Neutral Citation Number: [2019] EWHC 1588 (TCC)

Case No: HT-2016-000245

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2019

Before :

MR ALEXANDER NISSEN QC

- -

Between :

UK INSURANCE LIMITED	**Claimant**
- and -	
(1) CARILLION SPECIALIST SERVICES LIMITED	**Defendants**
(2) CONSTRUCTION AUDITING SERVICES LIMITED	

- -

Anna Laney (instructed by **BLM**) for the **Claimant**
Ben Sareen (instructed by **DAC Beachcroft LLP**) for the **Second Defendant**

Hearing dates: 7 June 2019

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Approved Judgment

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

....

MR ALEXANDER NISSEN QC

Mr Alexander Nissen QC :

Introduction

1. Before the Court are two unrelated applications issued by the Second Defendant against the Claimant. The first is an application for summary judgment pursuant to Part 24 CPR on the grounds that the Claimant has no real prospect of establishing that its claim against the Second Defendant is not time barred. The second is an application to strike out the claim pursuant to Part 3 CPR on the grounds that, in the absence of a sufficient plea on causation, there is no complete cause of action pleaded against the Second Defendant.

2. The Claimant is an insurance company. The circumstances in which it claims to be entitled to sue in these proceedings are factually complicated and unnecessary to explain for present purposes. The First Defendant, a company within the Carillion group, is now in liquidation and since then has played no further part in the action. The Second Defendant is a company engaged in the business of acting as independent surveyor and auditor. In these proceedings, the Claimant brings a tortious claim for damages against the Second Defendant arising out of professional services provided by it in circumstances set out in more detail below. The claim is presently quantified in the sum of £626,451.98 plus other consequential costs.

Summary Judgment

3. CPR Part 24 provides as follows:

> *"The court may give summary judgment against a claimant ... on the whole of a claim or on a particular issue if –*
>
> *(a) it considers that –*
>
> > *(i) that claimant has no real prospect of succeeding on the claim or issue; ...*
>
> *and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

As the notes to the White Book make clear, the inclusion of the word *real* means that the respondent to the application has to have a case which is not fanciful and is better than merely arguable: *International Finance Corp v Utexafrica Sprl* [2001] C.L.C. 1361 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A realistic claim is one that carries some degree of conviction and is more than "merely arguable": *Global Asset Capital Inc v Aabar Block S.A.R.L.* [2017] EWCA Civ 37; [2017] 4 W.L.R. 163. There was no issue between the parties as to the test to be applied. The only question was whether the test had been met in this case.

4. In these proceedings, the Second Defendant has pleaded a limitation defence. Where limitation issues are inextricably bound up with the question of the underlying breach, the merits of a limitation defence usually have to be determined in a full trial. However, in some cases, a limitation defence may be suitable for the trial of a preliminary issue. Both of these outcomes are contemplated by paragraph 8.4.1 of the TCC Guide. However, in this case, the Second Defendant seeks to avoid both a full trial and the trial of a preliminary issue by applying for summary judgment. It contends that no trial at all is necessary because all the available facts

are those which are readily apparent from the documents before the Court and, on the basis of those facts and documents alone, the Court can determine that the Claimant has no real prospect of success in respect of the Second Defendant's limitation plea. If that contention is fully made out, I agree that it would be appropriate to grant summary judgment. I did not understand the Claimant to disagree.

Background to the claim

5. I propose to summarise the facts which are not disputed for the purposes of this application as between the Claimant and the Second Defendant. If a trial is required, it would be for the subsequent Court to determine the facts in the usual way. For simplification, I draw no distinction between the Claimant and its subsidiary or its agent.

The Scheme in outline

6. In outline, the Claimant was in the business of issuing Latent Defect Policies for the benefit of companies involved in the construction industry. The purpose of such policies was to provide an indemnity to the insured in respect of latent defects caused by defective design or construction during the policy period, subject to any other terms of the policy. The benefit of such policies could be made available to developers or other clients. Unsurprisingly, the Claimant would not wish to have issued such policies unless it had first been satisfied that works in respect of which cover was issued were, during the course of their execution, regularly inspected and monitored by an independent surveyor so that, upon their completion, a surveyor acting with reasonable skill and care would be able to say that, as far as (s)he was concerned, the works had apparently been undertaken competently. In reliance on such confirmation, provided by means of a Certificate of Approval, a policy would then be issued to the insured on standard terms. If a potential or actual defect or problem had already been identified before or at completion, a qualified Certificate of Approval could be issued and the policy would then be issued subject thereto. Of course, it was not expected that the independent surveyor would warrant to the Claimant that the works had been undertaken competently. But the Claimant was relying on an expectation that reasonable skill and care had been exercised. The effect of this was, ordinarily, that the Claimant anticipated that it may have to indemnify an insured in respect of a latent defect which had not been identified during the construction period by a surveyor using reasonable skill and care.

The arrangement in this case

7. As it happens, the Claimant was introduced to set up this Scheme by the First Defendant though nothing turns on that. Pursuant to the Scheme the First Defendant contractually agreed to undertake surveying services for the Claimant in accordance with a Capability Statement whenever such services were required. The services included the provision of a site technical audit for the purposes of enabling insurers such as the Claimant to receive an informed opinion about the assessment of risk.

8. Pursuant to the Scheme, the contractor undertaking the works would complete an application form for the policy which would be sent to the Claimant. The Claimant would then require the First Defendant to undertake the audit and, on completion, to issue the Certificate of Approval.

9. In reliance on the Certificate, the Claimant would then issue the policy to the contractor for the benefit of the insured. The policy in this case contained the following provisions:

"Section 2 – Major Defects Period

The Insurers agree to indemnity the Insured against the following contingencies reported during the period stated against Section 2 in the Schedule:

(a) The cost of repairing or replacing that part of the Insured Works damaged by a Major Defect;

(b) The cost of repairing or replacing those parts of the Premises damaged as a result of a Major Defect in the Insured Works"

"Inherent Defect means any fault, defect, error or omission in the design, specification, materials or workmanship of the Insured Works that existed but remained undiscovered on Practical Completion but which subsequently becomes apparent and is reported during the currency of the policy."

"Major Defect means any Inherent Defect which results in: -
(i) Major damage to the structure and/or building envelope, or
(ii) Faulty or deficient waterproofing to the structure and/or building envelope…"

10. In about 2003, the Second Defendant took over the role of certification in respect of the technical audit scheme. As a result, it is assumed for present purposes that it owed a duty of care to the Claimant in respect thereof.

The Facts

11. The present case concerns a project to apply a rendering system to the external elevations of two existing blocks of flats in Oldham for Oldham Housing Arms Length Management Organisation Ltd ("Oldham HA"). The claim concerns problems that subsequently became manifest in the render system applied to Summervale House. There is no equivalent problem with Crossbank House.

12. The underlying work essentially comprised the application of an exterior insulation system known as Dryvit Outsulation System to an existing structure. The existing building was clad in pre-cast concrete panels. The works were undertaken by a subcontractor Insulclad (Europe) Ltd, ("Insulclad") for a main contractor, Emanuel Whitaker Ltd. On 16 December 2003, a Certificate of Approval was issued in accordance with the scheme. It reads materially as follows:

"We certify that the undernoted Building Works have been the subject of the Site Audit Survey as instructed by the Insurers:
Name of Contractor: Insulclad (Europe) Ltd
Date of Final inspection: 5/11/03
Date(s) of site inspections: 14/1/03, 18/2/03, 1/7/03, 9/10/03, 5/11/03
Site address: Cross Bank and Summervale House, Oldham
The purpose of the Site Audit Survey work was to assess by inspection and monitoring that the Works were construed to normal and reasonable standards.
…

The site was visited during construction and a Final Inspection was carried out in order to assess that the Works were constructed in accordance with accepted building practice and that adequate quality control and recording procedures had been established during the course of the Works.

The following items of substandard, unsatisfactory or sub-quality workmanship, design or materials were notified to the Insurer and have yet to be rectified by the Insured: None

…

Name of Site Audit Surveyor: J O'Rourke
Employed by Carillion Specialist Services Ltd

Signed: Mr Billington Construction Auditing Services Ltd
Date: 16 December 2003"

13. The reasons why the Claimant brought proceedings against both Defendants is evident from the Certificate of Approval. It was Mr O'Rourke of the First Defendant who undertook the inspections. At the outset, Mr Billington had also been employed by the First Defendant. However, at some point during 2003, Mr Billington became employed by the Second Defendant and it was he who, in that capacity, signed the Certificate itself. On the Claimant's case, it was induced by this unqualified Certificate to issue a policy on 12 January 2004 in favour of the Insured in respect of the render works. In essence, its case is that it would never have done so, or would have issued a qualified policy, had both of the Defendants properly inspected and certified in accordance with their respective obligations.

14. Insulclad went into administration on 9 January 2009.

15. The term of the Major Defects cover under the issued policy was to run until 5 September 2013. Cracking in the render of Summervale House was apparently first noticed in about December 2012 although, on the insurance claim form to which I will shortly refer, it was said that cracking had first been discovered in January 2013. It makes no material difference since both dates fell within the relevant period of cover.

16. In March 2013, a firm of engineers named Morley Design Associates Ltd ("Morley") was asked by the main contractor to inspect the cracking at Summervale House. In view of its importance, I shall set out the whole of the letter dated 21 March 2013 ("the March letter") which followed this inspection:

"As you are aware we have undertaken a limited inspection of the South and South Westerly elevation of the above building on 28 February 2013.

Our brief was to examine the existing fabric and advise if there was any damage occurring to the existing structure.

The inspection was purely visual via a cradle positioned as the south westerly corner of the block.

A number of cracks are evident by the naked eye from ground level, the majority being at the corners of the high rise blocks.

As we understand the tower was overclad using board insulation and dryvit render system. The 'build out' from the original face of structure is something in the order of 125-150mm, no as built details are currently available although we have had sight of the dryvit specification on terms of the render.

The form of the cracking is predominately horizontal at fairly regular centres although we did note areas of random vertical cracking.

The more pronounced cracking appears to be at regular centres, suggesting that they occur on a joint line in respect of the modular sizes of the insulation board behind.

At the juncture of some window and cills reveals, the sealant has cracked which will allow the ingress of water.

A close inspection of the cracking to the corner reveals moss growth in the cracks which give the appearance to the eye from the ground level of more significant movement however, the cracks are of sufficient width to permit water ingress and freeze, thaw action behind.
A visual assessment of the remaining elevations from ground level reveal very nominal cracking.
On the southerly elevation there appeared to be only one horizontal expansion joint.
The external medium of the original structure were substantial pre cast cladding panels with feature exposed aggregate.
Our opinion is that we do not view this as a structural problem in respect of the original building or original cladding panels.
The fact that the majority of defects our [sic] occurring on the south/south west elevation, combined with the absence of a suitable frequency of expansion joints would suggest that the cracking has occurred as a result of thermal movement over the seasons. The cracking has permitted the ingress of water which will eventually deteriorate the render coat and in the longer terms, a question has to be placed against the longevity of the fixings.
In order to be more categoric on the cause and effect we would recommend the removal of say four sections of panel over the height of the building on the extreme south westerly corner for about 1m^2 in each direction at crack locations. This will enable a more detailed inspection of the makeup, fixings and original structure.
Should you wish to discuss any aspect please do not hesitate to contact me".

17. As was apparent from the penultimate paragraph of the letter, Morley had proposed the removal of some panels to enable a more detailed inspection of the make-up, fixings and original structure to be undertaken. It is not clear exactly when the Claimant received this letter. The Second Defendant pleads that this was in June 2013. The Claimant's pleading does not dispute that date and no evidence has been adduced by the Claimant to suggest any other date.

18. On 7 June 2013, still within the Major Defects term, Oldham HA completed a Latent Defects Insurance claim form. According to the insurance claim form, the defect was described as:

"cracking in render on South and South West Elevations – Summervale House"

19. The inspection proposed by Morley took place on 5 August 2013. Morley wrote again on 22 August 2013 ("the August letter"). Again, in view of its importance I shall set out the whole of the letter.

"*We confirm having attended the above premises on Monday 5 August 2013 to inspect the existing structure behind areas of external cracking render had been removed, as recommended in previous correspondence.*
Due to unfavourable weather conditions i.e. gusting winds, only one area was removed however, we are of the opinion that due to the original pre cast panel construction, the consistent render application applied and the frequency and location of the cracking, the exposed area will be highly likely to represent a true reflection of the cause of defect throughout. No evidence of structural distress in the form of cracking was noted on the original pre-cast panels.
It is significant that the defects occur on the South facing elevation, this being the elevation most exposed to thermal variations throughout the seasons.
It is also significant that prevailing rain generally comes from a South Westerly direction in the region.

The more prominent cracking is horizontal and occurs at the majority of structural floor levels over the height of the building at each corner.
Between these are secondary cracks again at regular centres (approximately 500mm) which coincide with the modular dimensions of the insulation board used.
From a support cradle, a 1m square panel of render and insulation was removed at seventh floor level of the south elevation adjacent to the western elevation.
No fixings were encounted (sic), the installation was bonded with adhesive. The insulation boards were 85mm thick and bonded to the original exposed aggregate precast panels. Over this was a square fabric matting to receive the render finish.
From our inspection of the remaining intact render at this level from the cradle, we noticed numerous small cracks in the render finish randomly spaced from 25mm to 40mm in length.
There was a rockwool firestop at the seventh floor level.
It was immediately apparent that the rockwool firebreak was completely saturated indeed, moisture was dripping from the insulation board above on the soffit 'cut' line to the area exposed.
[Note: We noted at ground floor level behind the bellcast, that water was dripping at the corner of the western/southern elevation and running toward a gully, prior to the cradle inspection].
We removed a portion of insulation board on a joint that did not appear to be reinforced with additional mesh as is best practice.
It is our conclusion that due to seasonal temperature fluctuations, slight movement has occurred between the pre cast cladding, insulation board, mesh, render and rockwool, each having varying co-efficients of linear thermal expansion, resulting in fracturing of the brittle render finish.
Over time, this has permitted the ingress of small amounts of water which, when subject to freeze thaw action, has increased the crack width thus permitting more ingress of water resulting in an exponential acceleration. The lack of additional reinforcing mesh across joints has lowered the resistance of the board to movement at the joints, explaining the correlation between board sizes and crack positions through the render.
In our opinion the system to all southern elevations should be stripped and replaced entirely, encompassing returns where consequential cracking has occurred on western and eastern elevations.
I trust that this is conclusive should you wish to discuss any aspect please do not hesitate to contact me."

20. It is agreed that this was received by the Claimant on 12 September 2013.

21. Thereafter, loss adjusters for the Claimant appointed Watts Group plc ("Watts"). It took some time for Watts to gain access to inspect but they did so in March 2015 and, on the back of that, issued a report which the Claimant received on 30 May 2015. It is this report which the Claimant has used in order to plead its claims in these proceedings. In essence, Watts identified that Insulclad had failed to comply with the Dryvit specification and the engineer's contractual specification in a number of respects. These were as follows: (a) double mesh within the render make up had not been provided at vulnerable locations such as window reveals, corners of windows and at cavity fire barriers; (b) no vertical movement joints had been installed into the render; (c) horizontal movement joints did not coincide with the existing concrete panels and such movement joints as had been provided were of insufficient width; (d) the render itself was applied too thinly.

22. Since the terms of the policy had been fulfilled, the Claimant paid Oldham HA. The sum insured was subject to a cap which was index linked and, as between insurer and insured, the cap was determined to be £626,451.98. It is this sum which comprises the largest element of the Claimant's by way of damages.

23. The Claim Form in these proceedings was issued on 14 September 2016, within three years of receipt of the Watts report.

24. The Particulars of Claim came later. It is unnecessary to recite the contents in any detail. Suffice it to say that the key breach alleged against the Second Defendant is that, for reasons detailed under the heading "Particulars of Breach", Mr Billington should not have issued an unqualified Certificate of Approval. Instead, it is said that he should have identified and warned that there was a risk of damage occurring during the currency of the Policy.

25. Other than the sum paid out on the policy, the Claimant claims professional fees and other consequential costs of resolving Oldham HA's claim.

Limitation

26. No claim in contract is advanced against the Second Defendant. The claim in tort has a primary limitation period of six years from the date of damage. Given the nature of the claim, it was not suggested by the Claimant either that the identification of cracking on Summervale House (December 2012) or the claim made under the policy (June 2013) could be regarded as the date of relevant damage. On the contrary, the Claimant's pleading admits that the proceedings were issued more than six years after the date of damage. Although the Claimant does not say so expressly, that must be because the Claimant has treated the relevant damage for these purposes as the date on which it entered into the policy which it says, but for the Defendants' culpability, it would not have done. As I have said, that was on 12 January 2004. It follows that the primary limitation period expired on 11 January 2010. This was several years before the issue of the Claim Form.

27. In anticipation of the likely plea of limitation, the Claimant (on whom the burden would lie at a substantive trial) pleaded as follows:

> *"The Claimant accepts that these proceedings were commenced outside the primary limitation periods set out in sections 2 and 5 of the Limitation Act 1980 ("the 1980 Act"). The Claimant sues in tort only and relies in section 14A of the 1980 Act."*
>
> *"The Claimant will say that it acquired the relevant knowledge for the purposes of section 14A of the 1980 Act no earlier than 30 May 2015, when it received the report of Watts. The Claimant says as follows in support of this plea:*
>
> a. *The mere fact of latent damage to the Summervale House did not, in and of itself, suffice to provide the Claimant with the necessary knowledge for the purposes of section 14A. The basis of the Claimant's claim is not simply that it is liable to indemnify Oldham in respect of the damage which has occurred, but that, had the Defendants and each of them acted properly and with reasonable skill and care, the Claimant would have been aware of the defects of workmanship and would not have issued the Policy, either at all or upon the terms which it did. The Claimant has accordingly suffered damage in that it has incurred liability to Oldham on terms which it would not have accepted had the Defendant acted properly and with reasonable skill and care;*

b. *The damage suffered by the Claimant is accordingly attributable to the fact that it issued the Policy on the basis of an unqualified Certificate of Approval issued by the Second Defendant on the basis of the Technical Audit undertaken by the First Defendant;*
c. *The Claimant was not aware and could not reasonably have been aware that the damage which it had suffered was attributable to the acts and omissions of the Defendants until it received Watts' report, which identified those acts and omissions;*
d. *Further, until the watts report was received, the Claimant was not aware and could not reasonably have been aware that it had suffered any damage. Until receipt of the said report, the Claimant was not aware that it had incurred liability to Oldham on terms which it would not have accepted had the Defendant acted properly and with reasonable skill and care;*
e. *Accordingly, the Claimant's claim is within time under section 14A of the 1980 Act, proceedings have been issued within 3 years of the date of the watts report*".

28. Accordingly, the issue raised squarely by the present application is whether the Claimant's case, which relies entirely on section 14A of the Limitation Act, has a real prospect of success. Mr Sareen, who appears for the Second Defendant, submits that it does not because the Claimant demonstrably had requisite knowledge before 14 September 2013, which is three years prior to the issue of the Claim Form. Ms Laney, who appears for the Claimant, submits to the contrary.

The Law

29. Section 14A of the Limitation Act provides as follows:

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either—

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b)the identity of the defendant; and

(c)if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

30. The leading case on this section is *Haward and others v Fawcetts (a firm) and another* [2006] 1 WLR 682 (HL). Adopting the headnote of the report, the House of Lords clarified that "knowledge" for the purposes of section 14A meant knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ. Knowledge that damage was attributable in whole or in part to the acts or omissions of the defendant meant knowledge in broad terms of the facts on which the claimant's complaint was based and of the defendant's acts or omissions and knowing that there was a real possibility that those acts or omissions had been a cause of the damage.

31. In *Jacobs v Sesame Ltd* [2015] PNLR 6 at 173, the Court of Appeal emphasised that the starting point of any enquiry as to whether a claimant could rely on section 14A was to identify the damage in respect of which it claimed since the "knowledge" referred to in the section was knowledge of the material facts about the damage in respect of which damages were claimed. In the present case, I have already referred to the Claimant's case that the damage was it having entered into a policy which, in retrospect, it says it would not have done but for the issue of the Certificate of Approval.

The rival contentions

32. In brief, Mr Sareen submits as follows by way of opening. By June 2013, the Claimant had received the March letter from Morley. That letter identified that there was only one

horizontal expansion joint in the render and, in so reporting, made clear that this was an unsuitable frequency. It expressed the view that cracking was caused by thermal movement which expansion joints would be expected to address. Also, in June 2013, the Claimant knew that a claim had been made by Oldham HA under the policy in respect of cracking which had been apparent since, at the latest, January 2013. Accordingly, since an insufficiency of movement joints is one of the matters complained of against the Second Defendant, the Claimant had acquired the relevant knowledge by June 2013. That is because, by that date, it knew that back in 2004, it had taken on an additional unwanted risk of issuing a policy which would respond to a defect in the render; it knew that damage was attributable to an act or omission alleged to constitute negligence, namely the issue of the unqualified Certificate of Approval and it also knew that the additional unwanted risk had actually manifested in a claim under the policy.

33. Alternatively, even if the Claimant did not have sufficient knowledge by that date, it did so by 12 September 2013 when it received a copy of the August letter from Morley. That letter identified further complaints including defects in the mesh and advised that the entire render system would have to be replaced on the southern elevation. That date was (just) over three years before the Claim Form was issued.

34. Accordingly, by one or other of those dates, the Claimant knew all the material facts and other facts required by section 14A(7) and (8). It has no realistic prospect of establishing that the claim is not time barred by section 14A(4)(b). Mr Sareen concluded by suggesting that there was no other compelling reason why the case should be disposed of at trial.

35. Summarising briefly, Ms Laney responded as follows. Whilst the March letter identified the cause of cracking as thermal movement it did not suggest that defective workmanship was the underlying cause. On the contrary, the author did not see it as being a structural problem at all. Rather, an insurer reading this letter would understand it to be saying only that the cause of cracking was attributable to a natural consequence of the weather. Even if someone with construction experience might read the letter differently, an insurer could be understood to read it in the way contended for by Ms Laney. The author having expressed the view that cracking was due to environmental factors, the March letter also said that further investigations were required. In short, the March letter did not provide any basis upon which an insurer could have concluded that it had suffered relevant damage attributable to the issue of the Second Defendant's Certificate of Approval.

36. In respect of the August letter, the cause of cracking remained attributable to seasonal temperature fluctuations. There was no mention of a lack of movement joints which, if anything, implied that any concern previously expressed about that in the March letter was no longer expressed. Whilst Morley noted that an additional layer of mesh would have been "best practice" that is not to be read by an insurer as a criticism of Insulclad's workmanship because he was not saying it was contrary to "accepted practice" (that being the standard applicable for the issue of the Certificate of Approval) if only one layer of mesh had been provided in the relevant locations. Therefore, an insurer could reasonably read the August letter as saying that the cause of cracking may be non-culpable workmanship (or design) which falls short of best practice but which is not contrary to accepted practice. A fortuitous event of that type which then causes Major Damage would give rise to a claim under the policy but would not have meant that the Second Defendant had been at fault for issuing the Certificate of Approval.

37. If I were to conclude, contrary to the Claimant's case, that the March letter was sufficient to constitute knowledge for the purposes of the Act, the August letter stopped time running because it effectively put the Claimant's mind at rest and time therefore stopped. Ms Laney was unable to provide any authority for the proposition that once time had started running under section 14A(4)(b) it could then be stopped.

38. On Ms Laney's case, the Claimant only acquired the relevant knowledge when it received the Watts report in May 2015, which was less than three years before the issue of the Claim Form. She submitted that the facts of both *Hayward v Fawcetts* and *Jacobs v Sesame Ltd* were far removed from those in the present case. Insofar as necessary Ms Laney relied on *Marston v British Railways Board* [1976] ICR 125.

39. If I were against the Claimant on prospects of success under CPR Part 24 (a)(i), Ms Laney did not identify any other compelling reason why the case should be disposed of at trial.

40. In reply, Mr Sareen disputed the Claimant's construction of both letters. He said it was not necessary for the Claimant to know what caused the damage to the render. The damage in respect of which the Claimant sued was the unwanted additional risk. It was also not relevant for the Claimant to know whether or not the render complied with the specification. Mr Sareen submitted that if Parliament had intended to provide for time to stop running under section 14A(4)(b) it would have expressly so provided. He also challenged the submission that the August letter could have satisfied any concerns that the Claimant may previously have had on reading the March letter.

Decision

41. The issue turns on the appropriate conclusions which can be drawn from the information which, it is common ground, was provided to the Claimant in writing. I agree that no factual or expert evidence is needed for these purposes.

42. I do not accept Ms Laney's submission that the principles of law in both *Hayward v Fawcetts* and *Jacobs v Sesame Ltd* should be disapplied or distinguished in the present case simply because they arise in a different factual setting. Both cases concern section 14A and fall to be applied whenever that section is relied on, as it is here by the Claimant. Whilst I accept Ms Laney's point that it does not inevitably follow from the fact that Oldham HA submitted a claim under the policy that the Second Defendant had been negligent, nonetheless the existence of the claim made under the policy necessarily meant that Oldham HA was contending that there was an Inherent Defect in the works (i.e. that the cracking was caused by a fault, defect, error or omission in the design, specification, materials or workmanship of the Insured Works) which had caused Major Damage. No claim would have been permissible if the cause was solely due to the climactic effect of the seasons in the absence of fault, defect, error or omission.

43. I agree that the relevant damage about which the Claimant must have knowledge is the additional unwanted risk which it undertook. Knowledge of the cause of damage to the render is not, in itself, relevant.

44. In my judgment, the March letter should be construed in the way contended for by Mr Sareen. Morley wrote of "only" one horizontal expansion joint and identified "an absence of suitable frequency of expansion joints". It is obvious that those remarks must be read as criticisms about the number of expansion or movement joints which had been installed. It makes no difference whether that shortfall is the result of a design issue or a workmanship issue

as either would have given rise to a claim under the policy. Either way, Morley was saying that there were not enough there. It was also clear that the lack of sufficient joints was directly connected to the cracking because both features were described in the very same sentence. No particular expertise is needed to see that. Whilst thermal movement over the seasons is the product of nature, it is to my mind obvious that Morley was linking that seasonal movement to a lack of expansion joints. Ms Laney submits that I should read the letter as blaming Mother Nature for the cracking but that cannot be right. By analogy it would be futile to blame wet weather for causing water ingress into a home which has been built with a defective roof. I also reject the submission that the Claimant could have drawn comfort from the fact that Morley was excluding any structural problem. In my view, it is quite clear that Morley was making the point that the cracking in the render, which was manifest, was not a structural problem so far as the original concrete clad building was concerned. The word "this" is a reference to the existing pre-cast cladding panels whereas the policy covered the render. Armed with the policy, the Claimant could see that the deterioration in the render coat and, in the longer term, its fixings, could qualify as a Major Defect under the policy.

45. Ms Laney submitted that I should construe the letter as it would have been understood by a lay insurer, such as the Claimant, engaged in the business of providing policies of latent defect policies of insurance to the construction industry. I agree. But, beyond that, the letter does not contain any information which requires particularly specialist knowledge in order to understand it. The Claimant's contention that the letter makes no suggestion of defective work (whether in its design or execution) is hopeless.

46. Although Morley recommended further inspection, I do not regard the views expressed in the letter as in any way tentative or subject to qualification. I reject the submission that the letter should be read as saying that cracking in the render may be due to the lack of movement joints but that an inspection is needed to determine this. The inspection was merely suggested in order to be "more categoric" than Morley already was and was to identify the make-up of the render, the fixings and the original structure. Opening up would not, of course, bear on the number of movement joints. The insufficiency of those, if that was the appropriate description, was always patent. Therefore, the conclusion that the cause of cracking was a lack of movement joints did not require an inspection to support it.

47. Mr Sareen pointed out that the defect pleaded at paragraph 46(c) of the Particulars of Claim is that a reasonably competent surveyor would know that movement joints should be provided to coincide with the number of concrete panels behind so that they can expand and contract in changing weather conditions. Since "only" one horizontal expansion joint had been provided, it should have been obvious, or at least broadly indicative, that it was appropriate to start asking questions as to the sufficiency because no-one could expect the existing building elevation to have been constructed of only two huge panels, with one dividing movement joint.

48. I therefore conclude that the Claimant had requisite, broad knowledge in June 2013 when it received the March letter concluding that there was an insufficiency of movement joints. Whether that insufficiency was due to workmanship or design, it was a patent matter of complaint which, by its nature, would have been apparent to anyone considering the issue of a Certificate of Approval. By then the Claimant also knew that a claim had been made by the insured under the policy. I agree with Mr Sareen that viewed on a broad basis, at this point, the Claimant had sufficient information to be asking questions as to why the Certificate of Approval had been issued.

49. I do not accept the pleaded contention that, until receipt of the Watts report, the Claimant was unaware that it had suffered any damage. It follows that the criteria in *Haward v Fawcett* are met. The Claimant knew that it was the Second Defendant who had issued the Certificate. It did not need to have known it had a worthwhile cause of action against the Second Defendant but it did know enough for it to be reasonable to undertake preliminary investigations into that question further. Against the background of the cracking, the diagnosis of insufficiently frequent horizontal expansion joints was sufficient to reasonably cause the Claimant to start asking questions about the reliability of the Certificate of Approval and, thus, the potential for it having undertaken an inappropriate level of risk.

50. As is clear from section 14(A)(5), the relevant knowledge is that required to bring "an" action for damages. The damage in this case is the issue of a policy with an additional unwanted risk. I accept the submission that the existence of any one defect (if caused by the Second Defendant's negligence) gives rise to that risk and qualifies for this purpose. A greater number of defects would potentially have increased the degree or extent of additional unwanted risk but that does not change the nature of the damage or the need, if appropriate, to bring an action in respect of it. For the purposes of section 14A, it is therefore irrelevant that the March letter contained no information about the mesh or any other matter than the number of horizontal joints.

51. Even if my earlier conclusion was wrong, I would accept Mr Sareen's further submission that the Claimant had requisite, broad knowledge when it received the August letter on 12 September 2013. The letter contains no suggestion that Morley had changed its mind about the insufficiency of joints. Quite the contrary. The cause of failure was described as movement between the various elements which comprised the building fabric. Sufficient expansion joints would have prevented this. But Morley also identified other matters of complaint too. The lack of additional mesh across the joints was the subject of criticism. I reject the submission that the author was deliberately drawing a distinction between a non-culpable failure to follow "best practice" and a breach of "accepted practice". In my view, when read in its full context, including the later reference to a "lack" of additional reinforcing mesh, it is clear that the author drew no such distinction and was, instead, criticising the installation. He made clear that the lack of a second mesh had lowered still further the resistance of the insulation boards to movement.

52. The letter expressed no doubts and described the conclusions as "conclusive". The nature of the identified defects was such as to warrant whole stripping off and replacement of the southern elevations together with the returns to the western and eastern elevations where there was cracking. It is inherently unlikely that remedial works on such a scale would be required merely because of a failure to follow best practice, in the sense described by Ms Laney, rather than as a result of a failure to adhere to accepted practice.

53. Once again, the criteria in *Haward v Fawcett* have been met. The Claimant knew that it was the Second Defendant who had issued the Certificate. It did not need to have known it had a worthwhile cause of action against the Second Defendant but this letter provided sufficient information for it to be reasonable to undertake preliminary investigations into that question further. The August letter contained sufficient information to reasonably cause the Claimant to start asking questions about the reliability of the Certificate of Approval and, thus, the potential for it having undertaken an inappropriate level of risk.

54. I further reject Ms Laney's case that the August letter could properly be read as providing any form of comfort to the Claimant. In my judgment, it does not supersede the March letter but is complimentary to it. In those circumstances, the undecided point of law about time stopping does not arise. The Claimant had acquired relevant knowledge in June 2013 and continued to acquire further relevant knowledge, sufficient in itself to qualify, in September 2013. For what it is worth, although the submissions on the point were pretty sparse, I would be most surprised if Parliament intended that once relevant knowledge had been acquired under the Act, time could thereafter stop in particular circumstances. The section does not appear to contemplate any such cessation. By contrast, the position in respect of disability etc. is treated differently.

55. For completeness, I should mention that, in the mistaken belief that the Second Defendant was solely relying on Oldham HA's notification of a claim under the policy as sufficient knowledge, the Claimant relied on s.14A(10). On this hypothesis, it was said by Ms Laney that the Claimant acted reasonably in procuring and relying on the Morley investigations. As set out above, the Second Defendant relied on the knowledge acquired by virtue of the Morley letters, against a background in which a claim under the policy had already been made on account of the cracking.

56. Finally, I did not gain any assistance from *Marston v British Railways Board* [2976] ICR 124 the facts of which were very different to those in this case. It concerned the application of an earlier equivalent of s.14(3) of the Act. Ms Laney contended that it shows time should only run from the point in time at which a claimant received "correct" or "full" expert advice that it has suffered relevant damage. On Ms Laney's case, that only occurred upon the issue of the Watts report. In my judgment, Mr Sareen is right to say that the case is not authority for the proposition for which Ms Laney contends. If it did, it would be contrary to *Haward v Fawcetts*. For example, Lord Walker of Gestingthorpe said at [57]:

> *"As numerous reported cases show, the starting date may occur at a time when a claimant's knowledge about his claim is far from complete. Inquiries and investigations may have to be made, and expert advice may have to be obtained as to how the claim should be pleaded, and how special damages should be quantified. A claimant may have the requisite knowledge (as Slade LJ said in* Wilkinson v Ancliff (BLT) Ltd [1986] 1 WLR 1352 , *1365): "even though he may not yet have the knowledge sufficient to enable him or his legal advisers to draft a fully and comprehensively particularised statement of claim."*

57. For all of these reasons, it follows that I should grant summary judgment in favour of the Second Defendant. Since the Claimant's claim is wholly time barred, the appropriate order is that the claim be dismissed.

Strike out

58. CPR Part 3.4(2) provides:

> *"The court may strike out a statement of case if it appears to the court-*
>
> *(a) That the statement of case discloses no reasonable grounds for bringing or defending the claim"*

59. The Second Defendant contends that the pleading contains no allegation that any negligence by it has caused the Claimant any loss and damage. Paragraph 46 of the Particulars of Claim identifies the failures by Insulclad to adhere to the applicable specifications.

Paragraph 47 pleads the allegations of negligence against the First Defendant. Paragraph 48 pleads the allegations of negligence against the Second Defendant. Then, paragraph 49 of the Particulars of Claim, headed Loss and Damage, says this:

> *"Had the Defendants and each of them acted properly and with reasonable skill and care, the Claimant would have been aware of the defects of workmanship and would not have issued the Policy, either at all or upon the terms which it did. The Claimant has accordingly suffered damage in that it has incurred liability to Oldham on terms which it would not have accepted had the Defendant acted properly and with reasonable skill and care. Had the matters identified at paragraph 46 above been drawn to [the Claimant's] attention, it would have amended policy terms such that the policy would not respond to damage caused by or arising out of those matters."*

60. Mr Sareen submits that "each of them" in the first line must be read as referring to both Defendants together so that the Claimant has only pleaded causation arising in circumstances where both are liable. There is, he says, no plea of causation directed exclusively at the Second Defendant. He submits that the final sentence, referring to paragraph 46, is only a plea on causation which is directed to the First Defendant because paragraph 47(j) cross refers to paragraph 46, whereas paragraph 48 makes no reference to the defects in paragraph 46.

61. I do not read the plea in this way. In my view, the first sentence of paragraph 49 should be read as saying, amongst other things, that the Claimant would not have issued the policy if either one of the Defendants had properly performed its obligations. Accordingly, in that sense there is a sufficient, albeit basic, plea of causation.

62. However, there is to my mind greater force in Mr Sareen's underlying point that the Claimant's pleading never really grapples with the substance of how, in reality, it says it would have acted differently if each of the allegations of breach made against the Second Defendant had not occurred. None of the breaches alleged against the Second Defendant consist of a failure to bring the defects identified in paragraph 46 to the Claimant's attention. There is no concise statement of facts, supported by a statement of truth, which connects the breaches which are alleged and the different course of action which the Claimant says it would have taken.

63. Ms Laney did not accept this was a fair criticism but contended that, if further detail was required, it could be dealt with by an amendment. The Claimant did not come armed with a proposed amendment as it might have done if it wanted to defeat this application.

64. As I have said, I do consider that the Claimant's claim requires further elaboration. But, given that there is a basic plea on causation, it would not be appropriate to strike the action out on that ground. Since I have dismissed the Claimant's claim, this alternative application is formally redundant. Had I not granted summary judgment, I would have made an order that the Claimant provides Further Information pursuant to CPR Part 18 in this respect.