All England Reporter/2008/January/Kajima UK Engineering Ltd v Underwriter Insurance Company Ltd - [2008] All ER (D) 194 (Jan)

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Kajima UK Engineering Ltd v Underwriter Insurance Company Ltd

[2008] EWHC 83 (TCC)

Queen's Bench Division

Akenhead J

25 January 2008

Contract – Construction – Contractual term – Agreement to provide professional indemnity insurance in respect of building work – Claim lodged during period of insurance – Settlement agreement – Insurance ceasing – Investigations revealing further damage – Whether defects and/or damage which were subject matter of settlement agreement or what led up to it covered by notification.

Abstract

In the instant case, there was no claim to the extent that defects and damage not attributable to, or which did not give rise to, any of the later discovered defects or damage, where the defendant insurance company had provided the claimant company main contractor to the design and building of a block of flats with indemnity insurance, and where notification was given by the claimant in respect of defects and damage to the block of flats during the period of cover. The notification was only effective in relation to the specific circumstances which were originally notified; the later investigations revealed the other defects had no relationship to the original defects.

Digest

The claimant company was a main contractor employed by the Joseph Rowntree Foundation (JRF) to design and build a block of flats. It involved the application of the installation on five stories of a stacked pre-constructed pod and flat pack construction. The building contract was dated 1 October 1999. The work was carried out between September 1999 and June 2000 with the continuing involvement of the claimant over the following five years. The defendant company was an insurer who provided professional indemnity insurance to the claimant for the period 20 May 2000 and 19 May 2002. The policy was a 'claims made' policy which also had provision for cover in respect of circumstances 'which might reasonably be expected to produce a claim' notified during a period of insurance. By a written notification dated 22 February 2001 (the notification), the claimant notified the defendant that 'accommodation pods' were 'settling and moving excessively causing adjoining roofing and balconies and walkways to distort under differential settlement'. There was reference to an investigation to identify and confirm the cause and potential effects and risks. The investigation that ensued determined that the problem was an anticipated one and that it had stabilised. On

19 May 2002, the period of insurance expired and the defendant thereafter ceased underwriting. Insurance was secured from other underwriters. In the years which followed, JRF and the claimant carried out a number of investigations which revealed a number of increasingly serious and extensive problems, some of which were in the physical areas of the matters notified but others of which were not and some of which were not of the same type as or, directly associated with, what had been specifically covered in the notification. The process culminated in an investigation, which concluded that the flats were at risk of collapse due to, inter alia, wind loadings. Tenants were evacuated and a settlement was subsequently reached between the claimant and JRF whereby the claimant purchased the flats from JRF. The claimant commenced proceedings against the defendant. It sought guidance from the court as to the extent to which in principle the defects and/or damage which were the subject matter either of the final settlement agreement or what led up to it were covered by the notification.

The court ruled:

In all the circumstances, the notification had only been effective in relation to the specific circumstances which were notified. The notification had not effective in relation to any other matters loss, defects or damage save and to the extent that the other matters, defects or damage had caused or related or contributed to the circumstances which had been notified or were caused by the notified circumstances. The policy would cover the defects which had been finally identified by the claimant and JRF by the time the settlement agreement only to the extent that they were the subject matter of the notified circumstances. The defects and damage discovered during the investigations after May 2002, had not been related to the matters actually notified and any claim relating to them did not arise out of the notified circumstances. There would have been some relationship between the defects and damage and the notified circumstances, namely the damage to the accommodation pods. That relationship did not arise because later investigations happened to reveal other defects which had no relationship to the notified circumstances.

Accordingly, there would be no claim to the extent that the notified settlement, movement or distortion was not attributable to, or did not give rise to, any of the later discovered defects or damage.

Adrian Williamson QC (instructed by Stephenson Harwood) for the claimant.

Stuart Catchpole QC and Rachel Ansell (instructed by Davies Arnold Cooper) for the defendant.

Tunde Gbadamosi Barrister.

Judgment

[2008] EWHC 83 (TCC)

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)

25 January 2008

MR JUSTICE AKENHEAD

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Introduction

1. Kajima (UK) Engineering Limited ('Kajima') was a main contractor employed by the Joseph Rowntree Foundation ('JRF') to design and build a block of flats at 45, North Street, Leeds. The building contract was dated 1 October 1999. The development was known as “Caspar II”. It involved the relatively novel application of the installation on five stories of a stacked pre-constructed pod and flat pack construction. The work was essentially carried out between September 1999 and June 2000 with a continuing involvement of Kajima over the following five years. “Caspar” was an acronym for “City-Centre Apartments for Single people at Affordable Rents”.

2. The Underwriter Insurance Company Limited ('TUIC') was an insurer who provided professional indemnity insurance to Kajima for the period 20 May 2000 and 19 May 2002. The policy was a 'claims made' policy which also had provision for cover in respect of circumstances 'which might reasonably be expected to produce a claim' notified during a period of insurance.

3. By a written notification dated 22 February 2001, Kajima notified TUIC that the 'Accommodation Pods' were 'settling and moving excessively causing adjoining roofing and balconies and walkways to distort under differential settlement'. There was reference to other possible damage and risk and to the fact that 'an investigation was presently underway to identify/confirm cause & potential effects/risk'. Such investigation as there was over the months that followed immediately determined that the problem was an anticipated one and that it had stabilised. Some work was done. In March 2002, Kajima effectively confirmed this but asked that the insurance file should remain open for twelve months to see if the settlement remained static.

4. On 19 May 2002, the Period of Insurance expired and TUIC thereafter ceased underwriting and has since been in a state of solvent run-off. Kajima secured insurance from other underwriters.

5. In the years which followed, JRF initially and then also Kajima carried out a number of investigations and indeed extensive remedial work at Caspar II. These revealed a number of increasingly serious and extensive problems some of which were in the physical area of the matters notified but others of which were not and some of which were not of the same type as or, arguably, directly associated with, what had been specifically notified by Kajima to TUIC in February 2001.

6. This process culminated in an investigation in the late summer of 2005 by Ove Arup & Partners (“Arup”), retained by Kajima, which concluded that the flats were at risk of collapse due, inter alia, from wind loadings. The tenants were evacuated. Ultimately in 2006 a settlement was reached between JRF and Kajima whereby Kajima bought the flats from JRF because it was thought that repair was uneconomic. Kajima has sold the property on.

7. Essentially, the issue between the parties revolves around whether, and if so to what extent, the defects and damage which emerged in the period after the notification and the expiry of the TUIC insurance cover were effectively the subject matter of what was notified in February 2001.

The Construction

8. It is necessary for an understanding of the case to appreciate what the construction was. The development was, on plan, semi-circular in shape and was to some extent on a slope. It was up to five stories high and was to comprise flats to be let. The front of the block, as it was called, was the outer convex area and the rear was the inner concave area. There were 3 main staircases supported off steelwork. The plans show 45 flats, although the pleadings suggest that there were 46.

9. On the front, there were walkway balconies from the staircases to the front doors of various flats whilst, at the rear, there were private balconies for each of the flats, with entry from within each of the flats.

10. Each flat on each floor comprised two basic elements, pods and flat packs. Each pod was not dissimilar to a substantial container and was pre-fabricated in factory conditions off site. The pods were to be on the front of the building and comprised the front door, hallway and three rooms, including the bathroom and kitchen. The flat packs were mostly of wooden construction with the pieces, walls, floors and ceilings and the like made in the factory; they were to be delivered to site and were to be assembled and put together on site.

11. Underlying foundations were constructed and the pods placed (by crane) on and fixed to them. Pods on the floors above were stacked on the lower pods. On each floor, there was a floor 'cassette' which in plan covered the whole area of each flat and onto which the pods and the flat packs were placed. The flat pack for each flat was erected on site adjacent to the pod and (mostly) sitting rooms and a bedroom were provided for in the flat pack areas. Again, the flat packs for the floors above were erected on the lower ones. In effect, each pod and flat pack area was also fixed laterally not only to each other but also to adjacent pods and flat pack areas and to those above and below. The roof was attached to the top and sloped from the front to the rear.

12. The walkways at the front were originally planned to be suspended by steel or other bars off the roof structure, it being anticipated that, if the whole structure settled, the walkways would settle with the rest of the structure. That was changed for various reasons believed to be good ones so that these walkways were supported by steelwork which had its own separate foundations. There remained as an architectural feature 'machaloy' bars at various points from the roof area down to the ground floor; these were some 50 mm diameter steel alloy bars which were attached to the walkways on the front of the building. The walkways were to be slightly sloped so that any rainwater would be flowing away from the living areas.

13. The services, gas, electricity, sewerage and water, were distributed both vertically and horizontally throughout the building, with various risers accommodating incoming and outgoing services in or between flats.

The policy

14. The professional indemnity insurance policy schedule provided that the limited indemnity was £5 million for each and every claim with costs and expenses in addition. The period of Insurance was 20 May 2000 to 19 May 2002 inclusive. Clause 1 of the policy required as follows:

> “The Underwriters will indemnify the Insured:
>
> In respect of claims made against the Insured and notified to the Underwriters during the Period of Insurance against civil liability:
>
> (a) arising out of the Professional Activities undertaken by or on behalf of Insured…”

15. 'Professional Activities' were defined as:

> “Project Management and/or performance by the Insured of any professional:-
>
> design or specification.
>
> supervision of construction/ installation.
>
> feasibility study.
>
> technical information calculation.
>
> surveying.
>
> Undertaken only by or under the direction and direct control of properly qualified architect or engineer or surveyor or quantity surveyor.
>
> Professional Activities DOES NOT include the supervision by the Insured of its own or its sub-contractor's work where such supervision is undertaken in its capacity as Building or Engineering Contractor”.

16. Condition 1 of the Policy is, in essence, what the case is about:

> “The Insured shall give written notice to the Underwriters as soon as possible after becoming aware of circumstances which might reasonably be expected to produce a claim or on receiving information of a claim for which there may be liability under this insurance. Any claim arising from such circumstances shall be deemed to have been made in the Period of Insurance in which such notice has been given”.

17. Thus, although the insurance policy is a 'claims made' policy relating to claims which are made in any given period of insurance, it is open to the Insured in an appropriate case to notify the Underwriters of “circumstances” which might produce a claim. Where such circumstances are notified within the Period of Insurance, even if a claim is then made outside that Period, all things being equal, the Insurers will be responsible to indemnify against it.

The history

18. Kajima employed a number of consultants and sub-contractors. So far as is material, Alan Conisbee & Associates ('Conisbee') were consulting structural engineers. Levitt Bernstein were architects. Volumetric Ltd was a sub-contractor which manufactured and installed the pods.

19. On 15th June 2000, practical completion of Caspar II was certified. Thus, the project entered into the defects liability period during which Kajima could be expected, contractually, to put right defects and deficiencies for which they were responsible over a 12 month period. As might be expected, there were some such matters (which have nothing to do with this case) which were attended to by Kajima during this period.

20. On 27 September 2000, JRF pointed out to Kajima that there was ponding of water on the walkways. In a letter dated 27 September 2000 the following was stated:

> "I must record my concern over the ponding of water on the walkways. When I visited the site last week, after heavy rain, there were extensive and deep pools standing on a number of walkways making them hazardous for residents and leading to water and dirt being taken into flats.
>
> I am particular concerned that the water is standing against the splayed batten which runs along the fronts of the pods and seals the gap between the sheet vinyl covering of the deck and the cladding on the pod. There was evidence of water emerging from the cladding about three boards up from the decking on one walkway exactly underneath a point where there was evidence of water leaking through from the walkway above into the down stand beam running along the inner edge of the walkway and the face of the pond.
>
> It seems to me that if water is standing against this batten there is the possibility that, any slight break in the seal between the batten and the vinyl may allow water to penetrate into the void behind the cladding, which may lead to damage inside flats or early rotting of the cladding. In any event it is not acceptable that water should stand on the walkways which should be self draining".

Kajima offered to look into the matter when the relevant person returned to site from his holiday.

21. JRF took the matter up again with Kajima on 1 November 2000 and urgently required Kajima to let JRF have their proposals for dealing "with the flooding problem and also confirmation of when it will be attended to". It does appear that proposals were faxed through to JRF and following discussions between JRF and Kajima various works were done outside some four of the flats to address the problem as it was then appreciated to be.

22. By the third week in February 2001, Kajima had formed the view that at least part of the problem to do with the ponding of the walkways was excessive settlement. Thus, it was on 22 February 2001 that Kajima notified TUIC through their brokers, Japan England Insurance Brokers Ltd. ('Japan England'). The notification was on a formal 'Professional Indemnity Notification Advice Form'. In the 'Circumstances' box on the form, the following was stated:

"**Accommodation Pods Settling and Moving Excessively; causing adjoining Roofing and Balconies and Walkways to distort under differential settlement. Service connections also under risk from movement; Potential Internal damage; Tennant [sic] Risk/Danger, and/or Inconvenience.**

Foundations believed not to have unduly settled – but to be level checked by KCEUL.

Investigation presently underway to identify/confirm cause and potential affect/risks".

In the Estimated loss the highest figure box (£50,000 plus) was ticked with the words 'Potential' typed in beside. In the Action tick box the following was said:

"Advising KCEUL Designers – Structural; and Architects Advising Sub-Contractor – Volumetric".

Three letters which were sent to the Architect, Conisbee, and Volumetric were attached. Nothing now turns on the fact that part of this notification was in bold and part not.

23. The three letters written to Volumetric, Levitt Bernstein and Conisbee were respectively as follows:

(a) "We would like to record that during a recent visit to the above project, it was noted that there appears to be excessive settlement of the Pods which is affecting adjacent structural members ie Makaloy bars supporting the metal walkways are distorted.

We look forward to your comments on this matter." (to Volumetric).

(b) "We enclose a copy of a letter sent to Volumetric regarding settlement of the Pods which is causing distortion of the Makaloy bars holding the walkways.

We request your comments on what allowance was made for settlement of the Pods in your design." (to Levitt Bernstein)

(c) "We enclose a copy of a letter sent to Volumetric regarding settlement of the Pods which is causing distortion of the Makaloy bars holding the walkways.

We request your comments what allowance was made for settlement of the Pods in your design." (to Conisbee)

24. These letters evokes the following responses:-

'(a) Volumetric wrote on 26 February, 2001:

“...please could you advise how much settlement seems to be occurring.

We would point out that it was always known that settlement/ shrinkage would occur and connections to non-shrinkable elements should have been designed to accommodate this movement.

We look forward to your response of the first item, upon receipt of which the undersigned will arrange to visit site to carry out an inspection.”

(b) On the 23 February, 2001, Levitt Bernstein replied:

“Volumetric informed us that there would be about 3mm shrinkage in each floor zone of the timber Pods.

Originally we designed the access galleries to hang from the roof in the same way as the private balconies. If they had been carried out, the galleries would settle with the timber frame and the machaloy rods would remain in tension.

However, during the summer of 1999 the design of the access galleries was changed at Kajima's request to include a column supporting the galleries from the ground, so that the galleries could be erected at the same time as the Pods and be used as permanent scaffolding. The machaloy bars were retained as 'ties' to prevent wind uplift of the roof.

We understand that the machaloy bars would feature a tan-buckle to allow them to be tightened following shrinkage of the timber structure.”

(c) Conisbee's response on 2 March, 2001 was:

“…could you please advise how much lateral deflection has occurred to the vertical ties. From our conversation earlier you believed it to be approximately 150mm.

Volumetric Ltd stated that the units will shrink by 2-4mm/floor. This will give up to 20mm downward movement on the five storey. The access walkways were originally design (sic) to be hung from the roof to allow for this movement, but due to the cost of fire proofing the structure was supported from the ground. It was also intended to use the walkways as scaffold, but this never happened. Fixing the walkways to the ground will result in differential movement between the steel and timber structures.

It had been intended to allow for tensioners in the rods or ties, but these were omitted due to costs.

The high level ties are 1840mm long, a 20mm differential movement will produce a lateral deflection of 150mm. The lateral deflection should reduce with the storey heights, the

> deflections should be reduce [sic] as the building curves away from North St.
>
> The deflection of the ties is not an immediate structural concern. The ties are required to take load if there is a fire on the lower floors and the column fails. The compression of the rods should exert 4.5kN load on the roof which can be resisted.
>
> The building had been designed with the shrinkage in mind. The walkways are bolted to the timber frame with a pin joint. Our GA's show the level difference between the front and back edges of the walkway required to provide a fall away from the building once the shrinkage had taken place. The fall was not put into the walkways during fabrication. So there will be a fall across the walkways back to the building which may cause weather proofing problems & staining.
>
> To sum up structurally the bowing rods are do [sic] not to cause a structural problem, only an aesthetic one…"

25. By the end of April 2001, Kajima appeared to accept this advice that the current movement was within design parameters and at present there were no problems with the Pods. It was always expected that movement would occur. At this stage, remedial work was considered as possibly costing £13,600.

26. In October, 2001 the Certificate of Making Good Defects was issued under Kajima's building contract with JRF.

27. On 2 January 2002, TUIC's brokers, Senior Wright, wrote to Kajima's brokers, Japan England, asking whether matters had "moved on in terms of establishing what exactly was causing the settling and movement of the Pods." On 10 April, 2002, Japan England, having obtained the requisite information, wrote back to Senior Wright as follows:

> "I…have now received a response from the insured confirming that they have reconsidered the present status of the PODS movement and although the settlement has stabilised, the design and construction is at an (up to) 5 storey timber structure, which has not previously been tested.
>
> They have asked for the file to remain open and they will check the situation in 12 months time and report on the outcome. You will notice that they have made no comment as to any causation and I am attempting to find out whether any further information on this can be provided by Kajima."

28. In this context, Kajima wrote to Japan England on 3 May 2002 as follows:

> "The information requested is as follows:-
>
> 1. <u>Investigation</u>
>
> 1.1 The walkways are supported, down to ground level on foundations, which are independent

> from the accommodation units (PODS). The roof covering support structure is fixed to the top level of PODS and that the Walkway supports, by hanging rods (tie bars). The tie bars have the facility for limited adjustment.
>
> 1.2 The tie bars were visibly inspected and found to be deflecting.
>
> 2. Actions
>
> 2.1 Adjusted tie bars (shortened) to bring back to vertical.
>
> 2.2 Adjustments not made to walkway surfaces to regularise levels, as movement taken upon existing gradients.
>
> 2.3 Presently no further additional settlement has occurred (visibly); and original settlement is being assumed to be 'initial settlement'."

29. Thus, the state of affairs as at 19 May 2002, when the insurance cover with TUIC ceased, was as follows:

30. It seems that a number of tenants had complained to Oriel Management Ltd, JRF's agents, in relation to drainage of the walkways and problems in relation to front doors. In consequence JRF instructed DAC Wood to investigate the causes of the problems. DAC Wood's first report is dated 19 August 2002. The author visited the apartments on 21 May and 20 and 21 June; he inspected the walkways and a few of the apartments, although no formal inspection of the interior of the apartments was made. The report summarised its findings at Paragraph 1.6;

> "The problems with the access balconies are the result of differential movement between the timber frame and the external steel posts. Drains have been installed to deal with the immediate problem, but in the long term, the falls across the balconies should be corrected by alterations to the supporting posts.
>
> The doors and windows on the front walls of the apartments are severely distorted. This appears to be the result of bedding in of the timber frame exacerbated by shrinkage of the timbers. There is no simple solution, and it is necessary to wait until the shrinkage has ceased and then to ease/re-hang the doors and windows inserting new seals as required.
>
> The coping stones on the low level brick work are being tipped up by the timber cladding caused by the reduction in height of the timber frame. They can simply be re-bedded making sure that there is a sufficient gap between them and the timber cladding to allow for any future movement.
>
> An investigation into the interior of the apartments should be made and any doors/windows found to have similar problems to those on the front should be treated accordingly."

In the body of the report, the author considers that the downward movement of the building is unlikely to be

attributable to foundation movement (which was “unlikely as the ground conditions are good and there is no other evidence such as cracked brickwork to support this theory”). He attributed it to shrinkage of the timber frame. This report was passed on to Kajima in late August 2002. Kajima passed it on to its brokers, who in turn passed it on to TUIC's brokers.

31 Mr Doherty of Kajima carried out an inspection of the property on 20 September, 2002 to check the first Wood report. It was thought that the cost of rectification was around £11,000. Kajima retained its own independent engineer, Mr Lupton, to investigate in November 2002. Mr Lupton visited the site in early December 2002 and he prepared a report entitled 'Visual Structure Appraisal' dated 24 January 2003. He had been appointed to consider “differential settlement of main timber framed modular apartment building relative to the structural steel framed balconies”. Mr Lupton's conclusions were as follows:

> “We believe that we need to assess the position working between two basic suppositions:-
>
> 1. Timber frame elements of the construction have settled and shrunk beyond that which would be reasonable (sic) expected and the structure still is 'live'.
>
> 2. The construction sequence is such that the timber frame elements had already started to settle and shrink prior to installation of the steel supported elements, which could have resulted in the walkways being installed with at less than the intended cross falls. Following which the timber frame has settled and shrunk within normal parameters but has resulted in a reverse cross fall.
>
> It is probable that the likely cause of the problem lies somewhere between the two.
>
> With respect to the bowing of the steel ties between the top of the walkways and the eaves level, we would point out that the extent of movement required to change the load in these ties from tension to compression could be relatively small. For example, a 5mm shortening in a 2000 long straight bar will cause it to bow with a deviation at mid length of approximately 60mm from the previous straight bar.
>
> The buckled shape of the bars observed on site may therefore be the result of relatively small amounts of movement.”

Mr Lupton recommended a 12 month monitoring period.

32 Meanwhile, further complaints had been made to Oriel Management by tenants about problems with the floors in the flats. Mr Wood was instructed on 24 December 2002 to report on the extent and courses of these problems. His report is dated 7 April 2003 and essentially dealt with problems with the construction of the floors. His conclusions were summarised at Paragraph 1.7:

> “There are severe falls in the floors of the majority of the flats. These are results of:
>
> Large variations in the levels of the floors,

> Excessive deflection of the floors, and
>
> Misalignment of the supporting trimmers.
>
> The floating floor in all the flats appears to be very flexible and this flexibility is due to:
>
> The severe falls in the floors,
>
> The fact that the chipboard deck is laid parallel with the joist,
>
> The OSB3 structural deck is thinner than recommended and the free edges are not supported,
>
> There being no herringbone strutting between the joists.
>
> Water has entered the construction of the floor causing [dampness] to the acoustic boarding and OSB3 structural deck, neither of which is suitable for use in wet conditions.
>
> Door openings are distorted due to poor control of the levels during construction...
>
> Major remedial works are necessary to make good these defects, to bring the building back to a state considered to be good practice and to ensure that it survives for its design life without needing excessive maintenance."

So far as the water ingress problem was concerned, Mr Wood's views proceeded on the presumption that water ingress had occurred whilst the flats were being built.

33 JRF wrote to Kajima on 29 April 2003 and enclosed Mr Wood's latest report:

> "The second report was commissioned as a result of continuing issues with regard to shrinkage associated with water penetration at the flats. The recommendations on page 24 identify the principal sources of concern and their causes during the construction period. These problems have previously been brought to your attention, both in site meetings during the contract, and subsequently in correspondence from our Mr Jardine.
>
> In addition to the issues both internally and externally, I should also advise that in view of the ongoing problems with the security gate to the car park, I have arranged a detailed inspection which indicates that the original installation was put together with incompatible equipment.
>
> My Trustees are most concerned that the construction defects at CASPAR House should be remedied as soon as possible so that the residents do not experience further inconvenience, and that the reputation of the Foundation is not damaged. We also wish to bring under control the considerable losses in respect of repairs and voids incurred to date. In this context, the proposals in the brief report from James Lupton Construction dated 24 January 2003

> suggesting that the movements in the building should be monitored over a twelve month period are not acceptable to us.
>
> I have instructed DAC Wood and EC Harris (Quantity Surveyors) to prepare documentation and subsequently invite tenders for all the remedial work. Copies will be sent to you in due course. You may inspect the building by agreement at any time, both before and during the remedial works. The Foundation will be looking to Kajima to full recompense for its costs and loss of income."

Kajima passed this claim letter on to their brokers who passed it on to TUIC's new loss adjusters, Crawford and Co.

34. By June 2003, JRF had decided that they would commence remedial work in Flat 17 to determine the scope and extent of works to be done within the other apartments. In one sense, the works in Flat 17 were clearly intended to help determine the extent of the problems and what remedial works would be needed to overcome them. Mr Lupton and representatives of Kajima and Volumetric were allowed to inspect the works in Flat 17. For instance, there was a meeting on 24 June 2003 attended by representatives of those firms.

35. Since works were being done in the whole of the flat, it was inevitable that inspections would be made not only of the pod but also the flat pack build part of the flat. During the course of the works to Flat 17, Mr Wood discovered that the floor in the flat pack part of Flat 17, which was supposed to have two joists underlying it as trimmers, only had one. Two trimmers were required to comply with the Building Regulations relating to 'Disproportionate Collapse'. Mr Wood was of the view that the wrong floor unit had been installed in that flat. This information was passed on by Kajima to its insurers. Mr Wood formally reported the single trimmer problem to JRF in his letter dated 22 July 2003.

36. Mr Goldman of Crawford wrote to Kajima's brokers by email on 4 August 2003 reviewing the position to date, particularly in relation to the falls to the balconies. He was of the view that the Woods reports had indicated workmanship problems as well as design issues. He was happy with the approach taken by Kajima thus far.

37. By early August 2003 Mr Lupton had done essentially a desktop study of Mr Wood's report data.

38. In September 2003, JRF brought in TRADA to consider not only Flat 17 but also general construction issues. TRADA was and is an association which specialises in the research and development of the use of timber particularly in construction applications. TRADA produced a report headed 'Site Inspection of Timber Frame Elements' on 17 December, 2003.

39. By the end of 2003, a Schedule of Defects had been prepared and circulated. The purpose of it was, amongst others, to determine who was to take action and by 8 January 2004 the Schedule comprised 39 'problems'. There were columns in the Schedule for 'defects' description, cause, likely extent and action. Some of the matters in this Schedule were or are arguably consequences, causes or symptoms of the specific problems notified by Kajima in February 2001 whilst others are not obviously so. Falling into this latter category, simply by way of example, was a complaint about a faulty overflow to a WC said to be attributable to the fact that overflow pipe work was not connected. By this stage, the Schedule included the inadequate rear wall floor trimmer complaint which had been found to exist in Flat 17 (at least) by this stage.

40. That schedule was sent to Kajima, together with a copy of the TRADA report, by JRF on 8 January 2004.

41. Volumetric had been involved in this process by Kajima and by mid February 2004 were wishing to carry out investigations so as to produce a proposal for remedial works.

42. The full remedial work on Flat 17 was completed by about the end of March 2004. In mid April 2004, JRF presented their specification in respect of remedying the internal defects.

43. Kajima was keeping TUIC and its brokers reasonably well-informed about what was happening. For instance, in its letter of 23 April 2004 to Crawford, Kajima passed on various letters and reports together with a schedule of notes and actions to be taken.

44. It is of some interest that, on 26 April 2004, Mr Cockayne of Kajima notified Kajima's brokers of further circumstances which were that external cladding and ring screen joinery materials had failed a test for 'Class O Spread of Flame'. This had been discovered relatively recently. It seems to have been the case that Mr Cockayne did not know that by this time Kajima had changed its insurance company from TUIC to Brit.

45. Mr Lupton on behalf of Kajima inspected the vast majority of the flats over a period of some two weeks in May 2004 and produced a report shortly thereafter. Surveys were made of the levels, some probe drilling was done and there was a visual structural appraisal. A number of defects and deficiencies were observed.

46. In mid June 2004, Kajima submitted to JRF their 'Proposals for Remedial Works' dated 14 June 2004. That document split the issues into four areas: works inside the flats, walkways and balconies, cladding and exterior of building. It must be borne in mind that there was a strong probability that Kajima was liable to JRF for any defects of design or workmanship in the building. It was therefore necessary for them to put forward remedial works proposals, failing which JRF would have done the work themselves. Detailed responses were made to the TRADA comments and the running Schedule of Defects (up to 39 items as at that stage) was also addressed with regard to remedial works.

47. JRF's immediate reaction in their letter of 16 June 2004 to Kajima was that its proposals fell short of what was required. A discussion took place thereafter in relation to Kajima's proposals.

48. In July 2004, TUIC replaced Crawford with Axis as their loss adjusters dealing with the claim or notification. Mr Cameron of Axis handled matters.

49. In the works to Flat 17, another problem had emerged. Flat 17 was on the fourth floor and when it was opened up, the construction of the rear wall panel was exposed. This was part of the flat pack for Flat 17. The exposed panel had doubled up studs and six studs on each side of the door/window opening. The original design drawing (99206/L5/E8) showed that the wall panel on this floor should have been panel No. L5/Z9; this had single studs doubled up either side of the opening. As also confirmed in JRF's letter dated 15 July 2004 to Kajima, it appeared that the panel used in Flat 17 appeared either to be L5/Z5 (intended for use on the second floor) or L5/E1 (intended to be used for the ground and first floors). The design concept appears to have been, unsurprisingly, that the walls in the flat packs at lower levels should have a great number of studs than the walls at higher levels; there needed to be more studs to accommodate the greater loads. The reason that this gave rise for concern was that it appeared that it was at least a possibility that the less strong walling had been used lower down in the building and, if so, it might prove inadequate to take the loads at least from above if not elsewhere. Consequently, the updated schedule added two items, number 41

of which related to the wrong wall panel in Flat 17 and item 40 related to inadequate support for non-load bearing walls in the kitchen and bathroom.

50. On 26 July 2004, JRF sent to Kajima their remedial works schedule together with relevant drawings. JRF wrote:

> "Would you now, within the next 14 days, consider the enclosures and give me your response to either:
>
> (a) Agree to carry out the works within an agreed timescale;
>
> (b) Reject our requirements.
>
> If you decide for option (b), JRF will undertake without further delay to put the works in hand…
>
> JRF have not come to their decision lightly but after taking advice and seeking to obtain the essential remedies for what we had envisaged to be a 'Flagship Development'."

51. On 2 August 2004, Kajima wrote to Mr Cameron of Axis responding to queries raised by him:

> "The situation remains complex and potential costs/recharges/liability remain not insubstantial.
>
> The actual scope, and responsibilities are still under severe debate, though remedial inspection, and some remedial works have commenced. Meanwhile:-
>
> 1. The remedial works to the "PODS Settlement" includes attention to the steel external wall post. These are not the responsibility of Volumetric.
>
> 2. Considering the consequence of costs being incurred or likely to be incurred, by ourselves and the Employer (which includes decant and compensation costs to tenants), there will be substantial additional costs arising.
>
> Taking account of the foregoing, it is very likely that the (direct) claim from [Kajima] to Volumetric will (alone) substantially exceed £50,000.00."

52. By letter dated 5 August 2004 to JRF, Kajima indicated that they would "undertake the full remediation works to the Volumetric units in accordance with" JRF's proposals. Kajima also agreed to undertake a remedial programme to the walkways. JRF, Kajima and their respective consultants thereafter had a number of discussions and exchanges about the extent of the works and programme.

53. By early November 2004, Kajima had formed the view that the remedial works costs would be £961,000 although it was considered that a large proportion was recoverable, principally from Volumetric. This information was passed on to Mr Cameron of Axis. Mr Cameron emailed Mr Powis of Japan England on 29

November 2004 as follows:

> "…I am reviewing files for end of year purposes and I really need to have a better idea of Kajima's potential PI exposure on this as the claim for alleged defects is, I understand, £961,000. As recommended by Crawford, TUIC have no reserve on the file, except for fees, as they did not believe Kajima would have an exposure, or not one that would exceed the £50K Excess. This may still be so but we really need to address the issues ASAP and determine whether a reserve should be carried into next year's figures. Could you please help me to carry out a thorough review of the issues by eliciting a response from Barry [Cockayne of Kajima] before the end of the year?..."

54 Mr Lupton produced a Report on "Phase 3 Access Walkways Survey" which had been carried out from August to September 2003 and at six monthly intervals thereafter. He concluded that the level changes recorded were generally small and within the range of being noticeably affected by survey errors. He stated:

> "…it can be seen that maximum reading change across the building is less than 2mm and that the differences over the 12 month period are smaller than those [over] the six month period.
>
> It would appear that any movement occurring to the structure is small and the overall reading summaries would suggest is primarily composed of a seasonal component with a reduction in height during the winter months due to thermal shrinkage and a recovery in the summer.
>
> It is likely therefore that the building movement due to drying shrinkage of the timber frame is now substantially complete."

55 Kajima and JRF were not able to agree on the drainage solution to the ponding defects on the walkways. Kajima wanted to provide additional drainage to drain away any excess water whilst JRF's preference was to adjust the walkways to prevent future ponding.

56 By early January 2005 another problem had emerged which was to do with fire integrity relating to the surface spread of flame to the timber boarding on the walkways. Every sample which was taken by architects retained by JRF was said to have failed.

57 Kajima was seeking to discuss and negotiate with Volumetric as to who should do and pay for what in relation to the remedial work. For instance on 17 January 2005, Kajima wrote to Volumetric attaching a table showing Kajima's estimated costs in the sum of £987, 205 as a worse case.

58 Throughout the period up to and including 2005, it is clear that TUIC through their loss adjusters did not reject liability on the part of TUIC in respect of any element of the remedial works that were being put forward and discussed. For instance, at what seems to have been a relatively routine meeting between Mr Powis, Mr Cameron and Mr Cockayne (amongst others) on 26 January 2005, there was a review of the current position regarding the remedial works relating to PI insurance matters. There was a discussion relating back to the settlement problems which had been notified in 2001 and what had happened thereafter. Relationships between Mr Cameron, Mr Powis and Kajima remained reasonably good. For instance on 1 February 2005, Mr Cameron wrote direct to Kajima setting out his understanding of the key issues and how best the parties might proceed. He pointed out that the policy did not cover defective workmanship and in certain cases did not cover inadequate supervision. He said there was a £50,000 deductible and he pointed out that Kajima

had to prove that there were errors in the design, specifications, plans or drawings in respect of which Kajima was in breach of its contract to JRF. He wrote:

> "On the basis of the various reports that have been made available, it would seem that there could be a valid claim under the policy to some extent, but the reports are unclear at this stage in regard to the following:-
>
> 1. What exactly are, or were, the errors and/or omissions in the design for which you believe you could have liability as design and build contractors?
>
> 2. What remedial works need to be affected so as to correct the result of each error/omission?
>
> 3. What is the projected cost of this work in respect of each breach of duty?
>
> 4. What direct financial losses will be incurred by the Principals as a result of these works?"

He asked for a number of documents.

59. By this time, it had begun clearly to emerge that additional remedial work was required to improve the racking resistance of some of the walls. Some concerns began to emerge as to whether there was a risk of collapse and Kajima sought the advice of Andy Collett Associates who were timber frame designers in this context. Mr Collett confirmed on 24 March 2005 that in his opinion none of the defects encountered to date with the building (covered by the proposed remedial works) would cause the collapse of the building.

60. By mid April 2005, Volumetric (or its holding company) had indicated that they would offer £350,000 in full and final settlement of all claims to be made against them by Kajima in respect of their work on this project. That offer was never increased.

61. On 21 April 2005, Mr Cockayne sent to Mr Cameron an updated summary of the present position. This document related to the 'Notified Event' which it said had affected two distinct elements of the Building Works, namely the PODS and the adjoining walkways. This document does not, obviously, address work required in the flat pack part of the flat.

62. On 22 April 2005, Kajima wrote to Mr Cameron of Axis indicating that around £900,000's worth of costs related to "design Professional Negligence".

63. By the end of April 2005, Kajima by Mr Cockayne was telling Mr Cameron that remedial works costs in relation to design might conservatively be about £1m. Attached to Mr Cockayne's email of 26 April 2005 was a "provisional 'guesstimate'" of potential costs. This included costings for what remained 41 items of complaint which indicated a possible total remedial work cost to be incurred by Kajima of about £2.2m.

64. On 29 April 2005, Mr Cameron told Mr Powis that TUIC had appointed Messrs Kennedy as their solicitors to handle the claim and advise them on policy liability. TUIC had given him to believe that it would "be issuing a full reservation of rights until such time as the insured …could prove cause of the loss and whether there is evidence to prove that there are elements of the claim that reside in defective design rather than

workmanship/materials". Mr Powis wanted TUIC at this time to identify whether or not they objected to the insured proceeding to carry out remedial works. Mr Cameron emailed Mr Powis on 6 May 2005 in the following terms:

> "Insofar as Insurers' position is concerned, Kennedys are preparing a letter to set out the position but without wishing to pre-empt their views in any way, I believe it will by necessity endorse our…views that we must be able to investigate all the policy issues in conjunction with the contractual documentation and structural reports etc, as previously requested, and I would urge you once again to ask Barry [Cockayne] to make this available as a matter of urgency, so that a more meaningful progress can be made. Following a study of the various information, we should be able to determine whether there is a PI claim at all and, if so, to what extent the policy might address the loss.'

Kajima sent the requested documents (some of which had been provided before in any event) under cover of the letter dated 11 May 2005 to Axis.

65. In May 2005, Kajima began the further remedial work. Kajima had been told that it could act as a 'prudent uninsured' in initiating those remedial works.

66. Internally, TUIC in their Loss report dated 2 June 2005, identified a reserve of £104,066.40 and stated as follows:

> "As the basis of the construction was a timber frame, it was anticipated by all parties that a certain amount of settlement would occur to the structure. However from a relatively early stage it became apparent that the level of settlement occurring was greater than expected. The situation continued in this way (with insurers generally unaware of the potential severity of the problem) until early this year. We now understand that the extent of the settlement is significant. The main problem this has caused is with the walkways surrounding the pods on each level. The walkway structure (which may be independent of the pod structure) has stayed in place but the settlement of the pod structure has pulled down the inner edge of the walkways. This has led to the walkways being higher on the outer edge than the inner edge and this has had the effect of any water hitting the walkways running down into the structure. Significant water damage has occurred to some of the pods.
>
> Substantial repairs are now needed (which will involve moving the affected inhabitants out of their flats) and it is estimated that costs associated with these repairs could be anywhere between £900k and £2.2m. The Insured's view is that most of the problems are design issues and liability needs to be shared between those involved in the project. Volumetric for their part are believed to be [in] voluntary administration and have issued a take it or leave it £300k offer to the Insured.
>
> With the improved level of information we are now moving to fully investigate this claim and this investigation is being performed under a reservation of rights. We have serious concerns regarding the level of investigation undertaken by the Insured to date and the manner in which Insurers have not been kept up to date.
>
> …Kennedys are currently undertaking a review of all available documentation…"

67. By the end of June 2005, Kennedys had reported to TUIC, who then increased their reserve to £1m. Kennedys felt that the insured had seriously overestimated the extent of the design related defects. There appears to have been little or no analysis carried out by TUIC, its brokers or Kennedys as to the extent to which, if at all, the defects or damage reported and being addressed as at June 2005, were within the circumstances notified in February 2001. I conclude that, at least up to the end of June 2005, no one on TUIC's side had reviewed the extent of the notification of February 2001. They seemed to have been making the assumption, if they thought about it at all, that there was no point to be made on the notification. However, there had been a reservation of rights.

68. By the end of June 2005, Kajima was coming under time pressure from Volumetric as to whether or not to accept Volumetric's offer of £350,000. Mr Cockayne emailed Mr Cameron asking for an urgent meeting within a few days about this. It was not possible for there to be a meeting that quickly.

69. By the end of July, a yet further type of defect had emerged. It had been discovered during the remedial works and related to the strength of the panels fixed to the walls. The type of board used was either plasterboard or 'Orientated Strand Board' ('OSB'). It emerged that spacing of fixings for these panels and in some instances the board material provided was not in accordance with the original design calculations and drawings. Mr Lupton reported to Kajima's then solicitors on 29 July 2005 to that effect and recommended that localised inspections should be carried out in the flats which had not yet been remedied to see whether similar defects existed. Mr Lupton said:

> "..The findings of such inspections could have major implications for the safety of those who currently occupy the building…"

70. Kajima instructed Arup, the well known engineers to consider the building.

71. On 8 August 2005, Kajima wrote a polite but firm letter to Axis because TUIC had still not indicated what Kajima could or should do with regard to the offer from Volumetric:

> "As we have indicated the Insurers' decision on parameters for the negotiations with Volumetric and Rowntree is required as a matter of extreme urgency. You will appreciate that with the potential consequences of delay we have to set a deadline for that decision. Accordingly if we have not heard from you within 7 days of this letter, we will have no alternative but to conclude we are in dispute and instigate the dispute resolution provisions that are provided for under the Policy. However, clearly we would prefer to resolve this matter by other means. We are therefore very happy to meet the insurers and yourselves as loss adjusters in order to reach agreement without recourse to more formal routes; but any such meeting would have to be held in the very short timescale and would require all parties to attend with authority to conclude in agreement."

72. On 9 August 2005, Arup gave some initial views about the stability of the Caspar II building when subjected to wind loading. The initial optimistic view was:

> "The initial computer modelling and the past performance of the building provided confidence that the building in its current condition has sufficient redundancy and load sharing mechanisms to be able to withstand high wind loading and remain stable."

73. With regards to Kajima's letter of 8 August 2005, Mr Cameron emailed Mr Powis with an attached letter. In the email he said:

> "…The letter seeks to reassure the Insured that there is no hidden agenda in their detailed enquiries, such as compliance with Policy Conditions such as Notification, for example, and that Insurers are satisfied that the claim will be considered under the policy insofar as the Insured can demonstrate that it arises from the Insured's Professional Activities.'

The attached letter dated 10 August 2005 was drafted by solicitors but signed by Mr Cameron:

> "I can confirm [TUIC] accept that, insofar as it is proved that the losses complained of arise out of 'Professional Activities' (as defined under the policy) filed on behalf of Kajima, then the policy will respond, subject to other terms and conditions, such as the policy deductible, or deductibles as previously discussed."

74. There then followed, in September, 2005, a critical development. Arup, having carried out further investigations, reported to Kajima on 13 September, 2005 that there were serious problems relating to the stability and integrity of the Caspar II building. Arup was concerned about disproportionate collapse; properly designed and constructed buildings should not suffer collapse to an extent disproportionate to its cause. Arup found that the wind loading was underestimated in the design by about 20%. Arup was concerned that gas pipe work was not adequately protected. They had a real concern that the connection details between the different elements of the building were such that there was 'a key concern for overall stability'. Inadequate provision was made against racking and deficiencies in the construction had, on preliminary calculations, reduced the racking capacity by just over half that which was needed. Under the heading 'Temporary Stability', Arup concluded:

> "In our preliminary examination of the building in early August we mistakenly assumed that the roof and the steelwork contributed to the lateral stability of the building overall.
>
> Subsequent investigations and discussions…have indicated that this is not the case. The result is that current indications do now show that this building cannot safely resist designed wind loads in accordance with current British Standards code of practice and contemporary good practice guidance.
>
> We therefore recommend that you erect a temporary support structure to provide lateral stability as soon as possible."

The substance of this was communicated by Kajima to TUIC. Kajima obviously also passed this on to JRF.

75. Thus, Arup had identified both lateral stability as a serious problem together with the risk of disproportionate collapse. By mid November, 2005, Arup in conjunction with Dr Kenneth Falcon who had been retained by TUIC to investigate matters were concentrating on the five primary structural defects:

> "Inadequate factor of safety against overturning.
>
> Inadequate strength of wall panels for racking and vertical load.

Inadequate provision against disproportionate collapse.

Inadequate strength and stiffness of floor structure.

Inadequate strength of roof structure and its supports.”

This quote is from Arup's letter dated 18 November 2005 to Dr Falcon.

76. By early December, Kajima, its consultants and solicitors had reviewed the Arup findings and had formed the view that Caspar II was beyond economic repair. By letter of 7 December 2005 to Kennedys, Tarlo Lyons (instructed by Kajima) identified that the likely remedial costs were £7.25m. The letter sought to persuade the recipients that the normal measure of damages would be less than the cost of reinstatement.

77. By this time Kajima, internally, had prepared an 'Effective Summary of Defects'. At Paragraph five, there was a 'summary of known defects' which were classified under six headings: Structure, Building Services, Fire Safety, Acoustics, External Works and Cladding/Finishes/Fit-out. These defects were substantially the same (albeit differently numbered) to the original schedules of defects. Under the heading “Structure” the following defects were identified:

“1.1 Inadequate factor of safety against overturning.

1.2 Inadequate strength of wall panels for racking and vertical load.

1.3 Inadequate provision against disproportionate collapse.

1.4 Inadequate strength and stiffness of floor structure/finishes and its connections.

1.5 No allowance for shortening of timber frame relative to vertical steel work elements.

1.6 Strength of balcony, walkway and roof fixings inadequate.'

78. By early January 2006 most of the tenants of Caspar II had left the premises. The remainder was to leave by 14 January 2006.

79. At a meeting on 25 January 2006, attended by Mr Cameron and Mr Chapman from Axis and Dr Falcon, various Kajima representatives and Arup Engineers, it was made clear that TUIC was “not concerned with defects which had been discovered and notified post 2001”.

80. Thus, from this time onwards, there began to emerge the dispute with which this trial is concerned, namely to what extent the original notification covered the problems which later emerged.

81. For instance, Dr Falcon was asked by Kennedys to review the 22 February 2001 notification to see the extent to which it covered the later defects. In an email dated 27 January 2006, he opined that it was only the absence of “allowance of shortening of timber frame relative to vertical steel work elements” (Paragraph 1.5 in the summary above) which was covered by the notification.

82. Meanwhile negotiations were continuing with JRF as to a resolution of the dispute. A structure began to emerge for a settlement which involved Kajima purchasing back the Caspar II building at what should have been the market price, assuming no defects.

83. Around this time, Kennedys obtained Counsel's opinion in which, although it is not being disclosed, it is advised that substantial elements of the current problems known about were not covered by the notification. Dr Falcon advised on 6 February 2006 by email to Kennedys that possibly some £470,000's worth of remedial work would represent the cost of putting right the defects which were covered by the original notification.

84. Kennedys wrote to Tarlo Lyons on 28 February 2006, effectively asserting that a large part of the defects were not covered by the notification:

> “As stated above, the policy only responds to a claim where the claim arises from circumstances that were notified during the period of insurance. The bulk of the defects now identified by Arup are not matters that were notified by the Advice Form dated 22 February 2001. On the limited information currently available it appears that the only defects which fall within the notification are (using the Arup numbering on page 18 of their draft report) the following:
>
> • 1.5 (excluding Defects Action Plan item 37, which we understand to be a separate problem with the balcony bracket fixings). [Item 1.5 related to there being no allowance for shortening of the timber frame relative to vertical elements].
>
> • 2.3 (if confirmed to exist) [This related to allowance in vertical pipe work for shrinkage.]
>
> • 3.4 [Gaps around fire doors].
>
> • 6.1 (excluding item 8 of the Defects Action Plan, which we understand to be a workmanship snagging item, now rectified) [Item 6.1 related to the allowance for differential movement between timber frame and cladding] and
>
> • 6.5 [Ill-fitting doors].
>
> The items we have listed appear to be matters of design, rather than workmanship, so that a claim in respect of them would potentially fall within the policy cover, if such a claim were made by JRF against Kajima…”

85. A Settlement Agreement was signed off on 13 September 2006 between JRF and Kajima. Preambles recorded what the parties agreed were background facts:

“(B) The Building suffers from catastrophic defects ('the Defects') which Defects and/or some of them render the Building unfit for human habitation and which the Foundation attributes to Kajima's breaches of the Contract for which it holds Kajima liable.

(C) Kajima has expended to the 31st August 2006 the sum of not less than £1,943,531.83 in investigative and remedial works and other matters connected with the Foundation's claims.

(D) Further, it is agreed that pursuant to the Contract (and without prejudice to Kajima's rights to recover for the same against third parties…) Kajima is liable for the Defects and that the Defects were caused by Kajima's breaches of contract. The Defects and the costs (excluding costs referred to in Recital C) of rectifying them are set out below:

a. Floors £721,157

b. Racking resistance £1,006,129

c. Provisions for robustness £89,359

d. Resistance to overturning £1,417,532

e. Balconies and walkways £427,081

f. Roof structure £793,285

g. Non-structural defects £221,089

h. Loss of Rent during the works and mobilisation £511,339

i. Financing costs during the works and mobilisation £347,127

Total £5,534,098

(E) Thus, the total cost of remediating the Building (excluding costs referred to in Recitals (C) and (F)) is no less than £5,534,098. Kajima is liable to pay damages to the Foundation in at least that amount.

(F) In addition, the Foundation incurred costs and expenses of £814,968.95 as particularized in Schedule 2 hereto in respect of which it was agreed that Kajima's liability would be £755,000. The Foundation has deducted from that figure a sum of £300,000 which it owed to Kajima and the Foundation has received the sum of £250,000 on account from Kajima. The Foundation is owed the balance of £205,000. This sum will be paid by Kajima upon completion of the Purchase Contract referred to in Recital (J) below...

(I) The parties have further agreed that:

a. The sale price of the land and premises on which the Building is situated (the “Property”) in the state which it should have been in but for the Defects, and which is more particularly described in Schedule 1) and to include the Building is £4,750,000; and

b. The residual value of the Property with the Building in its current state is £1,250,000; and

c. Therefore the sale price less the residual value of the Property is £3,500,000; and

d. The costs of remediation to the Building, excluding costs referred to in Recital C, is £5,534,098;

e. Therefore the Building is beyond economic repair.

(J) In the premises, the parties have agreed that Kajima will purchase the Property from the Foundation for the sum of £4,750,000 on the terms set out in the Purchase Contract annexed at Schedule 3 hereto…”

The rest of the Settlement Agreement put these terms into effect and the property was duly conveyed to Kajima.

These Proceedings

86. Kajima commenced these proceedings on 16 January 2007 and served their Particulars of Claim on 6 February 2007. The Defence followed on 2 April 2007 and the Reply on 8 May 2007.

87. Kajima had also commenced separate proceedings against a number of other defendants, including Conisbee and Volumetric.

88. Mr Justice Ramsey gave various directions on 16 July 2007 ordering that there should be a trial of preliminary issues in the form contained in a schedule to his order.

89. I do not intend to analyse the pleadings in great detail because both parties have, sensibly, decided not to take pleading points against each other.

The Issues

90. The Preliminary Issues as drafted in the schedule attached to Mr Justice Ramsay's order have, to a substantial extent, gone by the board. Some of the issues are in effect no longer issues and for others the parties have agreed that I can not and should not finally decide them.

91. What, essentially, the parties seek is guidance from this court as to the extent to which in principle the defects and/or damage which were the subject matter either of the final Settlement Agreement or what led up to it were covered by the original 22 February 2001 notification.

92. I am neither required nor able to decide whether any of the defects or damage arise out of Professional Activities within the meaning of the Insurance Policy. I am also not required to decide, at least with any precision, whether particular defects or damage fall within the original notification.

The Law

93. There has, fortunately, been a recent decision of Mrs Justice Gloster, *HLB Kidsons v Lloyds Underwriters and others* [2007] EWHC 1951 (Comm) which impacts upon this case given that they both relate to 'claims made ' policies and to notified circumstances. The facts of the Kidson case were different: Kidson purported to notify their insurers of circumstances relating to possible claims made against them with regard to tax avoidance schemes. There were issues which were not comparable: for instance, in Kidsons there was an issue as to whether there had been a valid notification. In the case before me, it is accepted that there was a valid notification. However, in both cases there were issues as to what circumstances were covered by the notifications given. The circumstances notification clauses are not dissimilar.

94. I set out the requisite parts of Mrs Justice Gloster's judgement which have some bearing on the current case:

> “16. The correct general approach to the construction of the Policy was, not surprisingly, to a large extent common ground between the parties. The Policy is a commercial contract and, like any commercial contract, must be construed in its appropriate factual matrix; see e.g. *Investor's Compensation Scheme v West Bromwich Building Society* [1998] 1WLR 896 at 912-3, per Lord Hoffman. This includes, in this case, the practice in the London Market of writing professional indemnity insurance on a 'claims made' basis as opposed to on an occurrence occurring basis.'
>
> 17. This practice is well known: See e.g. *Friends Provident Life and Pensions v Sirius* [2005] 1 Lloyds Rep IR135 at 142, per Moore-Bick J. …
>
> 18. By contrast, from the insurer's perspectives, claims made policies
>
> (i) enable the insurer to know by the end of the claims made period, or very soon thereafter, what claims have been made against the assured during the policy period and what circumstances have become first known to the assured during the period of the policy that might mature into claims against him;
>
> (ii) enable the insurer upon or very shortly after the expiry of the policy period to evaluate reported claims and circumstances for the purposes of making appropriate provision or reserves for ultimate liabilities;
>
> (iii) enable the insurer thus to avoid the undesirable uncertainty of long-tailed future claims arising out of occurrences which are in many instances unreported.

22. The authorities concerning such clauses recognise the purpose of a notification clause…is twofold. First, it is intended to enable insurers to investigate potential claims at the earliest possibly opportunity, before the trail of evidence goes cold, and to take, or require the insured to take, such steps as insurers think appropriate to minimise liability under the policy…

23. Secondly, the clause enables the assured to obtain an extension of cover in respect of the claim made after expiry of the Policy (and which would otherwise fall outside the scope of the Insuring Clause), provided the claim arises out of a circumstance of which the assured became aware during the period of the Policy and in respect of which he gave notice in accordance with the clause…

31. I find nothing surprising in the concept that there should be a contractual requirement that notice of circumstances is given in a timely fashion… The commercial imperative is that notice to insurers should be given promptly: see per Moore-Bick J in *Friends Provident* paragraphs 20, 25, 27 & 38. The reasons are obvious: the insurers needs to know about any claim or relevant circumstances as soon as possible in order to be given the opportunity in the case of the claim, to minimise the risk of a finding of ultimate liability against the assured and to take over the defence; and, in the case of any circumstance, to minimise the risk of a claim ultimately materialising or, in the event that any claim should ultimately materialise, the risk of liability falling on the assured. Moreover, the insured needs the commercial certainty of finality of exposure; it enables him to calculate his reserves with more certainty and avoids, or least ameliorates, the difficulties of estimating his contingent liabilities for long-tailed claims.

47. …It seems to me that the huge additional protection afforded to an assured in respect of claims potentially made long after the policy has expired, provided that the assured has given notice of 'circumstances', amply justifies the reciprocal, correlative obligation of the assured to notify 'circumstances' strictly within the time period described in the policy.

48. Other reasons why the dependency of extended coverage upon proper notice being given as soon as practicable is commercially sensible include the following:

(i) If notice is not required to be given as soon as practicable, there is always the danger that insurers would be engulfed immediately before the end of the policy period with 'laundry lists' of circumstances containing the barest detail in list form sometimes hundreds and thousands of cases in respect of which the assured fears that he might some time in the future be confronted by a claim. However, if notice is required to be given of each and every circumstance as soon as practicable, the assured is bound to give consideration to each circumstance and notified if he genuinely thinks that it might give rise to a claim, neither exaggerating the circumstance nor diminishing it – so that underwriters and insurers can in a sensible and structured environment be given the opportunity to examine and investigate each one – validating whether it really is a circumstance and, if it is, taking all necessary steps to protect their position.

(ii) If it were right that an assured could with effective impunity give notice of circumstances long after the expiration of the policy period in respect of circumstances of which he became aware during the subsistence of the policy period, that would, in reality, have the commercial effect of converting the policy from a claims made policy into an occurrence occurring policy…

72. …I agree that, whilst Kidsons' intention as to what it was intending to notify, is not relevant to the objective interpretation of the purported notice and the perspective of the reasonable

> recipient, Kidsons' state of mind is nevertheless relevant to determine the extent to which it was aware, and hence capable of notifying, circumstances which might give rise to a loss or claim under [the circumstance notification clause].
>
> 73. Secondly, when [the circumstance notification clause] refers to a “circumstance…which may give rise to a loss or claim against” the assured, it requires that the circumstance should be one which, objectively evaluated, creates a reasonable and appreciable possibility that it will give rise to a loss or claim against the assured. It is necessary to emphasise, however, that the circumstance may give rise to a loss or claim when there is a possibility or perceived possibility that, at some stage in the future, it will do so. There need not be a certainty that it will do so; there need not be a probability or likelihood that it will do so. All that need exist is a state of affairs from which the prospects of the claim (whether good or bad) or loss emerging in the future are 'real' as oppose to false, fanciful or imaginary, and that is what has to be notified.
>
> 76. At the end of the day, it is in my view largely a question of interpretation and analysis of the document setting out the notification, in the context of the facts known to the assured, as to what precise circumstance or set of circumstances has in fact been notified to insurers. I am not therefore convinced that semantic cavilling over the precise formulation of the test assists the ultimate resolution of the problem. There way well be uncertainty at the time of notification as to what the precise problems or potential problems are; there well may be, whether known, or unknown, to the assured a 'hornets' nest which may give rise to numerous types of claims of presently unknown quantum and character at the date of the notification. Whilst in principle, there is no reason why such a state of affairs should not be notified as a circumstance if the assured is aware of it, in each case the extent and ambit of the notification and the claims that are covered by such notification will depend on the particular facts and terms of the notification.
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> 77. Fourthly, it is also obvious (in the light of my conclusion of the construction issue) that, when [the circumstance notification clause] refers to the giving of 'notice in writing as soon as practicable', it requires the written notice to have been given by or on behalf of the assured as soon as reasonably possible after he has become aware (i.e. for the first time during the period of the Policy) of the relevant circumstance…
>
> 78. Fifthly, I also accept [Counsel's] submissions that, when [the circumstance notification clause] refers, in the context of notice having been given, to “any loss or claim to which the [notified] circumstance has given rise”, it requires that the loss or claim should be sufficiently causally related to the fact, event, happening or condition which comprises the notifying circumstance, that it can be fairly said to have arisen out of it.”

95. In my view, Mrs Justice Gloster's dicta as set out above are germane, correct and applicable in this case. Further, so far as they specifically relate to the interests of the insurers and the insured, they apply here. The unchallenged evidence of Ms. Gately broadly identified what insurers' interests are in notified circumstances under claims made policies, if evidence is required.

96. Reliance is placed by the claimant on the Court of Appeal decision in *Thorman and Others -v- New Hampshire Insurance Co. (UK) Ltd* [1988] 1 Lloyd's Rep 7. The issue concerned the ambit of a notified claim. The insured were architects and notified their insurers in respect of a claim with regard to the costs of remedial works to brickwork. Later the architects received a letter from their client relating to various problems “inter alia with regard to cracking and defective brickwork”. A month later a generally endorsed writ alleging breaches of professional duty was served on the architects. The insurers were notified of both of these matters. It was held that the notifications were sufficient to notify the insurers of claims other than

those relating to brickwork. This case is not of particular assistance here because in the current case, there are notified circumstances, not a notified claim as such. What is or may be covered by a generally described claim simply depends upon what are in context the matters which can properly be described as covered by the particular claim.

97. Reference was also made by the Claimant's Counsel to an authority in the High Court of Australia, *Government Insurance Office of New South Wales -v- RJ Green and Lloyd Pty Ltd* [1966] 114 CLR 437 and *Dunthorne v Bentley and Others* [1999] 1 Lloyds LR 560 which consider the phrase “arising out of” in the context of what may be covered by an insurance policy. Broadly those cases are simply authority for the relatively obvious proposition that where an insurance clause relates to cover for something “arising out of” a particular contingency that expression may well be wider than an expression such as “caused by”. These authorities are of marginal relevance here albeit I will bear them in mind when construing that part of Condition 1 of the insurance policy which talks about “any claim arising from such [notified] circumstances”.

Condition 1 of the Policy

98. I repeat the wording of Condition 1 i:

> 'The Insured shall give written notice to the Underwriters as soon as possible after becoming aware of circumstances which might reasonably be expected to produce a claim or on receiving information of a claim for which there may be liability under this insurance. Any claim arising from such circumstances shall be deemed to have been made in the Period of Insurance in which such notice has been given'.

99. As a matter of construction and in the light of the observations of Mrs Justice Gloster in the *Kidson* case, I make the following observations applicable to the current case:

> (a) There is no restriction in condition 1 as to what circumstances might be notified. They may be specific or general. They may relate to damage, symptoms of damage, or actual, potential or perceived defects, liabilities or losses. It is not necessary that the notified circumstances will probably give rise to a claim; it is enough that they might reasonably be expected to do so. The circumstances might impinge upon a particular project although they arise on another. An example put to Counsel was the design and build contractor to whose notice it comes that a design engineer working for it on other projects has been extensively negligent on other projects. It might then be legimate to notify the insurers in respect of the particular project to the effect that it has come to the insured's attention that a named individual's possible incompetence on other projects might well have been repeated on the particular project in question.
>
> (b) It is impossible and unhelpful to produce a finite definition of circumstances which might reasonably be expected to produce a claim because, given the factual permutations and possibilities, the type of such circumstances may be almost infinite.
>
> (c) It is possible for the insured to give notice of a 'hornets' nest' or 'can of worms' type of circumstance.
>
> (d) The insured must be aware of the circumstances which it is notifying to the Underwriters. It

would not be enough to say: “I think it is possible that there may be some unknown and unidentified design deficiencies in a particular building”. That would not be a good notification because the insured would not be aware of the circumstances; the insured would simply be guessing that there might be circumstances. That is not good enough. It is only circumstances of which the Insured is actually aware which can be the subject matter of a notification.

(e) The fact that notification must be given “as soon as possible after” the Insured has become aware of the relevant circumstances suggests strongly that the notification only covers those matters of which the Insured is actually aware. Further notifications have to be given as soon as the Insured become aware of new circumstances.

(f) If there has been a proper notification of circumstances, any claim arising from those notified circumstances, of which the Insured was aware, will be considered to have been made within the requisite Period of Insurance. Any claim which arose consequently from the notified circumstances would arise from those circumstances. There must be some causal, as opposed to some coincidental, link between the notified circumstances and the later claim.

(g) One must construe any notification objectively but one is entitled to review subjectively what the Insured was aware of with regard to the notified circumstances. It matters not in this case because the Insured did notify expressly in words the circumstances of which it was aware.

(h) I do not consider it helpful to talk in terms of a narrow or broad interpretation of the notification. It will be interpreted objectively on the basis of the words used, having regard to the factual context in which it was served. The factual context is important, not only as a matter of interpretation of the notification but also, because it is only matters of which the insured is aware that can form the basis of a valid notification.

(i) The claim which is later pursued must arise not only from the notified circumstances but also only from the circumstances of which the Insured was aware. It can not arise from any other circumstances which may have happened or been discovered either after the notification or in any event after the expiry of the insurance cover. Put another way, a subsequent claim which relates to matters of which the Insured was not aware at the time of the notification would not and could not arise from the notified circumstances and, to that extent, would not be covered by the policy.

(j) The claim subsequently brought can relate to new damage flowing from or consequences of the properly notified circumstances which had not occurred by the time of the expiry of the insurance cover because the claim would arise from the notified circumstances.

The parties' arguments

100. I will not paraphrase all the parties' submissions and arguments which were set out very fully in written openings and closings as well as oral presentations. There is no issue that the February 2001 notification was a valid notification under Condition 1. The issue goes to what the notification actually covers.

101. In summary, the Claimant's case is that the investigation referred to in the notification led in time (after expiry of the insurance) to further investigations both by JRF's consultants and Kajima's own. Over the years

which followed further defects and deficiencies were uncovered resulting in the discovery finally of defects which brought about the final settlement with JRF. Mr Williamson QC for Kajima effectively said that there was a “continuum” from 2001 onwards and the losses, costs and liabilities incurred by Kajima all in effect therefore arose from the notified circumstances. He argued that it mattered not that the defects uncovered as time went on were different from those which were or which gave rise to the specific notified circumstances. In the alternative, he argued upon a narrow basis that at the very least Kajima would be entitled to those losses which were attributable to the specifically notified circumstances.

102. Mr Catchpole QC and Miss Ansell for TUIC argued that the notified circumstances were relatively narrow. The 'investigation' referred to in the notification was clearly intended to be an investigation into the notified circumstances as opposed to some general investigation into the possible existence of other defects. They argued that the coincidental later discovery of other defects or damage had nothing to do with the originally notified circumstances directly and was not covered by the notification; alternatively such defects or damage and any claim arising from them did not arise from the notified circumstances.

Discussion

103. Another contention of the Claimant by Mr Williamson was that it was instructive to consider how TUIC and its brokers behaved and dealt with the ever growing list of defects over the period 2003 to 2006. The argument was that it was instructive because it showed that insurers would have no difficulty in practice in dealing with and addressing the various claims as they crystallised or became clearer as time went on; thus, the broad interpretation of the notification would give rise to no difficulties in practice, thus suggesting that such a broad interpretation was right. I have to say that I find this exercise unhelpful. My reasons are as follows:

(a) In principle and as a matter of logic, if one is construing, as here, the notification objectively, what Kajima, its loss adjusters, TUIC and its brokers did or said two to five years later is in practice not going to assist, significantly or at all; it does not assist here.

(b) The behaviour and statements of those parties might have been relevant if there was some estoppel plea or similar. In this case, at one stage, Kajima sought to argue that TUIC was estopped by its statements and representations from denying that they were liable under the Policy. However, that plea was abandoned by way of amendment.

(c) In any event, as a matter of fact, there is some confusion as to the basis on which some of the key players were proceeding during the 2003 to 2006 period. For instance, Mr Cockayne was not aware that the insurance cover with TUIC had expired in May 2002. Similarly, I have formed the view that neither its brokers nor TUIC itself turned their mind to the notification issue until it became clear that the claim was likely to run into millions. There was some technical confusion within TUIC's brokers' minds as to the connection between the ponding and walkway problems and the other defects which emerged after 2002. It seems to have been the fortuitous introduction of Counsel which brought to the surface that there was or might be a serious argument relating to the extent of the notification.

(d) At best for Kajima, even if TUIC and its brokers believed after May 2002 that the February 2001 notification was wide enough to cover all the problems which were uncovered, that would simply be a mistaken view to the extent that TUIC's current arguments are now correct.

(e) It follows that if one side did not know that its insurance cover had ended with a particular insurer and the other, the Insurer, did not even consider the notification issue until a late stage, little of utility emerges from this post notification period.

104. So far as the notification is concerned, it is clear what it related to:

(a) Water had been ponding on the walkways. It was believed to have occurred because the Pods were settling and moving excessively.

(b) This settlement and excessive movement was thought to be causing, actually or potentially, adjoining roofing balconies and walkways to distort by way of differential settlement. It was also believed that the service connections were under risk from that movement. There was associated with that movement potential internal damage and possible tenant risk, danger or inconvenience.

On its face, in context and objectively, the circumstances notified were limited to these matters. It was not a “hornet's nest” or “can of worms” set of circumstances. Whilst neither the causes of the notified circumstances nor necessarily all the consequences were identified, the essential circumstances notified were the settlement or movement of the pods and distortion of the adjoining balconies, walkways and roofing; the actual and potential consequences of these circumstances were covered by the notification.

105. It is wholly clear, as a matter of simple interpretation, that the 'Investigation' which was notified as being 'presently under way' was an investigation into this settlement and movement of the accommodation pods. It was not and was not intended to relate to any other investigation. It was not a “stand-alone” or abstract investigation. It was not a general investigation into what was perceived as some general “can of worms”. No general problem was known or believed to exist at the time of the notification or indeed up to the expiry of the TUIC insurance cover.

106. I agree with the concession made by Dr Falcon, a witness for TUIC, that the cause of the movement and settlement was not identified, although, as the notification indicated, it was not believed to have been attributed to undue settlement of the foundations. Thus, to the extent that the settlement and movement of the pods was attributable to shrinkage of the timber structure or other components or some other factor, the notification would and did cover that.

107. As a matter of fact, the “investigation presently underway” in February 2001 was a relatively limited exercise involving seeking the views of, Volumetric, Levitt Bernstein and Conisbee. After receiving their comments, little was done by way of further investigation into this problem other, apparently, than Kajima keeping a 'weather eye' on whether the settlement was continuing. It is informative that Kajima in writing to their brokers on 3 May 2002 do not hint or suggest that the investigation referred to in the notification was as such continuing. Thereafter, the investigation was limited to checking twelve months after April 2002 whether the notified problems were continuing.

108. The fact that, over the period 2002 to 2006, a number of other defects emerged of more or less seriousness does not enable, somehow, the notified circumstances to be expanded. Many of those defects seem, although I make no final finding about them, to have been discovered coincidentally. The notified circumstances could not be expanded by the later discovery of unrelated defects or damage which were not the subject matter of the notification.

109. The following are observations which are provided to assist the parties in interpreting what this judgment means and are not intended as final findings of fact in relation to individual defects:

(a) With regard to the first Wood report, it does seem clear that Mr Wood agreed that there had been substantial shrinkage of the structure which, amongst other things had caused coping stones at the head of the low level brickwork to be tipped up. If the tipping up of the coping stones was a consequence of shrinkage of the Pods which in turn had caused or contributed to settlement and excessive movement which had been notified in February 2001, there would be cover. Similarly, Mr Wood referred to the fact that doors and window frames were severely affected by distortion. If that was caused by the shrinkage and movement of the timber frame or components, again that would be covered by the notification.

(b) In the second Wood report, he identifies a number of defects. Some may be attributable to the notified circumstances and others may not. For instance, if door openings had distorted, not because of the shrinkage and movement (actual or continuing) referred to in the notification but, as Mr Wood opines, the 'poor control of the levels during construction', that would not be covered by the notification; it does not arise from the notified circumstances. I leave aside whether Professional Activities within the meaning of the Policy brought about such poor control. The absence of “herring bone strutting between the joists” might or might not be covered by the notification. If the absence of such strutting had caused or materially contributed or related to the movement which was notified, there might be cover. However, if it had not in any material way contributed or was not materially related to the notified circumstances, it would simply be a deficiency (of design or workmanship as the case may be) which was coincidentally discovered during later inspections. There is no effective link between such a defect and that which was notified. He also refers to water being present in the acoustic and structural boarding. Although Mr Wood preferred the view that the dampness was likely to have been present during construction (in which case there would be no cover under the notification and policy), if the water penetration was caused or materially contributed to by ponding on the walkways which had been caused by the differential settlement which had been notified, the notification would be broad enough to cover any claim relating to such water penetration.

110. Similar considerations apply in relation to the later deficiencies which were uncovered as time went on. For instance, the discovery that the wrong panels had been used at the wrong levels or used with inadequate fixings would only be covered by the notification to the extent that such deficiencies had materially contributed or related to or caused the settlement, movement or distortion which was notified in February 2001.

Conclusion

111. I conclude as follows:

(a) The notification is only effective in relation to the specific circumstances which were notified;

(b) The notification is not effective in relation to any other matters, loss, defects or damage save and to the extent that the other matters, defects or damage caused or related or contributed to the circumstances which were notified or were caused by the notified circumstances;

(c) In general terms, the notification would cover (i) the defects which caused (ii) the symptoms of, or (iii) the consequences of, the circumstances which were notified in February 2001.

(d) It is insufficient that there was a historical 'continuum' of investigation by various parties which coincidentally revealed a number of defects or deficiencies which have not or may not have anything, to do with the notified circumstances.

(e) Even if the investigation referred to in the notification had revealed within the insurance period damage, defects and deficiencies which were not related to the notified circumstances, the original notification would not be wide enough to cover such laterally or coincidentally discovered matters. Further notifications would be required as Kajima became aware of further circumstances which might give rise to a claim.

(f) The Policy would cover the defects (if arising from “Professional Activities”) which had been finally identified by JRF and Kajima and their advisers by the time of the Settlement Agreement only to the extent that they were the subject matter of the notified circumstances.

(g) As the investigation referred to in the notification was and could only be into the notified circumstances, it was not a separate notified circumstance in itself. Thus, to the extent that the defects and damage discovered during investigations after May 2002 were not related to the matters actually notified, any claim relating to them did not arise out of the notified circumstances. There must be some relationship between such defects and damage and the notified circumstances, namely “accommodation pods settling and moving excessively; causing adjoining roofing and balconies and walkways to distort under differential settlement”. That relationship does not arise because later investigations, even if into the notified circumstances, happen to reveal other defects which have no relationship to the notified circumstances. To the extent that the notified settlement, movement or distortion was not attributable to, or did not give rise to, any of the later discovered defects or damage, there would be no claim.

112. I will hear the parties as to consequential relief, the form of any declarations and further procedural directions.