on the findings set out above, there can equally be no doubt that the works were both defective and incomplete and that, despite being asked repeatedly to remedy the deficiencies, the defendant had refused to do so.

50. Accordingly, it seems to me that, unless the defendant could justify his suspension of the works and/or his failure to return to the site, the claimants' case that they determined in accordance with clause 6.4 of the Minor Works Form would be unanswerable.

7.3 Reasonable Cause

51. It is the defendant's case that he was entitled to suspend works because he had not been paid the sums properly due. However, on an analysis of the facts, it seems to me that such an argument is untenable.

52. The claimants made payments to the defendant in advance of the defendant's claim for progress payments and the certification of such progress payments by the architect. By December, the architect had issued 6 progress payment certificates against the defendant's valuations, in the total sum of £120,342.36, whilst the claimants had in fact paid the defendant considerably more than that. There was a dispute as to whether the sums due to the defendant attracted VAT because, at this stage, despite requests from the claimants, the defendant had not provided any details as to his VAT registration.

53. On 10th December 2007, the defendant provided to the architect what he called valuation 7 which stated that it was an “anticipated final account”. It was in the sum of £167,390.08 plus VAT and thus represented a considerable increase in what he had claimed before. Various queries were raised on the claim. No progress payment certificate was issued by the architect.

54. On 7th January 2008, the defendant sent a final account document in the sum of £172,748.67 plus VAT. This was apparently sent again, but described as valuation 8, two days later on the 9th January.

55. Again, there were requests for further information, copies of daywork sheets and the like. As noted in paragraph 19 above, on 17th January 2009, the architect wrote to the defendant to indicate that, on his figures, no further sums were due and that in reality the claimants were in credit. It was this letter that prompted the defendant to suspend the works.

56. It seems to me clear that, on the evidence, the defendant is unable to justify his decision to suspend. There was a genuine dispute as to whether, at that point in January, he was entitled to any further monies at all. Furthermore, that dispute must be seen against the backdrop of the other issues, including the defective

work, the incomplete work, and the delays. In such circumstances, the defendant was not entitled simply to abandon the works on site.

57. This conclusion is made good by reference to the contract terms. Clause 4.7 gave the defendant the express right to suspend works (see paragraph 8 above), but this entitlement could only arise when a progress payment certificate had been issued by the architect and not been met by the employer.

58. In the present case, there was no outstanding progress payment certificate. The final date for payment of any sum required by the contract was the date calculated by reference to such a certificate. The employer was obliged to pay on the certificate, but not otherwise. In these circumstances, in the absence of a certificate, the claimants were under no obligation to make any further payment to the defendant.

59. In addition, under clause 4.7, suspension could not happen immediately; there had to be a notice from the contractor identifying the sum due and the intention to suspend, and a 7 day period in which the employer could, if he chose to do so, make any necessary payment. There was no such notice in the present case.

60. Accordingly, it seems to me that the correct analysis must be this. The defendant could only justify the suspension for non-payment if he suspended the works in accordance with clause 4.7. He did not do so because there was no progress payment certificate and no notice. No other ground for suspension was raised by the defendant and no other ground arises on the evidence before me.

7.4. Summary

61. For these reasons, therefore, it seems to me that the claimants were entitled to determine the employment of the defendant under the contract. The defendant was not entitled to suspend the works in the circumstances in which he did.

8. THE CLAIM FOR DEFECTIVE/INCOMPLETE WORKS

62. The principal head of claim is the £47,558.13 paid to Voytex Limited. In addition to that are the sums of £7,443.60 by way of additional architect's fees; £846 in relation to the quantity surveyors fees; £352.50 for the structural engineers fees in relation to the defects in the floors; £105.75 in relation to Pimlico plumbers; £183 in relation to replacement locks and fees; £342.29 in relation to mosaic tiles retained by the defendant and £60 to replace marmoleum damaged by the defendant. This produces a total figure of £56,891.27.

63. The evidence is that these sums were incurred by the claimants and paid to the various contractors and consultants. The evidence of the claimant's expert quantity surveyor, Mr Ohl, was to the effect that these sums were recoverable in full.

64. Unhappily, the defendant's expert quantity surveyor, Mr Woods, raised two areas of criticism of these figures which, on analysis, were not valid or correct in principle. First, he appeared to indicate that some of the items in question might not actually have been defective or incomplete. Judge Toulmin correctly made clear at the Pre-Trial Review that this was not evidence which the quantity surveyor had the expertise to provide.

65. Secondly, Mr Woods attempted to value the works from scratch, treating every item individually and trying to work out a price for each, without regard to the actual costs incurred. There is no basis for such an approach. In circumstances where, as here, the building owner has carried out extensive remedial work, the starting position is that he can recover the cost of reinstatement/repair, because that is the foreseeable consequence of the defective work: see *Darlington Borough Council v Wiltshire Northern Limited* [1995] 1 WLR 68 at 79. That will usually mean the actual costs incurred if the work has been done. In *The Board of Governors of Hospital for Sick Children v McLaughin and Harvey Plc* 19 Con LR 95, HHJ Newey QC said:

> "The plaintiff who carries out either repair or reinstatement of his property must act reasonably. He can only recover as damages the cost which the defendant ought reasonably to have foreseen that he would incur and the defendant would not have foreseen unreasonable expenditure. Reasonable costs do not, however, mean the minimum amount which, with hindsight, it could be held would have sufficed. When the nature of the repairs is such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take such advice and be influenced by it."

66. This principle does not mean that the claimants in a case like this have carte blanche to claim all the costs incurred, whether they were reasonable or not: see, for example, *The Maersk Columbo* [2001] EWCA Civ 717; *Scandia Property UK Limited v Thames Water Utilities* [1999] BLR 338; and *McGlinn v Waltham Contractors Limited No 3* [2007] EWHC 149 (TCC). But the costs actually incurred will always be the starting point for an analysis of what is reasonable (particularly if, as here, they are the costs of work which the claimants carried out on advice) and, if there is no reason to justify a departure from the actual costs incurred, then they will be regarded as reasonable costs to be recovered as damages.

67. In the present case, as Mr Ohl confirmed, there was nothing to say that the actual costs were not reasonable and no reason to depart from the usual rule. Accordingly, in those circumstances, I conclude that the sum of £56,891.27 is recoverable in relation to defective and incomplete works.

9. THE CLAIM FOR LIQUIDATED DAMAGES

9.1 The Claim

68. For the reasons set out in paragraphs 33-47 above, the period of culpable delay was 29 weeks. The claimants' claim liquidated damages at the rate of £700 per week for that period, making a total claim of £20,300.

9.2 The Defendant's Response

69. The defendant has three responses. The first is to suggest that the defendant's liability to pay liquidated damages ceased when the claimants moved into the property in mid-December 2007. The second is to argue that the liability to pay liquidated damages ceased when the defendant's employment was terminated in March 2008. And the third argument is the suggestion that, because of variations to the contract payment scheme and other alleged changes, the claimants are now precluded from relying in any way upon the liquidated damages provision. I deal with each of those three purported defences in turn below.

9.3 Moving In

70. Under the contract, the defendant's liability to pay liquidated damages does not cease until practical completion. For the reasons set out in paragraphs 43-46 above, practical completion of these works was not achieved until 17th May 2008. On this analysis, it is difficult to see why or how the date that the claimants moved back into the flat is of any relevance at all.

71. I apprehend that, in reality, the argument is to the effect that, because the principal loss that would be caused to the claimants by any delay would be the cost of alterative accommodation, and that cost was no longer incurred from mid-December 2007, the liquidated damages provision had, in some way, become a penalty clause and was not enforceable: see *Alfred McAlpine Projects Limited v Tile Box Limited* [2005] BLR 271 at pages 277-280.

72. A penalty “is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage”: see Lord Dunedin's speech in *Dunlop Limited v New Garage Co Limited* [1915] AC 79 at 86. It is important also to note that the issue of whether or not a clause is a penalty has to be determined objectively, and judged at the date that the contract was made: see *Phillips Hong Kong v Attorney General of Hong Kong* (1993) 61 BLR 41 at 58. In the same case it was noted that “it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss”.

73. The evidence in the present case was clear: the figure of £700 was a genuine pre-estimate of loss. As Ms Hall said, it took into account the cost of alternative accommodation, but there were numerous other charges to be incurred by the claimants whilst they were out of the property which meant that, if anything, the figure was an under-estimate. I have in mind things like storage charges, and the need to eat out much more often than would be the case if they had their own kitchen.

74. In accordance with the principles noted above, it is irrelevant that, at some point long after the contract was made, in far from ideal circumstances, the claimants had had enough of their nomadic existence and had taken re-possession of their flat. On the evidence, at the time that the contract was made, I find that £700 was a genuine pre-estimate of loss. It cannot be properly described as a penalty due to subsequent events. Moreover, in the light of the fact that even when they moved back in, the works were far from being complete, and thus many of the additional expenses were continuing to be incurred after the claimants moved back in (like storage charges), I would not be prepared to find that the sum was a penalty in any event.

75. Accordingly, for all these reasons, I find that the sum of £700 per week was not a penalty. There is no reason why the defendant's liability to pay liquidated damages ceased in mid-December.

9.4 Termination

76. I reject the suggestion that the defendant's liability to pay liquidated damages somehow came to an end when his employment under the contract was terminated. There is no such provision in the contract. Any such term would reward the defendant for his own default. Take the example of a contractor who has wholly failed to comply with the contract, is in considerable delay, and is facing a notice of termination. The defendant's case would mean that such a contractor was only liable to pay liquidated damages for delay before the decision was taken to terminate, thereby penalising the employer for trying to get the works completed by another contractor, and rewarding the contractor for sitting on his hands and failing to carry out the works in accordance with the programme. If the defendant was right, the contractor would be better off not coming back on site to carry out the works because, if he refused to do so, the contract would then be

terminated and his liability to pay liquidated damages would automatically come to an end. That would not be a commonsense interpretation of this (or any) construction contract.

77. Accordingly, as a matter of principle, I reject the submission that the defendant's liability to pay liquidated damages came to an end when the employment was terminated.

9.5 Variation to Contract

78. The defendant's pleaded case takes a number of unusual points, but none more novel than this. The suggestion is, I think, that because the contract was “fundamentally varied” (to use the words in the defendant's pleading), the claimants could not now rely on clause 2.9 of the contract.

79. In my judgment, the contract was not “fundamentally varied”, whether as alleged or at all. As to payments, it is certainly right that the claimants made payments in advance of the progress payment certificates, including cash payments to the defendant at his request. That was wholly to the defendant's advantage. It was not a variation to the contract, merely a temporary waiver of some of the payment provisions. It could not possibly now be said that this generosity on the part of the claimants deprived them of the right to levy liquated damages in accordance with clause 2.9.

80. The argument as to instructions is equally bad. The criticism appears to be that the architect provided written instructions to the defendant in e-mail form and that, in some way; some more formal written instruction was required. That does not seem to me a variation to the contract at all. Instructions were provided in writing; if the defendant wanted instructions in a different form, then he could have said so. He never did.

81. Even if I am wrong, so that in some way the contract terms were varied by the conduct of either the claimants or the architect, that would not allow the defendant to escape from his other liabilities under the contract. There is a long and relatively inglorious, history of cases in which one party has argued that, because of variations to the contract, in some way the new (varied) contract was so different from the original that the obligations under the old contract should not be enforced: see *Bush v Whitehaven Trustees* (1888) Hudson's Building Contract (4th Edition volume 2) page 122 and *Parkinson v Ministry of Works* [1949] 2 KB 632. These cases are based on an argument of quasi-frustration. However, as the Court of Appeal made plain in *McAlpine Humberoak v McDermott International* (1992) 58 BLR 6, there was and is no such doctrine.

82. Accordingly, I dismiss the suggestion that, even if (which I do not accept) the contract was varied, these variations somehow relieved the defendant of liability to pay the liquidated damages that fell due under clause 2.9.

9.6 Summary

83. For these reasons, therefore I consider that the sum of £20,300 due by way of liquidated damages (29 weeks x £700) was payable by the defendant to the claimants. The separate claim for storage charges in the sum of £2947 is not recoverable. The £700 was a genuine pre-estimate of loss and covered all delay-related claims. This sum is not due in addition.

10. THE VALUE OF THE FINAL ACCOUNT

84. On the face of the papers, there seemed to be a major dispute about the value of the defendant's Final Account. But on analysis, as Mr Ohl explained, there was in truth no real dispute at all. The joint statement of the quantum experts dated 15.2.10 made plain that Mr Ohl's figure for the value of works when the defendant left site was £136,405.7, whilst Mr Woods' figure was £142,580.05. That was much less than the defendant asserted at the time, and is another reason why his conduct in suspending the works was unjustified. As to the overall value of the final account, Mr Ohl's figure was £164,672.48 and Mr Woods' figure was £167,390.48.

85. Furthermore, this very small difference appears to be made up almost entirely of the additional loss and expense allowed by Mr Woods on the basis of a 10 week extension of time. I have rejected that claim. On all the evidence, I conclude that the correct figure for the Final Account is £164,672.48. That figure should be compared, in the first instance, with the total sum of £172,426.77 paid by the claimants to the defendant.

86. However, whilst that comparison appears to suggest an over-payment by the claimants, the position is rather more complicated than that. The £164,672.48 figure is exclusive of VAT. If VAT was due to the defendant on the full amount of the Final Account, then an additional £28,817.68 would be due, making a total Final Account figure of £193,490.16, and a short-fall in payment of £21,063.39.

87. The evidence in relation to VAT was unsatisfactory. It seems that the claimants were never clear whether VAT was due because the defendant, despite requests, did not give any details of his VAT registration. Moreover, they paid some sums in cash to the defendant, at his request, for him to pass on to various sub-contractors who were not registered for VAT. It does not seem to me that, when in January 2008, he was comparing the defendant's Final Account claim with the sums paid, the architect properly had the VAT position in mind. It seems that, very recently, the defendant has provided information as to his VAT status and, although he appears to be registered for VAT, he has not passed on to HMRC all the VAT that he has recovered from customers.

88. The general position is that building works of this kind attract VAT. It also appears that, whatever his compliance record, the defendant is registered for VAT. In those circumstances it seems to me that the claimants are liable to pay VAT on the Final Account. Moreover, it does not seem to me appropriate to reduce that liability in order to reflect the cash payments that they made. As I indicated to Mr Woods during the course of argument, that might be said to come uncomfortably close to a potential scheme to avoid paying VAT, and the claimants have made it crystal clear that they wish to have no part in any such arrangement.

89. Accordingly, I conclude that the net value of the final account is £164,672.48 and that the gross value including VAT is £193,490.16. That means that there is a credit due to the defendant on the Final Account of £21,063.39. For the reasons noted above, every other element of the defendant's counterclaim must fail.

11. THE CLAIM FOR GENERAL DAMAGES

90. Each of the claimants makes a claim for general damages. It seems to me that, as a matter of principle, a claim for general damages is made out. This is to compensate the claimants for the inconvenience and stress caused by the defendant's breaches of contract.

91. The issue is the amount recoverable. I remind myself of the cases noted at paragraph 114 of my judgment in *Iggleden v Fairview New Homes (Shooters Hill) Limited* [2007] EWHC 1573 (TCC) in which more recent figures for general damages are identified in the region of about £1,000-£1,500 per year. I was also

referred to the decision of Akenhead J in *Axa Insurance (UK) Plc v Cunningham Lindsay United Kingdom* [2007] EWHC 2464 (TCC) in which he indicated a range of figures from £1,800 up to in excess of £2,000.

92. In my judgment, the relevant period referable to these claims for general damages is one year, from May 2007 to May 2008. I consider that each of the claimants has been put through considerable upset and inconvenience. At the same time, this is not a case where the claimants have had to put up with unsanitary or dangerous living conditions. In all the circumstances, I consider that the right level of general damages is £1,500 for each claimant, making a total of £3,000.

12. SUMMARY

93. For the reasons set out in paragraphs 25-32 and 62-67 above, I consider that the defendant is liable to the claimants in respect of defective and incomplete work in the total sum of £56,891.27.

94. For the reasons set out in paragraphs 33-47 and 68-83 above, I consider that the defendant is liable to the claimants for liquidated damages in the total sum of £20,300.

95. For the reasons set out in paragraphs 90-92 above, I consider that the defendant is liable to pay general damages to the claimants in the total sum of £3,000.

96. Accordingly there is a total due from the defendants to the claimants of £80,191.27. However, for the reasons set out in paragraphs 84-89 above, there is a credit due to the defendant from the claimants of £21,063.39.

97. This would leave a net balance due to the claimants of £59,127.88.

98. The claimants would also be entitled to interest. In cases of this sort, it is conventional to calculate the interest on the net sum, namely in this case £59,127.88 However, when this judgment is handed down, the calculation of interest can be finalised, and I will consider any alternative submissions on behalf of the claimants.