



Neutral Citation Number: [2024] EWHC 1510 (TCC)

Case No: HT-2023-000006

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 18 June 2024

Before:

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

A & V BUILDING SOLUTION LIMITED
Claimant

- and -

J & B HOPKINS LIMITED
Defendant

Alex Paduraru (a director of the Defendant Company) for the **Claimant**.
James Frampton (instructed by **Hawkswell Kilvington**) for the **Defendant**

Hearing dates: 14, 15, 16, 17 and 20 May 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 18th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Roger ter Haar KC

Mr Roger ter Haar KC :

1. In this action and an associated action, I have previously handed down four judgments:
 - (1) On 15 February 2023: [2023] EWHC 301 (TCC)¹;
 - (2) On 16 June 2023: [2023] EWHC 1483 (TCC)²;
 - (3) On 6 October 2023: [2023] EWHC 2475 (TCC)³;
 - (4) On 17 October 2023: [2023] EWHC 2576 (TCC)⁴
2. In this judgment, as in my previous judgments, I refer to J & B Hopkins Ltd as “J&BH” and to A & V Building Solution Limited as “A & V”.
3. The previous judgments concerned enforcement of an adjudicator’s award and a number of interlocutory matters.
4. This judgment is the judgment following the trial of the disputes between the Parties.

Representation

5. The hearing before me was an in person hearing.
6. As I have set out above, there have been a number of previous judgments following hearings (previously all remote) on interlocutory and other matters.
7. At none of those hearings was A & V legally represented.
8. J&BH has been represented at all the hearings before me by Mr James Frampton, a member of the English Bar.
9. At the trial of this action, A & V has been represented by Mr. Paduraru, a director and shareholder in A & V. He was accompanied by Mr. Judd, who is a surveyor, but not an officer of, or shareholder in, A & V.
10. On a previous occasion, Mr. Frampton, for J&BH, drew my attention to the helpful guidance in the judgment of Hildyard J. in *Bank St Petersburg v Arkhangelsky (No. 2)*⁵ at paragraphs [73] to [76]:

¹ TB 4292

² TB 4316

³ TB 4416

⁴ TB 4540

⁵ [2015] EWHC 2997 (Ch.); [2016] 1 WLR 1081

73. After I had completed most of this judgment in draft, I received from the Claimants' Counsel a Note I had requested on a further issue which arose in the course of the hearing as to the Court's power to grant a right of audience on an ad hoc basis to a party's McKenzie friend when that party is a body corporate rather than an individual acting in person.

74. Though no authority has been found, that Note (for which I am very grateful) helpfully sets out the applicable framework as regards McKenzie friends. It suggests the conclusion that, given that CPR 39.6 does now allow an employee of a body corporate duly authorised to do so by it to appear at trial on its behalf with the permission of the Court, the Court does have jurisdiction to allow a body corporate the assistance of a McKenzie friend, and in appropriate (and exceptional) circumstances to allow that McKenzie friend a right of audience on an ad hoc basis. The Note also identifies a case where it appears that the Court assumed that to be so: namely, *Tracto Teknik GmbH v LKL International* [2003] EWHC 1563 (Ch);

75. I agree that the Court has such jurisdiction, as part of its power (in the absence of specific restriction) to regulate its own proceedings and, in circumstances where otherwise the body corporate would have no-one capable of speaking for it, to prevent a failure in the administration of justice (and see also *A.L.I. Finance Ltd v Havelet Ltd* [1992] 1 WLR 455 at 460-461). I agree further that the Legal Services Act 2007 at Schedule 3 assumes and recognises such jurisdiction (as did its predecessor, the Courts and Legal Services Act 1990) even if it does not expressly confer it. Thirdly, I consider that since the jurisdiction is inherent, neither Rule 39.6 nor Practice Direction 39A is an exclusive and complete code, so that the Court may give permission in exceptional cases even where neither that rule nor the Practice Direction (which prescribes the form of the evidence of authority which must be provided where a company or corporation is to be represented by an employee) has been complied with.

76. In that latter context the Note provided to me very properly referred me to two cases in the Court of Appeal which might be read as having assumed the contrary (that is, that CPR 39.6 and PD 39A provide a complete code): see *Watson v Bluemoor Properties Ltd* [2003] BCC 382 (particularly paragraphs 7 and 11-15) and *Avinue Ltd v Sunrule Ltd* [2004] 1 WLR 634 (particularly at paragraph 25). However, it does not seem to me that in either case the issue whether the Court retains jurisdiction in exceptional circumstances to permit someone other than a director or employee to represent a body corporate was directly addressed. I note that it does not appear

that the A.L.I. Finance case was cited in either of the two cases. In my view, there is nothing in either of those cases which binds me to hold that the jurisdiction of the Court, as propounded in the A.L.I. Finance case at a time before the CPR, has been restricted by rules intended to introduce, not less but greater, flexibility. I also consider that it is unlikely that the jurisdiction should be so limited in the case of a body corporate, but unconfined in the case of a litigant who is an individual.

11. During this trial, A & V has been principally represented by Mr Paduraru but I permitted Mr. Judd to cross-examine J&BH's accountancy expert and to make closing submissions on A&V's behalf, as I considered this to be in the interests of justice.
12. Both Mr Paduraru and Mr Judd acted in a careful and measured way.
13. I pay tribute also to Mr Frampton, who dealt with the difficulties presented by this method of representation with courtesy and efficiency.

Summary of the Claim

14. The claim relates to a new student accommodation development, known as the Moulsecomb Campus, for the University of Brighton ("the Project").
15. The Project comprised two podiums and five towers.
16. Bouygues UK Ltd ("BYUK") was the main contractor.
17. BYUK engaged J&BH as its Main Contractor for the project by a sub-contract dated 30 September 2019.
18. By a sub-sub-contract agreement dated 18 December 2019 (Sub-Contract Order No. S4/10513) ("the Sub-Contract"), J&BH engaged A & V to carry out plumbing works for the Project.
19. The Sub-Contract Works were labour only. Free issue materials were to be supplied by J&BH.
20. Whilst the Sub-Contract Works did not initially include works to Tower 3, works to that Tower were added by a variation, so that A & V's works were to Towers 1, 2 and 3 and to Podiums 1 and 2.
21. After the addition of Tower 3, the sub-contract sum was £447,800.
22. The plumbing installation works for Towers 4 and 5 were carried out by a different sub-sub-contract, Watertight.
23. A & V left the Project in March 2021, at a time when it accepts the sub-contract works were incomplete.
24. This claim involves the taking of a final account under the sub-contract requiring the determination of

- (a) The value of A & V's works at the time it left the Project
- (b) Claims by A & V for losses allegedly suffered before it left the Project;
- (c) Competing claims between the Parties as to the financial consequences following A & V's decision to abandon the sub-contract works.

Summary of Account

25. The Parties' rival positions are as follows:

Item	A & V	J&BH	Difference
Measured Works	£413,940.00	£338,683.35	£75,256.65
Variations	£67,200.00	£39,228.00	£27,972.00
A & V Breaches and Losses	£645,100.45	£0.00	£645,100.45
JBH Contra Charges	£0.00	(£88,069.61)	£88,069.61
Mr Blizzard Adjudicator Fees	£17,400	£0.00	£17,400.00
Mr Smith Adjudicator Fees	(£13,962.00)	(£13,962.00)	£0.00
Enforcement proceedings costs	(£20,822.00)	(£20,822.00)	£0.00
Paid to date	(£364,909.64)	(£364,909.64)	£0.00
Total	£743,946.81	(£109,851.90)	£853,798.71

Contractual Provisions

26. The principal relevant sub-contract terms are as follows:

Clause 4.1: The Sub-Contractor shall supply all labour, supervision, administration and plant and equipment (including any storage on site required) necessary for the Sub-Contractor to carry out the Sub-Contract Works in accordance with the Sub-Contract.

Clause 4.7: The Sub-Contractor shall advise J & B Hopkins when it requires the delivery (whether to Site or the Sub-Contractor's premises) of Free Issue Materials. The Sub-Contractor shall retain all delivery/advice/collection notes for all such items provided by J & B Hopkins and shall return such documents to J & B Hopkins as directed by J & B Hopkins. Free Issue Materials not incorporated into the Sub-Contract Works and/or used in the carrying out of the Sub-Contract Works shall be returned to J & B Hopkins immediately upon Practical Completion.

Clause 4.8: Free Issue Material shall become the responsibility of the Sub-Contractor upon delivery to it either at the Site or the Sub-Contractor's premises. The Sub-Contractor shall assume all risks and insurance obligations in Free Issue Materials upon such delivery to it until Practical Completion. Title in Free Issue Materials shall be retained at all times by J & B Hopkins.

Clause 4.9: The Sub-Contractor shall satisfy itself in good and sufficient time before commencing any part of the Sub-Contract Works as to the position, dimensions and suitability of any previous work, which might affect the Sub-Contract Works and shall promptly advise J & B Hopkins in writing if any such previous work is out of position, wrongly dimensioned or in any other way unsuitable. The Sub-Contractor shall not be entitled to any adjustment of the Sub-Contract Sum or to an extension of time in respect of any discrepancy in position or dimension or other unsuitability of any such previous work unless the Sub-Contractor shall have advised J & B Hopkins of the same in accordance with this clause.

Clause 4.10: The Sub-Contractor shall be liable for the cost of replacement of any items of plant and equipment, Free Issue Material and materials and goods (whether Free Issue Materials and/or materials and goods are incorporated into the Sub-Contract Works or not) stolen or damaged whilst on site. All costs caused to J & B Hopkins as a result of such theft or damage shall be recovered as a debt due from the Sub-Contractor under this Sub-Contract.

Clause 7.1: The Sub-Contractor shall carry out and complete the Sub-Contract Works in conformity with the requirements of these conditions plus the Agreement and in such a manner as to avoid hindrance to the progress of others.

Clause 7.2: The Sub-Contractor shall, as soon as works are commenced on Site, proceed regularly and diligently with the execution of the sub-Contract Works in accordance with the construction programme and in accordance with progress of the works.

Any loss or expense caused to J & B Hopkins by the Sub-Contractor's failure to comply with this clause shall be recoverable as a debt due from the Sub-Contractor or by way of set-off from sums due to the Sub-Contractor whether under this Sub-Contract or otherwise.

Clause 7.4: If in the opinion of the Contractor, the Sub-Contract works are failing to progress in line with the Contract Programme requirements, then after due notice of 7 days being given, and if resultant actions are not undertaken, it shall be J & B Hopkins's prerogative to supplement the onsite labour requirements for the Sub-Contractor recovering all resultant costs as a deduction from the Sub-Contractor account.

Clause 8.1: J & B Hopkins may instruct a variation to the Sub-Contractor's access date to the Site as may be set out in the Agreement by giving notice in writing to the Sub-Contractor at any time up to 5 business days prior to such date. The Sub-Contractor shall not be entitled to an increase in the Sub-Contract Sum and/or loss and expense as a result of or in connection with such variation.

Clause 8.2: J & B Hopkins may, at any time prior to Principal Practical Completion, by notice in writing require the Sub-Contractor to carry out a variation to the Sub-Contract Works. Notwithstanding anything to the contrary elsewhere in this Sub-Contract, no variation to the Sub-Contract Works shall be made necessary by reason of negligence, omission or default of the Sub-Contractor, its servants, agents and suppliers and in such event the Sub-Contractor shall not be entitled to any increase in the Sub-Contract Sum or any extension of time to the Completion Date.

Clause 8.3: The Sub-Contractor shall implement a variation immediately upon receiving notice of the same and the Sub-Contractor shall provide a quotation for the variation to J & B Hopkins within five days from receipt of the notice. A failure by the Sub-Contractor to provide a quotation pursuant to this clause and/or if such quotation is not agreed the Sub-Contractor shall not be excused from implementing the variation and in such event the Sub-Contractor shall be paid a fair and reasonable price for the variation.

Clause 8.4: The Sub-Contractor's quotation shall comprise the following:

- (1) The value of the adjustment to the Sub-Contract Sum for performing the additional work supported by all necessary calculations for reference, where relevant, to the quantified schedule of rates in support of the Sub-Contractor's tender and including, where appropriate, allowance for any adjustment of preliminary items;
- (2) Any adjustment to the period specified in the Sub-Contract Order and/or the Agreement and/or an agreed programme for the

completion of the Sub-Contract Works to the extent that such adjustment is not included in any other extension of time which has been granted to the Sub-Contractor, or included in any other quotation accepted by J & B Hopkins in accordance with this Clause 8.0;

- (3) The value of the adjustment to the Sub-Contract Sum for any delay and/or disruption likely to be caused to the regular progress and/or completion of the Sub-Contract Works by reason of the instruction to carry out the additional work;
- (4) The method of carrying out the additional work; and
- (5) Any other information required by J & B Hopkins.

Clause 8.5: Within 7 days of J & B Hopkins receipt of the Sub-Contractor's quotation, J & B Hopkins shall by written notice to the Sub-Contractor state whether it accepts the Sub-Contractor's quotation. The acceptance by J & B Hopkins of any quotation provided by the Sub-Contractor in accordance with Clause 8.0 shall be in full and final settlement of the matters and process contained in the Sub-Contractor's quotation and the Sub-Contractor shall not be entitled to any further change to the Sub-Contract Sum and/or any further extension of time to the Completion Date other than as set out in the quotation accepted by J & B Hopkins.

Clause 8.6: If J & B Hopkins does not accept the Sub-Contractor's quotation, J & B Hopkins shall by written notice to the Sub-Contractor either direct that the additional work shall be performed (which, after completion of the same by the Sub-Contractor, shall be measured and valued by J & B Hopkins by reference to the rates specified in Appendix 8 for the like or analogous work but if there are no such rates J & B Hopkins shall be entitled at its complete discretion to make up the Sub-Contractor's tender and apply those assessed rates), or direct that the additional work shall not be performed.

Clause 8.8: If J & B Hopkins accepts the Sub-Contractor's estimate submitted under clause 8.7, J & B Hopkins will issue a variation notice setting out the agreed increase or decrease in the Sub-Contract Sum and/or the agreed extension of time to be granted. Such variation shall be entirely conclusive as to the effect of such variation. If the estimate submitted under clause 8.7 is not agreed, J & B Hopkins may nevertheless issue the variation notice and the Sub-Contractor shall be paid such sum and granted such extension of time as shall be fair and reasonable in all the circumstances. If a variation notice is issued, the Sub-Contractor shall thereupon proceed to comply immediately with such notice.

Clause 8.9: Notwithstanding anything in this clause 8.0, J & B Hopkins shall not be obliged to make payment to the Sub-Contractor for carrying out any variation to the Sub-Contract Works unless J & B

Hopkins has instructed the Sub-Contractor to carry out such variation in writing.

Clause 8.10: The Sub-Contractor shall submit full and proper substantiation and such information as is required by J & B Hopkins and to J & B Hopkins satisfaction, in support of any **Purport]** to either variation works or an additional entitlement. This requirement shall be a condition precedent to payment for the same. This information provided by the Sub-Contractor shall clearly identify the source and basis of any purport to either variation works or any additional entitlement.

A fully detailed breakdown of all calculations and rates including, but not limited to, time sheets and material invoices, shall be provided by the Sub-Contractor.

Clause 8.11: Variation means a written instructed addition, substitution, or omission of work issued by the Contractor only. No alteration or modification to the design, quality and quantity of the Sub-Contract Works arising purely from the development of detailed design by the Sub-Contractor or from the co-ordination of the design or of the Sub-Contract Works with the works of other trades to avoid any spatial conflict or obstructions to access shall be construed or regarded as Variations.

Clause 9.5: The Contractor may not later than five days after the due date in Appendix 6, give a notice (“Payment Notice”) to the Sub-Contractor specifying:

- (1) The amount the Contractor considers to be due to the Sub-Contractor showing the basis on which that sum has been calculated, less retention, or such other amount as specified in Appendix 6, less any money previously paid;
- (2) In relation to a Payment Notice, it is immaterial that the amount then considered to be due may be zero.

Clause 9.8: Rules governing retention deducted and retained by the Contractor are as follows:

Prior to the First Retention Release Date the Contractor will retain the percentage as stated in Appendix 6.

50% of the retention amount held by the Contractor shall be released on the First Retention Release Date.

The remainder of the retention amount held by the Contractor shall be released on the Second Retention Release Date.

Clause 10.3: The Sub-Contractor shall indemnify J & B Hopkins in full against all liability, loss or damage (including costs, expenses and legal expenses) to persons or property real or personal, arising out of

the carrying out of the Sub-Contract Works except where and to the extent such liability, loss or expense is caused by an act or omission of J & B Hopkins.

Clause 10.4: The Sub-Contractor warrants that it will carry out and complete the Sub-Contract Works in such a way so as not to directly or indirectly cause J & B Hopkins to be in breach of any provision of the Principal Contract and/or any other Contract made by J & B Hopkins in connection with the Works or incur any other liability thereunder. The Sub-Contractor hereby acknowledges that any breach or default by it of the Sub-Contract may result in J & B Hopkins committing breaches and/or becoming liable in damages under the Principal Contract and/or any other Contract made by J & B Hopkins in connection with the Works and may occasion further loss and/or expense to J & B Hopkins in connection with the Works and J & B Hopkins and the Sub-Contractor hereby acknowledge that any such damages, loss and expense are hereby agreed to be within the contemplation of the parties as being probable results of any such breach and/or default.

Clause 11.1: J & B Hopkins shall have the right to suspend performance of the Sub-Contract Works by the Sub-Contractor for any period J & B Hopkins requires upon giving written notice to the Sub-Contractor who shall forthwith comply with such notice. J & B Hopkins may end suspension of the Sub-Contract Works by giving written notice to the Sub-Contractor and the Sub-Contractor shall forthwith resume performance of the Sub-Contract Works

Clause 11.2: The Sub-Contractor may suspend performance of its obligations under this Sub-Contract where a sum due to the Sub-Contractor is not paid pursuant to clause 9. Such right to suspend shall not be exercised until the Sub-Contractor has given 14 days' notice in writing to J & B Hopkins of its intention to suspend performance and stating the ground or grounds.

Clause 12: If J & B Hopkins fails to make payment to the Sub-Contractor of any sum which is due to the Sub-Contractor under this Sub-Contract by the final date for payment of that sum, J & B Hopkins shall pay to the Sub-Contractor in addition to the amount not paid simple interest thereon for the period from the final date for payment to the date payment is made. The rate of interest shall be 2% over the Base Rate of the Bank of England current at the date of J & B Hopkins default. The Sub-Contractor acknowledges that such rate is a substantial remedy for late payment (as defined in the Late Payment of Commercial Debts (Interest) Act 1998).

Clause 13.1: If the Sub-Contractor fails to complete the sub-Contract Works by the Completion Date it shall pay or allow to J & B Hopkins as a debt from the Sub-Contractor or by way of set-off from sums due to the Sub-Contractor under this Sub-Contract a sum equivalent to any loss or damage suffered by and/or anticipated to be suffered by, J & B

Hopkins and caused by such failure including, but not limited to, J & B overhead charges and supervision and liquidation damages payable by J & B Hopkins under the Principal Contract. J & B Hopkins is hereby authorised to deduct or set off any amount payable under this clause from any payment which may at any time be due or have become due to the Sub-Contractor whether under the Sub-Contract or otherwise.

Clause 13.2: If the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works by:

- (1) Force Majeure; or
- (2) The order of any variation to the Sub-Contract Works under clause 8; or
- (3) Any breach of the Sub-Contract or act of prevention by J & B Hopkins; or
- (4) Suspension of the Sub-Contract Works in accordance with clause 11

then the Sub-Contractor shall be entitled to such extension of time to the Completion Date as J & B Hopkins may determine acting reasonably provided always that any such extension of time shall not exceed any extensions of time to which J & B Hopkins is properly entitled under the Principal Contract.

Clause 13.3: It shall be a condition precedent to the Sub-Contractor being granted an extension of time pursuant to clause 13.2 that the Sub-Contractor shall notify J & B Hopkins in writing within 14 days of such event occurring that it is or may be prevented from completing the Sub-Contract Works by the Completion Date. Except for suspension of the Sub-Contract Works pursuant to clause 11.2, a failure to comply with this clause shall prevent the Sub-Contractor from being entitled to an extension of time to the Completion Date.

Clause 13.4: The Sub-Contractor shall constantly use its best endeavours to prevent or minimise any delay in the progress of the whole or any part of the Sub-Contract Works.

Clause 15.1: If the Sub-Contractor:

- (1) Fails to proceed regularly and diligently with the Sub-Contract Works after being required in writing so to do; or
- (2) Without reasonable cause suspends the carrying out of the Sub-Contract Works; or
- (3) Refuses or persistently neglects after notice in writing from J & B Hopkins to remove defective work or improper materials; or
- (4) Becomes insolvent as set out in clause 15.2; or

- (5) Fails to comply with any applicable legislation; or
- (6) Is in breach of this Sub-Contract

then, without prejudice to any other rights and remedies it may have J & B Hopkins may except in the case of sub-clause (4), by written notice (the “Notice”) to the Sub-Contractor require the Sub-Contractor to remedy such failing and/or breach within 7 days from the date of the Notice. In the case of sub-clause (4), or if the Sub-Contractor fails to remedy its failing and/or breach within 7 days from the date of the Notice, J & B Hopkins may forthwith determine the Sub-Contractor’s employment under the Sub-Contract and may elect to employ a third party to complete the Sub-Contract Works or complete the Sub-Contract Works itself.

Clause 20.3: The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings or [by] agreement.

Clause 20.4(5): The Adjudicator’s decision shall be binding until the dispute is finally determined by the High Court or by agreement between the Parties.

Clause 22.1: All notices under or in respect of this Agreement shall be deemed to be duly given or made when sent by recorded delivery to the address set out in the Agreement. All other communication made by e-mail or facsimile as set out in the Agreement shall be deemed given when sent.

Clause 23.1: No waiver by J & B Hopkins of any breach of the Sub-Contract by the Sub-Contractor shall be a waiver of any subsequent breach of the same or of any other provision of the Sub-Contract. No failure by J & B Hopkins to exercise any right or remedy arising under the Sub-Contract or at law shall be a waiver of its right to exercise such rights arising subsequently.

Appendix 2

Scope of Sub-Contract Works.

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Defined Scope of Works

The Sub-contract package of works comprises of the supply of labour, supervision and management required to install the free issue plumbing works further identified below. For the avoidance of doubt all installation materials are to be free issued by J & B Hopkins.

...

The Non-Expert Witnesses

27. The witnesses for A&V were Mr Paduraru and Mr Judd, to whom I have made reference above.
28. Mr Paduraru was cross-examined at some length. Apart from minor and understandable exceptional moments when he expressed concern at the time that cross-examination was taking and when his answers were not fully responsive to questions which he was asked, particularly when he was keen to make sure that the Court was aware of relevant documentation, he answered questions in a straight forward manner and demonstrating an impressive recollection of the documentation when the questions related to the progress of the sub-contract works and events on site. In those respects, I found his evidence generally reliable. I found his answers upon the financial aspects of A&V from the Spring of 2021 onwards less satisfactory.
29. Mr Judd's evidence was most significant in respect of a meeting held on 11 May 2021, to which I refer below. I found him to be an honest, open and reliable witness.
30. J&BH called four witnesses. I found all of them to be honest, although in cross-examination their evidence departed from their written statements. My conclusion was that where the evidence differed, their oral evidence was more reliable than the witness statements.
31. The first witness called was Mr Alan Giles, a Site Supervisor at J&BH. His role was principally dealing with issue of materials. I formed the impression that he had limited visibility of A&V's works and methods of working on Site.
32. The second witness was Mr Ian Davidson. He was a Senior Site Supervisor at J&BH brought to site to help with supervision of A&V's works. It seems probable that he started work on the Site on or about 8 March 2021.
33. The third witness was Mr Dominic Harman, a major projects director at J&BH. It became apparent that his involvement with the Sub-Contract was generally at too high a level to provide useful evidence as to the detailed issues which I must decide: however he did provide useful evidence as to the nature of the Project.
34. The final witness was Mr Richard Niziolek, a commercial director at J&BH. Again, his role was generally at too high a level to provide useful evidence as to the issues which I must decide.
35. Where those witnesses gave relevant evidence I have commented upon it below: in particular there are disputes about who from A & V was on Site and for how long on 19 and 22 March 2021.
36. What was significant was the absence of certain J&BH employees whose evidence would have been of interest:
 - i) Mr Adam Hill, J&BH's Operations Manager and Contract Lead;
 - ii) Mr Seth Brown, J&BH's Quantity Surveyor;
 - iii) Mr Andrew Macey, one of J&BH's Project Managers; and

- iv) Mr Julian Smart, one of J&BH's Site Managers.

Expert Evidence

37. As I have said, A&V called Mr Judd to give evidence. Although he is a surveyor, his evidence was essentially factual rather than opinion evidence.
38. J&BH called Mr Geale, a Chartered Accountant. In advance of the hearing A&V had raised issues as to the form of his reports and the nature of his instructions. In the event, I found Mr Geale to be helpful and willing to consider alternative hypotheses in a manner appropriate for an independent expert witness.

The History of the Sub-Contract and Sub-Contract Works

39. The Sub-Contract was entered into on 18 December 2019. Prior to the Sub-Contract being finalised, A & V provided J&BH with answers to a Sub-Contract Questionnaire. In those answers, A & V gave details of its previous three years' turnover (£420,035; £494,930; £537,906)⁶. There was also a Pre-Order Meeting held on 19 September 2019, the minutes of which were placed before me⁷.
40. Item 9 of those minutes recorded:

9.1 The present Programme for the sub-contract works is as per J&B Hopkins construction programme Moulsecoomb draft M&E programme and is subject to revision as the contract proceeds – key dates and short term look aheads will be issued throughout the duration of the works.

....

9.5 Critical dates to be achieved: As per JBH M&E Construction Programme

....

9.17 The Sub-Sub-Contractor will attend site, execute and resource the works in accordance with J&B Hopkins key dates requirements, including for all necessary visits, whilst complying with all reasonable requests and directives issued by J&B Hopkins.

41. Item 12.3 of those minutes recorded:

NB: Works will only be considered for payment as daywork on the basis of an order for daywork issued by our Site Manager and will only be evaluated against daywork sheets submitted daily in detail and authorised by our Site Manager and Project Manager. However, such signature will not necessarily entitle the Sub-Sub-Contractor to payment as daywork. Daywork hours shall be checked against the daily allocation sheets signed by the Sub-Sub-Contractor's labour.

⁶ TB 286

⁷ TB 295

42. In his witness statement, Mr Harman gives a useful description of A & V's subcontract works:

7. A& V was selected as the plumbing subcontractor by the operations team through an interview and bidding process. A&V's works included carrying out the mechanical installation works as part of the M&E package on towers 1, 2 & 3 and Podiums 1 and 2 at the Project on the Moulsecoomb University Campus, Lewes Road, Brighton. This included the installation of above ground drainage systems. The works to Podium Levels 1 and 2 consisted of a gym, students union and communal areas. On Podium level 2 there were bedrooms and communal kitchens. Works to Towers 1, 2 and 3 including distribution of domestic hot ("DHWS") and cold water systems ("DCWS") water systems ("DHWS") and low temperature hot water systems ("LTHWS") all of which derived from the underground district systems which fed these services through risers to each floor plate. Each floor plate generally consisted of approximately 12 Bedrooms and two communal kitchens. A&V's works included quality assurance ("QA"), testing, and handover.

8. A&V's work flow and installation on the Moulsecoomb University project was broadly based on the following installation sequences:

General Sequence of works

8.1 The main contractor, Bouygues ("BYUK") built walls and single side boarded walls in advance of A&V's works to allow pipes to be installed within the fabric of the walls before being double side boarded and fully enclosed. In the case of plumbing installation works within the service risers, A&V's 1st fix works required the walls to be boarded and fire tape sealed to allow the pipe brackets and surface pipework including the HDPE drainage soil stack installation to commence.

8.2 The installation of HDPE drainage started on the ground floor before progressing up the risers which were supplied prefabricated to A&V from JBH. This sequence allowed the bathroom pods and DDA (disabled access) bathrooms wastewater to be connected to a network of drains. Each HDPE drainage system had what we call a stack number. Once installed, this network of pipework was tested to ensure the system was sealed correctly when each stack was complete. This is known as soil stack testing which was an activity for A&V to complete.

Sequence for floor plates (Typical sequence within a floor plate)

8.3 Floor plates consisted of bedrooms and two communal kitchens which were constructed by a drylining company and then handed over to JBH for M&E 1st Fix distribution pipework.

8.4 A&V had to connect plumbing and soil wastes to bathroom pods associated with each student bedroom. Bathroom pods were pre-constructed fibreglass units which were free issued and positioned completed in bathrooms. A&V had to make external connections to pre-installed pipework connections on these pods for hot and cold water and waste connections for the WC, shower and sink.

8.5 There were a small number of DDA bathrooms which had services and sanitaryware connected to in a traditional way with 1st fix pipework, soil pipe and wastes installed, followed by wall closures and QA checks/handovers. The drylining subcontractor would follow on to board and close walls. Once closed, subsequent trades included the decorators, ceramic wall tilers, flooring installation and the installation of vanity units. Once these works had been completed, A&V's 2nd fix works could be carried out which included the fixing of sanitaryware including basins WC's and shower rails.

8.6 Handovers for 1st and 2nd fix works were generally managed via meeting minutes issued by BYUK. If areas handed over to JBH were not in a satisfactory condition, we recorded this in the 1-Auditor software and identified why the M&E works were not able to proceed. This would normally result in BYUK rectifying the issue or, as we call it, removing a "blocker" to enable works to commence. An example would be materials of others left in the workspace or an incomplete wall area stopping A&V from making a meaningful start. This system was also used to hand back areas when A&V had completed its works. This process was managed by our freelance QA Manager Wayne Reed and BYUK.

8.7 M&E services were completed on floorplates. A&V's 1st fix services works included main distribution of DHWS and LTHW pipework in corridors & risers then tested over a 10-day period which included a two-day transition period for QA checks and removing material ready for hand-over to the next trade. After A&V had installed the pipework services on a floor plate, the pipework was pressure tested in sections prior lagger (thermal insulation) being applied to the pipework.

8.8 Floorplates were then handed back to BYUK for dryliners, decorators, the flooring contractor and ceramic tiler to complete their works before handing back to JBH and A&V for M&E 2nd fix works.

8.9 A&V's 2nd fix works consisted of the installation of radiators and final connections to kitchen sinks, testing and filling of services. Once completed there was a further transition period for QA checks and clearing the floorplate for handover back to BYUK.

8.10 A&V's Final Fix, also referred to as 3rd Fix, included TRV Heads. These are the thermostatic mixing valves which control the heat output on the radiators.

Commissioning

8.11 Once the systems were completed, a separate commissioning company was responsible for setting up the heating systems, LTHW and domestic systems. Additional specialists were engaged to flush the systems adding inhibitors to the LTHW heating system and chlorinating the domestic water systems.

43. Mr Giles's evidence in paragraph 9 of his witness statement was that A & V came onto site in late February 2020. Mr Paduraru's evidence in paragraph 12 of his "Trial Witness Statement" is that:

The works at Mousescoomb began in late January 2020, with J&B Hopkins being so happy with the performance, quality and the work my business A&V have done in the first few months at Mouslecoomb, again, so happy, that J&B Hopkins have sent eight more projects for A&V to tender (while A&V was working on Mouslecoomb) from which I secured one of the eight projects and signed another Sub-Contract with J&B Hopkins for the Addington Valley Academy Project.

44. Insofar as there is a difference of recollection as to when A & V started work on Site, it seems to me that Mr Paduraru's recollection is more likely to be correct. There is no dispute between the Parties as to the fact that J&BH awarded a second contract to A & V.
45. Soon after the works began, BYUK closed the Site from 27 March 2020 because of Covid. In paragraph 5.0 (c) of the Particulars of Claim it is pleaded that the closure was from 30 March to 1 June 2020. In paragraph 47 of the Defence it is pleaded:

47.1 It is admitted that Bouygues closed the site for approximately 8 weeks from 4pm on 27 March 2020 as a result of Covid-19.

47.2 The Claimant had already halted its Works and left the site on 24 March 2020, before the closure of the site. On 24 March 2020, Mr Paduraru sent an email stating that the Claimant had "*all decided to stay at home for at least 2 weeks*".

47.3 Clause 11.1 grants the Defendant a right to suspend performance of the Sub-Contract Works. There is no obligation on the Defendant to do so and it cannot be in breach for failing to exercise this right.

47.4 In any event, it is denied that any such breach could have caused the Claimant any loss. Under clause 11.1, if the Defendant exercises its right to suspend, the Claimant is not entitled to any adjustment to the Sub-Contract Sum or additional payment.

46. Thus there is agreement that work ceased for about two calendar months. I consider the contractual consequences of this below.
47. Mr Harman describes the working methods adopted when works recommenced:

10. The initial effects of Covid-19 on the site meant that the works had to be managed differently by BYUK. BYUK reduced its main contractor site labour levels, which led to corresponding changes to staffing and adjustments to programmes. However, with the work faces available, A&V and our other subcontractors were able to maintain their labour levels when we returned after the site lockdown while still achieving the required safety protocols that the government had in place at the time. Site conditions changed with the implementation of one-way systems. For example, some staircases changed to either up or down only. Workfaces were made available to one trade at a time to reduce the chance of spreading the virus. Toilet facilities were reduced on site as well, with additional facilities added by BYUK to mitigate the risks associated with cross-contamination via other trades. Works had to be planned more carefully as a result of Covid-19 restrictions but, once these were bedded in, we generally found that the single trade access requirements meant that the works progressed more productively than they would have done if several trades were working on workfaces at the same time.

48. I consider below the evidence as to the extent to which A & V's works were disrupted by the working practices adopted on the Site.

49. On 9 July 2020 Mr Paduraru sent an email to Mr Smart of J&BH saying⁸:

Good morning Julian,

- I agreed with you to get T1 L9 SVP done today.
- I have not agreed for T3 6 RWP to be completed by end of today or T3 SVP to be completed by end of play tomorrow.

Julian with all my respect you can not keep asking us to jump on something straight away within the last moment, this is a Directed Acceleration Work!

From now on I will request a prior to commencing work notice from you, same as we do with 2 weeks look ahead program.

In one side we are constantly delayed on floors plates day by day by BYUK ([where] I will come back shortly with a delay notice for that)

On the other side you accelerate the program on upper floors or any others area of work without giving us a reasonable time notice and this is a bit frustrating.

Delaying and accelerating the work in a same time it's not good for us, but I will discuss all this matters and more with Adam on our minutes meeting.

⁸ TB 1524

50. Mr Smart responded promptly⁹:

The RWP in T3 was asked by myself to Ian and yourself to be complete 2 weeks ago, as you request I will inform you of everything we require and when it needs to be complete by email. What is required and when is agreed at the weekly 2 week look ahead you would also be copied in with these.

51. That email exchange refers to a “2 week look ahead”. That was a reference to the arrangement made between the various parties to the Project whereby BYUK would inform J&BH of areas which would become available for J&BH to work in over a two week period. J&BH would then in turn pass that information on to its sub-sub-contractors. This seems to have worked reasonably well as a practical solution to the fact that BYUK were falling behind with its structural and other works which were essential precursors to J&BH’s works. However, this was not what had been envisaged at the outset of the project and did cause some problems as I discuss below.
52. Thus, for example, on 7 August 2020 Mr Smart sent an email saying that in the following week (week commencing 10 August 2020) three areas would be available – level 5 in tower 3 and levels 6 and 7 in Tower 1¹⁰.
53. By email on 10 August 2020 Mr Paduraru notified Mr Smart that level 7 of Tower 1 was “*not ready for us yet, drilliners [sic] are still working on the floor*”¹¹. That was a reference to a company called Hepburn who were carrying out dry lining works. Mr Smart responded¹²:

HepBurns will still be on the floor as the floor hasn’t been handed over to us but you can make a start, although saying that you already did last week.

54. On 1 September 2020, Mr Paduraru sent an email to Mr Smart saying¹³:

Just to let you know, based on your 2 weeks look ahead we can not do the following:

T1 L2 - 2nd fix can not be complete because of Hepburn, they haven't completed the repairs behind the radiators, disable toilet it's not ready for 2nd fix too.

T1 L3 - not ready for 2nd fix (far behind).

T2 L3 - not ready for 1st fix (far behind).

I'm [recording] all this days since we start in Moulsecoomb, until now we are almost 2 months delayed on floor plate 1st fix and 2nd fix day by day!

⁹ TB 1524

¹⁰ TB 1529

¹¹ TB 1529

¹² TB 1529

¹³ TB 1532

55. Mr Smart responded by commenting in red on the email¹⁴, accepting the specified areas were not then available. Two of the areas would not be available until the following week, and one (level 3 in Tower 1) would, he said, be available on Thursday 3 September.
56. Whilst the number of complaints made by A & V in writing from June to December 2020 was limited, it seems to me that the 2 week look ahead system was liable to cause unproductive working:
1. The system itself appears to have been created to deal with the problems caused by BYUK's failure to provide working areas in accordance with pre-Covid expectations;
 2. It was inherent in the system that A & V would only know on the Friday before a two week period what working areas would be made available to them;
 3. The evidence of Mr Paduraru, supported by the contemporaneous documents to which I have referred, was that areas said to be available were not always available, and even where available were often obstructed by other workforces;
 4. Often A & V would go into an area to carry out work ahead, for example, of the dry lining work, but would then be required to revisit areas once the dry lining work had been completed.
57. Mr Paduraru emphasised to me on more than one occasion that until March 2021 there were no complaints about the quality of A & V's works, its productivity or about any delays said to be attributable to A & V.
58. There is some evidence before me which suggests that there were concerns on J&BH's part about A & V's performance before March 2021.
59. Firstly, Mr Giles in his witness statement said at paragraphs 15 and 16:
15. A&V's labour levels were up and down throughout his involvement on the Project, and they regularly left site early which caused problems with progress. It seemed to me that A&V's labour was impacted by turnover of individuals, with a core of perhaps 3 skilled plumbers. Other A&V operatives completed bracketing out and more of the lower skilled jobs such as cutting stud for clips, fixing radiators, copper to iron converters into valves. I had initially thought that one of A&V's operatives who went by the name of "Ian" was the owner of A&V as he appeared to be managing A&V's labour on site. However, I later learned that Alex Paduraru was A&V's owner. Alex was not personally working on the Project and I only saw him on site a few times although, towards the end of A&V's involvement on the Project, Alex did attend more frequently.

¹⁴ TB 1532

16. During the course of the works, I recall a recurring issue with A&V's installation of pan floats (soil pipes running from the back of the toilet plan to main vertical soil stack) which had not been clipped as required. This resulted in waste pipes running up hill. When I raised this with A&V, A&V instructed one of its operatives (who went by the name of Martinez) to clip the pan floats. This was a basic task that should not have been missed by A&V and resulted in re-work. Despite some improvements being made by A&V initially, the quality and attention to detail in A&V's works dropped off and I ended up clipping a number of floats on different floor plates myself together with other JBH operatives.

60. When he gave oral evidence, it became apparent that Mr Giles's involvement with A&V's work was substantially to do with supply to A&V of the free issue materials which A&V needed to carry out its works. As to the suggestion that "*A&V's labour levels were up and down throughout his involvement on the Project, and they regularly left site early which caused problems with progress*", there is nothing to corroborate this suggestion at any time prior to March 2021, and I find it difficult to accept that this could have been a significant problem without there being some reflection in some form of contemporaneous record, most probably in an email (as there were in respect of some defective work). It seems to me likely that in giving this evidence Mr Giles had in mind the email exchanges in March 2021 to which I refer below.
61. As to the suggestion in paragraph 16 that there were waste pipes "*running up hill*": this was repeated by Mr Giles in the course of his oral evidence, but I was not taken to any contemporaneous documentation showing that this was a significant problem. Asked about this, his evidence was that these problems concerned "*some leaks in Tower 2*". He also confirmed at the end of cross-examination that he had no concerns about A & V's productivity or quality before March.
62. The second witness, Mr Davidson, only came to site in the early part of March 2021.
63. The third witness, Mr Harman, said in his witness statement:

11. On several occasions during the period of A&V's works, concerns were raised by Adam Hill (JBH Operations Manager), Andrew Macey (Senior Mechanical Project Manager) and BYUK that A&V were starting to fall behind programme. In other words A&V was failing to complete the works available on floorplates within the required timeframes. Adam Hill, Andrew Macey and Seth Brown (JBH Quantity Surveyor) wrote letters and emails to A&V regarding the lack of site progress. These issues were mainly due to A&V's productivity levels caused by the fact that A&V did not work to the site hours which were 8am to 6pm Monday to Friday. Instead, from what I witnessed when I was on site, A&V's operatives seemed to work from around 8.00am to 3.00 - 3.30pm (at the latest). I discussed this with our construction team who I know asked A&V to increase their site working hours.

12. I recall talking to one of A&V's operatives who explained they were leaving at those times due to the travel back to Essex. When I asked the same question to local agency lads on site employed by A&V, they said that that was the time they were told to work to by A&V despite them being local.

13. Another recurring issue with A&V was its use of materials. I remember raising a concern as to why A&V were using large numbers of copper crimped pipe fittings unnecessarily in pod service risers for offsets and changes in pipe direction. Installing these fittings was time consuming and expensive, and also added to the risk of leaks due to excessive jointing. The other subcontract mechanical installation team on Towers 4 & 5 (Watertight) were installing the pod risers using a pipe bender rather than large amounts of crimped fittings. Watertight's method was the correct/preferable way to install as this reduced the number of joints and potential weak points in the system. The team did challenge A&V on this, but A&V didn't choose to change their installation methods. I was told this was to do with the skill base of their operatives.

14. I am aware from conversations with Adam Hill from December 2020 through to March 2021 that Adam raised concerns with A&V regarding A&V falling behind programme due to several poor workmanship issues and ongoing poor productivity levels. In January 2021 a [decision] was made by Adam Hill to add an additional mechanical supervisor, Ian Davidson, to the site team specifically to support, manage, and supervise A&V's works. This was because A&V were absorbing a lot of the other supervisor's time. Ian Davidson was brought to site in February 2021 to fulfil this role.

15. Concerns regarding A&V's performance came to a head in around March 2021. I can clearly remember Adam Hill raising concerns to me in early March 2021 that A&V had reduced their labour levels on site. Adam made me aware that he had been speaking to A&V on site and by phone and email regarding its labour levels. JBH subsequently escalated matters with more formal correspondence issued by JBH's Quantity Surveyor, Seth Brown.

64. This passage suggests that there were concerns on the part of J&BH about A & V's performance before March 2021. In his oral evidence Mr Harman was asked whether any issues were raised prior to March 2021. His answer was that there were standard issues. Later he said that in December there was "*just general talk – not a major issue in December*" and later he said that he didn't see any major issue with quality. As to the issue of crimping, he confirmed that this was an acceptable, if not preferable, way of carrying out the work.
65. In the light of those clarifications, I do not regard Mr Harman as suggesting that there were any significant problems with A & V's performance before March 2021.

66. The final witness was Mr Niziolek. It was clear in his oral evidence that he was entirely reliant upon what he heard from others and could therefore not give any evidence from his own knowledge as to A & V's performance.
67. As I have already pointed out, I did not hear from some potentially significant witnesses: Messrs Hill, Smart, Macey and Brown.
68. Importantly, as I have already emphasised, there was no documentation recording any significant concerns on the part of J&BH as to A & V's performance. That is powerful negative evidence, but as important if not more important is what happened during a telephone conversation between Mr Paduraru and Mr Hill on 5 March 2021.
69. This conversation was recorded by Mr Paduraru, unbeknownst to Mr Hill. I have listened to that conversation. In it Mr Hill confirms that A&V had not missed any dates.
70. On the basis of this evidence, and Mr Paduraru's own evidence, I firmly conclude that A & V was not responsible for any significant failure of performance up to the beginning of March 2021.
71. Payment Application 11 was submitted with a Valuation Date of 20 December 2020. Payment Certificate 11 was issued on 18 January 2021¹⁵.
72. The amount claimed in respect of the unvaried works was £336,479 against which J&BH certified £333,518.70. In respect of variations, the claim was £39,700 and the certified sum £33,225.
73. Payment Application 12 was submitted with a Valuation Date of 20 January 2021. Payment Certificate 12 was issued on 18 February 2021.
74. The amount claimed in respect of the unvaried works was £370,012 against which J&BH certified £352,390.40. In respect of variations, the claim was again £39,700 and the certified sum £31,725.
75. One significant change was that in Application 11 the Contract Sum was stated to be £368,000 (which was the original Contract Sum before Tower 3 was added to the Sub-Contract Works). In Application 12 the Contract Sum was stated to be £447,800 (which was the varied Contract Sum after Tower 3 was added to the Sub-Contract Works).
76. I return to details of the applications and certificates and stated levels of completion below.
77. Both Parties' valuations in broad terms show the Towers as being very largely complete. Some progress had been made on Podium 1 commercial, but otherwise Podiums 1 and 2 were to a greater or lesser extent incomplete.
78. Mr Harman told me that at the end of February 2021 into March the Project was beginning to ramp up. He said that BYUK was concerned about the Podiums.

¹⁵ TB 1080

79. His evidence was that A&V was falling behind the two weekly look ahead programmes.
80. Certainly, the relationship between the Parties deteriorated very rapidly during March 2021.
81. It was Mr Paduraru's evidence that A&V had first been asked to carry out works to the Podiums in September 2020 and afterwards, despite the Podiums not having been handed over by BYUK to J&BH. In its written Closing Submissions, A&V submitted as follows:
- 3.1 JBH by not accepting the Towers and Podiums Floor Plates (the Areas of Work) from Bouygues UK, and timely release in accordance with the Contract Programme [Trial Bundle 1, page 308 - 345] has caused major delays for A&V.
 - 3.2 In fact, during A&V's time on site, JBH never accepted the Podiums levels from Bouygues UK and formally rejected them, on 22 February 2021 [Trial Bundle 3, page 1176 - 1180].
 - 3.3 However, despite the fact that the Podiums levels were never accepted by JBH, A&V was asked by JBH to carry out the plumbing installation works in those areas [Trial Bundle 4, pages 1541; 1542; 1543; 1544; 1545; 1546; 1547; 1548; 1549; 1550; 1551; 1554; 1555; 1556; 1557; 1558; 1559; 1560; 1561; 1562; 1563]
 - 3.4 Consequently, on the 12th of March 2021 (A&V's date for completion of the Sub-Contract) [Trial Bundle 1, page 333] small elements of work remained incomplete on Podium 1- Level 1 (East); Podium 2 – Level 1 (East and West) only, as demonstrated by JBH in [Trial Bundle 5, page 2208 - 2010].
 - 3.5 These details are confirmed in the JBH witness statement of Mr Ian Davidson dated 29 February 2024 paragraph 17 [Trial Bundle 1, page 180] and were further confirmed by Mr Davidson, at the Trial, in his oral witness statement under oath.
 - 3.6 After a period of three years and two months, the truth finally came out, and it has been conclusively confirmed by JBH now, that A&V's position, consistently maintained as correct and true, is affirmed by the fact that as of 22 March 2021, Tower 1; Tower 2; Tower 3 and Podium 1 - Level 1 (West); Podium 1 - Level 0 (East and West); Podium 2 Level 0 (East and West) were indeed fully completed, this being confirmed by Mr Davidson, at the Trial, in his oral witness statement under oath.
 - 3.7 During A&V's time on site, A&V repeatedly informed JBH of the delays they were experiencing, which were not due to their own fault, as documented in the emails listed in [Trial Bundle 4, page 1524; 1529; 1532; 1673; 1674; 1675; 1676; 1799; 1801; 1804]. A&V's emails have never been disputed by JBH (up until March 2021) but

agreed / acknowledged that the dates had been re sequenced, as detailed in [Trial Bundle 4, page 1532]

3.8 Mr Dominic Harman, a Director of JBH, further confirmed in his oral witness statement under oath that the contract programme was re sequenced due to the eight-weeks Covid shut down and further because the areas of work were not handed over to JBH on time as per the contract programme nor accepted by JBH as areas ready for the Mechanical 1st fix and 2nd fix plumbing installation works to commence in line with the Contract Programme. These programmes were made and issued by BYUK / JBH and not A&V.

3.9 Consequently, in fact the Contract was completed only on 4/5 October 2021 [Trial Bundle 4, page 1565, 1566] which is six months and twenty-three days beyond A&V's completion date, also confirmed by Mr Harman in his oral statement.

82. A & V's obligation under the Sub-Contract (absent any extension of time) was to complete its sub-contract works by 12 March 2021.
83. As set out above, as at the beginning of March 2021 the most significant areas of work left to be completed were the works in the Podiums.
84. The documentation before me confirms that generally the Podium areas had not been formally accepted by J&BH as having been handed over to it by BYUK – the Trial Bundles contain a number of J&BH documents formally rejecting areas in the Podiums which BYUK has purported to hand over to it¹⁶.
85. What appears to have happened is that despite the formal position being that J&BH had not accepted formal handovers, J&BH accepted that specified areas were sufficiently complete to enable J&BH (and its sub-sub-contractors) to carry out works, the available areas being those specified in the two week look ahead programmes.
86. On 22 February 2021 Mr Brown, J&BH's quantity surveyor, sent Mr Paduraru an email¹⁷:

Please see attached payment notice covering works completed to period end January 2021. You will notice some comments where we disagree with the claim made.

Are you available this Thursday morning (at Brighton office) to discuss and carry out an account review to try and get this realigned?

87. In his oral evidence, Mr Paduraru made it clear that A & V was suffering a substantial cash flow problem at this stage. It is apparent that J&BH was aware of A & V's problems. On 25 February 2021, Mr Paduraru sent an email to J&BH¹⁸:

¹⁶ TB 1176-1180

¹⁷ TB 2024

¹⁸ TB 2039

Hi Adam / Seth

Thanks for your time today.

Just to let you know I did think about increasing labourer on site.

Basically I need at least 6 to 8 plumbers for couple of weeks. Which will [add] up around to 15 plumbers.

To supply those numbers is not a problem for me, I will get more plumbers in on Monday the 1st of March. But what I will need extra is another supervisor, I must have 2 supervisors between them.

My prelims allowance was for 1 supervisor only and because now we have these unexpected acceleration programme I hope I can get your support by paying the 2nd supervisor for these acceleration period of time on day work sheet basis.

Please let me know if you agree with what I have mention above.

In regard with the delay thing and value of it, I will come back to you by end of play tomorrow.

88. Mr Hill's responded on 1 March 2021¹⁹:

Have you got anymore costs that we need to review? I am very keen to get this resolved today or tomorrow.

We have instructed Martyn to install the heating pipework above the ceiling in P2 as we are concerned that this would add additional stress to finances.

Can you advise ASAP so we can make a final decision.

89. The reference to "Martyn" was a reference to the representative on Site of the sub-contractor working on Towers 4 and 5, Watertight. It is not clear on what basis J&BH took the view that it could instruct works in A & V's working area (podium 2) to be executed by another sub-contractor. Mr Paduraru responded to that email on the same day²⁰:

Hi Adam,

We working at this as I want to give you more information as possible.

You will receive the 2 weeks look ahead back dates since we start with the proposal dates, and all the floor plates acceptance and rejections, then you can see exactly how big is the gap (time) that we been pushed back (which I am sure you JBH have all this [information] already).

¹⁹ TB 2038

²⁰ TB 2079-2080

But just to give you an idea of the cost for direct loss and expense incurred, by the time you get the info sent across to you tonight or early in the morning tomorrow is around 45k.

This is because the progress of our work has been affected by a matter for which your client is responsible for all the delays that BYUK created as you all are aware, by failing to give us the possession of the floors plate and others site areas on the proposal date agreed in the program or in the 2 weeks look ahead.

We have been delayed week by week since we start our 1st fix on site.

With the instruction work I never refuse to do it. I don't know what made you think there is a financial stress for that.

I also want to come to a final decision ASAP for this project.

90. On 2 March 2021, Mr Hill sent an email²¹:

To review the labour and workfaces. Introduce the new JBH supervisor we have bought to

Moulsecoomb to help organise works etc.

We have to walk away from this meeting with a clear plan on how to complete the job.

91. The reference to the “new JBH supervisor” appears to be a reference to Mr Davidson. Thus, it appears that J&BH had responded positively to Mr Paduraru’s request in his 25 February email.

92. On 4 March 2021 Mr Hill sent an email about labour on Site²²:

Further to our meeting yesterday, I looked briefly at A&V hours on site. Its looks like your labour is on site for 6 hours a day. In this 6 hours you were attending morning briefs, and site movement.

This would mean your time at the workplace was limited to roughly 5 hours per day. Please can you review this and increase your hours on site. On average all your labour spends about 90 to 120min less on site (per person per day) then all the other subbies/contractors.

93. Mr Paduraru responded promptly²³:

Hi Adam,

Our working hours are 8:am to 15.30 which are 8.5h a day. Not 6h

But I will increase the hours work from now on.

²¹ TB 2041

²² TB 2042

²³ TB 2043

Thank you

94. Mr Paduraru was asked about working hours in cross-examination. He accepted that his direct workforce came from London, and would leave at 15.30 to get back to London. His evidence was that they made up time by working through the lunch hour.
95. On 5 March 2021, Mr Macey of J&BH returned to the same topic²⁴:

Hi Alex,

earlier in the week, when we sat down with Adam, I spoke about productivity. just noting you guys have left site today 2pm.

I asked if you would look at your team site hrs. where are you with that?

concern that you are not getting the full production from your team, and losing valuable to complete the works.

can you confirm the site working hrs for AV. if you need help monitoring your guys hrs. let me know.

96. I have already referred to a telephone call which took place between Mr Paduraru and Mr Hill on 5 March 2021. In that call Mr Hill told Mr Paduraru that J&BH was going to provide A & V with extra labour. There was no suggestion that A & V would be charged for this labour. Mr Paduraru expressed his gratitude for A & V's assistance.
97. Notwithstanding that positive conversation, on the following Monday, 8 March 2021, Mr Hill resent Mr Macey's email set out above and said as follows²⁵:

The below is concerning to hear. We need to see this change now.

I am also concerned that you still haven't got the correct level of labour on site. We spoke on Friday about Watertight helping where they could. At the moment they are busy completing rad pipework in the P2 L00 SU, and haven't got spare resources. I believe Martyn is trying to get additional labour from tomorrow so he can achieve the completion dates in P2 L00. These are works that A&V should be doing. Martyn (Watertight) will be directed by JBH to work in areas that are available, and A&V are behind on programme. These areas will have a QA inspection before any works commence. Martyn isn't there to subsidise your labour, he is there to make sure areas are completed in line with the 2 weekly look ahead (as sent by Julian).

As discussed JBH have bought in additional supervision to help A&V manage their works.

It is starting to feel like you are expecting JBH to pick up works you don't want to do, this can't be the case. We need A&V completed, and

²⁴ TB 2050

²⁵ TB 2064

to do this we expect A&V to increase working hours (in line with the contract), productivity and labour.

98. The tone of this email was in marked contrast to the helpful tone of the conversation before the weekend.
99. Mr. Hill's email was timed at 14.28. It followed hard on the heels of another email from Mr Macey sent at 14.20²⁶:

I am still concerned labour levels are not covering all the workfaces.

I have now looked at your mens Biosite times, and summarise as follows

I have taken a snapshot for 3 of your men. over the recent 20 working days. the daily average time on

site is

man 1 – 07:04 hrs less 00:30 hrs lunch = 06:34 Productive hrs.

man 2 – 06:47 hrs less 00:30 hrs lunch = 06:17 Productive hrs.

man 3 - 07:22 hrs less 00:30 hrs lunch = 06:52 Productive hrs.

you are losing well in excess of 1 hrs production time per man every day

3men on site - 04:17 hrs per day lost.

6men on site - 08:34 hrs per day lost.

9men on site – 12:51 hrs per day lost.

this means your men are only 79% productive, when using 8 hrs work for the standard day. 21% of your

cost is therefore non recoverable.

I am happy to run through this with you.

100. In the meantime, on Sunday 7 March 2021 Mr Paduraru had sent an email as follows²⁷:

Following to our conversation we had in the meeting last week I have attached the schedule with all the floor plates acceptances dates for T1 T2 T3 and Podiums.

²⁶ TB 2066

²⁷ TB 2079

Also as a [proof] that the floor plates start dates in this schedule are real once I have attached the Handover Inspection Report, where now you can see the gap between them.

101. Mr Hill responded on 9 March 2021²⁸:

This doesn't really tell JBH anything regarding cost and delay. JBH can't see that this contributes to a £30,000.00 variation. I understand that you are struggling and we want to help A&V complete this project but we also need to be very cautious of your current situation. JBH are very concerned that A&V will not complete the project due to cashflow.

I understand you were down on labour today again, this means that JBH we not complete on time in areas as per the 2 weekly overhead.

We need you to decide what A&V want to do to complete this project.

You have a few options as far as we can see.

1. Justify your claim for your variation. To formulate a plan and advise JBH on how you are going to complete the project with the remaining monies.

2. Complete the towers and fill the systems and test. JBH will take the remaining work within the Podiums 1 & 2 (Level 1 and 2) from A&V.

3. Walk away from the project and have JBH value your works. JBH to take over your works and take to completion.

102. Thus, at this point matters had moved fast over a period of a little over a week. From a position where J&BH had raised no significant criticisms of A & V as it completed the greater part of its sub-contract works, now J&BH was expressing considerable concerns about A & V's progress. In parallel, A & V was putting forward claims for extra monies.

103. On 9 March 2021, Mr Smart of J&BH added his voice of criticism²⁹:

Yesterday 8no Labour and Today 7no as it stands it seems you don't have sufficient Labour to get areas which were released to us Monday 08/03 complete by 12/03. Can you resource sufficient labour to ensure all work accepted is complete by Friday 12/03.

104. On 10 March 2021 Mr Hill wrote³⁰:

Due to the issues and lack of labour on site JBH will start to subsidise you're labour so key dates are not missed.

²⁸ TB 2078

²⁹ TB 2082

³⁰ TB 2083

JBH will be controlling this labour and directing them to complete certain areas. Julian and Andy will keep you abreast of the situation on site, records will follow on email soon after.

The next 6 weeks are vital to the handover of the project.

As discussed last night please can you review your options. Also you need to increase productivity on site. I'm being total that you have local labour on site now and they are being told by A&V to finish up at 3pm.

105. The oral evidence before me suggests that A & V interpreted this as meaning that J&BH would provide labour and then re-charge A & V for that labour. Correspondence which followed on 11 March 2021 to which I refer below confirmed that understanding. I accept Mr Judd's submission in closing that this does not fit with the sub-contract. This appeared to involve J&BH carrying out at its total discretion parts of A & V's sub-contract works, without any clarity as to who would take responsibility. Mr Paduraru's evidence was that he had understood from the telephone conversation on 5 March 2021 that the labour which J&BH was going to provide would be under A & V's control and direction. This proposal was a very different proposition.
106. On 10 March 2021, Mr Paduraru set out A & V's position in an email sent to Mr Hill and copied to Mr Brown and Mr Macey³¹:

There is no issue with the no. of labourers on site, I have already increasing from 6 plumbers to 10 in the last two weeks.

The problem is with the programme that has been accelerated not with us!

In regard with your options and all others enquires and problems, JBH will receive by this Friday my final decision in written about [Moulsecombe].

I have tried hard in the last weeks to come to an agreement about delays and acceleration programme with you guys ...

I gave you the cost for delays, I gave you the evidences for that too (where for you are not enough) I did ask for a solution of what we gonna do with this acceleration programme (no solutions, no plans) just waiting for me to increase labourer without any kind of deal.

I have put [Moulsecombe] project top of my priority since we start, I have always hit the dates never let JBH down on site. I lost the interest in my other projects with my other clients for [Moulsecombe], but now at the end I can see JBH let A&V down, on top of that start accounting the time keeping on site and trying to find everything just to hit back on A&V. Disappointing.

³¹ TB 1807

107. On 11 March 2021, Mr Brown sent an email saying³²:

Following recent conversations, emails (as attached) and the meeting held at our Brighton office on the 25th February 2021 we hereby issue the attached notice highlighting the subsidisation of A&V Building Solution Ltd. on site labour.

By return we request that you notify us of your proposed forthcoming labour levels. Please note, the attached does not alleviate A&V Building Solution Ltd. of any contractual obligations, A&V Building Solution Ltd. are to continue to work towards the close out of their works.

Trust you will find this self-explanatory however, should you have any questions please do let us know.

108. The email attached a letter dated the previous day, 10 March 2021³³:

Further to recent correspondence between yourself and Mr Adam Hill and Mr Andrew Macey (email "Schedule with floor plates delays" From A. Hill @ 17:39 on Tuesday the 9th March 2021), J&B Hopkins Ltd. have become increasingly concerned about A&V Building Solution Ltd.'s on-site labour levels. This is now negatively effecting programme and subsequently our ability to deliver our contractual obligations to our client.

Due to this, J&B Hopkins Ltd. are left with no alternative but to supplement A&V Building Solution Ltd. on-site labour with that of our own. We request that A&V Building Solution Ltd. continue to work to deliver their contracted works and obligations to the best of their endeavours and advise by return as to how A&V Building Solution Ltd. propose to complete such.

Please note; In accordance with clause 7.4 of the Sub-Contract all costs associated with the supplementation of on-site labour and its associated management costs will be contra charged to A&V Building Solution Ltd. and as such will therefore contribute to the forming of the Sub-Contract final account.

109. Within 2 hours Mr Paduraru responded copying his response not only to Mr Brown but also to Messrs Hill, Macey and Harman³⁴:

Thank you for your response and letter as this comes as a surprise to me.

First of all can you identify the areas where we are delaying the project?

³² TB 2089

³³ TB 1069

³⁴ TB 2088

I will need specific areas and proof of QA acceptance as well JBH notification for me to start works in those areas so then I can accept this areas and place men to work on those areas that you are saying we start delaying you in.

Currently I have 9 men on site today in all the areas that work is available to me.

I also want to bring into your attention that as of tomorrow **12/03/21** indicates that:

- 52 weeks are finished which is the Period(s) for carrying out and completion of the Sub-Contract works on site in line with the contract.
- Key Date: (Completion and handover of all works on or before 12th March 2021) in line with the contract.

I will issue to you again a proper breakdown showing and identifying exactly the delays my team have experienced by no fault of my own but the Main Contractor where floor plates and Podiums were not ready in time as we agreed on the programme and 2 weeks look ahead together with an invoice.

I just want to make it clear that there has never been a delay from A&V on site and we have ... are constantly keeping up with our works.

I am happy to walk on site with you so that you can show me exactly where we are delaying you!?

Also last week Adam Hill phoned me and told me that he know that A&V never delay the project and he also said as of good gesture that he will send out some men on the project at no cost or contra charge for A&V to help us out which I appreciated and agreed to.

Why now all of the sudden 180° change?

110. This email did not receive a direct response from any of its four recipients: in particular the sensible suggestion to walk the site received no response.
111. At 16.07 on 12 March 2021³⁵, Mr Macey wrote an email stating that A & V's workforce had left by 15.30 that day leaving various specified areas incomplete.
112. Another email from Mr Hill to Mr Smart on the same day suggested that A & V was reducing its workforce³⁶. In cross-examination Mr Paduraru accepted that he had reduced his workforce: his reasoning was that the sub-contract period had ended on 12 March 2021 so that he was no longer obliged to work on site – however he only released his agency labour and kept his direct employees.

³⁵ TB 2090

³⁶ TB 2092

113. I have referred above to Mr Macey's email sent at 16.07 on 12 March 2021. At 10.07 on 13 March 2021³⁷ Mr Paduraru annotated that email setting out A & V's position that certain areas were not available, some areas had not been formally handed over and that other areas were more complete than Mr Macey's email suggested. Mr Paduraru's evidence before me was that in the areas available to A & V the physical works were complete and that what remained to be done was only the QA (Quality Assurance) inspections.
114. It is unfortunate no joint inspection was carried out at this stage.
115. Mr Macey responded to Mr Paduraru's 13 March email as follows³⁸:

I will be onsite early Monday morning.

1. Site wide Biosite update needs to be completed. as per my email attached, can you advise the names in advance to help process as early as possible before/on Monday. this applies to the entire site not just JBH.
2. Establish what workfaces AV are on and set out to complete by 19/03/2021.
3. JBH will subsidise additional labour to areas not being worked in by AV.

as you and I discussed, JBH need to deliver a project in line with programme/lookahead and efficiently as possible. this means working as we have throughout the project with advance works and early access to areas that can be progressed.

SVP and RWP form essential works that help a) weather the building, b) sequence with the other trades for building walls, thus releasing the work areas to JBH 1st Fix etc. we must continue to progress SVP and RWP.

reducing labour, and by not maximising the site hours, at this stage where all works in Towers and Podiums must be advancing on the dates provided and in the sequence of working, this does not provide sufficient resource to cover all of the available work.

our QA system records if the workface is available to us, in areas such as podiums we are working to dates, and JBH /AV are progressing/advancing works/sequencing with trades, the absence of a QA acceptance in these areas does not constitute rejection nor does it exclude JBH/AV to advance the work in line with the dates, these areas are well published on mark up drawings and all JBH and subcontractor have been briefed with progressing these areas specifically to get heating and radiators fitted during first fix, to enable the start of our flushing/commissioning.

³⁷ TB 2098

³⁸ TB/2096

the QA closing of areas remains due on the last day of each agreed duration.

I understand and have been discussing with you the issues AV have and how that needs to be presented to us.

please issue the information as a matter of priority.

if you can get me the Names over the weekend I can review the Biosite actions needed.

116. On 15 March 2021 A & V sent J&BH a lengthy letter³⁹. This was comprehensive. It started by commenting upon the works in the Towers:

As you are aware our contract period for carrying out and completion of the Sub-Contract Works on site was for 52 weeks. The Key Date for Completion and handover of all works on or before 12th March 2021 and that period has now expired and the works are still incomplete.

The reasons for the delays have previously been detailed to you but in brief terms the areas your programme detailed to us as being available were in fact incomplete. A schedule previously sent to you detailed the locations and time periods of delay marked in red. We attach a further schedule particularising the critical delays and these total 74 days.

This period of delay resulted in return visits to complete the works to areas unavailable and as such the works were not able to be undertaken in an economical fashion. This has resulted in us incurring additional costs to which we seek to recover. The attached further schedule details the labour levels in more detail and the corresponding delays for your consideration.

The effect of the above is that the return visits and uneconomical working from that which Hopkins programmed to be available but was in fact not available once on site has incurred us in additional costs. In respect to Hopkins delays we consider that we have only been 65% efficient with our operative installation works. As such £268k of the £413k claimed to date for our works have been installed in the manner that we were anticipating. Unfortunately, the remaining 35% (£144k) has not been SO productive and has resulted in a 33% additional time period to complete those works. On this basis in real terms this is a £45K cost that we have incurred to which we would request is paid for by Hopkins as loss and expense. This cost we have included in our current valuation application but would be grateful of your confirmation and/or instruction that this issue of increased costs for delays and the sum claimed will be paid.

117. As I have already recorded, until the beginning of March 2021 there had been no significant complaints about A & V's performance. I also accept Mr Paduraru's evidence that the sub-contract works had been carried out in a non-productive way as

³⁹ TB 2126

a result of late release of working areas by BYUK. I return below to the contractual consequences of these matters and to the claim for additional payment.

118. Next the letter dealt with the Podium works:

In regard to the remaining works which is predominately to Podiums 1 and 2 again these works should already be complete and are beyond our 52 week programme as a result of Hopkins delays. As we understand you are proposing proceeding with these over the next 5 months. We have discussed the additional costs in brief terms but am able to advise this in more detail below.

The Podium works similar to the Towers have not been made available as Hopkins's programme due to delays beyond our control and thus we have been working uneconomically with return visits. The value remaining for the works to the podiums is circa £34k from an original sum of circa 120k but this as we understand is planned to be installed over a further 5-month period. The original works were for a 10-week period, so it is a little unclear as to why we are expected to continuing installing our works over a longer period. The remaining balance of £34k of labour from our contract to complete this section of the works is approximately 136-man days so effectively 6 men for 4 weeks. Once the 4 weeks has elapsed if the works are incomplete this will require additional instructions for the additional labour.

As requested in terms of providing guidance on the additional costs that we would require instruction to continue for the full 5 month (20 weeks) period on the basis of on average 6 men for the remaining 15 weeks this would equate to a an additional sum of circa £113k. Similarly, if there were 12 men for half the period this would still equate to £113k. The remaining £34k from the original contract sum would also require to be paid. These figures are on the basis that reasonable [and] economical works can take place and there are no further delays.

We look forward to your further instructions and agreement to costs prior to proceeding further.

119. This part of the letter reflected a real problem affecting A & V. The letter accurately recorded J&BH's view at that time that it would take five months to complete the works (in the event it took slightly longer than that). However, the works which remained for A & V to complete were substantially only the Podium works. Thus A & V was faced with the prospect of a long period of unproductive working.

120. It is also important to note A & V's request for instructions.

121. The letter now put forward a request for an extension of time and payment of additional preliminaries:

In addition to the above the works have overrun the 52-week and key date period and A&V request an extension of time to cover the overrun

periods currently advised by Hopkins as being 5 months. In addition for the 5-month period we will require additional preliminaries costs of £25k and we look forward to your further instructions and agreement to costs prior to proceeding further.

122. Again, there was a request by A & V for instructions.
123. I have already set out above the terms of Mr Brown's letter dated 10 March 2021⁴⁰. A & V's letter addressed this:

Mr Brown letter 10th March 2021

We are in receipt of Mr Brown letter and would reject the contents of the letter and any assertion that A&V have any responsibility for the delays or additional labour and/or costs that you refer to. As detailed within this and previous correspondence you are aware of the project overrun which is Hopkins responsibility. In addition, Hopkins has requested a variation to the works (extending the contract period, acceleration etc) and sought A&V costs for the variation prior to instructing and that process continues as described above and look forward to your confirmation in accordance with Clause 8.5 and/or 8.6.

Furthermore clause 7.4 provides for a 7 day period of notice being given, and if resultant actions are not undertaken; it shall be J & B Hopkins prerogative to supplement the on-site labour requirements for the Sub-Contractor recovering all resultant costs as a deduction from the Sub-Contractor account. The notice you refer is dated the 10th March 2021 and therefore any decisions or actions taken by Hopkins to supplement labour would at the earliest not be applicable until the 17th March 2021. As such any supplementary labour provided thus far and up until the 17th March 2021 is not the responsibility of A&V [and] any deductions would be deemed unlawful.

124. Finally, the letter proposed "alternative agreement proposals":

Notwithstanding the above and appreciating you are attempting to catch up with the delays you may also wish to consider our alternative proposals as follows:

- A&V withdraw from site within 7 days of the dated letter.
- Hopkins employ other operatives and complete the works themselves.
- Hopkins to pay A&V within 7 days of the dated letter the sums detailed within the current
- A&V valuation attached in the total sum of £105,619.10 plus Vat which includes the £45k for the uneconomical and return visits detailed above.

⁴⁰ TB 1069

- Hopkins retain the A&V retention sum in full.
- A&V to have no liability for any works installed to date.
- This alternative agreement would be a full and final settlement of all matters between the parties.

125. The letter closed with the following:

In the alternative should you wish to provide your own alternative proposals please provide these for our consideration by return.

I trust that the above meets with your approval and look forward to your response/instructions accordingly so that this matter can be progressed to an amicable conclusion.

126. The letter was sent under an email dated 15 March 2021⁴¹:

Further our recent communication, please find the [attached] A&V Building Solution Notice with our alternative agreement proposal as Seth requested on 11th March 2021 together with schedule particularising the critical delays.

Please note that A&V Building Solution will be working on site for the next 7 days of the dated letter.

By return we request that you notify us with your response/instruction accordingly

127. The letter was accompanied a schedule detailing the delays of which A & V was complaining⁴². Mr Paduraru explained that schedule to me. It distinguishes between the works to each of the Towers, with a column for each Tower, and the works to the Podiums.

128. The schedule sets out the date when the sub-contract programme planned for works to start and then, in respect of the Towers, where the works had not started in a particular week, that week was highlighted in red. In respect of the Podiums, the delay in commencement of the works is highlighted in a similar way but in orange.

129. The two right hand columns represent A & V's claim as to unproductive labour on site.

130. On the same day A & V submitted payment Application 13⁴³.

131. On the following day, 16 March 2021, there was a flurry of emails, particularly from J&BH complaining of a shortage of labour from A & V on site. My conclusion on the evidence before me is that there were some A & V plumbers on site, but not enough to maintain the progress that J&BH was demanding. The reason, as Mr Paduraru's emails made clear, was in part that A & V was waiting for "instructions" from J&BH.

⁴¹ TB 2122

⁴² TB 2129

⁴³ TB 3454

But it was also said by Mr Paduraru that there was a shortage of clear areas in which A & V could work. It seems to me that there is truth in what both parties were saying, i.e. that J&BH were right that there were areas in which A & V could work, but access in those areas was not clear of obstructions.

132. The week passed with no answer to A & V's requests for instructions until the end of the week, Friday 19 March 2021. It was Mr Paduraru's evidence that he was awaiting a response to A & V's letter of 15 March 2021.
133. There is a dispute as to what workforce was on site on that Friday and for how long. I accept Mr Paduraru's evidence that 6 of his plumbers attended site first thing that day, probably at about 07.30 which was the time when by this date they usually attended site. It seems to me clear that they left site by about midday having handed in tools and materials which had been supplied by J&BH.
134. At some point on the same day, J&BH dealt with the shortage of labour and relied upon Clause 7.4 of the Sub-Contract⁴⁴:

Further to recent correspondence dated 10th of March 2021 we hereby note that A&V Building Solution Ltd. [have] failed to offer the required on-site resource to maintain programme and close out available workfaces.

As such, as of the 17th of March J&B Hopkins Ltd. have supplemented A&V Building Solution Ltd. workforce with that of our own. J&B Hopkins Ltd. will continue to monitor and log this over the coming weeks and will advise in due course as to cost associated with such. We request that A&V Building Solution Ltd. offer the required resource to close out these workfaces to avoid any further subsidisation.

Please note; In accordance with clause 7.4 of the Sub-Contract all costs associated with the supplementation of on-site labour and its associated management costs will be contra charged to A&V Building Solution Ltd. and as such will therefore contribute to the forming of the Sub-Contract final account.

135. The second letter was considerably longer and answered A & V's letter of 15 March 2021⁴⁵:

Further to the letter issued on the 17th of March 2021 J&B Hopkins Ltd. hereby offer formal response to A&V Building Solution Ltd.

With reference to the contract period, whilst we note the contract period has now elapsed, prior to your letter dated 15th March 2021 J&B Hopkins Ltd. had not received any request for an extension of time, nor have we had any build up to the costs you have mentioned within the letter. Nothing submitted to date falls in line with clause 8.4 of the subcontract and therefore limits our ability to understand and value your claim.

⁴⁴ TB 2156; 3457

⁴⁵ TB 3458

Whilst the duration has indeed changed the scope and works themselves as tendered by A&V Building Solution Ltd. have not. We therefore see no reason as to why A&V Building Solution Ltd. have any entitlement to additional monies for such. We would remind yourselves that A&V Solutions Ltd. [have] an obligation to manage productivity of staff and adjust numbers to suit programme.

The records you have submitted neglect to show the other work faces your operatives were working on at the time, at no stage have A&V Building Solution Ltd. been placed in a situation [where] there were no workfaces available to progress.

Throughout the duration of the project J&B Hopkins Ltd. have worked very closely with all our subcontract supply chain including A&V Building Solution Ltd. to ensure that sufficient workfaces are available, whilst this is not always within our control, J&B Hopkins Ltd. have gone to great lengths to provide A&V Building Solutions ltd. with visibility of workface availability & works that will be coming available, in turn putting additional pressure on our own preliminary resource. We would also like to remind you that the 2 week look ahead is a fluid programme initiated by the client and referenced within the head contract that A&V Building Solution Ltd. are deemed to be fully aware of at time of tender and subsequent contract agreement.

In regard to the proposed claim for additional cost associated with preliminary resource, J&B Hopkins Ltd. the aforementioned letter does not meet the level of information required of the sub-contract agreement that has prohibited a meaningful review. Once we have received such we will review, assess, and respond accordingly.

With reference to J&B Hopkins Ltd. letter dated 10th March 2021 in relation to the subsidisation of A&V Building Solution Ltd. labour. We acknowledge that any labour subsidised prior to the 17th of March 2021 can and will not be counter charged to A&V Building Solution Ltd. However, we disregard your claim that A&V Building Solution Ltd. have not contributed to the delays on site nor the requirement for J&B Hopkins Ltd. having to initiate such clause. At the time of writing A&V Building Solution Ltd. Have multiple areas of incomplete works, both physical works on site and subsequent Q&A signs off that are now in delay. A&V Building Solution Ltd. have neglected to supply sufficient labour to allow the close out of these works, therefore, J&B Hopkins Ltd. Have been left no alternative on the matter to maintain programme and the pace of the project.

Insufficient labour for the available workfaces & defect closures has been continuously highlighted over the past months by J&B Hopkins Ltd. and A&V Building Solution Ltd. have refused to act in accordance with the site requirements. Alongside this A&V Building Solution Ltd. have been asked multiple times to maximise their own productivity by ensuring their operatives work full days on site. Upon review of the Biosite login it is clear that a vast majority of A&V Building Solution

Ltd. labour are leaving site between 3-4pm each day, that is a loss of 2-3 hours productivity per person, per day that only further compounds A&V Building Solution Ltd. inability to close out available workfaces and control its own labour.

We also highlight the vast number of suspension or works notices (SOWN) issued to J&B Hopkins Ltd. by the client for either defective or unsafe acts on behalf of A&V Building Solution Ltd. At the time of writing there have been approximately 10 of these SOWN notices issued by our client that are the sole responsibility of A&V Building Solution Ltd.'s failure or neglect. Each of these notices results in lost time and additional cost for J&B Hopkins Ltd. both in terms of physical works on site and preliminary resource associated with closing these items on behalf of A&V Building Solution Ltd. To date J&B Hopkins Ltd. have carried these costs and disruption to mitigate site progress however, rest assured A&V Building Solution Ltd. are fully culpable for such, further negating A&V Building Solution Ltd. claim that they have not caused delay to the completion of works.

Given the above we are unable to agree with either of your requests for additional monies at this stage

Finally, we understand that you have advised various members of our site team that you will be withdrawing from site on Monday, we urge you to reconsider this position and continue to [fulfil] your contractual obligations. Should you withdraw from site we will treat this as a blatant breach of the subcontract with resultant costs being levied and recovered from A&V Solutions ltd.

136. On the following Monday (22 March 2021), none of A&V's labourers attended site. However, I accept Mr Paduraru's evidence that he did attend site intending to carry out QA assessments.
137. Before that day, J&BH had required A & V to use its IAuditor system to record completion of its works. When Mr Paduraru attended on 22 March 2021 he found that his access to IAuditor system had been withdrawn.
138. Mr Harman's evidence about this was as follows⁴⁶:

23. I-Auditor is a piece of electronic software that JBH selected for our QA manager to use as an inspection tool so that the JBH site management team and its subcontractors could use it for inspections, to flag up any issues and resolve problems together. The system worked to capture and provide a corrective action platform for the installation teams. The system shares and stores digital checklists. For example, on plumbing systems we need to pressure test the pipework using a pressure gauge and this system helps log and record that test functions have been successful, and that the pipework was tested to and held the agreed pressure. I remember that there was a concern when Alex Paduraru left site that he could still access I-Auditor and potentially

⁴⁶ TB 182

tamper with the records on the system. As a precaution, his access was therefore removed. Alex would have had a level of access to allow him to add information and sign documents and modify information previously submitted.

24. Access to I-Auditor was controlled by the QA manager Wayne Reed who had the management level administrator rights. A&V's licence was re-assigned so we could carry on handing areas over to our QA team. The I-Auditor software captured when an area was handed over to us for 1st fix which was an opportunity for our site management team to go and inspect the area to see if the area was complete and available for JBH's installation works. This function of area acceptance was used by JBH during discussions with BYUK at Lean Meetings where we looked at the next two weeks' work activities and planned works for the subcontract installation teams. I-Auditor therefore facilitated workflow management and enabled JBH to manage resources in line with programme requirements. I-Auditor was not an installation programming tool for our supply chain and physical works and QA tasks could be progressed and completed without access to I-Auditor. It was also not needed for A&V to access site which was controlled by BYUK Bio-site readers.

139. It is A & V's case that withdrawal of access to the IAuditor was a breach of the sub-contract: I return to that below.
140. In an email sent at 11.20, Mr Paduraru complained about the withdrawal of access to the system⁴⁷. Mr Hill's response was⁴⁸:
- We were told you wouldn't carry out any further QA works so we had to employ another supervisor and give him your licence in the meantime.
141. In the absence of evidence from Mr Hill, it is unclear upon what basis Mr Hill said that A & V had indicated that A & V would not carry out any further QA works. I accept Mr Paduraru's evidence that far from saying that he would not carry out QA works, he attended to do so: to do so made sense from A & V's point of view since the more completed works there were, the greater the value of the works for which J&BH would have to pay. I also note that Mr Harman's explanation for withdrawal of access to the system was for a different reason from that given by Mr Hill in this email: namely to prevent Mr Paduraru modifying the information on the system rather than a need to give the licence to another sub-contractor.
142. What appears to have happened then is that A & V did not return to Site and J&BH used other labour to complete the sub-contract works.
143. J&BH's pleaded case is that A & V was in repudiatory breach of contract by abandoning the works⁴⁹, which repudiatory breach was accepted by J&BH "by its

⁴⁷ TB 2159

⁴⁸ TB 2173

⁴⁹ Defence, paragraph 93 at TB 88

letter dated 16 April 2021 and/or engaging others to complete the works.”⁵⁰ The letter of 16 April 2021 stated⁵¹:

Further to recent correspondence dated 19th of March 2021 we hereby note that A&V Building Solution Ltd. have failed to return to site with any operatives. As such, A&V Building Solution Ltd. last productive day is recorded to be that of the 19th of March 2021.

We hereby confirm that A&V Building Solution Ltd. are now deemed to be in breach of their contractual obligations, as such J&B Hopkins Ltd. will continue to undertake A&V Building Solution Ltd. works on their behalf.

All incurred loss and expense to J&B Hopkins Ltd. associated with this breach of contract will be continually tracked and recorded for recovery from A&V Building Solution Ltd.

144. By this time Mr Judd had been involved for some time, advising Mr Paduraru. He tried to see if an amicable settlement could be reached, writing letters on 1 April 2021⁵² and 20 April 2021⁵³.
145. He convened a meeting on 11 May 2021, attended by Mr Niziolek and Mr Paduraru, held over Zoom or a similar remote medium. This meeting was again recorded secretly by Mr Paduraru. Part was held on a without prejudice basis: the record of that part of the meeting was not put before me. Before that there was a discussion accepted now to be on an open basis. Mr Judd’s evidence, supported by the record of the meeting, was that at the meeting Mr Niziolek accepted that A & V was not responsible for the delays to the project.

A & V’s Allegations of Breaches of Contract

146. Paragraph 5 of the Particulars of Claim alleges various breaches of the sub-contract.

Paragraph 5.0 (a)

147. Paragraph 5.0(a) alleges:

Without instructions and being beyond the Contract completion date of the 12th March 2021 (and despite A&V request for instructions prior to and on 15th March 2021 J&BH chose to force upon A&V supplementary labour and undertake the remaining works themselves being a breach of contract as clause 7.4 and 15.1 and requires due formal “Notice” which has not been provided. Failure and/or breach clause 15.1 by J&BH employing others to undertake works without prior 7 day “notice” and/or advising of any purported breaches of failures. J&BH unreasonably and without agreement and/or correctly

⁵⁰ Defence, paragraph 94 at TB 88

⁵¹ TB 2178

⁵² TB 2176

⁵³ TB 2181

served Notices sought to forcibly undertake A&V contract works by engaging others.

148. As set out above, Clause 7.4 entitles J&BH if “in the opinion of the Contractor, the Su-Contract Works are failing to progress in line with the Contract Programme requirements, then after due notice of 7 days being given, and if resultant actions are not undertaken” to “supplement the on-site labour requirements for the Sub-Contractor”.
149. The earliest date when notice was given under Clause 7.4 was 11 March 2021 when the 10 March 2021 letter was sent. Thus the 7 day notice period expired on 18 March 2021.
150. It follows that the case is made out by A & V that J&BH’s actions in deploying other labour to carry out A & V’s works on the basis that A & V would have to pay for such labour was a breach by J&BH of Clause 7.4.
151. On its own, this breach can be seen as doing no more than disentitling J&BH from recovering any costs of the supplementary labour before 18 March 2021. A & V submitted through Mr Judd that this matter needs to be read together with the other matters alleged. I return to this below.
152. The second part of this allegation is reliance upon Clause 15.1. In my judgment there was no breach of Clause 15.1. Clause 15.1 provides J&BH with a remedy, namely a right to terminate, in the event of breaches on the part of A&V. As J&BH did not purport to exercise any remedy under Clause 15.1, no claim for breach of Clause 15.1 can be sustained.

Paragraph 5.0 (b)

153. Paragraph 5.0 (b) alleges:

Failure and/or breach by J&BH of clause 8.5 and 8.6 to provide instructions beyond the contract completion date of 12th March 2021 relating to A&V correspondence/quote dated 15th March 2021 (issued in accordance with clause 8.4).
154. Clause 8 sets out the variation machinery in the sub-contract.
155. The terms of the sub-contract are weighted in J&BH’s favour. Whilst there is an extension of time clause (Clause 13), that Clause does not expressly allow the sub-contractor to recover its losses arising out of delays.
156. Whilst Clause 8 does provide for a variation to be issued which would compensate the sub-contractor for both time and expense flowing from a variation, the quotation mechanism in that Clause is ill-suited to a situation where delays for which the sub-contractor causes that sub-contractor to suffer loss which cannot be quantified for some time to come.
157. In my view A & V has not made out a claim for breach of Clause 8.5 or 8.6.
158. I consider below the claims under Clause 13 for an extension of time.

Paragraph 5.0 (c)

159. Paragraph 5.0 (c) alleges:

Failure and/or breach of clause 11.1 for not providing “notice” to suspend the works from 30th March 2020 to 1st June 2020.

160. As I have pointed out above, the Parties are agreed that the works were suspended by reason of Covid.

161. That suspension was ordered by BYUK, but, as it seems to me, as between A & V and J&BH, it should be treated either as being a suspension ordered by J&BH or a suspension which ought to have been ordered by J&BH: it would be a nonsense for there to be an ordered suspension of work as between BYUK and J&BH, but not as between J&BH and A & V.

162. As a matter of common sense, I infer that J&BH informed A & V of BYUK’s suspension and thereby instructed A & V to suspend its works.

163. Thus I come to the conclusion that the breach on the part of J&BH was a failure to formalise the suspension by written notice under Clause 11.1, and accept that that was a breach of the sub-contract.

164. However, that breach in itself takes the matter nowhere: what matters is A & V’s case that the suspension was not reflected in J&BH’s treatment of A & V. This is the subject of the next alleged breach or group of breaches.

Paragraph 5.0 (d)

165. Paragraph 5.0 (d) alleges:

Failure and/or breach of clause 13.2 and 13.3 to extend the contract period for delays clause 11.1 above and issue of revised programmes and 2 weeks look ahead programmes ... and unreasonably and deliberately preventing any further works being undertaken by A&V by employing others to complete A&V works and removing A&V from the IAuditor system.

166. This paragraph rolls together a number of different strands, but seems to me to bring together the core of the case as to the termination of the sub-contract and as to whether A & V lawfully ceased work.

167. The first strand is “failure and/or breach of clause 13.2 and 13.3 to extend the contract period for delays clause 11.1 above”. The wording is a little garbled, but I read this as being an allegation that there had been a suspension in accordance with Clause 11.1 entitling A & V to an extension of time under Clause 13.2(3).

168. As I have accepted above, there does not appear to have been a formal suspension by J&BH under Clause 11.1, but there was a de facto suspension. In my judgment, J&BH cannot rely upon its failure to operate the machinery of the sub-contract to deny the extension of time which ought to have been given by J&BH.

169. J&BH rely upon the absence of formal notices in accordance with Clause 13.3 – however, given that J&BH did not comply with the suspension machinery, it seems to me that it cannot rely upon the failure to give notice.
170. I also note that in March 2021 no point was taken by J&BH as to a failure to comply with Clause 13.3.
171. The second strand relates to “issue of revised programmes and 2 weeks look ahead programmes”. I have set out above Mr Harman’s evidence as to the procedures followed on site once the suspension was over: those procedures inevitably made the works slower and less productive. Further, as I have found as a matter of fact, BYUK was late in handing over working areas and/or areas were handed over with obstructions. All of this would have hindered A & V and, as between A & V and J&BH, amounted to acts of prevention by J&BH falling within Clause 13.2(3), and were having a continuing effect right up to the 19th March 2021.
172. Whilst A & V were slow to make formal application for an extension of time, on 15 March 2021 it did do so. At that stage J&BH knew that the sub-contract works (on its own estimation) were likely to take 5 months to complete, against a background when until March 2021 there had been no significant complaints about A & V’s progress and, to the contrary, Mr Hill had accepted in the telephone conversation on 5 March 2021 that A & V had not missed any dates.
173. In those circumstances, in my judgment J&BH was obliged to consider A & V’s legitimate application for an extension of time in respect of acts of prevention which were continuing through March 2021 and was in breach of the sub-contract in not issuing any extension of time.
174. The penultimate strand is “unreasonably and deliberately preventing any further works being undertaken by A&V by employing others to complete A&V works”. If J&BH is right that A & V was in repudiatory breach of contract in leaving site on 19 March 2021 (and that J&BH accepted that repudiation), it (J&BH) was not in breach of contract in employing others to complete A&V’s works. If, on the other hand, A & V was entitled to cease work on 19 or 22 March 2021, the fact that J&BH used other contractors to complete its works is irrelevant.
175. However, I do regard J&BH’s use of other contractors to carry out part of A & V’s works as being a significant part of the background to A & V’s withdrawal from Site.
176. The final strand is “removing A&V from the IAuditor system”.
177. I have set out at paragraph 138 above Mr Harman’s evidence as to the functions of the IAuditor system.
178. It is correct, as J&BH submits, that the use of and access to the IAuditor system was not a contractual requirement under the sub-contract, nor did A & V have any contractual right of access to it.
179. However, on the evidence before me, J&BH had required A & V to use that system, and it was a convenient way of recording progress and, importantly, completion of the QA process for parts of the works, and one upon which the whole QA process

depended. The centrality of the IAuditor system was shown firstly by an email sent by Mr Wayne Reed of J&BH to its sub-contractors on 11 February 2020⁵⁴:

For those who do not know me I am the QA manager for JB Hopkins here at the Brighton office.

You are all sub-contractors on the UoB Moulsecoomb project and as such I would like to introduce you to the QA system we will be using on the project. Attached is the product overview of IAuditor which is an app that we will be using for all our QAs, pressure testing and snagging on our project...

180. Specifically in respect of A & V, Mr Reed's email of 10 July 2020 illustrates the importance of the IAuditor system⁵⁵:

Please find attached an example of the QA for 1st fix mechanical.

This was carried out for tower 1 level 3. As you can see photos are taken of everything under the sections that they are pertaining to and notes attached to strengthen the position taken. This is all evidence gathering to prevent any comebacks further down the line. This document protects yourselves as well as JBH.

We need to set aside time for any training that you and Ian require to accomplish this level of QA checking. I feel that you guys are onboard now with the testing we just need to get the QA sorted.

Please be aware that this is not a box ticking exercise it is important for handing over areas on time snag free and demonstrating a rigorous process of QA.

181. In the circumstances, removal of access to the IAuditor system evinced J&BH's intention that A & V should not complete its sub-contract works particularly after Mr Paduraru's protest on 22 March 2021 at being excluded from access to that system.
182. Tying all these threads together: firstly, by the beginning of March 2021 the sub-contract was significantly in delay for reasons which were in no way A & V's responsibility. Secondly, at the beginning of March 2021, only 12 days of the original sub-contract period remained, but on J&BH's estimation, months of work remained to be done. Thirdly, it must have been obvious to J&BH that progress of the works had been disrupted not only by the suspension, but also by the working methods adopted once works resumed and by BYUK's delays in making working areas available. Fourthly, it was J&BH's belief (well-founded despite A & V's contemporaneous denials, as I discuss in greater detail below) that A & V was in cash flow difficulties.
183. It was against that background that the actions of J&BH are to be judged. Firstly, after initially offering on 5 March to supply labour free of charge, J&BH committed a volte face and insisted on providing labour at A & V's expense. Not only was this not in compliance with Clause 7.4, but it introduced problems of responsibility for the

⁵⁴ TB 1679

⁵⁵ TB 1689

works, and was likely to make A & V's financial problems worse. Secondly, as I have found above, J&BH failed to grant an extension of time which was obviously justified. Thirdly, when on 11 March 2021 A & V asked for particulars of the alleged delays, and sensibly suggested a joint walk through of the Site⁵⁶, there was no direct response to A&V's request, and a failure to respond in any way to the suggestion of a walk through the Site. Finally, on 22 March 2021 J&BH excluded A & V from access to the IAuditor system.

184. As is often the case, the only circumstance referred to in the sub-contract expressly entitling A&V to terminate the sub-contract was if the main contract was terminated (Clause 16) whilst granting J&BH relatively wide rights of termination in Clause 15.
185. The question arises as to whether either party retained common law right to terminate the sub-contract. It seems to me impossible to construe the sub-contract as removing or restricting A & V's common law rights to bring the sub-contract to an end in circumstances where the sub-contract conferred no rights for A & V to do so for J&BH's breaches of the sub-contract. (I also accept that J&BH's common law rights to terminate for repudiatory breach were not excluded.)
186. As to A & V's right to treat the sub-contract as having been terminated, Mr Frampton drew my attention to the decision of H.H. Judge Coulson Q.C., as he then was, in *Tombs v Wilson Connolly Ltd*⁵⁷. In that case the learned judge first considered the effect of the imposition upon a sub-contractor of additional labour. At paragraph [45] he referred to the earlier case of *Sweatfield Ltd v Hathaway Roofing Ltd*⁵⁸, in which it had been held that the bringing to site of additional labour by the main contractor, in the teeth of the sub-contractor's objections, was found to be repudiatory. By contrast, in the case before him, the sub-contractor had not withdrawn his labour in consequence of the decision to engage other sub-contractors to carry out part of the work, hence that action had not caused the repudiation of the sub-contract by the main contractor nor the acceptance of repudiation by the sub-contractor.
187. This part of the decision in *Tombs* is helpful in illustrating that taking work away from a sub-contractor and giving it to another sub-contractor may amount to repudiation of the sub-contract by the main contractor, but will not necessarily do so. Mr Frampton argues that in this case what J&BH did was purportedly carried out in exercise of rights granted by Clause 7.4 of the sub-contract, even if no right to supplement labour would arise until the seven day notice period had expired.
188. I do not regard the imposition of labour by J&BH as being on its own repudiatory conduct.
189. Secondly, in *Tombs*, the learned judge considered the implications of an alleged failure by the main contractor to pay the sub-contractor. This was considered in paragraphs [46] to [58] of the judgment. The learned judge held, first of all, that the main contractor was not in breach of the payment provisions in the sub-contract (paragraphs [47] to [53]). Secondly, the learned judge accepted a submission that generally a failure by an employer to pay one instalment would not amount to repudiation (paragraphs [54] and [55]). Finally, the learned judge held that the sub-

⁵⁶ TB 2088

⁵⁷ [2004] EWHC 2809 (TCC); 98 ConLR 44

⁵⁸ [1997] CILL 1235

contractor had failed to give seven days' notice required under s. 112 of the Housing Grants, Construction and Regeneration Act 1996 (paragraphs [51] and [52]).

190. In this case, I accept that there was no failure by J&BH to pay a certified sum. I also accept that the intent of the Scheme set up under the 1996 Act is that rather than a payment dispute resulting in a repudiation of a contract, generally a failure to pay or to certify payment would not be a repudiatory breach, since the unpaid contractor or sub-contractor has a remedy through adjudication.
191. My conclusion is that J&BH's combined breaches of contract and unreasonable position were an important part of the background against which its action in withdrawing access to the IAuditor system is to be judged: it had become clear during the morning of 22 March 2021 that J&BH had decided that A & V would not be permitted to complete its works.
192. I recognise that this conclusion is contrary to the position adopted in J&BH's two letters of 19 March 2021, which were demanding that A & V complete its works. However, the position adopted in those letters, that A & V should return to site and complete its works, is entirely contrary to the practical position evinced by the exclusion from the IAuditor system.
193. It is necessary for me to consider whether the exclusion from that system was contractually justified. In my view it was not: it was in my view a clear drawing of a line in the sand: thereafter the works would not be carried out by A & V. That position could be justified if J&BH already had a right to refuse A & V carrying out its works: but it did not have such a right. Thus there is some similarity between this case and the case of *Sweatfield Ltd v Hathaway Roofing Ltd* distinguished by H.H. Judge Coulson in *Tombs*.
194. Firstly, J&BH had no right to terminate the sub-contract under Clause 15.1 as it did not purport to operate the machinery of that Clause.
195. Secondly, at common law for a party to bring a contract to an end because of the other party's alleged repudiatory breach, there must be an acceptance of that repudiation: J&BH's pleaded case was that the repudiation was accepted on 16 April. This could not justify refusal of access to the IAuditor system on 22 March 2021. J&BH pleads in the alternative that it accepted the repudiation by engaging others to complete the works, but there is no pleading of any election communicated to A & V before 16 April 2021.
196. For the above reasons, I accept A & V's case that the removal of A & V from the IAuditor system, taken with the background facts to which I have referred, amounted to repudiatory breach of the sub-contract which A & V was entitled to accept and did accept by refusing to return to Site and resume work.
197. It follows from this that I reject J&BH's case that as at 22 April 2021 A & V was guilty of a repudiatory breach of contract which J&BH was entitled to accept.
198. For the above reasons, I substantially accept A & V's case pleaded at paragraph 5.0 (d) of the Particulars of Claim.

Paragraph 5.0 (e)

199. Paragraph 5.0 (e) alleges:

Failure and/or breach of Contract clause 9.8 and 9.10 to certify the Practical Completion of the works and the subsequent release of retention monies and the process of the final account. Practical Completion was not achieved until 5/10/21 6 months and 3 weeks after AS&V completion date.

200. The simple fact is that A & V did not achieve Practical Completion and therefore is not entitled to a Certificate of Practical Completion.

Paragraph 5.0 (f)

201. Paragraph 5.0(f) alleges:

A breach preventing A&V from undertaking the works to actual completion by engaging others and removing A&V from the IAuditor system without agreement. Removing A&V's access to the IAuditor system prevented A&V from being able to properly progress the works...

202. I have accepted A & V's case that removal from the IAuditor system amounted to a repudiatory breach of contract. Paragraph 5.0 (f) adds nothing to paragraph 5.0 (d).

Paragraph 5.0 (g)

203. Paragraph 5.0 (g) alleges:

Paragraph 23 of the Court of Appeal Judgment CA-2022-000848 dated 27 January 2023 judged that J&BH had breached clause 20.3 of the Sub-Contract.

204. In order to consider this allegation, it is necessary to set out the history of the adjudications which took place in respect of this sub-contract.

205. I have set out above that on 15 March 2021 A&V submitted Application No. 13. On 22 March 2021, A & V submitted Application No. 14. That application was dated the previous day, 21 March 2021, which was a Sunday. That application claimed £211,773.60 net of VAT. J&BH responded with a certificate showing £68,946.25 due from A & V to J&BH.

206. On 17 November 2021 A & V commenced adjudication proceedings seeking a net payment of £211,773.60 plus VAT, interest and fees, based on Application 14.

207. J&BH argued that Application 14 was invalid because it was issued a day late.

208. The adjudicator appointed was Mr Blizzard.

209. In due course the Court of Appeal commented⁵⁹:

⁵⁹ Per Coulson LJ at paragraph [17], [2023] EWCA Civ 54

In my view, the first adjudication was made more complicated than it needed to be, in particular because JBH's solicitors raised a number of unmeritorious jurisdictional challenges and generally failed to provide the sort of assistance to a lay adjudicator that I would expect. In the event, the jurisdictional challenges were correctly rejected by the adjudicator at [115] onwards of his decision of 19 January 2022.

210. Mr Blizzard's decision dated 19 January 2022 found that interim application 14 was valid. He identified a net sum due to A & V of £138,010.86 to which he added interests, costs and his fees.
211. Notwithstanding Clause 20.3 of the sub-contract, J&BH failed to pay any part of this sum to A & V.
212. On 2 December 2021, at a time when the Blizzard adjudication was ongoing, J&BH issued Part 8 proceedings against A & V in which, amongst other things, J&BH sought declarations as to the invalidity of Application 14.
213. The Part 8 proceedings came before Eyre J on 12 April 2022. He held that Application 14 was a day late and therefore invalid⁶⁰.
214. On 26 May 2022 Coulson LJ granted A & V permission to appeal against Eyre J's decision.
215. In June 2022 A & V commenced a second adjudication before Mr Smith. This did not go well for A & V: on 6 July 2022 Mr Smith issued a decision holding that the true value of the sub-contract works was less than A & V had already been paid. He ordered A & V to pay J&BH a net sum of £82,956.88.
216. The Court of Appeal heard the appeal against Eyre J's decision on 17 January 2023.
217. Two days later, on 19 January 2023 I heard argument on J&BH's claim for enforcement of Mr Smith's adjudication.
218. On 27 January 2023 the Court of Appeal handed down its judgment. In the course of that judgment Coulson LJ made the following comment in paragraph [23], which is what is referred to in paragraph 5.0 (g) of the Particulars of Claim:

23. The judgment given at the hearing on 12 April 2023 is at [2022] EWHC 1186 (TCC). Perhaps because of the way in which the matter had come before him, the judge did not deal with the adjudicator's decision at all, save to note at [2] that the adjudicator's findings were not binding on him. He said that he would "approach the matter on the footing of my interpretation of the documents and of the submissions before me". He did not therefore approach the hearing from the starting-point that there was an outstanding adjudication decision in AVB's favour, and that JBH were in a breach of clause 20.3 of the Sub-Contract in failing to make payment of the sum due to AVB.

219. Coulson LJ also said at paragraph [43]:

⁶⁰ [2022] EWHC 1186 (TCC)

So, as at the hearing on 12 April 2022, the position was that JBH were in breach of contract because they had not paid the first adjudicator's decision and that, in the light of the 'pay now, argue later' mantra, that should have been the first order of business. Having determined the enforcement position, the secondary question for the judge was whether AVB should lose their entitlement to enforce the decision in the first adjudication on the basis of JBH's Part 8 claim.

220. The Court of Appeal rejected A & V's submission that the Part 8 proceedings were an abuse of process. However, the Court of Appeal decided that, contrary to Eyre J's decision, Application 14 was valid.
221. To that extent A & V was successful, but in the final paragraph of his judgment Coulson LJ said:
74. Although I consider that AVB were entitled to enforce the first adjudicator's decision back in April 2022, that entitlement has long since been overtaken by events and, in particular, by the result of the second Final Account adjudication, which result JBH have applied to enforce. Moreover, as Mr Frampton correctly noted, no part of this appeal sought the payment of any sum by JBH to AVB, so this court does not have the power to award any such sum in any event. This all reflects the largely academic nature of this appeal, to which I referred at the outset of this judgment.
222. On 15 February 2023 I handed down my judgment enforcing Mr Smith's decision⁶¹.
223. Thereafter, on 1 June 2023 I heard a number of cross-applications, but importantly for present purposes, I heard an application by A&V for a stay of my 15 February 2023 judgment. On 16 June 2023 I handed down judgment in which I granted the stay⁶².
224. Against that recital of the complicated procedural history, I return to paragraph 5.0 (g) of the Particulars of Claim.
225. The importance of this allegation appears to be twofold: firstly, it was suggested by Mr Judd in cross-examination of Mr Geale that the decision of Mr Blizzard showed that £138,000 should have been paid to A & V in May 2021. Whilst that is correct insofar as it goes, the failure to pay at that time was not a breach of Clause 20.3. That breach only occurred upon failure by J&BH to comply with Mr Blizzard's January 2022 Decision: however in the events which happened, that was only effective until Mr Smith issued his decision 6 months later. Secondly, it is said that the Smith adjudication was only necessary because of J&BH's failure to honour the Blizzard decision. That is right up to a point, but as the Court of Appeal pointed out, the usual procedure is to seek enforcement in this Court of the adjudicator's decision, which procedure A & V did not invoke.
226. In the circumstances, whilst A & V are correct to say that J&BH was in breach of Clause 20.3, that breach does not sound in damages save to the extent that A & V may be entitled to interest, a matter considered below.

⁶¹ [2023] EWHC 301 (TCC)

⁶² [2023] EWHC 1483 (TCC)

Conclusion on breaches

227. For the reasons set out above, I conclude that A & V has established:
1. That J&BH was in breach of Clause 7.4 in supplementing A & V's labour on site before the expiry of the 7-day notice period;
 2. That J&BH was in breach of Clause 13 in not granting an extension of time;
 3. That J&BH was in breach of Clause 20.3 in not treating Mr Blizzard's decision as binding; and, most importantly,
 4. That J&BH was in repudiatory breach of the sub-contract in denying A & V access to the IAuditor system.
228. I now turn to consider the separate heads of claim in the Scott Schedule.

Measured Works

229. After earlier iterations of the pleading, with which parts of my previous judgments are concerned, A & V's claims are pleaded in the Scott Schedule which is at Section 8.1 of Volume 1 of the Trial Bundle.
230. The Measured Works claims are set out at pages 1/50 to 1/52 under item nos. 1.0 to 47.0.
231. In paragraph 48 of his written Opening Submissions, Mr Frampton helpfully summarised the differences between the Parties:
- 48.1 7 items (1.0, 2.0, 3.0, 32.0, 33.0, 34.0 and 37.0) account for £63,000 (c.84%) of the £73,256.66 difference between the parties. Save for item 37, these relate to the Podium works.
- 48.2 2 further items (4.0 and 35.0) should be considered alongside item 3.0 and 34.0 respectively.
- 48.3 For 16 items relating to the installation of heating, domestic water and waste on the different floors to Tower 2 (15.0 to 30.0) A&V had not completed the final fix of the domestic and waste pipes to the kitchens (as explained at paragraph 37 of Defence For some of these items, there were other elements of the works (including fitting radiators or the sink in the cleaner's/janitor's cupboard which had not been completed. These account for £7,942.40 of the difference between the parties.
- 48.4 For 6 items (12.0, 13.0, 14.0, 44.0, 45.0 and 46.0) relating to the installation in the top 2 floors of Towers 1 and 3 (and follow on testing fir all floors), JBH does not have evidence that the physical works were incomplete. However, A&V had not completed the quality assurance paperwork or sign off,

meaning that it had to be checked by others. These items account for £2,472.80 of the difference between the parties.

48.5 There are 2 other miscellaneous items (31.0, 47.0).

232. A & V's workforce left site on 19 March 2021, in circumstances discussed in detail above. Mr Paduraru's evidence, which I have accepted, was that he last attended at site on 22 March 2021.
233. On Mr Paduraru's evidence it was clear by the time he left site on the morning of 22nd March 2021 that the sub-contract had come to an end and the actions of J&BH were consistent with that having been the de facto position (I have analysed the legal position above).
234. Shortly before the events of 19 March 2021, on 15 March 2021, A & V submitted its Application for Payment 13 which claimed the value of work done up to the end of February 2021. It was the figures for completeness of the Measured Works which found their way into the Scott Schedule and which found the basis for A & V's claims at pages 50-52 of the Scott Schedule.
235. In his oral evidence, Mr Paduraru explained that for the purpose of that payment application, he had walked the site and assessed the level of completeness of each part of A & V's sub-contract works.
236. This was the same procedure as had been adopted in respect of all previous applications.
237. What did not happen, as happens on many projects, was a joint exercise in assessing progress on a monthly basis.
238. On JBH's part, monthly assessments of completeness were also carried out, which resulted in payments being made on a monthly basis against JBH's assessments.
239. Those assessments are set out in the third column on pages 50-52 of the Scott Schedule.
240. On 22 March 2021, surveys were carried out by Mr Ian Davidson and Mr Julian Smart to assess the level of completeness of the works. Mr Davidson's evidence in paragraph 17 of his witness statement was as follows:

I went around the site with Julian Smart (JBH's Site Manager) to establish what works remained outstanding and what labour levels would be needed to complete the outstanding works. In order to help manage the remaining works, we made sure that photographs were taken of incomplete works and the status of A&V's works was recorded by reference to the drawings.
241. In March 2021 marked-up drawings were prepared by Mr Seth Brown (the J&BH Quantity Surveyor) and Mr Paul James. These are in the Trial Bundle at pages 5/2208 to 2209.

242. Mr Davidson said that the photographs which are inserted into the marked-up drawings and which are also helpfully included elsewhere in the Trial Bundle in full size were taken by Mr Smart on the walk around.
243. When he gave oral evidence, Mr Davidson accepted that the drawings at 5/2208 to 2210 were the drawings of the areas where there were incomplete works. On that basis he accepted that the sub-contract works to Towers 1 to 3 were complete, and also the works to level 0 in both Podiums (although he said that these works were limited in nature. He also accepted that the works to the East Side of Podium 1 were complete.
244. In respect of the works to level 1 in the West Side of Podium 1, and to both West and East sides of Podium 2 were partially complete, although he said that most areas of the Podium works were to be completed.
245. Mr Davidson made it clear in his oral evidence that he had no part in assessing the percentage completeness of any parts of the works. His job was to assist Mr Smart in his walk round. Mr Smart himself does not appear to have carried out the assessments: my impression is that these were carried out by Mr Brown, which would be appropriate in his role and profession of quantity surveyor. However, Mr Brown was not called as a witness, and there is no evidence before me as to the way in which he calculated his assessments.
246. The same criticism can be made of Mr Paduraru's assessments (i.e. that there is no evidence as to precisely how he came to his various assessments) but he was at least available to answer questions, and I formed the impression that overall his assessments seemed reasonable, albeit that I had little firm basis upon which to test some of his assessments. I would comment that had Mr Paduraru had access to the IAuditor system on 22 March 2021, then A&V's position as to the completeness of the Project would have been on the contemporaneous record.
247. Further, it will be seen below that in many cases J&BH's assessments in the Scott Schedule of the completeness of parts of the sub-contract works depart significantly from its earlier assessments.
248. In those circumstances, I generally prefer A & V's assessments to J&BH's.

Item 1.0 – Podium 1 Commercial, Level 00, Install lateral out runs

249. This item relates to the lateral out runs for Level 00 in Podium 1. The description “commercial” is potentially misleading. This item does not concern a particular commercial area. Rather, it refers to all the pipework running laterally from the energy centre to the bottom of each of the risers, so that the services can move up the floors of the Podiums and the Towers. The reference to “commercial” signifies that it does not include the pipework in the rooms themselves.
250. The scope of works was set out in Appendix 2 of the sub-contract:

“Podium 1 – continued –Install all distribution pipe runs on levels 1 and 2 including all rain waters and soils. Pipe works will include installing and pressure testing of all Heating & domestics & drainage

pipework distribution runs in all areas area's [sic] concerned with podium 1."

251. While this refers to "levels 1 and 2", there are only 2 levels in the podiums: ground or street level and an upper level. The Tower floors are above the upper level. The reference to levels 1 and 2 in Appendix 2 is therefore to Levels 00 and 01 respectively in A&V's quote and the Scott Schedule.
252. The total sum allowed for "Podium 1 Commercial" works in Appendix 8 was £38,000⁶³, split as to £25,000 for level 00 and £13,000 for level 01.
253. A & V claims that these works were 80% complete, and therefore claims 80% of £25,000, namely £20,000.
254. J&BH's present position is that these works were 40% complete, thus allowing £10,000. It is to be noted that in Payment Certificate 11 (measuring the position as at December 2020) J&BH had assessed these works as being 50% complete, accepting A & V's assessment. Since that date A & V had been working in the Podium areas, right up to the date works stopped.
255. In paragraph 4.2 of A & V's written closing submissions, reliance is placed upon the evidence given by Mr Davidson:
 - (a) JBH [Trial Bundle 5, page 2208-2213] JBH does not detail any evidence of outstanding works for this item and/or area.
 - (b) Mr Davidson in his witness evidence on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works and that there were no works outstanding to this level. Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22nd March 2021 and that Julian Smart coordinated the document as Mr Davidson was not very good with technology.
 - (c) Although I was not able to undertake a record of the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), this item should be paid in full.
256. In my judgment it was too late in closing submissions to put forward what was in essence an application to amend the Scott Schedule.
257. However, the evidence referred to casts doubt upon accuracy of the assessment put forward by J&BH (40%) and raises questions as to the basis upon which Mr Brown carried out his exercise.

⁶³ TB 337

258. This evidence also suggests to me that A & V's assessments may be an underestimate of the amount which should be allowed.
259. I am prepared to accept J&BH's case that these works were not complete, but I accept A & V's case that they were at least 80% complete by 19 March 2021.
260. I allow the sum claimed by A & V, £20,000.

Item 2.0 – Podium 1 Commercial, Level 01, Install lateral out runs

261. The issues here are the same as in respect of item 1.0, except here the works were to level 01 and the contract allowance was only £13,000.
262. Again, A & V claims that the works were 80% complete, thus claiming £10,400.
263. Again, J&BH puts forward an assessment of 40%, having previously accepted 50% in Payment Certificate 11.
264. In paragraph 4.3 of A & V's written Closing Submissions, it submits:

(a) JBH [Trial Bundle 5, page 2208 (drawing with 16 photographs) and 2213 (list of 16 items)] JBH does not detail any outstanding works for half of the floor area to this item and only to drawing sheet 1 of 2.

(b) [Trial Bundle 5, page 2213] with its list of items JBH only refers to issues of outstanding works to 9 of the items.

(c) Mr Davidson in his witness evidence on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works and that there were only works to half of the floor outstanding to this level (only sheet 1 of 2). Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22nd March 2021 and that Julian Smart coordinated the document as Mr Davidson was not very good with technology.

(d) A&V contract value for this item is £13,000.00 so therefore based on Mr Davidson evidence, the maximum value outstanding for works remaining could only be half of that in the sum of £6,500.00.

(e) Within JBH assessment in application 12 [trial bundle 4, page 1658] for works up to January 2021 JBH had already valued the entire floor level at 50%.

(f) A&V continued with works to the podiums into February and March 2021 therefore the level of install would have increased.

(g) The evidence of photographs and schedule of the 22nd March 2021 Trial bundle 5, page 2213 only details comments for 9 items outstanding and these all of a minor nature and not really relating to

matters of “lateral out runs” and only likely to be a cost of approximately £1,000.00 to complete

(h) Although I was not able to undertake a record the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), the court should consider the minor nature of works to complete as only being approximately £1,000.00. A&V would contend that they should be paid in full for this contract item as by JBH acts of prevention in taking over A&V works without permission and not awarding further time from the contract period of 12th March 2021 prevented this from being completed.

265. I accept the above submissions as justifying the pleaded valuation in the sum of £10,400.
266. I do not accept that there should now be a re-assessment of this item on the basis of carrying out an assessment of the cost to complete the works, this being a case of which J&BH should have had notice before the evidence was complete.
267. I also do not accept the case that the item should be valued at 100% on the basis that J&BH prevented A & V from completing the work. There is a separate claim which I consider below for loss of profit/recovery of overheads as a result of the sub-contract coming to an end, which is the appropriate legal basis for such a claim.
268. I am prepared to accept J&BH’s case that these works were not complete, but I accept A & V’s case that they were at least 80% complete by 19 March 2021.
269. I allow the sum claimed by A & V, £10,400.

Item 3.0 – Podium 1, Level 01, Install risers per room with Heating, Domestic and SVP and

Item 4.0 – Podium 1, Level 01, Connect radiators in each room 1st and 2nd fix

270. In respect of both these items A & V claims 80% completeness. The contract sum for item 3.0 is £22,800 and for item 4.0 is £1,000. Accordingly, the amount claimed for 3.0 is £18,240 and for item 4.0 £800.
271. In respect of item 3.0, J&BH allows 30%, i.e. £6,840 and in respect of item 4.0 J&BH allows nil.
272. In respect of item 3.0, in Payment Certificate 11 allowed 30% for item 4.0 (the same figure as claimed then by A&V) and nil for item 4.0 (in this instance A&V then agreed with the nil assessment).
273. I do not accept that A & V did not make any further progress after December 2020, although it is to be noted that in Payment Application 12 A & V did not suggest that there was any increase in level of completeness up to 20 January 2021.
274. In paragraph 4.4 of its written Closing Submissions, A & V submitted:

(a) [Trial bundle 5, page 2208 (drawing with 16 photographs) and 2213 (list of 16 items) JBH does not detail any outstanding works for half of the floor area to this item and only to drawing sheet 1 of 2.

(b) [Trial bundle 5, page 2213] with its list of items JBH only refers to issues of outstanding works to 9 of the items.

(c) Mr Davidson in his witness evidence on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works and that there were only works to half of the floor outstanding to this level (only sheet 1 of 2). Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22nd March 2021 and that Julian Smart coordinated the document as Mr Davidson was not very good with technology.

(d) A&V contract value for this item is £22,800.00 so therefore based on Mr Davidson evidence, the maximum value outstanding for works remaining could only be half of that in the sum of £11,400.00.

(e) Within JBH assessment in application 12 for works up to January 2021 JBH had already valued the entire floor level at 50%.

(f) A&V continued with works to the podiums into February and March 2021 therefore the level of install would have increased.

(g) The evidence of photographs and schedule of the 22nd March 2021 [Trial bundle 5, page 2213] only details comments for 9 items outstanding and these all of a minor nature and only likely to be a cost of approximately £2,000.00 to complete

(h) Although I was not able to undertake a record the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), the court should consider the minor nature of works to complete as only being approximately £2,000.00. A&V would contend that they should be paid in full for this contract item as by JBH acts of prevention in taking over A&V works without permission and not awarding further time from the contract period of 12th March 2021 prevented this from being completed.

275. As I read Certificate 12, the valuation was for 30%, not 50%, as suggested in paragraph (e) above.

276. However, I accept the above submissions as justifying the pleaded valuation in the sum of £18,240.

277. I do not accept that there should now be a re-assessment of this item on the basis of carrying out an assessment of the cost to complete the works, this being a case of which J&BH should have had notice before the evidence was complete.

278. I also do not accept the case that the item should be valued at 100% on the basis that J&BH prevented A & V from completing the work. There is a separate claim which I consider below for loss of profit/recovery of overheads as a result of the sub-contract coming to an end, which is the appropriate legal basis for such a claim.
279. I am prepared to accept J&BH's case that these works were not complete, but I accept A & V's case that they were at least 80% complete by 19 March 2021.
280. Item 4.0 is a small item, in respect of which I see no reason to doubt Mr. Paduraru's assessment.
281. Accordingly, I accept Mr Paduraru's assessments in the Scott Schedule, and allow £18,240 for item 3.0 and £800 for item 4.0.

Item 5.0: Level 01, Test SVP – Domestic and Heating pipe

282. A & V makes no monetary claim against this item.

Item 32.00: Podium 2 Commercial, Level 00, Install lateral out runs

283. I agree with J&BH's suggestion in Mr Frampton's written Opening Submissions that it is convenient to deal with all the Podium issues before turning to the Towers works.
284. This is the same work as item 1.0, save that it relates to Podium 2 (instead of Podium 1).
285. In the Scott Schedule, A & V claims 50% completeness against a contract allowance of £20,000, thus claiming £10,000.
286. In its written Closing Submissions, A&V points out that in the marked up drawings at TB 3/2208-2213 J&BH does not detail any evidence of outstanding works for this item and/or area. The submission at paragraphs 4.8 (b) and (c) of those submissions was:

(b) Mr Davidson in his witness statement on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works and that there were no works outstanding to this level. Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22 March 2021 and that Julian Smith coordinated the document as Mr Davidson was not very good with technology.

(c) Although I was not able to undertake a record [of] the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), this item should be allowed in full.

287. In my judgment it was too late in closing submissions to put forward what was in essence an application to amend the Scott Schedule.

288. However, the evidence referred to casts considerable doubt upon the accuracy of the assessment put forward by J&BH (10%) and raises questions as to the basis upon which Mr Brown carried out his exercise.
289. This evidence also suggests to me that A & V's assessments may be an underestimate of the amount which should be allowed.
290. As mentioned above, J&BH puts forward a figure of 10%, allowing £2,000.
291. In Payment Certificates 11 and 12 J&BH assessed completeness at 25%.
292. Given Mr Davidson's evidence, I have no hesitation in accepting A & V's case that these works were at least 50% complete by 19 March 2021.
293. I allow the sum claimed by A & V, £10,000.

Item 33.00 Podium 2 Commercial, Level 01, Install lateral run outs

294. This item is the same as item 32.00, save that it relates to Level 01.
295. A & V claims 80% completeness against a contract allowance of £10,000, thus claiming £8,000.
296. J&BH puts forward a figure of 10%, allowing £1,000.
297. In Payment Certificates 11 and 12 J&BH assessed completeness at 25% in both Certificates.
298. In paragraph 4.9 of its written Closing Submissions, A&V submitted as follows:

(c) Mr Davidson in his witness evidence on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works. Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22nd March 2021 and that Julian Smart coordinated the document as Mr Davidson was not very good with technology.

(d) A&V contract value for this item is £10,000.00. A&V have claimed 80% complete. These works being major runs of brackets and pipework's above corridor areas. Mr Frampton and I having a long discussion regarding this during my questioning. The court has since been provided with a video taken by myself of the podiums on the 12th March 2021 showing these completed pipe runs etc.

(e) Within JBH assessment in application 12 for works up to January 2021 JBH had already valued the entire floor level at 25%. Therefore, the maximum works to complete at that time was £7,500.00.

(f) A&V continued with works to the podiums to this level January into February and March 2021 therefore the level of install would have increased.

(g) The evidence of photographs and schedule of the 22nd March 2021 [Trial bundle page 5, pages 2211 and 2212] details comments for 49 items outstanding for the entire podium 2 level 1 and in A&V opinion these all likely to be a cost of approximately £2,000.00 to complete. From the photographs presented at trial and reviewed and evidenced by Mr Frampton these clearly show quite an element of A&V works already installed.

(h) Many of the items refer to pod connections, this an item relating to the install of the connections being separately fabricated by A&V within variation item 22 to which I explained within my cross examination by Mr Frampton.

(i) Much of the work outstanding would require an instruction for a return visit due to changes in design, incomplete walls to the pods described by Mr Davidson in his cross examination *“The podiums were not ready, pods not built, no walls and JBH wouldn’t accept areas”*

(j) Although I was not able to undertake a record the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), the court should consider the works to complete this Podium 2 Level 1 works as only being approximately £2,000.00. A&V would contend that they should be paid in full for this contract item as by JBH acts of prevention in taking over A&V works without permission and not awarding further time from the contract period of 12th March 2021 prevented this from being completed.

299. I accept the above submissions as justifying the pleaded valuation in the sum of £8,000.

300. I do not accept the case that the item should be valued at 100% on the basis that J&BH prevented A & V from completing the work. There is a separate claim which I consider below for loss of profit/recovery of overheads as a result of the sub-contract coming to an end, which is the appropriate legal basis for such a claim.

301. I therefore allow the sum claimed by A & V, £8,000.

Item 34: Podium 2 level 01 Install risers per room with Heating, Domestic and SVP and

Item 35: Connect radiators in reach room 1st fix and 2nd fix

302. These items are the same work scope as items 3.0 and 4.0, save that they relate to Podium 2 rather than Podium 1.

303. Item 34 claims 70% of a contract allowance of £26,400, namely £18,480. Item 35 claims 70% of £1,000, namely £700.

304. J&BH has an allowance of 10% for each item, therefore £2,640 and £100.

305. This contrasts with the valuations in Certificates 11 and 12 (0% for both items in each certificate).
306. Thus these are instances where, albeit modestly, J&BH's position is more favourable to A & V than the earlier Certificates.
307. The difference between the Parties in respect of this Item is particularly marked – hardly any progress on J&BH's case, moving towards completion on A & V's case.
308. A & V's submissions in respect of these items, as in respect of other items considered above, concentrate on Mr Davidson's evidence.
309. In respect of Item 34 A & V submitted in paragraph 4.10:
- (a) Trial bundle 5, page 2209 and 2210 (2 drawings with photographs) and 2211 and 2212 (list of 39 items)
 - (b) Trial bundle 5, page 2211 and 2212 with its list of items JBH refers to issues of outstanding works to 49 of the items.
 - (c) Mr Davidson in his witness evidence on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works. Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22nd March 2021 and that Julian Smart coordinated the document as Mr Davidson was not very good with technology.
 - (d) A&V contract value for this item is £26,400.00. A&V have claimed 70% complete.
 - (e) A&V continued with works to the podiums at this level from January into February and March 2021 on an uneconomical basis at the behest of JBH and their 2 weeks look ahead therefore the level of install would have increased.
 - (f) The evidence of photographs and schedule of the 22nd March 2021 [Trial bundle page 5, 2211 and 2212] details comments for 49 items outstanding for the entire podium 2 level 1 and in A&V opinion these all likely to be a cost of approximately £5,000.00 to complete. From the photographs presented at trial and reviewed and evidenced by Mr Frampton these clearly show quite an element of A&V works already installed. In many instances the pipes were installed, just final connections with crimping etc. Mr Frampton and I having quite a discussion about crimping pipes. Mr Harman later during his cross examination confirming that crimping was acceptable but not his preferred method of pipe joints.
 - (g) Many of the items refer to pod connections, this an item relating to the install of the connections being separately fabricated by A&V within variation item 22 to which I explained within my cross examination by Mr Frampton.

(h) Much of the work outstanding would require an instruction for a return visit due to changes in design, incomplete walls to the pods described by Mr Davidson in his cross examination *“The podiums were not ready, pods not built, no walls and JBH wouldn’t accept areas”*

(i) Although I was not able to undertake a record the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), the court should consider the works to complete to the entirety of Podium 2 Level 1 as only being approximately £5,000.00. A&V would contend that they should be paid in full for this contract item as by JBH acts of prevention in taking over A&V works without permission and not awarding further time from the contract period of 12th March 2021 prevented this from being completed.

310. A & V’s submission in paragraph 4.11 in respect of Item 35 was similar:

(a) Trial bundle 5, page 2209 and 2210 (2 drawings with photographs) and 2211 and 2212 (list of 39 items)

(b) Trial bundle 5, page 2211 and 2212 with its list of items JBH refers to issues of outstanding works to 49 of the items.

(c) Mr Davidson in his witness evidence on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22nd March 2021 and that Julian Smart coordinated the document as Mr Davidson was not very good with technology.

(d) A&V contract value for this item is £1,000.00. A&V have claimed 70%.

(e) A&V continued with works to the podiums into February and March 2021 therefore the level of install would have increased.

(f) The evidence of photographs and schedule of the 22nd March 2021 [Trial bundle 5, page 2211 and 2212] details comments for 49 items outstanding for the entire podium 2 level and do not generally detail incomplete radiator works.

(g) Although I was not able to undertake a record the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), the court should consider the works to complete to the entirety of Podium 2 Level 1 as only being approximately £300.00. A&V would contend that they should be paid in full for this contract item as by JBH acts of prevention in taking over A&V works without permission and not

awarding further time from the contract period of 12th March 2021 prevented this from being completed.

311. In my view, if these works were as incomplete as J&BH contends, that this would have been reflected in the marked-up drawings. Accordingly, A & V's reliance upon Mr Davidson's evidence appears to me to be justified.
312. However, as in respect of the other items considered above, I do not think it appropriate at this stage to allow A & V to put forward an amended case, I do not regard it as appropriate to rely upon a late case as to the cost to complete the works, nor to assess these items on the basis of 100% of the contract allowance for works which were not complete.
313. In the circumstances I accept the valuations put forward in the Scott Schedule, namely £18,480 for Item 34 and £700 for Item 35.

Item 36: Podium 2 Level 01, Test SVP – Domestic and Heating Pipe Contract

314. In the Scott Schedule there is no claim against this item.
315. In paragraph 4.12 of A & V's written Closing Submissions submits:

A&V have not undertaken this item, A&V would contend that they should be paid in full for this contract item as by JBH acts of prevention in taking over A&V works without permission and not awarding further time from the contract period of 12th March 2021 prevented this from being completed.

316. I do not accept this submission: the works were not completed and therefore payment on the basis that they should be treated as having been completed is inappropriate. It is another matter as to whether A & V can recover loss of profits and overhead recovery in respect of this work.

Items 6.0 to 31.0 and 38.00 to 45.00: Works to Towers

317. It is convenient to consider these Items together as they raise the same issues.
318. Items 6.0 to 31.00 relate to Towers 1 and 2 and total £225,280. Items 38.00 to 45.00 relate to Tower 3 and total £74,240.
319. In Certificate 12, J&BH had accepted that levels 1 to 7 were 100% complete. Levels 8 and 9 were treated as 98% complete with a note saying "Value held for kitchens and snag completion". There was a separate line item for "Levels 2-9 test" which was also assessed at 98% on the same basis.
320. In respect of Tower 2, Certificate 12 was recorded as 100% and other items at 98% on the same basis ("Value held for kitchens and snag completion").
321. In respect of Tower 3, levels 2 to 7 were recorded in Certificate 12 as being 100% complete, levels 8, 9 and the testing item were recorded as 98% complete on the same basis ("Value held for kitchens and snag completion").

322. In the Scott Schedule, J&BH still accepts that levels 2 to 11 of Tower 1 and levels 2 to 7 of Tower 3 were 100% complete.
323. In respect of Tower 1, J&BH's position changed in the Scott Schedule as follows: level 8 went from 98% to 95%; level 9 from 98% to 93% and the testing item from 98% to 89%.
324. In respect of Tower 2, J&BH's position changed in the Scott Schedule as follows: level 2 went from 100% to 94%; level 3 from 98% to 94%; levels 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 level 8 went from 98% to 95%; levels 15, 16, and 17 from 98% to 94% and the testing item from 98% to 84%.
325. In respect of Tower 3, J&BH's position changed in the Scott Schedule as follows: level 8 went from 98% to 95%; level 9 from 98% to 93% and the testing item from 98% to 89%.
326. There is no evidence before me as to how precisely the revised figures were calculated, but three main issues of principle emerged in the course of the trial: firstly that there were some incomplete works in some kitchens; that there were some defective works; and that the QA process remained outstanding.
327. In respect of the issue as to kitchens, this was explained carefully and fully in paragraphs 125 to 139 of Mr Frampton's written Opening Submissions. The total deduction sought is £6,783.75.
328. As to the QA issue, it is common ground that QA needed to be completed in a number of areas.
329. As to the defective works, these were mentioned in respect of J&BH's counterclaim for costs to complete as consisting of leaks to pipework, which had to be fixed (see paragraphs 19 and 20 of Mr Ian Davidson's witness statement⁶⁴).
330. In paragraph 4.7 of A & V's written Closing Submissions, it is submitted in respect of Towers 1 and 2:
- (a) Trial bundle 5, page 2208-2213 JBH does not detail any evidence of outstanding works for this item and/or area.
 - (b) Prior to the dispute JBH had valued many of these items as complete or a high percentage complete.
 - (c) Mr Davidson in his witness evidence on trial day 3 confirmed within his paragraph 17 that he had undertaken an inspection and report with Julian Smart to detail all of the remaining outstanding works and that there were no works outstanding to the 3 towers. Upon me questioning this for a second time Mr Davidson reconfirmed this statement. Mr Davidson confirmed the photographs were from that inspection on the 22nd March 2021 and that Julian Smart coordinated the document as Mr Davidson was not very good with technology.

⁶⁴ TB 189-190

(d) Although I was not able to undertake a record the completeness of this item as a result of being removed from the IAuditor system on the 22nd March 2021 by JBH (an act of prevention), this item should be paid in full.

331. In respect of Tower 3, paragraph 4.14 of A & V's written closing submissions was to like effect.
332. As set out above, the total claimed by A & V for all three towers was £299,250 (£225,280 + £74,240).
333. The amount contended for by J&BH in respect of the kitchens is £6,783.75. That is a little over 2% of the contract allowance for the direct works in the Towers. There is evidence of incomplete works in the kitchens as analysed by Mr Frampton in his written Opening Submissions, and as explored in cross-examination of Mr Paduraru.
334. In my view there should be a reduction of that sum (£6,783.75) to reflect those outstanding works, but otherwise I accept A & V's case that the works to the Towers were substantially complete.
335. As to the alleged leaks, it seems to me that J&BH was correct to treat the costs of dealing with these leaks as being an element of the cost to complete, and I make no reduction for those defects.
336. As to the QA elements, it seems to me that the costs of Mr Paduraru attending site to carry out QA assessments would have been minimal. Whilst in respect of other items I have declined to award monies upon the basis that A & V would have carried out 100% of the works but for J&BH's acts of prevention, my reason for not doing so (namely that A & V's approach does not allow for the costs which would have been incurred in completing the works) does not apply in respect of Mr Paduraru's time, given that he was a full-time employee of A & V whose cost A & V would have incurred in any event. Accordingly, I make no reduction for the outstanding QA exercise: I would add that I had and have no basis upon which to test whether the reductions made by J&BH could be justified – they appeared to be somewhat arbitrary as well as conflicting with the assessments in Certificate 12 and Mr Davidson's evidence as to overall completion, which must have included elements of QA carried out before 19 March 2021.
337. Accordingly, I assess the value of the works in the Towers in the sum of £299,250 less £6,783.75, namely £292,466.25.

Item 37.00: Preliminaries phase 1 – Towers 1 and 2; Podiums 1 and 2

338. This is one of two items relating to preliminaries.
339. The contract allowance was £22,240.
340. A & V claims 100%.
341. J&BH suggests 75%.
342. In paragraph 4.13 of its written Closing Submission, A & V submits:

A&V value this at 100% based upon the value for this item as it directly relates to the contract period on site being to the 12th March 2021. Any time thereafter would require additional preliminaries and thus an instruction.

343. In Mr Frampton's written Opening Submissions he submits as follows:

A&V's position

163. A&V claims that item 37.0 was 100% complete and values it at £22,240.

164. A&V does not properly justify or evidence its position. A&V's comment in the Scott Schedule is the same, verbatim, as for Item 1.0 (see paragraph 57 above).

165. This comment only goes to why the Works were incomplete. It does not address the extent of the Works which were incomplete.

166. The comment also contradicts A&V's assessment. Given it accepts the works were incomplete, A&V cannot claim the full preliminaries sum.

167. As the claimant, and particularly when it accepts that the Works were incomplete, the burden is on A&V to demonstrate the extent and value of the Works it did complete.

JBH's position

168. JBH assesses that item 37.0 was 75% complete, £16,680.

169. The difference between the parties is £5,560.

170. JBH's assessment is a pro rata based on the progress made by A&V. JBH's assessment aligns with its valuation of the extent to which A&V had completed the Tower 1, Tower 2, Podium 1 and Podium 2 works.

171. Specific tasks covered by the preliminaries which A&V had not completed included:

171.1 The marked-up/ red line drawings showing any deviations to the installed pipework from the design. The production of these drawings was a management task required by the Sub-Contract Pre-Order Meeting Minutes [Vol 1/ Tab 25/ 293]. In particular see:

a) Item 7.8A (*"Record drawings required"* "Yes" [297]).

b) Item 9.7A) of (*"Red lind [sic] mark ups or as build drawings"* [299]).

c) Item 12.9 (“*Final account to be submitted within 2 weeks of completion of sub-contract works with full substantiation, instructions, marked up drawings, breakdowns and invoices supporting values claimed*” [302]).

A&V had not provided any of these drawings (which would be normally produced once all the Sub-Contract Works were complete).

171.2 The production of the testing certificates for the pressure testing of the pipework.

172. JBH’s overall position is that A&V had completed £243,500.95 of these works which had a total value of £345,760. That is 70%.

173. A&V’s claim is that it had completed £311,900, or 90%. 90% of the preliminaries of £22,240 would be £20,016.

344. As set out above, I have accepted A & V’s case save as to £6,783.75. Accordingly, on a percentage of completion basis A & V would be entitled to about £20,000 for these preliminaries.

345. However, I accept A & V’s case that, having been on Site for the full contract period, A & V is entitled to the full amount of £22,240.

Item 47.0: Preliminaries, Phase 2, Tower 3

346. The difference between the Parties is minimal.

347. A & V claims 100% of the contract allowance of £5,560.

348. J&BH says that the figure should be 98%, namely £5,448.80 giving rise to a difference of £111.20.

349. As with Item 37.00, I accept A & V’s claim to be entitled to 100%, namely £5,560.

Measured Works: Conclusions

350. For the above reasons, I value the Measured Works at £6,783.75 less than the sum claimed of £413,940, namely £407,156.25.

Variations

351. The Variations are pleaded at page 53 of the Scott Schedule.

352. A & V claims £67,200 in respect of 22 variations.

353. J&BH accepts 14 variations to a total value of £39,230.

Variations 6 and 21

354. These two variations are conveniently considered together. Variation 6 claims £6,000 in respect of claimed suspension of the works. Variation 21 claims £8,000 in respect of the value of execution of the relevant works. Thus these two variations together explain just over 50% of the difference between the Parties on the variation account.
355. The dispute between the Parties turns upon works required to install protective coverings to close off gaps created where holes were cut in floor slabs to allow piping to pass from one floor level to the next.
356. The holes themselves were not part of A & V's works. Photographs show that the holes were relatively substantial – sufficiently large that if left uncovered, such items as tools could fall from one floor to the floor below with an obvious safety risk.
357. The solution was that wooden boards were cut to cover the holes.
358. However, those boards had no holes to allow pipes to go through. A & V was required to solve this problem. The solution was to create boards with slots in them which could be placed around the pipes once installed.
359. Variation 6 concerns a suspension of work in connection with this, and Variation 21 concerns payment for the work done.
360. Originally J&BH agreed to make some allowance for the time, allowing £3,000 (50%) in Certificate 12. JBH now says nothing is payable.
361. In A & V's written Closing Submissions at paragraph 5.2 it is submitted:
- (a) This was discussed at some length at the trial. This item must not be confused with variation item 21 which relates to the separate instruction to cover the holes/slots in the concrete slabs, that not being part of A&V works. I explained that the service holes/slots holes to the concrete floor slabs were required to be covered as a result of a suspension by BYUK at the beginning of July 2020. This suspension required A&V and all other subcontractors of BYUK and JBH to attend a 2-day tool box talk specific to debris falling through floor service holes (trial bundle 4, page 1678). The creation of the initial holes, materials falling through the holes by others and the covering of the holes was not my responsibility. The talk was undertaken specifically because the works were suspended for 2 days by BYUK not by any of my actions.
 - (b) Previously Adam Hill / JBH had agreed with me to pay for this item. It is only as a result of JBH actions in March 2021 that they purport to change their mind regarding payment.
 - (c) Within the Blizzard adjudication the Adjudicator decided that as JBH had accepted this as a variation withing application 12 then this still confirms this as a variation.
362. In Mr Frampton's written Opening Submissions he submits:

JBH's position

194. JBH rejects this alleged variation and values it at £nil:

194.1 The email referred to by A&V did not instruct it to suspend its works [1678]. The email stated that there had been a suspension of works issued against JBH. The instruction to the subcontractors, including A&V, was to attend a tool-box-talk (TBT) at 8am the next morning.

194.2 Attending a tool-box-talk is not a suspension or a variation. It is part of the general health and safety obligations. Appendix 7 to JBH's primary contract states that part of JBH's commitments in respect of health and safety, which A&V then had to comply with, including "*the undertaking of regular tool box talks*" [630]. See also item 8 of the primary contract final tender review meeting minutes at [637]. Ian Davidson explains at para 10 of his statement that [188]:

"Each day JBH carried out an all-trade morning briefing (referred to as 'toolbox talks') to set out any general information, issues or concerns. Following this meeting I usually had a separate discussion with Nick to remind him what A&V needed to accomplish and to see if there was anything he needed from me/JBH. After the toolbox talks, I made sure I went around the workfaces to discuss any problems with A&V as well as speaking to the main contractor to see what issues, snagging items or other works were outstanding."

194.3 JBH accepts that a suspension of works notification was issued by Bouygues. At 17:23 on 7 July 2020 (after A&V had left site) Bouygues issued a suspension of works notification because the holes through the floor slabs had not been covered up after the installed of the vertical pipes for the risers ("Penetrations not recovered [sic] after services installed.") [3590] These services were installed by A&V, and it was its failure to cover up the holes. At 11.37am on 8 July 2020, Bouygues issued a further suspension of work notification specific to Tower 3 (A&V's scope) because of the same unsafe working. Bouygues stated that there was a risk of "*Falling objects, dust and debris can cause injury and health problems for operatives working below.*" [3588] This was rectified by JBH (on behalf of A&V) by covering the holes, and by delivering tool box talks to operatives working on Towers 1 to 3 (including A&V). The attendees are recorded at [4219, 4220]. The SOWN to Tower 3 was lifted at 14:55 on 9 July 2020. The emails show that the SOWNs only affected Towers 1, 2 and 3; see [4217] and [4221]. In other words, the health and safety issue and resultant suspension concerned A&V's scope. There was no suspension of Towers 4 and 5 where Watertight was working.

194.4 Adam Hill provided the following evidence in his first witness statement in the Final Account Adjudication [1700-1701]:

“I note that F135457.1 and F1.431339 [suspension notices] are both from July 2020. These relate to the removal of safety covers over open riser shafts. These riser safety plates were removed and discarded by A&V resulting in the stop works notice being issued by BYUK. This notice affected not only A&V but also all other JBH trades on site. It is our view that if this variation relates to these SOWN notices that the suspension of works was in fact due to A&V’s disregard for the safe systems of work that were in place on the project. The SOWN notices resulted in JBH being required to undertake project toolbox talks with all operatives again (previously undertaken as part of the site induction) before the SOWN was closed. BYUK also had to check all safety covers on site before being in a position to reset the areas to work.”

194.5 Given A&V caused the suspension, it is not entitled to any additional payment.

194.6 In any event, A&V has failed to comply with the condition precedents in clause 8.9 and 8.10 to any payment related to this stop work notices.:

a. Clause 8.9 states [320]:

“Notwithstanding anything in this clause 8.0, J & B Hopkins shall not be obliged to make payment to the Sub-Contractor for carrying out any variation to the Sub-Contract Works unless J & B Hopkins has instructed the Sub-Contractor to carry out such variation in writing.”

b. A&V has failed to comply with this clause. The only written instruction identified by A&V is an instruction to attend a toolbox talk, not to suspend.

c. Clause 8.10 states [320]:

“The Sub-Contractor shall submit full and proper substantiation and such information as is required by J & B Hopkins and to J & B Hopkins satisfaction, in support of any purport to either variation works or any additional entitlement. This requirement shall be a condition precedent to payment for the same. This information provided by the Sub-Contractor shall clearly identify the source and basis of any purport to either variation works or any additional entitlement.

A fully detailed breakdown of all calculations and rates including, but not limited to, time sheets and material invoices, shall be provided by the Sub-Contractor.”

d. A&V has failed to comply with this clause. A&V has not provided full and proper substantiation and information for the alleged variation.

195. As to quantum:

195.1 If the Court considers that there is a valid variation it would be for attending a tool-box-talk. At most, this would be 2 hours. 2 hours per operative for 12 operatives would be £666.67 (hourly rate: £250 ÷ 9 = £27.77). Even this figure would overcompensate A&V because some of its operatives were plumber's mates (not plumbers). The given rate by A&V for plumber's mates was £160 per hour, rather than the £250 per hour rate for plumbers which A&V has wrongly used for all 12 operatives.

195.2 Alternatively, even if the Court finds that A&V is entitled to a variation for the suspension, A&V has failed to provide any evidence of costs it incurred or that its operatives were unable to carry out any works at all. The tool box talks attendance records show only 9 operatives from A&V on 9 July 2020, not 12 as claimed [4219, 4220].

363. In my judgment, J&BH accepted contemporaneously that this was a legitimate claim, and clearly understood the nature of the claim sufficiently to make an interim payment of £3,000, so that I see no substance in the arguments based upon Clause 8.9 and 8.10. Whilst this does not bind J&BH in the final account exercise which I am now carrying out, it seems to me to carry great weight.

364. I allow the £6,000 claimed for the reasons given by A & V.

365. In the Scott Schedule, the explanation for Variation 21 is as follows:

A&V never contested that there should be a cover over the open holes between the slabs for Health and Safety purpose, [sic] but the way JBH instructed A&V to undertake this was a variation. JBH agreed to provide A&V with plywood and carpenters tools (inappropriate for a plumbing firm). However, as a good gesture A&V did accept to do this work as per JBH instruction, unfortunately [sic], JBH failed to supply A&V with the mentioned items and A&V was physically forced to undertake this work [AP3/ page 354 - 362] A&V undertook the new process works including revisits as instructed by Andrew Macey. Hopkins failed to supply the plywood and multitool and A&V was forced to look on site after any small pieces of wood in order to cover those open holes between the slabs and utilising their own tools not JBH multitool as promised. A&V had no allowance [sic] for such work, as this Penetration Cover works was not included within the Scope of Works of the Sub-Contract. A&V consider that this variation should be honoured and paid in full in the sum of £8,000.00.

366. Paragraph 4.9.1 of the Particulars of Claim repeats the comments from the Scott Schedule. Paragraph 4.9.2 then states⁶⁵:

J&BH do not deny this works was undertaken. However, Hopkins's commentary in the adjudication confuses the forming of holes through non-structural elements with that of providing additional temporary protection between concrete floors to be H&S compliant as requested by J&BH prior to completion of other works by other trades and the fire stopping company to the riser cupboards. The forming of holes through non-structural walls etc has been extensively undertaken by A&V throughout the works in partitions, ceilings and the like and that was included. The timber covers and hole forming is purely a Health and Safety requirement requested by J&BH for A&V to undertake. The floor aperture where this was to be undertaken was a concrete structural floor and A&V consider that this variation should be honoured and paid in full as this works was not part of their Sub-Contract scope of work.

367. In respect of Variation 21, in its written Closing Submissions at paragraph 5.8 A & V submits:

This item relates to the penetration covers between floors. During my cross examination with Mr Frampton I re-confirmed that JBH had instructed me to undertake this work. I also noted the difficulty with the process. I agreed that I had initially agreed to undertake the early works as a good will gesture but as JBH became more aggressive in March 2021 then I withdrew the offer. We had to install these to all floors and not much reuse of boards was possible between floors.

368. In his written Opening Submissions, Mr Frampton submitted:

JBH's position

230. JBH rejects this alleged variation and values it as nil:

230.1 A&V had a duty of care to adopt a safe method of working. In order to carry out its works in a good and workmanlike manner and to comply with health and safety, A&V had to provide these covers. See Variation 6 above. Alan Giles explains at paragraph 14 of his statement that "*These covers were required to create protection from any falling debris*" [170].

230.2 A&V's position is not understood in that it is understood (from the comment in the Scott Schedule) to accept that it was obliged to cover the holes. Its case appears to be that "how" it was instructed to cover the holes was a variation. However, A&V has not explained how this could be case.

230.3 Alternatively, the quantum is disputed:

⁶⁵ TB 31

a. In its email of 12 August 2020, A&V provided a price of £50 per riser, however it also said it has completed 7 floors in T1 & 6 in T3 for free as a favour [1739].

b. There were existing covers to the holes, The only requirement was for A&V to drill through the covers for A&V's pipes to fit, then roughly cut a slot from the hole to the edge of the cover with a multi-tool, as explained in JBH's email of 12 August 2020 [1738].

c. Once the firestopping was complete to the holes on the lower floors, the covers could be reused on the higher floor (as A&V recognised in its email on 21 July 2020 [1737]. A&V could also reuse covers across the 3 Towers it was working on.

d. Alan Giles and others at JBH in fact did a lot of the covers. Julian Smart in his email on 21 July 2020 stated "*we have done most of them to date*" [1737]. Alan Giles explains at para 14 of his statement that [170]:

"We did ask A&V to cut ply cover boards, but they refused and were unhappy about having to move and refit the ply covers. Following increasing pressure from BYUK, we decided to cut the majority of these boards ourselves, with Kaye (JBH site logistics) cutting most of the boards, along with myself and Paul James."

e. There was no requirement for a revisit. The intention, and health and safety requirement, was for the covers to be left in situ as soon as the pipes were installed.

f. A&V has provided no other evidence or explanation to support its claimed quantum.

g. In its Payment Application 13, A&V valued this variation at £4,000 [3456]. No justification or explanation has been provided for the increase to £8,000 in Payment Application 14, just 6 days later.

h. Overall, JBH's estimate is that a maximum of an additional 20 covers would need to be cut. The value of this variation, at the rate quoted by A&V, would therefore be £1,000 (20 x £50).

369. I accept the justification for this Variation put forward in the Scott Schedule and Particulars of Claim.

370. However, it does seem to me that the amount claimed is rather high, particularly given the earlier claim for £4,000.

371. Whilst I accept this is a somewhat rough and ready approach, I allow £2,000 for this Variation.

372. Thus the total allowed for Variations 6 and 21 together is £8,000.

Variation 14: Kitchen copper pipework extension in T1, T2 and T3 on every floor

373. A & V claims £4,000 in respect of this Variation.

374. In Certificate 12, J&BH accepted that 90% was then payable on an interim basis. It now allows only £1,028.

375. J&BH accepts that there was a variation, but contends that it only related to Tower 1. J&BH also challenges the amount claimed.

376. I can deal with this variation shortly: J&BH's acceptance of this as a Variation in Certificate 12 in a figure of £3,600 was a clear acceptance a) that it related to all three Towers, and (b) that the figure of £4,000 was reasonable.

377. Whilst that acceptance was on an interim basis, I take the view that J&BH must have considered that it had sufficient information to accept the Variation in full and the reasonableness of the amount claimed, and was content to proceed on that basis.

378. In the circumstances, I accept this Variation in full as claimed and value it at £4,000.

Variation 16: P1 L1 North Corridor High level install: 2 operatives @ £250/D: revisit

379. The amount claimed here is £2,500.

380. The justification for this Variation in the Scott Schedule is as follows:

A&V had installed the Corridor high level pipework without having the side wall installed (as per JBH 2 weeks look ahead email 6 Nov 2020) [AP3/ page 118] Then the dry liners could not install the corridor side walls because of the A&V's installed pipework. So JBH instructed A&V to remove the pipework and to come back as a revisit to re-install the high level pipework once the walls were ready. A&V was first instructed to commence the works on Podium 1 Level 1 [which was H/L (high level) corridor] on 6 Nov 2020 [AP3/ page 118] A&V installed the high level pipework at that time as instructed, but then A&V had to go back and remove the pipeworks as this was clashing with dry liners and re-install the work again on 12 February 2021 as instructed by Paul James email [AP3/ page 130]. A&V consider that this variation should be honoured and paid in full in the sum of £2,500.00.

381. In A & V's written Closing Submissions, it is submitted at paragraph 5.4:

(a) It is accepted that no formal instruction was issued but it is apparent from the commentaries from JBH detailed in the Scott schedule evidence that the works were requested to be undertaken. Within my cross examination from Mr Frampton, I recall advising of numerous revisits to the podiums to undertake alteration works and this was one of those.

(b) During my cross examination by Mr Frampton, I confirmed that we had asked JBH managers to sign time sheets, but they refused. My claims were therefore based on the simple actual labour time spent on this item.

382. The issue here is firstly whether there was any relevant instruction and secondly as to the amount claimed.
383. Where, as here, the allegation is as to an instruction to revisit and redo works, it is reasonable (quite apart from the sub-contract provisions) to see some written record of the instruction, and the time taken (even if in the form of unsigned time sheets).
384. The instructions referred to in the Scott Schedule do not refer to revisits or reinstallation.
385. In the absence of any contemporaneous documentation to establish the instructions as alleged or to prove the amount of time involved, I make a nil award in respect of Variation 16.

Variation 17: P1 L1 Main Riser Boosted meter set changed 1 Operative for 2 days @ £250/D

386. Variation 17 is a claim for £500.
387. The Scott Schedule justifies this variation as follows:

A&V had installed the booster pipework set within the Riser as per the drawings received at the tender stage. Then after installation JBH changed the design and asked A&V to change the install as per new (hand) drawing. Paul James (JBH) issued the new (hand) drawing via the Whatsapp [sic] Group on the 16 February 2021 [AP3/ page 352]. A&V had to remove the set from the inside of the Riser and re-install the set outside the Riser as per the Paul James (JBH) hand drawing. A&V consider that this variation should be honoured and paid in full in the sum of £500.00.

388. In Mr Frampton's written Opening Submissions, he submits as follows:

JBH's position

214. JBH accepts rejects this item as a variation and values it at nil:

214.1 A&V has failed to identify the tender drawings which it says show the booster pipework set within the riser.

214.2 In any event, the final paragraph of Appendix 2 of the Sub-Contract [331] and the Note at the end of Appendix 4 [332] stated that:

“the drawings included within the contract are design stage drawings with final working drawings to follow, directional changes & minor sizing changes for co-ordination and layout purposes do not constitute a variation to the contract.”

214.3 The WhatsApp image refers to shows a standard meter, not a booster set, as shown by the “M” on the sketch [3125].

214.4 The booster sets in Tower 2 were installed by Watertight, not A&V, and not part of the Sub-Contract Works (see JBH’s Defence Scott Schedule [Vol 1/ Tab 9.1/ p98]).

214.5 There is no evidence that the meter had already been installed and was moved. Rather, Nick Sima of A&V asked Mr James where the meter was to go (“*Where exactly to be the meter*”). [2515] Mr James then provided the sketch. [3125] This sketch was consistent with the drawing already in A&V’s possession [3124] and standard practice, to put a valve either side of the meter (or a booster set) so it can be isolated for maintenance/replacement etc.

214.6 A&V has failed to comply with the condition precedent in clause 8.10. A&V has not provided full and proper substantiation and information for the alleged variation. There are no timesheets. It appears to be an arbitrary lump sum amount.

214.7 There is no evidence or justification for A&V’s claimed quantum.

389. I accept J&BH’s submissions at paragraphs 214.1 to 214.5 and for those reasons reject this part of the claim.

390. Accordingly, Variation 17 is valued at nil.

Variation 18: Repositioning of Heating IV; 1 Operative for 8 days @ £250/D (which is half of the actual 16 days as agreed with Mr Macey

391. In respect of Variation 18, there is no dispute that there was a variation.

392. There is no dispute between the Parties that A & V agreed to accept 50% of its valuation of £2,000.

393. As with other items, although I accept that on a final account it is open to both Parties to seek to re-open interim valuations, I place considerable weight upon such interim valuations.

394. My valuation for Variation 18 is £1,000.

Variation 19: Kitchen SVP-HDPE stack (batweld) extension and install extra 6 PRV on Domestic services in all 3 Towers (28 floors in total) A&V charged this work @ £258.07 per floor

395. A & V claims £8,000 for this Variation.

396. J&BH accepts that this was a variation, but values it at £2,752.

397. The justification for Variation 19 in the Scott Schedule is as follows:

Similar as variation 14 A&V could not install the HDPE pipework in full lengths at the first time of installation as no walls were fully erected [AP3/ page 348] so A&V had to install the main vertical HDPE pipe and come back as a revisit to extend the low level horizontal HDPE pipework once the walls were ready. JBH have previously been provided with the details for this variation. JBH accept this item as a variation [despite not doing so previously] and value this as 34% only as part of the Final Account Adjudication [AP3/ page 227] A&V consider that this variation should be honoured and paid in full as it was accepted.

398. In Mr Frampton's written Opening Submissions, he submitted as follows:

JBH's position

224. JBH accepts this Variation 19 is a variation but disputes the valuation:

224.1 A&V has provided no evidence or explanation for the alleged value. No timesheets have been provided. The works involved were to install 6 pressure release valves and extend the HDPE pipework for the SVP by approximately 1 metre with a set per floor. A&V's assessment of that work is not realistic and denied.

224.2 These works were or could be undertaken during the course of the installation and did not require a return visit or cutting in. The pressure release valves could have been installed at the same time as carrying out the final fix of the kitchens and the works to the risers were not complete, so the SVP could have been extended when completing the other works to the risers.

224.3 Spons suggests a rate of 0.29 per hour for a 22mm valve (the rate is for a 25mm diameter ball valve at [4558], a PRV would take the same time) and 0.92 hrs to install a metre of HDPE and a set (0.47 hrs per metre of 40mm HDPE pipe at [4556] plus 0.45 hrs for a 40 mm bend at [4557]). This equates to 2.66 hours per floor (0.29 x 6 plus 0.92), which suggest that

three floors should have been completed per day (as part of a continuous installation) this totals 11 days.

224.4 JBH therefore value this item at £2,750 (11 days at A&V's rate of £250 per day).

399. In A & V's written Closing Submissions at paragraph 5.7 it submits:

(a) JBH accept this as a variation but not for the sums claimed. During my cross examination by Mr Frampton, I corrected him on the amount of work required to undertake this. There were 4 sinks per floor in various locations. The time claimed was for finding materials, collecting materials making the pipes to the correct bends and then installing including that of the valves. Each of these were individual and over all towers floors and not just in one location. I did not recognise the application of Spons to value this work as this assumes continuous work in one location and/or a larger run of work, it was based on actual labour of 1 man per day per floor whom I saw undertaking the works during my site visits.

(b) I repeated that we had asked JBH managers to sign time sheets, but they refused. My claims were therefore based on the simple labour time spent on this item.

400. I accept Mr Paduraru's evidence, reflected in A & V's Closing Submissions that the figure put forward of £8,000 is reasonable.

401. Accordingly, I value Variation 19 at £8,000.

Variation 22: Prefabrication of SVP for P2 L1. A&V charged for 1 Operative – 10 days of work @ £250/D.

402. A & V claims £2,500 against Variation 22.

403. J&BH accepts that there was a variation, but values it at £750.

404. The justification for Variation 22 in the Scott Schedule is as follows:

There were approximately 100 of these Prefab SVP to undertake but at the time of JBH breaches A&V engineer had only undertaken 10-man days directly related to this instruction [AP3/ page 363] [£250 x 10 days = £2,500.00] JBH accept this item as a variation [despite not doing so previously] and value this as 30% as part of the Final Account Adjudication [AP3/ page 227] A&V consider that this variation should be honoured and paid in full as it was accepted.

405. In Mr Frampton's written Opening Submissions, he submitted:

235. JBH accepts that this item was a variation but challenges quantum:

235.1 A&V claims that it carried out 10 days' work, but the instruction was at midday on Friday 5 March 2021. A&V left the site on Friday 19 March 2021. That was 10 days later. However, A&V only made a notional start on the works subject to variation 22 in that period (see paragraph 55 of Adam Hill's first witness statement in the Final Account Adjudication [1704]).

235.2 A&V has not provided any dayworks, timesheets or other evidence to substantiate its claim.

235.3 JBH values this variation as 3 man days, coming to £750.

235.4 In its Payment Application 13, A&V valued this variation at £1,250 [3456]. No justification or explanation has been provided for the increase to £2,500 in Payment Application 14, just 6 days later.

406. In paragraph 5.9 of its written Closing Submissions, A & V submitted:

(a) JBH accept this as a variation but not for the sums claimed. During my cross examination by Mr Frampton, I advised that there had to be no joints, so these had to be made up on benches. These were not installed as Mr Frampton had assumed but just a variation to prefabricate some svp pipework. As there were numerous hold ups on the to the podiums and as we were waiting for instructions this work was good to keep an operative engaged. This was an actual instruction from JBH, and the works started on the 5th March 2021 and I saw this undertaken.

(b) I repeated that we had asked JBH managers to sign time sheets, but they refused. My claims were therefore based on the simple labour time spent on this item.

407. At first sight, the points made by Mr Frampton at paragraphs 235.1 and 235.2 of his submissions appeared very powerful. However, I accept Mr. Paduraru's evidence, reflected in A & V's Closing Submissions, (a) that the work started on 5 March 2021 and continued thereafter until 19 March 2021 and (b) that accordingly the valuation put forward in Application 13 of 15 March 2021, did not reflect the work done in the week commencing 15 March.

408. Accordingly, I value Variation 22 as claimed, in the Sum of £2,500.

Variations: Conclusion

409. I set out in a table the result of my conclusions above:

Variation No	A & V Position	J&BH position	Award
1	£1,000	£1,000	£1,000

2	£2,950	£2,950	£2,950
3	£7,750	£7,750	£7,750
4	£1,500	£1,500	£1,500
5	£5,250	£5,250	£5,250
6	£6,000	£0	£6,000
7	£1,500	£1,500	£1,500
8	£1,500	£1,500	£1,500
9	£1,500	£1,500	£1,500
10	£1,500	£1,500	£1,500
11	£1,500	£1,500	£1,500
12	£1,500	£1,500	£1,500
13	£1,500	£1,500	£1,500
14	£4,000	£1,028	£4,000
15	£750	£750	£750
16	£2,500	£0	£0
17	£500	£0	£0
18	£2,000	£1,000	£1,000
19	£8,000	£2,752	£8,000
20	£4,000	£4,000	£0
21	£8,000	£0	£2,000
22	£2,500	£750	£2,500
Total	£67,200	£39,230	£53,200

A & V Loss and Expense/Breaches Cost Recovery

410. At pages 54 to 56 of the Scott Schedule. A & V puts forward 10 claims for “A & V Loss and Expense/Breaches Cost Recovery. The amounts claimed total £662,500.45. None are conceded by J&BH.

Loss and Expense

411. The first two items claim respectively £53,300 and £35,000.

412. Item 1 relates to delay and disruption in the Towers and Item 2 relates to delay and disruption in the Podiums.

413. Standing back and considering the conclusions I have reached thus far, in the period of one week more than the sub-contract time for completion, A & V had completed work to a value of £407,156.25 of the original contract value of £447,800, that is about 91% of those works. The contract value of the works left outstanding was £40,643.75.

414. If the variations are added in, the varied sub-contract sum becomes £501,000, of which work to a value of £460,356.25 (£53,200 plus £407,156.25) had been done bringing the total done to about 92%.

415. These two claims for disruption amount together to £88,000, which is equivalent to almost 20% of the original sub-contract sum.
416. It seems to me that these figures cannot stand together. Had the works been disrupted to the extent of 20%, it could be expected that the level of completion would have been significantly less than 91 or 92%.
417. The claims for disruption, which is what these claims are, were put forward at a very late date. This makes it very difficult to assess the claims particularly in the absence of any significant contemporaneous correspondence or documentation to support the claims. The best basis for the claims is the table sent with the letter of 15 March 2021⁶⁶, but that falls a long way short of establishing the actual losses suffered by A & V.
418. There is a further difficulty, pointed out in Mr Frampton's written Opening Submissions, of identifying the appropriate legal basis for the claims. The Scott Schedule relies upon Clauses 11.1, 13.2 and 13.3. The last two Clauses do not assist A & V, being concerned with extensions of time, whilst the last sentence of Clause 11.1 provides:
- The Sub-Contractor shall not be entitled to any adjustment to the Sub-Contract Sum, additional payment of any kind, costs, losses or damages however caused arising as a result of suspension of the Sub-Contract Works pursuant to this clause.
419. This makes it clear that no claim for financial recompense can be based upon a suspension ordered under Clause 11.1.
420. I have considered whether a claim might be pursued on the basis of an implied term obliging J&BH to provide unimpeded access to A & V for A & V to carry out its works. However, it would be very late to introduce such a claim, and the evidentiary difficulties would persist.
421. In the circumstances these two claims fail.

Interest

422. Item 3 concerns interest.
423. I will invite submissions following the handing down of this judgment.

Mr Blizzard's Fees

424. This claim is for £17,400 under item 4. Item 5 concerns interest.
425. Mr Frampton helpfully set out the relevant background facts, issues and J&BH's position in his written Opening Submissions:

Issues

⁶⁶ TB 2129

359. During the Blizzard Adjudication, JBH challenged Mr Blizzard's jurisdiction. A&V has never obtained an order enforcing the Blizzard Decision. Nevertheless, taking note of the Court of Appeal's comments on appeal (albeit not following any debate or submissions on the point), JBH does not maintain its challenge to Mr Blizzard's jurisdiction.

360. The issue for the Court to determine is whether there was a binding settlement as to the sums due under the Blizzard Decision which included Mr Blizzard's fees?

Was there a binding settlement as to the sums due under the Blizzard Decision?

361. The relevant chronology is as follows:

361.2 On 17 November 2021, A&V commenced the Blizzard Adjudication.

361.2 On 2 December 2021, the same date on which it served its Response, JBH commenced Part 8 proceedings seeking declarations that Payment Application 14 was invalid and that its Payment Notice 14 was valid.

361.3 Mr Blizzard's Decision was provided on 19 January 2022 [Vol 3/ Tab 29/ p1217].

361.4 On 25 March 2022, A&V belatedly issued proceedings to enforce the Blizzard Adjudication Decision.

361.5 On 4 April 2022, A&V served the enforcement proceeding on JBH.

361.6 On 12 April 2022, Eyre J granted judgment in favour of JBH, making declarations that Application 14 was invalid, Payment Notice 14 was valid and A&V was not entitled to any payment for Application 14. The order is at [Vol 8/ Tab 35/ p3581]. The judgment is at [4204].

361.7 On 13 April 2022, JBH wrote to A&V offering to "*drop hands' on the ill-advised enforcement proceedings with your claim being discontinued and both parties bearing their own costs*" [Vol 7/ Tab 34/ p3312-3]. JBH's offer was for both parties to agree not to pursue any entitlements they may have in respect of the enforcement proceedings, that included the first adjudicator's fees.

361.8 On 14 April 2022, A&V replied stating the enforcement proceedings were "*withdrawn and both parties are to bear their own costs.*" [Vol 7/ Tab 34/ p 3314] A&V thereby accepted JBH's offer. A&V purported to "*reserve our position regarding the Adjudicator's fees*".

361.9 On 21 April 2022, A&V provided a consent order to record the agreement; email at [Vol 7/ Tab 34/ p3315]. The consent order [Vol 7/ Tab 34/ p3322] did not refer to the Adjudicator's fees.

361.10 JBH returned a signed copy of the consent order [Vol 7/ Tab 34/ p3324] and [3331-2].

361.11 It appears that A&V never signed or filed a copy of the consent order. However, on 21 April 2021 it did file a notice of discontinuance [Vol 7/ Tab 34/ p3333].

362. JBH's position is that, in the circumstances, there was a binding agreement that the parties would not pursue any entitlements they each had in respect of the enforcement of the First Adjudication Decision, including any claim by A&V for Mr Blizzard's fees and any claim by JBH for its costs of the discontinued enforcement proceedings.

363. A&V's position is understood to be that there was a binding agreement, save in respect of the Adjudicator's fees. That argument is understood to be based on the reservation in its email of 14 April 2022. However, the purported reservation was contrary to the remainder of the email and, therefore, ineffective.

364. In the well-known case of *Butler Machine Tool Co Ltd v Ex-cell-o Corporation (England)* [1979] 1 WLR 401:

364.1 A seller had offered to sell a machine on its terms. One clause of these terms was:

“All orders are accepted only upon and subject to the terms set out in our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the buyer's order.”

364.2 The buyer responded attaching its own terms, including a tear-off acknowledgment to be signed below the statement “*We accept your order on the terms and conditions stated thereon—and undertake to deliver by —Date—signed.*”

364.3 The seller returned the signed acknowledgement but referred back to its quotation in the covering letter (“*This being delivered in accordance with our revised quotation of May 23*”). The seller argued that this was sufficient to incorporate its terms and conditions and was the so-called “last shot”.

364.4 The Court of Appeal held that the contract was concluded on the buyer's terms upon the seller returning the signed acknowledgement. The buyer's response was a counteroffer which was accepted by the seller signing the acknowledgement. Lawton LJ explained that the reference in

the covering letter to the seller's prior quotation did "*not bring into the contract the small print conditions on the back of the quotation.*"

365. Applied to this case, by confirming its agreement and/or providing a consent order A&V confirmed its agreement to JBH's offer. No part of that offer included a term that A&V was still entitled to pursue JBH for proceedings relating to Mr Blizzard's fees.

366. Alternatively, if the Court decides there was no binding agreement in respect of the Mr Blizzard's fees. That must mean there was no binding agreement at all. JBH would remain entitled to its costs of the discontinued enforcement proceedings. Per CPR 38.6:

"Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."

426. In my judgment the key issue is the effect of A & V's letter of 14 April 2022. That letter was short and said:

We confirm that the Enforcement claim HT-2022-000101 is withdrawn and both parties are to bear their own costs.

At the same time, we reserve our position regarding the Adjudicator's fees. Your client is still liable for the Adjudicator fees as such we look forward to receiving the payment in full in regards of the Adjudicators fees including the interest.

427. In my view this was a counteroffer to J&BH's offer in respect of the withdrawal of action HT 2022-000101. The effect was that neither party would pursue any application for costs of those proceedings. But there was no agreement that A & V could not pursue a claim for recovery of the fees paid to Mr Blizzard.

428. The consent order which followed upon the agreement between the Parties did not affect the validity or otherwise of Mr Blizzard's Decision, subject to J&BH's continuing jurisdictional objection, which has been held to be invalid by the Court of Appeal.

429. In this judgment I am considering the merits of Mr Blizzard's Decision in the sense that I am deciding what sum or sums is due from the one to the other. That will have the effect of reviewing and revising his decision.

430. In my judgment, the appropriate course to adopt is to invite the submissions of the Parties on this head of claim after they have had the opportunity to consider this judgment.

Mr Smith's Fees

431. It is convenient to consider at this stage a counterclaim/contracharge put forward by J&BH for the fees charged by Mr Smith.
432. This concerns the fees charged by Mr Smith for rendering his Decision in the sum of £13,962.
433. When I rendered my judgment enforcing Mr Smith's decision, I ordered in the usual way that A & V should pay his fees in the usual way.
434. That judgment was subsequently stayed by me pending this trial and judgment following that trial.
435. In this judgment I have reached a different conclusion as to the balance due between the Parties from that reached by Mr Smith.
436. In my judgment, as with Mr Blizzard's fees, the appropriate course to adopt is to invite the submissions of the Parties on this head of claim after they have had the opportunity to consider this judgment.

Loss of profits on incomplete work

437. The amount claimed is £34,193.41.
438. In considering this claim there are two different limbs. The first relates to loss of profits on the remaining contract works. The second relates to loss of profits or potential profits.
439. J&BH's pleaded position is as follows in paragraphs 65 and 66 of the Defence⁶⁷:

65. The claim for loss of profits on the incomplete work at paragraphs 5.6 to 5.6.4 is denied:

65.1. It is denied that the Defendant was in breach as alleged.

65.2. Further or alternatively, it is denied that the alleged breaches entitle the Claimant to the loss or profits on the incomplete works. The Claimant does not allege that the Defendant repudiated the Sub-Contract. There is no alleged breach which would entitle the Claimant to the sums claimed.

65.3. Further or alternatively, it is denied that the alleged breaches caused such losses. The Claimant chose, for its own reasons, to abandon the Project when its Works were incomplete.

65.4. Further or alternatively, it is denied that the Claimant is entitled to any loss of profits on variations. As a matter of law, damages will be assessed on the basis that the Defendant,

⁶⁷ TB 79

where it had a choice on how to perform the Sub-Contract, would have chosen the way which benefited it and not the Claimant. It will be assumed that the Defendant would not have voluntarily subjected itself to an additional contractual obligation in favour of the Claimant by issuing it with variations or additional works.

65.5. Further or alternatively, even if (which is denied) the Defendant was in repudiatory breach of the Sub-Contract or other breach which may entitle the Claimant to recover loss of profits, it is denied that the Claimant can recover more than nominal damages because it was not ready, willing and able to carry out the Works, given its statements and actions between 15 to 22 March 2021 and its financial position.

66. As to quantum:

66.1. The Claimant's position is inconsistent with its assessment of the measured works and its claims are duplicative. Any loss of profits for the incomplete works should be assessed on the value and amount of the incomplete works determined by the Court on the final account. The Claimant will have been paid in full for any works which are determined to be complete and the price paid to third parties to carry out works is not the appropriate figure to take for the Claimant's loss of profit. The Claimant's position is that the value of the incomplete Works is only £33,860. The Defendant's position is that the value of the incomplete Works is £109,116.65. On these figures the alleged loss of profit would be only £5,079 or £16,367.50.

440. As to paragraph 65.1, I have held above that J&BH was in breach of the sub-contract. Having heard Mr Paduraru, I accept his evidence that he intended his letter of 15 March to be a seven day notice, and he was hoping and expecting to get a response from J&BH. I accept his evidence that he took the exclusion from IAuditor as being the final indication that J&BH did not wish A & V to continue with the works.
441. As to paragraph 65.5, I accept that if A & V was not ready and willing and able to continue the sub-contract works, this claim could not succeed. Whether A & V was so ready willing and able is fiercely contested by J&BH.
442. I consider first the claim for lost profits on the outstanding sub-contract works. On my findings above, the value of the outstanding sub-contract works was £40,643.75 (£447,800 less £407,156.25).
443. I fully accept the evidence of Mr Geale that by March 2021 A & V's finances were not in a happy state.
444. The exact state of A & V's finances is not easy to determine because there are some uncertainties contained in its accounts. These are set out by Mr Geale in his first

report. Thus, a table in paragraph 5.4 of his first report⁶⁸ compares draft accounts for 2022 with the comparator in the draft 2023 accounts, which show a difference in the first of a profit of £119,478 and in the second a loss of £105,846. In a table in paragraph 5.6⁶⁹, a similar exercise of comparison is carried out: there is an entry under creditors falling due within one year of “(254,908)” in the draft 2022 accounts which become £8,396 in the draft 2023 accounts. There is no obvious explanation for these changes. In the entry for creditors falling due after more than one year, the figure is the same in both accounts: “(141,259)”. These negative figures are extremely important since they have the effect of reducing the creditors figure, producing a positive balance sheet in the draft 2022 accounts, which without those two entries would show a significant balance sheet deficit. As I have said, there is nothing before me to explain this unusual accounting treatment of the credits provision.

445. Thus it is difficult to be sure what the actual financial position of A & V was. However, it is clear that it was unsatisfactory.
446. Firstly, A & V had substantial loans from its banker, NatWest. There was some questioning of Mr Paduraru as to the propriety of the method by which some of the loans were obtained, but all I need to determine and record is that as at 31 January 2022 A & V was indebted to NatWest in the sum of £170,673⁷⁰.
447. Secondly, A & V owed HMRC £143,344 by 31 January 2021⁷¹.
448. Thirdly, the manner in which the company was being run was financially unsatisfactory, in that not insignificant sums were being paid out for purposes seemingly unrelated to A & V’s business – Mr Geale identifies £35,000 of such payments⁷².
449. Thus, the company was not in a healthy position. However, crucially, a loan of £100,000 taken out in May 2021 placed A & V’s bank account in a positive cash position⁷³.
450. It is a matter of fact that A & V had managed to survive long enough to take out that loan, and indeed is still not in liquidation.
451. I have no doubt that if A & V had been given the opportunity to complete the sub-contract works it could and would have done so.
452. In making that assessment, I should note one of the curiosities of the case – as I have said, on my findings the amount of outstanding work was to a value of £40,643.75. The sub-contract sum (once Tower 3 was added in) was £447,800, to be executed over a 12 month period. In fact, as I have found, work to a value of £460,356.25 had been done by 19 March 2021. After taking away the ten week suspension period, this had been done on 43 weeks (the 52 week contract period, less 10 weeks for the suspension, plus one week after the end of the sub-contract period on 12 March 2021).

⁶⁸ TB 209

⁶⁹ TB 210

⁷⁰ Mr Geale’s first report, paragraph 5.59 at TB 219

⁷¹ Mr Geale’s first report, paragraph 5.60 at TB 219

⁷² Mr Geale’s first report, paragraphs 6.21 and 6.22 at TB 228

⁷³ Mr Geale’s first report, paragraph 6.25 at TB 229

Thus, A & V had managed to do work to an average value of £10,705 per week. On that basis, if A & V had unimpeded access to working areas, it should have been able to complete the outstanding works within 4 weeks.

453. Thus, the question on the first limb of this claim is whether A & V could have survived and paid its work force for about 4 weeks: I have no doubt that it could and would have done.
454. Of course, that evaluation is based upon my assessment of the value of the work done. However, on J&BH's own Certification, the figures are also revealing as to A & V's productivity. Taking Certificate 12, this values the works as at 20 January 2021, which is after approximately 44 weeks of the sub-contract, of which 10 weeks were the period of suspension. In that 34 week period, on J&BH's valuation A & V had carried out work to a value of £384,115, a weekly value on average of £11,297.
455. It was J&BH's case that there was outstanding work to a value of £109,117. On that basis if A & V maintained its rate of progress up to 20 January 2021, it would take about 10 weeks to complete the works.
456. Again, looking at the cashflow position, that was manageable, and in my judgment would have been achieved, by A & V if it had continued the works to completion.
457. For the above reasons, I hold that, had J&BH not repudiated the sub-contract, A & V could and would have completed the original sub-contract works.
458. A & V claims a figure for overheads and profit of 15%. Mr Geale came to a figure on the basis of the accounting records he saw of 17%. In my view a figure of 15% seems a reasonable assessment.
459. Accordingly, on the first limb of this claim I hold that A & V is entitled to recover 15% of £40,643.75, namely £6096.56.
460. The second limb of this claim is more difficult factually and legally.
461. The background to this part of the claim is that in the Blizzard adjudication, J&BH put forward a claim for the costs to complete in the sum of £405,353.
462. It is hard to see how that claim could have been put forward if more than a moment had been taken by J&BH to consider it: on J&BH's case the sub-contract value of the works outstanding was £109,117. To claim that costs closing on 4 times the amount outstanding had been incurred should have given J&BH pause for thought.
463. By the time that J&BH put forward its evidence in the Smith adjudication, J&BH had re-thought its position. A witness statement from Mr Hill was submitted saying that the correct figure was £177,396.89⁷⁴.
464. The explanation for this change of position was⁷⁵:

⁷⁴ Paragraph 83 at TB 1709

⁷⁵ Paragraph 84 at TB 1709

On closer analysis, suitable adjustments have now been made to remove labour that was placed on site to conclude further variations that were instructed beyond the date A&V left site.

465. Thus, Mr Hill's explanation for the £228,000 difference between the two figures was that there were post-termination variations to that value.
466. Faced with that explanation, A & V has put forward a claim contending that if A & V had stayed on Site, it would have been instructed to carry out variations to a value of £228,000 upon which it would have earned overheads and profit at a rate of 15%.
467. In the Defence at paragraph 66.2 J&BH now contends⁷⁶:

The value of variations instructed to the Defendant by Bouygues after 22 March 2021 which included mechanical pipework service, as claimed by the Defendant from Bouygues was only £24,182.99. However, this figure included variations to Towers 4 and 5 and to the plumbing on the bathroom pods, supplied by the pod manufacture, neither of which were part of the Claimant's scope. The value of the variations to the Claimant's scope was £9,746.60 (Variations 76, 91, 94 and 98). This value claimed by the Defendant included materials and its overhead and profit. The labour value of these variations was only £3,450:

- a. VO 76: Gym WC - Shower. Labour: £1,800.
- b. VO91: 2nd fix radiators. Labour: 1 hr, £25.
- c. VO 94: Costs associated with RFAs. Labour: 29 hours, £725.
- d. VO98: Removal and reinstatement of Gym services. Labour: 36 hours, £900.

15% of £3,450 is £517.50. Further even for these variations, the Defendant could have engaged Watertight or its own labour to carry them out, particularly given the Claimant's lack of progress and resources in March 2021.

468. I find it very surprising that in the Smith adjudication as in the Blizzard adjudication material was placed before the adjudicator which was liable to be misunderstood (in the Blizzard adjudication, the £405,353 figure: in the Smith adjudication where it was said that the £405,353 figure was overstated entirely because of variations).
469. The position is surprising in another respect: I have already pointed out that the time to complete the sub-contract works based on A & V's past performance would be between 4 and 10 weeks. However, before A & V left Site, J&BH was suggesting that there were 5 months of work left to do, and on the evidence before me it took over 6 months for J&BH to complete its contract works. This suggests that the scope of J&BH's works changed significantly.

⁷⁶ TB 80

470. Unsatisfactory as this is, with consequences as to the reliability of J&BH's assessment of the cost incurred by it to complete A & V's sub-contract work, it leaves it difficult for me to conclude that there were changes after 19 March 2021 in what would have been A & V's scope of works amounting to a value of £228,000 – nor can I assess on any reliable basis what any lesser valuation of such works might have been.
471. Even were that not so, I accept J&BH's submission that there is a fundamental legal problem with this claim. In paragraph 287.1 of Mr Frampton's written Opening Submissions he submitted:

As a matter of law, it is not entitled to claim loss of profits on variations. In assessing how JBH would have acted in terms of issuing variations or other discretionary benefits to A&V, the Court must apply the minimum obligation rule. *The Law of Contract Damages* by Adam Kramer KC, explains in a section entitled "*Would the Defendant Have Conferred a Discretionary Benefit or Extended the Contract*" that where a claimant seeks damages for discretionary bonuses etc:

"13-41 ... it will be assumed against the claimant that the defendant would not have 'voluntarily subjected himself to an additional contractual obligation in favour of the Plaintiff'.

13-42 Similarly a claimant cannot usually claim for the change that the defendant would have chosen to extend the claimant's employment, or other contract profitable to the claimant, beyond the contractual period.

...

13-44 The modern English approach is to apply the balance of probabilities approach to what would have happened between the claimant and defendant."

472. I accept this submission.
473. The consequence is that A & V succeeds on the first but not the second limb of this claim, in respect of which I award £6,096.56.

Claim for overheads

474. Claim 7 is a small claim for £2,084 for loss of the ability to earn preliminaries in the period after 22 March 2021.
475. In my judgment this is duplicative of the claim just considered and I dismiss it.

Claim for directors and consultants' time

476. Claim 8 is a claim for £40,573.80. Of this £16,573.80 relates to Mr Judd's time and £24,000 to Mr Paduraru's time.
477. In Mr Frampton's written Opening Submissions he submits:

295. For the reasons set out above, A&V has not established any of the breaches on which it seeks to rely or that it was ready and willing to carry out the works.

296. These alleged losses are not, in any event, as a matter of principle recoverable:

296.1. Any time spent on the adjudications, previous court proceedings are not recoverable as damages and have already been determined or cannot be claimed. That must include all time of and incidental to those earlier proceedings.

296.2 The other time spent appears to be the costs of pursuing A&V's claim, effectively costs of and incidental to these proceedings. Those costs would be subject to the Court's rules on costs, not damages.

296.3 For the avoidance of doubt, Mr Judd's fees would not be recoverable as costs. Mr Judd was carrying out tasks (in terms of correspondence etc) which would have been done by a solicitor (see the discussion in *Octoesse LLP v Trak Special Projects Ltd* [2016] EWHC 3180 (TCC), 6 Costs LR 1187, in particular at [29]). A consultant's costs were recoverable in those proceedings however the Court's reasoning was specific to adjudication enforcement business, it does not apply to full Part 7 proceedings following an adjudication.

297. Mr Paduraru's time is, yet further:

297.1 Duplicative of the claims for overheads and profit in Claims 6 and 7.

297.2 Based on a theoretical calculation of 8 hours per month at a rate of £100. There is no evidence that A&V incurred such costs, and it cannot be said that Mr Paduraru could otherwise have spent his time profitably given A&V's financial position.

478. The costs are claimed as having been incurred after March 2021. I accept that these amounts must therefore have been incurred principally or exclusively in connection with the adjudications and/or the court proceedings.
479. I agree with the submission above that costs occasioned by or connected with the adjudications are not recoverable as damages nor as costs.
480. I also agree that the costs occasioned by or connected with the court proceedings are not recoverable as damages.
481. Insofar as actions other than this present action are concerned, the costs have already been the subject of orders in those proceedings, and it would not now be appropriate for me to make any order in respect of costs in other proceedings in this action.

482. As to the costs of this action, these will be dealt with in the normal way, otherwise this claim is dismissed.

Loss of business opportunity

483. Claim 9 is a claim for £177,865.23 for loss of business opportunity.

484. The claim is calculated on the basis that A & V lost the opportunity to attract contracts to a value of £889,326.16 upon which it would have earned 20% profit.

485. The basis of this head of claim is set out helpfully in paragraph 6.9 of A & V's written Closing Submissions:

a) JBH were aware and accept that A&V were solely working for JBH, and all of their resources were with JBH.

b) Adam Hill email 1st March 2021 12:42 (Trial bundle 4, page 1672) Mr Hill and Seth Brown specifically were aware of A&V financial position as it noted: -

“as we are concerned this would add additional stress to your finances”

c) JBH being aware of A&V financial difficulties and without discussing the issues raised nor reasonably considering the merits of A&V position within A&V letter 15th March 2021 chose deliberately to take an alternative course of action by employing other to undertake A&V works, remove them from the IAuditor system and generally unreasonably, erroneously, vexatiously and in breach of the contract make it difficult for A&V.

d) The consequences of JBH deliberate actions were that as A&V had all of its resources with JBH were unable to seek employment with other companies that they had any established relationship with. Those relationships were long over so A&V would have to start again. As has been heard within the trial A&V have tried to gain work for A&V but this has been difficult due to lack of working capital in March 2021 as a result of inadequate payments for works genuinely undertaken (Blizzards £138K) that JBH had not paid for.

e) The QS responsible for valuing the works was Seth Brown and he and Adam Hill worked closely together. As a result of Seth Brown incorrectly and deliberately undervaluing A&V works as a result of:-

- The commentaries within Blizzard decision particularly in relation to the JBH acts of prevention.
- The inaccurate measuring and valuing of works completed (valuation 14). Mr Brown was fully aware of the outstanding works detailed by JBH in their outstanding works schedule and photographs (Trial bundle 5, pages 2208-2210). In Mr Niziolek witness statement, he referred in paragraph 15 to Seth having

carried out a comprehensive review [Trial Bundle 1, page 195]. Mr Davidsons cross examination confirmed works were complete to all 3 towers and a significant part of the podiums. Mr Browns actions appear deliberate.

f) Judd letter 3rd Feb 2022 refers to the impact that JBH actions were having on A&V cash flow (trial bundle 3, pages 1453 and 1454)

g) Judd letter 26/05/22 (trial bundle 3, page 1455) noted that JBH due to the breaches had a duty of care and were causing harm and damage to A&V.

h) A&V schedule for the losses is contained in trial bundle 4, page 1660.

i) The actions of JBH in March 2021, in the knowledge that they knew of A&V financial stress and that BYUK / JBH were behind programme, and were in the process of issuing significant variations, deliberately denied A&V the opportunity to undertake those works and thus would have removed the “financial stresses” upon A&V. The additional works A&V could have undertaken in the following 6 months to completion have been discussed during trial in the confirmed variations by Adam Hill of £228k and/or further works up to £405k (trial bundle 4, page 1709).

j) At the trial I have demonstrated attempts to gain work for A&V but to no avail. This is a direct consequence of JBH actions and breaches. Any monies I did have were subsequently used for legal actions against JBH, so I had no real working capital, this being directly caused by JBH wrong actions and the consequences thereto.

k) These actions were not remote from the contract but a direct result of the actions from the breaches of contract.

l) Paragraph 16 of the 17th of October judgement:

“A recurrent theme in the application for permission is a challenge to my finding that A&V’s financial position was aggravated by J&BH’s conduct: that was, in my view, a statement of the obvious. J&BH’s conduct caused A&V real time financial problems as it had to deal with J&BH’s conduct which caused it cash flow problems as it dealt with the obstructions placed in the way of the Blizzard adjudication and the wrongfully issued Part 8 proceedings. Whilst the Court of Appeal questioned the continuance of the appeal to that Court following the Smith adjudication, in the real world much damage had already been done.”

m) As part of Mr Judd cross examination of Mr Geale, Mr Geale accepted that if the courts accepted the breach and loss his calculation for that loss would be £97,825.88 (Mr Geale report paragraph 9.7) Mr

Judd noted that but advised that they would rely on A&V higher figures and commentary.

n) This is a matter for the courts review.

o) The court also has remedies as described within the claim as follows: -

- Further or alternatively, damages
- Any other relief the Court deems fit

Resulting from the Defendant's ("JBH") Breach of Contract.

486. It is correct that in my judgment handed down on 17 October 2023 I said⁷⁷:

A recurrent theme in the application for permission is a challenge to my finding that A&V's financial position was aggravated by J&BH's conduct: that was, in my view, a statement of the obvious. J&BH's conduct caused A&V real time financial problems as it had to deal with J&BH's conduct which caused it cash flow problems as it dealt with the obstructions placed in the way of the Blizzard adjudication and the wrongfully issued Part 8 proceedings. Whilst the Court Appeal questioned the continuance of the appeal to that Court following the Smith adjudication, in the real world much damage had already been done.

487. That was said in the context of an application for permission to appeal against my judgment handed down on 6 October 2023⁷⁸. In order to set what I said in context, it is necessary to see what I said in the judgment in respect of which such permission was sought. At paragraph 117 I had said this:

In my judgment this is one of those cases where the Court should, exceptionally, grant a stay of execution of the judgment against A&V for the following reasons:

(1) The Court of Appeal has ruled in paragraph [43] of its judgment (*A&V Building Solution Ltd v J&B Hopkins Ltd* [2023] EWCA Civ 54; 206 ConLR 184) that as at April 2022 J&BH was in breach of contract because it had not paid the first adjudicator's decision "that should have been the first order of business";

(2) The Court of Appeal held (at paragraph [17]) that "the first adjudication was made more complicated than it needed to be, in particular because JBH's solicitors raised a number of unmeritorious jurisdictional challenges and generally failed to provide the sort of assistance to a lay adjudicator that I would expect";

⁷⁷ [2023] EWHC 2576(TCC) paragraph [16]

⁷⁸ [2023] EWHC 2475 (TCC)

(3) J&BH launched Part 8 proceedings raising arguments which the Court of Appeal held to be wrong (overruling the decision of Eyre J.);

(4) Whilst these actions were not the sole cause of A&V's financial difficulties, I am satisfied on the evidence before me that the costs arising from these actions exacerbated A&V's financial difficulties ...

488. The terms of sub-paragraph 117(4) are important in understanding the context of what I said in the later judgment.
489. In considering the claim for loss of business opportunity, it is necessary first to consider the legal bases upon which the claim is put forward.
490. In the Scott Schedule reliance is placed upon Clauses 7.4, 8.5, 8.6, 9.8, 9.10, 13.2, 13.3 and 15.1.
491. These have been considered largely above.
492. Clause 7.4 relates to the bringing to site of additional labour. The breach which I have held existed could not justify a claim for loss of business opportunity.
493. Clauses 8.5 and 8.6 relate to variations. I have held that A & V's case as to the variation account has succeeded in part, but not to an extent that could be said to have caused significant loss of business opportunity.
494. Clauses 9.8 relates to retentions and 9.10 to the usual final account exercise. There is no breach of contract proved in respect of these clauses.
495. Clause 13.2 and 13.3 relate to extensions of time: I have held that an extension of time should have been granted, but if it had been granted, it would probably only have been in respect of the period of suspension. A grant of an extension of time for 10 weeks or so would have made no appreciable difference to A & V's business prospects.
496. There was no breach of Clause 15.1.
497. Accordingly, none of the breaches pleaded in the justification for Claim 9 can support a claim for loss of business opportunity.
498. However, I have held, firstly, that the measured works were worth significantly more than J&BH's assessment, and, secondly, I have held that J&BH was in repudiatory breach of the sub-contract.
499. As to the first, whilst it would undoubtedly have eased A & V's cashflow position had more monies been certified, that certification in itself would not have transformed A & V's position and made the difference between continuing in business profitably or not.
500. As to the second, the practical effect of J&BH's breach was to prevent A & V continuing to complete its works, thereby earning further profit of £6,396.56: this cannot sensibly be said to have led to the loss of business opportunity claimed.

501. I return to the passages from my judgments set out above. It is important to note that what I said in paragraph 117(4) of the 6 October 2023 judgment was “whilst these actions were not the sole cause of A&V’s financial difficulties, I am satisfied on the evidence before me that the costs arising from these actions exacerbated A&V’s financial difficulties”.
502. I have no doubt that the time and money expended by A & V in the two adjudications, and the various twists and turns in the court cases, has been considerable, but that cannot be attributed to any aspects of the dispute resolution process before Mr Blizzard delivered his decision in January 2022. This is significant since for most practical purposes A & V had stopped gaining any significant new work after March 2021: that cannot be attributed to the dispute resolution process.
503. The conclusion I come to on the evidence is that A & V did make efforts to win fresh work but was generally unsuccessful. It is probably the case that A & V suffered significant problems because it had put all its eggs in the J&BH basket which perhaps inevitably would cause problems if that relationship got into difficulties, as it did.
504. In my view A & V has failed to establish a significant loss of business opportunity as a result of any breach on J&BH’s part.
505. Apart from that factual conclusion, I accept J&BH’s contention that the losses claimed are too remote in law to be recoverable. This was put by Mr Frampton in his written Opening Submissions as follows:

302. As a matter of law, these losses are also too remote to be recoverable:

302.1 The legal test for remoteness is well known. In *Hadley v Baxendale* (1854) 9 Ex. 341, at [151], it was said that to be foreseeable, losses needed to be:

“such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”

302.2 The House of Lords in *The Achilleas* [2009] AC 61 and the Court of Appeal in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] CH 529, clarified that the reasonable contemplation test was not sufficient in all cases to meet the rule of remoteness, which is intended to control recoverable damages. Instead the ultimate test is whether a party is to be regarded as having assumed responsibility for the damage in question. In particular, the Court of Appeal explained at [550] that:

“The principle is founded on the notion that the parties, in the absence of special provision in the contract,

would normally expect a contract-breaker to be assuming responsibility for damage which would reasonably be contemplated to result from a breach. The Achilleas shows that there may be cases where, based on the individual circumstances surrounding the making of the contract, this assumed expectation is not well-founded.”

302.3 Neither test is satisfied here. It was not in the reasonable contemplation of the parties that A&V would cease to trade at all if there was a breach by JBH. More importantly, JBH cannot in the circumstances of the Sub-Contract be regarded as having assumed responsibility for such damages.

506. In his oral submissions, Mr Frampton emphasised, correctly as a matter of law, that the issue of foreseeability is to be determined at the time that the contract was entered into (see the passage from *Hadley v Baxendale* cited above). In this case, the due diligence carried out by J&BH was intended to, and did, satisfy J&BH as to A & V’s financial stability. I agree with J&BH that it was not within the reasonable contemplation of J&BH at that time that the sort of disputes as to performance and contract value which emerged (and which are common in the construction industry) would be such as to threaten A & V’s commercial viability.
507. For these reasons I reject A & V’s claim for damages for loss of business opportunity.

Claim for damage to business and reputation

508. Claim 10 is a claim for damages to A & V’s business and loss of reputation in the sum of £273,333.33.
509. I cannot see any circumstances in which this claim could succeed when Claim 9 has failed for the reasons I have given above.

The Counterclaims

510. The following matters are raised as counterclaims or contracharges in the account.
511. Firstly, payment of Mr Smith’s fees: I have indicated that I will seek further submissions on this in due course.
512. Secondly, the list of disputed items set out in the table at paragraph 25 above includes an item for “enforcement procedure costs” in the sum of £20,822. These are the subject of an existing order. I have no jurisdiction in this action to do anything about that order, although I can see that there may be arguments in due course about the stay on enforcement which I have previously ordered.
513. Thirdly, there is a claim for the cost of completing the works. This is pleaded in the sum of £88,089.61, which is calculated by taking the costs said to be attributable to completing the works by a different sub-contractor and others (said to be

£191,186.26) less £109,116.65 which would have been paid to A & V to complete the works⁷⁹.

514. I accept that if J&BH had succeeded in establishing that A & V repudiated the sub-contract this would have been the appropriate method of calculating this head of counterclaim (subject to A & V's waiver/estoppel argument in paragraph 6.2 of the Particulars of Claim). However, as I have held that it was J&BH which was in repudiatory breach of sub-contract, this counterclaim must fail in any event.
515. I should say that if I had to assess the reasonable and attributable costs of completing the sub-contract works, I would not have accepted the figure of £191,186.26 or anything like that figure. Firstly, I have recorded that J&BH's figures for the costs to complete and the linked figure for costs of post March 2021 variations have changed in very surprising ways. Secondly, A & V carried out an exercise for the purpose of the Smith adjudication which appeared to show that the invoices which truly related reliably to the costs to complete totalled £31,120⁸⁰. This was shown to me and relied upon by A & V in the enforcement proceedings before me, but despite that no witness was called by J&BH who could answer those criticisms. Thirdly, on my finding that the value of outstanding works was £42,643.75 a figure of £191,000 (or £177,000 to which Mr Frampton reduced it in the course of his submissions) would need a very full explanation - even if the outstanding value was £109,116, explanation would have been called for.
516. Finally, there is a claim for £6,000 for stolen copper. As to this, it is undoubtedly the case that one of A & V's plumbers was caught red-handed trying to steal copper. However that attempt failed.
517. Understandably, J&BH is suspicious that this might have been but one instance in a series of thefts. Unfortunately for J&BH, as Mr Frampton recognises in paragraph 326 of his written Opening Submissions, J&BH is unable to accurately identify the value of all copper and other materials taken by A & V's operatives.
518. As I understand the position, Mr Hill tried to assess a figure and came up with the figure claimed of £6,000. However, he has not been called nor has any other witness who could prove that this was a reasonable estimate.
519. In those circumstances I have no basis upon which I can award the sum claimed or any sum, and the counterclaim is dismissed.

Conclusion

520. I understand that the Parties are agreed that the amount paid to date is £364,909.64.
521. Accordingly, the amount due to A & V is as follows:

Claim	Amount Awarded
Measured works	£407,156.25
Variation account	£53,200

⁷⁹ Paragraph 355 of Mr Frampton's written Opening Submissions

⁸⁰ TB 1106-1111

Loss of profit	£6,096.56
Less paid	-£364,909.64
Amount due	£101,543.17

522. This does not allow for interest or adjudicators' fees.